CONSUMER FINANCIAL PROTECTION BUREAU JAN 2025

Compendium of Recent CFPB Guidance

Consumer Financial Protection Bureau

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There has been tremendous change in the market for consumer financial products and services since the creation of the Consumer Financial Protection Bureau (CFPB) in the wake of the 2008 financial crisis. Important questions have arisen about emerging technology, the rise of artificial intelligence, the entrance of large technology firms into the market, the use of sensitive data, privacy, the growth of junk fees, ongoing surveillance, and a broad range of other issues.

Given the evolution in the consumer financial markets, the CFPB has in recent years published guidance documents on a wide variety of topics under the federal consumer financial laws. We believe that the interpretations set forth in these documents, which reflect the best reading of the federal consumer financial laws, will prove durable. Accordingly, the CFPB has now compiled many of the guidance documents that the CFPB has released in the last several years and is reproducing them herein. These documents have generally all been published in the *Federal Register*.

The CFPB is the principal federal regulator responsible for administering the federal consumer financial laws,[1] including the Consumer Financial Protection Act's prohibition on unfair, deceptive, and abusive acts or practices,[2] and eighteen other "enumerated consumer laws."[3] The CFPB enforces these laws, but is not the only enforcer of them. To ensure that consumers receive comprehensive protection, Congress spread enforcement responsibility among a large set of state and federal government agencies. This includes state and tribal attorneys general and regulators,[4] and federal banking regulators such as the Federal Deposit Insurance Corporation, the Office of

[1] *See* 12 U.S.C. § 5511.

[2] 12 U.S.C. § 5536(a)(1)(B).

[3] 12 U.S.C. § 5481(12).

[4] 12 U.S.C. § 5552; *see* CFPB, *Authority of States to Enforce the Consumer Financial Protection Act of 2010*, 87 Fed. Reg. 31940 (May 26, 2022), https://www.govinfo.gov/content/pkg/FR-2022-05-26/pdf/2022-11356.pdf.

the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the National Credit Union Administration.[5] Some federal consumer financial laws are also enforceable by other federal agencies, including the Department of Justice, the Federal Trade Commission, the Farm Credit Administration, the Department of Transportation, and the Department of Agriculture. In addition, some of these laws provide for private enforcement by individual consumers.

The attached guidance documents reflect the considered judgment, reasoning, knowledge, and expertise of the CFPB. The United States Supreme Court recently stated that "[i]n an agency case as in any other, … even if some judges might (or might not) consider the statute ambiguous, there is a best reading all the same—'the reading the court would have reached' if no agency were involved." *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2266 (2024) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.11 (1984)). At the same time, the Court indicated that "courts may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes." *Id.* at 2262. In that spirit, our hope is that these CFPB guidance documents implementing the federal consumer financial laws prove useful to courts in their interpretation of those laws, as well as to the various enforcers of them. Indeed, in many instances, courts have agreed with interpretations articulated in CFPB guidance documents.[6] We believe that the interpretations set forth in these documents reflect the best reading of the federal consumer financial laws and that the reasoning provided therein will therefore prove to be durable.

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[5] *See, e.g.,* 12 U.S.C. § 5516(d), 5581(c)(2).

[6] *See, e.g., Kelly v. RealPage Inc.*, 47 F.4th 202, 220-21 (3rd Cir. 2022) (court relied on CFPB guidance to support contention that "report" and "file" are interchangeable under the Fair Credit Reporting Act); *Alexander v. Carrington Mortg. Servs., LLC*, 23 F.4th 370, 378-79 (4th Cir. 2022) (court considered and reached same conclusion as CFPB interpretation of the Fair Debt Collection Practices Act permitting only the collection of fees expressly permitted by state law); *Consumer Data Indus. Ass'n v. Platkin*, 2024 U.S. Dist. LEXIS 54812, at *48-*49 (D.N.J. Mar. 27, 2024) (court agreed with CFPB that the Fair Credit Reporting Act does not preempt certain state laws); *Pa. ex rel. Rosenblum v. Mariner Fin., LLC*, 711 F. Supp. 3d 463, 484 & n.13 (E.D. Pa. 2024) (court agreed with CFPB that states can bring concurrent enforcement actions under the Consumer Financial Protection Act); *Rivera v. JPMorgan Chase Bank*, 2023 U.S. Dist. LEXIS 171974, at *11 (D.D.C. Sept. 26, 2023) (court agreed with CFPB interpretation of servicer liability under the Fair Debt Collection Practices Act); *Glover v. Ocwen Loan Servicing, LLC,* 2023 WL 5026826, at *2 (S.D. Fla. Aug. 2, 2023) (court agreed with CFPB interpretation of restrictions on debt collectors charging pay-to-pay fees); *Davis v. Money Source, Inc.*, 2021 U.S. Dist. LEXIS 163450, at *40-*41 (D. Conn. Aug. 30, 2021) (court cited CFPB guidance on service provider obligations in support of contention that defendants' actions violated public policy).

Sincerely,

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Table of Contents

Fair Credit Reporting; Name-Only Matching Procedures, 86 Fed. Reg. 62468 (Nov. 10, 2021).	https://www.govinfo.gov/content/pkg/FR-2021-11-10/pdf/2021-24471.pdf	**Tab 1**
Bulletin 2022-01: Medical Debt Collection and Consumer Reporting Requirements in Connection With the No Surprises Act, 87 Fed. Reg. 3025 (Jan. 20, 2022).	https://www.govinfo.gov/content/pkg/FR-2022-01-20/pdf/2022-01012.pdf	**Tab 2**
Bulletin 2022-02: Compliance Bulletin on the Electronic Fund Transfer Act's Compulsory Use Prohibition and Government Benefit Accounts, 87 Fed. Reg. 10297 (Feb. 24, 2022).	https://www.govinfo.gov/content/pkg/FR-2022-02-24/pdf/2022-03587.pdf	**Tab 3**
Bulletin 2022-03: Servicer Responsibilities in Public Service Loan Forgiveness Communications, 87 Fed. Reg. 11286 (Mar. 1, 2022).	https://www.govinfo.gov/content/pkg/FR-2022-03-01/pdf/2022-04266.pdf	**Tab 4**
Bulletin 2022-04: Mitigating Harm From Repossession of Automobiles, 87 Fed. Reg. 11951 (Mar. 3, 2022).	https://www.govinfo.gov/content/pkg/FR-2022-03-03/pdf/2022-04508.pdf	**Tab 5**
Bulletin 2022-05: Unfair and Deceptive Acts or Practices That Impede Consumer Reviews, 87 Fed. Reg. 17143 (Mar. 28, 2022).	https://www.govinfo.gov/content/pkg/FR-2022-03-28/pdf/2022-06446.pdf	**Tab 6**
Equal Credit Opportunity (Regulation B); Revocations or Unfavorable Changes to the Terms of Existing Credit Arrangements, 87 Fed. Reg. 30097 (May 18, 2022).	https://www.govinfo.gov/content/pkg/FR-2022-05-18/pdf/2022-10453.pdf	**Tab 7**
Authority of States To Enforce the Consumer Financial Protection Act of 2010, 87 Fed. Reg. 31940 (May 26, 2022).	https://www.govinfo.gov/content/pkg/FR-2022-05-26/pdf/2022-11356.pdf	**Tab 8**

Circular 2022-03: Adverse Action Notification Requirements in Connection With Credit Decisions Based on Complex Algorithms, 87 Fed. Reg. 35864 (June 14, 2022).	https://www.govinfo.gov/content/pkg/FR-2022-06-14/pdf/2022-12729.pdf	**Tab 9**
Circular 2022-02: Deceptive Representations Involving the FDIC's Name or Logo or Deposit Insurance, 87 Fed. Reg. 35866 (June 14, 2022).	https://www.govinfo.gov/content/pkg/FR-2022-06-14/pdf/2022-12728.pdf	**Tab 10**
Debt Collection Practices (Regulation F); Pay-to-Pay Fees, 87 Fed. Reg. 39733 (July 5, 2022).	https://www.govinfo.gov/content/pkg/FR-2022-07-05/pdf/2022-14230.pdf	**Tab 11**
The Fair Credit Reporting Act's Limited Preemption of State Laws, 87 Fed. Reg. 41042 (July 11, 2022).	https://www.govinfo.gov/content/pkg/FR-2022-07-11/pdf/2022-14150.pdf	**Tab 12**
Fair Credit Reporting; Permissible Purposes for Furnishing, Using, and Obtaining Consumer Reports, 87 Fed. Reg. 41243 (July 12, 2022).	https://www.govinfo.gov/content/pkg/FR-2022-07-12/pdf/2022-14823.pdf	**Tab 13**
Limited Applicability of Consumer Financial Protection Act's "Time or Space" Exception With Respect to Digital Marketing Providers, 87 Fed. Reg. 50556 (Aug. 17, 2022).	https://www.govinfo.gov/content/pkg/FR-2022-08-17/pdf/2022-17699.pdf	**Tab 14**
Circular 2022-04: Insufficient Data Protection or Security for Sensitive Consumer Information, 87 Fed. Reg. 54346 (Sept. 6, 2022).	https://www.govinfo.gov/content/pkg/FR-2022-09-06/pdf/2022-19075.pdf	**Tab 15**
Circular 2022-05: Debt Collection and Consumer Reporting Practices Involving Invalid Nursing Home Debts, 87 Fed. Reg. 57375 (Sept. 20, 2022).	https://www.govinfo.gov/content/pkg/FR-2022-09-20/pdf/2022-20324.pdf	**Tab 16**
Fair Credit Reporting; Facially False Data, 87 Fed. Reg. 64689 (Oct. 26, 2022).	https://www.govinfo.gov/content/pkg/FR-2022-10-26/pdf/2022-23264.pdf	**Tab 17**

Circular 2022-06: Unanticipated Overdraft Fee Assessment Practices, 87 Fed. Reg. 66935 (Nov. 7, 2022).	https://www.govinfo.gov/content/pkg/FR-2022-11-07/pdf/2022-23982.pdf	**Tab 18**
Bulletin 2022-06: Unfair Returned Deposited Item Fee Assessment Practices, 87 Fed. Reg. 66940 (Nov. 7, 2022).	https://www.govinfo.gov/content/pkg/FR-2022-11-07/pdf/2022-23933.pdf	**Tab 19**
Circular 2022-07: Reasonable Investigation of Consumer Reporting Disputes, 87 Fed. Reg. 71507 (Nov. 23, 2022).	https://www.govinfo.gov/content/pkg/FR-2022-11-23/pdf/2022-25138.pdf	**Tab 20**
Circular 2023-01: Unlawful Negative Option Marketing Practices, 88 Fed. Reg. 5727 (Jan. 30, 2023).	https://www.govinfo.gov/content/pkg/FR-2023-01-30/pdf/2023-01560.pdf	**Tab 21**
Real Estate Settlement Procedures Act (Regulation X); Digital Mortgage Comparison-Shopping Platforms and Related Payments to Operators, 88 Fed. Reg. 9162 (Feb. 13, 2023).	https://www.govinfo.gov/content/pkg/FR-2023-02-13/pdf/2023-02910.pdf	**Tab 22**
Bulletin 2023-01: Unfair Billing and Collection Practices After Bankruptcy Discharges of Certain Student Loan Debts, 88 Fed. Reg. 17366 (Mar. 23, 2023).	https://www.govinfo.gov/content/pkg/FR-2023-03-23/pdf/2023-06002.pdf	**Tab 23**
Statement of Policy Regarding Prohibition on Abusive Acts or Practices, 88 Fed. Reg. 21883 (Apr. 12, 2023).	https://www.govinfo.gov/content/pkg/FR-2023-04-12/pdf/2023-07233.pdf	**Tab 24**
Fair Debt Collection Practices Act (Regulation F); Time-Barred Debt, 88 Fed. Reg. 26475 (May 1, 2023).	https://www.govinfo.gov/content/pkg/FR-2023-05-01/pdf/2023-09171.pdf	**Tab 25**
Coverage of Franchise Financing Under the Equal Credit Opportunity Act, Including the Small Business Lending Rule (May 16, 2023).	https://files.consumerfinance.gov/f/documents/cfpb_coverage-of-franchise-financing_2023-05.pdf	**Tab 26**

Circular 2023-02: Reopening Deposit Accounts That Consumers Previously Closed, 88 Fed. Reg. 33545 (May 24, 2023).	https://www.govinfo.gov/content/pkg/FR-2023-05-24/pdf/2023-10982.pdf	**Tab 27**
Consumer Information Requests to Large Banks and Credit Unions, 88 Fed. Reg. 71279 (Oct. 16, 2023).	https://www.govinfo.gov/content/pkg/FR-2023-10-16/pdf/2023-22774.pdf	**Tab 28**
Fair Credit Reporting; File Disclosure, 89 Fed. Reg. 4167 (Jan. 23, 2024).	https://www.govinfo.gov/content/pkg/FR-2024-01-23/pdf/2024-00786.pdf	**Tab 29**
Fair Credit Reporting; Background Screening, 89 Fed. Reg. 4171 (Jan. 23, 2024).	https://www.govinfo.gov/content/pkg/FR-2024-01-23/pdf/2024-00788.pdf	**Tab 30**
Circular 2024-01: Preferencing and Steering Practices by Digital Intermediaries for Consumer Financial Products or Services, 89 Fed. Reg. 17706 (Mar. 12, 2024).	https://www.govinfo.gov/content/pkg/FR-2024-03-12/pdf/2024-05141.pdf	**Tab 31**
Circular 2024-02: Deceptive Marketing Practices About the Speed or Cost of Sending a Remittance Transfer, 89 Fed. Reg. 27357 (Apr. 17, 2024).	https://www.govinfo.gov/content/pkg/FR-2024-04-17/pdf/2024-08007.pdf	**Tab 32**
Circular 2023-03: Adverse Action Notification Requirements and Proper Use of Sample Forms, 89 Fed. Reg. 27361 (Apr. 17, 2024).	https://www.govinfo.gov/content/pkg/FR-2024-04-17/pdf/2024-08003.pdf	**Tab 33**
Truth in Lending (Regulation Z); Use of Digital User Accounts To Access Buy Now, Pay Later Loans, 89 Fed. Reg. 47068 (May 31, 2024).	https://www.govinfo.gov/content/pkg/FR-2024-05-31/pdf/2024-11800.pdf	**Tab 34**
Circular 2024-03: Unlawful and Unenforceable Contract Terms and Conditions, 89 Fed. Reg. 51955 (June 21, 2024).	https://www.govinfo.gov/content/pkg/FR-2024-06-21/pdf/2024-13581.pdf	**Tab 35**

Truth in Lending (Regulation Z); Consumer Credit Offered to Borrowers in Advance of Expected Receipt of Compensation for Work, 89 Fed. Reg. 61358 (July 31, 2024).	https://www.govinfo.gov/content/pkg/FR-2024-07-31/pdf/2024-16827.pdf	**Tab 36**
Circular 2024-04: Whistleblower Protections Under CFPA Section 1057, 89 Fed. Reg. 65170 (Aug. 9, 2024).	https://www.govinfo.gov/content/pkg/FR-2024-08-09/pdf/2024-17539.pdf	**Tab 37**
Truth in Lending (Regulation Z); Consumer Protections for Home Sales Financed Under Contracts for Deed, 89 Fed. Reg. 68086 (Aug. 23, 2024).	https://www.govinfo.gov/content/pkg/FR-2024-08-23/pdf/2024-18620.pdf	**Tab 38**
Circular 2024-05: Improper Overdraft Opt-In Practices, 89 Fed. Reg. 80075 (Oct. 2, 2024).	https://www.govinfo.gov/content/pkg/FR-2024-10-02/pdf/2024-22551.pdf	**Tab 39**
Debt Collection Practices (Regulation F); Deceptive and Unfair Collection of Medical Debt, 89 Fed. Reg. 80715 (Oct. 4, 2024).	https://www.govinfo.gov/content/pkg/FR-2024-10-04/pdf/2024-22962.pdf	**Tab 40**
Circular 2024-06: Background Dossiers and Algorithmic Scores for Hiring, Promotion, and Other Employment Decisions, 89 Fed. Reg. 88875 (Nov. 12, 2024).	https://www.govinfo.gov/content/pkg/FR-2024-11-12/pdf/2024-26099.pdf	**Tab 41**
Circular 2024-07: Design, Marketing, and Administration of Credit Card Rewards Programs, 89 Fed. Reg. 106277 (Dec. 30, 2024).	https://www.govinfo.gov/content/pkg/FR-2024-12-30/pdf/2024-30988.pdf	**Tab 42**

Tab 1

Fair Credit Reporting; Name-Only Matching Procedures, 86 Fed. Reg. 62468 (Nov. 10, 2021).

CFPB Takes Action to Stop False Identification by Background Screeners

Mistaken identity matching undermines housing and labor market recoveries

NOV 04, 2021

WASHINGTON, D.C. – The CFPB today issued an advisory opinion affirming that consumer reporting companies, including tenant and employment screening companies, are violating the law if they engage in shoddy name-matching procedures. Regulators are concerned about the significant harms caused by false identity matching, where an applicant is disqualified from rental housing or a job based on having the same name as another individual with negative information in their credit history. Specifically, the CFPB affirmed that the practice of matching consumer records solely through the matching of names is illegal under the Fair Credit Reporting Act.

For Black and Hispanic communities, who were disproportionately affected by the pandemic, the need for accuracy is even more acute. The risk of mistaken identities from name-only matching is likely to be greater among Hispanic, Black, and Asian communities because there is less surname diversity in those populations compared to the white population. With families across the country seeking affordable rental units and new employment, careless background screening practices can unnecessarily contribute to housing instability and unemployment.

"When background screening companies and their algorithms carelessly assign a false identity to applicants for jobs and housing, they are breaking the law," said CFPB Director Rohit Chopra. “No one should lose out on a job or an apartment because of sloppy and illegal matching. Error-ridden background screening reports may disproportionately impact communities of color, further undermining an equitable recovery.”

“Today’s advisory opinion reaffirms that shutting people out of housing and other opportunities based on careless errors isn’t only wrong – it’s illegal,” said Federal Trade Commission Chair Lina M. Khan. “The FTC strongly supports this longstanding interpretation and stands ready to work with the CFPB to protect American families.”

In the United States, the majority of landlords and employers rely on tenant screeners and employment background checks in the course of deciding whether to accept a rental application or offer someone a job. Some of the companies providing these services are subsidiaries of the nationwide credit reporting agencies, while others are newer entrants to the background screening industry. Because of the sheer scale of background screening activity, even ostensibly low error rates can harm significant numbers of consumers.

Today's advisory opinion affirms the obligations and requirements of consumer reporting companies, including background screeners, to use reasonable procedures to assure maximum possible accuracy. The CFPB and federal courts have consistently found that the use of name-only matching procedures—when a consumer reporting company uses only first and last name to determine whether a particular item of information relates to a particular consumer, without using other personally identifying information such as address, date of birth, or Social Security number—does not assure maximum possible accuracy of consumer information. The advisory opinion does not create a safe harbor to use insufficient matching procedures involving multiple identifiers. Other practices, for instance name combined with a date of birth, could also lead to cases of mistaken identity.

The Fair Credit Reporting Act promotes the accuracy, fairness, and privacy of information in the files of consumer reporting companies. There are many types of consumer reporting companies, including the nationwide CRAs—Equifax, Experian, and TransUnion—as well as specialty companies that sell information about individuals' check writing histories, medical records, or rental history records.

The CFPB will be working closely with the Federal Trade Commission to root out illegal conduct in the background screening industry. Background screening companies that violate the Fair Credit Reporting Act can be liable for significant civil penalties, restitution for victims, damages, and other relief.

Consumers who have a problem with credit or consumer reporting, such as tenant screening or background checks, can submit a complaint to the CFPB online (https://www.consumerfinance.gov/complaint/) or by calling (855) 411-CFPB (2372). More educational resources are available on the CFPB website, including:

- What should I do if my rental application is denied due to a tenant screening report? (cfpb.gov/askcfpb/2105)
- Could I be turned down for a job because of something in my credit report? (cfpb.gov/askcfpb/1345)
- Know your data: Our updated list of reporting companies (https://www.consumerfinance.gov/about-us/blog/know-your-data-our-updated-list-of-reporting-companies/)

Read today's advisory opinion. (https://files.consumerfinance.gov/f/documents/cfpb_name-only-matching_advisory-opinion_2021-11.pdf)

Read the full statement of CFPB Director Rohit Chopra on this action. (cfpb.gov/about-us/newsroom/statement-regarding-the-advisory-opinion-to-curb-false-identity-matching/)

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit ***consumerfinance.gov*** (cfpb.gov/).

Topics

- **TENANT SCREENING** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=TENANT-SCREENING)
- **CONSUMER COMPLAINTS** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=CONSUMER-COMPLAINTS)

PRESS INFORMATION

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E-Government Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the E-Government Act to promote the use of the internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes. For information pertinent to E-Government Act compliance related to this action, please contact Mr. Joseph Moxey, APHIS' Paperwork Reduction Act Specialist, at (301) 851–2483.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

Authority: 7 U.S.C. 1633, 7701–7772, and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 4th day of November 2021.

Mark Davidson,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2021–24490 Filed 11–9–21; 8:45 am]

BILLING CODE 3410–34–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1022

Fair Credit Reporting; Name-Only Matching Procedures

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Advisory opinion.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is issuing this advisory opinion to highlight that a consumer reporting agency that uses inadequate matching procedures to match information to consumers, including name-only matching (*i.e.,* matching information to the particular consumer who is the subject of a consumer report based solely on whether the consumer's first and last names are identical or similar to the names associated with the information), in preparing consumer reports is not using reasonable procedures to assure maximum possible accuracy under section 607(b) of the Fair Credit Reporting Act (FCRA).

DATES: This advisory opinion is effective on November 10, 2021.

FOR FURTHER INFORMATION CONTACT: Brandy Hood, Courtney Jean, Kristin McPartland, Amanda Quester, or Pavneet Singh, Senior Counsels, Office of Regulations, at (202) 435–7700 or *https://reginquiries.consumerfinance.gov/.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION: The Bureau is issuing this advisory opinion through the procedures for its Advisory Opinions Policy.[1] Refer to those procedures for more information.

I. Advisory Opinion

A. Background

Accuracy in consumer reports is of vital importance to the consumer reporting system, particularly as consumer reports play an increasingly important role in the lives of American consumers. Consumer reporting agencies assemble and evaluate credit, public record, and other consumer information into consumer reports. The information in these reports is used by many different types of businesses, from creditors and insurers to landlords and employers, to make eligibility and other decisions about consumers. Creditors, for example, use information in consumer reports to determine whether, and on what terms, to extend credit to a particular consumer. The majority of landlords and employers use background screening reports to screen prospective tenants and employees.[2]

Inaccurate information in consumer reports can have significant adverse impacts on consumers. These impacts are particularly concerning for prospective renters and job seekers struggling to recover from the impacts of the COVID–19 pandemic. Consumers with inaccurate information in their consumer reports may, for example, be denied credit or housing they would have otherwise received, or may be offered less attractive terms than they would have been offered if their information had been accurate. For example, an applicant whose tenant screening report shows past litigation or a poor rental payment history may find it difficult or more expensive to rent property.[3] Job-seekers with inaccurate information in their consumer reports may also be denied employment opportunities.[4] Inaccurate information in consumer reports can also harm the businesses that use such reports by leading them to incorrect decisions. Consumer report accuracy relies on the various parties to the consumer reporting system: the three nationwide consumer reporting agencies—Equifax, Experian, and TransUnion; other consumer reporting agencies, such as background screening companies; entities such as creditors who furnish information to consumer reporting agencies (*i.e.,* furnishers); public record repositories; users of credit reports; and consumers.

The FCRA, enacted in 1970, regulates consumer reporting. The statute was designed to ensure that ''consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information.'' [5] The FCRA was enacted ''to protect consumers from the transmission of inaccurate information about them and to establish credit reporting practices that utilize accurate, relevant, and current information in a confidential and responsible manner.'' [6] Because of the importance of consumer report accuracy to businesses and consumers, the structure of the FCRA creates interrelated legal standards and requirements to support the policy goal of accurate credit reporting. Among these is the requirement that, when preparing a consumer report, consumer

[1] 85 FR 77987 (Dec. 3, 2020).

[2] *See* Nat'l Consumer Law Ctr., *Broken Records Redux: How Errors by Criminal Background Check Companies Continue to Harm Consumers Seeking Jobs and Housing* 3 (Dec. 2019), *https://www.nclc.org/images/pdf/criminal-justice/report-broken-records-redux.pdf;* Bureau of Consumer Fin. Prot., *Market Snapshot: Background Screening Reports: Criminal background checks in employment* 3–4 (Oct. 2019), *https://files.consumerfinance.gov/f/documents/201909_cfpb_market-snapshot-background-screening_report.pdf* (CFPB Background Screening Report); Sharon Dietrich, *Preventing Background Screeners from Reporting Expunged Criminal Cases,* Sargent Shriver Nat'l Ctr. on Poverty L. (Apr. 2015).

[3] *See, e.g.,* Bureau of Consumer Fin. Prot., *Complaint Bulletin: COVID–19 issues described in consumer complaints* 15 (July 2021), *https://files.consumerfinance.gov/f/documents/cfpb_covid-19-issues-described-consumer-complaints_complaint-bulletin_2021-07.pdf* (CFPB Complaint Bulletin) (noting that, in their complaints to the Bureau, some consumers have reported being denied applications for housing because information in their tenant screening reports was inaccurate, and other consumers reported facing homelessness because an eviction had negatively affected their credit, making it more difficult to secure housing); Kaveh Waddell, *How Tenant Screening Reports Make It Hard for People to Bounce Back from Tough Times,* Consumer Reports (Mar. 11, 2021), *https://www.consumerreports.org/algorithmic-bias/tenant-screening-reports-make-it-hard-to-bounce-back-from-tough-times/;* Lauren Kirchner & Matthew Goldstein, *How Automated Background Checks Freeze Out Renters,* N.Y. Times (May 28, 2020), *https://www.nytimes.com/2020/05/28/business/renters-background-checks.html.*

[4] CFPB Background Screening Report, *supra* note 2, at 13–14.

[5] 15 U.S.C. 1681(b).

[6] *Guimond* v. *Trans Union Credit Info.,* 45 F.3d 1329, 1333 (9th Cir.1995) (citations omitted).

reporting agencies ''shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.'' [7] This requirement remains as important today as it was when the statute was enacted in 1970.

Concerns about the accuracy of information included in consumer reports are long-standing. In 2003, Congress passed the Fair and Accurate Credit Transactions (FACT) Act, which, in addition to expanding the FCRA's substantive consumer protections, required the Federal Trade Commission (FTC) to conduct an ongoing study of consumer report accuracy and completeness.[8] In 2012, the FTC published a report summarizing results of that study, finding, among other things, that one in five consumers who participated in the study had an error on at least one of their three nationwide credit reports.[9] More recently, the Bureau and the FTC hosted a full-day public workshop to discuss issues affecting the accuracy of both traditional credit reports and employment and tenant background screening reports.[10]

The Bureau is especially concerned about the effects of these accuracy problems in light of the economic and public health impacts of COVID–19. Income shocks resulting from the pandemic, such as a job loss, reduced work hours, or the death or illness of a family member, have contributed to an increase in housing and financial insecurity for many households.[11] Low-income and minority renters have been disproportionately affected by the economic effects of the COVID–19 pandemic, including job losses.[12] The Bureau is concerned that the risk that inaccurate data will be included in consumer reports may be further heightened by increased volumes of negative information in the consumer reporting system resulting from the pandemic. Inaccurate information in consumer reports can have devastating impacts on consumers, including impairing the ability of renters and job-seekers negatively impacted by the pandemic to secure new rental housing, find employment, and otherwise recover from the pandemic's economic effects. An increase in housing instability and financial distress caused by inaccurate consumer reporting information could undermine the nation's efforts to recover from the pandemic.

Consumer complaints received by the Bureau reflect significant consumer concern about inaccuracies in consumer reports. Complaints about ''incorrect information on your report'' have represented the largest percentage of consumer complaints received by the Bureau regarding credit or consumer reporting each year for at least the last five years.[13] In 2020 alone, companies provided responses to more than 191,000 such complaints, which represents approximately 68 percent of credit or consumer reporting complaints responded to by companies that year.[14]

Inaccuracies in consumer reports can in part be attributed to errors introduced by consumer reporting agencies during the ''matching'' process. When preparing a consumer report, a consumer reporting agency must assign or ''match'' information it obtains from a public data source or receives from a furnisher to the specific consumer who is the subject of the report. Each year, the Bureau receives many complaints from consumers arising from errors that likely occurred during the matching process. Some consumers who submit such complaints include narrative descriptions noting, among other things, their frustration at trying to get such errors corrected, as well as the negative consequences of such errors, such as not being able to complete planned purchases of homes or cars.[15]

One method of matching, ''name-only matching,'' is particularly likely to lead to inaccuracies in consumer reports. Name-only matching occurs when a consumer reporting agency uses only first and last name to determine whether a particular item of information relates to a particular consumer, without using other personally identifying information such as address, date of birth, or Social Security number. Matching errors are particularly common when using name-only matching because many consumers have the same or similar names. For example, in the United States, the 2010 census (the most recent to have last name statistics available) found more than 2.4 million respondents with the last name of Smith, 1.9 million respondents with the last name of Johnson, 1.6 million respondents with the last name of Williams, and more than 1 million respondents each with the last name of Brown, Jones, Garcia, Miller, Davis, Rodriguez, Martinez, or Hernandez.[16] Given the commonality of many first and last names, it is not unlikely that thousands, or even tens of thousands, of consumers, might share a particular first and last name combination.[17]

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[7] 15 U.S.C. 1681e(b).

[8] Fair and Accurate Credit Transactions Act of 2003, Public Law 108–159, sec. 319, 117 Stat. 1952 (2003).

[9] *See* Fed. Trade Comm'n, *Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003,* at 64 (Dec. 2012), *https://www.ftc.gov/sites/default/files/documents/reports/section-319-fair-and-accurate-credit-transactions-act-2003-fifth-interim-federal-trade-commission/130211factareport.pdf.*

[10] Fed. Trade Comm'n, *Accuracy in Consumer Reporting Workshop* (Dec. 10, 2019), *https://www.ftc.gov/news-events/events-calendar/accuracy-consumer-reporting-workshop.*

[11] *See* Bureau of Consumer Fin. Prot., *Housing Insecurity and the COVID–19 Pandemic,* at 5 (Mar. 1, 2021), *https://files.consumerfinance.gov/f/documents/cfpb_Housing_insecurity_and_the_COVID-19_pandemic.pdf.*

[12] *See id.* at 8, 18; *see also* Pew Research Ctr., *Economic Fallout From COVID–19 Continues To Hit Lower-Income Americans the Hardest* (Sept. 24, 2020), *https://www.pewresearch.org/social-trends/2020/09/24/economic-fallout-from-covid-19-continues-to-hit-lower-income-americans-the-hardest/.*

[13] *See* Bureau of Consumer Fin. Prot., *Consumer Response Annual Report,* at 22 (Mar. 2021), *https://files.consumerfinance.gov/f/documents/cfpb_2020-consumer-response-annual-report_03-2021.pdf;* Bureau of Consumer Fin. Prot., *Consumer Response Annual Report,* at 19 (Mar. 2020), *https://files.consumerfinance.gov/f/documents/cfpb_consumer-response-annual-report_2019.pdf;* Bureau of Consumer Fin. Prot., *Consumer Response Annual Report,* at 19 (Mar. 2019), *https://files.consumerfinance.gov/f/documents/cfpb_consumer-response-annual-report_2018.pdf;* Bureau of Consumer Fin. Prot., *Consumer Response Annual Report,* at 13 (Mar. 2018), *https://files.consumerfinance.gov/f/documents/cfpb_consumer-response-annual-report_2017.pdf;* Bureau of Consumer Fin. Prot., *Consumer Response Annual Report,* at 18 (Mar. 2017), *https://files.consumerfinance.gov/f/documents/201703_cfpb_Consumer-Response-Annual-Report-2016.PDF.*

[14] *See* Bureau of Consumer Fin. Prot., *Consumer Response Annual Report,* at 22 (Mar. 2021), *https://files.consumerfinance.gov/f/documents/cfpb_2020-consumer-response-annual-report_03-2021.pdf* for more in-depth analyses. Additionally, consumers with a problem with a credit or consumer report may submit multiple complaints, for example, complaints about data furnishers and complaints about consumer reporting agencies. *Id.* at 21.

[15] *See generally* Bureau of Consumer Fin. Prot., Consumer Complaint Database, *https://www.consumerfinance.gov/data-research/consumer-complaints/* (last visited Oct. 21, 2021).

[16] U.S. Census Bureau, *Frequently Occurring Surnames from the 2010 Census, https://www.census.gov/topics/population/genealogy/data/2010_surnames.html* (last revised Dec. 27, 2016).

[17] For example, one study catalogued a number of first-and-last name combinations such as James Smith that each corresponded to over 30,000 individuals in the United States. *See* Lee Hartman, Southern Illinois University, *John Smith et al.: Some observations on how the 20 most popular first names combine with the 20 most popular surnames in the United States* (n.d.), *https://web.archive.org/web/20190225042148/http:/mypage.siu.edu/lhartman/johnsmith.html; see also* Mona Chalabi & Andrew Flowers, *Dear Mona, What's The Most Common Name In America?* (Nov. 20, 2014), *https://fivethirtyeight.com/features/whats-the-most-common-name-in-america/* (cataloguing common first-and-last name combinations). Indeed, one court, in evaluating an FCRA section 607(b) claim, noted that there could be as many as 125,000 individuals named ''David Smith'' living in the United States. *Smith* v. *LexisNexis Screening Solutions, Inc.,* 837 F.3d 604, 610 (6th Cir. 2016) (noting that '''David Smith' is an exceedingly common first-and-last-name combination—to the tune of over 125,000 individuals living in the United States'').

Tab 1

The risk of mismatching from name-only matching is likely to be greater for Hispanic, Asian, and Black individuals because there is less last-name diversity in those populations than among the non-Hispanic white population.[18] For example, a study of 2010 census data indicated that the percentage of non-Hispanic white respondents covered by the top 10 most common last names is lower than the corresponding percentages for Hispanic, Asian, and Black respondents.[19] The study found the highest level of last-name clustering among Hispanic respondents, noting that just 26 last names cover a quarter of the Hispanic population (as compared to 319 last names required to cover a quarter of the population identified as non-Hispanic white alone) and that 16.3 percent of Hispanic respondents reported one of the top 10 most common last names (as compared to 4.5 percent for non-Hispanic white alone respondents).[20] The study further noted that these clustering patterns were similar for Asian and Black respondents.[21]

The Bureau, the FTC, and State attorneys general have brought enforcement actions in this area. In 2014, a background screening company settled FTC allegations that it violated FCRA section 607(b) by failing to use reasonable procedures to assure maximum possible accuracy of consumer report information when it provided employers background screening reports about job applicants that included, based on name-only matching, information about whether the applicants were registered in a National Sex Offender Registry.[22] In 2019, the Bureau settled allegations that a background screening company violated FCRA section 607(b) by matching publicly sourced criminal records to job applicants based only on limited personal identifiers, which could include first and last name and either date of birth or address, a practice that resulted in ''a heightened risk of false positives'' because commonly named individuals (*e.g.,* John Smith) might share the same first and last name and date of birth or address.[23] Similarly, in 2015, the Bureau took action against a background screening company for violating FCRA section 607(b) by permitting, but not requiring, employers to provide middle names for job applicants for purposes of matching criminal record information to particular consumers. According to the Bureau's complaint, the company's procedures resulted in the reporting of mismatched criminal record information about consumers.[24]

In March 2015, the three nationwide consumer reporting agencies—Equifax, Experian, and TransUnion—launched the National Consumer Assistance Plan (NCAP), an initiative aimed at enhancing the accuracy of credit reports and making it easier for consumers to correct errors on their credit reports. The NCAP was the result of a settlement between the nationwide consumer reporting agencies and over thirty State Attorneys General that required the nationwide consumer reporting agencies to, among other things, form a working group to establish standards regarding the collection of public record data for consumer credit reports.[25] Pursuant to the NCAP, starting July 1, 2017, public record data obtained by the nationwide consumer reporting agencies for inclusion on credit reports must contain name, address, and Social Security Number and/or date of birth and must be refreshed at least every 90 days.[26]

Courts have also spoken on this topic. For example, a decade ago, the Third Circuit in *Cortez* v. *Trans Union, LLC* considered a case in which the nationwide consumer reporting agency TransUnion had indicated in a consumer report that the consumer's name matched a name on a list maintained by the Office of Foreign Assets Control (OFAC), despite the fact that TransUnion had information within its own files showing that the OFAC alert was not about the correct consumer.[27] The Third Circuit upheld the district court's ruling that TransUnion's matching protocols that compared only the consumer's name to the names on the OFAC list did not satisfy the requirement of FCRA section 607(b).[28] Nonetheless, TransUnion did not adequately update its matching practices, and it was sued a second time for similar practices in *Ramirez* v. *TransUnion LLC.* In a 2020 decision that was later overturned on other grounds, the Ninth Circuit ruled that ''despite [*Cortez*], TransUnion continued to use problematic matching technology. . . . In doing so, it ran an unjustifiably high risk of error.'' [29] The court upheld a jury verdict deeming TransUnion liable for violating section 607(b) because it used ''rudimentary name-only matching software without any additional checks to avoid false positives.'' [30] The Ninth Circuit held that the violation was willful because the correct reading of the FCRA should have been clear to TransUnion after *Cortez.*[31]

[18] Joshua Comenetz, *Frequently Occurring Surnames in the 2010 Census* 3–7 (Oct. 2016), *https://www2.census.gov/topics/genealogy/2010surnames/surnames.pdf;* U.S. Census Bureau, *Hispanic Surnames Rise in Popularity* (Aug. 9, 2017), *https://www.census.gov/library/stories/2017/08/what-is-in-a-name.html;* U.S. Census, *What's in a Name* (Dec. 15, 2016), *https://www.census.gov/newsroom/blogs/random-samplings/2016/12/what_s_in_a_name.html.*

[19] *Frequently Occurring Surnames in the 2010 Census, supra* note 18, at 4, 6, 7 & table 4 (noting that 14 of the 15 most rapidly increasing last names that were among the top 1,000 most common last names in both 2000 and 2010 were predominantly Asian or Hispanic).

[20] *Id.* at 7. Relatedly, one study estimated that four of the top 13 most common first-and-last-name combinations in the United States are names of Spanish origin. Specifically, the study estimated that there are more than 25,000 individuals in the United States each named Maria Garcia, Maria Rodriguez, Maria Hernandez, or Maria Martinez. *See John Smith et al., supra* note 17.

[21] *Frequently Occurring Surnames in the 2010 Census, supra* note 18, at 7.

[22] Complaint at ¶¶ 9–17, *U.S.* v. *InfoTrack Info. Servs, Inc.,* No. 1:14–cv–02054 (N.D. Ill. Mar. 24, 2014), *https://www.ftc.gov/enforcement/cases-proceedings/122-3092/infotrack-information-services-inc-et-al.*

[23] Complaint at ¶¶ 5–11, *Bureau of Consumer Fin. Prot.* v. *Sterling Infosys., Inc.,* No. 1:19–cv–10824 (S.D.N.Y. Nov. 22, 2019), *https://www.consumerfinance.gov/enforcement/actions/sterling-infosystems-inc/.*

[24] Consent Order at ¶¶ 4–13, *In re Gen. Info. Servs., Inc.,* 2015–CFPB–0028 (Oct. 29, 2015), *https://files.consumerfinance.gov/f/201510_cfpb_consent-order_general-information-service-inc.pdf; see also, e.g.,* Complaint at ¶¶ 8–21, *Fed. Trade Comm'n* v. *RealPage, Inc.,* No. 3:18–cv–02737–N (N.D. Tex. Oct. 16, 2018), *https://www.ftc.gov/enforcement/cases-proceedings/152-3059/realpage-inc* (alleging defendant violated FCRA section 607(b) by using matching criteria that required ''an exact match on the applicant's last name only,'' and ''a 'soft', or non-exact, match for first name, middle name, and date of birth,'' resulting in defendant providing tenant screening reports with criminal record information for individuals other than the applicant).

[25] Assurance of Voluntary Compliance/Assurance of Voluntary Discontinuance at ¶ IV.E.6, *In re Equifax Info. Servs. LLC, Experian Info. Solutions, Inc., and TransUnion LLC* (May 20, 2015), *https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/Consumer-Protection/2015-05-20-CRAs-AVC.aspx.*

[26] Following the launch of the NCAP, the nationwide consumer reporting agencies took steps to remove public records not meeting the specified criteria and, beginning in April 2018, ceased including civil judgments and tax liens in the consumer reports they issued. Bankruptcies are the only type of public record that continue to be reported by the nationwide consumer reporting agencies. Other consumer reporting agencies, however, continue to include civil judgments and tax liens on the consumer reports they prepare. *See* Bureau of Consumer Fin. Prot., *Quarterly Consumer Credit Trends: Public records, credit scores, and credit performance* (Dec. 2019), *https://files.consumerfinance.gov/f/documents/cfpb_quarterly-consumer-credit-trends_public-records-credit-scores-performance_2019-12.pdf;* Bureau of Consumer Fin. Prot., *Quarterly Consumer Credit Trends: Public Records* (Feb. 2018), *https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-trends_public-records_022018.pdf.*

[27] 617 F.3d 688 (3d Cir. 2010).

[28] *Id.*

[29] *Ramirez* v. *TransUnion, LLC,* 951 F.3d 1008, 1032 (9th Cir. 2020), *rev'd on standing grounds,* 141 S. Ct. 2190 (June 25, 2021).

[30] *Id.* at 1022.

[31] *Id.* at 1031–33. Consumers have also brought other private party claims under the FCRA relating to matching using limited personal identifiers. *See,*

Despite these enforcement actions, the steps taken by the nationwide consumer reporting agencies pursuant to the NCAP, and these court decisions, it appears that some consumer reporting agencies continue to use matching practices that do not satisfy the standard of ''reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates,'' as required by FCRA section 607(b). The NCLC stated in a 2019 report that some background screening companies are still relying on name-only matches.[32] NCLC and other consumer and civil rights groups recently requested that the Bureau provide guidance that name-only matching is a practice that fails to comply with the FCRA.[33]

The Bureau is issuing this advisory opinion to remind consumer reporting agencies that their matching practices must comply with their FCRA obligation to ''follow reasonable procedures to assure maximum possible accuracy'' under section 607(b), and that the practice of name-only matching in particular is far from sufficient to meet that standard. Indeed, as illustrated by the foregoing discussion, multiple additional elements beyond names may often be required to meet the FCRA standard of ''reasonable procedures to assure maximum possible accuracy.''

B. Coverage

This advisory opinion applies to all consumer reporting agencies as defined in FCRA section 603(f).[34] As used in this advisory opinion, ''name-only matching'' refers to matching information to the particular consumer who is the subject of a consumer report based solely on whether the consumer's first and last names are identical or similar to the first and last names associated with the information, without verifying the match using additional identifying information for the consumer. ''Matching procedures'' refers to the broader set of practices and procedures consumer reporting agencies use to link information to a consumer's consumer report.

C. Legal Analysis

FCRA section 607(b) provides that ''[w]henever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.''[35] The Bureau interprets the requirement in section 607(b) to include as an integral component that the information in fact pertains to the consumer who is the subject of the report. Indeed, the text of section 607(b) refers explicitly to ''the individual about whom the report relates.'' This interpretation is consistent with the core purpose of the FCRA as described in FCRA section 602—*i.e.,* to require consumer reporting agencies to adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner that is fair and equitable to the consumer with regard to confidentiality, accuracy, and the proper use of such information.[36]

Other provisions of the FCRA that directly relate to section 607(b) also support this interpretation. For example, section 603(d) of the FCRA defines ''consumer report'' to include certain communications ''bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living'' that are ''used or expected to be used . . . for the purpose of . . . establishing the consumer's eligibility'' for credit, employment, insurance, and other purposes.[37] Information in a consumer report on a different consumer than the consumer report purports to relate to would not have any utility in serving as a factor in establishing the eligibility of the person the consumer report purports to relate to. Additionally, section 604 of the FCRA generally provides that a consumer reporting agency may not provide a consumer report about a particular consumer unless there is a permissible purpose, such as a legitimate business need related to a transaction initiated by the consumer.[38] The FCRA expressly ties many of these permissible purposes to the specific consumer who is the subject of the report, making it clear that Congress intended that information in the consumer report would relate to that specific consumer. For instance, in FCRA section 604(a)(3)(A), Congress allowed consumer reporting agencies to release a consumer report to a person if they have reason to believe the person ''intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished.''[39]

The steps that a consumer reporting agency takes in matching information it obtains or receives to the correct consumer in preparing consumer reports are critical in assessing whether a consumer reporting agency is following ''reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates'' under FCRA section 607(b). As detailed in part I.A. above, matching information to the consumer who is the subject of a consumer report by name alone creates significant accuracy concerns because most names are shared with other consumers and, in some cases, with thousands of other consumers. In preparing consumer reports, it is not a reasonable procedure to assure maximum possible accuracy to use insufficient identifiers to match information to the consumer who is the subject of the report. In particular, it has been the consistent view of the Bureau that name-only matching is not a procedure that assures maximum possible accuracy, and thus, consumer reporting agencies that use name-only matching violate FCRA section 607(b).[40] That continues to be the Bureau's position as outlined in this advisory opinion. Moreover, nothing in this analysis creates a safe harbor for the FCRA requirement of ''reasonable procedures to assure maximum possible accuracy'' with respect to matching.

Based on the high risk that name-only matching will result in the inclusion of information that does not pertain to the consumer who is the subject of the report and the relative lack of burden on a consumer reporting agency associated

e.g., Lopez v. *Nat'l Credit Reporting, Inc.,* 2013 WL 1999624 (N.D. Cal. May 13, 2013) (denying motion to dismiss in case alleging violation of FCRA section 607(b) related to mixed file due to match based only on name and similar area of residence).

[32] Nat'l Consumer Law Ctr., *Broken Records Redux, supra* note 2, at 18, 38.

[33] Letter from American Civil Liberties Union *et al.* to Secretary Marcia L. Fudge, U.S. Dep't of Hous. & Urban Dev. *et al.* (July 13, 2021), at 7–8 (addressing technology's role in housing discrimination), *https://www.aclu.org/letter/coalition-memo-re-addressing-technologys-role-housing-discrimination.*

[34] 15 U.S.C. 1681a(f).

[35] 15 U.S.C. 1681e(b).

[36] 15 U.S.C. 1681(a); *see also Guimond,* 45 F.3d at 1333. Inaccuracy based on mistaken identity was one of the reasons a first version of the FCRA was introduced. As Senator William Proxmire stated when introducing the legislation, ''There are many varieties of inaccurate information . . . . One is the case of mistaken identity, where two individuals with the same names are confused, and the deserving individual is denied credit because of something done by the other person.'' 114 Cong. Rec. 24,902, 24,903 (1968).

[37] 15 U.S.C. 1681a(d).

[38] 15 U.S.C. 1681b.

[39] 15 U.S.C. 1681b(a)(3)(A).

[40] *See* Consent Order at ¶¶ 4–13, *In re Gen. Info. Servs., Inc.,* 2015–CFPB–0028 (Oct. 29, 2015), *https://files.consumerfinance.gov/f/201510_cfpb_consent-order_general-information-service-inc.pdf;* Complaint at ¶¶ 5–11, *Bureau of Consumer Fin. Prot.* v. *Sterling Infosys., Inc.,* No. 1:19–cv–10824 (S.D.N.Y. Nov. 22, 2019), *https://www.consumerfinance.gov/enforcement/actions/sterling-infosystems-inc/.*

with utilizing additional identifiers or not including name-only matched information in a consumer report, the Bureau continues to conclude that it is not a reasonable procedure to use name-only matching to match information to the consumer who is the subject of the report in preparing a consumer report.

In some cases, in preparing consumer reports, consumer reporting agencies may obtain information from a data broker, database, or other source that does not have or use identifying information other than consumers' names. It is not a reasonable procedure for the consumer reporting agency to simply include information from such sources in a consumer's report without taking additional steps to match the information to the consumer who is the subject of the report, such as consulting other databases or sources of information that contain additional identifying information.

II. Regulatory Matters

This advisory opinion is an interpretive rule issued under the Bureau's authority to interpret the FCRA, including under section 1022(b)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act,[41] which authorizes guidance as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of Federal consumer financial laws.[42]

As an interpretive rule, this advisory opinion is exempt from the notice-and-comment rulemaking requirements of the Administrative Procedure Act.[43] Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.[44] The Bureau has also determined that this advisory opinion does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.[45]

Pursuant to the Congressional Review Act,[46] the Bureau will submit a report containing this interpretive rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to the rule's published effective date. The Office of Information and Regulatory Affairs has designated this interpretive rule as not a ''major rule'' as defined by 5 U.S.C. 804(2).

[41] Public Law 111–203, 124 Stat. 1376 (2010).

[42] 12 U.S.C. 5512(b)(1).

[43] 5 U.S.C. 553(b).

[44] 5 U.S.C. 603(a), 604(a).

[45] 44 U.S.C. 3501–3521.

[46] 5 U.S.C. 801 *et seq.*

Dated: November 3, 2021.

Rohit Chopra,

Director, Bureau of Consumer Financial Protection.

[FR Doc. 2021–24471 Filed 11–9–21; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 107

[Docket No. FAA–2018–1087; Amdt. No. 107–9]

RIN 2120–AK85

Operation of Small Unmanned Aircraft Systems Over People; Technical Amendments

AGENCY: Federal Aviation Administration (FAA), U.S. Department of Transportation (DOT).

ACTION: Technical amendments.

SUMMARY: The Federal Aviation Administration is making technical amendments to the ''Operation of Small Unmanned Aircraft Systems over People'' final rule, which was published on January 15, 2021. The final rule document inadvertently misnumbered regulatory text and used inconsistent language to refer to a process.

DATES: Effective November 10, 2021.

FOR FURTHER INFORMATION CONTACT: Michael Machnik, General Aviation and Commercial Division, Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue SW, 8th Floor, Washington, DC 20591; telephone 1–844–FLY–MYUA; email: *UASHelp@faa.gov.*

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

A copy of the notice of proposed rulemaking (NPRM) (84 FR 3856, February 13, 2019), all comments received, the final rule, and all background material may be viewed online at *https://www.regulations.gov* using the docket number listed above. A copy of these technical amendments will be placed in the docket. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded from the Office of the Federal Register's website at *https://www.federalregister.gov* and the Government Publishing Office's website at *https://www.govinfo.gov.* A copy may also be found at the FAA's Regulations and Policies website at *https://www.faa.gov/regulations_policies.*

Copies may also be obtained by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW, Washington, DC 20591, or by calling (202) 267–9677. Commenters must identify the docket or notice number of this rulemaking.

All documents the FAA considered in developing these technical amendments, including economic analyses and technical reports, may be accessed in the electronic docket for this rulemaking.

Good Cause for Adoption Without Prior Notice

Section 553(b)(3)(B) of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) authorizes agencies to dispense with notice and comment procedures for rules when the agency for ''good cause'' finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Section 553(d)(3) of the APA requires that agencies publish a rule not less than 30 days before its effective date, except as otherwise provided by the agency for good cause found and published with the rule.

Because this action merely makes technical amendments to a published final rule, the FAA finds that notice and public comment under 5 U.S.C. 553(b) is unnecessary. For the same reason, the FAA finds that good cause exists under 5 U.S.C. 553(d) for making this rule effective in less than 30 days.

Background

On January 15, 2021, the ''Operation of Small Unmanned Aircraft Systems Over People'' final rule (RIN 2120–AK85) published in the **Federal Register** at 86 FR 4314. After the rule was published, the FAA discovered three minor drafting errors that require correction. This document corrects drafting errors in § 107.110(b) and (c) and in § 107.125(a)(2). In § 107.110, two paragraphs were designated improper paragraph levels. Section 107.110(b) should change to § 107.110 (a)(2) and § 107.110(c) should change to § 107.110(b). The final drafting errors that occur in § 107.125(a)(2) should read as ''FAA-accepted declaration of compliance,'' instead of ''current'' declaration of compliance, to match the language in § 107.115(a)(2).

Tab 2

Bulletin 2022-01: Medical Debt Collection and Consumer Reporting Requirements in Connection With the No Surprises Act, 87 Fed. Reg. 3025 (Jan. 20, 2022).

CFPB Issues Bulletin to Prevent Unlawful Medical Debt Collection and Credit Reporting

New Law Limits Surprise Medical Bills

JAN 13, 2022

WASHINGTON, D.C. – The Consumer Financial Protection Bureau (CFPB) today released a bulletin reminding debt collectors and credit bureaus of their legal obligations in light of the No Surprises Act, which protects consumers from certain unexpected medical bills. Companies that try to collect on medical bills that are prohibited by the No Surprises Act, or who furnish information to credit bureaus about such invalid debts, may face significant legal liability under the Fair Debt Collection Practices Act (FDCPA) and the Fair Credit Reporting Act (FCRA). The bulletin advises credit bureaus that the accuracy and dispute obligations imposed by the FCRA apply with respect to debts stemming from charges that exceed the amount permitted by the No Surprises Act.

The CFPB will investigate claims and take action against companies that attempt to collect or report or furnish consumer information about debts stemming from charges that exceed the amounts permitted under the No Surprises Act.

"Too many Americans have been shocked by surprise medical bills and forced to pay up through credit report coercion," said CFPB Director Rohit Chopra. "Our action today should serve as a reminder not to collect on or furnish credit reporting information about invalid medical debt."

"The No Surprises Act is the most critical consumer protection law since the Affordable Care Act," said Health and Human Services (HHS) Secretary Xavier Becerra. "After years of bipartisan effort, we are finally providing hardworking Americans with the federal guardrails needed to shield them from surprise medical bills. We are taking patients out of the middle of the food fight between insurers and providers and ensuring they aren't met with eye-popping, bankruptcy-inducing medical bills. This is the right thing to do, and it supports President Biden's vision of creating a more transparent, competitive and fair health care system."

Concerns over unexpected medical expenses and medical debt have been magnified by the global COVID-19 pandemic. Last year, the Federal Reserve Board reported (https://www.federalreserve.gov/publications/2021-economic-well-being-of-us-households-in-2020-dealing-with-unexpected-expenses.htm) that 17% of adults had major, unexpected medical expenses in the prior 12 months with the median amount between $1,000 and $1,999, and 23 percent of adults went without medical care due to an inability to pay. In 2014, the CFPB published a report (https://www.consumerfinance.gov/about-us/newsroom/cfpb-spotlights-concerns-with-medical-debt-collection-and-reporting/?_gl=1*1b3de0o*_ga*NDg5OTExMDI2LjE2MzY0NzM3MTk.*_ga_DBYJL30CHS*MTY0MTkxMzg0NC4xMjEuMS4xNjQxOTEzODc4LjA.) showing that 43 million Americans had overdue medical debt on their credit reports, and more than half of all overdue debt on credit reports is from medical debt.

The bulletin released today by the CFPB includes the following reminders to debt collectors, information furnishers, and credit bureaus:

- Consumer financial protection law prohibits debt collectors from misrepresenting the character, amount, or legal status of any debt. This prohibition includes misrepresenting that a consumer must pay a debt stemming from a charge that exceeds the amount permitted by the No Surprises Act. In addition, debt collectors are also prohibited from using unfair or unconscionable means to collect or attempt to collect any debt, including the collection of any amount unless such amount is expressly authorized by the agreement creating the debt or permitted by law. Courts have emphasized that collecting an amount that exceeds what is owed would violate the prohibition on unfair or unconscionable debt collection practices.
- Many debt collectors furnish information about unpaid medical debts to credit bureaus. Furnishers must have reasonable written policies and procedures regarding the accuracy and integrity of consumer information provided to credit bureaus. Credit bureaus preparing a consumer report must follow reasonable procedures to assure the maximum possible accuracy of information contained in the consumer report. Both credit bureaus and furnishers must conduct reasonable and timely investigations of consumer disputes to verify the accuracy of consumer information.
- For furnishers and credit bureaus, the accuracy and dispute obligations imposed by federal consumer financial protection law apply with respect to debts stemming from charges that exceed the amount permitted by the No Surprises Act.

The CFPB will continue to work with the U.S. Department of Health and Human Services and other partners to address medical debt abuses.

Read today's bulletin, *Medical Debt Collection and Consumer Reporting Requirements in Connection with the No Surprises Act* (https://files.consumerfinance.gov/f/documents/cfpb_bulletin-2022-01_no-surprises-act_2022-01.pdf).

Visit the Centers for Medicare & Medicaid Services (CMS) No Surprises Act website. (https://www.cms.gov/nosurprises)

Read more about debt collection and the Debt Collection Rule. (https://www.consumerfinance.gov/compliance/compliance-resources/other-applicable-requirements/debt-collection/)

Read more about credit reporting requirements. (https://www.consumerfinance.gov/compliance/compliance-resources/other-applicable-requirements/fair-credit-reporting-act/)

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit consumerfinance.gov (cfpb.gov/).

Topics

- **DEBT COLLECTION** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=DEBT-COLLECTION)
- **FAIR CREDIT REPORTING ACT** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=FAIR-CREDIT-REPORTING-ACT)
- **FAIR DEBT COLLECTION PRACTICES ACT** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=FAIR-DEBT-COLLECTION-PRACTICES-ACT)
- **MEDICAL DEBT** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=MEDICAL-DEBT)

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Rules and Regulations

Federal Register
Vol. 87, No. 13
Thursday, January 20, 2022

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Parts 1006 and 1022

Bulletin 2022–01: Medical Debt Collection and Consumer Reporting Requirements in Connection With the No Surprises Act

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Compliance bulletin and policy guidance.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is issuing this compliance bulletin and policy guidance (Bulletin) to remind debt collectors of their obligation to comply with the Fair Debt Collection Practices Act's prohibition on false, deceptive, or misleading representations or means in connection with the collection of any debt and unfair or unconscionable means to collect or attempt to collect any debt, and to remind consumer reporting agencies and information furnishers to comply with the Fair Credit Reporting Act's accuracy and dispute resolution requirements, including when collecting, furnishing information about, and reporting medical debts covered by the No Surprises Act.

DATES: This Bulletin is applicable as of January 20, 2022.

FOR FURTHER INFORMATION CONTACT: Seth Caffrey, Courtney Jean, Kristin McPartland, or Alexandra Reimelt, Senior Counsels, Office of Regulations, at 202–435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov*.

SUPPLEMENTARY INFORMATION:

I. Bulletin

The Bureau is issuing this Bulletin to emphasize the obligation of debt collectors to comply with the Fair Debt Collection Practices Act's (FDCPA) [1] prohibitions on false, deceptive, or misleading representations or means in connection with the collection of any debt and unfair or unconscionable means to collect or attempt to collect any debt, and the obligation of consumer reporting agencies and information furnishers to comply with the Fair Credit Reporting Act's (FCRA) [2] accuracy and dispute resolution requirements, including when collecting, furnishing information about, and reporting medical debts covered by the No Surprises Act. This Bulletin describes certain acts or practices related to the collection of medical debts that may violate the FDCPA or the FCRA. The examples described in this bulletin are not exhaustive of all potential violations of the FDCPA and FCRA that could arise from the collection of such debts.

Effective generally for plan years beginning on or after January 1, 2022, the No Surprises Act [3] protects participants, beneficiaries, and enrollees in group health plans and group and individual health insurance coverage from surprise medical bills when they receive, under certain circumstances, emergency services, non-emergency services from nonparticipating providers at participating health care facilities, and air ambulance services from nonparticipating providers of air ambulance services.[4] In addition, the No Surprises Act, among other things, requires certain health care facilities and providers to disclose Federal and State patient protections against balance billing and sets forth complaint processes with respect to potential violations of the protections against balance billing and out-of-network cost sharing.[5] The No Surprises Act also includes certain protections for uninsured (or self-pay) individuals from surprise medical bills.[6] Several Federal agencies have published rules implementing the No Surprises Act.[7]

Several characteristics of medical debt pose special risks to consumers and distinguish it from other types of debt.[8] Medical debt often results from an unanticipated event, such as an accident or sudden illness, rather than from a voluntary, planned transaction. Consumers are rarely informed of the costs of medical treatment in advance (although provisions in the No Surprises Act will help to remedy this), and because of price opacity, provider availability, and the emergency nature of some medical care, consumers may have only a limited ability to ''shop around.'' In addition, medical bills can be rife with errors, and the unique complexity of the medical billing and third-party reimbursement process exacerbates consumer confusion. A consumer faced with a bill for medical services is generally ill suited to the task of identifying billing errors, including, for example, identifying whether the billed services were actually received and whether the correct amount was billed. A consumer also may have difficulty determining whether the amount is covered by insurance (if applicable) and, if so, whether and to what extent the amount was already paid.

If a medical bill remains unpaid after a certain amount of time, a medical provider may engage a third party to collect the debt.[9] To the extent the third party qualifies as a ''debt collector'' under the FDCPA and its implementing Regulation F, the third party is subject to the FDCPA and Regulation F.[10] The FDCPA and Regulation F prohibit the use of ''any false, deceptive, or misleading representation or means in connection with the collection of any

[1] 15 U.S.C. 1692 *et seq.*

[2] 15 U.S.C. 1681 *et seq.*

[3] Public Law 116–260, div. BB, tit. I, 134 Stat. 2758 (2020).

[4] *See* Requirements Related to Surprise Billing; Part I, 86 FR 36872 (July 13, 2021). The protections against surprise billing also apply to health benefits plans offered by carriers under the Federal Employees Health Benefits (FEHB) Act. *See* 5 U.S.C. 8901(p).

[5] *See* Requirements Related to Surprise Billing; Part I, 86 FR 36872 (July 13, 2021).

[6] *See* Requirements Related to Surprise Billing; Part II, 86 FR 55980 (Oct. 7, 2021).

[7] *See, e.g., id.* (interim final rule issued by Office of Personnel Management; Internal Revenue Service, Department of the Treasury; Employee Benefits Security Administration, Department of Labor; Centers for Medicare and Medicaid Services, Department of Health and Human Services); Requirements Related to Surprise Billing; Part I, 86 FR 36872 (July 13, 2021) (same).

[8] *See generally* Bureau of Consumer Fin. Prot., *Consumer credit reports: A study of medical and non-medical collections* (Dec. 2014), at 15–16, 38–42, *https://files.consumerfinance.gov/f/201412_cfpb_reports_consumer-credit-medical-and-non-medical-collections.pdf.*

[9] *See generally* Debt Collection Practices (Regulation F), 85 FR 76734, 76735–36 (Nov. 30, 2020).

[10] 15 U.S.C. 1692a(6) (defining ''debt collector''); 12 CFR 1006.2(i) (same).

debt,'' [11] including, for example, any false representation of ''the character, amount, or legal status of any debt.'' [12] The FDCPA and Regulation F also prohibit the use of ''unfair or unconscionable means to collect or attempt to collect any debt,'' [13] including, for example, the ''collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.'' [14]

The Bureau reminds debt collectors about these FDCPA prohibitions. The prohibition on misrepresentations includes misrepresenting that a consumer must pay a debt stemming from a charge that exceeds the amount permitted by the No Surprises Act. Thus, for example, a debt collector who represents that a consumer owes a debt arising from out-of-network charges for emergency services may violate the prohibition on misrepresentations if those charges exceed the amount permitted by the No Surprises Act. Courts have also emphasized that collecting an amount that exceeds what is owed would violate the prohibition on unfair or unconscionable debt collection practices.

Many debt collectors furnish information about unpaid medical debts to consumer reporting agencies (CRAs).[15] Debt collectors who furnish information and the CRAs to which they furnish that information are subject to the FCRA and its implementing Regulation V.[16] The FCRA and Regulation V impose obligations on CRAs and furnishers relating to the accuracy of information in consumer reports. Among these is the requirement that, when preparing a consumer report, CRAs ''shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates,'' [17] and the requirement that furnishers ''establish and implement reasonable written policies and procedures regarding the accuracy and integrity of the information relating to consumers that it furnishes to a consumer reporting agency.'' [18] The FCRA and Regulation V also require CRAs and furnishers to conduct reasonable and timely investigations of consumer disputes to verify the accuracy of furnished information.[19]

The Bureau reminds furnishers and CRAs that the accuracy and dispute obligations imposed by the FCRA and Regulation V apply with respect to debts stemming from charges that exceed the amount permitted by the No Surprises Act. Thus, for example, a debt collector who furnishes information indicating that a consumer owes a debt arising from out-of-network charges for emergency services (or a CRA that includes such information in a consumer report) may violate the FCRA and Regulation V if those charges exceed the amount permitted by the No Surprises Act or if the furnisher (or CRA) fails to meet its dispute obligations.

The Bureau will closely review the practices of those engaged in the collection or reporting of medical debt. The Bureau will hold debt collectors accountable for failing to comply with the FDCPA and Regulation F, and it will hold CRAs and furnishers accountable for failing to comply with the FCRA and Regulation V. The Bureau will use all appropriate tools to assess whether supervisory, enforcement, or other action may be necessary.

II. Regulatory Matters

This Bulletin constitutes a general statement of policy exempt from the notice and comment rulemaking requirements of the Administrative Procedure Act.[20] It summarizes existing legal requirements. It does not impose any legal requirements on external parties, nor does it create or confer any substantive rights on external parties that could be enforceable in any administrative or civil proceeding. Because no notice of proposed rulemaking is required in issuing this Bulletin, the Regulatory Flexibility Act also does not require an initial or final regulatory flexibility analysis.[21] The Bureau has also determined that the issuance of this Bulletin does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act of 1995.[22]

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2022–01012 Filed 1–19–22; 8:45 am]

BILLING CODE 4810–AM–P

[11] 15 U.S.C. 1692e; 12 CFR 1006.18(a).

[12] 15 U.S.C. 1692e(2)(A); 12 CFR 1006.18(b)(2)(i).

[13] 15 U.S.C. 1692f; 12 CFR 1006.22(a).

[14] 15 U.S.C. 1692f(1); 12 CFR 1006.22(b). *See also, e.g., Tuttle* v. *Equifax Check,* 190 F.3d 9, 13 (2nd Cir. 1999) (noting that, if state law expressly prohibits service charges, a service charge cannot be imposed even if the contract allows it).

[15] *See* Bureau of Consumer Fin. Prot., *Market Snapshot: Third-Party Debt Collections Tradeline Reporting,* at 5, 12–14 (July 2019), *https://files.consumerfinance.gov/f/documents/201907_cfpb_third-party-debt-collections_report.pdf* (finding that, in the second quarter of 2018, medical debt accounted for approximately two-thirds of total third-party collections tradelines). *See also* Bureau of Consumer Fin. Prot., *Consumer credit reports: A study of medical and non-medical collections,* at 4–5 (Dec. 2014), *https://files.consumerfinance.gov/f/201412_cfpb_reports_consumer-credit-medical-and-non-medical-collections.pdf* (finding that, based on data from 2012 through 2014, medical debt collections tradelines affected the credit reports of nearly one-fifth of all consumers with credit reports); *id.* at 5 (finding that, based on data from 2012 through 2014, medical debt collection tradelines accounted for over half of all debt collection tradelines with an identifiable creditor or provider).

[16] 15 U.S.C. 1681 through 1681x; 12 CFR part 1022.

[17] 15 U.S.C. 1681e(b).

[18] 12 CFR 1022.42(a).

[19] 15 U.S.C. 1681i, 1681s–2; 12 CFR 1022.43.

[20] 5 U.S.C. 553(b).

[21] 5 U.S.C. 603(a), 604(a).

[22] 44 U.S.C. 3501 *et seq.*

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. FAA–2014–1077; Special Conditions No. 25–609A–SC]

Special Conditions: Dassault Aviation Model Falcon 6X Airplane; Design Roll Maneuver

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; amendment.

SUMMARY: These amended special conditions are issued for the Dassault Aviation (Dassault) Model Falcon 6X airplane. This airplane will have a novel or unusual design feature when compared to the state of technology envisioned in the airworthiness standards for transport-category airplanes. This design feature is electronic flight controls that affect maneuvering. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: This action is effective on Dassault on January 20, 2022.

FOR FURTHER INFORMATION CONTACT: Todd Martin, AIR–621, Materials and Structural Properties Section, Technical Innovation Policy Branch, Policy and Innovation Division, Federal Aviation Administration, 2200 S 216th Street,

Tab 3

Bulletin 2022-02: Compliance Bulletin on the Electronic Fund Transfer Act's Compulsory Use Prohibition and Government Benefit Accounts, 87 Fed. Reg. 10297 (Feb. 24, 2022).

CFPB Takes Action to Halt Prepaid Card Providers Siphoning Government Benefits

Government Contractors That Illegally Harvest Fees Will Be Subject to Enforcement Actions

FEB 15, 2022

WASHINGTON, D.C. – The Consumer Financial Protection Bureau (CFPB) is taking action to halt prepaid card providers illegally siphoning money away from Americans through exclusive government benefit contracts. The CFPB issued a compliance bulletin today outlining the existing prohibitions against prepaid cards being the sole method for distributing government benefits. The bulletin underscores rules intended to protect market competition and to protect people's right to have a choice in how they receive their money under the Electronic Fund Transfer Act (EFTA).

"When companies act as gatekeepers for government benefits, they often abuse that power to extract unavoidable fees," said CFPB Director Rohit Chopra. "Barriers to choice kill competition and can harm families who need every dollar to make ends meet."

The federal government administers benefits like Social Security payments and veterans' benefits, while state and local governments distribute other benefits, including unemployment insurance, child support, and pension plan payments. Typically, people receive their money through direct deposit into their bank account, by prepaid card, or by check. Existing laws, specifically EFTA and its implementing Regulation E, say that people cannot be forced to receive government benefits at a specific financial institution as a condition of receiving government benefits. The rule ensures people have choices and prohibits exclusive deals that undermine competition and fair market prices.

Companies hired to distribute government payments can abuse their exclusive contracts to extract illegal fees. In October, the CFPB fined the prison financial services company JPay $6 million (https://www.consumerfinance.gov/about-us/newsroom/cfpb-penalizes-jpay-for-siphoning-taxpayer-funded-benefits-intended-to-help-people-re-enter-society-after-incarceration/) for charging consumers fees to access their own money on prepaid debit cards that they were forced to use.

The bulletin issued today confirms that EFTA's consumer protections apply to government benefit accounts, and financial institutions may be held liable for violations of this requirement. The bulletin also confirms that it is a violation of law when people are not provided a choice on where to receive their first payment, even if they can redirect subsequent payments to an account of their choice.

Read the compliance bulletin here (https://files.consumerfinance.gov/f/documents/cfpb_bulletin-2022-02_electronic-fund-transfer-act_2022-02.pdf).

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit consumerfinance.gov (cfpb.gov/).

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Rules and Regulations

Federal Register

Vol. 87, No. 37

Thursday, February 24, 2022

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1005

Bulletin 2022–02: Compliance Bulletin on the Electronic Fund Transfer Act's Compulsory Use Prohibition and Government Benefit Accounts

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Compliance bulletin.

SUMMARY: The Electronic Fund Transfer Act (EFTA) provides, among other things, that no person may require a consumer to establish an account for receipt of electronic fund transfers with a particular financial institution as a condition of receipt of a government benefit. The Bureau of Consumer Financial Protection (Bureau) is issuing this Compliance Bulletin to reiterate that this prohibition in EFTA applies to government benefit accounts.

DATES: This bulletin is applicable on February 24, 2022.

FOR FURTHER INFORMATION CONTACT: Eliott C. Ponte, Counsel, or Kristine M. Andreassen, Senior Counsel, Office of Regulations, at 202–435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Discussion

Section 913 of EFTA provides, among other things, that no person may require a consumer to establish an account for receipt of electronic fund transfers (EFTs) with a particular financial institution as a condition of employment or receipt of a government benefit.[1] This provision, often referred to as the compulsory use prohibition, is implemented in § 1005.10(e)(2) of Regulation E. The Bureau is issuing this Compliance Bulletin to reiterate that the compulsory use prohibition in EFTA applies to government benefit accounts.

A. Background

Congress enacted EFTA in 1978 with the purpose of ''provid[ing] a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems.''[2] EFTA's primary objective is ''the provision of individual consumer rights.''[3] Congress also empowered the Board of Governors of the Federal Reserve System (Board) to promulgate regulations implementing EFTA. With the adoption of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), authority to implement most of EFTA transferred to the Bureau.[4]

The regulations first promulgated by the Board to implement EFTA now reside in subpart A of Regulation E.[5] These rules provide a broad suite of protections to consumers who make EFTs, and for accounts from which consumers can make EFTs. An EFT is any transfer of funds initiated through an electronic terminal, telephone, computer, or magnetic tape for the purpose of ordering, instructing, or authorizing a financial institution to debit or credit a consumer's account.[6] In its initial rulemaking to implement EFTA, the Board developed a broad definition of ''account,'' which closely mirrored the definition of ''account'' in EFTA.[7] The definition provides that, subject to certain specific exceptions, an account is a demand deposit (checking), savings, or other consumer asset account (other than an occasional or incidental credit balance in a credit plan) held directly or indirectly by a financial institution and established primarily for personal, family, or household purposes.[8]

In 1994, the Board amended Regulation E to extend Regulation E's protections to accounts used for the electronic distribution of government benefits (1994 EBT Rule).[9] After the Board finalized the 1994 EBT Rule, Congress amended EFTA to exempt ''needs-tested'' State and local electronic benefit transfer (EBT) programs.[10] The Board subsequently adopted a rule exempting EBT programs established or administered by State or local government agencies from Regulation E. However, all accounts used to distribute benefits for federally administered programs (including Federal needs-tested programs) as well as non-needs tested State and local government benefit programs remained covered by Regulation E.[11]

On October 5, 2016, the Bureau issued a final rule titled ''Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth In Lending Act (Regulation Z)'' (2016 Final Rule).[12] The 2016 Final Rule, as subsequently amended,[13] is referred to herein as the Prepaid Accounts Rule. The Prepaid Accounts Rule, among other things, extended Regulation E coverage to prepaid accounts and adopted provisions specific to such accounts. The definition of ''prepaid account'' in the Prepaid Accounts Rule includes government benefit accounts (as defined in § 1005.15(a)(2)), which were already covered by Regulation E since the mid-1990s. The Prepaid Accounts Rule generally maintained the existing provisions specific to government benefit accounts, while adding certain new requirements such as pre-acquisition disclosures. The Prepaid Accounts Rule did not change the compulsory use prohibition in § 1005.10(e) of Regulation E, but did add commentary to clarify the compulsory use prohibition's application to government benefits (comment 10(e)(2)–2), which is in line with pre-existing commentary regarding payroll card accounts (comment 10(e)(2)–1).

B. Compulsory Use Prohibition

As mentioned above, the compulsory use prohibition of EFTA, as implemented by Regulation E, provides that no person may require a consumer

[1] 15 U.S.C. 1693k.

[2] Public Law 95–630, 92 Stat. 3728 (1978).

[3] 15 U.S.C. 1693b.

[4] Public Law 111–203, tit. X, section 1084, 124 Stat. 1376, 2081 (2010) (codified at 15 U.S.C. 1693a *et seq.*). *See also* Dodd-Frank Act section 1061(b), 124 Stat. 2036 (codified at 12 U.S.C. 5581(b)).

[5] These provisions were originally adopted as 12 CFR part 205 but, upon transfer of authority in the Dodd-Frank Act to implement Regulation E to the Bureau, were renumbered as 12 CFR part 1005. 76 FR 81020 (Dec. 27, 2011).

[6] 12 CFR 1005.3(b)(1).

[7] 44 FR 18468, 18480 (Mar. 28, 1979).

[8] 12 CFR 1005.2(b)(1).

[9] 59 FR 10678 (Mar. 7, 1994).

[10] Public Law 104–193, 110 Stat. 2105 (1996).

[11] 62 FR 43467 (Aug. 14, 1997).

[12] 81 FR 83934 (Nov. 22, 2016).

[13] *See* 82 FR 18975 (Apr. 25, 2017) and 83 FR 6364 (Feb. 13, 2018). These amendments, among other things, extended the effective date of the Prepaid Accounts Rule to April 1, 2019.

to establish an account for receipt of EFT with a particular financial institution as a condition of receipt of a government benefit.[14] Person, for the purposes of Regulation E and the compulsory use prohibition, means a natural person or an organization, including a corporation, government agency, estate, trust, partnership, proprietorship, cooperative, or association.[15] The compulsory use prohibition applies to all persons, not just financial institutions as defined in Regulation E.[16] The compulsory use prohibition applies to ''government benefit accounts,'' which is defined as an account established by a government agency for distributing government benefits to a consumer electronically. However, for purposes of Regulation E, including the compulsory use prohibition, a government benefit account does not include an account for distributing needs-tested benefits in a program established under State or local law or administered by a State or local agency.[17]

The term ''needs-tested'' is not defined in EFTA or Regulation E. In the preamble to its 2016 Final Rule, the Bureau identified examples of needs-tested government benefit programs that *are not* ''government benefit accounts'' subject to the compulsory use prohibition, such as those used to distribute funds related to Temporary Assistance for Needy Families (TANF), Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), and the Supplemental Nutrition Assistance Program (SNAP).[18] Accounts established under programs administered by State or local agencies for benefits that are not needs-tested *are* ''government benefit accounts'' subject to the compulsory use prohibition. Examples of government benefit accounts administered by State or local agencies that are subject to the compulsory use prohibition because they are not needs-tested include accounts used to distribute unemployment insurance, child support, certain prison and jail ''gate money'' benefits, and pension plan payments.[19]

In addition, all accounts used to distribute funds under federally administered benefits programs (even if those benefits are needs-tested) are ''government benefit accounts'' subject to the compulsory use prohibition; for example, accounts used to distribute Social Security, Social Security Disability Insurance, and Supplemental Security Income (SSI) payments; or Federal tax credits like the Earned Income Tax Credit (EITC) or the Child Tax Credit (CTC) are subject to the compulsory use prohibition.[20]

The compulsory use prohibition ensures that consumers receiving the government benefits described above have a choice with respect to how they receive their funds. Government agencies, financial institutions, and other persons have several options available to them to ensure consumers are provided a choice.[21] For example, a government agency that requires consumers to receive benefits through direct deposit will not violate the compulsory use prohibition if it allows consumers to choose the financial institution they want to use in receiving the direct deposit.[22] Alternatively, a government agency may give a consumer the choice of having their benefits deposited at a particular institution (designated by the government agency) so long as the consumer is able to receive their benefits by another means.[23]

As the Bureau explained in the 2016 Final Rule, the Bureau believes that consumers are not provided a choice when a consumer is required to receive the *first* payment of government benefits on a prepaid card (or otherwise at a particular institution), even if the consumer can later re-direct the payment to an account of their choice.[24] In such a scenario, the consumer does not have a choice with respect to how to receive the first payment of the government benefit; rather, with respect to that first payment, the consumer was required to establish an account with the financial institution that issued the prepaid card as a condition of receiving the funds.[25]

In addition to having a choice with respect to how consumers receive their government benefits, Regulation E requires that a statement of the consumer's payment options be included in disclosures provided before a consumer acquires a government benefit account. Specifically, that statement must disclose that (1) the consumer has several options to receive benefit payments, followed by a list of the options available to the consumer, and a statement directing the consumer to tell the agency which option the consumer chooses; or (2) the consumer does not have to accept the government benefit account and directing the consumer to ask about other ways to receive government benefit payments.[26] As discussed more below, government benefit accounts are entitled to additional protections and disclosures under Regulation E.

C. Additional Regulation E Protections for Government Benefit Accounts

As mentioned above, government benefit accounts are entitled to the protections of EFTA generally, and Regulation E's provisions applicable to prepaid accounts specifically. The protections in Regulation E for consumers who receive government benefits include the following:

- Disclosures. Under Regulation E, consumers are entitled to three types of disclosures for government benefit accounts: Pre-acquisition disclosures, disclosures on the access device or entry point, and initial disclosures.

Pre-acquisition disclosures for a government benefit account must set forth key information about the account that includes, as mentioned above, a statement regarding the consumer's payment options.[27] A government agency must provide the consumer with pre-acquisition disclosures before the consumer acquires a government benefit account.[28]

Disclosures on the access device or entry point for a government benefit account must contain the name of the financial institution that directly holds the account or issues the access device as well as a website and phone number that the consumer can use to contact that financial institution about the

[14] 12 CFR 1005.10(e).

[15] 12 CFR 1005.2(j).

[16] 12 CFR 1005.3(a).

[17] 12 CFR 1005.15(a)(2).

[18] *See* 81 FR 83934, 83942 (Nov. 22, 2016). While these accounts do not constitute ''government benefit accounts'' as defined in § 1005.15(a)(2), the Bureau notes that they may still be ''prepaid accounts'' under one of the other prongs of that definition in § 1005.2(b)(3). To the extent that they are prepaid accounts, the requirements of the Prepaid Accounts Rule apply.

[19] *See* 81 FR 83934, 83995 (Nov. 22, 2016); *In re JPay, LLC,* File No. 2021–CFPB–0006 (Oct. 19, 2021), *www.consumerfinance.gov/enforcement/actions/jpay-llc/.*

[20] *See id.* at 83995, 84320.

[21] In 2013, the Bureau issued a Compliance Bulletin on Payroll Card Accounts (Payroll Card Bulletin) to, among other things, reiterate that the compulsory use provision of EFTA and Regulation E prohibits employers, financial institutions, and other persons from mandating that employees receive wages only on a payroll card at a particular institution. As explained in the Payroll Card Bulletin, payroll card accounts are accounts that are established directly or indirectly through an employer, and to which transfers of the consumer's salary, wages, or other employee compensation are made on a recurring basis. *See CFPB Bulletin 2013–10* (Sept. 12, 2013), *www.consumerfinance.gov/compliance/supervisory-guidance/bulletin-payroll-card-accounts/.*

[22] 12 CFR 1005.10(e)(2) and comment 10(e)(2)–2.

[23] *See id.*

[24] 81 FR 83934, 83985 (Nov. 22, 2016).

[25] *Id.*

[26] 12 CFR 1005.15(c)(2)(i).

[27] 12 CFR 1005.15(c)(2).

[28] 12 CFR 1005.15(c)(1).

Tab 3

government benefit account.[29] These disclosures must be included on the access device or, if there is no physical access device, on a website, mobile application, or other entry point a consumer must visit to access the government benefit account electronically.[30]

Initial disclosures must set forth comprehensive fee information that may be imposed in connection with the account as well as the information required to be included in the initial disclosures for other accounts subject to Regulation E, which include, among other things, disclosures regarding a consumer's liability for unauthorized EFTs, an error resolution notice, contact information for the financial institution providing the account, the types of transfers a consumer may make and any limitations on the frequency and dollar amount of transfers, and the fees associated with making.[31] Initial disclosures must be made at account opening or before the first EFT occurs.[32]

- Change-in-Terms Notices. Change-in-terms notices are required when a term or condition required to be disclosed in the initial disclosures changes or the change results in an increased fee, increased liability for the consumer, fewer types of available EFTs, or stricter limitations on the frequency or dollar amount of EFTs.[33]
- Access to Account History. Government agencies must either provide a periodic statement as required by Regulation E generally, or must make available to the consumer (1) the consumer's account balance, by telephone; (2) an electronic history, such as through an website, of the consumer's account transactions covering at least 12 months preceding the date the consumer electronically accesses the account; and (3) written account transaction histories provided upon request must cover at least the 24 months preceding the date on which the government agency receives the consumer's request for the account transaction history.[34]
- Limited Liability for Unauthorized Transfers and Error Resolution Rights. With limited modifications regarding the period within which an unauthorized transfer must be reported, Regulation E's limited liability protections and error resolution rights fully apply to government benefit accounts.

II. Conclusion

The Bureau is issuing this Compliance Bulletin to reiterate that the compulsory use prohibition in EFTA applies to government benefit accounts, as defined in Regulation E. The Bureau notes that it is authorized, subject to certain exceptions, to enforce EFTA and Regulation E against any person subject to EFTA and Regulation E, including financial institutions.[35] In addition, subject to certain exceptions, the Bureau has enforcement authority over covered persons offering or providing certain consumer financial products or services—including government benefit accounts—under the Consumer Financial Protection Act of 2010.[36]

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2022–03587 Filed 2–23–22; 8:45 am]

BILLING CODE 4810–AM–P

[29] 12 CFR 1005.15(f), 1005.18(f).

[30] 12 CFR 1005.15(f), 1005.18(f)(3).

[31] 12 CFR 1005.15(e)(1) and (f), 1005.18(h)(2)(ii)(A) and (iv). *See generally* 12 CFR 1005.7(b).

[32] 12 CFR 1005.7(a).

[33] 12 CFR 1005.8(a)(1); 1005.15(f); 1005.18(f), (h)(2)(ii)(A), (iii), and (iv).

[34] 12 CFR 1005.9(b); 1005.15(d)(1); and 1005.18(h)(3)(i).

[35] 15 U.S.C. 1693o(a)(5).

[36] Public Law 111–203, tit. X, 124 Stat. 1955 (2010) (12 U.S.C. 5561 through 5567).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 21

[Docket No. FAA–2020–1086]

Airworthiness Criteria: Special Class Airworthiness Criteria for the Amazon.com Services LLC MK27–2 Unmanned Aircraft; Correction

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Issuance of final airworthiness criteria; correction.

SUMMARY: The FAA published a document in the **Federal Register** on January 27, 2022, announcing the special class airworthiness criteria for the Amazon.com Services LLC Model MK27–2 unmanned aircraft. The document contained incorrect references to the applicant's name.

DATES: This correction is effective on February 24, 2022.

FOR FURTHER INFORMATION CONTACT: Christopher J. Richards, Emerging Aircraft Strategic Policy Section, AIR–618, Strategic Policy Management Branch, Policy and Innovation Division, Aircraft Certification Service, Federal Aviation Administration, 6020 28th Avenue South, Room 103, Minneapolis, MN 55450, telephone (612) 253–4559.

SUPPLEMENTARY INFORMATION:

Background

On January 21, 2022, the FAA issued final airworthiness criteria for the Amazon.com Services LLC Model MK27–2 unmanned aircraft, which published in the **Federal Register** on January 27, 2022 (87 FR 4128). The original application identified the applicant name as Amazon Logistics, Inc. On November 19, 2020, Amazon Logistics, Inc., amended its application to change its applicant name to ''Amazon.com Services LLC.'' As published, the document incorrectly referred to the original applicant name.

Correction

In the **Federal Register** of January 27, 2022 (87 FR 4128), make the following corrections:

1. On page 4128, in the first column, correct the subject heading to read ''Airworthiness Criteria: Special Class Airworthiness Criteria for the Amazon.com Services LLC MK27–2 Unmanned Aircraft''

2. On page 4128, in the first column, in the **SUMMARY** section, line 3, correct ''Amazon Logistics, Inc.'' to read ''Amazon.com Services LLC''.

3. On page 4128, in the second column, in the **SUPPLEMENTARY INFORMATION** section, line 1, correct ''Amazon Logistics, Inc.'' to read ''Amazon.com Services LLC''.

Issued in Washington, DC, on February 15, 2022.

Ian Lucas,

Manager, Policy Implementation Section, Policy and Innovation Division, Aircraft Certification Service.

[FR Doc. 2022–03778 Filed 2–23–22; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2022–0142; Project Identifier AD–2022–00071–T; Amendment 39–21955; AD 2022–05–04]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all The Boeing Company Model 737–100, –200, –200C, –300, –400, –500, –600, –700,

Tab 4

Bulletin 2022-03: Servicer Responsibilities in Public Service Loan Forgiveness Communications, 87 Fed. Reg. 11286 (Mar. 1, 2022).

CFPB Steps Up Scrutiny of Student Loan Servicers That Deceive Borrowers About Public Service Loan Forgiveness

Bulletin Follows Findings That Servicers Made Deceptive Statements to Borrowers About Loan Cancellation for Public Service

FEB 18, 2022

Washington, D.C. – Today the Consumer Financial Protection Bureau (CFPB) released a bulletin detailing student loan servicers' obligation to halt unlawful conduct regarding borrowers' eligibility and benefits under the Public Service Loan Forgiveness (PSLF) Waiver. The bulletin recommends actions servicers should consider taking to ensure they do not misrepresent borrower eligibility or make deceptive statements to borrowers about the PSLF program and the Waiver.

"Illegal conduct by a student loan servicer can be ruinous for borrowers who miss out on the opportunity for debt cancellation," said CFPB Director Rohit Chopra. "We will be working closely with the U.S. Department of Education to ensure that loan cancellation promises for public service are honored."

"We want to make sure that every single borrower who could benefit from the PSLF Waiver has the chance to do so, and giving borrowers accurate and timely information about their eligibility is critical," said U.S. Secretary of Education Miguel Cardona. "I appreciate the CFPB's partnership in holding servicers accountable for their role in helping borrowers access loan forgiveness under PSLF."

Student loan servicers are companies that manage student loan accounts. Student loan borrowers generally do not have the power to choose their servicer.

In 2007, Congress enacted legislation to provide loan cancellation for borrowers working in an eligible public service job. For public service employees with Direct Loans, PSLF cancels the remaining balance on those loans after they make 120 loan payments while working for a qualifying employer. Despite one government estimate (https://studentaid.gov/sites/default/files/fsawg/datacenter/library/PSLF-april2021.xls) that 1.3 million borrowers qualify for PSLF, the CFPB has documented how poor servicing practices have impeded many borrowers from making progress toward relief, such as by giving them inaccurate information about how they can become eligible for debt cancellation.

Through its supervision of student loan servicers, the CFPB has found that servicers made deceptive statements to borrowers about their ability to become eligible for PSLF. When servicers fail to provide accurate and complete information, they mislead borrowers about their ability to benefit under PSLF, which can lead to tens of thousands of dollars in loan payments that should have been cancelled.

In October 2021, the Department of Education announced the PSLF Waiver (https://studentaid.gov/announcements-events/pslf-limited-waiver), which extended benefits to borrowers who had previously been shut out of the program—including due to not getting the information they needed about how they could become eligible for PSLF. Under the Waiver, any past payment on a federal student loan by a borrower working in public service can count toward PSLF, regardless of payment plan, loan type, or whether the payment was made in full or on-time. This includes payments made through the Federal Family Education Loan (FFEL) and Federal Perkins Loan Programs, which did not previously count under the old PSLF rules. In order to benefit under the Waiver, many borrowers will need the assistance of their student loan servicer to take action by consolidating their loans, filing a PSLF application, or both, before the Waiver ends on October 31, 2022.

As servicers administer the new PSLF Waiver and assist borrowers, the CFPB expects servicers to comply with federal consumer financial protection laws. The CFPB plans to prioritize student loan servicing oversight work in deploying its enforcement and supervision resources in the coming year with a specific focus on monitoring engagement with borrowers about PSLF and the PSLF Waiver. The CFPB will pay particular attention to whether:

- Servicers of any federal loan type provide complete and accurate information about the PSLF Waiver when discussing PSLF or loan consolidation in any communications.
- Servicers have adequate policies and procedures to recognize when borrowers are expressing interest in PSLF or the PSLF Waiver, or where their files otherwise demonstrate their eligibility, and to direct those borrowers to appropriate resources.
- Servicers take steps to promote the benefits of the PSLF Waiver to borrowers who express interest or whose files otherwise demonstrate their eligibility.

To prevent unfair, deceptive, or abusive acts or practices, student loan servicers should consider enhancing their compliance management systems to develop and implement policies and procedures to ensure that all borrowers receive accurate and complete information about the PSLF Waiver and representatives facilitate their enrollment.

Time is of the essence since the PSLF Waiver closes at the end of October 2022. After the PSLF Waiver closes, direct payments to borrowers may be the primary means of remediating relevant violations.

The CFPB has used its law enforcement and supervisory authorities to address illegal student loan servicing practices. The CFPB's enforcement work, including actions against Wells Fargo (https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-wells-fargo-illegal-student-loan-servicing-practices/) and Discover (https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-discover-bank-to-pay-18-5-million-for-illegal-student-loan-servicing-practices/), has led to tens of millions of dollars in borrower refunds and penalties. The CFPB also sued Navient (https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-nations-largest-student-loan-company-navient-failing-borrowers-every-stage-repayment/), the nation's largest student loan servicer, for widespread violations in its student loan servicing business. The litigation is ongoing.

Read today's bulletin, Servicer Responsibilities in Public Service Loan Forgiveness Communications (cfpb.gov/compliance/supervisory-guidance/cfpb-bulletin-2022-03-servicer-responsibilities-in-public-service-loan-forgiveness-communications/).

Visit the CFPB's student loan page to learn more about student loans and borrower rights (https://www.consumerfinance.gov/consumer-tools/student-loans/).

Consumers having an issue resolving a problem with student loans or any other consumer financial product or service can submit a complaint with the CFPB online (https://www.consumerfinance.gov/complaint/) or by calling (855) 411-CFPB (2372).

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit consumerfinance.gov (cfpb.gov/).

Topics

- **PUBLIC SERVICE LOAN FORGIVENESS** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=PUBLIC-SERVICE-LOAN-FORGIVENESS)

PRESS INFORMATION

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the general operating account to the reserve account, the transfer does not change the future required contributions to the reserve account.

(e) * * *

(2) Reserve accounts must be supervised accounts that require the Agency to approve all withdrawals; except, this requirement is not applicable when loan funds guaranteed by the Section 538 GRRH program are used for the construction and/or rehabilitation of a direct MFH loan project. Direct MFH loan borrowers, who are exempted from the supervised account requirement, as described in this section, must follow Section 538 GRRH program regulatory requirements pertaining to reserve accounts. In all cases, Section 538 lenders must get prior written approval from the Agency before reserve account funds involving a direct MFH loan project can be disbursed to the borrower.

* * * * *

(g) * * *

(2) Borrowers should include any needed capital improvements based on the needs identified in an Agency approved Capital Needs Assessment (if obtained) are completed within a reasonable timeframe.

* * * * *

(j) * * *

(2) The Agency will allow for an annual adjustment to increase reserve account funding levels by Operating Cost Adjustment Factor (OCAF) as published by HUD annually. This will require a modification to the Loan agreement and the increase documented with budget submission as outlined in § 3560.303.

* * * * *

Subpart I—Servicing

■ 23. Amend § 3560.402 by revising paragraph (b) to read as follows:

§ 3560.402 Loan payment processing.

* * * * *

(b) *Required conversion to PASS.* Borrowers with Daily Interest Accrual System (DIAS) accounts must convert to PASS with any loan servicing action.

* * * * *

Subpart L—Off Farm Labor Housing

§ 3560.576 [Amended]

■ 24. Amend § 3560.576 by removing the words ''State Director's'' and adding in their place ''MFH Leadership Designee's'' in paragraph (e).

Subpart N—Housing Preservation

§ 3560.656 [Amended]

■ 25. Amend § 3560.656 by removing the word ''will'' and replacing it with ''may'' in paragraph (a) introductory text.

Joaquin Altoro,

Administrator, Rural Housing Service.

[FR Doc. 2022–03837 Filed 2–28–22; 8:45 am]

BILLING CODE 3410–XV–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Chapter X

Bulletin 2022–03: Servicer Responsibilities in Public Service Loan Forgiveness Communications

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Compliance bulletin and policy guidance.

SUMMARY: The Consumer Financial Protection Bureau (CFPB) is issuing this Compliance Bulletin and Policy Guidance (Bulletin) regarding the servicing of Federal student loans, including Federal Family Education Loan Program and Perkins loans, for borrowers who may be eligible for Public Service Loan Forgiveness (PSLF). The Limited PSLF Waiver announced by the Department of Education on October 6, 2021 (PSLF Waiver) significantly changes the program's eligibility criteria for a limited period. In communicating with borrowers about the PSLF program, servicers should consider taking certain actions to ensure compliance with the Dodd-Frank Wall Street Reform and Consumer Protection Act's (Dodd-Frank Act's) prohibition on unfair, deceptive, or abusive acts or practices (collectively, UDAAPs). In its oversight, the CFPB will be paying particular attention to whether student loan servicers provide complete and accurate information to consumers about the benefits they can receive under the PSLF Waiver and eligibility for PSLF generally.

DATES: This bulletin is applicable on March 1, 2022.

FOR FURTHER INFORMATION CONTACT: Matt Liles, Counsel, Office of Supervision Policy at 202–435–7435 or Carolyn Hahn, Senior Counsel, Office of Enforcement at 202–435–7212. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Student debt in the United States recently topped over $1.75 trillion. PSLF is a benefit provided by Congress to Federal student loan borrowers to earn forgiveness of their Federal student loans after 10 years of public service. The U.S. Department of Education estimates that over 1.3 million student loan borrowers work in jobs that qualify for PSLF; moreover, hundreds of thousands of these borrowers have expressed interest in PSLF by filing forms to certify their public service employment.[1]

The CFPB's supervisory work has revealed unfair or deceptive practices by student loan servicers that prevented many borrowers from making progress towards forgiveness. Accordingly, the CFPB is issuing this Bulletin to highlight the significant changes to PSLF eligibility criteria under the new waiver and the CFPB's supervision and enforcement priorities with respect to PSLF and the PSLF Waiver.

The Public Service Loan Forgiveness Program

To qualify for PSLF under the original requirements, a borrower had to make 120 on-time payments on a Direct Loan, while on a qualifying repayment plan, and while working in a qualifying public service job.[2] In 2018, Congress created Temporary Expanded Public Service Loan Forgiveness (TEPSLF) which allows some borrowers to qualify for forgiveness based on payments made under repayment plans that were previously ineligible.

The PSLF Waiver

In October 2021, in response to the COVID–19 national emergency, the Department of Education announced a temporary easing of some PSLF program requirements to help many previously ineligible borrowers receive forgiveness based on their qualifying public service employment regardless of their loan type or repayment plan.[3] Importantly, the PSLF Waiver allows borrowers with Federal Family Education Loan Program (FFELP) and Perkins loans to consolidate into a Direct Loan and receive credit toward loan forgiveness under PSLF for periods of repayment on the earlier loan(s). It also provides the same benefit to existing Direct Consolidation Loan borrowers resulting

[1] PSLF Report, September 2021 *available at https://studentaid.gov/sites/default/files/fsawg/datacenter/library/pslf-sep2021.xls.*

[2] 34 CFR 685.219(c).

[3] *See* Press Release, Federal Student Aid, *Public Service Loan Forgiveness Limited Waiver Opportunity, available at https://studentaid.gov/announcements-events/pslf-limited-waiver.*

in the forgiveness of tens of thousands of borrowers' loans automatically.[4] The PSLF Waiver credits any month that a Federal student loan borrower worked in public service and was in active repayment towards the 120 payments required for PSLF. The PSLF Waiver is intended to address several common problems borrowers have experienced in obtaining loan forgiveness, including where the borrower:

- Worked in a qualifying public service job but had Federal loans that were not Direct Loans;
- made payments on a Direct Loan while working in a qualifying public service job, but not on a qualified repayment plan;
- made payments on a Direct Loan while working in a qualifying public service job and on a qualifying repayment plan, but made underpayments or late payments;
- made 120 qualifying payments while working in public service but applied for forgiveness after having left public service; [5] or
- was a member of the military who did not receive credit for periods of deferment or forbearance while serving on active duty.

The impact of the PSLF Waiver could be large and far-reaching. But many borrowers who could benefit under the PSLF Waiver will need to take affirmative action before the October 31, 2022 deadline. To take advantage of the PSLF Waiver, borrowers without Direct Loans (such as Perkins loans or FFELP loans) must consolidate into a Direct Consolidation Loan and then file a PSLF form certifying their previous public service employment. Most borrowers who have Direct Loans and want credit for previously non-qualifying payments will need to file PSLF forms certifying their previous periods of public service employment. The Department of Education estimates that 27,000 Direct Loan PSLF borrowers could receive $2.82 billion in forgiveness merely by certifying periods of prior public service employment that were previously ineligible.[6]

II. Unfair and Deceptive Acts or Practices Related to PSLF

The CFPB has authority to oversee student loan servicing, including citing servicers for unfair, deceptive, or abusive acts or practices.[7] As described in previous *Supervisory Highlights,* CFPB examiners have uncovered deceptive student loan servicing practices, including the following with respect to PSLF.

Deceptive Statements to FFELP Borrowers About Consolidating Into a Direct Loan

Prior to the PSLF Waiver, only payments made on Direct Loans qualified for progress towards loan forgiveness under PSLF.[8] Any payment a borrower made on other types of Federal loans—such as Perkins Loans or FFELP loans—did not count towards the 120 payments required to achieve forgiveness. Instead, to pursue PSLF, Federal student loan borrowers who did not have Direct Loans had to first consolidate those loans into a Direct Consolidation Loan before their payments would begin to count towards forgiveness. Thus, prior to the PSLF Waiver, borrowers could convert their FFELP or Perkins loans into Direct Consolidation Loans to benefit under the PSLF program.

CFPB examiners have determined that servicers misled borrowers about their loan's PSLF eligibility.[9] For example, examiners have found that servicers committed a deceptive practice by leading FFELP borrowers to believe that they had no potential course of action to become eligible for PSLF, when the borrowers could consolidate their FFELP loans into a Direct Consolidation Loan and pursue PSLF.[10]

Deceptive Statements About Qualifying Public Service Employment

CFPB examiners also uncovered potentially deceptive statements to PSLF borrowers about whether their jobs qualified for PSLF. For example, examiners have found that servicers risked committing a deceptive practice by telling borrowers that only non-profit jobs qualify for PSLF even though government jobs also qualify.[11]

Misrepresenting the Effect of Filing an Employment Certification Form (ECF)

Borrowers previously submitted ECFs signed by their employers to verify their periods of public service employment.[12] CFPB examiners found that servicers committed a deceptive act or practice by misrepresenting the effect of filing the ECF for borrowers who had FFELP loans, but who did not have any Direct Loans. Servicer employees represented to FFELP borrowers that if they submitted an ECF they would learn whether their employment qualified for PSLF. However, borrowers would not receive a determination about employer eligibility because the ECF would be immediately denied because of their ineligible FFELP loans.[13]

III. The CFPB's Supervision and Enforcement Priorities

Prior supervisory observations and consumer complaints show that servicers were not adequately complying with the law, and were making deceptive representations about PSLF before the PSLF Waiver went into effect.[14] As servicers administer the new PSLF Waiver, the CFPB expects servicers to comply with Federal consumer financial protection laws. The CFPB plans to prioritize student loan servicing oversight work in deploying its enforcement and supervision resources in the coming year with a specific focus on monitoring engagement with borrowers about PSLF and the PSLF Waiver. Where the CFPB

[4] *See* Press Release, Federal Student Aid, *U.S. Department of Education Announces Transformational Changes to the Public Service Loan Forgiveness Program, Will Put Over 550,000 Public Service Workers Closer to Loan Forgiveness, available at https://www.ed.gov/news/press-releases/us-department-education-announces-transformational-changes-public-service-loan-forgiveness-program-will-put-over-550000-public-service-workers-closer-loan-forgiveness* (estimating these borrowers will discharge $1.74 billion in student loan debt).

[5] PSLF requires borrowers to not only work in public service when they make the 120 qualifying payments, but also when they apply for forgiveness and when it is granted. 34 CFR 685.219(c)(1)(ii)(B–C).

[6] *Press Release supra* n. 4.

[7] *See* title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act Public Law 111–203, 124 Stat. 1376 (2010) (establishing the CFPB's authority). Under the Dodd-Frank Act, all covered persons or service providers are prohibited from committing unfair, deceptive, or abusive acts or practices in violation of the Act. An act or practice is unfair when (i) it causes or is likely to cause substantial injury to consumers; (ii) the injury is not reasonably avoidable by consumers; and (iii) the injury is not outweighed by countervailing benefits to consumers or to competition. *Id.* at sections 1031, 1036; 12 U.S.C. 5531, 5536. Whether an act or practice is deceptive is informed by decades of precedent involving Section 5 of the Federal Trade Commission Act. *See* CFPB Exam Manual at UDAAP 5.

[8] 34 CFR 685.219(c)(1)(iii).

[9] If a supervisory matter is referred to the Office of Enforcement, Enforcement may cite additional violations based on these facts or uncover additional information that could impact the conclusion as to what violations may exist.

[10] *Supervisory Highlights,* Issue 24—Summer 2021 at 35–37 available at *https://www.consumerfinance.gov/data-research/research-reports/supervisory-highlights-issue-24-summer-2021/.*

[11] *Id.* at 36–37.

[12] Borrowers now certify their employment and apply for PSLF on a single consolidated PSLF form.

[13] *Supervisory Highlights,* Issue 24—Summer 2021 at 35–36.

[14] *See* Consumer Financial Protection Bureau (CFPB), *Staying on Track While Giving Back* (June 2017), *available at https://www.consumerfinance.gov/data-research/research-reports/staying-track-while-giving-back-cost-student-loan-servicing-breakdowns-people-serving-their-communities/.*

Tab 4

finds entities have committed UDAAPs related to PSLF and the PSLF Waiver, the CFPB will hold them accountable.

In its student loan servicing oversight work, the CFPB plans to pay particular attention to:

1. Whether servicers of any federal loan type provide complete and accurate information about the PSLF Waiver when discussing PSLF or loan consolidation in any communications;

2. Whether servicers have adequate policies and procedures to recognize when borrowers are expressing interest in PSLF or the PSLF Waiver or whose files otherwise demonstrate their eligibility and to direct those borrowers to appropriate resources;

3. Whether servicers take steps to promote the benefits of the PSLF waiver to borrowers who express interest or whose files otherwise demonstrate their eligibility.

IV. Compliance Management Program Expectations

To prevent unfair, deceptive, or abusive acts or practices, entities should consider enhancing their compliance management systems to develop and implement policies and procedures to ensure that all borrowers receive accurate and complete information about the PSLF Waiver and representatives facilitate their enrollment,[15] including by:

- Improving training to make sure representatives effectively identify borrowers who may be pursuing PSLF, who have provided information suggesting that they may benefit from the PSLF Waiver, or who are expressing interest in PSLF or the PSLF Waiver;
- improving training to make sure representatives accurately describe PSLF and the PSLF Waiver, their benefits, the process for applying for PSLF, using the Waiver, and the need to act before the October 31, 2022, deadline, including for representatives that interact with borrowers of FFELP and Perkins loans;
- updating call scripts to prompt representatives to inform borrowers who have provided information suggesting they may benefit from the PSLF Waiver about the benefits of the PSLF Waiver, and the importance of consolidating and filing a PSLF form for every job with an eligible employer before the October 31, 2022, deadline;
- enhancing existing communication tools, such as:
  - Posting a dedicated PSLF Waiver information page on the servicer's website that stresses the benefits of the waiver, explains who is eligible for the waiver, provides the steps for using the waiver, and emphasizes the need to apply for the waiver by October 31, 2022;
  - posting a temporary banner on the servicer's main web page and account log-in web page advertising the PSLF Waiver and linking the borrower to the dedicated PSLF Waiver information page, and
  - including information on the PSLF Waiver on automated hold messages;
- tracking borrower interest in using the PSLF Waiver to allow for targeted follow up;
- monitoring representatives' communications with borrowers about PSLF;
- evaluating these issues through the servicer's quality control/assurance program, compliance testing program, and audit program at appropriate intervals;
- actively monitoring for and addressing systemic issues—such as excessive call hold times—that inhibit PSLF borrowers from getting information from the entity about PSLF;
- regularly reviewing consumer complaints regarding PSLF and ensuring there is an appropriate channel for receiving, investigating, determining root causes, and properly resolving consumer complaints relating to misinformation about PSLF;
- ensuring that borrowers' consolidation decisions are honored timely, including by processing consolidation applications and providing payoff amounts timely; and
- ensuring that borrowers' PSLF forms are processed timely.

Generally, self-identification of Federal consumer financial law violations and developing an effective corrective action plan that includes complete identification of affected populations and complete remediation for injured consumers are important elements of a strong compliance management system. When these violations relate to providing false or misleading information about PSLF, a robust and affirmative outreach strategy to all potentially eligible consumers about the PSLF Waiver, tailored to the borrower's loan type, may be an important component of a corrective action plan. These actions also factor into the CFPB's decision about whether specific violations should be handled through supervisory or enforcement action.

CFPB Consideration of Proactive Efforts by Servicers To Promote the PSLF Waiver

In exercising its supervisory and enforcement discretion, the CFPB will consider the extent to which entities engage in proactive measures to promote the benefits of the PSLF Waiver to borrowers. For example, servicers can update call scripts to prompt representatives to affirmatively ask borrowers if they work or have worked for a nonprofit or government organization. In addition, servicers already use the Defense Manpower Database Center (DMDC) or other comparable means to identify military borrowers for purposes of ensuring that borrowers receive the benefits of the Servicemembers Civil Relief Act; they could engage in similar efforts with respect to the PSLF Waiver. Servicers can also identify consumers who previously submitted Teacher Loan Forgiveness applications and then target those groups with PSLF Waiver communications.

The CFPB notes that time is of the essence since the PSLF Waiver closes at the end of October 2022. After the PSLF Waiver closes, direct payments to borrowers may be the primary means of remediating relevant UDAAPs.

V. Conclusion

The CFPB will continue to review closely the practices of student loan servicers for potential UDAAPs, including the practices related to PSLF described above. The CFPB will use all appropriate tools to hold entities accountable if they engage in UDAAPs in connection with these practices.

VI. Regulatory Requirements

The Bulletin constitutes a general statement of policy exempt from the notice and comment rulemaking requirements of the Administrative Procedure Act (APA). It is intended to provide information regarding the CFPB's general plans to exercise its supervisory and enforcement discretion for institutions under its jurisdiction and does not impose any legal requirements on external parties, nor does it create or confer any substantive rights on external parties that could be enforceable in any administrative or civil proceeding. Because no notice of proposed rulemaking is required in issuing the Bulletin, the Regulatory Flexibility Act also does not require an initial or final regulatory flexibility analysis. The CFPB has also determined

[15] The U.S. Department of Education has issued guidance to FFELP and Perkins loan participants directing them to provide interested borrowers with accurate information about the PSLF Waiver. U.S. Dept. of Ed., Office of Fed. Student Aid, GEN–21–09, *Guidance for FFEL and Perkins Loan Program Participants on the Limited Public Service Loan Forgiveness Waiver* (Dec. 7, 2021), *available at https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2021-12-07/guidance-ffel-and-perkins-loan-program-participants-limited-public-service-loan-forgiveness-waiver.*

that the issuance of the Bulletin does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2022–04266 Filed 2–28–22; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2021–0259; Project Identifier AD–2020–01128–E; Amendment 39–21900; AD 2022–02–03]

RIN 2120–AA64

Airworthiness Directives; CFM International, S.A. Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: The FAA is correcting an airworthiness directive (AD) that published in the **Federal Register**. The AD applies to CFM International, S.A. CFM56–3 and CFM56–7B model turbofan engines with certain accessory gearbox assembly (AGB) not equipped with a dynamic oil seal assembly in the handcranking pad. As published, the part numbers (P/Ns) listed in paragraph (i)(2)(i) are incorrect. This document corrects that error. In all other respects, the original document remains the same; however, for clarity, the FAA is publishing the entire rule in the **Federal Register**.

DATES: This correction is effective March 22, 2022. The effective date of AD 2022–02–03 remains March 22, 2022.

ADDRESSES: For service information identified in this final rule, contact CFM International, S.A., Aviation Operations Center, 1 Neumann Way, M/D Room 285, Cincinnati, OH 45125; phone: (877) 432–3272; email: *fleetsupport@ge.com.* You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (817) 222–5110. It is also available at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0259.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0259, or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Kevin Clark, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: (781) 238–7088; fax: (781) 238–7199; email: *kevin.m.clark@faa.gov*.

SUPPLEMENTARY INFORMATION: AD 2022–02–03, 39–21961 (87 FR 8402, February 15, 2022) (AD 2022–02–03), requires independent inspection to verify re-installation of the AGB handcranking pad cover after maintenance. AD 2022–02–03 also requires the replacement of the affected AGB with a part eligible for installation as a terminating action to the inspection requirement.

Need for the Correction

As published, the P/Ns listed in paragraph (i)(2)(i) of the AD, which defines a part eligible for installation, are incorrect. The P/Ns were incorrectly listed as 340–046–503–0, 340–046–504–0, and 340–046–505–0. The correct P/Ns are 335–300–103–0, 335–300–105–0, 335–300–106–0, 335–300–107–0, 335–300–108–0, 335–300–109–0, and 335–300–110–0.

Although no other part of the preamble or regulatory information has been corrected, for clarity, the FAA is publishing the entire rule in the **Federal Register**.

The effective date of this AD remains March 22, 2022.

Good Cause for Adoption Without Prior Notice

Section 553(b)(3)(B) of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) authorizes agencies to dispense with notice and comment procedures for rules when the agency for ''good cause'' finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under this section, an agency, upon finding good cause, may issue a final rule without providing notice and seeking comment prior to issuance. Further, section 553(d) of the APA authorizes agencies to make rules effective in less than thirty days, upon a finding of good cause.

The FAA has found that the risk to the flying public justifies foregoing notice and comment prior to adoption of this rule because this action corrects P/Ns that were correctly identified in a notice of proposed rulemaking, which published in the **Federal Register** on May 3, 2021 (86 FR 23301). Accordingly, notice and opportunity for prior public comment are unnecessary pursuant to 5 U.S.C. 553(b).

In addition, the FAA finds that good cause exists pursuant to 5 U.S.C. 553(d) for making this amendment effective in less than 30 days, for the same reasons the FAA found good cause to forego notice and comment.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Correction

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) by correcting 87 FR 8402, (February 15, 2022), beginning at page 8405, column 2 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Corrected]

■ 2. The FAA amends § 39.13 by:

■ a. Removing airworthiness directive 2013–26–01, Amendment 39–17710 (78 FR 79295, December 30, 2013); and

■ b. Adding the following new airworthiness directive:

2022–02–03 CFM International, S.A.: Amendment 39–21900; Docket No. FAA–2021–0259; Project Identifier AD–2020–01128–E.

(a) Effective Date

This airworthiness directive (AD) is effective March 22, 2022.

(b) Affected ADs

This AD replaces AD 2013–26–01, Amendment 39–17710 (78 FR 79295, December 30, 2013).

(c) Applicability

This AD applies to CFM International, S.A. CFM56–3 and CFM56–7B model turbofan engines equipped with an accessory gearbox (AGB) assembly with the following part numbers (P/Ns):

(1) For CFM56–3, CFM56–3B, and CFM56–3C model turbofan engines, AGB P/N: 335–

Tab 5

Bulletin 2022-04: Mitigating Harm From Repossession of Automobiles, 87 Fed. Reg. 11951 (Mar. 3, 2022).

CFPB Moves to Thwart Illegal Auto Repossessions

High Car Prices Increase Risk of Improper Repossession by Lenders, Servicers, and Investors

FEB 28, 2022

WASHINGTON, D.C. – The Consumer Financial Protection Bureau (CFPB) is moving to thwart illegal repossessions in the heated auto market. A compliance bulletin issued today reveals conduct observed during CFPB examinations and enforcement actions, including the illegal seizure of cars, sloppy record keeping, unreliable balance statements, and ransom for personal property.

"With today's high car prices, auto lenders and investors might be tempted to seize vehicles for resale in the hot used car market," said CFPB Director Rohit Chopra. "No American ever wants to wake up to see their car stolen. Auto loan servicers need to ensure that every repossession is lawful."

In recent months, there has been extremely strong demand for used automobiles. Due to the global chip shortage, the average list price for new and used automobiles has spiked. The CFPB is concerned that these market conditions might create incentives for risky auto repossession practices, since repossessed automobiles can command higher prices when resold. The CFPB also expects (https://www.consumerfinance.gov/about-us/blog/rising-car-prices-means-more-auto-loan-debt/) that both the total amount of debt and the average loan size will continue to increase. Even when inventory shortages abate, larger car loans will put pressure on household budgets for much of the next decade.

To secure an auto loan, lenders require borrowers to give creditors a security interest in the vehicle. Sometimes, auto loans are bundled and sold to investors as securities. Servicers then collect and process auto loan or lease payments from the borrowers. If a borrower defaults, creditors often repossess the vehicle, then sell it.

The timing of auto repossessions often comes as a surprise to borrowers and can cause devastating injury by depriving borrowers of the use of their vehicles. In addition, many people experience emotional distress when a car is taken from them, lose personal property, miss work or lose their job, incur expenses for alternative transportation, pay repossession-related fees, experience negative credit reporting, and have to repair vehicles damaged during the repossession process.

To head off the risk of wrongful repossessions, the Bureau is taking action against illegal repossessions and sloppy servicing of auto loans. The bulletin describes instances, in examinations and enforcement actions, where servicers violated the Dodd-Frank Wall Street Reform and Consumer Protection Act's prohibition against unfair, abusive, or deceptive acts and practices such as:

- **Illegally seizing cars:** Servicers are repossessing vehicles from borrowers who made payments sufficient to stop the repossession or who entered a payment plan. Given the high level of harm caused by wrongful repossessions, servicers must ensure that every single repossession is valid.
- **Sloppy record keeping:** Incorrectly coded records or agents failing to talk to their colleagues about canceling repossession orders hurts consumers and is a violation of federal law. Servicers need to ensure proper communication between them and any third-party processing a repossession.
- **Unreliable balance inquiries:** Inaccurate balances can lead to a borrower paying less than a sufficient amount to avoid delinquency, resulting in a repossession. People are also having their vehicles repossessed because their loan payments are processed in a different order than what they had been told.
- **Ransom for personal property:** Servicers are still holding personal property found in repossessed vehicles hostage until the property owner pays a fee, a practice the CFPB has been cracking down (https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-settles-nissan-motor-acceptance-corporation-illegal-collections-and-repossession-practices/) on for years (https://files.consumerfinance.gov/f/documents/Supervisory_Highlights_Issue_13__Final_10.31.16.pdf).

The CFPB is closely watching (https://www.consumerfinance.gov/about-us/blog/rising-car-prices-means-more-auto-loan-debt/) the auto lending market. Auto loans are already the third largest consumer credit market in the United States at over $1.46 trillion outstanding, double the amount from ten years ago.

Read the compliance bulletin here (cfpb.gov/compliance/supervisory-guidance/cfpb-bulletin-2022-04-mitigating-harm-from-repossession-of-automobiles/).

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit www.consumerfinance.gov (http://www.consumerfinance.gov/).

Topics

- **AUTO LOANS** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=AUTO-LOANS)
- **COMPLIANCE** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=COMPLIANCE)

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Go to press resources page (cfpb.gov/about-us/newsroom/press-resources/)

course of action that the Commission intends to follow. This rule of agency procedure does not constitute an agency regulation requiring notice of proposed rulemaking, opportunities for public participation, prior publication, and delay in effective date under 5 U.S.C. 553 of the Administrative Procedure Act (''APA''). The provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b), which apply when notice and comment are required by the APA or another statute, are not applicable.

Dated: February 18, 2022.

On behalf of the Commission,

Allen J. Dickerson,

Chairman, Federal Election Commission.

[FR Doc. 2022–04358 Filed 3–2–22; 8:45 am]

BILLING CODE 6715–01–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Chapter X

Bulletin 2022–04: Mitigating Harm From Repossession of Automobiles

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Compliance bulletin and policy guidance.

SUMMARY: The Consumer Financial Protection Bureau (Bureau or CFPB) is issuing this Compliance Bulletin regarding repossession of vehicles, and the potential for violations of sections 1031 and 1036 of the Dodd-Frank Wall Street Reform and Consumer Protection Act's (Dodd-Frank Act's) prohibition on engaging in unfair, deceptive, or abusive acts or practices (collectively, UDAAPs) when repossessing vehicles.

DATES: This bulletin is applicable on March 3, 2022.

FOR FURTHER INFORMATION CONTACT: Pax Tirrell, Counsel, Office of Supervision Policy at 202–435–7097; Tara Flynn, Senior Counsel for Enforcement Policy and Strategy, Office of Enforcement at 202–435–9734. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In recent months, there has been extremely strong demand for used automobiles. Since the start of the COVID–19 pandemic, the average list price for used automobiles has continued to climb. While there are many factors contributing to high prices, the Consumer Financial Protection Bureau is concerned that these market conditions might create incentives for risky auto repossession practices, since repossessed automobiles can command these higher prices when resold. To mitigate harms from these risks, the Bureau is issuing this bulletin to remind market participants about certain legal obligations under Federal consumer financial laws.

To secure an auto loan, lenders require borrowers to give creditors a security interest in the vehicle. If a borrower defaults, a creditor may exercise its contractual rights to repossess the secured vehicle. Servicers collect and process auto loan or lease payments from borrowers and are either creditors or act on behalf of creditors. Generally, servicers do not immediately repossess a vehicle upon default and instead attempt to contact consumers before repossession, usually by phone or mail. Servicers may give consumers in default the opportunity to avoid repossession by making additional payments or promises to pay. Servicers generally use service providers to conduct repossessions.

While some repossessions are unavoidable, the Bureau pays particular attention to servicers' repossession of automobiles. Loan holders and servicers are responsible for ensuring that their repossession-related practices, and the practices of their service providers, do not violate the law. The Bureau intends to hold loan holders and servicers accountable for UDAAPs related to the repossession of consumers' vehicles.[1]

II. Unfair and Deceptive Acts or Practices in Supervision and Enforcement Matters

This Bulletin summarizes the current law and highlights relevant examples of conduct observed during supervisory examinations or enforcement investigations that may violate Federal consumer financial law.

Under the Dodd-Frank Act, all covered persons or service providers are prohibited from committing unfair, deceptive, or abusive acts or practices in violation of the Act. An act or practice is unfair when (i) it causes or is likely to cause substantial injury to consumers; (ii) the injury is not reasonably avoidable by consumers; and (iii) the injury is not outweighed by countervailing benefits to consumers or to competition.[2]

Whether an act or practice is deceptive is informed by decades of precedent involving Section 5 of the Federal Trade Commission Act.[3]

The Dodd-Frank Act prohibits two types of abusive practices. First, materially interfering with the ability of a consumer to understand a term or condition of a product or service is abusive. Second, taking unreasonable advantage of statutorily specified market imbalances is abusive. Those market imbalances include (1) a consumer's lack of understanding of the material risks, costs or conditions of a product or service, (2) a consumer's inability to protect their interests in selecting or using a product or service, or (3) a consumer's reasonable reliance on a covered person to act in their interests.[4]

a. Unfair or Deceptive Practices During the Repossession Process

In its Supervisory and Enforcement work, the Bureau has found the following conduct related to repossession of automobiles to be UDAAPs.[5]

Wrongful Repossession of Consumers' Vehicles

Many auto servicers provide options to borrowers to avoid repossession once a loan is delinquent or in default. Failure to prevent repossession after borrowers complete one of these options, where reasonably practicable given the timing of the borrowers' action, may constitute an unfair act or practice.

For example, in a public enforcement action, the Bureau found that an entity engaged in an unfair act or practice when it wrongfully repossessed consumers' vehicles.[6] The servicer told consumers it would not repossess vehicles when they were less than 60 days past due. Additionally, the servicer maintained a policy and told consumers that it would not repossess vehicles of consumers who had entered into an agreement to extend the loan, or who had made a promise to make a payment on a specific date and that date had not passed or who successfully kept a promise to pay. Nevertheless, the servicer wrongfully repossessed

[1] Although the focus of this bulletin is UDAAPs, the Bureau notes that certain provisions of the Fair Debt Collection Practices Act and its implementing Regulation F may also apply to the repossession of automobiles. Fair Debt Collection Practices Act, 803(6), 15 U.S.C. 1692a(6); 12 CFR 1006.2(i)(1) (effective November 30, 2021).

[2] Dodd-Frank Act sections 1031, 1036, 12 U.S.C. 5531, 5536.

[3] *See* CFPB Exam Manual at UDAAP 5.

[4] 12 U.S.C. 5531(d).

[5] For convenience, this document generally refers to historical findings by ''the Bureau'' in both Supervision and Enforcement, even though in Supervisory matters the findings are made by the Bureau's examiners rather than by the Bureau itself.

[6] *In the Matter of Nissan Motor Acceptance Corp.,* 2020–BCFP–0017 (Oct. 13, 2020).

vehicles from hundreds of consumers who had:

- Made and kept promises to pay that brought the account current;
- Made payments that decreased the delinquency to less than 60 days past due;
- Made promises to pay where the date had not passed; or
- Agreed to extension agreements.

Each of these actions taken by consumers should have prevented repossessions of their vehicles. The Bureau found the servicer's wrongful repossessions constituted an unfair act or practice. They caused substantial injury by depriving borrowers of the use of their vehicles, and many consumers also experienced consequences such as missed work, expenses for alternative transportation, repossession-related fees, detrimental credit reporting, and vehicle damage during the repossession process. Such injury was not reasonably avoidable, and the injury was not outweighed by countervailing benefits to the consumer or to competition.

Supervision has identified similar unfair practices in numerous examinations.[7] Supervision observed that these violations frequently occurred, after consumers acted to prevent repossession, because of one of the following errors:

- Servicers incorrectly coded consumers as delinquent;
- Servicer representatives failed to cancel repossession orders that had previously been communicated to repossession agents; or
- Repossession agents failed to confirm that the repossession order was still active prior to repossessing a vehicle.

Other Practices Causing Wrongful Repossession

Supervision has also identified other practices related to repossession that resulted in unfair acts or practices. For example, the Bankruptcy Code imposes an automatic stay that bars collection activity, including repossession, from the moment a consumer has filed a bankruptcy petition. Supervision found that when servicers received notice that consumers had filed bankruptcy petitions and their accounts were subject to an automatic stay, the servicers committed an unfair act or practice by repossessing vehicles subject to such automatic bankruptcy stays.

Additionally, Supervision has identified that servicers committed an unfair act or practice by wrongfully repossessing vehicles after communicating inaccurate information. For example, Supervision has found that some servicers sent consumers letters stating that loans would not be considered past due if the consumer paid the amount due by a specific date. Consumers reasonably expected the servicers not to repossess before the date listed in the letter. When the servicers repossessed the vehicles prior to that date, they committed an unfair act or practice.

Representations of Amounts Owed

Supervision has also identified that servicers committed deceptive acts or practices by failing to provide consumers with accurate information about the amount required to bring their accounts current. For example, when consumers called to determine what amount would bring their accounts current, servicing personnel erroneously represented to consumers an amount due that was less than what was actually owed. As a result of this misrepresentation consumers paid an amount insufficient to avoid delinquency and the consequences of delinquency. This later led to repossessions that would not have occurred had consumers received accurate information. This conduct was deceptive because the servicer told consumers that an amount would bring their accounts current when, in fact, that amount would not bring their account current.

b. Unfair or Deceptive Practices That May Lead to Repossession

The following are examples of practices that lead to repossession of consumers' vehicles that the Bureau has considered to be UDAAPs.

Applying Payments in a Different Order Than Disclosed to Consumers, Resulting in Repossession

Payment application for auto loans is governed by the finance agreements between servicers and consumers. Supervision has found that entities engaged in a deceptive act or practice when they made representations to consumers that payments would be applied in a specific order, and then subsequently applied payments in a different order. For example, Supervision found that servicers represented on their websites that payments would be applied to interest, then principal, then past due payments, before being applied to other charges, such as late fees. Instead, the servicers applied partial payments to late fees first, in contravention of the methodology disclosed on the website. Because servicers applied payments to late fees first, some consumers were deemed more delinquent than they would have been under the disclosed payment allocation order, and these servicers repossessed some consumers' vehicles.

Under these circumstances, servicers' websites provided inaccurate information about payment allocation order. In some instances, the underlying contract provided the servicer the right to apply payments in any order, which did not immunize the company from liability for the deceptive website content.[8]

Unlawful Fees That Push Consumers Into Default and Repossession

Enforcement has brought claims under the CFPB's unfairness authority where unlawful fees push consumers into default and repossession.

For example, in a public enforcement action, the Bureau found that an entity engaged in an unfair act or practice by operating its force-placed insurance (FPI) program in an unfair manner, in some instances resulting in repossession.[9] The entity purchased duplicative or unnecessary FPI policies and, in some instances, maintained the policies even after consumers had obtained adequate insurance and provided adequate proof of coverage. This conduct caused the entity to charge consumers for unnecessary FPI, resulting in additional fees, and in some instances delinquency or loan default. For some consumers the additional costs of unnecessary FPI contributed to a default that resulted in the repossession of a consumer's vehicle. Charging unnecessary amounts to consumers and subjecting them to default and repossession caused or was likely to cause substantial injury. This injury was not reasonably avoidable and was not outweighed by countervailing benefits.[10]

c. Unfair Practices That May Result in Illegal Fees After Repossession

The following are examples of practices that led to illegal fees after repossession of consumers' vehicles that the Bureau has considered to be UDAAPs.

Charging Illegal Personal Property Fees

The Bureau has identified an unfair practice concerning illegal personal property fees. Borrowers often keep personal property in the repossessed vehicles. These items often are not

[7] *Supervisory Highlights,* Issue 16—Summer 2017; *Supervisory Highlights,* Issue 17—Summer 2018.

[8] *Supervisory Highlights,* Issue 24—Summer 2021.

[9] *In re Wells Fargo Bank, N.A.,* 2018–BCFP–0001 (Apr. 20, 2018).

[10] *See also Supervisory Highlights,* Issue 24—Summer 2021.

merely incidental but can be of substantial practical importance or emotional attachment to borrowers. State law typically requires auto loan servicers and repossession companies to secure and maintain borrowers' property so that it may be returned to the borrower upon request. Some companies charge borrowers for the cost of retaining the property.

In a public enforcement action, the Bureau found that an entity engaged in an unfair act or practice by withholding consumers' personal property unless the consumers paid an upfront fee to recover the property.[11] Many of the repossession agents employed by the entity imposed fees on consumers for holding personal property in the repossessed vehicles. The agents often refused to return consumers' personal property unless and until the consumers paid the fees. The Bureau found that the servicer was responsible for its agents withholding consumers' personal property unless the consumer paid an upfront fee to recover it and thus caused substantial injury that was not reasonably avoidable and not outweighed by countervailing benefits to consumers or competition. Supervision has also identified this unfair act or practice at other servicers where the servicers withheld consumers' personal property unless they paid an upfront fee.[12]

Charging for Collateral Protection Insurance After Repossession

Supervision found that servicers engaged in unfair acts or practices by collecting or attempting to collect force-placed collateral protection insurance (FPI) premiums after repossession even though no actual insurance protection was provided for those periods. FPI automatically terminates on the date of repossession, and consumers should not be charged after this date. Despite this, servicers charged consumers for FPI after repossession in four different circumstances. First, servicers failed to communicate the date of repossession to the FPI service provider due to system errors. Second, servicers used an incorrect formula to calculate the FPI charges that needed to be removed due to the repossession. Third, servicers' employees entered the wrong repossession date into their system of record, resulting in improper termination dates. Fourth, servicers charged consumers—who had a vehicle repossessed and subsequently reinstated the loan—post-repossession FPI premiums, including for the days the vehicle was in the servicer's possession, despite the automatic termination of the policy on the date of repossession. These errors caused consumers substantial injury because they paid amounts they did not owe or were subject to collection attempts for amounts they did not owe. This injury was not reasonably avoidable because consumers did not control the servicers' cancellation processes. The substantial injury to consumers was not outweighed by any countervailing benefits to consumers or competition.[13]

III. The Bureau's Expectations

As explained in greater detail above, the Bureau has held auto lenders, loan holders, and servicers accountable if they or their agents commit UDAAPs when repossessing automobiles, including when they:

- Repossessed vehicles if consumers' loan account is current, even if there was a prior delinquency.
- Repossessed vehicles if consumers entered an agreement to extend the loan.
- Repossessed vehicles if consumers followed any instructions the company said would result in avoiding repossession.
- Repossessed vehicles from consumers who have filed for bankruptcy, and thus are protected by an automatic stay of collection activity.
- Repossessed vehicles as a result of processing payments in a different order than had been communicated to consumers.
- Repossessed vehicles after unlawful fees pushed the consumer's account into default.
- Withhold personal property found in repossessed vehicles until consumers pay an upfront fee to recover the property.
- Charged for collateral protection insurance after a vehicle is repossessed.

To prevent these unfair, deceptive, or abusive acts or practices, entities should consider doing the following:

- Review policies and procedures, including call scripts, to ensure that they provide employees with accurate information about steps consumers can take to prevent repossession.
- Review policies and procedures regarding cancellation of repossession orders to ensure that there is an appropriate process for cancelling repossessions if consumers take steps that should result in cancellation.
- Ensure prompt communications between the servicer and repossession service provider when the servicer cancels a repossession. For example, servicers may call repossession service providers to confirm cancelation or use mobile phone applications that push cancellation updates to repossession service providers' phones.
- Monitor repossession service providers for compliance with repossession cancellations.
- Incorporate monitoring of wrongful repossession in regular monitoring and audits of communications with consumers.
- Ensure that the entity has a corrective action program to address any violations identified and to reimburse consumers for the direct and indirect costs incurred as a result of unlawful repossessions when appropriate.
- Review payment allocation policies and procedures to validate that they are consistent with the payment allocation order disclosed in contracts and other consumer facing disclosures, such as websites.
- Monitor for illegal fees charged after repossession.
- Review consumer contracts to validate that any fees charged to consumers are authorized under the terms of applicable contracts.
- Review consumer complaints regarding repossession and ensure there is an appropriate channel for receiving, investigating, and properly resolving consumer complaints relating to wrongful repossession and illegal fees after repossession.
- Perform regular reviews of service providers, including repossession vendors, as to their pertinent practices.[14]
- Monitor any FPI program to ensure that consumers are not charged for unnecessary FPI. This may include review of FPI cancellation rates.

IV. Conclusion

The Bureau will continue to review closely the practices of entities repossessing automobiles for potential UDAAPs, including the practices described above. The Bureau will use all appropriate tools to hold entities accountable if they engage in UDAAPs in connection with these practices.

V. Regulatory Requirements

The Bulletin constitutes a general statement of policy exempt from the notice and comment rulemaking requirements of the Administrative Procedure Act (APA). It is intended to provide information regarding the

[11] *In the Matter of Nissan Motor Acceptance Corp.,* 2020–BCFP–0017 (Oct. 13, 2020).

[12] *Supervisory Highlights,* Issue 13—Fall 2016.

[13] *Supervisory Highlights,* Issue 24—Summer 2021.

[14] CFPB Compliance Bulletin and Policy Guidance; 2016–02, Service Providers (Oct. 31, 2016), *https://www.consumerfinance.gov/documents/1385/102016_cfpb_OfficialGuidanceServiceProviderBulletin.pdf.*

Bureau's general plans to exercise its supervisory and enforcement discretion for institutions under its jurisdiction and does not impose any legal requirements on external parties, nor does it create or confer any substantive rights on external parties that could be enforceable in any administrative or civil proceeding. Because no notice of proposed rulemaking is required in issuing the Bulletin, the Regulatory Flexibility Act also does not require an initial or final regulatory flexibility analysis. The Bureau has also determined that the issuance of the Bulletin does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2022–04508 Filed 3–2–22; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2021–1049; Airspace Docket No. 21–ASO–36]

RIN 2120–AA66

Amendment of Class E Airspace; Hampton, GA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Class E airspace extending upward from 700 feet above the surface for Atlanta Speedway Airport (formerly Clayton County-Tara Field), Hampton, GA by updating the airport's name and geographical coordinates to coincide with the FAA's database. This action also increases the radius and removes excessive verbiage from the legal description of the airport. Controlled airspace is necessary for the safety and management of instrument flight rules (IFR) operations in the area.

DATES: Effective 0901 UTC, May 19, 2022. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

ADDRESSES: FAA Order JO 7400.11F, Airspace Designations and Reporting Points, and subsequent amendments, can be viewed online at *https://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; Telephone: (202) 267–8783. FAA Order JO 7400.11F is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order JO 7400.11F at NARA, email *fr.inspection@nara.gov* or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

FOR FURTHER INFORMATION CONTACT: John Goodson, Operations Support Group, Eastern Service Center, Federal Aviation Administration, 1701 Columbia Ave., College Park, GA 30337; Telephone (404) 305–5966.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, part A, subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends Class E airspace extending upward from 700 feet above the surface to support IFR operations in Hampton, GA.

History

The FAA published a notice of proposed rulemaking in the **Federal Register** (86 FR, 69181, December 7, 2021) for Docket No. FAA–2021–1049 to amend Class E airspace extending upward from 700 feet above the surface for Hampton, GA.

Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Class E airspace designations are published in Paragraph 6005 of FAA Order JO 7400.11F, dated August 10, 2021, and effective September 15, 2021, which is incorporated by reference in 14 CFR 71.1. The Class E airspace listed in this document will be published subsequently in FAA Order JO 7400.11.

Availability and Summary of Documents for Incorporation by Reference

This document amends FAA Order JO 7400.11F, Airspace Designations and Reporting Points, dated August 10, 2021, and effective September 15, 2021. FAA Order JO 7400.11F is publicly available as listed in the **ADDRESSES** section of this document. FAA Order JO 7400.11F lists Class A, B, C, D, and E airspace areas, air traffic routes, and reporting points.

The Rule

The FAA amends 14 CFR part 71 by amending Class E airspace extending upward from 700 feet above the surface at Atlanta Speedway Airport (formerly Clayton County-Tara Field), Hampton, GA, by updating the airport's name and updating the geographical coordinates to coincide with the FAA's database. In addition, this action amends the radius to 9.2 miles (formerly 6.8 miles) and eliminates excessive verbiage in the legal description.

Class E airspace designations are published in Paragraph 6005 of FAA Order JO 7400.11F, dated August 10, 2021, and effective September 15, 2021, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

FAA Order JO 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified that this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA

Tab 5

Tab 6

Bulletin 2022-05: Unfair and Deceptive Acts or Practices That Impede Consumer Reviews, 87 Fed. Reg. 17143 (Mar. 28, 2022).

CFPB Issues Policy on Contractual 'Gag' Clauses and Fake Review Fraud

Financial companies will face consequences for illegally manipulating or suppressing consumer reviews

MAR 22, 2022

WASHINGTON, D.C. – Today, the Consumer Financial Protection Bureau (CFPB) issued policy guidance regarding potentially illegal practices related to consumer reviews. The CFPB seeks to ensure that customers can write reviews, particularly ones posted online, about financial products and services that accurately reflect their opinions and experiences. The guidance also highlights that practices such as posting fake reviews or inserting clauses that forbid a customer from publishing an honest review may violate the Consumer Financial Protection Act.

"In America, no corporation should be able to silence a customer from posting an honest review online," said CFPB Director Rohit Chopra. "Corporate disinformation campaigns that suppress legitimate reviews or manufacture fake reviews are not only a threat to free speech and fair competition, they are also illegal."

Many families learn about and shop for credit cards, mortgages, and other financial products online, including through third-party websites that include customer reviews and ratings. Customer reviews are an important way to promote competitive markets. However, if reviews are unreliable, it might reduce the incentive for companies to provide quality service.

The CFPB's guidance describes certain business practices related to customer reviews that are generally unlawful under the Consumer Financial Protection Act, including:

- **Contractual 'Gag' Clauses:** Attempting to silence consumers from posting an online review can undermine fair competition. Banks and financial companies that include clauses in form contracts that forbid a consumer from posting an honest review may be engaged in unfair or deceptive practices.
- **Fake Reviews:** Markets can be harmed if consumers cannot trust that online reviews are legitimate. Laundering fake reviews in ways that appear completely independent from the

company to improve their ratings may constitute a deceptive practice.

- **Review Suppression or Manipulation:** Consumers cannot easily shop and compare products and services when firms engage in practices to limit the posting of negative reviews or manipulate reviews to trick or confuse consumers. The guidance explains why these practices may be unlawful.

Today's effort is related to the Federal Trade Commission's efforts to deter fake reviews and related fraud across the digital economy. The FTC recently voted (https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-puts-hundreds-businesses-notice-about-fake-reviews-other-misleading-endorsements) to put hundreds of businesses on notice about fake reviews and misleading endorsements, which may result in significant penalties against marketers that engage in this misconduct.

Banks and financial companies should ensure that their customer review practices comply with all applicable laws, including the Consumer Financial Protection Act. Violations are subject to civil penalties and other legal consequences.

Read today's bulletin, *Unfair and Deceptive Acts or Practices That Impede Consumer Reviews* (https://files.consumerfinance.gov/f/documents/cfpb_bulletin-2022-05_unfair-deceptive-acts-practices-impede-consumer-reviews.pdf).

Topics

- ENFORCEMENT (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=ENFORCEMENT)
- SUPERVISION (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=SUPERVISION)

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Federal Register
Vol. 87, No. 59
Monday, March 28, 2022

Rules and Regulations

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Chapter X

Bulletin 2022–05: Unfair and Deceptive Acts or Practices That Impede Consumer Reviews

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Compliance bulletin.

SUMMARY: Reviews of products and services help to promote fair, transparent, and competitive markets. When firms frustrate the ability of consumers to post honest reviews of products and services that they use, they may be engaged in conduct prohibited by the Consumer Financial Protection Act (CFPA). The Consumer Financial Protection Bureau (Bureau) is issuing this bulletin to remind regulated entities of the CFPA's requirements and explain how the Bureau intends to exercise its enforcement and supervisory authorities on this issue.

DATES: This bulletin is applicable as of March 28, 2022.

FOR FURTHER INFORMATION CONTACT: Christopher Shelton, Senior Counsel, Legal Division, at 202–435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

A. Role of Consumer Reviews

Numerous studies and surveys have confirmed the importance of online reviews across the economy. For example, one prominent study estimated that a one-star rating increase on Yelp.com translated to an increase of 5 to 9 percent in revenues for a restaurant.[1] Another study found that a one-point boost in a hotel's online ratings on travel sites is tied to an 11 percent jump in room rates, on average.[2] To date, academic research has not focused specifically on markets for consumer financial products and services. But online reviews are also commonplace in many of those markets, and the Bureau expects them to play an increasing role in helping consumers choose between financial providers. This can create an incentive for dishonest market participants to attempt to manipulate the review process, rather than compete based on the value of their services, which can frustrate a competitive marketplace.

The Bureau notes that consumer reviews can be important to two groups of consumers: The consumers who read and rely upon reviews, as well as the consumers who take the time to express their viewpoints by writing them in the first place. Of course, these groups can be overlapping. Firms that interfere with consumer reviews can harm both of these groups.

B. Public Policy Regarding Consumer Reviews

Congress unanimously enacted the Consumer Review Fairness Act in 2016, in response to abuses by companies that restricted consumer reviews.[3] As the legislative history of the statute explains, the ''wide availability'' of consumer reviews ''has caused consumers to rely on them more heavily as credible indicators of product or service quality. In turn, businesses have sought to avoid negative reviews . . . through provisions of form contracts with consumers restricting such reviews. These provisions typically impose monetary or other penalties for publishing negative comments regarding the provider's services or products.'' [4] The legislative history explains that these ''gag clauses or non-disparagement clauses'' are harmful to consumers.[5]

As discussed below, the Consumer Review Fairness Act protects ''covered communications.'' A covered communication is defined as ''a written, oral, or pictorial review, performance assessment of, or other similar analysis of, including by electronic means, the goods, services, or conduct of a person by an individual who is party to a form contract with respect to which such person is also a party.'' [6] For simplicity, this bulletin will refer to ''covered communications'' as consumer reviews.

Relatedly, a ''form contract'' is defined as a contract with standardized terms that is: ''used by a person in the course of selling or leasing the person's goods or services;'' and ''imposed on an individual without a meaningful opportunity for such individual to negotiate the standardized terms.'' [7]

The Consumer Review Fairness Act provides, with limited exceptions, that ''a provision of a form contract is *void from the inception of such contract*'' if the provision:

A. Prohibits or restricts the ability of an individual who is a party to the form contract to engage in a covered communication;

B. imposes a penalty or fee against an individual who is a party to the form contract for engaging in a covered communication; or

C. transfers or requires an individual who is a party to the form contract to transfer to any person any intellectual property rights in review or feedback content, with the exception of a non-exclusive license to use the content, that the individual may have in any otherwise lawful covered communication about such person or the goods or services provided by such person.[8]

For simplicity, this bulletin will refer to these various types of provisions as restrictions on consumer reviews.

II. Violations of the Consumer Financial Protection Act (CFPA)

Sections 1031 and 1036 of the CFPA prohibit a covered person or service provider from engaging in an ''unfair, deceptive, or abusive act or practice'' that is ''in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.'' [9] There are a

[1] Michael Luca, *Reviews, Reputation, and Revenue: The Case of Yelp.com,* Harv. Bus. Sch. Working Paper No. 12–016, 14 (2016).

[2] Chris Anderson, *The Impact of Social Media on Lodging Performance,* 12(15) Cornell Hospitality Report 6, 11 (2012).

[3] Public Law 114–258, 130 Stat. 1355 (2016) (codified at 15 U.S.C. 45b).

[4] H.R. Rep. No. 114–731, at 5 (2016).

[5] *Id.*

[6] 15 U.S.C. 45b(a)(2). The statute clarifies that the term ''pictorial'' includes pictures, photographs, video, illustrations, and symbols. 15 U.S.C. 45b(a)(4).

[7] 15 U.S.C. 45b(a)(3)(A). However, the term ''form contract'' does not include an employer-employee or independent contractor contract. 15 U.S.C. 45b(a)(3)(B).

[8] 15 U.S.C. 45b(b)(1) (emphasis added). There are additional rules of construction, 15 U.S.C. 45b(b)(2), and exceptions, 15 U.S.C. 45b(b)(3).

[9] 12 U.S.C. 5531, 5536. For definitions of ''covered person,'' ''service provider,'' and ''consumer financial product or service,'' *see* section 1002 of the CFPA, 12 U.S.C. 5481, and the associated regulation, 12 CFR part 1001.

number of ways that covered persons or service providers could violate this prohibition by interfering with consumer reviews.

A. Deceiving Consumers Who Wish To Leave Consumer Reviews, Using Purported Contractual Restrictions That Are Unenforceable

''An act or practice is deceptive if: (1) There is a representation, omission, or practice that (2) is likely to mislead consumers acting reasonably under the circumstances, and (3) the representation, omission, or practice is material.'' [10]

It is well-established that material misrepresentations to consumers that are unsupported under applicable law can be deceptive.[11] In particular, including an unenforceable material term in a consumer contract is deceptive, because it misleads consumers into believing the contract term is enforceable. The Bureau's examiners have repeatedly cited such unenforceable contract provisions in their supervisory work.[12] Moreover, disclaimers in a contract such as ''subject to applicable law'' do not cure the misrepresentation caused by the inclusion of an unenforceable contract term. Additionally, subsequent disclaimers cannot cure a misrepresentation.[13]

Consistent with these principles, it would generally be deceptive to include a restriction on consumer reviews in a form contract, given that the restriction would be void under the Consumer Review Fairness Act. Consumers can be expected to read the language to mean what it says: That they are restricted in their ability to provide consumer reviews. But that is not the case, since the provision is void under applicable law. And the option to post candid reviews about products or services would be material to the many American consumers who do so. Moreover, the Bureau believes that enforcing the deception prohibition is particularly important in this context, given that consumer reviews are a significant driver of competition in the modern economy.

In addition, if a covered person or service provider attempts to pressure a consumer to remove an already posted negative review, by invoking a restriction on consumer reviews that is void under the Consumer Review Fairness Act, that would also generally be a deceptive act or practice. Note that this would be an additional deceptive act or practice, not a precondition for establishing the kind of deceptive act or practice already described. Damage can be done by chilling consumers' reviews even if, unknown to the consumer, the covered person or service provider does not later follow up by invoking the contract provision against consumers who post negative reviews. Accordingly, in other contexts, Bureau examiners have found unenforceable contract provisions to be deceptive regardless of whether the provision is ultimately enforced.[14] But if a covered person or service provider does invoke the void contract provision against the consumer (for example, by claiming that the consumer is contractually required to remove a negative review, or that the consumer is contractually required to stop posting such reviews, or assessing a penalty or fee if the consumer does not remove a negative review), that can be expected to further deepen the materially misleading impression that the affected consumers would have. It would be natural for consumers to believe that they need to remove existing negative reviews, stop posting such reviews, or pay the purported penalty or fee, which is not the case.

B. Unfairly Depriving Consumers of Information Using Restrictions on Consumer Reviews

In addition to deceiving consumers who wish to leave reviews, purported contractual restrictions on consumer reviews can unfairly harm the many other consumers who rely upon reviews when deciding what products and services to purchase.

Under section 1031(c) of the CFPA, an act or practice is unfair if: (A) It causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and (B) such substantial injury is not outweighed by countervailing benefits to consumers or to competition.[15]

In applying the CFPA's unfairness prohibition, the Bureau finds persuasive the reasoning of the Federal Trade Commission (FTC) in *FTC* v. *Roca Labs, Inc.*[16] *Roca Labs* was an enforcement action that predated the Consumer Review Fairness Act, but it was cited in the that statute's legislative history.[17] In *Roca Labs,* the FTC alleged that the Defendants' use of ''contractual provisions that prohibit purchasers from speaking or publishing truthful or nondefamatory negative comments or reviews about the Defendants, their products, or their employees'' was unfair under the Federal Trade Commission Act.[18] The defendants' conduct ''caused or are likely to cause purchasers to refrain from commenting negatively about the Defendants or their products. By depriving prospective purchasers of this truthful, negative information, Defendants' practices have resulted or are likely to result in consumers buying Roca Labs products they would not otherwise have bought.'' [19] This substantial injury was not reasonably avoidable by consumers or outweighed by countervailing benefits to consumers or to competition.[20] The Bureau intends to apply similar unfairness principles if it encounters a covered person or service provider, acting within the scope of the CFPA, who uses contractual restrictions to restrict consumer reviews.

C. Deceiving Consumers Who Read Consumer Reviews About the Nature of Those Reviews

Whether or not there are any contractual restrictions on consumer reviews, covered persons or service providers can engage in a deceptive act or practice by manipulating consumers' comprehension of the set of reviews that are available. Two recent FTC matters illustrate this concern.

First, in the *Sunday Riley* matter, the FTC alleged that a company instructed its employees to leave reviews of its products on a third-party website, and also to ''dislike'' negative reviews left by real customers.[21] The FTC found that this was deceptive. By engaging in this conduct, the company had ''represented, directly or indirectly, expressly or by implication, that certain reviews . . . reflected the experiences

[10] *CFPB* v. *Gordon,* 819 F.3d 1179, 1192 (9th Cir. 2016) (internal quotation marks and punctuation omitted).

[11] *See, e.g., FTC* v. *World Media Brokers,* 415 F.3d 758, 763 (7th Cir. 2005).

[12] *See, e.g.,* Supervisory Highlights: Summer 2017, 82 FR 48703, 48708 (Oct. 19, 2017) (deceptive waivers of borrowers' rights in loss mitigation agreements that were unenforceable under 12 CFR part 1026 (Regulation Z), implementing the Truth in Lending Act); Supervisory Highlights, Issue 24, Summer 2021, 86 FR 36108, 36117 (July 8, 2021) (deceptive waivers of rights in security deed riders that were unenforceable under 12 CFR part 1024 (Regulation X), implementing the Real Estate Settlement Procedures Act).

[13] *See, e.g., FTC* v. *IAB Marketing Assoc., LP,* 746 F.3d 1228, 1233 (11th Cir. 2014).

[14] *See* matters cited in note 12.

[15] 12 U.S.C. 5531(c).

[16] Complaint, *FTC* v. *Roca Labs, Inc.,* No. 8:15–cv–02231 (M.D. Fla. filed Sept. 24, 2015), *https://www.ftc.gov/system/files/documents/cases/150928rocalabscmpt.pdf.*

[17] H.R. Rep. No. 114–731, at 5 (2016) (citing *id.*).

[18] Complaint at 27, *FTC* v. *Roca Labs, Inc.,* No. 8:15–cv–02231.

[19] *Id.* at 22.

[20] *Id.* at 27.

[21] Complaint, *In the Matter of Sunday Riley Modern Skincare, LLC,* File No. 192–3008 (F.T.C. Nov. 6, 2020), *https://www.ftc.gov/system/files/documents/cases/192_3008_c4729_sunday_riley_complaint.pdf.*

or opinions of users of the products.'' [22] But the company ''failed to disclose that the online consumer reviews were written by'' the company's employees, which ''would be material to consumers . . . in connection with a purchase or use decision.'' [23] And, although in *Sunday Riley* the posters were the company's own employees, the Bureau notes that another way that companies can deceive consumers is by paying non-employees to post reviews that are materially misleading.

Second, in the *Fashion Nova* matter, a company that sold products through a website allegedly had ''four- and five-star reviews automatically post to the website, but did not approve or publish hundreds of thousands lower-starred, more negative reviews.'' [24] The FTC found that this was a deceptive act or practice, misleading consumers who read the website into believing that the posted ratings accurately reflected the consumer reviews submitted.[25]

Of course, there are also numerous other ways that firms could improperly manipulate consumer reviews. The Bureau intends to carefully scrutinize whether covered persons or service providers are skewing consumers' understanding of consumer reviews in a manner that is deceptive (or unfair or abusive).

III. Conclusion

In summary, covered persons and service providers are liable under the CFPA if they deceive consumers using restrictions on consumer reviews that are unenforceable under the Consumer Review Fairness Act, if they unfairly deprive consumers of information by using such restrictions, or if they deceive consumers who read reviews about the nature of those reviews. If the Bureau identifies a violation of the CFPA, it intends to use its authorities to hold the violators accountable.

IV. Regulatory Matters

This is a general statement of policy under the Administrative Procedure Act (APA). It provides background information about applicable law and articulates considerations relevant to the Bureau's exercise of its authorities. It does not confer any rights of any kind. As a general statement of policy, it is exempt from the APA's notice-and-comment rulemaking requirements.[26]

Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.[27] It also does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act of 1995.[28]

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2022–06446 Filed 3–25–22; 8:45 am]

BILLING CODE 4810–AM–P

[22] *Id.* at 4.

[23] *Id.*

[24] Complaint at 2, *In the Matter of Fashion Nova, LLC,* File No. 192–3138 (F.T.C. Jan. 25, 2022), *https://www.ftc.gov/system/files/documents/cases/192_3138_fashion_nova_complaint.pdf.*

[25] *Id.*

[26] 5 U.S.C. 553(b).

[27] 5 U.S.C. 603(a), 604(a).

[28] 44 U.S.C. 3501–3521.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 21

[Docket No. FAA–2020–1092]

Airworthiness Criteria: Special Class Airworthiness Criteria for the Airobotics Inc. OPTIMUS 1–EX Unmanned Aircraft

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Issuance of final airworthiness criteria.

SUMMARY: The FAA announces the special class airworthiness criteria for the Airobotics Inc. Model OPTIMUS 1–EX unmanned aircraft (UA). This document sets forth the airworthiness criteria the FAA finds to be appropriate and applicable for the UA design.

DATES: These airworthiness criteria are effective April 27, 2022.

FOR FURTHER INFORMATION CONTACT: Christopher J. Richards, Emerging Aircraft Strategic Policy Section, AIR–618, Strategic Policy Management Branch, Policy and Innovation Division, Aircraft Certification Service, Federal Aviation Administration, 6020 28th Avenue South, Room 103, Minneapolis, MN 55450, telephone (612) 253–4559.

SUPPLEMENTARY INFORMATION:

Background

Airobotics Inc. (Airobotics) applied to the FAA on September 25, 2019, for a special class type certificate under title 14, Code of Federal Regulations (14 CFR), § 21.17(b) for the Model OPTIMUS 1–EX unmanned aircraft system (UAS).

The Model OPTIMUS 1–EX consists of a rotorcraft UA and its associated elements (AE) including communication links and components that control the UA. The Model OPTIMUS 1–EX UA has a maximum gross takeoff weight of 23 pounds. It is approximately 70 inches in width, 70 inches in length, and 13 inches in height. The Model OPTIMUS 1–EX UA uses battery-powered electric motors for vertical takeoff, landing, and forward flight. The UAS operations would rely on high levels of automation and may include multiple UA operated by a single pilot, up to a ratio of 20 UA to 1 pilot. Airobotics anticipates operators will use the Model OPTIMUS 1–EX for surveying, mapping, inspection of critical infrastructure, and patrolling. The proposed concept of operations (CONOPS) for the Model OPTIMUS 1–EX identifies a maximum operating altitude of 400 feet above ground level (AGL), a maximum cruise speed of 27 knots, operations beyond the visual line of sight (BVLOS) of the pilot, and operations over human beings. Airobotics has not requested type certification for flight into known icing for the Model OPTIMUS 1–EX.

The FAA issued a notice of proposed airworthiness criteria for the Airobotics Model OPTIMUS 1–EX UAS, which published in the **Federal Register** on November 20, 2020 (85 FR 74280).

Summary of Changes From the Proposed Airworthiness Criteria

Based on the comments received, these final airworthiness criteria reflect the following changes, as explained in more detail under Discussion of Comments: A new section containing definitions; revisions to the CONOPS requirement; changing the term ''critical part'' to ''flight essential part'' in D&R.135; changing the basis of the durability and reliability testing from population density to limitations prescribed for the operating environment identified in the applicant's CONOPS per D&R.001; and, for the demonstration of certain required capabilities and functions as required by D&R.310.

Additionally, the FAA re-evaluated its approach to type certification of low-risk UA using durability and reliability testing. Safe UAS operations depend and rely on both the UA and the AE. As explained in FAA Memorandum AIR600–21–AIR–600–PM01, dated July 13, 2021, the FAA has revised the airworthiness criteria to define a boundary between the UA type certification and subsequent operational evaluations and approval processes for

Tab 7

Equal Credit Opportunity (Regulation B); Revocations or Unfavorable Changes to the Terms of Existing Credit Arrangements, 87 Fed. Reg. 30097 (May 18, 2022).

CFPB Issues Advisory Opinion on Coverage of Fair Lending Laws

Equal Credit Opportunity Act continues to protect borrowers after they have applied for and received credit

MAY 09, 2022

Washington, D.C. – Today, the Consumer Financial Protection Bureau (CFPB) published an advisory opinion to affirm that the Equal Credit Opportunity Act (ECOA)—a landmark federal civil rights law protecting individuals and businesses against discrimination in accessing and using credit—bars lenders from discriminating against customers after they have received a loan, not just during the application process.

"The CFPB is ramping up its efforts to issue guidance and advisory opinions to assist entities with understanding their obligations under the law," said CFPB Director Rohit Chopra. "Today's advisory opinion and accompanying analysis makes clear that anti-discrimination protections do not vanish once a customer obtains a loan."

In 2020, the CFPB issued (https://files.consumerfinance.gov/f/documents/cfpb_advisory-opinion_policy_2020-11.pdf) an Advisory Opinion policy. Advisory opinions are one of many types of guidance documents that the agency issues to provide market participants with information about the application of federal consumer financial laws.

ECOA has helped people obtain credit on fair terms since 1974. Throughout its almost 50-year history, ECOA has protected people and businesses against discrimination when seeking, applying for, and using credit. ECOA bans credit discrimination on the basis of race, color, religion, national origin, sex, marital status, and age. It also protects those who are receiving money from any public assistance program or exercising their rights under certain consumer protection laws.

The CFPB issued today's advisory opinion and accompanying analysis to clarify that ECOA protects people from discrimination in all aspects of a credit arrangement. The advisory opinion is consistent with a recent legal brief (https://www.consumerfinance.gov/about-us/blog/cfpb-standing-up-civil-rights-protections/) filed by the CFPB, the Federal Trade Commission, the Federal Reserve Board of Governors, and the U.S. Department of Justice. Among other things, the advisory opinion states that ECOA:

- **Continues to protect borrowers after they have applied for and received credit:** Lenders are prohibited from discriminating against borrowers with existing credit. For example, ECOA prohibits lenders from lowering the credit limit of certain borrowers' accounts or subjecting certain borrowers to more aggressive collections practices on a prohibited basis, such as race.
- **Requires lenders to provide "adverse action notices" to borrowers with existing credit:** Adverse action notices explain why an unfavorable decision was made against a borrower. Credit applicants and borrowers receive these notices for reasons including that credit was denied, an existing account was terminated, or an account's terms were unfavorably changed. "Adverse action notices" discourage discrimination, and they help applicants and borrowers learn the reasons for creditors' decisions.

Read the advisory opinion. (https://files.consumerfinance.gov/f/documents/cfpb_revoking-terms-of-existing-credit-arrangement_advisory-opinion_2022-05.pdf)

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit consumerfinance.gov (cfpb.gov/).

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Rules and Regulations

Federal Register
Vol. 87, No. 96
Wednesday, May 18, 2022

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1002

Equal Credit Opportunity (Regulation B); Revocations or Unfavorable Changes to the Terms of Existing Credit Arrangements

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Advisory opinion.

SUMMARY: The Consumer Financial Protection Bureau (CFPB) is issuing this advisory opinion to affirm that the Equal Credit Opportunity Act and Regulation B protect not only those actively seeking credit but also those who sought and have received credit.

DATES: This advisory opinion is applicable on May 18, 2022.

FOR FURTHER INFORMATION CONTACT: Christopher Davis, Attorney-Advisor; Office of Fair Lending and Equal Opportunity, at *CFPB_FairLending@cfpb.gov* or 202–435–7000. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION: The CFPB is issuing this advisory opinion through the procedures for its Advisory Opinions Policy.[1] Refer to those procedures for more information.

I. Advisory Opinion

A. Background

The Bureau is issuing this advisory opinion to affirm that the Equal Credit Opportunity Act (ECOA) [2] and Regulation B [3] protect both those actively seeking credit and those who sought and have received credit. ECOA is a landmark civil rights law that protects individuals and businesses against discrimination in accessing and using credit—''a virtual necessity of life'' for most people.[4] Congress enacted ECOA in 1974, initially to address ''widespread discrimination . . . in the granting of credit to women.'' [5] Accordingly, ECOA made it unlawful for ''any creditor to discriminate against any applicant on the basis of sex or marital status with respect to any aspect of a credit transaction.'' [6] From the beginning, this prohibition has protected both those actively seeking credit and those who sought and have received credit.

Then as now, ECOA defined ''applicant'' to mean ''any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit.'' [7] The drafters of these provisions emphasized that ECOA's prohibition on discrimination ''applies to all credit transactions including the approval, denial, renewal, continuation, *or revocation* of any open-end consumer credit account.'' [8] Among other examples of the sort of discrimination against ''applicants'' that ECOA would bar, its drafters cited a scenario in which a lender required a ''newly married woman whose creditworthiness has otherwise remained the same'' to reapply for her existing credit arrangement as a new applicant.[9] The Act also created a private right of action under which aggrieved ''applicant[s]'' can hold liable a creditor that fails to comply with ''any requirement imposed under [ECOA].'' [10] And it provided that this private right of action extends to violations of any requirement imposed under ECOA's implementing regulations.[11]

Congress originally tasked the Board of Governors of the Federal Reserve System (Board) with prescribing those regulations.[12] The Board issued those rules, known as Regulation B, the year after ECOA was enacted and several days before the Act took effect.[13] From the beginning, Regulation B made clear that the new law's protections against credit discrimination cover both those currently applying to receive credit and those who have already received it. It did so by defining ''applicant'' to expressly include not only ''any person who applies to a creditor directly for an extension, renewal or continuation of credit'' but also, ''[w]ith respect to any creditor[,] . . . any person to whom credit is or has been extended by that creditor.'' [14] In explaining this provision, the Board noted that ECOA's express terms and its legislative history ''demonstrate that Congress intended to reach discrimination . . . 'in any aspect of a credit transaction.' '' [15]

Two years after enacting ECOA, Congress significantly broadened the Act to prohibit discrimination on bases in addition to sex and marital status.[16] These bases now generally include ''race, color, religion, national origin, sex or marital status, or age'' as well as the receipt of public-assistance income.[17] In what the Senate drafters called ''one of [the amendments'] most important provisions,'' [18] the amendments also provided that ''[e]ach applicant against whom adverse action is taken shall be entitled to a statement of reasons for such action from the creditor.'' [19] The amendments defined

[1] 85 FR 77987 (Dec. 3, 2020).

[2] 15 U.S.C. 1691 *et seq.*

[3] 12 CFR part 1002.

[4] S. Rep. 94–589, 94th Cong., 2nd Sess., at 4, *reprinted in* 1976 U.S.C.C.A.N. 403, 406.

[5] S. Rep. 93–278, 93rd Cong., 1st Sess., at 16 (1973).

[6] Public Law 93–495, sec. 503, 88 Stat. 1521, 1521 (1974).

[7] Public Law 93–495, sec. 503, 88 Stat. at 1522 (codified at 15 U.S.C. 1691a(b)).

[8] S. Rep. 93–278, at 27 (emphasis added).

[9] S. Rep. 93–278, at 17.

[10] 15 U.S.C. 1691e(a).

[11] 15 U.S.C. 1691a(g) (''Any reference to any requirement imposed under this subchapter . . . includes reference to the regulations of the Bureau under this subchapter . . . .'').

[12] Public Law 93–495, sec. 503, 88 Stat. at 1522.

[13] *See* 40 FR 49298 (Oct. 22, 1975) (promulgating 12 CFR part 202); 40 FR 42030 (Sept. 10, 1975); 40 FR 18183 (Apr. 25, 1975).

[14] 12 CFR 202.3(c) (1976); *see also* 40 FR 49306.

[15] 40 FR 49298 (quoting 15 U.S.C. 1691(a)).

[16] *See* ECOA Amendments of 1976, Public Law 94–239, 90 Stat. 251.

[17] ECOA Amendments of 1976, Public Law 94–239, sec. 2, 90 Stat. 251 (codified at 15 U.S.C. 1691(a)). In 2021, the CFPB issued an interpretive rule to clarify that, with respect to any aspect of a credit transaction, the prohibition against sex discrimination in ECOA and Regulation B encompasses sexual orientation discrimination and gender identity discrimination, including discrimination based on actual or perceived nonconformity with sex-based or gender-based stereotypes and discrimination based on an applicant's associations. 86 FR 14363 (Mar. 16, 2021).

[18] S. Rep. 94–589, 94th Cong., 2nd Sess., at 2, *reprinted in* 1976 U.S.C.C.A.N. 403, 404.

[19] 15 U.S.C. 1691(d)(2); *see also* 15 U.S.C. 1691(d)(3) (''A statement of reasons meets the requirements of this section only if it contains the specific reasons for the adverse action taken.''). In lieu of providing this statement of specific reasons, a creditor may instead disclose the applicant's right

Continued

''adverse action'' as ''a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested.'' [20] Thus, since 1976, ECOA has provided that ''applicants'' are entitled to an explanation when the terms of an existing credit arrangement are altered or the credit cancelled outright, among other circumstances.

ECOA's notice requirements ''were designed to fulfill the twin goals of consumer protection and education.'' [21] In terms of consumer protection, ''the notice requirement is intended to prevent discrimination *ex ante* because 'if creditors know they must explain their decisions . . . they [will] effectively be discouraged' from discriminatory practices.'' [22] The notice requirement ''fulfills a broader need'' as well by educating consumers about the reasons for the creditor's action.[23] As a result of being informed of the specific reasons for the adverse action, consumers can take steps to try to improve their credit status or, in cases ''where the creditor may have acted on misinformation or inadequate information[,] . . . to rectify the mistake.'' [24]

Following the ECOA Amendments of 1976, the Board amended Regulation B, including by adding new provisions to implement ECOA's notice requirement.[25] The amended rule defined ''adverse action'' to include ''[a] termination of an account or an unfavorable change in the terms of an account that does not affect all or substantially all of a class of the creditor's accounts.'' [26] And it required that adverse action notices give a ''statement of reasons'' for the action that is ''specific'' and ''indicate[s] the principal reason(s) for the adverse action.'' [27]

Finally, the Board made a ''minor editorial change'' to Regulation B's definition of ''applicant'' in order to ''express more succinctly the fact that the term includes both a person who requests credit and a debtor,'' a debtor being one who has already requested and received credit.[28] Whereas Regulation B originally defined ''applicant'' to include one who ''applies to a creditor directly for an extension, renewal or continuation of credit'' as well as, ''[w]ith respect to any creditor[,] . . . any person to whom credit is or has been extended by that creditor,'' [29] the revised definition simply stated that ''applicant'' includes ''any person who requests or *who has received* an extension of credit from a creditor.'' [30] Although the Board revised other parts of the definition over the years, it never departed from the bedrock understanding of the term ''applicant'' as including any person ''who has received'' an extension of credit.[31]

The Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted in 2010, revoked primary rulemaking responsibility under ECOA from the Board and transferred it to the newly created Bureau.[32]

Shortly thereafter, the Bureau republished the Board's ECOA regulations, including the definition of ''applicant,'' without material change.[33] In addition, the Bureau's *Supervision and Examination Manual* makes clear that creditors subject to the Bureau's supervisory jurisdiction must comply with ECOA and Regulation B's requirements with respect to existing accounts. For instance, the Examination Manual explains that ''[n]otification of adverse action taken on an *existing* account must also be made within 30 days.'' [34]

B. Coverage

This advisory opinion applies to all ''creditors'' as defined in section 702 of ECOA.[35] As used in this advisory opinion, ''existing account holder'' refers to an applicant who has applied for and received an extension of credit. ''Existing account'' or ''existing credit arrangement'' refers to an extension of credit previously made by a creditor other than an extension of credit that is closed or inactive. This advisory opinion has no application to any other circumstance and does not offer a legal interpretation of any other provisions of law.

C. Legal Analysis

ECOA and Regulation B plainly protect applicants who have received credit and are existing account holders, not just those in the process of applying for credit. This has been the longstanding position of the Bureau, and the view of Federal agencies prior to the Bureau's creation. Despite this well-established interpretation,[36] the Bureau is aware that some creditors fail to acknowledge that ECOA and Regulation B plainly apply to circumstances that take place after an extension of credit has been granted, including a revocation of credit or an unfavorable change in the terms of a credit arrangement.[37] In addition, the Bureau is aware that some creditors fail to provide applicants with required notifications that include a statement of the specific reasons for the adverse action taken or disclose an applicant's right to such a statement.[38] But ECOA's

to receive such a statement. 15 U.S.C. 1691(d)(2)(B); *see also* 12 CFR 1002.9(a)(2)(ii).

[20] 15 U.S.C. 1691(d)(6).

[21] *Fischl* v. *Gen. Motors Acceptance Corp.,* 708 F.2d 143, 146 (5th Cir. 1983); *see also id.* (calling these provisions ''[p]erhaps the most significant of the 1976 amendments to the ECOA'').

[22] *Treadway* v. *Gateway Chevrolet Oldsmobile Inc.,* 362 F.3d 971, 977–78 (7th Cir. 2004) (quoting *Fischl,* 708 F.2d at 146); *see also* S. Rep. 94–589, at 4 (calling the notice requirement ''a strong and necessary adjunct to the antidiscrimination purpose of the legislation'').

[23] S. Rep. 94–589, at 4.

[24] *Id.*

[25] 42 FR 1242 (Jan. 6, 1977); 41 FR 49123 (Nov. 8, 1976); 41 FR 29870 (July 20, 1976).

[26] 12 CFR 1002.2(c)(1)(ii).

[27] 12 CFR 1002.9(b)(2).

[28] 41 FR 29870, 29871 (July 20, 1976) (proposed rule).

[29] 12 CFR 202.3(c) (1976).

[30] 12 CFR 202.2(e) (1978) (emphasis added); *see also* 42 FR 1242, 1252 (Jan. 6, 1977) (final rule).

[31] *See* 12 CFR 1002.2(e).

[32] Public Law 111–203, sec. 1085, 124 Stat. 1376, 2083–84.

[33] *See* 76 FR 79442 (Dec. 21, 2011) (promulgating 12 CFR part 1002 & supplement I).

[34] CFPB Supervision and Examination Manual, at ECOA 7, *https://files.consumerfinance.gov/f/documents/201510_cfpb_ecoa-narrative-and-procedures.pdf* (emphasis added); *see also id.* at ECOA 10 (''[a] creditor must preserve any written or recorded information concerning adverse action on an existing account as well as any written statement submitted by the applicant alleging a violation of the ECOA or Regulation B.'').

[35] *See* 15 U.S.C. 1691a(e).

[36] *See* 12 CFR 202.3(c) (1976) (expressly defining the term ''applicant'' to include ''any person to whom credit is or has been extended'').

[37] *See* Brief of Amici Curiae Consumer Fin. Prot. Bureau, Dep't of Justice, Bd. of Governors of the Fed. Reserve Sys., and Fed. Trade Comm'n in Support of Appellant and Reversal, *Fralish* v. *Bank of Am.,* No. 21–2846 (7th Cir. filed Dec. 16, 2021), *https://files.consumerfinance.gov/f/documents/cfpb_fralish-v-bank-of-america_amicus-brief_2021-12.pdf;* Brief of Amici Curiae Consumer Fin. Prot. Bureau and Fed. Trade Comm'n, *TeWinkle* v. *Capital One, N.A.,* No. 20–2049 (2d Cir. filed Oct. 7, 2020), *https://files.consumerfinance.gov/f/documents/cfpb_amicus-brief_tewinkle-v-capital-one-na_2020-10.pdf.*

[38] Credit cards are one of the most commonly held and widely used financial products in America—over 175 million Americans hold at least one credit card. During the COVID–19 pandemic, credit cards played a vital role as both a source of credit in emergencies and a payment method as more transactions occurred online. According to the CFPB's 2021 Credit Card Report, about 2%, or over 10 million credit card accounts, were closed in 2020 and consumers with low credit scores are two to three times more likely to have their accounts closed than those with a higher credit score. *See* Bureau of Consumer Fin. Prot., *The Consumer Credit Card Market* (Sept. 2021), *https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2021.pdf.* Additionally, the same report shows that over 10 million accounts experienced a credit line decrease in 2020. *See id.; see also 5 Reasons Credit Card Companies Close Accounts Without Notice—And How to Fix Them,* USA TODAY (July 13, 2021), *https://www.usatoday.com/story/money/personalfinance/budget-and-spending/2021/07/13/5-reasons-a-credit-card-company-can-close-your-account-with-no-notice/*

text, history, purpose, and judicial interpretation all point the same way: As used in ECOA, the term ''applicant'' includes persons who applied for and have received credit. Any uncertainty about ECOA's protections for existing borrowers is dispelled by Regulation B.

a. Statutory Text

''It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'' [39] Reading together the relevant provisions of ECOA makes clear that the term ''applicant'' is not limited to those who are in the process of applying for credit. The Supreme Court's analysis in *Robinson* v. *Shell Oil Co.*[40] is instructive. In that case, the Court held that the term ''employees'' in Section 704(a) of Title VII includes those who were former employees when the discrimination occurred. Writing for a unanimous Court, Justice Thomas explained that although ''[a]t first blush, the term 'employees' . . . would seem to refer to those having an existing employment relationship with the employer in question,'' that ''initial impression . . . does not withstand scrutiny in the context of § 704(a).'' [41]

For one thing, the Court observed, there is ''no temporal qualifier in the statute such as would make plain that § 704(a) protects only persons still employed at the time of the retaliation.'' [42] The same reasoning applies to the term ''applicant'' in ECOA, which is not expressly limited to those currently in the process of seeking credit. The Court further noted that ''a number of other provisions in Title VII use the term 'employees' to mean something more inclusive or different than 'current employees.' '' [43] The same reasoning applies to the term ''applicant'' used in ECOA.

Reading ECOA's definition of ''applicant'' alongside the Act's other provisions makes clear that the term includes applicants who have received credit and become existing borrowers. For example, ECOA's core anti-discrimination provision protects ''applicant[s]'' from discrimination ''with respect to *any aspect* of a credit transaction''—not just during the application process itself.[44] The phrase ''any aspect of a credit transaction'' is most naturally read to include both the initial formation of a credit agreement as well as the performance of that agreement.[45] Consistent with this ordinary meaning, Regulation B has always defined the term ''credit transaction'' to encompass ''every aspect of an applicant's dealings with a creditor,'' including elements of the transaction that take place after credit has been extended.[46] The expansive language of this provision shows an intent to sweep broadly, beyond just the initial process of requesting credit, to bar discrimination in all parts of a credit arrangement. Indeed, the main Senate report accompanying ECOA specifically noted that ''[t]he prohibition applies to all credit transactions including . . . revocation of any open-end consumer credit account.'' [47]

Similarly, ECOA's disclosure provision requires that creditors give a statement of reasons to ''[e]ach applicant'' against whom they take ''adverse action.'' [48] ECOA defines ''adverse action'' to include a ''revocation of credit'' as well as a ''change in the terms of an existing credit arrangement.'' [49] These are actions that can be taken only with respect to persons who have already received credit.

ECOA's private right of action points in the same direction. It allows an aggrieved ''applicant'' to bring suit against creditors who fail to comply with ECOA or Regulation B.[50] These references to ''applicant[s]'' cannot be understood to refer only to those with pending credit applications. Otherwise, a person whose application was denied on a prohibited basis would have no recourse under ECOA's private right of action, which Congress intended would be the Act's ''chief enforcement tool.'' [51] Instead, these references further confirm that the term ''applicant'' is not limited to those currently applying for credit.[52]

b. Legislative History

Congress's history of amending the statute strongly supports reading the statute to include existing borrowers. As noted, the Board issued Regulation B in 1975, through notice-and-comment rulemaking, shortly before ECOA took effect. The rule defined ''applicant'' to include ''any person to whom credit is or has been extended.'' [53] If Congress thought this definition an unreasonable departure from the statute it had just passed, it would surely have given some sign of that when it amended and expanded ECOA the following year. Nor is there any doubt that the drafters of those statutory amendments were generally aware of the new Regulation B, as they cited parts of it in explaining their bill.[54]

But the 1976 amendments did not limit the reasonable definition of ''applicant'' that the Board had promulgated just months before. To the contrary, the 1976 amendments added new provisions—such as the ones entitling ''applicants'' to a statement of reasons when their credit is revoked or modified—that make sense only if ''applicant'' is understood to include existing borrowers, as stated in Regulation B. Nor has Congress ever amended the statutory definition of ''applicant'' or otherwise expressed disapproval of the understanding of that term in Regulation B, despite revising the statute multiple times since 1976.[55]

''[W]hen,'' as here, ''Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one

47470647/; 'My Credit Card Just Got Canceled and I Don't Know Why,' THE CUT (Sept. 11, 2020), *https://www.thecut.com/article/can-my-credit-card-company-cancel-my-card.html.*

[39] *Nat'l Ass'n of Home Builders* v. *Defs. of Wildlife,* 551 U.S. 644, 666 (2007) (quotation marks omitted).

[40] 519 U.S. 337 (1997).

[41] *Id.* at 341.

[42] *Id.*

[43] *Id.* at 342.

[44] 15 U.S.C. 1691(a) (emphasis added); *see also Ali* v. *Fed. Bureau of Prisons,* 552 U.S. 214, 218 (2008) (''[T]he word 'any' has an expansive meaning . . . .'') (quoting *United States* v. *Gonzales,* 520 U.S. 1, 5 (1997)).

[45] *See, e.g.,* Black's Law Dictionary 1668 (rev. 4th ed. 1968) (defining ''transaction'' to include the ''[a]ct of transacting or conducting any business'' and defining ''transact'' as ''equivalent to 'carry on,' when used with reference to business'').

[46] 12 CFR 1002.2(m) (defining ''credit transaction'' to include, among other things, the ''revocation, alteration, or termination of credit'' and ''collection procedures''); 12 CFR 202.3(k) (1976) (defining ''credit transaction'' to include the ''furnishing of credit information and collection procedures''). Accordingly, the Bureau interprets aspects of the credit transactions enumerated in Regulation B as including and encompassing the servicing of that credit, debt collection, loss mitigation, payment plans, settlements, co-signer release, and certain other services provided to existing accountholders.

[47] S. Rep. 93–278, 93rd Cong., 1st Sess., at 27 (1973).

[48] 15 U.S.C. 1691(d)(2).

[49] 15 U.S.C. 1691(d)(6).

[50] 15 U.S.C. 1691e(a); *see also id.* 1691e(b) (a ''creditor, other than a government or governmental subdivision or agency,'' shall be liable to the aggrieved ''applicant'' for punitive damages); *id.* 1691e(c) (aggrieved ''applicant'' may seek relief in district court).

[51] S. Rep. 94–589, at 13.

[52] *Cf. Robinson,* 519 U.S. at 343 (similarly concluding that the reference to aggrieved ''employees'' in Title VII's private right of action shows that that term is not limited to current employees).

[53] 12 CFR 202.3(c) (1976).

[54] *See* S. Rep. 94–589, at 2 (citing the Board's rules and noting that the amendments expanded the Board's rulemaking authority).

[55] *See* FDIC Improvement Act of 1991, Public Law 102–242, sec. 223, 105 Stat. 2306–07; Dodd-Frank Act, Public Law 111–203, secs. 1071, 1474, 124 Stat. 2056–57, 2199–2200.

Tab 7

intended by Congress.' '' [56] That maxim applies with particular force here: The first time Congress revisited the statute after the Board defined ''applicant'' to include existing borrowers, Congress enacted new provisions that implicitly approved the Board's interpretation by requiring that creditors provide an explanation for adverse actions that can be taken only with respect to existing borrowers.

c. Statutory Purpose

Reading ''applicant'' to protect individuals and businesses from discrimination both during the process of requesting credit and once credit has been extended furthers ECOA's purpose. It prevents a creditor from canceling an existing account because of a borrower's race. It bars a creditor from unfavorably modifying the terms of an existing account—perhaps by lowering the amount available on a line of credit—because of a borrower's national origin. It stops a creditor from requiring women with existing accounts to reapply for their credit upon getting married.[57] And it ensures that a creditor would be required to provide a statement of reasons to the applicant in any of these situations. This is the most plausible interpretation of ECOA.

Finally, reading ''applicant'' in this way—*i.e.,* ECOA protects applicants from discrimination both during the process of requesting credit and once credit has been extended—precludes obvious paths to evasion. A creditor that wished to deny credit applications on a prohibited basis, or to offer credit on inferior terms for the same prohibited reason, cannot do so by simply extending credit on the terms requested and later revoking or amending the terms of the credit arrangement. Nor can a creditor use similar means to avoid ever having to explain to an applicant the reasons for an adverse action. This interpretation of ECOA, therefore, forecloses a potential loophole that could effectively swallow much of the Act. Such a loophole would be plainly inconsistent with ECOA.

d. Judicial Precedent

Those courts that have properly read the term ''applicant'' in its statutory context, including the only court of appeals to have addressed the issue, have agreed that the statute protects existing borrowers. In *Kinnell* v. *Convenient Loan Co.,*[58] the Tenth Circuit considered a claim that a creditor discriminated in violation of ECOA when it refused to accept a late payment on an existing loan and instead accelerated the remaining balance due. The court rejected the argument that the plaintiff was not an ''applicant'' under ECOA because he was no longer actively seeking credit.[59] ECOA, the court explained, prohibits discrimination ''with respect to any aspect of a credit transaction,'' [60] and was meant ''to protect people from the 'denial *or termination* of credit' '' on a prohibited basis.[61] The lender's reading of ''applicant'' would mean that ''any sua sponte action on the part of the creditor . . . would not be actionable. Such an interpretation improperly narrows the scope of the ECOA.'' [62] The court noted that its reading of ''applicant'' was directly supported by Regulation B.[63]

At least one district court has reached the same conclusion. In *Powell* v. *Pentagon Fed. Credit Union,*[64] the court held that the plaintiff, who alleged that his existing credit plan was terminated on a prohibited basis, was an ''applicant'' under ECOA. The court relied on ECOA's requirement that ''applicants'' receive notice when their credit is revoked and on the longstanding definition in Regulation B.[65] The court observed that the contrary interpretation would be wholly at odds with ECOA's purposes because it ''would preclude a plaintiff with an existing account from bringing a claim for the discriminatory revocation of that account.'' [66] The court found nothing to ''suggest[ ] that Congress' intent to discourage discrimination against applicants somehow ceases when the alleged discrimination is against existing credit customers.'' [67]

The Bureau acknowledges that a few other district court decisions have interpreted ''applicant'' to include only persons actively seeking credit, but the Bureau does not believe this interpretation is persuasive.[68] No court of appeals has endorsed these district courts' narrow reading. These district court decisions read ''applicant'' in isolation instead of reading this statutory term in context, as required by the Supreme Court. For example, these decisions did not attempt to square their interpretation with ECOA's requirement that ''applicants'' receive an explanation when their existing credit is terminated or modified. Nor did they grapple with the clear loophole their interpretation would create or the degree to which it would frustrate the Act's remedial purposes.

e. Regulation B

Regulation B has always defined the term ''applicant'' to include those who applied for and have received credit.[69] Other provisions reflect the same interpretation.[70] Neither the Board nor the Bureau has ever amended the rule to reflect a contrary understanding of the term.

As described above, the best interpretation of ECOA is that the term ''applicant'' includes existing borrowers. It was thus reasonable for the Board and then the Bureau to adopt that interpretation in Regulation B. Adopting the contrary reading would have led to the serious textual inconsistencies described above and run directly contrary to the statute's purposes. Regulation B's definition avoids those difficulties and, in the process, serves to ''carry out'' and ''effectuate'' the purposes of ECOA.[71] And because the contrary interpretation would open a glaring loophole in ECOA, Regulation B's definition is ''necessary or proper . . . to prevent circumvention or evasion'' of the Act.[72]

Notably, Regulation B has expressly included existing borrowers as applicants since the rule was first promulgated through notice-and-comment rulemaking in 1975. Indeed, the interpretation of ''applicant'' discussed here has been confirmed by numerous Federal agencies for decades. For example, nine separate agencies or offices, including the Department of Justice, Federal Trade Commission, and

[56] *CFTC* v. *Schor,* 478 U.S. 833, 846 (1986) (quoting *NLRB* v. *Bell Aerospace Co.,* 416 U.S. 267, 274–75 (1974)).

[57] *Cf.* S. Rep. 93–278, at 17 (citing this very scenario as an example of the discrimination against ''applicants'' that ECOA prohibits).

[58] 77 F.3d 492 (10th Cir. 1996) (unpublished table decision).

[59] *Id.* at *2.

[60] *Id.* (quoting 15 U.S.C. 1691(a)).

[61] *Id.* (emphasis added) (quoting *Miller* v. *American Express Co.,* 688 F.2d 1235, 1239 (9th Cir. 1982)).

[62] *Id.*

[63] *Id.*

[64] No. 10–cv–785, 2010 WL 3732195 (N.D. Ill. Sept. 17, 2010).

[65] *Id.* at *4–5.

[66] *Id.* at *4.

[67] *Id.* at *4 n.2.

[68] *See, e.g., TeWinkle* v. *Capital One, N.A.,* No. 1:19–cv–01002, 2019 WL 8918731, at *4–5 (W.D.N.Y. Dec. 11, 2019); *Kalisz* v. *Bank of America, N.A.,* No. 1:18–cv–00516, 2018 WL 4356768, at *2–3 (E.D. Va. Sept. 11, 2018).

[69] *See* 12 CFR 1002.2(e) (including in the definition ''any person . . . who has received an extension of credit from a creditor''); *see also* 12 CFR 202.3(c) (1976) (including in the definition ''any person to whom credit is or has been extended by [a] creditor'').

[70] *See, e.g.,* 12 CFR 1002.2(m) (defining ''credit transaction'' to mean ''every aspect of *an applicant's* dealings with a creditor regarding an application for credit *or an existing extension of credit*'') (emphasis added).

[71] 15 U.S.C. 1691b(a).

[72] *Id.*

the Board, previously published a statement confirming their view that ECOA prohibits discrimination in the treatment of existing borrowers, such as by ''[t]reat[ing] a borrower differently in servicing a loan or invoking default remedies'' or ''[using] different standards for pooling or packaging a loan in the secondary market.'' [73] The same view is reflected in the manual used by the Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, and other financial regulators to conduct examinations of financial institutions for compliance with fair lending laws.[74] The Bureau has consistently taken the same view of ''applicant,'' including by reissuing the Board's original definition; issuing guidance that Regulation B ''covers creditor activities before, during, and after the extension of credit''; [75] and taking enforcement action to address violations of ECOA against existing borrowers.[76] In short, the Bureau's interpretation is longstanding and well established.

II. Regulatory Matters

This advisory opinion is an interpretive rule issued under the Bureau's authority to interpret ECOA and Regulation B, including under section 1022(b)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which authorized guidance as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of Federal consumer financial laws.[77]

By operation of ECOA section 706(e), no provision of ECOA imposing any liability applies to any act done or omitted in good faith in conformity with this interpretive rule, notwithstanding that after such act or omission has occurred, the interpretive rule is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.[78]

As an interpretive rule, this rule is exempt from the notice-and-comment rulemaking requirements of the Administrative Procedure Act.[79] Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.[80] The Bureau also has determined that this interpretive rule does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.[81]

Pursuant to the Congressional Review Act,[82] the Bureau will submit a report containing this interpretive rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to the rule's published effective date. The Office of Information and Regulatory Affairs has designated this interpretive rule as not a ''major rule'' as defined by 5 U.S.C. 804(2).

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2022–10453 Filed 5–17–22; 8:45 am]

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[73] Policy Statement on Discrimination in Lending, 59 FR 18266, 18268 (Apr. 15, 1994).

[74] *See* Interagency Fair Lending Examination Procedures, at ii (Aug. 2009), *available at https://go.usa.gov/xeY37.*

[75] Bureau of Consumer Fin. Prot., Equal Credit Opportunity Act Examination Procedures, at 1 (Oct. 2015), *available at https://go.usa.gov/xekcN.*

[76] *See, e.g., In re American Express Centurion Bank and American Express Bank, FSB,* No. 2017–CFPB–0016, 2017 WL 7520638 (Aug. 23, 2017) (consent order resolving claims that creditors discriminated against existing borrowers on the basis of race and national origin by, for example, subjecting certain borrowers to more aggressive collection practices).

[77] 12 U.S.C. 5512(b)(1). The relevant provisions of ECOA and Regulation B form part of Federal consumer financial law. 12 U.S.C. 5481(12)(D), (14).

[78] 15 U.S.C. 1691e(e).

[79] 5 U.S.C. 553(b).

[80] 5 U.S.C. 603(a), 604(a).

[81] 44 U.S.C. 3501–3521.

[82] 5 U.S.C. 801 *et seq.*

POSTAL SERVICE

39 CFR Part 111

Domestic Competitive Products Pricing and Mailing Standards Changes

AGENCY: Postal Service™.

ACTION: Final rule.

SUMMARY: The Postal Service is amending *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM®), to reflect changes to pricing and mailing standards for certain competitive products.

DATES: *Effective:* July 10, 2022.

FOR FURTHER INFORMATION CONTACT: Steven Jarboe at (202) 268–7690, Margaret Pepe (202) 268–3078, or Garry Rodriguez at (202) 268–7281.

SUPPLEMENTARY INFORMATION: This final rule describes new price and product features for competitive products, by class of mail, established by the Governors of the United States Postal Service®. New prices are available under Docket Number CP2022–62 on the Postal Regulatory Commission (PRC) website at *https://www.prc.gov,* and on the Postal Explorer® website at *https://pe.usps.com.*

The Postal Service will revise *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM), to reflect changes to certain pricing and mailing standards for the following competitive products:

- Priority Mail®.
- Parcel Select®.
- Return Services.
- Other.

Competitive price and product changes are identified by product as follows:

Priority Mail

Priority Mail Commercial Plus Cubic

Currently, Commercial Plus cubic prices are available to Priority Mail customers whose account volumes exceeded 50,000 pieces in the previous calendar year and have a customer commitment agreement with the Postal Service.

The Postal Service is revising the DMM to remove the volume requirements for Priority Mail Commercial Plus Cubic prices. The Postal Service will also eliminate the requirement to have a customer commitment agreement for cubic pricing. Priority Mail cubic prices will now be available to all commercial customers.

Priority Mail Maximum Insurance Indemnity

The Postal Service is proposing to make the maximum insurance indemnity included with retail and commercial priced Priority Mail limited to a maximum liability of $100.00. See **Federal Register** document, *New Mailing Standards for Domestic Mailing Services Products* (87 FR 21601–21603), for additional information.

Parcel Select

Parcel Select Ground Cubic

The Postal Service is implementing cubic pricing under the Parcel Select Ground price category. Parcel Select Ground cubic pricing will be available to eligible Parcel Select Ground customers for rectangular, nonrectangular, and soft pack mailpieces. Each mailpiece must measure 1 cubic foot or less, weigh 20 pounds or less, and the longest dimension may not exceed 18 inches. Cubic-priced mailpieces may not be rolls or tubes. Parcel Select Ground

Tab 8

Authority of States To Enforce the Consumer Financial Protection Act of 2010, 87 Fed. Reg. 31940 (May 26, 2022).

CFPB Bolsters Enforcement Efforts by States

Interpretive Rule Seeks to Clarify Scope of States' Ability to Enforce Federal Consumer Financial Protection Laws

MAY 19, 2022

Washington, D.C. – Today, the Consumer Financial Protection Bureau (CFPB) issued an interpretive rule that describes states' authorities to pursue lawbreaking companies and individuals that violate the provisions of federal consumer financial protection law. Because of the crucial role states play in protecting consumers, the Consumer Financial Protection Act grants their consumer protection enforcers the authority to protect their citizens and otherwise pursue lawbreakers.

"In the years leading up to the financial crisis, federal regulators undermined states seeking to protect families and businesses from abuses in the mortgage market," said CFPB Director Rohit Chopra. "Our action today demonstrates our commitment to promoting state enforcement, not suffocating it."

When Congress passed the Consumer Financial Protection Act in 2010, it recognized the important role of states in protecting consumers from financial fraud, scams, and other wrongdoing. In the run-up to the Great Recession, federal banking regulators took numerous steps to undermine state regulators and enforcers, deteriorating protections for mortgage borrowers and setting the stage for the subprime crisis. Through the Consumer Financial Protection Act, Congress significantly restricted the ability of federal banking regulators to broadly preempt state consumer financial protections.

In addition, Congress sought to enhance states' enforcement abilities, so states were empowered to enforce the Consumer Financial Protection Act's consumer protection provisions. This authority was provided for both state attorneys general and state regulators. In the years since Congress granted this authority, states have used it in 33 public enforcement actions to protect consumers. States brought some of these actions in partnership with the CFPB, while others were brought by individual states or multistate groups that have included almost every state and territory in the country.

These actions are in addition to other collaboration and cooperation efforts among the CFPB and states. The CFPB has memoranda of understanding to promote and enable these efforts with over 20 state attorney general offices, as well as regulators in all fifty states, the District of Columbia, and Puerto Rico.

Today's interpretive rule affirms:

- **States can enforce the Consumer Financial Protection Act, including the provision making it unlawful for covered persons or service providers to violate any provision of federal consumer financial protection law.** This provision covers the Consumer Financial Protection Act itself as well as its 18 enumerated consumer laws and certain other laws, along with any rule or order prescribed by the CFPB under the Consumer Financial Protection Act, an enumerated consumer law, or pursuant to certain other authorities.
- **States can pursue claims and actions against a broad range of entities.** The Consumer Financial Protection Act outlines entities over which the CFPB may exercise its enforcement authority under the statute. States are able to bring actions against a broader cross-section of companies and individuals.
- **CFPB enforcement actions do not put a halt to state actions.** Sometimes states bring enforcement actions in coordination with the CFPB. A state may also bring an enforcement action to stop or remediate harm that is not addressed by a CFPB enforcement action against the same entity. Nothing in the Consumer Financial Protection Act precludes these complementary enforcement activities that serve to protect consumers at both the national and state levels.

Today's announcement is part of the CFPB's expansion of its efforts to support state enforcement activity. The CFPB plans to consider other steps to promote state enforcement of federal consumer financial protection law, including ways to facilitate victim redress (https://www.consumerfinance.gov/about-us/newsroom/director-chopra-remarks-december-naag-meeting/).

Read the interpretive rule. (cfpb.gov/rules-policy/final-rules/authority-of-states-to-enforce-the-consumer-financial-protection-act-of-2010/)

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit consumerfinance.gov (cfpb.gov/).

Topics

- ENFORCEMENT (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=ENFORCEMENT)
- PARTNERSHIPS (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=PARTNERSHIPS)
- RULEMAKING (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=RULEMAKING)

transit to the packinghouse and while awaiting packing. Fruit must be packed in insect-proof cartons or containers, or covered with insect-proof mesh or a plastic tarpaulin for transport to the United States. During the time the packinghouse is in use for exporting avocado fruit to the United States, the packinghouse may only accept fruit from registered, approved production sites.

- A sample of avocado fruit from each site of production must be inspected by the NPPO of Ecuador following any post-harvest processing.
- Fruit presented for inspection at the port of entry to the United States must be identified in the shipping documents accompanying each lot of fruit to specify the production site or sites, in which the fruit was produced, and the packing shed or sheds, in which the fruit was processed.
- Each consignment of avocados must be accompanied by a phytosanitary certificate issued by NPPO of Ecuador and providing an additional declaration stating that the fruit in the consignment has been produced in compliance with the requirements of the systems approach.

Additional phytosanitary measures for varieties of Ecuador avocados other than Hass:

- No other host of *Anastrepha fraterculus, A, serpentina, A, striata,* or *Ceratitis capitata* can be grown within 100 meters of the edge of the avocado site of production.
- The registered production sites must conduct trapping for *Anastrepha spp.* and *Ceratitis capitata* fruit flies in accordance with the operational workplan.
- The NPPO must keep records of fruit fly detections for each trap, update the records each time the traps are checked, and make the records available to APHIS upon request. The records must be maintained for at least 1 year.
- If *Anastrepha spp.* or *Ceratitis capitata* fruit flies trapped at a registered production site go above the threshold specified in the operational workplan, the avocados may still be exported, but only with an APHIS-approved quarantine treatment. Irradiation treatment at 150 Gy (T105–a–1) is approved for all fruit flies.

These conditions are described in further detail in the final RMD. In addition to these specific measures, fresh avocado fruit from continental Ecuador will be subject to the general requirements listed in § 319.56–3 that are applicable to the importation of all fruits and vegetables.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the recordkeeping and burden requirements associated with this action are covered under the Office of Management and Budget control number 0579–0049, which is updated every 3 years during the required renewal period.

E-Government Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the E-Government Act to promote the use of the internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes. For information pertinent to E-Government Act compliance related to this notice, please contact Mr. Joseph Moxey, APHIS' Paperwork Reduction Act Coordinator, at (301) 851–2483.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this action as not a major rule, as defined by 5 U.S.C. 804(2).

Authority: 7 U.S.C. 1633, 7701–7772, and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 23rd day of May 2022.

Anthony Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2022–11367 Filed 5–25–22; 8:45 am]

BILLING CODE 3410–34–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Chapter X

Authority of States To Enforce the Consumer Financial Protection Act of 2010

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Interpretive rule.

SUMMARY: Section 1042 of the Consumer Financial Protection Act of 2010 (CFPA) generally authorizes States to enforce the CFPA's provisions. The Consumer Financial Protection Bureau (Bureau) is issuing this interpretive rule to provide further clarity regarding the scope of State enforcement under section 1042 and related provisions of the CFPA. Specifically, the Bureau is issuing the following interpretations: Section 1042 allows States to enforce any provision of the CFPA, including section 1036(a)(1)(A), a provision that makes it unlawful for covered persons or service providers to violate the Federal consumer financial laws; the limitations on the Bureau's authority in sections 1027 and 1029 generally do not constrain States' enforcement authority under section 1042; and section 1042 does not restrict States from bringing concurrent enforcement actions with the Bureau.

DATES: This interpretive rule is effective on May 26, 2022.

FOR FURTHER INFORMATION CONTACT: Shiva Nagaraj, Senior Counsel, Legal Division, (202) 435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

The Consumer Financial Protection Act of 2010 (CFPA) establishes the Consumer Financial Protection Bureau as the Federal government's primary regulator of consumer financial products and services.[1] The Bureau is charged with administering, interpreting, and enforcing the "Federal consumer financial laws," a category that includes the CFPA itself, 18 enumerated consumer laws (such as the Fair Credit Reporting Act and the Truth in Lending Act), and the laws for which authorities were transferred to the Bureau under subtitles F and H of the CFPA, as well as rules and orders issued by the Bureau under any of these laws.[2]

However, the Bureau is not the only enforcer of these laws. The CFPA recognizes the important role that States play in overseeing the consumer financial marketplace.[3] As noted in a 2010 Senate report on the financial crisis that precipitated the CFPA, "[w]here [F]ederal regulators refused to act, the [S]tates stepped into the breach."[4] These efforts were stymied, however, because "rather than supporting [States'] anti-predatory lending laws, [F]ederal regulators

[1] Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law 111–203, 124 Stat. 1376, 1955–2113 (2010).

[2] 12 U.S.C. 5481(14), (12).

[3] As defined in 12 U.S.C. 5481(27), "[t]he term 'State' means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, or the United States Virgin Islands or any federally recognized Indian tribe, as defined by the Secretary of the Interior under section 5131(a) of title 25."

[4] S. Rep. No. 111–176, at 16 (2010), *https://www.congress.gov/congressional-report/111th-congress/senate-report/176/1.*

preempted them.'' [5] Thus, Congress provided States with their own Bureau enforcement authority.

Generally, State attorneys general may ''bring a civil action in the name of such State in any district court of the United States in that State or in State court that is located in that State and that has jurisdiction over the defendant, to enforce provisions of this title [*i.e.,* the CFPA] or regulations issued under this title, and to secure remedies under provisions of this titleor remedies otherwise provided under other law.'' [6] Likewise, a ''state regulator may bring a civil action or other appropriate proceeding to enforce the provisions of this title or regulations issued under this title with respect to any entity that is State-chartered, incorporated, licensed, or otherwise authorized to do business under State law . . . and to secure remedies under provisions of this title or remedies otherwise provided under other provisions of law with respect to such an entity.'' [7] State attorneys general and regulators are required to consult the Bureau before initiating an action or proceeding under section 1042, in accordance with section 1042(b) and 12 CFR part 1082.

Section 1042, as one court has explained, allows States to vindicate their ''fundamental right to protect their citizens and prevent harmful conduct from occurring in their jurisdictions'' and gives them tools ''to pick up slack when the [F]ederal Government fails to enforce and regulate.'' [8]

Since the CFPA was enacted, many States have relied on section 1042 to bring civil enforcement actions, on their own or in joint or coordinated filings with the Bureau, to enforce a provision of the CFPA that prohibits unfair, deceptive, and abusive acts and practices in connection with the offering or provision of consumer financial products or services.[9] Some States have also joined the Bureau in alleging violations of the CFPA's prohibition on covered persons and service providers violating other enumerated Federal consumer financial laws, but few have pursued such claims in their own CFPA actions. The Bureau is issuing this interpretive rule regarding several important aspects of section 1042.[10]

III. Analysis

A. States' Authority Under Section 1042 To Address Violations of Federal Consumer Financial Laws

CFPA section 1042 authorizes State attorneys general and State regulators to bring an enforcement action to pursue violations of section 1036(a)(1)(A), which makes it unlawful for a covered person or service provider to violate any Federal consumer financial law.[11]

As noted above, section 1042(a) generally authorizes States to bring civil actions ''to enforce provisions of [the CFPA].'' One such provision of the CFPA, section 1036(a)(1)(B), states that it is unlawful for any ''covered person'' or ''service provider'' to ''engage in any unfair, deceptive, or abusive act or practice.'' [12] States can thus rely on section 1042(a) to pursue an enforcement action against a covered person or service provider that commits an unfair, deceptive, or abusive act or practice, and many States have filed such enforcement actions.

Additionally, another provision of the CFPA, section 1036(a)(1)(A), declares it unlawful for any ''covered person'' or ''service provider'' to ''offer or provide to a consumer any financial product or service not in conformity with Federal consumer financial law, or otherwise commit any act or omission in violation of a Federal consumer financial law.'' [13] Because section 1036(a)(1)(A) is a ''provision of [the CFPA],'' States may use their section 1042 authority to enforce section 1036(a)(1)(A) against covered persons or service providers. Thus, when a covered person or service provider violates any of the Federal consumer financial laws, section 1042 gives States authority to address that violation by bringing a claim under section 1036(a)(1)(A) of the CFPA.

As explained above, the ''Federal consumer financial laws'' are the CFPA, the enumerated consumer laws, the laws for which authorities are transferred under subtitles F and H of the CFPA, and any rule or order prescribed by the Bureau under the CFPA, an enumerated consumer law, or pursuant to the authorities transferred under subtitles F and H. The enumerated consumer laws are the 18 laws referred to in section 1002(12) of the CFPA. Rules prescribed by the Bureau include, for example, the rules implementing the Real Estate Settlement Procedures Act (Regulation X),[14] the Truth in Lending Act (Regulation Z),[15] and the Fair Debt Collection Practices Act (Regulation F).[16] Orders prescribed by the Bureau include, for example, consent orders and other final orders issued by the Bureau under sections 1053 and 1055 of the CFPA.[17]

States' authority to pursue violations of the CFPA is, of course, supplemental to the authority States may already have to enforce the Federal consumer financial laws. Several enumerated consumer laws authorize States to bring actions to enforce the substantive provisions of those laws. Section 1042(a)(3) of the CFPA clarifies that it does not ''modify[ ], limit[ ], or supersed[e] the operation of any [such] provision of an enumerated consumer law.'' [18] As a result, States can enforce those laws to the full extent authorized under those laws—including against entities that are not covered persons or service providers (and thus not subject to liability under section 1036(a)(1)(A)) and including against national banks and Federal savings associations. For example, the Fair Credit Reporting Act allows States to bring enforcement actions against any person violating that statute, including users of consumer reports that are not themselves covered persons or service providers.[19] The Real Estate Settlement Procedures Act authorizes States to enforce the anti-kickback rule against those who profit from kickbacks but are not actually providing settlement services, and thus may not be covered persons.[20] And the Truth in Lending Act authorizes States to enforce provisions of that statute against national banks and Federal savings associations.[21] Thus, States may bring such claims even if they could not bring similar claims against such a defendant under section 1036(a)(1)(A).

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[5] *Id.*

[6] 12 U.S.C. 5552(a)(1). With respect to national banks or Federal savings associations, State attorneys general may only ''bring a civil action in the name of such State'' in order ''to enforce a regulation prescribed by the Bureau under a provision of this titleand to secure remedies under provisions of this titleor remedies otherwise provided under other law.'' 12 U.S.C. 5552(a)(2).

[7] *Id.*

[8] *Pennsylvania* v. *Navient Corp.,* 967 F.3d 273, 286 (3d Cir. 2020).

[9] 12 U.S.C. 5536(a)(1)(B); *see also id.* 5531.

[10] This interpretive rule is not intended as an exhaustive interpretation of section 1042.

[11] As noted above, however, section 1042 does not allow State attorneys general to bring an enforcement action against national banks or Federal savings associations, except for violations of ''a regulation prescribed by the Bureau under a provision of this title.'' 12 U.S.C. 5552(a)(2).

[12] 12 U.S.C. 5536(a)(1)(B).

[13] 12 U.S.C. 5536(a)(1)(A); *see also id.* 5481(6) (defining ''covered person''), 5481(26) (defining ''service provider'').

[14] 12 CFR part 1024.

[15] 12 CFR part 1026.

[16] 12 CFR part 1006.

[17] These orders can generally be found at *https://www.consumerfinance.gov/administrative-adjudication-proceedings/administrative-adjudication-docket/.*

[18] 12 U.S.C. 5552(a)(3).

[19] 15 U.S.C. 1681s(c)(1).

[20] 12 U.S.C. 2607(d)(4).

[21] 15 U.S.C. 1640(e).

Tab 8

B. Limitations on States' Enforcement Authority Under Section 1042

The enforcement authority of States under section 1042 is generally not subject to certain limits applicable to the Bureau's enforcement authority.

Sections 1027 and 1029 of the CFPA set limits on the Bureau's enforcement authority. Under section 1027, the Bureau is subject to limits on its authority with respect to merchants, retailers, and other sellers of nonfinancial goods; real estate brokerage activities; retailers of manufactured or modular homes; accountants and tax preparers; attorneys engaged in the practice of law; persons regulated by a State insurance regulator; products or services that relate to specified employee benefit and compensation plans; persons regulated by a State securities commission; persons regulated by the Securities and Exchange Commission; persons regulated by the Commodity Futures Trading Commission; persons regulated by the Farm Credit Administration; and activities related to charitable contributions.[22] Similarly, under section 1029, the Bureau is limited in exercising authority with respect to a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both.[23]

With one exception discussed below, each of these limitations expressly applies to only the ''Bureau'' or the Bureau's ''Director.'' For example, under section 1027(e), ''the Bureau may not exercise any supervisory or enforcement authority with respect to an activity engaged in by an attorney as part of the practice of law under the laws of a State in which the attorney is licensed to practice law,'' except as specified.[24] Likewise, under section 1029(a), ''the Bureau may not exercise any rulemaking, supervisory, enforcement or any other authority, including any authority to order assessments, over a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both,'' except as specified.[25]

Because Congress applied these limitations in sections 1027 and 1029 only to the Bureau, they do not extend to States exercising their enforcement authority under section 1042. Indeed, Congress used different language in the one exclusion that it intended to apply to States, the limitation on sellers of nonfinancial goods: ''To the extent that the Bureau may not exercise authority under this subsection with respect to a merchant, retailer, or seller of nonfinancial goods or services, no action by a State attorney general or State regulator with respect to a claim made under this titlemay be brought under [section 1042], with respect to an activity described in any of clauses (i) through (iii) of subparagraph (A) by such merchant, retailer, or seller of nonfinancial goods or services.'' [26] Because Congress did not similarly extend the exclusions to States in other provisions of 1027 and 1029, and instead applied them only to the Bureau, those exclusions do not extend to States.[27]

C. States May Pursue Actions Under Section 1042 Even While the Bureau Is Pursuing a Concurrent Action

State attorneys general and regulators may bring (or continue to pursue) actions under section 1042 even if the Bureau is pursuing a concurrent action against the same entity. As explained by the Third Circuit, ''the clear statutory language of the Consumer [Financial] Protection Act permits concurrent [S]tate claims, for nothing in the statutory framework suggests otherwise.'' [28]

When Congress intended to preclude concurrent CFPA actions, it expressly did so. There are multiple places within the CFPA where Congress made clear that concurrent actions should not occur or that one agency should take primary enforcement role over other agencies. For example, with respect to nondepository covered persons, if the Bureau or the Federal Trade Commission (FTC) has filed an action asserting certain violations of the CFPA, the other agency is prohibited during the pendency of the action from instituting ''a civil action under such provision of law against any defendant named in the complaint in such pending action for any violation alleged in the complaint.'' [29] Likewise, Congress limited States' ability to enforce rules relating to mortgage loan modification and foreclosure rescue services during the pendency of enforcement activity by either the Bureau or the FTC.[30] Finally, Congress can—and did—designate the Bureau as holding primary CFPA enforcement authority among Federal regulators, limiting other agencies to the position of backup enforcement or precluding their authority to enforce entirely. Congress made that decision regarding supervised nondepository covered persons and very large banks, savings associations, and credit unions in sections 1024(c) and 1025(c), limiting the possibility of concurrent enforcement activity by the Bureau and certain Federal agencies. In short, when Congress seeks to limit concurrent statutory enforcement activity, it knows how to do so.[31] It did not exercise that option with respect to section 1042.

V. Regulatory Matters

This is an interpretive rule issued under the Bureau's authority to interpret the CFPA, including under section 1022(b)(1) of the CFPA, which authorizes guidance as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of Federal consumer financial laws, such as the CFPA.[32]

As an interpretive rule, this rule is exempt from the notice-and-comment rulemaking requirements of the Administrative Procedure Act.[33] Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.[34] The Bureau has also determined that this interpretive rule does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.[35]

Pursuant to the Congressional Review Act,[36] the Bureau will submit a report containing this interpretive rule and other required information to the United States Senate, the United States House

[22] 12 U.S.C. 5517. Each of these exclusions is subject to various exceptions as detailed in section 1027(a) through (l) and (n).

[23] 12 U.S.C. 5519. As with the section 1027 limitations, this limitation is also subject to various exceptions as detailed in section 1029.

[24] 12 U.S.C. 5517(e).

[25] 12 U.S.C. 5519(a).

[26] 12 U.S.C. 5517(a)(2)(E).

[27] *See, e.g., Russello* v. *United States,* 464 U.S. 16, 23 (1983) (''[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'').

[28] *Navient Corp.,* 967 F.3d at 287.

[29] 12 U.S.C. 5514(c)(3).

[30] 12 U.S.C. 5538(b)(6).

[31] *See, e.g., Russello,* 464 U.S. at 23 (''[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'').

[32] 12 U.S.C. 5512(b)(1).

[33] 5 U.S.C. 553(b).

[34] 5 U.S.C. 603(a), 604(a).

[35] 44 U.S.C. 3501–3521.

[36] 5 U.S.C. 801 *et seq.*

of Representatives, and the Comptroller General of the United States prior to the rule's published effective date. The Office of Information and Regulatory Affairs has designated this interpretive rule as not a ''major rule'' as defined by 5 U.S.C. 804(2).

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2022–11356 Filed 5–25–22; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2021–0888; Project Identifier MCAI–2021–00676–T; Amendment 39–22036; AD 2022–09–16]

RIN 2120–AA64

Airworthiness Directives; Airbus SAS Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Airbus SAS Model A318 series; A319–111, –112, –113, –114, –115, –131, –132, –133, –151N, and –153N; A320 series; and A321 series airplanes. This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. This AD requires revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective June 30, 2022.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of June 30, 2022.

ADDRESSES: For material incorporated by reference (IBR) in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this IBR material on the EASA website at *https://ad.easa.europa.eu.* You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0888.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0888; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Vladimir Ulyanov, Aerospace Engineer, Large Aircraft Section, FAA, International Validation Branch, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3229; email *vladimir.ulyanov@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2021–0140, dated June 14, 2021 (EASA AD 2021–0140) (also referred to as the MCAI), to correct an unsafe condition for all Airbus A318–111, A318–112, A318–121, A318–122, A319–111, A319–112, A319–113, A319–114, A319–115, A319–131, A319–132, A319–133, A319–151N, A319–153N, A320–211, A320–212, A320–214, A320–215, A320–216, A320–231, A320–232, A320–233, A320–251N, A320–252N, A320–253N, A320–271N, A320–272N, A320–273N, A321–111, A321–112, A321–131, A321–211, A321–212, A321–213, A321–231, A321–232, A321–251N, A321–251NX, A321–252N, A321–252NX, A321–253N, A321–253NX, A321–271N, A321–271NX, A321–272N, and A321–272NX airplanes. Model A320–215 airplanes are not certificated by the FAA and are not included on the U.S. type certificate data sheet; this AD therefore does not include those airplanes in the applicability.

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Airbus SAS Model A318 series; A319–111, –112, –113, –114, –115, –131, –132, –133, –151N, and –153N; A320 series; and A321 series airplanes. The NPRM published in the **Federal Register** on October 28, 2021 (86 FR 59662). The NPRM was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The NPRM proposed to require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations, as specified in EASA AD 2021–0140.

Discussion of Final Airworthiness Directive

Comments

The FAA received comments from the Air Line Pilots Association, International (ALPA) and American Airlines. The ALPA supported the NPRM without change. The following presents the comment received on the NPRM and the FAA's response.

Request To Revise Paragraph To Correct Task Reference Error

American Airlines (AAL) requested a change in paragraph (j) of the proposed AD to correct an incorrect task reference. AAL stated that incorporating Task 531135–03–1 actually terminates Task 531135–01–2, as determined by Airworthiness Limitations Section (ALS) Part 2, Variation 8.5, not Task 531135–03–2, as indicated in the proposed AD.

The FAA agrees with the request and has revised paragraph (j) of this AD to indicate the correct task number.

Conclusion

The FAA reviewed the relevant data, considered the comment received, and determined that air safety requires adopting this AD as proposed. Except for minor editorial changes, and any other changes described previously, this AD is adopted as proposed in the NPRM. None of the changes will increase the economic burden on any operator. Accordingly, the FAA is issuing this AD to address the unsafe condition on these products.

Related Service Information Under 1 CFR Part 51

EASA AD 2021–0140 describes new or more restrictive airworthiness limitations for airplane structures and safe life limits.

This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

The FAA estimates that this AD affects 1,728 airplanes of U.S. registry.

Tab 9

Circular 2022-03: Adverse Action Notification Requirements in Connection With Credit Decisions Based on Complex Algorithms, 87 Fed. Reg. 35864 (June 14, 2022).

CFPB Acts to Protect the Public from Black-Box Credit Models Using Complex Algorithms

Companies relying on complex algorithms must provide specific and accurate explanations for denying applications

MAY 26, 2022

Washington, D.C. – Today, the Consumer Financial Protection Bureau (CFPB) confirmed that federal anti-discrimination law requires companies to explain to applicants the specific reasons for denying an application for credit or taking other adverse actions, even if the creditor is relying on credit models using complex algorithms. The CFPB published a *Consumer Financial Protection Circular* to remind the public, including those responsible for enforcing federal consumer financial protection law, of creditors' adverse action notice requirements under the Equal Credit Opportunity Act (ECOA).

"Companies are not absolved of their legal responsibilities when they let a black-box model make lending decisions," said CFPB Director Rohit Chopra. "The law gives every applicant the right to a specific explanation if their application for credit was denied, and that right is not diminished simply because a company uses a complex algorithm that it doesn't understand."

Data harvesting on Americans has become voluminous and ubiquitous, giving firms the ability to know highly detailed information about their customers before they ever interact with them. Many firms across the economy rely on these detailed datasets to power their algorithmic decision-making, which is sometimes marketed as "artificial intelligence." The information gleaned from data analytics has a broad range of commercial uses by financial firms, including for targeted advertising and in credit decision-making.

Law-abiding financial companies have long used advanced computational methods as part of their credit decision-making processes, and they have been able to provide the rationales for their credit decisions. However, some creditors may make credit decisions based on the outputs from complex algorithms, sometimes called "black-box" models. The reasoning behind some of these models' outputs may be unknown to the model's users, including the model's developers. With such models, adverse action notices that meet ECOA's requirements may not be possible.

ECOA protects individuals and businesses against discrimination when seeking, applying for, and using credit. To help ensure a creditor does not discriminate, ECOA requires that a creditor provide a notice when it takes an adverse action against an applicant, which must contain the specific and accurate reasons for that adverse action. Creditors cannot lawfully use technologies in their decision-making processes if using them means that they are unable to provide these required explanations.

Today's *Circular* makes clear that:

- **Federal consumer financial protection laws and adverse action requirements should be enforced regardless of the technology used by creditors.** For example, ECOA does not permit creditors to use technology that prevents them from providing specific and accurate reasons for adverse actions. Creditors' use of complex algorithms should not limit enforcement of ECOA or other federal consumer financial protection laws.
- **Creditors cannot justify noncompliance with ECOA based on the mere fact that the technology they use to evaluate credit applications is too complicated, too opaque in its decision-making, or too new.** Creditors who use complex algorithms—including artificial intelligence or machine learning technologies—to engage in credit decisions must still provide a notice that discloses the specific, principal reasons for taking adverse actions. There is no exception for violating the law because a creditor is using technology that has not been adequately designed, tested, or understood.

Whistleblowers play a central role in uncovering information about companies using technologies, like black-box models, in ways that violate ECOA and other federal consumer financial protection laws. Having clear, actionable information is critical for the CFPB and other consumer protection enforcers. The CFPB encourages tech workers to provide the agency with information, and they can visit the CFPB's Whistleblower Program webpage (https://www.consumerfinance.gov/enforcement/information-industry-whistleblowers/) to learn more.

Along with whistleblowers, government partners are also vital to the CFPB's enforcement efforts. For example, the CFPB is closely monitoring the work of the National Institute of Standards and Technology (https://www.nist.gov/), within the U.S. Department of Commerce (https://www.commerce.gov/), and other governmental bodies around the world, to assess the benefits and risks associated with emerging technologies.

The risks associated with decision-making technologies extend beyond adverse action notices and ECOA. Recently, the CFPB began taking a close look at the use of automated valuation models (https://www.consumerfinance.gov/about-us/newsroom/cfpb-outlines-options-to-prevent-algorithmic-bias-in-home-valuations/) within the home appraisal process to ensure home valuations are accurate and fair.

Read today's Consumer Financial Protection Circular, *Adverse action notification requirements in connection with credit decisions based on complex algorithms*. (cfpb.gov/compliance/circulars/circular-2022-03-adverse-action-notification-requirements-in-connection-with-credit-decisions-based-on-complex-algorithms/)

Consumers can submit fair lending complaints, or complaints about financial products or services, by visiting the CFPB's website (https://www.consumerfinance.gov/complaint/) or by calling (855) 411-CFPB (2372).

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit consumerfinance.gov (cfpb.gov/).

Topics

- **ADVANCED TECHNOLOGY** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=ADVANCED-TECHNOLOGY)

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Go to press resources page (cfpb.gov/about-us/newsroom/press-resources/)

Commission is adding a note to 11 CFR 109.10(e)(1) citing to the District Court and Court of Appeals decisions relating to this matter stating that the statutory provision at 52 U.S.C. 30104(c) remains in force.

The Commission is issuing this rule as an interim final rule. This interim final rule will take effect thirty legislative days after its transmittal to Congress. *See* 52 U.S.C. 30111(d). The Commission welcomes public comment on this interim final rule and may address any comments received in a later rulemaking.

The Administrative Procedure Act (''APA'') requires an agency promulgating regulations to publish a notice of a proposed rulemaking in the **Federal Register**. 5 U.S.C. 553(b). The notice requirement does not apply, however, ''when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' 5 U.S.C. 553(b)(B). According to the APA's legislative history, a situation is ''impracticable'' when ''the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings.'' *See Administrative Procedure Act: Legislative History,* S. Doc. No. 248 79–258 (1946); *see also Attorney General's Manual on the Administrative Procedure Act* 15 (1947). '' 'Unnecessary' means unnecessary so far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved.'' *Id.* ''Contrary to the public interest'' connotes a situation in which the interest of the public would be defeated by any requirement of advance notice. *Id.*

The notice to remove 11 CFR 109.10(e)(1)(vi) is unnecessary because that regulatory provision that has already been invalidated by a federal court and cannot be enforced. 5 U.S.C. 553(b)(B). Removing this provision from the regulations does not involve any exercise of discretion by the Commission. Moreover, because this provision is already unenforceable, the Commission's action will not affect the rights or interests of any person or entity, nor could the public notice and comment period benefit the Commission in this rulemaking.

In addition, a notice and comment period may be contrary to the public interest. The Commission notes that the 2022 elections for federal office are scheduled to take place on November 8, 2022. Although, as noted above, the Commission previously issued guidance on reporting requirements to the regulated community, the fundamental part of that guidance should be reflected in the Commission's regulation as soon as possible before the general election.

In addition, because this interim final rule is exempt from the notice and comment procedure under 5 U.S.C. 553(b), the Commission is not required to conduct a regulatory flexibility analysis under 5 U.S.C. 603 and 604 (Regulatory Flexibility Act). *See* 5 U.S.C. 601(2) and 604(a).

List of Subjects in 11 CFR Part 109

Coordinated and independent expenditures.

For the reasons set out in the preamble, the Commission is amending 11 CFR part 109 as follows:

PART 109—COORDINATED AND INDEPENDENT EXPENDITURES (52 U.S.C. 30101(17), 30116(a) AND (d), AND PUBLIC LAW 107–155 SEC. 214(C))

■ 1. The authority citation for part 109 continues to read as follows:

Authority: 52 U.S.C. 30101(17), 30104(c), 30111(a)(8), 30116, 30120; Sec. 214(c), Pub. L. 107–155, 116 Stat. 81.

■ 2. Section 109.10 is amended by removing and reserving paragraph (e)(1)(vi) and by adding a note to paragraph (e)(1).

The addition reads as follows:

§ 109.10 How do political committees and other persons report independent expenditures?

* * * * *

(e) * * *

(1) * * *

Note to § 109.10(e)(1): On August 3, 2018, the United States District Court for the District of Columbia vacated 11 CFR 109.10(e)(1)(vi). *CREW* v. *FEC,* 316 F. Supp. 3d 349 (Aug. 3, 2018), *aff'd,* 971 F.3d 340 (D.C. Cir. 2020). Section 30104(c) of title 52 of the U.S. Code and the remaining provisions of 11 CFR 109.10 remain in force.

* * * * *

Dated: June 8, 2022.

On behalf of the Commission,

Allen J. Dickerson,

Chairman, Federal Election Commission.

[FR Doc. 2022–12771 Filed 6–13–22; 8:45 am]

BILLING CODE 6715–01–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1002

Consumer Financial Protection Circular 2022–03: Adverse Action Notification Requirements in Connection With Credit Decisions Based on Complex Algorithms

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Consumer financial protection circular.

SUMMARY: The Consumer Financial Protection Bureau (Bureau or CFPB) has issued Consumer Financial Protection Circular 2022–03, titled, ''Adverse Action Notification Requirements in Connection with Credit Decisions Based on Complex Algorithms.'' In this circular, the Bureau responds to the question, ''When creditors make credit decisions based on complex algorithms that prevent creditors from accurately identifying the specific reasons for denying credit or taking other adverse actions, do these creditors need to comply with the Equal Credit Opportunity Act's requirement to provide a statement of specific reasons to applicants against whom adverse action is taken?''

DATES: The Bureau released this circular on its website on May 26, 2022.

ADDRESSES: Enforcers, and the broader public, can provide feedback and comments to *Circulars@cfpb.gov.*

FOR FURTHER INFORMATION CONTACT: Christopher Davis, Attorney-Advisor, Office of Fair Lending and Equal Opportunity, at (202) 435–7000. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

Question Presented

When creditors make credit decisions based on complex algorithms that prevent creditors from accurately identifying the specific reasons for denying credit or taking other adverse actions, do these creditors need to comply with the Equal Credit Opportunity Act's (ECOA's) requirement to provide a statement of specific reasons to applicants against whom adverse action is taken?

Response

Yes. ECOA and Regulation B require creditors to provide statements of specific reasons to applicants against whom adverse action is taken. Some creditors may make credit decisions based on certain complex algorithms, sometimes referred to as uninterpretable or ''black-box'' models, that make it difficult—if not impossible—to accurately identify the specific reasons for denying credit or taking other adverse actions.[1] The adverse action notice requirements of ECOA and Regulation B, however, apply equally to all credit decisions, regardless of the technology used to make them. Thus, ECOA and Regulation B do not permit creditors to use complex algorithms when doing so means they cannot provide the specific and accurate reasons for adverse actions.

Analysis

ECOA makes it unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction, on the basis of race, color, religion, national origin, sex or marital status, age (provided the applicant has the capacity to contract), because all or part of the applicant's income derives from any public assistance program, or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act.[2] In addition, ECOA provides that a creditor must provide a statement of specific reasons in writing to applicants against whom adverse action is taken.[3] ''Adverse action[s]'' include denying an application for credit, terminating an existing credit account, making unfavorable changes to the terms of an existing account, and refusing to increase a credit limit.[4]

Pursuant to Regulation B, a statement of reasons for adverse action taken ''must be *specific and indicate the principal reason(s)* for the adverse action.'' [5] Regulation B explains that ''[s]tatements that the adverse action was based on the creditor's internal standards or policies or that the applicant, joint applicant, or similar party failed to achieve a qualifying score on the creditor's credit scoring system are insufficient.'' [6] The Official Interpretations to Regulation B explain that ''[t]he specific reasons disclosed . . . must relate to and accurately describe the factors actually considered or scored by a creditor.'' [7] Moreover, while appendix C of Regulation B includes sample forms intended for use in notifying an applicant that adverse action has been taken, ''[i]f the reasons listed on the forms are not the factors actually used, a creditor will *not* satisfy the notice requirement by simply checking the closest identifiable factor listed.'' [8] With respect to adverse actions based on a credit scoring system specifically, the Official Interpretations explain that—

> [T]he reasons disclosed must relate only to those factors actually scored in the system. Moreover, no factor that was a principal reason for adverse action may be excluded from disclosure. The creditor must disclose the actual reasons for denial (for example, ''age of automobile'') even if the relationship of that factor to predicting creditworthiness may not be clear to the applicant.[9]

ECOA's notice requirements ''were designed to fulfill the twin goals of consumer protection and education.'' [10] In terms of consumer protection, ''the notice requirement is intended to prevent discrimination *ex ante* because 'if creditors know they must explain their decisions . . . they [will] effectively be discouraged' from discriminatory practices.'' [11] The notice requirement ''fulfills a broader need'' as well by educating consumers about the reasons for the creditor's action.[12] As a result of being informed of the specific reasons for the adverse action, consumers can take steps to try to improve their credit status or, in cases ''where the creditor may have acted on misinformation or inadequate information[,] . . . to rectify the mistake.'' [13] In addition, Congress also believed ECOA's notice requirement would have ''a beneficial competitive effect on the credit marketplace.'' [14]

Creditors who use complex algorithms, including artificial intelligence or machine learning, in any aspect of their credit decisions must still provide a notice that discloses the specific principal reasons for taking an adverse action. Whether a creditor is using a sophisticated machine learning algorithm or more conventional methods to evaluate an application, the legal requirement is the same: Creditors must be able to provide applicants against whom adverse action is taken with an accurate statement of reasons.[15] The statement of reasons ''must be specific and indicate the principal reason(s) for the adverse action.'' [16] A creditor cannot justify noncompliance with ECOA and Regulation B's requirements based on the mere fact that the technology it employs to evaluate applications is too complicated or opaque to understand. A creditor's lack of understanding of its own methods is therefore not a cognizable defense against liability for violating ECOA and Regulation B's requirements.

About Consumer Financial Protection Circulars

Consumer Financial Protection Circulars are issued to all parties with authority to enforce Federal consumer financial law. The CFPB is the principal Federal regulator responsible for administering Federal consumer financial law, *see* 12 U.S.C. 5511, including the Consumer Financial Protection Act's prohibition on unfair, deceptive, and abusive acts or practices, 12 U.S.C. 5536(a)(1)(B), and 18 other ''enumerated consumer laws,'' 12 U.S.C. 5481(12). However, these laws are also enforced by State attorneys general and State regulators, 12 U.S.C. 5552, and prudential regulators including the Federal Deposit Insurance Corporation, the Office of the Comptroller of the

[1] While some creditors may rely upon various post-hoc explanation methods, such explanations approximate models and creditors must still be able to validate the accuracy of those approximations, which may not be possible with less interpretable models.

[2] 15 U.S.C. 1691(a).

[3] 15 U.S.C. 1691(d)(2)(A), (B); *see also* 15 U.S.C. 1691(d)(3). A creditor may either provide the notice or follow certain requirements to inform consumers on how to obtain such notice. 15 U.S.C. 1691(d)(2)(B).

[4] 12 CFR 1002.2(c).

[5] 12 CFR 1002.9(b)(2) (emphasis added); *see also* 12 CFR part 1002 (supp. I), sec. 1002.9, para. 9(b)(2)–9 (''The Fair Credit Reporting Act (FCRA) requires a creditor to disclose when it has based its decision in whole or in part on information from a source other than the applicant or its own files. . . . The FCRA also requires a creditor to disclose, as applicable, a credit score it used in taking adverse action along with related information, including up to four key factors that adversely affected the consumer's credit score (or up to five factors if the number of inquiries made with respect to that consumer report is a key factor). Disclosing the key factors that adversely affected the consumer's credit score does not satisfy the ECOA requirement to disclose specific reasons for denying or taking other adverse action on an application or extension of credit.'').

[6] 12 CFR 1002.9(b)(2).

[7] 12 CFR part 1002 (supp. I), sec. 1002.9, para. 9(b)(1)–2. A creditor, however, ''need not describe how or why a factor adversely affected an applicant.'' 12 CFR part 1002 (supp. I), sec. 1002.9, para. 9(b)(1)–3.

[8] 12 CFR part 1002 (app. C), comment 4 (emphasis added). The sample forms are illustrative and may not be appropriate for all creditors. If a creditor chooses to use the checklist of reasons provided in one of the sample forms and if reasons commonly used by the creditor are not provided on the form, the creditor should modify the checklist by substituting or adding other reasons. 12 CFR part 1002 (app. C), comment 3.

[9] 12 CFR part 1002 (supp. I), sec. 1002.9, para. 9(b)(1)–4.

[10] *Fischl* v. *Gen. Motors Acceptance Corp.,* 708 F.2d 143, 146 (5th Cir. 1983); *see also id.* (calling these provisions ''[p]erhaps the most significant of the 1976 amendments to the ECOA'').

[11] *Treadway* v. *Gateway Chevrolet Oldsmobile, Inc.,* 362 F.3d 971, 977–78 (7th Cir. 2004) (quoting *Fischl,* 708 F.2d at 146); *see also* S. Rep. 94–589, 94th Cong., 2d Sess., at 4, *reprinted in* 1976 U.S.S.C.A.N. 403, 406 (calling the notice requirement ''a strong and necessary adjunct to the antidiscrimination purpose of the legislation'').

[12] S. Rep. 94–589, 94th Cong., 2d Sess., at 4, *reprinted in* 1976 U.S.S.C.A.N. 403, 406.

[13] *Id.*

[14] S. Rep. No. 94–589, at 4, 7 (1976).

[15] 15 U.S.C. 1691(d)(2)(A), (B); 12 CFR 1002.9(a)(2)(i), (ii).

[16] 12 CFR 1002.9(b)(2).

Currency, the Board of Governors of the Federal Reserve System, and the National Credit Union Administration. *See, e.g.,* 12 U.S.C. 5516(d), 5581(c)(2) (exclusive enforcement authority for banks and credit unions with $10 billion or less in assets). Some Federal consumer financial laws are also enforceable by other Federal agencies, including the Department of Justice and the Federal Trade Commission, the Farm Credit Administration, the Department of Transportation, and the Department of Agriculture. In addition, some of these laws provide for private enforcement.

Consumer Financial Protection Circulars are intended to promote consistency in approach across the various enforcement agencies and parties, pursuant to the CFPB's statutory objective to ensure Federal consumer financial law is enforced consistently. 12 U.S.C. 5511(b)(4).

Consumer Financial Protection Circulars are also intended to provide transparency to partner agencies regarding the CFPB's intended approach when cooperating in enforcement actions. *See, e.g.,* 12 U.S.C. 5552(b) (consultation with CFPB by State attorneys general and regulators); 12 U.S.C. 5562(a) (joint investigatory work between CFPB and other agencies).

Consumer Financial Protection Circulars are general statements of policy under the Administrative Procedure Act. 5 U.S.C. 553(b). They provide background information about applicable law, articulate considerations relevant to the Bureau's exercise of its authorities, and, in the interest of maintaining consistency, advise other parties with authority to enforce Federal consumer financial law. They do not restrict the Bureau's exercise of its authorities, impose any legal requirements on external parties, or create or confer any rights on external parties that could be enforceable in any administrative or civil proceeding. The CFPB Director is instructing CFPB staff as described herein, and the CFPB will then make final decisions on individual matters based on an assessment of the factual record, applicable law, and factors relevant to prosecutorial discretion.

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2022–12729 Filed 6–13–22; 8:45 am]

BILLING CODE 4810–AM–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Chapter X

Consumer Financial Protection Circular 2022–02: Deceptive Representations Involving the FDIC's Name or Logo or Deposit Insurance

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Consumer financial protection circular.

SUMMARY: The Consumer Financial Protection Bureau (Bureau or CFPB) has issued Consumer Financial Protection Circular 2022–02, titled, ''Deceptive representations Involving the FDIC's Name or Logo or Deposit Insurance.'' In this circular, the Bureau responds to the question, ''When do representations involving the name or logo of the Federal Deposit Insurance Corporation (FDIC) or about deposit insurance constitute a deceptive act or practice in violation of the Consumer Financial Protection Act (CFPA)?''

DATES: The Bureau released this circular on its website on May 17, 2022.

ADDRESSES: Enforcers, and the broader public, can provide feedback and comments to *Circulars@cfpb.gov.*

FOR FURTHER INFORMATION CONTACT: Brad Lipton, Senior Counsel, Legal Division, at (202) 435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

Question Presented

When do representations involving the name or logo of the Federal Deposit Insurance Corporation (FDIC) or about deposit insurance constitute a deceptive act or practice in violation of the Consumer Financial Protection Act (CFPA)?

Response

Covered persons or service providers likely violate the CFPA's prohibition on deception if they misuse the name or logo of the FDIC or engage in false advertising or make misrepresentations to consumers about deposit insurance, regardless of whether such conduct (including the misrepresentation of insured status) is engaged in knowingly. Representations about deposit insurance may be particularly relevant with respect to new financial products or services, especially those involving new technologies such as digital assets, including crypto-assets.

Analysis

The Bureau administers a number of laws and regulations relating to the offering or providing of deposit accounts, including these provisions:[1]

- The Truth in Savings Act and its implementing regulation (Regulation DD), which enable consumers to make informed decisions about their accounts at depository institutions through the use of uniform disclosures;[2]
- The Electronic Fund Transfer Act and its implementing regulation (Regulation E), which protect consumers engaging in electronic fund transfers and remittance transfers;[3]
- Portions of the Federal Deposit Insurance Act (FDI Act) and its implementing regulations, which require depository institutions lacking Federal deposit insurance to make certain disclosures;[4]
- The CFPA, which, among other things, prohibits unfair, deceptive, or abusive acts or practices.[5]

Deposit insurance has long been a means to promote confidence in the banking system. The most common form of deposit insurance is administered by the Federal Deposit Insurance Corporation (FDIC).[6] The FDIC insures deposits at FDIC-insured banks and savings associations up to the maximum deposit insurance amount, currently $250,000, per depositor, per FDIC-insured bank, for each account ownership category.[7]

Representations about deposit insurance may be particularly relevant with respect to new financial products or services, especially those involving new technologies such as digital assets, including crypto assets. New technologies may yield significant benefits for consumers, workers, and small businesses. Nonetheless, especially with respect to new

[1] *See* 12 U.S.C. 5481(12), (14), 5511.

[2] *See* 12 U.S.C. 4301–4313; 12 CFR pt. 1030; CFPB Exam Handbook, at TISA 1, *https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual.pdf.*

[3] *See* 15 U.S.C. 1693–1693r; 12 CFR pt. 1005; CFPB Exam Handbook, at EFTA 1, *https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual.pdf.*

[4] *See* 12 U.S.C. 1831t(b)–(f); 12 CFR pt. 1009.

[5] *See* 12 U.S.C. 5531, 5536; CFPB Exam Handbook, at UDAAP 1, *https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual.pdf.*

[6] Additionally, accounts at federally insured credit unions are insured through the National Credit Union Share Insurance Fund (NCUSIF). *See* NCUA, *How Your Accounts are Federally Insured* (Feb. 2018), *https://www.ncua.gov/files/publications/guides-manuals/NCUAHowYourAcctInsured.pdf.*

[7] *See* FDIC, *Your Insured Deposits,* at 3 (Jan. 2020), *https://www.fdic.gov/resources/deposit-insurance/brochures/documents/your-insured-deposits-english.pdf.*

Tab 10

Circular 2022-02: Deceptive Representations Involving the FDIC's Name or Logo or Deposit Insurance, 87 Fed. Reg. 35866 (June 14, 2022).

CFPB Takes Action to Protect Depositors from False Claims About FDIC Insurance

FDIC takes parallel action to combat misrepresentations

MAY 17, 2022

Washington, D.C. – The Consumer Financial Protection Bureau (CFPB) released an enforcement memorandum today that addresses prohibited practices on claims about Federal Deposit Insurance Corporation (FDIC) insurance. Specifically, firms cannot misuse the name or logo of the FDIC or make deceptive representations about deposit insurance. The issue has taken on renewed importance with the emergence of financial technologies – such as crypto-assets, including stablecoins – and the risks posed to consumers if they are lured to these or other financial products or services through misrepresentations or false advertising.

"People know and trust the FDIC name and logo, and firms must not prey on that trust by making deceptive representations about deposit insurance," said CFPB Director Rohit Chopra. "Companies undermine competition, erode confidence in the deposit insurance system, and threaten our hard-earned savings when they engage in false marketing or advertising."

The Consumer Financial Protection Act prohibits deceptive acts and practices, including deceptive representations involving the name or logo of the FDIC or deposit insurance, by covered firms. Deposit insurance has long been a means to promote confidence in the banking system, and misrepresentation of those protections undermines consumer confidence and market competition. The most common form of deposit insurance is administered by the FDIC. Currently, the FDIC insures deposits at FDIC-insured banks and savings associations up to $250,000 per depositor, per FDIC-insured bank, for each account ownership category.

The *Consumer Financial Protection Circular* released today provides guidance to consumer protection enforcers that covered firms likely violate the Consumer Financial Protection Act's prohibition on deception if they misuse the name or logo of the FDIC or engage in false advertising or make material misrepresentations to the public about deposit insurance, regardless of whether such conduct (including the misrepresentation of insured status) is engaged in knowingly. The Consumer Financial Protection Act is enforced by the CFPB, banking regulators, and the states.

Specifically, the *Circular* emphasizes that:

- **Misrepresenting the FDIC logo or name will typically be a material misrepresentation.** Material misrepresentations are deceptive practices in violation of the Consumer Financial Protection Act. Representations made by covered firms to consumers about FDIC insurance will typically be material. The misuse of the name or logo of the FDIC or engagement in false advertising or making misrepresentations to consumers about deposit insurance, regardless of whether such conduct is engaged in knowingly, is likely deceptive.
- **Misrepresentation or misuse of the FDIC name or logo harms customers and puts them at significant risk of unexpected losses.** Customers can be at risk of loss if they discover their assets are not insured during a time of financial distress. Because of their relatively recent entrance into the consumer marketplace, emerging financial products and services--such as digital assets, including crypto-assets--may present particularly acute risks to consumers. Claims that financial products or services are "regulated" by the FDIC or "insured" or "eligible for" FDIC insurance are likely deceptive if those claims expressly or implicitly indicate that the product or service is FDIC-insured when that is not in fact the case.
- **Misuse of the FDIC name or logo harms honest companies.** A covered firm deceptively advertising that its products or services are FDIC-insured may convince individuals to purchase that firm's products or services when the individuals may have otherwise selected similar products or services from one of the firm's competitors engaged in honest advertising and marketing.

The *Consumer Financial Protection Circular* was issued in connection with the FDIC's adoption of a regulation implementing a statutory provision that prohibits any person or organization from engaging in false advertising or misusing the name or logo of the FDIC and from making knowing misrepresentations about the extent or manner of FDIC deposit insurance. The CFPB will exercise its authorities to ensure the public is protected from risks and harms that arise when firms deceptively use the FDIC logo or name or make deceptive misrepresentations about deposit insurance, regardless of whether those misrepresentations are made knowingly.

Read the Statement of CFPB Director Chopra, Member, FDIC Board of Directors, on the Final Rule Regarding False Advertising, Misrepresentations of Insured Status, and Misuse of the FDIC's Name or Logo. (cfpb.gov/about-us/newsroom/statement-of-cfpb-director-rohit-chopra-fdic-board-member-final-rule-regarding-false-advertising-misrepresentations-of-insured-status-and-misuse-of-the-fdics-name-or-logo/)

Read today's *Consumer Financial Protection Circular*, *Deceptive representations involving the FDIC's name or logo or deposit insurance.* (cfpb.gov/compliance/circulars/circular-2022-02-deception-representations-involving-the-fdics-name-or-logo-or-deposit-insurance/)

Read the CFPB blog, *CFPB launches new system to promote consistent enforcement of consumer financial protections*, to learn more about *Consumer Financial Protection*

Circulars. (https://www.consumerfinance.gov/about-us/blog/cfpb-launches-new-system-to-promote-consistent-enforcement-of-consumer-financial-protections/)

Consumers can submit complaints about deposit products, or other consumer financial products or services, by visiting the CFPB's website (https://www.consumerfinance.gov/complaint/) or by calling (855) 411-CFPB (2372).

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit consumerfinance.gov (cfpb.gov/).

Topics

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Currency, the Board of Governors of the Federal Reserve System, and the National Credit Union Administration. *See, e.g.,* 12 U.S.C. 5516(d), 5581(c)(2) (exclusive enforcement authority for banks and credit unions with $10 billion or less in assets). Some Federal consumer financial laws are also enforceable by other Federal agencies, including the Department of Justice and the Federal Trade Commission, the Farm Credit Administration, the Department of Transportation, and the Department of Agriculture. In addition, some of these laws provide for private enforcement.

Consumer Financial Protection Circulars are intended to promote consistency in approach across the various enforcement agencies and parties, pursuant to the CFPB's statutory objective to ensure Federal consumer financial law is enforced consistently. 12 U.S.C. 5511(b)(4).

Consumer Financial Protection Circulars are also intended to provide transparency to partner agencies regarding the CFPB's intended approach when cooperating in enforcement actions. *See, e.g.,* 12 U.S.C. 5552(b) (consultation with CFPB by State attorneys general and regulators); 12 U.S.C. 5562(a) (joint investigatory work between CFPB and other agencies).

Consumer Financial Protection Circulars are general statements of policy under the Administrative Procedure Act. 5 U.S.C. 553(b). They provide background information about applicable law, articulate considerations relevant to the Bureau's exercise of its authorities, and, in the interest of maintaining consistency, advise other parties with authority to enforce Federal consumer financial law. They do not restrict the Bureau's exercise of its authorities, impose any legal requirements on external parties, or create or confer any rights on external parties that could be enforceable in any administrative or civil proceeding. The CFPB Director is instructing CFPB staff as described herein, and the CFPB will then make final decisions on individual matters based on an assessment of the factual record, applicable law, and factors relevant to prosecutorial discretion.

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2022–12729 Filed 6–13–22; 8:45 am]

BILLING CODE 4810–AM–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Chapter X

Consumer Financial Protection Circular 2022–02: Deceptive Representations Involving the FDIC's Name or Logo or Deposit Insurance

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Consumer financial protection circular.

SUMMARY: The Consumer Financial Protection Bureau (Bureau or CFPB) has issued Consumer Financial Protection Circular 2022–02, titled, ''Deceptive representations Involving the FDIC's Name or Logo or Deposit Insurance.'' In this circular, the Bureau responds to the question, ''When do representations involving the name or logo of the Federal Deposit Insurance Corporation (FDIC) or about deposit insurance constitute a deceptive act or practice in violation of the Consumer Financial Protection Act (CFPA)? ''

DATES: The Bureau released this circular on its website on May 17, 2022.

ADDRESSES: Enforcers, and the broader public, can provide feedback and comments to *Circulars@cfpb.gov.*

FOR FURTHER INFORMATION CONTACT: Brad Lipton, Senior Counsel, Legal Division, at (202) 435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

Question Presented

When do representations involving the name or logo of the Federal Deposit Insurance Corporation (FDIC) or about deposit insurance constitute a deceptive act or practice in violation of the Consumer Financial Protection Act (CFPA)?

Response

Covered persons or service providers likely violate the CFPA's prohibition on deception if they misuse the name or logo of the FDIC or engage in false advertising or make misrepresentations to consumers about deposit insurance, regardless of whether such conduct (including the misrepresentation of insured status) is engaged in knowingly. Representations about deposit insurance may be particularly relevant with respect to new financial products or services, especially those involving new technologies such as digital assets, including crypto-assets.

Analysis

The Bureau administers a number of laws and regulations relating to the offering or providing of deposit accounts, including these provisions: [1]

- The Truth in Savings Act and its implementing regulation (Regulation DD), which enable consumers to make informed decisions about their accounts at depository institutions through the use of uniform disclosures; [2]
- The Electronic Fund Transfer Act and its implementing regulation (Regulation E), which protect consumers engaging in electronic fund transfers and remittance transfers; [3]
- Portions of the Federal Deposit Insurance Act (FDI Act) and its implementing regulations, which require depository institutions lacking Federal deposit insurance to make certain disclosures; [4]
- The CFPA, which, among other things, prohibits unfair, deceptive, or abusive acts or practices.[5]

Deposit insurance has long been a means to promote confidence in the banking system. The most common form of deposit insurance is administered by the Federal Deposit Insurance Corporation (FDIC).[6] The FDIC insures deposits at FDIC-insured banks and savings associations up to the maximum deposit insurance amount, currently $250,000, per depositor, per FDIC-insured bank, for each account ownership category.[7]

Representations about deposit insurance may be particularly relevant with respect to new financial products or services, especially those involving new technologies such as digital assets, including crypto assets. New technologies may yield significant benefits for consumers, workers, and small businesses. Nonetheless, especially with respect to new

[1] *See* 12 U.S.C. 5481(12), (14), 5511.

[2] *See* 12 U.S.C. 4301–4313; 12 CFR pt. 1030; CFPB Exam Handbook, at TISA 1, *https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual.pdf.*

[3] *See* 15 U.S.C. 1693–1693r; 12 CFR pt. 1005; CFPB Exam Handbook, at EFTA 1, *https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual.pdf.*

[4] *See* 12 U.S.C. 1831t(b)–(f); 12 CFR pt. 1009.

[5] *See* 12 U.S.C. 5531, 5536; CFPB Exam Handbook, at UDAAP 1, *https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual.pdf.*

[6] Additionally, accounts at federally insured credit unions are insured through the National Credit Union Share Insurance Fund (NCUSIF). *See* NCUA, *How Your Accounts are Federally Insured* (Feb. 2018), *https://www.ncua.gov/files/publications/guides-manuals/NCUAHowYourAcctInsured.pdf.*

[7] *See* FDIC, *Your Insured Deposits,* at 3 (Jan. 2020), *https://www.fdic.gov/resources/deposit-insurance/brochures/documents/your-insured-deposits-english.pdf.*

technologies, some market participants may seek to entice consumers to use their products or services by deceptively advertising that uninsured products or services are FDIC-insured. These misrepresentations disadvantage financial institutions that truthfully market FDIC-insured accounts to consumers. Such misrepresentations also harm consumers, who may find that their assets are not insured in a time of financial distress.

The CFPB is issuing this circular to emphasize that covered persons and service providers are required to comply with the CFPA with respect to representations to consumers involving the name or logo of the FDIC and representations about deposit insurance. The CFPB is issuing this circular in connection with the FDIC's adoption of a regulation on related subject matter involving section 18(a)(4) of the FDI Act, 12 U.S.C. 1828(a)(4).[8] Thus, the circular is particularly focused on misrepresentations to consumers about FDIC insurance. This circular describes certain misrepresentations to consumers that can violate the CFPA's prohibition on deceptive acts or practices in connection with a transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.[9] This circular notes that misrepresentations to consumers may violate the CFPA regardless of whether they are made knowingly.

Section 18(a)(4) of the FDI Act, 12 U.S.C. 1828(a)(4), prohibits any person from engaging in false advertising or misusing the name or logo of the FDIC to represent or imply that uninsured deposits are FDIC-insured and from making knowing misrepresentations about the extent or manner of deposit insurance provided to any deposits.[10] Under the CFPA, covered persons and service providers are prohibited from committing or engaging in an unfair, deceptive, or abusive act or practice in connection with the offering or provision of a consumer financial product or service.[11] A covered person includes any person that engages in offering or providing financial products or services for use by consumers primarily for personal, family, or household purposes.[12] Financial products or services are defined to include, for example, engaging in deposit-taking activities, transmitting or exchanging funds, or otherwise acting as a custodian of funds or any financial instrument for use by or on behalf of a consumer, as well as (subject to certain exceptions) selling, providing, or issuing stored value or payment instruments.[13]

Material misrepresentations are ''deceptive'' practices in violation of the CFPA.[14] Like FDI Act section 18(a)(4)(A), which prohibits any false advertising or misuse of the name or logo of the FDIC, but unlike under FDI Act section 18(a)(4)(B), which prohibits knowing misrepresentations regarding the extent or manner that deposits are insured, a misrepresentation to consumers may violate the CFPA's prohibition on deception regardless of whether the misrepresentation was made knowingly.[15] Additionally, disclaimers may not cure otherwise deceptive messages or practices.

Covered persons or service providers likely violate the CFPA's prohibition on deception if they misuse the name or logo of the FDIC or engage in false advertising or make misrepresentations to consumers about deposit insurance, regardless of whether such conduct (including the misrepresentation of insured status) is engaged in knowingly. Representations made by covered persons or service providers about FDIC insurance will typically be material.[16] Accordingly, for example, if a person engages in or purports to engage in deposit-taking activity by accepting (or offering to accept) funds for use by consumers, and that person misrepresents that such funds are insured by the FDIC, that person likely violates the CFPA's prohibition on deception, even if the misrepresentation was not made knowingly. Similarly deceptive are claims that consumer financial products or services are ''regulated'' by the FDIC or ''insured'' or ''eligible for'' FDIC insurance if those claims expressly or implicitly indicate that the product is FDIC-insured when that is not in fact the case. In particular, firms offering or providing digital assets, including crypto assets, may be particularly prone to making such deceptive claims to consumers about FDIC deposit insurance coverage.

About Consumer Financial Protection Circulars

Consumer Financial Protection Circulars are issued to all parties with authority to enforce Federal consumer financial law. The CFPB is the principal Federal regulator responsible for administering Federal consumer financial law, *see* 12 U.S.C. 5511, including the Consumer Financial Protection Act's prohibition on unfair, deceptive, and abusive acts or practices, 12 U.S.C. 5536(a)(1)(B), and 18 other ''enumerated consumer laws,'' 12 U.S.C. 5481(12). However, these laws are also enforced by State attorneys general and State regulators, 12 U.S.C. 5552, and prudential regulators including the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the National Credit Union Administration. *See, e.g.,* 12 U.S.C. 5516(d), 5581(c)(2) (exclusive enforcement authority for banks and credit unions with $10

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[8] *See* FDIC, *Final Rule on False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC's Name or Logo* (adopted May 17, 2022), *https://www.fdic.gov/news/board-matters/2022/2022-05-17-notice-dis-a-fr.pdf.*

[9] This *Circular* does not constitute an interpretation of section 18(a)(4) of the FDI Act, rules adopted thereunder, or the authorities of the FDIC.

[10] Specifically, FDI Act section 18(a)(4)(A) prohibits any person from representing or implying that any deposit liability, obligation, certificate, or share is insured or guaranteed by the FDIC if such deposit liability, obligation, certificate, or share is not insured or guaranteed by the FDIC (i) by using the terms ''Federal Deposit,'' ''Federal Deposit Insurance,'' ''Federal Deposit Insurance Corporation,'' any combination of such terms, or the abbreviation ''FDIC'' as part of the business name or firm name of any person, including any corporation, partnership, business trust, association, or other business entity; or (ii) by using such terms or any other terms, sign, or symbol as part of an advertisement, solicitation, or other document. 12 U.S.C. 1828(a)(4)(A). FDI Act section 18(a)(4)(B) prohibits any person from knowingly misrepresenting (i) that any deposit liability, obligation, certificate, or share is insured by the FDIC if such deposit liability, obligation, certificate, or share is not so insured; or (ii) the extent to which or the manner in which any deposit liability, obligation, certificate, or share is insured by the FDIC if such deposit liability, obligation, certificate, or share is not so insured to the extent or in the manner represented. 12 U.S.C. 1828(a)(4)(B).

[11] 12 U.S.C. 5531, 5536.

[12] 12 U.S.C. 5481(5), (6).

[13] 12 U.S.C. 5481(15)(A)(iv), (v); *see also* 12 U.S.C. 5481(8).

[14] *See, e.g., CFPB* v. *Gordon,* 819 F.3d 1179, 1192–93 (9th Cir. 2016).

[15] *See, e.g., FTC* v. *Verity Int'l, Ltd.,* 443 F.3d 48, 63 (2d Cir. 2006) (''The deception need not be made with intent to deceive. . . .''); *FTC* v. *Bay Area Bus. Council, Inc.,* 423 F.3d 627, 635 (7th Cir. 2005) (''The FTC is not, however, required to prove intent to deceive.''); *FTC* v. *Freecom Communications, Inc.,* 401 F.3d 1192, 1204 n.7 (10th Cir. 2005) (''Unlike the elements of common law fraud, the FTC need not prove scienter, reliance, or injury to establish a [section] 5 violation.'').

[16] Certain categories of information are presumed to be material. In general, information about the central characteristics of a consumer financial product or service—such as costs, benefits, or restrictions on the use or availability—is presumed to be material. Express claims made with respect to a consumer financial product or service are presumed material. Implied claims are presumed to be material when evidence shows that the institution intended to make the claim (even though intent to deceive is not necessary for deception to exist). Omissions will be presumed to be material when the financial institution knew or should have known that the consumer needed the omitted information to evaluate the product or service. *See* CFPB Exam Handbook, at UDAAP 7, *https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual.pdf.*

billion or less in assets). Some Federal consumer financial laws are also enforceable by other Federal agencies, including the Department of Justice and the Federal Trade Commission, the Farm Credit Administration, the Department of Transportation, and the Department of Agriculture. In addition, some of these laws provide for private enforcement.

Consumer Financial Protection Circulars are intended to promote consistency in approach across the various enforcement agencies and parties, pursuant to the CFPB's statutory objective to ensure Federal consumer financial law is enforced consistently. 12 U.S.C. 5511(b)(4).

Consumer Financial Protection Circulars are also intended to provide transparency to partner agencies regarding the CFPB's intended approach when cooperating in enforcement actions. *See, e.g.,* 12 U.S.C. 5552(b) (consultation with CFPB by State attorneys general and regulators); 12 U.S.C. 5562(a) (joint investigatory work between CFPB and other agencies).

Consumer Financial Protection Circulars are general statements of policy under the Administrative Procedure Act. 5 U.S.C. 553(b). They provide background information about applicable law, articulate considerations relevant to the Bureau's exercise of its authorities, and, in the interest of maintaining consistency, advise other parties with authority to enforce Federal consumer financial law. They do not restrict the Bureau's exercise of its authorities, impose any legal requirements on external parties, or create or confer any rights on external parties that could be enforceable in any administrative or civil proceeding. The CFPB Director is instructing CFPB staff as described herein, and the CFPB will then make final decisions on individual matters based on an assessment of the factual record, applicable law, and factors relevant to prosecutorial discretion.

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2022–12728 Filed 6–13–22; 8:45 am]

BILLING CODE 4810–AM–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Chapter X

Consumer Financial Protection Circular 2022–01: System of Consumer Financial Protection Circulars to Agencies Enforcing Federal Consumer Financial Law

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Consumer financial protection circular.

SUMMARY: The Consumer Financial Protection Bureau (Bureau or CFPB) has issued Consumer Financial Protection Circular 2022–01, titled, ''System of Consumer Financial Protection Circulars to Agencies Enforcing Federal Consumer Financial Law.'' In this circular, the Bureau outlines its efforts to promote consistency among enforcers and fair competition in the market by launching a new system to provide guidance to other agencies with consumer financial protection responsibilities on how the CFPB intends to enforce Federal consumer financial law.

DATES: The Bureau released this circular on its website on May 16, 2022.

ADDRESSES: Enforcers, and the broader public, can provide feedback and comments to *Circulars@cfpb.gov.*

FOR FURTHER INFORMATION CONTACT: Brian Shearer, Senior Advisor, Office of the Director; Brad Lipton, Senior Counsel, Legal Division, at (202) 435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION: The CFPB will issue *Consumer Financial Protection Circulars* to the broad set of government agencies responsible for enforcing Federal consumer financial law.

The CFPB is the principal Federal regulator responsible for administering the Federal consumer financial laws, *see* 12 U.S.C. 5511, including the Consumer Financial Protection Act's prohibition on unfair, deceptive, and abusive acts or practices,[1] and eighteen other ''enumerated consumer laws.''[2] However, the CFPB is not the only enforcer of these laws; enforcement responsibility is spread among a large set of State and Federal government agencies. This includes, most notably, State attorneys general and State regulators[3] and prudential regulators such as the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the National Credit Union Administration.[4] Some Federal consumer financial laws are also enforceable by other Federal agencies, including the Department of Justice, the Federal Trade Commission, the Farm Credit Administration, the Department of Transportation, and the Department of Agriculture. In addition, some of these laws provide for private enforcement.

Given the broad variety of agencies responsible for enforcing Federal consumer financial law, there is a risk that companies might encounter inconsistent enforcement strategies and approaches. One of the CFPB's five statutory objectives is to ensure Federal consumer financial law is enforced consistently regardless of the status of a person as a chartered bank or nonbank.[5] Many entities are subject to the jurisdiction of multiple agencies, and to maintain certainty of expectations for those companies with multiple regulators, it is important for State and Federal government agencies to consistently enforce the laws that the CFPB administers. Consistency is also imperative to creating a level playing field between companies that compete in the same market but are subject to the jurisdiction of different enforcers and *Consumer Financial Protection Circulars* will provide transparency to partner agencies regarding the CFPB's intended approach when cooperating in enforcement actions.

As described more fully below, *Consumer Financial Protection Circulars* will be policy statements under the Administrative Procedure Act and will be released publicly to increase transparency for the benefit of the public and regulated entities. *Consumer Financial Protection Circulars* will provide background information about applicable law, articulate considerations relevant to the CFPB's exercise of its authorities and advise other parties with authority to enforce Federal consumer financial law. The Director of the CFPB will authorize issuance of each *Consumer Financial Protection Circular,* and the CFPB will publish them on its website and in the **Federal Register**.

The CFPB is beginning to identify a number of issues that would benefit from clear and consistent enforcement, and the CFPB intends to issue new *Consumer Financial Protection Circulars* to advance these goals. The

[1] 12 U.S.C. 5536(a)(1)(B).

[2] 12 U.S.C. 5481(12).

[3] 12 U.S.C. 5552.

[4] *See, e.g.,* 12 U.S.C. 5516(d), 5581(c)(2).

[5] 12 U.S.C. 5511(b)(4).

Tab 10

Tab 11

Debt Collection Practices (Regulation F); Pay-to-Pay Fees, 87 Fed. Reg. 39733 (July 5, 2022).

CFPB Moves to Reduce Junk Fees Charged by Debt Collectors

Advisory opinion explains that most "pay-to-pay" fees charged by debt collectors violate federal law

JUN 29, 2022

Today, the Consumer Financial Protection Bureau (CFPB) issued an advisory opinion affirming that federal law often prohibits debt collectors from charging "pay-to-pay" fees. These charges, commonly described by debt collectors as "convenience fees," are imposed on consumers who want to make a payment in a particular way, such as online or by phone.

"Federal law generally forbids debt collectors from imposing extra fees not authorized by the original loan," said CFPB Director Rohit Chopra. "Today's advisory opinion shows that these fees are often illegal, and provides a roadmap on the fees that a debt collector can lawfully collect."

Debt collectors play a critical role in the consumer finance ecosystem, and the CFPB wants to ensure that law-abiding debt collectors are not disadvantaged by their competitors that impose unlawful fees. While most debt collectors allow consumers to make payments by phone or online without charging additional fees, some debt collectors impose additional fees for those types of payments. These debt collectors do so even if it is cheaper and less time-consuming for them to process phone and online payments than it is to process the paper-check payments delivered by mail or in person that debt collectors typically process for free. These types of fees are often illegal, and today's advisory opinion and accompanying analysis seek to stop these violations of law and assist consumers who are seeking to hold debt collectors accountable for illegal practices.

The advisory opinion interprets the language in Section 808 of the Fair Debt Collection Practices Act (FDCPA), which prohibits debt collectors from collecting any amount that is not expressly authorized by the underlying agreement or permitted by law. The FDCPA was passed in 1977 in response to widespread abuses in the debt collection industry, which Congress acknowledged was not subject to appropriate regulation under existing laws at the time. In 2010, the Consumer Financial Protection Act transferred primary responsibility for the FDCPA, including issuing regulations and ensuring compliance, to the CFPB.

The advisory opinion covers the following on debt collection practices:

- **Identifies scope of illegal fees:** The collection of any fee is prohibited unless the fee amount is in the consumer's contract or affirmatively permitted by law.
- **Affirms that silence in the law is not an authorization:** A debt collector may only collect a fee when it is authorized by the agreement creating the debt or is "permitted by law." Where no law expressly authorizes a fee, it is not "permitted by law," even if no law expressly prohibits it.
- **Clarifies role of payment processors:** Debt collectors violate the FDCPA when using payment processors who charge unauthorized fees at a minimum if the debt collector receives a kickback from the payment processor.

Read the advisory opinion (cfpb.gov/rules-policy/final-rules/advisory-opinion-on-debt-collectors-collection-of-pay-to-pay-fees/).

Today's advisory opinion continues the CFPB's focus on addressing junk fees in consumer finance. Last week, the CFPB announced a review (https://www.consumerfinance.gov/about-us/newsroom/cfpb-initiates-review-of-credit-card-company-penalty-policies-costing-consumers-12-billion-each-year/) of the credit card industry's penalty policies costing consumers over $12 billion each year, and published an Advance Notice of Proposed Rulemaking (https://www.consumerfinance.gov/rules-policy/rules-under-development/advance-notice-of-proposed-rulemaking-regarding-credit-card-late-fees-and-late-payments/) asking for information to help determine whether regulatory adjustments are needed to address late fees under the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act). In addition, the CFPB earlier this year sent out a request for information (https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-launches-initiative-to-save-americans-billions-in-junk-fees/) to hear from the public about potential junk fees. The comments that the Bureau received are available for public inspection here (https://www.regulations.gov/docket/CFPB-2022-0003/comments).

Consumers encountering problems with debt collectors charging unauthorized additional fees to make payments can submit a complaint with the CFPB online (https://www.consumerfinance.gov/complaint/) or by calling (855) 411-CFPB (2372).

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit consumerfinance.gov (cfpb.gov/).

Topics

- JUNK FEES (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=JUNK-FEES)

Rules and Regulations

Federal Register

Vol. 87, No. 127

Tuesday, July 5, 2022

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1006

Debt Collection Practices (Regulation F); Pay-to-Pay Fees

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Advisory opinion.

SUMMARY: Section 808(1) of the Fair Debt Collection Practices Act (FDCPA or Act) prohibits debt collectors from collecting any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless that amount is expressly authorized by the agreement creating the debt or permitted by law. The Consumer Financial Protection Bureau (CFPB) issues this advisory opinion to affirm that this provision prohibits debt collectors from collecting pay-to-pay or ''convenience'' fees, such as fees imposed for making a payment online or by phone, when those fees are not expressly authorized by the agreement creating the debt or expressly authorized by law. This advisory opinion also clarifies that a debt collector may also violate section 808(1) when the debt collector collects pay-to-pay fees through a third-party payment processor.

DATES: This advisory opinion is effective on July 5, 2022.

FOR FURTHER INFORMATION CONTACT: Sonya Pass, Senior Legal Counsel and Chief of Staff, Legal Division, (202) 435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Advisory Opinion

A. Background

Congress enacted the FDCPA in 1977 to ''eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.'' [1] The statute was a response to ''abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors,'' which Congress attributed to the ''inadequacy'' of ''existing laws and procedures,'' including State laws.[2] To remedy this, the FDCPA imposes various requirements and restrictions on debt collectors' debt collection activity. Relevant here is section 808, which provides that a ''debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt.'' [3] Section 808 then states that ''[w]ithout limiting the general application of the foregoing, the following conduct is a violation of this section'' and enumerates eight specifically prohibited practices, including the ''collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.'' [4]

At the time of the FDCPA's enactment, the Federal Trade Commission (FTC) was the agency that administered, and had primary responsibility for enforcing, the FDCPA.[5] Then, in 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act, which created the CFPB and granted it authority to administer, implement, and enforce the FDCPA.[6] Congress also provided the CFPB authority to prescribe rules under the FDCPA.[7] Pursuant to that authority, in 2020, the CFPB issued Regulation F, which implements the FDCPA, to prescribe rules governing the activities of debt collectors.[8] The CFPB implemented FDCPA section 808(1) at 12 CFR 1006.22(b) by ''generally mirror[ing] the statute, with minor wording and organizational changes for clarity.'' [9] In particular, the CFPB stated that the ''term 'any amount' includes any interest, fee, charge, or expense incidental to the principal obligation.'' [10]

In 2013, the CFPB launched its supervisory program over certain larger participants in the consumer debt collection market. Through these examinations, the CFPB ascertains compliance with the FDCPA, and now Regulation F, as well as other Federal consumer financial laws. The CFPB also periodically publishes *Supervisory Highlights* with anonymized findings and analysis from these supervisory examinations, as well as compliance bulletins to provide entities with guidance on complying with certain legal requirements.

For example, in 2017, the CFPB issued a compliance bulletin (Bulletin) that ''provides guidance to debt collectors about compliance with the [FDCPA] when assessing phone pay fees,'' a type of pay-to-pay fee.[11] The Bulletin summarizes CFPB staff's conclusion that, under section 808(1), debt collectors may collect such pay-to-pay fees only if the underlying contract or state law expressly authorizes those fees.[12] In particular, the Bulletin states that in at least one supervisory exam, CFPB examiners found that a debt collector ''violated [section 808(1)] when they charged fees for taking mortgage payments over the phone'' where the underlying contracts creating the debt did not expressly authorize collecting such fees and where the relevant State law did not ''expressly permit collecting such fees.'' [13]

[1] Public Law 95–109, sec. 802(e), 91 Stat. 874, 874 (codified at 15 U.S.C. 1692(e)).

[2] 15 U.S.C. 1692(a), (b). *See also* S. Rep. No. 95–382, at 2 (1977) (stating that ''debt collection abuse by third party debt collectors [was] a widespread and serious national problem,'' which Congress largely attributed to a ''lack of meaningful legislation on the State level'').

[3] 15 U.S.C. 1692f.

[4] 15 U.S.C. 1692f(1).

[5] *See* 15 U.S.C. 1692*l*(a) (2010).

[6] Public Law 111–203, sec. 1089, 124 Stat. 1376, 2093 (codified at 15 U.S.C. 1692*l*(b)(6)).

[7] 15 U.S.C. 1691*l*(d).

[8] *See* Debt Collection Practices (Regulation F), 85 FR 76734 (Nov. 30, 2020); Debt Collection Practices (Regulation F), 86 FR 5766 (Jan. 19, 2021).

[9] 85 FR 76734, 76833.

[10] *Id.* at 76833, 76892.

[11] CFPB Compliance Bulletin 2017–01, 82 FR 35936, 35936 (Aug. 2, 2017).

[12] *Id.* at 35938.

[13] *Id.* (explaining that the CFPB examiners had instructed the company to collect pay-by-phone fees only ''where expressly authorized by contract or state law''); *see also* CFPB: Fall 2014 Supervisory Highlights, at 7, *available at https://files.consumerfinance.gov/f/201410_cfpb_supervisory-highlights_fall-2014.pdf* (similar); CFPB: Fall 2015 Supervisory Highlights, at 20–21, *available at https://*

Continued

B. Coverage

This advisory opinion applies to debt collectors as defined in section 803(6) of the FDCPA and implemented in Regulation F, 12 CFR 1006.2(i). As used in this advisory opinion, pay-to-pay fees—sometimes called convenience fees—refers to fees incurred by consumers to make debt collection payments through a particular channel, such as over the telephone or online.

C. Legal Analysis

1. Any Amount

Section 808(1) of the FDCPA prohibits debt collectors, in relevant part, from ''collect[ing] . . . *any* amount (*including* any interest, fee, charge, or expense incidental to the principal obligation).'' [14] As the Supreme Court has explained, the ''word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.' '' [15] In addition, under its ordinary meaning, the term ''including'' typically indicates a partial list.[16] The CFPB interprets the words ''any'' and ''including'' as used in section 808(1) consistent with their ordinary meanings. Accordingly, the CFPB clarifies that FDCPA section 808(1) and Regulation F, 12 CFR 1006.22(b), apply to any amount collected by a debt collector in connection with the collection of a debt,[17] including, *but not limited to,* any interest, fee, charge, or expense that is incidental to the principal obligation.

Consistent with this interpretation, the CFPB further clarifies that pay-to-pay fees charged to consumers for accepting a consumer's payment on a debt through a particular payment channel are an ''amount'' within the meaning of FDCPA section 808(1) and Regulation F, 12 CFR 1006.22(b). The CFPB acknowledges that some courts have held otherwise, finding that pay-to-pay fees do not violate FDCPA section 808(1) because such fees are not ''incidental to the principal obligation.'' [18] But, as explained, the CFPB interprets section 808(1) to apply to ''any amount,'' even if such amount is not ''incidental to'' the principal obligation.[19]

2. Permitted by Law

Section 808(1) of the FDCPA prohibits, in relevant part, the collection of any amount ''unless such amount is expressly authorized by the agreement creating the debt or *permitted by law*.'' [20] The word ''permit'' is susceptible to multiple meanings, but it tends to refer to ''affirmative authorization,'' and the CFPB reads section 808(1) to use the word in that sense. Dictionaries provide that ''permit'' can mean either ''to consent to expressly or formally,'' suggesting affirmative authorization, or to ''allow'' or ''to acquiesce, by failure to prevent,'' suggesting that the lack of a prohibition is sufficient.[21] However, ''allow and permit have an important connotative difference. Allow . . . suggests merely the absence of opposition, or refraining from a proscription. In contrast, permit suggests affirmative sanction or approval.'' [22] Use of the word ''permit,'' rather than ''allow,'' therefore suggests that affirmative authorization, rather than a mere lack of a prohibition, is required. Furthermore, as the Supreme Court has instructed, ''words of a statute must be read in their context,'' [23] and here, ''permit'' is used not in isolation but as part of the phrase ''permitted by law.'' While in some contexts one may ''permit'' something by failing to prevent it, it is far less natural to understand ''permitted by law'' to mean ''permitted by the absence of any law prohibiting it.''

The CFPB therefore interprets FDCPA section 808(1) to prohibit a debt collector from collecting any amount unless such amount either is expressly authorized by the agreement creating the debt (and is not prohibited by law) or is expressly permitted by law. That is, the CFPB interprets FDCPA section 808(1) to permit collection of an amount only if: (1) the agreement creating the debt expressly permits the charge and some law does not prohibit it; or (2) some law expressly permits the charge, even if the agreement creating the debt is silent. The CFPB's interpretation of the phrase ''permitted by law'' applies to any ''amount'' covered under section 808(1), including pay-to-pay fees.[24]

Under the CFPB's interpretation, an amount is impermissible if both the agreement creating the debt and other law are silent. For example, under the CFPB's interpretation, amounts, including pay-to-pay fees, that are neither expressly authorized by the agreement creating the debt nor expressly authorized by law are impermissible under FDCPA section 808(1) and Regulation F, 12 CFR 1006.22(b), even if such amounts are the subject of a separate, valid agreement under State contract law.[25] Although some courts have adopted this ''separate agreement'' interpretation to permit debt collectors to collect, for example, certain pay-to-pay fees, the CFPB declines to do so. Such a reading would render the part of section 808(1) that refers to amounts ''expressly authorized by the agreement creating the debt'' superfluous [26] because a lawful

files.consumerfinance.gov/f/201510_cfpb_supervisory-highlights.pdf (similar).

[14] 15 U.S.C. 1692f(1) (emphasis added). *See also* 12 CFR 1006.22(b).

[15] *Ali* v. *Fed. Bur. of Prisons,* 552 U.S. 214, 219 (2008) (quoting *United States* v. *Gonzales,* 520 U.S. 1, 5 (1997), in turn quoting Webster's Third New International Dictionary 97 (1976)).

[16] *Include,* Black's Law Dictionary (11th ed. 2019). Additionally, as the Supreme Court has stated, ''including'' is ''not [a term] of all-embracing definition, but connotes simply an illustrative application of the general principle.'' *Fed. Land Bank of St. Paul* v. *Bismarck Lumber Co.,* 314 U.S. 95, 100 (1941); *see also Arizona State Bd. For Charter Schools* v. *Dep't of Educ.,* 464 F.3d 1003, 1007 (9th Cir. 2006) (''[T]he word 'including' is ordinarily defined as a term of illustration, signifying that what follows is an example of the preceding principle.''); *United States* v. *Hawley,* 919 F.3d 252, 256 (4th Cir. 2019) (explaining that ''including'' ''is an introductory term for an incomplete list of examples'').

[17] The CFPB notes that, if a debt collector is engaged in a truly separate transaction and is not collecting or attempting to collect a debt covered by the FDCPA, section 808(1) does not apply.

[18] *See, e.g., Flores* v. *Collection Consultants of Cal.,* No. SA CV 14–0771–DOC, 2015 WL 4254032, at 10 (C.D. Cal. Mar. 20, 2015); *Shula* v. *Lawent,* 359 F.3d 489, 492–93 (7th Cir. 2004). In *Shula,* it does not appear that that court was presented with the question whether ''any amount'' included more than ''fees . . . incidental to the principal obligation''; nor did that court analyze the issue. For the reasons stated above, the CFPB disagrees with that decision to the extent it suggested that section 808(1) applies only to amounts that are incidental to the principal obligation.

[19] Section 808(1) of the FDCPA and Regulation F, 12 CFR 1006.22(b), also covers pay-to-pay fees for the separate reason that such fees are ''incidental to'' the principal obligation. While the FDCPA does not define ''incidental,'' it is ordinarily understood as ''related to,'' *see* Collins English Dictionary (12th ed. 2014), or ''[s]ubordinate to something of greater importance,'' *see* Black's Law Dictionary (11th ed. 2019). Pay-to-pay fees meet these definitions: They are ''related to'' the principal obligation because they are fees charged for paying the principal obligation. Indeed, if the principal obligation did not exist, then neither would the pay-to-pay fee. These fees are also generally minor in comparison to the outstanding debt and are therefore ''subordinate to'' the principal obligation.

[20] 15 U.S.C. 1692f(1) (emphasis added). *See also* 12 CFR 1006.22(b).

[21] *Permit,* Webster's Third New International Dictionary 1683 (1976); *see also Permit,* Black's Law Dictionary (5th ed. 1979) (defining ''permit'' as ''[t]o suffer, allow, consent, let; to give leave or license; to acquiesce, by failure to prevent, or to expressly assent or agree to the doing of an act'').

[22] Garner's Dictionary of Legal Usage 46 (3d ed. 2011); *see also Alexander* v. *Carrington Mortgage Services,* 23 F.4th 370, 377 (4th Cir. 2022) (holding ''permitted by law'' requires affirmative authorization).

[23] *King* v. *Burwell*, 576 U.S. 473, 492 (2015).

[24] Note that, even if pay-to-pay fees are expressly authorized in the underlying agreement or permitted by State law, debt collectors must still take care to comply with other laws, including other provisions of the FDCPA and the Consumer Financial Protection Act's prohibition on unfair, deceptive, or abusive acts or practices, when assessing pay-to-pay fees.

[25] The CFPB acknowledges that some district courts have held otherwise. *See, e.g., Thomas-Lawson* v. *Carrington Mortg. Servs., LLC,* No. 2:20–cv–07301–ODW, 2021 WL 1253578 (C.D. Cal. Apr. 5, 2021), *appeal pending,* No. 21–55459 (9th Cir.).

[26] *See Obduskey* v. *McCarthy & Holthus LLP,* 139 S. Ct. 1029, 1037 (2019) (refusing to interpret the

agreement creating the debt is, by definition, an agreement valid under State contract law.[27] In addition, the separate agreement interpretation ignores section 808(1)'s focus on the ''amount'' being ''expressly authorized by the agreement creating the debt'' or ''permitted by law.'' [28] Under section 808(1), it is not enough for the agreement to be ''permitted by law''; rather, the ''amount'' itself must be. Contract law standing alone does not provide for the collection of any specific amounts—and no principle of contract law says debt collectors may collect pay-to-pay fees.[29] Thus, while it may have been permissible under contract law for a debt collector to enter into separate agreements with consumers, contract law does not permit the ''amount'' at issue, *i.e.,* the pay-to-pay fees.

The CFPB's interpretation of ''permitted by law'' in FDCPA section 808(1) is consistent with the previous interpretation in a CFPB compliance bulletin as discussed in part I.A., as well as with the prior interpretation of FTC staff and the holdings of the majority of courts to address the issue.[30] In particular, in 1988, FTC staff issued Commentary that set forth ''staff interpretations'' of the FDCPA.[31] As relevant here, FTC staff stated that, under section 808(1), a ''debt collector may attempt to collect a fee or charge in addition to the debt if . . . the contract [creating the debt] is silent but the charge is otherwise expressly permitted by state law.'' [32] Conversely, FTC staff stated that ''a debt collector may not collect an additional amount if . . . the contract does not provide for collection of the amount and state law is silent.'' [33]

The CFPB's interpretation is also consistent with the FDCPA's statutory purposes. As noted in part I.A, Congress passed the FDCPA because it found that existing laws and procedures, including at the state level, were inadequate to protect consumers. Given this concern, it would be particularly unnatural to understand ''permitted by law'' to mean ''permitted because no law prohibits it.'' Accordingly, the CFPB interprets FDCPA section 808(1) and Regulation F, 12 CFR 1006.22(b), to prohibit debt collectors from collecting any amount, including any pay-to-pay fee, not expressly authorized in the agreement creating the debt unless there is some law that affirmatively authorizes the collection of that amount.

3. Payment Processors

Debt collectors may violate FDCPA section 808(1) and Regulation F, 12 CFR 1006.22(b), when using payment processors who charge consumers pay-to-pay fees. For instance, a debt collector collects an amount under section 808(1) at a minimum when a third-party payment processor collects a pay-to-pay fee from a consumer and remits to the debt collector any amount in connection with that fee, whether in installments or in a lump sum.[34]

II. Regulatory Matters

This is an advisory opinion issued under the CFPB's authority to interpret the FDCPA, including under section 1022(b)(1) of the Consumer Financial Protection Act, which authorizes guidance as may be necessary or appropriate to enable the CFPB to administer and carry out the purposes and objectives of Federal consumer financial laws, such as the FDCPA.[35]

An advisory opinion is a type of interpretive rule. As an interpretive rule, this advisory opinion is exempt from the notice-and-comment rulemaking requirements of the Administrative Procedure Act.[36] Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.[37] The CFPB has also determined that this advisory opinion does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.[38]

Pursuant to the Congressional Review Act,[39] the CFPB will submit a report containing this advisory opinion and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to the opinion's published effective date. The Office of Information and Regulatory Affairs has designated this advisory opinion as not a ''major rule'' as defined by 5 U.S.C. 804(2).

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2022–14230 Filed 7–1–22; 8:45 am]

BILLING CODE 4810–AM–P

FDCPA in a way that would render a provision ''superfluous'').

[27] *Accord Alexander,* 23 F.4th at 379 (rejecting the separate agreement interpretation in part because it would render section 808(1)'s other prong superfluous). The separate agreement interpretation also would conflict with the FDCPA's use of the phrase ''expressly authorized,'' since general principles of State contract law allow parties to agree to express or implied terms as part of any agreement. *See* Restatement (Second) of Contracts § 4 cmt. a (1981). If general principles of contract law counted as a ''law'' that ''permitted'' the collection of amounts, debt collectors would be free to collect not only those amounts authorized by separate agreements, but also to collect amounts that are only implicitly authorized by the agreement creating the debt—further rendering section 808(1)'s ''express'' requirement meaningless.

[28] *See Johnson* v. *Riddle,* 305 F.3d 1107, 1118 (10th Cir. 2002) (''The statute does not ask whether [the debt collector's] actions were permitted by law . . . , it asks whether the *amount* he sought to collect was permitted by law.'' (emphasis in original)).

[29] While a *contract* might, consistent with contract law, permit an amount, section 808(1) only permits collecting amounts authorized *by contract* when the amount is expressly authorized by the contract ''creating the debt.''

[30] *See, e.g., Alexander,* 23 F.4th at 376–77 (holding, in a case regarding pay-to-pay fees, that '' 'permitted by law' requires affirmative sanction or approval''); *Seeger* v. *AFNI, Inc.,* 548 F.3d 1107, 1111, 1112 (7th Cir. 2008) (finding that, to be entitled to collect a fee, debt collectors ''must show that the fee is either authorized by the governing contract or that it is permitted by Wisconsin law'' and that, in that case, that neither an agreement nor a law expressly permitting a collection fee existed); *Tuttle* v. *Equifax Check,* 190 F.3d 9, 13 (2d Cir. 1999) (explaining that if ''state law neither affirmatively permits nor expressly prohibits service charges, a service charge can be imposed only if the customer expressly agrees to it in the [underlying] contract'').

[31] *See* Staff Commentary on the Fair Debt Collection Practices Act, 53 FR 50097, 50101 (Dec. 13, 1988).

[32] *Id.* at 50108.

[33] *Id.*

[34] *See, e.g.,* Ballentine's Law Dictionary (3d ed. 2010) (defining ''collect'' as ''to receive payment''); *cf.* 15 U.S.C. 1692a(6) (defining debt collector to include persons who ''directly or indirectly'' collect debts).

[35] 12 U.S.C. 5512(b)(1); 5481(14); 5481(12)(H).

[36] 5 U.S.C. 553(b).

[37] 5 U.S.C. 603(a), 604(a).

[38] 44 U.S.C. 3501–3521.

[39] 5 U.S.C. 801 *et seq.*

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2022–0382; Project Identifier MCAI–2021–01452–T; Amendment 39–22099; AD 2022–13–13]

RIN 2120–AA64

Airworthiness Directives; Airbus SAS Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Airbus SAS Model A350–941 and –1041 airplanes. This AD was prompted by reports that passenger door stop screws were found with missing screw heads.

Tab 12

The Fair Credit Reporting Act's Limited Preemption of State Laws,
87 Fed. Reg. 41042 (July 11, 2022).

CFPB Affirms Ability for States to Police Credit Reporting Markets

The Fair Credit Reporting Act does not stop states from enacting laws to tackle credit reporting problems related to medical debt, tenant screening, and other consumer risks

JUN 28, 2022

Today, the Consumer Financial Protection Bureau (CFPB) issued an interpretive rule affirming states' abilities to protect their residents through their own fair credit reporting laws. With limited preemption exceptions, states have the flexibility to preserve fair and competitive credit reporting markets by enacting state-level laws that are stricter than the federal Fair Credit Reporting Act (FCRA).

"Given the intrusive surveillance that Americans face every day, it is critical that states can protect their citizens from abuse and misuse of data," said CFPB Director Rohit Chopra. "The legal interpretation issued today makes clear that federal law does not automatically hit delete on state data protections."

Enacted in 1970, the Fair Credit Reporting Act, among other things, defines the permissible uses of, and establishes guidelines for information included in, credit reports. It also creates a process for people to dispute information in their credit files.

The federal statute leaves states with the flexibility to consider and enact laws that reflect challenges and risks affecting their local economies and residents. For example, tenant screening reports (https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-to-stop-false-identification-by-background-screeners/) may contain questionable or incorrect information that impedes renters' access to housing. States are able to enact protections against abuse and misuse of data to mitigate these consequences.

Congress made clear that the Fair Credit Reporting Act preempts only narrow categories of state laws. As federal regulators learned from the 2007-2008 mortgage crisis and ensuing Great Recession, federal preemption of state laws can stop state regulators from identifying dangerous patterns and mitigating market risks. Accordingly, today's interpretive rule makes clear:

- **States retain broad authority to protect people from harm due to credit reporting issues:** For example, a state could forbid a credit reporting company from including information about a person's medical debt for a certain period of time after the debt was incurred.
- **State laws are not preempted unless they conflict with the Fair Credit Reporting Act or fall within narrow preemption categories enumerated within the statute:** Preemption under the Fair Credit Reporting Act is narrow and targeted. Nothing in the statute generally preempts state laws relating to the content or information contained in credit reports. It does not preempt, for instance, state laws governing whether eviction information or rental arrears appears in the content of credit reports.

Today's announcement is part of the CFPB's work to support the role of states to protect consumers and honest businesses. On May 19, the CFPB issued an interpretive rule (https://www.consumerfinance.gov/about-us/newsroom/cfpb-bolsters-enforcement-efforts-by-states/) that describes states' authorities to pursue lawbreaking companies and individuals under the Consumer Financial Protection Act. The CFPB will continue to consider other steps to promote state enforcement of fair credit reporting along with other parts of federal consumer financial protection law. These steps include consulting with states whenever interpretation of federal consumer financial protection law is relevant to a state regulatory or law enforcement matter, consistent with the State Official Notification Rule (https://files.consumerfinance.gov/f/201206_cfpb_final-rule_state-official-notification.pdf).

The issuance of today's rule arises from the Office of the New Jersey Attorney General notifying the CFPB of pending litigation that included an allegation the FCRA preempted a New Jersey consumer protection statute.

Read today's interpretive rule, *The Fair Credit Reporting Act's Limited Preemption of State Laws* (cfpb.gov/rules-policy/final-rules/the-fair-credit-reporting-acts-limited-preemption-of-state-laws/).

Consumers can submit credit reporting complaints, or complaints about other financial products or services, by visiting the CFPB's website (https://www.consumerfinance.gov/complaint/) or by calling (855) 411-CFPB (2372).

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit *consumerfinance.gov* (cfpb.gov/).

Topics

- FAIR LENDING (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=FAIR-LENDING)

- CREDIT REPORTS AND SCORES (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=CREDIT-REPORTS-AND-SCORES)

PRESS INFORMATION

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Go to press resources page (cfpb.gov/about-us/newsroom/press-resources/)

■ a. In paragraph (a), removing "§ 404.12(e)" and adding "§ 404.14(e)" in its place; and
■ b. In paragraph (c) introductory text, removing "§ 404.16(d)" and adding "§ 404.18(d)" in its place.

§ 404.17 [Amended]

■ 7. Amend newly redesignated § 404.17 in paragraph (b)(2)(iii) by removing "§ 404.17" and adding "§ 404.19" in its place.

§ 404.19 [Ameded]

■ 8. Amend newly redesignated § 404.19 in paragraph (a) introductory text by removing "§ 404.12(e)" and adding "§ 404.14(e)" in its place.

§ 404.20 [Amended]

■ 9. Amend newly redesignated § 404.20 as follows:
■ a. In paragraph (a), removing "§ 404.12(e)" and "§ 404.14(d) and (e)" and adding "§ 404.14(e)" and "§ 404.16(d) and (e)" in their places, respectively.
■ b. In paragraphs (c) introductory text and (e), removing "§ 404.12(e)" and adding "§ 404.14(e)" in its place.

§ 404.21 [Amended]

■ 10. Amend newly redesignated § 404.21 in paragraph (b) by removing "§ 404.14(d) and (e)" and "§ 404.12(e)" and adding "§ 404.16(d) and (e)" and "§ 404.14(e)" in their places, respectively.

§ 404.35 [Amended]

■ 11. Amend newly redesignated § 404.35 by removing "§ 404.32" and adding "§ 404.34" in its place.

Joyce B. Stone,
Assistant Corporate Secretary.

[FR Doc. 2022–14068 Filed 7–8–22; 8:45 am]
BILLING CODE 6690–01–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1022

The Fair Credit Reporting Act's Limited Preemption of State Laws

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Interpretive rule.

SUMMARY: States play an important role in the regulation of consumer reporting. State laws that are not "inconsistent" with the Fair Credit Reporting Act (FCRA) are generally not preempted by that statute. The FCRA also expressly preempts certain categories of State laws. This interpretive rule clarifies that FCRA's express preemption provisions have a narrow and targeted scope. States therefore retain substantial flexibility to pass laws involving consumer reporting to reflect emerging problems affecting their local economies and citizens. For example, if a State law were to forbid consumer reporting agencies from including information about medical debt, evictions, arrest records, or rental arrears in a consumer report (or from including such information for a certain period of time), such a law would generally not be preempted. Likewise, if a State law were to prohibit furnishers from furnishing such information to consumer reporting agencies, such a law would also not generally be preempted. Similarly, if a State law required that a consumer reporting agency provide information required by the FCRA at the consumer's requests in languages other than English, such a law would generally not be preempted.

DATES: This interpretive rule is effective on July 11, 2022.

FOR FURTHER INFORMATION CONTACT: Shiva Nagaraj, Senior Counsel, Legal Division, and Bradley Lipton, Senior Counsel, Legal Division, (202) 435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Fair Credit Reporting Act (FCRA)—which was enacted in 1970 and has since been amended several times—was intended by Congress to "ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy." *Safeco Ins. Co. of Am.* v. *Burr,* 551 U.S. 47, 52 (2007). The FCRA "imposes a host of requirements concerning the creation and use of consumer reports." *Spokeo, Inc.* v. *Robins,* 578 U.S. 330, 335 (2016). Among other things, the statute sets forth the permissible uses of consumer reports, establishes limits for information included in consumer reports, and creates a process for consumers to dispute information in their credit files.

In the Consumer Financial Protection Act of 2010, Congress granted the Consumer Financial Protection Bureau general rulemaking authority over the FCRA (except for certain provisions that are administered by other Federal agencies).[1] The Bureau also has authority to enforce the FCRA, along with other Federal regulators.[2]

States also play an important role in the regulation of consumer reporting. The FCRA itself grants States the authority to enforce the statute.[3] Additionally, in the wake of Congress's enactment of the FCRA, many States passed their own versions of the statute. States have continued to enact legislation regulating the conduct of consumer reporting agencies, furnishers, and users of consumer reports. In some cases, State legislation provides protections to consumers that go above and beyond the requirements of the FCRA.

These State statutes exist alongside the FCRA, which says that—subject to certain exceptions—it "does not annul, alter, affect, or exempt any person subject to [the FCRA] from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, or for the prevention or mitigation of identity theft, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency." [4] In other words, State laws that are not "inconsistent" with the FCRA—including State laws that are more protective of consumers than the FCRA—are generally not preempted.

The FCRA also expressly preempts certain categories of State laws. As relevant here, 15 U.S.C. 1681t(b) says that "[n]o requirement or prohibition may be imposed under the laws of any State with respect to any subject matter regulated under" certain sections or subsections of the FCRA:

- subsection (c) or (e) of section 1681b, relating to the prescreening of consumer reports;
- section 1681i, relating to the time by which a consumer reporting agency must take any action, including the provision of notification to a consumer or other person, in any procedure related to the disputed accuracy of information in a consumer's file, [with an exception for laws in effect on September 30, 1996];
- subsections (a) and (b) of section 1681m, relating to the duties of a person

[1] The Bureau is generally authorized to issue regulations as "necessary or appropriate to administer and carry out the purposes and objectives of [the FCRA], and to prevent evasions thereof or to facilitate compliance therewith." 15 U.S.C. 1681s(e)(1). The CFPA did not, however, transfer to the Bureau rulemaking authority for 15 U.S.C. 1681m(e) ("Red Flag Guidelines and Regulations Required"') and 15 U.S.C. 1681w ("'Disposal of Records").

[2] 15 U.S.C. 1681s(b).

[3] 15 U.S.C. 1681(c).

[4] 15 U.S.C. 1681t(a); *see also Davenport* v. *Farmers Ins. Group,* 378 F.3d 839, 842 (8th Cir. 2004) ("The FCRA makes clear that it is not intended to occupy the entire regulatory field with regard to consumer reports.").

who takes any adverse action with respect to a consumer;

- section 1681m(d), relating to the duties of persons who use a consumer report of a consumer in connection with any credit or insurance transaction that is not initiated by the consumer and that consists of a firm offer of credit or insurance;
- section 1681c, relating to information contained in consumer reports, [with an exception for laws in effect on September 30, 1996];
- section 1681s–2, relating to the responsibilities of persons who furnish information to consumer reporting agencies [with exceptions for certain enumerated State laws]
- section 1681g(e), relating to information available to victims under section 1681g(e);
- section 1681s–3, relating to the exchange and use of information to make a solicitation for marketing purposes;
- section 1681m(h), relating to the duties of users of consumer reports to provide notice with respect to terms in certain credit transactions;
- subsections (i) and (j) of section 1681c–1 relating to security freezes; or
- subsection (k) of section 1681c–1, relating to credit monitoring for active duty military consumers.

Similarly, 15 U.S.C. 1681t(b)(5) says that ''[n]o requirement or prohibition may be imposed under the laws of any State with respect to the conduct required by the specific provisions of'' certain sections or subsections of the FCRA:

- section 1681c(g);
- section 1681c–1;
- section 1681c–2;
- section 1681g(a)(1)(A);
- section 1681j(a);
- subsections (e), (f), and (g) of section 1681m;
- section 1681s(f);
- section 1681s–2(a)(6); or
- section 1681w.

This interpretive rule clarifies the preemptive scope of 15 U.S.C. 1681t(b), with a particular focus on 15 U.S.C. 1681t(b)(1) and (5), which have been the subject of recent legal challenges to State laws.[5] As 15 U.S.C. 1681t(b)(1) says, that provision preempts only those State laws ''with respect to any subject matter regulated under'' certain sections or subsections of the FCRA. Similarly, 15 U.S.C. 1681t(b)(5) preempts only those States law ''with respect to the conduct required by the specific provisions of'' certain sections or subsections of the FCRA. The term ''with respect to'' indicates that Congress intended these provisions to have a narrow sweep. As the Supreme Court has held in a similar context, ''with respect to'' means to ''concern.'' In other words, section 1681t(b)(1) does not preempt State laws unless they concern a subject matter regulated under the enumerated portions of the FCRA. Similarly, section 1681t(b)(5) does not preempt State laws unless they concern conduct required by the enumerated portions of the FCRA.

II. Analysis

The Supremacy Clause of the United States Constitution says that ''the Laws of the United States'' shall be ''the supreme Law of the Land . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.'' Art. VI, cl. 2. When a Federal statute includes a preemption clause—as the FCRA does—''[t]he purpose of Congress is the ultimate touchstone'' in interpreting such a clause. *Altria Grp., Inc.* v. *Good,* 555 U.S. 70, 76 (2008). ''Congressional intent, of course, primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it.'' *Medtronic, Inc.* v. *Lohr,* 518 U.S. 470, 486 (1996). Thus, any preemption analysis must ''focus on the plain wording of the clause.'' *Puerto Rico* v. *Franklin California Tax-Free Tr.,* 579 U.S. 115, 125 (2016).

Focusing on the plain text of sections 1681t(b)(1) and 1681t(b)(5), it is apparent that both provisions have a narrow and targeted scope.

A. Under 15 U.S.C. 1681t(b)(1), State Laws Are Not Preempted Unless They Are ''With Respect to Any Subject Matter Regulated Under'' Certain Sections or Subsections of the FCRA

Section 1681t(b)(1) has eleven subsections, each of which follows the same syntax. Each subsection preempts State laws ''with respect to any subject matter regulated under'' an enumerated part of the FCRA (*e.g.,* section 1681c). Following the enumerated section of the FCRA comes a parenthetical phrase beginning with ''relating to'' that describes or further narrows the section that has just been enumerated. For instance, section 1681(b)(1)(E) generally preempts State laws ''with respect to any subject matter regulated under section 1681c of this title, relating to information contained in consumer reports.'' Preemption under section 1681t(b)(1) thus depends on the meaning of both the ''with respect to'' and ''relating to'' clauses.

Foremost, State laws are not preempted unless they are ''with respect to any subject matter regulated under'' the enumerated sections of the FCRA. In the case of section 1681t(b)(1)(E), State laws would not be preempted unless they are ''with respect to any subject matter regulated under section 1681c.''

In addition, a State law is preempted under section 1681t(b)(1) only if it *also* falls within the description in the ''relating to'' parenthetical. In some cases, the ''relating to'' parenthetical merely reiterates the enumerated section. For instance, 15 U.S.C. 1681t(b)(1)(C) preempts State laws ''with respect to any subject matter regulated under subsections (a) and (b) of section 1681m of this title, relating to the duties of a person who takes any adverse action with respect to a consumer.'' Both subsections (a) and (b) of section 1681m lay out certain duties of a person who takes an adverse action with respect to a consumer. Thus, both the ''with respect to'' clause and the ''relating to'' clause of section 1681t(b)(1)(C) have the same scope.

But in other cases, the ''relating to'' clause serves as a further limitation on the ''with respect to'' clause. For example (and as noted above), section 1681t(b)(1)(E) preempts State laws ''with respect to any subject matter regulated under section 1681c of this title, relating to information contained in consumer reports.'' Although section 1681c primarily contains limitations on information that can be included in consumer reports, it also includes other miscellaneous provisions. See, *e.g.,* 15 U.S.C. 1681c(g) (requirement for truncating credit card and debit card numbers in receipts provided to cardholder). Thus, the plain text of section 1681t(b)(1)(E) indicates that only those State laws ''with respect to'' section 1681c that also ''relate to'' information contained in consumer reports are preempted.

It has been argued by some that the preemptive scope of section 1681t(b)(1) is defined only by the ''relating to'' clause. For example, in *Consumer Data Indus. Ass'n* v. *Frey,* 26 F.4th 1 (1st Cir. 2022), the plaintiffs argued that section 1681t(b)(1)(E) preempts any State laws ''relating to information contained in consumer reports,'' regardless of whether the law is ''with respect to any subject matter regulated under'' section 1681c. As courts have correctly held,

[5] The CFPB ''encourages State Officials to consult with the Bureau whenever interpretation of Federal consumer financial law, as defined in section 1002(14) of the Dodd-Frank Act, . . . is relevant to a State regulatory or law enforcement matter, even if it is not the type of action for which notification is required'' pursuant to the State Official Notification Rule. 77 FR 39112, 39113 (June 29, 2012). The Office of the New Jersey Attorney General recently notified the CFPB about pending litigation in which the plaintiff alleges that a New Jersey consumer protection statute is preempted by the FCRA.

that ''is not the most natural reading of the statute's syntax and structure.'' *Frey,* 26 F.4th at 6. That interpretation would render the ''with respect to'' clause surplusage. A statute, however, ''ought to be construed in a way that 'no clause, sentence, or word shall be superfluous, void, or insignificant.'' *Duncan* v. *Walker,* 533 U.S. 167, 174 (2001). Moreover, Congress knows how to broadly preempt State laws that are ''related to'' fields or topics. For instance, the Employee Retirement Income Security Act ''supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.'' 29 U.S.C. 1144(a). Congress could have used similar syntax in the FCRA—but it did not. Instead, Congress made clear that a State law is not preempted by section 1681t(b)(1) unless it falls within the ''with respect to'' clause.

Whether a particular State law is ''with respect to any subject matter regulated under'' the enumerated sections of the FCRA will depend on the facts and circumstances. But it bears noting that the phrase ''with respect to any subject matter regulated under'' is an important limiting factor. As the Supreme Court has noted in a case involving a statute that—like the FCRA—included a preemption provision with both ''related to'' and ''with respect to'' phrases, the ''with respect to'' phrase served to ''massively limit[ ] the scope of preemption.'' *Dan's City Used Cars, Inc.* v. *Pelkey,* 569 U.S. 251, 261 (2013). The ''with respect to'' phrase ''necessarily reaches a subset of laws narrower than those that merely relate to information contained in consumer reports.'' *Frey,* 26 F.4th at 8. It narrows the universe of preemption only to those laws that ''concern'' the subject matter regulated under the enumerated FCRA sections. *Dan's City Used Cars,* 569 U.S. at 261; see also, *e.g., Frey,* 26 F.4th at 7 (section 1681t(b)(1)(E) ''preempt[s] those claims that concern subject matter regulated under section 1681c''); *Galper* v. *JP Morgan Chase Bank, N.A.,* 802 F.3d 437, 446 (2d Cir. 2015) (section 1681t(b)(1)(F) ''preempts only those claims that concern a furnisher's responsibilities). Thus, if a State law does not ''concern'' the subject matters regulated under the FCRA sections specified in section 1681t(b)(1), it is not preempted by that clause.

It bears emphasis that section 1681t(b)(1) does *not* preempt all State laws relating to the content or information contained in consumer reports. Indeed, the legislative history of this provision confirms that it was intended to provide only ''limited'' preemption on ''procedural'' issues.[6]

For example, section 1681t(b)(1)(E) preempts State laws ''with respect to any subject matter regulated under'' section 1681c ''relating to information contained in consumer reports.'' In turn, section 1681c states requirements relating to four topics relating to information contained in consumer reports: (1) obsolescence, *i.e.,* how long certain specific types of information may continue to appear on a consumer report;[7] (2) certain information about medical information furnishers;[8] (3) certain information relating to veterans' medical debt;[9] and (4) certain information that must be included in a consumer report (*e.g.,* the fact that the consumer has disputed information provided by a furnisher to the consumer reporting agency issuing the report).[10]

The legislative history of the FCRA preemption provision confirms that only subject matter at this level of specificity is subject to preemption. The legislative history expressly references ''obsolescence periods'' as an example of a subject matter governed by preemption—not the broader subject matter of the content of a consumer report more generally.[11] Hence, FCRA 1681t(b)(1)(E) does *not* preempt State laws about subject matter regarding the content of or information on consumer reports beyond these topics.[12]

For instance, although *how long* the specific types of information listed in section 1681c may continue to appear on a consumer report is a subject matter regulated under section 1681c, what or when items generally may be *initially* included on a consumer report is not a subject matter regulated under section 1681c. Indeed, section 1681c(a)(7) provides requirements about when veterans' medical debt, specifically, may be included on a consumer report by a nationwide consumer reporting agency, but nothing in section 15 U.S.C. 1681c addresses what or when information of other types may initially be included on reports.[13] (For example, section 1681c(a)(5) regulates how long ''adverse item[s] of information, other than records of convictions of crimes'' may appear on consumer reports, but not whether or when adverse items may initially appear on a consumer report.) Similarly, only 1681c(a)(6) and (8), relating specifically to information about medical information furnishers and veterans' medical debt, contain restrictions on the content of a consumer report; the other provisions restrictions relate only to how long information may appear. section 1681c therefore does not provide any general restrictions on the content of a consumer report. Accordingly, State laws relating to what or when items generally may be initially included on a consumer report—or what or when certain types of information may initially be included on a consumer report—would generally not be preempted by section 1681t(b)(1)(E).

States therefore retain substantial flexibility to pass laws involving consumer reporting to reflect emerging problems affecting their local economies and citizens. For instance, medical debt that shows up in a consumer report can be factored into a consumer's credit score, though whether and how these debts affect their scores varies

[6] *See* 141 Cong. Rec. S5450 (daily ed. Apr. 5, 1995) (statement of Sen. Bond) (''This bill also contains limited Federal preemption to ensure that there are uniform Federal standards to govern a number of procedural issues which are part of credit reporting and which will reduce the burdens on the credit industry from having to comply with a variety of different State requirements. For example, the bill preempts requirements regarding prescreening, information shared among affiliates, reinvestigation timetables, obsolescence time periods and certain disclosure forms.'').

[7] 15 U.S.C. 1681c(a)(1)–(5).

[8] 15 U.S.C. 1681c(a)(6).

[9] 15 U.S.C. 1681c(a)(7)–(8).

[10] 15 U.S.C. 1681c(d), (e), (f).

[11] *See* 141 Cong. Rec. S5450 (daily ed. Apr. 5, 1995) (statement of Sen. Bond) (referring to ''obsolescence time periods'' as an example of a subject matter on which there would be preemption).

[12] To be sure, the title of Section 1681c is stated more broadly as ''Requirements relating to information contained in consumer reports.'' But the title of a statutory provision is of only limited significance. *See, e.g., Bhd. of R.R. Trainmen* v. *Balt. & Ohio R.R. Co.,* 331 U.S. 519, 529 (explaining that titles and headings ''are but tools available for the resolution of a doubt,'' ''[b]ut they cannot undo or limit that which the text makes plain''). And the actual subject matter regulated by the text of Section 1681c is limited to the narrow topics actually addressed. Further, the legislative history confirms that the subject matter intended to be preempted is only the specific topics regulated in Section 1681c.

[13] Section 1681c(a)(1)–(5) regulates when certain types of information that ''antedate the report'' by ''more than'' certain periods of time may appear. But only 1681c(a)(7), relating specifically to veterans' medical debt, regulates when a type of information that antedates the report by ''less than'' a period of time may appear. Hence, only 1681c(a)(7), which is limited to veterans' medical debt, regulates when a type of information that antedates a report by *less than* a certain period of time may appear. Moreover, restrictions on what or when types of information may initially appear on a consumer report do not alter the period of time that information may remain on a report under Section 1681c. The restrictions in Section 1681c(a)(1)–(5) each provide that information may remain on a report for a certain period of time following the date that particular events occurred. A restriction on what or when information may initially appear on a report would not alter the date of those events. Such a restriction therefore does not change the date on which Section 1681c(a)(1)–(5) prohibits the information from continuing to appear on the report.

Tab 12

depending on the score model.[14] Research by the CFPB has found that medical collections are less predictive of future consumer credit performance than nonmedical collections.[15] Additionally, paid medical collections are less predictive of future performance than unpaid medical collections. Individuals with more medical than non-medical collections and individuals with more paid than unpaid medical collections had delinquency rates that were comparable to those of individuals with credit scores of 10 points higher and 20 points higher, respectively. In other words, these individuals were less likely to be delinquent than other individuals with the same credit score. Nonetheless, some widely used models still weight medical and nonmedical collections equally.[16] This means that consumers with medical debt may be negatively affected if creditors use older scoring models that may overweight medical debt. To address these concerns and others, States may pass laws addressing the furnishing and reporting of medical debt.

If a State law were to forbid a consumer reporting agency from including medical debt in a consumer report for a certain period of time after the debt was incurred, such a law would generally not be preempted. Section 1681c does not regulate the subject matter of when medical debt (or debt generally) may be first included in a consumer report. As noted above, section 1681t(b)(1) does not preempt all State laws relating to the content or information contained in consumer reports; rather, 1681t(b)(1) preempts only State laws concerning the subject matter regulated under the specified FCRA sections. Hence, as described above, 1681t(b)(1)(E) preempts State laws only with respect to the four specific topics regulated under section 1681c. Section 1681c(a)(7) provides requirements regarding veterans' medical debt, but section 1681c does not regulate the subject matter of medical debt information more generally. Further, although medical debt information may be ''adverse information'' regulated under 1681c((a)(5), as explained above, that provision regulates only the subject of *how long* such information may appear on a consumer report, not the content of the information or when such information may initially appear.

Likewise, if a State law prohibited a furnisher from furnishing information about medical debt for a certain period of time after the debt was incurred, such a law would not be preempted by section 1681t(b)(1)(F), which voids only State laws ''with respect to any subject matter regulated under section 1681s–2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies.'' Section 1681s–2 sets forth several requirements for furnishers in order to assure the accuracy of information provided to consumer reporting agencies. For instance, ''[a] person shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate.''[17] However, section 1681s–2 says nothing about when a furnisher may or must begin furnishing information about a consumer's account. Consistent with the discussion above about section 1681, the subject matter of section 1681s–2 that is subject to preemption is limited to these topics that are actually addressed in the section. Accordingly, when a furnisher may or must begin furnishing information about a consumer's account is not a ''subject matter regulated under section 1681s–2.'' Thus, a State law governing when a furnisher may begin furnishing on a consumer's account (including medical debt) would not be preempted by section 1681t(b)(1)(F).

Additionally, for example, the CFPB has noted that rental information in consumer reports plays a critical role in consumers' access to rental housing, credit, and other opportunities.[18] The CFPB has received consumer complaints about receiving collection notices from landlords or debt collectors for rent-related charges and fees they viewed as questionable.[19] These charges may then appear on their consumer reports. Complaints to the CFPB also indicate that tenant screening companies may report inaccurate or misleading criminal and civil information, which led to consumers being denied for housing applications,[20] and the Federal Trade Commission has found that certain tenant screening companies have failed to follow reasonable procedures to ensure the accuracy of their reports about potential tenants.[21] CFPB examiners have also found that the oversight of public records providers by one or more consumer reporting agencies was weak and required corrective action.[22] Further, research suggests that a significant number of eviction records ''contain ambiguous information on how the case was resolved or falsely represent a tenant's eviction history.''[23] There is little or no empirical research showing that tenant screening report content is reliably predictive of future tenant behavior. For example, the CFPB has expressed concern regarding how reliably predictive pandemic era rental data is on a consumer's future performance.[24] To address these concerns and others, States may pass laws addressing the furnishing and reporting of rental information.

A State law prohibiting a consumer reporting agency from including information (or certain types of information) about a consumer's eviction, rental arrears, or arrests on a consumer report would generally not be preempted under section 1681t(b)(1). As noted above, section 1681t(b)(1)(E) preempts State laws only ''with respect to any subject matter regulated under'' section 1681c ''relating to information contained in consumer reports.'' Again, nothing in section 1681c regulates the content of eviction information, rental arrears, or arrest records or when such information may initially appear on a consumer report. Although such information may be information about ''[c]ivil suits, civil judgments, and records of arrest'' regulated under section 1681c((a)(2) or ''adverse information'' regulated under section

[14] CFPB, *Medical Debt Burden in the United States,* at 27 (Feb. 2022), *https://files.consumerfinance.gov/f/documents/cfpb_medical-debt-burden-in-the-united-states_report_2022-03.pdf.*

[15] CFPB, *Data point: Medical debt and credit scores* (May 2014), *https://files.consumerfinance.gov/f/201405_cfpb_report_data-point_medical-debtcredit-scores.pdf.*

[16] *Medical Debt Burden in the United States,* at 27–28.

[17] 15 U.S.C. 1681s–2(a)(1)(A).

[18] CFPB, *Bulletin 2021–03: Consumer Reporting of Rental Information,* at 2 (July 2021), *https://files.consumerfinance.gov/f/documents/cfpb_consumer-reporting-rental-information_bulletin-2021-03_2021-07.pdf.*

[19] CFPB, *Complaint Bulletin: COVID–19 issues described in consumer complaints,* at 14 (July 2021), *https://files.consumerfinance.gov/f/documents/cfpb_covid-19-issues-described-consumer-complaints_complaint-bulletin_2021-07.pdf.*

[20] CFPB, *Complaint Bulletin: COVID–19 issues described in consumer complaints,* at 15, *https://files.consumerfinance.gov/f/documents/cfpb_covid-19-issues-described-consumer-complaints_complaint-bulletin_2021-07.pdf.*

[21] *See FTC* v. *RealPage, Inc.* (Oct. 2018), *https://www.ftc.gov/system/files/documents/cases/152_3059_realpage_inc_stipulated_order_10-16-18.pdf; USA* v. *AppFolio, Inc.* (Dec. 2020), *https://www.ftc.gov/system/files/documents/cases/ecf_1_-_us_v_appfolio_complaint.pdf.*

[22] CFPB, *Supervisory Highlights,* at 6 (Summer 2015), *https://files.consumerfinance.gov/f/201506_cfpb_supervisory-highlights.pdf.*

[23] Adam Porton, Ashley Gromis, and Matthew Desmond, *Inaccuracies in Eviction Records: Implications for Renters and Researchers,* Housing Policy Debate 31:3–5 (Sept. 2021).

[24] CFPB, *Bulletin 2021–03: Consumer Reporting of Rental Information,* at 10 (July 2021), *https://files.consumerfinance.gov/f/documents/cfpb_consumer-reporting-rental-information_bulletin-2021-03_2021-07.pdf.*

1681c((a)(5), as explained above, those provisions regulate only the subject of *how long* such information may appear on a consumer report, not the content of the information. Section 1681t(b)(1) preempts only State laws concerning the subject matter regulated under the specified FCRA sections, and whether or when information such as eviction information, rental arrears, or arrest records appears on a consumer report is not such a subject matter.

B. Under 15 U.S.C. 1681t(b)(5), Only Those State Laws ''With Respect to the Conduct Required by'' Certain Sections or Subsections of the FCRA Are Preempted

Similarly, Congressional purpose in 15 U.S.C. 1681t(b)(5) is evident from its plain text. It has nine subsections, and each follows the same syntax: State laws are preempted to the extent they are ''with respect to the conduct required by the specific provisions of [an enumerated FCRA provision].'' For example, 15 U.S.C. 1681t(b)(5)(E) preempts State laws ''with respect to the conduct required by the specific provisions of section 1681j(a),'' which sets forth requirements for nationwide consumer reporting agencies and nationwide specialty consumer reporting agencies to provide free annual credit reports to consumers. A State law on this topic—for example, a State law requiring consumer reporting agencies to provide semi-annual credit reports to consumers—would likely be ''with respect to the conduct required'' by this provision. On the other hand, if a State law does not concern ''the conduct required by'' the enumerated section—the annual disclosure requirement, in the case of section 1681j(a)—then it is not preempted. For example, section 1681j(a) provides no requirements regarding the language in which disclosures of information are provided. Accordingly, if a State law required that a consumer reporting agency provide information required by the FCRA at the consumer's requests in languages other than English, such a law would generally not be preempted by section 1681t(b)(5)(E).

III. Regulatory Matters

This is an interpretive rule issued under the Bureau's authority to interpret the Dodd-Frank Wall Street Reform and Consumer Protection Act (CFPA), including under section 1022(b)(1) of the CFPA, which authorizes guidance as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of Federal consumer financial laws, such as the CFPA.[25]

As an interpretive rule, this rule is exempt from the notice-and-comment rulemaking requirements of the Administrative Procedure Act.[26] Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.[27] The Bureau has also determined that this interpretive rule does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.[28]

Pursuant to the Congressional Review Act,[29] the Bureau will submit a report containing this interpretive rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to the rule's published effective date. The Office of Information and Regulatory Affairs has designated this interpretive rule as not a ''major rule'' as defined by 5 U.S.C. 804(2).

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2022–14150 Filed 7–8–22; 8:45 am]

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[25] 12 U.S.C. 5512(b)(1).

[26] 5 U.S.C. 553(b).

[27] 5 U.S.C. 603(a), 604(a).

[28] 44 U.S.C. 3501–3521.

[29] 5 U.S.C. 801 *et seq.*

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2022–0295; Project Identifier MCAI–2021–00840–R; Amendment 39–22100; AD 2022–13–14]

RIN 2120–AA64

Airworthiness Directives; Airbus Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Airbus Helicopters Model AS–365N2, AS 365 N3, EC 155B, EC155B1, and SA–365N1 helicopters. This AD was prompted by a large amount of critical scale particles found on the tail rotor gearbox (TGB) chip detector magnetic plug during an unscheduled check of the TGB. The particles belonged to the double bearing (pitch control rod bearing) installed inside the TGB. This AD requires repetitive inspections of the TGB chip detector for particles, analyzing any particles collected, performing a double bearing washing, repetitive replacements of certain part-numbered double bearings, and corrective actions if necessary, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective August 15, 2022.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of August 15, 2022.

ADDRESSES: For EASA material incorporated by reference (IBR) in this final rule, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu*. You may find the EASA material on the EASA website at *https://ad.easa.europa.eu*. For Airbus Helicopters service information identified in this final rule, contact Airbus Helicopters, 2701 N Forum Drive, Grand Prairie, TX 75052; telephone (972) 641–0000 or (800) 232–0323; fax (972) 641–3775; or at *https://www.airbus.com/helicopters/services/technical-support.html*. You may view this material at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110. Service information that is IBRed is also available in the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2022–0295.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2022–0295; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the EASA AD, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200

Tab 13

Fair Credit Reporting; Permissible Purposes for Furnishing, Using, and Obtaining Consumer Reports, 87 Fed. Reg. 41243 (July 12, 2022).

CFPB Issues Advisory to Protect Privacy When Companies Compile Personal Data

Advisory affirms that "permissible purposes" are required to use and share credit reports and background reports

JUL 07, 2022

WASHINGTON, D.C. – Today, the Consumer Financial Protection Bureau (CFPB) issued a legal interpretation to ensure that companies that use and share credit reports and background reports have a permissible purpose under the Fair Credit Reporting Act. The CFPB's new advisory opinion makes clear that credit reporting companies and users of credit reports have specific obligations to protect the public's data privacy. The advisory also reminds covered entities of potential criminal liability for certain misconduct.

"Americans are now subject to round-the-clock surveillance by large commercial firms seeking to monetize their personal data," said CFPB Director Rohit Chopra. "While Congress and regulators must do more to protect our privacy, the CFPB will be taking steps to use the Fair Credit Reporting Act to combat misuse and abuse of personal data on background screening and credit reports."

Over the last century, Congress enacted a number of sector-specific privacy laws to protect personal data, such as educational and health data. One law that includes privacy protections across multiple sectors is the Fair Credit Reporting Act. Congress enacted the Fair Credit Reporting Act in 1970 to ensure companies "exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." The Fair Credit Reporting Act regulates companies that assemble dossiers on individual consumers, including credit reporting companies, tenant screeners, and other data brokers.

Permissible Purposes

Among other things, the Fair Credit Reporting Act ensures fair and accurate reporting, and it requires users who buy these dossiers to have a legally permissible purpose. This ensures that companies cannot check an individual's personal information, including their credit history, without a bona fide reason. Some common permissible purposes include using consumer reports for credit, insurance, housing, or employment decisions. For example, a bank may request a credit report in order to determine the terms on which it will offer someone a line of credit.

Today's advisory opinion will help to hold responsible any company, or user of credit reports, that violates the permissible purpose provisions of the Fair Credit Reporting Act. Specifically, the advisory opinion makes clear:

- **Insufficient matching procedures can result in credit reporting companies providing reports to entities without a permissible purpose, which would violate consumers' privacy rights:** For example, when a credit reporting company uses name-only matching procedures, the items of information appearing on a credit report may not all correspond to a single individual. That means the user of a credit report could be provided a report about a person for whom the user does not have a permissible purpose.
- **It is unlawful to provide credit reports of multiple people as "possible matches":** Credit reporting companies may not provide reports on multiple individuals where the requester only has a permissible purpose to obtain a report on one individual. They must have adequate procedures to find the right person, or else the result may be that they provide a report on at least one wrong person.
- **Disclaimers about insufficient matching procedures do not cure permissible purpose violations:** Disclaimers will not cure a failure to take reasonable steps to ensure the information contained in a credit report is only about the individual for whom the user has a permissible purpose.
- **Users of credit reports must ensure that they do not violate a person's privacy by obtaining a credit report when they lack a permissible purpose for doing so:** The Fair Credit Reporting Act strictly prohibits anyone from using or obtaining credit reports without a permissible purpose.

Criminal Liability for Violating the Fair Credit Reporting Act's Privacy Protections

The advisory opinion outlines some of the criminal liability provisions in the Fair Credit Reporting Act. Covered entities can face criminal liability for obtaining a background report on an individual under false pretenses or by providing a background report to an unauthorized individual. For example, Section 620 of the Fair Credit Reporting Act imposes criminal liability on any officer or employee of a consumer reporting agency who knowingly and willfully provides information concerning an individual from the agency's files to an unauthorized person. Violators can face criminal penalties and imprisonment.

The CFPB will continue to take steps to ensure credit reporting companies and other relevant entities adhere to the Fair Credit Reporting Act and other consumer financial protection laws. In addition to some of the steps already mentioned, the CFPB has:

- **Highlighted the experiences of military families with medical billing, credit reporting, and debt collection.** The CFPB's report (cfpb.gov/about-us/newsroom/cfpb-report-highlights-experiences-of-military-families-with-medical-billing-credit-reporting-and-debt-collection/) showed that nationwide credit reporting companies are failing to correct mistakes and inaccuracies, fueled by allegedly unpaid medical bills, on servicemembers' credit reports.
- **Spotlighted medical billing challenges faced by millions of American consumers.** The CFPB's report (cfpb.gov/about-us/newsroom/cfpb-report-spotlights-medical-billing-challenges/) found that many consumers reported their credit reports being used as weapons to force payments of allegedly unpaid medical bills and that the bills are surreptitiously and unlawfully placed on their credit reports.
- **Identified credit reporting companies the public can hold accountable.** The CFPB released its annual list of credit reporting companies (cfpb.gov/about-us/newsroom/cfpb-identifies-consumer-reporting-companies-the-public-can-hold-accountable/). Using the list, people can exercise their right to see what personal information these companies have, dispute inaccuracies, and take action if a firm is violating the Fair Credit Reporting Act.
- **Issued a bulletin to prevent unlawful medical debt collection and credit reporting.** The bulletin (cfpb.gov/about-us/newsroom/cfpb-issues-bulletin-to-prevent-unlawful-medical-debt-collection-and-credit-reporting/) states that the accuracy and dispute obligations imposed by the Fair Credit Reporting Act apply with respect to debts stemming from charges that exceed the amount permitted by the No Surprises Act.
- **Took action to stop the false identification of consumers by background screeners.** The advisory opinion (cfpb.gov/about-us/newsroom/cfpb-takes-action-to-stop-false-identification-by-background-screeners/) affirmed that credit reporting companies and tenant and employment screening companies are violating the Fair Credit Reporting Act if they engage in shoddy name-only matching procedures.

Read today's advisory opinion, *Fair Credit Reporting; Permissible Purposes for Furnishing, Using, and Obtaining Consumer Reports* (cfpb.gov/rules-policy/final-rules/fair-credit-reporting-permissible-purposes-for-furnishing-using-and-obtaining-consumer-reports/).

Consumers can submit credit reporting complaints, or complaints about other financial products or services, by visiting the CFPB's website (cfpb.gov/complaint/) or by calling (855) 411-CFPB (2372).

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit consumerfinance.gov (cfpb.gov/).

Topics

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Rules and Regulations

Federal Register

Vol. 87, No. 132

Tuesday, July 12, 2022

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1022

Fair Credit Reporting; Permissible Purposes for Furnishing, Using, and Obtaining Consumer Reports

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Advisory opinion.

SUMMARY: The Consumer Financial Protection Bureau (Bureau) is issuing this advisory opinion to outline certain obligations of consumer reporting agencies and consumer report users under section 604 of the Fair Credit Reporting Act (FCRA). This advisory opinion explains that the permissible purposes listed in FCRA section 604(a)(3) are consumer specific, and it affirms that a consumer reporting agency may not provide a consumer report to a user under FCRA section 604(a)(3) unless it has reason to believe that all of the consumer report information it includes pertains to the consumer who is the subject of the user's request. The Bureau notes that disclaimers will not cure a failure to have a reason to believe that a user has a permissible purpose for a consumer report provided pursuant to FCRA section 604(a)(3). This advisory opinion also reminds consumer report users that FCRA section 604(f) strictly prohibits a person who uses or obtains a consumer report from doing so without a permissible purpose.

DATES: This advisory opinion is effective on July 12, 2022.

FOR FURTHER INFORMATION CONTACT: Seth Caffrey, Pavneet Singh, Laura Stack, or Ruth Van Veldhuizen, Senior Counsels, Office of Regulations at (202) 435–7700 or *https://reginquiries.consumerfinance.gov/.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION: The Bureau is issuing this advisory opinion through the procedures for its Advisory Opinions Policy.[1] Refer to those procedures for more information.

I. Advisory Opinion

A. Background

Consumer reporting agencies collect and assemble or evaluate information about, among other things, the credit, criminal, employment, and rental histories of hundreds of millions of Americans. They package this information into consumer reports,[2] which are used by creditors, insurers, landlords, employers, and others to make eligibility and other decisions about consumers. This collection, assembly, evaluation, dissemination, and use of vast quantities of often highly sensitive personal and financial information about consumers poses significant risks to consumer privacy.

The FCRA regulates consumer reporting.[3] Congress enacted the statute ''to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy.''[4] One of the problems with the credit reporting industry that Congress recognized and sought to remedy with the FCRA was that ''information in a person's credit file [was] not always kept strictly confidential.''[5] The statute was enacted to ''prevent an undue invasion of the individual's right of privacy in the collection and dissemination of credit information.''[6] As courts have recognized, ''[a] major purpose of the [FCRA] is the privacy'' of consumer data.[7]

The FCRA protects consumer privacy in multiple ways, including by limiting the circumstances under which consumer reporting agencies may disclose consumer information. For example, FCRA section 604, entitled ''Permissible purposes of consumer reports,'' identifies an exclusive list of ''permissible purposes'' for which consumer reporting agencies may provide consumer reports,[8] including in accordance with the written instructions of the consumer to whom the report relates and for purposes relating to credit, employment, and insurance.[9] The statute states that a consumer reporting agency may provide consumer reports under these circumstances ''and no other.'' In addition, FCRA section 607(a) requires that ''[e]very consumer reporting agency shall maintain reasonable procedures designed to . . . limit the furnishing of consumer reports to the purposes listed under section 604.''[10] And FCRA section 620 imposes criminal liability on any officer or employee of a consumer reporting agency who knowingly and willfully provides information concerning an individual from the agency's files to an unauthorized person.[11]

In addition to imposing permissible purpose limitations on consumer reporting agencies, the FCRA limits the circumstances under which third parties may obtain and use consumer report information from consumer reporting agencies. FCRA section 604(f) provides that ''a person shall not use or obtain a

[1] 85 FR 77987 (Dec. 3, 2020).

[2] *See* 15 U.S.C. 1681a(d) (defining ''consumer report'').

[3] *See* 15 U.S.C. 1681–1681x.

[4] *Safeco Ins. Co. of Am.* v. *Barr,* 551 U.S. 47, 52 (2007); *see also* 15 U.S.C. 1681 (recognizing ''a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy'').

[5] S. Rep. No. 91–517, at 4 (1969) (noting, as an example of this problem, ''a reporter for a major TV network was able to obtain 10 out of 20 reports requested at random from 20 credit bureaus by using the name of a completely fictitious company under the guise of offering the individuals credit''). When introducing the bill that would become the FCRA, Senator Proxmire observed that ''[w]hat is disturbing is the lack of any public standards to ensure that the information [collected by consumer reporting companies] is kept confidential and used only for its intended purpose. The growing accessibility of this information through computer- and data-transmission techniques makes the problem of confidentiality even more important.'' 15 Cong. Rec. 2413 (1969).

[6] S. Rep. No. 91–517, at 1 (1969).

[7] *Trans Union Corp.* v. *FTC,* 81 F.3d 228, 234 (D.C. Cir. 1996).

[8] 15 U.S.C. 1681b(a) (providing that, ''[s]ubject to subsection (c), any consumer reporting agency may furnish a consumer report under the following circumstances and no other''). FCRA section 604(c) defines when consumer reporting companies may furnish consumer reports in connection with credit and insurance transactions not initiated by the consumer. 15 U.S.C. 1681b(c). Other sections of the FCRA identify additional limited circumstances under which consumer reporting companies are permitted or required to disclose certain information to government agencies. *See* 15 U.S.C. 1681f, 1681u, 1681v. Further, the Debt Collection Improvement Act of 1996, Public Law 104–134, sec. 31001(m)(1), allows the head of an executive, judicial, or legislative agency to obtain a consumer report under certain circumstances relating to debt collection. *See* 31 U.S.C. 3711(h).

[9] 15 U.S.C. 1681b(a)(2), (a)(3)(A), (a)(3)(B), (a)(3)(C).

[10] 15 U.S.C. 1681e(a).

[11] 15 U.S.C. 1681r.

consumer report for any purpose unless'' the consumer report ''is obtained for a purpose for which the consumer report is authorized to be furnished under [FCRA section 604]'' and ''the purpose is certified in accordance with FCRA section 607 by a prospective user of the report through a general or specific certification.''[12] FCRA section 619 imposes criminal liability on any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses.[13]

The FCRA's permissible purpose provisions are thus central to the statute's protection of consumer privacy. Consumers suffer harm when consumer reporting agencies provide consumer reports to persons who are not authorized to receive the information or when recipients of consumer reports obtain or use such reports for purposes other than permissible purposes. These harms include the invasion of consumers' privacy, as well as reputational, emotional, physical, and economic harms. The Bureau and the Federal Trade Commission (FTC) have collectively brought numerous enforcement actions to address violations of the FCRA's permissible purpose provisions.[14] For example, in a case that resulted in a 2006 settlement with a consumer reporting agency, the FTC alleged that the agency violated the FCRA's permissible purpose provisions by providing consumer reports to persons without a permissible purpose, resulting in at least 800 cases of identity theft.[15] More recently, in 2020, a group of companies and individuals settled Bureau allegations that they obtained consumer reports without a permissible purpose when they obtained consumer reports for use in marketing debt relief services.[16] Also in 2020, a mortgage broker settled FTC allegations that it used consumer reports for other than a permissible purpose when, in response to negative reviews on a website, it publicly posted information it had obtained from a consumer report about the reviewer.[17]

In light of the importance of the FCRA's permissible purpose provisions to the protection of consumer privacy, the Bureau is issuing this advisory opinion to affirm that consumer reporting agencies may not provide a consumer report pursuant to FCRA section 604(a) under any circumstance not expressly permitted by this section. In particular, the permissible purposes identified in FCRA section 604(a)(3) are consumer specific—that is, they apply only with respect to the consumer who is the subject of the user's request—and a consumer reporting company may not provide a consumer report to a user under FCRA section 604(a)(3) unless it has reason to believe that all of the consumer report information it includes pertains to the consumer who is the subject of the user's request. For example, consumer reporting agencies violate the FCRA's permissible purpose provisions if they provide consumer reports on multiple consumers (*e.g.,* consumers with the same name) in response to a request where the user only has a permissible purpose to obtain a report on a single individual because that would inherently involve providing at least one consumer report on an individual with respect to whom the user did not have a permissible purpose. The Bureau notes that disclaimers will not cure a failure to have a reason to believe that a user has a permissible purpose for a consumer report provided pursuant to FCRA section 604(a)(3). The Bureau also is issuing this advisory opinion to highlight that FCRA section 604(f) strictly prohibits a person who uses or obtains a consumer report from doing so without a permissible purpose.

B. Coverage

Section C.1 of this advisory opinion applies to all ''consumer reporting agencies,'' as that term is defined in FCRA section 603(f). Section C.2 of this advisory opinion applies to all persons that obtain or use, or seek to obtain or use, ''consumer reports,'' as that term is defined in FCRA section 603(d).

C. Legal Analysis

1. FCRA Section 604(a)(3)

Section 604(a) of the FCRA identifies a limited set of ''permissible purposes'' for which a consumer reporting company may provide a consumer report to a user.[18] The Bureau is aware that some consumer reporting agencies use insufficient identifiers in matching procedures, such as name-only matching, which can result in the provision of consumer reports to persons without a permissible purpose to receive them. The permissible purposes for which consumer reports are most commonly sought are those identified in FCRA section 604(a)(3), including for purposes related to credit, employment, insurance, and rental housing. Under section 604(a)(3), a consumer reporting company may provide a consumer report when it has ''reason to believe'' that the user requesting the report has one of the permissible purposes specified therein with respect to the consumer who is the subject of the user's request. The Bureau interprets the permissible purposes in FCRA section 604(a)(3) to apply only with respect to the consumer who is the subject of the user's request.

The Bureau's interpretation is based on the plain language of FCRA section

[12] 15 U.S.C. 1681b(f). FCRA section 607(a) requires that consumer reporting companies, among other things, must require that prospective users of consumer reports ''certify the purposes for which the information is sought, and certify that the information will be used for no other purpose.'' 15 U.S.C. 1681e(a).

[13] 15 U.S.C. 1681q.

[14] *See, e.g., United States* v. *Vivint Smart Home, Inc.,* No. 2:21-cv-00267 (D. Utah 2021), *https://www.ftc.gov/system/files/documents/cases/de2_complaint_against_vivint_smart_home.pdf* (alleging that the defendant violated FCRA section 604(f) by obtaining consumer reports about consumers who had not applied for credit in order to improve credit applicants' ability to satisfy the defendant's credit criteria); *In re Clarity Servs., Inc.,* 2015–CFPB–0030 (Dec. 3, 2015), *https://files.consumerfinance.gov/f/201512_cfpb_consent-order_clarity-services-inc-timothy-ranney.pdf* (alleging that the defendant violated FCRA section 604(f) by obtaining consumer reports to create presentations to market its analytical services to lenders and other financial service providers); *United States* v. *Direct Lending Source, Inc.,* No. 3:12-cv-02441 (S.D. Cal. 2012), *https://www.ftc.gov/sites/default/files/documents/cases/2012/10/121010directlendingcmpt.pdf* (alleging that the defendant violated FCRA section 604(f) by obtaining consumer reports without a permissible purpose and selling them to entities that targeted consumers in financial distress for loan modification, debt relief, and foreclosure relief services); *In re Fajilan & Assocs.,* No. C–4332 (Aug. 17, 2011), *https://www.ftc.gov/sites/default/files/documents/cases/2011/08/110819statewidecmpt.pdf* (alleging that the respondents furnished consumer reports to hackers in violation of FCRA section 604); *In re ACRAnet, Inc.,* No. C–4331 (Aug. 17, 2011), *https://www.ftc.gov/sites/default/files/documents/cases/2011/08/110809acranetcmpt.pdf* (same); *In re SettlementOne Credit Corp.,* No. C–4330 (Aug. 17, 2011), *https://www.ftc.gov/sites/default/files/documents/cases/2011/08/110819settlementonecmpt.pdf* (same).

[15] *United States* v. *Choicepoint, Inc.,* No. 1:06-cv-00198–GET, at ¶ 12 (N.D. Ga. 2006), *https://www.ftc.gov/sites/default/files/documents/cases/2006/01/0523069complaint.pdf.*

[16] *Bureau of Consumer Fin. Prot.* v. *Chou Team Realty, LLC et al.,* No. 8:20-cv-00043, at ¶¶ 57–59, 69, 77–78, 89–106 (C.D. Cal. 2020), *https://files.consumerfinance.gov/f/documents/cfpb_chou-team-realty-monster-loans_complaint_2020-01.pdf.*

[17] *United States* v. *Mortgage Sols. FCS, Inc.,* No. 4:20-cv-00110–DMR, at ¶¶ 11–14 (N.D. Cal. 2020), *https://www.ftc.gov/system/files/documents/cases/mortgage_solutions_complaint.pdf.* In addition to continuing to enforce the FCRA's permissible purpose provisions and protect the privacy of consumer reports, the Bureau's supervisory work also has focused on ensuring compliance with the FCRA's permissible purpose requirements by consumer reporting companies and consumer report users. *See, e.g.,* Bureau of Consumer Fin. Prot., *Supervisory Highlights,* at 3–4 (Sept. 2020), *https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-22_2020-09.pdf;* Bureau of Consumer Fin. Prot., *Supervisory Highlights Consumer Reporting Special Edition,* at 16–17 (Dec. 2019), *https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-20_122019.pdf.*

[18] 15 U.S.C. 1681b(a).

604(a)(3) itself, which makes clear that whether a user has a permissible purpose under that section is analyzed on a consumer-by-consumer basis. For example, FCRA section 604(a)(3)(A) permits a consumer reporting company to provide a consumer report ''to a person which it has reason to believe . . . intends to use the information in connection with a credit transaction involving *the consumer* on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, *the consumer*.'' [19] Similarly, FCRA section 604(a)(3)(F) permits a consumer reporting company to provide a consumer report ''to a person which it has reason to believe . . . has a legitimate business need for the information . . . in connection with a business transaction that is initiated by *the consumer* or to review an account to determine whether *the consumer* continues to meet the terms of the account.'' [20]

The Bureau's interpretation also is consistent with the FCRA's purpose and structure. As explained in part I.A, Congress enacted the FCRA in part to address ''a need to insure that consumer reporting agencies exercise their grave responsibilities with . . . a respect for the consumer's right to privacy.'' [21] The FCRA achieves this by, among other things, narrowly limiting the circumstances under which a consumer reporting company may provide consumer report information to third parties. The statute is structured so that the permissible purposes in section 604(a) function as exceptions to the general rule that a consumer reporting company may not provide consumer reports to third parties.[22] Interpreting FCRA section 604(a)(3) to allow a consumer reporting company to provide consumer report information to a third party about a consumer with respect to whom the third party does not have a permissible purpose would undermine the statutory scheme and threaten consumer privacy with respect to the often highly sensitive information collected by consumer reporting agencies.[23]

A consumer reporting company may not provide a consumer report under FCRA section 604(a)(3) unless it has reason to believe that the user has a permissible purpose with respect to the consumer about whom the report is requested. A user's request to a consumer reporting company for a report about a consumer does not give the consumer reporting company a reason to believe that the user has a permissible purpose to obtain a consumer report about other consumers. Accordingly, a consumer reporting company may not provide a consumer report under FCRA section 604(a)(3) unless it has reason to believe that all of the consumer report information it includes pertains to the consumer who is the subject of the user's request.

The use of poor matching procedures, such as name-only matching, can lead to violations of the FCRA's permissible purpose provisions. As the Bureau has observed, some consumer reporting agencies obtain information from sources that do not have or use identifying information other than consumer names, and they include such information in consumer reports without taking additional steps to match the information to the consumer who is the subject of the report.[24] The Bureau has recently affirmed that, ''[i]n preparing consumer reports, it is not a reasonable procedure to assure maximum possible accuracy to use insufficient identifiers to match information to the consumer who is the subject of the report.'' [25] In addition to running afoul of the FCRA's accuracy provisions, a consumer reporting company that uses insufficient identifiers in its matching procedures, such as name-only matching, cannot rely on these procedures to form a reason to believe that all of the information it includes in a consumer report pertains to the consumer who is the subject of the user's request.

For example, when a consumer reporting company conducts a public records search using name-only matching and identifies one or more individuals with the same name as the consumer who is the subject of the user's request, it sometimes might provide the user with a report containing a possible match or list of possible matches instead of taking further steps to match the information to the specific consumer who is the subject of the request.[26] Under these circumstances, a consumer reporting company has not formed a reason to believe that all of the information it includes in a consumer report pertains to the consumer who is the subject of the user's request. If the report includes information that identifies (even if not by name) consumers who are possible matches and information that bears on the credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living of those consumers, the consumer reporting company will have provided consumer reports about those consumers to a user that does not have a permissible purpose for them.[27]

The Bureau is aware that some consumer reporting agencies that use inadequate matching procedures include disclaimers with their consumer reports. For example, one consumer reporting company stated when providing a consumer report: ''This record is matched by First Name, Last Name ONLY and may not belong to your subject. Your further review of the State Sex Offender Registry is required in order to determine if this is your subject.'' [28] Disclaimers will not cure a

[19] 15 U.S.C. 1681b(a)(3)(A) (emphasis added).

[20] 15 U.S.C. 1681b(a)(3)(F) (emphasis added).

[21] 15 U.S.C. 1681(a)(4).

[22] 15 U.S.C. 1681b(a) (providing that, in general, ''[s]ubject to subsection (c), any consumer reporting agency may furnish a consumer report under the following circumstances and no other'').

[23] The Bureau's interpretation of FCRA section 604(a)(3) also is consistent with the statute's purpose and structure with respect to accuracy. *See* 15 U.S.C. 1681e(b). As discussed below, a consumer reporting agency's use of poor matching procedures can lead to violations of the FCRA's permissible purpose requirements, as well as its accuracy requirements.

[24] Bureau of Consumer Fin. Prot., *Fair Credit Reporting; Name-Only Matching Procedures,* 86 FR 62468, 62472 (Nov. 10, 2021).

[25] *Id.* at 62471.

[26] *See, e.g., Erickson* v. *First Advantage Background Screening Corp.,* 981 F.3d 1246, 1249 (11th Cir. 2020) (defendant furnished a consumer report about plaintiff that included a record belonging to plaintiff's father using name-only matching; defendant included with the consumer report the statement: ''[t]his record is matched by First Name, Last Name ONLY and may not belong to your subject. Your further review of the State Sex Offender Registry is required in order to determine if this is your subject.''); *see also United States* v. *Infotrack Info. Servs.,* 14-cv-02054, at ¶¶ 16–17 (N.D. Ill. 2014), *https://www.ftc.gov/system/files/documents/cases/140409infotrackcmpt.pdf* (defendant consumer reporting agency, using name-only matching, identified more than one individual with a record in the National Sex Offender registry and reported all identified individuals as ''possible matches'' to users). *Erickson* and *Infotrack* concerned alleged violations of the FCRA's accuracy provisions, 15 U.S.C. 1681e(b), not its permissible purpose provisions.

[27] *See, e.g., Erickson,* 981 F.3d at 1249 (consumer report directed the user to a public database ''to compare the 'demographic data and available photographs,' noting that the user might 'conclude that the records do not belong to''' the subject of the user's request); *Dodgson* v. *First Advantage Background Screening Corp.,* 2018 WL 1807014, *1 (N.D. Ga. 2018) (noting that the record belonging to plaintiff's father that was included in plaintiff's consumer report ''contained at the very least an address that did not match plaintiff's address''); *Infotrack,* 14-cv-02054, at ¶ 16 (''Defendants would forward reports that included names and pictures of several different people with the same name who were convicted sex offenders and listed in the National Sex Offender Registry. Defendants' practice and procedure resulted in furnishing consumer reports to employers that included National Sex Offender Registry records of individuals who could not have been the subject of the inquiry.'').

[28] *Erickson,* 981 F.3d at 1249.

failure to have a reason to believe that a user has a permissible purpose for a consumer report provided pursuant to FCRA section 604(a)(3). A disclaimer does not change the fact that the consumer reporting company has failed to satisfy the requirements of 604(a)(3) and has provided a consumer report about a consumer to a person lacking a permissible purpose with respect to that consumer.

2. FCRA Section 604(f)

FCRA section 604(f) prohibits a person from using or obtaining a consumer report ''unless . . . the consumer report is obtained for a purpose for which the consumer report is authorized to be furnished under [FCRA section 604]'' and ''the purpose is certified in accordance with FCRA section 607 by a prospective user of the report through a general or specific certification.'' [29] Congress amended the FCRA to include section 604(f) in September 1996.[30] Before the 1996 amendments, FCRA section 604 did not impose limitations on users of consumer reports, only on consumer reporting agencies. The Bureau interprets FCRA section 604(f) to provide that consumer report users are strictly prohibited from using or obtaining consumer reports without a permissible purpose. Although some courts have applied a ''reason to believe'' standard for persons using or obtaining a consumer report, as at least one court has noted, the opinion most commonly cited in support of this standard was decided before the 1996 amendments.[31] Based on its plain language, the 1996 addition of FCRA section 604(f) clearly imposes a strict prohibition on using or obtaining a consumer report without a permissible purpose.[32]

Users of consumer reports must ensure that they do not violate consumer privacy by obtaining consumer reports when they lack a permissible purpose for doing so. For example, in 2018 a company settled Bureau allegations that it violated FCRA section 604(f) when its agents obtained consumer reports for consumers who were not seeking an extension of credit from the company and the company had no other permissible purpose for the consumer reports it obtained.[33] In some instances, for example, the company's agents initiated credit applications for the wrong consumer by incorrectly inputting consumer information into the company's application system or by selecting the wrong consumer from a list of possible consumers identified in the system. When these applications were initiated in error, the company obtained a consumer report for a consumer with respect to which it had no permissible purpose, violating the FCRA's permissible purpose provisions and the privacy of the consumers that were the subject of those reports, and also generating an inquiry on the consumers' credit reports.[34]

II. Regulatory Matters

This advisory opinion is an interpretive rule issued under the Bureau's authority to interpret the FCRA, including under section 1022(b)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act,[35] which authorizes guidance as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of Federal consumer financial laws.[36]

As an interpretive rule, this advisory opinion is exempt from the notice-and-comment rulemaking requirements of the Administrative Procedure Act.[37] Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.[38] The Bureau has also determined that this advisory opinion does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.[39]

Pursuant to the Congressional Review Act,[40] the Bureau will submit a report containing this interpretive rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to the rule's published effective date. The Office of Information and Regulatory Affairs has designated this interpretive rule as not a ''major rule'' as defined by 5 U.S.C. 804(2).

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2022–14823 Filed 7–11–22; 8:45 am]

BILLING CODE 4810–AM–P

[29] 15 U.S.C. 1681b(f). As noted above, FCRA section 607(a) requires that a consumer reporting agency must, among other things, require that prospective users of consumer reports ''certify the purposes for which the information is sought, and certify that the information will be used for no other purpose.'' 15 U.S.C. 1681e(a).

[30] Consumer Credit Reporting Reform Act of 1996, Public Law 104–208, Div. A, tit. II, sec. 2404.

[31] *See, e.g., Blumenfeld* v. *Regions Bank,* No. 4:16–CV–01652–ACA, 2018 WL 4216369, at *5 (N.D. Ala. 2018) (holding that ''[FCRA section 604(f)] does not incorporate the 'reason to believe' language from [FCRA section 604(a)],'' and noting that the opinion in *Korotki* v. *Att'y Servs. Corp. Inc.,* 931 F. Supp. 1269, 1276 (D. Md. 1996) (applying section 604(a)(3)'s ''reason to believe'' standard to users), was decided prior to the 1996 amendments to the FCRA that added section 604(f)).

[32] Pursuant to FCRA sections 616 and 617, a person is civilly liable to a consumer for violations of section 604(f) if they have negligently or willfully failed to comply with the requirement. 15 U.S.C. 1681n, 1681o.

[33] *In re State Farm Bank, FSB,* 2018–CFPB–0009, at ¶¶ 17–19 (Dec. 6, 2018), *https://files.consumerfinance.gov/f/documents/bcfp_state-farm-bank_consent-order.pdf.*

[34] *Id.*

[35] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

[36] 12 U.S.C. 5512(b)(1).

[37] 5 U.S.C. 553(b).

[38] 5 U.S.C. 603(a), 604(a).

[39] 4 U.S.C. 3501–3521.

[40] 5 U.S.C. 801 *et seq.*

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 1

Fees for Reviews of the Rule Enforcement Programs of Designated Contract Markets and Registered Futures Associations; Correction

AGENCY: Commodity Futures Trading Commission.

ACTION: Notification of 2021 schedule of fees; correction.

SUMMARY: The Commodity Futures Trading Commission (Commission) is correcting a document published in the **Federal Register** on June 17, 2022. The document contained incorrect assessed fee data for four of the entities in Table 2. This document corrects the data contained in those inaccurate sixteen cells in Table 2.

DATES: Each self-regulatory organization is required to remit electronically the applicable fee on or before August 16, 2022.

FOR FURTHER INFORMATION CONTACT: Joel Mattingley, Chief Financial Officer, Commodity Futures Trading Commission; (202) 418–5310; Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581; *jmattingley@cftc.gov.* For information on electronic payments, contact Jennifer Fleming; (202) 418–5034; *jfleming@cftc.gov.*

SUPPLEMENTARY INFORMATION:

Correction

In FR Rule Doc. 2022–13141, appearing on page 36409 in the **Federal Register** of Friday, June 17, 2022, Table 2—Schedule of Fees is corrected to read as follows:

Tab 14

Limited Applicability of Consumer Financial Protection Act's "Time or Space" Exception With Respect to Digital Marketing Providers, 87 Fed. Reg. 50556 (Aug. 17, 2022).

CFPB Warns that Digital Marketing Providers Must Comply with Federal Consumer Finance Protections

Tech firms that use behavioral targeting of individual consumers regarding financial products are liable for violations

AUG 10, 2022

WASHINGTON, D.C. – Today, the Consumer Financial Protection Bureau (CFPB) issued an interpretive rule laying out when digital marketing providers for financial firms must comply with federal consumer financial protection law. Digital marketers that are involved in the identification or selection of prospective customers or the selection or placement of content to affect consumer behavior are typically service providers for purposes of the law. Digital marketers acting as service providers can be held liable by the CFPB or other law enforcers for committing unfair, deceptive, or abusive acts or practices as well as other consumer financial protection violations.

"When Big Tech firms use sophisticated behavioral targeting techniques to market financial products, they must adhere to federal consumer financial protection laws," said CFPB Director Rohit Chopra. "Federal and state law enforcers can and should hold these firms accountable if they break the law."

Digital marketing providers have transformed advertising. Traditional advertising relies on getting a product or service out to as wide an audience as possible. A traditional marketer, for example, may try to purchase time and space for a TV commercial on the most watched station or show. Digital marketers, on the other hand, seek to maximize individuals' interactions with ads. They may harvest personal data to feed their behavioral analytics models that can target individuals or groups that they predict are more likely to interact with an ad or sign up for a product or service.

When digital marketing providers go beyond traditional advertising, they are typically covered by the Consumer Financial Protection Act as service providers. The Act contains an exception for companies that solely provide time or space for an advertisement for a consumer financial product or service through print, newspaper, or electronic media. However, the CFPB stated today that the exception does not cover firms that are materially involved in the development of content strategy.

Financial firms rely on the expertise and tools of digital marketing providers that offer sophisticated analytic techniques, aided by machine learning and advanced algorithms, to process large amounts of personal data and deliver highly targeted ads. Financial firms use behavioral analytics to connect with potential customers. However, depending on how these practices are designed and implemented, behavioral marketing and advertising could subject firms to legal liability.

Today's interpretive rule explains:

- **Digital marketers provide material services to financial firms:** A material service is one that is significant or important. Digital marketing providers are typically materially involved in the development of content strategy when they identify or select prospective customers or select or place content in order to encourage consumer engagement with advertising. Digital marketers engaged in this type of ad targeting and delivery are not merely providing ad space and time, and they do not qualify under the "time or space" exception.
- **The CFPB, states, and other consumer protection enforcers can sue digital marketers to stop violations of consumer financial protection law:** Service providers are liable for unfair, deceptive, or abusive acts or practices under the Consumer Financial Protection Act. When digital marketers act as service providers, they are liable for consumer protection law violations.

Read today's interpretive rule, *Limited Applicability of Consumer Financial Protection Act's "Time or Space" Exception with Respect to Digital Marketing Providers* (cfpb.gov/rules-policy/final-rules/limited-applicability-of-consumer-financial-protection-acts-time-or-space-exception-to-digital-marketers/).

Consumers can submit complaints about financial products or services by visiting the CFPB's website (https://www.consumerfinance.gov/complaint/) or by calling (855) 411-CFPB (2372).

Employees who believe their companies have violated federal consumer financial protection laws are encouraged to send information about what they know to whistleblower@cfpb.gov.

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit consumerfinance.gov (cfpb.gov/).

Topics

- ADVANCED TECHNOLOGY (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=ADVANCED-TECHNOLOGY)

- **DATA** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=DATA)
- **FINANCIAL SERVICE PROVIDERS** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=FINANCIAL-SERVICE-PROVIDERS)
- **ACCESS TO CREDIT** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=ACCESS-TO-CREDIT)

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provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to our constituents and stakeholders. The *Constituent Update* is available on the FSIS web page. Through the web page, FSIS is able to provide information to a much broader, more diverse audience. In addition, FSIS offers an email subscription service which provides automatic and customized access to selected food safety news and information. This service is available at: *https://www.fsis.usda.gov/subscribe.* Options range from recalls to export information, regulations, directives, and notices. Customers can add or delete subscriptions themselves and have the option to password protect their accounts.

List of Subjects

9 CFR Part 317

Food labeling, Food packaging, Meat inspection, Nutrition, Reporting and recordkeeping requirements.

9 CFR Part 381

Administrative practice and procedure, Animal diseases, Crime, Exports, Food grades and standards, Food labeling, Food packaging, Government employees, Grant programs-agriculture, Intergovernmental relations, Laboratories, Meat inspection, Nutrition, Polychlorinated biphenyls (PCB's), Poultry and poultry products, Reporting and recordkeeping requirements, Seizures and forfeitures, Signs and symbols, Technical assistance, Transportation.

For the reasons set out in the preamble, FSIS amends 9 CFR parts 317 and 381 as follows:

PART 317—LABELING, MARKING DEVICES, AND CONTAINERS

■ 1. The authority citation for part 317 continues to read as follows:

Authority: 21 U.S.C. 601–695; 7 CFR 2.18, 2.53.

§ 317.2 [Amended]

■ 2. Amend § 317.2 as follows:

■ a. In paragraph (h)(4), remove the phrase "a declaration of 1½ pounds avoirdupois weight shall be expressed as "Net Wt. 24 oz. (1 lb. 8 oz.)," "Net Wt. 24 oz. (1½ lb.)," or "Net Wt. 24 oz. (1.5 lbs.)."" and add in its place "a declaration of 1 ½ pounds avoirdupois weight shall be expressed as "Net Wt. 24 oz.," "Net Wt. 1 lb. 8 oz.," "Net Wt. 1½ lb.," or "Net Wt. 1.5 lbs."".

■ b. In paragraph (h)(5), remove "the statement shall be expressed as a dual declaration both in ounces and (immediately thereafter in parentheses) in pounds" and add in its place "the statement shall be expressed in ounces or in pounds".

■ c. In paragraph (h)(9)(i), remove the phrase ", dual declaration," from the second and fourth sentences;

■ d. In paragraph (h)(9)(iii), remove the phrase ", dual declaration,";

■ e. In paragraph (h)(9)(iv), remove "paragraphs (h) (3) and (5)" and add in its place "paragraph (h)(3)";

■ f. In paragraph (h)(9)(v), remove "paragraphs (h)(3) and (h)(5)" and add in its place "paragraph (h)(3)" and remove the phrase ", and that the statement be expressed both in ounces and in pounds,";

■ g. In paragraph (h)(12), remove the phrase ", except that such declaration of total quantity need not be followed by an additional parenthetical declaration in terms of the largest whole units and subdivisions thereof, as required by paragraph (h)(5) of this section".

PART 381—POULTRY PRODUCTS INSPECTION REGULATIONS

■ 3. The authority citation for part 381 is revised to read as follows:

Authority: 7 U.S.C. 138f, 1633; 21 U.S.C. 451–472; 7 CFR 2.7, 2.18, 2.53.

■ 4. Amend § 381.121 as follows:

■ a. Paragraph (c)(5) is revised.

■ b. In paragraph (c)(8), remove ", except that such declaration of total quantity need not be followed by an additional parenthetical declaration in terms of the largest whole units and subdivisions thereof, as otherwise required by this paragraph (c)" from the first sentence;

■ c. In paragraph (c)(9)(i), remove the phrase ", dual declaration," from the second and fourth sentences; and

■ d. In paragraph (c)(9)(iii), remove the phrase ", dual declaration,".

The revision reads as follows:

§ 381.121 Quantity of contents.

* * * * *

(c) * * *

(5) The terms "net weight" or "net wt." shall be used when stating the net quantity of contents in terms of weight, and the term "net contents" or "contents" when stating the net quantity of contents in terms of fluid measure. Except as provided in § 381.128, the statement shall be expressed in terms of avoirdupois weight or liquid measure. Where no general consumer usage to the contrary exists, the statement shall be in terms of liquid measure, if the product is liquid, or in terms of weight if the product is solid, semi-solid, viscous, or a mixture of solid and liquid. On packages containing less than 1 pound or 1 pint, the statement shall be expressed in ounces or fractions of a pint, respectively. On packages containing 1 pound or 1 pint or more, and less than 4 pounds or 1 gallon, the statement shall be expressed in ounces or in pounds with any remainder in terms of ounces or common or decimal fraction of the pound, or in the case of liquid measure, in the largest whole units with any remainder in terms of fluid ounces or common or decimal fraction of the pint or quart. For example, a declaration of three-fourths pound avoirdupois weight shall be expressed as "Net Wt. 12 oz."; a declaration of 1½ pounds avoirdupois weight shall be expressed as "Net Wt. 24 oz.," "Net Wt. 1 lb. 8 oz.," "Net Wt. 1½ lb.," or "Net Wt. 1.5 lbs.". However, on random weight packages the statement shall be expressed in terms of pounds and decimal fractions of the pound, for packages over 1 pound, and for packages which do not exceed 1 pound the statement may be in decimal fractions of the pound in lieu of ounces. The numbers may be written in provided the unit designation is printed. Paragraphs (c)(8) and (9) of this section permit certain exceptions to this paragraph (c)(5) for multi-unit packages, and random weight consumer size and small packages (less than ½ ounce), respectively.

* * * * *

Done in Washington, DC.

Paul Kiecker,

Administrator.

[FR Doc. 2022–17498 Filed 8–16–22; 8:45 am]

BILLING CODE 3410–DM–P

CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Chapter X

Limited Applicability of Consumer Financial Protection Act's "Time or Space" Exception With Respect to Digital Marketing Providers

AGENCY: Consumer Financial Protection Bureau.

ACTION: Interpretive rule.

SUMMARY: Section 1002 of the Consumer Financial Protection Act of 2010 (CFPA) defines the term "service provider" and sets forth two exceptions to that definition. Under one of those exceptions, a person is not a service provider solely by virtue of such person offering or providing to a covered

person time or space for an advertisement for a consumer financial product or service through print, newspaper, or electronic media. The Consumer Financial Protection Bureau (Bureau or CFPB) is issuing this interpretive rule to address digital marketing providers that commingle the targeting and delivery of advertisements to consumers, such as by using algorithmic models or other analytics, with the provision of advertising ''time or space.'' Digital marketing providers that are materially involved in the development of content strategy would not fall within the ''time or space'' exception as interpreted by the Bureau. Accordingly, digital marketing providers that are involved in the identification or selection of prospective customers or the selection or placement of content to affect consumer engagement, including purchase or adoption behavior, are typically service providers under the CFPA.

DATES: This interpretive rule is effective on August 17, 2022.

FOR FURTHER INFORMATION CONTACT: Christopher Davis, Attorney-Advisor; Office of Fair Lending and Equal Opportunity, at *CFPB_FairLending@cfpb.gov,* or Brad Lipton, Senior Counsel, Legal Division, at 202–435–7000. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

Financial services companies rely on digital marketing providers to target and deliver advertisements across various platforms to consumers on their behalf. By doing so, financial services companies may be able to engage with audiences in ways that they were previously unable to with traditional advertising methods. Many modern digital marketing providers (or ''digital marketers'') play a dramatically different role in consumer advertising than did traditional media sources like print newspapers or radio stations. Many digital marketers target and deliver ads to specific consumers [1] using sophisticated analytical techniques, including machine learning and behavioral analytics, to process large amounts of consumer data.[2] In other words, many digital marketers aggregate and analyze immense amounts of granular consumer data, and then use that data to determine what advertisements to provide to specific consumers at what times. Accordingly, digital marketing providers commingle the service of targeting and delivering advertisements with the activities of traditional media sources in providing airtime or physical space.

Digital marketing providers obtain data from a variety of sources, including but not limited to data collected directly from consumers, for example when registering for an account or when conducting a search query into a search bar. Further, digital marketers may harvest a wide variety of consumer data by monitoring and tracking a consumer's web activity, including for example, their browsing history, their activity while online, and their geolocation.[3] (This is sometimes called ''surveillance advertising.'' [4]) Digital marketers may also obtain data from third-party data brokers or ''second-party'' partnerships with other companies.[5] Using these tools and others, digital marketers collect granular consumer data that they analyze to develop insights about consumers' behavior more broadly.[6]

The insights that digital marketing providers develop enable them to offer financial services companies targeted advertising services. For example, collected data from individual consumers can be analyzed by these marketers and used to segment consumers across various groupings, such as by age, location, or specific interests (*e.g.,* ''concert goers''). After these categories have been developed, firms that use digital marketing providers to acquire customers can select (or exclude) certain types of customers.[7]

In contrast, digital marketers may also target advertisements at specific times based on context, *i.e.,* the content that a user is currently viewing. Such contextual advertisements more closely resemble traditional ads users might find in other spaces—such as an ad for a sporting goods store aired during a televised basketball match or a print clothing ad placed in a fashion magazine—as they are based on the contents of what is being displayed, not consumer-specific data.

Digital marketers engaged in ad targeting and delivery may operate the websites or platforms on which ads appear, or they may not. In either case, digital marketers serve as an intermediary between the financial services company and consumers.

The ways in which digital marketing providers specifically target ads are varied and evolve over time. Ultimately, the digital marketer may decide which group(s) the consumer belongs in and which financial services companies desire to advertise to that group, and may select the specific ad to display to that consumer and/or when to display the ad based on other factors (*e.g.,* the amount a firm is willing to pay to display the ad). Accordingly, many digital marketing providers are materially involved in the development of ''content strategy'' [8] by identifying or selecting prospective customers and/or selecting or placing content to affect consumer engagement, including purchasing or adoption behavior. These activities go well beyond the activities of traditional media sources, such as print newspapers or radio, that solely passively provided airtime or physical space for advertisements.

II. Analysis

Service Providers

A person is a ''covered person'' under the CFPA, and thus subject to that law, including its prohibition on unfair, deceptive, or abusive acts or practices (UDAAPs), if it offers or provides a financial product or service for use by consumers primarily for personal, family, or household purposes.[9] ''Service provider[s]'' to covered persons are also subject to the CFPA, including its UDAAP prohibition.[10]

The CFPA defines a service provider as ''any person that provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or

[1] The targeting and delivery of advertisements includes both the targeting and delivery of certain ads to consumers generally at specific times to increase or maximize engagement and the targeting and delivery of ads to specific consumers at specific times. For instance, a digital marketer may select certain ads to show late at night to consumers generally. Or a digital marketer may select certain ads to show late at night to certain consumers.

[2] *See* C.A. Summers, R.W. Smith, and R.W. Reczek, ''An audience of one: Behaviorally targeted ads as implied social labels,'' Journal of Consumer Research, vol. 43, no. 1, pp. 156–178 (June 2016).

[3] *See* Paige M. Boshell, *The Power of Place: Geolocation Tracking and Privacy,* Bus. Law Today (Mar. 2019).

[4] *See* Shoshana Zuboff, The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power (2019).

[5] *See supra* note 3.

[6] *See supra* note 2.

[7] *See id.*

[8] Content strategy is ''the strategy for the distribution of th[e] content'' as well as ''the set of methods and guidelines for the development and curation of content.'' Christen Geiler, *Information Architecture vs Content Strategy—and Why YOU Need Both, Digital.gov* (July 18, 2016), *https://digital.gov/2016/07/18/information-architecture-vs-content-strategy-and-why-you-need-both/*.

[9] *See* 12 U.S.C. 5481(5), (6), (15)(A); 5531; 5536.

[10] *See* 12 U.S.C. 5481(26); 5531; 5536. As the CFPB has explained, discrimination may constitute an unfair act or practice that violates the CFPA's UDAAP prohibition. *See* CFPB UDAAP Exam Manual (updated Apr. 11, 2022).

service.'' [11] The term ''service provider'' includes, but is not limited to, a person that ''participates in designing, operating, or maintaining the consumer financial product or service'' or ''processes transactions relating to the consumer financial product or service.'' [12] The term ''service provider,'' however, ''does not include a person solely by virtue of such person offering or providing to a covered person'' either ''a support service of a type provided to businesses generally or a similar ministerial service,'' or ''time or space for an advertisement for a consumer financial product or service through print, newspaper, or electronic media.'' [13]

Material Service

When digital marketing providers are materially involved in the development of content strategy, they typically provide a material service. Unlike most traditional media sources, digital marketing providers engaged in ad targeting and delivery are not solely providing airtime or physical space for ads. Rather, digital marketers commingle the targeting and delivery of advertisements with the provision of ''time or space.''

A ''material'' service is a service that is significant or important.[14] When digital marketers identify or select prospective customers and/or select or place content to affect consumer engagement, including purchasing or adoption behavior, they are providing a significant—and thus ''material''—service provided to covered persons. In particular, identifying prospective customers and then attempting to acquire those customers is a significant component of the ''offering'' of a consumer financial product or service, which is part of the legally relevant test for determining that a firm is a ''covered person.'' [15]

Indeed, modern digital ad targeting and content delivery typically consists of many functions—such as lead generation,[16] customer acquisition, or marketing analysis or strategy—that would often be performed by covered persons. For example, a covered person may measure the effectiveness of certain marketing efforts by calculating a ''customer acquisition rate.'' [17] Similarly, a covered person's marketing group may analyze where to purchase advertising across multiple channels to maximize impact.[18] The involvement in the development of content strategy by digital marketing providers increasingly resembles these functions and others often performed by covered persons themselves (although the services are often carried out in a more sophisticated way, based on the digital marketers' data and technology). Accordingly, digital marketers that are materially involved in the development of content strategy by identifying or selecting prospective customers and/or selecting or placing content to affect consumer engagement, including purchasing or adoption behavior, typically provide a material service.

''*Time or Space*'' *Exception*

As noted above, the CFPA provides that the term service provider ''does not include a person solely by virtue of such person offering or providing to a covered person'' either ''a support service of a type provided to businesses generally or a similar ministerial service,'' or ''time or space for an advertisement for a consumer financial product or service through print, newspaper, or electronic media.'' [19] The reference to ''solely'' providing ''time or space for an advertisement'' means that digital marketers that provide additional services beyond ''time or space''—*i.e.,* beyond airtime or physical space for the ad—do not qualify for the exception. Accordingly, when digital marketers are materially involved in the development of content strategy in addition to providing airtime or physical space, they fall outside the exception for ''solely'' providing ''time or space.''

The ''service provider'' definition should be interpreted as a cohesive whole.[20] Thus, the ''time or space'' exception should be interpreted alongside its inclusion with the exception for ''a support service of a type provided to businesses generally or a similar ministerial service.'' [21] Firms that provide a ''ministerial'' service to financial institutions are not materially involved in the marketing or distribution of the consumer financial product or service; they are not typically involved in the identification or selection of prospective customers, nor do they select or place content to affect consumer engagement. For example, a firm that furnishes broadband access to a financial institution is not involved in the strategic marketing and distribution of the consumer financial product or service and is generally not providing a material service.

Additionally, the ''time or space'' exception refers to ''electronic media'' within the phrase ''print, newspaper, or electronic media.'' [22] This phrasing—especially alongside the other exemption for ''a support service of a type provided to businesses generally or a similar ministerial service''—indicates that the ''time or space'' exception should be interpreted to refer to the offering of advertising in a manner similar to that was generally performed by traditional media sources, such as ''print'' or ''newspaper.'' [23] A traditional media source typically provided ''time or space''—*i.e.,* the airtime or physical space for the ad—with relatively little (*i.e.,* largely ''ministerial'') involvement in the development of content strategy.[24]

To be sure, some traditional media sources may have been involved in the selection of the audience for or content of ads to some degree (such as by allowing businesses to select advertising space in a geographic-specific section of a newspaper to businesses operating in that geographic area or putting advertisements for financial services in the financial section of the newspaper). But traditional media sources were typically not materially involved in the development of content strategy; in the main, their function was solely to provide ''time or space'' by operating as

[11] 12 U.S.C. 5481(26)(A).

[12] 12 U.S.C. 5481(26)(B)(i), (ii). Of course, nothing in this interpretive rule precludes a digital marketing provider from being considered a covered person based on its acts and practices. Indeed, by engaging in consumer data collection, tracking, analysis, and maintenance activities, digital marketing providers may be covered persons. *See* 12 U.S.C. 5481(15)(A)(ix).

[13] 12 U.S.C. 5481(26)(B)(i), (ii).

[14] *See* Merriam Webster's Dictionary (online ed.) (defining ''material'' as ''having real importance or great consequences''); Black's Law Dictionary (11th ed. online) (defining ''material'' as ''significant; essential'').

[15] *See* 12 U.S.C. 5481(6).

[16] *See, e.g.,* Complaint for Violations of the Consumer Financial Protection Act of 2010, *Consumer Fin. Prot. Bureau* v. *D and D Marketing, Inc.,* No. 2:15–cv–9692 (filed Dec. 17, 2015), *https://files.consumerfinance.gov/f/201512_cfpb_complaint-v-d-and-d-marketing-inc-et-al.pdf* (alleging that a lead aggregator is a ''service provider'' because it sold consumer loan applications as ''leads'' to payday and installment lenders who are ''covered persons'').

[17] *See, e.g.,* Jacquelyn S. Thomas, Werner Reinartz, and V. Kumar, ''Getting the Most out of All Your Customers,'' *Harvard Business Review* (July–August 2004) (noting that ''most companies still use the customer acquisition rate'').

[18] *See, e.g.,* Wes Nichols, ''Advertising Analytics 2.0,'' *Harvard Business Review* (March 2013) (noting that ''most businesses still . . . measured how [their] TV, print, radio, and online ads each functioned independently to drive sales'').

[19] 12 U.S.C. 5481(26)(B)(i), (ii).

[20] *See, e.g., Gustafson* v. *Alloyd Co., Inc.,* 513 U.S. 561, 569 (1995) (noting that ''the Act is to be interpreted as a symmetrical and coherent regulatory scheme'').

[21] 12 U.S.C. 5481(26)(B)(i), (ii).

[22] 12 U.S.C. 5481(26)(B)(i).

[23] *Cf. Gustafson,* 513 U.S. at 576 (''[T]he term 'written communication' must be read in context to refer to writings that, from a functional standpoint, are similar to the terms 'notice, circular, and advertisement.' '').

[24] 12 U.S.C. 5481(26)(B)(i), (ii).

passive conduits of information provided by their customers.

Indeed, when digital marketers are materially involved in the development of content strategy, the marketers perform functions that would often traditionally be undertaken by the covered person itself, rather than by a traditional media outlet. For example, as noted above, a covered person's marketing group may analyze where or when to purchase advertising across multiple channels to maximize impact.[25] Of course, covered persons may sometimes engage third-party vendors for these activities. For example, they may engage an advertising or consulting firm to perform marketing analysis. But this would *not* typically be a service that was performed by a traditional media source, such as a newspaper or radio station. The enterprises or firms providing these services may be ''service providers'' under the CFPA, but a media source that merely provided airtime or physical space would fall into the ''time or space'' exception and would not be a service provider.

Specific Circumstances

The conduct of digital marketers that provide services to covered persons varies widely and, depending on the conduct, may or may not fall within the ''time or space'' exception. Under the interpretation of the definition of ''service provider'' described above, the role played by the digital marketing provider—*i.e.,* whether the digital marketing provider is materially involved in the development of content strategy by identifying or selecting prospective customers and/or selecting or placing content to affect consumer engagement—will determine whether the advertiser falls within the ''time or space'' exception. Increasingly, the role typically played by digital marketers fall outside the exception and the digital marketers are typically service providers under the CFPA.

In certain circumstances, the digital marketing provider is only minimally involved in identifying or selecting prospective customers or selecting or placing content to affect consumer engagement. For instance, digital marketers may offer covered persons the ability to choose to run an advertisement on a particular web page or application of the covered person's choosing, with advertisements seen by any user of that page or application. In these circumstances, the digital marketer would typically fall within the ''time or space'' exception. The digital marketer in this situation is ''solely'' providing ''time or space'' for the ad, in the sense of airtime or physical space for the ad, without commingling targeting or delivery of the advertisements. Moreover, the digital marketer's conduct in these circumstances is similar to a traditional media source (such as a newspaper or radio station) that offered advertisements directed at a particular market of the covered person's choosing, rather than a function traditionally performed by a covered person itself.

Digital marketing providers may also target and deliver the advertisements to users with certain characteristics (such as demographics, geography, online behavior (such as particular keyword searches), or offline behavior). In some circumstances, the covered person may provide an audience of existing users and specify that advertisements be provided to similar consumers. While the covered person may specify certain parameters of the intended audience for a specific consumer financial product or service, it is the digital marketers' ad targeting and delivery algorithms that identify the audience with the desired characteristics and determine whether and/or when specific consumers see an advertisement.[26]

Digital marketing providers do not fall within the ''time or space'' exception if they target and deliver advertisements to users with certain characteristics, even if those characteristics are specified by the covered person. In these circumstances, although the covered person also plays a role, the digital marketer selects, including through its algorithms and data, the specific audience that sees the advertisement for the covered person's consumer financial product or service. The selection of specific consumers to see specific ads goes beyond solely selling airtime or physical space as performed by traditional media sources such as newspapers or radio. When digital marketers target and deliver advertisements to users with certain characteristics, the digital marketer is materially involved in the development of content strategy and is not covered by the ''time or space'' exception.

Moreover, when digital marketers target and deliver advertisements to users with certain characteristics, the selection of the audience through algorithms and data is akin to a customer acquisition function that would traditionally be performed in-house by a covered person (or a vendor other than a traditional media source, such as a consulting firm). Accordingly, digital marketers that target and deliver advertisements to users with certain characteristics specified by the covered person are typically service providers under the CFPA.

Similarly, digital marketing providers do not fall into the ''time or space'' exception if a covered person identifies particular users by name and the digital marketer targets and delivers the advertisements to those users at specific times to increase or maximize engagement. The provision of the service of analyzing when advertisements should appear goes beyond ''solely'' selling airtime or physical space as performed by traditional media sources such as newspapers or radio. To be sure, a traditional media source might have provided some basic information to firms about when to air particular advertisements, but the business purchasing the ad was generally the entity that made the decision about when and where to place the ad. Here, the use of algorithms and business-specific data to determine when to display a specific business' ads to specific consumers to affect consumer engagement extends well beyond the activities performed by a traditional media source.

There are also circumstances in which the digital marketing provider plays an even more significant role in determining which specific consumers see digital advertisements, such as by determining or suggesting to the covered person which users are the most appropriate audience for the covered person's advertisements (rather than receiving such direction from the covered person). Digital marketers may determine who is the appropriate audience to receive ads based on, for instance, the content of the particular ad, the type of businesses being advertised, the marketer's own knowledge of a particular user's characteristics and behavior (including offline behavior), the behavior of other users, and past user engagement with similar types of ads.[27]

In circumstances such as these in which a digital marketing provider plays an even more significant role in

[25] *See, e.g.,* Wes Nichols, ''Advertising Analytics 2.0,'' *Harvard Business Review* (March 2013) (noting that ''most businesses still . . . measured how [their] TV, print, radio, and online ads each functioned independently to drive sales'').

[26] *See, e.g.,* Charge of Discrimination at 5 ¶ 17, *Facebook, Inc.,* No. 01–18–0323–8 (Dep't of Hous. & Urban Dev. Mar. 28, 2019), *https://www.hud.gov/sites/dfiles/Main/documents/HUD_v_Facebook.pdf.*

[27] *See, e.g.,* Charge of Discrimination at 4 ¶ 16, *Facebook, Inc.,* No. 01–18–0323–8 (Dep't of Hous. & Urban Dev. Mar. 28, 2019), *https://www.hud.gov/sites/dfiles/Main/documents/HUD_v_Facebook.pdf.*

determining which specific users see digital advertisements, such as by determining or suggesting which users are the appropriate audience for advertisements, the digital marketer does not fall within the ''time or space'' exception and is typically a service provider under the CFPA. Determining which users are the appropriate audience for a particular covered person's advertisement is well beyond providing airtime or physical space. To the contrary, determining the appropriate audience is much more similar to the function traditionally performed by a covered person's own customer acquisition or marketing group than by a traditional media source. Indeed, identifying or selecting prospective customers for a covered person's business is similar to the function of a ''lead generator'' that would be considered a service provider under the CFPA. Accordingly, digital marketers that, for example, determine or suggest which users are the appropriate audience for advertisements are materially involved in the development of content strategy, do not fall under the ''time or space'' exception, and are typically service providers under the CFPA.

III. Regulatory Matters

This is an interpretive rule issued under the Bureau's authority to interpret the CFPA, including under section 1022(b)(1) of the CFPA, which authorizes guidance as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of Federal consumer financial laws, such as the CFPA.[28]

As an interpretive rule, this rule is exempt from the notice-and-comment rulemaking requirements of the Administrative Procedure Act.[29] Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.[30] The Bureau also has determined that this interpretive rule does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.[31]

Pursuant to the Congressional Review Act,[32] the Bureau will submit a report containing this interpretive rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to the rule's published effective date. The Office of Information and Regulatory Affairs has designated this interpretive rule as not a ''major rule'' as defined by 5 U.S.C. 804(2).

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2022–17699 Filed 8–16–22; 8:45 am]

BILLING CODE 4810–AM–P

[28] 12 U.S.C. 5512(b)(1).

[29] 5 U.S.C. 553(b).

[30] 5 U.S.C. 603(a), 604(a).

[31] 44 U.S.C. 3501–3521.

[32] 5 U.S.C. 801 *et seq.*

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2022–0990; Project Identifier MCAI–2022–00372–T; Amendment 39–22137; AD 2022–16–08]

RIN 2120–AA64

Airworthiness Directives; Airbus Canada Limited Partnership (Type Certificate Previously Held by C Series Aircraft Limited Partnership (CSALP); Bombardier, Inc.) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Airbus Canada Limited Partnership Model BD–500–1A10 and BD–500–1A11 airplanes. This AD was prompted by a dual-engine automatic shutdown on landing. This AD requires revising the existing airplane flight manual (AFM) to incorporate a new normal procedure and revised non-normal procedures, as specified in a Transport Canada Civil Aviation (TCCA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD becomes effective September 1, 2022.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of September 1, 2022.

The FAA must receive comments on this AD by October 3, 2022.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For material incorporated by reference (IBR) in this AD, contact TCCA, Transport Canada National Aircraft Certification, 159 Cleopatra Drive, Nepean, Ontario K1A 0N5, Canada; telephone 888–663–3639; email *AD-CN@tc.gc.ca;* internet *tc.canada.ca/en/aviation.* You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket at *www.regulations.gov* by searching for and locating Docket No. FAA–2022–0990.

Examining the AD Docket

You may examine the AD docket at *www.regulations.gov* by searching for and locating Docket No. FAA–2022–0990; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

FOR FURTHER INFORMATION CONTACT: Jiwan Karunatilake, Aerospace Engineer, Airframe and Propulsion Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; email *9-avs-nyaco-cos@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written data, views, or arguments about this final rule. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2022–0990; Project Identifier MCAI–2022–00372–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the final rule, explain the reason for any recommended change, and include supporting data.

Tab 15

Circular 2022-04: Insufficient Data Protection or Security for Sensitive Consumer Information, 87 Fed. Reg. 54346 (Sept. 6, 2022).

CFPB Takes Action to Protect the Public from Shoddy Data Security Practices

Financial companies may be held liable for unfairly putting customers' data at risk

AUG 11, 2022

WASHINGTON, D.C. – The Consumer Financial Protection Bureau (CFPB) confirmed in a circular published today that financial companies may violate federal consumer financial protection law when they fail to safeguard consumer data. The circular provides guidance to consumer protection enforcers, including examples of when firms can be held liable for lax data security protocols.

"Financial firms that cut corners on data security put their customers at risk of identity theft, fraud, and abuse," said CFPB Director Rohit Chopra. "While many nonbank companies and financial technology providers have not been subject to careful oversight over their data security, they risk legal liability when they fail to take commonsense steps to protect personal financial data."

The CFPB is increasing its focus on potential misuse and abuse of personal financial data. As part of this effort, the CFPB circular explains how and when firms may be violating the Consumer Financial Protection Act with respect to data security. Specifically, financial companies are at risk of violating the Consumer Financial Protection Act if they fail to have adequate measures to protect against data security incidents.

Past data security incidents, including the 2017 Equifax data breach, have led to the harvesting of the sensitive personal data of hundreds of millions of Americans. In some cases, these incidents violated the Consumer Financial Protection Act, in addition to other laws. For example, in 2019, the CFPB charged Equifax (https://www.consumerfinance.gov/about-us/newsroom/cfpb-ftc-states-announce-settlement-with-equifax-over-2017-data-breach/) with violating the Consumer Financial Protection Act to address misconduct related to data security.

Today's circular also provides examples of widely implemented data security practices. The circular does not suggest that particular security practices are specifically required under the Consumer Financial Protection Act. However, the circular notes some examples where the failure to implement the following data security measures might increase the risk that a firm's conduct triggers liability under the Consumer Financial Protection Act, including:

- **Multi-factor Authentication**: Multi-factor authentication greatly increases the level of difficulty for adversaries to compromise enterprise user accounts, and thus gain access to sensitive customer data. Multi-factor authentication can protect against credential phishing, such as those using the Web Authentication standard supported by web browsers.
- **Adequate Password Management:** Unauthorized use of passwords is a common data security issue, as is the use of default enterprise logins or passwords. Username and password combinations can be sold on the dark web or posted for free on the internet, creating risk of future breaches. For firms that are still using passwords, password management policies and practices allow for ways to monitor for breaches at other entities where employees may be re-using logins and passwords.
- **Timely Software Updates:** Software vendors and creators, including open-source software libraries and projects, often send out patches and other updates to address continuously emerging threats. Upon announcement of these updates to address vulnerabilities, hackers immediately become aware that firms using older versions of software are potential targets to exploit. Protocols to immediately update software and address vulnerabilities once they become publicly known can reduce vulnerabilities.

Read today's *Consumer Financial Protection Circular* on data security (cfpb.gov/compliance/circulars/circular-2022-04-insufficient-data-protection-or-security-for-sensitive-consumer-information/).

Consumers can submit complaints about financial issues that come up from data breaches by visiting the CFPB's website (https://www.consumerfinance.gov/complaint/) or by calling (855) 411-CFPB (2372).

Employees who believe their companies have violated federal consumer financial protection laws are encouraged to send information about what they know to whistleblower@cfpb.gov.

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit consumerfinance.gov (cfpb.gov/).

Topics

- ADVANCED TECHNOLOGY (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=ADVANCED-TECHNOLOGY)
- DATA (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=DATA)

- IDENTITY THEFT AND FRAUD (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=IDENTITY-THEFT-FRAUD)

PRESS INFORMATION

If you want to republish the article or have questions about the content, please contact the press office.

Go to press resources page (cfpb.gov/about-us/newsroom/press-resources/)

■ 2. Section 430.2 is amended by adding, in alphabetical order, definitions of ''Decorative hearth product'', ''Miscellaneous gas products'', and ''Outdoor heater'' to read as follows:

§ 430.2 Definitions.

* * * * *

Decorative hearth product means a gas-fired appliance that—

(1) Simulates a solid-fueled fireplace or presents a flame pattern;

(2) Includes products designed for indoor use, outdoor use, or either indoor or outdoor use;

(3) Is not for use with a thermostat;

(4) For products designed for indoor use, is not designed to provide space heating to the space in which it is installed; and

(5) For products designed for outdoor use, is not designed to provide heat proximate to the unit.

* * * * *

Miscellaneous gas products mean decorative hearth products and outdoor heaters.

* * * * *

Outdoor heater means a gas-fired appliance designed for use in outdoor spaces only, and which is designed to provide heat proximate to the unit.

* * * * *

[FR Doc. 2022–18856 Filed 9–2–22; 8:45 am]

BILLING CODE 6450–01–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Chapter X

Consumer Financial Protection Circular 2022–04: Insufficient Data Protection or Security for Sensitive Consumer Information

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Consumer Financial Protection Circular.

SUMMARY: The Consumer Financial Protection Bureau (Bureau or CFPB) has issued Consumer Financial Protection Circular 2022–04, titled, ''Insufficient Data Protection or Security for Sensitive Consumer Information.'' In this circular, the Bureau responds to the question, ''Can entities violate the prohibition on unfair acts or practices in the Consumer Financial Protection Act (CFPA) when they have insufficient data protection or information security?''

DATES: The Bureau released this circular on its website on August 11, 2022.

ADDRESSES: Enforcers, and the broader public, can provide feedback and comments to *Circulars@cfpb.gov.*

FOR FURTHER INFORMATION CONTACT: Jaclyn Sellers, Senior Counsel, Office of Supervision, Fair Lending and Enforcement, at (202) 435–2661. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

Question Presented

Can entities violate the prohibition on unfair acts or practices in the Consumer Financial Protection Act (CFPA) when they have insufficient data protection or information security?

Response

Yes. In addition to other Federal laws governing data security for financial institutions, including the Safeguards Rules issued under the Gramm-Leach-Bliley Act (GLBA), ''covered persons'' and ''service providers'' must comply with the prohibition on unfair acts or practices in the CFPA. Inadequate security for the sensitive consumer information collected, processed, maintained, or stored by the company can constitute an unfair practice in violation of 12 U.S.C. 5536(a)(1)(B). While these requirements often overlap, they are not coextensive.

Acts or practices are unfair when they cause or are likely to cause substantial injury that is not reasonably avoidable or outweighed by countervailing benefits to consumers or competition. Inadequate authentication, password management, or software update policies or practices are likely to cause substantial injury to consumers that is not reasonably avoidable by consumers, and financial institutions are unlikely to successfully justify weak data security practices based on countervailing benefits to consumers or competition. Inadequate data security can be an unfair practice in the absence of a breach or intrusion.

Analysis

Widespread data breaches and cyberattacks have resulted in significant harms to consumers, including monetary loss, identity theft, significant time and money spent dealing with the impacts of the breach, and other forms of financial distress. Providers of consumer financial services are subject to specific requirements to protect consumer data. In 2021, the Federal Trade Commission (FTC) updated its Safeguards Rule implementing section 501(b) of GLBA, to set forth specific criteria relating to the safeguards that certain nonbank financial institutions must implement as a part of their information security programs.[1] These safeguards, among other things, limit who can access customer information, require the use of encryption to secure such information, and require the designation of a single qualified individual to oversee an institution's information security program and report at least annually to the institution's board of directors or equivalent governing body. The Federal banking agencies also have issued interagency guidelines to implement section 501 of GLBA.[2]

In certain circumstances, failure to comply with these specific requirements may also violate the CFPA's prohibition on unfair acts or practices. The CFPA defines an unfair act or practice as an act or practice: (1) that causes or is likely to cause substantial injury to consumers, (2) which is not reasonably avoidable by consumers, and (3) is not outweighed by countervailing benefits to consumers or competition.[3]

A practice causes substantial injury to consumers when it causes significant harm to a few consumers or a small amount of harm to many consumers. For example, inadequate data security measures can cause significant harm to a few consumers who become victims of targeted identity theft as a result, or it can cause harm to potentially millions of consumers when there are large customer-base-wide data breaches. Information security weaknesses can result in data breaches, cyberattacks, exploits, ransomware attacks, and other exposure of consumer data.[4]

Further, actual injury is not required to satisfy this prong in every case. A significant risk of harm is also sufficient. In other words, this prong of unfairness is met even in the absence of a data breach. Practices that ''are likely to cause'' substantial injury, including inadequate data security measures that have not yet resulted in a breach, nonetheless satisfy this prong of unfairness.[5]

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[1] 86 FR 70272 (Dec. 9, 2021).

[2] *See* 66 FR 8616 (Feb. 1, 2001). These guidelines are currently codified at 12 CFR pt. 30, appendix B (OCC); Regulation H, 12 CFR 208, appendix D–2 (Board); Regulation Y, 12 CFR 225, appendix F (Board); 12 CFR pt. 364, appendix B (FDIC).

[3] 12 U.S.C. 5531(c). The unfairness standard in the CFPA is similar to the unfairness standard in section 5 of the Federal Trade Commission Act.

[4] *Compliance Management Review—Information Technology,* CFPB Examination Procedures (Sept. 2021), *https://files.consumerfinance.gov/f/documents/cfpb_compliance-management-review-information-technology_examination-procedures.pdf.*

[5] *See, e.g., FTC* v. *Wyndham Worldwide Corp.,* 799 F.3d 236, 246 (3d Cir. 2015) (''Although unfairness claims 'usually involve actual and completed harms,' 'they may also be brought on the

Consumers cannot reasonably avoid the harms caused by a firm's data security failures. They typically have no way of knowing whether appropriate security measures are properly implemented, irrespective of disclosures provided. They do not control the creation or implementation of an entity's security measures, including an entity's information security program. And consumers lack the practical means to reasonably avoid harms resulting from data security failures.[6]

Where companies forgo reasonable cost-efficient measures to protect consumer data, like those measures identified below, the CFPB expects the risk of substantial injury to consumers will outweigh any purported countervailing benefits to consumers or competition. The CFPB is unaware of any instance in which a court applying an unfairness standard has found that the substantial injury caused or likely to have been caused by a company's poor data security practices was outweighed by countervailing benefits to consumers or competition.[7] Given the harms to consumers from breaches involving sensitive financial information, this is not surprising.

Relevant Precedent

On July 22, 2019, the CFPB alleged that Equifax violated the CFPA's prohibition on unfair acts or practices.[8] The FTC also alleged that Equifax violated the FTC Act and the FTC's Safeguards Rule, which implements section 501 of GLBA and establishes certain requirements that nonbank financial institutions must adhere to in order to protect financial information.[9]

In its complaint against Equifax, the CFPB alleged an unfairness violation based on Equifax's failure to provide reasonable security for sensitive personal information it collected, processed, maintained, or stored within computer networks.[10] In particular, Equifax violated the prohibition on unfairness (as well as the FTC's Safeguards Rule) by using software that contained a known vulnerability and failing to patch the vulnerability for more than four months. Hackers exploited the vulnerability to steal over 140 million names, dates of birth, and SSNs, as well as millions of telephone numbers, email addresses, and physical addresses, and hundreds of thousands of credit card numbers and expiration dates.[11]

Before the Equifax matter, law enforcement actions related to inadequate authentication triggered liability under the FTC Act's prohibition on unfair practices. In 2006, the FTC sued online check processor Qchex and related entities for violating the FTC Act. The FTC alleged that it was an unfair practice to create and deliver checks without verifying that the person requesting the check was authorized to draw checks on the associated bank account.[12] Qchex created checks ''even when the customer's name differed from the name on the bank account listed on the checks or from the name on the credit card account the customer used to pay for [Qchex's] services.'' [13]

Even after setting up certain identity verification procedures, Qchex bypassed those procedures for some customers.[14] Ultimately, a court observed, ''it was a simple matter for unscrupulous opportunists to obtain identity information and draw checks from accounts that were not their own.'' [15] That court confirmed that Qchex injured consumers by creating and delivering unverified checks, in violation of section 5 of the FTC Act.[16] Implementation of common-sense practices—including those that are now required under the FTC's Safeguards Rule—protects consumers from injury and that, in turn, mitigates potential liability for businesses.

Liability for unfair acts or practices has also been triggered in the context of password management and routine software updates. In 2012, the FTC sued multiple entities associated with the Wyndham hospitality company for their failures ''to employ reasonable and appropriate measures to protect personal information against unauthorized access'' in violation of the FTC Act's prohibitions on deceptive and unfair acts and practices.[17] The inadequate data security practices included ''using outdated operating systems that could not receive security updates or patches to address known security vulnerabilities,'' servers that used ''well-known default user IDs and passwords . . . which were easily available to hackers through simple internet searches,'' and password management policies that did not require ''the use of complex passwords for access to the Wyndham-branded hotels' property management systems and allow[ing] the use of easily guessed passwords.'' [18]

The FTC alleged that, due to these and other deficient security measures, ''intruders were able to gain unauthorized access to [Wyndham's] computer network . . . on three separate occasions'' and retrieved ''customers' payment card account numbers, expiration dates, and security codes.'' [19] One such incident led to ''the compromise of more than 500,000 payment card accounts, and the export of hundreds of thousands of consumers' payment card account numbers to a domain registered in Russia.'' [20] When Wyndham argued that data security issues were outside the bounds of the FTC's unfairness authority, the courts confirmed that ''the FTC has authority to regulate cybersecurity under the unfairness prong of'' section 5(a) of the FTC Act and that regulated entities have adequate notice that cybersecurity issues could lead to violations of that provision.[21]

In March 2022, the FTC announced an administrative complaint and proposed consent orders against Residual Pumpkin Entity, LLC and PlanetArt, LLC, respectively the former and current operators of CafePress, a customized

basis of likely rather than actual injury,' '[and] the FTC Act expressly contemplates the possibility that conduct can be unfair before actual injury occurs.' '') (interpreting unfairness standard in the FTC Act, for which precedent is often used in interpreting the similar CFPA standard) (citations omitted).

[6] *FTC* v. *Neovi, Inc.,* 598 F. Supp. 2d 1104, 1115 (S.D. Cal. 2008) (''[C]onsumers who had their bank accounts accessed without authorization had no chance whatsoever to avoid the injury before it occurred.'').

[7] *FTC* v. *Neovi,* 604 F.3d 1150, 1158 (9th Cir. 2010) (''The FTC also met its burden of showing that consumer injury was not outweighed by countervailing benefits to consumers or to competition.''); *FTC* v. *Wyndham Worldwide Corp.,* 10 F. Supp. 3d 602 (D.N.J. 2014) (defendant challenged first two elements, but not the countervailing benefits finding).

[8] Complaint at 39–53, *BCFP* v. *Equifax, Inc.,* 1:19–cv–03300 (N.D. Ga. July 22, 2019), *https://files.consumerfinance.gov/f/documents/cfpb_equifax-inc_complaint_2019-07.pdf.* The FTC also alleged that Equifax violated the FTC Act's prohibition on unfair acts or practices.

[9] Complaint at 45–46, *FTC* v. *Equifax, Inc.,* 1:19–mi–99999–UNA (N.D. Ga. July 22, 2019), *https://www.ftc.gov/system/files/documents/cases/172_3203_equifax_complaint_7-22-19.pdf.*

[10] Complaint at 40–42, *BCFP* v. *Equifax, Inc., https://files.consumerfinance.gov/f/documents/cfpb_equifax-inc_complaint_2019-07.pdf.*

[11] The CFPB, FTC, and state Attorneys General imposed $700 million in relief and penalties against Equifax.

[12] *See* Complaint at 10, *FTC* v. *Neovi, Inc.,* 598 F. Supp. 2d 1104 (S.D. Cal. 2008) (No. 06 Civ. 1952), *aff'd,* 604 F.3d 1150 (9th Cir. 2010).

[13] *Id.* at 5.

[14] *Id.* at 6.

[15] *Neovi, Inc.,* 604 F.3d at 1154.

[16] *Id.* at 1157.

[17] First Amended Complaint at 19, *FTC* v. *Wyndham Worldwide Corp.,* 10 F. Supp. 3d 602 (D.N.J. 2014) (No. 13 Civ. 1887), *aff'd,* 799 F.3d 236 (3d Cir. 2015).

[18] *Id.* at 11.

[19] *Id.* at 12–13.

[20] *Id.* at 15.

[21] *Wyndham Worldwide Corp.,* 799 F.3d at 240.

merchandise e-commerce platform.[22] The FTC's complaint documented several inadequate data security practices, including the failure to ''implement patch management policies and procedures to ensure timely remediation of critical security vulnerabilities,'' the failure to ''establish or enforce rules sufficient to make user credentials (such as username and password) hard to guess,'' the failure to disclose security incidents to relevant parties, and inadequate ''measures to prevent account takeovers through password resets using data known to have been obtained by hackers.''[23]

While the prohibition on unfair practices is fact-specific, the experience of the agencies suggests that failure to implement common data security practices will significantly increase the likelihood that a firm may be violating the prohibition. In the examples below, the Circular describes conduct that will typically meet the first two elements of an unfairness claim (likely to cause substantial injury to consumers that is not reasonably avoidable by consumers), and thus increase the likelihood that an entity's conduct triggers liability under the CFPA's prohibition of unfair practices.

1. Multi-Factor Authentication

Multi-factor authentication (MFA) is a security enhancement that requires multiple credentials (factors) before an account can be accessed.[24] Factors fall into three categories: something you know, like a password; something you have, like a token; and something you are, like your fingerprint. A common MFA setup is supplying both a password and a temporary numeric code in order to log in. Another MFA factor is the use of hardware identification devices. MFA greatly increases the level of difficulty for adversaries to compromise enterprise user accounts, and thus gain access to sensitive customer data. MFA solutions that protect against credential phishing, such as those using the Web Authentication standard supported by web browsers, are especially important.

If a covered person or service provider does not require MFA for its employees or offer multi-factor authentication as an option for consumers accessing systems and accounts, or has not implemented a reasonably secure equivalent, it is unlikely that the entity could demonstrate that countervailing benefits to consumers or competition outweigh the potential harms, thus triggering liability.[25]

2. Password Management

Unauthorized use of passwords is a common data security issue. Username and password combinations can be sold on the dark web or posted for free on the internet, which can be used to access not just the accounts in question, but other accounts held by the consumer or employee.

If a covered person or service provider does not have adequate password management policies and practices, it is unlikely they would succeed in showing countervailing benefits to consumers or competition that outweigh the potential harms, thus triggering liability.[26] This includes failing to have processes in place to monitor for breaches at other entities where employees may be re-using logins and passwords (including notifying users when a password reset is required as a result) and includes use of default enterprise logins or passwords.

3. Timely Software Updates

Software vendors regularly update software to address security vulnerabilities within a program or product. When patches are released, the public, including hackers, become aware of the prior vulnerabilities. Therefore, when companies use commonly available software, including open-source software and open-source libraries,[27] and do not install a patch that has been released for that software or take other mitigating steps if patching is not possible, they neglect to fix a security vulnerability that has become widely known. As noted in the CFPB's complaint against Equifax, Equifax's 2017 failure to patch a known vulnerability resulted in hackers gaining access to Equifax's systems that exposed the personal information of nearly 148 million consumers.[28]

If covered persons or service providers do not routinely update systems, software, and code (including those utilized by contractors) or fail to update them when notified of a critical vulnerability, it is unlikely they would succeed in showing countervailing benefits to consumers or competition that outweigh the potential harms, thus triggering liability. This includes not having asset inventories of which systems contain dependencies on certain software to make sure software is up to date and highlight needs for patches and updates. It also includes the use of versions of software that are no longer actively maintained by their vendors.

About Consumer Financial Protection Circulars

Consumer Financial Protection Circulars are issued to all parties with authority to enforce Federal consumer financial law. The CFPB is the principal Federal regulator responsible for administering Federal consumer financial law, *see* 12 U.S.C. 5511, including the Consumer Financial Protection Act's prohibition on unfair, deceptive, and abusive acts or practices, 12 U.S.C. 5536(a)(1)(B), and 18 other ''enumerated consumer laws,'' 12 U.S.C. 5481(12). However, these laws are also enforced by State attorneys general and State regulators, 12 U.S.C. 5552, and prudential regulators including the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the National Credit Union Administration. *See, e.g.,* 12 U.S.C. 5516(d), 5581(c)(2) (exclusive enforcement authority for banks and credit unions with $10 billion or less in assets). Some Federal consumer financial laws are also enforceable by other Federal agencies, including the Department of Justice and the Federal Trade Commission, the Farm Credit Administration, the Department of Transportation, and the Department of Agriculture. In addition, some of these laws provide for private enforcement.

Consumer Financial Protection Circulars are intended to promote

[22] CafePress, 87 FR 16187 (FTC Mar. 22, 2022) (analysis of proposed consent orders to aid public comment).

[23] Complaint at 4–5, *In re Residual Pumpkin Entity, LLC and PlanetArt, LLC,* No. 1923209, (FTC June 23, 2022), *https://www.ftc.gov/system/files/ftc_gov/pdf/1923209CafePressComplaint.pdf.*

[24] *Back to Basics: What's multi-factor authentication—and why should I care?,* National Institute of Standards and Technology, *https://www.nist.gov/blogs/cybersecurity-insights/back-basics-whats-multi-factor-authentication-and-why-should-i-care.*

[25] For a more thorough discussion of MFA, please refer to Cybersecurity & Infrastructure Security Agency's (CISA's) Multi-Factor Authentication page, or the National Institute of Standards and Technology's (NIST's) Digital Identity Guidelines. *Multi-Factor Authentication,* CISA, *https://www.cisa.gov/mfa; Digital Identity Guidelines: Authentication and Lifecycle Management; Authenticator Assurance Level 2,* NIST, (June 2017), *https://pages.nist.gov/800-63-3/sp800-63b.html.*

[26] *Good Security Habits,* CISA, (Feb. 1, 2021), *Good Security Habits | CISA.*

[27] *FTC warns companies to remediate Log4j security vulnerability* (Jan. 4, 2022), *https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2022/01/ftc-warns-companies-remediate-log4j-security-vulnerability.* (''Log4j is a ubiquitous piece of software used to record activities in a wide range of systems found in consumer-facing products and services. Recently, a serious vulnerability in the popular Java logging package, Log4j (CVE–2021–44228) was disclosed, posing a severe risk to millions of consumer products to enterprise software and web applications.'')

[28] Complaint at 13, *BCFP* v. *Equifax, Inc., https://files.consumerfinance.gov/f/documents/cfpb_equifax-inc_complaint_2019-07.pdf.*

consistency in approach across the various enforcement agencies and parties, pursuant to the CFPB's statutory objective to ensure Federal consumer financial law is enforced consistently. 12 U.S.C. 5511(b)(4).

Consumer Financial Protection Circulars are also intended to provide transparency to partner agencies regarding the CFPB's intended approach when cooperating in enforcement actions. *See, e.g.,* 12 U.S.C. 5552(b) (consultation with CFPB by State attorneys general and regulators); 12 U.S.C. 5562(a) (joint investigatory work between CFPB and other agencies).

Consumer Financial Protection Circulars are general statements of policy under the Administrative Procedure Act. 5 U.S.C. 553(b). They provide background information about applicable law, articulate considerations relevant to the Bureau's exercise of its authorities, and, in the interest of maintaining consistency, advise other parties with authority to enforce Federal consumer financial law. They do not restrict the Bureau's exercise of its authorities, impose any legal requirements on external parties, or create or confer any rights on external parties that could be enforceable in any administrative or civil proceeding. The CFPB Director is instructing CFPB staff as described herein, and the CFPB will then make final decisions on individual matters based on an assessment of the factual record, applicable law, and factors relevant to prosecutorial discretion.

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2022–19075 Filed 9–2–22; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. FAA–2022–1147; Special Conditions No. 25–829–SC]

Special Conditions: L2 Consulting Services, Inc., Bombardier Model BD–700–1A10 and BD–700–1A11 Airplanes; Electronic System Security Protection From Unauthorized External Access

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued for the Bombardier Model BD–700–1A10 and BD–700–1A11 airplanes. These airplanes, as modified by L2 Consulting Services, Inc., will have a novel or unusual design feature when compared to the state of technology envisioned in the airworthiness standards for airplanes. This design feature is associated with the installation of an electronic network system architecture that will allow increased connectivity to and access from external network sources, (*e.g.,* operator networks, wireless devices, internet connectivity, service provider satellite communications, electronic flight bags, etc.) to the airplane's previously isolated electronic assets (networks, systems, and databases). The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: This action is effective on L2 Consulting Services, Inc., on September 6, 2022. Send comments on or before October 21, 2022.

ADDRESSES: Send comments identified by Docket No. FAA–2022–1147 using any of the following methods:

- *Federal eRegulations Portal:* Go to *https://www.regulations.gov/* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30, U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

Privacy: Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in title 14, Code of Federal Regulations (14 CFR) 11.35, the FAA will post all comments received without change to *https://www.regulations.gov/,* including any personal information you provide. The FAA will also post a report summarizing each substantive verbal contact received about these special conditions.

Confidential Business Information: Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to these special conditions contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to these special conditions, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and the indicated comments will not be placed in the public docket of these special conditions. Send submissions containing CBI to Thuan T. Nguyen, Aircraft Information Systems, AIR–622, Technical Innovation Policy Branch, Policy and Innovation Division, Aircraft Certification Service, Federal Aviation Administration, 2200 South 216th Street, Des Moines, Washington 98198; telephone; 206–231–3365; email *Thuan.T.Nguyen@faa.gov.* Comments the FAA receives, which are not specifically designated as CBI, will be placed in the public docket for these special conditions.

Docket: Background documents or comments received may be read at *https://www.regulations.gov/* at any time. Follow the online instructions for accessing the docket or go to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Thuan T. Nguyen, Aircraft Information Systems, AIR–622, Technical Innovation Policy Branch, Policy and Innovation Division, Aircraft Certification Service, Federal Aviation Administration, 2200 South 216th Street, Des Moines, Washington 98198; telephone; 206–231–3365; email *Thuan.T.Nguyen@faa.gov*.

SUPPLEMENTARY INFORMATION: The substance of these special conditions has been published in the **Federal Register** for public comment in several prior instances with no substantive comments received. Therefore, the FAA finds, pursuant to 14 CFR 11.38(b), that new comments are unlikely, and notice and comment prior to this publication are unnecessary.

Tab 16

Circular 2022-05: Debt Collection and Consumer Reporting Practices Involving Invalid Nursing Home Debts, 87 Fed. Reg. 57375 (Sept. 20, 2022).

CFPB and Centers for Medicare and Medicaid Services Take Action to Protect Caregivers and Families from Illegal Nursing Home Debt Collection Practices

New report, circular, and joint letter with CMS remind facilities and debt collectors of their responsibilities for nursing home admission and debt collection under multiple laws

SEP 08, 2022

WASHINGTON, D.C. – Today, the Consumer Financial Protection Bureau (CFPB) released an *Issue Spotlight* (cfpb.gov/data-research/research-reports/issue-spotlight-nursing-home-debt-collection/) highlighting some of the difficulties and experiences heard from caregivers about being pursued over friends' or family members' alleged debts from nursing home facilities. Based on the findings in the report, the CFPB and the Centers for Medicare & Medicaid Services (CMS) have issued a **joint letter** (https://files.consumerfinance.gov/f/documents/cfpb_nursing-home-debt-collection_joint-letter_2022-09.pdf) confirming that a nursing care facility may not require that a third-party caregiver personally guarantee payment of a nursing home resident's bills as a condition of the resident's admission to the facility. Such conditions violate the Nursing Home Reform Act and, as discussed in a new *Consumer Financial Protection Circular* (cfpb.gov/compliance/circulars/circular-2022-05-debt-collection-and-consumer-reporting-practices-involving-invalid-nursing-home-debts/) issued today, subsequent attempts to collect debts from caregivers may violate the Fair Debt Collection Practices Act and the Fair Credit Reporting Act.

"Nursing homes that participate in Medicare and Medicaid are prohibited from forcing a resident's family or friends to assume responsibility for the cost of care as a condition of admission or continued stay in the facility," said CFPB Director Rohit Chopra. "Debt collectors must take steps to ensure they are not violating the law by collecting on invalid nursing home debts."

The *Issue Spotlight*, "Nursing Home Debt Collection," explores how questionable contract provisions and debt collection tactics affect caregivers. Caregivers have been subjected to wage garnishment and have even lost their homes after being pursued by nursing homes for debts associated with family members' or friends' costs of care. The report finds that many facilities include clauses in admission contracts that require caregivers to be a "responsible party" for the resident's costs of care, or that otherwise subject the caregiver to financial liability should the admitted resident incur a debt.

Consumer Financial Protection Circular

The CFPB also issued a new *Consumer Financial Protection Circular* today. The circular confirms that debt collectors can violate the Fair Debt Collection Practices Act and Fair Credit Reporting Act when they attempt to collect a nursing facility debt from a caregiver based on contract terms that are invalid under the Nursing Home Reform Act.

While the CFPB does not enforce the Nursing Home Reform Act, contract terms that violate the Act's ban on requesting or requiring a third-party guarantee of payment are unenforceable. This means that subsequent collection of debts from those contracts may violate the consumer financial protection laws the CFPB does enforce, including the Fair Debt Collection Practices Act and its prohibition of "any false, deceptive, or misleading representation or means in connection with the collection of any debt."

The prohibition on misrepresentations includes stating a consumer must pay a debt that arises from a contract provision that is illegal and unenforceable under federal or state law. A debt collector that attempts to compel a caregiver to pay a nursing facility resident's debt may violate the prohibition on misrepresentations where the debt is invalid under the Nursing Home Reform Act. Nursing facilities that participate in Medicare or Medicaid are subject to the Act's prohibitions on requesting or requiring a caregiver guarantee payment as a condition of admission, expedited admission, or continued stay in the facility.

Joint Letter

The CFPB has also issued a joint letter with CMS to remind nursing home facilities and debt collectors of the Nursing Home Reform Act's prohibitions against requiring third-parties to personally guarantee payment to a facility as a condition of a resident's admission or continued stay in the facility. Such contract conditions are unenforceable, and when nursing home facilities hire debt collectors to collect debts from third-parties, those debt collectors may violate the Fair Debt Collection Practices Act by attempting to collect debts that are invalid. The debt collectors may also violate the Fair Credit Reporting Act by furnishing information regarding such invalid debts to consumer reporting agencies.

Read today's *Issue Spotlight* on problematic collection of nursing home debt from family members and friends (cfpb.gov/data-research/research-reports/issue-spotlight-nursing-home-debt-collection/).

Read today's *Consumer Financial Protection Circular* on debt collection and consumer reporting practices involving invalid nursing home debts (cfpb.gov/compliance/circulars/circular-2022-05-debt-collection-and-consumer-reporting-practices-involving-invalid-nursing-home-debts/).

Read the joint letter with HHS (https://files.consumerfinance.gov/f/documents/cfpb_nursing-home-debt-collection_joint-letter_2022-09.pdf).

Congress created the CFPB's Office of Financial Protection for Older Americans to help older consumers make sound financial decisions as they age, identify and address emerging consumer protection risks, and coordinate these consumer protection efforts with other federal agencies and state regulators to promote consistent, effective, and efficient enforcement. Since its inception, the office has assisted caregivers supporting older Americans and published research reports, including a recent data spotlight on medical debt among older adults. The CFPB has developed resources (https://www.consumerfinance.gov/consumer-tools/educator-tools/resources-for-older-adults/protecting-against-fraud/) for older adults and caregivers on consumer financial protection.

Consumers can submit complaints about their debt collection issues by visiting the CFPB's website (https://www.consumerfinance.gov/complaint/) or by calling (855) 411-CFPB (2372).

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit consumerfinance.gov (cfpb.gov/).

Topics

- MEDICAL DEBT (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=MEDICAL-DEBT)

PRESS INFORMATION

If you want to republish the article or have questions about the content, please contact the press office.

Go to press resources page (cfpb.gov/about-us/newsroom/press-resources/)

Rules and Regulations

Federal Register
Vol. 87, No. 181
Tuesday, September 20, 2022

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Chapter X

Consumer Financial Protection Circular 2022–05: Debt Collection and Consumer Reporting Practices Involving Invalid Nursing Home Debts

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Consumer financial protection circular.

SUMMARY: The Consumer Financial Protection Bureau (Bureau or CFPB) has issued Consumer Financial Protection Circular 2022–05, titled, ''Debt collection and consumer reporting practices involving invalid nursing home debts.'' In this circular, the Bureau responds to the question, ''Can debt collection and consumer reporting practices relating to nursing home debts that are invalid under the Nursing Home Reform Act violate the Fair Debt Collection Practices Act (FDCPA) and Fair Credit Reporting Act (FCRA)?''

DATES: The Bureau released this circular on its website on September 8, 2022.

ADDRESSES: Enforcers, and the broader public, can provide feedback and comments to *Circulars@cfpb.gov.*

FOR FURTHER INFORMATION CONTACT: Colin Reardon or Joshua Johnson, Senior Counsels, Office of Law & Policy, at (202) 435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

Question Presented

Can debt collection and consumer reporting practices relating to nursing home debts that are invalid under the Nursing Home Reform Act violate the Fair Debt Collection Practices Act (FDCPA) and Fair Credit Reporting Act (FCRA)?

Response

Yes. Under the Nursing Home Reform Act, a nursing facility may not condition a resident's admission or continued stay on receiving a guarantee of payment from a third party, such as a relative or friend. Contractual provisions that violate that prohibition are illegal and unenforceable. As detailed in this Circular, certain practices related to the collection of nursing home debts that are invalid under the Nursing Home Reform Act and its implementing regulation violate the FDCPA and FCRA.

Background on the Nursing Home Reform Act

Enacted in 1987, the Nursing Home Reform Act establishes a comprehensive set of requirements that protect the health, safety, welfare, and rights of residents of nursing facilities that participate in Medicaid and Medicare.[1] The Centers for Medicare & Medicaid Services (''CMS'') and the Department of Health and Human Services (''HHS'') have issued rules implementing the Nursing Home Reform Act.[2] State agencies are responsible for surveying nursing facilities for compliance with the Nursing Home Reform Act's requirements concerning admissions agreements, and HHS and CMS are responsible for the enforcement of those requirements.[3]

Among other protections, the Nursing Home Reform Act and its implementing regulation prohibit a nursing facility that participates in Medicaid or Medicare from requesting or requiring a third-party guarantee of payment as a condition of admission, expedited admission, or continued stay in the facility.[4] As HHS has explained, this prohibition prevents a nursing facility ''from requiring a person other than the resident to assume personal responsibility for any cost of the resident's care.''[5] The prohibition applies to all residents and prospective residents of a nursing facility, regardless of whether they are eligible for Medicare or Medicaid.[6] The Nursing Home Reform Act further provides that a nursing facility may require a resident's representative who has legal access to a resident's available income or resources to sign a contract to provide the facility payment from the resident's income or resources, so long as the representative does not incur personal financial liability.[7]

Through these provisions, Congress sought to prohibit nursing facilities ''from requiring a person, such as a relative, to accept responsibility for the charges incurred by a resident, unless that person is authorized by law to disburse the income or assets of the resident.''[8] A nursing facility's admissions agreement may not contain terms that conflict with the Nursing Home Reform Act and its implementing regulation,[9] and courts have recognized that contract terms that conflict with the Nursing Home Reform Act and its implementing regulation are unenforceable.[10]

Some States have adopted State law analogues of the Nursing Home Reform Act that prohibit nursing facilities from requiring third-party guarantees, and admissions agreements can also be unenforceable if they violate those State law prohibitions.[11]

Violations of the FDCPA and FCRA

While the CFPB does not enforce compliance with the Nursing Home Reform Act and is generally not responsible for overseeing the activities of nursing facilities, the CFPB is

[1] *See* Public Law 100–203, tit. IV, subtit. C, 101 Stat. 1330 (1987). The Nursing Home Reform Act imposes requirements for nursing facilities that participate in Medicaid, *see* 42 U.S.C. 1396r, and for skilled nursing facilities that participate in Medicare, *see* 42 U.S.C. 1395i–3. For simplicity, and because the distinction is not relevant to the Bureau's analysis, this *Circular* refers to both nursing facilities and skilled nursing facilities as ''nursing facilities.''

[2] *See* 42 CFR 483.1 *et seq.*

[3] *See* 42 U.S.C. 1395i–3(f)(1), (g)(1)(A), (h); 42 U.S.C. 1396r(f)(1), (g)(1)(A), (h).

[4] 42 U.S.C. 1395i–3(c)(5)(A)(ii), 1396r(c)(5)(A)(ii); 42 CFR 483.1(b), 483.15(a)(3).

[5] 56 FR 48826, 48841 (Sept. 26, 1991).

[6] *See id.; see also* Centers for Medicare & Medicaid Services, State Operations Manual, Appendix PP, Guidance to § 483.15(a)(3) (Nov. 22, 2017), *available at https://www.cms.gov/files/document/appendix-pp-guidance-surveyor-long-term-care-facilities.pdf.*

[7] 42 U.S.C. 1395i–3(c)(5)(B)(ii), 1396r(c)(5)(B)(ii); *see also* 42 CFR 483.15(a)(3).

[8] 56 FR 48826, 48841 (Sept. 26, 1991).

[9] 42 CFR 483.10(g)(18)(v).

[10] *See, e.g., Manor of Lake City, Inc.* v. *Hinners,* 548 NW2d 573, 576 (Iowa 1996); *Village at the Greene* v. *Smith,* 2020-Ohio-4088, ¶ 25 (Ohio Ct. App. 2020); *Knight* v. *John Knox Manor, Inc.,* 92 So. 3d 111, 120 (Ala. Civ. App. 2012).

[11] *See, e.g.,* Ala. Admin. Code r. 560–X–10–.02(9); 410 Ind. Admin. Code 16.2–3.1–16(b); *see also* DC Mun. Regs. tit. 22, § B3200.1 (incorporating requirements of Federal regulations implementing Nursing Home Reform Act).

responsible for issuing rules regarding and enforcing compliance with the FDCPA and FCRA.[12] The FDCPA and FCRA can also be enforced by other Federal government agencies and States,[13] and through private actions brought by consumers.[14] The CFPB is issuing this Circular to emphasize that certain practices involving the collection of nursing home debts can violate the FDCPA and FCRA.[15]

Nursing facilities and their third-party debt collectors at times seek to collect residents' debts from relatives and other third parties when the resident cannot afford to pay. The nursing facilities reportedly collect unpaid balances, often after the resident's discharge or death, directly from third parties. If the third-party refuses to pay the arrears, some nursing facilities hire debt collectors to demand payment, report the debt to consumer reporting companies as the third party's personal debt, and sue the third party in court.

An amount that is owed or allegedly owed for nursing facility services is a ''debt'' under the FDCPA because it arises out of a consumer transaction.[16] When a nursing facility claims that a resident's bill has not been paid, it may engage a third-party debt collector subject to the FDCPA and Regulation F to collect the resident's debt,[17] including when the facility claims that a third party is personally financially responsible for the debt. Among other things, the FDCPA and Regulation F prohibit the use of ''any false, deceptive, or misleading representation or means in connection with the collection of any debt.'' [18] That prohibition includes, for example, using a false representation of the ''character, amount, or legal status of any debt''; a ''threat to take any action that cannot legally be taken or that is not intended to be taken''; and ''any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.'' [19]

The prohibition on misrepresentations includes misrepresenting that a consumer must pay a debt that arises from a contract provision that is illegal and unenforceable under Federal or State law. Thus, a debt collector, including a law firm in litigation,[20] that represents that a third party must personally pay a nursing facility resident's debt may violate the prohibition on misrepresentations where the debt is invalid under the Nursing Home Reform Act, its implementing regulation, or one of its State law analogues.[21]

The CFPB is also aware that debt collectors sometimes claim that a third party, such as a relative of the resident, is personally liable for the resident's debt because the third party engaged in financial wrongdoing in relation to the resident's resources. In some cases, debt collectors make such allegations in debt collection lawsuits without having any factual basis for the allegations, and the allegations prove to be false. A debt collector may violate the FDCPA's prohibition on misrepresentations by making a false, baseless allegation in a lawsuit that a third party engaged in financial wrongdoing as a means to hold them personally liable for a resident's debts.[22]

The FCRA and its implementing Regulation V impose obligations on consumer reporting companies and on debt collectors who furnish information to consumer reporting companies, including obligations relating to the accuracy of information in consumer reports. For example, a furnisher must ''establish and implement reasonable written policies and procedures regarding the accuracy and integrity of the information relating to consumers that it furnishes to a consumer reporting agency.'' [23] Furnishers must also investigate consumer disputes concerning the accuracy of the information furnished,[24] and are prohibited from furnishing inaccurate information to any consumer reporting company after receiving notice from a consumer that particular information is inaccurate.[25] In addition, consumer reporting companies ''shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates'' [26] and must investigate consumer disputes.[27]

It is inaccurate to report that a consumer owes a debt when the debt is based on an illegal contract term. Thus, a debt collector who furnishes information about nursing home debts, or a consumer reporting company that includes such information in a consumer report, may violate FCRA and Regulation V if those debts are invalid and unenforceable under the Nursing Home Reform Act, its implementing regulation, or one of its State law analogues. A furnisher or consumer reporting company also violates FCRA or Regulation V if it fails to meet its dispute obligations with respect to information related to such debts.

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[12] *See, e.g.,* 12 U.S.C. 5481(12)(F), (H), 5512(b), 5514(c); 15 U.S.C. 1681s(b)(1)(H), (e) (FCRA); 15 U.S.C. 1692*l*(b)(6), (d) (FDCPA).

[13] 15 U.S.C. 1681s (FCRA); 15 U.S.C. 1692*l* (FDCPA). States can directly bring actions under FCRA, *see* 12 U.S.C. 1681s(c), and can also bring actions under the Consumer Financial Protection Act (CFPA) against ''covered persons'' and ''service providers'' based upon violations of Federal consumer financial laws, including the FDCPA and FCRA, *see* Authority of States to Enforce the Consumer Financial Protection Act of 2010, 87 FR 31940 (May 26, 2022).

[14] 15 U.S.C. 1681n, 1681*o* (FCRA); 15 U.S.C. 1692k (FDCPA).

[15] The Bureau notes that practices involving the collection of invalid nursing home debts may violate other laws not discussed in this *Circular.* For example, the collection of invalid nursing home debt may violate State law analogues of the FDCPA and State laws prohibiting unfair, deceptive, or abusive acts or practices. In addition, to the extent that persons collecting nursing home debts are ''covered persons'' or ''service providers'' under the CFPA, *see* 12 U.S.C. 5481(6), (15)(A)(i), (iv), (x), (26), the collection of invalid nursing home debts would typically violate the CFPA's prohibition on engaging in any unfair, deceptive, or abusive act or practice. 12 U.S.C. 5531(a), 5536(a)(1)(B); *see also CFPB* v. *CashCall, Inc.,* 35 F.4th 734, 746 (9th Cir. 2022) (affirming ruling that defendant ''engaged in a deceptive practice by collecting payments on loans that were invalid''). Furthermore, actions taken with respect to nursing home debts may violate other provisions of the FDCPA and FCRA not specifically addressed in this *Circular.*

[16] *See* 15 U.S.C. 1692a(5) (defining ''debt'' as ''any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment''); *see also Eades* v. *Kennedy, PC Law Offices,* 799 F.3d 161, 170 (2d Cir. 2015).

[17] 15 U.S.C. 1692a(6) (defining ''debt collector''); 12 CFR 1006.2(i) (same).

[18] 15 U.S.C. 1692e; 12 CFR 1006.18(a).

[19] 15 U.S.C. 1692e(2), (5), (10); *accord* 12 CFR 1006.18(b)(2)(i), (c)(1), (d).

[20] Attorneys who regularly engage in collecting consumer debts, including through litigation, are ''debt collectors'' under the FDCPA. *See Heintz* v. *Jenkins,* 514 U.S. 291 (1995).

[21] Some nursing facilities may claim that family members are responsible for residents' costs under State filial support or necessaries statutes. *See* Katherine C. Pearson, *Filial Support Laws in the Modern Era: Domestic and International Comparison of Enforcement Practices for Laws Requiring Adult Children to Support Indigent Parents,* 20 Elder L.J. 269 (2013), *https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1034&context=fac_works.* This *Circular* does not address such claims made under State law.

[22] Attorneys collecting debts on behalf of nursing facilities may also independently violate the FDCPA's prohibition on misrepresentations if their law firm alleges that a third party owes the debt in pleadings or other communications that the firm's attorneys were not ''meaningfully involved'' in preparing. *Nielsen* v. *Dickerson,* 307 F.3d 623, 635 (7th Cir. 2002); *see also Miller* v. *Wolpoff & Abramson, L.L.P.,* 321 F.3d 292, 300–07 (2d Cir. 2003); *CFPB* v. *Frederick J. Hanna & Assocs.,* 114 F. Supp. 3d 1342, 1362–69 (N.D. Ga. 2015).

[23] 12 CFR 1022.42(a).

[24] 15 U.S.C. 1681s–2(a)(8), (b); 12 CFR 1022.43(a).

[25] 15 U.S.C. 1681s–2(a)(1)(B). The consumer must send the notice to the address specified by the furnisher for such notices. *Id.* If the furnisher has not specified such an address, then the furnisher is subject to FCRA's general prohibition against ''furnish[ing] any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate.'' 15 U.S.C. 1681s–2(a)(1)(A).

[26] 15 U.S.C. 1681e(b).

[27] 15 U.S.C. 1681i.

About Consumer Financial Protection Circulars

Consumer Financial Protection Circulars are issued to all parties with authority to enforce Federal consumer financial law. The CFPB is the principal Federal regulator responsible for administering Federal consumer financial law, *see* 12 U.S.C. 5511, including the Consumer Financial Protection Act's prohibition on unfair, deceptive, and abusive acts or practices, 12 U.S.C. 5536(a)(1)(B), and 18 other ''enumerated consumer laws,'' 12 U.S.C. 5481(12). However, these laws are also enforced by State attorneys general and State regulators, 12 U.S.C. 5552, and prudential regulators including the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the National Credit Union Administration. *See, e.g.,* 12 U.S.C. 5516(d), 5581(c)(2) (exclusive enforcement authority for banks and credit unions with $10 billion or less in assets). Some Federal consumer financial laws are also enforceable by other Federal agencies, including the Department of Justice and the Federal Trade Commission, the Farm Credit Administration, the Department of Transportation, and the Department of Agriculture. In addition, some of these laws provide for private enforcement.

Consumer Financial Protection Circulars are intended to promote consistency in approach across the various enforcement agencies and parties, pursuant to the CFPB's statutory objective to ensure Federal consumer financial law is enforced consistently. 12 U.S.C. 5511(b)(4).

Consumer Financial Protection Circulars are also intended to provide transparency to partner agencies regarding the CFPB's intended approach when cooperating in enforcement actions. *See, e.g.,* 12 U.S.C. 5552(b) (consultation with CFPB by State attorneys general and regulators); 12 U.S.C. 5562(a) (joint investigatory work between CFPB and other agencies).

Consumer Financial Protection Circulars are general statements of policy under the Administrative Procedure Act. 5 U.S.C. 553(b). They provide background information about applicable law, articulate considerations relevant to the Bureau's exercise of its authorities, and, in the interest of maintaining consistency, advise other parties with authority to enforce Federal consumer financial law. They do not restrict the Bureau's exercise of its authorities, impose any legal requirements on external parties, or create or confer any rights on external parties that could be enforceable in any administrative or civil proceeding. The CFPB Director is instructing CFPB staff as described herein, and the CFPB will then make final decisions on individual matters based on an assessment of the factual record, applicable law, and factors relevant to prosecutorial discretion.

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2022–20324 Filed 9–19–22; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2022–0587; Project Identifier AD–2022–00394–E; Amendment 39–22170; AD 2022–19–01]

RIN 2120–AA64

Airworthiness Directives; General Electric Company Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain General Electric Company (GE) GEnx-2B67/P model turbofan engines. This AD was prompted by the detection of an iron inclusion in a forging, which may reduce the fatigue life of certain low-pressure turbine rotor (LPTR) stage 4 disks and LPTR stage 6 disks. This AD requires the removal of certain LPTR stage 4 disks and LPTR stage 6 disks from service and replacement with parts eligible for installation. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective October 25, 2022.

ADDRESSES: *AD Docket:* You may examine the AD docket at *regulations.gov* by searching for and locating Docket No. FAA–2022–0587; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Alexei Marqueen, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: (781) 238–7178; email: *Alexei.T.Marqueen@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain GE GEnx-2B67/P model turbofan engines with an affected LPTR stage 4 disk or LPTR stage 6 disk installed, identified by part number and serial number. The NPRM published in the **Federal Register** on June 22, 2022 (87 FR 37247). The NPRM was prompted by the engine manufacturer notifying the FAA of the detection of an iron inclusion in a forging, which may reduce the fatigue life of certain LPTR stage 4 disks and LPTR stage 6 disks. The manufacturer's investigation determined that the inclusion is a melt-related defect and that, as a result of the inclusion forming in the forging, certain LPTR stage 4 disks and LPTR stage 6 disks may have reduced material properties and a lower fatigue life capability. Reduced material properties may cause premature LPTR stage 4 disk and LPTR stage 6 disk fracture, which could result in uncontained debris release. As a result of its investigation, the manufacturer published service information that specifies procedures for the removal and replacement of certain LPTR stage 4 disks and LPTR stage 6 disks installed on GEnx-2B67/P model turbofan engines. This condition, if not addressed, could result in uncontained debris release, damage to the engine, and damage to the airplane. In the NPRM, the FAA proposed to require the removal of certain LPTR stage 4 disks and LPTR stage 6 disks from service and replacement with parts eligible for installation. The FAA is issuing this AD to address the unsafe condition on these products.

Discussion of Final Airworthiness Directive

Comments

The FAA received one comment, from The Boeing Company (Boeing). Boeing concurred with the contents of the NPRM.

Conclusion

The FAA reviewed the relevant data, considered the comment received, and determined that air safety requires adopting the AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these products. Except for minor editorial

Tab 17

Fair Credit Reporting; Facially False Data, 87 Fed. Reg. 64689 (Oct. 26, 2022).

CFPB Takes Action to Address Junk Data in Credit Reports

Effort seeks to address false information on the credit reports of children in foster care and the general public

OCT 20, 2022

Washington, D.C. – Today, the Consumer Financial Protection Bureau (CFPB) issued guidance to consumer reporting companies about their obligation to screen for and eliminate obviously false “junk data” from consumers’ credit reports. Companies need to take steps to reliably detect and remove inconsistent or impossible information from consumers’ credit profiles. For example, many children in foster care have large amounts of information on their credit reports that is clearly junk data because as minors they are prohibited from entering into most contracts for credit.

“When a credit report accuses someone of defaulting on a loan before they were born, this is nonsensical, junk data that should have never shown up in the first place,” said CFPB Director Rohit Chopra. “Consumer reporting companies have a clear obligation to use better procedures to screen for and eliminate conflicting information, or information that cannot be true.”

While incorrect data affects millions of Americans, children in foster care may be particularly susceptible to these problems because of a high rate of identity theft impacting that population. The roughly 400,000 children in the United States foster care system often lack permanent addresses, and their personal information is frequently shared among numerous adults and agency databases. When bad actors take advantage of children passing through their care and use their personal information to take out loans, children in foster care may enter adulthood saddled with negative and clearly inaccurate credit histories that can hinder their progress toward financial independence.

When consumer reporting companies include inconsistent or conflicting account information or information that does not make sense or cannot be true, consumers can suffer real-world consequences. Junk data in reports can lead to consumers being denied credit, housing, or employment, or paying more for credit. Junk data can take many forms, but some examples are credit reports that reflect a child having a mortgage, or a credit report that reflects a debt incurred years before the person’s birth.

Consumer reporting companies have a legal requirement to follow reasonable procedures to assure maximum possible accuracy of information that they collect and report. As part of that requirement, companies must have policies and procedures to screen for and eliminate junk data. Specifically, the policies and procedures should be able to detect and remove:

- **Inconsistent account information:** Sometimes consumer reports can show two or more pieces of information that cannot all be true. For example, an account is paid in full but still shows a balance, or a date of first delinquency predates the account's opening.
- **Information that cannot be accurate:** Sometimes information on consumer reports reflects obvious impossibilities. For example, if a tradeline includes a date that predates the consumer's date of birth or if just one of many tradelines indicates a consumer is deceased.

A consumer reporting company's policies, procedures, and internal controls should further identify and prevent reporting of illegitimate credit transactions for a minor. Minors generally cannot legally enter into contracts for credit except in certain limited circumstances, including applications for student loans, for emancipated minors, or as credit card authorized users.

Today's guidance is one in a series of actions being taken by the CFPB to ensure consumer reporting companies comply with consumer financial protection law. Consumer complaints submitted to the CFPB continue to reflect significant concern about inaccuracies in consumer reports. Complaints about "incorrect information on your report" have represented the largest share of credit or consumer reporting complaints submitted to the CFPB for at least the last six years, and the CFPB receives more complaints about credit reporting than any other subject.

Read the advisory opinion, *Fair Credit Reporting; Facially False Data* (https://files.consumerfinance.gov/f/documents/cfpb_fair-credit-reporting-facially-false-data_advisory-opinion_2022-10.pdf).

The CFPB has **published tools** (cfpb.gov/about-us/newsroom/cfpb-releases-tools-to-protect-foster-care-children-from-credit-reporting-errors/) to help child welfare caseworkers dispute credit reporting errors affecting children in foster care.

Consumers can submit consumer or credit reporting complaints, or complaints about other financial products and services, by visiting the **CFPB's website** (cfpb.gov/complaint/) or by calling (855) 411-CFPB (2372).

Employees who believe their companies have violated federal consumer financial protection laws, including the Fair Credit Reporting Act, are encouraged to send information about what they know to whistleblower@cfpb.gov.

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial *products are fair, transparent, and competitive. For more information, visit www.consumerfinance.gov (http://www.consumerfinance.gov/).*

Topics

- **TENANT SCREENING** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=TENANT-SCREENING)
- **CREDIT REPORTS AND SCORES** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=CREDIT-REPORTS-AND-SCORES)
- **CONSUMER COMPLAINTS** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=CONSUMER-COMPLAINTS)

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Rules and Regulations

Federal Register

Vol. 87, No. 206

Wednesday, October 26, 2022

DEPARTMENT OF ENERGY

10 CFR Parts 429 and 431

[EERE–2020–BT–TP–0011]

RIN 1904–AE62

Energy Conservation Program: Test Procedure for Electric Motors

Correction

In rule document 2022–21891, appearing on pages 63588 through 63660 in the issue of Wednesday, October 19, 2022, make the following correction:

§ 431.12 [Corrected]

■ In § 431.12, on page 63655, in the second column, remove the first definition of *IEC Design HY* by removing lines eleven through twenty-five.

[FR Doc. C1–2022–21891 Filed 10–25–22; 8:45 am]

BILLING CODE 0099–10–D

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1022

Fair Credit Reporting; Facially False Data

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Advisory opinion.

SUMMARY: The Consumer Financial Protection Bureau (Bureau) is issuing this advisory opinion to highlight that a consumer reporting agency that does not implement reasonable internal controls to prevent the inclusion of facially false data, including logically inconsistent information, in consumer reports it prepares is not using reasonable procedures to assure maximum possible accuracy under section 607(b) of the Fair Credit Reporting Act (FCRA).

DATES: This advisory opinion is effective on October 26, 2022.

FOR FURTHER INFORMATION CONTACT: Ilana Waxman, Senior Counsel, Tyler Sines or Jason Grimes, Counsels, Office of Supervision Policy at (202) 435–7700 or *https://reginquiries.consumerfinance.gov/.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION: The Bureau is issuing this advisory opinion through the procedures for its Advisory Opinions Policy.[1] Refer to those procedures for more information.

I. Advisory Opinion

A. Background

Accuracy in consumer reports is of vital importance to the consumer reporting system, particularly as consumer reports play an increasingly central role in the lives of American consumers. Consumer reporting agencies collect and assemble credit, public record, and other consumer information into consumer reports.[2] Creditors, insurers, landlords, employers, and others use the information in these reports to make eligibility determinations and other decisions that can have a significant impact on consumers. For example, creditors use information in consumer reports to determine whether, and on what terms, to extend credit to a particular consumer, while landlords and employers use background screening reports in deciding whether to rent to prospective tenants and hire employees, respectively.

Inaccurate, derogatory information in consumer reports can have significant adverse impacts on consumers. For example, inaccurate, derogatory information in consumer reports can lead to higher interest rates, ineligibility for promotional offers, or otherwise less favorable credit terms for affected consumers. This in turn may cost consumers hundreds or thousands of dollars in additional interest. Even worse, inaccurate, derogatory information in consumer reports could lead lenders to deny a consumer credit entirely, making it difficult or impossible for that consumer to obtain a mortgage, auto loan, student loan, or other credit. Any of these consequences can be devastating for a consumer's financial well-being and life. Inaccurate, derogatory information in consumer reports can also harm the businesses that use such reports by leading them to make unsupported decisions.

Consumer report accuracy depends on the various parties to the consumer reporting system, including: the three nationwide consumer reporting agencies (Equifax, Experian, and TransUnion); other consumer reporting agencies, such as background screening companies; entities such as creditors who furnish information to consumer reporting agencies (*i.e.,* furnishers); and public record repositories. While any of these parties may introduce inaccurate information into the consumer reporting process, a consumer reporting agency is uniquely positioned to identify certain obvious inaccuracies and implement policies, procedures, and systems to keep them off of consumer reports. In some cases, such as when certain account or other information fields on consumer reports are logically inconsistent with other fields of information, a consumer reporting agency can detect the logical inconsistencies and prevent the inaccurate information from being included in consumer reports it generates, thereby avoiding the consumer harm to individual consumers that can result from reporting such inaccurate information.

Inaccuracy in consumer reports is a long-standing issue that remains a problem today. Pursuant to its obligations under the Fair and Accurate Credit Transactions (FACT) Act[3] to conduct a study of consumer report accuracy and completeness, the Federal Trade Commission in 2012 published a report finding, among other things, that one in five consumers who participated in the study had an error on at least one of their three nationwide credit reports.[4] Another more recent study, published in 2021, found that over 34% of consumers surveyed were able to

[1] 85 FR 77987 (Dec. 3, 2020).

[2] *See* 15 U.S.C. 1681a(d) (defining ''consumer report'').

[3] Fair and Accurate Credit Transactions Act of 2003, Public Law 108–159, sec. 319, 117 Stat. 1952 (2003).

[4] *See* Fed. Trade Comm'n, *Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003,* at 64 (Dec. 2012), *https://www.ftc.gov/sites/default/files/documents/reports/section-319-fair-and-accurate-credit-transactions-act-2003-fifth-interim-federal-trade-commission/130211factareport.pdf.*

identify at least one error in their credit reports.[5]

Consumer complaints submitted to the Bureau continue to reflect significant consumer concern about inaccuracies in consumer reports. Complaints about ''incorrect information on your report'' have represented the largest share of credit or consumer reporting complaints submitted to the Bureau each year for at least the last six years.[6] In 2021 alone, companies responded to more than 157,000 such complaints, representing a majority (53%) of credit or consumer reporting complaint responses that year.[7]

Moreover, the Bureau continues to see accuracy issues at furnishers and consumer reporting agencies through its supervisory activities. For example, the Bureau noted in its Spring 2022 Supervisory Highlights that many furnishers lacked ''reasonable written policies and procedures regarding the accuracy and integrity of the information relating to consumers.'' [8] In its Summer 2021 Supervisory Highlights, the Bureau explained that some consumer reporting agencies lacked adequate procedures for assuring maximum possible accuracy of consumer reports when they ''continued to include information in consumer reports that was provided by unreliable furnishers.'' [9]

The Bureau also continues to find accuracy issues in the consumer reporting context through its enforcement activities. For example, the Bureau has brought enforcement actions against consumer reporting agencies whose inadequate ''name-only matching'' led to reports with inaccurate derogatory criminal and public records information on consumers.[10] The Bureau also has brought enforcement actions against furnishers who furnish information with inherent logical inconsistencies, such as furnishing an increasing ''original loan amount'' over time, where that field should not change.[11]

The FCRA regulates consumer reporting.[12] The statute was designed to ensure that ''consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information.'' [13] In interpreting the statute, Federal courts likewise highlight the importance of data accuracy. The FCRA was enacted ''to protect consumers from the transmission of inaccurate information about them and to establish credit reporting practices that utilize accurate, relevant, and current information in a confidential and responsible manner.'' [14] Because of the importance of consumer report accuracy to businesses and consumers, the structure of the FCRA creates interrelated legal standards and requirements to support the policy goal of accurate credit reporting. Among these is the requirement that, when preparing a consumer report, consumer reporting agencies ''shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.'' [15]

Inaccuracies in consumer reports can, in part, be attributed to consumer reporting agencies failing to maintain reasonable procedures, such as business rules, to prevent the inclusion of facially false data, including logical inconsistencies relating to consumer data and/or the status or other information associated with consumer accounts, when preparing consumer reports. Courts have recognized that in ''certain instances, inaccurate credit reports by themselves can fairly be read as evidencing unreasonable procedures[.]'' [16] The Bureau is issuing this advisory opinion to highlight that the legal requirement to follow reasonable procedures to assure maximum possible accuracy of the information concerning the individuals about whom the reports relate includes, but is not limited to, procedures to screen for and eliminate logical inconsistencies to avoid including facially false data in consumer reports.

There are many logical inconsistencies that could result in inaccurate, facially false data being included on consumer reports in violation of section 607(b). The following is a non-exhaustive list of examples of some of the types of logical inconsistencies that reasonable procedures to assure maximum possible accuracy would screen for and eliminate:

Inconsistent Account Information or Statuses

A consumer reporting agency's policies and procedures should be sufficient to detect tradelines with account statuses or codes that are plainly inconsistent with other information reported for that same account, such that, if included in a consumer report, at least one item of information therein would necessarily be inaccurate. Such inconsistencies may include:

• An account whose status is paid in full, and thus has no balance due but nevertheless reflects a balance due; [17]

[5] *See* Syed Ejaz, Consumer Reports, *A Broken System: How the Credit Reporting System Fails Consumers and What to Do About It* 4 (June 10, 2021), *https://advocacy.consumerreports.org/wp-content/uploads/2021/06/A-Broken-System-How-the-Credit-Reporting-System-Fails-Consumers-and-What-to-Do-About-It.pdf.*

[6] *See* Consumer Fin. Prot. Bureau, *Consumer Response Annual Report,* at 20 (Mar. 2022), *https://files.consumerfinance.gov/f/documents/cfpb_2021-consumer-response-annual-report_2022-03.pdf;* Consumer Fin. Prot. Bureau, *Consumer Response Annual Report,* at 22 (Mar. 2021), *https://files.consumerfinance.gov/f/documents/cfpb_2020-consumer-response-annual-report_03-2021.pdf;* Consumer Fin. Prot. Bureau, *Consumer Response Annual Report,* at 19 (Mar. 2020), *https://files.consumerfinance.gov/f/documents/cfpb_consumer-response-annual-report_2019.pdf;* Consumer Fin. Prot. Bureau, *Consumer Response Annual Report,* at 19 (Mar. 2019), *https://files.consumerfinance.gov/f/documents/cfpb_consumer-response-annual-report_2018.pdf;* Consumer Fin. Prot. Bureau, *Consumer Response Annual Report,* at 13 (Mar. 2018), *https://files.consumerfinance.gov/f/documents/cfpb_consumer-response-annual-report_2017.pdf;* Consumer Fin. Prot. Bureau, *Consumer Response Annual Report,* at 18 (Mar. 2017), *https://files.consumerfinance.gov/f/documents/201703_cfpb_Consumer-Response-Annual-Report-2016.PDF.*

[7] *See* Consumer Fin. Prot. Bureau, Consumer Response Annual Report, at 20 (Mar. 2022), *https://files.consumerfinance.gov/f/documents/cfpb_2021-consumer-response-annual-report_2022-03.pdf* for more in-depth analyses.

[8] *See* Consumer Fin. Prot. Bureau, *Spring 2022 Supervisory Highlights,* at 10 (May 2022), *https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-26_2022-04.pdf.*

[9] *See* Consumer Fin. Prot. Bureau, *Summer 2021 Supervisory Highlights,* at 7 (Jun. 2021), *https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-24_2021-06.pdf.*

[10] Consent Order at ¶¶ 8–29, *In re Gen. Inf. Svcs. Inc.,* 2015–0028 (Oct. 29, 2015), *https://files.consumerfinance.gov/f/201510_cfpb_consent-order_general-information-service-inc.pdf;* Complaint at ¶¶ 5–11, *Consumer Fin. Prot. Bureau* v. *Sterling Infosys., Inc.,* No. 1:19–cv–10824 (S.D.N.Y. Nov. 22, 2019), *https://www.consumerfinance.gov/enforcement/actions/sterling-infosystems-inc/.*

[11] Consent Order at ¶ 41, *In re Hyundai Capital Am.,* 2022–CFPB–0005 (July 26, 2022), *https://files.consumerfinance.gov/f/documents/cfpb_hyundai-capital-america_consent-order_2022-07.pdf.*

[12] *See* 15 U.S.C. 1681–1681x.

[13] 15 U.S.C. 1681(b).

[14] *Guimond* v. *Trans Union Credit Info.,* 45 F.3d 1329, 1333 (9th Cir.1995) (citations omitted); *see also* S. Rep. No. 91–517, at 1 (1969) (explaining that the FCRA was intended to ''prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report'').

[15] 15 U.S.C. 1681e(b).

[16] *Stewart* v. *Credit Bureau, Inc.,* 734 F.2d 47, 52 (D.C. Cir. 1984).

[17] *Cf.* Consent Order at ¶ 20, *In re Santander Consumer USA Inc.,* 2022–BCFP–0027 (Dec. 20, 2020) (''Respondent also reported in approximately 250,000 instances that accounts had a current balance and simultaneously furnished contradictory

• An account that reflects an ''Original Loan Amount'' that increases over time, an impossibility by definition; [18] and

• Derogatory information being reported on an account, although that derogatory information predates an earlier report that did not include the derogatory information.[19]

A consumer reporting agency's policies and procedures should further identify and prevent illogical reporting of a Date of First Delinquency in connection with an account.[20] Section 605(a) of the FCRA identifies categories of information that cannot be included in a consumer report after a certain amount of time.[21] For example, a consumer reporting agency may not include on a consumer report accounts placed for collection or charged to profit and loss that antedate the report by more than seven years and 180 days.[22] This provision enables consumers to move beyond their past and rebuild their credit following a delinquency. The Date of First Delinquency provided by a furnisher must reflect the month and year on which the delinquency being reported commenced.[23] When accurate, that date corresponds with the start of the time period that, once elapsed, precludes the delinquency from remaining on a consumer report under FCRA section 605(a). A Date of First Delinquency that is more recent than the start of a delinquency may lead a report user to believe a consumer had financial difficulty more recently than is the case. Similarly, a Date of First Delinquency reflected on a report where a consumer is not in fact delinquent could cause a user to inaccurately believe that the consumer is delinquent. Examples of an illogical Date of First Delinquency may include:

• A Date of First Delinquency reported for an account whose records reflect no delinquency, such as through activity reflecting a current account (complete history of timely payments, $0 amount overdue) or through a current account status code; [24]

• A Date of First Delinquency that post-dates a charge-off date; and

• A Date of First Delinquency, or date of last payment, that predates the account open date (for non-collection accounts).

Illogical Information Relating to Consumers

A consumer reporting agency's policies and procedures should also identify logical inconsistencies in consumer information, such that, if included in a consumer report, some of the information therein would necessarily be inaccurate. Such inconsistencies may include:

• Impossible information about consumers—for example, a tradeline that includes a relevant date, such as a date of account opening, account closing, date of last payment, or date of first delinquency, for an account that is in the future—an obvious impossibility—or for an individual account that either predates that consumer's listed date of birth or that is so far in the past (*e.g.,* January 1, 1800) that it must predate every living consumers' date of birth, as individuals cannot open an account before they are born; [25] and

• Information about consumer accounts that is plainly inconsistent with other reported information, such that one piece of information must be inaccurate—for example, if every other tradeline is reporting ongoing payment activity, while one tradeline contains a ''deceased'' indicator, reasonable policies and procedures should identify the inconsistency and the consumer reporting agency should prevent the inclusion of the inaccurate information in consumer reports it generates.[26]

A consumer reporting agency's policies, procedures and internal controls should further identify and prevent reporting of illegitimate credit transactions for a minor. Minors generally cannot legally enter into contracts for credit except in certain limited circumstances. It is logically inconsistent when a credit transaction is reported for a person who lacks capacity to enter into a contract because they are a minor, unless there are indicia that the credit transaction is legitimate, such as in the context of student loans, credit card authorized users, or emancipated minors.[27] The Bureau is aware of evidence showing that instances of identity theft are especially prevalent for minors, suggesting that identity thieves may target minors due to the value of unused Social Security numbers and a belief that there is a lower probability of discovery of the

information, such as also furnishing information indicating that the accounts were paid in full.''), *https://files.consumerfinance.gov/f/documents/cfpb_santander-consumer-usa-inc_consent-order_2020-12.pdf.* The Santander consent order, along with other CFPB consent orders cited herein, relate to furnisher obligations under section 623 of the FCRA, but the underlying logical inconsistencies involved, as described herein, are illustrative examples of the types of inconsistencies that a credit reporting agency's reasonable policies and procedures to assure maximum possible accuracy should be designed to detect.

[18] *Cf.* Consent Order at ¶ 41, *In re Hyundai Capital Am.,* 2022–CFPB–0005 (July 26, 2022) (''After furnishing the correct original loan amount (a field that should not change), Respondent furnished increased amounts for the ''original loan amount,'' making it appear that a consumer had taken out a larger loan than they had actually taken out.''), *https://files.consumerfinance.gov/f/documents/cfpb_hyundai-capital-america_consent-order_2022-07.pdf.*

[19] *Bryant* v. *TRW, Inc.,* 487 F. Supp. 1234, 1242 (E.D. Mich. 1980) (refusing to set aside a jury verdict finding that a consumer reporting agency failed to follow reasonable procedures under FCRA section 607(b) for failing to detect inconsistencies between a September report containing derogatory information and an earlier May report on which such information did not appear even though at least one of the derogatory items predated the May report).

[20] The Date of First Delinquency herein refers to the date furnished to a credit reporting agency by a furnisher that purportedly reflects the month and year on which the delinquency being reported in connection with a consumer's account commenced.

[21] 15 U.S.C. 1681c(a).

[22] 15 U.S.C. 1681c(a)(4), (c).

[23] 15 U.S.C. 1681s–2(a)(5)(A). Under the FCRA, furnishers must report a Date of First Delinquency within 90 days of furnishing information regarding delinquent accounts being placed for collection, charged to profit or loss, or subjected to any similar action. *Id.*

[24] *Cf.* Consent Order at ¶ 36, *In re Hyundai Capital Am.,* 2022–CFPB–0005 (July 26, 2022) (''Respondent furnished account data showing that the consumer account was current, such as reporting $0 amount overdue or full payments made timely each month, but then also furnished a [Date of First Delinquency], a field that inaccurately indicated that the account was in an ongoing delinquency.''); Consent Order at ¶ 17, *In re Santander Consumer USA Inc.,* 2020–BCFP–0027 (Dec. 20, 2020) (alleging Santander violated FCRA § 623(a)(1)(A) by inaccurately furnishing ''internally inconsistent'' data, including reporting ''[Date of First Delinquencies] for accounts that were current, paid in full (and not delinquent immediately beforehand), or previously delinquent but subsequently became current'').

[25] *See, e.g., Sheffer* v. *Experian Information Solutions, Inc.,* 2003 WL 21710573, at *2 (E.D. Pa. 2003) (referencing a consumer report that ''indicated both that Plaintiff was born in 1969 and that the account was opened in 1965'' as one of two ''inconsistencies'' that ''provide[d] a basis from which a jury could infer that the procedures were unreasonable'').

[26] *Gohman* v. *Equifax Information Services, LLC,* 395 F. Supp. 2d 822, 827 (D. Minn. 2005); *see also Sheffer,* 2003 WL 21710573, at *2 (referencing the fact that only one account of approximately two dozen on a consumer's report included the ''deceased'' notation as one of two ''inconsistencies'' that ''provide[d] a basis from which a jury could infer that the procedures were unreasonable'').

[27] This example is consistent with prior Federal Trade Commission (FTC)'s *40 Years Report. See* FTC, 40 Years of Experience with the Fair Credit Reporting Act (July 2011) [hereinafter, the ''FTC 40 Years Report''], *available at https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf,* at 68, comment 8 (''A [consumer reporting agency] must maintain procedures to avoid reporting information with obvious logical inconsistencies, such as a credit account opened when the consumer was known to be a minor.''). FTC staff published the *40 Years Report,* an updated compilation of past FTC interpretations of the FCRA, to coincide with the transfer of authority to the Bureau. Effective July 21, 2011, the Dodd-Frank Act transferred rulemaking authority related to most of the FCRA to the Bureau, giving the Bureau the primary regulatory and interpretive roles under the FCRA.

fraud.[28] This risk may be even more acute for minors in the United States foster care system, who often lack a permanent address and frequently have their personal information shared among numerous adults and agency databases, making them particularly susceptible to identity theft and inaccurate credit history information.[29] This heightened risk faced by minors underscores the importance for consumer reporting agencies to maintain procedures designed to identify illegitimate credit transactions reported for minors and prevent inclusion thereof when preparing consumer reports.

The Bureau is issuing this advisory opinion to remind consumer reporting agencies that the failure to maintain reasonable procedures to screen for and eliminate logical inconsistencies, to prevent the inclusion of facially false data in consumer reports, is a violation of their FCRA obligation to ''follow reasonable procedures to assure maximum possible accuracy'' under section 607(b) of the FCRA.

B. Coverage

This advisory opinion applies to all consumer reporting agencies as defined in FCRA section 603(f).[30]

C. Legal Analysis

Section 607(b) of the FCRA provides that ''[w]henever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.'' [31] The Bureau has interpreted this requirement in section 607(b) to include as an integral component that consumer reporting agencies implement and maintain reasonable screening procedures, such as business rules, designed to identify and prevent the inclusion of facially false data, such as logical inconsistencies relating to consumer or account information, in the consumer reports they prepare.

Courts have spoken on this topic. For example, in *Bryant* v. *TRW, Inc.,* the court rejected a consumer reporting agency's assertion that it had ''no obligation'' to compare facially inconsistent information contained in two of plaintiff's consumer reports from different months because such an interpretation would make the consumer reporting agency ''simply a conduit and eliminate from the [FCRA] its emphasis on the reasonableness of the procedures followed in putting together a consumer report,'' contrary to Congressional intent.[32] Courts have also indicated that the inclusion of facially false data inaccuracies on a consumer report may, in certain circumstances, evidence the unreasonableness of a consumer reporting agency's procedures.[33]

It continues to be the Bureau's interpretation as outlined in this advisory opinion that such procedures are required, consistent with the core purpose of the FCRA as described in FCRA section 602—*i.e.,* to require consumer reporting agencies to adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner that is fair and equitable to the consumer with regard to accuracy, among other responsibilities.[34] This interpretation also aligns with the Federal Trade Commission's *40 Years Report,* which states that pursuant to 607(b), a consumer reporting agency ''must maintain procedures to avoid reporting information with obvious logical inconsistencies, such as a credit account opened when the consumer was known to be a minor.'' [35]

In addition to provisions authorizing Federal and State enforcement,[36] the FCRA contains two provisions relating to civil liability to consumers for noncompliance. Section 617 provides that ''any person who is *negligent* in failing to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to'' the consumer's actual damages, and costs and reasonable attorney's fees.[37] Section 616 provides that ''any person who *willfully* fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to'' actual or statutory damages of up to $1,000 per violation, such punitive damages as the court allows, and costs and reasonable attorney's fees.[38] A violation is willful when it is inconsistent with ''authoritative guidance'' from a relevant agency.[39] As with any guidance issued by the CFPB on the FCRA, or predecessor agencies that were responsible for administering the FCRA prior to the CFPB's creation, consumer reporting agencies risk liability under Section 616 if they violate the FCRA in a manner described in this Advisory Opinion, regardless of whether the consumer reporting agencies were previously liable for willful violations prior to its issuance.

II. Regulatory Matters

This advisory opinion is an interpretive rule issued under the Bureau's authority to interpret the FCRA, including under section 1022(b)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act,[40] which authorizes guidance as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of Federal consumer financial laws.[41]

The Bureau has determined that this advisory opinion does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.[42]

Pursuant to the Congressional Review Act,[43] the Bureau will submit a report containing this interpretive rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to the

[28] *See, e.g.,* Richard Power, Carnegie Mellon CyLab, Child Identity Theft: New Evidence Indicates Identity Thieves are Targeting Children for Unused Social Security Numbers (2011), *available at https://www.cylab.cmu.edu/_files/pdfs/reports/2011/child-identity-theft.pdf.*

[29] *See* Consumer Fin. Prot. Bureau, ''CFPB Releases Tools to Protect Foster Care Children from Credit Reporting Problems'' (May 1, 2014), *available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-releases-tools-to-protect-foster-care-children-from-credit-reporting-errors/#:~:text=To%20submit%20a%20complaint%2C%20consumers,1%2D855%2D237%2D2392.*

[30] 15 U.S.C. 1681a(f).

[31] 15 U.S.C. 1681e(b).

[32] *See Bryant* v. *TRW, Inc.,* 487 F. Supp. at 1242. *See also McKeown* v. *Sears Roebuck & Co.,* 335 F. Supp. 2d 917, 930 (W.D. Wis. 2004) (''[R]eceiving apparently inconsistent credit reports may trigger an obligation to investigate on the part of the credit reporting agency . . . . [because] allowing credit reporting agencies to act as nothing more than mere conduits of information would eviscerate the act's emphasis on reasonable compilation procedures.'') (citing *Bryant,* 487 F. Supp. at 1242); *Wright* v. *Experian Info. Sols., Inc.,* 805 F.3d 1232, 1239 (10th Cir. 2015) (''Courts have held [consumer reporting agencies] must look beyond information furnished to them when it is inconsistent with the [consumer reporting agencies'] own records, contains a facial inaccuracy, or comes from an unreliable source.'').

[33] *See Stewart* v. *Credit Bureau, Inc.,* 734 F.2d at 52; *Sheffer,* 2003 WL 21710573, at *2.

[34] 15 U.S.C. 1681(b); *see also Guimond,* 45 F.3d at 1333.

[35] FTC 40 Years Report, at 68, comment 8.

[36] 15 U.S.C. 1681s.

[37] 15 U.S.C. 1681o (emphasis added).

[38] 15 U.S.C. 1681n (emphasis added); *Safeco Ins. Co. of Am.* v. *Burr,* 551 U.S. 47, 57–58 (2007) (construing meaning of ''willful'').

[39] *Safeco Ins. Co. of Am.* v. *Burr,* 551 U.S. 47, 70 (2007); *Fuges* v. *Sw. Fin. Servs., Ltd.,* 707 F.3d 241, 253 (3d Cir. 2012).

[40] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

[41] 12 U.S.C. 5512(b)(1).

[42] 4 U.S.C. 3501–3521.

[43] 5 U.S.C. 801 *et seq.*

rule's published effective date. The Office of Information and Regulatory Affairs has designated this interpretive rule as not a ''major rule'' as defined by 5 U.S.C. 804(2).

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2022–23264 Filed 10–25–22; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2022–1252; Project Identifier AD–2022–01163–T; Amendment 39–22204; AD 2022–21–05]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain The Boeing Company Model 737–300, –400, and –500 series airplanes. This AD was prompted by a report that a spoiler sensor failure may go undetected by the autothrottle (A/T) computer. This AD requires repetitive built-in test equipment (BITE) tests of the A/T computer to detect a spoiler sensor failure, and corrective action if necessary. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective November 10, 2022.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of November 10, 2022.

The FAA must receive comments on this AD by December 12, 2022.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

• *Federal eRulemaking Portal:* Go to *regulations.gov*. Follow the instructions for submitting comments.

• *Fax:* 202–493–2251.

• *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

• *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

AD Docket: You may examine the AD docket at *regulations.gov* by searching for and locating Docket No. FAA–2022–1252; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

• For service information identified in this final rule, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110 SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; website *myboeingfleet.com*.

• You may view this referenced service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available at *regulations.gov* by searching for and locating Docket No. FAA–2022–1252.

FOR FURTHER INFORMATION CONTACT: Eric Igama, Aerospace Engineer, Systems and Equipment Section, FAA, Los Angeles ACO Branch, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 562–627–5388; email: *Roderick.igama@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA has received a report that a spoiler sensor failure may go undetected by the A/T computer. A review of the A/T cruise thrust split monitor logic terms showed that failure of the spoiler sensor input, including the wiring into the monitor logic, cannot be detected without a maintenance action performed on the flight control system. Latent loss of spoiler sensor position data or erroneous spoiler sensor position data could result in failure of the A/T cruise thrust split monitor to activate, which may result in a significant throttle split leading to asymmetric thrust. The subsequent lack of A/T disengagement could lead to an uncommanded roll. This condition, if not addressed, could result in potential loss of control of the airplane or reduced ability of the flightcrew to maintain the safe flight and landing of the airplane. The FAA is issuing this AD to address the unsafe condition on these products.

The FAA has confirmed that accomplishment of the applicable BITE test in the existing airplane maintenance manual (AMM) detects the spoiler sensor failure. This test is currently not required to be performed repetitively, leading to a potential latent failure if the test is not performed regularly, which will be required by this AD.

FAA's Determination

The FAA is issuing this AD because the agency has determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Boeing Alert Requirements Bulletin 737–22A1411 RB, dated August 22, 2022. This service information specifies procedures for performing an A/T computer BITE test, ''Autopilot Aileron Actuator Test—DFCS BITE,'' and, if the test fails, performing applicable corrective actions to repair defects and repeating the test until the test passes. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in **ADDRESSES**.

AD Requirements

This AD requires accomplishing the actions identified in Boeing Alert Requirements Bulletin 737–22A1411 RB, dated August 22, 2022, already described, except as discussed under ''Differences Between this AD and the Service Information,'' and except for any differences identified as exceptions in the regulatory text of this AD.

For information on the procedures and compliance times, see this service information at *regulations.gov* by searching for and locating Docket No. FAA–2022–1252.

Differences Between This AD and the Service Information

Boeing Alert Requirements Bulletin 737–22A1411 RB, dated August 22, 2022, specifies a compliance time of 250 flight hours for the initial BITE test. However, this AD requires the initial BITE test within 250 flight hours or 2 months after the effective date of this AD, whichever occurs first, to ensure that airplanes with low utilization rates are addressed in a timely manner.

Justification for Immediate Adoption and Determination of the Effective Date

Section 553(b)(3)(B) of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) authorizes agencies to dispense with notice and comment procedures for rules when the agency, for ''good cause,'' finds that those

Tab 18

Circular 2022-06: Unanticipated Overdraft Fee Assessment Practices, 87 Fed. Reg. 66935 (Nov. 7, 2022).

CFPB Issues Guidance to Help Banks Avoid Charging Illegal Junk Fees on Deposit Accounts

Agency highlights surprise overdraft and surprise depositor fees

OCT 26, 2022

Washington, D.C. – Today, the Consumer Financial Protection Bureau (CFPB) issued guidance about two junk fee practices that are likely unfair and unlawful under existing law. The first, surprise overdraft fees, includes overdraft fees charged when consumers had enough money in their account to cover a debit charge at the time the bank authorizes it. The second is the practice of indiscriminately charging depositor fees to every person who deposits a check that bounces. The penalty is an unexpected shock to depositors who thought they were increasing their funds.

"Americans are willing to pay for legitimate services at a competitive price, but are frustrated when they are hit with junk fees for unexpected or unwanted services that have no value to them," said CFPB Director Rohit Chopra. "We are providing guidance on existing law that will help law-abiding businesses seeking to fairly compete and the families they serve."

Overdraft and depositor fees likely violate the Consumer Financial Protection Act prohibition on unfair practices when consumers cannot reasonably avoid them. Today's *Consumer Financial Protection Circular* (https://files.consumerfinance.gov/f/documents/cfpb_unanticipated-overdraft-fee-assessment-practices_circular_2022-10.pdf) on surprise overdraft fees and the CFPB's compliance bulletin on surprise depositor fees (https://files.consumerfinance.gov/f/documents/cfpb_returned-deposited-item-fee-assessment-practice_compliance-bulletin_2022-10.pdf) lay out when a financial institution's back-end penalties likely break the law.

Surprise Depositor Fees

When a consumer deposits a check that bounces, banks sometimes charge a fee to the depositor, usually in the range of $10 to $19. However, a person trying to deposit a check has no idea or control over whether the check will clear, and sometimes, that person is the victim of check fraud. In fact, there are many reasons deposited checks can bounce, and the most common reason is that the check originator does not have enough money available in their account. Charging a fee to the depositor penalizes the person who could not anticipate the check would bounce, while doing nothing to deter the originator from writing bad checks.

The bulletin explains that indiscriminately charging these depositor fees, regardless of circumstances, likely violates the Consumer Financial Protection Act. Financial institutions can generally stay on the right side of the law when they employ more tailored fee policies that charge depositor fees only in situations where a depositor could have avoided the fee, such as when a depositor repeatedly deposits bad checks from the same originator.

Surprise Overdraft Fees

An overdraft fee can become a surprise fee when the customer doesn't reasonably expect their actions to incur an overdraft fee. For instance, even if a person closely monitors their account balances and carefully manages their spending to avoid overdraft fees, they can easily incur penalties when financial institutions employ processes that are unintelligible or manipulative.

Today's *Consumer Financial Protection Circular* explains that when financial institutions charge surprise overdraft fees, sometimes as much as $36, they may be breaking the law. The circular provides some examples of potentially unlawful surprise overdraft fees, including charging penalties on purchases made with a positive balance. These overdraft fees occur when a bank displays that a customer has sufficient available funds to complete a debit card purchase at the time of the transaction, but the consumer is later charged an overdraft fee. Often, the financial institution relies on complex back-office practices to justify charging the fee. For instance, after the bank allows one debit card transaction when there is sufficient money in the account, it nonetheless charges a fee on that transaction later because of intervening transactions.

In September 2022, the CFPB took action against **Regions Bank** (cfpb.gov/about-us/newsroom/cfpb-orders-regions-bank-pay-191-million-for-illegal-surprise-overdraft-fees/) for charging surprise overdraft fees known as authorized positive fees. As early as 2015 the CFPB, as well as other federal regulators, including the Federal Reserve, began cautioning financial institutions against charging certain types of authorized positive fees, such as the ones used by Regions to unlawfully penalize customers. Regions is required to, among other consequences, reimburse consumers all the funds it unlawfully charged since August 2018 and pay a $50 million penalty.

Today's *Consumer Financial Protection Circular* on surprise overdraft fees and its bulletin on surprise deposited item fees are just the latest announcements as part of the CFPB's junk fee initiative, one of many efforts across the federal government to increase competition and reduce unnecessary financial burdens on American families.

Junk Fee Initiative

In January 2022, the CFPB launched an initiative to scrutinize back-end junk fees that cost Americans billions of dollars. Tens of thousands of people responded to a CFPB **Request for**

Information (https://www.federalregister.gov/documents/2022/02/02/2022-02071/request-for-information-regarding-fees-imposed-by-providers-of-consumer-financial-products-or) with their stories and complaints about unnecessary fees in banking. Since then, the CFPB has taken action (cfpb.gov/about-us/newsroom/cfpb-moves-to-reduce-junk-fees-charged-by-debt-collectors/) to constrain "pay-to-pay" fees, and has announced (cfpb.gov/about-us/newsroom/cfpb-initiates-review-of-credit-card-company-penalty-policies-costing-consumers-12-billion-each-year/) a rulemaking proceeding on credit card late fees. In the last year, the CFPB has also published several research reports on overdraft fees (cfpb.gov/about-us/newsroom/cfpb-research-shows-banks-deep-dependence-on-overdraft-fees/) and an analysis (https://www.consumerfinance.gov/about-us/newsroom/cfpb-report-finds-high-fees-on-student-banking-products-endorsed-by-colleges/) of college banking products.

The CFPB has observed that financial institutions have started to compete more when it comes to fees. Earlier this year multiple banks announced (https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-on-the-junk-fees-rfi-press-call/) they were eliminating overdraft fees or updating their policies to be more consumer friendly. And, in recent months, multiple large banks announced (https://www.consumerfinance.gov/about-us/blog/consumers-on-course-to-save-one-billion-in-nsf-fees-annually-but-some-banks-continue-to-charge-them/) that they are eliminating non-sufficient fund fees on their checking accounts. The CFPB estimates that these changes mean $3 billion in savings for consumers.

Read today's *Consumer Financial Protection Circular, Surprise Overdraft Fee assessment practices* (https://files.consumerfinance.gov/f/documents/cfpb_unanticipated-overdraft-fee-assessment-practices_circular_2022-10.pdf).

Read today's compliance bulletin (https://files.consumerfinance.gov/f/documents/cfpb_returned-deposited-item-fee-assessment-practice_compliance-bulletin_2022-10.pdf).

Read the CFPB's recent enforcement action against Regions Bank for charging surprise overdraft fees (cfpb.gov/about-us/newsroom/cfpb-orders-regions-bank-pay-191-million-for-illegal-surprise-overdraft-fees/).

Learn about the CFPB's work on junk fees at consumerfinance.gov/JunkFees (cfpb.gov/rules-policy/junk-fees/).

Consumers can submit complaints about overdraft and depositor fees, as well as about other financial products or services, by visiting the CFPB's website (cfpb.gov/complaint/) or by calling (855) 411-CFPB (2372).

Employees who believe their companies have violated federal consumer financial protection laws are encouraged to send information about what they know to whistleblower@cfpb.gov.

Rules and Regulations

Federal Register
Vol. 87, No. 214
Monday, November 7, 2022

DEPARTMENT OF ENERGY

10 CFR Parts 429 and 430

[EERE–2021–BT–TP–0030]

RIN 1904–AF29

Energy Conservation Program: Test Procedure for Central Air Conditioners and Heat Pumps

Correction

In rule document 2022–22257, appearing on pages 64550–64607, in the issue of Tuesday, October 25, 2022, make the following correction:

■ Appendix M to Subpart B of Part 430 [Corrected]

On page 64588, in Appendix M to Subpart B of Part 430, in the third column, the equation in the 6th line down is corrected to read as set forth below.

$X^{k=2}(T_j) = BL(T_j)/Q_n{}^{k=2}(T_j)$

[FR Doc. C1–2022–22257 Filed 11–4–22; 8:45 am]

BILLING CODE 0099–10–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Chapter X

Consumer Financial Protection Circular 2022–06: Unanticipated Overdraft Fee Assessment Practices

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Consumer financial protection circular.

SUMMARY: The Consumer Financial Protection Bureau (Bureau or CFPB) has issued Consumer Financial Protection Circular 2022–06, titled, ''Unanticipated Overdraft Fee Assessment Practices.'' In this Circular, the Bureau responds to the question, ''Can the assessment of overdraft fees constitute an unfair act or practice under the Consumer Financial Protection Act (CFPA), even if the entity complies with the Truth in Lending Act (TILA) and Regulation Z, and the Electronic Fund Transfer Act (EFTA) and Regulation E?''

DATES: The Bureau released this Circular on its website on October 26, 2022.

ADDRESSES: Enforcers, and the broader public, can provide feedback and comments to *Circulars@cfpb.gov.*

FOR FURTHER INFORMATION CONTACT: Sonya Pass, Senior Legal Counsel, Legal Division, at 202–435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

Question Presented

Can the assessment of overdraft fees constitute an unfair act or practice under the Consumer Financial Protection Act (CFPA), even if the entity complies with the Truth in Lending Act (TILA) and Regulation Z, and the Electronic Fund Transfer Act (EFTA) and Regulation E?

Response

Yes. Overdraft fee practices must comply with TILA, EFTA, Regulation Z, Regulation E, and the prohibition against unfair, deceptive, and abusive acts or practices in section 1036 of the CFPA.[1] In particular, overdraft fees assessed by financial institutions on transactions that a consumer would not reasonably anticipate are likely unfair. These unanticipated overdraft fees are likely to impose substantial injury on consumers that they cannot reasonably avoid and that is not outweighed by countervailing benefits to consumers or competition.

As detailed in this Circular, unanticipated overdraft fees may arise in a variety of circumstances. For example, financial institutions risk charging overdraft fees that consumers would not reasonably anticipate when the transaction incurs a fee even though the account had a sufficient available balance at the time the financial institution authorized the payment (sometimes referred to as ''authorize positive, settle negative (APSN)'').

Background

An overdraft occurs when consumers have insufficient funds in their account to cover a transaction, but the financial institution nevertheless pays it. Unlike non-sufficient funds penalties, where a financial institution incurs no credit risk when it returns a transaction unpaid for insufficient funds, clearing an overdraft transaction is extending a loan that can create credit risk for the financial institution. Most financial institutions today charge a flat per-transaction fee, which can be as high as $36, for overdraft transactions, regardless of the amount of credit risk, if any, that they take.

Overdraft programs started as courtesy programs under which financial institutions would decide on a manual, ad hoc basis to pay particular check transactions for which consumers lacked funds in their deposit accounts rather than to return the transactions unpaid, which may have other negative consequences for consumers. Although Congress did not exempt overdraft programs offered in connection with deposit accounts when it enacted TILA,[2] the Federal Reserve Board (Board) in issuing Regulation Z in 1969 created a limited exemption from the new regulation for financial institutions' overdraft programs at that time (also then commonly known as ''bounce protection programs'').[3]

Overdraft programs in the 1990s began to evolve away from this historical model in a number of ways. One major industry change was a shift away from manual ad hoc decision-making by financial institution employees to a system involving heavy reliance on automated programs to process transactions and to make overdraft decisions. A second was to impose higher overdraft fees. In addition, broader changes in payment transaction types increased the impacts of these other changes on overdraft programs. In particular, debit card use expanded dramatically, and financial institutions began charging overdraft

[1] CFPA section 1036, 12 U.S.C. 5536.

[2] Public Law 90–321, 82 Stat. 146 (May 29, 1968), codified as amended at 15 U.S.C. 1601 *et seq.*

[3] 34 FR 2002 (Feb. 11, 1969). *See also, e.g.,* 12 CFR 1026.4(c)(3) (excluding charges imposed by a financial institution for paying items that overdraw an account from the definition of ''finance charge,'' unless the payment of such items and the imposition of the charge were previously agreed upon in writing); 12 CFR 1026.4(b)(2) (providing that any charge imposed on a checking or other transaction account is an example of a finance charge only to the extent that the charge exceeds the charge for a similar account without a credit feature).

fees on debit card transactions, which, unlike checks, are authorized by financial institutions at the time consumers initiate the transactions. And unlike checks, there are no similar potential negative consequences to consumers from a financial institution's decision to decline to authorize a debit card transaction.

As a result of these operational changes, overdraft programs became a significant source of revenue for banks and credit unions as the volume of transactions involving checking accounts increased due primarily to the growth of debit cards.[4] Before debit card use grew, overdraft fees on check transactions formed a greater portion of deposit account overdrafts. Debit card transactions presented consumers with markedly more chances to incur an overdraft fee when making a purchase because of increased acceptance and use of debit cards for relatively small transactions (*e.g.,* fast food and grocery stores).[5] Over time, revenue from overdraft increased and began to influence significantly the overall pricing structure for many deposit accounts, as providers began relying heavily on back-end pricing while eliminating or reducing front-end pricing (*i.e.,* ''free'' checking accounts with no monthly fees).[6]

As a result of the rapid growth in overdraft programs, Federal banking regulators expressed increasing concern about consumer protection issues and began a series of issuances and rulemakings. In the late 2000s as the risk of significant harm regarding overdraft programs continued to mount despite the increase in regulatory activity, Federal agencies began exploring various additional measures with regard to overdraft, including whether to require that consumers affirmatively opt in before being charged for overdraft programs. In February 2005, the Board, the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Administration (NCUA), and the Office of the Comptroller of the Currency (OCC) issued Joint Guidance on Overdraft Protection Programs.[7] In May 2005, the Board amended its Regulation DD (which implements the Truth in Savings Act) to expand disclosure requirements and revise periodic statement requirements for institutions that advertise their overdraft programs to provide aggregate totals for overdraft fees and for returned item fees for the periodic statement period and the year to date.[8] In May 2008, the Board along with the NCUA and the now-defunct Office of Thrift Supervision proposed to exercise their authority to prohibit unfair or deceptive acts or practices under section 5 of the Federal Trade Commission Act (FTC Act)[9] to prohibit institutions from assessing any fees on a consumer's account in connection with an overdraft program, unless the consumer was given notice and the right to opt out of the service, and the consumer did not opt out.[10] In January 2009, the Board finalized a Regulation DD rule that, among other things, expanded the previously mentioned disclosure and periodic statement requirements for overdraft programs to all depository institutions (not just those that advertise the programs).[11] In addition, although the three agencies did not finalize their FTC Act proposal, the Board ultimately adopted an opt-in requirement for overdraft fees assessed on ATM and one-time debit card transactions under Regulation E (which implements EFTA)[12] in late 2009.[13]

More recently, Federal financial regulators, such as the CFPB, the Board, and the FDIC, issued guidance around practices that lead to the assessment of overdraft fees. In 2010, the FDIC issued Final Overdraft Payment Supervisory Guidance on automated overdraft payment programs and warned about product over-use that may harm consumers.[14] In 2015, the CFPB issued public guidance explaining that one or more institutions had acted unfairly and deceptively when they charged certain overdraft fees.[15] Beginning in 2016, the Board publicly discussed issues with unfair fees related to transactions that authorize positive and settle negative.[16] In July 2018, the Board issued a Consumer Compliance Supervision Bulletin finding certain overdraft fees assessed based on the account's available balance to be an unfair practice in violation of section 5 of the FTC Act.[17] In June 2019, the FDIC issued its Consumer Compliance Supervisory Highlights and raised risks regarding certain use of the available balance method.[18] In September 2022, the CFPB found that a financial institution had engaged in unfair and abusive conduct when it charged APSN fees.

Analysis

Violations of the Consumer Financial Protection Act

The CFPA prohibits conduct that constitutes an unfair act or practice. An act or practice is unfair when: (1) It causes or is likely to cause substantial injury to consumers that is not reasonably avoidable by consumers; and (2) The injury is not outweighed by countervailing benefits to consumers or to competition.[19]

An unanticipated overdraft fee occurs when financial institutions assess overdraft fees on transactions that a consumer would not reasonably expect would give rise to such fees. The CFPB has observed that in many circumstances, financial institutions have created serious obstacles to consumers making informed decisions about their use of overdraft services. Overdraft practices are complex—and differ among institutions. Even if a consumer closely monitors their

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[4] CFPB, Study of Overdraft Programs: A White Paper of Initial Data Findings, at 16 (June 2013), *available at https://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-practices.pdf.*

[5] *Id.* at 11–12.

[6] *Id.* at 16–17.

[7] 70 FR 9127 (Feb. 24, 2005).

[8] 70 FR 29582 (May 24, 2005).

[9] 15 U.S.C. 45.

[10] 73 FR 28904 (May 19, 2008).

[11] 74 FR 5584 (Jan. 29, 2009). The rule also addressed balance disclosures that institutions provide to consumers through automated systems.

[12] Public Law 90–321, 92 Stat. 3728 (Nov. 10, 1978), codified as amended at 15 U.S.C. 1693 *et seq.*

[13] 74 FR 59033 (Nov. 17, 2009).

[14] FDIC, Final Overdraft Payment Supervisory Guidance, FIL–81–2010 (Nov. 24, 2010), *available at https://www.fdic.gov/news/financial-institution-letters/2010/fil10081.pdf.*

[15] CFPB Supervisory Highlights, Winter 2015, at 8–9, *available at https://files.consumerfinance.gov/f/201503_cfpb_supervisory-highlights-winter-2015.pdf.*

[16] Interagency Overdraft Services Consumer Compliance Discussion (Nov. 9, 2016), *available at https://www.consumercomplianceoutlook.org/outlook-live/2016/interagency-overdraft-services-consumer-compliance-discussion/* (follow ''Presentation Slides'' hyperlink), at slides 20–21.

[17] *See* Federal Reserve Board, Consumer Compliance Supervision Bulletin 12 (July 2018), *available at https://www.federalreserve.gov/publications/files/201807-consumer-compliance-supervision-bulletin.pdf* (stating that it had identified ''a UDAP violation . . . when a bank imposed overdraft fees on [point-of-sale] transactions based on insufficient funds in the account's available balance at the time of posting, even though the bank had previously authorized the transaction based on sufficient funds in the account's available balance when the consumer entered into the transaction'').

[18] FDIC, Consumer Compliance Supervisory Highlights 2–3 (June 2019), *available at https://www.fdic.gov/regulations/examinations/consumercomplsupervisoryhighlights.pdf?source=govdelivery&utm_medium=email&utm_source=govdelivery.* The agency referred to the available balance method as assessing overdraft fees based on the consumer's ''available balance'' rather than the consumer's ''ledger balance.'' The agency stated that use of the available balance method ''creates the possibility of an institution assessing overdraft fees in connection with transactions that did not overdraw the consumer's account,'' and that entities could mitigate risk ''[w]hen using an available balance method, [by] ensuring that any transaction authorized against a positive available balance does not incur an overdraft fee, even if the transaction later settles against a negative available balance.''

[19] CFPA sections 1031, 1036, 12 U.S.C. 5531, 5536.

Tab 18

account balances and carefully calibrates their spending in accordance with the balances shown, they can easily incur an overdraft fee they could not reasonably anticipate because financial institutions use processes that are unintelligible for many consumers and that consumers cannot control. Though financial institutions may provide disclosures related to their transaction processing and overdraft assessment policies, these processes are extraordinarily complex, and evidence strongly suggests that, despite such disclosures, consumers face significant uncertainty about when transactions will be posted to their account and whether or not they will incur overdraft fees.[20]

For example, even when the available balance on a consumer's account—that is, the balance that, at the time the consumer initiates the transaction, would be displayed as available to the consumer—is sufficient to cover a debit card transaction at the time the consumer initiates it, the balance on the account may not be sufficient to cover it at the time the debit settles. The account balance that is not reduced by any holds from pending transactions is often referred to as the ledger balance. The available balance is generally the ledger balance plus any deposits that have not yet cleared but are made available, less any pending (*i.e.,* authorized but not yet settled) debits. Since consumers can easily access their available balance via mobile application, online, at an ATM, or by phone, they reasonably may not expect to incur an overdraft fee on a debit card transaction when their balance showed there were sufficient available funds in the account to pay the transaction at the time they initiated it. Such transactions, which industry commonly calls ''authorize positive, settle negative'' or APSN transactions, thus can give rise to unanticipated overdraft fees.

This Circular highlights potentially unlawful patterns of financial institution practices regarding unanticipated overdraft fees and provides some examples of practices that might trigger liability under the CFPA. This list of examples is illustrative and not exhaustive.[21] Enforcers should closely scrutinize whether and when charging overdraft fees may contravene Federal consumer financial law. A ''substantial injury'' typically takes the form of monetary harm, such as fees or costs paid by consumers because of the unfair act or practice. In addition, actual injury is not required; a significant risk of concrete harm is sufficient.[22] An injury is not reasonably avoidable by consumers when consumers cannot make informed decisions or take action to avoid that injury. Injury that occurs without a consumer's knowledge or consent, when consumers cannot reasonably anticipate the injury, or when there is no way to avoid the injury even if anticipated, is not reasonably avoidable. Finally, an act or practice is not unfair if the injury it causes or is likely to cause is outweighed by its consumer or competitive benefits.

Charging an unanticipated overdraft fee may generally be an unfair act or practice. Overdraft fees inflict a substantial injury on consumers. Such fees can be as high as $36; thus consumers suffer a clear monetary injury when they are charged an unexpected overdraft fee. Depending on the circumstances of the fee, such as when intervening transactions settle against the account or how the financial institution orders the transactions at the end of the banking day, consumers could be assessed more than one such fee, further exacerbating the injury. These overdraft fees are particularly harmful for consumers, as consumers likely cannot reasonably anticipate them and thus plan for them.

As a general matter, a consumer cannot reasonably avoid unanticipated overdraft fees, which by definition are assessed on transactions that a consumer would not reasonably anticipate would give rise to such fees. There are a variety of reasons consumers might believe that a transaction would not incur an overdraft fee, because financial institutions use complex policies to assess overdraft fees that are likely to be unintelligible to many consumers. These policies include matters such as the timing gap between authorization and settlement and the significance of that gap, the amount of time a credit may take to be posted on an account, the use of one kind of balance over another for fee calculation purposes, or the order of transaction processing across different types of credit and debits. Mobile banking and the widespread use of debit card transactions could create a consumer expectation that account balances can be closely monitored. Consumers who make use of these tools may reasonably think that the balance shown in their mobile banking app, online, by telephone, or at an ATM, for example, accurately reflects the balance that they have available to conduct a transaction and, therefore, that conducting the transaction will not result in being assessed one or more overdraft fees. But unanticipated overdraft fees are caused by often convoluted settlement processes of financial institutions that occur after the consumer enters into the transaction, the intricacies of which are explained only in fine print, if at all.

Consumers are likely to reasonably expect that a transaction that is authorized at point of sale with sufficient funds will not later incur overdraft fees. Consumers may understand their account balance based on keeping track of their expenditures, or increasingly through the use of mobile and online banking, where debit card transactions are immediately reflected in mobile and online banking balances. Consumers may reasonably assume that when they have sufficient available balance in their account at the time they entered into the transaction, they will not incur overdraft fees for that transaction. But consumers generally cannot reasonably be expected to understand and thereby conduct their transactions to account for the delay between authorization and settlement—a delay that is generally not of the consumers' own making but is the product of payment systems. Nor can consumers control the methods by which the financial institution will settle other transactions—both transactions that precede and that follow the current one—in terms of the balance calculation and ordering processes that the financial institution uses, or the methods by which prior deposits will be taken into account for overdraft fee purposes.[23]

The injury from unanticipated overdraft fees likely is not outweighed by countervailing benefits to consumers or competition. Where a financial institution has authorized a debit card transaction, the institution is obligated to pay the transaction, irrespective of whether an overdraft fee is assessed. Access to overdraft programs therefore is not a countervailing benefit to the

[20] *See, e.g.,* CFPB, Consumer voices on overdraft programs (Nov. 2017), *available at https://files.consumerfinance.gov/f/documents/cfpb_consumer-voices-on-overdraft-programs_report_112017.pdf.*

[21] Depending on the circumstances, assessing overdraft fees may also implicate deceptive or abusive acts or practices, or other unfair acts or practices under CFPA sections 1031, 1036, 12 U.S.C. 5531, 5536.

[22] *See F.T.C.* v. *Wyndham Worldwide Corp.,* 799 F.3d 236, 246 (3d Cir. 2015).

[23] While financial institutions must obtain a consumer's ''opt-in'' before the consumer can be charged overdraft fees on one-time debit card and ATM transactions, 12 CFR 1005.17(b), this does not mean that the consumer intended to make use of those services in these transactions where the consumer believed they had sufficient funds to pay for the transaction without overdrawing their account.

assessment of overdraft fees in such unanticipated circumstances.

Nor does it seem plausible that the ability to generate revenue through unanticipated overdraft fees allows for lower front-end account or maintenance fees that would outweigh the substantial injury in terms of the total costs of the unanticipated overdraft fees charged to consumers. Indeed, in recent months, several large banks have announced plans to entirely eliminate or significantly reduce overdraft fees.[24] In other consumer finance contexts, research has shown that where back-end fees decreased, companies did not increase front-end prices in an equal amount.[25] But even a corresponding front-end increase in pricing would generally not outweigh the substantial injury from unexpected back-end fees.

As for benefits to competition, economic research suggests that shifting the cost of products from front-end prices to back-end fees risks harming competition by making it more difficult to compete on transparent front-end fees and reduces the portion of the overall cost that is subject to competitive price shopping.[26] This is especially the case, where, as here, the fees likely cannot reasonably be anticipated by consumers. Given that back-end fees are likely to be harmful to competition, it may be difficult for institutions to demonstrate countervailing benefits of this practice. A substantial injury that is not reasonably avoidable and that is not outweighed by such countervailing benefits would trigger liability under existing law.

Examples of Potential Unfair Acts or Practices Involving Overdraft Fees That Consumers Would Not Reasonably Anticipate

In light of the complex systems that financial institutions use for overdraft, such as different balance calculations and transaction processing orders, enforcers should scrutinize situations likely to give rise to unanticipated overdraft fees. The following are non-exhaustive examples of such practices that may warrant scrutiny.

Unanticipated overdraft fees can occur on ''authorize positive, settle negative'' or APSN transactions, when financial institutions assess an overdraft fee for a debit card transaction where the consumer had sufficient available balance in their account to cover the transaction at the time the consumer initiated the transaction and the financial institution authorized it, but due to intervening authorizations, settlement of other transactions (including the ordering in which transactions are settled), or other complex processes, the financial institution determined that the consumer's balance was insufficient at the time of settlement.[27] These unanticipated overdraft fees are assessed on consumers who are opted in to overdraft coverage for one-time debit card and ATM transactions, but they likely did not expect overdraft fees for these transactions.

The following table (Table 1) shows an example of unanticipated overdraft fees involving a debit card transaction with an intervening debit transaction. The consumer is charged an overdraft fee even though the consumer's available balance was positive at the time the consumer entered into the debit card transaction.

TABLE 1—UNANTICIPATED OVERDRAFT FEE ASSESSED THROUGH APSN WITH INTERVENING DEBIT TRANSACTION

Description	Transaction	Available balance	Ledger balance
Day 1:			
Opening Balance		$100	$100
Debit card transaction—authorized	−$50	50	100
Day 2:			
Preauthorized ACH debit—posted	−120	−70	−20
Overdraft fee	−34	−104	−54
Day 3:			
Debit card transaction—posted	−50	−104	−104
Overdraft fee	−34	−138	−138

For example, as illustrated above in Table 1, on Day 1, a consumer has $100 in her account available to spend based on her available balance displayed. The consumer enters into a debit card transaction that day for $50. On Day 2, a preauthorized ACH debit that the consumer had authorized previously for $120 is settled against her account. The financial institution charges the consumer an overdraft fee. On Day 3, the debit card transaction from Day 1 settles, but by that point the consumer's account balance has been reduced by the $120 ACH debit settling and the $34 overdraft fee, leaving the balance as negative $54 using ledger balance, or negative $104 using available balance. When the $50 debit card transaction settles against the negative balance, the financial institution charges the consumer another overdraft fee. Consumers may not reasonably expect to be charged this second overdraft fee, based on a debit card transaction that has been authorized with a sufficient account balance. The consumer may reasonably expect that if their account balance shows sufficient funds for the transaction just before entering into the

[24] CFPB, ''Comparing overdraft fees and policies across banks'' (Feb. 10, 2022), *available at https://www.consumerfinance.gov/about-us/blog/comparing-overdraft-fees-and-policies-across-banks/.*

[25] Sumit Agarwal, Souphala Chomsisengphet, Neale Mahoney, & Johannes Stroebel, *Regulating Consumer Financial Products: Evidence from Credit Cards,* Quarterly Journal of Economics, Vol. 130, Issue 1 (Feb. 2015), pp. 111–64, at p. 5 & 42–43, *available at https://academic.oup.com/qje/article/130/1/111/2338025?login=true.*

[26] Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets,* Quarterly Journal of Economics, Vol. 121, Issue 2 (May 2006), pp. 505–40, *available at https://pages.stern.nyu.edu/~xgabaix/papers/shrouded.pdf; see also* Steffen Huck & Brian Wallace, *The impact of price frames on consumer decision making: Experimental evidence* (2015), *available athttps://www.ucl.ac.uk/~uctpbwa/papers/price-framing.pdf;* Agarwal et al., *Regulating Consumer Financial Products, supra* note 25; Sumit Agarwal, Souphala Chomsisengphet, Neale Mahoney, & Johannes Stroebel, *A Simple Framework for Establishing Consumer Benefits from Regulating Hidden Fees,* Journal of Legal Studies, Vol. 43, Issue S2 (June 2014), pp. S239–52, *available at https://nmahoney.people.stanford.edu/sites/g/files/sbiybj23976/files/media/file/mahoney_hidden_fees_jls.pdf.*

[27] *See, e.g.,* CFPB Supervisory Highlights, *supra* note 15; Interagency Overdraft Services Consumer Compliance Discussion, *supra* note Error! Bookmark not defined.; Federal Reserve Board, Consumer Compliance Supervision Bulletin, *supra* note Error! Bookmark not defined.; FDIC, Consumer Compliance Supervisory Highlights, *supra* note Error! Bookmark not defined.

transaction, as reflected in their account balance in their mobile application, online, at an ATM, or by telephone, then that debit card transaction will not incur an overdraft fee. Consumers may not reasonably be able to navigate the complexities of the delay between authorization and settlement of overlapping transactions that are processed on different timelines and impact the balance for each transaction. If consumers are presented with a balance that they can view in real-time, they are reasonable to believe that they can rely on it, rather than have overdraft fees assessed based on the financial institution's use of different balances at different times and intervening processing complexities for fee-decisioning purposes.

Certain financial institution practices can exacerbate the injury from unanticipated overdraft fees from APSN transactions by assessing overdraft fees in excess of the number of transactions for which the account lacked sufficient funds. In these APSN situations, financial institutions assess overdraft fees at the time of settlement based on the consumer's available balance reduced by debit holds, rather than the consumer's ledger balance, leading to consumers being assessed multiple overdraft fees when they may reasonably have expected only one.

The following table (Table 2) shows an example of how financial institutions may process overdraft fees on two transactions. The consumer is charged an additional overdraft fee when the financial institution assesses fees based on available balance, because the financial institution is assessing an overdraft fee on a transaction which the institution has already used in making a fee decision on another transaction. By contrast, the consumer would not have been charged the additional overdraft fee if the financial institution used ledger balance.

TABLE 2—UNANTICIPATED OVERDRAFT FEE ASSESSED THROUGH APSN BY FINANCIAL INSTITUTION USING AVAILABLE BALANCE FOR FEE DECISION

Description	Transaction	Available balance	Ledger balance
Day 1:			
Opening Balance		$100	$100
Debit card transaction—authorized	−$50	50	100
Day 2:			
Preauthorized ACH debit—posted	−60	−10	−40
Overdraft fee (assessed based on available balance)	−34	−44	*6
Day 3:			
Debit card transaction—posted	−50	−44	−44
Overdraft fee	−34	−78	−78

* (But if the financial institution had used ledger balance for fee assessment, the balance would not have been reduced by an overdraft fee.)

For example, as illustrated above in Table 2, on Day 1, a consumer has $100 in her account, which is the amount displayed on her online account. The consumer enters into a debit card transaction that day for $50. On Day 2, a preauthorized ACH debit that the consumer had authorized previously for $60 is settled against her account. Because the debit card transaction from Day 1 has not yet settled, the consumer's ledger balance, prior to posting of the $60 ACH debit, is still $100. But some financial institutions will consider the consumer's balance for purposes of an overdraft fee decision as $50, as already having been reduced by the not-yet-settled debit card transaction from Day 1, and thus the settlement of the $60 ACH debit will take the account negative and incur an overdraft fee. On Day 3, the debit card transaction from Day 1 settles, but by that point the consumer's balance has been reduced by the settlement of the $60 ACH debit plus the overdraft fee for that transaction. If the overdraft fee is $34, the consumer's account has $6 left in ledger balance. The $50 debit card transaction then settles, overdrawing the account and the financial institution charges the consumer an overdraft fee. The consumer would not expect two overdraft fees, since her account balance showed sufficient funds at the time she entered into the debit card transaction to cover either one of them. But in this example, the financial institution charged two overdraft fees, by assessing an overdraft fee on a transaction which the institution has already used in making a fee decision on another transaction. By contrast, a financial institution using ledger balance for the overdraft fee decision would have charged only one overdraft fee.

About Consumer Financial Protection Circulars

Consumer Financial Protection Circulars are issued to all parties with authority to enforce Federal consumer financial law. The CFPB is the principal Federal regulator responsible for administering Federal consumer financial law, *see* 12 U.S.C. 5511, including the Consumer Financial Protection Act's prohibition on unfair, deceptive, and abusive acts or practices, 12 U.S.C. 5536(a)(1)(B), and 18 other ''enumerated consumer laws,'' 12 U.S.C. 5481(12). However, these laws are also enforced by State attorneys general and State regulators, 12 U.S.C. 5552, and prudential regulators including the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the National Credit Union Administration. *See, e.g.,* 12 U.S.C. 5516(d), 5581(c)(2) (exclusive enforcement authority for banks and credit unions with $10 billion or less in assets). Some Federal consumer financial laws are also enforceable by other Federal agencies, including the Department of Justice and the Federal Trade Commission, the Farm Credit Administration, the Department of Transportation, and the Department of Agriculture. In addition, some of these laws provide for private enforcement.

Consumer Financial Protection Circulars are intended to promote consistency in approach across the various enforcement agencies and parties, pursuant to the CFPB's statutory objective to ensure Federal consumer financial law is enforced consistently. 12 U.S.C. 5511(b)(4).

Consumer Financial Protection Circulars are also intended to provide transparency to partner agencies regarding the CFPB's intended approach when cooperating in enforcement actions. *See, e.g.,* 12 U.S.C. 5552(b) (consultation with CFPB by State attorneys general and regulators); 12

U.S.C. 5562(a) (joint investigatory work between CFPB and other agencies).

Consumer Financial Protection Circulars are general statements of policy under the Administrative Procedure Act. 5 U.S.C. 553(b). They provide background information about applicable law, articulate considerations relevant to the Bureau's exercise of its authorities, and, in the interest of maintaining consistency, advise other parties with authority to enforce Federal consumer financial law. They do not restrict the Bureau's exercise of its authorities, impose any legal requirements on external parties, or create or confer any rights on external parties that could be enforceable in any administrative or civil proceeding. The CFPB Director is instructing CFPB staff as described herein, and the CFPB will then make final decisions on individual matters based on an assessment of the factual record, applicable law, and factors relevant to prosecutorial discretion.

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2022–23982 Filed 11–4–22; 8:45 am]

BILLING CODE 4810–AM–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Chapter X

Bulletin 2022–06: Unfair Returned Deposited Item Fee Assessment Practices

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Compliance bulletin.

SUMMARY: A Returned Deposited Item is a check that a consumer deposits into their checking account that is returned to the consumer because the check could not be processed against the check originator's account. Blanket policies of charging Returned Deposited Item fees to consumers for all returned transactions irrespective of the circumstances or patterns of behavior on the account are likely unfair under the Consumer Financial Protection Act (CFPA). The Consumer Financial Protection Bureau (Bureau or CFPB) is issuing this bulletin to notify regulated entities how the Bureau intends to exercise its enforcement and supervisory authorities on this issue.

DATES: This bulletin is applicable as of November 7, 2022.

FOR FURTHER INFORMATION CONTACT: Sonya Pass, Senior Legal Counsel, Legal Division, at 202–435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

A Returned Deposited Item is a check that a consumer deposits into their checking account that is returned to the consumer because the check could not be processed against the check originator's account. There are many reasons deposited items can be returned unprocessed. For example, the check originator may not have sufficient funds available in their account to pay the amount stated on the check; the check originator may have directed the issuing depository institution to stop payment; the account referenced on the check may be closed or located in a foreign country; or there may be questionable, erroneous, or missing information on the check, including with respect to the signature, date, account number, or payee name.

Consumers often rely on payments made by check for personal, family, or household purposes. The check may be from another consumer or from a business or entity and may represent a gift, a refund, a payment, or a public benefit. In many circumstances, as discussed below, the check depositor has no control over whether, and likely no reason to anticipate that, the deposited check would be returned. Nor as a general matter can the check depositor verify with the check originator's depository institution prior to depositing a check whether there are sufficient funds in the issuer's account for the check to clear. Yet, many depository institutions have blanket policies of charging fees to the check depositor for Returned Deposited Items for every Returned Deposited Item, irrespective of the circumstances of the particular transaction or patterns of behavior on the account. While certain entities, such as lenders and landlords, may be able to recoup such fees from the check originator, consumers generally cannot.

Under the blanket policies of depository institutions, Returned Deposited Item fees are often in the range of $10–$19. The fees are typically charged in a flat amount on a per-transaction basis. Notably, in the case of checks that are returned for insufficient funds, Returned Deposited Item fees are charged in addition to any non-sufficient funds fees charged by the originating bank to the check originator. Assuming a typical Returned Deposited Item fee of $12 and a non-sufficient funds fee of $35, when the depositor's bank charges a Returned Deposited Item fee to the depositor consumer, and the check originator's bank charges a non-sufficient funds fee to the check originator for the same check, those banks collectively generate $47 in fees from each returned check—$12 to the depositor's bank, $35 to the originator's bank.

II. Violations of the Consumer Financial Protection Act [1]

The Consumer Financial Protection Act (CFPA) prohibits covered persons from engaging in unfair acts or practices.[2] Congress defined an unfair act or practice as one that (A) ''causes or is likely to cause substantial injury to consumers which is not reasonably avoidable,'' and (B) ''such substantial injury is not outweighed by countervailing benefits to consumers or to competition.'' [3]

Blanket policies of charging Returned Deposited Item fees to consumers for all returned transactions irrespective of the circumstances of the transaction or patterns of behavior on the account are likely unfair.

Fees charged for Returned Deposited Items cause substantial injury to consumers. Under the blanket policies of many depository institutions, Returned Deposited Item fees cause monetary injury, in the range of $10–19 for each returned item. Depository institutions that charge Returned Deposited Item fees for returned checks impose concrete monetary harm on a large number of customers.

In many of the instances in which Returned Deposited Item fees are charged, consumers would not be able to reasonably avoid the substantial monetary injury imposed by the fees. An injury is not reasonably avoidable unless consumers are fully informed of the risk and have practical means to avoid it.[4] Under blanket policies of many depository institutions, Returned Deposited Item fees are charged whenever a check is returned because the check originator has insufficient available funds in their account, the check originator instructs the originating depository institution to stop payment, or the check is written against a closed account. But a consumer depositing a check would normally be unaware of and have little to no control over whether a check originator has

[1] As a matter of prosecutorial discretion, the CFPB does not intend to seek monetary relief for potential unfair practices regarding Returned Deposited Item fees assessed prior to November 1, 2023.

[2] 12 U.S.C. 5536(a)(1)(B).

[3] 12 U.S.C. 5531(c)(1).

[4] *See F.T.C.* v. *Neovi, Inc.,* 604 F.3d 1150, 1158 (9th Cir. 2010).

Tab 18

Tab 19

Bulletin 2022-06: Unfair Returned Deposited Item Fee Assessment Practices, 87 Fed. Reg. 66940 (Nov. 7, 2022).

CFPB Issues Guidance to Help Banks Avoid Charging Illegal Junk Fees on Deposit Accounts

Agency highlights surprise overdraft and surprise depositor fees

OCT 26, 2022

Washington, D.C. – Today, the Consumer Financial Protection Bureau (CFPB) issued guidance about two junk fee practices that are likely unfair and unlawful under existing law. The first, surprise overdraft fees, includes overdraft fees charged when consumers had enough money in their account to cover a debit charge at the time the bank authorizes it. The second is the practice of indiscriminately charging depositor fees to every person who deposits a check that bounces. The penalty is an unexpected shock to depositors who thought they were increasing their funds.

"Americans are willing to pay for legitimate services at a competitive price, but are frustrated when they are hit with junk fees for unexpected or unwanted services that have no value to them," said CFPB Director Rohit Chopra. "We are providing guidance on existing law that will help law-abiding businesses seeking to fairly compete and the families they serve."

Overdraft and depositor fees likely violate the Consumer Financial Protection Act prohibition on unfair practices when consumers cannot reasonably avoid them. Today's *Consumer Financial Protection Circular* (https://files.consumerfinance.gov/f/documents/cfpb_unanticipated-overdraft-fee-assessment-practices_circular_2022-10.pdf) on surprise overdraft fees and the CFPB's compliance bulletin on surprise depositor fees (https://files.consumerfinance.gov/f/documents/cfpb_returned-deposited-item-fee-assessment-practice_compliance-bulletin_2022-10.pdf) lay out when a financial institution's back-end penalties likely break the law.

Surprise Depositor Fees

When a consumer deposits a check that bounces, banks sometimes charge a fee to the depositor, usually in the range of $10 to $19. However, a person trying to deposit a check has no idea or control over whether the check will clear, and sometimes, that person is the victim of check fraud. In fact, there are many reasons deposited checks can bounce, and the most common reason is that the check originator does not have enough money available in their account. Charging a fee to the depositor penalizes the person who could not anticipate the check would bounce, while doing nothing to deter the originator from writing bad checks.

The bulletin explains that indiscriminately charging these depositor fees, regardless of circumstances, likely violates the Consumer Financial Protection Act. Financial institutions can generally stay on the right side of the law when they employ more tailored fee policies that charge depositor fees only in situations where a depositor could have avoided the fee, such as when a depositor repeatedly deposits bad checks from the same originator.

Surprise Overdraft Fees

An overdraft fee can become a surprise fee when the customer doesn't reasonably expect their actions to incur an overdraft fee. For instance, even if a person closely monitors their account balances and carefully manages their spending to avoid overdraft fees, they can easily incur penalties when financial institutions employ processes that are unintelligible or manipulative.

Today's *Consumer Financial Protection Circular* explains that when financial institutions charge surprise overdraft fees, sometimes as much as $36, they may be breaking the law. The circular provides some examples of potentially unlawful surprise overdraft fees, including charging penalties on purchases made with a positive balance. These overdraft fees occur when a bank displays that a customer has sufficient available funds to complete a debit card purchase at the time of the transaction, but the consumer is later charged an overdraft fee. Often, the financial institution relies on complex back-office practices to justify charging the fee. For instance, after the bank allows one debit card transaction when there is sufficient money in the account, it nonetheless charges a fee on that transaction later because of intervening transactions.

In September 2022, the CFPB took action against **Regions Bank** (cfpb.gov/about-us/newsroom/cfpb-orders-regions-bank-pay-191-million-for-illegal-surprise-overdraft-fees/) for charging surprise overdraft fees known as authorized positive fees. As early as 2015 the CFPB, as well as other federal regulators, including the Federal Reserve, began cautioning financial institutions against charging certain types of authorized positive fees, such as the ones used by Regions to unlawfully penalize customers. Regions is required to, among other consequences, reimburse consumers all the funds it unlawfully charged since August 2018 and pay a $50 million penalty.

Today's *Consumer Financial Protection Circular* on surprise overdraft fees and its bulletin on surprise deposited item fees are just the latest announcements as part of the CFPB's junk fee initiative, one of many efforts across the federal government to increase competition and reduce unnecessary financial burdens on American families.

Junk Fee Initiative

In January 2022, the CFPB launched an initiative to scrutinize back-end junk fees that cost Americans billions of dollars. Tens of thousands of people responded to a CFPB **Request for**

Information (https://www.federalregister.gov/documents/2022/02/02/2022-02071/request-for-information-regarding-fees-imposed-by-providers-of-consumer-financial-products-or) with their stories and complaints about unnecessary fees in banking. Since then, the CFPB has taken action (cfpb.gov/about-us/newsroom/cfpb-moves-to-reduce-junk-fees-charged-by-debt-collectors/) to constrain "pay-to-pay" fees, and has announced (cfpb.gov/about-us/newsroom/cfpb-initiates-review-of-credit-card-company-penalty-policies-costing-consumers-12-billion-each-year/) a rulemaking proceeding on credit card late fees. In the last year, the CFPB has also published several research reports on overdraft fees (cfpb.gov/about-us/newsroom/cfpb-research-shows-banks-deep-dependence-on-overdraft-fees/) and an analysis (https://www.consumerfinance.gov/about-us/newsroom/cfpb-report-finds-high-fees-on-student-banking-products-endorsed-by-colleges/) of college banking products.

The CFPB has observed that financial institutions have started to compete more when it comes to fees. Earlier this year multiple banks announced (https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-on-the-junk-fees-rfi-press-call/) they were eliminating overdraft fees or updating their policies to be more consumer friendly. And, in recent months, multiple large banks announced (https://www.consumerfinance.gov/about-us/blog/consumers-on-course-to-save-one-billion-in-nsf-fees-annually-but-some-banks-continue-to-charge-them/) that they are eliminating non-sufficient fund fees on their checking accounts. The CFPB estimates that these changes mean $3 billion in savings for consumers.

Read today's *Consumer Financial Protection Circular, Surprise Overdraft Fee assessment practices* (https://files.consumerfinance.gov/f/documents/cfpb_unanticipated-overdraft-fee-assessment-practices_circular_2022-10.pdf).

Read today's compliance bulletin (https://files.consumerfinance.gov/f/documents/cfpb_returned-deposited-item-fee-assessment-practice_compliance-bulletin_2022-10.pdf).

Read the CFPB's recent enforcement action against Regions Bank for charging surprise overdraft fees (cfpb.gov/about-us/newsroom/cfpb-orders-regions-bank-pay-191-million-for-illegal-surprise-overdraft-fees/).

Learn about the CFPB's work on junk fees at consumerfinance.gov/JunkFees (cfpb.gov/rules-policy/junk-fees/).

Consumers can submit complaints about overdraft and depositor fees, as well as about other financial products or services, by visiting the CFPB's website (cfpb.gov/complaint/) or by calling (855) 411-CFPB (2372).

Employees who believe their companies have violated federal consumer financial protection laws are encouraged to send information about what they know to whistleblower@cfpb.gov.

U.S.C. 5562(a) (joint investigatory work between CFPB and other agencies).

Consumer Financial Protection Circulars are general statements of policy under the Administrative Procedure Act. 5 U.S.C. 553(b). They provide background information about applicable law, articulate considerations relevant to the Bureau's exercise of its authorities, and, in the interest of maintaining consistency, advise other parties with authority to enforce Federal consumer financial law. They do not restrict the Bureau's exercise of its authorities, impose any legal requirements on external parties, or create or confer any rights on external parties that could be enforceable in any administrative or civil proceeding. The CFPB Director is instructing CFPB staff as described herein, and the CFPB will then make final decisions on individual matters based on an assessment of the factual record, applicable law, and factors relevant to prosecutorial discretion.

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

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BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Chapter X

Bulletin 2022–06: Unfair Returned Deposited Item Fee Assessment Practices

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Compliance bulletin.

SUMMARY: A Returned Deposited Item is a check that a consumer deposits into their checking account that is returned to the consumer because the check could not be processed against the check originator's account. Blanket policies of charging Returned Deposited Item fees to consumers for all returned transactions irrespective of the circumstances or patterns of behavior on the account are likely unfair under the Consumer Financial Protection Act (CFPA). The Consumer Financial Protection Bureau (Bureau or CFPB) is issuing this bulletin to notify regulated entities how the Bureau intends to exercise its enforcement and supervisory authorities on this issue.

DATES: This bulletin is applicable as of November 7, 2022.

FOR FURTHER INFORMATION CONTACT: Sonya Pass, Senior Legal Counsel, Legal Division, at 202–435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

A Returned Deposited Item is a check that a consumer deposits into their checking account that is returned to the consumer because the check could not be processed against the check originator's account. There are many reasons deposited items can be returned unprocessed. For example, the check originator may not have sufficient funds available in their account to pay the amount stated on the check; the check originator may have directed the issuing depository institution to stop payment; the account referenced on the check may be closed or located in a foreign country; or there may be questionable, erroneous, or missing information on the check, including with respect to the signature, date, account number, or payee name.

Consumers often rely on payments made by check for personal, family, or household purposes. The check may be from another consumer or from a business or entity and may represent a gift, a refund, a payment, or a public benefit. In many circumstances, as discussed below, the check depositor has no control over whether, and likely no reason to anticipate that, the deposited check would be returned. Nor as a general matter can the check depositor verify with the check originator's depository institution prior to depositing a check whether there are sufficient funds in the issuer's account for the check to clear. Yet, many depository institutions have blanket policies of charging fees to the check depositor for Returned Deposited Items for every Returned Deposited Item, irrespective of the circumstances of the particular transaction or patterns of behavior on the account. While certain entities, such as lenders and landlords, may be able to recoup such fees from the check originator, consumers generally cannot.

Under the blanket policies of depository institutions, Returned Deposited Item fees are often in the range of $10–$19. The fees are typically charged in a flat amount on a per-transaction basis. Notably, in the case of checks that are returned for insufficient funds, Returned Deposited Item fees are charged in addition to any non-sufficient funds fees charged by the originating bank to the check originator. Assuming a typical Returned Deposited Item fee of $12 and a non-sufficient funds fee of $35, when the depositor's bank charges a Returned Deposited Item fee to the depositor consumer, and the check originator's bank charges a non-sufficient funds fee to the check originator for the same check, those banks collectively generate $47 in fees from each returned check—$12 to the depositor's bank, $35 to the originator's bank.

II. Violations of the Consumer Financial Protection Act [1]

The Consumer Financial Protection Act (CFPA) prohibits covered persons from engaging in unfair acts or practices.[2] Congress defined an unfair act or practice as one that (A) "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable," and (B) "such substantial injury is not outweighed by countervailing benefits to consumers or to competition." [3]

Blanket policies of charging Returned Deposited Item fees to consumers for all returned transactions irrespective of the circumstances of the transaction or patterns of behavior on the account are likely unfair.

Fees charged for Returned Deposited Items cause substantial injury to consumers. Under the blanket policies of many depository institutions, Returned Deposited Item fees cause monetary injury, in the range of $10–19 for each returned item. Depository institutions that charge Returned Deposited Item fees for returned checks impose concrete monetary harm on a large number of customers.

In many of the instances in which Returned Deposited Item fees are charged, consumers would not be able to reasonably avoid the substantial monetary injury imposed by the fees. An injury is not reasonably avoidable unless consumers are fully informed of the risk and have practical means to avoid it.[4] Under blanket policies of many depository institutions, Returned Deposited Item fees are charged whenever a check is returned because the check originator has insufficient available funds in their account, the check originator instructs the originating depository institution to stop payment, or the check is written against a closed account. But a consumer depositing a check would normally be unaware of and have little to no control over whether a check originator has

[1] As a matter of prosecutorial discretion, the CFPB does not intend to seek monetary relief for potential unfair practices regarding Returned Deposited Item fees assessed prior to November 1, 2023.

[2] 12 U.S.C. 5536(a)(1)(B).

[3] 12 U.S.C. 5531(c)(1).

[4] *See F.T.C.* v. *Neovi, Inc.,* 604 F.3d 1150, 1158 (9th Cir. 2010).

Tab 19

funds in their account, will issue a stop payment instruction, or has closed the account. Nor would a consumer normally be able to verify whether a check will clear with the check originator's depository institution before depositing the check or be able to pass along the cost of the fee to the check originator.

Liability under the prohibition on unfair acts or practices depends on the particular facts and circumstances. The CFPB notes that it is unlikely that an institution will violate the prohibition if the method in which fees are imposed are tailored to only charge consumers who could reasonably avoid the injury. For example, if a depository institution only charges consumers a fee if they repeatedly deposit bad checks from the same originator, or only charges consumers a fee when checks are unsigned, those fees would likely be reasonably avoidable.

Regulation DD, which applies in relevant part to depository institutions except for credit unions,[5] requires depository institutions to disclose fee information on depository accounts to consumers before an account is opened or a service is provided.[6] The returned item fee is among the fees required to be disclosed in the fee schedule when the consumer first opens the account.[7] In applying the CFPA's unfairness prohibition, the Bureau finds persuasive the reasoning of the D.C. Circuit and the Federal Trade Commission (FTC) in *American Financial Services Ass'n* v. *F.T.C.* (*AFSA*).[8] The FTC issued the Credit Practices Rule, which determined that creditor remedies of certain irrevocable wage assignments and non-purchase, non-possessory security interests in household goods are unfair acts or practices. Although the creditor remedies were disclosed and agreed upon in credit contracts, the FTC determined, and the D.C. Circuit upheld, that the provisions were not reasonably avoidable because ''(1) consumers are not, as a practical matter, able to shop and bargain over alternative remedial provisions; and (2) default is ordinarily the product of forces beyond a debtor's control.'' [9] Similar unfairness principles likely apply to account opening disclosures of blanket policies of imposing fees for Returned Deposited Items because, similarly, consumers have limited ability to bargain over specific fee terms in selecting deposit accounts, and consumers are charged these fees in circumstances beyond their control.

The CFPB advises institutions that it may be difficult to show that the injury from blanket policies of charging Returned Deposited Item fees is outweighed by countervailing benefits to consumers or competition. Check processing is a service made broadly available to all depositors of checks, and there is no separate benefit to consumers from having a deposited check returned, as opposed to paid. Benefits to the depository institutions themselves are not necessarily benefits to consumers or competition. Even if they were, the costs to the depository institution of developing and maintaining a reliable check processing system for account holders likely is not attributable to Returned Deposited Item transactions, as those costs are necessary to provide payment services to all check users. Returned Deposited Item fees are also not well-tailored to recoup costs from the consumers actually responsible for the costs to depository institutions of expected losses for the limited circumstances in which the institution cannot recoup funds made available to the depositor on a check that is later returned. Instead, the fee is charged to depositors even where the depository institution incurs no such loss from the returned transaction, and institutions usually do not collect the fee in those limited circumstances where they actually incur a loss (entities only incur a loss because they cannot collect). Depository institutions may argue that consumers may also receive a benefit from a fee to the extent that the fee leads to a decrease in front-end or other costs to the consumer for the product or an increase in the availability or quality of services. However, to the extent the revenue generated by Returned Deposited Item fees charged pursuant to blanket policies causes any discernable consumer benefits in terms of lower front-end costs or better quality or more available services, it is unlikely that a financial institution would be able to show that any such benefits would outweigh the substantial injury to the consumer even in terms of the total amount of such fees paid by the consumer. Indeed, even assuming a 100% pass through of the fee to lower front-end costs for consumers charged the fee, that pass through would not be greater than the total cost of the fees to those consumers.

Deterring consumers from depositing checks in instances where the checks will be returned may benefit consumers and the public interest if the institution's policy and practice are well-tailored to address the issue, do not harm consumers in some other way, minimize losses to the depository institution that would be passed through to consumers, bolster the integrity of the banking system through loss avoidance, and, in the case of fraud, prevent conduct that offends public policy as embodied in statutes and common law. However, deterrence can only be accomplished through the collection of fees in circumstances where the consumer anticipates that a check will be returned but deposits it anyway, such as where a consumer knowingly deposits a counterfeit check. As noted, however, this bulletin is focused on Returned Deposited Item policies that indiscriminately impose fees in circumstances where the consumer does not know the check would be returned. In other words, blanket Returned Deposited Item polices are not targeted to address patterns of behavior indicative of fraud or other circumstances where the consumer reasonably should have anticipated that the check would be returned.[10] With respect to fraud, it is also not apparent that the nature or amount of the fees would result in deterrence beyond other available mechanisms, such as reviewing depositors' accounts, criminal penalties, or more tailored Returned Deposited Item fee policies aimed at consumers who deposit bad checks intentionally or negligently.[11]

As to benefits to competition, economic research suggests that add-on fees may have a distortionary market effect by making it more difficult to compete on transparent front-end prices and reducing the portion of the overall cost that is subject to competitive price shopping.[12] The concern is especially

[5] The National Credit Union Administration has rules governing disclosures for credit unions at 12 CFR 707 *et seq.*

[6] 12 CFR 1030.4.

[7] *See* comment 4(b)(4)–1.iv (listing ''fees associated with checks returned unpaid'' as a type of fee that must be disclosed); Reg DD Sample Form B–4 (describing a fee of $5 for ''Deposited checks returned'').

[8] 767 F.2d 957, 972 (D.C. Cir. 1985).

[9] *Id.* at 976.

[10] As noted above, policies that are tailored to only charge consumers who could reasonably avoid the injury likely would not violate the prohibition on unfairness.

[11] *See F.T.C.* v. *Amazon.com,* No. C14–1038–JCC, 2016 WL 10654030, at *10–11 (W.D. Wash. July 22, 2016) (finding no countervailing benefits where the purported benefits could be achieved without engaging in the conduct that caused substantial injury).

[12] *See* Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets,* Quarterly Journal of Economics, Vol. 121, Issue 2 (May 2006), pp.505–40, *available at https://pages.stern.nyu.edu/~xgabaix/papers/shrouded.pdf; see also* Steffen Huck & Brian Wallace, *The impact of price frames on consumer decision making: Experimental*

Continued

heightened for back-end penalty fees which are often not subject to the competitive process: firms typically have not competed for customers based on penalty fee pricing and consumers do not shop on the basis of fees they do not intend to incur. Indeed, economic research suggests that consumer decision making is impaired by hidden or shrouded pricing regimes.[13] Given these harms to competition, the CFPB advises institutions that there is a substantial risk of violating the prohibition on unfair acts or practices with respect to this practice.

III. Regulatory Matters

This is a general statement of policy under the Administrative Procedure Act. It provides background information about applicable law and articulates considerations relevant to the Bureau's exercise of its authorities. It does not confer any rights of any kind. The Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis for general statements of policy.[14] It also does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act of 1995.[15]

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2022–23933 Filed 11–4–22; 8:45 am]

BILLING CODE 4810–AM–P

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evidence (2015), *available at https://www.ucl.ac.uk/~uctpbwa/papers/price-framing.pdf;* Sumit Agarwal, Souphala Chomsisengphet, Neale Mahoney, & Johannes Stroebel, *Regulating Consumer Financial Products: Evidence from Credit Cards,* Quarterly Journal of Economics, Vol. 130, Issue 1 (Feb. 2015), pp. 111–64, at p.5 & 42–43, *available at https://academic.oup.com/qje/article/130/1/111/2338025?login=true;* Sumit Agarwal, Souphala Chomsisengphet, Neale Mahoney, & Johannes Stroebel, *A Simple Framework for Establishing Consumer Benefits from Regulating Hidden Fees,* Journal of Legal Studies, Vol. 43, Issue S2 (June 2014), pp.S239–52, *available at https://nmahoney.people.stanford.edu/sites/g/files/sbiybj23976/files/media/file/mahoney_hidden_fees_jls.pdf;* Glenn Ellison, *A Model of Add-On Pricing,* Quarterly Journal of Economics, Vol. 120, Issue 2 (May 2005), pp.585–637, available at *https://economics.mit.edu/files/7605.*

13 *See* Gabaix & Laibson, *supra* note 12; Huck & Wallace, *supra* note 12; Agarwal *et al., Regulating Consumer Financial Products, supra* note 12; Agarwal *et al., A Simple Framework, supra* note 12; Ellison, *supra* note 12.

14 5 U.S.C. 603(a), 604(a).

15 44 U.S.C. 3501–3521.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2022–1402; Project Identifier MCAI–2022–01094–R; Amendment 39–22227; AD 2022–22–12]

RIN 2120–AA64

Airworthiness Directives; Bell Textron Inc., Erickson 214 Holdings, LLC, Leonardo S.p.a., and Various Restricted Category Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Bell Textron Inc., Model 204B, 205A, 205A–1, 205B, 210, 212, 412, 412CF, and 412EP helicopters; certain Erickson 214 Holdings, LLC, Model 214B and 214B–1 helicopters; certain Leonardo S.p.a. Model AB412 and AB412 EP helicopters; and certain various restricted category helicopters. This AD was prompted by reports of two in-service failures of forward crosstubes due to fatigue damage and the issuance of newly established life limits. This AD requires determining the total number of landings on certain part-numbered forward crosstubes and incorporating requirements (airworthiness limitations) into existing maintenance records. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD becomes effective November 22, 2022.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of November 22, 2022.

The FAA must receive comments on this AD by December 22, 2022.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2022–1402; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For service information identified in this final rule, contact Dart Aerospace Ltd. 1270 Aberdeen Street Hawkesbury, ON, K6A 1K7 Canada; telephone 1 613 632 5200; email *support@dartaero.com;* internet dartaerospace.com.
- You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110. It is also available at *regulations.gov* under Docket No. FAA–2022–1402.

FOR FURTHER INFORMATION CONTACT: Elizabeth Dowling, Aerospace Engineer, COS Program Management Section, Operational Safety Branch, Compliance & Airworthiness Division, FAA, 1600 Stewart Ave., Suite 410, Westbury, NY 11590; telephone (516) 228–7300; email *9-AVS-NYACO-COS@FAA.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written data, views, or arguments about this final rule. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2022–1402; Project Identifier MCAI–2022–01094–R'' at the beginning of your comments. The most helpful comments reference a specific portion of the final rule, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this final rule because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *regulations.gov*, including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this final rule.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act

Tab 20

Circular 2022-07: Reasonable Investigation of Consumer Reporting Disputes, 87 Fed. Reg. 71507 (Nov. 23, 2022).

CFPB Issues Guidance to Address Shoddy Investigation Practices by Consumer Reporting Companies

English

Español (cfpb.gov/about-us/newsroom/cfpb-emite-directrices-para-enfrentar-practicas-deficientes-de-investigacion-por-companias-de-informes-del-consumidor/)

When consumer reporting companies and furnishers fail to investigate disputed information, consumers are left paying higher interest rates and face greater difficulty finding housing, employment

NOV 10, 2022

WASHINGTON, D.C. – Today, the Consumer Financial Protection Bureau (CFPB) issued a circular to affirm that neither consumer reporting companies nor information furnishers can skirt dispute investigation requirements. The circular outlines how federal and state consumer protection enforcers, including regulators and attorneys general, can bring claims against companies that fail to investigate and resolve consumer report disputes. The CFPB has found that consumer reporting companies and some furnishers have failed to conduct reasonable investigations of consumer disputes and to spend the time necessary to get to the bottom of inaccuracies. These failures can affect, among other things, people's eligibility for loans and interest rates, for insurance, and for rental housing and employment.

"One wrong piece of information on a person's credit report can have destructive consequences that follow a consumer for years," said CFPB Director Rohit Chopra. "Companies that fail to properly address consumer disputes in accordance with the law may face serious consequences."

When people identify inaccurate information on their consumer report, they can dispute it with the consumer reporting company. However, that important right is dependent on consumer reporting companies and furnishers conducting complete investigations. The CFPB's supervisory exams (https://files.consumerfinance.gov/f/documents/cfpb_supervis ory-highlights_issue-26_2022-04.pdf) suggest that consumer reporting companies do not always live up to their investigatory responsibilities. In some cases, the CFPB found consumer reporting companies ignored the results of their investigations and simply deleted disputed tradelines instead of correcting inaccurate information. Consumer complaints received by the CFPB highlight similar problems. In fact, inaccurate information and failures to investigate are the two most common consumer reporting complaints (cfpb.gov/about-us/newsroom/cfpb-releases-report-detailing-consumer-complaint-response-deficiencies-of-the-big-three-credit-bureaus/) received by the CFPB.

Consumer reporting companies are required to investigate all disputes that are not frivolous or irrelevant. Consumer reporting companies and furnishers may be liable under the Fair Credit Reporting Act if they fail to investigate relevant disputes, and claims can be pursued by both state and federal consumer protection enforcers and regulators. Specific responsibilities for the investigations include:

- **Consumer reporting companies must promptly provide to the furnisher all relevant information regarding a person's dispute:** After a person disputes the accuracy or completeness of information in their file, the consumer reporting company must notify the entity that originally furnished the information within five business days. In addition, the consumer reporting company must give the furnisher all relevant information provided by the individual.
- **Consumer reporting companies and furnishers may not limit a person's dispute rights:** Consumer reporting companies and furnishers must reasonably investigate disputes received directly from individuals. For furnishers, they must reasonably investigate all indirect disputes received from consumer reporting companies. These requirements remain in place even if a person does not include or use the entity's preferred format, intake forms, or documentation.

Consumer Financial Protection Circulars (https://www.consumerfinance.gov/compliance/circulars/about/#:~:text=Consumer%20Financial%20Protection%20Circulars%20are%20intended%20to%20promote%20consistency%20in,financial%20law%20is%20enforced%20consistently.), such as the one published today, are intended to promote consistency in approach across the various federal and state enforcement agencies and regulators. They are also intended to provide transparency to partner agencies regarding the CFPB's intended approach when cooperating in enforcement actions. The circulars provide background information about applicable law, articulate considerations relevant to the CFPB's exercise of its authorities, and, in the interest of maintaining consistency, advise other parties with authority to enforce federal consumer financial protection law.

Read the *Consumer Financial Protection Circular, Reasonable investigation of consumer reporting disputes* (cfpb.gov/compliance/circulars/consumer-financial-protection-circular-2022-07-reasonable-investigation-of-consumer-reporting-disputes/).

Consumers can submit credit reporting complaints, or complaints about other financial products and services, by visiting the CFPB's website (cfpb.gov/complaint/) or by calling (855) 411-CFPB (2372).

Employees who believe their companies have violated federal consumer financial protection laws, including the Fair Credit Reporting Act, are encouraged to send information about what they know to whistleblower@cfpb.gov.

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit consumerfinance.gov (cfpb.gov/).

Topics

- TENANT SCREENING (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=TENANT-SCREENING)
- CREDIT REPORTS AND SCORES (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=CREDIT-REPORTS-AND-SCORES)

PRESS INFORMATION

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Go to press resources page (cfpb.gov/about-us/newsroom/press-resources/)

Rules and Regulations

Federal Register

Vol. 87, No. 225

Wednesday, November 23, 2022

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Chapter X

Consumer Financial Protection Circular 2022–07: Reasonable Investigation of Consumer Reporting Disputes

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Consumer financial protection circular.

SUMMARY: The Consumer Financial Protection Bureau (Bureau or CFPB) has issued Consumer Financial Protection Circular 2022–07, titled, ''Reasonable Investigation of Consumer Reporting Disputes.'' In this circular, the Bureau responds to the questions, ''1. Are consumer reporting agencies and the entities that furnish information to them (furnishers) permitted under the Fair Credit Reporting Act (FCRA) to impose obstacles that deter submission of disputes?'' and ''2. Do consumer reporting agencies need to forward to furnishers consumer-provided documents attached to a dispute?''

DATES: The Bureau released this circular on its website on November 10, 2022.

ADDRESSES: Enforcers, and the broader public, can provide feedback and comments to *Circulars@cfpb.gov.*

FOR FURTHER INFORMATION CONTACT: David Wake, Senior Counsel, at (202) 435–9613. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

Questions Presented

1. Are consumer reporting agencies and the entities that furnish information to them (furnishers) permitted under the Fair Credit Reporting Act (FCRA) to impose obstacles that deter submission of disputes?

2. Do consumer reporting agencies need to forward to furnishers consumer-provided documents attached to a dispute?

Responses

1. No. Consumer reporting agencies and furnishers are liable under the FCRA if they fail to investigate any dispute that meets the statutory and regulatory requirements, as described in more detail below. Enforcers may bring claims if consumer reporting agencies and furnishers limit consumers' dispute rights by requiring any specific format or requiring any specific attachment such as a copy of a police report or consumer report beyond what the statute and regulations permit.

2. It depends. Enforcers may bring a claim if a consumer reporting agency fails to promptly provide to the furnisher ''all relevant information'' regarding the dispute that the consumer reporting agency receives from the consumer. While there is not an affirmative requirement to specifically provide original copies of documentation submitted by consumers, it would be difficult for a consumer reporting agency to prove they provided all relevant information if they fail to forward even an electronic image of documents that constitute a primary source of evidence.[1]

Background

Information contained in consumer reports has critical effects on Americans' daily lives. Consumer reports are used to evaluate consumers' eligibility for loans and the interest rates they pay, their eligibility for insurance and the premiums they pay, their eligibility for rental housing, and their eligibility for checking accounts. Prospective employers commonly use consumer reports in their hiring decisions.[2] Given the importance of this information, Congress enacted the FCRA to ''prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report.''[3]

A central component of the protections against inaccurate information is the requirement to conduct a reasonable investigation of consumer disputes. Since its enactment, the FCRA has required consumer reporting agencies to investigate consumer disputes.[4] To further ensure that consumer reports are accurate, in 1996 Congress amended the FCRA to also impose ''duties on the sources that provide credit information to CRAs [consumer reporting agencies], called 'furnishers' in the statute.''[5] Thus, when consumer reporting agencies and furnishers are properly notified of a dispute about information furnished in a consumer report, both consumer reporting agencies and furnishers must conduct a reasonable investigation of the dispute.[6]

These responsibilities are part of the FCRA's overall framework for ensuring accuracy in consumer reports. Consumers are in a good position to identify inaccurate information in their consumer reports, and timely and responsive investigations of these identified inaccuracies is crucial to the FCRA's purpose of ensuring fair and accurate consumer reporting.

Despite Congress's repeated efforts to promote accuracy by requiring reasonable investigation of disputes, consumers continue to report problems with accuracy and dispute investigations. Between January and September 2021, the CFPB received more than 500,000 complaints about credit or consumer reporting; the most common issue they identified was incorrect information on a credit report.[7] In each of the past three

[1] Examples of primary sources of evidence include but are not limited to documents submitted by a consumer in support of a dispute such as copies of letters from creditors, bank statements, checks, or periodic billing statements.

[2] *See generally* Consumer Financial Protection Bureau, *Key Dimensions and Processes in the U.S. Credit Reporting System* (2012), *https://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf.*

[3] S. Rep. No. 91–517, at 1 (1969).

[4] 84 Stat. 1114, 1132 (Oct. 26, 1970).

[5] *Gorman* v. *Wolpoff & Abramson, LLP,* 584 F.3d 1147, 1153 (9th Cir. 2009).

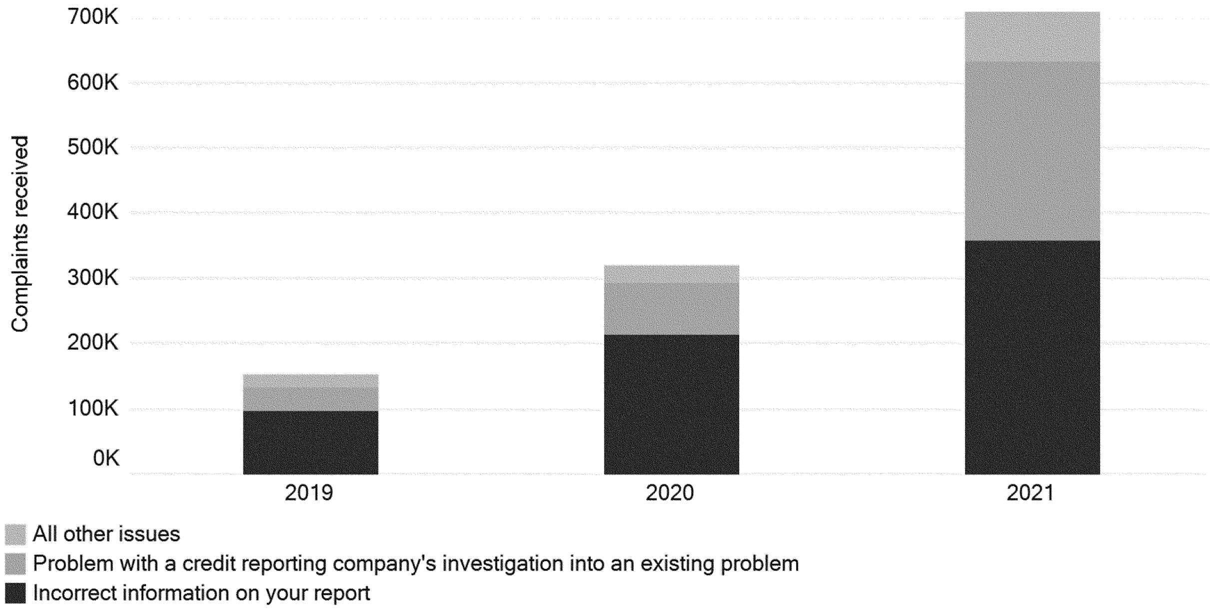
[6] *See, e.g.,* 15 U.S.C. 1681i(a)(1)(A) (Consumer reporting agency obligation to ''conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate''); 15 U.S.C. 1681s–2(b)(1) (furnisher obligation to ''conduct an investigation with respect to the disputed information'' for disputes provided by a consumer reporting agency); 12 CFR 1022.43(e)(1) (furnisher obligation to ''conduct a reasonable investigation with respect to the disputed information'' for disputes sent directly from a consumer); *see also Johnson* v. *MBNA America Bank, NA,* 357 F.3d 426, 431 (4th Cir. 2004) (holding that furnishers receiving indirect disputes from consumer reporting agencies must ''conduct a reasonable investigation of their records to determine whether the disputed information can be verified'').

[7] *See* Consumer Financial Protection Bureau, *Annual Report of Credit and Consumer Reporting*

Continued

calendar years, the top two most frequently identified issues in complaints submitted to the CFPB were ''Incorrect information on your report'' and ''Problem with a credit reporting company's investigation into an existing problem.''

Figure 1: Credit or Consumer Reporting Complaints to the CFPB 2019–2021



The CFPB is responsible for issuing rules and enforcing compliance with these provisions of the FCRA.[8] The FCRA can also be enforced by other Federal government agencies and States,[9] and through private actions brought by consumers.[10] The CFPB is issuing this *Circular* to emphasize that certain practices involving the failure to conduct a reasonable investigation of disputes can violate the FCRA.

Analysis

Consumer reporting agencies and furnishers cannot avoid the obligation to conduct a reasonable investigation of disputes by making consumers satisfy demands other than those specified by statute or regulation.

The CFPB is aware that consumer reporting agencies and furnishers have sought to evade the obligation to investigate disputes by requiring consumers to submit particular items of information or documentation with a dispute before the entity will conduct its investigation of the dispute. Examples of this conduct include:

• Consumer reporting agencies that require a consumer to provide a recent copy of the consumer's report or file disclosure before investigating disputes despite the consumer providing sufficient information to investigate the disputed information;[11]

• Furnishers that require a consumer to provide additional specific documents even though the consumer has already provided the supporting documentation or other information reasonably required to substantiate the basis of a direct dispute;[12] and

• Consumer reporting agencies or furnishers that require a consumer to attach a completed proprietary form before investigating the consumer's dispute.[13]

Enforcers may consider bringing an action under the FCRA when furnishers and consumer reporting agencies require consumers to provide documentation or proof documents, other than as described in the statute or regulation, as a precondition to investigation. For disputes received directly from a consumer, a consumer reporting agency or furnisher must reasonably investigate the dispute unless they have reasonably determined that the dispute is frivolous or irrelevant.[14] If such a determination is made, the consumer reporting agency or furnisher must notify the consumer of such determination within five business days of the determination and identify the additional information needed from the consumer to investigate the dispute.[15] Further, furnishers are not permitted to deem disputes as frivolous or irrelevant if the dispute has been provided to the furnisher from a

Complaints (Jan. 2022), at 21, 30, *https://files.consumerfinance.gov/f/documents/cfpb_fcra-611-e_report_2022-01.pdf.*

[8] *See, e.g.,* 12 U.S.C. 5481(12)(F), 5512(b), 5514(c), 5515(c), and also Subtitle E (12 U.S.C. 5561–5567); 15 U.S.C. 1681s(b)(1)(H), (e). Authority over 15 U.S.C. 1681m(e) and 1681w are limited to the Federal banking agencies, the NCUA, the FTC, the CFTC, and SEC.

[9] 15 U.S.C. 1681s. States can directly bring actions under FCRA. *See* 12 U.S.C. 1681s(c). States can also bring actions under the Consumer Financial Protection Act (CFPA) against ''covered persons'' and ''service providers'' based upon violations of Federal consumer financial laws, including the FCRA. *See* Authority of States to Enforce the Consumer Financial Protection Act of 2010, 87 FR 31940 (May 26, 2022).

[10] 15 U.S.C. 1681n, 1681*o*.

[11] *See, e.g.,* Consumer Financial Protection Bureau, *Supervisory Highlights* (Spring 2014), at 10, *https://files.consumerfinance.gov/f/201405_cfpb_supervisory-highlights-spring-2014.pdf.*

[12] *See, e.g.,* Complaint at 15, *CFPB* v. *Fair Collections & Outsourcing, Inc.,* D. Md. No. 19–Civ–2817 (Filed Sept. 25, 2019).

[13] With respect to furnisher direct disputes, *see* 74 FR 31,484, 31,500 (July 1, 2009) (''Some industry commenters also suggested that the Agencies issue a model direct dispute complaint form, with some advocating that consumers be required to use the model complaint form. The Agencies decline to adopt these suggestions because such requirements would cause otherwise valid disputes to be rejected as frivolous or irrelevant due solely to the consumer's failure to meet a technical requirement that probably would be unknown to the consumer.'').

[14] 15 U.S.C. 1681i(a)(3)(A) (identifying which disputes the consumer reporting agency can determine to be frivolous or irrelevant); 12 CFR 1022.43(f)(1) (identifying which disputes the furnisher can determine to be frivolous or irrelevant).

[15] 15 U.S.C. 1681i(a)(3) (Consumer reporting agency frivolous or irrelevant determination); 12 CFR 1022.43(f) (furnisher direct dispute frivolous or irrelevant determination).

consumer reporting agency pursuant to FCRA section 623(b).[16]

Accordingly, consumer reporting agencies and furnishers must reasonably investigate disputes received directly from consumers that are not frivolous or irrelevant—and furnishers must reasonably investigate all indirect disputes received from consumer reporting agencies—even if such disputes do not include the entity's preferred format, preferred intake forms, or preferred documentation or forms.

Consumer reporting agencies must provide to the furnisher all relevant information regarding the dispute that it received from the consumer.

Enforcers may bring a claim if a consumer reporting agency fails to promptly provide to the furnisher ''all relevant information'' regarding the dispute that the consumer reporting agency receives from the consumer.[17] Through its supervision, the CFPB has found that consumer reporting agencies tend to ingest dispute information from consumers using automated protocols, and they also share dispute information with furnishers electronically.[18] The use of these technologies has reduced the cost and time to transmit relevant information.

When transmitting information about a dispute, a consumer reporting agency may be able to demonstrate that it has transmitted ''all relevant information'' even if it does not provide original documents in paper form. However, given that primary sources of evidence provided by consumers can be dispositive in determining whether there has been a furnishing error, and given that the character of a primary source of evidence is probative and thus relevant to the investigation,[19] it will be difficult for a consumer reporting agency to prove that it complied with the FCRA if it does not provide electronic images of primary evidence for evaluation by the furnisher.[20]

The consumer reporting agency's failure to provide the furnisher with all relevant information limits the *furnisher's* ability to reasonably investigate the dispute. A furnisher must ''review all relevant information'' provided by the consumer reporting agency.[21] Accordingly, consumer reporting agency compliance with the obligation to provide all relevant information is crucial to the consumer's right to have their dispute reasonably investigated.

About Consumer Financial Protection Circulars

Consumer Financial Protection Circulars are issued to all parties with authority to enforce Federal consumer financial law. The CFPB is the principal Federal regulator responsible for administering Federal consumer financial law, *see* 12 U.S.C. 5511, including the Consumer Financial Protection Act's prohibition on unfair, deceptive, and abusive acts or practices, 12 U.S.C. 5536(a)(1)(B), and 18 other ''enumerated consumer laws,'' 12 U.S.C. 5481(12). However, these laws are also enforced by State attorneys general and State regulators, 12 U.S.C. 5552, and prudential regulators including the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the National Credit Union Administration. *See, e.g.,* 12 U.S.C. 5516(d), 5581(c)(2) (exclusive enforcement authority for banks and credit unions with $10 billion or less in assets). Some Federal consumer financial laws are also enforceable by other Federal agencies, including the Department of Justice and the Federal Trade Commission, the Farm Credit Administration, the Department of Transportation, and the Department of Agriculture. In addition, some of these laws provide for private enforcement.

Consumer Financial Protection Circulars are intended to promote consistency in approach across the various enforcement agencies and parties, pursuant to the CFPB's statutory objective to ensure Federal consumer financial law is enforced consistently. 12 U.S.C. 5511(b)(4).

Consumer Financial Protection Circulars are also intended to provide transparency to partner agencies regarding the CFPB's intended approach when cooperating in enforcement actions. *See, e.g.,* 12 U.S.C. 5552(b) (consultation with CFPB by State attorneys general and regulators); 12 U.S.C. 5562(a) (joint investigatory work between CFPB and other agencies).

Consumer Financial Protection Circulars are general statements of policy under the Administrative Procedure Act. 5 U.S.C. 553(b). They provide background information about applicable law, articulate considerations relevant to the Bureau's exercise of its authorities, and, in the interest of maintaining consistency, advise other parties with authority to enforce Federal consumer financial law. They do not restrict the Bureau's exercise of its authorities, impose any legal requirements on external parties, or create or confer any rights on external parties that could be enforceable in any administrative or civil proceeding. The CFPB Director is instructing CFPB staff as described herein, and the CFPB will then make final decisions on individual matters based on an assessment of the factual record, applicable law, and factors relevant to prosecutorial discretion.

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2022–25138 Filed 11–22–22; 8:45 am]

BILLING CODE 4810–AM–P

[16] 15 U.S.C. 1681s–2(b). *See* Brief for Consumer Financial Protection Bureau and Federal Trade Commission as Amici Curiae Supporting Plaintiff-Appellant, *Ingram* v. *Waypoint Resource Group, LLC,* Third Circuit Court of Appeals (No. 21–2430).

[17] 15 U.S.C. 1681i(a)(2)(A).

[18] Consumer Financial Protection Bureau, *Bulletin 2013–09* (Sept. 4, 2013), at 1, *https://files.consumerfinance.gov/f/201309_cfpb_bulletin_furnishers.pdf* (alerting furnishers to the fact that consumer reporting agencies have begun forwarding images of relevant documentation to furnishers as part of the reasonable investigation of disputes).

[19] For example, a copy of a bill supporting the consumer's dispute conveys information regarding the persuasiveness of a consumer's dispute that data about the bill would not.

[20] Federal Trade Commission, 40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations (July 2011), at 77, *https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf* (''A CRA does not comply with this provision if it merely indicates the nature of the dispute, without communicating to the furnisher the specific relevant information received from the consumer. For example, if the consumer claimed ''never late'' and submitted documentation (such as cancelled checks) to support his/her dispute, a CRA does not comply with the requirement that is provide ''all relevant information'' if it simply notifies the furnisher that the consumer disputes the payment history without communicating the evidence received.'').

[21] 15 U.S.C. 1681s–2(b)(1)(B).

FEDERAL TRADE COMMISSION

16 CFR Part 314

RIN 3084–AB35

Standards for Safeguarding Customer Information

AGENCY: Federal Trade Commission.

ACTION: Final rule; delay of effectiveness.

SUMMARY: The Federal Trade Commission is delaying the effective date of portions of the amended Safeguards Rule as published on December 9, 2021.

DATES:

Effective date: This final rule is effective November 23, 2022.

Applicability date: The applicability of the provisions set forth in § 314.5 is delayed from December 9, 2022 until June 9, 2023.

Tab 21

Circular 2023-01: Unlawful Negative Option Marketing Practices,
88 Fed. Reg. 5727 (Jan. 30, 2023).

CFPB Issues Guidance to Root Out Tactics Which Charge People Fees for Subscriptions They Don't Want

English

Español (cfpb.gov/about-us/newsroom/la-cfpb-emite-normativa-para-eliminar-tacticas-que-cobran-tarifas-a-los-consumidores-por-suscripciones-que-no-quieren-tener/)

New circular addresses dark patterns and other tricks used by companies to confuse and deceive consumers enrolled in subscription services

JAN 19, 2023

WASHINGTON, D.C. – The Consumer Financial Protection Bureau (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 the consumer affirmatively cancels, and trial marketing programs that charge a reduced fee for an initial period and then automatically begin charging a higher fee. Companies risk violating the law if they do not clearly and conspicuously disclose the terms of their subscription services and obtain consumers' informed consent, or if they make it unreasonably difficult for consumers to cancel. Drawing from the Federal Trade Commission's (FTC) recent policy statement and the CFPB's past enforcement cases, the circular highlights examples of unlawful behavior by companies that have used dark patterns and other manipulative tactics to trick consumers into paying recurring charges for products and services they do not want.

"Consumers shouldn't have to jump through hoops to cancel subscriptions they don't want, and they shouldn't have to worry about a trial marketing offer turning into an unwanted monthly charge," said CFPB Director Rohit Chopra. "The CFPB has made it clear that misleading consumers about products or subscription services they don't want is not only dishonest, but also a violation of law."

"Deceptive practices that seek to trap consumers into subscriptions they don't want are a violation of the law," said Samuel Levine, Director of the FTC's Bureau of Consumer Protection. "Today's circular puts companies on notice that there is a government-wide effort to stop these manipulations."

Negative option marketing refers to a term or condition under which a seller may interpret a person's silence or failure to cancel an agreement as continued acceptance of the offer. The CFPB has received complaints from consumers about being charged for products or services they did not intend to purchase or had sought to cancel, and has brought many enforcement actions involving unlawful negative option marketing practices.

The CFPB took action against Transunion for **repeatedly breaking the law** (cfpb.gov/about-us/newsroom/cfpb-charges-transunion-and-senior-executive-john-danaher-with-violating-law-enforcement-order/) by violating a CFPB consent order and for deceptive marketing when selling credit scores, reports, and credit monitoring products. The CFPB sued ACTIVE Network for tricking consumers into enrolling into a **costly membership club** (cfpb.gov/about-us/newsroom/cfpb-sues-payment-platform-used-by-ymca-camps-race-organizers-for-junk-fee/) through the use of digital dark patterns. The CFPB has also entered into consent orders with numerous credit card issuers for **deceptively marketing optional "add-on" products** (cfpb.gov/about-us/newsroom/cfpb-orders-citibank-to-pay-700-million-in-consumer-relief-for-illegal-credit-card-practices/) that charged recurring fees until consumers affirmatively cancelled.

Today's circular highlights that negative option programs can be particularly harmful when paired with dark patterns because consumers may be misled into purchasing subscriptions and other services with recurring charges and be unable to cancel the unwanted products and services or avoid their charges. Digital dark patterns are design features used to deceive, steer, or manipulate users into behavior that is profitable for a company, but often harmful to users or contrary to their intent.

Companies offering negative option programs risk violating the Consumer Financial Protection Act's (CFPA) prohibition on unfair, deceptive, or abusive acts or practices where they:

- **Fail to disclose, clearly and conspicuously, the material terms of the negative option offer to the consumer**: Companies likely violate the law if they misrepresent or fail to disclose information likely to inform a consumer's decision about whether to enroll in a negative option service, including the amount of all charges and the fact that charges will continue unless the consumer takes affirmative steps to cancel.
- **Fail to obtain the consumer's informed consent:** Companies should ensure that consumers genuinely agree to the terms of a negative option program. The CFPB has found or alleged that companies engaged in unfair, deceptive, and abusive acts and practices when companies misrepresented or failed to disclose that they were offering negative option programs, which resulted in consumers not understanding that they were enrolling in services with recurring charges.

- **Mislead or impede consumers wishing to cancel:** A common practice of bad actors is requiring consumers to jump through complicated hoops to cancel subscription products or services, such as being forced to talk to customer service agents repeatedly, or for unreasonably long times, before granting a request to cancel.

Today's circular continues the CFPB's focus on raising awareness about the growing scourge of dark pattern practices (https://www.consumerfinance.gov/about-us/newsroom/statement-of-cfpb-director-rohit-chopra-on-complaint-against-active-network/) and other harmful tactics that companies are using to trick consumers into paying for products or services they do not want. The CFPB is partnering with the FTC in its effort to combat the rise of digital dark patterns, and both agencies will continue to monitor these practices and bring agency actions where needed.

Read the *Consumer Financial Protection Circular, Unlawful negative option marketing practices* (cfpb.gov/compliance/circulars/consumer-financial-protection-circular-2023-01-unlawful-negative-option-marketing-practices/).

Read the FTC's October 2021 policy statement on negative option marketing (https://www.ftc.gov/system/files/documents/public_statements/1598063/negative_option_policy_statement-10-22-2021-tobureau.pdf).

Consumers can submit complaints about dark patterns, and about financial products and services, by visiting the CFPB's website (cfpb.gov/complaint/) or by calling (855) 411-CFPB (2372).

Employees who believe their companies have violated federal consumer financial protection laws are encouraged to send information about what they know to whistleblower@cfpb.gov.

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit ***www.consumerfinance.gov*** (http://www.consumerfinance.gov/).

Topics

- RULEMAKING (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=RULEMAKING)
- SUPERVISION (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=SUPERVISION)

PRESS INFORMATION

information in the database is current, accurate, and complete. The UEI of the applicant must be included in the application.

(c) * * *

(12) Unqualified, audited financial statements from the date the application is submitted as detailed in § 1740.63;

* * * * *

(19) If service is being proposed on or over Tribal Land, a Tribal Government Resolution of Consent from the Tribal Council of the Tribal Government with jurisdiction over the Tribal Lands at issue must be provided to show that they are in support of the project and will allow construction to take place on Tribal Land. * * *

* * * * *

■ 6. Amend § 1740.63 by:
■ a. Redesignating paragraphs (a)(2) through (5) as paragraphs (a)(3) through ((6).
■ b. Redesignating paragraph (a)(1) as paragraph (a)(2);
■ c. Adding a new paragraph (a)(1); and
■ d. Revising the first sentence of newly redesignated paragraph (a)(2).

The addition and revision read as follows:

§ 1740.63 Financial information.

(a) * * *

(1) Applicants subject to 2 CFR part 200 must submit an audited financial statement for the previous year from the date the application is submitted. If an application is submitted and the most recent year-end audit has not been completed, the applicant can use the previous audit that has been completed.

(2) Applicants not subject to 2 CFR part 200 must submit unqualified, comparative, audited financial statements for the previous year from the date the application is submitted. * * *

* * * * *

Subpart F—Closing, Servicing, and Reporting

■ 7. Amend § 1740.80 by:
■ c. Redesignating paragraphs (c) through (g) as paragraphs (d) through (h);
■ b. Redesignating paragraph (b) as paragraph (c);
■ a. Adding a new paragraph (b); and
■ d. Revising the first sentence of newly redesignated paragraph (c).

The addition and revision read as follows:

§ 1740.80 Accounting, monitoring, and reporting requirements.

* * * * *

(b) Awardees subject to 2 CFR part 200 must submit annual audited financial statements along with a report on compliance and on internal control over financial reporting, in accordance with 2 CFR part 200, subpart F.

(c) Awardees not subject to 2 CFR part 200 must submit annual comparable audited financial statements along with a report on compliance and on internal control over financial reporting in accordance with the requirements of 7 CFR part 1773 using the RUS' online reporting system.

* * * * *

Andrew Berke,

Administrator, Rural Utilities Service, Rural Development.

[FR Doc. 2023–01621 Filed 1–27–23; 8:45 am]

BILLING CODE 3410–15–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Chapter X

Consumer Financial Protection Circular 2023–01: Unlawful Negative Option Marketing Practices

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Consumer financial protection circular.

SUMMARY: The Consumer Financial Protection Bureau (Bureau or CFPB) has issued Consumer Financial Protection Circular 2023–01, titled ''Unlawful Negative Option Marketing Practices.'' In this circular, the Bureau responds to the question, ''Can persons that engage in negative option marketing practices violate the prohibition on unfair, deceptive, or abusive acts or practices in the Consumer Financial Protection Act (CFPA)? ''

DATES: The Bureau released this circular on its website on January 19, 2023.

ADDRESSES: Enforcers, and the broader public, can provide feedback and comments to *Circulars@cfpb.gov.*

FOR FURTHER INFORMATION CONTACT: Colin Reardon, Senior Counsel, Office of Law & Policy, at (202) 570–6740. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

Question Presented

Can persons that engage in negative option marketing practices violate the prohibition on unfair, deceptive, or abusive acts or practices in the Consumer Financial Protection Act (CFPA)?

Response

Yes. ''Covered persons'' and ''service providers'' must comply with the prohibition on unfair, deceptive, or abusive acts or practices in the CFPA.[1] Negative option marketing practices may violate that prohibition where a seller (1) misrepresents or fails to clearly and conspicuously disclose the material terms of a negative option program; (2) fails to obtain consumers' informed consent; or (3) misleads consumers who want to cancel, erects unreasonable barriers to cancellation, or fails to honor cancellation requests that comply with its promised cancellation procedures.

Background on Negative Option Marketing

As used in this Circular, the phrase ''negative option'' refers to a term or condition under which a seller may interpret a consumer's silence, failure to take an affirmative action to reject a product or service, or failure to cancel an agreement as acceptance or continued acceptance of the offer.

Negative option programs are common across the market, including in the market for consumer financial products and services, and such programs can take a variety of forms. For example, in automatic renewal plans, consumers' subscriptions are automatically renewed when they expire unless consumers affirmatively cancel their subscriptions by a certain date. In continuity plans, consumers agree in advance to receive a product or service, which they continue to receive until they cancel the agreements. In trial marketing plans, consumers receive products or services for free (or for a reduced fee) for a trial period. After the trial period, consumers are automatically charged a fee (or a higher fee) on a recurring basis unless they affirmatively cancel.

Negative option programs can cause serious harm to consumers who do not wish to receive the products or services for which they are charged. Harm is most likely to occur when sellers mislead consumers about terms and conditions, fail to obtain consumers' informed consent, or make it difficult for consumers to cancel. The Consumer Financial Protection Bureau (CFPB) has received consumer complaints, including complaints from older

[1] 12 U.S.C. 5481(6), (26), 5531, 5536. For simplicity, the remainder of this Circular refers to covered persons and service providers as ''sellers.'' The CFPB notes, however, that entities and individuals can be covered persons or service providers (and thus subject to liability under the CFPA) even if they do not themselves engage in ''selling'' a consumer financial product or service with a negative option feature.

Tab 21

consumers, about being repeatedly charged for services they did not intend to buy or no longer want to continue purchasing. Some consumers have reported that they were enrolled in subscriptions without knowledge of the program and its cost.[2] Consumers have also complained about the difficulty of cancelling subscription-based services and about charges made to their credit card or bank account after they requested cancellation.[3]

In recent decades, the Federal Trade Commission (FTC) has brought numerous enforcement cases challenging harmful negative option practices using its authority under section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices.[4] The FTC's enforcement cases have also frequently relied on the Restore Online Shoppers' Confidence Act (ROSCA)[5] and the Telemarketing Sales Rule (TSR).[6] The FTC recently summarized its enforcement work regarding negative option marketing in a policy statement, which noted that its cases have ''involve[d] a range of deceptive and unfair practices, including inadequate disclosures of hidden charges in ostensibly 'free' offers and other products or services, enrollment without consumer consent, and inadequate or overly burdensome cancellation and refund procedures.''[7]

Since it began enforcement in 2011, the CFPB has brought enforcement actions to halt a variety of harmful negative option practices, which have primarily relied on the CFPA's prohibition on unfair, deceptive, and abusive acts or practices.[8] For example, the CFPB has brought multiple enforcement actions involving optional ''add-on'' products offered to credit card users, such as debt protection and identity protection products, which featured recurring fees that continued until consumers affirmatively cancelled.[9] In other enforcement actions involving negative option practices, the CFPB has found or alleged that consumer reporting companies,[10] debt relief companies,[11] credit repair companies,[12] payment processors,[13] and service providers[14] have engaged in unfair, deceptive, and abusive acts or practices.

The CFPB has also relied on other Federal consumer financial laws that it enforces to address certain harmful negative option marketing practices. The Electronic Fund Transfer Act (EFTA) and Regulation E prohibit preauthorized electronic fund transfers from a consumer's bank account without written authorization.[15] The TSR also prohibits deceptive acts or practices by telemarketers, including failing to disclose the material terms of a negative option feature of an offer and misrepresenting the total cost to purchase goods or services.[16]

Recently, the CFPB and FTC have taken action to combat the rise of digital dark patterns, which are design features used to deceive, steer, or manipulate users into behavior that is profitable for a company, but often harmful to users or contrary to their intent.[17] Dark patterns can be particularly harmful when paired with negative option programs, causing consumers to be misled into purchasing subscriptions and other services with recurring charges and making it difficult for consumers to cancel and avoid such charges.[18]

Analysis

The CFPB is issuing this Circular to emphasize that covered persons and service providers who engage in negative option marketing are required to comply with the CFPA's prohibition on unfair, deceptive, and abusive acts or practices.[19] The CFPB further emphasizes that its approach to negative option marketing is generally in alignment with the FTC's approach to section 5 of the FTC Act as set forth in its recent policy statement. In particular, the CFPB shares the view that a seller offering a negative option program risks violating the law if the seller (1) does not clearly and conspicuously disclose the material terms of the negative option offer to the consumer, (2) does not obtain the consumer's informed consent, or (3) misleads consumers who wish to cancel, erects unreasonable barriers to cancellation, or impedes the effective operation of promised cancellation procedures.[20]

Disclosure. Sellers may violate the CFPA's prohibition on deceptive acts or practices if they misrepresent or fail to clearly and conspicuously disclose the material terms of an offer for a product or service with a negative option feature. Under the CFPA, a

[2] *See Consumer Response Annual Report* at 25 (CFPB Mar. 2018), *https://files.consumerfinance.gov/f/documents/cfpb_consumer-response-annual-report_2017.pdf; Monthly Complaint Report* at 16 (CFPB May 2017), *https://files.consumerfinance.gov/f/documents/201705_cfpb_Monthly_Complaint_Report.pdf.*

[3] *See Consumer Response Annual Report* at 67 (CFPB Mar. 2022), *https://files.consumerfinance.gov/f/documents/cfpb_2021-consumer-response-annual-report_2022-03.pdf; Consumer Response Annual Report* at 88 (CFPB Mar. 2021), *https://files.consumerfinance.gov/f/documents/cfpb_2020-consumer-response-annual-report_03-2021.pdf.*

[4] *See, e.g., FTC* v. *Vonage Holdings Corp.,* No. 3:22–cv–6435 (D.N.J. 2022); *FTC* v. *Age of Learning, Inc.,* No. 2:20–cv–07996 (C.D. Cal. 2020); *FTC* v. *Apex Capital Group, LLC,* No. 2:18–cv–09573 (C.D. Cal. 2018); *FTC* v. *Triangle Media Corp.,* No. 3:18–cv–01388 (S.D. Cal. 2018); *FTC* v. *AdoreMe, Inc.,* No. 1:17–cv–09083 (S.D.N.Y. 2017); *FTC* v. *RevMountain, LLC,* No. 2:17–cv–02000 (D. Nev. 2017); *FTC* v. *Health Formulas, LLC,* No. 2:14–cv–01649 (D. Nev. 2016); *FTC* v. *JDI Dating, Ltd.,* No. 1:14–cv–08400 (N.D. Ill. 2014); *FTC* v. *Complete Weightloss Center,* No. 1:08–cv–00053 (D.N.D. 2008); *FTC* v. *Consumerinfo.com,* No. 05–cv–801 (C.D. Cal. 2005); *see also* 15 U.S.C. 45.

[5] 15 U.S.C. 8401 *et seq.*

[6] 16 CFR part 310.

[7] Enforcement Policy Statement Regarding Negative Option Marketing, 86 FR 60822, 60823 (Nov. 4, 2021) (hereafter, FTC Policy Statement).

[8] 12 U.S.C. 5531, 5536.

[9] *See CFPB* v. *Sterling Jewelers, Inc.,* No. 1:19–cv–00448 (S.D.N.Y. 2019); *First National Bank of Omaha,* File No. 2016–CFPB–0014 (Aug. 25, 2016) (consent order); *Citibank, N.A.,* File No. 2015–CFPB–0015 (July 21, 2015) (consent order); *Synchrony Bank, f/k/a GE Capital Retail Bank,* No. 2014–CFPB–0007 (June 19, 2014) (consent order); *Bank of America, N.A.,* File No. 2014–CFPB–0004 (Apr. 9, 2014) (consent order); *American Express Centurion Bank,* File No. 2013–CFPB–0011 (Dec. 24, 2013) (consent order); *Discover Bank,* File No. 2012–CFPB–0005 (Sept. 24, 2012) (joint consent order with FDIC); *Capital One Bank, (USA) N.A.,* 2012–CFPB–0001 (July 18, 2012) (consent order). For a description of consumer protections applicable to credit card add-on products and the CFPB's compliance expectations regarding such products, see *Marketing of Credit Card Add-on Products,* CFPB Bulletin 2012–06 (July 18, 2012).

[10] *CFPB* v. *Transunion,* No. 1:22–cv–01880 (N.D. Ill. 2022); *Equifax Inc.,* File No. 2017–CFPB–0001 (Jan. 3, 2017) (consent order); *Transunion Interactive, Inc.,* File No. 2017–CFPB–0002 (Jan. 3, 2017) (consent order).

[11] *CFPB* v. *Student Financial Aid Services, Inc.,* No. 2:15–cv–00821 (E.D. Cal. 2015).

[12] *CFPB* v. *Prime Marketing Holdings, LLC,* No. 2:16–cv–07111 (C.D. Cal. 2016).

[13] *CFPB* v. *ACTIVE Network, LLC,* No. 4:22–cv–00898 (E.D. Tex. 2022).

[14] *CFPB* v. *Affinion Group Holdings, Inc.,* No. 5:15–cv–01005 (D. Conn. 2015); *CFPB* v. *Intersections Inc.,* No. 1:15–cv–835 (E.D. Va. 2015).

[15] *See* 15 U.S.C. 1693e(a); 12 CFR 1005.10(b); *see also CFPB* v. *Student Financial Aid Services, Inc.,* No. 2:15–cv–00821 (E.D. Cal. 2015). The CFPB described these requirements in more detail in a 2015 compliance bulletin. *See Requirements for Consumer Authorization for Preauthorized Electronic Fund Transfers,* CFPB Compliance Bulletin 2015–06 (Nov. 23, 2015).

[16] 16 CFR 310.3(a)(1)(vii), (a)(2)(i); *see also CFPB* v. *Prime Marketing Holdings, LLC,* No. 2:16–cv–07111 (C.D. Cal. 2016); *Citibank, N.A.,* File No. 2015–CFPB–0015 (July 21, 2015) (consent order); *CFPB* v. *Student Financial Aid Services, Inc.,* No. 2:15–cv–00821 (E.D. Cal. 2015).

[17] *See, e.g., FTC* v. *Age of Learning, Inc.,* No. 2:20–cv–07996 (C.D. Cal. 2020); Statement of CFPB Director Rohit Chopra on Complaint Against ACTIVE Network (Oct. 18, 2022), *https://www.consumerfinance.gov/about-us/newsroom/statement-of-cfpb-director-rohit-chopra-on-complaint-against-active-network/.*

[18] *See Bringing Dark Patterns to Light* at 11–15 (FTC Sept. 2022), *https://www.ftc.gov/system/files/ftc_gov/pdf/P214800%20Dark%20Patterns%20Report%209.14.2022%20-%20FINAL.pdf.*

[19] Sellers should also comply with other consumer protection laws enforceable by the CFPB that may apply to their conduct, such as EFTA, Regulation E, and the TSR.

[20] *See* FTC Policy Statement, 86 FR 60823–25.

representation or omission is deceptive if it is likely to mislead a reasonable consumer and is material.[21] A ''material'' representation or omission ''involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.'' [22] Where a seller makes a partial disclosure about the nature of a product or service, its failure to disclose other material information may be deceptive.[23] In assessing the meaning of a representation or omission, the CFPB looks to the overall, net impression of the communication, meaning that it considers the context of the entire advertisement, transaction, or course of dealing rather than evaluating statements in isolation.[24]

The material terms of a negative option offer would typically include the following, to the extent applicable:

- That the consumer is enrolling in and will be charged for the product or service.
- The amount (or range of amounts) that the consumer will be charged.
- That charges will be on a recurring basis unless the consumer takes affirmative steps to cancel the product or service.
- That, in a trial marketing plan, charges will begin (or increase) after the trial period unless the consumer takes affirmative action.[25]

A seller would likely violate the CFPA by misrepresenting or failing to adequately disclose these material terms, as the CFPB's enforcement cases illustrate. For example, the CFPB found that consumer reporting agencies deceptively represented that credit-related products were ''free'' when, in reality, consumers who signed up for a ''free'' trial were automatically enrolled in a subscription program with a recurring monthly fee unless they cancelled.[26] In those cases, disclosures about the negative option feature were often displayed in fine print, in low contrast, and were generally placed in a less prominent location, such as the bottom of a web page, grouped with other disclosures. Thus, the disclosures were neither clear nor conspicuous. Similarly, in several credit card add-on cases, the CFPB found that credit card issuers engaged in deceptive marketing and enrollment practices where they did not adequately inform consumers that they were purchasing add-on products or misrepresented the cost of the add-on products.[27]

Consent. Sellers engaged in negative option marketing would likely violate the CFPA where they fail to obtain the consumer's informed consent before charging the consumer.[28] Consent will generally not be informed if, for example, a seller mischaracterizes or conceals the negative option feature, provides contradictory or misleading information, or otherwise interferes with the consumer's understanding of the agreement. The CFPB has brought deception and unfairness claims under the CFPA where sellers failed to obtain consumers' informed consent.[29]

With respect to deception, as noted, a representation is deceptive if it is likely to mislead a reasonable consumer and is material.[30] In the credit card add-on cases, the CFPB found that credit card issuers engaged in a deceptive practice when the card issuers falsely represented to consumers that they were agreeing to receive information about an add-on product rather than purchasing the product.[31]

With respect to unfairness, an act or practice is unfair if it causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers and the injury is not outweighed by countervailing benefits to consumers or to competition.[32] Applying that standard, the CFPB alleged that a debt relief company engaged in an unfair practice by charging consumers on an automatic, recurring basis where the recurring charges were not clearly explained or disclosed to consumers at the time of purchase.[33]

Cancellation. It is understandable that sellers will generally prefer to retain their existing customers, but they must do so in a manner that complies with the CFPA. For purposes of the prohibition on deception, certain types of representations are presumed to be material, including express representations and representations regarding costs.[34] Consistent with that principle, the CFPB found that a credit card issuer engaged in a deceptive practice when it represented that consumers could cancel an add-on product ''immediately'' and with ''no questions asked'' but then directed sales representatives to repeatedly rebut requests to cancel, with the result that consumers were often unable to cancel unless they demanded cancellation multiple times in succession.[35] The CFPB has also found that sellers engaged in deceptive practices by making misrepresentations about the costs and benefits of their products and services in order to persuade consumers not to cancel.[36]

In addition, the CFPB agrees with the FTC that sellers would likely violate the law if they erect unreasonable barriers to cancellation or fail to honor cancellation requests that comply with their promised cancellation procedures. Such conduct would include, for example, ''[h]ang[ing] up on consumers who call to cancel; plac[ing] them on hold for an unreasonably long time; provid[ing] false information about how to cancel; or misrepresent[ing] the

[21] *See CFPB* v. *Gordon,* 819 F.3d 1179, 1192–93 (9th Cir. 2016).

[22] *Novartis Corp.* v. *FTC,* 223 F.3d 783, 786 (D.C. Cir. 2000) (quoting *In re Cliffdale Assocs., Inc.,* 103 F.T.C. 110, 165 (1984)).

[23] *See, e.g., Sterling Drug Inc.* v. *FTC,* 741 F.2d 1146, 1154 (9th Cir. 1984) (drug company's failure to disclose that its drug only contained ordinary aspirin was misleading when its advertisements implied that the drug did not contain aspirin); *see also FTC* v. *Bay Area Business Council, Inc.,* 423 F.3d 627, 635 (7th Cir. 2005) (''[T]the omission of a material fact, without an affirmative misrepresentation, may give rise to an FTC Act violation.'').

[24] *See, e.g., CFPB* v. *Aria,* 54 F.4th 1168, 1173 (9th Cir. 2022); *Gordon,* 819 F.3d at 1193; *see also FTC* v. *E.M.A. Nationwide, Inc.,* 767 F.3d 611, 631 (6th Cir. 2014); *Fanning* v. *FTC,* 821 F.3d 164, 170 (1st Cir. 2016).

[25] This list is not exhaustive, and additional terms of a negative option offer may be material depending on the facts and circumstances.

[26] *Equifax Inc.,* File No. 2017–CFPB–0001 (Jan. 3, 2017) (consent order); *Transunion Interactive, Inc.,* File No. 2017–CFPB–0002 (Jan. 3, 2017) (consent order).

[27] *See, e.g., First National Bank of Omaha,* File No. 2016–CFPB–0014 (Aug. 25, 2016) (consent order); *Synchrony Bank, f/k/a GE Capital Retail Bank,* No. 2014–CFPB–0007 (June 19, 2014) (consent order); *Bank of America, N.A.,* File No. 2014–CFPB–0004 (Apr. 9, 2014) (consent order).

[28] *Cf. FTC* v. *Kennedy,* 574 F. Supp. 2d 714, 721 (S.D. Tex. 2008) (defendant engaged in unfair practice in violation of section 5 of the FTC Act by imposing charges on consumers' telephone bills without obtaining their informed consent).

[29] A seller offering a negative option program must also comply with 12 U.S.C. 5531(d), which provides that an act or practice is abusive if it (1) materially interferes with a consumer's ability to understand a term or condition of a consumer financial product or service or (2) takes unreasonable advantage of the consumer's (a) lack of understanding of the material risks, costs, or conditions of the product or service; (b) inability to protect their interests in selecting or using a consumer financial product or service; or (b) reasonable reliance on a covered person to act in the consumer's interests.

[30] *See Gordon,* 819 F.3d at 1192–93.

[31] *Fifth Third Bank,* File No. 2015–CFPB–0025 (Sept. 28, 2015) (consent order); *Bank of America, N.A.,* File No. 2014–CFPB–0004 (Apr. 9, 2014) (consent order).

[32] 12 U.S.C. 5531(c).

[33] *CFPB* v. *Student Financial Aid Services, Inc.,* No. 2:15–cv–00821 (E.D. Cal. 2015). Specifically, the CFPB alleged that the company's practice caused injuries by subjecting consumers to charges they did not authorize or bargain for, those injuries were not reasonably avoidable because the fact of the recurring charges and negative option feature were not clearly explained or disclosed to consumers, and the injury was not outweighed by any countervailing benefits to consumers or competition.

[34] *See Novartis Corp.,* 223 F.3d at 786.

[35] *First National Bank of Omaha,* File No. 2016–CFPB–0014 (Aug. 25, 2016) (consent order).

[36] *Citibank, N.A.,* File No. 2015–CFPB–0015 (July 21, 2015) (consent order); *Capital One Bank, (USA) N.A.,* 2012–CFPB–0001 (July 18, 2012) (consent order).

reasons for delays in processing consumers' cancellation requests.'' [37] Depending on the facts and circumstances, such conduct may constitute an unfair, deceptive, or abusive act or practice in violation of the CFPA.

About Consumer Financial Protection Circulars

Consumer Financial Protection Circulars are issued to all parties with authority to enforce Federal consumer financial law. The CFPB is the principal Federal regulator responsible for administering Federal consumer financial law, *see* 12 U.S.C. 5511, including the Consumer Financial Protection Act's prohibition on unfair, deceptive, and abusive acts or practices, 12 U.S.C. 5536(a)(1)(B), and 18 other ''enumerated consumer laws,'' 12 U.S.C. 5481(12). However, these laws are also enforced by State attorneys general and State regulators, 12 U.S.C. 5552, and prudential regulators including the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the National Credit Union Administration. *See, e.g.,* 12 U.S.C. 5516(d), 5581(c)(2) (exclusive enforcement authority for banks and credit unions with $10 billion or less in assets). Some Federal consumer financial laws are also enforceable by other Federal agencies, including the Department of Justice and the Federal Trade Commission, the Farm Credit Administration, the Department of Transportation, and the Department of Agriculture. In addition, some of these laws provide for private enforcement.

Consumer Financial Protection Circulars are intended to promote consistency in approach across the various enforcement agencies and parties, pursuant to the CFPB's statutory objective to ensure Federal consumer financial law is enforced consistently. 12 U.S.C. 5511(b)(4).

Consumer Financial Protection Circulars are also intended to provide transparency to partner agencies regarding the CFPB's intended approach when cooperating in enforcement actions. *See, e.g.,* 12 U.S.C. 5552(b) (consultation with CFPB by State attorneys general and regulators); 12 U.S.C. 5562(a) (joint investigatory work between CFPB and other agencies).

Consumer Financial Protection Circulars are general statements of policy under the Administrative Procedure Act. 5 U.S.C. 553(b). They provide background information about applicable law, articulate considerations relevant to the Bureau's exercise of its authorities, and, in the interest of maintaining consistency, advise other parties with authority to enforce Federal consumer financial law. They do not restrict the Bureau's exercise of its authorities, impose any legal requirements on external parties, or create or confer any rights on external parties that could be enforceable in any administrative or civil proceeding. The CFPB Director is instructing CFPB staff as described herein, and the CFPB will then make final decisions on individual matters based on an assessment of the factual record, applicable law, and factors relevant to prosecutorial discretion.

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2023–01560 Filed 1–27–23; 8:45 am]

BILLING CODE 4810–AM–P

[37] FTC Policy Statement, 86 FR 60823, 60826.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2022–0540; Airspace Docket No. 22–AAL–49]

RIN 2120–AA66

Amendment of Alaskan Federal Airway V–531 Near Point Hope, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Alaskan Very High Frequency (VHF) Omnidirectional Range (VOR) Federal airway V–531 (hereinafter referred to as Alaskan V–531) due to the planned decommissioning of the Point Hope, AK (PHO), Non-Directional Beacon (NDB) navigational aid (NAVAID).

DATES: Effective date 0901 UTC, April 20, 2023. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

ADDRESSES: FAA Order JO 7400.11G, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *www.faa.gov/air_traffic/publications/.* For further information, you can contact the Rules and Regulations Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

FOR FURTHER INFORMATION CONTACT: Colby Abbott, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it modifies the route structure as necessary to preserve the safe and efficient flow of air traffic within the National Airspace System.

History

The FAA published a notice of proposed rulemaking (NPRM) for Docket No. FAA–2022–0540 in the **Federal Register** (87 FR 32378; May 31, 2022), amending Alaskan V–531 due to the planned decommissioning of the Point Hope, AK, NDB NAVAID. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal. No comments were received.

Alaskan VOR Federal airways are published in paragraph 6010(b) of FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022, which is incorporated by reference in 14 CFR 71.1. The Alaskan VOR Federal airway action listed in this document will be published subsequently in FAA Order JO 7400.11.

Differences From the NPRM

The NPRM proposed amending Alaskan V–531 to read: ''From Fairbanks, AK, via Tanana, AK; Huslia, AK; Selawik, AK; to Kotzebue, AK''. Use of the word ''via'' to describe the change was in error. To conform to the FAA's preferred language, the final rule removes the ''via'' from the regulatory text. The route remains the same as proposed; the final rule does not incorporate any substantive changes to the airway.

Tab 22

Real Estate Settlement Procedures Act (Regulation X); Digital Mortgage Comparison-Shopping Platforms and Related Payments to Operators, 88 Fed. Reg. 9162 (Feb. 13, 2023).

CFPB Issues Guidance to Protect Mortgage Borrowers from Pay-to-Play Digital Comparison-Shopping Platforms

English

Español (cfpb.gov/about-us/newsroom/cfpb-emite-normas-para-proteger-a-prestatarios-de-hipotecas/)

Financial arrangements that influence or manipulate search results are illegal

FEB 07, 2023

WASHINGTON, D.C. – Today, the Consumer Financial Protection Bureau (CFPB) issued an advisory opinion to protect Americans from double dealing on digital mortgage comparison-shopping platforms. Companies operating these digital platforms appear to shoppers as if they provide objective lender comparisons, but may illegally refer people to only those lenders paying referral fees. When shoppers use a lender that is not the best option for their needs, they may end up with a lower quality lender or paying thousands more in closing costs or interest. The advisory opinion outlines how companies violate the Real Estate Settlement Procedures Act (RESPA) when they steer shoppers to lenders by using pay-to-play tactics rather than providing shoppers with comprehensive and objective information.

"Given the rise in mortgage interest rates, it is even more important for homebuyers to shop and compare loan offers," said CFPB Director Rohit Chopra. "We are working to ensure that online platforms are not manipulating their search results in order to coerce kickbacks from lenders."

Over the last year, mortgage interest rates have risen substantially. People looking for the best deal on mortgages or other settlement services often are turning to comparison-shopping platforms and mobile apps. Many of the websites and applications claim to offer ranked lists of providers suitable to the individual consumer's needs. After providing their personal data to an online site to get access or run a customized search, people reasonably expect a neutral and fair presentation of the providers that may best meet their mortgage or other settlement needs.

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. Eliminating illegal kickback schemes fosters fair competition by forcing lenders and other providers to compete on a level playing field and leads to lower rates and higher quality service.

Today's advisory opinion seeks to assist law-abiding companies to comply with existing law. It does not create any new requirements, but rather offers clarity on how firms can navigate issues associated with digital mortgage comparison-shopping platforms. It describes how these companies may violate RESPA, and potentially other laws, if they coerce payments from mortgage professionals, unlawfully steer consumers, or engage in other illegal referral activities, including:

- **Presenting one or more service providers in a non-neutral way:** The platform's operator presents lenders based on extracted referral payments rather than the shopper's personal data or preferences or other objective criteria. For example, the operator presents a lender as the best option because that lender pays the highest referral fee. However, the shopper is led to believe the lender was selected based on their shared personal data or preferences. In one variation, digital mortgage comparison-shopping platforms may receive payments from lenders to rotate them as the top presented option regardless of whether the highlighted lender is the best fit for the shopper.
- **Biasing the platform's internal formula to favor preferred providers:** The platform's inputs or formula are manipulated to generate comparison options favoring higher-paying or preferred providers. For example, a platform's formula is designed to steer shoppers to use providers in which the operator has a financial stake. In this case, the shopper is unaware that the platform's formula was potentially designed to steer them away from non-preferred providers.

The Consumer Financial Protection Act of 2010 transferred authority for RESPA to the CFPB from the Department of Housing and Urban Development (HUD). This advisory opinion supplements guidance HUD provided in 1996 on early versions of comparison-shopping platforms, which the CFPB continues to apply. The CFPB will enforce RESPA to protect consumers and to ensure a robust, competitive mortgage market. Today's advisory opinion also follows a set of Frequently Asked Questions regarding RESPA (cfpb.gov/compliance/compliance-resources/mortgage-resources/real-estate-settlement-procedures-act/real-estate-settlement-procedures-act-faqs/) published in 2020 to help entities understand their obligations under current law.

Read the advisory opinion, *Real Estate Settlement Procedures Act (Regulation X); Digital Mortgage Comparison-Shopping Platforms and Related Payments to Operators*. (cfpb.gov/rules-policy/final-rules/real-estate-settlement-procedures-act-regulation-x-digital-mortgage-comparison-shopping-platforms-and-related-payments-to-operators/)

Read Director Chopra's Statement on Mortgage Comparison Shopping in a Time of Higher Interest Rates. (cfpb.gov/about-us/newsroom/statement-of-cfpb-director-rohit-chopra-on-mortgage-comparison-shopping-in-a-time-of-higher-interest-rates/)

Learn about the CFPB's tools and resources for homebuyers. (cfpb.gov/owning-a-home/)

The CFPB established the Advisory Opinion program (cfpb.gov/compliance/advisory-opinion-program/) in 2020 to provide guidance to companies about how existing federal consumer financial protection law applies to emerging market trends and business practices.

Consumers can submit complaints about mortgage and other financial products and services by visiting the CFPB's website (cfpb.gov/complaint/) or by calling (855) 411-CFPB (2372).

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit www.consumerfinance.gov (http://www.consumerfinance.gov/).

Topics

- ADVANCED TECHNOLOGY (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=ADVANCED-TECHNOLOGY)
- DATA (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=DATA)
- MORTGAGES (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=MORTGAGES)

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it has been determined that the determination is not a ''major rule'' as defined by 5 U.S.C. 804(2).

VII. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this final determination.

Signing Authority

This document of the Department of Energy was signed on February 3, 2023, by Francisco Alejandro Moreno, Acting Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on February 3, 2023.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2023–02655 Filed 2–10–23; 8:45 am]

BILLING CODE 6450–01–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1024

Real Estate Settlement Procedures Act (Regulation X); Digital Mortgage Comparison-Shopping Platforms and Related Payments to Operators

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Advisory opinion.

SUMMARY: The Consumer Financial Protection Bureau (CFPB) is issuing this Advisory Opinion to address the applicability of the Real Estate Settlement Procedures Act (RESPA) section 8 to operators of certain digital technology platforms that enable consumers to comparison shop for mortgages and other real estate settlement services, including platforms that generate potential leads for the platform participants through consumers' interaction with the platform (Digital Mortgage Comparison-Shopping Platforms). Generally, this Advisory Opinion describes how an operator of a Digital Mortgage Comparison-Shopping Platform violates RESPA section 8 if the platform provides enhanced placement or otherwise steers consumers to platform participants based on compensation the platform operator receives from those participants rather than based on neutral criteria. More specifically, this Advisory Opinion states that an operator of a Digital Mortgage Comparison-Shopping Platform receives a prohibited referral fee in violation of RESPA section 8 when: the Digital Mortgage Comparison-Shopping Platform non-neutrally uses or presents information about one or more settlement service providers participating on the platform; that non-neutral use or presentation of information has the effect of steering the consumer to use, or otherwise affirmatively influences the selection of, those settlement service providers, thus constituting referral activity; and the operator receives a payment or other thing of value that is, at least in part, for that referral activity. Furthermore, if an operator of a Digital Mortgage Comparison-Shopping Platform receives a higher fee for including one settlement service provider compared to what it receives for including other settlement service providers participating on the same platform, that can be evidence of an illegal referral fee arrangement absent other facts indicating that the payment is not for enhanced placement or other form of steering.

DATES: This advisory opinion is effective on February 13, 2023.

FOR FURTHER INFORMATION CONTACT: Brandy Hood, Joan Kayagil, or Michael G. Silver, Senior Counsels, Office of Regulations, at (202) 435–7700 or *https://reginquiries.consumerfinance.gov/.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION: The Bureau is issuing this Advisory Opinion through the procedures for its Advisory Opinions Policy.[1] Please review those procedures for more information.

I. Advisory Opinion

A. Background

1. RESPA Section 8

The Real Estate Settlement Procedures Act (RESPA) [2] provides a series of protections for consumers who are engaged in the process of buying a home, applying for or closing on a mortgage, making escrow payments, or purchasing other services associated with most residential real estate transactions.[3] RESPA section 8(a) [4] provides that no person [5] shall give and no person shall accept any fee, kickback, or thing of value [6] pursuant to any agreement or understanding,[7] oral or otherwise, that business incident to or a part of a real estate settlement service [8] involving a federally related mortgage loan [9] shall be referred [10] to any person. While RESPA section 8(a) prohibits referral fees, RESPA section 8(c) provides that bona fide payments for goods or facilities provided or services rendered (which do not include payments for referral fees) are not prohibited by RESPA section 8.[11]

RESPA and its implementing Regulation X [12] have been in effect for nearly a half century. One of the reasons for RESPA's enactment in 1974 was congressional concern over excessive settlement costs. Congress found that ''significant reforms in the real estate settlement process are needed to insure that consumers throughout the Nation . . . are protected from unnecessarily

[1] 85 FR 77987 (Dec. 3, 2020).

[2] 12 U.S.C. 2601 *et seq.*

[3] *See generally* 12 U.S.C. 2601 *et seq.* and Regulation X, 12 CFR part 1024. Certain RESPA and Regulation X provisions address mortgage servicing and escrow issues (*e.g.,* 12 U.S.C. 2605), which are not the subject of this Advisory Opinion.

[4] 12 U.S.C. 2607(a). Regulation X, 12 CFR 1024.14(b), implements RESPA section 8(a)'s prohibition.

[5] *See* 12 U.S.C. 2602(5) (statutory definition of ''person'').

[6] *See* 12 CFR 1024.14(d) (regulatory definition of ''thing of value'').

[7] *See* 12 CFR 1024.14(e) (regulatory definition of ''agreement or understanding'').

[8] *See* 12 CFR 1024.2(b) (defining settlement service as ''any service provided in connection with a prospective or actual settlement'' and providing 15 non-exhaustive examples). The regulatory definition is based on the broad statutory definition of settlement services in 12 U.S.C. 2602(3).

[9] 12 U.S.C. 2602(1). As the TILA–RESPA Integrated Disclosure rule summarized, a federally related mortgage loan ''is broadly defined to encompass virtually any purchase money or refinance loan, with the exception of temporary financing, that is 'secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from one to four families.' '' 78 FR 79730, 79736 (Dec. 31, 2013) (quoting 12 U.S.C. 2602(1)). The term federally related mortgage loan also includes certain other loans, such as reverse mortgages and home equity loans and lines of credit, that meet the other criteria of the definition.

[10] *See* 12 CFR 1024.14(f) (regulatory definition of ''referral'').

[11] 12 U.S.C. 2607(c)(2) (''Nothing in this section shall be construed as prohibiting . . . the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed''); *accord* 12 CFR 1024.14(g)(1)(iv) (''Section 8 of RESPA permits . . . [a] payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed. . . .'').

[12] 12 CFR part 1024.

high settlement charges caused by certain abusive practices that have developed in some areas of the country.'' [13] Among the RESPA statutory purposes is the ''elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services.'' [14] Congressional committee reports noted that kickbacks for the referral of settlement service business were a common practice in the real estate industry and cited payments for referrals of settlement services as a factor in the inflated prices for those services.[15]

Further, Congress in 1983 amended RESPA to permit what are now called affiliated business arrangements subject to certain conditions.[16] In doing so, Congress recognized that settlement service providers engage in reverse competition for their business—that is, they do not compete for a consumer's business directly, but rather compete for and almost exclusively rely on referrals from, *e.g.,* real estate brokers or lenders—and that this dynamic can have deleterious effects on consumers and markets beyond higher settlement costs.[17] One court, citing the legislative and regulatory history concerning the affiliated business arrangement provisions, noted that ''RESPA's overarching goal'' was to ''mitigat[e] market-distorting practices.'' [18] Consistent with the notion that RESPA section 8 addresses consumer harms beyond settlement cost increases, Regulation X provides that a RESPA section 8 violation can occur even if the consumer's settlement costs do not increase.[19]

2. Digital Mortgage Comparison-Shopping Platforms

RESPA section 8 applies broadly, and in many circumstances covers conduct by persons who connect settlement service providers to consumers who may be interested in purchasing a home, applying for a mortgage, or otherwise using a settlement service provider in a RESPA-covered transaction. This may include selling the consumer's contact information (*i.e.,* leads) to settlement service providers. Leads are increasingly sold through a variety of digital platforms and related business agreements.

In particular, some digital platforms are structured as consumer-facing websites or online applications that allow consumers to search for and compare options for mortgages or other settlement services.[20] These digital platforms—in some cases called ''online marketplaces''—can facilitate a consumer's choice among alternative products or settlement service providers and may be operated by settlement service providers or third parties.[21] Through their interaction with these digital platforms, consumers often provide their contact information to set up an account, and sometimes they may provide additional information that is typically part of a mortgage application or fill out an online long form. The platform operator then purports to use the consumer's information to help the consumer compare a range of options to find a suitable lender or other settlement service provider that the consumer can contact. The platforms typically will generate leads for the participating lender or other settlement service provider by facilitating the consumer's click-through to the website of the participating provider, selling the consumer's contact information to the provider, or both. The comparison information may be presented to the consumer viewing the platform in a static or interactive format. In the latter case, the platform may give consumers the ability to sort the options or rankings based on different criteria or to customize the presentation of options or rankings based on factors they can select (sometimes after default options or rankings are presented). Digital platforms may also combine online marketplace and lead generation activities with other services, such as advertising to consumers.

This Advisory Opinion focuses on digital platforms that include information or features that enable consumers to comparison shop options for mortgages and other settlement services, including those platforms that generate potential leads for the platform participants through consumers' interaction with the platform (Digital Mortgage Comparison-Shopping Platforms). Digital Mortgage Comparison-Shopping Platforms generally are covered by a 1996 policy statement issued by the Department of Housing and Urban Development (HUD) on ''computer loan origination systems,'' or CLOs (HUD CLO Policy Statement),[22] which the CFPB has applied, as relevant, since 2011, when Congress transferred responsibility for RESPA to the CFPB from HUD.[23]

[13] 12 U.S.C. 2601(a).

[14] 12 U.S.C. 2601(b)(2).

[15] *See* H.R. Rep. No. 93–1177, at 7 (1974) and S. Rep. No. 93–866, at 6 (1974) (providing examples where the payment or other thing of value furnished by the person to whom the settlement business is referred tended to increase the cost of settlement services without providing any benefits to the homebuyer, and noting that ''[w]hile the making of such payments may heretofore have been necessary from a competitive standpoint in order to obtain or retain business, and in some areas may even be permitted by state law, it is the intention of [this] section . . . to prohibit such payments, kickbacks, rebates, or unearned commissions'').

[16] Housing and Urban-Rural Recovery Act of 1983, Public Law 98–181, section 461, 97 Stat. 1155, 1230 (1983) (codified as amended at 12 U.S.C. 2607(c)(4)).

[17] As explained in a House Committee Report: ''[T]he advice of a person making the referral may lose its impartiality and may not be based on his professional evaluation of the quality of service provided if the referror or his associates have a financial interest in the company being recommended.'' H.R. Rep. No. 97–532, at 52 (1982). The 1983 RESPA amendments addressed questions following RESPA's enactment about ''the legality of more sophisticated transactions where . . . there was a less obvious causal link between the referral and the payment.'' *Minter* v. *Wells Fargo Bank, N.A.,* 274 FRD. 525, 536 (D. Md. 2011). This arose most frequently within the context of what were then called ''controlled business arrangements'' where ''one provider of one settlement service maintained an enhanced relationship with a second provider of a different settlement service, through which each service provider captured the clients of the other.'' *Id.*

[18] *Id.* at 538–39; *see also Baehr* v. *Creig Northrop Team,* 953 F.3d 244, 253–56 & n.7 (4th Cir. 2020) (finding that ''deprivation of impartial and fair competition between settlement services providers'' was not sufficient to confer standing on a private litigant under RESPA section 8's statutory purposes in absence of increased settlement costs, but noting that increased settlement costs were not a requirement for a statutory violation and that governmental entities are not bound to the same standing constraints as private litigants).

[19] *See* 12 CFR 1024.14(g)(2) (''The fact that the transfer of the thing of value does not result in an increase in any charge made by the person giving the thing of value is irrelevant in determining whether the act is prohibited.'').

[20] *See* Rory Van Loo, *Rise of the Digital Regulator,* 66 Duke L.J. 1267, 1281 (2017) (describing how ''digital intermediaries'' can list mortgage options from specific financial institutions, permit consumers to use mortgage calculators, or allow consumers to input information to generate a response as to whether they should refinance).

[21] *See* Miriam Cross, *Bank comparison sites recast themselves, with celeb help and new services,* Am. Banker (Aug. 9, 2022) (describing how ''[o]nline marketplaces have revamped their branding or adapted their strategy over the course of the pandemic to maintain financial institution partnerships and meet new customer needs'' and noting that ''[b]anks and lenders are closely intertwined with these platforms'').

[22] HUD, *RESPA Statement of Policy 1996–1, Regarding Computer Loan Origination Systems (CLOs),* 61 FR 29255 (June 7, 1996). The HUD CLO Policy Statement was issued as part of a broader set of HUD regulations and interpretations that addressed employer-to-employee payments. *See* 61 FR 29238 (June 7, 1996). Because some of these regulations and interpretations were never finalized, *see* 61 FR 58472 (Nov. 15, 1996), certain aspects of the HUD CLO Policy Statement not relevant to this Advisory Opinion—for example, section 4, addressing ''Payments of Commissions or Bonuses to Employees''—were not made effective by HUD and would not be applied by the CFPB. *See id.* at 58473.

[23] *See* 12 U.S.C. 5581(b)(7). When the CFPB assumed jurisdiction over the enumerated consumer laws in the Dodd-Frank Act on the designated transfer date, it issued a rule identifying the enforceable rules and orders from transferor agencies. The preamble to that rule explained that

Continued

3. HUD CLO Policy Statement

The HUD CLO Policy Statement defined a CLO as ''a computer system that is used by or on behalf of a consumer to facilitate a consumer's choice among alternative products or settlement service providers in connection with a particular RESPA-covered real estate transaction'' and gave seven examples of CLO system functions.[24] The description of CLOs in the HUD CLO Policy Statement was ''not meant to be restrictive or exhaustive'' and ''merely attempt[ed] to describe existing practices of service providers,'' and the HUD CLO Policy Statement elaborated that with the ''use of technology evolving so rapidly,'' it is difficult ''to provide guidance on future unspecified practices in the abstract.'' [25] Based on the HUD CLO Policy Statement's description of CLOs, which expressly left room for platform evolution, Digital Mortgage Comparison-Shopping Platforms are a type of CLO.[26] Further, for clarity, this Advisory Opinion sometimes refers to the person that receives payment from participants on a Digital Mortgage Comparison-Shopping Platform as the ''Operator.'' [27]

The HUD CLO Policy Statement noted that settlement service providers ''may pay CLOs a reasonable fee for services provided by the CLO to the settlement service provider, such as, having information about the provider's products made available to consumers for comparison with the products of other settlement service providers.'' [28] Moreover, ''if a CLO lists only one settlement service provider and only presents basic information to the consumer on the provider's products, then there would appear to be no or nominal compensable services provided by the CLO to either the settlement service provider or the consumer, only a referral''; thus, ''any payment by the settlement service provider for the CLO listing could be considered a referral fee in violation of section 8 of RESPA.'' [29] The HUD CLO Policy Statement, further, noted that ''favoring one settlement service provider over others may be affirmatively influencing the selection of a settlement service provider'' and that ''if one lender always appears at the top of any listing of mortgage products and there is no real difference in interest rates and charges between the products of that lender and other lenders on a particular listing, then this may be a non-neutral presentation of information which affirmatively influences the selection of a settlement service provider.'' [30] The HUD CLO Policy Statement also noted that the statement ''should not be read to discourage CLOs from assisting consumers in determining which products are most advantageous to them'' and that if, for example, ''a CLO consistently ranks lenders and their mortgage products on the basis of some factor relevant to the borrower's choice of product, such as APR [annual percentage rate] calculated to include all charges and to account for the expected tenure of the buyer, HUD would consider this practice as a neutral display of information.'' [31]

The HUD CLO Policy Statement further noted that ''if a CLO charges different fees to different settlement service providers in similar situations, an incentive may exist for the CLO to steer the consumer to the settlement service provider paying the highest fees,'' which could lead to RESPA violations.[32] HUD's concern over 26 years ago about steering was both compelling and prescient. Based on the evolution of business arrangements and technology platforms, the CFPB's market monitoring, and regulator activity, the CFPB understands that operators of Digital Mortgage Comparison-Shopping Platforms and participating settlement service providers in some cases may be engaging in activities that violate RESPA section 8.

In this Advisory Opinion, the CFPB is addressing, as a general matter, certain circumstances in which payments received by Operators from settlement service providers for participating on Digital Mortgage Comparison-Shopping Platforms violate RESPA section 8. This Advisory Opinion also identifies additional, illustrative examples of Digital Mortgage Comparison-Shopping Platforms that involve RESPA section 8 violations. The CFPB, finally, briefly discusses the potential applicability of other consumer-protection laws and regulations.

B. Scope of Coverage

This Advisory Opinion applies to any ''person'' to which RESPA section 8's prohibitions apply. RESPA defines ''person'' to include individuals, corporations, associations, partnerships, and trusts.[33] RESPA does not apply to extensions of credit to government or governmental agencies or instrumentalities.[34] It also does not apply to extensions of credit primarily for business, commercial, or agricultural purposes.[35]

C. Legal Analysis

1. Interpretation of RESPA Section 8

An operator of a Digital Mortgage Comparison-Shopping Platform receives a prohibited referral fee in violation of RESPA section 8 when: (1) the Digital Mortgage Comparison-Shopping Platform non-neutrally uses or presents information about one or more settlement service providers participating on the platform; (2) that non-neutral use or presentation of information has the effect of steering the consumer to use, or otherwise

''official commentary, guidance, and policy statements'' previously issued by transferor agencies with exclusive rulemaking authority over the law in question, including RESPA, ''will be applied by the CFPB pending further CFPB action.'' 76 FR 43569, 43570 (July 21, 2011) (Transfer of Authorities Rule). The CFPB also wrote that it ''will seek over time to improve the clarity and uniformity of guidance regarding the laws it will administer as necessary . . . to facilitate compliance with the Federal consumer financial laws.'' *Id.* Although the CFPB considers this Advisory Opinion to be ''further CFPB action'' as such term was used in the Transfer of Authorities Rule, this Advisory Opinion is intended to supplement the HUD CLO Policy Statement, rather than supersede it. The CFPB will continue to apply the HUD CLO Policy Statement, as relevant, pending further CFPB action.

[24] 61 FR 29255, 29256 (June 7, 1996) (''Such a computer system: (1) may provide information concerning products or services; (2) may pre-qualify a prospective borrower; (3) may provide consumers with an opportunity to select ancillary settlement services; (4) may provide prospective borrowers with information regarding the rates and terms of loan products for a particular property in order for the borrower to choose a loan product; (5) may collect and transmit information concerning the borrower, the property, and other information on a mortgage loan application for evaluation by a lender or lenders; (6) may provide loan origination, processing, and underwriting services, including but not limited to, the taking of loan applications, obtaining verifications and appraisals, and communicating with the borrower and lender; and (7) may make a funding decision.'').

[25] *Id.*

[26] The CFPB recognizes that the platforms will continue to evolve as technology and business arrangements continue to evolve. Thus, similar to the HUD CLO Policy Statement's approach when defining the term CLO, the CFPB intends the term Digital Mortgage Comparison-Shopping Platform to be flexible and non-exhaustive.

[27] For purposes of this Advisory Opinion, a payment or other thing of value would be considered to be received from a settlement service provider participating on a Digital Mortgage Comparison-Shopping Platform even if it is provided to the Operator by another person on behalf of the participating provider, rather than directly by the participating provider.

[28] 61 FR 29255, 29257 (June 7, 1996).

[29] *Id.* at 29256. Depending on the facts and circumstances, such a payment could also violate RESPA section 8(b), which prohibits splitting charges made or received for settlement services, except for services actually performed, in connection with a federally related mortgage loan. *See* 12 U.S.C. 2607(b), 12 CFR 1024.14(c).

[30] 61 FR 29255, 29258 (June 7, 1996).

[31] *Id.*

[32] *Id.* at 29257.

[33] 12 U.S.C. 2602(5).

[34] 12 U.S.C. 2606(a)(2).

[35] 12 U.S.C. 2606(a)(1). Regulation X, 12 CFR 1024.5, provides additional limits on the coverage of RESPA.

affirmatively influences the selection of, those settlement service providers, thus constituting referral activity; and (3) the Operator receives a payment or other thing of value that is, at least in part, for that referral activity. By non-neutrally using or presenting information, the Operator impedes the consumer's ability to engage in meaningful comparison of options and, instead, preferences certain options over others or presents options for reasons other than presenting them based on neutral criteria such as APR, objective consumer satisfaction information, or factors the consumer selects for themselves to rank or sort the settlement service providers on the platform.[36] In these instances, the payment received by the Operator for such preferences or presentation of options is not merely for compensable services; instead, it is, at least in part, for referral activity.[37] Further, when the Operator receives a higher fee for including one settlement service provider than it receives for including other settlement service providers participating on the same platform, that can be evidence of an illegal referral fee arrangement, absent other facts indicating that the payment is not for enhanced placement or other form of steering; see further explanation and illustrative examples below.

[36] *See* 61 FR 29255, 29258 (June 7, 1996). Although these are examples of information that Operators may be using or presenting with regard to Digital Mortgage Comparison-Shopping Platforms in today's market, the Bureau emphasizes that this Advisory Opinion implicates the *manner* in which an Operator uses and presents information, not *what* information an Operator must or must not use or present. Moreover, the CFPB notes that presenting comparable options based on neutral criteria (*e.g.,* listing lenders with the lowest to highest APR in ascending order) would be a neutral presentation of information.

[37] The CFPB is aware that some Digital Mortgage Comparison-Shopping Platforms contain certain disclosures addressing how the participating settlement service providers' information is used and presented. While it may be a best practice for an Operator to disclose clearly and prominently how it is using and presenting the information of platform participants—for compliance with the prohibition on unfair, deceptive, or abusive acts or practices (UDAAPs), 12 U.S.C. 5531, 5536(a)(1)(B), or for other reasons—a disclosure would not, absent other facts, turn a directed action that has the effect of affirmatively influencing into one that does not. Unlike RESPA section 8(c)(4)—where giving a disclosure along with meeting other specified conditions would allow for referrals to be made and a return on an ownership interest or franchise relationship to be received under the ambit of an affiliated business arrangement—a disclosure does not cure what would otherwise be a RESPA section 8(a) or 8(b) violation. *See HUD RESPA Statement of Policy 1999–1 Regarding Lender Payments to Mortgage Brokers,* 64 FR 10080, 10087 (Mar. 1, 1999) (''[D]isclosure alone does not make illegal fees legal under RESPA.'').

a. RESPA Section 8(a)

When a Digital Mortgage Comparison-Shopping Platform Operator non-neutrally uses or presents information and that has the effect of steering the consumer to use, or otherwise affirmatively influences the selection of, a settlement service provider, the Operator is making a referral. Under Regulation X, the term ''referral'' is defined as ''any oral or written action directed to a person which has the effect of affirmatively influencing the selection by any person of a provider of a settlement service or business incident to or part of a settlement service when such person will pay for such settlement service or business incident thereto or pay a charge attributable in whole or in part to such settlement service or business.'' [38] Steering is a form of referral because it is an action directed to a person [39] that exerts affirmative influence.[40]

The Operator can steer or otherwise affirmatively influence the consumer to select certain platform participants by non-neutrally *using* information to generate the comparison options. Non-neutral use of information involves manipulation or biasing of the inputs or formula that the Operator employs to generate the comparison options before they are presented to the consumer. This can happen in a variety of ways. For example, some Digital Mortgage Comparison-Shopping Platforms allow consumers to generate comparison options based on purportedly objective criteria specified by the Operator (*e.g.,* lower interest rate, superior customer service). In this scenario, the Operator would non-neutrally use information if it were to set the formula to boost the rankings of lenders who pay more to participate on the platform by, behind the scenes, excluding or placing low weight on the purportedly objective comparison criteria that would otherwise favor the lower-paying provider. Another example involves a platform that seeks—and purports to incorporate into the formula used to generate comparison results—the consumer's preferences regarding the factors that are most important to them in choosing a settlement service provider. In that scenario, the Operator could manipulate the formula to favor certain participating providers by declining to honor the consumer's preferences or unwarrantedly placing weight on inaccurate information about the provider (*e.g.,* giving credit in the formula to a lender for more favorable interest rates that the Operator knows are outdated, which ensures that lender will have a higher ranking under the formula).

The Operator also can steer or otherwise exert affirmative influence by non-neutrally *presenting* information about comparison options to the consumer while the consumer is interacting with a Digital Mortgage Comparison-Shopping Platform.[41] The Operator could do this in several ways, including through subtle actions that bias the presentation for the consumer. For example, an Operator could provide the names and telephone numbers of all participating providers but only provide weblinks for a subset of higher-paying providers. Alternatively, the Operator might list the lenders that pay more to the Operator on the first page and rank them by interest rate—so the platform appears to have ranked *all* participants by that factor—while at the same time showing on the second page other participants with the same or lower interest rates but that pay less to the Operator. Another example is if an Operator: permits a consumer to generate a presentation of ranked lender options; receives a higher fee if the consumer clicks on the top-ranked

[38] 12 CFR 1024.14(f)(1). To qualify as a ''referral,'' the oral or written action at issue need not be directed to a person that is a consumer. Rather, it might be directed to a variety of persons, such as appraisers, real estate agents, title companies and agents, lenders, mortgage brokers, or other companies that provide information in connection with settlements, such as credit reports and flood determinations. *See* 12 CFR 1024.14(b) and (f).

[39] Based on the CFPB's understanding of how consumers interact with Digital Mortgage Comparison-Shopping Platforms in the market today, the Operator will typically take action that is ''directed to a person.'' For example, if the consumer makes a request of the platform to run a search of comparison options, sort the comparison options into different categories, or use the consumer's preferences to generate or refine the comparison options, the Operator's response to the consumer's request is an action ''directed to a person,'' *i.e.,* the consumer. 12 CFR 1024.14(f)(1).

[40] *See Wilborn* v. *New Century Mortg. Corp.,* No. C 08–5044 JL, 2009 WL 10695188, at *6 (N.D. Cal. Apr. 29, 2009) (noting that RESPA section 8 in general ensures that ''fees or commissions are not kickbacks for steering business to a particular lender''); Paul Barron et al., 1 *Fed. Reg. of Real Estate & Mortgage Lending* section 2:51 (4th ed. Sept. 2022 update) (treatise excerpt explaining that the HUD CLO Policy Statement reflects HUD's concern that ''i[f] there is steering, the implication is that the settlement service provider to whom the consumer is steered is paying a referral fee'').

[41] The CFPB emphasizes that the distinction between non-neutral *use* and *presentation* of information is not binary. For example, Digital Mortgage Comparison-Shopping Platforms with more interactive elements—where consumers can sort options by different categories, indicate preferences which will affect the generation of comparison options, or generate multiple sets of comparison options—will involve both the use and presentation of information, often in rapid succession. The distinction is intended to elucidate the legal interpretation rather than suggest that there is a rigid delineation as an operational or practical matter.

lender compared with the other lenders; and segregates and highlights prominently the top-ranked option but presents the other options in very small font requiring the consumer to scroll down.[42] Another example is if the Operator labels a lender that appears within, and at or near the top of, the platform's rankings as a ''sponsored lender,'' ''featured lender,'' or similar phrase because the lender has paid for enhanced placement, but nonetheless designs the platform and displays the lender in a manner that implies the lender earned its placement within the platform's rankings based on neutral criteria. Alternatively, the Operator could list the same participant who has paid for enhanced placement multiple times in the rankings, using either the same name or an affiliated name. Another example would be where a consumer visits a Digital Mortgage Comparison-Shopping Platform and runs an initial search of comparison options which yields a ''top-ranked lender'' and other lenders, but when revisiting the platform, the consumer only sees that ''top-ranked'' lender based on the Operator and lender's agreement to show only that lender when the consumer revisits the platform. This action prevents the consumer from using the platform for comparison shopping based on neutral criteria and boosts the likelihood the consumer will choose that lender over other options.

Through all these actions, the Operator non-neutrally presents information to increase the odds that the consumer will select the lender who pays more, as opposed to other options that are similarly suitable or even better for the consumer. The HUD CLO Policy Statement recognized that these types of non-neutral presentations (which it sometimes called ''non-neutral displays'') of information on a CLO platform may constitute a referral.[43] The illustrative examples in section I.C.2 of this Advisory Opinion highlight other ways in which an Operator non-neutrally uses or presents information.

By non-neutrally using or presenting information on a Digital Mortgage Comparison-Shopping Platform, the Operator is putting a thumb on the scale. Consequently, the Operator is no longer merely providing the most basic function of a Digital Mortgage Comparison-Shopping Platform, which was identified in the HUD CLO Policy Statement—''having information about the provider's products made available to consumers for comparison with the products of other settlement service providers.''[44] Instead, the Operator is receiving payment for steering or otherwise affirmatively influencing the consumer, which constitutes a referral. This activity could also potentially implicate the Dodd-Frank Act's prohibition on unfair, deceptive, or abusive acts or practices (UDAAPs).[45]

In addition to the element of referral, a RESPA section 8(a) violation occurs when two other elements are present: a thing of value, and an agreement or understanding. Thing of value is defined in Regulation X broadly and non-exhaustively.[46] The term ''thing of value'' would include payments received by the Operator under a contractual agreement for the settlement service provider to participate on the platform where referrals are being generated for the settlement service provider. Furthermore, if the settlement service provider receives enhanced, non-neutral placement on a Digital Mortgage Comparison-Shopping Platform, there presumably would be an express agreement or understanding to pay for that enhanced placement. Even if there is not such an express agreement or understanding for the enhanced placement, because the Operator is providing the participating settlement service providers with access to a Digital Mortgage Comparison-Shopping Platform that non-neutrally uses or presents information and results in steering or other affirmative influence (as discussed above), it is likely that an agreement or understanding for referrals can be established under Regulation X through a pattern, practice, or course of conduct.[47]

b. RESPA Section 8(c)(2)

RESPA section 8(c)(2) provides that section 8 of RESPA does not prohibit ''the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed.''[48] Regulation X further clarifies RESPA section 8(c)(2). It provides that ''[i]f the payment of a thing of value bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for services or goods actually performed or provided.''[49] Regulation X also provides that ''[t]he value of a referral (*i.e.,* the value of any additional business obtained thereby) is not to be taken into account in determining whether the payment exceeds the reasonable value of such goods, facilities or services.''[50] Moreover, under Regulation X, ''[t]he fact that the transfer of the thing of value does not result in an increase in any charge made by the person giving the thing of value is irrelevant in determining whether the act is prohibited.''[51]

RESPA section 8(c)(2) does not provide a defense to payment of referral fees because referrals are not compensable services under RESPA.[52] As described above, when (1) a Digital Mortgage Comparison-Shopping Platform non-neutrally uses or presents information about one or more settlement service providers participating on the platform, (2) that non-neutral use or presentation of information has the effect of steering the consumer to use, or otherwise affirmatively influences the selection of, those settlement service providers, thus constituting referral activity, and (3) the Operator receives a payment or other thing of value that is, at least in part, for that referral activity, the Operator is receiving a payment that is not merely for compensable services. Consequently,

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[42] *See* 61 FR 29255, 29257 (June 7, 1996).

[43] *See id.* at 29258.

[44] *Id.* at 29257.

[45] 12 U.S.C. 5531, 5536(a)(1)(B).

[46] *See* 12 CFR 1024.14(d); *see also Edwards* v. *First Am. Corp.,* 798 F.3d 1172, 1179 (9th Cir. 2015) (''[A]n exchange of a 'thing of value' is used as synonymous with a payment and does not require a transfer of money.'').

[47] *See* 12 CFR 1024.14(e). Where the elements of a RESPA section 8 violation are otherwise satisfied, it is no defense that a Digital Mortgage Comparison-Shopping Platform's non-neutral use or presentation of information was allegedly the product of a complex algorithm. Operators are expected to know whether their platform uses or presents information in a non-neutral manner, even if the platform may employ complex algorithms in using or presenting the information. *See generally* Consumer Financial Protection Circular 2022–03, *Adverse Action Notification Requirements in Connection with Credit Decisions Based on Complex Algorithms,* 87 FR 35864 (June 14, 2022) (''A creditor cannot justify noncompliance with ECOA and Regulation B's requirements based on the mere fact that the technology it employs to evaluate applications is too complicated or opaque to understand.''). Moreover, when structuring or implementing a contractual agreement to participate on a Digital Mortgage Comparison-Shopping Platform that results in steering or other affirmative influence based on non-neutral criteria, settlement service providers likely would know that the Operator is non-neutrally using or presenting information.

[48] 12 U.S.C. 2607(c)(2); *accord* 12 CFR 1024.14(g)(1)(iv).

[49] 12 CFR 1024.14(g)(2); *see also O'Sullivan* v. *Countrywide Home Loans, Inc.,* 319 F.3d 732, 739 (5th Cir. 2003) (explaining that this provision ''was promulgated for the purpose of assisting courts in ferreting out kickbacks disguised as legitimate payments for goods and services in complex real estate settlement transactions'').

[50] 12 CFR 1024.14(g)(2).

[51] *Id.*

[52] *See* HUD, *Real Estate Settlement Procedures Act (RESPA): Home Warranty Companies' Payments to Real Estate Brokers and Agents,* 75 FR 36271 (June 25, 2010) (distinguishing where home warranty companies could legally pay real estate brokers for services versus where such payments were non-compensable referral fees).

the Operator is not only providing what the HUD CLO Policy Statement described as a CLO operator's compensable service of ''having information about the provider's products made available to consumers for comparison with the products of other settlement service providers'' [53] or other compensable services. Rather, as described above, the Operator is being paid, at least in part, for conduct that has the effect of steering or otherwise affirmatively influencing the consumer to select a provider on the platform. Yet, Regulation X does not permit the value of the referral to be taken into account when determining the reasonable value of the services under RESPA section 8(c)(2).[54]

In contrast, an Operator that receives payment from settlement service providers for their participation on a Digital Mortgage Comparison-Shopping Platform that both neutrally uses and neutrally presents information is receiving payment for compensable services,[55] and thus would be compliant with RESPA section 8, assuming no other facts were present that would call such RESPA section 8 compliance into question.[56]

c. HUD CLO Policy Statement

The HUD CLO Policy Statement, as noted above, cautioned that differential payments by settlement service providers (*e.g.,* lenders) participating on CLO platforms create steering incentives that could lead to RESPA violations.[57] When examining the fees received by an Operator from similarly situated settlement service providers that participate on the same Digital Mortgage Comparison-Shopping Platform, a fee differential can be evidence of an illegal referral fee arrangement. The reason is commonsensical. If the Operator receives a higher fee from one settlement service provider than another for participating on the same Digital Mortgage Comparison-Shopping Platform, and if the higher-paying settlement service provider is, in fact, also receiving enhanced placement on the platform, then it is reasonable to infer that the settlement service provider is paying for the enhanced placement on the platform rather than merely the compensable service of ''having information about the provider's products made available to consumers for comparison with the products of other settlement service providers'' [58] or other compensable services. The higher charge paid by some providers thus can be ''evidence of a violation of section 8,'' [59] absent other facts indicating that the payment is not for enhanced placement or other form of steering.

Notwithstanding the CLO Policy Statement's language about *differential* fees, if (1) a Digital Mortgage Comparison-Shopping Platform's non-neutral use or presentation of information has the effect of steering the consumer to use, or otherwise affirmatively influences the selection of, one or more settlement service providers participating on the platform, and therefore constitutes referral activity, and (2) the Operator receives a payment for including participating settlement service providers on the platform that is, at least in part, for those referrals, then the Operator's actions would violate RESPA section 8 even if the Operator were to receive the *same fee* from each provider (or from some, but not all, providers). Although the HUD CLO Policy Statement noted the potential for steering and described how a RESPA violation could occur if different settlement service providers were paying different fees for participating on the same CLO system,[60] the HUD CLO Policy Statement did not identify that scenario as the only problematic one under RESPA section 8 with respect to CLOs.[61] By steering the consumer to particular settlement service providers, even where the fees paid by those providers are the same as one another, the Operator is providing a different—and non-compensable—service from those identified as compensable under the HUD CLO Policy Statement, including ''having information about the provider's products made available to consumers for comparison with the products of other settlement service providers.'' [62] See sections I.C.2.b and I.C.2.e below for examples illustrating where a Digital Mortgage Comparison-Shopping Platform refers consumers to participating settlement service providers and where the Operator receives illegal referral fees, even if those fees do not differ among the participating providers.

The HUD CLO Policy Statement also noted that no compensable services would be present if a CLO were to list only one settlement service provider and only present basic information to the consumer on the provider's products.[63] As noted above, the HUD CLO Policy Statement described as compensable services a CLO operator's ''having information about the provider's products made available to consumers for comparison with the products of other settlement service providers.'' [64] For these particular CLO services to be compensable, a range of options must be presented to the consumer. RESPA section 8 does not require a particular numerical threshold, but in general, presenting a greater number of comparison options rather than fewer makes it less likely that the Operator is steering the consumer to one or more settlement service providers.

2. Examples of Digital Mortgage Comparison-Shopping Platforms Violating RESPA Section 8

Below are examples of Digital Mortgage Comparison-Shopping Platforms where, based on the interpretation above, the CFPB would find that there is a RESPA section 8 violation. The CFPB emphasizes that these examples are illustrative and non-exhaustive.

a. Pay To Play and Steering to Highest Bidder

In an example of conduct that would violate RESPA section 8, assume the Operator permits the consumer to input

[53] 61 FR 29255, 29257 (June 7, 1996).

[54] 12 CFR 1024.14(g)(2).

[55] As noted above, an example of a neutral presentation of information would be a platform that lists participating lenders with the lowest to highest APR in ascending order. *See supra* note 36.

[56] Similarly, advertising arrangements where actual services are being provided and reasonable payment is being received are compensable services under RESPA section 8 depending on the facts and circumstances. *See* 12 U.S.C. 2607(c)(2). *Cf.* CFPB Real Estate Settlement Procedures Act FAQs, *RESPA Section 8: Marketing Services Agreements (MSAs),* no. 2, *https://www.consumerfinance.gov/compliance/compliance-resources/mortgage-resources/real-estate-settlement-procedures-act/real-estate-settlement-procedures-act-faqs/* (explaining that ''[w]hether a particular activity is a referral or a marketing service is a fact-specific question,'' and noting that a marketing service, in contrast to a referral, ''is not directed to a person'' but instead ''is generally targeted at a wide audience''—*e.g.,* ''placing advertisements . . . in widely circulated media'' such as ''a newspaper, a trade publication, or a website'').

[57] 61 FR 29255, 29257 (June 7, 1996). As noted above, the CFPB has applied the HUD CLO Policy Statement since the CFPB's designated transfer date under the Dodd-Frank Act, and the CFPB will continue to apply the HUD CLO Policy Statement, as relevant, pending further CFPB Action. *See supra* note 23.

[58] *Id.*

[59] 12 CFR 1024.14(g)(2) (providing that fees in excess of reasonable market value can be evidence of a RESPA section 8 violation).

[60] *See* 61 FR 29255, 29257 (June 7, 1996).

[61] The CFPB also emphasizes that there is no ''market'' value to be ascribed to a referral, since a referral is not compensable under RESPA section 8. *See* 12 CFR 1024.14(g)(2) (''The value of a referral (*i.e.,* the value of any additional business obtained thereby) is not to be taken into account in determining whether the payment exceeds the reasonable value of such goods, facilities or services.'').

[62] 61 FR 29255, 29257 (June 7, 1996).

[63] *Id.* at 29256.

[64] *Id.* at 29257.

relevant information on the Digital Mortgage Comparison-Shopping Platform to aid in the consumer's search for mortgage options (*e.g.,* location, anticipated loan amount, credit score) and represents that the platform will use the information to identify the ''best match.'' Assume further that the platform presents a purported ''best match'' lender to the consumer, or ranks the lenders, but skews the results of the comparison function to ensure that the ''best match'' is the highest bidding lender participating on the platform. Such conduct would violate RESPA section 8 because here, the Operator non-neutrally uses information to preference the highest bidding lender, resulting in the Operator steering the consumer to that lender. The Operator's actions imply an endorsement by leading the consumer to believe that the Operator did an analysis behind the scenes (possibly driven by an algorithm) to determine the most suitable lender for the consumer—which thereby influences the consumer to select that lender.[65] Furthermore, for the reasons described in section I.C.1.b above, the Operator is not merely receiving a bona fide payment for services under RESPA section 8(c)(2). The CFPB notes that this example could also potentially implicate the prohibition against UDAAPs, particularly if the Digital Mortgage Comparison-Shopping Platform were to contain misrepresentations about the accuracy of the information on the platform (including about the objectivity of the rankings).[66] Deceptive misrepresentations could serve to accentuate the affirmative influence noted above.

b. Payments Only From and Promotion of Lenders Who Rotate in Top Spot

A variation of the previous scenario involves a Digital Mortgage Comparison-Shopping Platform that allows consumers to input information about their needs and then to generate lender rankings, but where all lenders participating on the platform take turns appearing in the top spot randomly or based on a predetermined schedule, *i.e.,* the rankings do not reflect a tailoring to the consumer's needs based on their inputted information. Moreover, assume that the Operator is paid by only the lender appearing in the top spot or that lenders pay in advance for the opportunity to appear in the top spot randomly or based on the predetermined schedule. This example involves a referral because a consumer would reasonably perceive that, after entering information about their needs and using the platform to call up a ranking of participating lenders, the lender appearing in the top spot would be the one determined by the Operator to be best suited to the consumer's needs, not the lender who is next in a round robin. For reasons similar to those described in section I.C.1.b, the Operator is not merely receiving a bona fide payment for services under RESPA section 8(c)(2), and this scenario likewise would also raise UDAAP concerns. The payment would be considered a referral fee even if it does not differ from the payments made by other lenders participating in the round robin.

c. Preferencing Platform Participants That Are Affiliates

In another scenario, assume that a Digital Mortgage Comparison-Shopping Platform is designed and operated in a manner that steers consumers to use settlement service providers that are affiliates of the Operator. For example, assume that a mortgage lender develops a Digital Mortgage Comparison-Shopping Platform permitting consumers to search information about and view rankings of comparable mortgage brokers and that the platform includes both affiliated and non-affiliated mortgage brokers. However, the mortgage lender/Operator manipulates the application of the ranking criteria so that its affiliated mortgage brokers appear higher than the non-affiliated mortgage brokers. The Operator receives payment for the higher ranking of affiliated mortgage brokers. In this scenario, the Operator's receipt of payments from the affiliated mortgage brokers for the higher ranking would violate RESPA section 8. A platform that preferences affiliated settlement service providers non-neutrally uses or presents information. Therefore, the Operator is affirmatively influencing the consumer's selection of the providers on the platform and is referring the consumer, and the Operator is receiving payment for the preferential treatment, *i.e.,* the referral.

This fact scenario may also implicate the RESPA section 8(c)(4) provisions regarding affiliated business arrangements.[67] Whether a particular arrangement is an affiliated business arrangement would depend on various factors, including the nature of the relationship between the parties and whether the Operator is ''in a position to refer [settlement service] business.''[68] In theory, the Operator could follow the conditions for affiliated business arrangements and then claim that the platform is permissible under RESPA section 8. However, other than payments separately permitted under RESPA section 8(c), the only ''thing of value'' persons in an affiliated business arrangement may receive is a return on ownership interest (or franchise relationship).[69] In the scenario described above, the Operator would be receiving a thing of value other than payments separately permitted under RESPA section 8(c) or a return on an ownership interest (or franchise relationship).[70] Furthermore, for reasons similar to the other examples, that payment would not be merely for compensable services under RESPA section 8(c)(2). Thus, the RESPA affiliated business arrangement provisions would not permit this arrangement.

d. Additional Services That Promote Platform Participant

In another example, assume an Operator designs a Digital Mortgage Comparison-Shopping Platform that gathers the consumer's contact information and permits the consumer to generate a ranking of lender options based on criteria selected by the consumer. The ranking reflects neutral use and display of information. Assume, further, that the Operator also contracts with one of the participating lenders

[65] An endorsement is an example of an action that exerts ''affirmative influenc[e]'' within the meaning of 12 CFR 1024.14(f)(1)'s definition of ''referral.'' *See NewDay Fin., LLC,* File No. 2015–CFPB–0004, at 6–8 (Feb. 10, 2015) (consent order), *https://files.consumerfinance.gov/f/201502_cfpb_consent-order_newday-financial.pdf*.

[66] *See* Fed. Trade Comm'n, Policy Statement on Deception (Oct. 14, 1983), *https://www.ftc.gov/legal-library/browse/ftc-policy-statement-deception*. The CFPB notes that in 2020, the Federal Trade Commission (FTC) finalized a settlement with the operator of a consumer loan comparison website, LendEDU. The FTC found that, among other deceptive conduct, LendEDU misled consumers to believe its website provided objective product information, when in fact it offered higher rankings and ratings to companies that paid for placement. *Shop Tutors, Inc.,* No. 182–3180 (F.T.C. May 21, 2020) (complaint), *https://www.ftc.gov/system/files/documents/cases/c-4719_182_3180_lendedu_complaint.pdf* (FTC LendEDU Matter).

[67] 12 U.S.C. 2607(c)(4)(A)–(C); 12 CFR 1024.15(b)(1)–(3).

[68] *See* 12 U.S.C. 2602(7) (definition of affiliated business arrangement); 12 CFR 1024.15(c) (definition of ''[p]erson who is in a position to refer settlement service business'').

[69] 12 U.S.C. 2607(c)(4)(C); 12 CFR 1024.15(b)(3).

[70] Variations of this example—such as where the Operator receives no payment from the affiliated mortgage broker for being listed on the platform but receives indirect compensation because the Operator's preferential treatment generated additional business for the affiliate—may also violate RESPA section 8 depending on the circumstances. *See, e.g.,* 12 CFR 1024.15(b)(3)(ii) through (iv) (describing exclusions from the meaning of ''a return on an ownership interest'' and when returns on ownership interests or franchise relationships under an affiliated business arrangement are not bona fide).

(which is not necessarily the top-ranked lender) to promote that lender by sending a text message or email to any consumer who uses the platform to generate a ranking of lender options, encouraging the consumer to submit an application to that lender because it would be a good fit for the consumer's needs. The promotional activity by the Operator undermines the platform's neutral presentation of information by steering the consumer to use a particular provider soon after the consumer had searched for comparison information. The Operator's promotional activity, either by itself or when combined with the effect of the Operator's action in presenting the comparison options to the consumer, affirmatively influences the consumer's selection of that lender and is a referral. For the reasons described in section I.C.1.b above, payment in exchange for the promotional activity is not merely a payment for compensable services under RESPA section 8(c)(2).[71]

e. Warm Handoff

In another example, assume the Operator of a Digital Mortgage Comparison-Shopping Platform presents comparison information on multiple lenders and uses an online long form to gather detailed information from a consumer who is browsing the platform. The consumer's information relates to the consumer's particular borrowing needs, such as credit score and target loan amount. Soon thereafter, the Operator calls the consumer to offer an immediate phone or live chat transfer to, or callback from, a lender participating on the platform and tells the consumer that they will be ''in good hands'' with that lender. However, the lender that receives the lead is merely the first lender to respond to the Operator's push notification alerting a network of lenders that a consumer is available for an immediate transfer, rather than a lender the Operator identified as meeting the consumer's needs based on the consumer's inputted information. The sequence of events described above is one variation of a lead generation practice that industry stakeholders sometimes call a ''warm handoff'' or ''live transfer.''[72] Through its enforcement activity, the CFPB has identified other examples of so-called ''warm handoff'' or ''live transfer'' activity that led to RESPA section 8 violations.[73]

In this example, the Operator's actions convey to the consumer an implied endorsement of the lender when the Operator tells the consumer that they will be ''in good hands'' with that lender. Further, regardless of the specific words used when the transfer occurs, a consumer who inputs detailed information to the Operator immediately before a transfer to a lender would reasonably infer that the consumer is being connected to the lender that best meets their needs. Moreover, the first lender to respond to the push notification receives the lead exclusively; HUD identified exclusivity as a relevant factor in determining whether a referral arrangement is present.[74] Therefore, the Operator's actions exert affirmative influence and constitute a referral. An Operator that receives payment for a warm handoff is not merely receiving payment for a compensable service, for the reasons described in section I.C.1.b above. The payment also would be considered a referral fee even if it does not differ among the providers participating in the warm transfer process.

3. Other Applicable Laws

The design, operation, and payments associated with Digital Mortgage Comparison-Shopping Platforms may implicate other Federal and State laws and regulations. As noted above, if an Operator makes false or misleading representations about the objectivity or veracity of the information presented on the platform, it may violate the Dodd-Frank Act prohibition on UDAAPs.[75] Operators may also be subject to laws and regulations that include, without limitation, 12 CFR part 1026 (Regulation Z); 12 CFR part 1008 (Regulation H) and State laws regarding licensing of mortgage originators; State laws imposing restrictions on referral fees and unearned fees;[76] 12 CFR part 1002 (Regulation B), which implements the Equal Credit Opportunity Act; and the Telemarketing Sales Rule.[77] Additional laws and regulations that may apply include the Federal Trade Commission Act,[78] the Telephone Consumer Protection Act,[79] and applicable Federal and State privacy laws. The CFPB's enforcement activity has also focused on the applicability of the Fair Credit Reporting Act in lead generation scenarios involving trigger leads.[80]

II. Regulatory Matters

This Advisory Opinion is an interpretive rule issued under the CFPB's authority to interpret RESPA and Regulation X, including under section 1022(b)(1) of the Consumer Financial Protection Act of 2010, which authorizes guidance as may be necessary or appropriate to enable the CFPB to administer and carry out the purposes and objectives of Federal consumer financial laws.[81]

By operation of RESPA section 19(b), no provision of RESPA or the laws of any State imposing any liability applies to any act done or omitted in good faith in conformity with this interpretive rule, notwithstanding that after such act or omission has occurred, the interpretive rule is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.[82]

The CFPB has determined that this Advisory Opinion does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.[83]

Pursuant to the Congressional Review Act,[84] the CFPB will submit a report containing this interpretive rule and other required information to the United

[71] Regulation X provides that when a person in a position to refer settlement service business receives a payment for providing additional settlement services as part of a real estate transaction, such payment must be for services that are actual, necessary, and distinct from the primary services provided by such person. 12 CFR 1024.14(g)(3); *see also* 12 CFR 1024.15(c) (''person who is in a position to refer settlement service business'' includes mortgage brokers). In this example, the Operator, who may be a mortgage broker, is providing a promotional ''service'' that is not actual, necessary, and distinct from the Operator's comparison function (*i.e.,* its primary service).

[72] Variations of this example, including where the Operator makes a ''warm handoff'' of a consumer to a lender that is not displayed to the consumer on the platform, may also violate RESPA section 8.

[73] *See, e.g., Planet Home Lending, LLC,* File No. 2017–CFPB–0007, at 4–5 (Jan. 31, 2017) (consent order) (Planet Home Order), *https://files.consumerfinance.gov/f/documents/201701_cfpb_PlanetHomeLending-consent-order.pdf.*

[74] *See* HUD, *Real Estate Settlement Procedures Act (RESPA): Home Warranty Companies' Payments to Real Estate Brokers and Agents Interpretive Rule: Response to Public Comments,* 75 FR 74620, 74621 (Dec. 1, 2010).

[75] 12 U.S.C. 5531, 5536(a)(1)(B); *see also* FTC LendEDU Matter; CFPB Bulletin 2022–05: *Unfair and Deceptive Acts or Practices That Impede Consumer Reviews,* 87 FR 17143 (Mar. 28, 2022); Consumer Financial Protection Circular 2022–02: *Deceptive Representations Involving the FDIC's Name or Logo or Deposit Insurance,* 87 FR 35866 (June 14, 2022).

[76] *See generally* 1 Barron 2:59 (''Prohibition against referral fees and unearned fees—State prohibitions against referral fees and unearned fees'').

[77] 16 CFR part 310, which was issued under the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. 6101 *et seq.*

[78] 15 U.S.C. 41 *et seq.; see also* FTC LendEDU Matter.

[79] 47 U.S.C. 227.

[80] *See* Planet Home Order, at 6–7.

[81] 12 U.S.C. 5512(b)(1); *see also* 12 U.S.C. 2617(a).

[82] 12 U.S.C. 2617(b); *see also* 12 CFR 1024.4.

[83] 44 U.S.C. 3501 through 3521.

[84] 5 U.S.C. 801 *et seq.*

States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to the rule's published effective date. The Office of Information and Regulatory Affairs has designated this interpretive rule as not a ''major rule'' as defined by 5 U.S.C. 804(2).

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2023–02910 Filed 2–10–23; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–1078; Project Identifier AD–2020–00716–A; Amendment 39–22324; AD 2023–02–17]

RIN 2120–AA64

Airworthiness Directives; Textron Aviation Inc. (Type Certificate Previously Held by Cessna Aircraft Company) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Textron Aviation Inc. (type certificate previously held by Cessna Aircraft Company) (Textron) Model 210N, 210R, P210N, P210R, T210N, T210R, 177, 177A, 177B, 177RG, and F177RG airplanes. This AD was prompted by the in-flight break-up of a Model T210M airplane in Australia, due to fatigue cracking that initiated at a corrosion pit, and subsequent corrosion reports on other Model 210- and 177-series airplanes. This AD requires visual and eddy current inspections of the carry-thru spar lower cap for corrosion, cracking, and damage; corrective action if necessary; application of a protective coating and corrosion inhibiting compound (CIC); and reporting the inspection results to the FAA. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective March 20, 2023.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of March 20, 2023.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* by searching for and locating Docket No. FAA–2020–1078; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

- For service information identified in this final rule, contact Textron Aviation Inc., One Cessna Boulevard, Wichita, KS 67215; phone: (316) 517–6061; email: *structures@txtav.com;* website: *support.cessna.com.*
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (817) 222–5110. It is also available at *regulations.gov* by searching for and locating Docket No. FAA–2020–1078.

FOR FURTHER INFORMATION CONTACT: Bobbie Kroetch, Aviation Safety Engineer, Wichita ACO Branch, FAA, 1801 Airport Road, Wichita, KS 67209; phone: (316) 946–4155; email: *bobbie.kroetch@faa.gov* or *Wichita-COS@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all Textron Model 210N, 210R, P210N, P210R, T210N, T210R, 177, 177A, 177B, 177RG, and F177RG airplanes. The NPRM published in the **Federal Register** on May 11, 2021 (86 FR 25812).

The NPRM was prompted by a report that, on May 26, 2019, a Textron Model T210M airplane experienced an in-flight breakup while performing low-altitude aerial survey operations in Australia. The carry-thru spar failed and resulted in wing separation and loss of control of the airplane. A visual examination of the fracture surface identified fatigue cracking that initiated at a corrosion pit. The FAA issued an airworthiness concern sheet (ACS) on June 27, 2019, advising owners and operators of the accident and requesting relevant information about the fleet.

Following the ACS, the FAA received reports of widespread and severe corrosion of the carry-thru spar. Earlier Model 210G, T210G, 210H, T210H, 210J, T210J, 210K, T210K, 210L, T210L, 210M, and T210M airplanes experienced the most widespread and severe corrosion, and the FAA issued AD 2020–03–16, Amendment 39–21029 (85 FR 10043, February 21, 2020) (AD 2020–03–16) as an immediately adopted rule (Final Rule; Request for Comments) to address the unsafe condition on those airplanes.

The FAA also received reports of corrosion on later Model 210N, P210N, T210N, 210R, P210R, and T210R airplanes and Model 177-series airplanes. On Model 210N, P210N, T210N, 210R, P210R, and T210R airplanes, the upper surface of the carry-thru spar is covered by fuselage skin and is not exposed to the environment. This removes the leak paths at the skin splices common to the earlier Model 210-series airplanes and reduces the potential for moisture intrusion. Additionally, the later Model 210-series airplanes were manufactured with zinc chromate primer applied to all carry-thru spars. However, the later Model 210-series airplanes were also delivered with foam installed along the carry-thru spar lower cap. The foam traps moisture against the lower surface of the carry-thru spar cap, which can aid in the development of corrosion.

The Model 177-series airplanes share a similar carry-thru spar design with the earlier Model 210-series airplanes: The upper surface of the carry-thru spars are exposed, and the carry-thru spars might not have been delivered with zinc chromate primer applied. Although Model 177-series airplanes were not delivered with foam padding installed on the lower surface of the carry-thru spar, corrosion has been reported on the carry-thru spar lower cap for these airplanes. Corrosion of the carry-thru spar lower cap can lead to fatigue cracking or reduced structural strength of the carry-thru spar, which, if not addressed, could result in wing separation and loss of control of the airplane.

In the NPRM, the FAA proposed to require visual and eddy current inspections of the carry-thru spar lower cap for corrosion, cracking, and damage; corrective action if necessary; application of a protective coating and CIC; and reporting the inspection results to the FAA. The FAA is issuing this AD to address the unsafe condition on these products.

Discussion of Final Airworthiness Directive

Comments

The FAA received comments from 124 commenters. The majority of comments were from individuals. Organizations submitting comments included the Aircraft Owners and Pilots Association (AOPA), Aviation Plus LLC,

Tab 23

Bulletin 2023-01: Unfair Billing and Collection Practices After Bankruptcy Discharges of Certain Student Loan Debts, 88 Fed. Reg. 17366 (Mar. 23, 2023).

CFPB Heightens Scrutiny of Unlawful Collection of Payments on Discharged Student Loans

English

Español (cfpb.gov/about-us/newsroom/la-cfpb-intensifica-su-escrutinio-de-la-cobranza-ilegal-de-pagos-sobre-prestamos-estudiantiles-descargados/)

CFPB examiners found servicers engaging in unfair practices in trying to collect on loans discharged in bankruptcy

MAR 16, 2023

WASHINGTON, D.C. – Today, the Consumer Financial Protection Bureau (CFPB) released a bulletin warning servicers of their obligation to halt unlawful conduct with respect to private student loans that have been discharged by bankruptcy courts. The bulletin details recent findings by CFPB examiners that certain loan servicers were illegally returning loans to collections after bankruptcy courts had discharged the loans. The CFPB is directing these servicers to return illegally collected payments to affected consumers and immediately cease these unlawful collection tactics. The bulletin also makes clear that the CFPB will continue to examine student loan servicers' handling of these loans to detect whether these illegal practices persist at other companies.

"When a court orders the discharge of a loan, lenders and servicers should not treat this as a suggestion," said CFPB Director Rohit Chopra. "The CFPB has found that some servicers are ignoring bankruptcy court orders. The student loan servicing industry should ensure that their collection practices are compliant with the law."

Warning Servicers Against Collecting Discharged Debt

The bulletin details unfair practices observed by CFPB examiners in reviews of the way certain student loan servicers handled private loan accounts when consumers received loan discharges through bankruptcy court orders. The bulletin also makes clear that the CFPB will continue to examine servicer handling of these loans, and puts the servicing industry on notice that the CFPB intends to take action where it finds that servicers are collecting on debts that have been discharged.

Although many student loans are subject to an "undue hardship" standard and require a separate proceeding to be discharged in bankruptcy, some private student loans can be discharged in a standard bankruptcy proceeding, just like most other unsecured consumer debts. For this subset of private student loans, a bankruptcy discharge order eliminates the consumer's debt.

Some examples of student loans eligible for standard bankruptcy discharge include:

- Loans made to attend schools that are not eligible to receive U.S. Federal student aid, such as unaccredited schools and foreign schools ("non-Title IV schools")
- Loans to students attending school less than half-time
- Loans made in amounts in excess of the cost of attendance, which are often disbursed directly to the borrower, instead of the school
- Loans made to cover fees and living expenses incurred while studying for the bar exam or other professional exams
- Loans made to cover fees, living expenses, and moving costs associated with medical or dental residency
- Other loans made for non-qualified higher education expenses

Unfair Practices in Collecting Discharged Student Loans

CFPB examiners identified student loan servicers who failed to distinguish between education loans that are discharged in a standard bankruptcy proceeding and loans that are not. As a result, servicers improperly sought to collect on loans that had been discharged by bankruptcy courts. The CFPB found that, when faced with continued collection activities in violation of bankruptcy court orders, many borrowers continued to make payments, sometimes paying thousands of dollars on debts that they no longer owed. These supervisory findings build on previous work from 2014, when the CFPB found that student loan servicers deceptively told borrowers that their loans were not dischargeable in bankruptcy even though the Bankruptcy Code does allow for discharge.

The CFPB intends to continue to hold industry accountable for these illegal collection practices. The CFPB expects servicers to proactively identify student loans that are discharged via standard bankruptcy orders, permanently cease collections, and refund any consumers who have been affected by unlawful collections in the past.

Read today's bulletin, *Unfair Billing and Collection Practices After Bankruptcy Discharges of Certain Student Loan Debt.* (cfpb.gov/compliance/supervisory-guidance/cfpb-bulletin-2023

-01-unfair-billing-and-collection-practices-after-bankruptcy-discharges-of-certain-student-loan-debts/)

Consumers having an issue with a consumer financial product or service can submit a complaint with the CFPB online (cfpb.gov/complaint/) or by calling (855) 411-CFPB (2372).

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit www.consumerfinance.gov (http://www.consumerfinance.gov/).

Topics

- **STUDENT LOANS** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=STUDENT-LOANS)

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Area of Application. Survey area plus:

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Hagerstown-Martinsburg-Chambersburg

Survey Area

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Pennsylvania:
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West Virginia:
Berkeley

Area of Application. Survey area plus:

Maryland:
Allegany
Garrett
Pennsylvania:
Fulton
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Harrisonburg
Winchester
Virginia (counties):
Frederick
Page (Does not include the Shenandoah National Park portion)
Rockingham (Does not include the Shenandoah National Park portion)
Shenandoah
West Virginia:
Hampshire
Hardy
Mineral
Morgan

* * * * *

Virginia

Norfolk-Portsmouth-Newport News-Hampton

Survey Area

Virginia (cities):
Chesapeake
Hampton
Newport News
Norfolk
Poquoson
Portsmouth
Suffolk
Virginia Beach
Williamsburg
Virginia (counties):
Gloucester
James City
York
North Carolina:
Currituck

Area of Application. Survey area plus:

Virginia (city):
Franklin
Virginia (counties):
Accomack
Isle of Wight
Mathews
Northampton
Southampton
Surry
North Carolina:
Camden
Chowan
Gates
Pasquotank
Perquimans
Maryland:
Assateague Island part of Worcester

Richmond

Survey Area

Virginia (cities):
Colonial Heights
Hopewell
Petersburg
Richmond
Virginia (counties):
Charles City
Chesterfield
Dinwiddie
Goochland
Hanover
Henrico
New Kent
Powhatan
Prince George

Area of Application. Survey area plus:

Virginia (cities):
Charlottesville
Emporia
Virginia (counties):
Albemarle (Does not include the Shenandoah National Park portion)
Amelia
Brunswick
Buckingham
Caroline
Charlotte
Cumberland
Essex
Fluvanna
Greene (Does not include the Shenandoah National Park portion)
Greensville
King and Queen
King William
Lancaster
Louisa
Lunenberg
Mecklenburg
Middlesex
Nelson
Northumberland
Nottoway
Orange
Prince Edward
Richmond
Sussex
Westmoreland

Roanoke

Survey Area

Virginia (cities):
Radford
Roanoke
Salem
Virginia (counties):
Botetourt
Craig
Montgomery
Roanoke

Area of Application. Survey area plus:

Virginia (cities):
Bedford
Buena Vista
Clifton Forge
Covington
Danville
Galax
Lexington
Lynchburg
Martinsville
South Boston
Staunton
Waynesboro
Virginia (counties):
Alleghany
Amherst
Appomattox
Augusta (Does not include the Shenandoah National Park portion)
Bath
Bedford
Bland
Campbell
Carroll
Floyd
Franklin
Giles
Halifax
Henry
Highland
Patrick
Pittsylvania
Pulaski
Rockbridge
Wythe

* * * * *

[FR Doc. 2023–05816 Filed 3–22–23; 8:45 am]

BILLING CODE 6325–39–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Chapter X

Bulletin 2023–01: Unfair Billing and Collection Practices After Bankruptcy Discharges of Certain Student Loan Debts

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Compliance bulletin and policy guidance.

SUMMARY: The Consumer Financial Protection Bureau (CFPB) is issuing this Compliance Bulletin and Policy Guidance (Bulletin) to address the treatment of certain private student

loans (student loans) following bankruptcy discharge. In order to secure a discharge of ''qualified education loans'' in bankruptcy, borrowers must demonstrate that the loans would impose an undue hardship if not discharged. Student loans that are not ''qualified education loans'' (non-qualified student loans), however, are discharged under standard bankruptcy discharge orders. In recent supervisory work, CFPB examiners identified servicers that did not determine whether education loans were qualified or non-qualified. As a result, servicers improperly returned non-qualified education loans to repayment after a bankruptcy concluded and continued to bill and collect payments on the loans, even though the borrowers' bankruptcy discharges released them from these debts. This conduct violated the Consumer Financial Protection Act's (CFPA's) prohibition on unfair, deceptive, or abusive acts or practices. CFPB examiners directed the servicers to cease collection of discharged loans and take remedial action, which includes conducting a multi-year lookback and issuing refunds to affected consumers. In its oversight, the CFPB will pay particular attention to servicers' practices in connection with student loans that are the subject of bankruptcy discharge orders, including whether discharged debts are being collected contrary to bankruptcy court orders.

DATES: This bulletin is applicable on March 23, 2023.

FOR FURTHER INFORMATION CONTACT: Miya Tandon, Counsel, Office of Supervision Policy, at 202–695–4901; Matt Liles, Senior Counsel, Office of Supervision Policy, at 202–701–3828. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

After a debtor files for bankruptcy, a judge issues an order of discharge that releases a debtor from personal liability for all debts unless they are exempted. Some types of student loans are not discharged by general orders of discharge and receive special treatment under section 523(a)(8) of the Bankruptcy Code. Borrowers with these obligations must prove the debt would impose an undue hardship if not discharged. The Bankruptcy Code identifies these debts as:

a. Loans that are made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution;

b. Loans that meet the definition of a ''qualified education loan,'' as defined in section 221(d)(1) of the Internal Revenue Code of 1986; [1] or

c. Obligations to repay funds received as an educational benefit, scholarship, or stipend.[2]

The Internal Revenue Code specifies that qualified education loans are those that are incurred:

1. Solely to pay for the cost of attendance less scholarships or certain other payments;

2. At institutions eligible to participate in Federal student aid programs under Title IV of the Higher Education Act of 1965; and

3. While attending at least half-time.[3]

In practice, the majority of student loans meet one of the criteria for special treatment under the Bankruptcy Code, and therefore, are not discharged by a general order of discharge.[4] Importantly, however, some loans for educational purposes that borrowers may think of as ''private student loans'' are not exempt from the general order of discharge,[5] including:

- Loans made to attend non-Title IV schools (that is, schools that are not permitted to process U.S. Federal student aid, such as unaccredited schools and foreign schools); [6]
- Loans made to cover fees and living expenses incurred while studying for the bar exam or other professional exams; [7]
- Loans made to cover fees, living expenses, and moving costs associated with medical or dental residency;
- Loans made in amounts in excess of the cost of attendance; [8]
- Loans to students attending school less than half-time; [9] and
- Other loans made for non-qualified higher education expenses.[10]

Any private loans in these categories are discharged by standard bankruptcy discharge orders, just like most other unsecured consumer debts.[11] In addition to not fitting the definition of ''qualified education loan,'' these loans are not made, insured, or guaranteed by a governmental unit, and are not educational benefits, scholarships, or stipends. The obligations at issue here are originated as loans requiring repayment; educational benefits, scholarships, and stipends, in contrast, are grants, where repayment is only triggered if the student fails to meet a condition of the grant. Indeed, the Second, Fifth, and Tenth Circuits—the only circuits to analyze the issue fully—have held that the educational benefit exclusion does not apply to student loans.[12]

II. Unfair Acts or Practices in Handling Student Loans Post-Bankruptcy

The CFPB has authority to conduct oversight of student loan servicing, including by citing servicers for unfair, deceptive, or abusive acts or practices.[13] Congress defined an unfair act or practice as one that:

(A) Causes or is likely to cause substantial injury to consumers which is not reasonably avoidable, and

(B) Such substantial injury is not outweighed by countervailing benefits to consumers or to competition.[14]

Through its supervisory activities, CFPB examiners found that servicers of various types of student loans failed to maintain policies or procedures for distinguishing between loan types that are discharged in the regular course of a bankruptcy proceeding (generally, non-qualified education loans) and loan types that require consumers to initiate

[1] 11 U.S.C. 523(a)(8).

[2] 11 U.S.C. 523(a)(8)(A)(ii).

[3] 26 U.S.C. 221(d)(1).

[4] For example, the majority of student loans are Federal loans made or insured under title IV of the Higher Education Act. *See* Report of the CFPB Education Loan Ombudsman, *https://files.consumerfinance.gov/f/documents/cfpb_education-loan-ombudsman_report_2022-10.pdf* (Oct. 2022), pp. 7–8.

[5] *See, e.g., In re McDaniel,* 590 B.R. 537, 545 (Bankr. D. Colo. 2018) (noting that merely labeling a product a ''student loan'' does not subject it to the undue hardship standard); *Homaidan* v. *Sallie Mae, Inc.,* 3 F.4th 595, 605 (2d Cir. 2021); *In re McDaniel,* 973 F.3d 1083, 1092 (10th Cir. 2020); *In re Crocker,* 941 F.3d 206 (5th Cir. 2019), as revised (Oct. 22, 2019).

[6] *See Crocker,* 941 F.3d at 217–18 (noting that qualified educational expenses must be used to attend an ''eligible educational institution,'' which section 25A(f)(2) of the Internal Revenue Code defines as eligible to participate in Title IV programs).

[7] *Id.* (bar study loan subject to standard bankruptcy discharge); *see also In re Campbell,* 547 B.R. 49, 61 (Bankr. E.D.N.Y. 2016).

[8] 26 U.S.C. 221(d)(2) (limiting a qualified educational expense to ''the cost of attendance''); *see, e.g., Homaidan,* 3 F.4th at 599 (affirming discharge of loans made in excess of the cost of attendance).

[9] *See* 26 U.S.C. 221(d)(1)(C) (defining a ''qualified education loan'' as a loan made to an ''eligible student''); 20 U.S.C. 1091(b)(3) (defining ''eligible student'' as someone attending at least half-time).

[10] 26 U.S.C. 221(d)(1) (requiring a qualified education loan only be used to pay ''qualified higher education expenses'').

[11] *See, e.g., Homaidan,* 3 F.4th at 605; *McDaniel,* 973 F.3d at 1092; *Crocker,* 941 F.3d at 206.

[12] *See Homaidan,* 3 F.4th at 604–05; *McDaniel,* 973 F.3d at 1092; Crocker, 941 F.3d at 224.

[13] *See* title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010) (establishing the CFPB's authority). Under the Dodd-Frank Act, all covered persons or service providers are prohibited from committing unfair, deceptive, or abusive acts or practices in violation of the Act.

[14] 12 U.S.C. 5531(c)(1).

an adversarial proceeding and meet the ''undue hardship'' standard to receive bankruptcy relief. Some servicers relied entirely on loan holders to distinguish among the loans and did not determine whether holders had in fact done so. Nor did they take any other steps to evaluate whether or not the loans were qualified education loans. Consequently, examiners identified accounts where servicers, following a bankruptcy involving non-qualified education loans, resumed collecting on loans that had been discharged by bankruptcy courts.

CFPB examiners determined that student loan servicers engaged in an unfair act or practice, in violation of the Dodd-Frank Act, when they resumed collection of debts that were discharged by bankruptcy courts.[15] The conduct caused or was likely to cause substantial injury to consumers because the representations made to consumers in billing statements and other collection attempts were likely to result in consumers making payments they did not owe. In fact, CFPB examiners also observed that after exiting bankruptcy and being presented with bills from their student loan servicers, most borrowers made payments toward the debts, sometimes paying thousands of dollars on discharged debts. Since the consumers could not control the servicers' actions, consumers could not reasonably avoid the injury. Lastly, the substantial injury was not outweighed by countervailing benefits to consumers or competition, as there was no value to consumers or competition in servicers collecting debts that had already been discharged by operation of bankruptcy court orders.

In addition to directing the servicers to revise their policies and procedures to prevent the collection of discharged loans, CFPB examiners directed them to do a multi-year lookback resulting in refunds to affected borrowers.[16]

[15] Depending on the facts and circumstances, returning consumers to repayment status on debts discharged in bankruptcy may also implicate deceptive or abusive acts or practices, or other unfair acts or practices under the CFPA, sections 1031, 1036; 12 U.S.C. 5531, 5536.

[16] In addition, CFPB examiners have separately cited student loan servicers for deceptive conduct that violates the CFPA when the servicers misrepresented to consumers that student loans are never dischargeable in bankruptcy or conveyed to consumers that their loans are not dischargeable because those consumers have completed bankruptcy. *Supervisory Highlights, Fall 2014,* section 2.5.5, *https://files.consumerfinance.gov/f/201410_cfpb_supervisory-highlights_fall-2014.pdf* and *Supervisory Highlights, Fall 2015,* section 2.5.3, *https://files.consumerfinance.gov/f/201510_cfpb_supervisory-highlights.pdf.*

III. Supervision and Enforcement

The CFPB's supervisory observations and consumer complaints show that servicers continued to make collection attempts on student loans that were discharged through bankruptcy in many instances. This conduct violates Federal consumer financial law.[17] The CFPB expects servicers to proactively identify student loans that are discharged without an undue hardship showing and permanently cease collections following a standard bankruptcy discharge order. The CFPB is prioritizing student loan servicing oversight work in deploying its supervision and enforcement resources in the coming year, including a focus on evaluating whether lenders and servicers cease collection of student loans once they have been discharged.[18]

In its student loan servicing oversight work, the CFPB plans to pay particular attention to:

a. Whether student loan servicers continue to collect on loans that are discharged by a bankruptcy discharge order;

b. Whether servicers and loan holders have adequate policies and procedures to identify loans that are discharged by a bankruptcy discharge order and loans that require the borrower to go through an adversarial proceeding to demonstrate that they meet the undue hardship standard; and

c. Whether servicers provide accurate information to borrowers about the status of their loans and the protections that bankruptcy offers.[19]

In exercising its supervisory and enforcement discretion, the CFPB will consider the extent to which entities engage in proactive review and remediation. For example, where servicers or loan holders identify errors, they can expand their analysis to include a review of all accounts exiting bankruptcy going back to their earliest available data and provide full remediation where they wrongfully collected from any borrower. In addition, servicers can proactively categorize loans based on whether they can be discharged, so their policies and procedures do not require individual determinations at the time of bankruptcy. In future supervisory and enforcement work, the CFPB will assess servicers' processes and determine whether necessary remediation was adequate to compensate borrowers for the errors.

[17] Practices of this kind might also violate State laws, including State prohibitions on unfair or deceptive practices and State student loan servicing statutes.

[18] To the extent that continued attempts to collect result in improper accrual and collection of interest on discharged education loans, such practices may result in the provision of any report of examination or related information identifying possible tax law noncompliance to the Commissioner of Internal Revenue, per 12 U.S.C. 5514(b)(6).

[19] This list is not exhaustive. The CFPB may also scrutinize additional practices related to discharged student loans.

IV. Conclusion

The CFPB will continue to review closely the practices of student loan servicers for potential unfair, deceptive, or abusive acts or practices. Examiners will determine whether servicers of private student loans return loans to repayment status after a standard bankruptcy discharge has released the borrowers from these debts. The CFPB will use all appropriate tools, including its supervisory authority, enforcement authority, and referrals to State and other Federal authorities where appropriate to hold entities accountable if they engage in unfair, deceptive, or abusive acts or practices in connection with these bankruptcy-related practices.

V. Regulatory Requirements

This is a general statement of policy under the Administrative Procedure Act (APA). It is intended to provide information regarding the CFPB's general plans to exercise its supervisory and enforcement discretion for institutions under its jurisdiction and does not impose any legal requirements on external parties, nor does it create or confer any substantive rights on external parties that could be enforceable in any administrative or civil proceeding. Because no notice of proposed rulemaking is required in issuing the Bulletin, the Regulatory Flexibility Act also does not require an initial or final regulatory flexibility analysis. The CFPB has also determined that the issuance of the Bulletin does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2023–06002 Filed 3–22–23; 8:45 am]

BILLING CODE 4810–AM–P

Tab 24

Statement of Policy Regarding Prohibition on Abusive Acts or Practices, 88 Fed. Reg. 21883 (Apr. 12, 2023).

CFPB Issues Guidance to Address Abusive Conduct in Consumer Financial Markets

English

Español (cfpb.gov/about-us/newsroom/la-cfpb-emite-directrices-para-enfrentar-conductas-abusivas-en-los-mercados-financieros/)

Policy statement details post-financial crisis prohibition on illegal abusive conduct

APR 03, 2023

WASHINGTON, D.C. – Today, the Consumer Financial Protection Bureau (CFPB) issued a policy statement that explains the legal prohibition on abusive conduct in consumer financial markets and summarizes over a decade of precedent. The CFPB leads enforcement and supervision efforts to identify and end abusive conduct against consumers. In 2010, in response to the financial crisis, Congress passed the Consumer Financial Protection Act, and created the prohibition on abusive conduct. The Act tasks the CFPB, federal banking regulators, and states with the responsibility to enforce the prohibition, and puts the CFPB in charge of administering it. The policy statement will assist consumer financial protection enforcers in identifying wrongdoing, and will help firms avoid committing abusive acts or practices.

"In response to the predatory mortgage lending practices that drove the financial crisis, Congress banned abusive conduct in consumer financial markets," said CFPB Director Rohit Chopra. "The CFPB issued today's guidance to provide an analytical framework to help federal and state agencies hold companies accountable when they violate the law and take advantage of families."

The CFPB has long pursued lawbreakers for abusive conduct. Since the passage of the Consumer Financial Protection Act, the CFPB has brought 43 cases, and examiners have issued numerous citations, alleging abusive conduct. The claims have ranged from predatory student lending practices to charging consumers costly surprise overdraft fees. Today's policy statement builds on the agency's actions as well as summarizes for the market, in clear and simple terms, the meaning of the statutory prohibition on abusive conduct.

Policy statements provide background information about laws the CFPB administers and articulate how the CFPB will exercise its authorities, but they do not impose new legal requirements. In 1980 and 1983, respectively, the Federal Trade Commission issued policy statements on both the unfair (https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness) and deceptive (https://www.ftc.gov/legal-library/browse/ftc-policy-statement-deception) practices prohibitions. Similarly, today's guidance summarizes precedent and establishes a framework to help federal and state enforcers identify when companies engage in abusive conduct.

In this policy statement, the CFPB sets forth how abusive conduct generally includes (1) obscuring important features of a product or service or (2) leveraging certain circumstances –including gaps in understanding, unequal bargaining power, or consumer reliance–to take unreasonable advantage. In particular, the statement describes how the use of dark patterns, set-up-to-fail business models like those observed before the mortgage crisis, profiteering off captive customers, and kickbacks and self-dealing can be abusive.

Read the Statement of Policy Regarding Prohibition on Abusive Acts or Practices (cfpb.gov/compliance/supervisory-guidance/policy-statement-on-abusiveness/).

The policy statement will be published in the *Federal Register*, and the public will have until July 3, 2023 to submit their comments.

Read Director Chopra's remarks on the policy statement. (cfpb.gov/about-us/newsroom/director-chopra-remarks-at-the-university-of-california-irvine-law-school/)

Watch Director Chopra's remarks. (https://www.youtube.com/watch?v=P4SNQc_U6aU)

Consumers can submit complaints about financial products or services by visiting the CFPB's website (cfpb.gov/complaint/) or by calling (855) 411-CFPB (2372).

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit www.consumerfinance.gov (http://www.consumerfinance.gov/).

Topics

- DECEPTIVE PRACTICES (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=DECEPTIVE-PRACTICES)
- ENFORCEMENT (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=ENFORCEMENT)

- ADVANCED TECHNOLOGY (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=ADVANCED-TECHNOLOGY)
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Rules and Regulations

Federal Register
Vol. 88, No. 70
Wednesday, April 12, 2023

CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Chapter X

[Docket No. CFPB–2023–0018]

Statement of Policy Regarding Prohibition on Abusive Acts or Practices

AGENCY: Consumer Financial Protection Bureau.

ACTION: Policy statement; request for comment.

SUMMARY: The Consumer Financial Protection Act of 2010 (CFPA) prohibits any ''covered person'' or ''service provider'' from ''engag[ing] in any unfair, deceptive, or abusive act or practice'' and defines abusive conduct. An abusive act or practice: materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service, or takes unreasonable advantage of a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service, the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service, or the reasonable reliance by the consumer on a covered person to act in the interests of the consumer. Since the enactment of the CFPA, government enforcers and supervisory agencies have taken dozens of actions to condemn prohibited abusive conduct. This policy statement summarizes those actions and explains how the Consumer Financial Protection Bureau (CFPB) analyzes the elements of abusiveness through relevant examples, with the goal of providing an analytical framework to fellow government enforcers and supervisory agencies and to the market for how to identify violative acts or practices. While not required under the Administrative Procedure Act, the CFPB is opting to collect comments on the policy statement and may make revisions as appropriate after reviewing feedback received.

DATES: This policy statement is applicable as of April 12, 2023. Comments must be received by July 3, 2023.

ADDRESSES: You may submit comments, identified by Docket No. CFPB–2023–0018, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: 2023-AbusivenessPolicyStatement@cfpb.gov.* Include Docket No. CFPB–2023–0018 in the subject line of the message.
- *Mail/Hand Delivery/Courier:* Comment Intake—Statement of Policy Regarding Prohibition on Abusive Acts or Practices, c/o Legal Division Docket Manager, Consumer Financial Protection Bureau, 1700 G Street NW, Washington, DC 20552. Because paper mail in the Washington, DC area and at the CFPB is subject to delay, commenters are encouraged to submit comments electronically.

Instructions: The CFPB encourages the early submission of comments. All submissions must include the document title and docket number. In general, all comments received will be posted without change to *https://www.regulations.gov.* All submissions, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Proprietary information or sensitive personal information, such as account numbers or Social Security numbers, or names of other individuals, should not be included. Submissions will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Bradley Lipton, Senior Counsel, Legal Division, at 202–435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In 2010, Congress passed the Consumer Financial Protection Act of 2010 (CFPA) and banned abusive conduct.[1] The CFPA's prohibition on abusive conduct was the most recent instance of congressional tailoring of the Federal prohibitions intended to ensure fair dealing and protect consumers and market participants in the United States.[2]

Since the beginning of the 20th century, Congress has amended these prohibitions in response to evolving norms, economic events, and judicial interpretations, guiding those tasked with enforcing the law. Beginning with the creation of the Federal Trade Commission, and the development of the ''unfair methods of competition''[3] and ''unfair or deceptive acts or practices''[4] prohibitions, Congress has

[1] CFPA section 1036(a)(1)(B), 12 U.S.C. 5536(a)(1)(B). In CFPA section 1031, Congress prohibited covered persons and services providers from committing or engaging in unfair, deceptive, or abusive acts or practices in connection with the offering or provision of consumer financial products or services. CFPA section 1031(d) sets forth the general standard for determining whether an act or practice is abusive. *See* 12 U.S.C. 5531(d).

[2] *See, e.g., FTC* v. *Standard Educ. Soc'y,* 86 F.2d 692, 696 (2d Cir. 1936), *rev'd in part on other grounds,* 302 U.S. 112, 116 (1937) (describing the congressional prohibitions intended to regulate methods of fair dealing in the marketplace). Certain other Federal consumer financial laws, including the Fair Debt Collection Practices Act (FDCPA) and the Home Ownership and Equity Protection Act (HOEPA), reference either the term ''abusive'' or ''abuse.'' *See* 15 U.S.C. 1692d (FDCPA), 15 U.S.C. 1639(p)(2)(B) (HOEPA). The Telemarketing and Consumer Fraud and Abuse Prevention Act also directed the Federal Trade Commission (FTC) to ''prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices.'' 15 U.S.C. 6102(a)(1).

[3] In 1914, Congress passed the FTC Act, which declared as unlawful ''unfair methods of competition'' but did not define the term ''unfair.'' Act of Sept. 26, 1914, ch. 311, sec. 5(a), 38 Stat. 717, 719 (codified at 15 U.S.C. 45(a)). Congress intended that this prohibition would capture conduct that caused competitive harm yet remain flexible enough to allow the law to develop and avoid circumvention. As the Supreme Court explained in 1934, ''[n]either the language nor the history of the Act suggests that Congress intended to confine the forbidden methods to fixed and unyielding categories,'' and Congress, in defining the powers of the FTC, ''advisedly adopted a phrase which . . . does not admit of precise definition, but the meaning and application of which must be arrived at by . . . the gradual process of judicial inclusion and exclusion.'' *FTC* v. *R.F. Keppel & Bro.,* 291 U.S. 304, 310, 312 (1934) (internal quotation marks omitted).

[4] In 1938, in the Wheeler-Lea Act, Congress amended the FTC Act to declare as unlawful ''unfair or deceptive acts or practices.'' Wheeler-Lea Act, ch. 49, sec. 3, 52 Stat. 111, 111–14 (1938); 15 U.S.C. 45(a). As it had done previously with ''unfair methods of competition,'' Congress did not define this term, instead intending for it to be developed over time. *See Am. Fin. Servs. Ass'n* v. *FTC,* 767 F.2d 957, 978 (D.C. Cir. 1985) (*AFSA*) (''[N]either Congress nor the FTC has seen fit to delineate the specific 'kinds' of practices which will be deemed

Continued

passed laws to regulate fair dealing, and the agencies tasked with administering those laws have issued policy statements to offer guidance on the agencies' approach to enforcing those prohibitions.[5]

For centuries, lenders and investors generally had an incentive to ensure that a borrower had the ability to repay a debt. But innovations in capital markets and fixed income instruments altered this alignment of incentives.[6] The advent of complex securitization led to lenders no longer bearing risk when a borrower defaulted because they had sold the underlying asset, and passed on the exposure to investors. Fair dealing laws in the U.S. have long sought to address the risks and harms from market failures.

The 2007–2008 financial crisis tested U.S. consumer protection laws, government watchdogs, and the ability of the existing authorities to address the predatory lending that was a root cause of the collapse.[7] The financial crisis was set in motion by a set of avoidable interlocking forces—but at its core were mortgage lenders profiting (by immediately selling on the secondary market) on loans that set people up to fail because they could not repay.[8] Millions of Americans saw their home values drop and their jobs eliminated as a result of forces largely out of their control.

In response, Congress concluded that the manner in which agencies had enforced the prohibitions on unfair and deceptive acts or practices was too limited to be effective at preventing the financial crisis, and once again amended existing law to better meet new challenges.[9] In the CFPA, Congress granted authority over unfair or deceptive acts or practices to the States, the Federal banking agencies, and the newly created Consumer Financial Protection Bureau (CFPB). Congress also added a prohibition on abusive acts or practices.[10]

Since the enactment of the CFPA, government enforcers and supervisory agencies have taken dozens of actions to condemn prohibited abusive conduct. The CFPB is issuing this Policy Statement to summarize those actions and explain how the CFPB analyzes the elements of abusiveness through relevant examples, with the goal of providing an analytical framework to fellow government enforcers and to the market for how to identify violative acts or practices.[11]

II. Analysis

Under the CFPA, there are two abusiveness prohibitions.[12] An abusive act or practice: (1) Materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or (2) Takes unreasonable advantage of:

- A lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
- The inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or
- The reasonable reliance by the consumer on a covered person to act in the interests of the consumer.[13]

The statutory text of these two prohibitions can be summarized at a high level as: (1) obscuring important features of a product or service, or (2) leveraging certain circumstances to take an unreasonable advantage. The circumstances that Congress set forth, stated generally, concern *gaps in understanding, unequal bargaining power, and consumer reliance.*[14]

Unlike with unfairness but similar to deception, abusiveness requires no showing of substantial injury to establish liability, but is rather focused on conduct that Congress presumed to be harmful or distortionary to the proper functioning of the market. An act or practice need fall into only one of the categories above in order to be abusive, but an act or practice could fall into more than one category.[15]

unfair . . . . Instead the FTC has adhered to its established convention, envisioned by Congress, of developing and refining its unfair practice criteria on a progressive, incremental basis.'').

[5] *See, e.g.,* Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Comm. on Commerce, Science and Transportation, U.S. Senate, Commission Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction (Dec. 17, 1980), *reprinted in Int'l Harvester Co.,* 104 F.T.C. 949, 1070–76 (1984), *https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness* (Policy Statement on Unfairness); Letter from the FTC to Hon. John D. Dingell, Chairman, Comm. on Energy and Commerce, U.S. House of Representatives (Oct. 14, 1983), *reprinted in Cliffdale Assocs., Inc.,* 103 F.T.C. 110, 174–84 (1984), *https://www.ftc.gov/legal-library/browse/ftc-policy-statement-deception* (Policy Statement on Deception).

[6] *See* Financial Crisis Inquiry Commission, *The Financial Crisis Inquiry Report,* at 191–192 (2011), *https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf* (describing how synthetic collateralized debt obligations, which gained popularity in the mid-2000s, involved ''two types of investors with opposing interests: those who would benefit if the assets performed, and those who would benefit if the mortgage borrowers stopped making payments and the assets failed to perform'').

[7] *See id.* at xvii, xxiii–xxiv.

[8] *See id.* at 104–111, 113–18; *see also* S. Rep. No. 111–176, at 11 (2010), *https://www.congress.gov/congressional-report/111th-congress/senate-report/176/1* (''Th[e] financial crisis was precipitated by the proliferation of poorly underwritten mortgages with abusive terms, followed by a broad fall in housing prices as those mortgages went into default and led to increasing foreclosures.'').

[9] For example, in 2007, Federal Deposit Insurance Corporation (FDIC) Chairwoman Sheila Bair explained in congressional testimony that unfairness ''can be a restrictive legal standard'' and proposed that Congress consider ''adding the term 'abusive,' '' which she noted existed in the Home Ownership and Equity Protection Act, and which ''is a more flexible standard to address some of the practices that make us all uncomfortable.'' Sheila C. Bair, *Improving Federal Consumer Protection in Financial Services,* House Committee on Financial Services (June 13, 2007), *https://www.govinfo.gov/content/pkg/CHRG-110hhrg37556/html/CHRG-110hhrg37556.htm.*

[10] *See, e.g.,* S. Rep. No. 111–176, at 172 (Apr. 30, 2010), *https://www.congress.gov/congressional-report/111th-congress/senate-report/176/1* (''Current law prohibits unfair or deceptive acts or practices. The addition of 'abusive' will ensure that the Bureau is empowered to cover practices where providers unreasonably take advantage of consumers.''); Public Law 111–203, pmbl. (listing, in the preamble to the Dodd-Frank Act, one of the purposes of the Act as ''protect[ing] consumers from abusive financial services practices''); *see also* S. Rep. No. 111–176, at 9 n.19, *https://www.congress.gov/congressional-report/111th-congress/senate-report/176/1* (''Today's consumer protection regime . . . could not stem a plague of abusive and unaffordable mortgages.''); *id.* at 11 (''This financial crisis was precipitated by the proliferation of poorly underwritten mortgages with abusive terms.''); H.R. Rep. No. 111–367, at 91 (Dec. 9, 2009) (''Th[e] disparate regulatory system has been blamed in part for the lack of aggressive enforcement against abusive and predatory loan products that contributed to the financial crisis, such as subprime and nontraditional mortgages.''); H.R. Rep. No. 111–517, at 876–77 (June 29, 2010), *https://www.congress.gov/congressional-report/111th-congress/house-report/517* (Conf. Rep.) (''The Act also prohibits financial incentives . . . that may encourage mortgage originators . . . to steer consumers to higher-cost and more abusive mortgages.'').

[11] This Policy Statement is the CFPB's first formal issuance that summarizes precedent on abusive acts or practices and provides an analytical framework for identifying abusive acts or practices. The CFPB previously issued a Policy Statement on Abusive Acts or Practices in 2020, *see* 85 FR 6733 (Feb. 6, 2020) (2020 Policy Statement), *rescinded in* 86 FR 14808 (Mar. 19, 2021), *https://files.consumerfinance.gov/f/documents/cfpb_abusiveness-policy-statement-consolidated_2021-03.pdf.* The 2020 Policy Statement communicated how the CFPB intended to exercise prosecutorial discretion regarding some issues related to abusiveness. However, the 2020 Policy Statement did not summarize existing precedent on abusive acts or practices or provide an analytical framework for identifying abusive acts or practices.

[12] The second of the two prohibitions has three independent disjunctive grounds for finding abusiveness.

[13] CFPA section 1031(d), 12 U.S.C. 5531(d).

[14] This Policy Statement uses the phrases ''gaps in understanding,'' ''unequal bargaining power,'' and ''consumer reliance'' as shorthand descriptors of the inquiries required under the three subparagraphs of CFPA section 1031(d)(2). The CFPB does not intend its use of these shorthand phrases to limit in any way the scope of section 1031(d)(2)'s text.

[15] The conduct that underlies an abusiveness determination may also be found to be unfair or deceptive, depending on the circumstances.

A. Materially Interfering With Consumers' Understanding of Terms and Conditions

The first abusiveness prohibition concerns situations where an entity [16] ''materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service.'' [17] Material interference can be shown when an act or omission is intended to impede consumers' ability to understand terms or conditions, has the natural consequence of impeding consumers' ability to understand, or actually impedes understanding.

Acts or Omissions

Material interference may include actions or omissions that obscure, withhold, de-emphasize, render confusing, or hide information relevant to the ability of a consumer to understand terms and conditions. Interference can take numerous forms, such as buried disclosures, physical or digital interference, overshadowing, and various other means of manipulating consumers' understanding.

Buried disclosures include disclosures that limit people's comprehension of a term or condition, including but not limited to, through the use of fine print, complex language, jargon, or the timing of the disclosure.[18] Entities can also interfere with understanding by omitting material terms or conditions.[19]

Physical interference can include any physical conduct that impedes a person's ability to see, hear, or understand the terms and conditions, including but not limited to physically hiding or withholding notices.[20]

Digital interference can include impediments to a person's ability to see, hear, or understand the terms and conditions when they are presented to someone in electronic or virtual format. This form of interference includes but is not limited to user interface and user experience manipulations such as the use of pop-up or drop-down boxes, multiple click-throughs, or other actions or ''dark patterns'' [21] that have the effect of making the terms and conditions materially less accessible or salient.

Overshadowing includes the prominent placement of certain content that interferes with the comprehension of other content, including terms and conditions.[22]

Material Interference

There are a number of methods to prove material interference with a consumers' ability to understand terms or conditions, including but not limited to those described below. First, while intent is not a required element to show material interference, it is reasonable to infer that an act or omission materially interferes with consumers' ability to understand a term or condition when the entity intends it to interfere.[23] Second, material interference can be established with evidence that the natural consequence of the act or omission would be to impede consumers' ability to understand. And third, material interference can also be shown with evidence that the act or omission did in fact impede consumers' actual understanding. While evidence of intent would provide a basis for inferring material interference under the first method, it is not a required element to show material interference.

Certain terms of a transaction are so consequential that when they are not conveyed to people prominently or clearly, it may be reasonable to presume that the entity engaged in acts or omissions that materially interfere with consumers' ability to understand. That information includes, but is not limited to, pricing or costs, limitations on the person's ability to use or benefit from the product or service, and contractually specified consequences of default.

Additionally, an entity's provision of a product or service may interfere with consumers' ability to understand if the product or service is so complicated that material information about it cannot be sufficiently explained or if the entity's business model functions in a manner that is inconsistent with its product's or service's apparent terms.

B. Taking Unreasonable Advantage

The second form of ''abusiveness'' under the CFPA prohibits entities from taking unreasonable advantage of certain circumstances.[24] Congress determined that it is an abusive act or practice when an entity takes unreasonable advantage of three particular circumstances.[25] The circumstances are:

(1) A ''lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service.'' [26] This circumstance concerns *gaps in understanding* affecting consumer decision-making.

(2) The ''inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service.'' [27] This circumstance concerns *unequal bargaining power* where, for example, consumers lack the practical ability to switch providers, seek more favorable terms, or make other decisions to protect their interests.

(3) The ''reasonable reliance by the consumer on a covered person to act in the interests of the consumer.'' [28] This circumstance concerns *consumer reliance* on an entity, including when consumers reasonably rely on an entity to make a decision for them or advise them on how to make a decision.

Under the CFPA, it is illegal for an entity to take unreasonable advantage of one of these three circumstances, even if the condition was not created by the entity.[29]

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[16] This Policy Statement refers to covered persons, service providers, and persons that provide substantial assistance to abusive conduct by a covered person or service provider as ''entity'' or ''entities.''

[17] CFPA section 1031(d)(1), 12 U.S.C. 5531(d)(1).

[18] *See, e.g., TD Bank, N.A.,* File No. 2020–BCFP–0007, at 16–20 (Aug. 20, 2020) (bank materially interfered with consumers' ability to understand terms and conditions of overdraft-protection service by withholding any written notice regarding those terms and conditions until after eliciting an oral-enrollment decision that followed a misleading or incomplete oral presentation regarding the service).

[19] *See, e.g., TMX Finance LLC,* File No. 2016–CFPB–0022, at 6 (Sept. 26, 2016) (lender's sales pitch and Payback Guide materially interfered with consumers' ability to understand that the consumer received a 30-day transaction, that the Payback Guide was not an actual repayment plan, that the terms of the 30-day transaction were not affected by the Payback Guide, and that renewing the transaction over an extended period would substantially affect the overall cost of the transaction, as well as several other aspects of the process, by omitting those terms and conditions).

[20] *See, e.g.,* Complaint at 6, 18–19, *CFPB* v. *All American Check Cashing, Inc.,* No. 3:16–cv–00356 (S.D. Miss. May 11, 2016) (check cashing company materially interfered with consumers' ability to understand a term or condition by requiring employees to block consumers' view of check cashing fees by counting money over the receipt or to quickly remove the receipt).

[21] *See* FTC Staff Report, *Bringing Dark Patterns to Light* (Sept. 2022), *https://www.ftc.gov/reports/bringing-dark-patterns-light.*

[22] *See, e.g.,* First Amended Complaint at 12–13, 26–27, *CFPB* v. *TCF National Bank,* No. 17–cv–00166 (D. Minn. Mar. 1, 2017) (bank chose to use ''an account opening process that interfered with customers' ability to consider the contents of the Notice when they made their Opt-In decision'' by presenting consumers with the choice to select overdraft service during a time when they were not looking at the explanatory notice relating to their opt-in rights); *see also CFPB* v. *TCF Nat'l Bank,* No. 17–cv–00166, 2017 WL 6211033, at *2–3 (D. Minn. Sept. 8, 2017) (denying bank's motion to dismiss abusiveness claim).

[23] *Cf.* Policy Statement on Deception at 5, Federal Trade Commission (''When evidence exists that a seller intended to make an implied claim, the Commission will infer materiality.'').

[24] CFPA section 1031(d)(2), 12 U.S.C. 5531(d)(2).

[25] *See supra* note 14.

[26] CFPA section 1031(d)(2)(A), 12 U.S.C. 5531(d)(2)(A).

[27] CFPA section 1031(d)(2)(B), 12 U.S.C. 5531(d)(2)(B).

[28] CFPA section 1031(d)(2)(C), 12 U.S.C. 5531(d)(2)(C).

[29] *See* CFPA section 1031(d)(2), 12 U.S.C. 5531(d)(2).

The ordinary meaning of the phrase ''take advantage of'' is generally ''to make use of for one's own benefit.'' [30] An advantage can include a variety of monetary and non-monetary benefits to the entity or its affiliates or partners, including but not limited to increased market share, revenue, cost savings, profits,[31] reputational benefits, and other operational benefits to the entity.

The CFPA prohibits taking ''unreasonable'' advantage of the specified statutory circumstances. The term ''reasonable'' means ''[f]air, proper, or moderate under the circumstances,'' [32] and conversely, ''unreasonable'' means ''exceeding the bounds of reason or moderation.'' [33]

In crafting the abusiveness prohibition, Congress identified categories of practices that distort the market and ultimately harm consumers. Therefore, unlike unfairness, government enforcers do not need to independently prove that an act or practice caused substantial injury in order to establish liability under the abusiveness prohibition.[34]

Evaluating unreasonable advantage involves an evaluation of the facts and circumstances that may affect the nature of the advantage and the question of whether the advantage-taking was unreasonable under the circumstances.[35] Such an evaluation does not require an inquiry into whether advantage-taking is typical or not.[36] And even a relatively small advantage may be abusive if it is unreasonable. There are also a number of analytical methods, including but not limited to those described below, that can be used to evaluate unreasonable advantage-taking.

First, when Congress formulated the CFPA, one of its main concerns was financial products and services that may be ''set up to fail.'' Before the 2007–2008 financial crisis, mortgage lenders were willing to make loans on terms that people could not afford in part due to the ability to off-load default risk into the secondary market. This led to significant harm to the household sector, which was ultimately transmitted to the broader financial system.

The CFPA's legislative history explains that, had the CFPB existed, ''the CFPB would have been able to see and take action against the proliferation of poorly underwritten mortgages with abusive terms.'' [37] Partly in response to the financial crisis, Congress prohibited certain abusive business models and other acts or practices that—contrary to many consumer finance relationships where the company benefits from consumer success—misalign incentives and generate benefit for a company when people are harmed.[38] In many circumstances, it is unreasonable for an entity to benefit from, or be indifferent to, negative consumer outcomes resulting from one of the circumstances identified by Congress.

Second, the CFPA's legislative history emphasized that, as a result of CFPB oversight, ''a consumer can shop and compare products based on quality, price, and convenience without having to worry about getting trapped by fine print into an abusive deal.'' [39] Unreasonable advantage-taking includes using the statutory circumstances to acquire particular leverage over people or deprive consumers of legal rights.[40] Relatedly, advantage-taking may be unreasonable when an entity caused one of the circumstances described in CFPA section 1031(d)(2).[41]

One may also assess whether entities are obtaining an unreasonable advantage by considering whether they are reaping more benefits as a consequence of the statutorily identified circumstances, or whether the benefit to the entity would have existed if the circumstance did not exist.[42] In other words, entities should not get a windfall due to a gap in understanding, unequal bargaining power, or consumer reliance. Having said that, section 1031(d)(2) does not require an investigative accounting of costs and benefits or other form of quantification to make a finding. Instead, one may rely on qualitative assessment to determine whether an entity takes an unreasonable advantage.

a. Lack of Understanding

The first circumstance, of which entities cannot take ''unreasonable advantage,'' as defined in the CFPA, concerns ''a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service.'' [43] When there are *gaps in understanding* regarding the material risks, costs, or conditions of the entity's product or service, entities may not take unreasonable advantage of that gap. Such gaps could include those between an entity and a consumer. Certain types of gaps in understanding can create

[30] *E.g., CFPB* v. *ITT Educ. Servs., Inc.,* 219 F. Supp. 3d 878, 918 (S.D. Ind. 2015) (quoting this as one of the definitions from *Webster's Third New Int'l Dictionary* 2331 (3d ed.1993)).

[31] Advantage-taking may occur when an entity pursues the prospect of monetary gain, even if ultimately it does not accrue a profit. In ordinary usage, one can take advantage of one of the specified statutory circumstances, even if that benefit is not successfully realized. The CFPA's legislative history provides an example of this situation, when discussing abuses in the subprime mortgage industry. The legislative history notes that some ''abusive practices may well be profitable in the short term, but are ticking time bombs waiting to explode'' upon banks. S. Rep. No. 111–176, at 17 (2010) (internal quotation marks omitted). Thus, abusive acts or practices may not ultimately be profitable for the covered party. If an abusive act or practice takes advantage of one of the specified statutory circumstances but fails to turn a profit, for example due to incompetence in carrying out the scheme, it would be in line with congressional intent and the ordinary usage of the phrase ''takes unreasonable advantage of'' to consider the act or practice to be eligible for an abusiveness finding on that basis.

[32] *Reasonable, Black's Law Dictionary* (11th ed. 2019).

[33] *Unreasonable, Webster's Third New Int'l Dictionary* 2507 (3d ed. 1993).

[34] *See* CFPA section 1031(c)(1)(A), 12 U.S.C. 5531(c)(1)(A). The amount of harm is relevant, however, to crafting remedies. Also, harm in some cases may bolster a determination that an entity is taking unreasonable advantage of consumers within the meaning of CFPA section 1031(d)(2).

[35] *Cf., e.g., Swift & Co.* v. *Wallace,* 105 F.2d 848, 854–55 (7th Cir. 1939) ('' '[U]nreasonable' is not a word of fixed content and whether preferences or advantages are unreasonable must be determined by an evaluation of all cognizable factors which determine the scope and nature of the preference or advantage.'').

[36] While evidence of large or atypical advantage-taking is not required under the reasonableness inquiry, it may nonetheless be relevant.

[37] S. Rep. No. 111–176, at 229 (2010), *https://www.congress.gov/congressional-report/111th-congress/senate-report/176/1.*

[38] *See, e.g.,* Complaint at 26–29, *CFPB* v. *Aequitas Capital Management, Inc.,* No. 3:17–cv–01278 (D. Or. Aug. 17, 2017) (action against lender to students at for-profit schools that reaped revenue despite the high default rate of the loans that the students were induced to take out).

[39] S. Rep. No. 111–176, at 229 (2010), *https://www.congress.gov/congressional-report/111th-congress/senate-report/176/1.*

[40] *E.g.,* First Amended Complaint at 40–41, *CFPB* v. *Think Finance, LLC,* No. 4:17–cv–00127 (D. Mont. Mar. 28, 2018) (It was abusive for a company to attempt to collect loans that, unbeknownst to the consumers, could not lawfully be collected because they were void.).

[41] *See, e.g.,* Complaint at 9–10, *CFPB* v. *SettleIT, Inc.,* No. 8:21–cv–00674 (C.D. Cal. Apr. 13, 2021) (A debt-settlement company took unreasonable advantage of consumers' reasonable reliance when it ''told consumers that it would work in their interests only,'' thus inducing consumers to rely on the company, but actually prioritized the settlement of debts owed to lenders with which it was affiliated.).

[42] *See, e.g.,* CFPB, *Supervisory Highlights: Issue 28, Fall 2022,* at 22 (Nov. 2022), *https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-28_2022-11.pdf* (mortgage servicers took unreasonable advantage of consumers' lack of understanding when they profited from insufficiently disclosed phone-payment fees that were materially greater than the cost of other payment options). In *JPay, LLC,* File No. 2021–CFPB–0006 (Oct. 19, 2021), the CFPB found an abusive practice where a firm leveraged an exclusive contract to charge fees on prepaid cards used to provide money to individuals being released from prison or jail. The prepaid cards replaced the feeless option of receiving such money as cash or by check that previously had been offered by prisons and jails. Under these circumstances, the entire fee accruing to JPay was considered an ''unreasonable advantage.''

[43] CFPA section 1031(d)(2)(A), 12 U.S.C. 5531(d)(2)(A).

circumstances where transactions are exploitative.

Gaps in understanding as to ''risks'' encompass a wide range of potential consumer harms. ''Risks'' include but are not limited to the consequences or likelihood of default [44] and the loss of future benefits.[45] Gaps in understanding related to ''costs'' include any monetary charge to a person as well as non-monetary costs such as lost time, loss of use, or reputational harm.[46] And gaps in understanding with respect to ''conditions'' include any circumstance, context, or attribute of a product or service, whether express or implicit.[47] For example, ''conditions'' could include the length of time it would take a person to realize the benefits of a financial product or service,[48] the relationship between the entity and the consumer's creditors,[49] the fact a debt is not legally enforceable,[50] or the processes that determine when fees will be assessed.[51]

While acts or omissions by an entity can be relevant in determining whether people lack understanding,[52] the prohibition in section 1031(d)(2)(A) does not require that the entity caused the person's lack of understanding through untruthful statements or other actions or omissions.[53] Under the text of section 1031(d)(2)(A), the consumer's lack of understanding, regardless of how it arose, is sufficient. If people lack understanding, entities may not take unreasonable advantage of that lack of understanding. The lack of understanding can be caused by third parties and can exist even when there is no contractual relationship between the person and the entity that takes unreasonable advantage of the person's lack of understanding.[54]

The statutory text of the prohibition does not require that the consumer's lack of understanding was reasonable to demonstrate abusive conduct.[55] Similarly, the prohibition does not require proof that some threshold number of people lacked understanding to establish that an act or practice was abusive.

A person may lack understanding of risks, costs, or conditions, even if they have an awareness that it is in the realm of possibility that a particular negative consequence may follow or a particular cost may be incurred as a result of using the product or service.[56] But consumers generally do not expect companies to benefit from or be indifferent to certain negative consequences, including but not limited to default. Moreover, consumers may not understand that a risk is very likely to happen or that—though relatively rare—the impact of a

[44] *See, e.g.,* Complaint at 13–14, 18, *CFPB* v. *Pension Funding LLC,* No. 8:15–cv–01329 (C.D. Cal. Aug. 20, 2015) (explaining that because pension advance companies ''obscured the true nature of the transactions, failed to disclose and misrepresented the costs of the loans, and gave consumers misleading advice, consumers could not clearly understand the risks or costs of the loans or effectively compare the loans to potential less costly alternatives,'' and describing how companies aggressively pursued consumers who defaulted).

[45] *See, e.g.,* Amended Complaint at 6, *CFPB* v. *Access Funding,* No. 1–16–cv–03759–JFM (D. Md. Dec. 13, 2017) (''Consumers received a steeply discounted lump sum in return for signing away their future payment streams. The lump sums Access Funding provided consumers typically represented only about 30% of the present value of those future payments.'').

[46] *See, e.g., Fort Knox Nat'l Co.,* File No. 2015–CFPB–0008, at 8 (Apr. 20, 2015) (entities took unreasonable advantage of consumers' lack of understanding by charging fees that they ''did not adequately disclose''); CFPB, *Supervisory Highlights: Issue 28, Fall 2022,* at 22 (Nov. 2022), *https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-28_2022-11.pdf* (mortgage servicers took unreasonable advantage of consumers' lack of understanding when they profited from insufficiently disclosed phone-payment fees that were materially greater than the cost of other payment options); First Amended Complaint at 14, *CFPB* v. *Freedom Debt Relief, LLC,* No. 3:17–cv–06484 (N.D. Cal. June 1, 2018) (''Freedom did not disclose to consumers before they enrolled in its program that they might be required to negotiate with creditors on their own, including by deceiving their creditors, in order to settle their debts.'').

[47] *See, e.g.,* First Amended Complaint at 40–41, *CFPB* v. *Think Finance, LLC,* No. 4:17–cv–00127–BMM (D. Mont. Mar. 28, 2018) (consumers' ''legal obligation to repay is a material term, cost, or condition of a loan,'' and online lenders ''took unreasonable advantage of consumers' lack of understanding regarding the voidness of [their] loans'' under State usury or licensing laws to charge higher, illegal interest rates); *Zero Parallel, LLC,* File No. 2017–CFPB–0017, at 6 (Sept. 6, 2017) (''Zero Parallel's sale of Leads resulting in, or likely to result in, loans that are void in whole or in part under the laws of the consumer's state of residence based on state-licensing requirements or interest-rate limits takes unreasonable advantage of a lack of understanding on the part of the consumer of the material risks, costs, and conditions of the loans.''); *see also CFPB* v. *Think Finance, LLC,* No. CV–17–127–GF–BMM, 2018 WL 3707911, at *8 (D. Mont. Aug. 3, 2018) (denying *Think Finance* defendants' motion to dismiss abusiveness claim).

[48] *See, e.g., CFPB* v. *American Debt Settlement Solutions,* No. 9:13–cv–80548–DMM, at 8 (S.D. Fla. June 6, 2013) (Stipulated Final Judgment and Order) (''ADSS's acts or practices are abusive . . . because . . . ADSS has knowingly enrolled in its debt-relief programs consumers whose financial conditions make it highly unlikely that they can complete the programs, and ADSS has nonetheless collected fees from consumers who had inadequate income to complete their debt settlement programs.''); Complaint at 15, *CFPB* v. *American Debt Settlement Solutions,* No. 9:13–cv–80548–DMM (S.D. Fla., May 30, 2013) (''This practice takes unreasonable advantage of consumers' lack of understanding of how long it will take ADSS to settle their debts and therefore how much money they will spend before realizing any benefits from enrolling in ADSS's debt-relief program.'').

[49] *See, e.g.,* Amended Complaint at 14, *CFPB* v. *Access Funding,* No. 1–16–cv–03759–JFM (D. Md. Dec. 13, 2017) (''Consumers did not understand that Smith was not providing independent professional advice or that he did not take their individual circumstances or interests into account. They also did not understand that their interests would likely be better served by a truly independent advisor.'').

[50] *See* First Amended Complaint at 40–41, *CFPB* v. *Think Finance, LLC,* No. 4:17–cv–00127 (D. Mont. Mar. 28, 2018) (It was abusive for a company to attempt to collect loans that, unbeknownst to the consumers, could not lawfully be collected because they were void.); *Colfax Capital Corp.,* File No. 2014–CFPB–0009, at 11–12 (July 29, 2014) (it was abusive for company to service and collect on consumer financing agreements that State laws rendered void or limited the consumer's obligation to repay).

[51] *See, e.g., Regions Bank,* File No. 2022–CFPB–0008, at 15 (Sept. 28, 2022) (''Due to [the bank's] counter-intuitive, complex transaction processing, many consumers did not understand [the bank's] overdraft practices or expect Authorized-Positive Overdraft Fees. [The bank] took unreasonable advantage of this lack of understanding by assessing at least $141 million in Authorized-Positive Overdraft fees during the Relevant Period.'').

[52] *See, e.g.,* Amended Complaint at 15–16, *Bureau of Consumer Fin. Prot.* v. *Certified Forensic Loan Auditors, LLC,* No. 2:19–cv–07722 (C.D. Cal. Nov. 13, 2019) (entities took unreasonable advantage of consumers' lack of understanding regarding the residential-mortgage industry and foreclosure-defense law by making misrepresentations and concealing material facts regarding the mortgage-relief services they offered); *see also Bureau of Consumer Fin. Prot.* v. *Certified Forensic Loan Auditors, LLC,* No. 2:19–cv–07722–ODW, 2020 WL 2556417, at *4 (C.D. Cal. May 20, 2020) (denying *Certified Forensic Loan Auditors* defendants' motion to dismiss abusiveness claim).

[53] *See, e.g., Zero Parallel, LLC,* File No. 2017–CFPB–0017, at 6 (Sept. 6, 2017) (it was abusive to sell leads resulting or likely to result in loans that were void in whole or in part under the laws of the consumer's State of residence).

[54] *See, e.g.,* Am. Complaint at 2, *CFPB* v. *D & D Marketing Inc.,* No. 2:15–cv–09692 (C.D. Cal. June 30, 2016) (lead aggregator ''failed to vet or monitor its lead generators and lead purchasers, exposing consumers to the risk of having their information purchased by actors who would use it for illegal purposes,'' ''allowed its lead generators to attract consumers with misleading statements,'' and ''took unreasonable advantage of consumers' lack of understanding of the material risks, costs, or conditions of the loan products for which they apply'').

[55] Although establishing that a reasonable consumer would lack understanding of the material risks, costs, or conditions of a product or service is not a prerequisite to establishing liability under CFPA section 1031(d)(2)(A), government enforcers or supervisory agencies may rely on the fact that a reasonable consumer would lack such understanding to establish that consumers did not understand.

[56] 82 FR 54472, 54740 (Nov. 17, 2017) (''2017 Payday Rule''), *ratified by* 85 FR 41905 (July 13, 2020), *upheld in Cmty. Fin. Servs. Ass'n of Am., Ltd.* v. *CFPB,* 558 F. Supp. 3d 350, 362 (W.D. Tex. 2021), *aff'd in relevant part,* 51 F.4th 616 (5th Cir. 2022). The CFPB explained in the preamble to a rule rescinding part of the 2017 Payday Rule that ''[t]he [rescission] rulemaking addresse[d] the legal and evidentiary bases for particular rule provisions identified in this final rule. It d[id] not prevent the Bureau from exercising tool choices, such as appropriate exercise of supervision and enforcement tools, consistent with the Dodd-Frank Act and other applicable laws and regulations. It also d[id] not prevent the Bureau from exercising its judgment in light of factual, legal, and policy factors in particular circumstances as to whether an act or practice meets the standards for abusiveness under section 1031 of the Dodd-Frank Act.'' 85 FR 44382, 44415 n.286 (July 22, 2020).

particular risk would be severe.[57] The inquiry under section 1031(d)(2)(A) is whether some consumers in question have a lack of understanding, not all consumers or even most consumers. Since there can be differences among consumers in the risks, costs, and conditions they face and in their understanding of them, there may be a violation with respect to some consumers even if other consumers do not lack understanding.

Lastly, one can demonstrate a person's lack of understanding in a number of ways. For example, direct evidence of lack of understanding, including but not limited to complaints and consumer testimony, can suffice. Evidence or analysis showing that reasonable consumers were not likely to understand can likewise be used to establish lack of understanding. One can also demonstrate lack of understanding by considering course of conduct and likely consequences. For example, if a transaction would entail material risks or costs and people would likely derive minimal or no benefit from the transaction, it is generally reasonable to infer that people who nonetheless went ahead with the transaction did not understand those material risks or costs.[58]

b. Inability of Consumers To Protect Their Interests

The second circumstance, of which entities cannot take ''unreasonable advantage,'' as defined in the CFPA, concerns ''the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service.'' [59] When people are unable to protect their interests in selecting or using a consumer financial product or service, they can lack autonomy. In these situations, there is a risk that entities will take unreasonable advantage of the *unequal bargaining power.*[60] Thus, Congress has outlawed taking unreasonable advantage of circumstances where people lack sufficient bargaining power to protect their interests. Such circumstances may occur at the time of, or prior to, the person selecting the product or service, during their use of the product or service, or both.

The consumer ''interests'' contemplated in section 1031(d)(2)(B) include monetary and non-monetary interests, including but not limited to property, privacy, or reputational interests.[61] People also have interests in limiting the amount of time or effort necessary to obtain consumer financial products or services or remedy problems related to those products or services. This includes, but is not limited to, the time spent trying to obtain customer support assistance.[62]

A consumer's ''inability'' to protect their interests includes situations when it is impractical for them to protect their interests in selecting or using a consumer financial product or service.[63] For example, when the steps a person would need to take to protect their interests are unknown to the person [64] or are especially onerous,[65] they are likely unable to protect their interest. Furthermore, people who do not have monetary means may be unable to protect their interests if the only practical method for doing so requires payment of money.[66] Of course, merely serving people without monetary means is not abusive. However, it may be abusive to take unreasonable advantage of a person's lack of monetary means to protect their interests.[67]

The nature of the customer relationship may also render consumers unable to protect their interests in selecting or using a consumer financial product or service. People are often unable to protect their interests when they do not elect to enter into a relationship with an entity and cannot elect to instead enter into a relationship with a competitor. These consumer relationships, including but not limited to those with credit reporting companies, debt collectors, and third-party loan servicers, are generally structured such that people cannot exercise meaningful choice in the

[57] 82 FR at 54740.

[58] *See* CFPB, *Supervisory Highlights: Issue 19, Summer 2019,* at 3 (Sept. 2019), *https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-19_092019.pdf* (''By purchasing a product [guaranteed asset protection] they would not benefit from [because of the low loan-to-value ratio of their auto loans], consumers demonstrated that they lacked an understanding of a material aspect of the product.'').

[59] CFPA section 1031(d)(2)(B), 12 U.S.C. 5531(d)(2)(B).

[60] Consumers may also be unable to protect their interests when the inequality in bargaining power flows from circumstances or vulnerabilities that are present for individual or particular groups of consumers.

[61] *See, e.g., Wells Fargo Bank, N.A.,* File No. 2016–CFPB–0015, at 6–7 (Sept. 8, 2016) (noting that respondent's ''acts of opening unauthorized deposit accounts and engaging in simulated funding took unreasonable advantage of consumers' inability to protect their interests . . . in having an account opened only after affirmative agreement[ ] [and] protecting themselves from security and other risks'').

[62] *See, e.g.,* Complaint at 15, *CFPB* v. *PayPal, Inc.,* No. 1:15–cv–01426–PDB (D. Md. May 19, 2015) (consumers unable to protect their interests where ''Defendants purported to allow consumers to control the allocation of payments by requesting that their payments be allocated to specific balances, but consumers seeking to make such requests often could not reach a customer-service representative'').

[63] 82 FR at 54743 (''The Bureau also rejects the interpretation, presented by commenters, that the prong of 'inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service' can be met only when it is literally impossible for consumers to take action to protect their interests. . . . [T]he Bureau believes the clause 'inability of the consumer to protect' is . . . reasonably interpreted to mean that consumers are unable to protect their interests when it is impracticable for them to do so in light of the circumstances.''); *see also ITT Educ. Servs.,* 219 F. Supp. 3d at 919 (holding that the phrase ''inability . . . to protect the interests of the consumer'' does not refer merely to ''the theoretical power [of consumers] to defend their interests''; it also encompasses circumstances where ''a consumer is unable to protect herself not in absolute terms, but *relative to* the excessively stronger position of the defendant'').

[64] *See, e.g., Wells Fargo Bank, N.A.,* File No. 2016–CFPB–0015, at 6–7 (Sept. 8, 2016) (Bank's ''acts of opening unauthorized deposit accounts and engaging in simulated funding took unreasonable advantage of consumers' inability to protect their interests in selecting or using consumer financial products or services, including [their] interests in having an account opened only after affirmative agreement, protecting themselves from security and other risks, and avoiding associated fees.''); *U.S. Bank, N.A.,* File No. 2022–CFPB–0006, at 10 (July 28, 2022) (Bank's ''conduct violated the CFPA prohibition against abusive acts or practices because [the bank] took unreasonable advantage of the consumers' inability to protect their interests in selecting or using a product or service by opening credit cards, lines of credit, and deposit accounts without consumers' knowledge and consent.'').

[65] *See, e.g.,* Complaint at 15–16, *CFPB* v. *Freedom Stores Inc.,* 2:14–cv–00643 (E.D. Va. Dec. 18, 2014) (consumers were unable to bargain for the removal of a venue-selection clause that designated the State or Federal courts of Virginia, and which ''was almost certain to produce default judgments and lead to garnishments against consumers who were unable to appear and assert a defense'').

[66] *See, e.g., Ace Cash Express Inc.,* File No. 2014–CFPB–0008, at 10–11 (July 10, 2014) (payday loan provider ''leveraged an artificial sense of urgency to induce delinquent borrowers with a demonstrated inability to repay their existing loan to take out a new . . . loan with accompanying fees''); *see also* Complaint at 14, *CFPB* v. *S/W Tax Loans, Inc.,* No. 1:15–cv–00299–JB–WPL (D.N.M. Apr. 14, 2015) (''By failing to disclose their financial interests in the high-cost loan products to which they were steering their *cash-strapped and vulnerable customers,* Thomas and the Tax Franchise took unreasonable advantage of their tax clients' inability to protect their own interests . . . .'' (emphasis added)); Credit Practices Rule, 49 FR 7740, 7747 (Mar. 1, 1984) (The results of leading studies indicate ''that the precipitating cause of default is usually a circumstance or event beyond the debtor's immediate control. When such events occur, default is generally an involuntary response.''); *AFSA,* 767 F.2d at 976 (upholding the Credit Practices Rule, including the finding that ''default is ordinarily the product of forces beyond a debtor's control'').

[67] *ITT Educ. Servs.,* 219 F. Supp. 3d at 887–89, 919–20 (for-profit college took unreasonable advantage of students' inability to protect their interests by first guiding its students into temporary loans that they could not repay and then, once those became due, coercing them into taking out financially irresponsible longer-term loans); Complaint at 26–29, *CFPB* v. *Aequitas Capital Management, Inc.,* No. 3:17–cv–01278 (D. Or. Aug. 17, 2017) (lender to students at for-profit schools reaped revenue despite the high default rate of the loans that the schools induced students to take out).

selection or use of any particular entity as a provider. In these circumstances, people cannot protect their interests by choosing an alternative provider either upfront (*i.e.,* they have no ability to select the provider to begin with) or during the course of the customer relationship (*i.e.,* they have no competitive recourse if they encounter difficulty with the entity while using the product or service). Obviously, such relationships are not *per se* abusive; however, entities may not take unreasonable advantage of the absence of choice in these types of relationships.[68] In addition, entities may not take unreasonable advantage of the fact that they are the only source for important information or services.[69]

Consumers may also lack power to protect their interests in selecting or using a consumer financial product or service when entities use form contracts, where contractual provisions are not subject to a consumer choice.[70] Similarly, where the person is unable to bargain over a clause because it is non-negotiable, they may be deprived of the ability to protect their interests.[71]

Consumers are often unable to protect their interests in selecting or using a consumer financial product or service where companies have outsized market power. When an entity's market share, the concentration in a market more broadly, or the market structure prevents people from protecting their interests by choosing an entity that offers competitive pricing, entities may not use their market power to their ''unreasonable advantage.'' [72]

In addition, people are often unable to protect their interests in using a product or service if they face high transaction costs to exit the relationship. For example, the time, effort, cost, or risks associated with extricating oneself from a relationship with entities may effectively lock people into the relationship.

c. Reasonable Reliance

The third circumstance, of which entities cannot take ''unreasonable advantage,'' as defined in the CFPA, concerns ''the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.'' [73] This basis for finding abusiveness recognizes that sometimes people are in a position in which they have a reasonable expectation that an entity will act in their interest to make decisions for them, or to advise them on how to make a decision. Where people reasonably expect that a covered entity will make decisions or provide advice in the person's interest, there is potential for betrayal or exploitation of the person's trust. Therefore, Congress prohibited taking unreasonable advantage of reasonable *consumer reliance.* There are a number of ways to establish reasonable reliance, including but not limited to the two described below.

First, reasonable reliance may exist where an entity communicates to a person or the public that it will act in its customers' best interest, or otherwise holds itself out as acting in the person's best interest. Where an entity communicates to people that it will act in their best interest, or otherwise holds itself out as doing so, including through statements, advertising, or any other means, it is generally reasonable for people to rely on the entity's explicit or implicit representations to that effect.[74] People reasonably assume entities are telling the truth. The entity in these situations creates an expectation of trust and the conditions for people to rely on the entity to act in their best interest.

Second, reasonable reliance may also exist where an entity assumes the role of acting on behalf of consumers or helping them to select providers in the market. In certain circumstances entities assume the role of acting on behalf of people as their agents or representatives, and people should be able to rely on those entities to act on their behalf. In other circumstances entities often act as intermediaries to help people navigate marketplaces for consumer financial products or services.[75] In these

[68] *See, e.g., JPay, LLC,* File No. 2021–CFPB–0006 (Oct. 19, 2021) (prison financial services company took unreasonable advantage of its status as a single-source government contractor for prepaid cards; the company charged fees even if consumers did not want to do business with the company).

[69] *See* CFPB, *Supervisory Highlights: Issue 27, Fall 2022,* at 8–9 (Sept. 2022), *https://files.consumerfinance.gov/f/documents/cfpb_student-loan-servicing-supervisory-highlights-special-edition_report_2022-09.pdf* (''Examiners found that institutions engaged in abusive acts or practices by withholding official transcripts as a blanket policy in conjunction with the extension of credit. These schools did not release official transcripts to consumers that were delinquent or in default on their debts to the school . . . . Th[e] heightened pressure to produce transcripts leaves consumers with little-to-no bargaining power while academic achievement and professional advancements depend on the actions of a single academic institution.''); *Bank of America, N.A.,* File No. 2022–CFPB–0004, at 18 (July 14, 2022) (bank reversed permanent credits for consumers' unemployment insurance prepaid debit cards, and cardholders were ''unable to protect their interests because they could not control how and when [the bank] would investigate and resolve their notices of error'').

[70] *See, e.g.,* Complaint at 15–16, *CFPB* v. *Freedom Stores Inc.,* 2:14–cv–00643 (E.D. Va. Dec. 18, 2014) (consumers were unable to bargain for the removal of a venue-selection clause that designated the State or Federal courts of Virginia, and which ''was almost certain to produce default judgments and lead to garnishments against consumers who were unable to appear and assert a defense'').

[71] *See, e.g.,* Complaint at 4, 7, *CFPB* v. *Sec. Nat'l Auto. Acceptance Co.,* No. 1:15–cv–401 (S.D. Ohio June 17, 2015) (alleging, in support of abusiveness claim under CFPA section 1031(d)(2)(B), that consumers ''had no opportunity to bargain for [the] removal'' of contractual language purporting to authorize lender to contact commanding officers of military servicemembers who defaulted on their loans); Credit Practices Rule, 49 FR 7740, 7745–47 (Mar. 1, 1984). In *AFSA,* the D.C. Circuit upheld the FTC's Credit Practices Rule against challenge to FTC's exercise of its unfairness authority in promulgating the rule. The D.C. Circuit noted: ''The Commission further found . . . that due to certain characteristics of the consumer credit market, it could not reasonably conclude that the mix of remedies included in the contracts reflects consumer preferences. Whereas consumers may bargain over terms such as interest rates, and the amount or number of payments, their ability and incentive to bargain over the boilerplate remedial provisions is substantially limited. Several aspects of the credit transaction combine to prevent consumers from making meaningful efforts to search, compare, and bargain over remedial provisions. As noted, standard form contracts are presented on a take it or leave it basis. . . . Given the substantial similarity of contracts, consumers have little ability or incentive to shop for a better contract.'' 767 F.2d at 976–77 (citations omitted).

[72] *See, e.g., JPay, LLC,* File No. 2021–CFPB–0006 (Oct. 19, 2021) (prison financial services company took unreasonable advantage of the market structure which allowed it, as a single-source government contractor for prepaid cards, to charge fees even if consumers did not want to do business with the company because consumers were denied a choice on how their money would be given to them upon release from incarceration).

[73] CFPA section 1031(d)(2)(C), 12 U.S.C. 5531(d)(2)(C).

[74] *See, e.g., ITT Educ. Servs.,* 219 F. Supp. 3d at 920–21 (denying motion to dismiss abusiveness claim under CFPA section 1031(d)(2)(C) where students reasonably relied on for-profit college's financial-aid staff to act in their interests in signing them up for loans); *see also* CFPB, *Supervisory Highlights: Issue 27, Summer/Fall 2022,* at 14–15 (Sept. 2022), *https://files.consumerfinance.gov/f/documents/cfpb_student-loan-servicing-supervisory-highlights-special-edition_report_2022-09.pdf* (''A servicer . . . engaged in an abusive act or practice by denying [Teacher Loan Forgiveness (TLF)] applications where consumers used a [nonstandard] format for their employment dates . . . . Consumers reasonably rely on servicers to act in their interests, and this servicer encouraged consumers to consult with their representatives to assist in managing their accounts, including on its websites where it provided information about TLF. Further, it was reasonable for consumers who are applying for TLF to rely on their servicers to act in the consumers' best interests because processing forgiveness applications is a core function for student loan servicers, and they are entirely in control of the evaluation policies and procedures.'').

[75] *See, e.g.,* Complaint at 15–16, *CFPB* v. *College Educ. Servs. LLC,* 8:14–cv–3078–T–36EAJ (M.D. Fla. Dec. 11, 2014) (College Education Services' (CES) ''telemarketers held themselves out as loan counselors and advisors with the expertise to establish custom-tailored programs to address each student-loan debtor's specific needs. CES created the illusion of expertise and individualized advice to induce consumers to reasonably rely on the company to act in their interests in seeking and selecting student loan debt-relief plans. . . . CES took unreasonable advantage of the reasonable reliance of consumers by enrolling and taking fees from consumers whose loans were ineligible for consolidation . . . . CES also took upfront fees to enroll some consumers in income-based repayment

Continued

situations, the entity, acting as an intermediary, can function as a broker or other trusted source that the person uses in selecting, negotiating for, or otherwise facilitating the procurement of consumer financial products or services provided by third parties. Where the entity's role in the marketplace is to perform these kinds of intermediary functions, people should be able to rely on the entity to do so in a manner that is free of manipulation.[76] In both circumstances, entities that engage in certain forms of steering or self-dealing may be taking unreasonable advantage of the consumers' reasonable reliance.[77]

III. Regulatory Matters

This is a general statement of policy under the Administrative Procedure Act (APA).[78] While not required under the APA, the CFPB is collecting comments and may make revisions to the policy statement at a later time as appropriate in light of feedback received. The CFPB may take no further action if no revisions are warranted. The policy statement provides background information about applicable law and articulates considerations relevant to the CFPB's exercise of its authorities. It does not impose any legal requirements, nor does it confer rights of any kind. It also does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.[79] Pursuant to the Congressional Review Act,[80] the CFPB will submit a report containing this policy statement and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to its applicability date. The Office of Information and Regulatory Affairs has designated this policy statement as not a ''major rule'' as defined by 5 U.S.C. 804(2).

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2023–07233 Filed 4–11–23; 8:45 am]

BILLING CODE 4810–AM–P

plans or loan forgiveness programs for which they were not eligible. In addition, CES placed some consumers in repayment plans that increased their monthly student-loan payments, leaving those consumers in a more financially precarious position than before.'').

[76] *See, e.g.,* U.S. Department of Treasury, *Financial Regulatory Reform, A New Foundation: Rebuilding Financial Supervision and Regulation* 68 (June 2009), *https://fraser.stlouisfed.org/title/financial-regulatory-reform-5123* (''[C]onsumers may reasonably but mistakenly rely on advice from conflicted intermediaries.'').

[77] *See, e.g.,* Amended Complaint at 13–15, *CFPB* v. *Access Funding, LLC,* No. 1:16-cv-03759 (D. Md. Dec. 13, 2017) (consumers seeking structured settlement advances were told by the advance company that they needed independent advice and were directed to an attorney who, though he held himself out as providing professional, independent advice, was not independent and failed to disclose ties to the company); *see also, e.g.,* Complaint at 9–10, *CFPB* v. *SettleIT, Inc.,* No. 8:21–cv–00674 (C.D. Cal. Apr. 13, 2021) (consumers seeking debt-settlement services relied on the company to negotiate for debt reductions because the company told consumers that it would work in their interests only, but the company failed to disclose its financial connections to consumers' creditors); Complaint at 15, *CFPB* v. *Am. Debt Settlement Solutions, Inc.,* No. 9:13–cv–80548 (S.D. Fla. May 30, 2013) (consumers reasonably relied on debt-settlement company to act in their interest by settling their debts expeditiously).

[78] *See* 5 U.S.C. 553(b).

[79] 44 U.S.C. 3501 *et seq.*

[80] 5 U.S.C. 801 *et seq.*

SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

RIN 3245–AH92

Small Business Lending Company (SBLC) Moratorium Rescission and Removal of the Requirement for a Loan Authorization

AGENCY: U.S. Small Business Administration.

ACTION: Final rule.

SUMMARY: The U.S. Small Business Administration (SBA or Agency) is amending its business loan program regulations to lift the moratorium on licensing new Small Business Lending Companies (SBLCs) and add a new type of lending entity called a Community Advantage SBLC. SBA is also removing the requirement for a Loan Authorization in the 7(a) and 504 Loan Programs.

DATES: This rule is effective May 12, 2023.

FOR FURTHER INFORMATION CONTACT: Dianna Seaborn, Director, Office of Financial Assistance, Office of Capital Access, Small Business Administration, at (202) 205–3645 or *Dianna.Seaborn@sba.gov.* The phone number above may also be reached by individuals who are deaf or hard of hearing, or who have speech disabilities, through the Federal Communications Commission's TTY-Based Telecommunications Relay Service teletype service at 711.

SUPPLEMENTARY INFORMATION:

I. Background Information

The mission of SBA is to ''aid, counsel, assist, and protect . . . the interests of small business concerns in order to preserve free competitive enterprise . . . and to maintain and strengthen the overall economy of our nation.'' 15 U.S.C. 631(a). SBA accomplishes this mission, in part, through programs that bridge the financing gap in the private market. One such program is the 7(a) Loan Program authorized by section 7(a) of the Small Business Act (15 U.S.C. 636(a)), which supports our nation's economy by providing SBA-guaranteed loans to small businesses that lack adequate access to capital on reasonable terms and conditions.

Section 7(a)(17) of the Small Business Act states that SBA shall authorize lending institutions and other entities, in addition to banks, to make 7(a) loans. To this end, SBA has authorized Small Business Lending Companies (SBLCs) as defined in 13 CFR 120.10 to participate in the 7(a) Loan Program. SBLCs are non-depository lending institutions authorized by SBA only to make loans pursuant to section 7(a) of the Small Business Act and loans to Intermediaries in SBA's Microloan program. Under current regulations, SBLCs may not be affiliated with another SBA Lender, including 7(a) Lenders or Certified Development Companies (CDCs) that participate in SBA's CDC/504 Loan Program. SBLCs are subject to all regulations pertaining to 7(a) loans and Loan Program Requirements (as defined in 13 CFR 120.10) regarding origination, servicing, and liquidation. Unlike the majority of 7(a) Lenders, which are Federally-regulated depository institutions, SBLCs are regulated, supervised, and examined solely by SBA. As SBA-regulated entities, SBLCs are subject to specific regulations and policies regarding formation, capitalization, and enforcement actions.

On August 17, 1981, SBA published a proposed rule (46 FR 41523) to, among other things, impose a moratorium on licensing new SBLCs. Subsequently, on January 4, 1982, SBA published a final rule (47 FR 9) repealing its authority to approve additional SBLCs as participating lenders. Since then, the number of SBLC Licenses has remained unchanged at 14. To become an SBLC under current regulations, an entity must acquire one of the existing 14 SBLC Licenses from an entity that is willing to sell its SBLC License and exit the 7(a) Loan Program.

On February 18, 2011, SBA created the Community Advantage (CA) Pilot

Tab 25

Fair Debt Collection Practices Act (Regulation F); Time-Barred Debt, 88 Fed. Reg. 26475 (May 1, 2023).

CFPB Issues Guidance to Protect Homeowners from Illegal Collection Tactics on Zombie Mortgages

English

Español (cfpb.gov/about-us/newsroom/la-cfpb-emite-directrices-para-proteger-a-propietarios-de-viviendas-de-tacticas-ilegales-de-cobranzas-sobre-hipotecas-zombis/)

It is illegal for debt collectors to sue or threaten to sue to collect debts past the statute of limitations

APR 26, 2023

WASHINGTON, D.C. – Today, the Consumer Financial Protection Bureau (CFPB) issued guidance on debt collectors, covered by the Fair Debt Collection Practices Act, threatening to foreclose on homes with mortgages past the statute of limitations. The advisory opinion clarifies that a covered debt collector who brings or threatens to bring a state court foreclosure action to collect a time-barred mortgage debt may violate the Fair Debt Collection Practices Act and its implementing regulation. A time-barred debt is one whose statute of limitations has expired. The CFPB is issuing today's advisory opinion in light of a series of actions by debt collectors attempting to foreclose on silent second mortgages, also known as zombie mortgages, that consumers thought were satisfied long ago and that may be unenforceable in court.

"Some debt collectors, who sat silent for a decade, are now pursuing homeowners on zombie mortgages inflated with interest and fees," said CFPB Director Rohit Chopra. "We are making clear that threatening to sue to collect on expired zombie mortgage debt is illegal."

Leading up to the 2008 financial crisis, many lenders relied on predatory practices to lock homebuyers into mortgages they could not repay. In the case of today's advisory opinion, the CFPB is focusing on "piggyback" mortgages. Generally, this piggyback mortgage product, known as an 80/20 loan, involved a first lien loan for 80% of the value of the home and a second lien loan for the remaining 20% of the home's valuation.

By and large, lenders did not pursue homeowners on second mortgages, instead selling off these mortgages to debt collectors for pennies on the dollar. Now, over a decade later, and often without any intervening communication with homeowners who were able to save their homes, some of these debt collectors are demanding the mortgage balance, interest, and fees, and threatening foreclosures on families who do not or cannot pay.

Debt collectors now attempting to collect on these zombie second mortgages may be in violation of the Fair Debt Collection Practices Act. The CFPB is issuing this advisory opinion to remind covered debt collectors that:

- The Fair Debt Collection Practices Act and its implementing Regulation F prohibit a debt collector from suing or threatening to sue to collect a time-barred debt.
- The prohibition applies even if the debt collector does not know that the debt is time barred. Accordingly, any debt collector who is covered under the Fair Debt Collection Practices Act and who brings or threatens to bring a state court foreclosure action to collect a time-barred mortgage debt may violate the law.

The Fair Debt Collection Practices Act and its implementing Regulation F govern the conduct of covered debt collectors when they collect debt. Many individuals and entities that seek to collect defaulted mortgage loans, and many of the attorneys that bring foreclosure actions on their behalf, are Fair Debt Collection Practices Act debt collectors.

Along with private plaintiffs, the CFPB and state attorneys general have the authority in appropriate circumstances to take action against institutions and individuals violating the Fair Debt Collection Practices Act and Regulation F. The CFPB will be monitoring the debt collection market for violations related to time-barred mortgages as well as to time-barred non-mortgage debt.

Read the advisory opinion, *Fair Debt Collection Practices Act (Regulation F); Time-Barred Debt* (https://files.consumerfinance.gov/f/documents/cfpb_regulation-f-time-barred-debt_advisory-opinion_2023-04.pdf).

Read the blog, *Zombie second mortgages: When collectors come for long forgotten home loans* (cfpb.gov/about-us/blog/zombie-second-mortgages-when-collectors-come-for-long-forgotten-home-loans/).

Read Director Chopra's Prepared Remarks of Director Rohit Chopra on Zombie Mortgage Debt at Brooklyn Law School in New York (cfpb.gov/about-us/newsroom/prepared-remarks-of-director-rohit-chopra-on-zombie-mortgage-debt/).

Consumers can submit complaints about zombie mortgages, time-barred debts, and other financial products or services by visiting the CFPB's website (cfpb.gov/complaint/) or by calling (855) 411-CFPB (2372).

Employees who believe their companies have violated federal consumer financial protection laws, including the Fair Debt Collection Practices Act, are encouraged to send information about what they know to whistleblower@cfpb.gov.

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit www.consumerfinance.gov (http://www.consumerfinance.gov/).

Topics

- **FORECLOSURE** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=FORECLOSURE)
- **DEBT COLLECTION** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=DEBT-COLLECTION)
- **MORTGAGES** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=MORTGAGES)

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Rules and Regulations

Federal Register

Vol. 88, No. 83

Monday, May 1, 2023

CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Part 1006

Fair Debt Collection Practices Act (Regulation F); Time-Barred Debt

AGENCY: Consumer Financial Protection Bureau.

ACTION: Advisory opinion.

SUMMARY: The Consumer Financial Protection Bureau (CFPB) is issuing this advisory opinion to affirm that the Fair Debt Collection Practices Act (FDCPA) and its implementing Regulation F prohibit a debt collector, as that term is defined in the statute and regulation, from suing or threatening to sue to collect a time-barred debt. Accordingly, an FDCPA debt collector who brings or threatens to bring a State court foreclosure action to collect a time-barred mortgage debt may violate the FDCPA and Regulation F.

DATES: This advisory opinion is effective on May 1, 2023.

FOR FURTHER INFORMATION CONTACT: Seth Caffrey, Courtney Jean, or Kristin McPartland, Senior Counsels, Office of Regulations at (202) 435–7700 or *https://reginquiries.consumerfinance.gov/.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION: The CFPB is issuing this advisory opinion through the procedures for its Advisory Opinions Policy.[1] Refer to those procedures for more information.

I. Advisory Opinion

A. Background

Leading up to the 2008 financial crisis, many lenders originated mortgages to consumers without considering their ability to repay the loans.[2] These practices, which harmed millions of people, included in some cases originating products such as ''piggyback'' mortgages in which high-interest second mortgages were issued simultaneously with the origination of the first mortgage. One common piggyback mortgage product, known as an 80/20 loan, involved a first lien loan for 80 percent of the value of the home and a second lien loan for the remaining 20 percent of the valuation. Some consumers in these loans found themselves unable to make full payments on their first and second mortgages, and when housing prices began to decline in 2005, refinancing became more difficult.[3]

When a borrower defaults on a second mortgage, the mortgage holder may be able to initiate a foreclosure even if the borrower is current on the first mortgage. However, the second mortgage holder only receives proceeds from the foreclosure sale if there are any funds left after paying off the first mortgage. As a result, many second mortgage holders of piggyback loans, recognizing that a foreclosure would not generate enough money to cover even the first mortgage, charged their defaulted loans off as uncollectible and ceased communicating with the borrowers. Some sold the loans to debt buyers, often for pennies on the dollar. Such sales often occurred unbeknownst to borrowers, who continued to receive no communications regarding the loans. Many borrowers, having not received any notices or periodic statements for years, concluded that their second mortgages had been modified along with the first mortgage, discharged in bankruptcy, or forgiven.

In recent years, as home prices have increased and borrowers have paid down their first mortgages, after years of silence, some borrowers are hearing from companies that claim to own or have the right to collect on their long-dormant second mortgages.[4] These companies often demand the outstanding balance on the second mortgage, plus fees and interest, and threaten to foreclose if the borrower does not or cannot pay. The CFPB is concerned about homeowners who survived the 2008 financial crisis but who are now facing foreclosure threats and other collection activity because of long-dormant second mortgages. These borrowers are often told that they face a choice between entering into onerous payment plans or losing their homes and the equity they have diligently built since the financial crisis.

Because of the amount of time that has lapsed on these long-dormant loans, some have likely become time barred under State law. Time-barred debts are debts for which the applicable statute of limitations has expired.[5] Statutes of limitation are, typically, State laws that provide time limits for bringing suit on legal claims.[6] In most States the expiration of the applicable statute of limitations, if raised by the consumer as an affirmative defense, precludes the debt collector from recovering on the debt using judicial processes.[7] In many jurisdictions, State court (*i.e.,* judicial) foreclosure actions are subject to a statute of limitations.

The CFPB understands that some debt collectors collecting on long-dormant second mortgages may have filed or have threatened to file judicial foreclosure actions even though the underlying debt is time barred. The CFPB is issuing this advisory opinion to affirm that: (1) the FDCPA and its implementing Regulation F prohibit a debt collector, as that term is defined in the statute and regulation, from suing or threatening to sue to collect a time-barred debt; and (2) this prohibition applies even if the debt collector neither knows nor should know that the debt is time barred. Accordingly, an FDCPA debt collector who brings or threatens to bring a State court foreclosure action to collect a time-barred mortgage debt may violate the FDCPA and Regulation F.

B. Coverage

This advisory opinion applies to debt collectors as defined in section 803(6) of the FDCPA and implemented in Regulation F, 12 CFR 1006.2(i).

[1] 85 FR 77987 (Dec. 3, 2020).

[2] *See generally* 78 FR 79730, 79732–33 (Dec. 31, 2013).

[3] *Id.* at 79733.

[4] *See generally* Michael Hill, ''*Zombie Debt*'': *Homeowners face foreclosure on old mortgages,* Associated Press (Nov. 16, 2022), *https://apnews.com/article/business-mortgages-44b1ffad08a80b96a8630e091d1e96f2.*

[5] *See* 86 FR 5766, 5776–77 (Jan. 19, 2021); 12 CFR 1006.26(a)(2).

[6] *See* 86 FR at 5775–76; 12 CFR 1006.26(a)(1).

[7] *See* 86 FR at 5777.

C. Legal Analysis

The FDCPA [8] and its implementing Regulation F [9] govern the conduct of ''debt collectors'' when they collect ''debt.'' The statute and regulation generally define a debt collector as ''any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.'' [10] Many individuals and entities that seek to collect defaulted mortgage loans, and many of the attorneys that bring foreclosure actions on their behalf, are FDCPA debt collectors.

The FDCPA and Regulation F define ''debt'' as ''any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.'' [11] A consumer's payment obligation arising from a mortgage transaction primarily for personal, family, or household purposes, such as the purchase of the consumer's residence, falls within the plain language of this definition.[12] It follows that State court foreclosure proceedings often constitute the collection of ''debt'' under the FDCPA,[13] and debt collectors who engage in such debt collection activity are subject to the requirements and prohibitions of the FDCPA and Regulation F.

Regulation F prohibits a debt collector from suing or threatening to sue to collect a time-barred debt.[14] As the CFPB explained in finalizing this prohibition, ''a debt collector who sues or threatens to sue a consumer to collect a time-barred debt explicitly or implicitly misrepresents to the consumer that the debt is legally enforceable, and that misrepresentation is material to consumers because it may affect their conduct with regard to the collection of that debt, including whether to pay it.'' [15] Regulation F's prohibition on suits and threats of suit on time-barred debt is subject to a strict liability standard.[16] That is, a debt collector who sues or threatens to sue to collect a time-barred debt violates the prohibition ''even if the debt collector neither knew nor should have known that a debt was time barred.'' [17] Accordingly, a debt collector who brings or threatens to bring a State court foreclosure action with respect to a time-barred mortgage debt may violate the FDCPA and Regulation F. This is true even if the debt collector neither knew nor should have known that the debt was time barred.

The CFPB also notes that a broad range of non-foreclosure debt collection-related activity, such as communicating with consumers about defaulted mortgages, can be covered by the FDCPA. FDCPA debt collectors undertaking such activity are subject to the other requirements and prohibitions of the statute and Regulation F when collecting debt [18] whether or not that debt is time-barred. These include, for example, the prohibition on debt collectors: falsely representing the character, amount, or legal status of any debt; [19] threatening to take any action that cannot legally be taken or that is not intended to be taken; [20] and selling, transferring for consideration, or placing for collection a debt that the debt collector knows or should know has been paid or settled or discharged in bankruptcy.[21] They also include, for example, the requirement that debt collectors: identify themselves as a debt collector in all communications with the consumer (except formal pleadings in connection with a legal action); [22] provide the consumer with validation information in certain circumstances; [23] and respond to consumer disputes adequately before continuing to collect.[24] Finally, even if an FDCPA debt collector engages only in actions necessary to undertake a nonjudicial foreclosure action, the debt collector is still subject to FDCPA section 808(6) [25] and Regulation F, 12 CFR 1006.22(e),[26] which generally prohibit taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if the debt collector has no present right or intention to do so.[27]

Although not the focus of this advisory opinion, the CFPB also notes that entities selling or collecting on these second mortgages who are mortgage servicers may also be subject to certain requirements under the Real Estate Settlement Procedures Act,[28] the Truth in Lending Act,[29] and the CFPB's mortgage servicing regulations.[30] For example, unless an exemption applies, the CFPB's mortgage servicing regulations require servicers to provide periodic statements to consumers.[31]

II. Regulatory Matters

This advisory opinion is issued under the CFPB's authority to interpret the FDCPA, including under section 1022(b)(1) of the Consumer Financial Protection Act of 2010,[32] which authorizes guidance as may be necessary or appropriate to enable the CFPB to administer and carry out the purposes and objectives of Federal consumer financial laws.[33]

An advisory opinion is a type of interpretive rule. As an interpretive rule, this advisory opinion is exempt from the notice-and-comment rulemaking requirements of the Administrative Procedure Act.[34] Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.[35] The CFPB has also

[8] 15 U.S.C. 1692–1692p.

[9] 12 CFR part 1006.

[10] 15 U.S.C. 1692a(6); 12 CFR 1006.2(i). The statute and regulation also provide that, for purposes of section 808(6) and 12 CFR 1006.22(e), the term debt collector also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. *Id.*

[11] 15 U.S.C. 1692a(5); 12 CFR 1006.2(h).

[12] *See, e.g., Cohen* v. *Rosicki, Rosicki & Assocs., PC,* 897 F.3d 75, 83 (2d Cir. 2018).

[13] *Id.* at 83–84.

[14] 12 CFR 1006.26(b).

[15] 86 FR 5776, 5778 (Jan. 19, 2021).

[16] *See id.* at 5777, 5781.

[17] *Id.* at 5777.

[18] *See* 15 U.S.C. 1692a(5); 12 CFR 1006.2(h).

[19] 15 U.S.C. 1692e(2)(a); 12 CFR 1006.18(b)(2).

[20] 15 U.S.C. 1692e(5); 12 CFR 1006.18(c)(1); 15 U.S.C. 1692f(6); 12 CFR 1006.22(e).

[21] 12 CFR 1006.30(b).

[22] 15 U.S.C. 1692e(11); 12 CFR 1006.18(e).

[23] 15 U.S.C. 1692g(a); 12 CFR 1006.34.

[24] 15 U.S.C. 1692g(b); 12 CFR 1006.38(d); 85 FR 76734, 76845–48 (Nov. 30, 2020).

[25] 15 U.S.C. 1692f(6).

[26] *See* 15 U.S.C. 1692a(6); 12 CFR 1006.2(i)(1).

[27] *See Obduskey* v. *McCarthy & Holthus LLP,* 139 S.Ct. 1029 (2019) (holding that a business engaged in no more than nonjudicial foreclosure proceedings is not a debt collector under FDCPA section 803(6), except for the limited purpose of FDCPA section 808(6)).

[28] 12 U.S.C. 2601 *et seq.*

[29] 15 U.S.C. 1601 *et seq.*

[30] *See, e.g.,* 12 CFR 1024.33(b) (requiring a transferee and transferor servicer to provide a timely notice of transfer of servicing to the affected borrower), 12 CFR 1024.39 (requiring servicers to make early intervention contacts with delinquent borrowers), 12 CFR 1024.41 (requiring servicers to follow certain loss mitigation procedural requirements, including certain foreclosure-related protections). Note that small servicers, as defined in 12 CFR 1026.41(e)(4), are exempt from certain of these requirements. *See* 12 CFR 1024.30(b).

[31] *See* 12 CFR 1026.41(a); *see also, e.g.,* 12 CFR 1026.41(e)(4) (exempting small servicers from this requirement) and 12 CFR 1026.41(e)(6) (exempting servicers from periodic statement requirements for certain charged-off loans but only if, among other conditions, the servicer sends a specific notice to the consumer and does not charge additional fees or interest on the account).

[32] Dodd-Frank Wall Street Reform and Consumer Protection Act, *Public Law* 111–203, 124 Stat. 1376 (2010).

[33] 12 U.S.C. 5512(b)(1).

[34] 5 U.S.C. 553(b).

[35] 5 U.S.C. 603(a), 604(a).

determined that this advisory opinion does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.[36]

Pursuant to the Congressional Review Act,[37] the CFPB will submit a report containing this interpretive rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to the rule's published effective date. The Office of Information and Regulatory Affairs has designated this interpretive rule as not a ''major rule'' as defined by 5 U.S.C. 804(2).

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2023–09171 Filed 4–28–23; 8:45 am]

BILLING CODE 4810–AM–P

[36] 44 U.S.C. 3501–3521.

[37] 5 U.S.C. 801 *et seq.*

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 158

[Docket ID: DOD–2020–OS–0015]

RIN 0790–AK81

Operational Contract Support (OCS) Outside the United States

AGENCY: Office of the Under Secretary of Defense for Acquisition and Sustainment, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: The DoD is updating the policies and procedures for operational contract support (OCS) outside the United States. These changes include broadening the range of applicable operational scenarios, eliminating content internal to the Department designating contractor personnel as part of the DoD total force, incorporating requirements for accountability and reporting, and clarifying responsibilities. With these updates, the Department addresses open recommendations from the Government Accountability Office (GAO).

DATES: This rule is effective May 31, 2023.

FOR FURTHER INFORMATION CONTACT: Ms. Donna M. Livingston, 703–692–3032, *donna.m.livingston.civ@mail.mil*.

SUPPLEMENTARY INFORMATION: OCS is a segment of the GAO High Risk Area of DoD Contract Management, and while the latest update in March 2021, GAO–21–119SP, ''High-Risk Series: Dedicated Leadership Needed to Address Limited Progress in Most High-Risk Areas'' (available at: *https://www.gao.gov/products/gao-21-119sp*) acknowledged progress, GAO cited the need to revise and reissue guidance to address five open recommendations.

Legal Authority

Section 861 of the *National Defense Authorization Act for Fiscal Year 2008* (Pub. L. 110–181) requires the DoD, Department of State, and the United States Agency for International Development to enter into an agreement regarding contracting matters in Iraq and Afghanistan and identify a common database to serve as a repository of information on contracts and contractor personnel supporting these operations. Section 854 of the *Duncan Hunter National Defense Authorization Act for Fiscal Year 2009* (Pub. L. 110–417) requires mechanisms for ensuring contractors are required to report specified offenses that are alleged to have been committed by or against contractor personnel to the appropriate authorities.

Discussion of Comments

The Department of Defense published a proposed rule titled ''Operational Contract Support (OCS) Outside the United States'' (32 CFR part 158) in the **Federal Register** on January 7, 2021 (86 FR 1063–1080). Fourteen comments were received from eight respondents and a summary of the comments and the Department's responses as follows.

Comment: The Department received five comments from respondents recommending the addition of requirements for defense contractor personnel to report information on gross violations of human rights (GVHRs). In general, all five comments regarding GVHR reporting recommended that the rule include a ''duty to report'' GVHRs for defense contractors. Several respondents noted that the proposed rule missed an opportunity to address the requirements of Section 888 of the National Defense Authorization Act for Fiscal Year 2020 to ''monitor and report allegations of gross violations of internationally recognized human rights.''

Response: The DoD acknowledges the requirement, however the policy and processes to support the requirements for reporting allegations of gross violations of human rights are still being developed and are not final. When those actions are completed, the DoD will initiate actions to update this rule as needed to comply with the established policy.

Comment: The Department received a comment objecting to requiring the people of the United States to provide proof of vaccination for the coronavirus disease 2019 (COVID–19) prior to any travel.

Response: The rule does not address requirements related to any specific vaccination requirement for contractor personnel. The provisions in the rule regarding immunizations and deployment health activities ensure that contractor personnel are medically ready to deploy and protect the health of the total force in deployed environments.

Comment: The DoD received a comment recognizing the significant role defense contractors play in support of military operations overseas and the costs born in terms of injury and death that have resulted. The commenter recommended DoD make a more robust effort to collect, analyze, and publicly share data with regard to contractor personnel fatalities and injuries.

Response: The Department appreciates the commenter's understanding of the key role defense contractors play in supporting the DoD. While the DoD does collect data on contractor personnel wounded and killed while performing their duties, this data is not made publicly available. The Synchronized Predeployment and Operational Tracker—Enterprise Suite (SPOT–ES) is the common joint database used to maintain accountability and visibility of contractors supporting applicable operations. In accordance with the SPOT Business Rules, referenced in this rule, it is the responsibility of the contractor's employer to close out the individual's deployment record in SPOT–ES following a death and to update the records when an injury occurs. The DoD is reviewing how to improve contractors' compliance with these procedures and to respectfully encourage more comprehensive reporting to the DoD without impacting legal and privacy issues.

Comment: The DoD received one comment regarding the types of support contractors are generally required to provide their employees while deployed. The commenter asserted that in austere environments, it is common for the U.S. Government to provide life support to contractor personnel when those personnel are located at U.S. military facilities; however, contractor personnel may need to transit through other military facilities before reaching

Tab 26

Coverage of Franchise Financing Under the Equal Credit Opportunity Act, Including the Small Business Lending Rule
(May 16, 2023).

Consumer Financial Protection Bureau

1700 G Street NW, Washington, D.C. 20552

Coverage of Franchise Financing Under the Equal Credit Opportunity Act, Including the Small Business Lending Rule

Franchising constitutes a significant portion of the small business ecosystem. This document communicates the extent to which the Equal Credit Opportunity Act (ECOA) and its implementing Regulation B apply with respect to franchisees seeking credit to finance their businesses.

Under ECOA and Regulation B, much of franchise financing is likely "credit" and "business credit."[1] Franchisees generally obtain credit either directly from the franchisor or from third-party finance companies, which could be independent of the franchisor or brokered by or affiliated with the franchisor. Regardless of whether the credit is provided directly by the franchisor itself, an entity affiliated with the franchisor, or an entity unrelated to the franchisor, the creditor is granting franchisees the right to defer payment for debts they incur. Notably, ECOA and Regulation B generally apply to business credit—which is defined as "extensions of credit primarily for business or commercial (including agricultural) purposes," with limited exclusions[2]—as well as to other credit extended primarily for personal, family, and household use.[3]

Creditors, including franchisors, providing financing to franchisees are thus subject to ECOA

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[1] *See* 15 U.S.C. § 1691a(d) ("The term 'credit' means the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor."); 12 C.F.R. § 1002.2(j) ("Credit means the right granted by a creditor to an applicant to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment therefor."); 12 C.F.R. § 1002.2(g) ("Business credit refers to extensions of credit primarily for business or commercial (including agricultural) purposes…"). On the other hand, franchise financing might not constitute "credit" or "business credit" if, for example, it takes the form of factoring or a true lease, *see* Regulation B, comments 104(b)-1 and -2, or an investment.

[2] 12 C.F.R. § 1002.2(g). The exclusions are for public utilities credit, securities credit, incidental credit, and government credit, as defined in 12 C.F.R. § 1002.3.

[3] *See* Regulation B, comment 2(j)-1 (noting that Regulation B covers credit transactions "regardless of whether the credit is for personal or commercial purposes"). Regulation B distinguishes business credit from consumer credit only in the context of requirements for notifications following adverse actions, *see* 12 C.F.R. § 1002.9(a)(3), and record retention. *See* 12 C.F.R. § 1002.12(b).

and Regulation B's core prohibitions against discrimination. For example, creditors may not discriminate against an applicant on a prohibited basis regarding any aspect of a credit transaction,[4] and they are barred from taking a prohibited basis into account in any system of evaluating the creditworthiness of an applicant.[5] These proscriptions are enforced by an array of federal agencies, including the CFPB, the Small Business Administration, the prudential banking regulators, the Farm Credit Administration, the Department of Justice, and the Federal Trade Commission.[6] ECOA also provides "aggrieved applicants," including small business lending applicants, with a private right of action.[7]

The small business lending rule, like ECOA and Regulation B as a whole, generally covers "business credit."[8] As the CFPB explained in the preamble to the final small business lending rule, rather than provide an exhaustive list of all conceivable types of business credit, the rule covers any type of business credit that is not specifically excluded.[9] The rule also does not exclude any particular types of financial institution.[10] Consequently, entities providing credit to franchisees—which, as noted above, offer a product that meets the definition of "business credit"—would generally be financial institutions subject to the rule's data collection and reporting requirements to the same extent as any other provider of business credit, unless they are subject to one of the narrow exclusions from coverage. The CFPB would thus expect many entities providing franchise financing will be required to collect and report data under the rule if they meet the origination threshold for coverage.[11]

In particular, the CFPB anticipates that third-party entities providing credit to franchisees that meet the origination threshold for coverage will be required to collect and report data under the small business lending rule regardless of whether that company is affiliated with the franchisor. Under certain circumstances, however, franchisors that themselves directly provide credit to franchisees may be subject to the rule's exception for "trade credit." The rule defines trade credit

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[4] 15 U.S.C. § 1691(a); 12 C.F.R. § 1002.4(a).

[5] 12 C.F.R. § 1002.6(b)(1).

[6] 15 U.S.C. § 1691c; 12 C.F.R. § 1002.16(a).

[7] 15 U.S.C. § 1691e.

[8] *See* 12 C.F.R. §§ 1002.102(d); 1002.104(a).

[9] *See* Small Business Lending under the Equal Credit Opportunity Act (Regulation B) 150, *available at* https://files.consumerfinance.gov/f/documents/cfpb_1071-final-rule.pdf.

[10] *Id.* at 232. 12 C.F.R. § 1002.105(a) defines a "financial institution" to mean any partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity that engages in any financial activity.

[11] Under 12 C.F.R. § 1002.105(b), a covered financial institution—*i.e.*, a lender required to collect and report data under the rule—is one that originated at least 100 covered credit transactions for small businesses in each of the two preceding calendar years.

as a "financing arrangement wherein a business acquires goods or services from another business without making immediate payment in full to the business providing the goods or services."[12] Accordingly, if a franchisor— rather than a third party providing credit to franchisees—is providing goods and services (such as inventory, marketing rights, or licensing) and allowing the franchisee to repay it for those goods and services over time, that transaction could meet the definition of trade credit such that reporting would not be required under the rule. In the preamble to the final rule, the CFPB explained that this exclusion was appropriate because "trade creditors generally extend credit as a means to facilitate the sale of their own goods or services, rather than offering credit as a stand-alone financial product or as [a] more general credit product offered alongside the sale of their own goods or services. . . . [T]hey are not primarily financial services providers, nor do they have the infrastructure needed to manage compliance with regulatory requirements associated with making extensions of credit."[13]

Even if a franchisor is providing trade credit to franchisees and thus is not required to collect and report data under the small business lending rule,[14] it remains subject to ECOA and Regulation B's prohibitions against discrimination. Furthermore, to the extent that a franchisor is providing credit that could be used for purposes other than the purchase of its own goods or services, such as general operating expenses, purchase of the premises in which the franchise will operate or cash register funds, that aspect of the transaction would not constitute trade credit. That franchisor would thus be required to collect and report data under the rule if it meets the origination threshold for coverage.

[12] 12 C.F.R. § 1002.104(b)(1).

[13] Small Business Lending under the Equal Credit Opportunity Act (Regulation B) 172, *available at* https://files.consumerfinance.gov/f/documents/cfpb_1071-final-rule.pdf. In contrast, the CFPB declined to extend the exclusion to cover "affiliates and facilitators of trade creditors that provide financing, even if only for the trade creditor's products and not for competing or unrelated products," because "unlike trade creditors themselves, such providers offer stand-alone credit products in the same way as other financial institutions and are not retailers or merchants with limited regulatory compliance experience. . . . The trade credit exclusion does not extend to affiliates and facilitators of trade creditors that provide financing, even if only for the trade creditor's products and not for competing or unrelated products." *Id.* at 172-173.

[14] Trade creditors are also exempt from certain Regulation B notification requirements. *See* § 1002.9(a)(3).

Tab 27

Circular 2023-02: Reopening Deposit Accounts That Consumers Previously Closed, 88 Fed. Reg. 33545 (May 24, 2023).

CFPB Issues Guidance to Rein in Creation of Fake Accounts to Harvest Fees

New circular addresses illegal "reopening" of deposit accounts that can hit consumers with junk fees

MAY 10, 2023

WASHINGTON, D.C. – The Consumer Financial Protection Bureau (CFPB) issued a new circular affirming that a bank may violate federal law if it unilaterally reopens a deposit account to process transactions after a consumer has already closed it. The CFPB has observed in complaints that even after a consumer completes all the required steps to close an account, their bank has "reopened" the closed account and assessed overdraft and nonsufficient funds fees. Consumers have reported to the CFPB that financial institutions have also charged account maintenance fees upon reopening, even if the consumer was not required to pay account maintenance fees prior to account closure.

"When a bank unilaterally chooses to open an account in someone's name after they have already closed it, this is a fake account," said CFPB Director Rohit Chopra. "The CFPB is acting on all fronts to halt the harvesting of illegal junk fees."

Closing a bank account can take significant time and effort by the consumer to complete, and the bank may require a consumer to provide a certain period of advance notice prior to closing the account to allow for the financial institution to process any pending debits or deposits. Consumers often must also settle any negative balances in their deposit account before being able to close it. Upon closure of the deposit account, the consumer may no longer have access to their account information or receive notifications of account activity.

Today's circular confirms that banks may risk violating the Consumer Financial Protection Act's prohibition on unfair acts or practices by unilaterally reopening closed accounts. Consumers may incur overdraft, nonsufficient funds, or monthly maintenance fees when a closed account is reopened by the bank. This practice may also enable third parties to access a consumer's funds without consent. If reopening the account overdraws the account, banks may also furnish negative information to consumer reporting companies if consumers do not settle negative balances quickly. 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 previously ordered (cfpb.gov/about-us/newsroom/consumer-financial-protection-bureau-settles-usaa-federal-savings-bank/) USAA Federal Savings Bank to pay more than $15 million in consumer remediation and penalties for, among other things, violating the Consumer Financial Protection Act by reopening deposit accounts consumers had previously closed without seeking prior authorization or providing adequate notice. Today's circular highlights for regulators that an institution's unilateral reopening of a deposit account that a consumer previously closed can constitute an unfair act or practice under the Consumer Financial Protection Act.

Read the *Consumer Financial Protection Circular, Reopening deposit accounts that consumers previously closed.* (cfpb.gov/compliance/circulars/consumer-financial-protection-circular-2023-02-reopening-deposit-accounts-that-consumers-previously-closed/)

Consumers can submit complaints about bank accounts and other financial products and services by visiting the CFPB's website (cfpb.gov/complaint/) or by calling (855) 411-CFPB (2372).

Employees who believe their companies have violated federal consumer financial protection laws are encouraged to send information about what they know to whistleblower@cfpb.gov.

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit www.consumerfinance.gov (http://www.consumerfinance.gov/).

Topics

- CHECKING ACCOUNT (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=CHECKING-ACCOUNT)
- BANKING (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=BANKING)

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§ 430.2 Definitions.

* * * * *

Faucet means a lavatory faucet, kitchen faucet, metering faucet, or replacement aerator for a lavatory or kitchen faucet, excluding low-pressure water dispensers and pot fillers.

* * * * *

Low-pressure water dispenser means a terminal fitting that dispenses drinking water at a pressure of 105 kPA (15 psi) or less.

* * * * *

Pot filler means a terminal fitting that can accommodate only a single supply water inlet, with an articulated arm or the equivalent that allows the product to reach to fill vessels when in use and allows the product to be retracted when not in use.

* * * * *

■ 3. Section 430.3 is amended by revising paragraph (h)(1) to read as follows:

§ 430.3 Materials incorporated by reference.

* * * * *

(h) * * *

(1) ASME A112.18.1–2018/CSA B125.1–2018, (''ASME A112.18.1''), Plumbing supply fittings, CSA-published July 2018; IBR approved for appendix S to subpart B.

* * * * *

■ 4. Section 430.23 is amended by revising paragraphs (s) and (t) to read as follows:

§ 430.23 Test procedures for the measurement of energy and water consumption.

* * * * *

(s) *Faucets.* Measure the water use for lavatory faucets, lavatory replacement aerators, kitchen faucets, and kitchen replacement aerators, in gallons or liters per minute (gpm or L/min), in accordance to section 2.1 of appendix S of this subpart. Measure the water use for metering faucets, in gallons or liters per cycle (gal/cycle or L/cycle), in accordance to section 2.1 of appendix S of this subpart.

(t) *Showerheads.* Measure the water use for showerheads, in gallons or liters per minute (gpm or L/min), in accordance to section 2.2 of appendix S of this subpart.

* * * * *

■ 5. Appendix S to subpart B of part 430 is revised to read as follows:

Appendix S to Subpart B of Part 430—Uniform Test Method for Measuring the Water Consumption of Faucets and Showerheads

Note: Manufacturers must use the results of testing under this appendix to determine compliance with the relevant standards for faucets and showerheads at § 430.32(g)(o) and (p) as those standards appeared in January 1, 2023 edition of 10 CFR parts 200–499. Specifically, before November 20, 2023 representations must be based upon results generated either under this appendix as codified on June 23, 2023 or under this appendix as it appeared in the 10 CFR parts 200–499 edition revised as of January 1, 2023. Any representations made on or after November 20, 2023 must be made based upon results generated using this appendix as codified on June 23, 2023.

0. Incorporation by Reference

In § 430.3, DOE incorporated by reference the entire standard for ASME A112.18.1; however, only enumerated provisions of ASME A112.18.1 apply to this appendix, as follows. In cases in which there is a conflict, the language of the test procedure in this appendix takes precedence over the referenced test standard. Treat precatory language in ASME A112.18.1 as mandatory.

0.1 ASME A112.18.1:

(a) Section 5.4 ''Flow rate,'' including Figure 3 but excluding Table 1 and excluding sections 5.4.2.3.1(a) and (c), 5.4.2.3.2(b) and (c), and 5.4.3, as specified in section 2.1 and 2.2 of this appendix;

(b) Section 5.4.2.2(c), as specified in section 3.1 of this appendix.

(c) Section 5.4.2.2(d), as specified in sections 2.2 and 3.2 of this appendix.

0.2 [Reserved]

1. Scope

This appendix covers the test requirements to measure the hydraulic performance of faucets and showerheads.

2. Flow Capacity Requirements

2.1. Faucets—Measure the water flow rate for faucets, in gallons per minute (gpm) or liters per minute (L/min), or gallons per cycle (gal/cycle) or liters per cycle (L/cycle), in accordance with the test requirements specified in section 5.4, Flow Rate, of ASME A112.18.1. Record measurements at the resolution of the test instrumentation. Round each calculation to the same number of significant digits as the previous step. Round the final water consumption value to one decimal place for non-metered faucets, or two decimal places for metered faucets.

2.2. Showerheads—Measure the water flow rate for showerheads, in gallons per minute (gpm) or liters per minute (L/min), in accordance with the test requirements specified in section 5.4, Flow Rate, of ASME A112.18.1. Record measurements at the resolution of the test instrumentation. Round each calculation to the same number of significant digits as the previous step. Round the final water consumption value to one decimal place. If using the time/volume method of section 5.4.2.2(d), position the container to ensure it collects all water flowing from the showerhead, including any leakage from the ball joint.

3. General Instruction for Measuring Flow Rate

3.1. Using the Fluid Meter Method To Measure Flow Rate

When measuring flow rate upstream of a showerhead or faucet using a fluid meter (or equivalent device) as described in section 5.4.2.2(c) of ASME A112.18.1, ensure the fluid meter (or equivalent device) meets the following additional requirements. First, ensure the fluid meter is rated for the flow rate range of the product being tested. Second, when testing showerheads or non-metering faucets, ensure that the fluid meter has a resolution for flow rate of at least 0.1 gallons (0.4 liters) per minute. When testing a metering faucet, ensure that the fluid meter has a resolution for flow rate of at least 0.01 gallons (0.04 liters) per minute. Third, verify the fluid meter is calibrated in accordance with the manufacturer printed instructions.

3.2. Using the Time/Volume Method To Measure Flow Rate

There are several additional requirements when measuring flow rate downstream of a showerhead or faucet as described in section 5.4.2.2(d) of ASME A112.18.1 to measure flow rate. First, ensure the receiving container is large enough to contain all the water for a single test and has an opening size and/or a partial cover such that loss of water from splashing is minimized. Second, conduct the time/volume test for at least one minute, with the time recorded via a stopwatch with at least 0.1-second resolution. Third, measure and record the temperature of the water using a thermocouple or other similar device either at the receiving container immediately after recording the mass of water, or at the water in the supply line anytime during the duration of the time/volume test. Fourth, measure the mass of water to a resolution of at least 0.01 lb. (0.005 kg) and normalize it to gallons based on the specific gravity of water at the recorded temperature.

[FR Doc. 2023–10847 Filed 5–23–23; 8:45 am]

BILLING CODE 6450–01–P

CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Chapter X

Consumer Financial Protection Circular 2023–02: Reopening Deposit Accounts That Consumers Previously Closed

AGENCY: Consumer Financial Protection Bureau.

ACTION: Consumer financial protection circular.

SUMMARY: The Consumer Financial Protection Bureau (CFPB) has issued Consumer Financial Protection Circular 2023–02, titled, ''Reopening Deposit Accounts That Consumers Previously

Closed.'' In this circular, the CFPB responds to the question, ''After consumers have closed deposit accounts, if a financial institution unilaterally reopens those accounts to process a debit (*i.e.,* withdrawal, ACH transaction, check) or deposit, can it constitute an unfair act or practice under the Consumer Financial Protection Act (CFPA)?''

DATES: The Bureau released this circular on its website on May 10, 2023.

ADDRESSES: Enforcers, and the broader public, can provide feedback and comments to *Circulars@cfpb.gov.*

FOR FURTHER INFORMATION CONTACT: Terry J. Randall, Senior Counsel for Policy and Strategy, Office of Enforcement, at (202) 435–9497. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

Question Presented

After consumers have closed deposit accounts, if a financial institution unilaterally reopens those accounts to process a debit (*i.e.,* withdrawal, ACH transaction, check) or deposit, can it constitute an unfair act or practice under the Consumer Financial Protection Act (CFPA)?

Response

Yes. After consumers have closed deposit accounts, if a financial institution unilaterally reopens those accounts to process debits or deposits, it can constitute an unfair practice under the CFPA. This practice may impose substantial injury on consumers that that they cannot reasonably avoid and that is not outweighed by countervailing benefits to consumers or competition.

Background

Consumers may elect to close a deposit account for a variety of reasons. For example, after moving to a new area, a consumer may elect to use a new account that they opened with a different financial institution that has a branch close to their new home. A consumer also might close an account because they are not satisfied with the account for another reason, such as the imposition of fees or the adequacy of customer service.

The process of closing a deposit account often takes time and effort. For example, closing an account typically involves taking steps to bring the account balance to zero at closure. The financial institution typically returns any funds remaining in the account to the consumer at closure and the consumer typically must pay any negative balance at closure. Some institutions require customers to provide a certain period of notice (*e.g.,* a week) prior to closing the account to provide time for the financial institution to process any pending debits or deposits. Deposit account agreements typically indicate that the financial institution may return any debits or deposits to the account that the financial institution receives after closure and faces no liability for failing to honor any debits or deposits received after closure.

Sometimes after a consumer completes all of the steps that the financial institution requires to initiate the process of closing a deposit account and the financial institution completes the request, the financial institution unilaterally reopens the closed account if the institution receives a debit or deposit to the closed account. Financial institutions sometimes reopen an account even if doing so would overdraw the account, causing the financial institution to impose overdraft and non-sufficient funds (NSF) fees. Financial institutions may also charge consumers account maintenance fees upon reopening, even if the consumers were not required to pay such fees prior to account closure (*e.g.,* because the account previously qualified to have the fees waived).

In addition to subjecting consumers to fees, when a financial institution processes a credit through an account that has reopened, the consumer's funds may become available to third parties, including third parties that do not have permission to access their funds.

The Consumer Financial Protection Bureau (CFPB) has brought an enforcement action regarding the practice of account reopening under the CFPA's prohibition against unfair, deceptive, or abusive practices.[1] The CFPB found that a financial institution engaged in an unfair practice by reopening deposit accounts consumers had previously closed without seeking prior authorization or providing timely notice. This practice of reopening closed deposit accounts caused some account balances to become negative and potentially subjected consumers to various fees, including overdraft and NSF fees. In addition, when the financial institution reopened an account to process a deposit, creditors had the opportunity to initiate debits to the account and draw down the funds, possibly resulting in a negative balance and the accumulation of fees. These practices resulted in hundreds of thousands of dollars in fees charged to consumers. The CFPB concluded that the institution's practice of reopening consumer accounts without obtaining consumers' prior authorization and providing timely notice caused substantial injury to consumers that was not reasonably avoidable or outweighed by any countervailing benefit to consumers or to competition.

Analysis and Findings

A financial institution's unilateral reopening of deposit accounts that consumers previously closed can constitute a violation of the CFPA's probation on unfair acts or practices.[2]

Under the CFPA, an act or practice is unfair when it causes or is likely to cause consumers substantial injury that is not reasonably avoidable by consumers and the injury is not outweighed by countervailing benefits to consumers or to competition.[3]

Unilaterally reopening a closed deposit account to process a debit or deposit may cause substantial injury to consumers.

Substantial injury includes monetary harm, such as fees paid by consumers due to the unfair practice. Actual injury is not required; significant risk of concrete harm is sufficient.[4] Substantial injury can occur when a small amount of harm is imposed on a significant number of consumers.[5]

After a consumer has closed a deposit account, a financial institution's act of unilaterally reopening that account upon receiving a debit or deposit may cause monetary harm to the consumer. Financial institutions frequently charge fees after they reopen an account. For example, consumers may incur penalty

[1] USAA Federal Savings Bank, File No. 2019–BCFP–0001 (Jan. 3, 2019).

[2] Depending on the circumstances, reopening a closed deposit account may also implicate the CFPA's prohibition on deceptive or abusive acts or practices. 12 U.S.C. 5531, 5536. *See generally* ''Statement of Policy Regarding Prohibition on Abusive Acts or Practices,'' 88 FR 21883 (Apr. 12, 2023). This conduct may also violate other applicable laws, including State law. *See, e.g., Jimenez* v. *T.D. Bank, N.A.,* 2021 WL 4398754, at *16 (D.N.J., 2021) (private plaintiff stated a claim for unfair practices under Massachusetts law where bank allegedly ''either opened a new account in her name or reopened a previously closed account, without her knowledge and without seeking or obtaining her authorization'' and then charged her fees).

[3] 12 U.S.C. 5531(c)(1).

[4] *See, e.g., F.T.C.* v. *Wyndham Worldwide Corp.,* 799 F.3d 236, 246 (3d Cir. 2015) (interpreting ''substantial injury'' under the Federal Trade Commission Act (FTC Act), 15 U.S.C. 45(n), which uses the same language as the CFPA, 12 U.S.C. 5531(c)(1)).

[5] *See, e.g., Orkin Exterminating Co.* v. *Fed. Trade Comm'n,* 849 F.2d 1354, 1365 (11th Cir. 1988) (interpreting ''substantial injury'' under the FTC Act).

fees[6] when an account that they closed is reopened by the financial institution after receiving a debit or deposit. Since financial institutions typically require a zero balance to close an account, reopening a closed account to process a debit is likely to result in consumers incurring penalty fees.

In addition to fees, reopening a consumer's account to accept a deposit increases the risk that an unauthorized third party may gain access to the consumer's funds (*e.g.,* a person with the consumer's account information who pulls funds from the account without the consumer's authorization).

And if reopening the account overdraws the account and the consumer does not repay the amount owed quickly, the financial institution may furnish negative information to consumer reporting companies, which may make it harder for the consumer to obtain a deposit account in the future. Because reopening accounts that the consumer closed gives rise to these risks of monetary harm, this practice may cause substantial injury.

Consumers likely cannot reasonably avoid this injury.

An injury is not reasonably avoidable by consumers when consumers cannot make informed decisions or take action to avoid that injury. Injury that occurs without a consumer's knowledge or consent, when consumers cannot reasonably anticipate the injury, or when there is no way to avoid the injury even if anticipated, is not reasonably avoidable.[7]

Consumers often cannot reasonably avoid the risk of substantial injury caused by financial institutions' practice of unilaterally reopening accounts that consumers previously closed because they cannot control one or more of the following circumstances: a third party's attempt to debit or deposit money, the process and timing of account closure, or the terms of the deposit account agreements.

First, without the consumer's consent or knowledge, a third party may attempt to debit from or deposit to the closed account, prompting their previous financial institution to reopen the account. For example, a payroll provider may inadvertently send a consumer's paycheck to the closed account, even if the consumer informed the payroll provider about the account closure and directed them to deposit their paycheck in a new account. Similarly, a merchant may take an extended amount of time to process a refund to a customer's account for a returned item or may use the wrong account information to process a recurring monthly payment. Consumers cannot reasonably avoid these types of injuries resulting from these types of actions by a third party.

Second, financial institutions may require consumers to complete a multi-step process before closing a deposit account, which can involve completing paperwork in person, returning or destroying any access devices, bringing the balance to zero, and fulfilling waiting periods. When consumers begin this process, they likely will not know exactly when the financial institution will fulfill their request to close the account. Consumers, for example, do not control waiting periods or the length of time it takes a financial institution to settle transactions to bring a balance to zero. Consumers' lack of control over the financial institution's account closure process and timeline may make it more difficult for them to prevent debits and credits that will reopen the account, since the account may close earlier than they expect.

Finally, consumers may not have a reasonable alternative to financial institutions that permit this practice because most deposit contracts either permit or are silent on this practice. Further, to the extent that deposit account agreements allow or disclose such practices, these agreements typically are standard-form contracts prepared by financial institutions that specify a fixed set of terms.[8] Consumers have no ability to negotiate the terms of these agreements. Instead, financial institutions present these contracts to consumers on a take-or-leave-it basis. Thus, even if deposit account agreements reference this practice, consumers also have limited ability to negotiate the terms of such contracts, and consumers can incur injuries in circumstances beyond their control. Moreover, even if the financial institution informs the consumer at the time that the account is closed that the institution may reopen the account, pursuant to the account agreement, the consumer will still generally lack the practical ability to control whether the account will be reopened and to avoid fees and other monetary harms.

This injury is likely not outweighed by countervailing benefits to consumers or competition.

Reopening a closed account does not appear to provide any meaningful benefits to consumers or competition. To the extent financial institutions are concerned about controlling their own costs to remain competitive, they have alternatives to reopening a closed account upon receiving a debit or deposit that could minimize their expenses and liability. For example, the financial institution could decline any transactions that they receive for accounts consumers previously closed. In addition to minimizing the institution's costs, not reopening these accounts may protect the financial institution against the use of closed accounts to commit fraud.

Moreover, consumers do not generally benefit when a financial institution unilaterally reopens an account that consumers previously closed. Since financial institutions typically require consumers to bring the account balance to zero before closing an account, reopening an account in response to a debit will likely result in penalty fees rather than payment of an amount owed by the consumer. While consumers might potentially benefit in some instances where their accounts are reopened to receive deposits, which then become available to them, that benefit does not outweigh the injuries that can be caused by unilateral account reopening. Such benefits are unlikely to be significant because consumers can generally receive the same deposits in another way that they would prefer (such as through a new account that they opened to replace the closed account). And those uncertain benefits are outweighed by the risk that deposited funds will be depleted before the consumer can access (or is even aware of) the funds (*e.g.,* through maintenance or other fees assessed by the financial institution as a result of the reopening or debits from the reopened account by third parties).

Further, not reopening accounts may benefit consumers in certain circumstances. For example, declining a deposit submitted to a closed account alerts the fund's sender that they have incorrect account information and may encourage the sender to contact the consumer to obtain updated account information. Declining a debit also provides an opportunity for the sender of the debit to inform the consumer of any erroneous account information, providing the consumer with the opportunity to make the payment with

[6] In these circumstances, because there generally are no benefits to charging fees on reopened accounts (see countervailing benefits discussion below), such fees generally would function as penalty fees which cause substantial injury.

[7] *See FTC* v. *Neovi, Inc.,* 604 F.3d 1150, 1158 (9th Cir. 2010) (interpreting whether consumer's injuries were reasonably avoidable under the FTC Act); *Orkin Exterminating Co.,* 849 F.2d at 1365–66 (same); *American Fin. Servs. Ass'n* v. *FTC,* 767 F.2d 957, 976 (D.C. Cir. 1985) (same).

[8] *See American Fin. Servs. Ass'n,* 767 F.2d at 977 (concluding that certain practices were unfair even though disclosed and agreed to in agreements because consumers had no ability to negotiate the terms of form contracts).

a current account or through another process.

For these reasons, government enforcers should consider whether a financial institution has violated the prohibition against unfair acts or practices in the CFPA if they discover that a financial institution has unilaterally reopened accounts that consumers previously

About Consumer Financial Protection Circulars

Consumer Financial Protection Circulars are issued to all parties with authority to enforce Federal consumer financial law. The CFPB is the principal Federal regulator responsible for administering Federal consumer financial law, *see* 12 U.S.C. 5511, including the Consumer Financial Protection Act's prohibition on unfair, deceptive, and abusive acts or practices, 12 U.S.C. 5536(a)(1)(B), and 18 other ''enumerated consumer laws,'' 12 U.S.C. 5481(12). However, these laws are also enforced by State attorneys general and State regulators, 12 U.S.C. 5552, and prudential regulators including the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the National Credit Union Administration. *See, e.g.,* 12 U.S.C. 5516(d), 5581(c)(2) (exclusive enforcement authority for banks and credit unions with $10 billion or less in assets). Some Federal consumer financial laws are also enforceable by other Federal agencies, including the Department of Justice and the Federal Trade Commission, the Farm Credit Administration, the Department of Transportation, and the Department of Agriculture. In addition, some of these laws provide for private enforcement.

Consumer Financial Protection Circulars are intended to promote consistency in approach across the various enforcement agencies and parties, pursuant to the CFPB's statutory objective to ensure Federal consumer financial law is enforced consistently. 12 U.S.C. 5511(b)(4).

Consumer Financial Protection Circulars are also intended to provide transparency to partner agencies regarding the CFPB's intended approach when cooperating in enforcement actions. *See, e.g.,* 12 U.S.C. 5552(b) (consultation with CFPB by State attorneys general and regulators); 12 U.S.C. 5562(a) (joint investigatory work between CFPB and other agencies).

Consumer Financial Protection Circulars are general statements of policy under the Administrative Procedure Act. 5 U.S.C. 553(b). They provide background information about applicable law, articulate considerations relevant to the Bureau's exercise of its authorities, and, in the interest of maintaining consistency, advise other parties with authority to enforce Federal consumer financial law. They do not restrict the Bureau's exercise of its authorities, impose any legal requirements on external parties, or create or confer any rights on external parties that could be enforceable in any administrative or civil proceeding. The CFPB Director is instructing CFPB staff as described herein, and the CFPB will then make final decisions on individual matters based on an assessment of the factual record, applicable law, and factors relevant to prosecutorial discretion.

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2023–10982 Filed 5–23–23; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. FAA–2023–0068; Special Conditions No. 25–821–SC]

Special Conditions: B/E Aerospace Ltd., MHI RJ Aviation ULC Model CL–600–2B19 Airplane; Installation of a Therapeutic Oxygen System for Medical Use

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued for the MHI RJ Aviation ULC Model CL–600–2B19 airplane. This airplane, as modified by B/E Aerospace Ltd. (B/E Aerospace), will have a novel or unusual design feature when compared to the state of technology envisioned in the airworthiness standards for transport-category airplanes. This design feature is an installation of a therapeutic oxygen system for medical use. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: This action is effective on B/E Aerospace Ltd. on May 24, 2023. Send comments on or before July 10, 2023.

ADDRESSES: Send comments identified by Docket No. FAA–2023–0068 using any of the following methods:

- *Federal eRegulations Portal:* Go to *https://www.regulations.gov/* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30, U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

Docket: Background documents or comments received may be read at *https://www.regulations.gov/* at any time. Follow the online instructions for accessing the docket or go to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Robert Hettman, Mechanical Systems, AIR–623, Technical Policy Branch, Policy and Standards Division, Aircraft Certification Service, Federal Aviation Administration, 2200 South 216th Street, Des Moines, Washington 98198; telephone and fax 206–231–3171; email *robert.hettman@faa.gov.*

SUPPLEMENTARY INFORMATION: The substance of these special conditions has been published in the **Federal Register** for public comment in several prior instances with no substantive comments received. Therefore, the FAA finds, pursuant to § 11.38(b), that new comments are unlikely, and notice and comment prior to this publication are unnecessary.

Comments Invited

The FAA invites interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data.

The FAA will consider all comments received by the closing date for comments, and will consider comments filed late if it is possible to do so

Tab 28

Consumer Information Requests to Large Banks and Credit Unions, 88 Fed. Reg. 71279 (Oct. 16, 2023).

CFPB Issues Guidance to Halt Large Banks from Charging Illegal Junk Fees for Basic Customer Service

English

Español (cfpb.gov/about-us/newsroom/cfpb-emite-directrices-para-impedir-que-grandes-bancos-cobren-tarifas-inesperadas-ilegales-por-servicios-basicos-de-atencion-al-cliente/)

Advisory opinion provides guidance on 2010 legal provision regarding customer service by large financial firms

OCT 11, 2023

WASHINGTON, D.C. – Today, the Consumer Financial Protection Bureau (CFPB) issued an advisory opinion regarding a provision enacted by Congress which generally prohibits large banks and credit unions from imposing unreasonable obstacles on customers, such as charging excessive fees, for basic information about their own accounts. Under a 2010 federal law, large banks and credit unions must provide complete and accurate account information when requested by accountholders. As many large banks shift away from a relationship banking model that prioritizes high levels of customer service, today's advisory opinion clarifies that people are entitled to get the basic information they need without having to pay junk fees.

"While small relationship banks pride themselves on customer service, many large banks erect obstacle courses and impose junk fees to answer basic questions," said CFPB Director Rohit Chopra. "While the biggest banks have abandoned the relationship banking model, federal law still requires them to answer certain customer inquiries completely, accurately, and in a timely manner."

In the run up to the 2008 financial crisis, large banks, along with other financial institutions, failed to ensure consumers had access to full details about their accounts. As millions of homeowners struggled to pay their mortgages, many were unable to even determine which companies held their loans. When Congress instituted financial reforms in the Consumer Financial Protection Act, it included a provision in Section 1034(c) requiring large banks and credit unions – those with more than $10 billion in assets – to provide account information that is in their control or possession, when it is requested by customers.

When large financial institutions charge fees to respond to those requests, they impede customers from obtaining the essential information they are entitled to under federal law. From its market monitoring and the **public's comments** (cfpb.gov/about-us/newsroom/cfpb-launches-initiative-to-improve-customer-service-at-big-banks/) about large banks' customer service, the CFPB is aware that some large banks charge customers for basic information that is critical to fix problems with their bank account or to manage their finances.

Banks give many different names to these fees. Today's guidance explains how the CFPB will administer the legal requirement for large banks when it comes to customer service, including how the CFPB will evaluate fees imposed on customers for making reasonable requests, such as seeking original account agreements or information about recurring withdrawals from an account.

Read today's advisory opinion, *Consumer Financial Protection Act; Consumer Account Information.* (https://files.consumerfinance.gov/f/documents/cfpb-1034c-advisory-opinion-2023_10.pdf)

The CFPB does not intend to seek monetary relief for potential violations of Section 1034(c) that occur prior to February 1, 2024.

The CFPB has been pursuing a number of initiatives to preserve relationship banking in the United States and to ensure that consumers can obtain adequate customer service. Earlier this year, the CFPB **published an analysis** (cfpb.gov/about-us/newsroom/cfpb-issue-spotlight-analyzes-artificial-intelligence-chatbots-in-banking/) on financial institution use of customer service chatbots powered by artificial intelligence.

Consumers can submit complaints about junk fees and about financial products and services by visiting the **CFPB's website** (cfpb.gov/complaint/) or by calling (855) 411-CFPB (2372).

Employees who believe their companies have violated federal consumer financial protection laws, including by charging consumers unlawful fees, are encouraged to send information about what they know to whistleblower@cfpb.gov. To learn more about reporting potential industry misconduct, visit the **CFPB's website** (cfpb.gov/enforcement/information-industry-whistleblowers/).

Read today's related press release, **CFPB Exams Return $140 Million to Consumers Hit by Illegal Junk Fees in Banking, Auto Loans, and Remittances** (cfpb.gov/about-us/newsroom/cfpb-exams-return-140-million-to-consumers-hit-by-illegal-junk-fees-in-banking-auto-loans-and-remittances).

Read Prepared Remarks of CFPB Director Rohit Chopra on a Press Call on Junk Fees (cfpb.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-on-a-press-call-on-junk-fees/).

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit ***www.consumerfinance.gov*** (http://www.consumerfinance.gov/).

Topics

- **FINANCIAL SERVICE PROVIDERS** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=FINANCIAL-SERVICE-PROVIDERS)
- **JUNK FEES** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=JUNK-FEES)
- **BANKING** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=BANKING)

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CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Chapter X

Consumer Information Requests to Large Banks and Credit Unions

AGENCY: Consumer Financial Protection Bureau.

ACTION: Advisory Opinion.

SUMMARY: The Consumer Financial Protection Bureau (CFPB) is issuing this Advisory Opinion regarding section 1034(c) of the Consumer Financial Protection Act (CFPA), which requires large banks and credit unions to comply in a timely manner with consumer requests for information concerning their accounts for consumer financial products and services, subject to limited exceptions.

DATES: This Advisory Opinion is applicable as of October 16, 2023.

FOR FURTHER INFORMATION CONTACT: Colin Reardon or Yan Cao, Senior Counsels, Legal Division, at 202–435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION: The CFPB is issuing this Advisory Opinion through the procedures for its Advisory Opinions Policy.[1] Refer to those procedures for more information.

I. Background

Section 1034(c) of the CFPA requires large financial institutions to comply with consumer requests for information concerning their accounts in a timely manner.[2] This Advisory Opinion interprets this provision for the purpose of highlighting the obligations it imposes upon large financial institutions. The CFPB has not previously issued supervisory findings or pursued an enforcement action under this provision. This Advisory Opinion is the CFPB's first guidance regarding section 1034(c).[3]

Section 1034(c) applies to insured depository institutions and credit unions that offer or provide consumer financial products or services and that have total assets of more than $10 billion, as well as their affiliates.[4] The provision states that, subject to certain exceptions, banks and credit unions with over $10 billion in assets must ''in a timely manner, comply with a consumer request for information in the control or possession of such covered person concerning the consumer financial product or service that the consumer obtained from such covered person, including supporting written documentation, concerning the account of the consumer.''[5] Section 1034(c) is a current legal obligation that became effective on July 21, 2011.[6]

Congress placed section 1034(c) alongside provisions of the CFPA that establish a process for addressing consumer complaints submitted to the CFPB. Under sections 1034(a) and 1034(b), when a consumer submits a complaint or inquiry about a large bank or credit union, that entity ''shall provide a timely response'' to the CFPB, and the CFPB then provides a timely response to the consumer, including ''any responses received'' from the financial institution.[7] Through section 1034(c), Congress established an additional, direct channel for consumers to request information from large banks and credit unions without routing their inquiry through the CFPB or another government entity. And like a complaint submitted to the CFPB, a request for information under section 1034(c) can lead to the identification and resolution of errors by a large bank or credit union involving a consumer's account.

Responding to consumer requests for information is critical for ensuring high levels of customer service and enabling consumers to resolve issues with their accounts when they encounter problems. Large banks and credit unions possess information that is vital to meet these customer needs. Too often, however, it can be difficult and time consuming for individual consumers to obtain a clear answer to questions or resolve an account issue. The CFPB has observed that some larger financial institutions have moved away from a traditional relationship banking model with an emphasis on providing customized help to individuals.[8] Such individualized service is now generally reserved for high net-worth individuals, and is difficult for other households to find. For most consumers, larger banks and credit unions frequently rely on highly standardized processes rather than high-quality human interactions or digital channels that actually facilitate self-help. When a consumer has a question or problem, they typically cannot go to an individual at the bank or credit union who is already familiar with their account, such as the person that originally signed them up for the product. They are more likely to have to navigate a phone tree in the hope of speaking to the right person in a call center, to have to search through largely irrelevant material on a website to try to find the information they need, or to have to attempt to get a clear answer from a chatbot.[9]

On June 14, 2022, the CFPB issued a request for information asking the public to provide input on customer service obstacles they face in interacting with large banks and credit unions.[10] Commenters relayed consumers' frustration and difficulty in obtaining critical information about their accounts.[11] This includes information

[1] 85 FR 77987 (Dec. 3, 2020).

[2] 12 U.S.C. 5534(c).

[3] As a matter of prosecutorial discretion, the CFPB does not intend to seek monetary relief for violations of section 1034(c) that occur prior to February 1, 2024.

[4] 12 U.S.C. 5534(c)(1) (provision applies to ''a covered person subject to supervision and primary enforcement by the Bureau pursuant to section 1025''); *see also id.* sec. 5481(1), (6) (defining ''affiliate'' and ''covered person''); *id.* sec. 5515(a)–(c) (CFPA section 1025 providing CFPB with supervisory and primary enforcement authority over insured depository institutions and insured credit unions with total assets of more than $10 billion and over their affiliates). For convenience, this Bulletin generally refers to institutions subject to section 1034(c) as ''large banks and credit unions.''

[5] 12 U.S.C. 5534(c).

[6] Subtitle C of the CFPA, which includes section 1034, became effective on ''the designated transfer date.'' Public Law 111–203, title X, sec. 1037. The designated transfer date was July 21, 2011. *See* Designated Transfer Date, 75 FR 57252, 57253 (Sept. 20, 2010); *see also* 12 U.S.C. 5582.

[7] 12 U.S.C. 5534(a), (b); *see also* CFPB, Consumer Response Annual Report at 16–17 (Mar. 2023), *https://files.consumerfinance.gov/f/documents/cfpb_2022-consumer-response-annual-report_2023-03.pdf* (describing the consumer complaint process).

[8] *See* CFPB, *Prepared Remarks of CFPB Director Rohit Chopra in Great Falls, Montana on Relationship Banking and Customer Service* (June 14, 2022), *https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-in-great-falls-montana-on-relationship-banking-and-customer-service/; see also* FDIC, *FDIC Community Banking Study* at 4–1 (December 15, 2020), *https://www.fdic.gov/resources/community-banking/report/2020/2020-cbi-study-full.pdf* (noting that community banks ''tend to focus on loans as relationships, originating loans that require local knowledge, a greater personal touch, individual analysis, and continued administration'').

[9] *See CFPB, Chatbots in consumer finance* (June 6, 2023), *https://www.consumerfinance.gov/data-research/research-reports/chatbots-in-consumer-finance/chatbots-in-consumer-finance/* (observing that ''automated responses can be highly scripted and simply direct customers to lengthy policy statements or FAQs, which may contain very little helpful information, if any''); *see also* Ron Shevlin, *The Human + Digital Challenge In Banking: Consumers Want Both* at 2, Cornerstone Advisors (2021), *https://go.backbase.com/rs/987-MGR-655/images/Backbase_Cornerstone_Human_Digital.pdf* (finding, based on consumer survey, that ''[t]oday's consumers—even those at the younger end of the age spectrum—want and value high-quality human interactions in their financial lives'' and that ''[f]inancial institutions must quickly improve the quality of their digital channel experiences'').

[10] *See* Request for Information Regarding Relationship Banking and Customer Service, 87 FR 36828 (June 21, 2022).

[11] *See, e.g.,* Comment from Legal Services NYC at 2 (July 13, 2022), *https://downloads.regulations.gov/CFPB-2022-0040-0006/*

Continued

that consumers need to stay current and avoid fees or penalties; to identify and resolve errors; and to close accounts that no longer serve their interests.

Through section 1034(c), Congress ensured that as banks and credit unions grow larger they must continue to meet consumers' need for information necessary to manage their finances, and thus must provide timely responses to consumer requests for information concerning their accounts. Such responses help meet consumers' reasonable expectations for customer service.

II. Information Requests Under Section 1034(c)

A. Consumer Requests for Information Regarding Their Accounts

Section 1034(c) states that, subject to certain enumerated exceptions, large banks and credit unions ''shall, in a timely manner, comply with a consumer request for information in the control or possession of [a large bank or credit union] concerning the consumer financial product or service that the consumer obtained from [the large bank or credit union], including supporting written documentation, concerning the account of the consumer.'' [12] Thus, section 1034(c) applies to a consumer's request for information to a large bank or credit union where the information concerns the consumer's account for a consumer financial product or service, is in the large bank or credit union's control or possession, and does not fall into an enumerated exception.

The CFPA defines ''consumer financial product or service'' to include several types of financial products or services that consumers may obtain from a large bank or credit union, including deposit and savings accounts, credit products such as mortgage loans and credit cards, and loan servicing.[13] Under section 1034(c), large banks and credit unions that offer or provide consumer financial products or services must comply with consumer requests for information regarding their accounts. That obligation applies even if consumers do not expressly invoke section 1034(c).[14]

Section 1034(c) applies to consumer requests for information ''concerning'' an account for a consumer financial product or service. The term ''concerning'' means ''relating to'' or ''regarding'' and therefore encompasses a wide range of information about a consumer's account.[15] Information concerning an account would include account information that appears on periodic statements or on online account portals, such as the amount of the balance in a deposit account, the interest rate on a loan or credit card, and information regarding transactions or payments involving an account.[16] It would include information regarding bill payment and other recurring transactions involving the account (*e.g.,* a list of all recurring payments out of the account). It would also include the terms and conditions of the account, including a schedule of fees that may be charged on the account. It could also include information about the status of a lien on real property that was released (or should have been released) years before. Such information can be necessary for consumers to manage their accounts and resolve disputes with their bank or credit union, or with merchants or other third parties. In contrast, section 1034(c) does not apply to a consumer's request for information that is not specifically related to a consumer's account, such as information regarding a large bank or credit union's internal operating procedures, financial performance, marketing strategy, or training program for its employees.

In addition, section 1034(c) requires a large bank or credit union to comply with a consumer's request for ''information . . . including supporting written documentation.'' The word ''support'' means ''to assist,'' ''help,'' or ''provide with substantiation.'' [17] Accordingly, through its reference to ''supporting written documentation,'' section 1034(c) requires large banks and credit unions to provide consumers, upon request, with written documents that will substantiate information provided in response to consumer questions, or that will assist consumers with understanding or verifying information regarding their accounts. For example, under section 1034(c), a consumer seeking information about past transactions on their account could request copies of past periodic statements or check images. Similarly, a consumer seeking information regarding the terms and conditions governing their account could request a copy of their account agreement (including a copy of the original signed agreement).

Section 1034(c) requires large banks and credit unions to provide account information and supporting documentation to the extent it is in their ''control or possession.'' The concepts of ''control'' and ''possession'' are familiar from other contexts involving requests for information, such as the discovery provisions in the Federal Rules of Civil Procedure and the Freedom of Information Act.[18] In the context of section 1034(c), a bank or credit union ''possesses'' information that is known by its employees or that can be found

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attachment_2.pdf (describing low-income clients who have difficulty obtaining ''copies of their statements; records related to restraints placed on their accounts; copies of cashed checks or money orders; information on fees and charges placed on the account'' among other information); Comment from Mobilization for Justice (July 22, 2022), *https://downloads.regulations.gov/CFPB-2022-0040-0051/attachment_2.pdf* (describing low-income consumers without internet access who cannot afford fees charged to obtain hard copies of account statements); Comment from Tzedek DC (Aug. 19, 2022), *https://downloads.regulations.gov/CFPB-2022-0040-0084/attachment_1.pdf* (describing disabled clients who were denied access to account information because of the presence of a retained attorney, and who could not obtain documents a large bank relied upon to close fraud disputes); *see also* Nonrulemaking Docket: Request for Information Regarding Relationship Banking and Customer Services (CFPB–2022–0040), comments available at *https://www.regulations.gov/docket/CFPB-2022-0040/comments.*

[12] 12 U.S.C. 5534(c)(1).

[13] 12 U.S.C. 5481(5), (15)(A)(i), (iv). It should be noted that a consumer can receive services from a loan servicer (and thus ''obtain'' a consumer financial product or service from that servicer) even if the loan servicer is not the original creditor on the consumer's loan. *See* 12 U.S.C. 5481(5), (15)(A)(i).

[14] Nothing in section 1034(c) states or suggests that a consumer must expressly indicate that they are making a request under that provision. *See* 12 U.S.C. 5534.

[15] *Concerning,* Merriam-Webster, *https://www.merriam-webster.com/dictionary/concerning#dictionary-entry-2* (last visited Oct. 5, 2023); *see also Concerning,* Oxford English Dictionary, *https://www.oed.com/dictionary/concerning_prep?tab=meaning_and_use* (last visited Oct. 5, 2023) (defining ''concerning'' to mean ''[i]n reference or relation to; regarding, about'').

[16] With respect to periodic statements, Regulation DD describes information that must appear on periodic statements for deposit accounts held by depository institutions other than credit unions, *see* 12 CFR 1030.6(a), and NCUA regulations impose similar disclosure requirements for credit unions, *see* 12 CFR 707.6(b). Regulation E describes information that must appear on periodic statements for accounts to or from which electronic fund transfers can be made. *See* 12 CFR 1005.9. Regulation Z describes information that must appear on periodic statements for open-end credit plans (*e.g.,* credit cards and home-equity lines of credit), *see* 12 CFR 1026.7, 1026.8, and for closed-end residential mortgage loans, *see* 12 CFR 1026.41.

[17] *Support,* Merriam-Webster, *https://www.merriam-webster.com/dictionary/support* (last visited Oct. 5, 2023); *see also Supporting,* Oxford English Dictionary, *https://www.oed.com/dictionary/supporting_adj?tab=meaning_and_use#19725899* (last visited Oct. 5, 2023) (defining ''supporting'' to mean ''[t]hat provides evidence or authority for something; confirmatory, corroborative.'').

[18] *See, e.g.,* Fed. R. Civ. P. 34 (concerning requests for documents in party's ''possession, custody, or control''); *U.S. Dept. of Just.* v. *Tax Analysts,* 492 U.S. 136, 145 (1989) (stating that, with respect to requests under the Freedom of Information Act (FOIA), ''the agency must be in control of the requested materials at the time the FOIA request is made'' and that ''[b]y control we mean that the materials have come into the agency's possession in the legitimate conduct of its official duties'').

in its records, such as in its electronic or paper files.[19] A bank or credit union can also ''control'' information that it does not physically possess, where it has the legal right, authority, or practical ability to obtain the information.[20] For example, a large bank or credit union would control information held by an affiliate or service provider where it has the right or ability to receive that information from the affiliate or service provider.

Large banks and credit unions are not required to provide information that falls within one of the four enumerated exceptions in section 1034(c).[21] Specifically, those exceptions apply to (1) confidential commercial information, including an algorithm used to derive credit scores or other risk scores or predictors; (2) information collected for the purpose of preventing fraud or money laundering, or detecting or making any report regarding other unlawful or potentially unlawful conduct; (3) information required to be kept confidential by any other provision of law; and (4) any nonpublic or confidential information, including confidential supervisory information.[22]

In addition, section 1034(c) does not require a large bank or credit union to respond to a consumer information request in a specific form, such as in writing, orally, or electronically. In this regard, section 1034(c) differs from section 1033 of the CFPA, which requires that certain information be made available ''in an electronic form.'' [23]

B. Conditions That Unreasonably Impede Consumer Information Requests

Section 1034(c) provides that large banks and credit unions ''shall, in a timely manner, comply'' with consumer requests for information regarding their accounts for consumer financial products or services. It is well established that when the term ''shall'' is used in statutes, it generally means that something ''is required.'' [24] The addition of the word ''comply''—which creates the phrase ''shall . . . comply''—further indicates that section 1034(c) creates a mandatory obligation to do what the consumer requests.[25] Section 1034(c) thus grants consumers a right to request and receive account information that falls within the scope of the provision, and imposes a concomitant legal obligation on large banks and credit unions to respond to the consumer's request and to provide such account information.

Large banks and credit unions do not have to provide information in any particular manner, or using particular means. However, a large bank or credit union would not comply with section 1034(c) if it imposed conditions or requirements on consumers' information requests that unreasonably impeded consumers' ability to request and receive account information. Under the plain language of section 1034(c), if a consumer makes a ''request for information in the control or possession of such covered person concerning the consumer financial product or service that the consumer obtained from such covered person'' that does not fall into one of the specified exceptions, and a large bank or credit union refuses to provide that information unless the consumer satisfies an unreasonable condition, the bank or credit union has failed to ''comply'' with the request.[26] Section 1034(c) does not contain any language stating or suggesting that a large bank or credit union may impose conditions that unreasonably impede consumers' information requests. Such conditions, if permitted, would allow large banks and credit unions to frustrate and effectively nullify the right granted in section 1034(c). And there is no reason to believe that Congress intended for section 1034(c) to allow that result.

By contrast, a large bank or credit union would not violate section 1034(c) in the context of reasonable conditions on consumer information requests. For example, large banks or credit unions might require that the person making the request verify their identity, identify their account, and describe the information they are seeking. Similarly, large banks or credit unions might require the consumer to comply with reasonable data security measures. These kinds of conditions, when implemented in a reasonable manner, would not unreasonably impede consumers' ability to obtain information regarding their accounts.[27]

As a general matter, requiring a consumer to pay a fee or charge to request account information, through whichever channels the bank uses to provide information to consumers, is likely to unreasonably impede consumers' ability to exercise the right granted by section 1034(c), and thus to violate the provision. Some consumers cannot afford to pay even a small fee to obtain information about their accounts. Even for consumers who can afford such fees, the fees can operate as a significant deterrent to making an information request. Thus, a large bank or credit union's practice of charging fees to respond to an information request would generally unreasonably impede consumers' exercise of their rights under section 1034(c). Regardless of how a large bank or credit union labels or categorizes a fee on its fee schedule or other documents, section 1034(c) does not permit unreasonable impediments to a request for information about a consumer's account. That likely includes charging fees (1) to respond to consumer inquiries regarding their deposit account balances; (2) to respond to consumer inquiries seeking the amount necessary to pay a loan balance; (3) to respond to a request for a specific type of supporting document, such as a check image or an original account agreement; and (4) for time spent on consumer inquiries seeking information

[19] *Cf. Twentieth Century Fox Film Corp.* v. *Marvel Enterprises, Inc.,* 2002 WL 1835439, at *3 (S.D.N.Y. 2002) (noting, in context of Federal Rule of Civil Procedure 33, that a ''corporation responding to interrogatories must provide . . . the information contained in its own files and possessed by its own employees'').

[20] *Cf. In re NTL, Inc. Securities Litigation,* 244 FRD. 179, 195 (S.D.N.Y. 2007) (construing ''control'' in Federal Rule of Civil Procedure 34).

[21] 12 U.S.C. 5534(c)(2).

[22] *Id.*

[23] Section 1033(a) requires that covered persons (not limited to large depository institutions) ''make available . . . information,'' including ''in electronic form,'' which can be used by third parties for the provision of products or services to the consumer. 12 U.S.C. 5533(a). Section 1033 governs consumer authorized third-party access to data made available in electronic form in connection with third-party provision of other products or services—including for example, the provision of a potentially competing account offering. This is why, for example, section 1033 is limited to data available in the normal course, and why section 1033 requires data to be ''made available . . . in electronic form.'' The CFPB is in the process of writing proposed regulations to implement section 1033 of the CFPA. *See* CFPB, *Required Rulemaking on Personal Financial Data Rights, https://www.consumerfinance.gov/personal-financial-data-rights/* (last visited Oct. 5, 2023).

[24] *Shall,* Black's Law Dictionary (11th ed. 2019) (''This [definition] is the mandatory sense that drafters typically intend and that courts typically uphold.''); *see Shall,* Merriam-Webster Dictionary, *https://www.merriam-webster.com/dictionary/shall* (''shall'' is ''used in laws, regulations, or directives to express what is mandatory'') (last visited Oct. 5, 2023); *see also Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26, 35 (1998) (recognizing that ''shall'' is ''mandatory'').

[25] *See Reich* v. *Trinity Industries, Inc.,* 16 F.3d 1149, 1154 (11th Cir. 1994) (''shall comply'' language in provision of Occupational Safety and Health Act was ''mandatory'').

[26] 12 U.S.C. 5534(c).

[27] Relatedly, the CFPB does not interpret section 1034(c) to preempt or otherwise supersede the requirements of other Federal or state laws and regulations designed to protect privacy and data security. This includes, for example, any restrictions that may be imposed in the CFPB's upcoming rule implementing section 1033.

and supporting documents regarding an account.[28]

At the same time, it would generally not violate section 1034(c) for a large bank or credit union to impose a fee or charge in certain limited circumstances. For example, a large bank or credit union might charge a fee to a consumer who repeatedly requested and received the same information regarding their account (*e.g.,* repeatedly asked for a copy of the same document).[29] In that context, the large bank or credit union would have already met its obligation under section 1034(c) by complying with the consumer's earlier requests.

A large bank or credit union may also violate section 1034(c) by imposing other conditions or obstacles that unreasonably impede consumers' ability to make an information request. Depending on the facts and circumstances, such conditions or obstacles could include forcing consumers to endure excessively long wait times to make a request to a customer service representative, requiring consumers to submit the same request multiple times, requiring consumers to interact with a chatbot that does not understand or adequately respond to consumers' requests, or directing consumers to obtain information that the institution possesses from a third party instead.[30] Such conditions or obstacles may frustrate consumers' ability to exercise their right to request information under section 1034(c), and thus may violate that provision.

C. Timely Compliance With Consumer Information Requests

Section 1034(c) provides that large banks and credit unions ''shall, in a timely manner, comply'' with consumer requests for information.[31] Section 1034(c) thus does not specify a fixed time limit for responding that applies to all information requests. The CFPB will consider the specific circumstances and nature of a particular request to determine compliance. For example, whether a response to a 1034(c) request is timely may depend on the complexity of the request and/or the difficulty of responding. Where a request seeks basic information that is readily available to a large bank or credit union, to comply with section 1034(c) a bank or credit union would generally need to respond more quickly than if the request is more complex or seeks information that is less accessible. At the same time, even though a timely response for a complex response may involve a longer time period, that does not mean that large banks or credit unions can unduly delay their responses to more complicated requests.

What constitutes a timely response under section 1034(c) may also be informed by the timing requirements of other Federal laws and regulations with which large banks and credit unions must comply. For example, Regulation X requires mortgage servicers to respond to certain information requests within specific time periods depending on the nature of the requested information.[32] A large bank or credit union that is subject to Regulation X and that exceeded Regulation X's timing requirements for an information request likely would not be responding ''in a timely manner'' for purposes of section 1034(c) with respect to that same information request. Conversely, a bank or credit union subject to Regulation X would likely respond ''in a timely manner'' for purposes of section 1034(c) if it provided a response that satisfied the timing requirements in Regulation X. Thus, where both section 1034(c) and another Federal law or regulation applies to the same consumer information request, the CFPB does not view section 1034(c)'s ''timely manner'' requirement as likely to impose timing requirements that differ from the specific timing requirements of the other applicable Federal law or regulation. The CFPB expects that large banks and credit unions will already have policies and procedures in place to meet the timing requirements of other applicable laws and regulations.

D. Accuracy and Completeness of Responses to Consumer Information Requests

By providing that large banks and credit unions ''shall . . . comply'' with consumer requests for information, section 1034(c) contemplates that large banks and credit unions will in fact provide consumers with the information they request to the extent it is in their control or possession. A large bank or credit union would violate section 1034(c) if it provided incomplete or inaccurate information in response to a consumer's information request.

With respect to completeness, a large bank or credit union would not comply with section 1034(c) if, for example, the consumer asked for information about all of the consumer's transactions with a given merchant since the account was opened, and the large bank or credit union possesses transaction information going back seven years, but its response provides only transaction information going back one year. However, a large bank or credit union would not violate section 1034(c) by withholding information that falls within the scope of one of the enumerated exceptions in section 1034(c)(2).

With respect to accuracy, a large bank or credit union would not comply with section 1034(c) if it provided inaccurate information to consumers in response to their requests. For example, if a consumer asked the large bank or credit union the amount of a particular fee it charges for the consumer's account (*e.g.,* the amount of a monthly maintenance fee for a deposit account), a large bank or credit union would not comply with section 1034(c) if it provided the wrong amount for that fee. In that circumstance, the large bank or credit union would not be providing responsive information in its control or possession (*i.e.,* the correct amount of the fee).

The CFPB has noted in other contexts that Federal consumer financial laws generally apply regardless of the technology used by institutions.[33] The same principle applies to section 1034(c). Chatbots or other automated responses may serve to expedite responses in some cases; however, in the absence of appropriate checks and quality assurance processes, these tools can inadvertently misdirect inquiries or provide inadequate responses.[34] Large banks and credit unions may violate section 1034(c) if they employ technologies that do not properly recognize consumer information requests or that provide inaccurate or incomplete information in response to those requests.

[28] This is not intended to be an exhaustive list of the types of fees for consumer information requests that may be subject to section 1034(c).

[29] A consumer would not seek the same information by asking for information from a different time period where information can change over time (*e.g.,* by requesting certain transaction information for the month of April and then later seeking the same type of information for the month of May).

[30] The CFPB has recently highlighted the risks posed by financial institutions' use of deficient chatbots. *See* CFPB, Chatbots in Consumer Finance (June 6, 2023), *https://www.consumerfinance.gov/data-research/research-reports/chatbots-in-consumer-finance/.*

[31] 12 U.S.C. 5534(c)(1).

[32] *See* 12 CFR 1024.36(d)(2).

[33] *See, e.g.,* Consumer Financial Protection Circular 2022–03, ''Adverse action notification requirements in connection with credit decisions based on complex algorithms'' (May 2022), *https://www.consumerfinance.gov/compliance/circulars/circular-2022-03-adverse-action-notification-requirements-in-connection-with-credit-decisions-based-on-complex-algorithms/.*

[34] *See* CFPB, *Chatbots in consumer finance* (June 2023), *https://www.consumerfinance.gov/data-research/research-reports/chatbots-in-consumer-finance/chatbots-in-consumer-finance/.*

III. Summary of Section 1034(c) Obligations

The CFPB is providing this summary section to assist large banks and credit unions in complying with section 1034(c). This section is intended to serve as a simplified summary and a reference tool, and large banks and credit unions should refer to the legal analysis above for further detail and information.

As discussed above, when a bank or credit union with over $10 billion in assets receives a request for information from a consumer relating to the consumer's account for a consumer financial product or service, section 1034(c) requires the bank or credit union to respond with information in its possession or control. The large bank or credit union must respond to the request in a timely manner; whether a response is timely may depend on the complexity of the request or difficulty of responding. Responses to consumer information requests must also be complete and accurate. Large banks and credit unions may respond to requests using any means or channels they choose.

Consumers need information regarding their accounts to manages their finances, and the Advisory Opinion describes examples of account information that must be provided upon request. Consumers can request information such as account balances, transaction history, interest rates, scheduled auto-payments, fees, or balances necessary to pay off a loan, and may also request supporting written documents such as copies or images of checks or original signed contracts. The obligation to respond does not include information that does not concern the individual consumer's account, such as internal operating procedures or policies, or the company's financial performance, marketing strategy, or training program for its employees. The obligation also does not apply to information that falls within the four enumerated exceptions in section 1034(c), including confidential information or information collected to prevent fraud or money laundering.

Section 1034(c) does not bar large banks and credit unions from imposing reasonable impediments on consumer information requests, such as reasonable identity verification and data security measures. But large banks and credit unions may not impose conditions that unreasonably impede consumers' information requests. The practice of charging fees to respond to an information request would generally unreasonably impede consumers' exercise of their rights under section 1034(c), and thus violate the provision. Regardless of how a large bank or credit union labels or categorizes a fee on its fee schedule or other documents, section 1034(c) does not permit unreasonable impediments to a request for information about a consumer's account. That would likely include charging fees (1) to respond to consumer inquiries regarding their deposit account balance; (2) to respond to consumer inquiries seeking the amount necessary to pay a loan balance; (3) to respond to a request for a specific type of supporting document, such as a check image or an original account agreement; and (4) for time spent on consumer inquiries seeking information and supporting documents regarding an account. Depending on the circumstances, other kinds of conditions or obstacles may also violate section 1034(c), such as forcing consumers to endure excessive wait times, requiring consumers to submit the same request multiple times, requiring consumers to interact with a chatbot that does not adequately respond to requests, or directing consumers to obtain information from a third party.

As a matter of prosecutorial discretion, the CFPB does not intend to seek monetary relief for potential violations of section 1034(c) that occur prior to February 1, 2024.

IV. Regulatory Matters

The CFPB has concluded that the Advisory Opinion is an interpretive rule in part and a general statement of policy in part. Insofar as the Advisory Opinion constitutes an interpretive rule, it is issued under the CFPB's authority to interpret the Consumer Financial Protection Act, including under section 1022(b)(1) of the Consumer Financial Protection Act, which authorizes guidance as may be necessary or appropriate to enable the CFPB to administer and carry out the purposes and objectives of Federal consumer financial laws.[35]

Insofar as the Advisory Opinion constitutes a general statement of policy, it provides background information about applicable law and articulates considerations relevant to the CFPB's exercise of its authorities. It does not confer any rights of any kind.

Pursuant to the Congressional Review Act,[36] the CFPB will submit a report containing this Advisory Opinion and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to the rule's published effective date. The Office of Information and Regulatory Affairs has designated this interpretive rule as not a ''major rule'' as defined by 5 U.S.C. 804(2).

The CFPB has determined that this Advisory Opinion also does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act of 1995.[37]

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2023–22774 Filed 10–13–23; 8:45 am]

BILLING CODE 4810–AM–P

[35] 12 U.S.C. 5512(b)(1).

[36] 5 U.S.C. 801 *et seq.*

[37] 44 U.S.C. 3501–3521.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1998; Project Identifier MCAI–2023–01045–R; Amendment 39–22572; AD 2023–20–51]

RIN 2120–AA64

Airworthiness Directives; Airbus Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for Airbus Helicopters Model AS332C, AS332C1, AS332L, AS332L1, AS332L2, and SA330J helicopters. This AD was prompted by a report of three newly supplied main rotor swashplate bushing retaining plates with oversized internal diameters. This AD requires accomplishing a one-time inspection to measure the internal diameter of affected bushing retaining plates and depending on the results, accomplishing an additional inspection, replacing non-conforming bushing retaining plates, or accomplishing additional corrective action, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA previously sent this AD as an emergency AD to all known U.S. owners and operators of these helicopters. The FAA is issuing this AD to address the unsafe condition on these products.

Tab 29

Fair Credit Reporting; File Disclosure, 89 Fed. Reg. 4167 (Jan. 23, 2024).

CFPB Addresses Inaccurate Background Check Reports and Sloppy Credit File Sharing Practices

English

Español (cfpb.gov/about-us/newsroom/cfpb-enfrenta-reportes-de-antecedentes-inexactos-y-malas-practicas-en-entrega-de-archivos/)

False, incomplete, and old information must not appear in background check reports, and a person's complete consumer file must be provided to them upon request

JAN 11, 2024

WASHINGTON, D.C. – Today, the Consumer Financial Protection Bureau (CFPB) issued guidance to consumer reporting companies to address inaccurate background check reports, as well as sloppy credit file sharing practices. The two advisory opinions seek to ensure that the consumer reporting system produces accurate and reliable information and does not keep people from accessing their personal data. First, an advisory opinion on background check reports highlights that those reports must be complete, accurate, and free of information that is duplicative, outdated, expunged, sealed, or otherwise legally restricted from public access. Second, an advisory opinion on file disclosure highlights that people are entitled to receive all information contained in their consumer file at the time they request it, along with the source or sources of the information contained within, including both the original and any intermediary or vendor source.

"Background check and other consumer reporting companies do not get to create flawed reputational dossiers that are then hidden from consumer view," said CFPB Director Rohit Chopra. "Background check reports, and all other consumer reports, must be accurate, up to date, and available to the people that the reports are about."

Background Check Reports

Background checks are often critical factors when landlords and employers make rental and employment determinations. The information in the reports can cover a person's credit history, rental history, employment, salary, professional licenses, criminal arrests and convictions, and driving records. However, as documented in earlier **CFPB research** (cfpb.gov/about-us/newsroom/cfpb-reports-highlight-problems-with-tenant-background-checks/) on tenant screening, background check reports often contain false or misleading information about individuals.

The CFPB and Federal Trade Commission (FTC) launched a **public inquiry** (cfpb.gov/about-us/blog/tell-us-about-your-experiences-with-rental-background-checks-and-fees/) in early 2023, and asked for people's experiences with background checks used to screen potential tenants for rental housing. The CFPB and FTC received more than 600 comments. Most of the comments came from renters. They told the agencies about many problems they encounter, including not receiving adverse action notices and finding inaccuracies and errors that are difficult to correct and that have a decades long impact on housing opportunities. Many described biases in criminal and credit systems transferring into housing decisions.

The CFPB issued today's advisory opinion on background screening to highlight that consumer reporting companies, covered by the Fair Credit Reporting Act, must maintain reasonable procedures to avoid producing reports with false or misleading information. Specifically, the procedures should:

- Prevent the reporting of public record information that has been expunged, sealed, or otherwise legally restricted from public access.
- Ensure disposition information is reported for any arrests, criminal charges, eviction proceedings, or other court filings that are included in background check reports.
- Prevent the reporting of duplicative information.

In addition, today's advisory opinion on background screening reminds consumer reporting companies that they may not report outdated negative information—and that each negative item of information is subject to its own reporting period, the timing of which depends on the date of the negative item itself. For example, a criminal charge that does not result in a conviction generally cannot be reported by a consumer reporting company beyond the seven-year period that starts at the time of the charge.

Credit File Disclosure

People have the right to know what information consumer reporting companies keep about them as well as where the information originates. Disclosure of a person's complete file, upon their request, is a critical component of a person's right to dispute false or misleading information. Consumers must be provided with all sources for the information contained in their file, including both the originating sources and any intermediary or vendor sources, so they can correct any misinformation.

As explained in the advisory opinion on file disclosure, individuals requesting their files:

- Only need to make a request for their report and provide proper identification – they do not need to use specific language or industry jargon to be provided their complete file.
- Must be provided their complete file with clear and accurate information that is presented in a way an average person could understand.
- Must be provided the information in a format that will assist them in identifying inaccuracies, exercising their rights to dispute any incomplete or inaccurate information, and understanding when they are being impacted by adverse information.
- Must be provided with the sources of the information in their file, including both the original and any intermediary or vendor source or sources.

In a **January 2023 report** (cfpb.gov/about-us/newsroom/cfpb-issues-report-on-transunion-experian-and-equifax/), the CFPB noted improvements and continued challenges for the nationwide consumer reporting companies. The CFPB has highlighted other consumer reporting problems and has reminded consumer reporting companies of their obligations to consumers under the Fair Credit Reporting Act. For example, the CFPB issued guidance on **permissible purposes** (cfpb.gov/about-us/newsroom/cfpb-issues-advisory-to-protect-privacy-when-companies-compile-personal-data/) for accessing consumer reports, identifying and eliminating **obviously false and junk data** (cfpb.gov/about-us/newsroom/cfpb-takes-action-to-address-junk-data-in-credit-reports/), and resolving **consumer disputes** (cfpb.gov/about-us/newsroom/cfpb-issues-guidance-to-address-shoddy-investigation-practices-by-consumer-reporting-companies/). Additionally, the CFPB has **taken action** (cfpb.gov/about-us/newsroom/cfpb-ftc-take-actions-against-transunion-illegal-rental-background-check-and-credit-reporting-practices/) against consumer reporting companies when they have broken the law, as well as affirmed the ability of **states** (cfpb.gov/about-us/newsroom/cfpb-affirms-ability-for-states-to-police-credit-reporting-markets/) to police credit reporting markets.

Read the advisory opinion, ***Fair Credit Reporting; Background Screening*** (cfpb.gov/rules-policy/final-rules/fair-credit-reporting-background-screening-2024/).

Read the advisory opinion, ***Fair Credit Reporting; File Disclosure*** (cfpb.gov/rules-policy/final-rules/fair-credit-reporting-file-disclosure/).

Consumers can submit credit reporting complaints, or complaints about other financial products and services by visiting the CFPB's website or by calling (855) 411-CFPB (2372).

Employees who believe their companies have violated federal consumer financial protection laws, including the Fair Credit Reporting Act, are encouraged to send information about what they know to **whistleblower@cfpb.gov**. To learn more about reporting potential industry misconduct, visit the **CFPB's website** (https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-new-york-attorney-general-sue-credit-acceptance-for-hiding-auto-loan-costs-setting-borrowers-up-to-fail/).

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit www.consumerfinance.gov (http://www.consumerfinance.gov/).

Topics

- CREDIT REPORTS AND SCORES (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=CREDIT-REPORTS-AND-SCORES)

PRESS INFORMATION

If you want to republish the article or have questions about the content, please contact the press office.

Go to press resources page (cfpb.gov/about-us/newsroom/press-resources/)

conducted no earlier than November 26, 2029.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the Order's information collection requirements have been previously approved by OMB and assigned OMB No. 0581–0178, Vegetable and Specialty Crops. No changes to those requirements are necessary as a result of this rule. Should any changes become necessary, they would be submitted to OMB for approval.

This final rule does not impose any additional reporting or recordkeeping requirements on either small or large raisin handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. AMS has not identified any relevant Federal rules that duplicate, overlap, or conflict with this final rule.

AMS is committed to complying with the E-Government Act, to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *https://www.ams.usda.gov/rules-regulations/moa/small-businesses.* Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendations submitted by the Committee and other available information, it is hereby found that finalizing the interim final rule, without change, as published in the **Federal Register** of October 16, 2023 (88 FR 71273), will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 989

Grapes, Marketing agreements, Raisins, Reporting and recordkeeping requirements.

■ Accordingly, the interim final rule amending 7 CFR part 989, which was published at 88 FR 71273 on October 16, 2023, is adopted as a final rule without change.

Erin Morris,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2024–01252 Filed 1–22–24; 8:45 am]

BILLING CODE 3410–02–P

CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Part 1022

Fair Credit Reporting; File Disclosure

AGENCY: Consumer Financial Protection Bureau.

ACTION: Advisory opinion.

SUMMARY: The Consumer Financial Protection Bureau (CFPB or Bureau) is issuing this advisory opinion to address certain obligations that consumer reporting agencies have under section 609(a) of the Fair Credit Reporting Act (FCRA). This advisory opinion underscores that, to trigger a consumer reporting agency's file disclosure requirement under FCRA section 609(a), a consumer does not need to use specific language, such as ''complete file'' or ''file.'' This advisory opinion also highlights the requirements regarding the information that must be disclosed to a consumer under FCRA section 609(a). In addition, this advisory opinion affirms that consumer reporting agencies must disclose to a consumer both the original source and any intermediary or vendor source (or sources) that provide the item of information to the consumer reporting agency under FCRA section 609(a).

DATES: This advisory opinion is effective on January 23, 2024.

FOR FURTHER INFORMATION CONTACT: Amanda Quester, Alexandra Reimelt, or Ruth Van Veldhuizen, Senior Counsels, Office of Regulations at (202) 435–7700 or *https://reginquiries.consumerfinance.gov/.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION: The Bureau is issuing this advisory opinion through the procedures for its Advisory Opinions Policy.[1] Refer to those procedures for more information.

I. Advisory Opinion

A. Background

The FCRA regulates consumer reporting.[2] Congress enacted the statute ''to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy.''[3] One of the problems with the credit reporting industry that Congress recognized and sought to remedy with the FCRA was that a consumer ''is not always given access to the information in [their] file.''[4] In light of its broad remedial and consumer protection purposes, courts have recognized that the FCRA ''must be read in a liberal manner in order to effectuate the congressional intent underlying it.''[5]

The FCRA also promotes transparency of the credit reporting system to consumers in many ways, including by generally requiring that consumer reporting agencies disclose to consumers all information in their file upon request. Under section 609(a), a consumer reporting agency must, upon request, clearly and accurately disclose to the consumer ''[a]ll information in the consumer's file at the time of the request'' and ''[t]he sources of the information.''[6] This requirement applies to all consumer reporting agencies.[7] Consumers are entitled to free file disclosures in many circumstances. For example, each nationwide consumer reporting agency and nationwide specialty consumer reporting agency, including any nationwide tenant screening or employment background screening company, must provide at

[1] 85 FR 77987 (Dec. 3, 2020).

[2] *See* 15 U.S.C. 1681–1681x.

[3] *Safeco Ins. Co. of Am.* v. *Barr,* 551 U.S. 47, 52 (2007); *see also* 15 U.S.C. 1681 (recognizing ''a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy''); S. Rep. No. 91–517, at 1 (1969) (noting that purpose of the statute is, in part, to ''prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report'' and to ''prevent an undue invasion of the individual's right of privacy in the collection and dissemination of credit information'').

[4] S. Rep. No. 91–517, at 3 (1969) (noting, as an example of this problem, that ''[i]nsurance reporting firms generally do not admit to making a report on an individual and ordinarily will not reveal the contents of their file to [them]. Credit bureaus sometimes build roadblocks in the path of the consumer.''). When introducing the bill that would become the FCRA, Senator Proxmire stated that ''[m]any credit reporting agencies refuse to show consumers their files possibly out of fear of litigation and partly to protect its information sources.'' 115 Cong. Rec. 2412 (1969).

[5] *See, e.g.,* Fed. Trade Comm'n, *40 Years of Experience With the Fair Credit Reporting Act: An FTC Staff Report With Summary of Interpretations,* at 32 (2011); *Cortez* v. *Trans Union, LLC,* 617 F.3d 688, 706 (3rd Cir. 2010); *Guimond* v. *Trans Union Credit Info. Co.,* 45 F.3d 1329, 1333 (9th Cir. 1995) (''[The FCRA] was crafted to protect consumers from the transmission of inaccurate information about them, and to establish credit reporting practices that utilize accurate, relevant, and current information in a confidential and responsible manner. These consumer[-]oriented objectives support a liberal construction of the FCRA'' (citations omitted).).

[6] *See* 15 U.S.C. 1681g(a). This requirement is subject to several exceptions. For example, consumer reporting agencies are not required to disclose to a consumer any information concerning credit scores or any other risk scores or predictors relating to the consumer. *See* 15 U.S.C. 1681g(a)(1)(B). The Consumer Credit Reporting Reform Act of 1996 revised FCRA section 609(a) to require that consumers receive all information in the file rather than only the ''nature and substance'' of the information. Public Law 104–208, 110 Stat. 3009 (1996).

[7] *See* 15 U.S.C. 1681a(f) (defining ''consumer reporting agency'').

Tab 29

least one free file disclosure annually.[8] Consumers also are entitled to free file disclosures in certain other circumstances, such as in connection with adverse action notices and fraud alerts.[9]

The FCRA defines a consumer's ''file'' as ''all of the information on that consumer that is recorded and retained by a consumer reporting agency, regardless of how the information is stored.'' [10] Consumer reporting agencies possess files on hundreds of millions of Americans. These files typically include information about, among other things, a consumer's credit, criminal, employment, and rental histories. Consumer reporting agencies may obtain this information from multiple sources, including companies that provide information about their direct experiences with consumers and third parties who gather information from courts and other sources of public records.[11] Errors by a furnisher or a third-party source can affect a consumer's file at many different consumer reporting agencies.[12] Consumer reporting agencies use the information in consumer files to produce and sell consumer reports,[13] which creditors, insurers, landlords, employers, and others who have a permissible purpose use to make eligibility and other decisions about consumers. The potential for the vast quantity of information contained in consumer files to include errors poses significant risks to accuracy, fairness, and consumer privacy in the consumer reporting system.

Section 609(a)'s file disclosure requirements are central to the statute's accuracy, fairness, and privacy purposes. Consumers have a right to see the information consumer reporting agencies keep about them in their files at any time. Absent file disclosure requirements, a consumer may not be able to review their file, determine whether it contains any incomplete or inaccurate information, and, if it does, file a dispute under FCRA sections 611 and 623, and have the information corrected or deleted.[14] Disclosure of the information in a consumer's file upon request is a critical component of the FCRA's carefully calibrated dispute provisions.[15] Moreover, file disclosure also promotes the FCRA's fairness purpose by enabling consumers to identify any negative information in their files that may be used to make credit and other eligibility determinations about them and take steps to improve their credit profiles.[16]

Consumers may suffer significant harm when they are unable to obtain all information in their files upon request. Without access to all information in their file, a consumer often cannot even take the initial steps to dispute inaccurate information in their consumer reports or take well-informed action to improve their credit profile. Disputing inaccurate information on a consumer report and improving one's credit profile, often challenging and time-consuming processes for consumers, are made even more difficult when consumers do not have access to all of the information in their file. For example, if a consumer identifies an error in an item of information in their file, but the consumer reporting agency has only disclosed to the consumer the original source of the information and not also the vendor source that directly provided the information to the consumer reporting agency and from which the error arose, the consumer would not be able to identify the source of the erroneous information and may not be able to correct it.[17]

The CFPB is issuing this advisory opinion to highlight certain file disclosure requirements imposed under FCRA section 609(a). First, this advisory opinion underscores that, to trigger a consumer reporting agency's file disclosure requirement under FCRA section 609(a), a consumer does not need to use specific language, such as ''complete file'' or ''file.'' Next, this advisory opinion highlights the requirements regarding the information that must be disclosed to a consumer under FCRA section 609(a). Finally, this advisory opinion affirms that consumer reporting agencies must disclose to a consumer both the original source and any intermediary or vendor source (or sources) that provide the item of information to the consumer reporting agency under FCRA section 609(a).

B. Coverage

This advisory opinion applies to all ''consumer reporting agencies,'' as that term is defined in FCRA section 603(f).

C. Legal Analysis

1. Requests Under FCRA Section 609(a)

Section 609(a) of the FCRA provides, with certain exceptions, that ''[e]very consumer reporting agency shall, upon request . . . clearly and accurately disclose to the consumer, among other things: (1) All information in the consumer's file at the time of the request . . .; and (2) The sources of the information.'' Section 610 in turn specifies the conditions and form of

[8] *See* 15 U.S.C. 1681j; 12 CFR 1022.136 (centralized source for requesting annual file disclosures from nationwide consumer reporting agencies); 12 CFR 1022.137 (streamlined process for requesting annual file disclosures from nationwide specialty consumer reporting agencies); CFPB, *Bulletin 2012–09* (Nov. 29, 2012) (explaining FCRA's ''streamlined process'' requirement for consumers to obtain free annual reports from nationwide specialty consumer reporting agencies), *https://www.consumerfinance.gov/compliance/supervisory-guidance/bulletin-fcra-process-requirement-consumers/.*

[9] *See* 15 U.S.C. 1681j(b)–(d). In other instances, consumers may be required to pay for a file disclosure, with the fee capped by regulation. A list of consumer reporting companies is available at: *https://www.consumerfinance.gov/consumer-tools/credit-reports-and-scores/consumer-reporting-companies/companies-list/.*

[10] *See* 15 U.S.C. 1681a(g) (defining ''file'').

[11] CFPB, Market Snapshot: Background Screening Reports: Criminal background checks in employment 5–6 (Oct. 2019), *https://files.consumerfinance.gov/f/documents/201909_cfpb_market-snapshot-background-screening_report.pdf. See also* Nat'l Consumer Law Ctr., *Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Business* 10–11 (2012), *https://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf.*

[12] *See, e.g., Clark* v. *Trans Union LLC,* No. 3:15cv391, 2016 WL 7197391, at *11 (E.D. Va. Dec. 9, 2016) (stating that ''the failure to include LexisNexis in the report creates a material risk that LexisNexis could continue to report inaccurate information to others in the future'').

[13] *See* 15 U.S.C. 1681a(d) (defining ''consumer report'').

[14] *See* 15 U.S.C. 1681i.

[15] *See, e.g., Gillespie* v. *Equifax Info. Servs., LLC,* 484 F.3d 938, 941 (7th Cir. 2007) (stating that ''a primary purposes of the statutory scheme provided by the disclosure in § 1681g(a)(1) is to allow consumers to identify inaccurate information in their credit files and correct this information via the grievance procedure established under § 1681i''). In addition, the Bureau has previously emphasized the importance of consumer reporting agencies using disputes to assess furnisher data quality. For example, the Bureau has directed consumer reporting agencies to revise their accuracy procedures to identify and take corrective action regarding data from furnishers whose dispute response behavior indicates the furnisher is not a source of reliable, verifiable information about consumers. *See* CFPB, *Supervisory Highlights:* Issue 24, Summer 2021 (June 2021), *https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-24_2021-06.pdf.*

[16] The FTC and the CFPB have brought several enforcement actions to address violations of the FCRA's file disclosure requirements. *See, e.g., FTC* v. *TransUnion Rental Screening Solutions, Inc.,* No. 1:23–cv–2659 (D. Colo. 2023) (alleging that defendant violated FCRA section 609(a) by failing to disclose the sources of information contained in consumers' files in response to consumers' requests); *United States* v. *HireRight Solutions, Inc.,* No. 112–cv–01313 (D.D.C. 2012) (alleging that defendant violated FCRA section 609(a)(1) by either failing to provide consumers with information in their files or failing to do so upon request); *United States* v. *First Advantage SafeRent, Inc.,* No. 8:10–cv–0090–PJM (D. Md. 2010) (alleging that defendant violated FCRA section 609(a)(1) by rejecting requests for file disclosure submitted by facsimile and requiring consumers complete and submit a written file disclosure request form through the U.S. mail); *In re MIB, Inc.* (*d/b/a Medical Information Bureau*), 101 F.T.C. 415 (1983) (alleging that defendant violated FCRA section 609(a) when it required consumer to sign a release form as a prerequisite for obtaining their file disclosure).

[17] *See Leo* v. *AppFolio, Inc.,* No. 17–5771 RJB, 2018 WL 623647, at *8 (W.D. Wash. Jan. 30, 2018).

disclosures to consumers. The Bureau is aware that some industry stakeholders have taken the position that consumers must use specific language in order to request file disclosures under section 609(a), such as the term ''complete file.'' [18] As the Third Circuit recently held, such requirements contravene the FCRA.[19] The CFPB interprets the FCRA to require consumer reporting agencies to provide a file disclosure upon receipt of a ''request'' from a consumer who provides proper identification even if the consumer does not use the specific term ''request,'' ''file,'' ''complete file,'' or any other specific words in making such a request.

To obtain a file disclosure, the FCRA does not require consumers to use any specific language. Instead, the statute requires consumers to do two things: make a ''request'' and provide proper identification.[20] Once these conditions are satisfied, FCRA section 609(a) states that a consumer reporting agency ''shall'' provide the file disclosure. The statute's use of ''shall'' in this context makes clear that a consumer reporting agency may not add additional conditions as a prerequisite to complying with section 609(a).[21]

The statute does not define the term ''request'' as used in section 609(a). In construing the term's meaning, the Bureau is guided by the statute's broad remedial purposes.[22] As noted above, it is clear that one of Congress's goals in the FCRA was to facilitate consumers' access to their own information and, through such access, to promote the accuracy, privacy, and fairness of the consumer reporting system.[23] These goals would be thwarted if a consumer's right to a file disclosure depended upon the use of specific words—particularly since no such requirement appears in the statute and because consumers are unlikely to know which words any particular consumer reporting agency expects to hear before honoring its file disclosure obligations. As the Third Circuit explained, if the FCRA were read otherwise:

> [C]onsumers could only access their files pursuant to [section 609(a)] if they are familiar with the esoteric distinction between ''files'' and ''consumer reports'' in the Definitions section of the FCRA. Construing [section 609(a)] in this way would severely limit consumers' ''access to . . . information in [their] file'' and frustrate their ability to know when they are ''being damaged by an adverse credit report,'' or to ''correct[] inaccurate information'' in their report.[24]

Thus, to obtain a file disclosure under section 609(a), a consumer need not specifically request ''[a]ll information in the consumer's file'' or request a ''complete file'' or even use the word ''file.'' For example, a consumer's request to a consumer reporting agency for a ''report'' or ''credit report'' or ''consumer report'' or ''file'' or ''record,'' along with proper identification, trigger a consumer reporting agency's obligation under section 609(a).

The CFPB's interpretation of section 609(a)—that consumers do not need to use the words ''file'' or ''complete file'' to invoke their right to a file disclosure—is consistent with the way Congress itself refers to section 609(a) requests in parts of the FCRA. Although section 609(a) requires disclosure of all information in the consumer's ''file'' (with only limited, specified exceptions), Congress used the term ''consumer report'' as a short-hand term for the disclosures required by section 609(a) in some sections that refer to consumer requests and consumer-facing materials.[25] For example, FCRA section 609(c)(1)(B)(i) requires that the Summary of Rights provided to consumers include a description of ''the right of the consumer to obtain a copy of a consumer report under [FCRA section 609(a)].'' [26] Similarly, FCRA section 612(a)(1), which requires nationwide consumer reporting agencies and nationwide specialty consumer reporting agencies to ''make all disclosures pursuant to section [609(a)]'' available for free annually, later refers to such file disclosures as ''consumer reports'' when it refers to a ''streamlined process for consumers to request consumer reports under [FCRA section 612(a)(1)(A)].'' [27]

2. Information Required To Be Disclosed Under FCRA Section 609(a)(1)

Section 609(a) of the FCRA generally requires consumer reporting agencies to, upon request, ''clearly and accurately'' disclose ''all information in the consumer's file at the time of the request.'' To meet this standard, a file disclosure must be understandable to the average consumer.[28] It must assist a consumer in identifying inaccuracies in their file, exercising their rights to dispute any incomplete or inaccurate information, and knowing when they are being impacted by adverse information in their file.[29]

Some consumers are experiencing difficulty in obtaining clear, accurate, and complete file disclosures, particularly from background screening companies. As discussed below, in this advisory opinion the Bureau is highlighting that (1) section 609(a)(1) of the FCRA requires that a consumer reporting agency clearly and accurately disclose to a consumer all information in the consumer's file at the time of the request, including, among other things, all information the consumer reporting agency provided or might provide to a user, and (2) when a consumer reporting agency provides only summarized information to a user, section 609(a)(1) of the FCRA requires that the consumer reporting agency provide the consumer with the information that formed the

[18] *See, e.g.,* Brief of the Chamber of Commerce of the United States as *Amicus Curiae* in Support of Appellees, *Kelly* v. *RealPage, Inc.,* No. 21–1672 (Aug. 5, 2021), *https://www.chamberlitigation.com/cases/kelly-v-realpage-inc* at 5, 28–29 (arguing that to trigger the requirements of FCRA section 609(a) ''the request must specifically be for '[a]ll information in the consumer's file,' meaning the complete file''); Brief of *Amici Curiae* Consumer Data Industry Association and Professional Background Screening Association in Support of Defendants-Appellees and Affirmance, *Kelly* v. *RealPage, Inc.,* No. 21–1672 (Aug. 5, 2021), *https://www.cdiaonline.org/wp-content/uploads/2021/08/2021-08-05-CDIA-Amicus.pdf* at 7, 14–19. According to these stakeholders, a request for a ''report'' would not trigger section 609(a)'s disclosure obligations. These arguments were recently rejected by the Third Circuit. *Kelly* v. *RealPage, Inc.,* 47 F.4th 202, 219–20 (3rd Cir. Aug. 24, 2022) (''Nothing in the statute's text, context, purpose, or history indicates that any magic words are required for a consumer to effect a 'request' under § 1681g(a) or that a consumer's request for 'my consumer report' is any less effective at triggering the [consumer reporting agency]'s disclosure obligations than a request for 'my file.' '').

[19] *Kelly* v. *RealPage, Inc.,* 47 F.4th 202, 221 (3rd Cir. 2022) (''[W]hen read as a whole, the statute is unambiguous in providing that any generalized 'request' by a consumer for the [consumer reporting agency]'s information about her triggers the CRA's disclose obligation under § 1681g(a).'').

[20] 15 U.S.C. 1681g(a), 1681h(a)(1).

[21] This is consistent with longstanding interpretations from FTC staff. *See, e.g.,* Fed. Trade Comm'n, *40 Years of Experience With the Fair Credit Reporting Act: An FTC Staff Report With Summary of Interpretations,* at 75 & n.248, citing 1990 comment 610–2 (2011).

[22] *See supra* note 5.

[23] *See supra* notes 3, 4.

[24] *Kelly* v. *RealPage, Inc.,* 47 F.4th 202, 221 (3rd Cir. Aug. 24, 2022); *see also Taylor* v. *Screening Reports, Inc.,* 294 FRD. 680, 684 (N.D. Ga. 2013) (''[A] consumer who requests his 'report,' without limitation, is entitled to his entire consumer file.'').

[25] Presumably Congress appreciated that ''consumer report'' is an easy-to-understand term for consumers even if it is somewhat imprecise in describing what must be disclosed under section 609(a).

[26] 15 U.S.C. 1681g(c)(1)(B)(i).

[27] 15 U.S.C. 1681j(a)(1). The implementation of free file disclosure requirement for nationwide consumer reporting agencies also makes it clear that consumers do not need use the term ''file'' or ''complete file'' to invoke their rights under FCRA section 609(a). FCRA section 612(a)(1)(B) requires the nationwide consumer reporting agencies to make free annual section 609(a) disclosures via a ''centralized source.'' The nationwide consumer reporting agencies do so through the website *annualcreditreport.com*, which is the only authorized website for obtaining such disclosures and which refers to those disclosures as ''credit reports.'' 12 CFR 1022.136.

[28] *See, e.g., Shaw* v. *Experian Info. Sols., Inc.,* 891 F.3d 749, 759 (9th Cir. 2018).

[29] 15 U.S.C. 1681i(a); 1681s–2.

basis of the summarized information given to the user.

Section 609(a) generally requires a consumer reporting agency to provide a consumer with a file disclosure that, among other things, accurately reflects the information the consumer reporting agency provided or might provide to a user.[30] For example, a consumer reporting agency must provide a file disclosure to the consumer that allows the consumer to see criminal history information in the format that users see or will see it, so that the consumer can check for any inaccuracies and exercise their rights to dispute any information that may be inaccurate as presented to users (such as duplicative listings for a single case).

Additionally, there are a number of situations under the FCRA where a consumer reporting agency must provide information that is not or would not be included in a user report when providing a file disclosure under FCRA section 609(a).[31] One example of such a situation is when only summarized information, such as a credit or risk score, a tenant screening score, or a recommendation is provided to users. The CFPB interprets FCRA section 609(a)(1)'s requirement to disclose to the consumer ''all information in the consumer's file at the time of the request'' to include information that formed the basis of summarized information that a consumer reporting agency provided to a user. Providing only summarized information to users does not relieve a consumer reporting agency of its obligations under the plain language of section 609(a)(1) to provide to the consumer ''all information in the consumer's file at the time of the request.''

If a consumer reporting agency disclosed nothing to a consumer when it only provided summarized information to a user, the consumer would be unaware of the records upon which the summarized information was based, undermining the consumer's ability to exercise their right to dispute any incomplete or inaccurate information contained in their file.[32] This would also be the case if a consumer reporting agency disclosed to a consumer the summarized information it provided to a user without also disclosing the underlying information in the file.

The Bureau's interpretations regarding information required to be disclosed under section 609(a)(1) are consistent with the FCRA's purposes. When initially passing the FCRA, Congress stated that ''under this bill credit reporting agencies are required to make full disclosure to the consumer of all of the information obtained. The consumer will then be given the opportunity to correct inaccurate or misleading data.'' [33] The FCRA provides consumers the right to dispute any incomplete or inaccurate information contained in the consumer's file.[34] A consumer's ability to exercise this right is damaged if consumer reporting agencies withhold information that they are required to disclose under section 609(a)(1), including information that reveals inaccuracies in reports provided to users or information that forms the basis of summarized information (such as tenant screening scores). Withholding such information would also damage a consumer's ability to know when they are being impacted by adverse information in their file.

3. Sources of Information Under FCRA Section 609(a)(2)

Section 609(a) of the FCRA generally requires consumer reporting agencies to, upon request, disclose all information in the consumer's file at the time of the request and the sources of the information.[35] The CFPB is aware that, in response to these consumer requests, some consumer reporting agencies are not disclosing all sources of an item of information in the consumer's file and instead have disclosed only one source of the item of information. For example, some consumer reporting agencies that acquire public record information (*e.g.,* eviction proceeding records) from a vendor are only disclosing to consumers the jurisdiction that was the original source for these records (*e.g.,* the county court). The Bureau continues to interpret FCRA section 609(a)(2)'s requirement to disclose ''the sources of the information'' to include both the original source and any intermediary or vendor source (or sources) that provide the item of information from the original source to the consumer reporting agency.

The CFPB's interpretation is based on the plain language of FCRA section 609(a)(2) itself, which refers to ''sources'' in the plural. The statute does not limit this requirement to ''a source'' or ''the original source'' of the information.[36] This interpretation is also consistent with the FTC's *40 Years Report,* which states that ''CRAs must disclose the sources of information in the consumer's file, except for sources of information acquired solely for use in preparing an investigative consumer report.'' [37]

Additionally, and as described in part I.C.1, a consumer does not need to use specific language to trigger a consumer reporting agency's obligations under FCRA section 609(a)(2). As such, consumers do not need to specifically request that consumer reporting agencies identify *all* the sources of the information in their file in in order to be entitled to receive such information. This interpretation is consistent with the principle that the FCRA should be construed in light of its broad remedial purpose.[38]

The Bureau's interpretation also is consistent with the FCRA's purposes. Congress passed the FCRA in part to ''prevent consumers from being unjustly

[30] Note that the requirement in FCRA section 609(a)(1) that consumer reporting agencies disclose ''[a]ll information in the consumer's file at the time of the request'' is subject to exceptions. For example, section 609(a)(1)(B) does not require consumer reporting agencies to disclose to a consumer any information concerning credit scores or any other risk scores or predictors relating to the consumer. *See* 15 U.S.C. 1681g(a)(1)(B).

[31] *See, e.g.,* 15 U.S.C. 1681g(a)(2) (requiring disclosure of the sources of the information).

[32] 15 U.S.C. 1681i(a).

[33] 115 Cong. Rec. 33408, 33412 (1969). *See also Selvam* v. *Experian Info. Sols., Inc.,* 651 F. App'x 29, 33 (2d Cir. 2016) (''The purpose of § 1681g . . . is to enable consumers to obtain information in order to dispute any potential inaccuracies in the file so that inaccurate information is not sent to third parties.'').

[34] 15 U.S.C. 1681i(a).

[35] 15 U.S.C. 1681g(a). FCRA section 609(a)(2) requires disclosure of ''[t]he sources of the information'' but provides that ''the sources of information acquired solely for use in preparing an investigative consumer report and actually used for no other purpose need not be disclosed: *Provided,* That in the event an action is brought under this title, such sources shall be available to the plaintiff under appropriate discovery procedures in the court in which the action is brought.'' 15 U.S.C. 1681g(a)(2).

[36] Courts have found that all sources of the information must be disclosed to consumers. *See, e.g., Clark* v. *Trans Union LLC,* No. 3:15cv391, 2016 WL 7197391, at *11 (E.D. Va. Dec. 9, 2016) (stating that ''TransUnion's argument that it properly disclosed the 'ultimate sources' of information, but not the supposedly less pertinent LexisNexis disclosure as to how the data was collected, or by whom, does not persuade''); *Dennis* v. *Trans Union, LLC,* 2014 WL 5325231, at *7 (E.D. Pa. Oct. 20, 2014) (stating that ''[a]s the plain language of Section 1681g(a)(2) does not limit 'sources' in any way, the Court will not impose a limitation on the number of sources a CRA could have, and therefore be required to disclose, for a particular piece of information''). *But see Shimon* v. *Equifax Info. Servs.* LLC, 994 F.3d 88, 93 (2d Cir. 2021) (granting summary judgment to consumer reporting agency because not ''objectively unreasonable'' to fail to disclose third-party vendor as the source of information).

[37] Fed. Trade Comm'n, *40 Years of Experience With the Fair Credit Reporting Act: An FTC Staff Report With Summary of Interpretations,* at 71 (2011). FTC staff published the *40 Years Report,* an updated compilation of past FTC interpretations of the FCRA, to coincide with the transfer of authority to the Bureau. Effective July 21, 2011, the Dodd-Frank Act transferred rulemaking authority related to most of the FCRA to the Bureau, giving the Bureau the primary regulatory and interpretive roles under the FCRA.

[38] *See supra* note 5.

damaged because of inaccurate or arbitrary information in a credit report.'' [39] The FCRA achieves this by, among other things, providing consumers the right to obtain, upon request, all information in their file and the sources of that information and the right to dispute any incomplete or inaccurate information. The statutory right provided by FCRA section 609(a)(2) enables consumers to understand the true sources of any incomplete or inaccurate information in their file and helps them to address such errors more effectively.[40] For example, many consumer reporting agencies, including background screening companies, obtain public records information from vendors. Vendors often provide only distilled versions of these records that do not contain all the information housed by the jurisdiction from which the records originated and sometimes contain mistakes or fail to include the most up-to-date status of the public records. If a consumer reporting agency discloses to a consumer only the original jurisdiction as the source of the information and does not also disclose the vendor, or conversely, if the consumer reporting agency discloses to a consumer only the vendor and does not also disclose the original source of the information, the consumer may not be able to correct any erroneous public records information that could be included in their files at all of the consumer reporting agencies that receive data from the vendor.[41] Interpreting FCRA section 609(a)(2) to allow a consumer reporting agency to disclose to a consumer only a single source of the information, and not all sources of the information, would undermine the FCRA's purposes by limiting consumers' ability to understand the sources of the often highly sensitive information in their file and to address and prevent further dissemination of incomplete or inaccurate data.

In addition to provisions authorizing Federal and State enforcement,[42] the FCRA contains two provisions relating to civil liability to consumers for noncompliance. Section 617 provides that ''any person who is *negligent* in failing to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to'' the consumer's actual damages, and costs and reasonable attorney's fees.[43] Section 616 provides that ''any person who *willfully* fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to'' actual or statutory damages of up to $1,000 per violation, such punitive damages as the court allows, and costs and reasonable attorney's fees.[44] A violation is willful when it is inconsistent with ''authoritative guidance'' from a relevant agency.[45] As with any guidance issued by the CFPB on the FCRA, or predecessor agencies that were responsible for administering the FCRA prior to the CFPB's creation, consumer reporting agencies risk liability under section 616 if they violate the FCRA in a manner described in this advisory opinion, regardless of whether the consumer reporting agencies were previously liable for willful violations prior to its issuance.

II. Regulatory Matters

This advisory opinion is an interpretive rule issued under the Bureau's authority to interpret the FCRA, including under section 1022(b)(1) of the Consumer Financial Protection Act of 2010,[46] which authorizes guidance as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of Federal consumer financial laws.[47]

The Bureau has determined that this advisory opinion does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.[48]

Pursuant to the Congressional Review Act,[49] the Bureau will submit a report containing this interpretive rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to the rule's published effective date. The Office of Information and Regulatory Affairs has designated this interpretive rule as not a ''major rule'' as defined by 5 U.S.C. 804(2).

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

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[39] S. Rep. No. 91–517, at 1 (1969).

[40] Courts have recognized the importance of the disclosure of all sources for consumers to dispute inaccuracies and prevent the reoccurrence of inaccuracies. *See, e.g., Clark* v. *Trans Union LLC,* No. 3:15cv391, 2016 WL 7197391, at *11 (E.D. Va. Dec. 9, 2016) (stating that ''the omission of LexisNexis as a source deprived Clark of her congressionally-mandated right to correct the mistake with LexisNexis, or with anyone else to whom LexisNexis also may have disclosed the inaccurate information. Moreover, the failure to include LexisNexis in the report creates a material risk that LexisNexis could continue to report inaccurate information to others in the future.''); *Leo* v. *AppFolio, Inc.,* No. 17–5771 RJB, 2018 WL 623647, at *8 (W.D. Wash. Jan. 30, 2018) (noting that AppFolio's failure to properly identify the vendor who provided the data would make it harder for the plaintiff to correct the misreporting).

[41] *See, e.g., Clark* v. *Trans Union LLC,* No. 3:15cv391, 2016 WL 7197391, at *11 (E.D. Va. Dec. 9, 2016); *Leo* v. *AppFolio, Inc.,* No. 17–5771 RJB, 2018 WL 623647, at *8 (W.D. Wash. Jan. 30, 2018).

[42] 15 U.S.C. 1681s.

[43] 15 U.S.C. 1681o (emphasis added).

[44] 15 U.S.C. 1681n (emphasis added); *Safeco Ins. Co. of Am.* v. *Burr,* 551 U.S. 47, 57–58 (2007) (construing meaning of ''willful'').

[45] *Safeco Ins. Co. of Am.* v. *Burr,* 551 U.S. 47, 70 (2007); *Fuges* v. *Sw. Fin. Servs., Ltd.,* 707 F.3d 241, 253 (3d Cir. 2012).

[46] Pub. L. 111–203, 124 Stat. 1376 (2010).

[47] 12 U.S.C. 5512(b)(1).

[48] 44 U.S.C. 3501–3521.

[49] 5 U.S.C. 801 *et seq.*

CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Part 1022

Fair Credit Reporting; Background Screening

AGENCY: Consumer Financial Protection Bureau.

ACTION: Advisory opinion.

SUMMARY: The Consumer Financial Protection Bureau (CFPB or Bureau) is issuing this advisory opinion to affirm that, when preparing consumer reports, a consumer reporting agency that reports public record information is not using reasonable procedures to assure maximum possible accuracy under section 607(b) of the Fair Credit Reporting Act (FCRA) if it does not have certain procedures in place. For example, it must have procedures that prevent reporting of information that is duplicative or that has been expunged, sealed, or otherwise legally restricted from public access. This advisory opinion also highlights certain aspects of the reporting period for adverse items under FCRA section 605(a)(5).

DATES: This advisory opinion is effective on January 23, 2024.

FOR FURTHER INFORMATION CONTACT: Seth Caffrey, Amanda Quester, or Ruth Van Veldhuizen, Senior Counsels, Office of Regulations at (202) 435–7700 or *https://reginquiries. consumer finance.gov/*. If you require this document in an alternative electronic format, please contact *CFPB_ Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION: The Bureau is issuing this advisory opinion

Tab 30

Fair Credit Reporting; Background Screening, 89 Fed. Reg. 4171 (Jan. 23, 2024).

CFPB Addresses Inaccurate Background Check Reports and Sloppy Credit File Sharing Practices

English

Español (cfpb.gov/about-us/newsroom/cfpb-enfrenta-reportes-de-antecedentes-inexactos-y-malas-practicas-en-entrega-de-archivos/)

False, incomplete, and old information must not appear in background check reports, and a person's complete consumer file must be provided to them upon request

JAN 11, 2024

WASHINGTON, D.C. – Today, the Consumer Financial Protection Bureau (CFPB) issued guidance to consumer reporting companies to address inaccurate background check reports, as well as sloppy credit file sharing practices. The two advisory opinions seek to ensure that the consumer reporting system produces accurate and reliable information and does not keep people from accessing their personal data. First, an advisory opinion on background check reports highlights that those reports must be complete, accurate, and free of information that is duplicative, outdated, expunged, sealed, or otherwise legally restricted from public access. Second, an advisory opinion on file disclosure highlights that people are entitled to receive all information contained in their consumer file at the time they request it, along with the source or sources of the information contained within, including both the original and any intermediary or vendor source.

"Background check and other consumer reporting companies do not get to create flawed reputational dossiers that are then hidden from consumer view," said CFPB Director Rohit Chopra. "Background check reports, and all other consumer reports, must be accurate, up to date, and available to the people that the reports are about."

Background Check Reports

Background checks are often critical factors when landlords and employers make rental and employment determinations. The information in the reports can cover a person's credit history, rental history, employment, salary, professional licenses, criminal arrests and convictions, and driving records. However, as documented in earlier **CFPB research** (cfpb.gov/about-us/newsroom/cfpb-reports-highlight-problems-with-tenant-background-checks/) on tenant screening, background check reports often contain false or misleading information about individuals.

The CFPB and Federal Trade Commission (FTC) launched a **public inquiry** (cfpb.gov/about-us/blog/tell-us-about-your-experiences-with-rental-background-checks-and-fees/) in early 2023, and asked for people's experiences with background checks used to screen potential tenants for rental housing. The CFPB and FTC received more than 600 comments. Most of the comments came from renters. They told the agencies about many problems they encounter, including not receiving adverse action notices and finding inaccuracies and errors that are difficult to correct and that have a decades long impact on housing opportunities. Many described biases in criminal and credit systems transferring into housing decisions.

The CFPB issued today's advisory opinion on background screening to highlight that consumer reporting companies, covered by the Fair Credit Reporting Act, must maintain reasonable procedures to avoid producing reports with false or misleading information. Specifically, the procedures should:

- Prevent the reporting of public record information that has been expunged, sealed, or otherwise legally restricted from public access.
- Ensure disposition information is reported for any arrests, criminal charges, eviction proceedings, or other court filings that are included in background check reports.
- Prevent the reporting of duplicative information.

In addition, today's advisory opinion on background screening reminds consumer reporting companies that they may not report outdated negative information—and that each negative item of information is subject to its own reporting period, the timing of which depends on the date of the negative item itself. For example, a criminal charge that does not result in a conviction generally cannot be reported by a consumer reporting company beyond the seven-year period that starts at the time of the charge.

Credit File Disclosure

People have the right to know what information consumer reporting companies keep about them as well as where the information originates. Disclosure of a person's complete file, upon their request, is a critical component of a person's right to dispute false or misleading information. Consumers must be provided with all sources for the information contained in their file, including both the originating sources and any intermediary or vendor sources, so they can correct any misinformation.

As explained in the advisory opinion on file disclosure, individuals requesting their files:

- Only need to make a request for their report and provide proper identification – they do not need to use specific language or industry jargon to be provided their complete file.
- Must be provided their complete file with clear and accurate information that is presented in a way an average person could understand.
- Must be provided the information in a format that will assist them in identifying inaccuracies, exercising their rights to dispute any incomplete or inaccurate information, and understanding when they are being impacted by adverse information.
- Must be provided with the sources of the information in their file, including both the original and any intermediary or vendor source or sources.

In a **January 2023 report** (cfpb.gov/about-us/newsroom/cfpb-issues-report-on-transunion-experian-and-equifax/), the CFPB noted improvements and continued challenges for the nationwide consumer reporting companies. The CFPB has highlighted other consumer reporting problems and has reminded consumer reporting companies of their obligations to consumers under the Fair Credit Reporting Act. For example, the CFPB issued guidance on **permissible purposes** (cfpb.gov/about-us/newsroom/cfpb-issues-advisory-to-protect-privacy-when-companies-compile-personal-data/) for accessing consumer reports, identifying and eliminating **obviously false and junk data** (cfpb.gov/about-us/newsroom/cfpb-takes-action-to-address-junk-data-in-credit-reports/), and resolving **consumer disputes** (cfpb.gov/about-us/newsroom/cfpb-issues-guidance-to-address-shoddy-investigation-practices-by-consumer-reporting-companies/). Additionally, the CFPB has **taken action** (cfpb.gov/about-us/newsroom/cfpb-ftc-take-actions-against-transunion-illegal-rental-background-check-and-credit-reporting-practices/) against consumer reporting companies when they have broken the law, as well as affirmed the ability of **states** (cfpb.gov/about-us/newsroom/cfpb-affirms-ability-for-states-to-police-credit-reporting-markets/) to police credit reporting markets.

Read the advisory opinion, ***Fair Credit Reporting; Background Screening*** (cfpb.gov/rules-policy/final-rules/fair-credit-reporting-background-screening-2024/).

Read the advisory opinion, ***Fair Credit Reporting; File Disclosure*** (cfpb.gov/rules-policy/final-rules/fair-credit-reporting-file-disclosure/).

Consumers can submit credit reporting complaints, or complaints about other financial products and services by visiting the CFPB's website or by calling (855) 411-CFPB (2372).

Employees who believe their companies have violated federal consumer financial protection laws, including the Fair Credit Reporting Act, are encouraged to send information about what they know to **whistleblower@cfpb.gov**. To learn more about reporting potential industry misconduct, visit the **CFPB's website** (https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-new-york-attorney-general-sue-credit-acceptance-for-hiding-auto-loan-costs-setting-borrowers-up-to-fail/).

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit ***www.consumerfinance.gov*** (http://www.consumerfinance.gov/).

Topics

- CREDIT REPORTS AND SCORES (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=CREDIT-REPORTS-AND-SCORES)

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Go to press resources page (cfpb.gov/about-us/newsroom/press-resources/)

damaged because of inaccurate or arbitrary information in a credit report.'' [39] The FCRA achieves this by, among other things, providing consumers the right to obtain, upon request, all information in their file and the sources of that information and the right to dispute any incomplete or inaccurate information. The statutory right provided by FCRA section 609(a)(2) enables consumers to understand the true sources of any incomplete or inaccurate information in their file and helps them to address such errors more effectively.[40] For example, many consumer reporting agencies, including background screening companies, obtain public records information from vendors. Vendors often provide only distilled versions of these records that do not contain all the information housed by the jurisdiction from which the records originated and sometimes contain mistakes or fail to include the most up-to-date status of the public records. If a consumer reporting agency discloses to a consumer only the original jurisdiction as the source of the information and does not also disclose the vendor, or conversely, if the consumer reporting agency discloses to a consumer only the vendor and does not also disclose the original source of the information, the consumer may not be able to correct any erroneous public records information that could be included in their files at all of the consumer reporting agencies that receive data from the vendor.[41] Interpreting FCRA section 609(a)(2) to allow a consumer reporting agency to disclose to a consumer only a single source of the information, and not all sources of the information, would undermine the FCRA's purposes by limiting consumers' ability to understand the sources of the often highly sensitive information in their file and to address and prevent further dissemination of incomplete or inaccurate data.

[39] S. Rep. No. 91–517, at 1 (1969).

[40] Courts have recognized the importance of the disclosure of all sources for consumers to dispute inaccuracies and prevent the reoccurrence of inaccuracies. *See, e.g., Clark* v. *Trans Union LLC,* No. 3:15cv391, 2016 WL 7197391, at *11 (E.D. Va. Dec. 9, 2016) (stating that ''the omission of LexisNexis as a source deprived Clark of her congressionally-mandated right to correct the mistake with LexisNexis, or with anyone else to whom LexisNexis also may have disclosed the inaccurate information. Moreover, the failure to include LexisNexis in the report creates a material risk that LexisNexis could continue to report inaccurate information to others in the future.''); *Leo* v. *AppFolio, Inc.,* No. 17–5771 RJB, 2018 WL 623647, at *8 (W.D. Wash. Jan. 30, 2018) (noting that AppFolio's failure to properly identify the vendor who provided the data would make it harder for the plaintiff to correct the misreporting).

[41] *See, e.g., Clark* v. *Trans Union LLC,* No. 3:15cv391, 2016 WL 7197391, at *11 (E.D. Va. Dec. 9, 2016); *Leo* v. *AppFolio, Inc.,* No. 17–5771 RJB, 2018 WL 623647, at *8 (W.D. Wash. Jan. 30, 2018).

In addition to provisions authorizing Federal and State enforcement,[42] the FCRA contains two provisions relating to civil liability to consumers for noncompliance. Section 617 provides that ''any person who is *negligent* in failing to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to'' the consumer's actual damages, and costs and reasonable attorney's fees.[43] Section 616 provides that ''any person who *willfully* fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to'' actual or statutory damages of up to $1,000 per violation, such punitive damages as the court allows, and costs and reasonable attorney's fees.[44] A violation is willful when it is inconsistent with ''authoritative guidance'' from a relevant agency.[45] As with any guidance issued by the CFPB on the FCRA, or predecessor agencies that were responsible for administering the FCRA prior to the CFPB's creation, consumer reporting agencies risk liability under section 616 if they violate the FCRA in a manner described in this advisory opinion, regardless of whether the consumer reporting agencies were previously liable for willful violations prior to its issuance.

II. Regulatory Matters

This advisory opinion is an interpretive rule issued under the Bureau's authority to interpret the FCRA, including under section 1022(b)(1) of the Consumer Financial Protection Act of 2010,[46] which authorizes guidance as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of Federal consumer financial laws.[47]

The Bureau has determined that this advisory opinion does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.[48]

[42] 15 U.S.C. 1681s.

[43] 15 U.S.C. 1681o (emphasis added).

[44] 15 U.S.C. 1681n (emphasis added); *Safeco Ins. Co. of Am.* v. *Burr,* 551 U.S. 47, 57–58 (2007) (construing meaning of ''willful'').

[45] *Safeco Ins. Co. of Am.* v. *Burr,* 551 U.S. 47, 70 (2007); *Fuges* v. *Sw. Fin. Servs., Ltd.,* 707 F.3d 241, 253 (3d Cir. 2012).

[46] Pub. L. 111–203, 124 Stat. 1376 (2010).

[47] 12 U.S.C. 5512(b)(1).

Pursuant to the Congressional Review Act,[49] the Bureau will submit a report containing this interpretive rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to the rule's published effective date. The Office of Information and Regulatory Affairs has designated this interpretive rule as not a ''major rule'' as defined by 5 U.S.C. 804(2).

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2024–00786 Filed 1–22–24; 8:45 am]

BILLING CODE 4810–AM–P

CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Part 1022

Fair Credit Reporting; Background Screening

AGENCY: Consumer Financial Protection Bureau.

ACTION: Advisory opinion.

SUMMARY: The Consumer Financial Protection Bureau (CFPB or Bureau) is issuing this advisory opinion to affirm that, when preparing consumer reports, a consumer reporting agency that reports public record information is not using reasonable procedures to assure maximum possible accuracy under section 607(b) of the Fair Credit Reporting Act (FCRA) if it does not have certain procedures in place. For example, it must have procedures that prevent reporting of information that is duplicative or that has been expunged, sealed, or otherwise legally restricted from public access. This advisory opinion also highlights certain aspects of the reporting period for adverse items under FCRA section 605(a)(5).

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SUPPLEMENTARY INFORMATION: The Bureau is issuing this advisory opinion

[48] 44 U.S.C. 3501–3521.

[49] 5 U.S.C. 801 *et seq.*

through the procedures for its Advisory Opinions Policy.[1] Refer to those procedures for more information.

I. Advisory Opinion

A. Background

The majority of landlords and employers conduct background checks before renting property or hiring employees.[2] Landlords and employers typically conduct background checks by obtaining consumer reports from consumer reporting agencies.[3] Consumer reporting agencies that prepare consumer reports for these purposes are commonly known as background screening companies, and the reports that they prepare are commonly known as background screening reports.[4]

Background screening companies vary in size, the users they serve, the services they provide, and the geographic regions they cover.[5] The reports they provide sometimes include information about a consumer's credit history, rental history, employment, salary, professional licenses, criminal arrests and convictions, and driving records.[6] Background screening companies also vary in how they obtain information and prepare reports. Different companies use different identifying information to conduct searches; search different databases, external and internal, to access information; apply different criteria to determine whether a record in a database matches an individual; and employ different procedures for updating information.[7]

In many instances, background screening reports contain inaccurate information about consumers.[8] For example, some background screening reports contain information about the wrong consumer, such as when a report shows an eviction record or criminal conviction that belongs to someone else.[9] Some also contain duplicative information, such as when a report shows the same eviction or criminal conviction twice, giving the impression that the consumer's eviction or criminal history is more extensive than it really is.[10] In addition, some background screening reports omit existing disposition information, such as when an eviction action or criminal charges have been dismissed, giving a misleading picture of a consumer's rental or criminal history.[11]

Some background screening reports also include arrests, convictions, or other court records that should not be included because they have been expunged or sealed or otherwise legally restricted from public access.[12] Some States and localities have taken steps to make it easier to seal or expunge certain records, including eviction records.[13] Additionally, public access to certain criminal records maintained by government entities that reflect a disposition other than conviction or that have reached a specified age without active prosecution is legally restricted in certain circumstances.[14] As explained in part C.1 below, the CFPB interprets the FCRA to prohibit background screening companies from including in consumer reports information that would not be publicly available to the user due to these restrictions.

Background screening companies sometimes also include obsolete criminal record information in background screening reports.[15] For example, the CFPB is aware that, when some consumer reporting agencies report criminal cases that have been dismissed, they have used the disposition date to start the seven-year reporting period for records of arrests and other non-conviction criminal record information, rather than the ''date of entry'' for records of arrest or the date of the criminal charge for other non-conviction criminal record information.[16] As a result, these

[1] 85 FR 77987 (Dec. 3, 2020).

[2] CFPB, *Bulletin 2021–03: Consumer Reporting of Rental Information* (July 1, 2021), *https://files.consumerfinance.gov/f/documents/cfpb_consumer-reporting-rental-information_bulletin-2021-03_2021-07.pdf;* CFPB, *Market Snapshot: Background Screening Reports,* at 3–4 (Oct. 2019), *https://files.consumerfinance.gov/f/documents/201909_cfpb_market-snapshot-background-screening_report.pdf.*

[3] *See* 15 U.S.C. 1681a(d) (defining ''consumer report''); 1681a(f) (defining ''consumer reporting agency'').

[4] *See generally* CFPB, *Market Snapshot: Background Screening Reports* (Oct. 2019), *https://files.consumerfinance.gov/f/documents/201909_cfpb_market-snapshot-background-screening_report.pdf.*

[5] *See id.* at 5.

[6] *See id.* at 2.

[7] *See id.* at 8.

[8] *See generally* Nat'l Consumer Law Ctr., *Broken Records Redux: How Errors by Criminal Background Check Companies Continue to Harm Consumers Seeking Jobs and Housing,* at 3 (Dec. 2019), *https://www.nclc.org/images/pdf/criminal-justice/report-broken-records-redux.pdf;* Sarah E. Lageson & Robert Stewart, *Faulty Background Checks Are Violating Privacy and Ruining Lives,* The Hill (Sept. 28, 2023), *https://thehill.com/opinion/technology/4227081-faulty-background-checks-are-violating-privacy-and-ruining-lives/* (describing study that concluded that 74 percent of total criminal charges reported on 101 participants' reports did not have matches in official state reports and that a background report erroneously attributed 50 charges to a participant who in fact had only two drug convictions).

[9] In November 2021, the Bureau issued an advisory opinion highlighting that a consumer reporting agency that prepares consumer reports using name-only matching (*i.e.,* matching information to the particular consumer who is the subject of a consumer report based solely on whether the consumer's first and last names are identical or similar to the names associated with the information) does not use reasonable procedures to assure maximum possible accuracy under FCRA section 607(b). *Fair Credit Reporting: Name-Only Matching Procedures,* 86 FR 62468 (Nov. 10, 2021).

[10] *See* Nat'l Consumer Law Ctr., *Digital Denials: How Abuse, Bias, and Lack of Transparency in Tenant Screening Harm Renters,* at 37 (Sept. 2023), *https://www.nclc.org/wp-content/uploads/2023/09/202309_Report_Digital-Denials.pdf.*

[11] *See id.* at 38.

[12] *See, e.g., id.* at 5, 31, 35; Consent Order, *In re Gen. Info. Servs., Inc.,* 2015–CFPB–0028 (Oct. 29, 2015), *https://files.consumerfinance.gov/f/201510_cfpb_consent-order_general-information-service-inc.pdf;* CFPB, Press Release, *CFPB Takes Action Against Two of the Largest Employment Background Screening Report Providers for Serious Inaccuracies* (Oct. 29, 2015), *https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-two-of-the-largest-employment-background-screening-report-providers-for-serious-inaccuracies/;* Consent Order, *United States* v. *HireRight Sols., Inc.,* 1:12-cv-01313 (D.D.C. Aug. 8, 2012), *https://www.ftc.gov/sites/default/files/documents/cases/2012/08/120808hirerightstip.pdf.*

[13] *See, e.g.,* Or. Rev. Stat. sec. 105.163 (allowing sealing of eviction records in certain circumstances, such as when there is a judgment or judgment of dismissal entered in the consumer's favor); DC Code sec. 42–3505.09 (requiring that eviction records be sealed in certain circumstances, such as (1) after 30 days have passed from final resolution if the eviction proceeding does not result in a judgment for possession in favor of the housing provider or (2) three years after the final resolution of the eviction proceeding if the eviction proceeding results in a judgment for possession in favor of the housing provider); Cal. Civ. Proc. Code sec. 1161.2 (requiring certain eviction records to be sealed at filing, and limiting access to those records to a small list of exceptions, unless judgment is entered for the landlord within 60 days of the complaint being filed); *see also* Margaret C. Love, Collateral Consequences Res. Ctr., *50-State Comparison: Expungement, Sealing & Other Record Relief* (Oct. 2021), *https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside/.*

[14] *See, e.g.,* 28 CFR 20.21(b); 18 Pa. Cons. Stat. sec. 9121(b)(2) (generally restricting State and local police departments from disseminating information regarding the initiation of criminal proceedings to individuals or noncriminal justice agencies when three years have elapsed from the date of arrest, no disposition is indicated in the record, and nothing in the record indicates that proceedings seeking conviction remain pending); 6 Va. Admin. Code 20–120–50.A.1 (generally prohibiting dissemination of criminal history records to noncriminal justice agencies or individuals when one year has elapsed from the date of arrest, no disposition of the charge has been recorded, and no active prosecution of the charge is pending); *see also* SEARCH, The Nat'l Consortium for Justice Info. and Statistics, *Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information,* at 41 (2005), *https://www.search.org/files/pdf/RNTFCSCJRI.pdf* (''In most States, authorized noncriminal justice requestors receive less than the full record; most often they are provided conviction-only information.'').

[15] The FCRA limits the length of time that certain items of information may appear in a consumer report. 15 U.S.C. 1681c. For example, the FCRA generally prohibits the reporting of ''[a]ny . . . adverse item of information . . . which antedates the report by more than seven years.'' 15 U.S.C. 1681c(a)(5). This advisory opinion uses the term ''obsolete'' to refer to information that is older than the applicable FCRA time limit.

[16] *See, e.g., Moran* v. *The Screening Pros, LLC,* 25 F.4th 722, 724–25 (9th Cir. 2022); *Moran* v. *The*

consumer reporting agencies have included adverse information in consumer reports longer than FCRA section 605(a) permits.

When these types of information appear in background screening reports, the consequences for consumers can be grave. Consumers' rental housing applications may be denied, or they may end up paying more for such housing or be limited to locations or types of rental housing that they would not otherwise have selected, all of which is particularly challenging for consumers in a market characterized by high rents.[17] Consumers' employment applications may be rejected, they may be passed over for promotions or denied security clearances, and they may lose their jobs. Even if none of these things happen, a consumer may spend considerable time and energy, and incur considerable expense, attempting to correct inaccuracies. Consumers often do not see their reports, if at all, until after they are denied, and efforts to correct information with one company may not carry over to the hundreds of other background screening companies or those that sell data to them.

In 1970, Congress enacted the Fair Credit Reporting Act (FCRA) to protect against these types of harms. The FCRA regulates consumer reporting and imposes obligations on consumer reporting agencies, the entities that furnish information to them, and the users of consumer reports.[18] In passing the FCRA, Congress recognized ''a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's privacy.'' [19] Accordingly, Congress designed the FCRA ''to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information'' and ''to prevent an undue invasion of the individual's right of privacy in the collection and dissemination of credit information.'' [20] A primary purpose of the FCRA is ''to protect consumers from the transmission of inaccurate information about them, and to establish credit reporting practices that utilize accurate, relevant, and current information in a confidential and responsible manner.'' [21] The statute is meant to ensure, among other things, that consumer reporting agencies provide information ''in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information.'' [22]

Because of the importance of consumer report accuracy to businesses and consumers, the structure of the FCRA creates interrelated legal standards and requirements to support the goal of accurate credit reporting. Among these is the requirement that, when preparing a consumer report, consumer reporting agencies ''shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.'' [23] This requirement remains as important today as it was when the statute was enacted in 1970, and concerns about the accuracy of information included in consumer reports are long standing.

The CFPB is issuing this advisory opinion to underscore certain obligations that the FCRA imposes when background screening reports are provided and used. First, this advisory opinion highlights that consumer reporting agencies must comply with their FCRA obligation to ''follow reasonable procedures to assure maximum possible accuracy'' under section 607(b). In particular, a consumer reporting agency that reports public record information is not using reasonable procedures to assure maximum possible accuracy if it does not have reasonable procedures in place to ensure that (1) it does not report information that is duplicative or that has been expunged, sealed, or otherwise legally restricted from public access in a manner that would prevent the user from obtaining it directly from the government entities that maintain the records and (2) it includes any existing disposition information if it reports arrests, criminal charges, eviction proceedings, or other court filings.

Second, consistent with prior cases and guidance discussed below, this advisory opinion highlights that, when consumer reporting agencies include adverse information in consumer reports, the occurrence of the adverse event starts the running of the reporting period for adverse items under FCRA section 605(a)(5), which is not restarted or reopened by the occurrence of subsequent events. Moreover, a non-conviction disposition [24] of a criminal charge cannot be reported beyond the seven-year period that begins to run at the time of the charge. Consumer reporting agencies thus must ensure that they do not report adverse information beyond the reporting period in FCRA section 605(a)(5) and must at all times have reasonable procedures in place to prevent reporting of information that is duplicative or legally restricted from public access and to ensure that any existing disposition information is included if court filings are reported.

B. Coverage

This advisory opinion applies to all ''consumer reporting agencies,'' as that term is defined in FCRA section 603(f).

C. Legal Analysis

1. Reasonable Procedures To Assure Maximum Possible Accuracy When Preparing Background Screening Reports

FCRA section 607(b) provides that ''[w]henever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.'' [25] The Bureau has previously indicated that it is not a reasonable procedure to use name-only matching to match information to the consumer who is the subject of the report when preparing a consumer report.[26] This advisory opinion highlights the Bureau's interpretation of three other

Screening Pros, LLC, 943 F.3d 1175, 1182 (9th Cir. 2019); Complaint at ¶¶ 19–20, *Bureau of Consumer Fin. Prot.* v. *Sterling Infosys., Inc.,* No. 1:19–cv–10824 (S.D.N.Y. Nov. 22, 2019), *https://files.consumerfinance.gov/f/documents/cfpb_sterling-infosystems-inc_complaint_2019-11.pdf.*

[17] *See* Joint Ctr. for Hous. Studies of Harvard Univ., *The State of the Nation's Housing,* at 1–2, 22 (2023), *https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_The_State_of_the_Nations_Housing_2023.pdf* (noting that ''renter cost burdens have risen to their highest recorded level, underscoring the worsening affordability challenges facing many renters with lower incomes''); CFPB, *Tenant Background Checks Market* at 5 (Nov. 2022), *https://files.consumerfinance.gov/f/documents/cfpb_tenant-background-checks-market_report_2022-11.pdf.*

[18] 15 U.S.C. 1681–1681x.

[19] 15 U.S.C. 1681(a)(4).

[20] S. Rep. No. 91–517, at 1 (1969).

[21] *Guimond* v. *Trans Union Credit Info.,* 45 F.3d 1329, 1333 (9th Cir. 1995) (citations omitted); *see also Porter* v. *Talbot Perkins Children's Servs.,* 355 F. Supp. 174, 176 (S.D.N.Y. 1973) (noting that the FCRA was intended ''to protect an individual from inaccurate or arbitrary information about himself in a consumer report that is being used as a factor in determining the individual's eligibility for credit, insurance or employment'').

[22] 15 U.S.C. 1681(b).

[23] 15 U.S.C. 1681e(b).

[24] As used in this advisory opinion, non-conviction disposition refers to a dismissal or a similar disposition of criminal charges such as dropped charges or an acquittal.

[25] 15 U.S.C. 1681e(b).

[26] *See, e.g., Fair Credit Reporting: Name-Only Matching Procedures,* 86 FR 62468 (Nov. 10, 2021); Consent Order at ¶¶ 4–13, *In re Gen. Info. Servs., Inc.,* 2015–CFPB–0028 (Oct. 29, 2015), *https://files.consumerfinance.gov/f/201510_cfpb_consent-order_general-information-service-inc.pdf;* Complaint at ¶¶ 5–11, 13–14, *Bureau of Consumer Fin. Prot.* v. *Sterling Infosys., Inc.,* No. 1:19–cv–10824 (S.D.N.Y. Nov. 22, 2019), *https://files.consumerfinance.gov/f/documents/cfpb_sterling-infosystems-inc_complaint_2019-11.pdf.*

aspects of section 607(b)'s ''reasonable procedures to assure maximum possible accuracy'' requirement that relate to background screening information used in consumer reports: (1) preventing duplication of information; (2) including any existing disposition information if arrests, criminal charges, eviction proceedings, or other court filings are reported; and (3) ensuring that information that has been expunged, sealed, or otherwise legally restricted from public access in a manner that would prevent users from obtaining it directly from the government entity that maintains the records is not included in consumer reports.

To comply with section 607(b) of the FCRA, consumer reporting agencies must have reasonable procedures in place to prevent duplicative information from being reported on consumer reports in order to ensure that reports do not inaccurately suggest that a single event occurred more than once. For example, inclusion of multiple entries for the same criminal conviction or the same eviction can wrongly suggest that a consumer was convicted or evicted more than once. Consumer reporting agencies that obtain information from multiple sources, or from a single source that in turn collects information from multiple sources, must take particular care to identify information that is duplicative to ensure that information is accurately presented in consumer reports. Similarly, when a consumer reporting agency reports multiple stages of the same court proceeding, it must have procedures in place to ensure that information regarding the stages of these court proceedings (such as an arrest followed by a conviction) is presented in a way that makes clear the stages all relate to the same proceeding or case and does not inaccurately suggest that multiple proceedings or cases have occurred. For example, at a minimum, such procedures should require that all information about one court case should be collated and presented together in manner that makes it clear it is a single case.

When arrests, criminal charges, eviction proceedings, or other court filings are reported, consumer reporting agencies must also have reasonable procedures in place to check for any available disposition information and to ensure that such information is included.[27] For example, in situations where charges have been dismissed, it is misleading and inaccurate to report that an individual has been arrested for the charges without also reporting that the charges have been dismissed.[28] Similarly, if a bankruptcy has been discharged, it would be misleading and inaccurate to report the bankruptcy filing without also reporting the result. Highlighting the importance of the accuracy requirements in the statute, the CFPB and FTC recently agreed to a stipulated order with TransUnion Rental Screening Solutions, Inc. (TURSS) that requires TURSS to follow written procedures reasonably designed to prevent reporting of court filings (in that case eviction proceeding records) without a final disposition after TURSS repeatedly provided tenant screening reports with eviction proceeding records that did not include available disposition information.[29]

Similar considerations apply with respect to expunged records, sealed records, and public records that are otherwise legally restricted from public access. Background screening companies are responsible for maintaining procedures that ensure that any inclusion of charges or arrest records in a consumer report complies with the law in the relevant jurisdiction from which the record originates. To ''expunge'' means to remove from a record or to erase or destroy.[30] Expungement removes arrests, convictions, or other matters from a person's public record entirely, as if they had never occurred. Sealing removes items in public records from public view. Similarly, applicable law restricts public access to certain criminal records maintained by government entities that reflect a disposition other than conviction or that have reached a specified age without active prosecution when certain conditions are met.[31] Once a conviction or other matter of public record has been sealed, expunged, or otherwise legally restricted from public access in a manner that would prevent the user from obtaining it directly from the government entity that maintains the records, it is misleading and inaccurate to include it as part of the individual's background in a consumer report because there is no longer any public record of the matter.

Consumer reporting agencies that report public record information are not using reasonable procedures to assure maximum possible accuracy if they do not have reasonable procedures in place to prevent the inclusion in consumer reports of information that has been expunged, sealed, or otherwise legally restricted from public access in a manner that would prevent the user from obtaining it directly from the government entity that maintains the records. These procedures could include, for example, reporting only newly-gathered information or cross-checking existing data against updated sources so that matters that have been sealed or expunged can be identified and removed. In some instances, consumer reporting agencies may also be able to request lists of expunged matters from the original source and then remove those matters from their databases.[32] In addition, under FCRA section 611(a)(5)(C), consumer reporting agencies must maintain reasonable procedures to ensure that information that is deleted from a consumer's file under FCRA section 611(a)(5)(A) because it is inaccurate or incomplete or cannot be verified does not reappear, except in the limited circumstances

[27] *See, e.g.,* Complaint at ¶ 22, *United States* v. *AppFolio, Inc.,* No. 1:20–cv–03563 (D.D.C. Dec. 8, 2020), *https://www.ftc.gov/system/files/documents/cases/ecf_1_-_us_v_appfolio_complaint.pdf* (alleging that a tenant screening company failed to follow reasonable procedures to assure that the eviction and criminal record information included in tenant-screening reports accurately reflected the disposition). Even when disposition information is included, court filings can of course only be reported if doing so complies with the FCRA. As discussed below, consumer reporting agencies must, for example, have procedures in place to ensure that court filings are not reported if the information has been expunged, sealed, or otherwise legally restricted from public access in a manner that would prevent the user from obtaining it directly from the government entity that maintains the records.

[28] The Bureau notes that such disposition information appears to be available, in the majority of cases, within five years. For example, a 2018 survey of State criminal history information systems showed that in 48 States and the District of Columbia, an average of 64 percent of arrests in State databases in the past five years had final case dispositions reported. Becki R. Goggins & Dennis A. DeBacco, SEARCH, The Nat'l Consortium for Justice Info. and Statistics, *Survey of State Criminal History Information Systems, 2018* (Nov. 5, 2020), *https://www.ojp.gov/pdffiles1/bjs/grants/255651.pdf.*

[29] CFPB, Press Release, *CFPB and FTC Take Actions Against TransUnion for Illegal Rental Background Check and Credit Reporting Practices* (Oct. 12, 2023), *https://www.consumerfinance.gov/about-us/newsroom/cfpb-ftc-take-actions-against-transunion-illegal-rental-background-check-and-credit-reporting-practices/.*

[30] Black's Law Dictionary (11th ed. 2019).

[31] *See, e.g.,* 28 CFR 20.21(b); 18 Pa. Cons. Stat. sec. 9121; 6 Va. Admin. Code 20–120–50.A.1; *see also* SEARCH, The Nat'l Consortium for Justice Info. and Statistics, *Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information,* at 41 (2005), *https://www.search.org/files/pdf/RNTFCSCJRI.pdf* (''In most States, authorized noncriminal justice requestors receive less than the full record; most often they are provided conviction-only information.'').

[32] Nat'l Consumer Law Ctr., *Broken Records Redux: How Errors by Criminal Background Check Companies Continue to Harm Consumers Seeking Jobs and Housing,* at 35–36 (Dec. 2019), *https://www.nclc.org/images/pdf/criminal-justice/report-broken-records-redux.pdf.* The Administrative Office of Pennsylvania Courts regularly produces lists of expunged cases for entities that subscribe to its bulk distribution of criminal case data and contractually requires those entities to use the information to remove expunged cases. *Id.* at 23.

specified in FCRA section 611(a)(5)(B). This would include ensuring information does not reappear in situations in which a third-party vendor resupplies information that the consumer reporting agency has already removed.[33]

The CFPB and the Federal Trade Commission (FTC) have brought several cases illustrating the aspects of section 607(b) discussed in this advisory opinion.[34] For example, the CFPB alleged in one action that an employment background screening company, General Information Services, violated FCRA section 607(b) by, among other things, failing to use reasonable procedures to prevent the inclusion of expunged criminal records in consumer reports.[35] Similarly, the FTC alleged that another employment background screening company, HireRight Solutions, failed to take reasonable steps to ensure that the information in its consumer reports was current and reflected updates, such as the expungement of criminal records.[36] Because of this, the FTC charged, employers sometimes received information that incorrectly listed criminal convictions on individuals' records. In addition, according to the FTC's complaint, HireRight Solutions failed to follow reasonable procedures to prevent the same criminal offense information from being included in a consumer report multiple times.[37] In another action, the FTC alleged that a tenant screening company, AppFolio, failed to follow reasonable procedures to assure that the eviction and criminal record information included in tenant-screening reports accurately reflected the disposition, offense name, and offense type, and to prevent the inclusion of multiple entries for the same criminal or eviction action in the same report.[38]

Additionally, the CFPB and the FTC alleged in a recent action that a rental screening company, TURSS, violated the FCRA by failing to follow reasonable procedures to assure maximum possible accuracy of information in background screening reports relied on by landlords and others.[39] Specifically, the agencies alleged that TURSS knowingly and recklessly failed to follow reasonable procedures to: (1) prevent the inclusion of multiple entries for the same eviction case in eviction proceeding records, (2) accurately report the case disposition in eviction proceeding records, (3) accurately label data fields in eviction proceeding records, and (4) prevent the inclusion of sealed eviction proceeding records.[40]

2. Seven-Year Period for Reporting Adverse Information

The FCRA restricts a consumer reporting agency from including obsolete information in a consumer report.[41] FCRA section 605(a)(5) generally prohibits the reporting of ''[a]ny . . . adverse item of information . . . which antedates the report by more than seven years.''[42]

As the plain language of section 605(a)(5) makes clear, each adverse item of information is subject to its own seven-year reporting period, the timing of which depends on the date of the ''adverse item'' itself.[43] Thus, the reporting period applicable to one adverse item cannot be restarted or reopened by the occurrence of a subsequent event. Once the period applicable to a particular item expires, that item can no longer be reported. For example, an arrest is subject to a reporting period that ends seven years after the arrest's date of entry, and subsequent events do not restart or reopen the reporting period applicable to the arrest.[44]

Moreover, in the case of a non-conviction disposition of criminal charges, the disposition does not start its own seven-year reporting period.[45] This interpretation follows from a longstanding principle in the application of section 605(a): a consumer reporting agency ''may not furnish a consumer report referencing the existence of adverse information that predates the times set forth'' in section 605(a).[46] In other words, a consumer reporting agency generally cannot provide a consumer report containing information that reveals the existence of an adverse event that antedates the report by more than seven years. Otherwise the FCRA's clear limitations on the reporting of obsolete information would be vulnerable to easy evasion. Because it necessarily would reveal the existence of the charge, a dismissal of a criminal charge or similar disposition such as dropped charges or acquittal generally could not be reported after the seven-year period that begins when the charge occurred.[47]

This interpretation also follows from the structure of section 605(a) and a 1998 amendment to that provision. The contrast between section 605(a)(5) and several other paragraphs of section 605(a), in which Congress prescribed a different rule for specific categories of information, is instructive. For paid tax liens, the reporting period ends seven years ''from date of payment'';[48] for

[33] 15 U.S.C. 1681i(a)(5)(C).

[34] The Bureau and the FTC have also previously issued guidance on these aspects of section 607(b). *See, e.g.,* CFPB, *Bulletin 2021–03: Consumer Reporting of Rental Information* (July 1, 2021), *https://files.consumerfinance.gov/f/documents/cfpb_consumer-reporting-rental-information_bulletin-2021-03_2021-07.pdf;* Fed. Trade Comm'n, *What Tenant Background Screening Companies Need to Know About the Fair Credit Reporting Act* (Oct. 2016), *https://www.ftc.gov/business-guidance/resources/what-tenant-background-screening-companies-need-know-about-fair-credit-reporting-act.*

[35] *See* Consent Order, *In re Gen. Info. Servs., Inc.,* 2015–CFPB–0028 (Oct. 29, 2015), *https://files.consumerfinance.gov/f/201510_cfpb_consent-order_general-information-service-inc.pdf;* CFPB, Press Release, *CFPB Takes Action Against Two of the Largest Employment Background Screening Report Providers for Serious Inaccuracies* (Oct. 29, 2015), *https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-two-of-the-largest-employment-background-screening-report-providers-for-serious-inaccuracies/.*

[36] Consent Order, *United States* v. *HireRight Sols., Inc.,* 1:12–cv–01313 (D.D.C. Aug. 8, 2012), *https://www.ftc.gov/sites/default/files/documents/cases/2012/08/120808hirerightstip.pdf.*

[37] Complaint at ¶¶ 13–14, *United States* v. *HireRight Sols., Inc.,* 1:12–cv–01313 (D.D.C. Aug. 8, 2012), *https://www.ftc.gov/sites/default/files/documents/cases/2012/08/120808hirerightcmpt.pdf.*

[38] Complaint at ¶ 22, *United States* v. *AppFolio, Inc.,* No. 1:20–cv–03563 (D.D.C. Dec. 8, 2020), *https://www.ftc.gov/system/files/documents/cases/ecf_1_-_us_v_appfolio_complaint.pdf.*

[39] Complaint at ¶ 3, *FTC* v. *TransUnion Rental Screening Solutions, Inc.,* No. 1:23–cv–2659 (D. Colo. Oct. 12, 2023), *https://files.consumerfinance.gov/f/documents/cfpb_transunion-rental-screening-solutions-inc-trans-union-llc_complaint_2023-10.pdf.*

[40] *Id.* at ¶¶ 24–53.

[41] 15 U.S.C. 1681c.

[42] 15 U.S.C. 1681c(a)(5). FCRA section 605(a)(5) excludes from this prohibition records of convictions of crimes. *Id.* In addition, FCRA section 605(b) provides that this prohibition is not applicable in the case of any consumer credit report to be used in connection with certain specified transactions. 15 U.S.C. 1681c(b).

[43] *Moran* v. *The Screening Pros, LLC,* 943 F.3d 1175, 1184 (9th Cir. 2019) (''The statute's use of 'antedates' connects the seven-year window directly to the adverse event itself.'').

[44] While records of conviction of a crime are not subject to the time limits set forth in section 605(a)(5), an arrest underlying a conviction is subject to the reporting period that ends seven years after the arrest's date of entry.

[45] *Moran,* 943 F.3d at 1184 (''A dismissal indicates that the consumer no longer faces an indictment, an overall positive—but at least neutral—development. A dismissal is only adverse insofar as it discloses the previous adverse event, *i.e.,* the charge.'').

[46] Fed. Trade Comm'n, *40 Years of Experience With the Fair Credit Reporting Act: An FTC Staff Report With Summary of Interpretations,* at 55 (2011); *cf. Moran,* 943 F.3d at 1184 (''Even though non-adverse information is typically not subject to reporting windows, a dismissal is different. A dismissal necessarily references the existence of the adverse event, to which the reporting window still applies.'').

[47] *Moran,* 943 F.3d at 1184 (''A related later event should not trigger or reopen the window, as the adverse event already occurred. To hold otherwise, thereby allowing this information to be reported through disclosure of a dismissal, would circumvent Congress's intent to confine adverse criminal information to a seven-year window.'').

[48] 15 U.S.C. 1681c(a)(3).

bankruptcy cases, the reporting period ends 10 years ''from the date of entry of the order for relief or the date of adjudication.'' [49] Unlike these provisions, section 605(a)(5) contains no indication that Congress intended to tie the end of the reporting period to something other than the occurrence of the adverse item. The pre-1998 version of section 605(a) explicitly made ''disposition'' of a ''record[ ] . . . of indictment'' the trigger for the seven-year reporting period; however, a 1998 amendment deleted that provision.[50] This amendment ''significantly altered [the] statute,'' indicating clearly that the end of the reporting period under section 605(a)(5) depends on the date of the adverse item itself—not on the date of disposition.[51]

In addition to provisions authorizing Federal and State enforcement,[52] the FCRA contains two provisions relating to civil liability to consumers for noncompliance. Section 617 provides that ''any person who is *negligent* in failing to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to'' the consumer's actual damages, and costs and reasonable attorney's fees.[53] Section 616 provides that ''any person who *willfully* fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to'' actual or statutory damages of up to $1,000 per violation, such punitive damages as the court allows, and costs and reasonable attorney's fees.[54] A violation is willful when it is inconsistent with ''authoritative guidance'' from a relevant agency.[55] As with any guidance issued by the CFPB on the FCRA, or predecessor agencies that were responsible for administering the FCRA prior to the CFPB's creation, consumer reporting agencies risk liability under section 616 if they violate the FCRA in a manner described in this advisory opinion, regardless of whether the consumer reporting agencies were previously liable for willful violations prior to its issuance.

II. Regulatory Matters

This advisory opinion is an interpretive rule issued under the Bureau's authority to interpret the FCRA, including under section 1022(b)(1) of the Consumer Financial Protection Act of 2010,[56] which authorizes guidance as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of Federal consumer financial laws.[57]

The Bureau has determined that this advisory opinion does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.[58]

Pursuant to the Congressional Review Act,[59] the Bureau will submit a report containing this interpretive rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to the rule's published effective date. The Office of Information and Regulatory Affairs has designated this interpretive rule as not a ''major rule'' as defined by 5 U.S.C. 804(2).

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2024–00788 Filed 1–22–24; 8:45 am]

BILLING CODE 4810–AM–P

[49] 15 U.S.C. 1681c(a)(1).

[50] In the original FCRA, ''[r]ecords of arrest, indictment, or conviction of crime'' were reportable for seven years, starting at the ''date of disposition, release, or parole.'' 15 U.S.C. 1681c(a)(5) (1996). The 1998 amendment to the FCRA deleted this paragraph. Consumer Reporting Employment Clarification Act, Public Law 105–347, sec. 5(2), 112 Stat. 3211. The amendment moved ''records of arrest'' to pre-existing paragraph (a)(2), which now requires the reporting of ''[c]ivil suits, civil judgment, and records of arrest'' to end seven years after ''date of entry,'' 15 U.S.C. 1681c(a)(2). *See* Public Law 105–347, sec. 5(1), 112 Stat. 3211. (Information of this type can be reported ''until the governing statute of limitations has expired,'' if that period is longer. 15 U.S.C. 1681c(a)(2).) The 1998 amendment also removed criminal convictions altogether from the restriction on reporting obsolete information. *Id.,* sec. 5(3), codified at 15 U.S.C. 1681c(a)(5) (prohibiting reporting, past seven years, of ''any other adverse item of information, other than records of convictions of crimes'').

[51] *Moran*, 943 F.3d at 1185.

[52] 15 U.S.C. 1681s.

[53] 15 U.S.C. 1681o (emphasis added).

[54] 15 U.S.C. 1681n (emphasis added); *Safeco Ins. Co. of Am.* v. *Burr,* 551 U.S. 47, 57–58 (2007) (construing meaning of ''willful'').

[55] *Safeco Ins.,* 551 U.S. at 70; *Fuges* v. *Sw. Fin. Servs., Ltd.,* 707 F.3d 241, 253 (3d Cir. 2012).

[56] Public Law 111–203, 124 Stat. 1376 (2010).

[57] 12 U.S.C. 5512(b)(1).

[58] 44 U.S.C. 3501–3521.

[59] 5 U.S.C. 801 *et seq.*

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1498; Project Identifier MCAI–2023–00459–T; Amendment 39–22643; AD 2023–25–16]

RIN 2120–AA64

Airworthiness Directives; Airbus SAS Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Airbus SAS Model A330–200, A330–200 Freighter, A330–300, A330–800, and A330–900 series airplanes. This AD was prompted by a determination that part of a certain production ground test procedure used to confirm inner fuel tank integrity was not accomplished properly on certain airplanes. This AD requires a fuel tank leak test and, depending on findings, accomplishment of applicable corrective action, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective February 27, 2024.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of February 27, 2024.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–1498; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

- For EASA material incorporated by reference in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* website *easa.europa.eu.* You may find this material on the EASA website at *ad.easa.europa.eu.*
- For Airbus SAS service information identified in this AD, contact Airbus

Tab 31

Circular 2024-01: Preferencing and Steering Practices by Digital Intermediaries for Consumer Financial Products or Services, 89 Fed. Reg. 17706 (Mar. 12, 2024).

CFPB Issues Guidance to Rein in Rigged Comparison-Shopping Results for Credit Cards and Other Financial Products

English

Español (cfpb.gov/about-us/newsroom/cfpb-emite-directrices-para-comparar-productos-financieros/)

Manipulative advertisements and kickbacks undermine competition and can violate federal law

FEB 29, 2024

WASHINGTON, D.C. – The Consumer Financial Protection Bureau (CFPB) today issued a circular (cfpb.gov/compliance/circulars/consumer-financial-protection-circular-2024-01-preferencing-and-steering-practices-by-digital-intermediaries-for-consumer-financial-products-or-services/) to law enforcement agencies and regulators explaining how companies operating comparison-shopping tools can break the law when they steer consumers to certain products or lenders because of kickbacks. Consumers use comparison-shopping tools to evaluate the costs, features, and terms of many financial products, including credit cards, loans, and bank accounts. However, consumers often encounter manipulated results or digital dark patterns, fueled by behind-the-scenes incentive payments from lenders. The circular explains how these practices may violate federal law and highlights examples of illegal arrangements.

"Americans turn to online comparison tools to find the credit card with the lowest interest rates or best rewards," said CFPB Director Rohit Chopra. "The CFPB is working to ensure that digital advertisements for financial products are not disguised as unbiased and objective advice."

Digital comparison-shopping tools are widely used in many product categories, from retail goods to travel and financial products. By allowing consumers to compare a variety of competing products quickly and efficiently, these tools have the potential to benefit individual consumers and drive competition across the larger market.

Comparison-shopping tools can help consumers evaluate and find financial products, especially credit cards and mortgages. Consumers often rely on the tools to navigate difficult financial decisions. However, some tool operators take advantage of that reliance and manipulate results. For example, some operators might accept financial kickbacks, sometimes referred to as "bounties" within the industry, to manipulate lists of results displayed to shoppers.

The CFPB previously issued guidance on how real estate and mortgage laws apply to mortgage comparison-shopping (cfpb.gov/about-us/newsroom/cfpb-issues-guidance-to-protect-mortgage-borrowers-from-pay-to-play-digital-comparison-shopping-platforms/). In today's circular, the CFPB provides guidance on how consumer financial protection laws apply to comparison shopping for other financial products. Comparison-shopping tools can heavily influence a consumer's selection of a financial product. Many digital comparison-shopping tools hold themselves out as providing unbiased and objective advice. The guidance discusses how regulators and law enforcement agencies can evaluate operators of comparison-shopping tools that accept payments from financial firms to manipulate results or suppress options that may better fit the consumer's stated preferences.

Dark Patterns in Comparison Shopping

Dark patterns are a common tool used to manipulate consumers. Operators of comparison-shopping tools may deceive consumers with user experiences and user interfaces that lead people to believe they are the beneficiaries of competition. However, if consumers are being tricked into paying higher prices or selecting inferior products, the comparison-shopping company and the company paying-to-play may be the only ones benefiting from the façade of competition.

The CFPB has warned that dark patterns (cfpb.gov/about-us/newsroom/director-chopra-remarks-at-the-university-of-california-irvine-law-school/) can violate consumer financial protection laws, and the agency has taken enforcement actions against violators. The CFPB sued ACTIVE Network (cfpb.gov/about-us/newsroom/cfpb-sues-payment-platform-used-by-ymca-camps-race-organizers-for-junk-fee/) for illegally cramming consumers with junk membership fees, and sued TransUnion (cfpb.gov/about-us/newsroom/cfpb-charges-transunion-and-senior-executive-john-danaher-with-violating-law-enforcement-order/) for using dark patterns to make it difficult for consumers to cancel certain subscription services. The Federal Trade Commission has also taken action, including a lawsuit against Credit Karma (https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-finalizes-order-requiring-credit-karma-pay-3-million-halt-deceptive-pre-approved-claims) for tricking consumers with deceptive "Pre-Approved" credit offers.

Increasing Competition in Credit Cards and Other Markets

The CFPB has found evidence of practices that may imply anti-competitive behavior in the consumer credit card market, as well as high levels of concentration in the industry. A recent CFPB report (cfpb.gov/about-us/newsroom/cfpb-report-finds-large-banks-charge-higher-credit-card-interest-rates-than-small-banks-and-credit-unions/) showed that large banks are offering worse credit card terms and interest rates than small banks and credit unions, regardless of credit risk. The difference in interest rates can translate to $400 to $500 in additional annual interest for the average cardholder. The CFPB has also published research (cfpb.gov/about-us/blog/credit-card-interest-rate-margins-at-all-time-high/) showing how the largest issuers have increased their interest rate margins over the past decade, resulting in about $25 billion in additional interest charges in 2023 alone.

To help foster greater competition in this important market, the CFPB is developing a consumer-facing tool (cfpb.gov/about-us/newsroom/cfpb-enhances-tool-to-promote-competition-comparison-shopping-credit-card-market/) that, once finished, will bring more price transparency to credit card comparison-shopping. Consumers shopping for a credit card will have an unbiased way to compare credit card terms and interest rates.

Today's circular is part of a broader effort to level the playing field too often tilted against consumers across many different markets for consumer financial products and services. The guidance follows an advisory opinion to protect mortgage borrowers (cfpb.gov/about-us/newsroom/cfpb-issues-guidance-to-protect-mortgage-borrowers-from-pay-to-play-digital-comparison-shopping-platforms/) from pay-to-play digital comparison-shopping platforms. It also follows efforts to level marketplaces through actions on hard to cancel subscription services (cfpb.gov/about-us/newsroom/cfpb-issues-guidance-to-root-out-tactics-which-charge-people-fees-for-subscriptions-they-dont-want/), fake review fraud (cfpb.gov/about-us/newsroom/cfpb-issues-policy-on-contractual-gag-clauses-and-fake-review-fraud/), pay-to-pay fees (cfpb.gov/about-us/newsroom/cfpb-moves-to-reduce-junk-fees-charged-by-debt-collectors/), and hidden junk fees (cfpb.gov/rules-policy/junk-fees/).

Read today's circular. (cfpb.gov/compliance/circulars/consumer-financial-protection-circular-2024-01-preferencing-and-steering-practices-by-digital-intermediaries-for-consumer-financial-products-or-services/)

Consumers can submit complaints about financial products or services by visiting the CFPB's website (cfpb.gov/complaint/) or by calling (855) 411-CFPB (2372).

Employees who they believe their company has violated federal consumer financial protection laws are encouraged to send information about what they know to whistleblower@cfpb.gov.

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit *www.consumerfinance.gov* (http://www.consumerfinance.gov/).

Topics

- DATA (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=DATA)
- CREDIT CARDS (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=CREDIT-CARDS)
- FINANCIAL SERVICE PROVIDERS (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=FINANCIAL-SERVICE-PROVIDERS)
- MORTGAGES (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=MORTGAGES)

PRESS INFORMATION

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Go to press resources page (cfpb.gov/about-us/newsroom/press-resources/)

(b) If judicial review is not obtained, the action of the TSOB Review Panel is final and binding on the parties for the purpose of resolving the particular decision under review.

§ 126.31 Administration of proceedings.

(a) A TSOB Review Panel has authority to govern the conduct of its proceedings and internal operations by establishing any additional rules or procedures that are not inconsistent with this part.

(b) If TSA withdraws its Determination of Security Threat at any time after a notice of appeal has been filed pursuant to § 126.13(a), the proceedings before the TSOB Review Panel are rendered moot and closed. TSA must file a notice of withdrawal of the Determination of Security Threat with the TSOB Docket Clerk within five calendar days of such withdrawal.

(c) TSOB Review Panel proceedings will generally be closed to the public. A TSOB Review Panel may, in its discretion, open its proceedings to the public. Classified information, SSI, or other protected information shall not be disclosed during administrative proceedings, in accordance with § 126.25(d).

Alejandro Mayorkas,

Secretary, U.S. Department of Homeland Security.

[FR Doc. 2024–05131 Filed 3–8–24; 11:15 am]

BILLING CODE 9110–9B–P

CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Part X

Consumer Financial Protection Circular 2024–01: Preferencing and Steering Practices by Digital Intermediaries for Consumer Financial Products or Services

AGENCY: Consumer Financial Protection Bureau.

ACTION: Consumer financial protection circular.

SUMMARY: The Consumer Financial Protection Bureau (Bureau or CFPB) has issued Consumer Financial Protection Circular 2024–01, titled, ''Preferencing and steering practices by digital intermediaries for consumer financial products or services.'' In this circular, the Bureau responds to the question, ''Can operators of digital comparison-shopping tools or lead generators violate the Consumer Financial Protection Act (CFPA) by preferencing products or services based on financial or other benefits to the operator?''

DATES: The Bureau released this circular on its website on February 29, 2024.

ADDRESSES: Enforcers, and the broader public, can provide feedback and comments to *Circulars@cfpb.gov.*

FOR FURTHER INFORMATION CONTACT: George Karithanom, Regulatory Implementation & Guidance Program Analyst, Office of Regulations, at 202–435–7700 or at: *https://www.reginquiries.consumerfinance.gov/*. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

Question Presented

Can operators of digital comparison-shopping tools or lead generators violate the Consumer Financial Protection Act (CFPA) by preferencing products or services based on financial or other benefits to the operator?

Response

Yes. Operators of digital comparison-shopping tools can violate the prohibition on abusive acts or practices if they distort the shopping experience by steering consumers to certain products or services based on remuneration to the operator. Similarly, lead generators can violate the prohibition on abusive practices if they steer consumers to one participating financial services provider instead of another based on compensation received. Where consumers reasonably rely on an operator of a digital comparison-shopping tool or a lead generator to act in their interests, the operator or lead generator can take unreasonable advantage of that reliance by giving preferential treatment to their own or other products or services through steering or enhanced product placement, for financial or other benefits.

Background

For many households, the process of shopping for a financial product or service now includes interactions with digital intermediaries. These intermediaries include websites, applications, or chatbots that operate as comparison-shopping tools, which consumers turn to for help with researching, comparing, and selecting consumer financial products or services. Offering a comparison-shopping tool for consumers and generating leads for financial companies can and sometimes do operate as distinct business models, and for the purposes of this circular, comparison-shopping tools and lead generators are discussed separately. However, consumers often interact with them in similar ways and many digital intermediaries operate as both, presenting themselves as consumer-serving comparison-shopping tools while simultaneously increasing profits by directing leads based on financial benefit. Digital intermediaries commonly receive remuneration or other benefits, sometimes referred to as ''bounties'' by market participants.

Digital Comparison-Shopping Tools

Consumers are increasingly using digital comparison-shopping tools to find consumer financial products or services that fit their interests.[1] These tools facilitate comparison shopping by presenting information about the costs, features, or other terms for a set of comparable financial products or services, such as credit cards, student loans, and savings accounts, offered by different providers. In addition to presenting options offered by third-party providers of financial products and services, some operators of digital comparison-shopping tools offer their own financial products and services and include their own options in the comparison-shopping tool.

Comparison-shopping information can be presented in a static or interactive format. In the latter case, some operators allow people who use the tool to sort options based on different criteria or to otherwise customize the presentation of information and options (sometimes after a default presentation). Also, some operators collect information from consumers and then purport to provide a list of options tailored to the consumers' particular circumstances or preferences. In other cases, operators just present an ordered list of recommended providers. Increasingly,

[1] As used in this circular, the term ''digital comparison-shopping tools'' includes both tools that overtly recommend certain products as well as tools that have the effect of affirmatively influencing consumers' likelihood of selecting or engaging with information about various consumer financial products and services. The term encompasses ''Digital Mortgage Comparison-Shopping Platforms,'' which are addressed in a recent advisory opinion regarding the Real Estate Settlement Procedures Act. *See* Digital Mortgage Comparison-Shopping Platforms and Related Payments to Operators, 88 FR 9162 (Feb. 13, 2023). The term also encompasses some ''digital marketing providers,'' which are discussed in a recent interpretive rule regarding the CFPA definition of ''service providers.'' *See* Limited Applicability of Consumer Financial Protection Act's ''Time or Space'' Exception with Respect to Digital Marketing Providers, 87 FR 50556 (Aug. 17, 2022). The scope of this circular, however, is different than the scope of either of those prior documents. This circular addresses all digital comparison-shopping tools that provide recommendations for or comparisons among any consumer financial products or services and addresses potential violations under the abusive prong of the CFPA.

digital comparison-shopping tools are using algorithms that order recommendations or ranking lists based on multiple variables, such as consumer characteristics, product features, consumer ratings, the likelihood a consumer would be approved, various click-through and application completion or approval rates, and provider compensation or bids.

Operators of digital comparison-shopping tools enter various types of commercial arrangements with providers of consumer financial products and services that participate in a comparison-shopping tool. Some operators receive revenue in exchange for the provision of time or space for advertising that is clearly set apart from the content of the comparison-shopping tool, like banner ads or pop-up advertisements.[2] This kind of advertising is not at issue in this circular.

Instead, this circular focuses on compensation arrangements from providers for preferential treatment by an operator of a digital comparison-shopping tool. Operators are sometimes paid by product providers on a fee-per-action basis—for example, by receiving fees per click, per application, per conversion, per offer, or per sale. Often, operators allow firms to bid against each other for advantageous placement by paying bounties, which can be targeted at customers fitting the characteristics a provider wants to acquire or aimed at meeting certain volume goals. The degree to which these bounties affect product placement depends on the operator's business model and the weight given to provider compensation over other factors.

Lead Generation

Lead generators in lending markets sell information about prospective customers to lenders. Lead generators sometimes perform this function without making any contact with the consumer—selling data on consumers as a specialty data broker. But these entities also collect data directly from consumers by advertising websites that present themselves as helping consumers get a loan or connect with lenders.[3]

When consumers submit their information to a lead generator indicating an interest in obtaining a loan, the lead generator sells the consumer's information to lenders to complete a loan transaction. Lead generators decide which lender obtains a lead based on a variety of criteria depending on the firm. They sometimes deploy algorithms to use many variables simultaneously to make these automated decisions, similar to digital comparison-shopping tools. Sometimes lead generators collect more information from consumers to assist lenders in determining whether to purchase a lead, and lead generators sometimes perform underwriting or origination tasks on behalf of partner lenders. In fact, in some cases the automated decision on which a lender obtains a lead can be so quick that the consumer's user experience between navigating to a lead generator's website and obtaining a loan can be continuous.

Similar to compensation agreements for operators of digital shopping tools, lead generators are paid by participating lenders using a variety of pricing models. Payments can similarly be charged as a fee-per-action, such as for each lead, or each completed application. Lenders sometimes pay for a number of leads, or a number of leads meeting certain criteria. And, similarly, some lead generators send leads to providers who bid the highest for a specific type of lead.[4]

Analysis and Findings

The CFPA prohibits covered persons or service providers from engaging in any unfair, deceptive, or abusive act or practice.[5] An act or practice in connection with the provision of a consumer financial product or service is abusive if it ''takes unreasonable advantage'' of certain circumstances, including ''the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.'' [6]

Protecting and facilitating people's ability to effectively compare and choose among options for consumer financial products or services is among the core statutory objectives of the CFPB.[7]

Below, this circular first addresses how an operator of a digital comparison-shopping tool or a lead generator might leverage consumer reliance to take unreasonable advantage of consumers where the operator or lead generator preferences particular providers or products over others in exchange for financial or other benefits to the operator, as opposed to making presentation or lead distribution decisions using other factors not relating to the operator or lead generator's relative compensation from different providers. The circular then provides examples of potentially abusive acts or practices by digital comparison-shopping tool operators.

CFPA Section 1031(d)(2)(C) Elements

Reasonable Reliance by the Consumer on a Covered Person To Act in the Interests of the Consumer

Digital comparison-shopping tool operators and lead generators can qualify as ''covered persons'' under CFPA section 1031(d)(2)(C). An operator or lead generator is a ''covered person'' if it offers or provides consumer financial products or services or is an affiliate of a person that offers or provides consumer financial products or services and acts as a service provider by including those products in the tool or providing leads.[8] Depending on the role that a digital comparison-shopping tool or lead generator plays in a consumer's shopping experience, it may be extending or brokering the credit products that consumers ultimately receive.[9] In addition, some digital comparison-shopping tools and lead generators may be providing financial

[2] Factors that inform whether advertisements are separate from the content of a comparison-shopping tool include whether content is completely visually separate from the presentation of product recommendations or results, such that paid content is not embedded or intertwined with a tool's presentation of product rankings or recommendations, and whether paid content is presented as a recommendation from the comparison-tool operator. However, the question of whether advertising content is separate from a comparison-shopping tool is fact specific and will often include consideration of other factors.

[3] *See, e.g.,* Compl., *FTC* v. *ITMedia Sols. LLC,* No. 2:22–cv–00073 (C.D. Cal. Jan. 5, 2022) (alleging that lead generator unlawfully used a ''loan application'' form to collect consumers' information by deceptively presenting itself as connecting consumers with lenders).

[4] *See, e.g.,* Am. Compl., *CFPB* v. *D & D Marketing, Inc.,* No. 2:15–cv–09692 (C.D. Cal. June 30, 2016) (alleging unfair and abusive acts or practices where lead aggregator ordered sales based primarily on the price providers would pay for leads).

[5] Although this circular focuses on the reasonable-reliance prong of the abusive prohibition, conduct discussed in this circular can also violate other prongs of the abusive prohibition under 12 U.S.C. 5531(d), 12 U.S.C. 5531 and 5536(a)(1)(B)'s prohibitions against unfair or deceptive acts or practices, or other Federal, State, or local laws.

[6] 12 U.S.C. 5531(d)(2)(C). *See generally* CFPB, *Policy Statement on Abusive Acts or Practices,* at 17–18 (April 3, 2023), *https://files.consumerfinance.gov/f/documents/cfpb_policy-statement-of-abusiveness_2023-03.pdf* (discussing reasonable-reliance abusive prong).

[7] Under the CFPA, a central purpose of the CFPB is to promote ''fair, transparent, and competitive'' markets. 12 U.S.C. 5511(a). Moreover, CFPA legislative history highlights that an important purpose of the CFPB is to ensure that ''a consumer can shop and compare products based on quality, price, and convenience without having to worry about getting trapped by the fine print into an abusive deal.'' S. Rep. No. 111–176, at 11, 229 (2010).

[8] *See* 12 U.S.C. 5481(6) (defining ''covered person''); 12 U.S.C. 5481(26) (defining ''service provider'').

[9] *See* 12 U.S.C. 5481(5), (15)(A)(i).

advisory services to consumers as well.[10]

Additionally, some operators or lead generators offer their own version of the consumer financial product or service that consumers seek to compare using the digital comparison-shopping tool or for which leads are generated—for example, where an operator of a credit-card digital comparison-shopping tool offers its own card on the tool. Other operators or lead generators offer consumer financial products or services of a different type from what consumers are using a tool to compare or for which leads are generated—for example, an operator of a credit-card digital comparison-shopping tool might use pop-up advertisements to promote credit-counseling or credit-repair services offered by itself or an affiliate.

Reasonable Reliance

Consumers sometimes reasonably rely on digital comparison-shopping tool operators or lead generators to act in their interests. Operators of digital comparison-shopping tools and lead generators can engender reasonable consumer reliance by virtue of playing the role of helping people select providers. They can also engender reasonable consumer reliance by virtue of their explicit and implicit representations and communications.

In particular, reasonable consumer reliance can exist because of a digital comparison-shopping tool's function in a market, such as when a tool operator assumes the role of acting on behalf of consumers or helping them to select products or services based on the consumer's interests.[11] The nature of people's interactions with the tool informs an evaluation of the digital comparison-shopping tool's function in the market. For example, consumers may reasonably rely on a tool that functions by ''matching'' people with consumer financial products or services, *i.e.,* providing curated recommendations based partly on information provided by the consumer.

In addition, if an operator explicitly or implicitly holds its tool out as presenting information based on the interests of the consumer, it may be reasonable for consumers to rely on the tool to function accordingly. A tool operator sometimes explicitly holds itself out as presenting information based on the interests of the consumer by directly stating so, such as by, for example, claiming its recommendations are objective.

An operator can also implicitly hold itself out as presenting information based on the interests of the consumer even if it does not explicitly claim to make objective recommendations. For example, the operator may emphasize its ''expertise'' in helping consumers evaluate options; describe its tool as providing ''research-based'' rankings of options for consumers; state to consumers that it will ''help you today'' to ''achieve your financial goals''; purport to match consumers with the ''best'' or ''right'' offers; or claim to ''put consumers first'' or to provide a ''one stop shop'' with all the information consumers need to make informed selections among potential providers.

In some contexts, background conditions, such as an association with a trusted institution, could factor into consumers' reasonable reliance on a digital comparison-shopping tool (*e.g.,* a financial aid and student loan advisory website that is associated with a college or university).[12] Other factors, such as evidence that consumers using the tool tend to not understand that elements of the tool's rankings or recommendations are influenced by financial considerations, also contribute to establishing the existence of reasonable consumer reliance.

Relatedly, consumer-facing lead generators can engender reasonable consumer reliance within the meaning of CFPA section 1031(d)(2)(C) through their role as intermediating between consumers and lenders and their explicit or implicit communications to consumers. In particular, when lead generators conceal their real role in the market and present themselves as a tool for consumers to connect with trusted lenders or receive the best available terms for a consumer financial product or service, given the consumer's individual circumstances, a consumer would likely be reasonable in relying on the entity to act in the consumer's interests.[13]

Interests of the Consumer

Adjusting a digital comparison-shopping tool's presentation of consumer financial products and services based on fees or other benefits to tool operators will often not be in the interests of the consumer. In many cases where consumers use digital comparison-shopping tools, consumers have an interest in navigating a complex financial market to obtain products that are best for them. Consumer interests are not served when they are steered toward more expensive or less favorable products because those products are offered by the tool operator or its affiliates or because those products generate more revenue for the tool operator.

Similarly, consumer interests are not served when consumers are steered to more expensive or less favorable products by lead generators because one provider is bidding more for the lead than another.[14]

Unreasonable Advantage

A digital comparison-shopping tool operator or lead generator can take unreasonable advantage of the reasonable consumer reliance described above when they operate a business model that gives preferential treatment, such as through steering, to particular consumer financial products or services to increase financial or other benefits to the tool operator. For example, the operator may be taking unreasonable advantage of the consumer's reasonable reliance if the operator is able to generate more interest in its own financial products or services or is able to increase fees charged to third-party providers because the tool functions in a way that engenders the consumer's reasonable, but misguided, reliance on the tool to present information in a manner consistent with the interests of the consumer. In addition, benefits that accrue to the operator or lead generator include direct financial compensation or indirect or non-financial benefits, such as the ability to gather data that indirectly increases the operator's or lead generator's ability to obtain financial or other benefits.[15]

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[10] *See* 12 U.S.C. 5481(5), (15)(A)(viii).

[11] *See generally* CFPB, *Policy Statement on Abusive Acts or Practices,* at 17–18 (April 3, 2023), *https://files.consumerfinance.gov/f/documents/cfpb_policy-statement-of-abusiveness_2023-03.pdf.*

[12] Additionally, a comparison-shopping site operator or lead generator can also attempt to generate trust and reliance by falsely presenting a relationship with a trusted institution. *See, e.g.,* CFPB, *Consumer Financial Protection Circular 2022–02: Deceptive representations involving the FDIC's name or logo or deposit insurance* (May 17, 2022), *https://www.consumerfinance.gov/compliance/circulars/circular-2022-02-deception-representations-involving-the-fdics-name-or-logo-or-deposit-insurance/* (CFPB circular addressing deceptive misuse of the FDIC logo in representations about deposit insurance); Compl., *FTC* v. *Career Education Corporation,* No. 1:19–cv–05739 (N.D. Ill. Aug. 27, 2019) (Career Education Corporation purchased sales from lead generators that falsely represented they were affiliated with the U.S. military).

[13] *See, e.g.,* Compl., *FTC* v. *ITMedia Sols. LLC.*

[14] *See, e.g.,* Compl., *FTC* v. *Blue Global, LLC,* No. 2:17–cv–2117 (D. Ariz. July 3, 2017) (Blue Global collected loan applications and promised to match consumers with loans that had the best interest rates, finance charges, and repayment periods when, in fact, they indiscriminately sold leads.).

[15] *See* CFPB, *Policy Statement on Abusive Acts or Practices,* at 8 (April 3, 2023), *https://files.consumerfinance.gov/f/documents/cfpb_policy-statement-of-abusiveness_2023-03.pdf* (discussing monetary and

Enforcers should closely examine the specific details of bounty or bidding schemes when making a determination of abusive conduct. If a digital comparison-shopping tool operator or lead generator requires providers to bid or set bounties for leads, and that compensation scheme increases overall revenue while impacting placement on a comparison-shopping website or mobile app or impacting who receives leads, that can suggest that the operator or lead generator is violating the prohibition on abusive acts or practices. The reason is commonsensical: if the tool operator or lead generator receives a higher fee from one provider than another and provides preferential treatment as a result, this can suggest that the lead generator or operator is making decisions based on its own benefit and not in consumers' interests. This concern may be somewhat mitigated when a comparison-shopping tool operator or lead generator receives compensation from providers, but does not consider such compensation in its decisions regarding placement or, similarly, regarding which providers receive a lead.[16]

Unreasonable advantage-taking can also occur where the operator benefits by steering consumers toward products or services—including its own or those of its affiliates—that are more costly or otherwise less desirable than what consumers might otherwise prefer.[17] In addition, it can occur where an operator leverages an affiliation or informal connection with a trusted institution, such as a college or university, to increase the operator's revenue while making recommendations not based on factors likely to be consistent with consumer interests.

non-monetary advantages, including ''increased market share, revenue, cost savings, profits, reputational benefits, and other operational benefits'').

[16] A digital comparison-shopping tool operator or lead generator can face greater risk that the exclusion of non-paying providers from its service would constitute an abusive act or practice if a very low number of providers is included within a service. Similarly, in the context of digital mortgage comparison-shopping platforms, the CFPB has advised that, all other things being equal, ''presenting a greater number of comparison options rather than fewer'' generally reduces the risk of a violation of section 8 of the Real Estate Settlement Procedures Act. 88 FR 9162, 9167 (Feb. 13, 2023).

[17] While evidence of harm to consumers can bolster a determination that an entity is taking unreasonable advantage of consumers, the text of CFPA section 1031(d)(2)—in contrast to the definition of ''unfairness'' in CFPA section 1031(c)(1)—does not require ''substantial injury'' to consumers as a prerequisite for establishing abusive conduct. *Compare* 12 U.S.C. 5531(c)(1)(A), *with* 12 U.S.C. 5531(d)(2).

Examples of Preferencing or Steering Arrangements

The following is a non-exhaustive list of examples that illustrate arrangements where an operator of a digital comparison-shopping tool or a lead generator steers consumers to certain consumer financial products or services in exchange for financial or other benefits to the operator or lead generator, regardless of the interests of the consumer. These arrangements can be abusive if the operator or lead generator takes unreasonable advantage of the consumer's reasonable reliance on the operator or lead generator to act in the interests of the consumer.

- A tool operator presents a product (or set of products) that is preferred because of financial considerations in a placement that is more likely to be seen, reflects a preferential ordering, has more dynamic design features, requires fewer clicks to access product information, or otherwise increases the likelihood that a consumer will consider or select the preferred product.[18] This can include self-preferencing where the digital comparison-shopping tool promotes the products or services of the tool operator.
- A tool operator presents certain options as ''featured'' because they are provided by the operator or a third-party provider that paid for enhanced placement.[19]
- A tool operator directs consumers to the products that pay higher fees within a product category—for example, an operator routinely matches consumers with a loan provider because it pays the highest fee per application.
- A tool operator receives different payment based on whether the digital comparison-shopping tool meets a certain threshold volume allocation of leads generated within a set period of time, and uses steering practices to increase the likelihood the operator will satisfy volume allocation requirements. For example, in a 14-day period, a provider pays fees only if at least 1,000 applications are generated, and, on day 13, the operator is more likely to steer consumers to that provider's products until the allocation is met.
- A tool operator or lead generator uses dynamic bidding or a bounty system to determine which offers are presented to consumers with certain demographic or other characteristics.
- A tool operator expressly or implicitly presents the total set of options featured on the tool as relatively comprehensive or based on criteria such as price, terms, quality of service, or security, when in fact the operator determines which options to include based on financial or other benefits obtained by the operator. For example, a set of lenders jointly establish a comparison-shopping tool that appears to present options based on criteria that further the consumer's interests but that actually presents only a subset of products that are offered or provided by those lenders. Some sites preference certain products while also including other products, but with design features that ensure that only the preferred products receive preferred placement, regardless of whether that is in the interests of the consumer.
- A tool operator presents a preferred product as a ''match'' that is not the participating product that is most consistent with the expressed interests of a consumer. A comparison tool can prompt users to input information about their preferences through a survey, filtering options, or interactions with a chatbot. By eliciting input on consumer preferences, the operator creates the impression that results will be presented based on an objective evaluation of those preferences. However, the operator actually presents results based on financial or other benefits to the operator.
- A lead generator guarantees a certain number and quality of leads to multiple participating lenders and divides customers meeting those criteria up without regard to the fact that consumers with similar characteristics are receiving different offers.

[18] *See generally* FTC, *Bringing Dark Patterns to Light,* at 2 (Sept. 2022) (discussing ''design practices that trick or manipulate users into making choices they would not otherwise have made and that may cause harm'').

[19] Consumers may be less likely to have the impression that a product is being presented as being in the consumer's interest if a tool operator presents sponsored or other advertising content that is completely visually separate from the presentation of product recommendations or results and the advertisement itself is not presented as a recommendation.

About Consumer Financial Protection Circulars

Consumer Financial Protection Circulars are issued to all parties with authority to enforce Federal consumer financial law. The CFPB is the principal Federal regulator responsible for administering Federal consumer financial law, *see* 12 U.S.C. 5511, including the Consumer Financial Protection Act's prohibition on unfair, deceptive, and abusive acts or practices, 12 U.S.C. 5536(a)(1)(B), and 18 other ''enumerated consumer laws,'' 12 U.S.C. 5481(12). However, these laws are also enforced by State attorneys general and State regulators, 12 U.S.C. 5552, and prudential regulators including the Federal Deposit Insurance Corporation, the Office of the Comptroller of the

Currency, the Board of Governors of the Federal Reserve System, and the National Credit Union Administration. *See, e.g.,* 12 U.S.C. 5516(d), 5581(c)(2) (exclusive enforcement authority for banks and credit unions with $10 billion or less in assets). Some Federal consumer financial laws are also enforceable by other Federal agencies, including the Department of Justice and the Federal Trade Commission, the Farm Credit Administration, the Department of Transportation, and the Department of Agriculture. In addition, some of these laws provide for private enforcement.

Consumer Financial Protection Circulars are intended to promote consistency in approach across the various enforcement agencies and parties, pursuant to the CFPB's statutory objective to ensure Federal consumer financial law is enforced consistently. 12 U.S.C. 5511(b)(4).

Consumer Financial Protection Circulars are also intended to provide transparency to partner agencies regarding the CFPB's intended approach when cooperating in enforcement actions. *See, e.g.,* 12 U.S.C. 5552(b) (consultation with CFPB by State attorneys general and regulators); 12 U.S.C. 5562(a) (joint investigatory work between CFPB and other agencies).

Consumer Financial Protection Circulars are general statements of policy under the Administrative Procedure Act. 5 U.S.C. 553(b). They provide background information about applicable law, articulate considerations relevant to the Bureau's exercise of its authorities, and, in the interest of maintaining consistency, advise other parties with authority to enforce Federal consumer financial law. They do not restrict the Bureau's exercise of its authorities, impose any legal requirements on external parties, or create or confer any rights on external parties that could be enforceable in any administrative or civil proceeding. The CFPB Director is instructing CFPB staff as described herein, and the CFPB will then make final decisions on individual matters based on an assessment of the factual record, applicable law, and factors relevant to prosecutorial discretion.

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2024–05141 Filed 3–11–24; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 34

[Docket ID OCC–2024–0002]

FEDERAL RESERVE SYSTEM

12 CFR Part 225

[Docket No. OP–1829]

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 323

RIN 3064–ZA41

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 722 and 741

Temporary Exceptions to FIRREA Appraisal Requirements in Maui County as Affected by Hawaii Wildfires

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury; Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); and National Credit Union Administration (NCUA), collectively referred to as the agencies.

ACTION: Statement and order; temporary exceptions.

SUMMARY: The Depository Institutions Disaster Relief Act of 1992 (DIDRA) authorizes the agencies to make exceptions to statutory and regulatory appraisal requirements under Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) relating to transactions involving real property located within an area in a state or territory declared to be a major disaster by the President. In this statement and order, the agencies exercise their authority to grant temporary exceptions to the FIRREA appraisal requirements for real estate-related financial transactions, provided certain criteria are met, in an area in the State of Hawaii following the major disaster declared by President Biden as a result of wildfires. The expiration date for the exceptions is August 10, 2026, which is three years after the date the President declared the major disaster.

DATES: This order is effective on March 12, 2024 and expires three years after the date the President declared the relevant area a major disaster, which is August 10, 2026.

FOR FURTHER INFORMATION CONTACT:

OCC: Kevin Lawton, Appraiser, Real Estate Specialist, Bank Supervision Policy, at (202) 649–7152; or Mitchell Plave, Special Counsel, Chief Counsel's Office, at (202) 649–6285. If you are deaf, hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

Board: Devyn Jeffereis, Senior Financial Institution Policy Analyst II, Division of Supervision and Regulation at (202) 452–2729; Matthew Suntag, Senior Counsel, Legal Division, at (202) 452–3694; or David Imhoff, Senior Attorney, Legal Division, at (202) 452–2249; For users of TTY–TRS, please call 711 from any telephone, anywhere in the United States.

FDIC: Patrick J. Mancoske, Senior Examination Specialist, Division of Risk Management and Supervision, at (202) 898–7032, *PMancoske@FDIC.gov;* Mark Mellon, Counsel, Legal Division, at (202) 898–3884, *MMellon@FDIC.gov;* Lauren Whitaker, Counsel, Legal Division at (202) 898–3872, *lwhitaker@fdic.gov;* Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

NCUA: Simon Hermann, Senior Credit Specialist, Office of Examination and Insurance, at (703) 518–6360; Robert Leonard, Compliance Officer, Office of General Counsel, (703) 518–1143; Rachel Ackmann, Senior Staff Attorney, Office of General Counsel, at (703) 548–2601; National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314.

SUPPLEMENTARY INFORMATION:

Statement

Section 2 of DIDRA, which added section 1123 to Title XI of FIRREA,[1] authorizes the agencies to make exceptions to statutory and regulatory appraisal requirements for certain transactions. These exceptions are available for transactions involving real property located in an area in which the President has determined a major disaster exists, pursuant to 42 U.S.C. 5170, provided that the exception would facilitate recovery from the major disaster and is consistent with safety and soundness.

On August 10, 2023, the President declared that a major disaster existed in the State of Hawaii [2] due to damage resulting from wildfires beginning on August 8, 2023. The agencies have determined that granting relief from the appraisal requirements set forth in Title

[1] 12 U.S.C. 3352.

[2] Press Release, The White House (August 10, 2023), available at *https://www.whitehouse.gov/briefing-room/presidential-actions/2023/08/10/president-joseph-r-biden-jr-approves-hawaii-disaster-declaration-3/.*

Tab 32

Circular 2024-02: Deceptive Marketing Practices About the Speed or Cost of Sending a Remittance Transfer, 89 Fed. Reg. 27357 (Apr. 17, 2024).

CFPB Takes Action to Halt False Claims of 'Free' International Money Transfers

English

[Español](cfpb.gov/about-us/newsroom/cfpb-emitio-circular-sobre-transferencias-de-remesas/) (cfpb.gov/about-us/newsroom/cfpb-emitio-circular-sobre-transferencias-de-remesa s/)

CFPB warns remittance transfer providers about false claims regarding cost and speed

MAR 27, 2024

WASHINGTON, D.C. – Today, the Consumer Financial Protection Bureau (CFPB) issued a new circular warning remittance transfer providers that false advertising about the cost or speed of sending a remittance transfer can violate federal law. Companies in the marketplace are charging junk fees on international money transfers and making false claims about the speed of transfers. The circular highlights several marketing practices relating to sending international money transfers that may violate the Consumer Financial Protection Act's (CFPA) prohibition on deceptive acts or practices. This prohibition is enforced by the CFPB, states, and other regulators. Guidance in the circular applies both to traditional providers of international money transfers and to "digital wallets" that offer the capability to send money internationally from the United States.

"Consumers should not be paying junk fees on international money transfers that are advertised as free," said CFPB Director Rohit Chopra. "The CFPB will continue to work with law enforcement to ensure companies don't illegally burden families with fees or inflated exchange rates using false or misleading claims."

Consumers in the United States send tens of billions of dollars in international remittances every year, often sent by immigrants to family and friends living abroad or to Americans living temporarily abroad, such as students. The CFPB administers and enforces the Remittance Rule under the Electronic Funds Transfer Act, the first and only federal regulation that provides disclosures and other important consumer protections for people who send international remittances from the United States. The CFPB also enforces the Consumer Financial Protection Act, which prohibits unfair, deceptive or abusive acts and practices across consumer finance. Remittance providers may be liable under the CFPA for deceptive marketing practices regardless of whether the provider is in compliance with the disclosure requirements of the Remittance Rule.

Specifically, today's circular addresses the following practices by remittance providers, including digital wallet providers that offer remittance services, that consumers have complained to the CFPB about and that the CFPB has observed in its market monitoring:

- **Falsely marketing "no fee" or "free" services**: Providers can engage in deceptive acts by marketing remittance transfers as "no fee," when in fact the remittance transfer provider charges consumers fees to send the remittance transfer. Providers may also engage in deceptive practices by marketing remittance transfers as "free," if they are not in fact free. With respect to digital wallets or other similar products, it can be deceptive to market a transfer as "free" if the provider imposes costs to convert funds into a different currency or withdraw funds from the product. It may also be deceptive to market international money transfers as "free" if the provider is imposing costs on consumers through the exchange rate spread.
- **Burying promotional conditions in fine print:** Providers may violate the law by advertising promotional pricing for remittance transfers without clarifying that the offer is only limited or temporary in scope, even if the offer is disclosed in fine print or later in the transaction.
- **Deceptively advertising how long transfers will take:** Remittance transfer providers may violate the CFPA's prohibition on deceptive acts or practices by marketing remittance transfers as being delivered within a certain time frame, when transfers may actually take longer to reach recipients. Recipients rely on remittance transfers for day-to-day expenses or for time-sensitive emergencies.

Today's circular is the latest in the CFPB's continuing work to protect senders of international money transfers. In October 2023, the CFPB issued a consent order against Chime (cfpb.gov/about-us/newsroom/cfpb-takes-action-against-operator-of-sendwave-app-for-illegally-cheating-people-on-international-money-transfers/) (doing business as Sendwave), finding the company made misleading statements in advertisements about the speed and cost of its services. The CFPB also took action against Servicio UniTeller (cfpb.gov/about-us/newsroom/cfpb-orders-servicio-uniteller-to-refund-fees-and-pay-penalty-for-failing-to-follow-remittance-rules/) for failing to refund customers after the company made money transfer errors. Supervision conducted by the CFPB also found (https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-26_2022-04.pdf)that providers of international money transfers made false and misleading representations about the speed of remittance transfers.

The circular is part of a continued effort by the CFPB to rein in junk fees and spur competition in the consumer financial product marketplace. The CFPB has proposed rules to prohibit certain NSF fees (cfpb.gov/about-us/newsroom/cfpb-proposes-rule-to-stop-new-junk-fees-on-bank-accounts/) and close an overdraft loophole (cfpb.gov/about-us/newsroom/cfpb-proposes-rule-to-close-bank-overdraft-loophole-that-costs-americans-billions-each-year-in-junk-fees/) that costs consumers billions each year. Earlier this month, the CFPB finalized a rule to limit most credit card late fees (cfpb.gov/about-us/newsroom/cfpb-bans-excessive-credit-card-late-fees-lowers-typical-fee-from-32-to-8/) from major providers to $8 per instance.

Read today's new circular on remittances. (cfpb.gov/compliance/circulars/consumer-financial-protection-circular-2024-02/)

Read more about the CFPB's guidance on money transfers. (cfpb.gov/consumer-tools/money-transfers/)

Read more about the CFPB's work on junk fees. (cfpb.gov/rules-policy/junk-fees/)

Consumers can submit complaints about remittances, and about other financial products and services, by visiting the CFPB's website (cfpb.gov/complaint/) or by calling (855) 411-CFPB (2372).

Employees of companies who they believe their company has violated federal consumer financial laws are encouraged to send information about what they know to whistleblower@cfpb.gov.

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit www.consumerfinance.gov (http://www.consumerfinance.gov/).

Topics

- MONEY TRANSFERS (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=MONEY-TRANSFERS)
- REMITTANCES (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=REMITTANCES)

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Go to press resources page (cfpb.gov/about-us/newsroom/press-resources/)

Rules and Regulations

Federal Register

Vol. 89, No. 75

Wednesday, April 17, 2024

CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Part X

Consumer Financial Protection Circular 2024–02: Deceptive Marketing Practices About the Speed or Cost of Sending a Remittance Transfer

AGENCY: Consumer Financial Protection Bureau.

ACTION: Consumer financial protection circular.

SUMMARY: The Consumer Financial Protection Bureau (Bureau or CFPB) has issued Consumer Financial Protection Circular 2024–02, titled, ''Deceptive Marketing Practices About the Speed or Cost of Sending a Remittance Transfer.'' In this circular, the Bureau responds to the question, ''When do remittance transfer providers violate the prohibition on deceptive acts or practices in the Consumer Financial Protection Act (CFPA) in their marketing about the speed and cost of sending a remittance transfer?''

DATES: The Bureau released this circular on its website on March 27, 2024.

ADDRESSES: Enforcers, and the broader public, can provide feedback and comments to *Circulars@cfpb.gov.*

FOR FURTHER INFORMATION CONTACT: George Karithanom, Regulatory Implementation & Guidance Program Analyst, Office of Regulations, at 202–435–7700 or at: *https://reginquiries.consumerfinance.gov/.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

Question Presented

When do remittance transfer providers violate the prohibition on deceptive acts or practices in the Consumer Financial Protection Act (CFPA) in their marketing about the speed and cost of sending a remittance transfer?

Response

Remittance transfer providers may be liable under the CFPA for deceptive marketing about the speed or cost of sending a remittance transfer. Providers may be liable under the CFPA for deceptive marketing practices regardless of whether the provider is in compliance with the disclosure requirements of the Remittance Rule. For example, among other things, it may be deceptive to:

- Market remittance transfers as being delivered within a certain time frame, when transfers actually take longer to be made available to recipients;
- Market remittance transfers as ''no fee'' when in fact the provider charges fees;
- Market promotional fees or promotional exchange rates for remittance transfers without sufficiently clarifying when an offer is temporary or limited;
- Market remittance transfers as ''free'' if they are not in fact free.

Background

Remittance Transfer Speed and Costs

Pursuant to the CFPB's Remittance Rule,[1] the term ''remittance transfer'' includes most electronic transfers of funds sent by consumers in the United States to recipients in other countries. Consumers in the United States send hundreds of billions of dollars in remittance transfers to recipients in foreign countries each year.[2] Remittance transfers are often consumer-to-consumer transfers of money by immigrants sending financial support to family and friends in other countries. They also include other types of transfers, such as transfers by consumers in the United States to Americans living temporarily abroad, such as students. Consumers may send remittance transfers regularly as an ongoing source of financial assistance or in other circumstances, such as an occasional or emergency form of support. Remittance transfers also include cross-border consumer-to-business payments for goods or services.

Consumers may choose among a range of bank, credit union, and non-bank money transmitters when sending a remittance transfer. Non-bank money transmitters have traditionally dominated the market for remittance transfers from the United States. In recent years, new money transmitters have emerged offering digital remittance transfer services. Many established money transmitters have also added digital services, in addition to in-person options for consumers to go to a store or agent to send remittance transfers.[3]

When sending remittance transfers, consumers may consider a number of key factors when deciding among different providers, including the speed of the transfer and its cost as well as convenience, security, reliability, and trust.[4]

The speed of a remittance transfer varies depending on the type of transfer and provider. The World Bank Remittance Prices Worldwide database illustrates that a range of transfer speeds can exist within a given remittance corridor, with some providers, for example, offering delivery in less than an hour, and others offering delivery in three to five days.[5]

Costs can also vary significantly within a remittance corridor. Remittance transfer costs include fees charged by the remittance transfer provider including, if applicable, their agents and third parties. Costs also include any exchange rate costs applied by the provider to the currency conversion and governmental taxes. The exchange rate offered to consumers

[1] Reg. E, 12 CFR part 1005 *et seq.*

[2] CFPB, *Remittance Rule Assessment Report,* at 7 (Revised Apr. 24, 2019), *https://files.consumerfinance.gov/f/documents/bcfp_remittance-rule-assessment_report_corrected_2019-03.pdf.*

[3] *See* Daivi Rodima-Taylor, *The Uneven Path Toward Cheaper Digital Remittances,* Migration Information Source (June 22, 2023), *https://www.migrationpolicy.org/article/cheaper-digital-remittances;* Daniel Webber, *Remittances' Shift to Digital: Driving Change in an Industry Split Between Yesterday and Tomorrow,* Forbes (Mar. 21, 2023), *https://www.forbes.com/sites/danielwebber/2023/03/21/remittances-shift-to-digital-driving-change-in-an-industry-split-between-yesterday-and-tomorrow/?sh=77f07495341.*

[4] *See* 2012 Final Rule, 77 FR 6194, 6199 (Feb. 7, 2012). *See also* Annette LoVoi, *Sending Money: The Path Forward,* Appleseed, at 12 (May 2016), *http://www.ctappleseed.org/wp-content/uploads/2016/04/Immigrant-Finances-Final-Appleseed-Report-on-Remittance-Use-Sending-Money-Home-5.26.16.pdf;* ICF Macro, *Summary of Findings: Design and Testing of Remittance Disclosures,* Report to the Board of Governors of the Federal Reserve System, at 2–4 (Apr. 20, 2011), *https://www.federalreserve.gov/econresdata/bcreg20110512_ICF_Report_Remittance_Disclosures_(FINAL).pdf.*

[5] *See* The World Bank, *Remittance Prices Worldwide: Making Markets More Transparent, https://remittanceprices.worldbank.org/* The database also reflects that a range of costs exist for sending a remittance transfer in a given corridor.

often reflects a spread—meaning, a percentage difference between the retail exchange rate offered to the consumer and some wholesale exchange rate.[6] Remittance transfer providers utilize different pricing strategies when determining the fees and exchange rate they charge to consumers for remittance transfers.

Transparency Concerns Around Remittance Transfer Speed and Costs

Prior to the passage of the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act (Dodd-Frank Act), Federal consumer protection laws generally did not apply to remittances, and remittance transfer providers were not consistently required to disclose applicable fees, exchange rates, transfer speeds, and the amount to be received in a transaction. Consumers thus did not always know how much money would be received on the other end and were not able to easily comparison shop among providers.

With the Dodd-Frank Act's amendments to the Electronic Fund Transfer Act and the promulgation of the Remittance Rule, remittance transfer providers are now generally required to disclose certain information to consumers before the consumer pays for a transfer and also when payment is made.[7] Before the consumer pays for a transfer, the information a remittance transfer provider must disclose includes (but is not limited to): as applicable, the amount that will be transferred to the designated recipient in the currency in which the remittance transfer is funded; any fees imposed and any taxes collected on the remittance transfer; the total amount of the transaction, which is the sum of the amount that will be transferred and any fees imposed and any taxes collected, in the funding currency; the exchange rate used by the provider for the remittance transfer; any covered third-party fees; and the amount that will be received by the designated recipient in the currency in which the funds will be received. The receipt that consumers generally receive when payment is made must contain the same information. In addition, the receipt must disclose the date in the foreign country on which funds will be available to the designated recipient.

Compliance with the Remittance Rule disclosure requirements does not obviate the obligation to refrain from misleading marketing practices. In particular, remittance transfer providers must ensure their marketing practices do not violate the prohibition of unfair, deceptive, or abusive acts or practices in the CFPA.[8]

The CFPB has identified problems with transparency and accuracy in marketing practices about the speed of a remittance transfer in its supervision of remittance transfer providers and enforcement of the CFPA's prohibition against deceptive acts or practices. In the CFPB's Spring 2022 Supervisory Highlights, the CFPB discussed examiners' findings that remittance transfer providers made false and misleading representations about the speed of remittance transfers.[9] In October 2023, the CFPB issued a consent order against Chime Inc., d/b/a Sendwave, finding that the remittance transfer provider made misleading statements in advertisements about the speed and cost of its services, in violation of the CFPA's prohibition on deceptive acts or practices.[10] This provider claimed in social media marketing that remittance transfers would be delivered ''instantly,'' in ''30 seconds'' or ''within seconds,'' and would incur ''no fees,'' when in fact transfers often took much longer, and the provider charged a fee.[11]

In addition, consumers have reported, and the CFPB has observed, problems with price transparency in the marketing practices of remittance transfer providers, resulting in consumers encountering unexpected costs.[12] The CFPB has received consumer complaints about promotional pricing by remittance transfer providers who do not sufficiently inform consumers that the advertised fee or exchange rate is only a limited scope or temporary offer. The CFPB has also observed marketing claims by remittance transfer providers that may mislead consumers about the scope or duration of a temporary low or ''no fee'' offer or promotional exchange rate.

The CFPB has also received consumer complaints about marketing that omits or obscures the cost of a remittance transfer. Marketing claims by remittance transfer providers may fail to communicate the full cost of a remittance transfer, such as advertising that transfers are ''free'' or advertising that prominently emphasizes zero fees while only including a vaguely worded statement that additional costs related to the exchange rate may apply. Some of these statements use technical jargon or feature confusing language.

The CFPB has also received consumer complaints about companies that market ''free'' remittance transfers through digital wallet and other prepaid products, but that fail to sufficiently disclose costs for currency conversion or for withdrawing funds from the product. Companies that offer remittance transfers through digital wallets and other prepaid products often market them as a faster and cheaper way to send remittance transfers. Certain companies' websites market ''free account-to-account transfers'' or that ''receiving money from a friend'' is free. Providers may disclose only in fine print, however, that these transfers are only free when there is no currency conversion, and that for the recipient to withdraw and use funds in their local currency, they must pay a currency conversion fee. In addition, some digital wallet providers may not make clear that recipients of a remittance transfer must pay a fee to withdraw funds from the digital wallet or other prepaid product. Examples of such fees include fees to transfer funds to an external bank account, credit card, or prepaid card. Consumers have complained to the CFPB that these fees are unexpected when they convert currencies and withdraw funds

[6] *See* 2012 Final Rule, 77 FR 6194 at 6196 (discussing the exchange rate as a component of cost). *See also* CFPB, *Report on Remittance Transfers,* at 12–13 (July 20, 2011), *https://www.consumerfinance.gov/wp-content/uploads/2011/07/Report_20110720_RemittanceTransfers.pdf* (discussing the ''well-recognized'' concept of exchange rate spread in the remittance transfer industry).

[7] Reg. E, 12 CFR 1005.31.

[8] 12 U.S.C. 5531. The CFPB has taken public action against multiple remittance transfer providers to enforce various provisions of the CFPA and the Remittance Rule. *See Chime, Inc. d/b/a Sendwave,* No. 2023–CFPB–0012 (CFPB filed Oct. 17, 2023); *Servicio UniTeller, Inc.,* No. 2022–CFPB–0012 (CFPB filed Dec. 22, 2022); *Choice Money Transfer, Inc. d/b/a Small World Money Transfer,* No. 2022–CFPB–0009 (CFPB filed Oct. 4, 2022); *CFPB* v. *MoneyGram International, Inc.,* No. 22–cv–3256 (S.D.N.Y. filed Apr. 21, 2022) (pending); *Envios de Valores la Nacional Corp.,* No. 2020–BCFP–0025 (CFPB filed Dec. 21, 2020); *Sigue Corporation, et al.,* No 2020–BCFP–0011 (CFPB filed Aug. 31, 2020); *Trans-Fast Remittance LLC, also doing business as New York Bay Remittance,* No. 2020–BCFP–0010 (CFPB filed Aug. 31, 2020); *Maxitransfers Corp.,* No. 2019–BCFP–0008 (CFPB filed Aug. 27, 2019).

[9] CFPB, Supervisory Highlights, 87 FR 26727, 26734 (May 5, 2022).

[10] *Chime, Inc. d/b/a Sendwave,* No. 2023–CFPB–0012 (Oct. 17, 2023) (consent order).

[11] *Id.* at 8. The CFPB also found deceptive acts or practices in actions against Trans-Fast Remittances LLC and Maxitransfers Corp. *See Trans-Fast Remittance LLC, also doing business as New York Bay Remittance,* No. 2020–BCFP–0010 (CFPB filed Aug. 31, 2020) (consent order); *Maxitransfers Corp.,* No. 2019–BCFP–0008 (CFPB filed Aug. 27, 2019) (consent order).

[12] *See, e.g.,* Consumer Complaint 7007332, *https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/7007332;* Consumer Complaint 6845292, *https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/6845292;* Consumer Complaint 1972064, *https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/1972064.*

transmitted through digital wallets and other prepaid products.[13]

Analysis

Under the CFPA, it is unlawful for a provider of consumer financial products or services to engage in deceptive acts or practices.[14] A representation, omission, act, or practice is deceptive if it misleads or is likely to mislead the consumer; the consumer's interpretation is reasonable under the circumstances; and the misleading representation, omission, act, or practice is material.[15]

It is deceptive to market remittance transfers as being delivered within a certain time frame, when transfers actually take longer to be made available to recipients.

Remittance transfer providers violate the CFPA's prohibition on deceptive acts or practices if they market remittance transfers as being delivered within a certain time frame, when transfers actually take longer to reach recipients. The CFPB ''presumes that express claims are material.'' [16] Furthermore, as noted above, the speed of a remittance transfer is often a crucial consideration for consumers sending remittance transfers.[17] Recipients may rely on remittance transfers for day-to-day expenses or for time-sensitive emergencies.

As illustrated in the CFPB's action against Chime Inc., d/b/a Sendwave, marketing claims about the speed of remittance transfers may violate the prohibition on deceptive acts or practices under the CFPA when the actual time for delivery is longer than advertised.

In the Sendwave case, the provider told consumers that transfers would be delivered ''instantly,'' ''in 30 seconds,'' or ''within seconds.'' These statements were false and misleading because, although a reasonable customer might expect delivery within the time frame advertised, in many instances, transfers were not actually delivered instantly or within seconds for many consumers.[18] In addition, as an express marketing statement regarding a central characteristic of the product—when funds would be available to a recipient—the misleading representation was material.[19]

Providers must thus take care not to engage in deceptive acts or practices in their marketing claims about the speed of a remittance transfer.

It is deceptive to market transfers as ''no fee'' when in fact the remittance transfer provider charges consumers fees to send the remittance transfer.

Remittance transfer providers violate the CFPA's prohibition on deceptive acts or practices if they market remittance transfers as having ''no fee,'' when in fact the remittance transfer provider charges consumers fees to send the remittance transfer. The cost of sending a remittance transfer is a central consideration for consumers,[20] and, as discussed above, fees are an important component of the cost of a remittance transfer.[21] Expressly misleading price claims violate the prohibition on deceptive practices.[22]

For example, as alleged in the CFPB's action against Chime Inc., d/b/a Sendwave, from at least 2021 to 2022, Sendwave's website advertised that consumers could transfer funds from the United States to Nigeria ''with no fees.'' In fact, consumers were charged fees on all transfers from the United States to Nigeria, despite Sendwave continuing to promote its product as having ''no fees'' on its website with no qualification or disclaimer.[23]

The CFPB found that Sendwave's representations were likely to mislead the consumer and that the consumer's interpretation would be reasonable under the circumstances. Although Sendwave disclosed a 1 percent transfer fee in the FAQ section of its website, this did not correct the misleading statement or communication made at the top of its web page and on a graphic depicting its mobile app.[24] And as an express marketing statement regarding a central consideration for consumers when sending a remittance transfer—cost —, the misleading representation about transfer fees was material.[25]

It may be deceptive to market promotional fees or promotional exchange rates for remittance transfers without sufficiently clarifying when the offer is only limited or temporary.

Remittance transfer providers may violate the CFPA's prohibition on deceptive acts or practices by advertising promotional pricing for remittance transfers without sufficiently clarifying that the offer is only limited or temporary in scope, even if the promotional nature of the offer is disclosed in fine print or later in the transaction.[26] In such cases, consumers may not understand the pricing is limited and promotional and they may not understand that the cost of sending a remittance transfer through the provider rises after the first or first few transactions.

As the CFPB has articulated, consumers may be reasonably misled when financial service providers fail to clearly and conspicuously disclose material terms in advertising, such as when and by how much charges will increase.[27] Written disclosures or fine print in marketing materials would often be insufficient to correct a misleading statement or representation in marketing communications.[28] When a consumer's first contact with a remittance transfer provider involves deception, ''the law may be violated

[13] *See, e.g.,* Consumer Complaint 2994206, *https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/2994206.*

[14] 12 U.S.C. 5531, 5536.

[15] *See* FTC *Policy Statement on Deception* (Oct. 14, 1983), *https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.*

[16] *See id.*

[17] *See* 2012 Final Rule, 77 FR 6194 at 6199.

[18] *Chime, Inc. d/b/a Sendwave,* No. 2023–CFPB–0012, at 8–9 (Oct. 17, 2023) (consent order).

[19] *See* FTC, *Policy Statement on Deception* (Oct. 14, 1983).

[20] *See* Kangni Kpodar, Patrick Amir Imam, *How Do Transaction Costs Influence Remittances?* World Development Vol. 177 (May 2024), *https://doi.org/10.1016/j.worlddev.2024.106537.*

[21] *See* 2012 Final Rule, 77 FR 6194 at 6199.

[22] *See* FTC, *Policy Statement on Deception* (Oct. 14, 1983).

[23] *Chime, Inc. d/b/a Sendwave,* No. 2023–CFPB–0012, at 8 (Oct. 17, 2023) (consent order).

[24] *See FTC* v. *Davison Assocs., Inc.,* 431 F. Supp. 2d 548, 560 (W.D. Pa. 2006) (''Disclaimers or curative language must be 'sufficiently prominent and unambiguous' such that the overall net-impression of the communication becomes non-deceptive.''); *FTC* v. *Roca Labs, Inc.,* 345 F. Supp. 3d 1375, 1392 (M.D. Fla. 2018) (''Defendants cannot avoid liability by exclusively advertising that the product costs $480 without any caveats and then burying the conditions of the discount in a separate disclaimer.'').

[25] *See* FTC, *Policy Statement on Deception* (Oct. 14, 1983).

[26] *See FTC* v. *Davison Assocs.,* 431 F. Supp. 2d 548 at 560 (''Disclaimers or curative language must be 'sufficiently prominent and unambiguous' such that the overall net-impression of the communication becomes non-deceptive.'').

[27] CFPB, *Consumer Financial Protection Circular 2023–01: Unlawful negative option marketing practices* (Jan. 19, 2023), *https://www.consumerfinance.gov/compliance/circulars/consumer-financial-protection-circular-2023-01-unlawful-negative-option-marketing-practices/.*

[28] FTC, *Policy Statement on Deception* (Oct. 14, 1983). *See also In re Intuit, Inc.,* No. 9408, at 43 (FTC Opinion, Jan. 19, 2024) (''Disclaimers or qualifications are not adequate to avoid liability 'unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression. Anything less is only likely to cause confusion by creating contradictory double meanings.''') (quoting *Removatron Int'l Corp.* v. *FTC,* 884 F.2d 1489, 1497 (1st Cir. 1989)); *FTC* v. *Davison Assocs.,* 431 F. Supp. 2d 548 at 560 (''Disclaimers or curative language must be 'sufficiently prominent and unambiguous' such that the overall net-impression of the communication becomes non-deceptive.''); *FTC* v. *Roca Labs,* 345 F. Supp. 3d 1375 at 1392 (''Defendants cannot avoid liability by exclusively advertising that the product costs $480 without any caveats and then burying the conditions of the discount in a separate disclaimer.'').

even if the truth is subsequently made known'' to the consumer.[29]

Representations in advertising about ''no fee'' remittance transfers or specific promotional exchange rates without sufficiently clarifying, when applicable, that the offer is only limited or temporary in scope are presumed to be material, as they relate to cost, a key consumer consideration.

In addition, such statements are likely to be material because of their likely impact on a consumer's initial and subsequent choice of remittance transfer provider. The impact could be particularly significant for promotions offered to first-time customers who seek to continue using the provider to send remittance transfers. Such consumers may face unexpected higher costs after the expiration of the promotion and may also face unexpected hurdles in searching for a different provider. Had they been aware of the limited promotional nature of the offer, a reasonable consumer may have chosen a different provider.

It is deceptive to market remittance transfers as ''free'' if they are not in fact free.

Remittance transfer providers would also violate the CFPA's prohibition on deceptive acts or practices by marketing remittance transfers as ''free'' if they are not actually free for the consumer. For example, it may be deceptive to market a remittance transfer as ''free'' if the remittance transfer provider is imposing costs on consumers through the exchange rate spread for the transfer or, with respect to digital wallets or other prepaid products, if the provider imposes costs to convert funds into a different currency or to withdraw funds from the product.

The FTC has articulated that, under the FTC Act, offers of ''free'' services ''must be made with extreme care so as to avoid any possibility that consumers will be misled or deceived.'' [30] ''The word 'free' is a lure. It is the bait. It is a powerful magnet that draws the best of us against our will 'to get something for nothing.' '' *Book-of-the-Month Club, Inc.,* 48 F.T.C. 1297, 1312 (1952), *aff'd,* 202 F.2d 486 (2d Cir. 1953).

A consumer should generally expect that a ''free'' product or service is indeed free, and that the seller ''will not directly and immediately recover, in whole or in part, the cost of [] the service.'' [31] The FTC has explained that terms, conditions, and obligations that apply to a ''free'' item should be set forth clearly, conspicuously, and in close conjunction with the offer of the ''free'' item, and they should further be made clear at the outset of the offer ''so as to leave no reasonable probability that the terms of the offer might be misunderstood.'' [32] The same analysis applies to the use of terms that are similar to ''free,'' such as ''gift'' or ''given without charge.'' [33]

The FTC has recently reiterated that representations of ''free'' in marketing are deceptive when the offer is not in fact free or when limitations, restrictions, or hidden charges are inadequately disclosed, such that the claim is likely to mislead a reasonable consumer about information important to them when choosing a product.[34] As applied here, marketing representations of remittance transfers as free are deceptive under the CFPA if they are not actually free or when limitations, restrictions, or hidden charges are inadequately disclosed.

Marketing a remittance transfer as ''free'' is likely to cause a reasonable consumer to believe they are sending a remittance transfer without the provider imposing a cost to the consumer. Such interpretation would be incorrect—but reasonable—in instances where the remittance transfer provider is imposing costs through the exchange rate spread for the transfer. In this situation, a remittance transfer provider's claim that the transfer is ''free'' would be false and thus likely to be deceptive because there was a cost imposed on the transfer through the exchange rate spread.[35]

Remittance transfer providers should also be aware of the risk of deception when marketing ''free'' remittance transfers for digital wallets or other prepaid products. A claim that remittance transfers are ''free'' may be misleading if the provider in fact imposes costs for recipients to convert funds into a different currency or to withdraw funds from the product. In these circumstances, marketing ''free'' transfers may constitute a misrepresentation of the terms for the remittance transfer provider's services that may mislead a reasonable consumer, even with subsequent disclosure of such fees.

About Consumer Financial Protection Circulars

Consumer Financial Protection Circulars are issued to all parties with authority to enforce Federal consumer financial law. The CFPB is the principal Federal regulator responsible for administering Federal consumer financial law, *see* 12 U.S.C. 5511, including the Consumer Financial Protection Act's prohibition on unfair, deceptive, and abusive acts or practices, 12 U.S.C. 5536(a)(1)(B), and 18 other ''enumerated consumer laws,'' 12 U.S.C. 5481(12). However, these laws are also enforced by State attorneys general and State regulators, 12 U.S.C. 5552, and prudential regulators including the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the National Credit Union Administration. *See, e.g.,* 12 U.S.C. 5516(d), 5581(c)(2) (exclusive enforcement authority for banks and credit unions with $10 billion or less in assets). Some Federal consumer financial laws are also enforceable by other Federal agencies, including the Department of Justice and the Federal Trade Commission, the Farm Credit Administration, the Department of Transportation, and the Department of Agriculture. In addition, some of these laws provide for private enforcement.

Consumer Financial Protection Circulars are intended to promote consistency in approach across the various enforcement agencies and parties, pursuant to the CFPB's statutory objective to ensure Federal consumer financial law is enforced consistently. 12 U.S.C. 5511(b)(4).

[29] FTC, *Policy Statement on Deception* (Oct. 14, 1983).

[30] FTC, Guide Concerning the Use of the Word ''Free'' and Similar Representations, 16 CFR 251.1(a)(2).

[31] 16 CFR 251.1(b).

[32] 16 CFR 251.1(c). *See also In re Intuit, Inc.,* No. 9408, at 36–52 (FTC Opinion, Jan. 19, 2024); Lesley Fair, *Full Disclosure,* FTC Business Blog (Sept. 23, 2014), *https://www.ftc.gov/business-guidance/blog/2014/09/full-disclosure* (describing the FTC's ''4Ps''—prominence, presentation, placement, and proximity—four key considerations to help business ensure their advertisements are clear and conspicuous).

[33] 16 CFR 251.1(i) (applying same deception analysis to terms similar to ''free,'' such as ''gift,'' ''given without charge,'' or ''other words or terms which tend to convey the impression to the consuming public than an article of merchandise or service is ''Free'').

[34] *See In re Intuit, Inc.,* No. 9408 (FTC Opinion, Jan. 19, 2024). The FTC regularly brings cases against companies for ''inadequate disclosures of hidden charges in ostensibly 'free' offers and other products or services.'' FTC, *Enforcement Policy Statement Regarding Negative Option Marketing,* 86 FR 60822, 60823 (Nov. 11, 2021). Both the CFPB and the FTC have also taken action against companies that advertised ''free'' products and services and deceptively enrolled consumers in a negative option plan. *Cf. Equifax Inc. and Equifax Consumer Services LLC,* No. 2017–CFPB–0001 (filed Jan. 3, 2017) (consent order); *Transunion Interactive, Inc. et al.,* No. 2017–CFPB–0002 (filed Jan. 3, 2017) (consent order); *FTC* v. *Health Formulas, LLC,* No. 2:14–cv–01649 (D. Nev. 2016); *FTC* v. *Complete Weightloss Center,* No. 1:08–cv–00053 (D.N.D. 2008).

[35] *See In re Intuit, Inc.,* No. 9408, at 46 (FTC Opinion, Jan. 19, 2024) (finding liability for false misrepresentations about ''free'' services where it was false ⅔ of the time).

Consumer Financial Protection Circulars are also intended to provide transparency to partner agencies regarding the CFPB's intended approach when cooperating in enforcement actions. *See, e.g.,* 12 U.S.C. 5552(b) (consultation with CFPB by State attorneys general and regulators); 12 U.S.C. 5562(a) (joint investigatory work between CFPB and other agencies).

Consumer Financial Protection Circulars are general statements of policy under the Administrative Procedure Act. 5 U.S.C. 553(b). They provide background information about applicable law, articulate considerations relevant to the Bureau's exercise of its authorities, and, in the interest of maintaining consistency, advise other parties with authority to enforce Federal consumer financial law. They do not restrict the Bureau's exercise of its authorities, impose any legal requirements on external parties, or create or confer any rights on external parties that could be enforceable in any administrative or civil proceeding. The CFPB Director is instructing CFPB staff as described herein, and the CFPB will then make final decisions on individual matters based on an assessment of the factual record, applicable law, and factors relevant to prosecutorial discretion.

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2024–08007 Filed 4–16–24; 8:45 am]

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CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Chapter X

Consumer Financial Protection Circular 2023–03: Adverse Action Notification Requirements and Proper Use of Sample Forms

AGENCY: Consumer Financial Protection Bureau.

ACTION: Consumer financial protection circular.

SUMMARY: The Consumer Financial Protection Bureau (CFPB) has issued Consumer Financial Protection Circular 2023–03, titled, ''Adverse action notification requirements and the proper use of the CFPB's sample forms provided in Regulation B.'' In this circular, the CFPB responds to the question, ''When using artificial intelligence or complex credit models, may creditors rely on the checklist of reasons provided in CFPB sample forms for adverse action notices even when those sample reasons do not accurately or specifically identify the reasons for the adverse action?''

DATES: The CFPB released this circular on its website on September 19, 2023.

ADDRESSES: Enforcers, and the broader public, can provide feedback and comments to *Circulars@cfpb.gov.*

FOR FURTHER INFORMATION CONTACT: George Karithanom, Regulatory Implementation & Guidance Program Analyst, Office of Regulations, at 202–435–7700 or at: *https://reginquiries.consumerfinance.gov/.*

SUPPLEMENTARY INFORMATION:

Question Presented

When using artificial intelligence or complex credit models, may creditors rely on the checklist of reasons provided in CFPB sample forms for adverse action notices even when those sample reasons do not accurately or specifically identify the reasons for the adverse action?

Response

No, creditors may not rely on the checklist of reasons provided in the sample forms (currently codified in Regulation B) to satisfy their obligations under ECOA if those reasons do not specifically and accurately indicate the principal reason(s) for the adverse action. Nor, as a general matter, may creditors rely on overly broad or vague reasons to the extent that they obscure the specific and accurate reasons relied upon.

Analysis

The Equal Credit Opportunity Act (ECOA), implemented by Regulation B, makes it unlawful for any creditor to discriminate against any applicant with respect to any aspect of a credit transaction on the basis of race, color, religion, national origin, sex (including sexual orientation and gender identity), marital status, age (provided the applicant has the capacity to contract), because all or part of the applicant's income derives from any public assistance program, or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act.[1] ECOA and Regulation B require that, when taking adverse action against an applicant, a creditor must provide the applicant with a statement of reasons for the action taken.[2] This statement of reasons must be ''specific'' and indicate the ''principal reason(s) for the adverse action'';[3] moreover, the specific reasons disclosed must ''relate to and accurately describe the factors actually considered or scored by a creditor.''[4] Adverse action notice requirements promote fairness and equal opportunity for consumers engaged in credit transactions, by serving as a tool to prevent and identify discrimination through the requirement that creditors must affirmatively explain their decisions. In addition, such notices provide consumers with a key educational tool allowing them to understand the reasons for a creditor's action and take steps to improve their credit status or rectify mistakes made by creditors.[5]

The CFPB provides sample forms (currently codified in Regulation B) that creditors may use to satisfy their adverse action notification requirements, if appropriate. These forms include a checklist of sample reasons for adverse action which ''creditors most commonly consider,''[6] as well as an open-ended field for creditors to provide other reasons not listed. The sample forms are used by creditors to satisfy certain adverse action notice requirements under ECOA and the Fair Credit Reporting Act (FCRA), though the statutory obligations under each remain distinct.[7] While the

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[1] *See* 15 U.S.C. 1691(a).

[2] *See* 15 U.S.C. 1691(d)(2); 12 CFR 1002.9(a)(2)(i); *see also* 12 CFR 1002.9(a)(2)(ii) (allowing creditors the option of providing notice or following certain requirements to inform consumers of how to obtain such notice).

[3] 15 U.S.C. 1691(d)(3); 12 CFR 1002.9(b)(2).

[4] 15 U.S.C. 1691(d)(3); 12 CFR 1002.9(b)(2).

[5] *See Fischl* v. *Gen. Motors Acceptance Corp.,* 708 F.2d 143, 146 (5th Cir. 1983); S. Rep. 94–589, 94th Cong., 2d Sess., at 4, *reprinted in* 1976 U.S.S.C.A.N. 403, 406.

[6] 12 CFR part 1002, (app. C), comment 3.

[7] Like ECOA, FCRA also includes adverse action notification requirements. *See* 15 U.S.C. 1681m(a)(2). For example, when a person takes adverse action based in whole or in part on any information contained in a consumer report and has used a credit score, the person must disclose the credit score and, among other items, the ''key factors that adversely affected the score of the consumer,'' the total of which shall generally not exceed four (except if a key factor was the number of inquiries made with respect to a consumer report). 15 U.S.C. 1681g(f)(1)(C), 1681m(a)(2). Although this circular is focused on ECOA's adverse action notification requirements, similar principles apply under FCRA when a person must disclose the ''key factors that adversely affected the credit score of the consumer.'' 15 U.S.C. 1681g(f)(1)(C); *see also* 1681g(f)(2)(B) (defining ''key factors'' to mean ''all relevant elements or reasons adversely affecting the credit score of the particular individual, listed in the order of their importance based on their effect on the credit score''). Despite similar underlying principles, the statutory obligations under FCRA and ECOA are distinct. *See* 12 CFR part 1002 (supp. I), sec. 1002.9, para. 9(b)(2)–9 (''Disclosing the key factors that adversely affected the consumer's credit score does not satisfy the ECOA requirement to disclose specific reasons for denying or taking other adverse action on an application or extension of credit.''). Moreover, while ECOA's requirements only apply to creditors, FCRA's adverse action notice requirements apply to ''any person'' that takes adverse action based in

Continued

Tab 33

Circular 2023-03: Adverse Action Notification Requirements and Proper Use of Sample Forms, 89 Fed. Reg. 27361 (Apr. 17, 2024).

CFPB Issues Guidance on Credit Denials by Lenders Using Artificial Intelligence

Consumers must receive accurate and specific reasons for credit denials

SEP 19, 2023

WASHINGTON, D.C. – Today, the Consumer Financial Protection Bureau (CFPB) issued guidance about certain legal requirements that lenders must adhere to when using artificial intelligence and other complex models. The guidance describes how lenders must use specific and accurate reasons when taking adverse actions against consumers. This means that creditors cannot simply use CFPB sample adverse action forms and checklists if they do not reflect the actual reason for the denial of credit or a change of credit conditions. This requirement is especially important with the growth of advanced algorithms and personal consumer data in credit underwriting. Explaining the reasons for adverse actions help improve consumers' chances for future credit, and protect consumers from illegal discrimination.

"Technology marketed as artificial intelligence is expanding the data used for lending decisions, and also growing the list of potential reasons for why credit is denied," said CFPB Director Rohit Chopra. "Creditors must be able to specifically explain their reasons for denial. There is no special exemption for artificial intelligence."

In today's marketplace, creditors are increasingly using complex algorithms, marketed as artificial intelligence, and other predictive decision-making technologies in their underwriting models. Creditors often feed these complex algorithms with large datasets, sometimes including data that may be harvested from consumer surveillance. As a result, a consumer may be denied credit for reasons they may not consider particularly relevant to their finances. Despite the potentially expansive list of reasons for adverse credit actions, some creditors may inappropriately rely on a checklist of reasons provided in CFPB sample forms. However, the Equal Credit Opportunity Act does not allow creditors to simply conduct check-the-box exercises when delivering notices of adverse action if doing so fails to accurately inform consumers why adverse actions were taken.

In fact, the CFPB confirmed (cfpb.gov/about-us/newsroom/cfpb-acts-to-protect-the-public-from-black-box-credit-models-using-complex-algorithms/) in a circular from last year that the Equal Credit Opportunity Act requires creditors to explain the specific reasons for taking adverse actions. This requirement remains even if those companies use complex algorithms and black-box credit models that make it difficult to identify those reasons. Today's guidance expands on last year's circular by explaining that sample adverse action checklists should not be considered exhaustive, nor do they automatically cover a creditor's legal requirements.

Specifically, today's guidance explains that even for adverse decisions made by complex algorithms, creditors must provide accurate and specific reasons. Generally, creditors cannot state the reasons for adverse actions by pointing to a broad bucket. For instance, if a creditor decides to lower the limit on a consumer's credit line based on behavioral spending data, the explanation would likely need to provide more details about the specific negative behaviors that led to the reduction beyond a general reason like "purchasing history."

Creditors that simply select the closest factors from the checklist of sample reasons are not in compliance with the law if those reasons do not sufficiently reflect the actual reason for the action taken. Creditors must disclose the specific reasons, even if consumers may be surprised, upset, or angered to learn their credit applications were being graded on data that may not intuitively relate to their finances.

In addition to today's and last year's circulars, the CFPB has issued an advisory opinion (cfpb.gov/about-us/newsroom/cfpb-issues-advisory-opinion-on-coverage-of-fair-lending-laws/) that consumer financial protection law requires lenders to provide adverse action notices to borrowers when changes are made to their existing credit.

The CFPB has made the intersection of fair lending and technology a priority. For instance, as the demand for digital, algorithmic scoring of prospective tenants has increased among corporate landlords, the CFPB reminded (cfpb.gov/about-us/newsroom/cfpb-reports-highlight-problems-with-tenant-background-checks/) landlords that prospective tenants must receive adverse action notices when denied housing. The CFPB also has joined with other federal agencies to issue a proposed rule (cfpb.gov/about-us/newsroom/agencies-request-comment-on-quality-control-standards-for-automated-valuation-models-proposed-rule/) on automated valuation models, and is actively working to ensure that black-box models do not lead to acts of digital redlining (cfpb.gov/about-us/newsroom/director-chopras-prepared-remarks-at-a-joint-dof-cfpb-press-event-on-the-trident-enforcement-action/) in the mortgage market.

Read *Consumer Financial Protection Circular 2023-03, Adverse action notification requirements and the proper use of the CFPB's sample forms provided in Regulation B.* (cfpb.gov/compliance/circulars/circular-2023-03-adverse-action-notification-requirements-and-the-proper-use-of-the-cfpbs-sample-forms-provided-in-regulation-b/)

Consumers can submit complaints about financial products and services by visiting the CFPB's website (cfpb.gov/complaint/) or by calling (855) 411-CFPB (2372).

Employees who believe their companies have violated federal consumer financial protection laws are encouraged to send information about what they know to whistleblower@cfpb.gov. Workers in technical fields (cfpb.gov/about-us/blog/cfpb-calls-tech-workers-to-action/), including those that design, develop, and implement artificial intelligence, may also report potential misconduct to the CFPB. To learn more, visit the CFPB's website (cfpb.gov/enforcement/information-industry-whistleblowers/).

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit consumerfinance.gov (cfpb.gov/).

Topics

- DATA (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=DATA)
- ACCESS TO CREDIT (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=ACCESS-TO-CREDIT)
- FINANCIAL SERVICE PROVIDERS (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=FINANCIAL-SERVICE-PROVIDERS)
- CREDIT REPORTS AND SCORES (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=CREDIT-REPORTS-AND-SCORES)

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Rohit Chopra,

Director, Consumer Financial Protection Bureau.

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CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Chapter X

Consumer Financial Protection Circular 2023–03: Adverse Action Notification Requirements and Proper Use of Sample Forms

AGENCY: Consumer Financial Protection Bureau.

ACTION: Consumer financial protection circular.

SUMMARY: The Consumer Financial Protection Bureau (CFPB) has issued Consumer Financial Protection Circular 2023–03, titled, ''Adverse action notification requirements and the proper use of the CFPB's sample forms provided in Regulation B.'' In this circular, the CFPB responds to the question, ''When using artificial intelligence or complex credit models, may creditors rely on the checklist of reasons provided in CFPB sample forms for adverse action notices even when those sample reasons do not accurately or specifically identify the reasons for the adverse action?''

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ADDRESSES: Enforcers, and the broader public, can provide feedback and comments to *Circulars@cfpb.gov.*

FOR FURTHER INFORMATION CONTACT: George Karithanom, Regulatory Implementation & Guidance Program Analyst, Office of Regulations, at 202–435–7700 or at: *https://reginquiries.consumerfinance.gov/.*

SUPPLEMENTARY INFORMATION:

Question Presented

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Response

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Analysis

The Equal Credit Opportunity Act (ECOA), implemented by Regulation B, makes it unlawful for any creditor to discriminate against any applicant with respect to any aspect of a credit transaction on the basis of race, color, religion, national origin, sex (including sexual orientation and gender identity), marital status, age (provided the applicant has the capacity to contract), because all or part of the applicant's income derives from any public assistance program, or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act.[1] ECOA and Regulation B require that, when taking adverse action against an applicant, a creditor must provide the applicant with a statement of reasons for the action taken.[2] This statement of reasons must be ''specific'' and indicate the ''principal reason(s) for the adverse action''; [3] moreover, the specific reasons disclosed must ''relate to and accurately describe the factors actually considered or scored by a creditor.'' [4] Adverse action notice requirements promote fairness and equal opportunity for consumers engaged in credit transactions, by serving as a tool to prevent and identify discrimination through the requirement that creditors must affirmatively explain their decisions. In addition, such notices provide consumers with a key educational tool allowing them to understand the reasons for a creditor's action and take steps to improve their credit status or rectify mistakes made by creditors.[5]

The CFPB provides sample forms (currently codified in Regulation B) that creditors may use to satisfy their adverse action notification requirements, if appropriate. These forms include a checklist of sample reasons for adverse action which ''creditors most commonly consider,'' [6] as well as an open-ended field for creditors to provide other reasons not listed. The sample forms are used by creditors to satisfy certain adverse action notice requirements under ECOA and the Fair Credit Reporting Act (FCRA), though the statutory obligations under each remain distinct.[7] While the

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[1] *See* 15 U.S.C. 1691(a).

[2] *See* 15 U.S.C. 1691(d)(2); 12 CFR 1002.9(a)(2)(i); *see also* 12 CFR 1002.9(a)(2)(ii) (allowing creditors the option of providing notice or following certain requirements to inform consumers of how to obtain such notice).

[3] 15 U.S.C. 1691(d)(3); 12 CFR 1002.9(b)(2).

[4] 15 U.S.C. 1691(d)(3); 12 CFR 1002.9(b)(2).

[5] *See Fischl* v. *Gen. Motors Acceptance Corp.,* 708 F.2d 143, 146 (5th Cir. 1983); S. Rep. 94–589, 94th Cong., 2d Sess., at 4, *reprinted in* 1976 U.S.S.C.A.N. 403, 406.

[6] 12 CFR part 1002, (app. C), comment 3.

[7] Like ECOA, FCRA also includes adverse action notification requirements. *See* 15 U.S.C. 1681m(a)(2). For example, when a person takes adverse action based in whole or in part on any information contained in a consumer report and has used a credit score, the person must disclose the credit score and, among other items, the ''key factors that adversely affected the score of the consumer,'' the total of which shall generally not exceed four (except if a key factor was the number of inquiries made with respect to a consumer report). 15 U.S.C. 1681g(f)(1)(C), 1681m(a)(2). Although this circular is focused on ECOA's adverse action notification requirements, similar principles apply under FCRA when a person must disclose the ''key factors that adversely affected the credit score of the consumer.'' 15 U.S.C. 1681g(f)(1)(C); *see also* 1681g(f)(2)(B) (defining ''key factors'' to mean ''all relevant elements or reasons adversely affecting the credit score of the particular individual, listed in the order of their importance based on their effect on the credit score''). Despite similar underlying principles, the statutory obligations under FCRA and ECOA are distinct. *See* 12 CFR part 1002 (supp. I), sec. 1002.9, para. 9(b)(2)–9 (''Disclosing the key factors that adversely affected the consumer's credit score does not satisfy the ECOA requirement to disclose specific reasons for denying or taking other adverse action on an application or extension of credit.''). Moreover, while ECOA's requirements only apply to creditors, FCRA's adverse action notice requirements apply to ''any person'' that takes adverse action based in

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sample forms provide examples of commonly considered reasons for taking adverse action, ''[t]he sample forms are illustrative and may not be appropriate for all creditors.'' [8] Reliance on the checklist of reasons provided in the sample forms will satisfy a creditor's adverse action notification requirements only if the reasons disclosed are specific and indicate the principal reason(s) for the adverse action taken.

Some creditors use complex algorithms involving ''artificial intelligence'' and other predictive decision-making technologies in their underwriting models.[9] These complex algorithms sometimes rely on data that are harvested from consumer surveillance or data not typically found in a consumer's credit file or credit application. The CFPB has underscored the harm that can result from consumer surveillance and the risk to consumers that these data may pose. Some of these data may not intuitively relate to the likelihood that a consumer will repay a loan. The CFPB and the prudential regulators have previously noted that these data may create additional consumer protection risk.[10] This circular addresses adverse action notice requirements under ECOA and Regulation B; financial institutions also must ensure their use of data and advanced technologies fully complies with other legal requirements, such as the prohibition against illegal discrimination. The CFPB, along with the Department of Justice and other enforcement agencies, have pledged to vigorously use the agencies' collective authorities to protect individuals' rights regardless of whether legal violations occur through traditional means or advanced technologies.[11]

Under ECOA and Regulation B a creditor must provide an applicant with a statement of specific reason(s) for an adverse action; these reasons must ''relate to and accurately describe the factors actually considered or scored by a creditor.'' [12] A creditor therefore may not rely solely on the unmodified checklist of reasons in the sample forms provided by the CFPB if the reasons provided on the sample forms do not reflect the principal reason(s) for the adverse action. As explained in Regulation B, ''[i]f the reasons listed on the forms are not the factors actually used, a creditor will not satisfy the notice requirement by simply checking the closest identifiable factor listed.'' [13] Rather, the sample forms merely provide an illustrative and non-exclusive list.[14] Thus, if the principal reason(s) a creditor actually relies on is not accurately reflected in the checklist of reasons in the sample forms, it is the duty of the creditor—if it chooses to use the sample forms—to either modify the form or check ''other'' and include the appropriate explanation, so that the applicant against whom adverse action is taken receives a statement of reasons that is specific and indicates the principal reason(s) for the action taken. Creditors that simply select the closest, but nevertheless inaccurate, identifiable factors from the checklist of sample reasons are not in compliance with the law. Creditors may not evade this requirement, even if the factors actually considered or scored by the creditor may be surprising to consumers, as may be the case when a creditor relies on complex algorithms that, for instance, consider data that are not typically found in a consumer's credit file or credit application.

Because it is unlawful for a creditor to fail to provide a statement of specific reasons for the action taken,[15] a creditor will not be in compliance with the law by disclosing reasons that are overly broad, vague, or otherwise fail to inform the applicant of the specific and principal reason(s) for an adverse action. Just as an accurate description of the factors actually considered or scored by a creditor is critical to ensuring compliant adverse action notifications, sufficient specificity is also required. Such specificity is necessary to ensure consumer understanding is not hindered by explanations that obfuscate the principal reason(s) for the adverse action taken. For instance, Regulation B provides the example that a creditor should disclose ''insufficient bank references'' and not ''insufficient credit references,'' which is listed on the CFPB's sample form, if the creditor considers only references from banks and other depository institutions and not from other institutions.[16]

Specificity is particularly important when creditors utilize complex algorithms. Consumers may not anticipate that certain data gathered outside of their application or credit file and fed into an algorithmic decision-making model may be a principal reason in a credit decision, particularly if the data are not intuitively related to their finances or financial capacity. As noted in the Official Commentary to Regulation B, a creditor must ''disclose the actual reasons for denial . . . even if the relationship of that factor to predicting creditworthiness may not be clear to the applicant.'' [17] For instance, if a complex algorithm results in a denial of a credit application due to an applicant's chosen profession, a statement that the applicant had ''insufficient projected income'' or ''income insufficient for amount of credit requested'' would likely fail to meet the creditor's legal obligations. Even if the creditor believed that the reason for the adverse action was broadly related to future income or earning potential, providing such a reason likely would not satisfy its duty to provide the specific reason(s) for adverse action. Concerns regarding specificity may also arise when creditors take adverse action against consumers with existing credit lines. For example, if a creditor decides to lower the limit on, or close altogether,

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whole or in part on any information contained in a consumer report, including employers, landlords, insurers, and other users of consumer reports. 15 U.S.C. 1681m(a). This circular focuses on ECOA's adverse action notification requirements and does not address requirements under FCRA.

[8] 12 CFR part 1002 (app. C), comment 3.

[9] The CFPB has previously issued guidance affirming that creditors are not excused from their adverse action notice obligations under ECOA simply because they rely on complex algorithmic underwriting models in making credit decisions. *See* CFPB, *Consumer Financial Protection Circular 2022–03: Adverse action notification requirements in connection with credit decisions based on complex algorithms* (May 26, 2022) (''Consumer Financial Protection Circular 2022–03''), *https://www.consumerfinance.gov/compliance/circulars/circular-2022-03-adverse-action-notification-requirements-in-connection-with-credit-decisions-based-on-complex-algorithms/.* Building on that previous guidance, this Circular focuses on the accuracy and specificity requirements of those notices, even when such models, driven by data gathered outside of traditional credit reports or applications, are utilized.

[10] *See* Bd. of Governors of the Fed. Reserve Sys., Consumer Fin. Prot. Bureau, Fed. Deposit Insurance Corp., Nat'l Credit Union Admin., and Office of the Comptroller of the Currency, *Interagency Statement on the Use of Alternative Data in Credit Underwriting,* at 2 (''For example, using . . . data such as cashflow data, that are directly related to consumers' finances and how consumers manage their financial commitments may present lower risks than other data.''); *see also* Consumer Fin. Prot. Bureau, Dep't of Just., Equal Emp. Opportunity Comm'n, Fed. Trade Comm'n, *Joint Statement on Enforcement Efforts Against Discrimination and Bias in Automated Systems,* at 3 (Apr. 23, 2023) (''Joint Statement on Enforcement'') (''Automated system outcomes can be skewed by . . . datasets that incorporate historical bias'' and ''can correlate data with protected classes, which can lead to discriminatory outcomes.'').

[11] *See* Joint Statement on Enforcement at 3.

[12] 12 CFR part 1002 (supp. I), sec. 1002.9, para. 9(b)(2)–2 (emphasis added).

[13] 12 CFR part 1002 (app. C), comment 4.

[14] *See* 12 CFR part 1002 (app. C), comment 3.

[15] *See* 15 U.S.C. 1691(d)(2); 12 CFR 1002.9(a)(2)(i).

[16] 12 CFR part 1002 (app. C), comment 4.

[17] 12 CFR part 1002 (supp. I), sec. 1002.9, para. 9(b)(2)–4. Indeed, because a creditor is not required to explain the relationship of a factor to the credit decision, *see id.* at para. 3, transparency about the specific reason for a denial may be even more important to help consumers understand which factors drove the credit decision in instances where the relationship between that factor and the credit decision may not be intuitive to the consumer.

a consumer's credit line based on behavioral data, such as the type of establishment at which a consumer shops or the type of goods purchased, it would likely be insufficient for the creditor to simply state ''purchasing history'' or ''disfavored business patronage'' as the principal reason for adverse action.[18] Instead, the creditor would likely need to disclose more specific details about the consumer's purchasing history or patronage that led to the reduction or closure, such as the type of establishment, the location of the business, the type of goods purchased, or other relevant considerations, as appropriate.[19]

As discussed in an advisory opinion, these requirements under ECOA extend to adverse actions taken in connection with existing credit accounts (*i.e.,* an account termination or an unfavorable change in the terms of an account that does not affect all or substantially all of a class of the creditor's accounts[20]), as well as new applications for credit.[21] The CFPB has also made clear that adverse action notice requirements apply equally to all credit decisions, regardless of whether the technology used to make them involves complex or ''black-box'' algorithmic models, or other technology that creditors may not understand sufficiently to meet their legal obligations.[22] As data use and credit models continue to evolve, creditors have an obligation to ensure that these models comply with existing consumer protection laws.

About Consumer Financial Protection Circulars

Consumer Financial Protection Circulars are issued to all parties with authority to enforce Federal consumer financial law. The CFPB is the principal Federal regulator responsible for administering Federal consumer financial law, *see* 12 U.S.C. 5511, including the Consumer Financial Protection Act's prohibition on unfair, deceptive, and abusive acts or practices, 12 U.S.C. 5536(a)(1)(B), and 18 other ''enumerated consumer laws,'' 12 U.S.C. 5481(12). However, these laws are also enforced by State attorneys general and State regulators, 12 U.S.C. 5552, and prudential regulators including the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the National Credit Union Administration. *See, e.g.,* 12 U.S.C. 5516(d), 5581(c)(2) (exclusive enforcement authority for banks and credit unions with $10 billion or less in assets). Some Federal consumer financial laws are also enforceable by other Federal agencies, including the Department of Justice and the Federal Trade Commission, the Farm Credit Administration, the Department of Transportation, and the Department of Agriculture. In addition, some of these laws provide for private enforcement.

Consumer Financial Protection Circulars are intended to promote consistency in approach across the various enforcement agencies and parties, pursuant to the CFPB's statutory objective to ensure Federal consumer financial law is enforced consistently. 12 U.S.C. 5511(b)(4).

Consumer Financial Protection Circulars are also intended to provide transparency to partner agencies regarding the CFPB's intended approach when cooperating in enforcement actions. *See, e.g.,* 12 U.S.C. 5552(b) (consultation with CFPB by State attorneys general and regulators); 12 U.S.C. 5562(a) (joint investigatory work between CFPB and other agencies).

Consumer Financial Protection Circulars are general statements of policy under the Administrative Procedure Act. 5 U.S.C. 553(b). They provide background information about applicable law, articulate considerations relevant to the Bureau's exercise of its authorities, and, in the interest of maintaining consistency, advise other parties with authority to enforce Federal consumer financial law. They do not restrict the Bureau's exercise of its authorities, impose any legal requirements on external parties, or create or confer any rights on external parties that could be enforceable in any administrative or civil proceeding. The CFPB Director is instructing CFPB staff as described herein, and the CFPB will then make final decisions on individual matters based on an assessment of the factual record, applicable law, and factors relevant to prosecutorial discretion.

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2024–08003 Filed 4–16–24; 8:45 am]

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[18] *See, e.g.,* Complaint, *FTC* v. *CompuCredit,* No. 1:08–cv–1976–BBM–RGV, 34–35 (N.D. Ga. filed June 10, 2008) (alleging that creditor made decisions to limit active credit lines based on behavioral data including shopping at certain disfavored merchants, such as pawn shops and night clubs), *https://www.ftc.gov/sites/default/files/documents/cases/2008/06/080610compucreditcmplt.pdf; see also* Fed. Trade Comm'n, *Big Data: A Tool for Inclusion or Exclusion,* at 9 (Jan. 2016), *https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf* (describing use of shopping or other spending behavior to make credit decisions).

[19] However, inclusion of such factors in a credit model may be improper for other reasons, including that use of such factors may violate ECOA or other laws if they constitute unlawful discrimination on a prohibited basis. As noted previously, this circular focuses on a creditor's obligation to accurately and specifically identify the principal reason(s) for adverse action, and not whether any particular type of factor or data otherwise complies with the law.

[20] *See* 12 CFR 1002.2(c) (defining ''adverse action'').

[21] *See* CFPB, *Revocations or Unfavorable Changes to the Terms of Existing Credit Arrangements,* 87 FR 30097 (May 18, 2022) (discussing ECOA's application to changes to existing credit arrangements); *see also* CFPB, *Credit Card Line Decreases* (June 29, 2022), *https://www.consumerfinance.gov/data-research/research-reports/credit-card-line-decreases/* (describing industry practices related to credit line decreases and attendant consumer impacts).

[22] Consumer Financial Protection Circular 2022–03.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–2233; Project Identifier MCAI–2023–00755–E; Amendment 39–22704; AD 2024–05–12]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce Deutschland Ltd & Co KG

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Rolls-Royce Deutschland Ltd & Co KG (RRD) Model Trent 1000–AE3, Trent 1000–CE3, Trent 1000–D3, Trent 1000–G3, Trent 1000–H3, Trent 1000–J3, Trent 1000–K3, Trent 1000–L3, Trent 1000–M3, Trent 1000–N3, Trent 1000–P3, Trent 1000–Q3, and Trent 1000–R3 engines. This AD is prompted by reports of wear in the combining spill-valve (CSV) assembly of certain hydro-mechanical units (HMUs). This AD requires removing certain HMUs from service and replacing with a serviceable part or modifying the HMU by replacing the CSV assembly, which is an optional terminating action; and prohibits installing certain HMUs unless the HMU is a serviceable part, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective May 22, 2024.

The Director of the Federal Register approved the incorporation by reference

Tab 34

Truth in Lending (Regulation Z); Use of Digital User Accounts To Access Buy Now, Pay Later Loans, 89 Fed. Reg. 47068 (May 31, 2024).

CFPB Takes Action to Ensure Consumers Can Dispute Charges and Obtain Refunds on Buy Now, Pay Later Loans

English

Español (cfpb.gov/about-us/newsroom/cfpb-actua-en-prestamos-compre-hoy-y-pague-luego/)

Agency's interpretive rule addresses Buy Now, Pay Later lender obligations to investigate disputes and refund charges

MAY 22, 2024

WASHINGTON, D.C. – The Consumer Financial Protection Bureau (CFPB) today issued an interpretive rule (cfpb.gov/rules-policy/notice-opportunities-comment/open-notices/use-of-digital-credit-devices-to-access-buy-now-pay-later-loans/) that confirms that Buy Now, Pay Later lenders are credit card providers. Accordingly, Buy Now, Pay Later lenders must provide consumers some key legal protections and rights that apply to conventional credit cards. These include a right to dispute charges and demand a refund from the lender after returning a product purchased with a Buy Now, Pay Later loan. The CFPB launched its inquiry (cfpb.gov/about-us/newsroom/consumer-financial-protection-bureau-opens-inquiry-into-buy-now-pay-later-credit/) into the rapidly expanding Buy Now, Pay Later market more than two years ago and continues to see consumer complaints related to refunds and disputed transactions. Today's action will help bring consistency to this market.

"When consumers check out and choose Buy Now, Pay Later, they don't know if they will get a refund if they return their product or whether the lender will help them if they didn't get what was promised," said CFPB Director Rohit Chopra. "Regardless of whether a shopper swipes a credit card or uses Buy Now, Pay Later, they are entitled to important consumer protections under longstanding laws and regulations already on the books."

The Buy Now, Pay Later market has expanded rapidly over the past few years. Lenders advertise buying products over four simple payments. Products are marketed as a way to help consumers pay for expensive products and services over time without having to pay interest. Today, both products, like televisions and gaming systems, and services, like airline tickets and cruises, can be purchased through Buy Now, Pay Later products. Buy Now, Pay Later products are popular across ages, races, and income levels.

The CFPB began **studying** (cfpb.gov/about-us/newsroom/consumer-financial-protection-bureau-opens-inquiry-into-buy-now-pay-later-credit/) the Buy Now, Pay Later industry in 2021. The CFPB found that Buy Now, Pay Later is often used as a close substitute for conventional credit cards to purchase goods and services. When people go to check out online or in person at a store, Buy Now, Pay Later is frequently offered as an option alongside the option to pay with a credit card. Just as credit cards can be used in a variety of situations, and not just in-person with a swipe or tap, Buy Now, Pay Later products are used via digital user accounts linked to websites, mobile apps, browser extensions, or integrations with merchant websites or mobile apps. Like conventional credit cards, Buy Now, Pay Later combines payment processing and credit services, while charging transaction fees to merchants.

Because Buy Now, Pay Later lenders will typically meet criteria under existing law and regulation as traditional credit card providers, they need to extend many of the same rights and protections as classic credit card providers. Importantly, these cover dispute and refund rights. In a **market report** (cfpb.gov/about-us/newsroom/cfpb-study-details-the-rapid-growth-of-buy-now-pay-later-lending/), the CFPB uncovered that more than 13% of Buy Now, Pay Later transactions involved a return or dispute. In 2021, people disputed or returned $1.8 billion in transactions at the five firms surveyed. The failure to provide dispute protections can create chaos for consumers when they return their merchandise or encounter other billing difficulties.

Today's interpretive rule describes how Buy Now, Pay Later lenders meet the criteria for credit card providers, under the Truth in Lending Act. For consumers, this means Buy Now, Pay Later lenders must:

- **Investigate disputes:** Buy Now, Pay Later lenders must investigate disputes that consumers initiate. Lenders must also pause payment requirements during the investigation and sometimes must issue credits.
- **Refund returned products or cancelled services:** When consumers return products or cancel services for a refund, Buy Now, Pay Later lenders must credit the refunds to consumers' accounts.
- **Provide billing statements**: Consumers must receive periodic billing statements like the ones received for classic credit card accounts.

In 2021, the CFPB opened an **inquiry** (cfpb.gov/about-us/newsroom/consumer-financial-protection-bureau-opens-inquiry-into-buy-now-pay-later-credit/) into Buy Now, Pay Later with a focus on debt accumulation, regulatory arbitrage, and data harvesting. The agency published its **results** (cfpb.gov/about-us/newsroom/cfpb-study-details-the-rapid-growth-of-buy-now-pay-later-lending/) in 2022, and highlighted the rapid expansion of the industry and growing consumer risks. Last year, the CFPB published its **findings** (cfpb.gov/about-us/

newsroom/cfpb-publishes-new-findings-on-financial-profiles-of-buy-now-pay-later-borrowers/) on the financial profiles of Buy Now, Pay Later borrowers.

Read the interpretive rule, *Truth in Lending (Regulation Z); Use of Digital User Accounts to Access Buy Now, Pay Later Loans* (cfpb.gov/rules-policy/notice-opportunities-comment/open-notices/use-of-digital-user-accounts-to-access-buy-now-pay-later-loans/).

The CFPB encourages the public to submit comments on today's interpretive rule. Given the rapid changes in this market, public comments will help inform where the CFPB can offer further clarity, including through rules and guidance, related to the Buy Now, Pay Later market. Comments will be accepted until August 1, 2024.

Read Director Chopra's remarks on the interpretive rule (cfpb.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-on-the-buy-now-pay-later-press-call/).

Consumers can submit complaints about financial products or services by visiting the CFPB's website (https://www.consumerfinance.gov/complaint/) or by calling (855) 411-CFPB (2372).

Employees who believe their company has violated federal consumer financial protection laws are encouraged to send information about what they know to whistleblower@cfpb.gov.

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit www.consumerfinance.gov (http://www.consumerfinance.gov/).

Topics

- **CREDIT CARDS** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=CREDIT-CARDS)
- **FINANCIAL SERVICE PROVIDERS** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=FINANCIAL-SERVICE-PROVIDERS)
- **ACCESS TO CREDIT** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=ACCESS-TO-CREDIT)
- **CONSUMER COMPLAINTS** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=CONSUMER-COMPLAINTS)

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reflect the current statute. OPM appreciates this comment.

A different commenter (OPM–2023–0026–0003) generally supported the interim final rule. This individual stated that, although spouses of active-duty members face the hardship challenges of finding employment, the change to the recruitment date would give them a positive advantage. This commenter suggested that if the intent of the rule is to enhance the recruitment and hiring of military spouses for permanent Federal positions in the competitive service then OPM should remove the January 1, 2029 date. OPM appreciates this comment but notes the January 1, 2029 recruitment date is specified in statute and that OPM cannot alter it via regulation.

OPM is adopting the interim final rule with no changes.

Expected Impact of This Final Rule

This final rule adopts, without change, the interim final rule implementing statutory changes codified at 5 U.S.C. 3330d, which extended the eligibility date for noncompetitive appointment of military spouses married to a member of the armed forces on active duty until December 31, 2028, and removed the temporary agency reporting requirements established under section 573(d) of Public Law 115–232. OPM did not receive any comments on the costs identified in the interim final rule. The final rule will benefit military spouses married to military members on active duty and hiring agencies by reflecting the statutorily revised sunset date for the noncompetitive appointment hiring authority in the FY 2023 NDAA. This rule also benefits agencies by removing duplicative reporting requirements originally established under the FY 2019 NDAA provisions.

Administrative Procedure Act

On September 28, 2023, OPM published an interim final rule (88 FR 66677) and determined that there was a basis under the Administrative Procedure Act for issuing the interim final rule with immediate effect. OPM has considered all relevant input and information contained in the comments submitted in response to the interim final rule and has concluded that no changes to the interim final rule are warranted. OPM is adopting the provisions of the interim final rule as a final rule with no changes.

Regulatory Review

Executive Orders 13563, 12866, and 14094 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). The Office of Management and Budget has determined that this final rule is not a ''significant regulatory action'' under Section (3)(f) Executive Order 12866, as amended by Executive Order 14094.

Regulatory Flexibility Act

The Director of OPM certifies that this final rule will not have a significant economic impact on a substantial number of small entities because it applies only to Federal agencies and employees.

Federalism

This final rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, OPM has determined that this final rule does not have federalism implications that require preparation of a federalism summary impact statement.

Civil Justice Reform

OPM has determined this final rule meets the relevant standards of Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This final rule will not result in the expenditure by State, local or tribal governments, in the aggregate, or by the private sector of more than $100 million annually. Thus, no written assessment of unfunded mandates is required.

Congressional Review Act

OMB's Office of Information and Regulatory Affairs has determined this final rule does not satisfy the criteria listed in 5 U.S.C. 804(2).

Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35)

This final regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

List of Subjects in 5 CFR Part 315

Government employees.

Office of Personnel Management.

Kayyonne Marston,

Federal Register Liaison.

PART 315—CAREER AND CAREER-CONDITIONAL EMPLOYMENT

■ Accordingly, the interim rule published in the **Federal Register** on September 28, 2023, at 88 FR 66677, amending 5 CFR part 315, is adopted as final without change.

[FR Doc. 2024–11825 Filed 5–30–24; 8:45 am]

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CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Part 1026

[Docket No. CFPB–2024–0017]

Truth in Lending (Regulation Z); Use of Digital User Accounts To Access Buy Now, Pay Later Loans

AGENCY: Consumer Financial Protection Bureau.

ACTION: Interpretive rule; request for comment.

SUMMARY: The Consumer Financial Protection Bureau (CFPB) is issuing this interpretive rule to address the applicability of subpart B of Regulation Z to lenders that issue digital user accounts used to access credit, including to those lenders that market loans as ''Buy Now, Pay Later'' (BNPL). This interpretive rule describes how these lenders meet the criteria for being ''card issuers'' for purposes of Regulation Z. Such lenders that extend credit are also ''creditors'' subject to subpart B of Regulation Z, including those provisions governing periodic statements and billing disputes. While not required under the Administrative Procedure Act, the CFPB is opting to collect comments on this interpretive rule and may make revisions as appropriate after reviewing feedback received.

DATES: This interpretive rule is applicable as of July 30, 2024. Comments must be received by August 1, 2024.

ADDRESSES: You may submit comments, identified by Docket No. CFPB–2024–0017, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: 2024-BNPL-InterpretiveRule@cfpb.gov.* Include Docket No. CFPB–2024–0017 in the subject line of the message.
- *Mail/Hand Delivery/Courier:* Comment Intake—2024 BNPL

Interpretive Rule, c/o Legal Division Docket Manager, Consumer Financial Protection Bureau, 1700 G Street NW, Washington, DC 20552. Because paper mail in the Washington, DC area and at the CFPB is subject to delay, commenters are encouraged to submit comments electronically.

Instructions: The CFPB encourages the early submission of comments. All submissions must include the document title and docket number. In general, all comments received will be posted without change to *https://www.regulations.gov.* All submissions, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Proprietary information or sensitive personal information, such as account numbers or Social Security numbers, or names of other individuals, should not be included. Submissions will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: George Karithanom, Regulatory Implementation & Guidance Program Analyst, Office of Regulations, at (202) 435–7700 or *https://reginquiries.consumerfinance.gov/.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Interpretive Rule

A. Executive Summary

Over the past three years, the CFPB has extensively analyzed lenders marketing their loans as ''Buy Now, Pay Later.'' This includes a major study published in 2022, insights from supervisory examinations, and other market monitoring and investigation. Although market participants' loan offerings vary in this lending sector, the CFPB is publishing this interpretive rule to clarify existing obligations for market participants with specific business practices.

This interpretive rule's legal analysis states that lenders that issue digital user accounts that consumers use from time to time to access credit products to purchase goods and services are ''card issuers'' under Regulation Z, including when those products are marketed as Buy Now, Pay Later (BNPL). Such lenders are ''card issuers'' because such digital user accounts are ''credit cards'' under Regulation Z. Traditional BNPL products are closed-end loans payable in four or fewer installments without a finance charge, used to make purchases on credit. Consequently, BNPL loans are subject to some, but not all, of Regulation Z's credit card regulations.

Digital user accounts that consumers use to access BNPL credit mimic conventional credit cards. They meet the regulatory definition of ''credit cards'' as defined at 12 CFR 1026.2(a)(15)(i). Lenders that issue such digital user accounts are ''card issuers'' as defined at 12 CFR 1026.2(a)(7) and ''creditors'' for purposes of subpart B of Regulation Z, as defined at 12 CFR 1026.2(a)(17)(iii). However, traditional BNPL products do not meet the definition of ''open-end credit'' as defined at 12 CFR 1026.2(a)(20) or of a ''credit card account under an open-end (not home-secured) consumer credit plan'' as defined at 12 CFR 1026.2(a)(15)(ii).

Accordingly, lenders that issue digital user account to access BNPL credit are subject to the regulations appearing in subpart B of Regulation Z, including, most importantly, provisions governing credit card dispute and refund rights. Although subpart B is labeled ''Open-End Credit,'' 12 CFR 1026.2(a)(17)(iii) specifically states that subpart B also applies to credit that is not open end if, as with BNPL, the credit is not subject to a finance charge and is not payable by written agreement in more than four installments. This is the case because Congress expressly instructed the Bureau to apply open-end credit regulations to this form of credit that is not open end. The Truth in Lending Act (TILA) says that ''the Bureau shall, by regulation, apply [open-end credit] requirements to [card issuers that extend credit with no finance charge that is payable in four or fewer installments], to the extent appropriate, even though the requirements [of the open-end credit provisions] are by their terms applicable only to creditors offering open-end credit plans.'' [1]

Lenders that issue digital user accounts to access BNPL credit are generally not subject to the credit card regulations appearing in subpart G of Regulation Z (*e.g.,* penalty fee limits and ability-to-repay requirements).[2]

B. Background

Since the mid-2010s, a financing method marketed as ''Buy Now, Pay Later'' (BNPL) has rapidly gained popularity as an alternative to conventional credit cards in the United States and abroad.[3] While variations of the product exist, for this interpretive rule, BNPL refers to a consumer loan for a retail transaction that is repaid in four (or fewer) interest-free installments and does not otherwise impose a finance charge.[4] The loan generally requires an initial down payment of 25 percent, followed by three additional installments due every two weeks.

BNPL lenders currently acquire customers primarily through two channels: the merchant partner acquisition model and the app-driven acquisition model. In the merchant partner acquisition model, BNPL lenders typically establish contracts with online merchants to offer their BNPL product as a payment option on the merchant's website or mobile app checkout page.[5] The BNPL lenders provide merchants with the necessary digital code to integrate or embed access to the BNPL product into the merchant websites or mobile apps. Such digital code or other integrations are referred to in this interpretive rule as ''integrations.''

In the app-driven acquisition model, which is less common but rapidly expanding, consumers use the BNPL lender's own website or mobile app directly to create a digital user account to access the BNPL product.[6] Once activated by the provider, the consumer can use their digital user account through the BNPL website or mobile app to access credit and make purchases directly with partner merchants. For non-partner merchants, the BNPL lender enables the payment part of the credit process by issuing a single-use virtual card to the consumer, normally through an issuer processor and a bank partner. The consumer then typically has 24 hours to complete their purchase directly with the merchant, using the virtual card.[7]

In addition, BNPL lenders may issue credit through other methods, such as in-store or through browser extensions.[8] These methods generally operate the same as the acquisition methods described above, allowing the consumer

[1] 15 U.S.C. 1602(g).

[2] Subpart G generally applies only to ''credit card account[s] under an open-end (not home-secured) consumer credit plan.'' However, 12 CFR 1026.60 in subpart G may apply.

[3] *See* CFPB, *Buy Now, Pay Later: Market trends and consumer impacts,* at 6 (Sept. 2022), *https://files.consumerfinance.gov/f/documents/cfpb_buy-now-pay-later-market-trends-consumer-impacts_report_2022-09.pdf* (Market Trends Report).

[4] Other variations of BNPL include loans that, for example, incur interest or other finance charges (often referred to as point-of-sale loans). Depending on their features, such loans might be subject to other provisions of Regulation Z, including subparts C or G.

[5] *See* Market Trends Report at 12–13.

[6] *Id.* at 14–15.

[7] *See, e.g.,* Klarna, *What is a One-time card and how does it work?, https://www.klarna.com/us/customer-service/what-is-a-one-time-card-and-how-does-it-work/* (last visited May. 14, 2024).

[8] *See, e.g.,* Affirm, *Bring the power of Affirm to your Browser, https://www.affirm.com/shopping/browser-extension* (last visited May 20, 2024).

to access credit with their BNPL digital user account to make purchases either through the merchant's website or through the issuance of a single-use virtual card.

Regardless of how consumers access BNPL, a BNPL digital user account is activated when a consumer first accesses BNPL credit, similar to how a virtual credit card number for a traditional credit card account is issued at the same time a consumer opens the credit card account online and makes their first purchase on the card. These digital user accounts are secure, personal profiles that the BNPL provider activates for a consumer, enabling the consumer to access and utilize BNPL credit.[9] Once a digital user account is activated, the consumer can then immediately use their BNPL digital user account on an ongoing basis to access credit to make additional purchases. BNPL providers typically inform consumers of their ''amount available to spend,'' similar to a credit limit for conventional credit cards, and offer a frictionless borrowing process allowing consumers to rapidly access the BNPL credit.[10]

A significant and increasing number of Americans who purchase goods and services on credit do so with BNPL credit instead of conventional credit cards. According to a recent CFPB Making Ends Meet survey, 17 percent of consumers with a credit record made at least one purchase using BNPL between February 2021 and February 2022.[11] And data from five leading BNPL lenders reflect that originations have increased from $2 billion in 2019 to over $24 billion in 2021.[12] BNPL borrowers also increased their repeat usage during this timeframe. The data reveal that the average number of BNPL loans taken out by BNPL consumers from a single lender each quarter rose from 1.9 to 2.8.[13] The percentage of BNPL borrowers with more than five loans per quarter also increased, from 6.3 percent to 15.5 percent.[14]

BNPL is popular among a broad range of consumers, but certain groups have shown a significantly higher likelihood of using BNPL. These groups include Black, Hispanic, and female consumers, as well as consumers with an annual household income between $20,001–$50,000 and consumers under the age of 35.[15] In comparison to non-BNPL borrowers, BNPL borrowers tend to have higher levels of debt, carry balances on their conventional credit cards, have delinquencies on traditional credit products, and make use of higher-cost financial services like payday loans, pawn, and overdraft.[16] BNPL borrowers are also more likely to use other credit products like conventional credit cards, personal loans, and student loans, but have less liquidity and savings compared to non-BNPL borrowers.[17]

Consumers often use BNPL offerings as an alternative to conventional credit cards, and the two share many similarities. Both combine payment processing and credit services. Both charge transaction fees to merchants and are extensively used for retail transactions.[18] And consumers often use these two payment methods in a similar manner. In fact, often when a consumer is making purchases online from a merchant's website, the only options for paying on credit consist of conventional credit cards and BNPL, which are presented next to each other as alternatives.

The CFPB has been closely monitoring the BNPL market by issuing reports based on collected BNPL data and supervising certain BNPL lenders. In December 2021, the CFPB issued mandatory data collection orders to five large BNPL lenders to understand market trends and practices. These responses formed the basis of the September 2022 report ''Buy Now Pay Later: Market Trends and Consumer Impacts,'' which highlighted industry growth, as well as consumer benefits and risks associated with BNPL loans.[19] The report noted, among other findings, a lack of standardized disclosures and challenges in resolving disputes.[20] In March 2023, the CFPB published ''Consumer Use of Buy Now, Pay Later,'' which used data from the annual Making Ends Meet survey and credit bureaus to identify demographic and other characteristics of BNPL borrowers.[21] In March 2024, the CFPB released its ''Consumer Response Annual Report'' for 2023, which noted issues consumers faced with merchants regarding BNPL, such as non-receipt of items and challenges in canceling loans.[22] Through monitoring consumer complaints, the CFPB has further refined its understanding of the BNPL market. The CFPB continues to observe the industry and monitor new market and product trends.

Recognizing the importance of adequate consumer protections for BNPL loans, the CFPB is issuing this interpretive rule so that BNPL providers understand their obligations. As this interpretive rule explains, lenders that issue BNPL digital user accounts are ''card issuers'' under Regulation Z because the digital user accounts they issue constitute ''credit cards'' under Regulation Z. The term ''credit card''—which, as defined by TILA and Regulation Z, includes the term ''other credit device'' or ''other single credit device'' used for the purpose of obtaining credit—encompasses digital user accounts that consumers can use through websites, mobile apps, browser extensions, or integrations with merchant websites or mobile apps to access BNPL credit for the purchase of goods and services. The CFPB also affirms through this interpretive rule that BNPL lenders that extend credit—even though that credit is not subject to a finance charge and is not payable by written agreement in more than four installments—are creditors subject to subpart B of Regulation Z, including those provisions governing cost of credit disclosures and billing disputes.

C. Legal Analysis

This interpretive rule discusses the application of subpart B of Regulation Z to lenders that issue digital user accounts that consumers use from time to time to access credit, which includes those lenders that market their loans as ''Buy Now, Pay Later.'' Regulation Z[23] implements the Truth in Lending Act (TILA).[24] The purpose of TILA is to ''assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.''[25] Accordingly, TILA and its implementing regulation

[9] A digital user account is distinct from the concept of an account in TILA and Regulation Z.

[10] BNPL providers typically do not guarantee the ''amount available to spend'' and each loan is separately underwritten.

[11] *See* CFPB, *Consumer Use of Buy Now, Pay Later: Insights from the CFPB Making Ends Meet Survey,* at 5 (Mar. 2023), *https://files.consumerfinance.gov/f/documents/cfpb_consumer-use-of-buy-now-pay-later_2023-03.pdf* (MEM Survey Report); *see also* Bd. of Governors of the Fed. Rsrv. Sys., *Economic Well-Being of Households in 2022,* at 46 (May 2023) (reporting 12 percent of adults in U.S. households using BNPL in the prior 12 months, up from 10 percent in 2021).

[12] Market Trends Report at 31.

[13] *Id.*

[14] *Id.* at 33–34.

[15] MEM Survey Report at 22.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 6.

[19] *See* Market Trends Report.

[20] *See id.* at 72–73.

[21] *See* MEM Survey Report.

[22] *See* CFPB, *Consumer Response Annual Report,* at 64 (Mar. 2024), *https://files.consumerfinance.gov/f/documents/cfpb_cr-annual-report_2023-03.pdf.*

[23] 12 CFR 1026.

[24] 15 U.S.C. 1601 *et seq.*

[25] *Id.* at 1601(a).

generally establish uniform methods for calculating the cost of credit, require meaningful disclosure of those costs to consumers, and provide standardized mechanisms for resolving credit billing disputes.[26]

Although subpart B primarily covers open-end credit, many of its provisions apply more broadly, including to closed-end credit, under certain circumstances.[27] Certain subpart B provisions, such as those governing cardholder liability, apply to any ''card issuer,'' regardless of the type of credit offered.[28] Regulation Z defines ''card issuer'' as ''a person that issues a credit card or that person's agent with respect to the card.''[29] Additionally, ''card issuers'' are considered ''creditors'' for purposes of subpart B if they also extend ''either open-end credit or credit that is not subject to a finance charge and is not payable by written agreement in more than four installments.''[30] Such ''creditors'' are broadly subject to the provisions of subpart B, including those governing disclosures and billing dispute resolution.[31] Thus, BNPL lenders that issue a credit card as defined by Regulation Z are card issuers for purposes of the regulation. And as they also extend credit, even though that credit is not subject to a finance charge and not payable by written agreement in more than four installments, those BNPL lenders are creditors subject to the provisions of subpart B.

The definition of ''credit card'' in TILA and Regulation Z is not limited to a plastic or metal embossed physical card. While the term certainly includes those, it also includes archaic forms of credit devices like plates and coupon books, and non-physical credit devices like account numbers, including virtual credit cards where the account number itself is the ''credit card.'' In creating these definitions, Congress understood the need for flexibility to cover evolving types of credit devices, reflecting the rapid advancement of credit mechanisms at the time of enactment. TILA defines ''credit card'' as ''any card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.''[32] Regulation Z similarly defines ''credit card'' as ''any card, plate, or other single credit device that may be used from time to time to obtain credit.''[33]

The CFPB interprets the terms ''other credit device'' and ''other single credit device'' found within the TILA and Regulation Z definitions of credit card to include a BNPL digital user account that a consumer can use through websites, mobile apps, browser extensions, or integrations with merchant websites or mobile apps to access BNPL credit, to the extent the user account is used to draw, transfer, or authorize the draw or transfer of credit in the course of authorizing, settling, or otherwise completing transactions to obtain goods or services.[34] The broad catch-all terms ''other credit device'' and ''other single credit device'' are not defined by TILA and Regulation Z.[35] However, this interpretation is consistent with the ordinary meaning and historical context of the words.

The CFPB's interpretation flows from the ordinary meaning of the word ''device.'' Merriam-Webster Dictionary contains several definitions for the word ''device,'' including ''something devised or contrived: such as . . . [a] plan, procedure, [or] technique . . . [or] a piece of equipment or a mechanism designed to serve a special purpose or perform a special function.''[36] Similarly, Oxford English Dictionary defines ''device'' in part to mean ''[t]he result of contriving; something devised or framed by art or inventive power; an invention, contrivance; *esp.* a mechanical contrivance (usually of a simple character) for some particular purpose.''[37] These definitions indicate that the ordinary meaning of ''device'' is broad and incorporates a wide range of mechanisms, tools, or procedures specifically designed or contrived to achieve a particular purpose.

The CFPB's interpretation is also consistent with use of the word ''device'' broadly in other contexts. For example, both the CFPB, and the Federal Reserve Board (Board) before it, have interpreted ''access device'' in Regulation E to include such non-physical devices as personal identification numbers (PINs), telephone transfer and bill payment codes, and other means that may be used by a consumer to initiate an electronic fund transfer.[38]

The CFPB's interpretation is also consistent with Congress' intent to define the terms ''other credit device'' and ''credit card'' broadly. As a preliminary matter, courts have routinely held that, as a remedial statute, TILA should be interpreted expansively in favor of the consumer.[39] More specifically, as courts have recognized, the inclusion of the phrase ''other credit device'' in the statutory definition of ''credit card'' indicates that Congress intended the term ''credit card'' to encompass a wider scope than its customary usage.[40] Congress initially enacted the definitions in 1970 at the height of a rapid evolution of credit devices, which first included now-archaic credit devices such as coins and plates before the use of conventional

[26] Regulation Z defines credit broadly as the right to defer payment of debt or to incur debt and defer its payment. BNPL credit meets this definition.

[27] This can include BNPL credit, which for purposes of this interpretive rule is defined as a closed-end consumer loan for a retail transaction that is repaid in four (or fewer) interest-free installments and does not otherwise impose a finance charge. *See also* 12 CFR 1026.2(a)(17)(iii)–(iv). To the extent that subpart B applies to business-purpose credit cards, this would also include business-purpose BNPL credit. *See* 12 CFR 1026.12(a)–(b).

[28] *See* 12 CFR 1026.12, which covers unauthorized issuance and liability for unauthorized use. Other provisions of Regulation Z may also apply to ''card issuers'' regardless of the type of credit. *See* 12 CFR 1026.60, in subpart G, which outlines the rules for credit and charge card applications and solicitations.

[29] 12 CFR 1026.2(a)(7). Where a BNPL provider partners with another party to extend credit, including a bank, depending on the facts and circumstances both entities may be ''card issuers.''

[30] *See* 12 CFR 1026.2(a)(17)(iii) (one of several independent tests by which an entity can qualify as a ''creditor'' under 12 CFR 1026.2(a)(17)). Of course, were a BNPL provider to charge a finance charge, or allow repayment in more than four installments, they would meet one or more of the other independent tests for qualifying as a ''creditor.''

[31] Subpart B includes 12 CFR 1026.6 through .9, which cover disclosures, and 12 CFR 1026.13, which covers billing error resolution.

[32] 15 U.S.C. 1602(l).

[33] 12 CFR 1026.2(a)(15)(i). The term is also defined to include ''a hybrid prepaid-credit card as defined in § 1026.61.''

[34] A BNPL integration includes, for example, a BNPL lender's code or process embedded in the checkout flow of a merchant website or mobile app that allows a consumer to access a digital user account to obtain BNPL credit.

[35] In addition, there is no well-understood definition of ''other credit device'' or ''other single credit device'' under State law.

[36] *Device,* Merriam-Webster Dictionary, *https://www.merriam-webster.com/dictionary/device* (last visited May 20, 2024). *See also, e.g., James* v. *State,* 113 P. 226, 228 (Okla. Crim. App. 1910) (''Mr. Webster defines a 'device' as follows: 'That which is devised, or formed by conception, a contrivance, and invention, a project, a scheme, often a scheme to deceive, a stratagem, an artifice.' '').

[37] *Device,* Oxford English Dictionary, *https://doi.org/10.1093/OED/1300217116* (last visited May 20, 2024).

[38] *See* sec. 1005.2(a)(1); *see also* Regulation E, comment 2(a)(1)–1.

[39] *Begala* v. *PNC Bank, Ohio, Nat. Ass'n,* 163 F.3d 948, 950 (6th Cir. 1998), as amended (Mar. 26, 1999); *Rossman* v. *Fleet Bank (R.I.) Nat. Ass'n,* 280 F.3d 384, 390 (3d Cir. 2002).

[40] *See, e.g., United States* v. *Bice-Bey,* 701 F.2d 1086, 1092 (4th Cir. 1983) (holding that credit card numbers, not just the credit cards themselves, can be a ''credit device'' for purposes of TILA); *Telco Commc'ns Grp., Inc.* v. *Race Rock of Orlando, L.L.C.,* 57 F. Supp. 2d 340, 343 (E.D. Va. 1999) (holding that telephone calling cards can be credit cards); *Munoz* v. *Seventh Ave., Inc.,* No. 04 C 2219, 2004 WL 1593906, at *4 (N.D. Ill. July 15, 2004) (''Section 1602(k) contains a broad definition of 'credit card' which encompasses items that are not within the common understanding of the term credit card, such as a 'coupon book' or 'other credit device.' '').

credit cards became widespread.[41] In this context, Congress appears to have intended a flexible and comprehensive definition of ''credit card'' that could encompass both the entire range of existing credit devices and also those ''other credit devices'' that might not yet exist.

Indeed, the Board, which previously had jurisdiction over Regulation Z, adopted a similarly broad interpretation of ''other single credit device'' in 2010. The Board clarified in Official Staff Interpretations of Regulation Z that non-physical devices—in that case, account numbers—could be considered ''credit cards'' under the definition.[42] The Board explained in the rulemaking preamble that while Congress did not generally intend to treat all account numbers as credit cards—for example, where credit is transferred into a consumer's asset account—it would be inconsistent with Congressional intent not to do so when the account number could be used to access credit for the purchase of goods and services.[43] As an example, the Board provided a hypothetical scenario in which an open-end credit account was designed for online purchases, functioning like a conventional credit card account, but only accessible with an account number.[44] In such circumstances, the Board stated, it believed that TILA's credit card protections should apply.[45]

This analysis applies equally in the BNPL context. BNPL is a product primarily designed for the online purchase of goods and services and a digital BNPL user account functions like a conventional credit card. Consumers can use their BNPL digital user accounts through BNPL websites, mobile apps, browser extensions, or integrations with merchant websites or mobile apps to access credit for purchases. Given its similarities to conventional credit cards, a consumer's BNPL digital user account is among the types of ''credit devices'' that Congress would have had in mind in enacting TILA.

In order for a device to constitute a credit card under Regulation Z, it must be usable from time to time to obtain credit.[46] The commentary to Regulation Z interprets the term ''time to time'' to ''involve[ ] the possibility of repeated use of a single device.'' [47] The CFPB interprets the phrase ''usable from time to time'' to cover a consumer's BNPL digital user account that is issued as part of a business model designed for repeat use that can be used through websites, mobile apps, browser extensions, or integrations with merchant websites or mobile apps, to access credit for the purchase of goods and services.[48] Like conventional credit cards, the BNPL business model is designed around the repeat use of a digital user account to make real-time purchases on credit.[49] The CFPB therefore interprets the term ''credit cards'' to include such digital credit devices for purposes of TILA and Regulation Z.

Of course, not all digital user accounts are credit cards. However, digital user accounts with the purpose of giving consumers access to credit from time to time in the course of completing transactions to purchase goods or services, including those marketed as BNPL, meet the regulatory definition of ''credit card.'' When consumers use them through websites, mobile apps, browser extensions, and integrations, they get credit in the course of completing transactions to pay for a product at check-out or even in physical stores.[50] And these digital user accounts ''exist for [that] purpose.'' [51] They are, effectively, digital replacements for conventional credit cards, and consumers use them in the same way as conventional credit cards. The statutory and regulatory definitions of ''credit card'' are broad enough to capture new, technologically advanced ''devices'' designed to mimic the core features of conventional credit cards.

Consequently, BNPL providers issuing the credit cards (and their agents with respect to the credit card) are ''card issuers'' for purposes of Regulation Z. Additionally, as noted above, a ''card issuer'' is a ''creditor'' for purposes of subpart B if it extends credit, even though that credit is not subject to a finance charge and not payable by written agreement in more than four installments. Thus, BNPL lenders that issue credit cards are ''creditors'' for purposes of subpart B and must comply with its requirements, including the provisions related to disclosures and billing dispute resolution.

II. Regulatory Matters

This is an interpretive rule issued under the Bureau's authority to interpret TILA and Regulation Z, including under section 1022(b)(1) of the Consumer Financial Protection Act of 2010, which authorizes guidance as may be necessary or appropriate to enable the CFPB to administer and carry out the purposes and objectives of Federal consumer financial laws.[52] While not required under the APA, the CFPB is collecting comments and may make revisions to the interpretive rule at a later time as appropriate in light of feedback received. The CFPB may take no further action if no revisions are warranted.

By operation of TILA section 130(f), no provision of TILA sections 130, 108(b), 108(c), 108(e), or section 112 imposing any liability applies to any act done or omitted in good faith in conformity with this interpretive rule, notwithstanding that after such act or omission has occurred, the interpretive rule is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.[53]

The CFPB has determined that this interpretive rule does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.[54]

Pursuant to the Congressional Review Act,[55] the Bureau will submit a report containing this interpretive rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to the rule's published effective date. The Office of Information and Regulatory Affairs has designated this interpretive

[41] *See* John R. Webster & William F. Davis III., *Bank Credit Plans: Innovations in Consumer Financing,* 1 Loy. L. A. L. Rev. 49 (1968); *see also* 113 Cong. Rec. 28765 (1967) (member of Congressional Committee on Banking and Currency referring to credit cards as ''the new credit device'').

[42] *See* Regulation Z, comment 2(a)(15)–2.ii.C. An ''account number'' contemplated by the Board's interpretation is distinct from a BNPL digital user account.

[43] *See* 76 FR 22948 (Apr. 25, 2011). In that rulemaking, the Board was only considering open-end credit, but the CFPB believes that the logic applies similarly to closed-end credit.

[44] *Id.*

[45] *Id.*

[46] *See* sec. 1026.2(a)(15)(i).

[47] *See* Regulation Z, comment 2(a)(15)–1.

[48] The existence of a limit on the number of BNPL loans a consumer can have at one time or the issuance of a single-use virtual card as part of the credit extension and payment process would not preclude the credit device from satisfying the ''time to time'' requirement.

[49] This is the case regardless of whether the customer is acquired through the merchant partner acquisition model or the app-driven acquisition model, and regardless of whether the consumer uses the credit device more than one time.

[50] The fact that sometimes BNPL loans are declined does not change this fact. The same can be said about conventional credit cards.

[51] 15 U.S.C. 1602(l).

[52] 12 U.S.C. 5512(b)(1).

[53] 15 U.S.C. 1640(f).

[54] 44 U.S.C. 3501–3521.

[55] 5 U.S.C. 801 *et seq.*

rule as a ''major rule'' as defined by 5 U.S.C. 804(2).

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2024–11800 Filed 5–30–24; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 21

[Docket No. FAA–2022–1548]

Airworthiness Criteria: Special Class Airworthiness Criteria for the Archer Aviation, Inc. Model M001 Powered-Lift

Correction

In rule document 2024–11192, beginning on page 45944, make the following correction: On page 45976, in the second column, on the fifteenth line from the bottom of the page, the heading ''AM1.281 Propeller Critical Parts'' should read ''AM1.2816 Propeller Critical Parts''.

[FR Doc. C1–2024–11192 Filed 5–30–24; 8:45 am]

BILLING CODE 0099–10–D

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–1758; Airspace Docket No. 23–AWP–44]

RIN 2120–AA66

Modification of Class E Airspace; Mammoth Lakes Airport, Mammoth Lakes, CA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action modifies the Class E airspace designated as surface area, modifies the Class E airspace extending upward from 700 feet above the surface, and removes the Class E airspace extending upward from 1,200 feet above the surface at Mammoth Yosemite Airport, Mammoth Lakes, CA. Additionally, this action updates the administrative portion of the airport's Class E airspace legal descriptions. These actions support the safety and management of instrument flight rules (IFR) operations at the airport.

DATES: Effective date 0901 UTC, September 5, 2024. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

ADDRESSES: A copy of the Notice of Proposed Rulemaking (NPRM), all comments received, this final rule, and all background material may be viewed online at *www.regulations.gov* using the FAA Docket number. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year.

FAA Order JO 7400.11H, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *www.faa.gov/air_traffic/publications/.* You may also contact the Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

FOR FURTHER INFORMATION CONTACT: Jeffrey Drasin, Federal Aviation Administration, Western Service Center, Operations Support Group, 2200 S 216th Street, Des Moines, WA 98198; telephone (206) 231–2248.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it modifies and removes Class E airspace to support IFR operations at Mammoth Yosemite Airport, Mammoth Lakes, CA.

History

The FAA published a notice of proposed rulemaking for Docket No. FAA–2023–1758 in the **Federal Register** (88 FR 88546; December 22, 2023) for the removal and modification of Class E airspace at Mammoth Yosemite Airport, Mammoth Lakes, CA. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Differences From the NPRM

The legal description of the Class E airspace designated as a surface area within the NPRM included the following language: ''This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Air Missions. The effective date and time will thereafter be continuously published in the Chart Supplement.'' The FAA subsequently determined that the Class E airspace at Mammoth Yosemite Airport is effective 24 hours a day. Accordingly, the final rule does not include this language.

Incorporation by Reference

Class E2 and E5 airspace area designations are published in paragraphs 6002 and 6005, respectively, of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document amends the current version of that order, FAA Order JO 7400.11H, dated August 11, 2023, and effective September 15, 2023. FAA Order JO 7400.11H is publicly available as listed in the **ADDRESSES** section of this document. These amendments will be published in the next update to FAA Order JO 7400.11.

FAA Order JO 7400.11H lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This action amends 14 CFR part 71 by modifying the Class E airspace designated as surface area, modifying the Class E airspace extending upward from 700 feet above the surface, and removing the Class E airspace extending upward from 1,200 feet above the surface at Mammoth Yosemite Airport, Mammoth Lakes, CA.

The Class E surface area extension east of the airport centered on the 099° bearing is recentered to the airport's 096° bearing. Additionally, the width is reduced from 1.8 miles to 1 mile either side of the bearing, and the extension length is reduced from 5.6 miles to 4.6 miles east of the airport. This will better contain arriving IFR operations between the surface and 1,000 feet above the surface while executing the Area Navigation (RNAV) (Global Positioning System [GPS]) Runway (RWY) 27 approach.

The Class E airspace extending upward from 700 feet above the surface at the airport is extended eastward to include that airspace within 2.6 miles either side of the airport's 091° bearing extending from the 6.6-mile radius to 13.1 miles east of the airport. This will contain arriving IFR operations below 1,500 feet above the surface while

Tab 35

Circular 2024-03: Unlawful and Unenforceable Contract Terms and Conditions, 89 Fed. Reg. 51955 (June 21, 2024).

CFPB Warns Against Deception in Contract Fine Print

English

Español (cfpb.gov/about-us/newsroom/cfpb-advierte-contra-enganos-en-letra-pequena-de-contratos/)

Companies using illegal or unenforceable terms and conditions risk breaking the law

JUN 04, 2024

WASHINGTON, D.C. - The Consumer Financial Protection Bureau (CFPB) today issued a circular (cfpb.gov/compliance/circulars/consumer-financial-protection-circular-2024-03/) warning against the use of unlawful or unenforceable terms and conditions in contracts for consumer financial products or services. Companies use this fine print tactic to try to trick consumers into believing they have given up certain legal rights or protections. When financial institutions take these types of actions, they risk violating the Consumer Financial Protection Act. Today's warning is part of the CFPB's broader efforts to ensure freedom and fairness in people's interactions with financial institutions.

"Federal and state laws ban a host of coercive contract clauses that censor and restrict individual freedoms and rights," said CFPB Director Rohit Chopra. "The CFPB will take action against companies and individuals that deceptively slip these terms into their fine print."

Many consumer contracts include terms and conditions that claim to limit consumer rights and protections. This fine print may just be an attempt to confuse people about their rights. A common example is the general liability waiver, which purports to fully insulate companies from suits even though most states have laws that create hosts of exemptions to these waivers.

Similarly, several federal consumer financial protection laws offer protections that cannot be taken away from people, no matter what a contract says. For example, the Military Lending Act generally prohibits terms in certain consumer credit contracts that require servicemembers and their dependents to waive their right to legal recourse. Another example is mortgage rules, implementing the Truth in Lending Act, which prohibit fine print that forces homeowners into arbitration or other nonjudicial procedures to resolve problems with a mortgage transaction.

Today's circular explains how and when fine print tricks and intimidation in contracts for consumer financial products and services may violate the Consumer Financial Protection Act's prohibition on deceptive acts and practices. Companies may be liable even if the unenforceable terms are borrowed from form templates or widely available contracts.

The CFPB has taken action with respect to this unlawful conduct on many occasions over the past several years, including on deceptive behavior toward:

- **Mortgage borrowers:** CFPB examiners have repeatedly (https://files.consumerfinance.gov/f/201506_cfpb_supervisory-highlights.pdf) found (https://files.consumerfinance.gov/f/201510_cfpb_supervisory-highlights.pdf) examples of deceptive contract terms purporting to waive mortgage borrowers' rights that cannot be waived.
- **Bank accountholders:** The CFPB found (cfpb.gov/enforcement/actions/bank-of-america-na/) that a bank deceived consumers through contract terms that it claimed waived consumers' right to hold the bank liable for improperly responding to garnishment orders when, in fact, this right could not be waived. The bank inserted these terms into deposit agreements with broad fine print language.
- **Remittance transfer consumers:** The CFPB found (cfpb.gov/enforcement/actions/trans-fast-remittance-llc/) that a remittance transfer provider violated the Consumer Financial Protection Act's deception prohibition when it included misleading statements in disclosures purporting to limit consumers' error resolution rights, which would be unenforceable under the Electronic Fund Transfer Act and the Remittance Rule.
- **Auto loan borrowers**: The CFPB found (cfpb.gov/about-us/newsroom/consumer-financial-protection-bureau-settles-nissan-motor-acceptance-corporation-illegal-collections-and-repossession-practices/) an auto loan servicer deceptively included language in contracts that indicated that consumers could not exercise bankruptcy rights, when in fact, waivers of bankruptcy rights generally are void as a matter of public policy.

Today's circular builds on previous initiatives and guidance provided by the CFPB that are intended to ensure freedom and fairness in people's interactions with financial institutions. Last year, the CFPB proposed a rule (cfpb.gov/about-us/newsroom/cfpb-proposes-rule-to-establish-public-registry-of-terms-and-conditions-in-form-contracts-that-claim-to-waive-or-limit-consumer-rights-and-protections/) to require certain supervised nonbank companies to register with the CFPB information about their use of contractual terms that claim to waive or limit consumer rights. The CFPB also has explained (cfpb.gov/about-us/newsroom/cfpb-issues-policy-on-contractual-gag-clauses-and-fake-review-fraud/) that banks and financial companies attempting to silence consumers from posting honest online reviews through contract terms undermine fair competition and may be breaking the law. The CFPB additionally has highlighted (cfpb.gov/about-us/newsroom/cfpb-report-finds-college-tuition-payment-plans-can-put-student-borrowers-at-risk/) that certain tuition payment plans include terms and conditions that are likely unenforceable. And the CFPB recently filed (cfp b.gov/about-us/blog/ensuring-servicemembers-can-protect-themselves-from-unlawful-financial-practices/) an amicus brief with the Justice Department to help ensure that servicemembers can file lawsuits to enforce the Servicemembers Civil Relief Act notwithstanding unenforceable fine print in contracts.

Read the consumer financial protection circular, *Unlawful and unenforceable contract terms and conditions* (cfpb.gov/compliance/circulars/consumer-financial-protection-circular-2024-03/).

Consumers can submit complaints about financial products or services by visiting the CFPB's website (https://www.consumerfinance.gov/complaint/) or by calling (855) 411-CFPB (2372).

Employees who believe their company has violated federal consumer financial protection laws are encouraged to send information about what they know to whistleblower@cfpb.gov.

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit www.consumerfinance.gov (http://www.consumerfinance.gov/).

Topics

- ARBITRATION (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=ARBITRATION)
- FINANCIAL SERVICE PROVIDERS (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=FINANCIAL-SERVICE-PROVIDERS)
- BANKING (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=BANKING)
- SUPERVISION (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=SUPERVISION)
- DECEPTIVE PRACTICES (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=DECEPTIVE-PRACTICES)

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Rules and Regulations

Federal Register

Vol. 89, No. 120

Friday, June 21, 2024

CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Chapter X

Consumer Financial Protection Circular 2024–03: Unlawful and Unenforceable Contract Terms and Conditions

AGENCY: Consumer Financial Protection Bureau.

ACTION: Consumer financial protection circular.

SUMMARY: The Consumer Financial Protection Bureau (CFPB) has issued Consumer Financial Protection Circular 2024–03, titled, ''Unlawful and Unenforceable Contract Terms and Conditions.'' In this circular, the CFPB responds to the question, ''Can persons that include unlawful or unenforceable terms and conditions in contracts for consumer financial products and services violate the prohibition on deceptive acts or practices in the Consumer Financial Protection Act (CFPA)?''

DATES: The CFPB released this circular on its website on June 4, 2024.

ADDRESSES: Enforcers, and the broader public, can provide feedback and comments to *Circulars@cfpb.gov.*

FOR FURTHER INFORMATION CONTACT: George Karithanom, Regulatory Implementation & Guidance Program Analyst, Office of Regulations, at 202–435–7700 or at: *https://reginquiries.consumerfinance.gov/.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

Question Presented

Can persons that include unlawful or unenforceable terms and conditions in contracts for consumer financial products and services violate the prohibition on deceptive acts or practices in the Consumer Financial Protection Act (CFPA)?

Response

Yes. ''Covered persons'' and ''service providers'' must comply with the prohibition on deceptive acts or practices in the CFPA.[1] The inclusion of certain terms in contracts for consumer financial products or services may violate the prohibition when applicable Federal or State law renders such contractual terms, including those that purport to waive consumer rights, unlawful or unenforceable.

Background on Unlawful and Unenforceable Contract Terms

Many Federal laws—including statutes enforced by the CFPB—render unlawful or unenforceable various contract terms in certain contexts. For example, as highlighted in a recent CFPB compliance bulletin,[2] the Consumer Review Fairness Act of 2016 generally prohibits the use of form contracts that limit how consumers communicate their reviews, assessments, or similar analysis of the sale of goods or services, and invalidates these types of contract terms and conditions.[3] As another example, Regulation Z, which implements the Truth in Lending Act (TILA), prohibits the inclusion in a residential mortgage loan or open-ended consumer credit plan secured by the principal dwelling of terms requiring arbitration or any other nonjudicial procedure as the method for resolving any controversy or settling claims arising out of the transaction.[4] The Electronic Fund Transfer Act (EFTA) prohibits contract terms that contain a ''waiver of any right conferred'' by EFTA and prohibits waivers of any ''cause of action'' under EFTA.[5] And the Military Lending Act and its implementing regulations generally prohibit terms in certain consumer credit contracts that require servicemembers and their dependents to ''waive the covered borrower's right to legal recourse under any otherwise applicable provision of State or Federal law . . . .''[6]

In addition to express prohibitions like these, a recent Federal district court decision held that the Servicemembers Civil Relief Act (SCRA) renders unenforceable provisions in contracts with servicemembers that purport to waive their right to participate in class actions to enforce the SCRA.[7] The Federal Trade Commission also administers laws that forbid certain contractual waivers.[8] And certain State laws similarly prohibit or restrict the use of waivers in consumer contracts.[9]

[1] 12 U.S.C. 5481(6), (26), 5531, 5536. For simplicity, the remainder of this Circular refers to covered persons and service providers as ''covered persons.''

[2] CFPB, *Bulletin 2022–05: Unfair and Deceptive Acts or Practices That Impede Consumer Reviews* (Mar. 22, 2022), *https://files.consumerfinance.gov/f/documents/cfpb_bulletin-2022-05_unfair-deceptive-acts-practices-impede-consumer-reviews.pdf.*

[3] 15 U.S.C. 45b.

[4] 12 CFR 1026.36(h)(1), implementing 15 U.S.C. 1639c(e)(1).

[5] 15 U.S.C. 1693l; *see also, e.g., Choice Money Transfer, Inc. d/b/a Small World Money Transfer,* ¶¶ 79–83, File No. 2022–CFPB–0009 (Oct. 4, 2022) (consent order) (finding remittance transfer provider violated section 1693l by including waiver of consumer rights in disclosure consumers were required to sign); *Chime, Inc. d/b/a Sendwave,* ¶¶ 26–29, File No. 2023–CFPB–0012 (Oct. 17, 2023) (consent order) (finding violation of section 1693l where remittance transfer provider required consumers to sign a remittance services agreement containing language limiting consumers' damages and claims for costs and attorney fees, contrary to the provisions for defendant liability contained in section 1693m(a)(3)).

[6] 32 CFR part 232.8(b), implementing 10 U.S.C. 987(e)(2).

[7] *Espin* v. *Citibank, N.A.,* No. 5:22–CV–383–BO–RN, 2023 WL 6449909, at *3 (E.D.N.C. Sept. 29, 2023) (denying defendant's motion to compel arbitration and observing that the SCRA was ''amended to codify the unwaivable right of servicemembers to bring and participate in class actions, 'notwithstanding any previous agreement to the contrary' '') (quoting 50 U.S.C. 4042(a)).

[8] *See* 16 CFR part 442(a)(2) (FTC's 1984 Credit Practices Rule, prohibiting the use of contract terms purporting to waive a consumer's State law right to block creditors from seizing personal or real property of the consumer in which they do not hold security interests). The FTC also has interpreted section 604(b)(2)(A) of the Fair Credit Reporting Act (FCRA) to prohibit the inclusion of a waiver of consumer rights in a disclosure form required under that section, observing that ''it is a general principle of law that benefits provided to citizens by federal statute generally may not be waived by private agreement unless Congress intended such a result.'' *FTC, Division of Credit Practices, Staff Opinion Letter* (June 12, 1998), 1998 WL 34323756, at *1 (citing *Brooklyn Savings Bank* v. *O'Neill,* 324 U.S. 697 (1945)). In addition, while not an express prohibition on waivers, the FTC's *Preservation of Consumers' Claims and Defenses* rule, commonly known as the ''Holder Rule'' and also enforced by the CFPB, requires sellers of goods or services to consumers to include a provision in their finance contracts that ensures that if another person holds the loan or lease a consumer uses to finance acquisition of a good or service from a seller or lessor, then the holder is subject to the same consumer rights and defenses that the consumer had with respect to the seller or lessor, thereby emphasizing the importance of preserving consumer rights. 16 CFR part 433.

[9] For instance, the California Consumer Privacy Act affords consumers certain rights to know how their information will be used, instructs businesses

Continued

Analysis

The CFPB is issuing this Circular to emphasize that covered persons who include unlawful or unenforceable terms in their consumer contracts may violate the CFPA's prohibition on deceptive acts or practices.[10]

Covered persons may violate the CFPA's prohibition on deceptive acts or practices if they include terms, including waiver provisions, in their consumer contracts that are rendered unlawful or unenforceable by Federal or State law. Under the CFPA, a representation or omission is deceptive if it is likely to mislead a reasonable consumer and is material. A representation is ''material'' if it ''involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.'' [11] A contractual provision stating that a consumer agrees not to exercise a legal right is likely to affect a consumer's willingness to attempt to exercise that right in the event of a dispute. Moreover, certain categories of information, including express representations, are presumptively material.[12]

In the recent compliance bulletin noted above, the CFPB reminded covered persons that they could be liable under the CFPA if they deceive consumers using form contract restrictions on consumer reviews that are unenforceable.[13] The CFPB explained that ''including an unenforceable material term in a consumer contract is deceptive, because it misleads consumers into believing the contract term is enforceable,'' and that ''disclaimers in a contract such as 'subject to applicable law' do not cure the misrepresentation caused by the inclusion of an unenforceable contract term.'' [14] Similarly, qualifying a provision that purports to waive a consumer right with ''except where unenforceable'' is unlikely to cure the provision's misleading or material nature. Neither do disclaimers that are issued after the fact.[15]

CFPB supervisory examiners have identified several violations of the CFPA's prohibition on deception stemming from covered persons' use of unlawful or unenforceable contract terms and conditions.[16] In addition, in several prior enforcement matters, the CFPB has found covered persons to have violated the CFPA by including in contracts for consumer financial products or services terms that are unlawful or unenforceable under Federal or State law, such as waivers that are prohibited by Federal or State law. For example, the CFPB found that a respondent bank engaged in a deceptive practice under the CFPA when it represented to consumers that because they signed a deposit agreement including broad language directing the bank not to contest legal process, consumers had waived their right to hold the bank liable for improperly responding to garnishment notices; in fact, regardless of the language in the account agreement, consumers had the right to challenge the garnishments.[17] In another matter, the CFPB found that a respondent auto loan servicer violated the CFPA's deception prohibition when it used loan extension agreements or written confirmations that included language that created the net misimpression that consumers could not exercise bankruptcy protection rights, which was false.[18] In fact, an agreement to waive an individual's right to file for bankruptcy is void as against public policy,[19] rendering terms that purport to waive such right generally unenforceable. The CFPB found in a different matter that a respondent non-bank remittance transfer provider engaged in a deceptive act or practice in violation of the CFPA when it made misleading statements in disclosures purporting to limit consumers' error resolution rights, in violation of EFTA and the Remittance Rule.[20] And, in a recent report, the CFPB highlighted that certain student tuition payment plan agreements and financial responsibility agreements ''include terms and conditions that purport to waive consumers' legal protections, limit how consumers enforce their rights, or misrepresent the rights or protections available to consumers under existing law.'' [21] Some of these terms and conditions, such as purported waivers of the right to retain counsel and the right to seek discharge in bankruptcy proceedings, are likely unenforceable and thus similarly raise deception risk.

As these examples demonstrate, the inclusion of unlawful or unenforceable terms and conditions in consumer contracts is likely to mislead a

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not to sell consumers' personal information, and deems ''void and unenforceable'' any contractual provision ''that purports to waive or limit in any way rights under this title, including, but not limited to, any right to a remedy or means of enforcement.'' *See generally* Cal. Civ. Code sec. 1798.100 *et seq.* described at *https://oag.ca.gov/privacy/ccpa;* Cal. Civ. Code sec. 1798.192. Further, certain State laws, including those of California, Illinois, Kansas, and Tennessee, contain outright prohibitions of waivers of legal protections in general consumer protection laws. *See* Cal. Civ. Code. sec. 1751 (barring waivers of protections under California Consumers Legal Remedies Act); Ill. St. Ch. 815 sec. 505(10c), Waiver or modification (barring waiver or modification of protections under consumer fraud and deceptive practices statute); Kan. Stat. 50–625(a), Waiver (generally prohibiting waivers of rights or benefits under the Kansas Consumer Protection Act, unless otherwise specified in the statute); Tenn. Stat. 47–18–113(a) (generally prohibiting waivers ''by contract, agreement, or otherwise'' of provisions of the Tennessee Consumer Protection Act of 1977).

[10] Covered persons also should comply with other consumer protection laws enforceable by the CFPB that may apply to their conduct, including but not limited to EFTA, Regulation E; RESPA, Regulation X; and TILA, Regulation Z.

[11] *Novartis Corp.* v. *FTC,* 223 F.3d 783, 786 (D.C. Cir. 2000) (quoting *In re Cliffdale Assocs., Inc.,* 103 F.T.C. 110, 165 (1984)) (emphasis added).

[12] *See, e.g., CFPB* v. *Chou Team Realty LLC,* Case No. 8:20–cv–00043–SB–ADS, 2021 WL 4077110, at *4 (C.D. Cal. Aug. 10, 2021) (citing *FTC* v. *Pantron I Corp.,* 33 F.3d 1088, 1095–96 (9th Cir. 1994)); *FTC* v. *NCH, Inc.,* Civ.A. No. CV–S–94–138LDG, 1995 WL 623260, at *8 (D. Nev. May 25, 1995) (''express representations that are shown to be false are presumptively material'') (citing *Cliffdale Assocs.,* 103 F.T.C. at 168, 182).

[13] CFPB, *Bulletin 2022–05: Unfair and Deceptive Acts or Practices That Impede Consumer Reviews* (Mar. 22, 2022), *https://files.consumerfinance.gov/f/documents/cfpb_bulletin-2022-05_unfair-deceptive-acts-practices-impede-consumer-reviews.pdf* (Bulletin 2022–05).

[14] *Id.* at 4–5; *cf. Ruth* v. *Triumph P'ships,* 577 F.3d 790, 801–02 (7th Cir. 2009) (''To threaten to take some action 'to the extent permitted by law[ ]' . . . is to imply that, under some set of circumstances and to some extent, the law actually permits that action to be taken.'').

[15] Bulletin 2022–05 at 5 (citing *FTC* v. *IAB Marketing Assocs., LP,* 746 F.3d 1228, 1233 (11th Cir. 2014)).

[16] *See Supervisory Highlights: Summer 2015,* at 15, available at *https://files.consumerfinance.gov/f/201506_cfpb_supervisory-highlights.pdf* (deceptive waivers of borrowers' rights in mortgage loan agreements that were unenforceable under Regulation Z, implementing TILA); *Supervisory Highlights: Fall 2015,* at 17, available at *https://files.consumerfinance.gov/f/201510_cfpb_supervisory-highlights.pdf* (same); *Supervisory Highlights: Summer 2017,* 82 FR 48703, 48708 (Oct. 19, 2017) (deceptive waivers of borrowers' rights in loss mitigation agreements that were unenforceable under Regulation Z, implementing TILA); *Supervisory Highlights, Issue 24, Summer 2021,* 86 FR 36108, 36117 (July 8, 2021) (deceptive waivers of rights in security deed riders that were unenforceable under Regulation X, implementing the Real Estate Settlement Procedures Act); *Supervisory Highlights, Issue 28, Fall 2022,* 87 FR 72449, 72455 (Nov. 25, 2022) (deceptive waiver of borrowers' rights in loan security agreements that was unenforceable under Regulation Z, implementing TILA).

[17] *In re Bank of America, N.A.* (2022–CFPB–0002), *https://www.consumerfinance.gov/enforcement/actions/bank-of-america-na/.*

[18] *In re Nissan Motor Acceptance Corp.* (2020–BCFP–0017), *https://www.consumerfinance.gov/policy-compliance/enforcement/actions/nissan-motor-acceptance-corporation/.*

[19] *See* 11 U.S.C. 524(a) (providing that a bankruptcy discharge under title 11 voids judgments and operates as an injunction against the commencement or continuation of an action ''whether or not discharge of such debt is waived'').

[20] *In re Trans-Fast Remittance LLC, also d/b/a New York Bay Remittance* (2020–BCFP–0010), *https://www.consumerfinance.gov/policy-compliance/enforcement/actions/trans-fast-remittance-llc/.*

[21] CFPB, *Tuition Payment Plans in Higher Education* (Sept. 2023), at 29–30, available at *https://files.consumerfinance.gov/f/documents/cfpb_tuition_payment_plan_report_2023-09.pdf.*

reasonable consumer into believing that the terms are lawful and/or enforceable, when in fact they are not. Further, the representations made by the presence of such terms are often material, presumptively so when they are made expressly. In particular, consumers are unlikely to be aware of the existence of laws that render the terms or conditions at issue unlawful or unenforceable, so in the event of a dispute, they are likely to conclude they lawfully agreed to waive their legal rights or protections after reviewing the contract on their own or when covered persons point out the existence of these contractual terms and conditions. Deceptive acts and practices such as these pose risk to consumers, whose rights are undermined as a result, and distort markets to the disadvantage of covered persons who abide by the law by including only lawful terms and conditions in their consumer contracts.

Thus, the inclusion of unlawful or unenforceable terms in consumer contracts, including unlawful or unenforceable waiver provisions, may violate the CFPA's prohibition on deceptive acts or practices.

About Consumer Financial Protection Circulars

Consumer Financial Protection Circulars are issued to all parties with authority to enforce Federal consumer financial law. The CFPB is the principal Federal regulator responsible for administering Federal consumer financial law, *see* 12 U.S.C. 5511, including the Consumer Financial Protection Act's prohibition on unfair, deceptive, and abusive acts or practices, 12 U.S.C. 5536(a)(1)(B), and 18 other "enumerated consumer laws," 12 U.S.C. 5481(12). However, these laws are also enforced by State attorneys general and State regulators, 12 U.S.C. 5552, and prudential regulators including the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the National Credit Union Administration. *See, e.g.,* 12 U.S.C. 5516(d), 5581(c)(2) (exclusive enforcement authority for banks and credit unions with $10 billion or less in assets). Some Federal consumer financial laws are also enforceable by other Federal agencies, including the Department of Justice and the Federal Trade Commission, the Farm Credit Administration, the Department of Transportation, and the Department of Agriculture. In addition, some of these laws provide for private enforcement.

Consumer Financial Protection Circulars are intended to promote consistency in approach across the various enforcement agencies and parties, pursuant to the CFPB's statutory objective to ensure Federal consumer financial law is enforced consistently. 12 U.S.C. 5511(b)(4).

Consumer Financial Protection Circulars are also intended to provide transparency to partner agencies regarding the CFPB's intended approach when cooperating in enforcement actions. *See, e.g.,* 12 U.S.C. 5552(b) (consultation with CFPB by State attorneys general and regulators); 12 U.S.C. 5562(a) (joint investigatory work between CFPB and other agencies).

Consumer Financial Protection Circulars are general statements of policy under the Administrative Procedure Act. 5 U.S.C. 553(b). They provide background information about applicable law, articulate considerations relevant to the Bureau's exercise of its authorities, and, in the interest of maintaining consistency, advise other parties with authority to enforce Federal consumer financial law. They do not restrict the Bureau's exercise of its authorities, impose any legal requirements on external parties, or create or confer any rights on external parties that could be enforceable in any administrative or civil proceeding. The CFPB Director is instructing CFPB staff as described herein, and the CFPB will then make final decisions on individual matters based on an assessment of the factual record, applicable law, and factors relevant to prosecutorial discretion.

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2024–13581 Filed 6–20–24; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2024–0948; Airspace Docket No. 24–ASW–9]

RIN 2120–AA66

Amendment of Class E Airspace; Dallas-Fort Worth, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends the Class E airspace at Dallas-Fort Worth, TX. This action is the result of an airspace review conducted due to the amendment of the instrument procedures at Bourland Field, Fort Worth, TX—contained within the Dallas-Fort Worth, TX, Class E airspace legal description. This action brings the airspace into compliance with FAA orders and supports instrument flight rule (IFR) operations and procedures.

DATES: Effective 0901 UTC, September 5, 2024. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

ADDRESSES: A copy of the Notice of Proposed Rulemaking (NPRM), all comments received, this final rule, and all background material may be viewed online at *www.regulations.gov* using the FAA Docket number. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year.

FAA Order JO 7400.11H, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *www.faa.gov/air_traffic/publications/.* You may also contact the Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

FOR FURTHER INFORMATION CONTACT: Jeffrey Claypool, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5711.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends the Class E airspace extending upward from 700 feet above the surface at Bourland Field, Fort Worth, TX—contained within the Dallas-Fort Worth, TX, airspace legal description—to support IFR operations at these airports.

History

The FAA published an NPRM for Docket No. FAA–2024–0948 in the

Tab 36

Truth in Lending (Regulation Z); Consumer Credit Offered to Borrowers in Advance of Expected Receipt of Compensation for Work, 89 Fed. Reg. 61358 (July 31, 2024).

CFPB Proposes Interpretive Rule to Ensure Workers Know the Costs and Fees of Paycheck Advance Products

Proposed rule also addresses unusual practice of workers "tipping" their lender or employer

JUL 18, 2024

WASHINGTON, D.C. - The Consumer Financial Protection Bureau (CFPB) today proposed an interpretive rule (cfpb.gov/rules-policy/rules-under-development/consumer-credit-offered-to-borrowers-in-advance-of-expected-receipt-of-compensation-for-work/) explaining that many paycheck advance products, sometimes marketed as "earned wage" products, are consumer loans subject to the Truth in Lending Act. The guidance will ensure that lenders understand their legal obligations to disclose the costs and fees of these credit products to workers. The CFPB also published a report (cfpb.gov/data-research/research-reports/data-spotlight-developments-in-the-paycheck-advance-market/) examining employer-sponsored paycheck advance loans. The report finds that workers using these employer-sponsored products take out an average of 27 such loans per year and that the typical employer-sponsored loan carries an annual percentage rate (APR) over 100%.

"Paycheck advance products are often marketed to and designed for employers, rather than employees," said CFPB Director Rohit Chopra. "The CFPB's actions will help workers know what they are getting with these products and prevent race-to-the-bottom business practices."

"In recent years, workers have seen big increases in wages, but junk fees and high rates on financial products not only chip away at these gains – they take advantage of workers," said Acting Secretary of Labor Julie Su. "As part of the most pro-worker, pro-union administration in history, here at the Department of Labor, we proudly support efforts by the CFPB to guard against predatory lending in the workplace."

Almost three-quarters of workers receive their wages every two weeks or monthly. One major source of demand for consumer credit stems from the mismatch of when people receive compensation for the work they perform and when they incur expenses. While lenders have long offered credit for consumers to pay expenses in advance of a payday, a new market for paycheck advance products has emerged and is growing rapidly.

In recent years, financial providers have developed new products in the worker-credit marketplace. Typically offered online, these products provide paycheck advances before payday. Paycheck advance products are offered through two primary models: employer-partnered and direct-to-consumer. While employers can often make these fee-free, some of these products can come with fees for expedited service, subscriptions, or requested "tips."

CFPB's Findings on the Emerging Market for Paycheck Advance Products

The CFPB analyzed 2021-2022 data from eight companies that partner with employers to offer loans based on earned wages. The eight companies represent slightly less than 50% of the employer-partnered market.

Among the findings in today's spotlight:

- **More workers are paying fees to get wages early:** More than 90% of workers paid at least one fee in 2022 when employers do not cover the costs. Most fee revenue, 92.5%, was for expedited transfers. Expedited fees range from $1 to $5.99, with an average fee of $3.18. Workers who use direct-to-consumer paycheck advance products may pay monthly subscription fees (as much as $14.99) and often make payments that providers characterize as "tips."
- **The market for employer-partnered paycheck advance products is growing rapidly:** The CFPB estimates that the number of transactions processed by these providers grew by over 90% from 2021 to 2022, with more than 7 million workers accessing approximately $22 billion in 2022.
- **Workers access paycheck advance loans frequently and repeatedly:** Workers took out an average of 27 loans per year. The average transaction amount was $106.
- **Paycheck advance product's cash advances can be costly:** The APR for a typical employer-partnered earned wage cash advance is 109.5%.

Proposed Rule

To ensure fair competition in this market, the proposed interpretive rule explains how existing law applies to this emerging product market, and replaces a 2020 advisory opinion that addressed a very specific paycheck advance product that is not common in the real market. The proposed interpretive rule makes clear that many paycheck advance products – whether provided through employer partnerships or marketed directly to borrowers – trigger obligations under the federal Truth in Lending Act. In addition, the CFPB's proposed interpretive rule makes clear that:

- **Many loan costs are finance charges**: Fees for certain "tips" and expedited delivery meet the Truth in Lending Act's standard for being finance charges. When the paycheck advance product is no-fee and truly free to the employee, many requirements would not apply.

- **Borrowers must receive key disclosures**: Among other requirements, earned wage lenders must provide workers with appropriate disclosures about the finance charges. Clear disclosures help borrowers understand and compare loan options, sharpens price competition, and ultimately benefits companies that offer competitive products.

Today's actions follow a range of in-depth analysis by the CFPB, including investigations, market monitoring, coordination with state regulatory bodies, and fact-finding with lenders, employers, and consumer advocacy groups. The CFPB encourages the public to submit comments on today's interpretive rule to inform whether additional clarifications are needed. Comments will be accepted until August 30, 2024.

The CFPB is also analyzing options for workers to more easily access and permission their payroll data. This could facilitate more competition for paycheck advance products and other loans, since workers would not be locked into the provider that have a financial relationship with their employer. This is part of a broader effort (https://www.consumerfinance.gov/personal-financial-data-rights/) to jumpstart competition and protect personal data in the United States.

The CFPB has been working to ensure the workers are protected when using employment-related financial products and services. In July 2023, the CFPB issued a report (cfpb.gov/about-us/newsroom/cfpb-report-shows-workers-face-risks-from-employer-driven-debt/) on the risks workers face from employer-driven debt. In March 2023, the CFPB and the National Labor Relations Board announced an information sharing agreement (cfpb.gov/about-us/newsroom/cfpb-and-nlrb-announce-information-sharing-agreement-to-protect-american-consumers-and-workers-from-illegal-practices/) to protect American workers from illegal practices. In June 2022, the CFPB launched an inquiry (cfpb.gov/about-us/newsroom/cfpb-launches-inquiry-into-practices-that-leave-workers-indebted-to-employers/) into practices and financial products that leave workers indebted to employers.

Read the CFPB's data spotlight (cfpb.gov/data-research/research-reports/data-spotlight-developments-in-the-paycheck-advance-market/).

Read the CFPB's proposed interpretive rule (cfpb.gov/rules-policy/rules-under-development/consumer-credit-offered-to-borrowers-in-advance-of-expected-receipt-of-compensation-for-work/).

Read Director Chopra's remarks on paycheck advance products (cfpb.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-on-emerging-paycheck-advance-products/).

Consumers can submit complaints about financial products or services by visiting the CFPB's website (cfpb.gov/complaint/) or by calling (855) 411-CFPB (2372).

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit www.consumerfinance.gov (http://www.consumerfinance.gov/).

Topics

- **RULEMAKING** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=RULEMAKING)
- **RESEARCH** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=RESEARCH)
- **FINANCIAL SERVICE PROVIDERS** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=FINANCIAL-SERVICE-PROVIDERS)
- **ACCESS TO CREDIT** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=ACCESS-TO-CREDIT)

PRESS INFORMATION

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Proposed Rules

Federal Register

Vol. 89, No. 147

Wednesday, July 31, 2024

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Part 1026

[Docket No. CFPB–2024–0032]

Truth in Lending (Regulation Z); Consumer Credit Offered to Borrowers in Advance of Expected Receipt of Compensation for Work

AGENCY: Consumer Financial Protection Bureau.

ACTION: Notice of proposed interpretive rule; request for comment.

SUMMARY: The Consumer Financial Protection Bureau (CFPB) is charged with promoting competition and innovation in consumer financial products and services. After careful study of emerging offerings in the paycheck advance marketplace, including those marketed as ''earned wage advances'' and ''earned wage access,'' the CFPB is proposing this interpretive rule to help market participants determine when certain existing requirements under Federal law are triggered. The proposed interpretive rule would also address certain costs that are in substantial connection with extensions of such credit, such as expedited delivery fees and costs marketed as ''tips.''

DATES: Comments must be received by August 30, 2024.

ADDRESSES: You may submit comments, identified by Docket No. CFPB–2024–0032, by any of the following methods:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.

• *Email: 2024-Paycheck-Advance-Interpretive-Rule@cfpb.gov.* Include Docket No. CFPB–2024–0032 in the subject line of the message.

• *Mail/Hand Delivery/Courier:* Comment Intake—2024 Paycheck Advance Interpretive Rule, c/o Legal Division Docket Manager, Consumer Financial Protection Bureau, 1700 G Street NW, Washington, DC 20552. Because paper mail in the Washington, DC area and at the CFPB is subject to delay, commenters are encouraged to submit comments electronically.

Instructions: The CFPB encourages the early submission of comments. All submissions must include the document title and docket number. In general, all comments received will be posted without change to *https://www.regulations.gov.* All submissions, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Proprietary information or sensitive personal information, such as account numbers or Social Security numbers, or names of other individuals, should not be included. Submissions will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: George Karithanom, Regulatory Implementation & Guidance Program Analyst, Office of Regulations, at 202–435–7700 or at: *https://reginquiries.consumerfinance.gov/.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

One major source of demand for consumer credit is derived from the mismatch of when American workers receive compensation for their labor and when they incur expenses. While there have long been sources of credit for consumers to pay expenses in advance of receiving their compensation, there are a number of new offerings that seek to provide additional choices for consumers.

Instead of being paid daily or upfront, American workers generally provide services before employers pay for those services some time later—typically on a biweekly or semi-monthly wage cycle.[1] Employers have a strong incentive to delay payment, since these delays reduce working capital needs. Nearly three-quarters of non-farm payroll employees remain paid biweekly or even less frequently, and the remainder are generally paid their wages weekly. To address liquidity challenges, many consumers therefore turn to third-party credit products, such as payday loans, personal installment loans, and credit cards. In recent years, American consumers have significantly expanded their use of products sometimes marketed as ''earned wage access'' or ''earned wage advance.''[2] As these paycheck advance products generally have features that make them subject to the CFPB's jurisdiction, the CFPB has sought to understand these and other products, particularly those offered online, by engaging in ongoing monitoring of the market, including, for example, collecting and analyzing data, engaging with stakeholders (*e.g.,* market participants, consumer groups, and States), tracking and studying market developments, and conducting market research, among other things.

While many of these products have similarities to payday loans, there are important distinctions. The CFPB has found that there are two emerging models of earned wage products: employer-partnered and direct-to-consumer.

For ''employer-partnered'' products, providers contract with employers to offer funds in amounts not exceeding accrued wages. Those funds are recovered via one or more payroll deductions, lowering the consumer's paychecks accordingly, with other recourse options generally unavailable to the third-party provider. In contrast, ''direct-to-consumer'' products provide funds to employees in amounts that they estimate to be below accrued wages; funds are then recovered via automated withdrawal from the consumer's bank account,[3] and generally without limit to the provider's ability to seek further recourse as necessary.[4]

Some of the significant differences between these two types of earned wage products, however, are starting to erode.

[1] While the terms ''employer'' and ''employee'' are used throughout, the proposed interpretive rule would apply more broadly to situations where consumers receive payment for work performed.

[2] A CFPB report describes rapid recent growth in one part of this developing market. *See* CFPB, *Developments in the Paycheck Advance Market,* at 3 (July 2024) (hereinafter *2024 Paycheck Advance Report*).

[3] This includes, without limitation, *e.g.,* prepaid and payroll card accounts.

[4] As described, direct-to-consumer products lie outside the scope of the ''wage advance'' (12 CFR 1041.3(d)(7)) and ''no cost advance'' (12 CFR 1041.3(d)(8)) exclusions from the CFPB's 2017 Payday Rule. Employer-partnered products, however, may be (but are not necessarily) within the scope of one exclusion or both, with their revenue model particularly relevant to that determination. *See* 12 CFR 1041.3(d)(7)(ii)(A), (d)(8).

For example, some direct-to-consumer providers are now connecting directly to payroll records and recouping funds from payroll deductions, and ongoing State legal developments may cause them to limit their recourse options as well.[5]

Before the CFPB's market monitoring of these products intensified, the CFPB issued an advisory opinion in November 2020,[6] that described how one particular type of earned wage product does not involve the offering or extension of ''credit'' as that term is defined in Regulation Z (12 CFR part 1026) and the Truth in Lending Act (TILA).[7] The opinion explained that an earned wage product is not TILA or Regulation Z credit if it meets *all* of several identified conditions, including: providing the consumer with no more than the amount of accrued wages earned; provision by a third party fully integrated with the employer; no consumer payment, voluntary or otherwise, beyond recovery of paid amounts via a payroll deduction from the next paycheck, and no other recourse or collection activity of any kind; and no underwriting or credit reporting.

The 2020 advisory opinion was silent about whether earned wage products that do not meet all of these conditions are credit under TILA and Regulation Z.[8] The opinion did not address what counts under TILA and Regulation Z as a finance charge with respect to any such product that is credit. As the CFPB has acknowledged, the 2020 advisory opinion appears to have caused significant regulatory uncertainty.[9]

The CFPB is taking a number of steps to spur greater competition in markets for consumer financial products, including to address the credit needs of households who incur costs due to a mismatch in the timing of their income and expenses. In addition, some market participants and investors seek to better understand the applicability of existing federal law in these emerging business models. To provide greater clarity, the CFPB is proposing to replace the 2020 advisory opinion with a new interpretive rule. In light of the uncertainty caused by the 2020 advisory opinion as noted above and the fact that the CFPB is proposing to overturn and replace that opinion, the CFPB is opting to publish this proposed interpretive rule to solicit public comment. The proposed interpretive rule is informed by the CFPB's extensive study of this market, including data collection, continuous monitoring, investigation, coordination with states, and engagement with market participants. The CFPB is seeking comment on any aspect of this this proposed interpretive rule. The CFPB intends to publish a final interpretive rule after considering comments received.

II. Proposed Interpretive Rule

The text of the proposed interpretive rule is as follows.

A. Coverage

1. Earned Wage Products

This interpretive rule applies to products that involve both: (1) the provision of funds to the consumer in an amount that is based, by estimate or otherwise, on the wages that the consumer has accrued in a given pay cycle; and (2) repayment to the third-party provider via some automatic means, like a scheduled payroll deduction or a preauthorized account debit,[10] at or after the end of the pay cycle. Many payday loans would also meet this definition where the lender or State law restricts the amount of the loan based on accrued wages.[11]

2. Other Products and Other Laws

This interpretive rule only addresses the application of certain Regulation Z and TILA provisions; it does not address the application of any other laws that concern ''credit.'' Because the rule explains the applicability of Regulation Z, the rule may be useful to designers and creators of other financial products, including those relying on ''tips'' and other related payment mechanisms.

B. Legal Analysis

1. The Truth in Lending Act and Regulation Z Cover Products Where There Is an Obligation to Repay Debt

Section 1026.2(a)(14) of Regulation Z defines ''credit'' as ''the right to defer payment of debt or to incur debt and defer its payment.'' [12] TILA defines ''credit'' virtually identically as ''the right granted by a creditor to a debtor to defer payment of debt or to incur debt

[5] *See 2024 Paycheck Advance Report, supra* note 2, at 4 n.7. Several recently enacted State laws prohibit providers of earned wage products, including direct-to-consumer products, from compelling consumer repayment of earned wage amounts and fees through various means, such as lawsuits or third-party debt collection. *See, e.g.,* 24 Mo. Rev. Stat. sec. 361.749(5)(6); Wis. Stat. sec. 203.04(2)(f); *cf.* Montana Op. Att'y Gen., Vol. 59, Op. 2 (Dec. 22, 2023) (finding earned wage products do not meet the state law definitions of ''consumer loan'' or ''deferred deposit loan'' when they are ''fully non-recourse,'' among other criteria).

[6] CFPB, *Truth in Lending (Regulation Z); Earned Wage Access Programs* (Nov. 2020), *https://files.consumerfinance.gov/f/documents/cfpb_advisory-opinion_earned-wage-access_2020-11.pdf* (hereinafter *2020 Advisory Opinion*).

[7] Regulation Z defines credit at § 1026.2(a)(14).

[8] The opinion stated that it had no application to such products. *See 2020 Advisory Opinion, supra* note 6, at 3–7.

[9] *See, e.g.,* Nat'l Consumer L. Ctr., Ctr. for Responsible Lending, *Concern About Prior Leadership's Finding that Certain Earned Wage Access Products Are Not ''Credit'' Under TILA,* Nat'l Consumer L. Ctr., Ctr. for Responsible Lending, at 36–37 (Oct. 12, 2021), *https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-nclc-ewa-letter-to-cfpb-oct2021.pdf* (noting ''chaos'' and ''further questions'' caused by advisory opinions); U.S. Gov't Accountability Off., *GAO–23–105536, Financial Technology: Products Have Benefits and Risks to Underserved Consumers, and Regulatory Clarity is Needed,* at 36–37 (Mar. 2023), *https://www.gao.gov/assets/gao-23-105536.pdf* (citing industry requests for clarification). The CFPB has acknowledged the need for clarification in this area. *See, e.g.,* Letter from CFPB Director Rohit Chopra (Feb. 13, 2023) in U.S. Gov't Accountability Off., *supra,* at 51; Letter from CFPB Acting General Counsel to N.J. Citizen Action, *et al.,* at 2 (Jan. 18, 2022).

Problematically, the 2020 advisory opinion has been widely cited in support of legal conclusions that it did not reach. For example, it has erroneously been cited for the general propositions that no-fee earned wage products are not credit, *see, e.g.,* Ariz. Op. Att'y Gen. No. I22–005 (Dec. 16, 2022), *https://www.azag.gov/sites/default/files/2022-12/I22-005.pdf,* and that employer-partnered earned wage products are also not credit, *see, e.g.,* ZayZoon, Comment Letter on Cal. Dep't of Fin. Prot. & Innovation re: Notice of Proposed Rulemaking [PRO 01–21], at 4 (May 17, 2023), *https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/08/46-PRO-01-21-ZayZoon-US-Inc.-5.17.23_Redacted.pdf;* Innovative Payments Ass'n, Comment Letter on Cal. Dep't of Fin. Prot. & Innovation re: Notice of Proposed Rulemaking [PRO 01–21], at 4 (May 11, 2023), *https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/08/10-PRO-01-21-Innovative-Payments-Association-5.11.23_Redacted.pdf.* Some regulatory uncertainty may have resulted from the near-contemporaneous issuance of a ''Sandbox Approval Order'' that gave one provider a temporary safe harbor from liability under TILA and Regulation Z with respect to a specific product that did not satisfy all the conditions that the 2020 advisory opinion identified as taking such a product outside the reach of TILA and Regulation Z. *See* CFPB, *Payactiv Approval Order,* at 5 (Dec. 30, 2020), *https://files.consumerfinance.gov/f/documents/cfpb_payactiv_approval-order_2020-12.pdf.* The 2020 advisory opinion applied only to products that had all of a number of characteristics, including that they were free to consumers. In contrast, the approval order encompassed earned wage transactions in connection with which the consumer incurred fees. *See id.* The approval order was issued under a CFPB policy that is no longer in effect. *See generally* CFPB, *Statement on Competition and Innovation* (Sept. 30, 2022), *https://files.consumerfinance.gov/f/documents/cfpb_statement-on-competition-innovation_2022-09.pdf.* However, that approval order was never of general interpretative applicability, *see Payactiv Approval Order, supra,* at 4 n.15, and was terminated even before its temporary status expired, CFPB, *CFPB Rescinds Special Regulatory Treatment for Payactiv* (June 30, 2022), *https://www.consumerfinance.gov/about-us/newsroom/cfpb-rescinds-special-regulatory-treatment-for-payactiv/.*

[10] This includes repayment via ACH, check, or any other preauthorized repayment.

[11] This interpretive rule does not apply to an employer's actual payment of wages. Note that while the terms ''employer'' and ''employee'' are used throughout, this interpretive rule applies more broadly to situations where consumers receive payment for work performed.

[12] 12 CFR 1026.2(a)(14).

and defer its payment.'' [13] As described further below, earned wage products are consumer credit for purposes of TILA and Regulation Z.

TILA and Regulation Z do not define ''debt.'' Used infrequently in the statute and the regulation, ''debt'' for the most part only appears in the definition of ''credit.'' The term ''debt'' in ordinary usage means simply ''something owed,'' without any obvious limitation.[14] Legal dictionaries, including those dating to the enactment of TILA,[15] similarly describe debt as a ''sum of money due by certain and express agreement'' or ''a financial liability or obligation owed by one person, the debtor, to another, the creditor.'' [16] If Congress had intended to substantially narrow the types of transactions that could constitute ''debt,'' it could have done so by defining the term in TILA.[17] In light of this precedent, and the context in which the term ''debt'' appears in TILA, ''debt'' in TILA and Regulation Z includes any obligation by a consumer to pay another party.

This commonsense understanding of debt is reflected in State laws [18] defining the term, which also tend to use very broad language to describe debt to mean an obligation by the consumer to pay.[19] Bankruptcy law also uses a broad definition—''liability on a claim,'' where a ''claim'' is ''the right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.'' [20]

The only enumerated consumer financial law identified in the Consumer Financial Protection Act [21] that defines ''debt,'' the Fair Debt Collection Practices Act (FDCPA), broadly states that debt encompasses ''any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.'' [22] The main limiting feature in the definition of ''debt'' in the FDCPA is that it is limited to transactions for personal, family, or household purposes, a limitation already imposed elsewhere in TILA.[23] The FDCPA definition, therefore, also supports a broad reading of ''debt'' under TILA and Regulation Z in this context, consistent with ordinary usage that includes all obligations to pay another.

In an earned wage transaction, the consumer incurs an obligation to pay money at a future date. For some earned wage products, the specific amount of money that the consumer is obligated to pay at a future date has an element of contingency; for example, the obligation may be limited by whether funds available from the next payroll event (or events) are sufficient to cover the amount of earned wage funds the consumer received. But that is still an obligation to pay money at a future date. TILA has long been understood to cover contingent obligations.[24]

[13] 15 U.S.C. 1602(f).

[14] *Debt,* Merriam-Webster, *https://www.merriam-webster.com/dictionary/debt* (last updated Jan. 30, 2024).

[15] *See New Prime Inc.* v. *Oliveira,* 586 U.S. 105, 113 (2019) (''It's a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute.'') (cleaned up).

[16] *Debt,* Black's Law Dictionary (4th ed. 1968) (defining debt as ''[a] sum of money due by certain and express agreement; as by bond for a determinate sum, a bill or note, a special bargain, or a rent reserved on a lease, where the amount is fixed and specific, and does not depend upon any subsequent valuation to settle it.''); *Debt,* Wex, *https://www.law.cornell.edu/wex/debt* (last updated Sept. 2021).

[17] As the Court observed in *Whitman* v. *Am. Trucking Ass'ns,* ''Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.'' 531 U.S. 457, 468 (2001).

[18] *See* 12 CFR 1026.2(b)(3) (providing interpretive guidance with respect to undefined terms). As the Board of Governors of the Federal Reserve System noted when it first proposed § 1026.2(b)(3), the provision and its fellow rules of construction ''are intended to assist in understanding the regulatory language.'' 45 FR 29702, 29705 (May 5, 1980).

[19] *See, e.g.,* Cal. Civ. Code sec. 1788.2(d) (''The term 'debt' means money, property, or the equivalent that is due or owing or alleged to be due or owing from a natural person to another person.''); Colo. Rev. Stat. Ann. sec. 5–16–103(8)(a) ('' 'Debt' means any obligation or alleged obligation of a consumer to pay money arising out of a transaction, whether or not the obligation has been reduced to judgment.''); D.C. Code Ann. sec. 28–3814(b)(2) ('' 'Consumer debt' means money or its equivalent, or a loan or advance of money, which is, or is alleged to be, more than 30 days past due and owing, unless a different period is agreed to by the consumer, as a result of a purchase, lease, or loan of goods, services, or real or personal property for personal, family, medical, or household purposes.''); Fla. Stat. Ann. sec. 559.55(6) ('' 'Debt' or 'consumer debt' means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.''); Haw. Rev. Stat. Ann. sec. 480D–2 ('' 'Debt' means any obligation or alleged obligation of a person to pay money arising out of any transaction, whether or not the obligation has been reduced to judgment.''); Me. Rev. Stat. tit. 32, sec. 11002(5) ('' 'Debt' means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services that are the subject of the transaction are primarily for personal, family or household purposes, whether or not the obligation has been reduced to judgment.''); N.H. Rev. Stat. Ann. sec. 358–C:1(VI) ('' 'Debt' means any obligation or alleged obligation arising out of a consumer transaction.''); N.M. Stat. Ann. sec. 61–18A–2(F) ('' '[D]ebt' means an obligation or alleged obligation of a debtor to pay money arising out of a transaction in which the money, property, insurance or services that are the subject of the transaction are primarily for personal, family or household purposes, whether or not such obligation has been reduced to judgment.''); N.Y. Gen. Bus. Law sec. 600(6) ('' 'Debt' means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.''); N.D. Cent. Code Ann. sec. 13–05–01.1(6) ('' 'Debt' means an obligation or alleged obligation to pay money arising out of a transaction, regardless of whether the obligation has been reduced to a judgment.''); Or. Rev. Stat. Ann. sec. 646.639(f) ('' 'Debt' means an obligation or alleged obligation that arises out of a consumer transaction.''); 19 R.I. Gen. Laws Ann. sec. 19–14.9–3(4) ('' 'Debt' means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services that are the subject of the transaction are primarily for personal, family, or household purposes, whether or not the obligation has been reduced to judgment.''); Tex. Fin. Code Ann. sec. 392.001(2) ('' 'Consumer debt' means an obligation, or an alleged obligation, primarily for personal, family, or household purposes and arising from a transaction or alleged transaction.''); Utah Code Ann. sec. 12–1–11(1)(b) ('' 'Debt' means an obligation or alleged obligation to pay money arising out of a transaction for money, property, insurance, or services.''); Wash. Rev. Code Ann. sec. 6.01.060(2) ('' 'Consumer debt' means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes.''); Wyo. Stat. Ann. sec. 33–11–101(a)(vii) ('' 'Debt' means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family or household purposes, whether or not the obligation has been reduced to judgment.'').

[20] 11 U.S.C. 101(5)(A), (12). Bankruptcy law defines ''consumer debt'' as ''debt incurred by an individual primarily for a personal, family, or household purpose.'' 11 U.S.C. 101(8).

[21] 12 U.S.C. 5481(12).

[22] 15 U.S.C. 1692a(5); *see also* 12 CFR 1006.2(h); *Pollice* v. *Nat'l Tax Funding,* 225 F.3d 379, 410 (3d Cir. 2000) (''Although [TILA] does not contain a definition of the term 'debt,' we believe the term as used in [TILA] should be construed as it is defined in the FDCPA.''). Like TILA, the Consumer Financial Protection Act and Equal Credit Opportunity Act, for example, use the term ''debt'' in their definitions of ''credit'' without defining it. *See* 12 U.S.C. 5481(7); 15 U.S.C. 1691a(d).

[23] 15 U.S.C. 1602(g), (i).

[24] *See, e.g., Madewell* v. *Marietta Dodge, Inc.,* 506 F. Supp. 286 (N.D. Ga. 1980) (retail installment contract for purchase of automobile subject to TILA even though contingent on seller's ability to arrange financing); *Bailey* v. *Comm'r of Internal Revenue,* 993 F.2d 288, 292 (2d Cir. 1993) (discussing ''[n]onrecourse debt''); 12 CFR 1026.33(a) (reverse mortgages—where repayment is contingent on future home value at the time of a termination event, such as the death of the borrower—subject to TILA as credit); *cf.* Small Business Lending Under the Equal Credit Opportunity Act (Regulation B), 88 FR 35150, 35163 (May 31, 2023) (explaining that merchant cash advances—under which a provider offers a merchant a lump sum in

Earned wage products provide consumers with ''the right to defer payment of debt or to incur debt and defer its payment'' because they incur a ''debt'' when they obtain money with an obligation to repay via an authorization to debit a bank account or using one or more payroll deductions.[25] It does not matter that the obligation to repay is sometimes satisfied via payroll deduction.[26] It is still an act of repayment. In contrast, when an employer pays wages, no later act of repayment is required, by deduction or otherwise.

This interpretive rule replaces the advisory opinion the CFPB issued in November 2020, which stated that some earned wage products are not ''credit'' because they would not constitute a ''debt.'' [27] A primary justification for this statement, based on a legal dictionary definition of ''debt'' requiring a ''liability,'' was that the narrow type of earned wage products covered by that opinion—which, among other characteristics, were administered through the employer and cost-free to the consumer—were ''effectively'' providing earned wages to consumers early and, therefore, were not debts. Per the analysis above, the 2020 advisory opinion—narrowly focused as it was on one unique type of product—did not consider the full scope of available precedent and definitions in common legal usage when reaching its narrow conclusion.[28] Many credit products are used to gain liquidity in advance of receipt of a paycheck and thus will have some *de facto* resemblance to early payment of wages, but that does not take them outside the definition of credit. Earned wage products, as distinct from an employer's actual payment of wages, are no exception.[29]

Moreover, because the 2020 advisory opinion only addressed one particular type of product, its analysis does not shed light on how TILA and Regulation Z apply to new offerings on the market. The 2020 advisory opinion found that the products it addressed ''functionally operate[ ] like an employer that pays its employees earlier than the scheduled payday,'' but earned wage products in which, for example, consumers make a payment in connection with receiving funds do *not* leave consumers in the same position that they would be if their employer just paid them earlier. While the 2020 advisory opinion emphasized the absence of fees or charges to support its conclusion that covered products were different in kind from the credit covered by TILA and Regulation Z, except on a small number of employer-specific products, the vast majority of earned wage transactions involve consumer payment.[30]

2. Finance Charge Disclosures Include Consumer Payments That Are Made Incident to the Extension of Credit and Imposed by the Creditor Directly or Indirectly on the Consumer

a. General

In general, the obligations of Regulation Z apply to any credit provider that regularly offers or extends consumer credit subject to a finance charge.[31] The finance charge is ''the cost of consumer credit as a dollar amount.'' [32] Unless specifically excluded by the regulation, this includes ''any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit.'' [33] If providers do not disclose finance charges properly, they violate Regulation Z.

Neither Regulation Z nor TILA further explains the meaning of ''incident to the extension of credit.'' The statute's history and context indicate that Congress intended this term to be interpreted expansively. When TILA was enacted in 1968, Black's Law Dictionary defined ''incident'' to mean ''anything which is usually connected with another, or connected for some purposes, though not inseparably.'' [34] The phrase ''incident to the extension of credit'' thus did not require that the degree of connection be significant. The Supreme Court, in a unanimous decision by Justice Thomas, noted in the context of TILA's finance charge

exchange for a specific portion of the merchant's proceeds from future sales of goods and services—are credit, notwithstanding that the repayment obligation may be contingent on the merchant's future sales); Consent Order, *In re Better Future Forward, Inc.,* Admin. Proceeding No. 2021–CFPB–005 (Sept. 7, 2021) (identifying as credit income share agreements, which ''finance postsecondary education'' whereby ''[i]n exchange for money up front, students agree that once their income exceeds an income threshold, they will make payments based on a percentage of their income until either: (i) they meet a payment cap or (ii) a period of years elapses.'').

[25] Earned wage products are offered or extended to consumers primarily for personal, family, or household purposes, so they also meet the Regulation Z definition of ''consumer credit.'' 12 CFR 1026.2(a)(12).

[26] It is not uncommon for credit providers to compel repayment of debt using wage garnishment automatically deducted from consumer paychecks. Payday lenders are sometimes repaid through court-ordered wage garnishment. *See* CFPB, *Ask CFPB: Can a Payday Lender Garnish My Bank Account or My Wages?* (last reviewed Sept. 23, 2022), *https://www.consumerfinance.gov/ask-cfpb/can-a-payday-lender-garnish-my-wages-en-1609/.* Consumers may pay some lenders directly by paycheck allotment. *Cf.* 12 CFR part 1026, supplement I, comment 2(a)(14)–2 (''Credit includes a transaction in which a cash advance is made to a consumer . . . in exchange for the consumer's authorization to debit the consumer's deposit account, and where the parties agree . . . that the consumer's deposit account will not be debited, until a designated future date.'').

[27] *See 2020 Advisory Opinion, supra* note 6.

[28] The 2020 advisory opinion stated that there would not be a ''liability.'' That word is not used in all dictionary definitions of the term ''debt,'' and regardless, the earned wage product did require repayment.

[29] The CFPB also noted that the 2020 advisory opinion would be consistent with 12 CFR part 1026, supplement I, comment 2(a)(14)–A31JY2.1.v. *See 2020 Advisory Opinion, supra* note 6, at 9. However, that comment was promulgated as an exclusion from the definition of ''credit'' after notice and comment, which suggests that the product would be subject to TILA and Regulation Z but for the exclusion. Products similar to products in the exclusion, but not covered by the exclusion, should therefore be presumed to be ''credit.''

In the 2020 advisory opinion, the CFPB also noted that its interpretation was consistent with certain statements in the CFPB's 2017 Payday Lending Rule. However, the Payday Rule did not make a determination as to whether earned wage products are credit, stating only that some product constructs ''may not be.'' The CFPB declined to perform the more detailed analysis necessary to come to a considered conclusion on the boundaries of TILA and Regulation Z at that time because that was not necessary for the rulemaking exercise. It is performing that analysis now, in this interpretive rule. Some earned wage products may not be covered by the Payday Rule because of its ''wage advance'' and ''no cost advance'' exclusions. *See* 12 CFR 1041.3(d)(7) and (8). However, these exclusions can only apply to earned wage products to the extent that such products are TILA and Regulation Z credit. As a result, the CFPB's earlier decision to exclude certain earned wage product constructs from the Payday Rule has no impact on the credit status of such products under TILA or Regulation Z.

[30] *See, e.g., 2024 Paycheck Advance Report, supra* note 2, at 11 (''Without employer subsidization, across both years in our [employer-partnered earned wage] sample, around 90% of workers paid at least one fee and approximately 82% of transactions incurred a fee.''); Cal. Dep't of Fin. Prot. & Innovation, *2021 Earned Wage Access Data Findings,* at 7 (2023), *https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/2021-Earned-Wage-Access-Data-Findings-Cited-in-ISOR.pdf* (''In 2021, for the 5,827,120 transactions completed by tip-based companies, providers received tips 73% of the time.''). To the extent the interpretation underlying the 2020 Payactiv approval order articulated a different rationale regarding fees or charges for earned wage transactions, the CFPB no longer believes that interpretation is correct.

[31] *See* 12 CFR 1026.1(c)(1)(iii). Note that finance charges are not a necessary precondition for the obligations of Regulation Z to apply to a provider of Regulation Z credit. For example, the requirements of Regulation Z will apply where the provider regularly offers or extends consumer credit that is payable by a written agreement in more than four installments, even if the credit provided is not subject to finance charges. *See id.* As another example, certain Regulation Z requirements apply when the offering or extension of consumer credit involves a credit card, even if the credit is not subject to a finance charge. *See* 12 CFR 1026.1(c)(2). This interpretive rule does not state any view about grounds on which an earned wage provider of Regulation Z credit might be subject to Regulation Z obligations other than due to their provision of credit subject to a finance charge.

[32] 12 CFR 1026.4(a).

[33] *Id.*

[34] *Incident,* Black's Law Dictionary (4th ed. 1968).

provision that while ''the phrase 'incident to or in conjunction with' implies some necessary connection between the antecedent and its object . . . the phrase 'incident to' does not make clear whether a substantial (as opposed to a remote) connection is required.'' [35] Thus, while a substantial connection may not be the minimum degree of connection required under Regulation Z and TILA for a payment to be part of the consumer's cost of credit, as an interpretive matter, any payment exacted by the creditor that *is* substantially connected must be part of the finance charge.[36]

In addition, a payment may be ''imposed directly or indirectly by the creditor'' and hence part of the finance charge even if the credit can be obtained without making such payment. Regulation Z includes in the cost of credit payments imposed by the creditor that are ''conditions of'' the extension of credit and that are ''incident to'' it.[37] By the same token, a creditor can ''impose'' a cost on a consumer—in the sense of exacting it from them—''directly or indirectly'' even if that payment is not required for the extension of credit.[38] The non-exhaustive list of finance charges provided in Regulation Z includes consumer payments that, even when they are not a condition of the extension of credit, are nonetheless finance charges because the creditor exacts them in connection with the extension of credit.[39]

Two costs that consumers may incur in connection with particular extensions of earned wage credit are ''tips'' (and other similarly labeled payments, like ''gratuities'') and expedited funds delivery fees. When incurred, these payments are substantially connected to the extension of credit. Each happens because of the associated extension of credit, and the connection between each type of payment and that extension is close and clear. Thus, each is incident to the extension of credit. Expedited funds delivery fees are also ''imposed directly or indirectly by the creditor'' and so should be included as part of the ''cost of consumer credit as a dollar amount.'' Under certain circumstances, discussed further below, ''tips'' and similarly styled consumer payments may similarly be ''imposed directly or indirectly by the creditor'' such that they are a part of the finance charge.

b. Expedited Funds Delivery Fees

Speed of access to funds is an integral and defining aspect of earned wage products. They are designed to address—and marketed as addressing—the liquidity problem that arises between the accrual of wages and their actual payment. That problem necessarily occurs in a very short period,[40] so the value of this type of credit to the consumer includes the rapid availability of funds. Thus, when earned wage product providers offer two speeds for delivering funds (which they typically do), consumers predominantly opt for the faster.[41] That option typically involves direct imposition of an expedited delivery or ''instant funds'' fee that the creditor does not impose on the slower form of credit.

Availability of a slower speed does not control the cost of credit for the faster form of credit. Though consumers may not have to opt for faster funds, when they do so, the resulting speed is a feature of the credit extended, so the resulting fee is part of the cost of credit. As observed by the Board of Governors of the Federal Reserve System, ''even though a lender may not require a particular loan feature, the feature may become a term of the credit if it is included.'' [42] The speed with which earned wage credit provides liquidity to the consumer is an integral feature of such credit, which is why consumers tend to opt for faster delivery when it is available. Thus, when the consumer pays for that faster delivery, the associated fee is immediately and directly connected to the particular extension of credit. That substantial connection makes this ''a fee imposed as an incident to that particular extension of credit,'' and accordingly one that must be disclosed as part of the finance charge.[43]

[35] *Household Credit Servs., Inc.* v. *Pfennig,* 541 U.S. 232, 240–41 (2004). In *Pfennig,* the Supreme Court held that an overlimit fee was not unambiguously imposed as an incident to the extension of credit because it could reasonably be seen as a penalty for violation of the credit agreement instead. *See id.* at 239–41. The Court recognized that ''regardless of how the fee is characterized,'' there was ''at least some connection'' between the fee and credit extension, but that was not enough to conclude that the fee was necessarily imposed as an ''incident to'' credit because the term ''does not make clear whether a substantial (as opposed to a remote) connection is required.'' *Id.* at 241.

[36] This interpretive rule does not seek to establish the degree of connection required beyond interpreting ''incident to'' to cover charges that are substantially connected to a particular extension of credit.

[37] TILA's definition of finance charge only references charges imposed ''as an incident to the extension of credit.'' 15 U.S.C. 1605(a). The Board's implementing regulation then interprets the statutory term ''incident to'' as encompassing—while not being limited to—payments that are conditions of the extension of credit. *See* 12 CFR 1026.4(a). This interpretation has been in uninterrupted effect since the Board first adopted TILA regulations on point.

[38] TILA's history and context indicate that Congress intended the word ''imposed'' to be interpreted broadly to encompass a variety of charges the creditor might seek to have a consumer pay in connection with the extension of credit. The finance charge definition uses parallel language: the charges are ''payable directly or indirectly by'' the consumer, and ''imposed directly or indirectly by'' the creditor. The structure of the provision thus uses ''imposed'' as a counterpoint to ''payable,'' so as to identify the party doing the charging as opposed to the party being charged. Similarly, the 1968 Black's Law Dictionary definition of ''impose''—''to levy or exact as by authority; to lay as a burden, tax, duty, or charge''—emphasizes the deployment of power by the party doing the imposing. *Impose,* Black's Law Dictionary (4th ed. 1968). As the Board previously noted, ''the term 'imposed' is understood broadly, to include any cost charged by the creditor (unless otherwise excluded).'' 60 FR 66179, 66180 (Dec. 21, 1995). *See also, e.g., Impose,* Merriam-Webster, *https://www.merriam-webster.com/dictionary/impose* (last updated Feb. 9, 2024) (defining ''impose'' with a range of meanings, from ''to establish or apply by authority'' to ''to establish or bring about *as if* by force'' to simply ''pass off'' (emphasis added)).

[39] *See* 12 CFR 1026.4(b); *see also* 61 FR 49237, 49239 (Sept. 19, 1996) (explaining that payments for services that the creditor does not require can still be finance charges when the payment is ''imposed as an incident to that particular extension of credit''); *cf. Incident,* Black's Law Dictionary (11th ed. 2019) (defining ''incident'' as ''[d]ependent upon, subordinate to, arising out of, or otherwise connected with (something else, usu. of greater importance)'').

[40] To obtain earned wage credit, consumers must first accrue wages within a given pay period. Repayment then occurs at or very shortly after the conclusion of that same pay period. As a result, the duration of any particular earned wage credit extension has to be very brief.

[41] *See 2024 Paycheck Advance Report, supra* note 2, at 11. For the sample of employer-partnered providers covered in the CFPB's 2024 Report, expedited delivery fees accounted for more than 96.6 percent of all consumer-paid fee revenue by dollar value. *See id.* Public data also indicates that earned wage advance providers relying on a tipping revenue model obtain more than 25 percent of the dollar value of consumer payments as expedited delivery fees. *See* Cal. Dep't of Fin. Prot. & Innovation, *supra* note 30, at 6 n.11, 7.

[42] 61 FR 49237, 49239 (Sept. 19, 1996). The expedite fee at issue here differs in kind from the two types of expedite fees previously considered by the Board of Governors of the Federal Reserve System in the context of credit cards accessing home equity lines of credit: a fee for expediting delivery of the physical card, and a fee for expediting a consumer's payment. *See* 12 CFR part 1026, supplement I, comments 6(a)(2)–2(ix) and (x). The Board determined that fees for those services did not need to be included in account opening disclosures as ''other charges'' or ''finance charges.'' *See* 68 FR 16185, 16186–87 (Apr. 3, 2003). Neither of those services—faster possession of a physical card or faster payments of amounts outstanding—are as closely and integrally connected to the extension of credit as faster funds access is to obtaining an earned wage product.

[43] *Cf.* 61 FR 49237, 49239 (Sept. 19, 1996) (noting with respect to debt cancellation fees that ''[a]lthough the same loan may be available without that feature, with respect to a loan that has been structured in this manner, the . . . fee is one that has been imposed as an incident to that particular extension of credit''). Before this clarification from the Board, the Eleventh and Seventh Circuits had held that charges for optional services should not be considered finance charges because the consumer assumed their payment voluntarily. *See* *Veale* v. *Citibank,* 85 F.3d 577, 579–81 (11th Cir. 1996); *McGee* v. *Kerr-Hickman,* 93 F.3d 380, 381–86 (7th Cir. 1996). The CFPB sees no textual basis

Tab 36

Regulation Z also covers expedited delivery fees as finance charges because such a fee is a ''condition'' of an extension of credit. As noted above, when an earned wage product provider offers a slower and faster loan, and the faster loan requires payment of an expedited delivery fee, the expedited delivery fee is a ''condition'' of the extension of that type of credit.

c. ''Tips'' and Similarly Labeled Payments

In connection with the extension of earned wage credit, some providers solicit consumers for what they variously describe as ''tips,'' ''gratuities,'' ''donations,'' ''voluntary contributions,'' or the like. The CFPB is aware of a wide range of practices used by credit providers to solicit these kinds of payments from consumers, including: default ''tip'' amounts that the consumer must remove each time to avoid being charged; suggesting particular ''tip'' amounts or percentages; suggesting or stating that ''tips'' serve to ensure the future supply of credit to the individual or other users; and including multiple prompts to ''tip'' throughout the process of receiving credit.

Whatever the exact practice used, when such ''tip'' payments are solicited and then paid in connection with the extension of credit, there is a clear and close connection between the ''tip'' and the associated extension of credit. In such circumstances, consumers pay the ''tip'' for the credit extended, and the credit is the direct and proximate cause of the ''tip.''[44] That substantial connection between payment and associated extension of credit means that the payment is ''incident to . . . the extension of credit.''[45] Indeed, as a practical matter, tips are a central source of revenue for the earned wage product providers that solicit them. For such providers, public data shows that consumers made ''tip'' payments in connection with about 73 percent of all such credit extensions, with such payments representing roughly the same share of consumer-side revenue for these providers.[46]

As explained above, a payment may be ''imposed directly or indirectly by the creditor'' and hence may be part of the finance charge even if the credit can be obtained without making the payment.[47] Under certain circumstances, ''tips'' and similarly styled consumer payments may be ''imposed directly or indirectly by the creditor'' such that they are part of the finance charge. A provider using its authority—real or implied—to exact a ''tip'' from a consumer in connection with an earned wage transaction has ''imposed'' the resulting consumer payment.[48] Relevant considerations when determining whether a ''tip'' or similar payment is imposed by the creditor as part of the finance charge include but are not limited to: soliciting a ''tip'' before or at the time of a credit extension (rather than some significant time after it); labeling the solicited payment with a term (such as ''tip'') that carries an expectation that the consumer will make such a payment in the normal course; setting default ''tip'' amounts or otherwise making it practically more difficult for the consumer to avoid leaving a ''tip''; suggesting ''tip'' amounts or percentages to the consumer; repeatedly soliciting ''tips,'' even in the course of a single transaction; and stating or otherwise implying, directly or indirectly, truthfully or otherwise, that ''tipping'' may impact subsequent access to or use of the product.[49]

III. Regulatory Matters

This is a proposed interpretive rule issued under the CFPB's authority to interpret TILA and Regulation Z, including under section 1022(b)(1) of the Consumer Financial Protection Act of 2010, which authorizes guidance as may be necessary or appropriate to enable the CFPB to administer and carry out the purposes and objectives of Federal consumer financial laws.[50] While not required under the Administrative Procedure Act (APA), the CFPB is soliciting comments on the proposal and may make revisions when it issues a final interpretive rule as appropriate in light of feedback received.

By operation of TILA section 130(f), no provision of TILA sections 130, 108(b), 108(c), 108(e), or section 112 imposing any liability would apply to any act done or omitted in good faith in conformity with the final interpretive rule, notwithstanding that after such act or omission has occurred, the final interpretive rule is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.[51]

The CFPB has determined that this proposed interpretive rule, if finalized, would not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.[52]

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2024–16827 Filed 7–30–24; 8:45 am]

BILLING CODE 4810–AM–P

in the regulation (or statute) to disagree with the Board's considered 1996 position on payment for voluntary services. As the Board discerned, it does not matter that it is possible to obtain credit without the relevant service if the service is a feature of the loan affecting the total price paid for the credit.

[44] Such payments are not tips or gratuities in any traditional sense. Consumers generally pay tips to individual workers in the service industry, not to firms (whether partnered with the employer or otherwise) for lending them money. Providers should exercise care in ensuring that the language they use here is not deceptive.

[45] *See supra* note 35.

[46] *See* Cal. Dep't of Fin. Prot. & Innovation, *supra* note 30, at 1, 7.

[47] As explained above, payments that are not required as a condition of the credit but are nonetheless incident to it can be ''imposed directly or indirectly by the creditor.'' Including only ''conditions of'' the extension of credit in the finance charge would improperly read ''incident to'' out of Regulation Z's definition of finance charge, and a creditor can ''impose'' a cost on a consumer even if the cost is not required for the extension of credit.

[48] A consumer's reasonable understanding that a provider expects a ''tip'' in connection with a transaction is evidence that the provider exacts it as if by authority. This kind of reasonable understanding does not depend on whether ''tipping'' impacts the supply of credit to the consumer now or in the future.

[49] The presence or absence of one or all of these considerations may not be determinative. The importance and relevance of these and other considerations will vary in the context of a particular product and how it is offered or provided to consumers.

[50] 12 U.S.C. 5512(b)(1).

[51] 15 U.S.C. 1640(f).

[52] 44 U.S.C. 3501–3521.

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1500

[CPSC Docket No. CPSC–2021–0015]

Banned Hazardous Substances: Aerosol Duster Products Containing More Than 18 mg in Any Combination of HFC–152a and/or HFC–134a

AGENCY: Consumer Product Safety Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Consumer Product Safety Commission (Commission or CPSC) is proposing to declare that any aerosol duster products that contain more than 18 mg in any combination of HFC–152a and/or HFC–134a are banned hazardous substances under the Federal Hazardous Substances Act (FHSA). For the ten-year period from 2012 to 2021, CPSC is aware of more than 1,000 deaths, and estimates 21,700 treated injuries involving the inhalation of aerosol duster products. The proposed

Tab 37

Circular 2024-04: Whistleblower Protections Under CFPA Section 1057, 89 Fed. Reg. 65170 (Aug. 9, 2024).

CFPB Warns Against Intimidation of Whistleblowers

English

Español (cfpb.gov/about-us/newsroom/cfpb-advierte-contra-la-intimidacion-a-denunciantes/)

Forcing workers to sign broad nondisclosure agreements could deter disclosure of misconduct

JUL 24, 2024

WASHINGTON, D.C. - The Consumer Financial Protection Bureau (CFPB) today issued a circular (cfpb.gov/compliance/circulars/consumer-financial-protection-circular-2024-04/) to law enforcement agencies and regulators explaining how companies may be breaking the law by requiring employees to sign broad nondisclosure agreements that could deter whistleblowing. The circular explains how imposing sweeping nondisclosure agreements that do not clearly permit communication with law enforcement may intimidate employees from disclosing misconduct or cooperating with investigations. This could impede investigations and potentially violate federal whistleblower protections.

"The law enforcement community uncovers serious wrongdoing by financial firms through whistleblower tips," said CFPB Director Rohit Chopra. "Companies should not censor or muzzle employees through nondisclosure agreements that deter whistleblowers from coming forward to law enforcement."

Whistleblowing plays an important role in addressing illegal and unethical misconduct. In the Consumer Financial Protection Act (CFPA), Congress included a provision specifically protecting whistleblowers from retaliation for reporting violations of consumer financial protection laws. Although nondisclosure agreements can be entered into for legitimate purposes, such as ensuring the protection of confidential trade secrets, such agreements, depending on how they are worded and the context, could lead employees to believe they would face lawsuits or other retaliation for reporting suspected misconduct to governmental authorities.

Today's circular explains that financial institutions may violate the CFPA when they require employees in certain circumstances to sign broad nondisclosure agreements, or other types of agreements that contain confidentiality requirements, if the agreements do not clearly permit communications or cooperation with law enforcement. Confidentiality agreements often specify that the employer may file a lawsuit or terminate an employee for violating the terms of the agreement.

The circular highlights particularly egregious circumstances that would typically violate the law. One example is when an employer demands a confidentiality agreement during an internal investigation, warning employees not to discuss the relevant matters with any external parties and saying they may be subject to legal penalties for doing so. If an employee involved in or aware of an investigation must sign such an agreement, they may see it as a threat against whistleblowing. An employer can significantly reduce the risk of violating whistleblower protections by ensuring that its agreements expressly permit employees to communicate freely with government enforcement agencies and to cooperate in government investigations.

The CFPB's action today builds on prior efforts to affirm whistleblower protections and collect reports of misconduct. For example, the CFPB previously **streamlined** (cfpb.gov/about-us/blog/cfpb-calls-tech-workers-to-action/) how workers in the technology industry can submit tips about potential violations of federal consumer financial laws. The CFPB's work also aligns with a broader federal effort to protect whistleblowers and ensure corporate accountability. For example, the Securities and Exchange Commission has pursued enforcement actions against companies that violated its whistleblower protection rules when those companies required their employees or clients to sign overly restrictive confidentiality agreements.

Read today's circular (cfpb.gov/compliance/circulars/consumer-financial-protection-circular-2024-04/).

Employees of companies who they believe their company has violated federal consumer financial laws are encouraged to send information about what they know to **whistleblower@cfpb.gov**. To learn more about reporting potential industry misconduct, visit the **CFPB's website** (cfpb.gov/enforcement/information-industry-whistleblowers/).

Consumers can submit complaints about financial products or services by visiting the **CFPB's website** (cfpb.gov/complaint/) or by calling **(855) 411-CFPB (2372)**.

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit ***www.consumerfinance.gov*** (http://www.consumerfinance.gov/).

Topics

- FINANCIAL SERVICE PROVIDERS (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=FINANCIAL-SERVICE-PROVIDERS)
- DISCRIMINATION (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=DISCRIMINATION)

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U.S.C. 553(b). As discussed previously, consistent with section 553(b)(B) of the APA, the FDIC has determined for good cause that notice and opportunity for public comment prior to the rule's effective date is contrary to the public interest, and therefore is not issuing a notice of proposed rulemaking. Accordingly, the FDIC has concluded that the RFA's requirements relating to initial and final regulatory flexibility analyses do not apply. Nevertheless, the FDIC is interested in receiving feedback on ways that it could reduce any potential burden of the interim final rule on small entities.

Congressional Review Act

For purposes of the Congressional Review Act, the OMB makes a determination as to whether a final rule constitutes a ''major'' rule. If a rule is deemed a ''major rule'' by the OMB, the Congressional Review Act generally provides that the rule may not take effect until at least 60 days following its publication.

The Congressional Review Act defines a ''major rule'' as any rule that the Administrator of the Office of Information and Regulatory Affairs of the OMB finds has resulted in or is likely to result in (1) an annual effect on the economy of $100,000,000 or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions, or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

The OMB has determined that the interim final rule is not a major rule for purposes of the Congressional Review Act. The FDIC will submit the rule and other appropriate reports to Congress and the Government Accountability Office for review.

Plain Language

Section 722 of the Gramm-Leach-Bliley Act [30] requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The FDIC has sought to present the interim final rule in a simple and straightforward manner. The FDIC invites comments on whether the interim final rule is clearly stated and effectively organized and how the FDIC might make the proposal easier to understand.

[30] Public Law 106–102, sec. 722, 113 Stat. 1338, 1471 (codified at 12 U.S.C. 4809)).

List of Subjects in 12 CFR Part 330

Bank deposit insurance, Reporting and recordkeeping requirements, Savings associations.

Authority and Issuance

For the reasons stated in the preamble, the Board of Directors of the Federal Deposit Insurance Corporation amends part 330 of title 12 of the *Code of Federal Regulations* as follows:

PART 330—DEPOSIT INSURANCE COVERAGE

■ 1. The authority citation for part 330 continues to read as follows:

Authority: 12 U.S.C. 1813(*l*), 1813(m), 1817(i), 1818(q), 1819(a)(Tenth), 1820(f), 1820(g), 1821(a), 1821(d), 1822(c).

■ 2. Amend § 330.3 by revising paragraph (e)(3) to read as follows:

§ 330.3 General principles.

* * * * *

(e) * * *

(3) *Rule of construction.* For purposes of this paragraph (e), the following are not considered to be offices located outside any State, as referred to in paragraph (e)(1) of this section:

(i) Overseas Military Banking Facilities operated under U.S. Department of Defense regulations, 32 CFR parts 230 and 231; and

(ii) Legacy branches of U.S. insured depository institutions in the Federated States of Micronesia, the Republic of the Marshall Islands, or the Republic of Palau, which for purposes of this paragraph means the number of branches operated by each U.S. insured depository institution as of August 9, 2024.

* * * * *

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, DC, on July 30, 2024.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2024–17351 Filed 8–8–24; 8:45 am]

BILLING CODE 6714–01–P

CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Chapter X

Consumer Financial Protection Circular 2024–04: Whistleblower Protections Under CFPA Section 1057

AGENCY: Consumer Financial Protection Bureau.

ACTION: Consumer financial protection circular.

SUMMARY: The Consumer Financial Protection Bureau (CFPB) has issued Consumer Financial Protection Circular 2024–04, titled, ''Whistleblower protections under CFPA section 1057.'' In this circular, the CFPB responds to the question, ''Can requiring employees to sign broad confidentiality agreements violate section 1057 of the Consumer Financial Protection Act (CFPA), the provision protecting the rights of whistleblower employees, and undermine the CFPB's ability to enforce the law?''

DATES: The CFPB released this circular on its website on July 24, 2024.

ADDRESSES: Enforcers, and the broader public, can provide feedback and comments to *Circulars@cfpb.gov.*

FOR FURTHER INFORMATION CONTACT: George Karithanom, Regulatory Implementation & Guidance Program Analyst, Office of Regulations, at 202–435–7700 or at: *https://reginquiries.consumerfinance.gov/.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

Question Presented

Can requiring employees to sign broad confidentiality agreements violate section 1057 of the Consumer Financial Protection Act (CFPA), the provision protecting the rights of whistleblower employees, and undermine the CFPB's ability to enforce the law?

Response

Yes. Although confidentiality agreements can be entered into for legitimate purposes, such as to ensure the protection of confidential trade secrets, such agreements, depending on how they are worded and the context in which they are employed, could lead an employee to reasonably believe that they would be sued or subject to other adverse actions if they disclosed information related to suspected violations of Federal consumer financial law to government investigators. Threats of this nature can lead to violations of section 1057 and impede investigations into potential wrongdoing, including the CFPB's efforts to uncover violations of the consumer financial protection laws it enforces.

Background

Public policy in the United States long has recognized the important role that whistleblowing plays in preventing and stopping illegal and unethical misconduct. One of the first Federal laws to provide protections to employees who reported fraud against the government was the False Claims Act, originally passed in 1863 and since amended. A majority of States since have passed their own such statutes. As Congress passed more legislation providing protections for employees against retaliation from their employers for engaging in protected whistleblowing activity, it empowered the Occupational Safety and Health Administration (OSHA), a regulatory agency of the U.S. Department of Labor (DOL), to adjudicate employees' retaliation claims. Currently, OSHA's Whistleblower Protection Program enforces the anti-retaliation provisions of more than 20 Federal laws, including the CFPA as discussed below.[1]

Many entities, including covered persons and service providers under the CFPA,[2] require their employees to sign nondisclosure agreements (NDAs) or other types of agreements containing confidentiality requirements. Such agreements may indicate that employees who violate the agreement's terms may be subject to lawsuits, including the possibility of damages or other costs, as well as other punishment, such as termination. These types of agreements can be entered into for legitimate purposes—for example, to ensure the protection of confidential trade secrets or to safeguard the sensitive personal information of employees or consumers. However, depending on how they are worded and the context in which they are employed, confidentiality agreements hold the potential to frustrate the efforts of government enforcement agencies—including the CFPB—to investigate violations of law. In particular, confidentiality agreements entered into in certain circumstances may impede such efforts when they are so broadly worded as to forbid or otherwise dissuade employees from reporting suspected violations of law to the government or cooperating with a government investigation.

CFPA Section 1057

Section 1057 of the CFPA applies to covered persons. It provides anti-retaliation protections for covered employees[3] and their representatives who provide information to the CFPB or any other Federal, State, or local law enforcement agency regarding potential violations of laws and rules that are subject to the CFPB's jurisdiction. Specifically, section 1057(a) provides that ''[n]o covered person or service provider shall terminate or in any other way discriminate against, or cause to be terminated or discriminated against, any covered employee or any authorized representative of covered employees'' for: (1) providing or being about to provide information to the employer, the CFPB, or any other State, local, or Federal Government authority or law enforcement agency relating to a violation of, or any act or omission that the employee reasonably believes to be a violation of, a law subject to the CFPB's jurisdiction or prescribed by the CFPB; (2) testifying or intending to testify about such a potential violation; (3) objecting to or refusing to participate in any activity, policy, practice, or assigned task that the employee reasonably believes to be such a violation; or (4) filing any lawsuit or instituting any other proceeding under any Federal consumer financial law.[4]

Section 1057(c) provides procedures by which a person who believes they have been discharged or otherwise discriminated against in violation of section 1057(a) may file a complaint with DOL, and a process by which DOL shall investigate and adjudicate such complaints.[5] It further specifies the procedures for appealing DOL's decisions in Federal court. The CFPB also has independent authority to enforce section 1057.[6] Section 1057(d) provides that, outside of limited circumstances, contractual provisions that purport to waive the rights and remedies granted by section 1057 are unenforceable.[7]

Accordingly, section 1057 makes it unlawful for a covered person to discriminate against an employee for whistleblowing with respect to suspected violations of Federal consumer financial law. As explained below, discrimination in this sense may include suing or threatening to sue or otherwise taking or threatening to take adverse action against employees for engaging in whistleblowing activity. And, in certain circumstances, requiring employees to sign confidentiality agreements that are so broad as to forbid or otherwise dissuade employees from sharing information about potential law violations with the government or cooperating with a government investigation can amount to a threat to punish.

Analysis

The CFPB is issuing this circular to remind regulators and the public that covered persons who in certain circumstances require their employees to enter into broad confidentiality agreements that do not clearly permit communications with government enforcement agencies or cooperation with law enforcement investigations risk violating the CFPA's prohibition on discrimination against whistleblowers and undermining the government's ability to enforce the law.

As noted above, section 1057(a) prohibits covered persons from terminating or otherwise discriminating against covered employees for engaging in whistleblowing activity. The term ''discriminate against'' is broad and encompasses a variety of adverse actions that a covered person may take against covered employees.[8] The use of the term in multiple whistleblower protection statutes passed by Congress reflects this understanding.

For example, section 23 of the Commodity Exchange Act (CEA), which Congress passed as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (DFA, of which the CFPA is a part), created a whistleblower awards program and protection for whistleblowers.[9] Section 23, which is administered by the Commodity Futures Trading Commission (CFTC), states ''[n]o employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower'' in providing

[1] *See* Occupational Safety and Health Administration: *Whistleblower Protection, https://www.whistleblowers.gov/about-us.*

[2] Covered persons and service providers must comply with the whistleblower protection requirements of the CFPA. 12 U.S.C. 5481(6), (26); 12 U.S.C. 5567. For simplicity, the remainder of this circular refers to covered persons and service providers as ''covered persons.''

[3] A ''covered employee'' is defined as ''any individual performing tasks related to the offering or provision of a consumer financial product or service.'' 12 U.S.C. 5567(b).

[4] 12 U.S.C. 5567(a).

[5] 12 U.S.C. 5567(c).

[6] 12 U.S.C. 5563(a)(1), 5564(a).

[7] 12 U.S.C. 5567(d). This provision applies to pre-dispute arbitration agreements, which it states are not valid or enforceable to the extent they require arbitration of disputes arising under section 1057. 12 U.S.C. 5567(d)(2).

[8] At its essence, to ''discriminate'' means ''to make a distinction'' or ''to make a difference in treatment or favor on a basis other than individual merit.'' *Discriminate, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/discriminate* (last visited July 17, 2024); *see also Murray* v. *UBS Securities, LLC,* 601 U.S. 23, 34 (2024) (explaining meaning of ''discriminate'' under analogous anti-retaliation provision in the Sarbanes-Oxley Act, 18 U.S.C. 1514A, and holding that while the employee had to prove his protected activity was a contributing factor in the unfavorable personnel action, he did not also have to prove his employer acted with retaliatory intent).

[9] 7 U.S.C. 26. *See* Commodity Futures Trading Commission: *Whistleblower Protections, https://www.whistleblower.gov/protections.*

information to the CFTC.[10] Likewise, Congress created a whistleblower awards program and related protections when it passed section 21F of the Securities Exchange Act of 1934, also part of the DFA. Section 21F, which is administered by the Securities and Exchange Commission (SEC), identically provides that ''[n]o employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower'' in providing information to the SEC.[11] Congress thus made clear that the term ''discriminate against'' encompasses a variety of adverse actions—including threatening employees—listed in these statutes, in addition to other actions that employers may take to prevent or dissuade employees from whistleblowing or to punish them for whistleblowing.[12]

In addition to enforcing the anti-retaliation provision of section 21F, the SEC promulgated Rule 21F–17, which provides that ''[n]o person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications.'' [13] As the SEC explained in its proposal, ''the Congressional purpose underlying section 21F of the Exchange Act is to encourage whistleblowers to report potential violations of the securities laws by providing financial incentives, prohibiting employment-related retaliation, and providing various confidentiality guarantees. Efforts to impede a whistleblower's direct communications with Commission staff about a potential securities law violation, however, would appear to conflict with this purpose.'' [14] The SEC since has pursued enforcement actions against companies that it alleged violated Rule 21F–17 by requiring their employees or clients to sign confidentiality agreements that would impede the ability of such individuals to share freely information about suspected wrongdoing with the SEC.[15]

The SEC is not alone in observing that employer confidentiality agreements may undermine the rights of whistleblowers and impede government enforcement efforts. In 2017, the CFTC promulgated a rule that similarly bars impeding an individual from communicating with CFTC staff, including by enforcing or threatening to enforce confidentiality agreements.[16] The CFTC explained when it proposed the rule that it was doing so to complement the prohibition on employer retaliation against whistleblowers found in CEA section 23(h)(1)(A) and to achieve consistency with the SEC's whistleblower rules.[17] In June 2024, the CFTC issued a settlement order with Trafigura Trading LLC that addressed, among other issues, the company's NDAs with employees that impeded their ability to communicate voluntarily with the CFTC.[18] And last year, the Federal Trade Commission's (FTC's) Bureau of Competition issued guidance explaining that certain types of contractual provisions, including confidentiality agreements, NDAs, and notice-of-agency-contact provisions, are ''contrary to public policy and therefore void and unenforceable insofar as they purport to (1) prevent, limit, or otherwise hinder a contract party from speaking freely with the FTC; or (2) require a contract party to disclose anything to an investigation target about the FTC's outreach or communications.'' [19]

The same dynamic is true for the CFPB. Confidentiality agreements that limit the ability of employees to communicate with government enforcement agencies or speak freely with investigators undermine the CFPB's ability to enforce the law. Among the functions that Congress laid out for the CFPB is ''taking appropriate enforcement action to address violations of Federal consumer financial law.'' [20] Subtitle E of the CFPA specifies the CFPB's enforcement powers, including the authority to conduct investigations of potential violations of law.[21] In addition to other actions, the CFPB may issue demands for written or oral testimony in pursuing such investigations.[22] If, due to a confidentiality agreement, an employee perceives that they could suffer adverse consequences for cooperating in such circumstances, then the CFPB's ability to carry out its statutory functions to protect consumers is compromised.

Consistent with these observations, covered persons that require employees in certain circumstances to sign broadly worded confidentiality agreements risk violating section 1057 of the CFPA.

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[10] 7 U.S.C. 26(h)(1)(A) (emphasis added).

[11] 15 U.S.C. 78u–6(h)(1)(A) (emphasis added).

[12] In addition to these examples, the Financial Institutions Anti-Fraud Enforcement Act of 1990 (FIAFEA) allows whistleblowers to bring claims related to suspected violations of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA)—passed in the wake of the savings and loan crisis—by submitting confidential declarations setting forth facts about alleged fraud. 12 U.S.C. 4201 *et seq.* As enacted, in addition to providing for discretionary monetary awards from the Attorney General, the FIAFEA granted certain protections to whistleblowers against employer retaliation for lawfully reporting such information to the government. 12 U.S.C. 4212 (providing that such declarants shall enjoy the protections afforded under 18 U.S.C. 3059A(e)). Specifically, it provided that a person who ''is discharged, demoted, suspended, threatened, harassed, *or in any other manner discriminated against* in the terms or conditions of employment by an employer because of lawful acts done by the person . . . in furtherance of a prosecution under [applicable provisions] may, in a civil action, obtain all relief necessary to make the person whole.'' 18 U.S.C. 3059A(e)(1), *repealed by* Public Law 107–273, 116 Stat. 1781 (Nov. 2, 2002) (emphasis added). Congress repealed 18 U.S.C. 3059A in 2002 as it considered it to be one of several ''redundant authorizations of payments for rewards.'' Public Law 107–273, 116 Stat. 1781 (Nov. 2, 2002). Functionally equivalent award and anti-retaliation provisions apply to employees of insured depository institutions and credit unions pursuant to the Federal Deposit Insurance Corporation Act and Federal Credit Union Act, although those provisions do not contain the same list of examples of forms of employer discrimination that appeared in the FIAFEA. *See* 12 U.S.C. 1831j, 1831k; 12 U.S.C. 1790b, 1790c. These provisions predated the FIAFEA, however, and the fact that Congress labeled the FIAFEA protections ''redundant'' supports the notion that it viewed the less descriptive anti-discrimination provisions in these acts as encompassing the broad definition of discrimination articulated in the FIAFEA.

[13] 17 CFR 240.21F–17(a).

[14] 75 FR 70488, 70510 (Nov. 17, 2010). *See also* 76 FR 34300, 34351–52 (June 13, 2011) (final rule preamble reiterating congressional purpose).

[15] *See, e.g.,* Press Release, SEC, *SEC: Companies Cannot Stifle Whistleblowers in Confidentiality Agreements* (Apr. 1, 2015), *https://www.sec.gov/news/press-release/2015-54* (describing administrative settlement in enforcement action wherein SEC alleged that KBR Inc.'s practice requiring employees to sign confidentiality agreements in internal investigations created a ''chilling effect'' to discourage whistleblowing in violation of Rule 21F–17); Press Release, SEC, *Company Paying Penalty for Violating Key Whistleblower Protection Rule* (Aug. 10, 2016), *https://www.sec.gov/news/press-release/2016-157* (describing SEC's issuance of cease-and-desist order and imposition of remedial sanctions against publicly traded company BlueLinx Holdings, Inc. for including language in its employee severance agreements that required departing employees to notify the company's legal department prior to disclosing any financial or business information to any third parties); Press Release, SEC, *J.P. Morgan to Pay $18 Million for Violating Whistleblower Protection Rule* (Jan. 16, 2024), *https://www.sec.gov/news/press-release/2024-7* (announcing settled charges against J.P. Morgan Securities LLC for violations of Rule 21F–17(a) stemming from the company's regularly asking retail clients to sign confidential release agreements that allowed them to respond to SEC inquiries but did not permit them to voluntarily contact the SEC).

[16] 17 CFR 165.19(b).

[17] 81 FR 55951, 55955 (Aug. 30, 2016).

[18] *In re Trafigura Trading LLC,* CFTC No. 24–08, 2024 WL 3225331 (June 17, 2024), available at *https://www.cftc.gov/media/10791/enftrafiguratradingorder061724/download.*

[19] Bureau of Competition, FTC, *Re: Contracts That Impede Bureau of Competition Investigations* (June 15, 2023), available at *https://www.ftc.gov/system/files/ftc_gov/pdf/Formal-Analysis.pdf.*

[20] 12 U.S.C. 5511(c)(4).

[21] *See* 12 U.S.C. 5562.

[22] *See* 12 U.S.C. 5562(c)(1).

Tab 37

Confidentiality agreements sometimes specify that the employer may file a lawsuit or reserves the right to take adverse employment action upon the employee's violation of the agreement. Depending on the circumstances, an employee may interpret such conditions as threats to retaliate for engaging in whistleblowing activity. The risk of a violation of section 1057 is heightened when covered persons impose such agreements in situations that are particularly likely to lead a reasonable employee to perceive the required entry into the agreement as a threat, such as in the context of an internal investigation or other scenario involving potential violations of law—for example, after the uncovering of suspected or confirmed wrongdoing, or in the aftermath of a potentially embarrassing episode for a company. When an employee participates in an investigation or otherwise is made aware of possible wrongdoing and simultaneously is required to sign such an agreement, there is a heightened risk that the employee reasonably would view the requirement to sign as a threat by the employer to take adverse action if the employee were to engage in whistleblowing activity. Indeed, the employee reasonably may not fathom any other reason for why they are being made to sign the agreement beyond that the employer is threatening to sue or otherwise punish the employee for engaging in whistleblowing. In line with the analysis above, such threats may constitute discrimination within the meaning of section 1057 and thus be prohibited, regardless of whether or not the employer acts upon them or a court actually would enforce a confidentiality agreement with respect to whistleblowing.[23]

For example, in 2015, the SEC found that Houston-based global technology and engineering firm KBR Inc. violated Rule 21F–17 by requiring witnesses in certain internal investigations to sign confidentiality agreements containing language warning they could face discipline, including possible termination, if they discussed the matters with outside parties without the prior approval of the company's legal department.[24] The SEC's order stated that, although there were no apparent instances in which the company specifically prevented employees from communicating with the SEC about securities law violations, the company's blanket prohibition against witnesses discussing the substance of their interviews without prior approval under penalty of disciplinary action had a chilling effect that undermined the purpose of section 21F and Rule 21F–17, which is to encourage whistleblowers to report illegal conduct to the SEC. The company agreed as part of the settlement to amend its confidentiality statement to add language making clear that employees are free to report possible violations to the SEC and other Federal agencies without KBR approval or fear of retaliation.

Confidentiality agreements that risk leading to violations of whistleblower protection statutes—including section 1057 of the CFPA—can be formulated in different ways. Certainly, employers can draft them in an express manner that purports to forbid the sharing of information with outside parties with no acknowledgment of and exception for the exercise of whistleblower rights. The risk of a reasonable employee interpreting their required entry into such an agreement in circumstances involving potential wrongdoing as a threat against reporting information to the government is relatively high. But other confidentiality agreements that undermine whistleblower protections may reasonably be perceived by employees as threats against them for exercising their rights in such circumstances. For example, an agreement that forbids sharing information with third parties "to the extent permitted by law" may technically permit whistleblowing. However, an employee, who may not know that the law forbids restrictions on whistleblowing but understands that the consequence of violating the agreement is suffering adverse employment action, may reasonably interpret the agreement to bar providing information to a law enforcement agency or voluntarily cooperating in a government investigation depending on the circumstances in which the employer asks the employee to enter into the agreement. An employee reasonably may feel threatened by such language in certain circumstances, such as those described above, and decline to report suspected violations of law to the government.[25] An employer can significantly reduce the risk of this kind of perception—and thus of violating section 1057—by ensuring that its agreements expressly permit employees to communicate freely with government enforcement agencies and to cooperate in government investigations.

As explained above, suing or threatening to sue or otherwise punish employees for engaging in whistleblowing activity may constitute discrimination against whistleblowers. Accordingly, when covered persons require employees to sign broadly worded confidentiality agreements that do not clearly permit communicating with government enforcement agencies or cooperating with law enforcement, especially when circumstances bear indicia of potential or suspected wrongdoing, they may be threatening to take adverse action against those employees for reporting suspected violations of Federal consumer financial law to the CFPB or other regulators. Thus, covered persons who impose these types of agreements on their employees risk violating the prohibition on discrimination against whistleblowers contained in section 1057 of the CFPA.

About Consumer Financial Protection Circulars

Consumer Financial Protection Circulars are issued to all parties with authority to enforce Federal consumer financial law. The CFPB is the principal Federal regulator responsible for administering Federal consumer financial law, *see* 12 U.S.C. 5511, including the Consumer Financial

[23] As noted above, section 1057(d) of the CFPA renders unenforceable "any agreement, policy, form, or condition of employment" that purports to waive the rights and remedies provided for in section 1057. 12 U.S.C. 5567(d)(1). And, the CFPB has explained that including unenforceable terms in a consumer contract may constitute a deceptive act or practice in violation of the CFPA's prohibition on unfair, deceptive, or abusive acts or practices. *See* CFPB, Consumer Financial Protection Circular 2024–03: *Unlawful and unenforceable contract terms and conditions* (June 4, 2024), *https://www.consumerfinance.gov/compliance/circulars/consumer-financial-protection-circular-2024-03/*. Similarly, requiring employees to enter into overly broad confidentiality agreements that restrict or waive the employees' whistleblower rights could constitute a deceptive act or practice in appropriate circumstances. Although the CFPB typically has found deceptive acts or practices with respect to misrepresentations made to a consumer, deceptive acts or practices targeting other parties—such as a covered person's employees—may also violate the CFPA if the deception is in connection with the offering or provision of consumer financial products or services. *See* 12 U.S.C. 5531, 5536.

[24] *Supra* n.15.

[25] In a recently filed complaint, DOL explained how confidentiality provisions in employment agreements that require employees not to share the terms of the agreement except with the employee's immediate family or attorney or "as required by law" could cause employees to "reasonably believe that they cannot disclose the terms of the agreements to [DOL] absent a subpoena or court order," and that these provisions, along with broad non-disparagement and non-disclosure provisions coupled with the threat of termination and monetary damages, dissuade employees from speaking freely with DOL investigators in violation of section 15(a)(3) of the Fair Labor Standards Act, 29 U.S.C. 215(a)(3). Complaint, ¶¶ 95–106, 129–38, 160–65, *Su* v. *Smoothstack, Inc.,* No. 1:24–cv–04789 (E.D.N.Y. July 10, 2024), available at *https://www.dol.gov/sites/dolgov/files/OPA/newsreleases/2024/07/SmoothstackInc-Complaint-24-1337-NAT.pdf*.

Protection Act's prohibition on unfair, deceptive, and abusive acts or practices, 12 U.S.C. 5536(a)(1)(B), and 18 other ''enumerated consumer laws,'' 12 U.S.C. 5481(12). However, these laws are also enforced by State attorneys general and State regulators, 12 U.S.C. 5552, and prudential regulators including the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the National Credit Union Administration. *See, e.g.,* 12 U.S.C. 5516(d), 5581(c)(2) (exclusive enforcement authority for banks and credit unions with $10 billion or less in assets). Some Federal consumer financial laws are also enforceable by other Federal agencies, including the Department of Justice and the Federal Trade Commission, the Farm Credit Administration, the Department of Transportation, and the Department of Agriculture. In addition, some of these laws provide for private enforcement.

Consumer Financial Protection Circulars are intended to promote consistency in approach across the various enforcement agencies and parties, pursuant to the CFPB's statutory objective to ensure Federal consumer financial law is enforced consistently. 12 U.S.C. 5511(b)(4).

Consumer Financial Protection Circulars are also intended to provide transparency to partner agencies regarding the CFPB's intended approach when cooperating in enforcement actions. *See, e.g.,* 12 U.S.C. 5552(b) (consultation with CFPB by State attorneys general and regulators); 12 U.S.C. 5562(a) (joint investigatory work between CFPB and other agencies).

Consumer Financial Protection Circulars are general statements of policy under the Administrative Procedure Act. 5 U.S.C. 553(b). They provide background information about applicable law, articulate considerations relevant to the Bureau's exercise of its authorities, and, in the interest of maintaining consistency, advise other parties with authority to enforce Federal consumer financial law. They do not restrict the Bureau's exercise of its authorities, impose any legal requirements on external parties, or create or confer any rights on external parties that could be enforceable in any administrative or civil proceeding. The CFPB Director is instructing CFPB staff as described herein, and the CFPB will then make final decisions on individual matters based on an assessment of the factual record, applicable law, and factors relevant to prosecutorial discretion.

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2024–17539 Filed 8–8–24; 8:45 am]

BILLING CODE 4810–AM–P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

RIN 3245–AH92

Small Business Lending Company Application Process

AGENCY: U.S. Small Business Administration.

ACTION: Notification.

SUMMARY: The purpose of this notification is to announce that the U.S. Small Business Administration's (SBA) Office of Capital Access (OCA) is opening the application period for new Small Business Lending Companies (SBLC) licenses from September 2, 2024, to October 15, 2024, and share the process by which interested entities may apply. SBA is similarly opening the application period for Community Advantage SBLCs (CA SBLCs) from September 2, 2024, to December 20, 2024, and will be reviewing and decisioning CA SBLC licenses on a rolling basis.

DATES:

Applicability date: This notification is applicable beginning August 1, 2024. SBA will accept applications for:

—New SBLC licenses from September 2, 2024–October 15, 2024.

—New CA SBLC licenses from September 2, 2024–December 20, 2024.

Comment date: Comments must be received on or before September 9, 2024.

ADDRESSES: You may submit comments, identified by SBA docket number SBA–2024–0011, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov/.* Follow the instructions for submitting comments.
- *Mail:* Jihoon Kim, Office of Financial Program Operations, U.S. Small Business Administration, 409 Third Street SW, Washington, DC 20416.
- *Hand Delivery/Courier:* Darrel Eddingfield, Office of Financial Assistance, U.S. Small Business Administration, 409 Third Street SW, Washington, DC 20416.

SBA will post all comments on *https://www.regulations.gov.*

If you wish to submit confidential business information (''CBI'') as defined in the User Notice at *https://www.regulations.gov,* please submit the information to Jihoon Kim, Office of Financial Program Operations, U.S. Small Business Administration, 409 Third Street SW, Washington, DC 20416; or send an email to *SBLCApps@sba.gov.* Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination as to whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: Jihoon Kim, Director, Office of Financial Program Operations (OFPO), Office of Capital Access, Small Business Administration, at 202–205–6024 or *Jihoon.Kim@sba.gov.* The phone number above may also be reached by individuals who are deaf or hard of hearing, or who have speech disabilities, through the Federal Communications Commission's TTY-Based Telecommunications Relay Service teletype service at 711.

SUPPLEMENTARY INFORMATION:

I. Background Information

Section 7(a)(17) of the Small Business Act states that SBA shall authorize lending institutions and other entities, in addition to banks, to make 7(a) loans. To this end, SBA has authorized Small Business Lending Companies (SBLCs) as defined in 13 CFR 120.10 to participate in the 7(a) Loan Program. On April 12, 2023, SBA published the Final Rule on Small Business Lending Company (SBLC) Moratorium Rescission and Removal of the Requirement for a Loan Authorization (88 FR 21890, effective May 12, 2023). Through that rule, SBA lifted the self-imposed moratorium on licensing new SBLCs and established the plan to approve three SBLCs in the first year following implementation. An SBLC, as defined in 13 CFR 120.10, is a non-depository lending institution authorized by SBA to make loans pursuant to section 7(a) of the Small Business Act and loans to Intermediaries in SBA's Microloan program. An SBLC is:

- Supervised and examined solely by SBA at the federal level;
- Subject to additional SBA Loan Program Requirements, as defined in 13 CFR 120.10, including but not limited to regulations specific to SBLCs regarding formation, capitalization, and enforcement actions; and
- Subject to all other 7(a) Loan Program Requirements specific to origination, servicing, and liquidation.

Tab 38

Truth in Lending (Regulation Z); Consumer Protections for Home Sales Financed Under Contracts for Deed, 89 Fed. Reg. 68086 (Aug. 23, 2024).

CFPB Takes Action to Stop Contract-for-Deed Investors from Setting Borrowers Up to Fail

English

Español (cfpb.gov/about-us/newsroom/cfpb-actua-contra-inversionistas-por-enganar-a-prestatarios/)

CFPB affirms that contracts for deed must comply with longstanding federal mortgage protections

AUG 13, 2024

WASHINGTON, D.C. – The Consumer Financial Protection Bureau (CFPB) today released an advisory opinion (cfpb.gov/rules-policy/final-rules/truth-in-lending-regulation-z-consumer-protections-for-home-sales-financed-under-contracts-for-deed/) and research report (cfpb.gov/data-research/research-reports/report-on-contract-for-deed-lending/) on a form of home seller financing that is often referred to as contract for deed. Under contract-for-deed deals, the seller agrees to turn over a home's deed only after the buyer completes a series of payments. The deals often have little oversight, and investment groups and other sellers can set a series of traps that leave buyers in unlivable homes, on the hook for tax liens and expensive repairs, and at risk of losing their down payments and homes. The advisory opinion affirms that federal home lending rules and laws cover contracts for deed and provide key consumer protections. The report describes how predatory lenders use contracts for deed to target low-income borrowers, particularly in religious communities, and set them up to fail so the sellers can kick them out and repeat the process with a new family.

The advisory opinion is being released in conjunction with a field hearing the CFPB is holding today in St. Paul, Minnesota. Contract for deed loans have become increasingly prevalent in the Twin Cities' Somali Muslim community. The loans are often marketed as a way for community members to abide by the principles of their faith that prohibit paying or profiting from interest.

"The CFPB has found that investors are targeting people of faith with predatory mortgage products that set the borrower up to fail," said CFPB Director Rohit Chopra. "The government is taking action to ensure that these products do not turn the dream of homeownership into a nightmare."

Contracts for deed – also called "land contracts," "installment land contracts," "land sales contracts," or "bonds for deed" – typically cover the purchase of homes. They are structured such that the seller retains the legal title to a home until the borrower completes all the payments. During the contract term, the borrower often carries the responsibilities of homeownership, including repairs, property taxes, and improvements. In today's report, the CFPB traces the history of contract-for-deed lending. The CFPB has found that these products often target Black, Hispanic, immigrant, and religious communities.

Many lenders using contracts for deed generally sell homes at inflated prices, with high interest rates and balloon payments. The prices can be high because sellers are not competing against banks or other mainstream mortgage lenders, and the homes come without the benefit of inspections associated with mainstream mortgage financing that identify defects in a home. Contract-for-deed sellers often also have no stake in whether borrowers can afford the loan over the long term because they can generally kick buyers out immediately if the buyers miss even a single payment, and then resell the home at an even higher price to the next family.

Many contracts for deed come laden with traps like balloon payments that make it highly unlikely the borrowers will ever get full legal title to their homes. Available data shows that contracts for deed have much higher failure rates than mainstream mortgage loans.

However, while many sellers have abused this financing structure to trick buyers and churn homes, these contracts are in fact covered by the federal Truth in Lending Act. This law imposes certain requirements on larger sellers – often investment groups – such that they must:

- **Assess borrowers' ability to repay loans:** Determining a borrower's ability to repay makes sure they can afford to repay loans, including contracts for deed. Many people who bought homes through contracts for deed – and were kicked out of their homes for missed payments – would have been protected against these predatory products had the seller assessed ability to repay.
- **Provide informative and accurate disclosures**: Sellers must provide the Truth in Lending Act's required disclosures. These disclosures include the annual percentage rate and payment schedules. Predatory lenders will sometimes market contracts for deed to faith communities and lead buyers to believe that the contracts conform to religious bans on interest. However, the loans either do come with high, undisclosed interest rates or the interest rates are hidden through other means.
- **Limit balloon payments**: Many contracts for deed come with interest rates much higher than those commonly charged on traditional mortgages. Under the Truth in Lending Act, when an interest rate on a home loan is higher than certain published benchmarks,

additional requirements and consumer protections are activated. One of those important protections is that most balloon payments are banned. Balloon payments can be especially harmful to contract-for-deed borrowers who stand to lose all the money they have previously paid if they cannot afford to pay a large lump sum all at once.

Today's advisory opinion and report are part of the CFPB's efforts to rid the market of predatory and exclusionary home lending practices. The CFPB has taken actions to protect consumers from redlining (cfpb.gov/about-us/newsroom/cfpb-doj-order-trident-mortgage-company-to-pay-more-than-22-million-for-deliberate-discrimination-against-minority-families/), reverse redlining (cfpb.gov/about-us/newsroom/director-chopra-remarks-justice-department-interagency-event-combat-modern-day-redlining/), digital redlining (cfpb.gov/about-us/newsroom/agencies-issue-final-rule-to-help-ensure-credibility-and-integrity-of-automated-valuation-models/), predatory financing (cfpb.gov/about-us/newsroom/cfpb-and-doj-sue-developer-and-lender-colony-ridge-for-bait-and-switch-land-sales-and-predatory-financing/), and zombie mortgages (cfpb.gov/about-us/newsroom/cfpb-issues-guidance-to-protect-homeowners-from-illegal-collection-tactics-on-zombie-mortgages/). The CFPB also worked with federal partners to finalize rules (cfpb.gov/about-us/newsroom/agencies-issue-final-rule-to-help-ensure-credibility-and-integrity-of-automated-valuation-models/) to ensure automated valuation models do not engage in digital redlining practices.

Read Director Chopra's remarks on contracts for deed (cfpb.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-at-the-cfpbs-field-hearing-in-st-paul-minnesota/).

Read the advisory opinion (cfpb.gov/rules-policy/final-rules/truth-in-lending-regulation-z-consumer-protections-for-home-sales-financed-under-contracts-for-deed/).

Read the research report (cfpb.gov/data-research/research-reports/report-on-contract-for-deed-lending/).

Read today's consumer advisory (cfpb.gov/about-us/newsroom/consumer-advisory-help-is-available-for-people-facing-housing-problems-because-of-a-contract-for-deed/).

Consumers can submit complaints about financial products or services by visiting the CFPB's website (cfpb.gov/complaint/) or by calling (855) 411-CFPB (2372).

Employees who believe their company has violated federal consumer financial protection laws are encouraged to send information about what they know to whistleblower@cfpb.gov.

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit www.consumerfinance.gov (http://www.consumerfinance.gov/).

Topics

- CONSUMER COMPLAINTS (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=CONSUMER-COMPLAINTS)
- RESEARCH (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=RESEARCH)
- FINANCIAL SERVICE PROVIDERS (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=FINANCIAL-SERVICE-PROVIDERS)
- FORECLOSURE (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=FORECLOSURE)
- FAIR LENDING (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=FAIR-LENDING)

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exemptions,'' or 10 CFR part 37 Subpart B, ''Background Investigations and Access Authorization Program,'' Subpart C, ''Physical Protection Requirements During Use,'' and Subpart D, ''Physical Protection in Transit,'' except for violations of 10 CFR 37.43(c), ''General security program requirements—Training''; 10 CFR 37.45, ''LLEA coordination''; 10 CFR 37.49(b), ''Monitoring, detection, and assessment''; 10 CFR 37.49(d), ''Response''; 10 CFR 37.57, ''Reporting of events''; and 10 CFR 37.81, ''Reporting of events,'' involving robust structures containing category 1 or category 2 quantities of radioactive material, or to large components containing category 1 or 2 quantities of radioactive material, if the licensee meets the following conditions:

- The licensee has identified in writing those large components and robust structures that contain category 1 or category 2 quantities of radioactive material for which it is not in compliance with 10 CFR part 37.
- The licensee has an approved 10 CFR part 73 security plan or a written 10 CFR part 37 security plan that provides security measures adequate to detect, assess, and respond to actual or attempted theft or diversion, as well as a written analysis that considers the time needed to accomplish these activities given the proximity and mobility of the equipment available for those large components and robust structures identified above.
- The licensee has a written analysis documenting that the measures above do not decrease the effectiveness of the 10 CFR part 73 security plan.

An enforcement panel is not required to disposition a noncompliance using this discretion; however, each time discretion is granted, an enforcement action number will be assigned to document the use of discretion under this IEP. This discretion is not limited to the initial inspection identifying a noncompliance and can be applied to subsequent inspections, provided that all the criteria continue to be met.

Licensees must comply with all other requirements, as applicable, unless explicitly replaced or amended through this interim policy.

Licensees can submit a request for a specific exemption, as described in 10 CFR 37.11(a), for material that may not be included in the definitions above. If a licensee submits such a request for a component weighing 2,000 kilograms or more that does not contain either discrete sources or ion-exchange resins, or for a structure sufficiently robust that it would take significant time to access the material inside, and the request is submitted before the NRC inspects the licensee's facility, the NRC will postpone an enforcement decision until the NRC staff completes its review of the exemption request. If the NRC grants the exemption request, it will also consider enforcement discretion for any prior violation remedied by the exemption. If the NRC denies, or the licensee withdraws, the exemption request, the NRC will disposition the violation through the enforcement process.

This interim policy will remain in place until the underlying technical issue is dispositioned through rulemaking or other regulatory action.

IV. Paperwork Reduction Act

This revision to the Policy does not contain any new or amended collections of information subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Existing collections of information were approved by the Office of Management and Budget, approval numbers 3150–0136 and 3150–0214.

V. Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the document requesting or requiring the collection displays a currently valid OMB control number.

VI. Congressional Review Act

This policy is a rule as defined in the Congressional Review Act (5 U.S.C. 801–808). However, the Office of Management and Budget has not found it to be a major rule as defined in the Congressional Review Act.

Dated: August 15, 2024.

For the Nuclear Regulatory Commission.

Carrie Safford,

Secretary of the Commission.

[FR Doc. 2024–18669 Filed 8–22–24; 8:45 am]

BILLING CODE 7590–01–P

CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Part 1026

Truth in Lending (Regulation Z); Consumer Protections for Home Sales Financed Under Contracts for Deed

AGENCY: Consumer Financial Protection Bureau.

ACTION: Advisory opinion.

SUMMARY: This advisory opinion affirms the current applicability of consumer protections and creditor obligations under the Truth in Lending Act (TILA) and its implementing Regulation Z to transactions in which a consumer purchases a home under a ''contract for deed.'' When a creditor sells a home to a buyer under a contract for deed, that transaction will generally meet TILA and Regulation Z's definition of credit. Where the transaction is secured by the buyer's dwelling, the buyer will also generally be entitled to the protections associated with residential mortgage loans under TILA.

DATES: This advisory opinion is applicable as of August 23, 2024.

FOR FURTHER INFORMATION CONTACT: George Karithanom, Regulatory Implementation & Guidance Program Analyst, Office of Regulations, at 202–435–7700 or at: *https://reginquiries.consumerfinance.gov/.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION: The Consumer Financial Protection Bureau (CFPB) is issuing this advisory opinion through the procedures for its Advisory Opinions Policy.[1] Refer to those procedures for more information.

I. Advisory Opinion

A. Background

The CFPB is issuing this advisory opinion to affirm the applicability of certain consumer protections under the Truth in Lending Act (TILA) and its implementing Regulation Z to transactions in which a consumer purchases a home under a ''contract for deed.'' Broadly speaking, TILA protects consumers engaged in credit transactions by requiring creditors to disclose information about the costs and terms of the credit, and, where the credit is secured by the consumer's dwelling, provides additional protections. The CFPB has previously identified certain contracts for deed as consumer credit under the Consumer Financial Protection Act (CFPA),[2] which uses a substantially similar definition of credit. Consistent with that earlier application of the CFPA, this advisory opinion clarifies how the CFPB understands the current application of TILA and Regulation Z to contracts for deed.

1. Contract for Deed Overview and History

A contract for deed is a type of home loan, alternatively called a ''land contract,'' ''land installment contract,'' ''land sales contract,'' ''bond for deed,''

[1] 85 FR 77987 (Dec. 3, 2020).

[2] Consent Order, *In re Harbour Portfolio Advisors et al.,* CFPB No. 2020–BCFP–0004 (June 23, 2020), ¶ 4.

''agreement for deed,'' or ''buying on contract.'' Home loans commonly referred to as contracts for deed, which this advisory opinion refers to as ''contracts for deed,'' tend to have a few key features. In a typical contract for deed, a homebuyer agrees to make periodic payments to the home seller, and the seller retains the deed to the property until the loan is fully repaid.[3] Loan terms vary but often range from 5 to 30 years and may include balloon payments. Properties are often purchased ''as is,'' without inspection or appraisal, and may have property condition issues that prevent them from being suitable for rental or qualifying for mainstream mortgage financing. Additionally, because the sales price of the home may not be tied to appraisal or other typical market measures, the sales price may be inflated. During the repayment period, the buyer has the exclusive right to occupy the home and often assumes many of the responsibilities of homeownership, including paying for taxes, insurance, home maintenance, and repairs.[4]

Another common feature is a forfeiture clause that can be triggered if the borrower fails to meet the terms of the contract. In these scenarios, the contract is canceled, the seller retakes possession of the property, and the buyer generally forfeits their entire investment—including their downpayment, principal payments, and any increase in home equity, including home equity that the buyer generated by making property improvements.[5] In some contracts, a single missed payment is enough to trigger these losses. Forfeiture clauses can also be triggered by breaches unrelated to payment status, such as when a borrower fails to pay taxes, is unable to obtain or maintain insurance, or does not make improvements to the property within a specified timeframe.[6] While some states restrict forfeiture and require foreclosure, others have allowed ''virtually unrestricted use of forfeiture clauses.'' [7]

2. TILA Legislative History

Congress first enacted TILA, 15 U.S.C. 1601 *et seq.,* in 1968 intending ''to assure a meaningful disclosure of credit terms'' and ''avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.'' [8] As industry commenters noted at the time, TILA's disclosure regime could help ''a prospective mortgage borrower [ ] consider the relative costs of credit offered by . . . various purchase arrangements, for example, contract for deed or an FHA-insured mortgage'' when purchasing a home.[9]

In 1994, Congress amended TILA by enacting the Home Ownership and Equity Protection Act (HOEPA) to require special disclosures and restrictions for high-cost mortgage loans secured by the consumer's principal dwelling.[10] In the wake of the 2008 financial crisis, in which widespread mortgage loan defaults produced a wave of foreclosures and systemic economic instability, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) which added additional protections to TILA, as well as establishing the CFPB under the Consumer Financial Protection Act.[11]

New TILA sections added by the Dodd-Frank Act required creditors to make good-faith assessments of consumers' ability to repay loans secured by their dwellings, imposed new standards on mortgage disclosures, and prohibited certain practices, including mandatory arbitration clauses and waivers of Federal causes of action in consumer credit transactions secured by a dwelling.[12] The Dodd-Frank Act also expanded the scope of HOEPA coverage and protections. In the Senate Report accompanying the Dodd-Frank Act, Congress cited the ''proliferation of poorly underwritten mortgages with abusive terms,'' made ''with little or no regard for a borrower's understanding of the terms [ ], or their ability to repay,'' as precipitators of the financial crisis and motivation for the Act's financial reforms.[13] Congress explained that, because of failures in consumer protection, ''millions of Americans have lost their homes,'' [14] and quoted expert testimony that ''a plague of abusive and unaffordable mortgages and exploitative credit cards . . . cost millions of responsible consumers their homes, their savings, and their dignity.'' [15]

B. Legal Analysis

1. *Because contracts for deed allow buyers to acquire property and defer the payment, contracts for deed are generally ''credit'' under TILA and Regulation Z.*

a. Credit Under TILA

TILA's definition of ''credit'' includes the typical contract for deed. TILA and Regulation Z define credit as ''the right granted [by a creditor to a debtor] to defer payment of debt or to incur debt and defer its payment.'' [16] TILA and Regulation Z do not define debt. Used infrequently in the statute and the regulation, ''debt'' for the most part appears only in the definition of ''credit.'' As the CFPB has noted elsewhere,[17] in the ordinary usage, debt means simply ''something owed,'' without any obvious limitation.[18] Legal dictionaries, including those dating to the enactment of TILA, similarly describe debt as a ''sum of money due by certain and express agreement'' or ''a financial liability or obligation owed by one person, the debtor, to another, the creditor.'' [19] This understanding of ''debt,'' as any obligation by a consumer to pay another party, applies to contracts for deed in a straightforward manner.

[3] More complex arrangements exist, such as those where the buyer pays the seller's agent.

[4] *See* Joint Center for Housing Studies of Harvard University, *The American Dream or Just an Illusion? Understanding Land Contract Trends in the Midwest Pre- and Post-Crisis* (Aug. 2019), *https://www.jchsharvard.edu/sites/default/files/media/imp/harvard_jchs_housing_tenure_symposium_carpenter_george_nelson.pdf.*

[5] *Id.*

[6] *Id.*

[7] *See* The Pew Charitable Trusts, *Summary of State Land Contract Statutes* (Apr. 30, 2021), *https://www.pewtrusts.org/-/media/assets/2022/02/summary-of-state-land-contract-statutes.pdf.*

[8] 15 U.S.C. 1601.

[9] *Truth in Lending Act: Hearings Before the Subcomm. on Financial Institutions of the S. Comm. on Banking and Currency,* 90th Cong., 1st Sess. (Apr. 18, 1967) (testimony of Darrel M. Holt, Mortgage Bankers Association of America).

[10] 15 U.S.C. 1602(bb), 1639.

[11] Public Law 111–203, 124 Stat. 1376 (2010).

[12] Sections 1411, 1412, and 1414 of the Dodd-Frank Act, codified at 15 U.S.C. 1639c; sections 1418, 1420, 1463, and 1464 of the Dodd-Frank Act, codified at 12 U.S.C. 2605; 15 U.S.C. 1638, 1638a, 1639f, and 1639g. Other protections apply to servicing practices, such as prompt payment processing, no pyramiding of late fees, and loan originator qualification requirements. *See* 12 CFR 1026.36(c), (d), (f).

[13] S. Rept. No. 176, 111th Cong. (2010), at 11, 12.

[14] *Id.* at 9.

[15] *Id.,* n.19 (quoting Testimony of Michael Barr, Assistant Secretary of the Treasury for Financial Institutions, to the Senate Committee on Banking, Housing, and Urban Affairs, July 14, 2009).

[16] 15 U.S.C. 1602(f), 12 CFR 1026.2(a)(14). Whether a seller is a ''creditor'' under TILA and Regulation Z depends on several factors, discussed below, at section I.B.3.

[17] Proposed rule, *Truth in Lending (Regulation Z); Consumer Credit Offered to Borrowers in Advance of Expected Receipt of Compensation for Work,* 89 FR 61358 (July 31, 2024), *https://files.consumerfinance.gov/f/documents/cfpb_paycheck-advance-marketplace_proposed-interpretive-rule_2024-07.pdf.*

[18] *Debt,* Merriam-Webster, *https://www.merriam-webster.com/dictionary/debt* (last updated Jan. 30, 2024).

[19] *Debt,* Black's Law Dictionary (4th ed. 1968) (defining debt as ''[a] sum of money due by certain and express agreement; as by bond for a determinate sum, a bill or note, a special bargain, or a rent reserved on a lease, where the amount is fixed and specific, and does not depend upon any subsequent valuation to settle it''); *Debt,* Wex, *https://www.law.cornell.edu/wex/debt* (last updated Sept. 2021).

In a typical contract-for-deed transaction, as discussed above, a debt is created by the buyer receiving exclusive possession of the property, along with certain ownership obligations, at the outset of the contract in exchange for the obligation to repay the agreed-upon value of that property over time.[20] Courts applying common law doctrines have broadly recognized these property-related rights and obligations under the contract for deed as constituting a grant of equitable title to the buyer.[21] In exchange for these rights granted in the property, the purchaser agrees to complete payment on a deferred basis. The contractual obligation to repay the agreed-upon value of the property according to the terms of the contract, therefore, constitutes a debt under TILA. From the face of the typical contract for deed, it will be clear that the seller has granted to the purchaser ''the right . . . to defer'' payment of this debt.

b. Closed-End Credit

Where the property acquired under a contract for deed is purchased by a consumer primarily for personal, family, or household purposes, as it generally is when a purchaser buys a home using a contract for deed, the transaction is ''consumer credit'' under Regulation Z.[22] Any consumer credit that is not open-end credit under Regulation Z is considered ''closed-end credit.''[23] Because the typical contract for deed is contemplated as a one-time transaction, it is not open-end credit.[24] Thus, when a buyer purchases a personal dwelling from a creditor under a contract for deed, that transaction typically meets the definition of closed-end credit under TILA and Regulation Z, and is subject to the applicable requirements of subpart C of Regulation Z.

c. Consistency With Other Laws

In 2020, the CFPB settled with an entity selling property under contracts for deed, requiring penalties for violations of the CFPA.[25] In doing so, the CFPB applied the CFPA's substantially similar definition of credit, which is ''the right granted by a person to a consumer to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment for such purchase.''[26] This advisory opinion therefore affirms the consistency with which the CFPB views and applies these statutory definitions, when presented with similar contexts. Although this advisory opinion does not analyze the application of other laws, the CFPB expects that under other consumer financial laws with similar definitions of credit, the same considerations will apply.[27]

2. *Contracts for deed secured by a dwelling, generally will be ''residential mortgage loans'' under TILA and Regulation Z.*

Several provisions of TILA and Regulation Z apply specifically to credit transactions secured by the consumer's dwelling or by real property.[28] As discussed above, Congress amended TILA through the Dodd-Frank Act with the recognition that, when consumers commit to loans secured by possession of their homes, the stakes are particularly high.[29] It added to TILA specific protections that apply to ''residential mortgage loans.'' Many States define ''mortgages'' separately from their definitions for contracts for deed, with distinct requirements for each. However, in TILA Congress defined ''residential mortgage loan'' to include ''any consumer credit transaction that is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling or on residential real property that includes a dwelling, other than a[n open-end] consumer credit transaction . . . .''[30] Thus, the relevant consideration for determining whether contracts for deed are ''residential mortgage loans'' under TILA is not whether State law specifically regards contracts for deed as ''mortgages,'' but only whether the contract for deed is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling or on residential real property that includes a dwelling. Additional protections under Regulation Z apply to ''any consumer credit transaction secured'' by ''a dwelling,''[31] by ''the consumer's principal dwelling,''[32] or by ''real property.''[33]

Regulation Z defines a ''security interest'' as ''an interest in property that

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[20] This is distinct from lease-based rental arrangements, even those involving an eventual right to purchase (often called ''lease-to-own''), because the lessee's legal interest, privileges, and obligations in the property are more limited in scope, while the lessor retains both ownership obligations and title. Many lease-to-own products also require a separate agreement to effectuate a purchase option, allowing for complete performance of the original contract without necessarily transferring property ownership. In a typical contract for deed, complete performance includes the transfer of full legal ownership. Regardless of how the arrangement is styled, courts have generally looked to the function of the transaction and intent of the parties to determine its nature. *See, e.g., Gilliland* v. *Port Auth. of City of St. Paul,* 270 NW2d 743, 747 (Minn. 1978) (''To break the transaction into two separate parts, a sale and a lease, would be to distort its real nature and to ignore the intent of the parties.''); *In re Montgomery Ward, L.L.C.,* 469 B.R. 522, 529 (Bankr. D. Del. 2012) (''Courts must analyze the 'economic reality' of the agreement at issue to determine its true nature.''). Depending on their terms, such leases, as well as contracts for deed, may be considered ''credit sales'' covered under TILA and Regulation Z. 15 U.S.C. 1602(h); 12 CFR 1026.2(a)(16).

[21] *In re Restivo Auto Body, Inc.,* 772 F.3d 168, 177 (4th Cir. 2014) (''upon contracting to buy land, 'in equity the vendee becomes the owner of the land, the vendor of the purchase money' '') (internal citation omitted); *Hauben* v. *Harmon,* 605 F.2d 920, 925 (5th Cir. 1979) (''Under the doctrine of equitable conversion a purchaser of realty becomes seized of beneficial title to the property upon execution of the contract of sale.''); *In re Blanchard,* 819 F.3d 981, 985 (7th Cir. 2016) (''Under Wisconsin's doctrine of equitable conversion, a land contract buyer obtains equitable title to the property, which includes 'all the incidents of a real ownership.' '') (internal citation omitted); *Redevelopment Agency of City of Stockton* v. *BNSF Ry. Co.,* 643 F.3d 668, 678 (9th Cir. 2011) (''The doctrine of equitable conversion generally provides that when a valid executory land sales contract is entered into, the purchaser becomes the equitable owner of the land.''); *In re Hodes,* 402 F.3d 1005, 1011 (10th Cir. 2005); *SMS Assocs.* v. *Clay,* 868 F. Supp. 337, 340 (D.D.C. 1994), *aff'd,* 70 F.3d 638 (D.C. Cir. 1995). Even where some courts have declined to view a contract for deed as transferring equitable title, they nonetheless acknowledge that the purchaser has received possession in exchange for the promise of payment. *See, e.g., In re Wall Tire Distributors, Inc.,* 110 B.R. 614, 618 (Bankr. M.D. Ga. 1990).

[22] 12 CFR 1026.2(a)(12).

[23] 12 CFR 1026.2(a)(10).

[24] 12 CFR 1026.2(a)(20).

[25] Consent Order, *In re Harbour Portfolio Advisors et al.,* CFPB No. 2020–BCFP–0004 (June 23, 2020), ¶ 4.

[26] 12 U.S.C. 5481(7). A court validated the CFPB's authority to investigate the entity's contracts for deed as possible credit under the CFPA, noting that the transactions may be credit because they ''obligate the purchaser to pay a principal sum plus interest through deferred monthly payments.'' *CFPB* v. *Harbour Portfolio Advisors,* No. 16–014183, 2017 WL 631914, at *3 (E.D. Mich. Feb. 16, 2017). The court further characterized an acceleration clause that ''gives the seller the option to demand the full purchase price once the purchaser misses a payment'' as ''strongly suggest[ing] that Respondents are supplying 'credit' . . . .'' *Id.*

[27] *See, e.g.,* 15 U.S.C. 1691a(d) (defining ''credit'' under the Equal Credit Opportunity Act); 12 CFR pt. 1002 supp. I para. 2(j)–1 (''Regulation B covers a wider range of credit transactions than Regulation Z.'').

[28] The CFPA similarly has provisions specifically addressing loans secured by real estate. *See, e.g.,* 12 U.S.C. 5514(a)(1)(A) (providing supervisory authority over any covered person who originates consumer loans ''secured by real estate''). This advisory opinion does not assess the applicability of such provisions beyond TILA, but the CFPB expects to apply such definitions consistently across Federal consumer financial laws to the extent appropriate.

[29] *See supra,* text accompanying notes 13–15.

[30] 15 U.S.C. 1602(dd)(5).

[31] *E.g.,* 12 CFR 1026.43(a). Regulation Z defines a ''dwelling'' as ''a residential structure that contains one to four units, whether or not that structure is attached to real property.'' 12 CFR 1026.2(a)(19).

[32] *E.g.,* 12 CFR 1026.32(a)(1).

[33] *E.g.,* 12 CFR 1026.19(e). Under Regulation Z, a ''dwelling'' does not need to be attached to real property. 12 CFR 1026.2(a)(19). Thus, there may be instances where, depending on the transaction, a contract for deed is secured by a dwelling, but not real property, or by real property without a dwelling.

secures performance of a consumer credit obligation and that is recognized by State or Federal law.'' [34] While State and Federal law regarding secured transactions and contracts for deed will vary, the CFPB expects that this definition would be satisfied in many or most cases. As a matter of general usage, security is the ''[c]ollateral given or pledged to guarantee the fulfillment of an obligation.'' [35] As described earlier, in a typical contract for deed, the seller retains legal title to the subject property, which generally allows the seller to retake possession of the property should the purchaser default on the payment agreement. In function, this retention of title serves to ensure that the purchaser, who already has exclusive possession of the property, fulfills the payment obligations.[36] The CFPB notes that this structure is functionally equivalent to common definitions of ''mortgage,'' [37] and is aware of State laws that expressly consider such transactions to be mortgages.[38]

The CFPB is additionally aware of many instances nationwide in which a seller's retention of legal title to the property has been characterized as securing payment of the contract for deed, either by State statute [39] or by courts applying State law and equitable principles.[40] While this advisory opinion does not provide any specific interpretation or application of State law, the prevalence of similar language across State law and related jurisprudence informs the CFPB's expectation that contracts for deed will generally trigger Regulation Z's thresholds for mortgage transaction protections based on the security interest in the buyer's home. As noted above, this is the case whether or not the relevant State or Federal law regards a contract for deed generally as a ''mortgage,'' or its equivalent, including for the purpose of forfeiture. Similarly, this advisory opinion's recognition that contracts for deed are often ''residential mortgage loans'' under TILA and Regulation Z does not constitute a determination that they are mortgages under State or other Federal laws.

3. *Creditors selling homes using contracts for deed must comply with applicable requirements under TILA and Regulation Z.*

a. TILA Creditors

Contract for deed sellers have important obligations under TILA and Regulation Z depending on the nature of the contract for deed and whether they are ''creditors.'' [41] For a transaction to be credit covered under TILA, the seller must be a creditor, and whether a seller of a contract for deed is a creditor under TILA turns not only on whether the seller extends credit, but on the characteristics of the credit and frequency with which the seller engages in such transactions. First, the credit extended must be either subject to a finance charge (such as interest or implied interest) or be payable by a written agreement in more than four installments, not including a downpayment.[42] Second, the obligation must be initially payable to the person, either on the face of the note or contract, or by agreement when there is no note or contract, in order for that person to be considered a creditor.[43] These first two prongs will typically be satisfied in a contract-for-deed transaction. Contracts for deed are generally set up to require periodic payments during the term of the contract—often monthly over the span of years—and thus, require repayment of more than four installments.[44] Contracts for deed also generally are established by a written agreement that lists the title holder as the payee.

Third, a creditor is a person that regularly extends credit.[45] For purposes of this requirement, a ''person'' is a natural person or an organization, including a corporation, partnership, proprietorship, association, cooperative, estate, trust, or government unit.[46] It may include, for example, business arrangements where multiple related subsidiaries of a single organization each conduct contract-for-deed sales.[47] Whether a person *regularly* extends credit will depend on the frequency with which the person extends credit, as well as the specific nature of those credit transactions. As described below, Regulation Z may require as many as 25 transactions or as few as one to be deemed a person who regularly extends credit, depending on the type of credit.[48] This will, in turn, determine the seller's legal obligations under TILA and Regulation Z.

b. TILA Obligations With Contracts for Deed

In general, when a person extends consumer credit more than 25 times, or more than 5 times for transactions secured by a dwelling, in the preceding calendar year, that person is a creditor under TILA.[49] Thus, in contract-for-deed sales that are not considered secured by a dwelling in the relevant jurisdiction, a seller that extends credit more than 25 times in the preceding or current calendar year will qualify as a TILA creditor, assuming all other elements of the ''creditor'' definition are met.[50] In such a case, the contract-for-deed sale is closed-end credit, subject to TILA and Regulation Z's general disclosure requirements regarding the key terms of the loan, including the

[34] 12 CFR 1026.2(a)(25).

[35] *Security,* Black's Law Dictionary (11th ed. 2019).

[36] *See* Restatement (Third) of Property (Mortgages) sec. 3.4 (1997) (''A contract for deed is a contract for the purchase and sale of real estate under which the purchaser acquires the immediate right to possession of the real estate and the vendor defer delivery of a deed until a later time to secure all or part of the purchase price. A contract for deed creates a mortgage.'').

[37] *Id. See also Mortgage,* Black's Law Dictionary (11th ed. 2019) (''A conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance according to the stipulated terms.''); Restatement (Third) of Property (Mortgages) sec. 1.1 (1997) (''The function of a mortgage is to employ an interest in real estate as security for the performance of some obligation.'').

[38] *See, e.g.,* Florida (Fla. Stat. Ann. sec. 697.01); Indiana (Ind. Code Ann. sec. 24–4.4–1–301(14)); Oklahoma (Okla. Stat. Ann. tit. 16 sec. 11A).

[39] *See, e.g.,* Maine (33 M.R.S. sec. 481); Maryland (Md. Real Property Code sec. 10–101); Ohio (Ohio Rev. Code Ann. sec. 5313.01).

[40] *See, e.g.,* California (*Petersen* v. *Hartell,* 40 Cal. 3d 102, 112, 707 P.2d 232, 239 (1985)); Indiana (*Vic's Antiques & Uniques, Inc.* v. *J. Elra Holdingz, LLC,* 143 NE3d 300, 305 (Ind. Ct. App. 2020)); Kentucky (*Sebastian* v. *Floyd,* 585 SW2d 381 (Ky. 1979)); Michigan (*Barker* v. *Klingler,* 302 Mich. 282, 288, 4 NW2d 596, 599 (1942)); Minnesota (*Gagne* v. *Hoban,* 280 Minn. 475, 479, 159 NW2d 896, 899 (1968)); Nebraska (*Mackiewicz* v. *J.J. & Assocs.,* 245 Neb. 568, 573, 514 NW2d 613, 618 (1994)); Oregon (*Bedortha* v. *Sunridge Land Co.,* 312 Or. 307, 311, 822 P.2d 694, 696 (1991)); Pennsylvania (*Anderson Contracting Co.* v. *Daugherty,* 274 Pa. Super. 13, 21, 417 A.2d 1227, 1231 (1979)); Washington (*Lanzce G. Douglass, Inc.* v. *Dep't of Revenue,* 25 Wash. App. 2d 893, 908, 525 P.3d 999, 1007 (2023)); Wisconsin *(Larchmont Holdings, LLC* v. *N. Shore Servs.,* LLC, 292 F. Supp. 3d 833, 848–49 (W.D. Wis. 2017)).

[41] 12 CFR 1026.2(a)(17).

[42] 12 CFR 1026.2(a)(17)(i), 1026.4(b).

[43] 12 CFR 1026.2(a)(17)(i).

[44] Further, even if the contract for deed required less than four installments, often the sales price is inflated such that the additional profits earned by the seller meet the requirement for finance charge under Regulation Z.

[45] 12 CFR 1026.2(a)(17).

[46] 12 CFR 1026.2(a)(22).

[47] *See Ward* v. *Shad,* No. 18–CV–01933 (NEB/ECW), 2019 WL 1084219, at *3 (D. Minn. Mar. 7, 2019).

[48] 12 CFR 1026.2(a)(17)(v). The CFPB is aware that some contract-for-deed transactions may involve one-time sellers. Where such transactions are conducted without a broker and/or do not qualify as ''high-cost'' mortgages, such one-time sellers will not be creditors under Regulation Z.

[49] *Id.*

[50] *Id.* (''A person regularly extends consumer credit only if it extended credit . . . more than 25 times . . . in the preceding calendar year. If a person did not meet these numerical standards in the preceding calendar year, the numerical standards shall be applied to the current calendar year.'').

amount financed, any finance charge, and the annual percentage rate.[51]

If the contract for deed is considered to be secured by a dwelling by the applicable law in the relevant jurisdiction but is not a high-cost mortgage loan, the seller will qualify as a creditor if the seller has extended credit secured by a dwelling more than five times in the preceding or current calendar year and all other elements of the ''creditor'' definition are met.[52] In such a case, the seller is subject to TILA and Regulation Z's general disclosure requirements, as well as additional mortgage disclosure requirements.[53] The transaction would generally also qualify as a residential mortgage loan.[54] These transactions are subject to important additional requirements, including the requirement that a creditor make a reasonable, good faith determination of the consumer's ability to repay the loan as well as the prohibition on mandatory arbitration clauses.[55] These transactions may also be subject to rules regarding servicing, origination, and fees under TILA.[56]

If the contract for deed is secured by a dwelling and qualifies as a high-cost mortgage,[57] a seller who extends credit more than once in any 12-month period can qualify as a creditor.[58] A seller who originates one or more such credit extensions through a mortgage broker can also qualify as a creditor.[59]

High-cost mortgage transactions will also trigger HOEPA requirements and protections, including required disclosures.[60] Specific prohibitions also apply to high-cost mortgages, including a prohibition on extending high-cost mortgages without written certification that a consumer has obtained counseling, a prohibition on opening a plan without regarding a consumer's ability to repay, and prohibitions on certain fees, among others.[61]

Regulatory Matters

This advisory opinion is an interpretive rule issued under the CFPB's authority to interpret TILA and Regulation Z, including under section 1022(b)(1) of the Consumer Financial Protection Act of 2010, which authorizes guidance as may be necessary or appropriate to enable the CFPB to administer and carry out the purposes and objectives of Federal consumer financial laws.[62]

By operation of TILA section 130(f), no provision of TILA sections 130, 108(b), 108(c), 108(e), or section 112 imposing any liability applies to any act done or omitted in good faith in conformity with this interpretive rule, notwithstanding that after such act or omission has occurred, the interpretive rule is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.[63]

Pursuant to the Congressional Review Act,[64] the CFPB will submit a report containing this advisory opinion and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to the rule's published effective date. The Office of Information and Regulatory Affairs has designated this interpretive rule as not a ''major rule'' as defined by 5 U.S.C. 804(2).

The CFPB has determined that this advisory opinion does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.[65]

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2024–18620 Filed 8–22–24; 8:45 am]

BILLING CODE 4810–AM–P

[51] What specific protections and requirement apply will depend on the particular loan. *See* 15 U.S.C. 1631, 1632; *see also* 12 CFR 1026.17–.18.

[52] 12 CFR 1026.2(a)(17)(v) (the person must regularly extend credit ''more than 5 times for transactions secured by a dwelling'').

[53] 15 U.S.C. 1631, 1632; 12 CFR 1026.17–.18; *see also* 15 U.S.C. 1638; 12 CFR 1026.19(e), 1026.37, 1026.38. Specific disclosure requirements will depend on whether the dwelling-secured credit is also secured by real property.

[54] 15 U.S.C. 1602(dd)(5).

[55] 12 CFR 1026.43(c); 12 CFR 1026.36(h)(1).

[56] *See generally* 12 CFR 1026.36; 15 U.S.C. 1639a, 1639b, 1639e, 1639c(a)–(h). Some provisions only apply if the loan is secured by the consumers' principal dwelling. *See, e.g.,* 12 CFR 1026.23.

[57] A high-cost mortgage is any consumer credit transaction secured by a principal dwelling and which meets certain conditions as described in 12 CFR 1026.32. 15 U.S.C. 1602(bb), 1639; *see also* 12 CFR 1026.31, 1026.32, 1026.34.

[58] 12 CFR 1026.2(a)(17)(v).

[59] *Id.*

[60] 12 CFR 1026.32, 1026.34.

[61] 12 CFR 1026.34(a)(4) (open-end, high-cost mortgage repayment prohibitions), 1026.34(a)(5) (pre-loan counseling requirements), 1026.34(a)(7)–(8), 1026.34(a)(10) (requirements and prohibitions related to fees).

[62] 12 U.S.C. 5512(b)(1).

[63] 15 U.S.C. 1640(f).

[64] 5 U.S.C. 801 *et seq.*

[65] 44 U.S.C. 3501 through 3521.

SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

[Docket Number SBA–2024–0006]

RIN 3245–AI17

Business Loan Program Temporary Changes; Paycheck Protection Program—Extension of Lender Records Retention Requirements

AGENCY: U.S. Small Business Administration.

ACTION: Interim final rule.

SUMMARY: This interim final rule lengthens the required records retention for lenders that made loans under the Paycheck Protection Program (PPP) to ten years. PPP was established under the Coronavirus Aid, Relief, and Economic Security Act as a temporary emergency guaranteed loan program to provide economic relief to small businesses nationwide adversely impacted by the Coronavirus Disease 2019 (COVID–19), as amended. SBA has issued a number of final rules implementing the PPP Program. This interim final rule harmonizes the PPP lender records retention requirements with subsequent legislation extending the statute of limitations for criminal charges and civil enforcement actions for alleged PPP borrower fraud to ten years after the offense.

DATES:

Effective date: The provisions of this interim final rule are effective August 22, 2024.

Applicability date: This interim final rule applies to all PPP lender loan records. This includes PPP loan applications that were withdrawn, approved, denied or cancelled, and all other PPP lender loan records for PPP loans with an outstanding balance, PPP loans that have been forgiven, and PPP loans that are in repayment or have been paid in full by the borrower as of the effective date of this rule.[1]

Comment date: Comments must be received on or before September 23, 2024.

ADDRESSES: You may submit comments, identified by docket number SBA–2024–0006 through the Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

[1] To the extent that a federally regulated PPP lender destroyed any PPP loan records before the effective date of this rule in accordance with a general internal records retention policy that was acceptable to the PPP lender's federal regulator, SBA will not enforce compliance by that federally regulated PPP lender with respect to the PPP loan records that were destroyed before the effective date of this rule.

Tab 39

Circular 2024-05: Improper Overdraft Opt-In Practices, 89 Fed. Reg. 80075 (Oct. 2, 2024).

CFPB Takes Action to Stop Banks from Harvesting Overdraft Fees Without Consumers' Consent

Banks have charged overdraft fees for ATM and one-time debit card transactions even though they did not have customers' documented consent

SEP 17, 2024

WASHINGTON, D.C. – Today, the Consumer Financial Protection Bureau (CFPB) published guidance (cfpb.gov/compliance/circulars/consumer-financial-protection-circular-2024-05/) to help federal and state consumer protection enforcers stop banks from charging overdraft fees based on phantom opt-in agreements. Phantom opt-ins occur when banks claim they have customers' consent to charge overdraft fees but there is no proof they actually obtained that consent. Under the Electronic Fund Transfer Act, banks cannot charge overdraft fees on ATM and one-time debit card transactions unless consumers have affirmatively opted in.

"The CFPB has found instances where banks have no evidence that they obtained consent for overdraft," said CFPB Director Rohit Chopra. "No Americans should be hit with bank account fees that they never agreed to."

When people withdraw money from an ATM or make a purchase with a debit card, the transaction sometimes can drop their account balance below $0. In such cases, banks can either decline the transaction or let it go through by extending an overdraft loan. If a bank covers the transaction through an overdraft loan, the bank can only charge a fee if the consumer opted into overdraft services.

Consumer protection law enforcers should assume consumers have not opted into overdraft unless the banks can prove otherwise. The CFPB has found that some banks have been unable to provide such evidence before they charged consumers fees for overdraft loans to cover ATM and one-time debit transactions.

The CFPB has observed that in many circumstances, financial institutions have created serious obstacles to consumers taking steps to anticipate and avoid overdraft fees. In fact, for a sizeable group of consumers (cfpb.gov/data-research/research-reports/overdraft-and-nonsufficient-fund-fees-insights-from-the-making-ends-meet-survey-and-consumer-credit-panel/) who overdraft infrequently, they report being surprised by their most recent overdraft. The CFPB took action against **Regions Bank** (cfpb.gov/about-us/newsroom/cfpb-orders-regions-bank-pay-191-million-for-illegal-surprise-overdraft-fees/) for the bank's unintelligible and manipulative processes that resulted in unexpected overdraft fees. The CFPB also has taken enforcement actions when institutions have violated the Electronic Transfer Fund Act's implementing Regulation E or engaged in related deceptive or abusive practices. Most recently, in 2023, the CFPB ordered **Atlantic Union Bank** (cfpb.gov/about-us/newsroom/cfpb-orders-atlantic-union-bank-to-pay-6-2-million-for-illegal-overdraft-fee-harvesting/) to pay $6.2 million for, among other overdraft violations, improperly enrolling customers in overdraft. The CFPB has taken similar actions against **TD Bank** (cfpb.gov/about-us/newsroom/cfpb-announces-settlement-td-bank-illegal-overdraft-practices/) and **TCF National Bank** (cfpb.gov/about-us/newsroom/cfpb-sues-tcf-national-bank-tricking-consumers-costly-overdraft-service/).

Today's circular is the latest step in the CFPB's work to make sure financial institutions' overdraft services follow the law and that people are not charged junk or unlawful fees. Earlier this year, the CFPB proposed a **rule** (cfpb.gov/about-us/newsroom/cfpb-proposes-rule-to-close-bank-overdraft-loophole-that-costs-americans-billions-each-year-in-junk-fees/) to require the nation's largest banks to apply longstanding consumer protections, including interest rate disclosures, to overdraft loans.

After the CFPB began its work to tackle junk fees, many banks began reforming their overdraft fee policies, which have resulted in **$4 billion** (cfpb.gov/data-research/research-reports/data-spotlight-overdraft-nsf-revenue-in-2023-down-more-than-50-versus-pre-pandemic-levels-saving-consumers-over-6-billion-annually/) in annual savings.

Read today's circular (cfpb.gov/compliance/circulars/consumer-financial-protection-circular-2024-05/).

Read more about the CFPB's overdraft and other junk fee work. (cfpb.gov/rules-policy/junk-fees/)

Consumers can submit complaints about financial products or services by visiting the **CFPB's website** (cfpb.gov/complaint/) or by calling **(855) 411-CFPB (2372)**.

Employees who believe their company has violated federal consumer financial protection laws are encouraged to send information about what they know to **whistleblower@cfpb.gov**.

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit ***www.consumerfinance.gov*** (http://www.consumerfinance.gov/).

Topics

- **OVERDRAFT** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=OVERDRAFT)
- **DEBIT CARDS** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=DEBIT-CARDS)
- **FINANCIAL SERVICE PROVIDERS** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=FINANCIAL-SERVICE-PROVIDERS)
- **CHECKING ACCOUNT** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=CHECKING-ACCOUNT)
- **BANKING** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=BANKING)
- **ENFORCEMENT** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=ENFORCEMENT)

PRESS INFORMATION

If you want to republish the article or have questions about the content, please contact the press office.

Go to press resources page (cfpb.gov/about-us/newsroom/press-resources/)

higher education for the purpose of participation in internship programs for graduate and undergraduate students in support of the 1994 Tribal College Program and carry out the related authorities and responsibilities outlined in 7 U.S.C. 2279c.

* * * * *

Subpart F—Delegations of Authority by the Under Secretary for Farm Production and Conservation

■ 5. Amend § 2.41 by adding paragraph (a)(7) to read as follows:

§ 2.41 Chief Operating Officer, Farm Production and Conservation Business Center.

(a) * * *

(7) Establish programs with any bureau of the U.S. Department of the Interior (DOI), or with other agencies within USDA, in support of the Service First initiative for the purpose of promoting customer service and efficiency, including delegating to employees of DOI and other USDA agencies the authorities of the Farm Production and Conservation Business Center necessary to carry out projects on behalf of USDA (43 U.S.C. 1703).

* * * * *

■ 6. Amend § 2.42 by adding paragraph (a)(31) to read as follows:

§ 2.42 Administrator, Farm Service Agency.

(a) * * *

(31) Establish programs with any bureau of the U.S. Department of the Interior (DOI), or with other agencies within USDA, in support of the Service First initiative for the purpose of promoting customer service and efficiency, including delegating to employees of DOI and other USDA agencies the authorities of the Farm Service Agency necessary to carry out projects on behalf of USDA (43 U.S.C. 1703).

* * * * *

■ 7. Amend § 2.43 by adding paragraph (a)(5) to read as follows:

§ 2.43 Chief, Natural Resources and Conservation Service.

(a) * * *

(5) Establish programs with any bureau of the U.S. Department of the Interior (DOI), or with other agencies within USDA, in support of the Service First initiative for the purpose of promoting customer service and efficiency, including delegating to employees of DOI and other USDA agencies the authorities of the Natural Resources and Conservation Service necessary to carry out projects on behalf of USDA (43 U.S.C. 1703).

* * * * *

■ 8. Amend § 2.44 by adding paragraph (a)(10) to read as follows:

§ 2.44 Administrator, Risk Management Agency and Manager, Federal Crop Insurance Corporation.

(a) * * *

(10) Establish programs with any bureau of the U.S. Department of the Interior (DOI), or with other agencies within USDA, in support of the Service First initiative for the purpose of promoting customer service and efficiency, including delegating to employees of DOI and other USDA agencies the authorities of the Risk Management Agency to carry out projects on behalf of USDA (43 U.S.C. 1703).

* * * * *

Subpart J—Delegations of Authority by the Under Secretary for Natural Resources and Environment

■ 9. Amend § 2.60 by revising paragraph (a)(58) to read as follows:

§ 2.60 Chief, Forest Service.

(a) * * *

(58) Enter into reciprocal fire agreements or contracts with domestic entities. Administer reimbursements received for fire suppression (42 U.S.C. 1856–1856e).

* * * * *

Signing Authority

The Secretary of Agriculture, Thomas J. Vilsack, having reviewed and approved this document, is delegating the authority to electronically sign this document to Mary Beth Schultz, Principal Deputy General Counsel, for purposes of publication in the **Federal Register**.

Mary Beth Schultz,

Principal Deputy General Counsel.

[FR Doc. 2024–22571 Filed 10–1–24; 8:45 am]

BILLING CODE 3410–90–P

FEDERAL RESERVE SYSTEM

12 CFR Part 201

[Docket No. R–1839]

RIN 7100 AG–80

Regulation A: Extensions of Credit by Federal Reserve Banks

Correction

In rule document 2024–21908 beginning on page 78221 in the issue of Wednesday, September 25, make the following correction:

On page 78221, the Docket Number should read as set forth above.

[FR Doc. C1–2024–21908 Filed 10–1–24; 8:45 am]

BILLING CODE 0099–10–D

CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Chapter X

Consumer Financial Protection Circular 2024–05: Improper Overdraft Opt-In Practices

AGENCY: Consumer Financial Protection Bureau.

ACTION: Consumer financial protection circular.

SUMMARY: The Consumer Financial Protection Bureau (CFPB) has issued Consumer Financial Protection Circular 2024–05, titled ''Improper Overdraft Opt-In Practices.'' In this circular, the CFPB responds to the question, ''Can a financial institution violate the law if there is no proof that it has obtained consumers' affirmative consent before levying overdraft fees for ATM and one-time debit card transactions?''

DATES: The CFPB released this circular on its website on September 17, 2024.

ADDRESSES: Enforcers, and the broader public, can provide feedback and comments to *Circulars@cfpb.gov.*

FOR FURTHER INFORMATION CONTACT: George Karithanom, Regulatory Implementation & Guidance Program Analyst, Office of Regulations, at 202–435–7700 or at: *https://reginquiries.consumerfinance.gov/.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

Question Presented

Can a financial institution violate the law if there is no proof that it has obtained consumers' affirmative consent before levying overdraft fees for ATM and one-time debit card transactions?

Response

Yes. A bank or credit union can be in violation of the Electronic Fund Transfer Act (EFTA) and Regulation E if there is no proof that it obtained affirmative consent to enrollment in covered overdraft services. The form of the records that demonstrate consumer consent to enrollment may vary according to the channel through which the consumer opts into covered overdraft services.

Regulation E's overdraft provisions establish an opt-in regime, not an opt-out regime, where the default condition is that consumers are not enrolled in covered overdraft services. Financial institutions are prohibited from charging fees for such services until consumers affirmatively consent to enrollment. Violations of 12 CFR 1005.17(b)(1) can be proven in part by showing evidence that a consumer was charged an overdraft fee on a covered transaction where the available evidence does not adequately validate that the consumer opted in.[1]

Regulatory Background

Regulation E implements the EFTA and governs the assessment of certain overdraft fees. Specifically, before a financial institution may charge a consumer a fee in connection with an ATM or one-time debit transaction, Regulation E requires the financial institution to provide consumers with a ''reasonable opportunity for the consumer to affirmatively consent, or opt in'' to covered overdraft services, and to obtain the consumer's ''affirmative consent, or opt in'' to such services.[2] Institutions are also required to provide consumers with a written or electronic notice describing the institution's overdraft services prior to opt in, and to provide consumers with confirmation of the consumer's consent to enrollment in writing or electronically with a notice informing the consumer of the right to revoke such consent.[3] These rules do not apply to overdraft fees charged on written checks, recurring debit transactions, or ACH transactions.

Analysis

As noted above, Regulation E sets forth an opt-in, rather than opt-out, process before financial institutions are permitted to assess fees for covered overdraft services. The opt-in provisions provide that, absent affirmative enrollment by consumers, consumers' default status is to not be enrolled in covered overdraft services. Regulation E's opt-in provisions were established after the Federal Reserve Board found that consumers who were automatically enrolled in overdraft services may prefer to ''avoid fees for a service they did not request.''[4] Therefore, consistent with this opt-in design, when determining compliance with Regulation E's opt-in provisions, regulators and enforcers should inspect the financial institutions' records to determine whether there is evidence of affirmative consent to enrollment in covered overdraft services.

In the CFPB's supervisory work, examinations have found that some institutions have been unable to provide evidence that consumers had opted into overdraft coverage before they were charged fees for ATM and one-time debit transactions. While some institutions maintained policies and procedures relating to Regulation E's overdraft opt-in requirements, supervisory examinations found that the institutions were unable to show that these policies and procedures were actually followed with respect to individual consumers. In response to examination findings, institutions began maintaining records to prove the consumer's affirmative consent to enrollment in covered overdraft services.

In supervisory and enforcement work, the CFPB has also identified numerous other violations of law relating to Regulation E's overdraft opt-in requirements over the years. These violations have included, for example: the failure of institutions to obtain consumers' affirmative consent to enrollment in covered overdraft services,[5] and obtaining consumers' opt-in to covered overdraft services through deceptive and abusive acts or practices.[6] The prevalence of violations related to overdraft opt in underscores the need for effective supervision and enforcement of Regulation E's overdraft opt-in provisions.

Form of Records Evidencing Opt-In

The form of the records that demonstrate consumer consent to enrollment may vary according to the channel through which the consumer opts into covered overdraft services. For example:

- For consumers who opt into covered overdraft services in person or by postal mail, a copy of a form signed or initialed by the consumer indicating the consumer's affirmative consent to opting into covered overdraft services would constitute evidence of consumer consent to enrollment.
- For consumers who opt into covered overdraft services over the phone, a recording of the phone call in which the consumer elected to opt into covered overdraft services would constitute evidence of consumer consent to enrollment.
- For consumers who opt into covered overdraft services online or through a mobile app, a securely stored and unalterable ''electronic signature'' as defined in the E-Sign Act (15 U.S.C. 7006(5)) conclusively demonstrating the specific consumer's action to affirmatively opt in and the date that the consumer opted in would constitute evidence of consumer consent to enrollment.

About Consumer Financial Protection Circulars

Consumer Financial Protection Circulars are issued to all parties with authority to enforce Federal consumer financial law. The CFPB is the principal Federal regulator responsible for administering Federal consumer financial law, *see* 12 U.S.C. 5511, including the Consumer Financial Protection Act's prohibition on unfair, deceptive, and abusive acts or practices, 12 U.S.C. 5536(a)(1)(B), and 18 other ''enumerated consumer laws,'' 12 U.S.C. 5481(12). However, these laws are also enforced by State attorneys general and State regulators, 12 U.S.C. 5552, and prudential regulators including the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the National Credit Union Administration. *See, e.g.,* 12 U.S.C. 5516(d), 5581(c)(2) (exclusive enforcement authority for banks and credit unions with $10 billion or less in assets). Some Federal consumer financial laws are also enforceable by other Federal agencies, including the Department of Justice and the Federal Trade Commission, the Farm Credit Administration, the Department of Transportation, and the Department of Agriculture. In addition, some of these laws provide for private enforcement.

Consumer Financial Protection Circulars are intended to promote consistency in approach across the

[1] Depending on the circumstances, a financial institution's overdraft practices may also implicate the CFPA's prohibition on unfair, deceptive, or abusive acts or practices. 12 U.S.C. 5531, 5536. *See, e.g.,* Consumer Financial Protection Circular 2022–06, Unanticipated Overdraft Fee Assessment Practices (Oct. 26, 2022).

[2] 12 CFR 1005.17(b)(1)(ii) & (iii).

[3] 12 CFR 1005.17(b)(1)(i) & (iv). 12 CFR 1005.13(b)(1) requires a person to retain evidence of compliance with the requirements of EFTA and Regulation E for a period of not less than two years from the date disclosures are required to be made or action is required to be taken. This is an independent legal obligation, which does not change the fact that the absence of records proving that an opt-in occurred is suggestive that a consumer did not opt in.

[4] Electronic Fund Transfers, 74 FR 59033, 59038 (Nov. 17, 2009) (amending 12 CFR part 205).

[5] *See, e.g.,* CFPB Consent Order, *In re Atlantic Union Bank,* No. 2023–CFPB–0017 (Dec. 7, 2023); CFPB Consent Order, *In re Regions Bank,* No. 2015–CFPB–0009 (Apr. 28, 2015); Supervisory Highlights, Summer 2015 Edition, at 23, *available at https://files.consumerfinance.gov/f/201506_cfpb_supervisory-highlights.pdf.*

[6] *See, e.g.,* CFPB Consent Order, *In re TD Bank, N.A.,* No. 2020–BCFP–0007 (Aug. 20, 2020); *CFPB* v. *TCF National Bank,* Stipulated Final Judgment and Order, No. 17–cv–00166 (July 20, 2018).

various enforcement agencies and parties, pursuant to the CFPB's statutory objective to ensure Federal consumer financial law is enforced consistently. 12 U.S.C. 5511(b)(4).

Consumer Financial Protection Circulars are also intended to provide transparency to partner agencies regarding the CFPB's intended approach when cooperating in enforcement actions. *See, e.g.,* 12 U.S.C. 5552(b) (consultation with CFPB by State attorneys general and regulators); 12 U.S.C. 5562(a) (joint investigatory work between CFPB and other agencies).

Consumer Financial Protection Circulars are general statements of policy under the Administrative Procedure Act. 5 U.S.C. 553(b). They provide background information about applicable law, articulate considerations relevant to the Bureau's exercise of its authorities, and, in the interest of maintaining consistency, advise other parties with authority to enforce Federal consumer financial law. They do not restrict the Bureau's exercise of its authorities, impose any legal requirements on external parties, or create or confer any rights on external parties that could be enforceable in any administrative or civil proceeding. The CFPB Director is instructing CFPB staff as described herein, and the CFPB will then make final decisions on individual matters based on an assessment of the factual record, applicable law, and factors relevant to prosecutorial discretion.

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2024–22551 Filed 10–1–24; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2024–2317; Project Identifier AD–2024–00468–T; Amendment 39–22856; AD 2024–19–14]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain The Boeing Company Model 777–200, 777–200LR, 777–300ER, and 777F series airplanes. This AD was prompted by a report of potential latent failures of the lightning protection features for the engine fuel feed system. This AD requires repetitive inspections and bond resistance measurement of the bonding jumpers on the first fuel feed tube installed immediately forward of the wing front spar at each of the two engine locations, and applicable corrective actions. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective October 17, 2024.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of October 17, 2024.

The FAA must receive comments on this AD by November 18, 2024.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

AD Docket: You may examine the AD docket at *regulations.gov* by searching for and locating Docket No. FAA–2024–2317; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For Boeing material identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; website *myboeingfleet.com.*
- You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available at *regulations.gov* under Docket No. FAA–2024–2317.

FOR FURTHER INFORMATION CONTACT: Samuel Dorsey, Aviation Safety Engineer, FAA, 2200 South 216th St, Des Moines, WA 98198; phone: 206–231–3415; email: *Samuel.J.Dorsey@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written data, views, or arguments about this final rule. Send your comments to an address listed under the **ADDRESSES** section. Include Docket No. FAA–2024–2317 and Project Identifier AD–2024–00468–T at the beginning of your comments. The most helpful comments reference a specific portion of the final rule, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this final rule because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *regulations.gov*, including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this final rule.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this AD contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this AD, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this AD. Submissions containing CBI should be sent to Samuel Dorsey, Aviation Safety Engineer, FAA, 2200 South 216th St, Des Moines, WA 98198; phone: 206–231–3415; email: *Samuel.J.Dorsey@faa.gov.* Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

In 2023, the FAA received reports of latent failures of the lightning protection features for the engine fuel feed system on Boeing Model 747 airplanes. Subsequent analysis has shown that

Tab 40

Debt Collection Practices (Regulation F); Deceptive and Unfair Collection of Medical Debt, 89 Fed. Reg. 80715 (Oct. 4, 2024).

CFPB Takes Aim at Double Billing and Inflated Charges in Medical Debt Collection

English

Español (cfpb.gov/about-us/newsroom/cfpb-actua-contra-problemas-en-cobro-de-deudas-medicas/)

Debt collectors may not collect on inaccurate, unsubstantiated, or invalid medical bills

OCT 01, 2024

WASHINGTON, D.C. – Today, the Consumer Financial Protection Bureau (CFPB) issued guidance (cfpb.gov/rules-policy/final-rules/fair-debt-collection-medical-debt-2024/) to prevent families from being targeted by illegal medical debt collection tactics. The advisory opinion clarifies that debt collectors, which may include third-party "revenue cycle management" companies, are violating federal law when they collect on inaccurate or legally invalid medical debts. These illegal practices include double-dipping to get paid for services already covered by insurance, hounding consumers to pay fake or exaggerated charges, misrepresenting consumers' rights to contest bills, and collecting on debts without documentation that the amount is actually owed. The CFPB's action aims to protect consumers from careless or predatory practices that can lead to inflated healthcare costs.

"Medical billing is often riddled with errors, including inflated or duplicative charges, fees for services the patient never received, or charges already paid," said CFPB Director Rohit Chopra. "The CFPB is taking action to ensure that Americans are not unfairly chased by debt collectors over unsubstantiated or invalid medical bills."

About 100 million Americans owe over $220 billion in medical debt, and medical bills are often confusing and filled with errors. The CFPB has received complaints from people receiving collections notices for debts they do not owe, that were already paid by the consumer or insurance, or that should have been covered by insurance, government programs, or hospital financial assistance. Hospitals and other healthcare providers in the

United States are increasingly outsourcing medical billing and collection activities to third parties, such as "revenue cycle management" firms, who may have legal obligations under the Fair Debt Collection Practices Act.

The advisory opinion details how these companies violate federal law when they collect or attempt to collect on medical bills that are inaccurate, unsubstantiated, or invalid under the law. Specifically, the guidance details illegal practices including:

- **Double billing:** Companies cannot attempt to collect on medical bills that have already been paid by the consumer, insurance, or a government program such as Medicare or Medicaid. This practice can coerce consumers into paying twice for the same service, causing significant financial harm.
- **Exceeding legal limits:** Companies must not attempt to collect amounts that surpass federal or state caps, such as those set by the federal No Surprises Act or state laws on "reasonable" rates. These violations can saddle consumers with unjustifiably high medical debts, burdening their finances and deterring them from seeking future care.
- **Falsified or fake charges:** Debt collectors must not collect on bills that include "upcoded" or exaggerated services, or charges for services the consumer did not receive. This deceptive practice can drastically inflate consumers' medical debts, potentially leading to long-term financial distress or even bankruptcy.
- **Collecting unsubstantiated medical bills:** Debt collectors must not attempt to collect medical debts unless they are substantiated, which may include having documentation of payments or financial assistance eligibility. Collecting unsubstantiated bills can result in consumers being harassed for debts they do not owe or for which they qualify for financial assistance.
- **Misrepresenting consumers' rights to contest bills:** Companies must not misrepresent to consumers that the amount being collected is fully settled, when the payment obligation may be uncertain. Misrepresenting the status of the amount may pressure consumers into paying disputed or negotiable debts.

The CFPB also published a consumer advisory (cfpb.gov/about-us/newsroom/consumer-advisory-pause-and-review-your-rights-when-you-hear-from-a-medical-debt-collector/) with practical information about the steps consumers can take if they have received collection notices for medical bills.

The CFPB has taken a range of actions (cfpb.gov/rules-policy/medical-debt/) to address unfair and coercive medical debt collection and practices, including proposing a rule to ban medical bills (cfpb.gov/about-us/newsroom/cfpb-proposes-to-ban-medical-bills-from-credit-reports/) from people's credit reports. The CFPB and other enforcement agencies will take action against debt collectors that violate the rights of patients.

Read today's advisory opinion (cfpb.gov/rules-policy/final-rules/fair-debt-collection-medical-debt-2024/).

Consumers can submit complaints about financial products or services by visiting the CFPB's website (cfpb.gov/complaint/) or by calling (855) 411-CFPB (2372).

Employees who they believe their company has violated federal consumer financial protection laws are encouraged to send information about what they know to whistleblower@cfpb.gov.

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit www.consumerfinance.gov (http://www.consumerfinance.gov/).

Topics

- **DEBT COLLECTION** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=DEBT-COLLECTION)
- **MEDICAL DEBT** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=MEDICAL-DEBT)

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NUCLEAR REGULATORY COMMISSION

10 CFR Part 2

[NRC–2023–0210]

RIN 3150–AL09

Non-Substantive Amendments to Adjudicatory Proceeding Requirements

AGENCY: Nuclear Regulatory Commission.

ACTION: Direct final rule; confirmation of effective date.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is confirming the effective date of November 5, 2024, for the direct final rule that was published in the **Federal Register** on August 22, 2024. This direct final rule amended the agency's rules of practice and procedure to improve access to documents and make e-filing rules technology neutral, to delete an obsolete regulation, to clarify the applicability of subpart L and subpart N procedures, to enhance internal consistency for page limit requirements, to enhance consistency with the Federal Rules of Evidence for ''true copies,'' and to better reflect current Atomic Safety and Licensing Board Panel practice regarding admission of evidence.

DATES: *Effective date:* The effective date of November 5, 2024, for the direct final rule published in the **Federal Register** on August 22, 2024 (89 FR 67830), is confirmed.

ADDRESSES: Please refer to Docket ID NRC–2023–0210 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2023–0210. Address questions about NRC dockets to Helen Chang; telephone: 301–415–3228; email: *Helen.Chang@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, at 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The comment can be viewed in ADAMS under Accession No. ML24256A206.
- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time, Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Ethan Licon, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–1016, email: *Ethan.Licon@nrc.gov.*

SUPPLEMENTARY INFORMATION: On August 22, 2024 (89 FR 67830), the NRC published a direct final rule amending its regulations in part 2 of title 10 of the *Code of Federal Regulations* to revise the agency's rules of practice and procedure to improve access to documents and make e-filing rules technology neutral, to delete an obsolete regulation, to clarify the applicability of Subpart L and Subpart N procedures, to enhance internal consistency for page limit requirements, to enhance consistency with the Federal Rules of Evidence for ''true copies,'' and to better reflect current Atomic Safety and Licensing Board Panel practice regarding admission of evidence. In the direct final rule, the NRC stated that if no significant adverse comments were received, the direct final rule would become effective on November 5, 2024. The NRC received one anonymous comment, which can be viewed at ADAMS Accession No. ML24256A206; the comment was not a significant adverse comment on the direct final rule. Therefore, this direct final rule will become effective as scheduled.

Dated: October 1, 2024.

For the Nuclear Regulatory Commission.

Cindy Bladey,

Chief, Regulatory Analysis and Rulemaking Support Branch, Division of Rulemaking, Environmental, and Financial Support, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2024–23015 Filed 10–3–24; 8:45 am]

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CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Part 1006

Debt Collection Practices (Regulation F); Deceptive and Unfair Collection of Medical Debt

AGENCY: Consumer Financial Protection Bureau.

ACTION: Advisory opinion.

SUMMARY: The Consumer Financial Protection Bureau (CFPB) is issuing this advisory opinion to remind debt collectors of their obligation to comply with the Fair Debt Collection Practices Act (FDCPA) and Regulation F's prohibitions on false, deceptive, or misleading representations or means in connection with the collection of any medical debt and unfair or unconscionable means to collect or attempt to collect any medical debts.

DATES: This advisory opinion is applicable as of December 3, 2024.

FOR FURTHER INFORMATION CONTACT: George Karithanom, Regulatory Implementation & Guidance Program Analyst, Office of Regulations, at 202–435–7700 or at: *https://reginquiries.consumerfinance.gov/.* If you require this a document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

The CFPB is issuing this advisory opinion through the procedures for its Advisory Opinions Policy.[1] Refer to those procedures for more information.

This advisory opinion explains that debt collectors are strictly liable under the FDCPA and Regulation F (12 CFR part 1006) for engaging in the following

[1] 85 FR 77987 (Dec. 3, 2020).

unlawful practices when collecting medical bills:

○ *Collecting an amount not owed because it was already paid.* This includes instances when a bill was already fully or partially paid by insurance or a Government payor.

○ *Collecting amounts not owed due to Federal or State law.* This includes where law prohibits obligating a person on certain debts. For example, a State workers' compensation scheme may make employers or insurers responsible for qualifying medical expenses, rather than the patients. In addition, the Nursing Home Reform Act prohibits nursing homes from requiring third parties to pay for a patient's expenses in certain circumstances.

○ *Collecting amounts above what can be charged under Federal or State law.* This includes, for example, collecting amounts that exceed limits in the No Surprises Act. It also includes collection of amounts that exceed a State's common law remedies for claims when there is no express contract.

○ *Collecting amounts for services not received.* This includes ''upcoding'' where a patient is charged for medical services that are more costly, more extensive, or more complex than those actually rendered.

○ *Misrepresenting the nature of legal obligations.* This includes collecting on uncertain payment obligations that are presented to consumers as amounts that are certain, fully settled, or determined.

○ *Collecting unsubstantiated medical bills.* Debt collectors must have a reasonable basis for asserting that the debts they collect are valid and the amounts correct. Debt collectors may be able to satisfy this requirement by obtaining appropriate information to substantiate those assertions, consistent with patients' privacy. This information could include payment records (including from insurance); records of a hospital's compliance with any applicable financial assistance policy; copies of executed contracts or, in the absence of express contracts, documentation that the creditor can make a prima facie claim for an alleged amount under State law (*e.g.,* ''reasonable'' or ''market rates'').

This advisory opinion also interprets the meaning of ''in default'' for purposes of FDCPA section 803(6)(F)(iii) in the medical debt context to be determined by the terms of any agreement between the consumer and the medical provider under applicable law governing the agreement.

II. Background

Medical debt is a major burden for many Americans. Recent estimates place total medical debt owed by people in the United States at $220 billion.[2] Medical debt is known to disproportionately impact young and low-income adults, Black and Hispanic people, veterans, older adults, and people in the Southern United States.[3]

Medical debt is unique because consumers rarely plan to take on medical debt or choose among providers based on price. Most medical debt arises from acute or emergency care.[4] In many cases, patients lack the ability to substantively comparison-shop between medical service providers due to emergency need, restrictive insurance networks, price opacity, or limited provider availability.[5] This leaves many patients subject to the pricing and policies of the medical service providers available to them.

Healthcare providers send medical bills to consumers to obtain compensation for care rendered to patients. In some cases, providers and patients enter into express contractual relationships, which may define patients' payment obligations or providers' pricing for the care. Yet contracts between providers and patients may still be vague, as some do not define specific prices for the care provided.[6] In other cases, such as in emergency settings or where independent contractors or provider groups are involved (*e.g.,* lab work or anesthesiology), consumers may not have any contractual relationship with a medical provider that provides care and then sends a bill.[7]

Consumers consistently report being confused about medical billing practices.[8] One reason for this is the variation in how medical providers bill their patients. In most cases, medical providers charge different rates for the same services to different payors, for example charging patients far more than what Medicare would pay for a given procedure if the patient is not covered by Medicare.[9] This, in part, stems from the fact that the pricing of medical services is heavily negotiated between providers and certain institutional payors such as insurance companies, and set by Government programs like Medicare and Medicaid. As a result, healthcare providers are incentivized to initially set high list prices as starting offers in negotiations with insurers.[10] As a result, uninsured and out-of-network patients are often charged much higher prices than those ultimately agreed to with insurers for patients in their networks.[11] Even within network, prices sometimes vary by facility or department.[12] These rates often vastly exceed the cost of providing care.[13] Research has also shown that healthcare markups are higher at hospitals with

[2] Shameek Rakshmit et al., *The Burden of Medical Debt in the United States*, KFF (Feb. 12, 2024), *https://www.kff.org/health-costs/issue-brief/the-burden-of-medical-debt-in-the-united-states/#:~:text=This%20analysis%20of%20government%20data,debt%20of%20more%20than%20%2410%2C000.*

[3] CFPB, *Medical Debt Burden in the United States* at 2 (Mar. 1, 2022), *https://www.consumerfinance.gov/data-research/research-reports/medical-debt-burden-in-the-united-states/.*

[4] *See* Lunna Lopes et al., *Health Care Debt in the U.S.: The Broad Consequences of Medical and Dental Bills,* KFF (June 16, 2022), *https://www.kff.org/report-section/kff-health-care-debt-survey-main-findings/* (finding that 50 percent of the people in the United States who have medical debt have it because of emergency care and 72 percent have it because of acute care).

[5] CFPB, *Medical Debt Burden in the United States,* at 3 (Mar. 1, 2022), *https://www.consumerfinance.gov/data-research/research-reports/medical-debt-burden-in-the-united-states/.*

[6] George A. Nation III, *Contracting for Healthcare: Price Terms in Hospital Admission Agreements,* at 106, 124 Dick. L. Rev. 91 (2019) (describing how it is ''very common'' for admissions agreements to not include exact prices).

[7] *Id.* at 92 (''self-pay patients, who enter the hospital through the emergency department, simply lack capacity to contract due to the rushed, stressful and tension-laden emergency circumstances''). As described below, the issue of whether this constitutes an implied contract is a matter of State law.

[8] *See* CFPB, *Medical Debt Burden in the United States,* at 3 (Mar. 1, 2022), *https://www.consumerfinance.gov/data-research/research-reports/medical-debt-burden-in-the-united-states/* (''medical billing and collections practices can be confusing and difficult to navigate'').

[9] *See* Eric Lopez et al., *How Much More Than Medicare Do Private Insurers Pay? A Review of the Literature,* KFF (Apr. 15, 2020), *https://www.kff.org/medicare/issue-brief/how-much-more-than-medicare-do-private-insurers-pay-a-review-of-the-literature/;* Frank Griffin, *Fighting Overcharged Bills from Predatory Hospitals,* 51 ARIZ. ST. L.J. 1003 (2019).

[10] Hospitals generally have no limit on their ''chargemaster'' rate, the rate they initially charge most private payors, and chargemaster rates are typically significantly higher than the actual cost of services rendered. *See* National Nurses United, *Fleecing Patients: Hospitals Charge Patients More Than Four Times the Cost of Care*'' (Nov. 2020), *https://www.nationalnursesunited.org/sites/default/files/nnu/graphics/documents/1120_CostChargeRatios_Report_FINAL_PP.pdf.*

[11] *See* Jennifer Tolbert et al., *Key Facts about the Uninsured Population,* KFF (Dec. 18, 2023), *https://www.kff.org/uninsured/issue-brief/key-facts-about-the-uninsured-population/.*

[12] *See* Matthew Panhans et al., *Prices for Medical Services Vary Within Hospitals, but Vary More Across Them,* Medical Care Research and Review 78(2), 157 (June 19, 2019); Xu, Tim, Angela Park and Ge Bai, *Variation in Emergency Department vs Internal Medicine Excess Charges in the United States,*'' JAMA Internal Medicine (2017), *https://pubmed.ncbi.nlm.nih.gov/28558093/.*

[13] *See* Ge Bai and Gerard F. Anderson, ''*Extreme Markup: The Fifty US Hospitals With The Highest Charge-To-Cost Ratios,*'' Health Affairs (June 2015), *https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2014.1414.*

Tab 40

more Black and Hispanic patients and at investor-owned, for-profit hospitals.[14]

Further, healthcare providers sometimes charge patients for ''upcoded'' services, or services more expensive than what the consumer actually received.[15] A 2024 study found that, from 2010–2019, the total of upcoding expenses for Medicare Parts A, B, and C was $656 million, $2.39 billion, and $10–15 billion, respectively.[16] Upcoding is relatively widespread and has been estimated to account for 5–10 percent of total healthcare expenditures in the United States.[17]

After an individual receives a medical service, they and their insurer are billed, if the individual is insured. Some healthcare providers also market medical payment products or other external financing options to their patients.[18] In some cases, providers are obligated by State or Federal laws to perform certain affirmative functions involving the medical bill or refrain from specific collection actions.[19] After any insurance payments or payment via a medical payment product are received, unpaid amounts, if any, are collected by phone calls, letters, emails, and offers of payment plans or settlements.[20] Hospitals and other healthcare providers in the United States are increasingly outsourcing medical billing and collection activities to third parties, such as ''Revenue Cycle Management'' firms, which are often funded by private equity.[21] One estimate projects the domestic market for Revenue Cycle Management companies to grow by 10.2 percent annually until 2030.[22] Unpaid medical bills may also be assigned to more traditional debt collectors, including those that specialize in medical debt, placed with an attorney for litigation, or, more rarely, sold to a debt buyer.

The CFPB has observed and reported on many issues with how debt collectors collect medical debt in the United States. For example, the CFPB has brought enforcement actions against debt collectors for collecting on disputed medical debts without adequate substantiation.[23] The CFPB has also previously described reports from consumers who have received collections notices for medical debts they should or do not owe. Specifically, consumers have reported receiving collections notices for debts that have or should have been covered by insurance, government payors, hospital financial assistance programs, or that the patient has otherwise paid.[24] Consumers also have reported receiving collections notices for debts they believe they do not owe under State or Federal law.

Further, many debt collectors do not have timely access to healthcare providers' billing and payment information, increasing the likelihood that the debt collector collects on an amount that is not owed, such as a bill that has already been paid.[26] Many consumers have reported difficulties receiving verification of medical debts for which they have received collections notices.[27] In some cases, debt collectors either may not have or refuse to provide to a consumer upon request proof of insurance payments, documentation confirming that the amount billed complies with State law and other affirmative collection requirements, such as hospital financial assistance, or other documents that would demonstrate the validity of the debt and the accuracy of the demanded amount.

The FDCPA's protections are enforced by the CFPB, by other Federal regulators, by individual consumers, and, under certain circumstances, by States.[28] And the CFPB is responsible for issuing rules regarding the FDCPA.[29] To the extent a person qualifies as a ''debt collector'' under the FDCPA and its implementing Regulation F, that person is subject to the FDCPA and

[14] *See* CFPB, *Medical Debt Burden in the United States,* at 11 (Mar. 1, 2022), *https://www.consumerfinance.gov/data-research/research-reports/medical-debt-burden-in-the-united-states/* (referencing Faiz Gani, et al., *Hospital markup and operation outcomes in the United States, Surgery* (July 2016), *https://www.sciencedirect.com/science/article/abs/pii/S0039606016300022?via%3Dihub;* Tim Xu, Angela Park, and Ge Bai, *Variation in Emergency Department vs Internal Medicine Excess Charges in the United States, Jama Internal Medicine* (2017), *https://pubmed.ncbi.nlm.nih.gov/28558093/).*

[15] Medical care providers often calculate and itemize charges for care using a standardized set of codes. These codes indicate the various aspects of care a patient received along with the type and scope of that care. Typically, more serious, more urgent, or more involved forms of care will incur higher charges. If a medical provider designates an aspect of a patient's care with a code that denotes a higher or more involved level of care than was actually received, the provider is said to be ''upcoding.''

[16] Keith Joiner, Jianjing Lin, and Juan Pantano, *Upcoding in medicare: where does it matter most,* Health Economics Review 14(1) (2024), *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10759668/.*

[17] William Hsiao, *Fraud and Abuse in Healthcare Claims,* California HHS (Jan. 2022), *https://www.chhs.ca.gov/wp-content/uploads/2022/01/Commissioner-William-Hsiao-Comments-on-Fraud-and-Abuse-in-Healthcare-Claims.pdf.*

[18] Consumers are increasingly using medical credit cards and other financing options to pay for medical care, and the CFPB has done significant work studying and addressing this issue. *See* CFPB, *Medical Credit Cards and Financing Plans*'' (May 4, 2023), *https://www.consumerfinance.gov/data-research/research-reports/medical-credit-cards-and-financing-plans/; see also* Lorelei Salas, *Ensuring consumers aren't pushed into medical payment products*'' (June 18, 2024), *https://www.consumerfinance.gov/about-us/blog/ensuring-consumers-arent-pushed-into-medical-payment-products/;* CFPB, *Request for Information on Medical Payment Products,*'' 88 FR 44281 (July 12, 2023).

[19] Certain Federal laws, such as the No Surprises Act and the Nursing Home Reform Act, limit collection activities for certain kinds of medical debt. Non-profit hospitals may lose their non-profit tax status if they fail to evaluate patients for eligibility for financial assistance before the hospital takes certain types of collection actions. *See* 26 U.S.C. 501(r)(6). Some State laws similarly limit medical debt collections activities. For example, states have enacted additional requirements that broaden the applicability of hospital financial assistance, covering additional services for those patients deemed eligible. *See* Washington State Charity Care Law, RCW 70.170.060 (2024) (requiring non-profit hospitals to provide charity care for patients and their guarantors with incomes less than 300 percent of the Federal poverty guidelines). Medicare and Medicaid requirements also vary by State and may limit medical debt collections activities.

[20] *See* CFPB, *Medical Debt Burden in the United States,* at 12 (Mar. 1, 2022), *https://www.consumerfinance.gov/data-research/research-reports/medical-debt-burden-in-the-united-states/.*

[21] *See* Jacqueline LaPointe, *What's Behind Private Equity's Interest in RCM Vendors,* TechTarget (Mar. 5, 2024), *https://www.techtarget.com/revcyclemanagement/answer/Whats-Behind-Private-Equitys-Interest-in-RCM-Vendors.*

[22] *See* Grand View Research, *U.S. Revenue Cycle Management Market Size, Share, and Trends Analysis Report, https://www.grandviewresearch.com/industry-analysis/us-revenue-cycle-management-rcm-market.*

[23] *See* Consent Order, *Commonwealth Fin. Sys., Inc.,* CFPB No. 2023–CFPB–0018 (Dec. 15, 2023); Consent Order, *Phoenix Fin. Servs., LLC,* CFPB No. 2023–CFPB–0004 (June 8, 2023).

[24] *See* CFPB, *Fair Debt Collection Practices Act CFPB Annual Report 2023* (Nov. 16, 2023); *https://www.consumerfinance.gov/data-research/research-reports/fair-debt-collection-practices-act-cfpb-annual-report-2023/.*

[25] *See* CFPB, *Fair Debt Collection Practices Act CFPB Annual Report 2023* (Nov. 16, 2023), *https://www.consumerfinance.gov/data-research/research-reports/fair-debt-collection-practices-act-cfpb-annual-report-2023/;* CFPB, *Nursing Home Debt Collection* (Sept. 9, 2022), *https://www.consumerfinance.gov/data-research/research-reports/issue-spotlight-nursing-home-debt-collection/; see also, e.g.,* Complaint for Civil Penalties, Injunctive and Other Relief, *Washington* v. *Providence Health & Services,* No. 22–2–01754–6 SEA (King Cnty. Sup. Ct. Feb. 24, 2024), ¶¶ 70–77 (alleging that hospital system sent the accounts of patients it knew were eligible for financial assistance under state law to debt collectors).

[26] John McNamara, *Debt collectors re-evaluate medical debt furnishing in light of data integrity issues* (Feb. 14, 2023), *https://www.consumerfinance.gov/about-us/blog/debt-collectors-re-evaluate-medical-debt-furnishing-in-light-of-data-integrity-issues/.*

[27] *See* CFPB, *Medical Debt Burden in the United States,* at 4 (Mar. 1, 2022), *https://www.consumerfinance.gov/data-research/research-reports/medical-debt-burden-in-the-united-states/.*

[28] 15 U.S.C. 1692l, 1692k; *see* 87 FR 31940, 31941 (May 26, 2022) (explaining state authority to address violations of the federal consumer financial laws committed by ''covered persons'' and ''service providers'' under the Consumer Financial Protection Act).

[29] 12 U.S.C. 5481(12)(F), (H), 5512(b), 5514(c); 15 U.S.C. 1692l(d).

Regulation F.[30] The FDCPA and Regulation F prohibit the use of ''any false, deceptive, or misleading representation or means in connection with the collection of any debt,'' [31] including, for example, any false representation of ''the character, amount, or legal status of any debt.'' [32] The FDCPA and Regulation F also prohibit the use of ''unfair or unconscionable means to collect or attempt to collect any debt,'' [33] including, for example, the ''collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.'' [34] The CFPB reminds debt collectors that these FDCPA prohibitions interact with other Federal and State laws in a variety of ways that could create liability for debt collectors operating in the medical debt market.

The CFPB also reminds debt collectors that sections 1692e(2)(A) and 1692f(1) impose strict liability. First, these two provisions include no scienter requirement, in contrast to several others that do.[35] Second, the statute differentiates between intentional and unintentional violations.[36] As many courts have held,[37] imposing strict liability for violations of these provisions is therefore the best reading of the plain language, consistent with the statute's overall structure, and consonant with Congress' intent.[38]

III. Collection of Debts Invalid Under Law

A. Collection of Amounts Not Owed Because Already Paid

Section 808(1) of the FDCPA prohibits, in relevant part, the collection of any amount ''unless such amount is expressly authorized by the agreement creating the debt or permitted by law.'' [39] And section 807(2)(A) prohibits any false representation of ''the character, amount, or legal status of any debt.'' [40]

Under these provisions, debt collectors must only collect or attempt to collect the amount that a consumer, in fact, owes at the time of a debt collection action after all appropriate deductions for partial payments by the consumer or third parties are made. The amounts due on a medical bill can often be adjusted multiple times, in light of payments made by consumers themselves or by third parties, such as insurers. Providers may also agree to accept a reduced amount in full satisfaction of the bill, or reduce the amount billed pursuant to a financial assistance policy or program.

Under the FDCPA, the ''amount [ ] expressly authorized by the agreement creating the debt'' refers only to the remaining balance on a debt that is fully owed by the consumer after any payments that reduce the debt's remaining balance are deducted because such payments reduce the amount that the consumer is obligated to pay under the original agreement. Accordingly, seeking to collect an amount that does not account for partial payments or changes to the bill made by the provider would violate the FDCPA's prohibitions against unfair or unconscionable debt collection practices because the amount has not been expressly agreed to. In other words, once a partial payment has been made toward an agreed-to amount, collection or attempted collection of the full amount without accounting for the partial payment is collection of an amount *greater* than that agreed to or permitted by law. Such collection or attempted collection would also violate the FDCPA's prohibitions against deceptive or misleading debt collection practices because it would misrepresent the amount of the debt actually owed.[41] Because payments toward a debt might be made at any time, debt collectors are responsible for ensuring that the correct collection amount is sought during each attempt at collection.

B. Collection of Amounts Not Owed Due to Federal or State Law

Section 808(1) of the FDCPA prohibits, in relevant part, the collection of any amount ''unless such amount is expressly authorized by the agreement creating the debt or permitted by law.'' [42] An ''amount expressly authorized by the agreement creating the debt or permitted by law'' means only a debt that the consumer is legally obligated to pay. If a Federal or State law relieves consumers of the obligation to pay for medical costs, in whole or in part, then collection of those costs is not ''permitted by law'' but rather prohibited by law. Thus, any amount that a consumer is not obligated to pay by operation of Federal or State law, is not an ''amount . . . permitted by law.'' Nor is the amount collectible as an ''amount [ ] expressly authorized by the agreement creating the debt'' since contractual terms that contravene Federal or State law are unenforceable as contrary to public policy.[43]

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30 15 U.S.C. 1692a(6) (defining ''debt collector''); 12 CFR 1006.2(i) (same).

31 15 U.S.C. 1692e; 12 CFR 1006.18(a).

32 15 U.S.C. 1692e(2)(A); 12 CFR 1006.18(b)(2)(i).

33 15 U.S.C. 1692f; 12 CFR 1006.22(a).

34 15 U.S.C. 1692f(1); 12 CFR 1006.22(b).

35 *See, e.g.,* 15 U.S.C. 1692e(8) (prohibiting ''[c]ommunicating or threatening to communicate to any person credit information *which is known or which should be known* to be false'') (emphasis added); 15 U.S.C. 1692d(5) (prohibiting debt collectors from ''causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously *with intent* to annoy, abuse, or harass'') (emphasis added); 15 U.S.C. 1692j(a) (making it unlawful to ''design, compile, and furnish any form *knowing* that such form would be used'' to deceive consumers in a specified way'') (emphasis added).

36 *See, e.g.,* 15 U.S.C. 1692k(b)(1) (including as a factor for calculating statutory damages ''the extent to which [the debt collector's] noncompliance was intentional''). Entities may also have an affirmative defense to liability for violations described in this advisory opinion, but only if they maintain procedures that are reasonably designed to prevent unintentional violations that are the result of bona fide errors. *See* 15 U.S.C. 1692k(c) (providing affirmative defense for violations if they are: (1) ''not intentional,'' (2) the result of ''a bona fide error,'' and (3) occurred despite ''the maintenance of procedures reasonably adapted to avoid any such error''). Further, ''the broad statutory requirement of procedures reasonably designed to avoid 'any' bona fide error indicates that the relevant procedures are ones that help to avoid errors like clerical or factual mistakes. Such procedures are more likely to avoid error than those applicable to legal reasoning. . . .'' *Jerman* v. *McNellie, et al.,* 559 U.S. 573, 587 (2010).

37 Every Federal Circuit Court of Appeals to address this issue has held that the FDCPA is a strict liability statute. *See, e.g., Vangorden* v. *Second Round, Ltd. P'ship,* 897 F.3d 433, 437–38 (2d Cir. 2018) (''The FDCPA is 'a strict liability statute' and, thus, there is no need for a plaintiff to plead or prove that a debt collector's misrepresentation . . . was intentional.''); *Allen ex rel. Martin* v. *LaSalle Bank, N.A.,* 629 F.3d 364, 368 (3d Cir. 2011) (''The FDCPA is a strict liability statute to the extent it imposes liability without proof of an intentional violation.''); *Stratton* v. *Portfolio Recovery Assocs., LLC,* 770 F.3d 443, 448–49 (6th Cir. 2014) (''The FDCPA is a strict-liability statute: A plaintiff does not need to prove knowledge or intent.'').

38 Congress enacted the FDCPA in 1977 to ''eliminate abusive debt collection practices by debt collectors, to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.'' Public Law 95–109, sec. 802(e), 91 Stat. 874, 874 (codified at 15 U.S.C. 1692(e)).

39 15 U.S.C. 1692f(1); 12 CFR 1006.22(b).

40 15 U.S.C. 1692e(2)(A); 12 CFR 1006.18(b)(2)(i).

41 *See Vangorden* v. *Second Round, L.P.,* 897 F.3d 433, 437–38 (2d Cir. 2018) (consumer stated claim under FDCPA sections 807 and 808 when debt collector sought to collect debt that consumer had already settled with creditor); *Gonzalez* v. *Allied Collection Servs., Inc.,* No. 216CV02909MMDVCF, 2019 WL 489093, at *8–9 (D. Nev. Feb. 6, 2019), *aff'd,* 852 F. App'x 264 (9th Cir. 2021) (debt collector violated FDCPA sections 807 and 808 when it sought to collect full amount of debt that had been partially paid); *see also* Complaint for Permanent Injunction and Other Equitable Relief, *FTC* v. *Midwest Recovery Systems, LLC,* No. 12–00182 (E.D. Mo. Nov. 25, 2020), *https://www.ftc.gov/system/files/documents/cases/01_-_complaint.pdf* (pleading violation of FDCPA section 807 where, among other things, ''[t]he debt was medical debt in the process of being re-billed to the consumer's medical insurance'').

42 15 U.S.C. 1692f(1); 12 CFR 1006.22(b).

43 *See* Restatement (Second) of Contracts sec. 178 (''A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable. . . .'');

A range of laws protect consumers from the legal obligation to pay medical bills in certain circumstances. For example, a State workers' compensation scheme may provide that a medical provider only has recourse against a patient's employer or workers' compensation insurer for the treatment of a work-related injury.[44] And the Federal Nursing Home Reform Act prohibits, among other things, nursing care facilities that participate in Medicaid or Medicare from requesting or requiring a third-party guarantee of payment as a condition of admission, expedited admission, or continued stay in the facility, and thus nursing care facilities cannot collect the debt from third parties in violation of this law.[45]

A debt collector that collects or attempts to collect a debt from a consumer who is not legally obligated on the debt by operation of State or Federal law violates the FDCPA's prohibitions against unfair or unconscionable debt collection practices because the amount is not expressly authorized by the agreement creating the debt or permitted by law[46] and also violates the FDCPA's prohibitions against deceptive or misleading debt collection practices because it would falsely represent the amount of the debt. Debt collectors are responsible for ensuring that they do not collect or attempt to collect debts that are not legally owed by the relevant consumer, whether by operation of State or Federal law.

C. Collection of Amounts Above That Permitted by Federal or State Law

Section 807 prohibits any false representation of ''the character, amount, or legal status of any debt.''[47] Section 808(1) of the FDCPA prohibits, in relevant part, the collection of any amount ''unless such amount is expressly authorized by the agreement creating the debt or permitted by law.''[48] Debt collectors would violate the FDCPA when they collect or attempt to collect amounts that exceed limits or calculation methods provided by State or Federal law, thus misrepresenting the consumer's obligation to pay the debt and collecting or attempting to collect an amount not permitted by law. Here again, a range of laws may operate to limit or control the amount that a medical provider may bill a patient in certain circumstances. For example, the Federal No Surprises Act of 2020 restricts the charges that certain medical providers can bill to certain patients depending on a number of factors such as their insured status and whether a billing provider is in- or out-of-network for a patient's health insurance plan.[49] As the CFPB has previously stated, the FDCPA's prohibition on misrepresentations includes misrepresenting that a consumer must pay a debt stemming from a charge that exceeds the amount permitted by the No Surprises Act.[50] Thus, for example, a debt collector who represents that a consumer owes a debt arising from out-of-network charges for emergency services would violate the prohibition on misrepresentations if those charges exceed the amount permitted by the No Surprises Act. Relatedly, if a Federal law limits or caps the amount a consumer may be billed in a given circumstance, then collection or attempted collection of an amount over the relevant limit or cap would run afoul of the FDCPA's prohibition on collection of amounts unless permitted by law.

State law may also provide a limit on the allowable amount that a medical provider can bill a consumer. Many States have enacted laws to protect consumers from unexpected medical bills in much the same vein as the Federal No Surprises Act and which may provide additional protections beyond those in the Federal law.[51] While State laws vary considerably, many include limits on the amounts that medical providers, both emergency and non-emergency, can bill certain consumers and provide specific standards to guide billing calculations.[52] As with the Federal statute, where one of these State laws applies to limit the amount that a medical provider can bill a consumer, a debt collector that collects or attempts to collect an amount that exceeds the relevant limits would violate the FDCPA's prohibition against misrepresenting the amount of the debt owed and the prohibition against collecting or attempting to collect an amount unless permitted by law.

Finally, State contract or common law may also provide limits on the allowable amount that a medical provider can bill a consumer in certain circumstances. For example, consumers are sometimes billed by medical service providers that the consumer did not enter into an express agreement with prior to receiving the services. In these circumstances, some courts have held that State contract law provides that the relationship between the consumer and provider is governed by an implied-in-fact agreement, the price term of which may be limited to a ''reasonable'' amount.[53] Courts have also interpreted some States' laws to require that when an express contract for medical services contains no explicit price term, a ''reasonable'' price term should be inserted.[54] Courts have even invalidated

see also, e.g., United States v. *Blue Cross/Blue Shield of Ala.,* 999 F.2d 1542, 1547 (11th Cir. 1993) (''The application of a regulatory statute that is otherwise valid may not be defeated by private contracts.'') (citing *Connolly* v. *Pension Benefit Guaranty Corp.,* 475 U.S. 211, 224 (1986)); *SodexoMAGIC, LLC* v. *Drexel Univ.,* 24 F.4th 183, 219–20 (3d Cir. 2022) (''[A] voluntarily-agreed-to contract term is enforceable unless a statute or the common law specifically prevents enforcement of that term.'') (applying Pennsylvania law); *Metcalfe* v. *Grieco Hyundai LLC,* 698 F. Supp. 3d 239, 2442 (D.R.I. 2023) (''Because the [Rhode Island State statute] explicitly allows collective actions, the class action waiver provision in the Leasing Agreement is unenforceable as against public policy in Rhode Island.'') (applying Rhode Island law).

[44] *See, e.g., Kottler* v. *Gulf Coast Collection Bureau, Inc.,* 460 F. Supp. 3d 1282, 1293 (S.D. Fla. 2020), aff'd, 847 F. App'x 542 (11th Cir. 2021) (debt collector violated section 807(2)(A) when it attempted to collect a debt for which consumer had pending workers' compensation claim); *Young* v. *NPAS, Inc.,* 361 F. Supp. 3d 1171, 1196 (D. Utah 2019) (debt collector violated FDCPA sections 807(2)(A) and 808(1) when it attempted to collect a debt that consumer did not owe under Utah workers' compensation law); *Raytman* v. *Jeffrey G. Lerman, P.C.,* No. 17 CIV. 9681 (KPF), 2018 WL 5113952, at *5–6 (S.D.N.Y. Oct. 19, 2018) (consumer stated claim for violations of FDCPA sections 807 and 808 when debt collector sought to collect debt that consumer did not owe under New York Medicaid payment rules).

[45] *See generally CFPB Circular 2022–05: Debt collection and consumer reporting practices involving invalid nursing home debts* (Sept. 8, 2022), *available at: https://www.consumerfinance.gov/compliance/circulars/circular-2022-05-debt-collection-and-consumer-reporting-practices-involving-invalid-nursing-home-debts/.*

[46] This may be the case even if terms of the contract creating the debt would make a given consumer liable. *See, e.g., Tuttle* v. *Equifax Check,* 190 F.3d 9, 13 (2d Cir. 1999) (noting that it would be a violation of section 1692f(1) to collect a fee if State law expressly prohibits such fees, even if the contract allows it).

[47] 15 U.S.C. 1692e(2)(A); 12 CFR 1006.18(b)(2)(i).

[48] 15 U.S.C. 1692f(1); 12 CFR 1006.22(b).

[49] *See Requirements Related to Surprise Billing; Part II,* 86 FR 55980 (Oct. 7, 2021).

[50] *See CFPB Bulletin 2022–01: Medical Debt Collection and Consumer Reporting Requirements in Connection With the No Surprises Act,* 87 FR 3025, 3026 (Jan. 20, 2022).

[51] *See State Surprise Billing Laws and the No Surprises Act, accessible at: https://www.cms.gov/files/document/nsa-state-laws.pdf,* at 2 (''The No Surprises Act supplements State surprise billing law protections; it does not replace them.'').

[52] *See, e.g.,* Conn. Gen. Stat. secs. 38a–477aa, 20–7f; Mich. Comp. Laws sec. 333.24507.

[53] *See, e.g., Leslie* v. *Quest Diagnostics, Inc.,* No. CV171590ESMAH, 2019 WL 4668140, at *7 (D.N.J. Sept. 25, 2019) (''Plaintiffs sufficiently allege that Quest's chargemaster prices are unreasonable based on Quest's internal cost structure, the usual and customary rates charged, and payments received for these services by both Quest and other laboratory testing services.'').

[54] *Colomar* v. *Mercy Hosp., Inc.,* No. 05–22409–CIV–SEITZ, 2007 WL 2083562, at *4 (S.D. Fla. July 20, 2007) (''Florida law is settled that when the price term in a contract for hospital services is left 'open' or undefined, then the courts will infer a reasonable price.'').

explicit price terms in contracts when those terms were determined to be unconscionable under State law, often limiting the price that must be paid to some ''reasonable'' amount as a remedy.[55]

The CFPB reminds debt collectors that State law may determine or limit the amount that medical providers may charge to consumers, and that collection of or an attempt to collect an amount that exceeds the allowable amount under State law (including applicable State case law) may misrepresent the amount of the debt in violation of the FDCPA. Collection or an attempt to collect an amount that exceeds the allowable amount under State law may also violate the prohibition against collecting or attempting to collect an amount unless permitted by law. These State law cases make clear that the collection amount that is ''permitted by law'' may be much less than the amount asserted to be owed by the medical provider. Debt collectors are responsible for ensuring that they do not collect or attempt to collect amounts above that which the relevant consumer(s) can be charged under applicable State and Federal laws. Because, as noted above, the FDCPA imposes strict liability, debt collectors should ensure that they only collect or attempt to collect amounts that may be charged under applicable State law.[56]

D. Collection of Amounts Not Owed Because Services Not Received

Section 808(1) of the FDCPA prohibits, in relevant part, the collection of any amount ''unless such amount is expressly authorized by the agreement creating the debt or permitted by law.'' [57] And section 807(2)(A) prohibits any false representation of ''the character, amount, or legal status of any debt.'' [58] As relevant here, the ''amount [] expressly authorized by the agreement creating the debt'' means amounts due for services actually rendered under the relevant agreement. Similarly, a ''false representation of the . . . amount . . . of any debt'' includes a representation to a consumer that they owe an amount for services that have not been rendered.

Courts have held that it is a violation of the FDCPA for debt collectors to collect or attempt to collect amounts for services that were not rendered.[59] Medical bills, especially for services rendered in hospitals, are frequently calculated by reference to a standardized set of codes that indicate the type and degree of medical care a patient received. Typically, providers will seek greater compensation for more serious, more urgent, or more involved forms of care. As noted above, if a medical provider designates an aspect of a patient's care with a code that denotes a higher or more involved level of care than was actually received, the provider is said to be ''upcoding.'' [60]

A debt collector that collects or attempts to collect a debt that has been ''upcoded'' violates the FDCPA's prohibitions against unfair or unconscionable debt collection practices because the amount is not expressly authorized by the agreement for services actually rendered and also violates the FDCPA's prohibitions against deceptive or misleading debt collection practices because it would falsely represent the amount of the debt. Debt collectors are responsible for ensuring that they do not collect or attempt to collect amounts that have been charged for services that have not actually been rendered.[61]

IV. Misrepresentation of the Nature of Legal Obligations

Section 807(2)(A) prohibits any false representation of ''the character, amount, or legal status of any debt.'' A ''false representation of the . . . legal status of any debt'' includes representations to a consumer about the legal nature of the provider's claim for payment and the legal rights and obligations that arise under that particular type of claim.

As described above, there are a variety of ways in which medical bills and the amounts demanded therein differ from consumer transactions where a consumer agrees to a known and definite price in exchange for goods or services. In medical billing, consumers sometimes enter agreements that have undefined price terms or are billed by providers with whom the consumer has never entered into an express agreement. The legal basis for a provider's claim for payment in such circumstances therefore also varies, and each such basis may have different implications for a consumer's legal rights or obligations. For example, under some States' laws, providers sometimes demand payment for services on the basis of an account stated theory, whereby a party presents another with an alleged statement of account and a legal obligation to pay that amount arises if the receiving party does not object within a reasonable period of time.[62] The inverse is also true under these State's laws: an account stated claim cannot be maintained if the receiving party disputes the alleged statement of account within a reasonable period of time before making payments on the account.[63]

However, the variations in medical billing and the associated legal consequences are not readily apparent or known to most consumers.[64] Most

[55] *See, e.g., Ahern* v. *Knecht,* 563 NE2d 787, 793 (Ill. App. 1990) (price term in contract for appliance repair was unconscionable and repairman would be allowed only ''the actual value of his services''); *Toker* v. *Westerman,* 274 A.2d 78, 81 (N.J. Super. 1970) (price term in contract for sale of refrigerator was unconscionably high; court refused to enforce term, relieving the defendant-consumer from obligation to pay remaining balance owed); Restatement (Second) of Contracts sec. 208—Unconscionable Contract or Term, cmt. g (1981) (''the offending party [to an unconscionable contract] will ordinarily be awarded at least the reasonable value of performance rendered by him''); *see also De La Torre* v. *CashCall, Inc.,* 422 P.3d 1004, 1009 (Cal. 2018) (''As long established under California law, the doctrine of unconscionability reaches contract terms relating to the price of goods or services exchanged.'').

[56] Debt collectors may be able to minimize risk of misrepresentations in these circumstances by working with client medical providers to ensure that pricing and billing practices comply with applicable legal limits.

[57] 15 U.S.C. 1692f(1); 12 CFR 1006.22(b).

[58] 15 U.S.C. 1692e(2)(A); 12 CFR 1006.18(b)(2)(i).

[59] *Langley* v. *Statebridge Co., LLC,* No. CIV.A. 14–6366 JLL, 2014 WL 7336787, at *3 (D.N.J. Dec. 22, 2014) (consumer stated claim under FDCPA section 807(2)(A) when debt collector attempt to collect debt for tax and insurance payments not actually made by creditor); *Fitzsimmons* v. *Rickenbacker Fin., Inc.,* No. 2:11–CV–1315 JCM PAL, 2012 WL 3994477, at *3 (D. Nev. Sept. 11, 2012).

[60] *See* Centers for Medicare & Medicaid Servs., *Common Types of Healthcare Fraud,* at 2 (2016), *https://www.cms.gov/files/document/overview fwacommonfraudtypesfactsheet072616pdf.* (''Upcoding is a term that is not defined in [] regulations but is generally understood as billing for services at a higher level of complexity than the service actually provided or documented in the file.''); *U.S. ex rel. Harris* v. *Bernad,* 275 F. Supp. 2d 1, 4 (D.D.C. 2003) (''The government alleges that the defendants engaged in 'upcoding'—that is, submitted claims with CPT codes that represented a level of care higher than the defendants actually provided.'').

[61] Nothing in this Advisory Opinion should be interpreted to mean that in order to mitigate risk of violations of the FDCPA debt collectors should obtain access to documents beyond relevant patient contracts or bills. Again, debt collectors may be able to minimize risk of misrepresentations in these circumstances by working with client medical providers to ensure appropriate billing practices.

[62] *See, e.g., Univ. of S. Ala.* v. *Bracy,* 466 So.2d 148, 150 (Ala. Civ. App. 1985) (stating elements of account stated claim under Alabama law in medical context); *Egge* v. *Healthspan Servs. Co.,* No. CIV. 00–934 ADM/AJB, 2001 WL 881720, at *2 (D. Minn. July 30, 2001) (elements of account stated claim under Minnesota law in medical context).

[63] *See, e.g., Grandell Rehab. & Nursing Home, Inc.* v. *Devlin,* 809 N.Y.S.2d 481 at *3 (N.Y. Sup. Ct. 2005) (rejecting nursing home's account stated claim because, among other reasons, receiving consumer disputed their liability and the amounts) (citing *Abbott, Duncan & Wiener* v. *Ragusa,* 214 A.D.2d 412, 413 (N.Y. App. Div. 1995)).

[64] When evaluating a claim under section 807 of the FDCPA, courts apply the ''least sophisticated debtor'' standard. *See, e.g., Jensen* v. *Pressler & Pressler,* 791 F.3d 413, 420 (3d Cir. 2015) (applying ''least sophisticated debtor'' standard to evaluate liability under section 807); *McCollough* v. *Johnson, Rodenburg & Lauinger, LLC,* 637 F.3d 939, 952 (9th

consumers understand a demand for payment from a debt collector to mean that they owe the full amount demanded. The least sophisticated consumer presented with a demand for payment may believe that the full demanded amount is legally owed.[65] In particular, a consumer may be unlikely to know that, in the absence of an express agreement and definite price term, a debt collector's demand for payment may not accurately reflect the consumer's actual legal obligation to the provider under State law.[66]

A debt collector that collects or attempts to collect a debt where the amount is not based on an express contractual price term risks violating the FDCPA's prohibitions against deceptive or misleading debt collection practices if the debt collector gives the misleading impression that the amount demanded is final and that precise amount is legally owed. Moreover, because, as noted above, the FDCPA imposes strict liability, debt collectors are responsible for ensuring that they do not collect or attempt to collect debts in a way that deceives or misleads a consumer, explicitly or impliedly, about the legal status of the medical provider's claim and a consumer's right to object to claims, as appropriate; a debt collector may misrepresent the legal status of the debt even if the collector is relying on information provided by the medical provider. When dealing with uncertainty arising from the lack of express agreement, debt collectors may be able to minimize their risk of engaging in violations by communicating clearly and conspicuously with consumers about the legal status of the debt and the amount owed, for example, as appropriate, that an enforceable payment obligation may not exist until proven in court.

V. Substantiation of Medical Debts

Section 807(2)(A) prohibits any false representation of ''the character, amount, or legal status of any debt.'' When a debt collector makes a demand for payment of a debt or otherwise represents that a consumer owes a debt, the collector makes an implied representation that it has a reasonable basis to assert the character, amount, and legal status of the debt.[67] A debt collector violates the prohibition against false representations if the collector has no reasonable basis on which to represent that the specific amount demanded is due and legally collectible.

The many unique features of the markets for medical care and services present particularly acute risks of uncertainty as to the ''character, amount, or legal status'' of debts that are incurred in these markets. As described above, the health care market is complex, variable, and opaque. Prices charged by providers vary widely even for the same treatment or procedure and are often conditional, changing based on factors that often cannot be known before services are rendered. A variety of State and Federal laws may impact a consumer's liability for payment, in whole or in part, or for the amount that may be charged. Billing and payment are complicated by the involvement of third-party payors such as insurers, public compensation programs, or tortfeasors. And the nature or legal basis of a provider's claim for payment may be unclear, often due to a lack of express agreements. While this level of uncertainty may arise from the inherently complex reality of medical care and the broader heath care system, it underscores the need for debt collectors to properly substantiate the character, amount, and legal status of medical debt before they begin collection, in accord with consumer's expectations that debt collectors have a reasonable basis for their demands.[68]

Although a debt collector must be able to substantiate claims regarding the amount and validity of the debt made to a consumer, including those made at the outset of collection, the type and amount of information that is necessary to substantiate a particular representation will vary depending upon the claim itself, the circumstances surrounding the claim, and the need to observe patients' privacy rights under relevant law. The inherently uncertain and conditional nature of the costs of and payments for medical care means that debt collectors should exercise heightened care to ensure that they have a reasonable basis to assert that the debt is legally collectible and the specific amount is owed. For example, consider a debt collector that receives summary information concerning accounts for collection from a provider group that operates within a hospital. An initial reasonable step to substantiate the debts prior to collection may include obtaining any relevant patient agreements or contracts executed by the relevant patients. If, as is often the case, there is no contract between patients and the provider group, the debt collector may need documents sufficient to make a prima facie case for the demanded amount under the applicable State law. Consider another example where a debt collector is onboarding a hospital client. The debt collector may reduce risk of liability if it has access to full payment histories for the patient accounts, including any payments from third parties covering any portion of an overall demanded amount, and to confirm the hospital's compliance with any affirmative legal obligations, such as requirements to assess consumers under financial assistance policies if the hospital is a non-profit[69] or otherwise participates in financial assistance programs, to ensure that there is a reasonable basis for the demanded amount.[70]

Regulators, including the CFPB, have brought actions against debt collectors for failing to substantiate collection

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Cir. 2011) (same); *Jeter* v. *Credit Bureau, Inc.,* 760 F.2d 1168, 1177 n.11 (11th Cir. 1985) (same).

[65] *See, e.g., Miller* v. *Carrington Mortgage Servs., LLC,* 607 B.R. 1, 5–6 (D. Me. 2019) (consumer alleged fear that ''he would never be free from demands for payment'' or that debt collector had ''found a way of getting around the bankruptcy discharge protections.''); *cf. Daugherty* v. *Convergent Outsourcing, Inc.,* 836 F.3d 507, 513 (5th Cir. 2016) (''[A] collection letter seeking payment on a time-barred debt (without disclosing its unenforceability) but offering a 'settlement' and inviting partial payment (without disclosing the possible pitfalls) could constitute a violation of the FDCPA.''); *Buchanan* v. *Northland Grp., Inc.,* 776 F.3d 393, 399 (6th Cir. 2015) (consumer stated claim under section 807(2)(A) when debt collector offered to ''settle'' time-barred debt at a discount and noting that rule under Michigan law that partial payment revives a time-barred debt ''is almost assuredly not within the ken of most people, whether sophisticated, whether reasonably unsophisticated, or whether unreasonably unsophisticated'').

[66] *C.f. Shula* v. *Lawent,* 359 F.3d 489, 491–92 (7th Cir. 2004) (affirming finding of liability under section 807 where debt collector attempted to collect amount of court costs that were not in fact awarded in State law action); *Van Westrienen* v. *Americontinental Collection Corp.,* 94 F. Supp. 2d 1087, 1101–02 (D. Or. 2000) (consumer stated claim under section 807(2)(A) when debt collector's communications suggested that wage garnishment or asset seizure would occur ''within 5 days'' when such legal action was not procedurally possible in that time span); *Biber* v. *Pioneer Credit Recovery, Inc.,* 229 F. Supp. 3d 457, 473–74 (E.D. Va. 2017) (consumer stated claim under section 807(2)(A) when debt collector threatened to garnish wages without disclosing that it had not in fact taken preliminary procedural steps required to do so).

[67] *See Debt Collection Practices (Regulation F),* Final Rule, 85 FR 76734, 76857 (Nov. 30, 2020) (codified at 12 CFR part 1006) (''[I]it is clear that a debt collector must have (or have access to) records reasonably substantiating its claim that a consumer owes a debt in order to avoid engaging in deceptive or unfair collection practices in violation of the FDCPA when it attempts to collect the debt.'').

[68] As noted above, nothing in this Advisory Opinion should be interpreted to mean that in order to mitigate risk of violations of the FDCPA debt collectors are encouraged to obtain access to documents beyond relevant patient contracts or bills as permitted under applicable privacy laws.

[69] *See* 26 U.S.C. 501(r).

[70] This example is provided merely as an illustration of the kinds of information that may be necessary to properly substantiate debt collection information in a given circumstance and is not offered as a complete or exhaustive list that would guarantee compliance in all circumstances.

information for accuracy and completeness before beginning collection efforts when there were indications that the information suffered from a high degree of uncertainty or unreliability.[71] For example, many debt collectors operate as ''debt buyers,'' purchasing large portfolios of debts from creditors or other debt collectors at significant discounts from the face value of the underlying debts.[72] These ''portfolios'' of debts may functionally be little more than spreadsheets containing purported information concerning debts and may not be accompanied by underlying contracts, customer agreements, or other documentation evidencing the existence and amount of the debts.[73] This information may be facially unreliable, such as when the sellers of the debt explicitly disclaim its accuracy or collectability or when it is readily apparent that the information is inaccurate.[74] In these circumstances, the CFPB and other regulators have alleged that the debt collectors were on notice that collecting or attempting to collect the purported debts based on the information in their possession could lead to widespread or repeated violations of section 807(2)(A).[75] Proceeding to collect the purported debts based on that unsubstantiated information misrepresented to the affected consumers that the collectors had a reasonable basis for their collection attempts.[76] Importantly, this misrepresentation did not rely on a finding that the claimed amount was incorrect—for which a debt collector can be separately liable, *see generally* section II, *supra*—but on their failure to substantiate the validity and amounts of the debts that were sought.

Debt collectors working with medical debts are responsible for ensuring that they possess a reasonable basis for collecting or attempting to collect those debts. Collecting or attempting to collect medical debts without substantiation violates section 807(2)(A).

VI. Defining Default Under the FDCPA

The prohibitions imposed by sections 807 and 808 of the FDCPA apply only to ''debt collectors.'' [77] As relevant here, Section 803 of the FDCPA defines ''debt collector'' in two ways: (1) ''any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts,'' or (2) any person ''who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.'' [78] The statute also provides a limited number of exemptions from the definition of ''debt collector.'' One of those exemptions carves out of the definition ''any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person.'' [79] In the context of medical debt collection, for purposes of section 803(6)(F)(iii)'s exemption, whether a debt is ''in default'' is determined by the terms of any agreement between the consumer and the medical provider under applicable law governing the agreement.[80]

The term ''default'' is not specifically defined in the FDCPA, so the meaning of the term should first be determined by its ordinary meaning.[81] ''Default'' is commonly defined as the failure to satisfy an agreement, promise, or obligation, especially a failure to make a payment when due.[82] These definitions are consistent with the longstanding common law use of the word as a party's failure to perform contractual obligations at the time they come due.[83] Further, applicable law—typically State contract law—may determine when obligations are due under a contract.

However, some third-party firms collecting on past-due medical bills have argued that the bills were not in default because the firm or the creditor did not consider or treat the accounts as in default until some later date.[84] To the contrary, under the plain meaning of ''default,'' when a ''default'' has occurred for purposes of section 803(6)(F)(iii) with respect to medical bills is determined based on the terms of the relevant consumer-provider

[71] *See, e.g.,* Complaint for Civil Penalties, Injunctive and Other Relief, *United States* v. *Asset Acceptance, LLC,* No. 12–00182 (M.D. Fla. Jan. 30, 2012), ECF No. 1 (*Asset Acceptance Compl.*); Consent Order, *Encore Capital Grp., Inc.,* CFPB No. 2015–CFPB–0022 (Sept. 9, 2015) (*Encore Consent Order*); Consent Order, *Portfolio Recovery Assocs., LLC,* CFPB No. 2015–CFPB–0023 (Sept. 9, 2015) (*PRA Consent Order*).

[72] *See Asset Acceptance Compl.* ¶¶ 9–10; *Encore Consent Order,* ¶ 22; *PRA Consent Order,* ¶ 24.

[73] *See Asset Acceptance Compl.,* ¶ 11; *Encore Consent Order,* ¶ 23; *PRA Consent Order,* ¶ 27.

[74] *See Asset Acceptance Compl.,* ¶ 11–16, 49–52; *Encore Consent Order,* ¶¶ 24–35; *PRA Consent Order,* ¶¶ 28–32.

[75] *See Asset Acceptance Compl.,* ¶ 81–83; *Encore Consent Order,* ¶ 112–114; *PRA Consent Order,* ¶ 103–105.

[76] *See Asset Acceptance Compl.,* ¶ 54–55; *Encore Consent Order,* ¶ 45–47, 78–81, 103–105; *PRA Consent Order,* ¶ 63–66, 94–96,.

[77] 15 U.S.C. 1692e (''A *debt collector* may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt.) (emphasis added); 15 U.S.C. 1692f (''A *debt collector* may not use unfair or unconscionable means to collect or attempt to collect any debt.'') (emphasis added).

[78] 15 U.S.C. 1692a(6). Section 803 also provides that the term ''debt collector'' ''includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts'' as well as, ''[f]or the purpose of section 808(6), . . . any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests.'' 15 U.S.C. 1692a(6). The term ''creditor'' is defined as ''any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.'' 15 U.S.C. 1692a(4).

[79] 15 U.S.C. 1692a(6)(F)(iii). The exemptions under section 803a(6)(F)—including the exemption for debt collection activity that ''concerns a debt which was not in default at the time it was obtained by such person''—explicitly apply only to persons collecting or attempting to collect debts ''owed or due another.'' *Compare* 15 U.S.C. 1692a(6)(F) (exemption that references ''owed or due another'') *with* 15 U.S.C. 1692a(6)(A)–(E) (exemptions that do not use ''owed or due another'' language).

[80] *De Dios* v. *Int'l Realty & Invs.,* 641 F.3d 1071, 1074 (9th Cir. 2011). Outcomes for non-express agreements may vary considerably under relevant State law, and this Advisory Opinion takes no position on the correct interpretation of those laws.

[81] *See, e.g., Lawson* v. *FMR LLC,* 571 U.S. 429, 440 (2014); *see also, e.g., Taniguchi* v. *Kan Pac. Saipan, Ltd.,* 566 U.S. 560, 566 (2012) (''When a term goes undefined in a statute, we give the term its ordinary meaning.'').

[82] *See, e.g., Default Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/default/* (accessed Aug. 19, 2024) (''failure to do something required by duty or law . . . a failure to pay financial debts''; *Default, Black's Law Dictionary* (11th ed. 2019) (''The omission or failure to perform a legal or contractual duty; esp., the failure to pay a debt when due.''); *Default, Ballentine's Law Dictionary* (3d ed. 1969) (''Fault; neglect; omission; the failure to perform a duty or obligation; the failure of a person to pay money when due or when lawfully demanded.'').

[83] *See, e.g., The Restatement (First) of Contracts Index D80* (1932) (''Default: See Breach of Contract.''); *Restatement (Second) of Contracts* sec. 235(2) (1981) (''When performance of a duty under a contract is due any non-performance is a breach.''); *23 Williston on Contracts* sec. 63:16 (4th ed.) (''It is a material breach of a contract to fail to pay any substantial amount of the consideration owing under the contract.''); *Butler Mach. Co.* v. *Morris Constr. Co.,* 682 NW2d 773, 778 (S.D. 2004) (''Morris was to make monthly payments of $5,547 and its failure to make such monthly payments constituted a default under the terms of that agreement.'').

[84] *See Ward* v. *NPAS, Inc.,* 63 F.4th 576, 583–84 (6th Cir. 2023) (Though medical provider's bill said ''due on receipt'' court considered evidence that provider ''didn't treat Ward's failure to pay immediately as a breach'' dispositive to the question of whether debt was in default when placed with third-party.); *Prince* v. *NCO Fin. Servs., Inc.,* 346 F. Supp. 2d 744, 749 (E.D. Pa. 2004) (''This evidence of Capital One's State of mind with regard to whether the debt was in default is a satisfactory initial showing that Capital One did not consider Prince's account to be ''in default.''); *Roberts* v. *NRA Grp., LLC,* No. CIV.A. 3:11–2029, 2012 WL 3288076, at *6 (M.D. Pa. Aug. 10, 2012) (''[W]hether Plaintiff's account was in default will be determined by looking at the 'state of mind' of the creditor to see whether the creditor considered the debt to be in default.'').

agreements under applicable law. It is the terms of the contract—the ''[o]bjective indicators of the debt's status'' at the time it was obtained[85]—that governs when collection of medical debts is covered by the FDCPA, not the subjective state of mind of the medical debt collector.[86]

In addition to being consistent with the term's plain meaning, reading ''default'' as coextensive with contractual breach under applicable law is consistent with Congress's intent to apply this exemption to ''servicers'' of debt that is not in default at the time the person obtains it. The FDCPA's legislative history explains that Congress ''[did] not intend the definition [of debt collector] to cover the activities of . . . mortgage service companies and others who service outstanding debts for others, so long as the debts were not in default when taken for servicing.''[87] These references make clear the intended distinction between a consumer who has failed to meet their contractual obligation to pay and a consumer who has an outstanding debt but under their contract repays it over a defined period of time (*i.e.,* their failure to pay the entire outstanding balance on a payment due date does not breach the contract).[88] Courts and the Federal Trade Commission (FTC) have likewise recognized a distinction between a debt that may yet be ''outstanding'' but for which a consumer is not necessarily ''in default.''[89]

In the context of medical debt, amounts owed are not typically paid on a regular, recurring schedule over time pursuant to the terms of a contract. To the contrary, as noted above, medical debts are contractually generally due in full at a given time. Medical debt collectors therefore do not ''service'' debts on an ongoing basis like the mortgage servicers intended to be covered by this exemption.

To be sure, the terms of a given contract or the principles of applicable law may differentiate between one (or more) missed payments and contractual breach, in which case the debt may not be ''in default'' if a single payment is missed. But absent such terms or applicable legal principle, failure to make full payment by the given time constitutes a breach of the consumer's contractual obligation. If a person obtains that debt (or the right to collect it) after that failure to make full payment, that person has obtained a debt ''in default at the time it was obtained'' and therefore does not qualify for the section 803(6)(F)(iii) exemption.

Finally, defining ''default'' for purposes of section 803(6)(F)(iii) by reference to relevant consumer-provider agreements and background legal principles also best effectuates the statute's purpose and Congress' intent, closes off avenues for regulatory evasion, and is consistent with prior regulatory interpretations. The FDCPA is a remedial consumer protection statute aimed at curbing abusive and unscrupulous conduct by debt collectors and establishing comprehensive national standards for the debt collection industry.[90] As such, the statute's provisions are interpreted liberally in favor of consumers' interests.[91] Defining ''default'' by reference to the relevant consumer agreements and applicable governing law advances consumer interests because it is an objective, transparent standard that a consumer or their advocate can apply to ascertain the status of a party seeking to collect money that is claimed to be owed by the consumer. Relatedly, an objective standard for defining ''default'' prevents debt collectors from attempting to expand the section 803(6)(F)(iii) exemption by reference to the subjective intent or belief of the collector or creditor or by reference to agreements or policy documents that the consumer has no access to.[92] And this interpretation is consistent with prior staff advisory opinions on this definition issued by the FTC in the period when that agency had primary regulatory authority over the FDCPA.[93]

VII. Regulatory Matters

The CFPB has concluded that the advisory opinion is an interpretive rule in part and a general statement of policy in part. Insofar as the advisory opinion constitutes an interpretive rule, it is issued under the CFPB's authority to interpret the Fair Debt Collection Practices Acts and Regulation F, including under section 1022(b)(1) of the Consumer Financial Protection Act of 2010, which authorizes guidance as may be necessary or appropriate to enable the CFPB to administer and carry

[85] *Mavris* v. *RSI Enters.,* 86 F. Supp. 3d 1079, 1088 (D. Ariz. 2015).

[86] *Echlin* v. *Dynamic Collectors, Inc.,* 102 F. Supp. 3d 1179, 1185 (W.D. Wash. 2015) (rejecting defendant's argument that it did not ''consider'' plaintiffs debt to be in default until a particular dunning letter was sent because ''Dynamic's belief that Echlin's account was not in default is not dispositive of whether default had in fact occurred''); *Hartman* v. *Meridian Fin. Servs., Inc.,* 191 F. Supp. 2d 1031, 1043–44 (W.D. Wis. 2002) (holding that defendant did not meet section 803(6)(F)(iii) exception and rejecting argument that defendant does not ''consider'' a buyer to be in default before end of 30-day cure period when buyer's contract with creditor expressly provided that buyer would be in default ''if he fails to pay on time'').

[87] S. Rep. No. 95–382, at 3–4 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1698. In its section-by-section discussion of the bill, the report reiterates that ''The term [debt collector] does not include . . . persons who service debts for others.'' S. Rept. No. 95–382, at 7, 1977 U.S.C.C.A.N. 1695, 1701.

[88] Of course, an entity that operates as a mortgage servicer does not enjoy a blanket exemption from the FDCPA for all its activities and can still satisfy the definition of ''debt collector'' for those debts that were in default when they were obtained by the entity. *See, e.g., Babadjanian* v. *Deutsche Bank Nat'l Tr. Co.,* No. CV1002580MMMRZX, 2010 WL 11549894, at *5 (C.D. Cal. Nov. 12, 2010) (collecting cases); S. Rep. No. 95–382, at 3–4 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1698 (''so long as the debts were not in default when taken for servicing).

[89] *See, e.g., Alibrandi* v. *Fin. Outsourcing Servs., Inc.,* 333 F.3d 82, 86 (2d Cir. 2003) (collecting cases that ''distinguish[] between a debt that is in default and a debt that is merely outstanding''); FTC, *Annual Report to Congress on the Fair Debt Collection Practices Act* (2000), (*available at: https://www.ftc.gov/reports/annual-report-congress-fair-debt-collection-practices-act-0*) (''[Section 803(6)(F)(iii)] was designed to avoid application of the FDCPA to mortgage servicing companies, whose business is accepting and recording payments on *current* debts.'') (emphasis in original) (*citing* S. Rep. No. 95–382).

[90] *See* 15 U.S.C. 1692(e) (''It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.'').

[91] *See, e.g., Salinas* v. *R.A. Rogers, Inc.,* 952 F.3d 680, 683 (5th Cir. 2020) (''Because Congress intended the FDCPA to have a broad remedial scope, the FDCPA should be construed broadly and in favor of the consumer.'') (internal quotations omitted); *Brown* v. *Card Serv. Ctr.,* 464 F.3d 450, 453 (3d Cir. 2006) (''Because the FDCPA is a remedial statute . . . we construe its language broadly, so as to effect its purpose. . . .''); *Johnson* v. *Riddle,* 305 F.3d 1107, 1117 (10th Cir. 2002) (''Because the FDCPA, like the Truth in Lending Act (TILA), 15 U.S.C. 1601 *et seq.,* is a remedial statute, it should be construed liberally in favor of the consumer.'').

[92] *See. e.g., Alibrandi* v. *Fin. Outsourcing Servs., Inc.,* 333 F.3d 82, 88 (2d Cir. 2003) (rejecting argument by debt collector that default status of debt should be determined by a ''letter agreement'' between the collector and creditor); *Echlin* v. *Dynamic Collectors, Inc.,* 102 F. Supp. 3d 1179, 1185 (W.D. Wash. 2015) (''Dynamic's belief that Echlin's account was not in default is not dispositive of whether default had in fact occurred.''); *Mavris* v. *RSI Enters.,* 86 F. Supp. 3d 1079, 1086 (D. Ariz. 2015) (''[T]he lender's subjective choice that the debtor has not defaulted cannot be dispositive of whether default has in fact occurred. If it were, debtors' access to FDCPA protections would be subject to the whim of creditors, who could leave debtors completely in the dark about when, if ever, those protections commence. Objective indicia of a creditor's treatment of a debt are entitled to greater weight.'').

[93] *See, e.g.,* FTC, *Staff Opinion Letter,* 1989 WL 1178045 at *1 n.2 (Apr. 25, 1989) (''Whether a debt is in default is generally controlled by the terms of the contract creating the indebtedness and applicable state law.'').

out the purposes and objectives of Federal consumer financial laws.[94]

Insofar as the advisory opinion constitutes a general statement of policy, it provides background information about applicable law and articulates considerations relevant to the CFPB's exercise of its authorities. It does not confer any rights of any kind.

The CFPB has determined that this rule does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.[95]

Pursuant to the Congressional Review Act,[96] the CFPB will submit a report containing this interpretive rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to the rule's published effective date. The Office of Information and Regulatory Affairs has designated this interpretive rule as a ''major rule'' as defined by 5 U.S.C. 804(2).

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2024–22962 Filed 10–3–24; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2024–0768; Project Identifier AD–2022–00504–R; Amendment 39–22825; AD 2024–16–19]

RIN 2120–AA64

Airworthiness Directives; Bell Textron Inc. Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Bell Textron Inc. Model 212, 412, 412CF, and 412EP helicopters. This AD was prompted by reports of cracked tail boom attachment barrel nuts (barrel nuts). This AD requires replacing all steel alloy barrel nuts with nickel alloy barrel nuts, replacing or inspecting other tail boom attachment point hardware, repetitively inspecting torque, and repetitively replacing tail boom attachment bolts (bolts). This AD also prohibits installing steel alloy barrel nuts. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective November 8, 2024.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of November 8, 2024.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2024–0768; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

• For Bell material identified in this AD, contact Bell Textron Inc., P.O. Box 482, Fort Worth, TX 76101; phone: (450) 437–2862 or 1–800–363–8023; fax: (450) 433–0272; email: *productsupport@bellflight.com;* or website: *bellflight.com/support/contact-support.*

• You may view this material at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Parkway, Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110. It is also available at *regulations.gov* under Docket No. FAA–2024–0768.

FOR FURTHER INFORMATION CONTACT: Jacob Fitch, Aviation Safety Engineer, FAA, 1801 S Airport Road, Wichita, KS 67209; phone: (817) 222–4130; email: *jacob.fitch@faa.gov*.

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain serial-numbered Bell Textron Inc. (Bell) Model 212, 412, 412CF, and 412EP helicopters. The NPRM published in the **Federal Register** on May 8, 2024 (89 FR 38841). The NPRM was prompted by reports of cracked barrel nuts on Model 412EP helicopters. According to Bell, the root cause for cracking can vary from corrosion damage, high time in service, or hydrogen embrittlement. Barrel nut cracking can also cause loss of torque on the associated bolt and subsequent bolt cracking. Due to design similarities, Model 212, 412, and 412CF helicopters are also affected.

In the NPRM, the FAA proposed to require, for certain serial-numbered Model 212, 412CF, 412, and 412EP helicopters, replacing the upper left-hand (LH) steel alloy barrel nut and bolt with a new nickel alloy barrel nut, retainer, and bolt. For certain other serial-numbered Model 412 and 412EP helicopters, the FAA proposed to require removing the upper LH steel alloy barrel nut, inspecting the removed upper LH steel alloy barrel nut and replacing it with a nickel alloy barrel nut and retainer, and either inspecting or replacing the upper LH bolt. For those serial-numbered Model 212, 412, 412CF, and 412EP helicopters, the FAA also proposed to require removing the upper right-hand (RH), lower LH, and lower RH steel alloy barrel nuts, inspecting those removed steel alloy barrel nuts and replacing them with new nickel alloy barrel nuts and retainers, and either inspecting or replacing the upper RH, lower LH, and lower RH bolts. Thereafter for those helicopters, as well as for one additional serial-numbered Model 412/412EP helicopter, the FAA proposed to require inspecting the torque applied on each bolt to determine if the torque has stabilized and, depending on the results, replacing and inspecting certain tail boom attachment point hardware and repeating the torque inspections, or applying torque stripes. For all applicable helicopters, the FAA proposed to require repetitively inspecting the torque applied on each bolt within a longer-term compliance time interval and, depending on the results, replacing and inspecting certain tail boom attachment point hardware and repeating the torque inspections and stabilization, or applying torque stripes. Additionally, for all applicable helicopters, within a longer-term compliance time interval, the FAA proposed to require repetitively replacing the upper LH bolt and inspecting the other three bolts and, depending on the results, taking corrective action. Following accomplishment of those actions, the FAA proposed to require inspecting the torque applied on each bolt to determine if the torque has stabilized and, depending on the results, replacing and inspecting certain tail boom attachment point hardware and repeating the torque inspections, or applying torque stripes. Lastly, the FAA proposed to prohibit installing steel alloy barrel nuts on any helicopter. The

[94] 12 U.S.C. 5512(b)(1).

[95] 44 U.S.C. 3501–3521.

[96] 5 U.S.C. 801 *et seq.*

Tab 41

Circular 2024-06: Background Dossiers and Algorithmic Scores for Hiring, Promotion, and Other Employment Decisions, 89 Fed. Reg. 88875 (Nov. 12, 2024).

CFPB Takes Action to Curb Unchecked Worker Surveillance

Booming "black box" scores subject to federal standards, including accuracy and dispute rights

OCT 24, 2024

WASHINGTON, D.C. – Today, the Consumer Financial Protection Bureau (CFPB) issued guidance to protect workers from unchecked digital tracking and opaque decision-making systems. The guidance warns that companies using third-party consumer reports – including background dossiers and surveillance-based, "black box" AI or algorithmic scores about their workers – must follow Fair Credit Reporting Act (FCRA) rules. This means employers must obtain worker consent, provide transparency about data used in adverse decisions, and allow workers to dispute inaccurate information. As companies increasingly deploy invasive tools to assess workers, this ensures workers have rights over the data influencing their livelihoods and careers.

"Workers shouldn't be subject to unchecked surveillance or have their careers determined by opaque third-party reports without basic protections," said CFPB Director Rohit Chopra. "The kind of scoring and profiling we've long seen in credit markets is now creeping into employment and other aspects of our lives. Our action today makes clear that longstanding consumer protections apply to these new domains just as they do to traditional credit reports."

The CFPB's circular addresses the use of third-party consumer reports by employers to make employment decisions about their workers. These reports increasingly extend beyond traditional background checks and may encompass a wide range of information and assessments about workers. For example, some employers require workers to install apps on their personal phones that monitor their conduct, which may be used to assess their performance.

Currently, such consumer reports may be used to:

- **Predict worker behavior:** This includes assessing the likelihood of workers engaging in union organizing activities or estimating the probability that a worker will leave their job, potentially influencing management decisions about staff retention and engagement strategies.

- **Reassigning workers:** Automated systems may use data on worker performance, availability, and historical patterns to reassign team members.
- **Issue warnings or other disciplinary actions:** These consumer reports might flag potential performance issues, leading to automated warnings or recommendations for disciplinary measures (potentially including firing) without direct human oversight.
- **Evaluate social media activity:** Some reports may include analysis of workers' social media presence, potentially impacting hiring or other decisions.

While background checks have long been a part of employment and hiring practices, the emergence of new technologies has expanded the scope and depth of worker tracking. These reports often contain sensitive information unknown to workers, which can significantly impact hiring decisions, job assignments, and career advancement. Inaccurate reports may cause workers to lose job opportunities, face unfair treatment, or suffer career setbacks due to information they did not even know existed, let alone had a chance to dispute.

Congress passed the FCRA in response to concerns about companies that assemble detailed dossiers about consumers and sell this information. In doing so, Congress was particularly cognizant of the impact of so-called "credit reporting" on consumers' employment. As Congress plainly stated, and as many courts have noted, the FCRA applies both to information used for initially evaluating a consumer for employment and to information used for ongoing employment purposes.

The Fair Credit Reporting Act's protections with respect to consumer reports include:

- **Consent:** Workers often have no idea that this personal information is being collected about them or used by employers. The CFPB circular makes clear that when companies provide these reports, the law requires employers to obtain worker consent before purchasing them. This ensures that workers will be aware of and can make informed decisions about the use of their personal information in employment contexts.
- **Transparency:** One of the top complaints from workers is that they do not even know what information is in these dossiers. The CFPB circular emphasizes that employers are required to provide detailed information to workers when taking adverse action – including firing, denials of promotions, and demotions or other reassignments – based on the reports. This allows workers to understand the basis for employment decisions and challenge any inaccuracies that may have influenced the decisions.
- **Disputes:** Workers also complain that this critical information is often wrong. The CFPB circular makes clear that when a worker disputes what is in a report, companies are required to correct or delete inaccurate, incomplete, or unverifiable information. This process is crucial for ensuring that workers are not unfairly penalized due to errors in these reports and have the opportunity to set the record straight.
- **Limits:** It is often unclear what employers are doing with the information they obtain or if they are using it for other purposes beyond worker evaluation. The CFPB circular makes clear that employers can only use these reports for purposes that are allowed under the

law. For example, employers generally cannot sell this information on the open market or use it to market financial products to their workers.

These protections are essential in an era where worker data is increasingly commodified and used to make critical employment decisions. By enforcing these rights, the CFPB aims to ensure that workers have control over their personal information and are protected from abuses. The CFPB will be working with other federal agencies and state regulators to ensure the responsible use of worker data.

The CFPB encourages employers to review their current practices regarding the use of third-party consumer reports to ensure compliance with FCRA requirements.

Today's action builds on previous CFPB activity to help workers. The CFPB has highlighted (cfpb.gov/about-us/newsroom/cfpb-report-shows-workers-face-risks-from-employer-driven-debt/) the growing prevalence of employer-driven debt and challenges workers and consumers face when they become indebted to an employer as a condition of employment. The CFPB has taken enforcement action (cfpb.gov/about-us/newsroom/cfpb-takes-action-against-coding-boot-camp-bloomtech-and-ceo-austen-allred-for-deceiving-students-and-hiding-loan-costs/) against multiple vocational schools that make false claims about hiring rates and deceive trainees about loans and their costs. The CFPB has also clarified (https://files.consumerfinance.gov/f/documents/cfpb_coverage-of-franchise-financing_2023-05.pdf) when the Equal Credit Opportunity Act applies with respect to franchisees seeking credit to finance their businesses. And the CFPB proposed an interpretive rule (cfpb.gov/about-us/newsroom/cfpb-proposes-interpretive-rule-to-ensure-workers-know-the-costs-and-fees-of-paycheck-advance-products/) to ensure workers receive clear disclosures about the costs and fees associated with paycheck advance products, which often carry APRs over 100%.

Read today's circular (cfpb.gov/compliance/circulars/consumer-financial-protection-circular-2024-06-background-dossiers-and-algorithmic-scores-for-hiring-promotion-and-other-employment-decisions/).

Consumers can submit complaints about financial products or services by visiting the CFPB's website (cfpb.gov/complaint/) or by calling (855) 411-CFPB (2372).

Employees who believe their company has violated federal consumer financial protection laws are encouraged to send information about what they know to whistleblower@cfpb.gov.

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive. For more information, visit www.consumerfinance.gov (http://www.consumerfinance.gov/).

Topics

- DATA (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=DATA)
- CREDIT REPORTS AND SCORES (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=CREDIT-REPORTS-AND-SCORES)
- PRIVACY (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=PRIVACY)

PRESS INFORMATION

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Go to press resources page (cfpb.gov/about-us/newsroom/press-resources/)

Rules and Regulations

Federal Register
Vol. 89, No. 218
Tuesday, November 12, 2024

CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Chapter X

Consumer Financial Protection Circular 2024–06: Background Dossiers and Algorithmic Scores for Hiring, Promotion, and Other Employment Decisions

AGENCY: Consumer Financial Protection Bureau.

ACTION: Consumer financial protection circular.

SUMMARY: The Consumer Financial Protection Bureau (CFPB) has issued Consumer Financial Protection Circular 2024–06, titled, ''Background Dossiers and Algorithmic Scores for Hiring, Promotion, and Other Employment Decisions.'' In this circular, the CFPB responds to the question, ''Can an employer make employment decisions utilizing background dossiers, algorithmic scores, and other third-party consumer reports about workers without adhering to the Fair Credit Reporting Act (FCRA)?''

DATES: The CFPB released this circular on its website on October 24, 2024.

ADDRESSES: Enforcers, and the broader public, can provide feedback and comments to *Circulars@cfpb.gov.*

FOR FURTHER INFORMATION CONTACT: George Karithanom, Regulatory Implementation & Guidance Program Analyst, Office of Regulations, at 202–435–7700 or at: *https://reginquiries.consumerfinance.gov/.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

Question Presented

Can an employer make employment decisions utilizing background dossiers, algorithmic scores, and other third-party consumer reports about workers without adhering to the Fair Credit Reporting Act (FCRA)?

Response

No. Similar to credit reports and credit scores used by lenders to make lending decisions, background dossiers—such as those that convey scores about workers—that are obtained from third parties and used by employers to make hiring, promotion, reassignment, or retention decisions are often governed by the FCRA. Many background dossiers that are compiled from databases collecting public records, employment history, collective-bargaining activity, or other information about a worker are ''consumer reports'' under the FCRA. Other types of consumer reports may include, for example, reports that convey scores assessing a current worker's risk level or performance.

Employers that use consumer reports—both initially when hiring workers and for subsequent employment purposes—must comply with FCRA obligations, including the requirement to obtain a worker's permission to procure a consumer report, the obligation to provide notices before and upon taking adverse actions, and a prohibition on using consumer reports for purposes other than the permissible purposes described in the FCRA.

The third-party providers furnishing these reports are ''consumer reporting agencies'' regulated by the FCRA, which (among other things) imposes an obligation to follow reasonable procedures to assure maximum possible accuracy, a requirement to disclose information in a worker's file to the worker upon request, and a requirement to investigate worker disputes alleging inaccuracies.

Consumer Reports for Employment Purposes

Similar to how credit reports and credit scores are commonly used by lenders, employers commonly purchase consumer reports to make employment decisions about workers. The most traditional form of consumer report in use in the United States for employment purposes is a background dossier that checks a worker's public records, including criminal history.

Recent technological advances have resulted in a rapid increase in the monitoring of workers across many sectors.[1] This has been compounded by an increase in remote work. Together, these phenomena have resulted in an increase in third-party technology companies that have made it easier and more cost effective to track, assess, and evaluate workers.[2]

Consumer reporting agencies and other background screening companies now offer a range of reports to employers, including those that record current workers' activities, personal habits and attributes, and even their biometric information. For example, some employers now use third parties to monitor workers' sales interactions, to track workers' driving habits, to measure the time that workers take to complete tasks, to record the number of messages workers send and the quantity and duration of meetings they attend, and to calculate workers' time spent off-task through documenting their web browsing, taking screenshots of computers, and measuring keystroke frequency.[3] In some circumstances, this information might be sold by ''consumer reporting agencies'' to prospective or current employers.

Some companies may analyze worker data[4] in order to provide reports containing assessments or scores of

[1] Veena Dubal, *On Algorithmic Wage Discrimination,* UC San Francisco Research Paper No. Forthcoming (2023) *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4331080* (hereinafter *Algorithmic Wage Discrimination*); Merve Hickok & Nestor Maslej, *A Policy Primer And Roadmap On AI Worker Surveillance And Productivity Scoring Tools* (2023) AI Ethics 3, 673–687 (2023) (hereinafter *Policy Primer*) *https://link.springer.com/article/10.1007/s43681-023-00275-8.*

[2] *Id.*

[3] *See, e.g.,* Diego Areas Munhoz, ''*Robot Bosses*'' *Spur Lawmaker Push to Police AI Job Surveillance,* Bloomberg Law (Sept. 8, 2023) *https://news.bloomberglaw.com/daily-labor-report/robot-bosses-spur-lawmaker-push-to-police-ai-job-surveillance;* Remarks of Benjamin Wiseman at the Harvard Journal of Law & Technology on Worker Surveillance and AI, *FTC.gov* (Feb. 8, 2024), Jolt-2-8-24-final.pdf (*ftc.gov*).

[4] Companies may engage in such analysis by making inferences and determinations about worker behavior and performance using algorithms, or sets of rules in computer programming code for solving a problem or performing a task based on input data. The algorithmic models used may also include ''artificial intelligence'' or ''AI'' models, which often develop and train algorithms using ''machine learning,'' which is the process of gathering data and supplying it to the computer program to train the algorithm to find patterns or make predictions. Conventional algorithms and AI models may also set performance goals or other parameters based on external data—for instance, by comparing a worker's output to an industry standard.

worker productivity or risk to employers.[5] Today, such scores are used to make automated recommendations or determinations related to worker pay; predict worker behavior, including potential union organizing activity and likelihood that a worker will leave their job; schedule shifts or job responsibilities; or issue warnings or other disciplinary actions.[6]

Analysis

Congress passed the FCRA in response to concerns about companies that assemble detailed dossiers about consumers and sell this information.[7] In doing so, Congress was particularly cognizant of the impact of so-called ''credit reporting'' on consumers' employment. Indeed, the Senate Report accompanying the bill that would be enacted as the FCRA noted in particular how ''a consumer's future employment career could be jeopardized because of an incomplete credit report.'' [8] To address those concerns, the FCRA regulates information in the form of ''consumer reports,'' a term defined to include ''any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for'' certain purposes, including ''employment purposes.'' [9]

While all of the general obligations of the FCRA apply to consumer reports provided for employment purposes, there are a few additional obligations that apply only to this kind of consumer report. For example, section 604(b) includes additional requirements when a consumer report is used for employment purposes, including a requirement to get permission from the worker.[10] It also generally requires employers to provide notice to workers and a copy of their report *before* taking adverse action.[11] In addition, upon request by a worker, ''consumer reporting agencies'' must disclose the identity of anyone who has used a consumer report for employment purposes in the two-year period preceding the date the request is made, which is longer than the one-year period used for other purposes.[12] And ''consumer reporting agencies'' must follow certain procedures when reporting public record information for employment purposes.[13]

Beyond the obligations that apply only to consumer reports used for employment purposes, the FCRA's general obligations also provide important protections for workers. Among other things, the FCRA provides workers the right to know what is in their file at a ''consumer reporting agency'' and dispute incomplete or inaccurate information,[14] requires such entities, in response to a consumer's dispute, to correct or delete inaccurate, incomplete, or unverifiable information,[15] and generally prohibits reporting of outdated negative information.[16] In addition to requiring that most employers give workers notice before taking an adverse action, the FCRA also generally requires that any person taking adverse action based on a consumer report provide notice to the consumer upon taking the adverse action.[17] Finally, the FCRA strictly limits ''consumer reporting agencies'' to providing consumer reports only for certain specified permissible purposes.[18] That means the background screener could not share consumer reports containing workers' data with employers or others, absent a FCRA permissible purpose.[19]

When looking at whether an employer that makes employment decisions based on a report from a third party is regulated by the FCRA, enforcers should consider two key questions:

1. Does the employer's use of data qualify as a use for ''employment purposes'' under the FCRA?
2. Is the report obtained from a ''consumer reporting agency,'' meaning that the report-maker ''assembled'' or ''evaluated'' consumer information to produce the report?

On the first question, the FCRA defines ''employment purposes'' to mean ''a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.'' [20] The FCRA thus applies both to information used for the purpose of evaluating a consumer for employment initially, and to information used for ongoing employment purposes—*i.e.,* promotion, reassignment, or retention.[21]

On the second question, a third party could be a ''consumer reporting agency'' that assembles or evaluates consumer information if they collect consumer information in order to furnish reports to employers.[22] A company that employers use to help make employment decisions could meet this standard in a number of ways. For example, similar to a ''nationwide consumer reporting agency,'' like

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[5] *See, e.g., Policy Primer;* Diego Areas Munhoz, ''*Robot Bosses*'' *Spur Lawmaker Push to Police AI Job Surveillance,* Bloomberg Law (Sept. 8, 2023) *https://news.bloomberglaw.com/daily-labor-report/robot-bosses-spur-lawmaker-push-to-police-ai-job-surveillance.*

[6] *See, e.g., Algorithmic Wage Discrimination;* Theara Coleman, *The (ongoing) fight against workplace AI surveillance,* The Week (Jan. 15, 2024) *https://theweek.com/tech/workplace-ai-surveillance.*

[7] *See generally* 115 Cong. Rec. S2410–11 (daily ed. Jan. 31, 1969) (statement of Sen. William Proxmire).

[8] S. Rep. 91–517, at 4 (1970).

[9] 15 U.S.C. 1681(d)(1)(B). Under the FCRA, the ''term 'consumer' means an individual.'' 15 U.S.C. 1681a(c). Among other things, the FCRA excludes from the definition of ''consumer report'' certain communications made to employers in connection with investigations of ''suspected misconduct relating to employment'' or ''compliance with Federal, State, or local laws and regulations, the rules of a self-regulatory organization, or any pre-existing written policies of the employer.'' 15 U.S.C. 1681a(d)(2)(D), (y). This Circular does not focus on such communications.

[10] 15 U.S.C. 1681b(b)(1)(2). The issue of whether an employer can use dossiers, scores, or other surveillance on workers may also be a topic of negotiation at the individual or collective bargaining level.

[11] 15 U.S.C. 1681b(3)(A). *But see* 15 U.S.C. 1681b(b)(3)(B)(C), (4) (exceptions from § 1681b(b)(3)(A) for workers in the transportation industry in certain circumstances and for consumer reports relevant to national security investigations in certain circumstances).

[12] 15 U.S.C. 1681g(a)(3)(A)(i).

[13] 15 U.S.C. 1681k. Subject to an exemption for national security investigations, CRAs that compile and report for employment purposes public record information that is likely to have an adverse effect on a consumer's ability to obtain employment must (1) notify the consumer that the information is being reported and of the name and address of the recipient, or (2) maintain ''strict procedures'' to ensure that the public record information is complete and up to date. *Id.*

[14] 15 U.S.C. 1681g(a); 15 U.S.C. 1681i(a)(1).

[15] 15 U.S.C. 1681i(a)(5).

[16] 15 U.S.C. 1681c.

[17] 15 U.S.C. 1681b(b)(3)(A), 1681m(a).

[18] *See* 15 U.S.C. 1681b(a).

[19] For example, courts have held that consumer reporting agencies generally cannot furnish consumer reports for targeted marketing. *See Trans Union Corp.* v. *FTC,* 81 F.3d 228, 233–34 (D.C. Cir. 1996).

[20] 15 U.S.C. 1681a(h).

[21] The FCRA's application to both prospective and current workers is confirmed by FCRA section 603(k), which provides that an ''adverse action'' under FCRA includes ''a denial of employment or any other decision for employment purposes that adversely affects any *current or prospective* employee.'' 15 U.S.C. 1681a(k)(1)(B)(ii) (emphasis added). *See also Ernst* v. *Dish Network, LLC,* 49 F. Supp. 3d 377, 383 (S.D.N.Y. 2014) (background report was collected, expected to be used, and used for the employment purposes of ''evaluat[ing] [the] Plaintiff for reassignment or retention as an employee'').

[22] The FCRA regulates consumer reports as furnished by ''consumer reporting agencies,'' which it defines as: ''any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.'' 15 U.S.C. 1681a(f).

Equifax, Experian, or TransUnion, some companies collect consumer data from third parties for dissemination to employers in background reports. Traditional background screening companies ''assemble'' or ''evaluate'' information about workers, often from public sources, such as criminal history records. Other firms might collect information from employers about workers' collective bargaining activity, or job performance, and then sell it to other employers to make hiring decisions.

In addition, an entity could ''assemble'' or ''evaluate'' consumer information within the meaning of the term ''consumer reporting agency'' if the entity collects consumer data in order to train an algorithm that produces scores or other assessments about workers for employers. For example, the developer of a phone app that monitors a transportation worker's driving activity and provides driving scores to companies for employment purposes could ''assemble'' or ''evaluate'' consumer information if the developer obtains or uses data from sources other than an employer receiving the report, including from other employer-customers or public data sources, to generate the scores.[23]

Not all third parties that assemble or evaluate data will qualify as ''consumer reporting agencies.'' For example, section 603(d)(2)(A)(i) of the FCRA excludes from the definition of ''consumer report'' any ''report containing information solely as to transactions or experiences between the consumer and the person making the report.'' But this exception applies only to reports containing information *solely* about transactions or experiences between the consumer and the report-maker. The exception by its own terms does not apply to a report containing information not about transactions or experiences between the report-maker and the consumer, such as when the report includes algorithmic scores, as described above.

About Consumer Financial Protection Circulars

Consumer Financial Protection Circulars are intended to promote consistency in approach across the various enforcement agencies and parties, pursuant to the CFPB's statutory objective to ensure Federal consumer financial law is enforced consistently. 12 U.S.C. 5511(b)(4).

Consumer Financial Protection Circulars are also intended to provide transparency to partner agencies regarding the CFPB's intended approach when cooperating in enforcement actions. *See, e.g.,* 12 U.S.C. 5552(b) (consultation with CFPB by State attorneys general and regulators); 12 U.S.C. 5562(a) (joint investigatory work between CFPB and other agencies).

Consumer Financial Protection Circulars are general statements of policy under the Administrative Procedure Act. 5 U.S.C. 553(b). They provide background information about applicable law, articulate considerations relevant to the Bureau's exercise of its authorities, and, in the interest of maintaining consistency, advise other parties with authority to enforce Federal consumer financial law. They do not restrict the Bureau's exercise of its authorities, impose any legal requirements on external parties, or create or confer any rights on external parties that could be enforceable in any administrative or civil proceeding. The CFPB Director is instructing CFPB staff as described herein, and the CFPB will then make final decisions on individual matters based on an assessment of the factual record, applicable law, and factors relevant to prosecutorial discretion.

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2024–26099 Filed 11–8–24; 8:45 am]

BILLING CODE 4810–AM–P

[23] That may be true even when the assessment is performed through a software program licensed to employers, because the software provider furnishes the reports. Federal Trade Commission (FTC) staff opined more than two decades ago that a seller of particular software that allowed users to compile and de-duplicate credit report information from the three major nationwide consumer reporting agencies was not itself a consumer reporting agency, reasoning that the software seller was not ''assembling or evaluating'' any information itself. FTC Advisory Opinion (Oct. 27, 1997), *https://www.ftc.gov/legal-library/browse/advisory-opinions/advisory-opinion-cast-10-27-97; see also* FTC, *40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations* at 12–13, 29 (July 2011). The FTC's guidance, however, focused on technology that was in existence at the time the guidance was drafted. Significant changes in the software and general technological landscape have taken place in the years since, rendering the FTC's prior guidance inapplicable to many of the kinds of technology used today. For example, software developers today often take a more active role in providing ongoing services to clients, such as by performing ongoing maintenance of the software, or by licensing services to clients instead of selling software as a point-in-time product. Accordingly, a third-party software provider could meet the definition of a consumer reporting agency where it assembles or evaluates consumer information to develop software that produces reports used to evaluate a worker ''for employment, promotion, reassignment or retention,'' or where the software itself assembles or evaluates information about a worker to produce reports used for those purposes. Judicial decisions declining to find software providers to be CRAs are likewise distinguishable. For instance, in *Zabriskie* v. *Fed. Nat'l Mortg. Ass'n,* 940 F.3d 1022, 1029 (9th Cir. 2019), the court determined that Fannie Mae did not act as a CRA by licensing a proprietary software that allowed lenders to determine whether their loans met requirements for Fannie Mae to purchase, but relied on reasoning inapplicable to third-party software developers that analyze worker data that companies use for employment purposes. *Id.* (reasoning that Congress intended to exclude Fannie Mae from the definition of a ''consumer reporting agency'' and that Fannie Mae did not have the purpose of furnishing consumer reports to a third party, but rather to determine the loans' eligibility for purchase).

FEDERAL RESERVE SYSTEM

12 CFR Part 209

[Regulation I; Docket No. R–1844]

RIN 7100—AG 85

Federal Reserve Bank Capital Stock

AGENCIES: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board of Governors (Board) is publishing a final rule that applies an inflation adjustment to the threshold for total consolidated assets in Regulation I. Federal Reserve Bank (Reserve Bank) stockholders that have total consolidated assets above the threshold receive a different dividend rate on their Reserve Bank stock than stockholders with total consolidated assets at or below the threshold. The Federal Reserve Act requires that the Board annually adjust the total consolidated asset threshold to reflect the change in the Gross Domestic Product Price Index, published by the Bureau of Economic Analysis (BEA). Based on the change in the Gross Domestic Product Price Index as of September 26, 2024, the total consolidated asset threshold will be $12,841,000,000 through December 31, 2025.

DATES:

Effective date: December 12, 2024.

Applicability date: The adjusted threshold for total consolidated assets will apply beginning on January 1, 2025.

FOR FURTHER INFORMATION CONTACT: Benjamin Snodgrass, Senior Counsel (202/263–4877), Legal Division; or Kelsey Cassidy, Senior Financial Institutions Policy Analyst (202/465–6817), Reserve Bank Operations and Payments Systems Division. For users of TTY–TRS, please contact 711 from any telephone, anywhere in the United States or (202) 263–4869.

SUPPLEMENTARY INFORMATION:

I. Background

Regulation I governs the issuance and cancellation of capital stock by the

Tab 42

Circular 2024-07: Design, Marketing, and Administration of Credit Card Rewards Programs, 89 Fed. Reg. 106277 (Dec. 30, 2024).

cfpb Consumer Financial Protection Bureau (cfpb.gov/)

CFPB Takes Action on Bait-and-Switch Credit Card Rewards Tactics

English

Español (cfpb.gov/about-us/newsroom/cfpb-actua-contra-tacticas-enganosas-de-tarjetas-de-credito/)

Agency warns companies against illegal devaluation of rewards and other unlawful practices, highlights issues with retail credit cards, and launches a tool to help find cards with lower rates

DEC 18, 2024

WASHINGTON, D.C. – The Consumer Financial Protection Bureau (CFPB) announced major actions today to protect consumers from illegal credit card practices and help people save money on interest and fees. In a circular (cfpb.gov/compliance/circulars/consumer-financial-protection-circular-2024-07-design-marketing-and-administration-of-credit-card-rewards-programs/) to other law enforcement agencies, the CFPB warned that some credit card companies operating rewards programs may be breaking the law, including by illegally devaluing rewards points and airline miles. The CFPB also published new research (cfpb.gov/data-research/research-reports/issue-spotlight-the-high-cost-of-retail-credit-cards/) finding that retail credit cards—which typically offer store-specific rewards and loyalty programs—charge significantly higher interest rates than traditional cards. The CFPB further launched a new tool, *Explore Credit Cards* (cfpb.gov/consumer-tools/credit-cards/explore-cards/), to help consumers find the best credit card rates across both rewards cards and traditional cards. This first-of-its-kind tool enables consumers to compare more than 500 credit cards using unbiased, comprehensive data.

"Large credit card issuers too often play a shell game to lure people into high-cost cards, boosting their own profits while denying consumers the rewards they've earned," said CFPB Director Rohit Chopra. "When credit card issuers promise cashback bonuses or free round-trip airfares, they should actually deliver them. The CFPB is taking aim at bait-and-switch tactics and promoting more competition in credit card markets to protect consumers and give people more choice."

The CFPB's actions arrive during the busy end-of-year shopping and travel season; for instance, retail card originations tend to be seasonal, peaking in November and December as retail sales volumes and promotions are high during the holidays.

CFPB Moves to Stop Credit Card Rewards Program Schemes

The circular released by the CFPB addresses practices in credit card rewards programs, which companies increasingly use to encourage consumers to apply for and use specific cards. Since 2019, more than 90 percent of general-purpose credit card spending occurred on rewards cards. In today's marketplace, credit card issuers often promise cash, points, and miles sign-up bonuses to consumers, as well as rewards for certain types of spending. Consumers have reported to the CFPB that these rewards can be difficult to redeem or are sometimes devalued by policy changes by partners.

In May 2024, the CFPB and the U.S. Department of Transportation hosted a public hearing (cfpb.gov/about-us/events/archive-past-events/cfpb-and-dot-to-hold-joint-hearing-on-airline-and-credit-card-rewards-programs/) about challenges consumers are experiencing and the lack of competition in airline and credit card rewards programs. In conjunction with the hearing, the CFPB issued a report (cfpb.gov/about-us/newsroom/cfpb-report-highlights-consumer-frustrations-with-credit-card-rewards-programs/) finding consumers encounter numerous problems with credit card rewards programs.

Today's circular warns that companies may violate federal law when they:

- **Devalue earned rewards:** Consumers make decisions on whether to open or use a credit card based on the value of card benefits and rewards conveyed by a company's advertising and other communications. If the company later deflates the value of a customer's accrued awards, this may be an unfair or deceptive practice resembling a bait-and-switch scheme.
- **Hide the conditions for earning or keeping rewards:** Fine print disclaimers or vague terms buried in a contract may unlawfully conflict with prominent promotional language advertising the rewards consumers can earn. Companies may also illegally rely on fine print to cancel valuable rewards that consumers have already earned. If consumers' receipt of rewards is revoked, canceled, or prevented based on buried or vague conditions, that may be an unfair or deceptive act or practice.
- **Fail to deliver promised benefits:** Companies operating rewards programs are responsible for ensuring consumers can redeem the rewards they have earned, including coordinating with merchant partners and vendors. If system failures result in consumers losing points when attempting to redeem, this may be considered an unfair or deceptive practice.

The CFPB has taken action against issuers such as American Express (cfpb.gov/about-us/newsroom/cfpb-orders-american-express-to-pay-85-million-refund-to-consumers-harmed-by-illegal-credit-card-practices/) and Bank of America (cfpb.gov/about-us/newsroom/bank-of-a merica-for-illegally-charging-junk-fees-withholding-credit-card-rewards-opening-fake-accounts/) for illegal practices related to credit card rewards programs. The CFPB will continue to monitor these programs and will take necessary action on these issues as appropriate.

CFPB Research Highlights High Interest Rates, Consumer Complaints with Retail Credit Cards

As part of its work to monitor the U.S. credit card market, the CFPB published new research identifying key findings about retail credit cards. Retail credit cards represent a significant part of the consumer credit card market, and one out of every four credit card accounts is a private label retail card, with over 160 million open accounts in 2024. The CFPB found that retail cards—more than 80 percent of which are issued by four large banks—are more expensive than general purpose cards, with 90 percent of retail cards reporting a maximum annual percentage rate (APR) above 30 percent, compared to only 38 percent of non-retail general purpose cards in one CFPB survey sample. In December 2024, private label cards for the top retailers had an average APR of 32.66% for new accounts.

In complaints submitted to the CFPB, consumers have also reported experiencing aggressive sales tactics at the point of sale, inability to redeem promotions, and frustration with paper statement fees and late fees. Private label store cards make up a disproportionate amount of late fee volume compared to their share of account volume, according to the CFPB's analysis.

A New, Unbiased Way to Explore Credit Cards and Find Lower Interest Rates

The CFPB also launched Explore Credit Cards, a tool that helps people make apples-to-apples comparisons about options in the credit card market, using **open data** (cfpb.gov/data-research/credit-card-data/terms-credit-card-plans-survey/). Unlike existing comparison sites that may feature a limited selection of cards with high annual fees and APRs, rely on kickback schemes, and accept money to promote cards, the CFPB's new tool provides unbiased, comprehensive data for more than 500 cards, and the data is available to everyone. Earlier this year, the CFPB issued a **circular** (cfpb.gov/about-us/newsroom/cfpb-issues-guidance-to-rein-in-rigged-comparison-shopping-results-for-credit-cards-and-other-financial-products/) explaining that companies operating existing shopping tools can break the law when they steer consumers to certain products or lenders because of kickbacks.

The tool addresses a lack of price competition in the credit card market: despite significant rate differences between issuers serving similar customers, people cannot easily compare interest rates before applying. By enabling consumers to explore cards based on credit score range, interest rates, fees, and rewards offerings, the tool also affords consumers with a higher degree of certainty when searching for cards for their situation.

The data and tool will promote more competition in the credit card market and allow smaller providers and companies with better offers a chance to compete. The CFPB is also inviting more companies to contribute (cfpb.gov/data-research/credit-card-data/terms-credit-card-plans-survey/) to the data set, to make sure that the information can cut through the marketing on pay-to-play platforms.

The CFPB previously used the same comparison data (cfpb.gov/about-us/newsroom/cfpb-report-finds-large-banks-charge-higher-credit-card-interest-rates-than-small-banks-and-credit-unions/) to show that the 25 largest credit card issuers charged interest rates 8 to 10 percentage points higher than smaller banks and credit unions – a difference that can cost the average cardholder $400 to $500 per year. By requiring issuers to report their actual average interest rate by credit tier and making this data public, people have access to information to find the best rates based on their situation and needs.

By law, the 25 largest issuers of credit cards and 125 others selected by the CFPB as a representative sample of all issuers are required to submit data to the CFPB. Additional issuers can voluntarily contribute their data. The CFPB invites voluntary data submissions, particularly from smaller issuers, so they have a chance to promote their credit products in a market typically dominated by pay-for-play. The next publication will be in Spring 2025.

Read today's circular on credit card rewards programs (cfpb.gov/compliance/circulars/consumer-financial-protection-circular-2024-07-design-marketing-and-administration-of-credit-card-rewards-programs/).

Read the Issue Spotlight on the High Cost of Retail Credit Cards (cfpb.gov/data-research/research-reports/issue-spotlight-the-high-cost-of-retail-credit-cards/).

Explore credit cards with the CFPB's new tool (cfpb.gov/consumer-tools/credit-cards/explore-cards/).

Consumers can submit complaints about financial products and services by visiting consumerfinance.gov/complaint (cfpb.gov/complaint/) or by calling (855) 411-CFPB (2372).

Employees who believe their company has violated federal consumer financial protection laws are encouraged to send information about what they know to whistleblower@cfpb.gov. To learn more about reporting potential industry misconduct, visit consumerfinance.gov/whistleblower (cfpb.gov/enforcement/information-industry-whistleblowers/).

The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal consumer financial law and ensures that markets for consumer financial *products are fair, transparent, and competitive. For more information, visit* ***www.consumerfinance.gov*** (http://www.consumerfinance.gov/).

Topics

- **RESEARCH** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=RESEARCH)
- **FINANCIAL SERVICE PROVIDERS** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=FINANCIAL-SERVICE-PROVIDERS)
- **CREDIT CARDS** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=CREDIT-CARDS)
- **DATA** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=DATA)
- **ACCESS TO CREDIT** (CFPB.GOV/ABOUT-US/NEWSROOM/?TOPICS=ACCESS-TO-CREDIT)

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CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Chapter X

Consumer Financial Protection Circular 2024–07: Design, Marketing, and Administration of Credit Card Rewards Programs

AGENCY: Consumer Financial Protection Bureau.

ACTION: Consumer financial protection circular.

SUMMARY: The Consumer Financial Protection Bureau (Bureau or CFPB) has issued Consumer Financial Protection Circular 2024–07 titled, ''Design, marketing, and administration of credit card rewards programs.'' In this circular, the CFPB responds to the question, ''Can credit card issuers violate the law if they or their rewards partners devalue earned rewards or otherwise inhibit consumers from obtaining or redeeming promised rewards?''

DATES: The CFPB released this circular on its website on December 18, 2024.

ADDRESSES: Enforcers, and the broader public, can provide feedback and comments to *Circulars@cfpb.gov.*

FOR FURTHER INFORMATION CONTACT: George Karithanom, Regulatory Implementation & Guidance Program Analyst, Office of Regulations, at 202–435–7700 or at: *https://reginquiries.consumerfinance.gov/.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

Question Presented

Can credit card issuers violate the law if they or their rewards partners devalue earned rewards or otherwise inhibit consumers from obtaining or redeeming promised rewards?

Response

Yes. Covered persons that offer, provide, or operate credit card rewards programs, and their service providers, may violate the prohibition against unfair, deceptive, or abusive acts or practices in a variety of circumstances, including instances where some of the conduct in question may be attributable to a third party, such as a merchant partner, and regardless of whether covered persons or service providers are taking actions consistent with rewards program terms. This circular provides some examples where covered persons that offer, provide, or operate credit card rewards programs, and their service providers, may violate the prohibition against unfair, deceptive, and abusive acts or practices, where: (1) the redemption values of rewards that consumers have already earned or purchased are devalued; (2) consumers' receipt of rewards is revoked, canceled, or prevented based on buried or vague conditions, such as criteria disclosed only in fine print or up to the operator's discretion; or (3) consumers have reward points deducted from their balance without receiving the corresponding benefit of the rewards, including due to technical failures when redeeming rewards points on merchant partners' systems.

Background on Credit Card Rewards Programs

Rewards programs are increasingly used to encourage consumers to apply for and use specific credit cards.[1] As of 2019, more than 90 percent of general purpose credit card spending occurred on rewards cards, and by the end of 2022, 75 percent of general purpose credit cards were rewards cards.[2] While rewards cards are more common for consumers with higher credit scores, the use of rewards cards is growing fastest among deep subprime, subprime, and near-prime consumers.[3] The amount of money or value that consumers earn and maintain in credit card rewards programs is also large and has increased substantially in recent years. For example, in 2022, consumers earned more than $40 billion in rewards from major general-purpose credit cards, more than a 50 percent increase from 2019.[4] Consumer rewards balances at the end of 2022 were more than $33 billion, up 40 percent relative to the fourth quarter of 2019.[5] More consumers are also using rewards to make payments, including for day-to-day purchases and necessary expenses.[6]

Credit card rewards programs are typically structured around earning rewards ''currencies''—most commonly ''miles'' or other units of value issued by a co-brand partner (such as an airline or hospitality chain) or, alternatively, a credit card issuer's own ''points.'' [7] Consumers typically earn miles or points through credit card spending or by directly purchasing them in accordance with pre-determined formulas, or ''earn rates.'' [8] Many issuers also offer promotional rewards through things like sign-up bonuses and referrals.[9]

Once earned or purchased by consumers, points can be redeemed for rewards like ''cash back'' (statement

[1] *See* CFPB, *The Consumer Credit Card Market* (Oct. 2023) (hereinafter ''*2023 Report*'') at 98, *https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2023.pdf.* An industry survey found that rewards and cash back programs were the top reason why consumers chose one card over another, as well as the top reason consumers cited for increasing spending on credit cards over the last six months. PYMNTS and Elan, *Credit Card Use During Economic Turbulence* (Dec. 2023), *https://www.pymnts.com/wp-content/uploads/2023/05/PYMNTS-Credit-Card-Use-During-Economic-Turbulence-May-2023.pdf. See also* Arielle Feger, *Cash-back rewards drive consumers to open new credit cards, eMarketer* (Mar. 26, 2024), *https://www.emarketer.com/content/cash-back-rewards-drive-consumers-open-new-credit-cards;* Drazen Prelec, *How credit cards activate the reward center of our brains and drive spending,* MIT Sloan (June 9, 2021), *https://mitsloan.mit.edu/experts/how-credit-cards-activate-reward-center-our-brains-and-drive-spending.*

[2] *2023 Report* at 99. One study also found that between 2021 and 2023, while total credit card applications decreased by 2 percent, applications for rewards cards and rewards cards with tiered earnings grew by 5 percent and 8 percent, respectively. Marketa Canayaz, *Consumer Demand for Rich Rewards Rises,* Comscore (July 17, 2024), *https://www.comscore.com/Insights/Blog/Consumer-Demand-for-Rich-Rewards-Rises.*

[3] *2023 Report* at 100. *See also* Electronic Payments Coalition, *New Study Shows LMI Households Rely on Credit Card Rewards,* Electronic Payments Coalition (Apr. 30, 2024), *https://electronicpaymentscoalition.org/2024/04/30/new-study-data-shows-credit-card-rewards-are-a-lifeline-for-working-class-americans/.* Despite the growth in the use of rewards cards among consumers with lower credit scores, in many cases, these consumers do not benefit from these rewards programs, and research has shown that consumers with higher credit scores generally benefit from credit card rewards programs at the expense of consumers with lower credit scores. *See* Sumit Agarwal, *et al., Who Pays for Your Rewards? Redistribution in the Credit Card Market* (Dec. 5, 2022), *http://dx.doi.org/10.2139/ssrn.4126641.*

[4] CFPB, *Credit Card Rewards* (May 2024) (hereinafter ''*Credit Card Rewards Issue Spotlight*'') at 9, *https://files.consumerfinance.gov/f/documents/cfpb_credit-card-rewards_issue-spotlight_2024-05.pdf.*

[5] *2023 Report* at 100. Notably, consumers also forfeit about $500 million in rewards each year. *Id.* at 102.

[6] *See* Rimma Kats, *Survey Highlights Growing Consumer Appetite for Paying with Points,* Payments Journal (Jan. 3, 2024), *https://www.paymentsjournal.com/survey-highlights-growing-consumer-appetite-for-paying-with-points/* (noting that a majority of consumers favor redeeming their points at grocery stores, online retail outlets, and at gas stations). *See also Chase Survey Reveals How Credit Card Rewards Are Enhancing The Holiday Season,* Chase Media Center (Nov. 20, 2023), *https://media.chase.com/news/chase-holiday-rewards-survey* (noting that during the holiday season, 33 percent of consumers planned to use rewards to pay for gifts and 25 percent on groceries for holiday meals). *See, e.g.,* Bilt, *How do I redeem points towards a down payment?, https://support.biltrewards.com/hc/en-us/articles/10377953401869-How-do-I-redeem-points-towards-a-down-payment.*

[7] *See* Agarwal *supra* note 4, at 8. In 2021, more than one in three general purpose credit cards offered were co-branded. *See 2023 Report* at 25. In addition to rewards currencies and cash back, rewards programs also increasingly offer other affiliated benefits or lifestyle rewards, such as access to airport lounges and priority boarding. *Credit Card Rewards Issue Spotlight* at 8.

[8] *See* CFPB, *The Consumer Credit Card Market* at 212–13 (Dec. 2015), *http://files.consumerfinance.gov/f/201512_cfpb_report-the-consumer-credit-card-market.pdf.*

[9] *See id.* at 213.

credits or direct deposits) or transfers to a co-brand or merchant partner (*e.g.,* miles or merchant-specific gift cards), and also for other types of goods or services, like buying merchandise, donating to charities, applying to purchases at check out, and others.[10] However, both credit card issuers and loyalty programs generally reserve, and often assert a right to, unilaterally change the value of rewards, including at the point of redemption.[11] Reward points or miles valuation changes can sometimes be tied to price changes in the underlying product or service for which the reward is being redeemed (*e.g.,* changes in flight pricing), but program operators also adjust rewards redemption rates distinct from underlying prices, apparently as a means to ''preserve'' or ''maintain'' profit margins.[12]

As the market for credit card rewards programs has grown, so too has their complexity.[13] Rewards program operators often assert their ability to unilaterally modify credit card rewards programs, which has caused at least one State to take action to provide consumers with additional protections against such unilateral program modifications.[14] Additionally, the number of consumer complaints that the CFPB receives about credit card rewards programs has also risen dramatically in recent years.[15] Many consumers' complaints describe how the marketing or initial offering of a rewards program is inconsistent with their actual, later experiences earning and redeeming credit card rewards. For instance, consumers have complained to the CFPB about companies devaluing their rewards relative to what they were marketed, or increasing barriers to redeeming cash or cash-equivalent rewards, such as eliminating the ability for consumers to redeem points for a statement credit.[16]

Consumers have also complained about being denied access to promotional or other rewards because of terms or other requirements hidden in their cardholder or rewards program agreements, including instances of unexpectedly being found ineligible after applying for a credit card [17] or being forced to return a promotional offer because they closed their account within a certain period.[18] For many of these types of complaints, companies and merchant partners justified revoking, canceling, or preventing consumer access to rewards through requirements and guidelines absent from their marketing materials and only found buried in their cardholder or rewards program agreements.

Consumers have also repeatedly alerted the CFPB about difficulties redeeming their rewards or inexplicably seeing their points disappear. These reported challenges include issues with customer service,[19] technical failures,[20] and dispute resolution,[21] all of which can be further compounded when neither the issuer nor its merchant partner accept responsibility and both refer consumers to the other.[22] Because of these issues, some consumers have seen their rewards disappear when being transferred or applied to a merchant partner, with little recourse to resolve such problems.[23]

Analysis

The CFPA prohibits any ''covered person'' or ''service provider'' from ''committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with . . . the offering of a consumer financial product or service.'' [24] An act or practice is unfair when: (1) it causes or is likely to cause substantial injury to consumers that is not reasonably avoidable by consumers and (2) such injury is not outweighed by countervailing benefits to consumers or to competition.[25] Substantial injury includes monetary harm, and may be based on likely rather than actual injury.[26] In general, an injury is not reasonably avoidable if consumers cannot reasonably anticipate the injury, or when there is no way to avoid the injury even if it is anticipated.[27]

Under the CFPA, a representation, omission, or practice is deceptive if it is likely to mislead a reasonable consumer and is material.[28] Representations, omissions, or practices are ''material'' if they ''involve[ ] information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.'' [29] In assessing the meaning of a communication, the CFPB looks to its overall, net impression; in other words, the CFPB considers the entire advertisement, transaction, or course of dealing rather than evaluating

[10] *Credit Card Rewards Issue Spotlight, supra* note 4, at 7. Both quantitative and qualitative evidence indicate consumers spend across months or years to earn sufficient points or miles for infrequent large purchases. *See, e.g., id.* at 15; *2023 Report* at 100.

[11] *See, e.g.,* American Express, *Membership Rewards Program Terms and Conditions, https://rewards.americanexpress.com/myca/loyalty/us/catalog/tandc* (last accessed Sept. 4, 2024); Citi, *Citi ThankYou Rewards Terms & Conditions, https://www.thankyou.com/cms/thankyou/tc.page?pageName=tc* (last accessed Sept. 4, 2024); Chase, *Chase Sapphire Preferred® with Ultimate Rewards® Program Agreement, https://www.chase.com/sapphire/rewardsagreement* (last accessed Sept. 4, 2024); Wells Fargo, *Wells Fargo Rewards® Program Terms and Conditions and Addendum, https://consumercard.wellsfargorewards.com/#/tnc* (last accessed Sept. 4, 2024); Southwest, *What are the Rapid Rewards Rules and Regulations, https://support.southwest.com/helpcenter/s/article/rapid-rewards-rules-and-regulations* (last accessed Sept. 4, 2024) Emily McNutt, *Delta is making it more expensive to earn elite status—here's how you can bypass the new requirements,* CNN (Aug. 28, 2023), *https://www.cnn.com/cnn-underscored/travel/delta-airlines-status-requirements-update;* Sean Cudahy, *Alaska Airlines raises lounge membership prices, tightens access,* The Points Guy (Nov. 9, 2023), *https://thepointsguy.com/news/alaska-lounge-restrictions/;* Zach Griff, *Why United's increased status thresholds might not be as bad as they seem,* The Points Guy (Nov. 11, 2022), *https://thepointsguy.com/news/united-premier-changes-not-so-bad/.*

[12] *See, e.g.,* United Airlines, *MileagePlus Investor Presentation,* at 23 (June 15, 2020) (MileagePlus program can ''adjust[ ] award pricing based on expected foregone revenue for United''), *https://ir.united.com/static-files/1c0f0c79-23ca-4fd2-80c1-cf975348bab9;* Delta Airlines, *Delta Air Lines SkyMiles Investor Presentation,* at 17 (Sept. 14, 2020) (dynamic pricing model of SkyMiles rewards program allows ''flexibility to control costs and preserve margins''), *https://www.sec.gov/Archives/edgar/data/27904/000119312520244688/d27099dex991.htm;* American Airlines, *American Airlines AAdvantage Investor Presentation,* at 22, 35 (Mar. 2021) (AAdvantage ''control[s] the 'exchange rate' between miles and dollars,'' which provides flexibility to ''manage costs'' and ''steer reward demand to optimal flights based on cash displacement risk.''), *https://www.sec.gov/Archives/edgar/data/6201/000000620121000022/aainvestorpresentation.htm.*

[13] *See* Jamie Lauren Keiles, *The Man Who Turned Credit-Card Points Into an Empire,* The New York Times (Jan. 5, 2021), *https://www.nytimes.com/2021/01/05/magazine/points-guy-travel-rewards.html* (how ''as rewards programs have multiplied, the earned point has grown increasingly complex and fungible''); *Credit Card Rewards Issue Spotlight, supra* note 4, at 6.

[14] *See Credit Card Rewards Issue Spotlight, supra* note 4, at 11, 20; New York General Business Law § 520–e (2023).

[15] In 2023, there was a more than 70 percent increase in complaints involving credit card rewards over pre-pandemic levels. *Credit Card Rewards Issue Spotlight, supra* note 4, at 2.

[16] *See, e.g., id.* at 15, 16.

[17] *See, e.g.,* id. at 13.

[18] *See, e.g.,* id. at 15.

[19] *See, e.g., id.* at 17.

[20] *See, e.g., id.* at 18.

[21] *See, e.g., id.*

[22] *See, e.g., id.*

[23] *See, e.g., id.* at 19.

[24] 12 U.S.C. 5531(a); *see also* 12 U.S.C. 5536(a)(1)(B).

[25] 12 U.S.C. 5531(c)(1).

[26] *See, e.g., FTC* v. *Wyndham Worldwide Corp.,* 799 F.3d 236, 246 (3d Cir. 2015).

[27] *See FTC* v. *Neovi, Inc.,* 604 F.3d 1150, 1158 (9th Cir. 2010) (interpreting whether consumer's injuries were reasonably avoidable under the FTC Act); *Orkin Exterminating Co.* v. *FTC,* 849 F.2d 1354, 1365–66 (11th Cir. 1988) (same); *Am. Fin. Servs. Ass'n* v. *FTC,* 767 F.2d 957, 976 (D.C. Cir. 1985) (same).

[28] *See CFPB* v. *Gordon,* 819 F.3d 1179, 1192–93 (9th Cir. 2016).

[29] *Novartis Corp.* v. *FTC,* 223 F.3d 783, 786 (D.C. Cir. 2000) (quoting *In re Cliffdale Assocs., Inc.,* 103 FTC 110, 165 (1984)).

statements in isolation.[30] A misrepresentation can be ''an express or implied statement [that is] contrary to fact.'' [31] It may also be deceptive, for example, when a seller partially discloses information about the nature of a product or service, but fails to disclose other material information.[32] Further, ''[w]ritten disclosures or fine print may be insufficient to correct a misleading representation.'' [33]

Rewards programs are a feature common to many credit cards, and tend to both be prominently marketed by issuers and widely used by consumers.[34] Credit card rewards programs also play a major role in consumer's choices on which cards to apply for and use for any given transaction.[35]

The CFPB is issuing this circular to underscore that the CFPA's prohibition on unfair or deceptive acts or practices applies to the design, marketing, and administration of credit card rewards programs.[36] Rewards program operators may violate this prohibition in a variety of circumstances regardless of whether they are taking actions consistent with rewards program terms. In particular, rewards program operators risk committing unfair or deceptive acts or practices when (1) rewards that consumers have already earned are devalued; (2) consumers' receipt of rewards is revoked, cancelled, or prevented based on buried or vague conditions; and (3) rewards points are deducted without consumers receiving the corresponding benefit of the rewards. These examples are illustrative and non-exhaustive.

As described further below, the CFPB emphasizes that covered persons that offer, provide, or operate credit card rewards programs may be liable for an unfair or deceptive act or practice where some of the conduct in question may be attributable to a third party or service provider, such as a merchant partner.[37]

Devaluation of Rewards Already Earned or Purchased

Rewards program operators may commit an unfair or deceptive act or practice when they materially reduce the overall value of rewards that consumers have already earned or purchased. Consumers make decisions on whether to open or use a credit card based on the explicit and implicit representations about the value of card benefits and rewards. For instance, consumers' reasonable expectations about the value of rewards may be informed by advertisements at account opening, as well as by redemption values of rewards communicated to consumers on or around the time the consumer makes decisions to purchase goods with the card and accrue rewards benefits. Furthermore, fine print disclaimers or contract terms stating that rewards program operators have the right to adjust rewards offerings often will not be sufficient to correct consumers' net impression about the expected value of rewards.

When rewards operators influence consumers' expectations about the value of rewards in their product or marketing efforts (*e.g.,* to support customer acquisition, retention, or increased purchase volume), but later make decisions to deflate the overall value of accrued rewards, they may have engaged in actions that resemble a traditional ''bait-and-switch'' scheme.[38] These activities may constitute unfair or deceptive acts or practices under the CFPA.[39]

Enforcers investigating potentially unfair or deceptive acts or practice should consider a variety of different devaluation tactics by rewards program operators. Unfair or deceptive devaluations are easier to detect when the rewards program involves simple, fixed redemption rates with one retailer or merchant partner. But such schemes may be harder to detect where there are numerous potential rewards available or rewards program operators implement more complex program changes. For example, if a rewards program operator uses dynamic pricing for rewards redemptions, enforcers can examine whether the firm is unfairly or deceptively devaluing points over time by considering, for example, whether the dynamic prices in points have increased, in aggregate, relative to dynamic cash prices for the same products or services. Similarly, if a rewards program includes redemption options from multiple participating merchant partners, and the rewards program operator loses a major merchant partner or a major partner materially downgrades the service provided, enforcers can look to whether the rewards program operator is taking reasonable measures to generally maintain the value of rewards, such as by increasing points usable at other merchant partners, allowing customers to cash out points, replacing lost rewards with other rewards, or by other

[30] *See, e.g., CFPB* v. *Aria,* 54 F.4th 1168, 1173 (9th Cir. 2022); *Gordon,* 819 F.3d at 1193; *FTC* v. *E.M.A. Nationwide, Inc.,* 767 F.3d 611, 631 (6th Cir. 2014); *Fanning* v. *FTC,* 821 F.3d 164, 170 (1st Cir. 2016).

[31] FTC, Policy Statement on Deception (Oct. 14, 1983).

[32] *See, e.g., Sterling Drug, Inc.* v. *FTC,* 741 F.2d 1146, 1154 (9th Cir. 1984) (advertisements referring to ''unique formula'' were deceptive because they could lead consumers to infer that pain reliever's formulation was something other than ordinary aspirin); *see also FTC* v. *Bay Area Business Council, Inc.,* 423 F.3d 627, 635 (7th Cir. 2005) (''[T]the omission of a material fact, without an affirmative misrepresentation, may give rise to an FTC Act violation.'').

[33] FTC, Policy Statement on Deception (Oct. 14, 1983).

[34] In 2022, rewards card spending was 90 percent of all consumer spending on general purpose credit cards. CFPB, *The Consumer Credit Card Market,* at 99 (Oct. 2023), *https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2023.pdf. See also Background on Credit Card Rewards Programs, supra.*

[35] *Id.* at 98. Because credit card rewards programs are offered or provided ''in connection'' with a consumer financial product or service (the extension of credit to consumers), the ''covered persons'' or ''service providers'' who offer, provide, or support such programs (hereinafter ''rewards program operators'') must comply with the CFPA, including its prohibitions against unfair, deceptive or abusive acts or practices, as well as other applicable consumer financial protection laws. In the typical case, a credit card issuer providing the rewards program would be a ''covered person,'' while ''service providers'' could include the partners or vendors that provide material services on the rewards program in connection with the credit card program, such as co-brand or merchant partners that deliver applicable rewards, or vendors who operate the key infrastructure or platforms for consumers to view, manage, and use their rewards earnings. *See* 12 U.S.C. 5481(6), 5481(26)(A).

[36] While not specifically discussed in this circular, rewards program operators must also comply with the CFPA's prohibition on abusive acts or practices, 12 U.S.C. 5531(d), which provides that an act or practice is abusive if it (1) materially interferes with a consumer's ability to understand a term or condition of a consumer financial product or service or (2) takes unreasonable advantage of the consumer's (a) lack of understanding of the material risks, costs, or conditions of the product or service; (b) inability to protect their interests in selecting or using a consumer financial product or service; or (c) reasonable reliance on a covered person to act in the consumer's interests.

[37] *See, e.g., CFPB* v. *Ocwen Fin. Corp.,* No. 17–80495–CIV, 2019 WL 13203853 at *30 (S.D. Fla. Sept. 5, 2019) (finding that the CFPB sufficiently alleged CFPA violations regarding add-on products even where add-on vendor was responsible for enrolling borrowers to such add-on products); *see also, e.g., FTC* v. *Bay Area Bus. Council, Inc.,* 423 F.3d at 630) (affirming district court ruling that multiple interrelated corporate and individual defendants were liable under section 5 of FTC Act for deceptive telemarketing scheme); *FTC* v. *Neovi, Inc.,* 604 F.3d 1150, 1155 (9th Cir. 2010) (''a single violation of the [FTC] Act may have more than one perpetrator'') (citing *Bay Area*).

[38] *See* 16 CFR 238 *et seq.,* FTC Guides Against Bait Advertising. *Cf. Rossman* v. *Fleet Card (R.I.) Nat. Ass'n,* 280 F.3d 384, 396–400 (3d Cir. 2002) (credit card issuer soliciting business with no-annual-fee offer while intending to later impose fee constitutes a bait-and-switch scheme).

[39] *Cf.* 24. FR 9755 (Dec. 4, 1959) (noting that FTC enforcement actions with respect to bait-and-switch schemes are brought under the FTC Act's prohibition on ''unfair or deceptive acts or practices''); 32 FR 15540 (Nov. 8, 1967) (similar); *Synopsis of Federal Trade Commission Decisions Concerning* ''*Bait and Switch*'' *Sales Practices* (Sept. 23, 1975) (''The Federal Trade Commission has determined that 'bait and switch' practices are unfair or deceptive trade practices and are unlawful under Section 5(a)(1) of Federal Trade Commission Act.''), *https://www.ftc.gov/system/files/ftc_gov/pdf/NOPO-Bait-and-Switch.pdf.*

means. Additionally, when two firms merge, resulting in a conversion of one firm's customers into a new rewards program, enforcers can look at whether the resulting firm took actions to convert customers' points to the new system without a reduction in points value.[40]

In any investigation into whether a rewards program operator has engaged in an unfair or deceptive devaluation scheme, enforcers are encouraged to collect and consider accounting or other metrics maintained by program operators or others regarding rewards values. For example, many companies maintain internal figures on the dollar value of outstanding rewards for accounting purposes, including an estimated cost-per-point or weighted average redemption cost.[41] If a firm's cost-per-point or weighted average redemption cost decreases over time, that could suggest a firm has engaged in a bait-and-switch or similar unfair or deceptive act or practice.

The CFPB emphasizes that covered persons that offer, provide, or operate credit card rewards programs may be liable for an unfair or deceptive act or practice even when the material devaluation of rewards could arguably be attributed to the actions of a third party. In other words, if a covered person that offers, provides, or operates a credit card rewards program makes explicit or implicit representations about, and thereby induces consumer expectations regarding, the value of the card benefits or rewards, and the value of those benefits or rewards is subsequently materially reduced by actions that may be attributable to the covered person's merchant partner, the covered person may be liable for an unfair or deceptive act or practice.

Hidden Conditions

Rewards program operators also risk committing unfair or deceptive acts or practices when they revoke or cancel rewards, or prevent the award of rewards, based on buried or vague conditions.[42] Rewards programs have become increasingly complex, with lengthy terms and unintuitive restrictions that consumers may not be aware of as they use their credit cards day to day. These lengthy terms may use buried or vague conditions set by rewards program operators that are non-negotiable and may not be consistent with prominent promotional language advertising the rewards that consumers can earn. As noted above, consumer complaints received by the CFPB suggest that, despite descriptions in the fine print of rewards program terms, consumers often do not understand the basis of many rewards forfeitures or denials.

The following are illustrative examples of potentially unfair rewards program practices:

- Revoking or canceling rewards based on vague catch-all language in program terms, such as ''gaming'' or ''abuse.'' This can be especially problematic when those terms are also subject to the rewards program operator's discretion.[43]
- Revoking previously earned rewards based on policies that tie revocation to actions that are not within the consumer's control and do not constitute fraud or misconduct by the consumer, like an issuer unilaterally closing an account.[44]
- Promotional ''sign-up'' offers that are denied based on hidden conditions that consumers were not reasonably aware of, such as ''churning'' conditions that restrict how frequently a consumer can earn sign-up rewards, time periods to earn rewards that are effectively shortened by the hidden and unavoidable period of time needed to receive and activate a card, or promotional offers that are unavailable for applicants through certain channels.

These sorts of dark patterns and fine print will often constitute deceptive representations, omissions, or practices about material concerns, and thus violate the prohibition on deceptive practices.[45] In addition, denying or preventing rewards based on buried or vague terms could cause a substantial monetary injury in the form of lost rewards value and may be unfair.[46] These injuries may not be reasonably avoidable by consumers where conditions are buried or vague, and accordingly hinder consumers' ability to make a ''free and informed choice.''[47] Specifically, consumers cannot reasonably avoid injuries where they are not ''adequately informed'' of key conditions or presented such information in a confusing way.[48] As noted above, rewards program operators typically promote most prominently the availability of rewards, even more so than other key credit card terms, such as APR or annual fees, while putting conditions around rewards in fine print.[49] Consumers may not understand the restrictive eligibility criteria buried in the fine print where program operators send marketing materials that target rewards promotions to the specific consumers.[50] Similarly, a consumer may be confused by the way a rewards program operator interprets vague catch-all language, such as terms restricting rewards based on impermissible ''gaming'' or ''abuse,''

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[40] *See, e.g.,* U.S. DOT, USDOT Requires Alaska and Hawaiian Airlines to Preserve Rewards Value, Critical Flight Service as Merger Moves Forward (Sept. 2024), *https://www.transportation.gov/briefing-room/usdot-requires-alaska-and-hawaiian-airlines-preserve-rewards-value-critical-flight* (in connection with regulatory merger approvals, Department of Transportation imposed ''rewards protections against devaluation,'' including requiring each earned loyalty program be converted to new program miles at 1:1 ratio and prohibiting ''any actions that would devalue HawaiianMiles miles''). The merger approval and requirements were based on ''[p]ublic interest criteria [that] include preventing unfair, deceptive, predatory or anticompetitive practices. . . .'' *Id.*

[41] *See, e.g.,* Capital One Financial Corporation, Annual Report (Form 10–K) (Feb. 24, 2023) (''We use the weighted-average redemption cost during the previous twelve months, adjusted as appropriate for recent changes in redemption costs, . . . to estimate future redemption costs.''). Similarly, informational websites aimed at consumers may also estimate rewards point values. *See, e.g.,* The Points Guy, *TPG launches new data-driven valuations for 6 major US airlines—and updates methodology for credit card currencies* (Sept. 8, 2023), *https://thepointsguy.com/news/new-data-driven-valuations/.*

[42] Additionally, rewards program terms that include unlawful or unenforceable conditions may violate the CFPA's prohibition on deceptive acts or practices. CFPB Circular 2024–03, Unlawful and unenforceable contract terms and conditions *(June 2024), https://www.consumerfinance.gov/compliance/circulars/consumer-financial-protection-circular-2024-03/.* For example, the recently enacted New York statute referenced above may render certain terms in rewards program deceptive with respect to New York residents.

[43] *See Credit Card Rewards Issue Spotlight, supra* note 4, at 14.

[44] *Id.* at 20.

[45] *See* FTC, *Bringing Dark Patterns to Light, at 7* (Sept. 2022) (''Some dark patterns operate by hiding or obscuring material information from consumers, such as burying key limitations of the product or service in dense Terms of Service documents that consumers don't see before purchase.''), *https://www.ftc.gov/system/files/ftc_gov/pdf/P214800%20Dark%20Patterns%20Report%209.14.2022%20-%20FINAL.pdf. Cf. FTC* v. *Amazon.com,* 2024 WL 2723812 at *1 (W.D. Wash. 2024) (denying motion to dismiss of claims brought under Section 5 of the FTC Act and the Restore Online Shoppers' Confidence Act based on defendants ''trick[ing], coerc[ing], and manipulat[ing] consumers . . . by failing to disclose the material terms of the subscription clearly and conspicuously and by failing to obtain consumers' informed consent before enrolling them''); *FTC* v. *Publishers Clearing House LLC,* No. 23–CV–4735 (E.D.N.Y. June 6, 2023) (complaint) (alleging defendant ''employs dark patterns throughout the consumer's experience by, among other things . . . placing disclosures in small and light font and in places where a consumer is unlikely to see them'').

[46] CFPB research suggests consumers lose hundreds of millions of dollars in earned rewards each year. *2023 Report,* at 102.

[47] *See FTC* v. *Neovi,* 604 F.3d at 1158; *Am. Fin. Servs. Ass'n* v. *FTC,* 767 F.2d at 976.

[48] *See, e.g., FTC* v. *Commerce Planet, Inc.,* 878 F. Supp. 2d 1048, 1079 (C.D. Cal. 2012) (consumers could not reasonably avoid injury where sign-up pages did not adequately disclose negative option plan by burying in separate fine print disclosures).

[49] *Credit Card Rewards Issue Spotlight, supra* note 4, at 4, 11.

[50] *Id.* at 12–13.

when those interpretations conflict with prominent promotional language or other representations.[51] There are no countervailing benefits that outweigh the injury to consumers or competition of inducing consumers to use credit cards with vague or fine-print conditions that consumers cannot reasonably understand.[52]

Inability To Redeem Rewards

Rewards program operators can also commit unfair or deceptive acts or practices when their customers lose their points because redemption procedures do not function properly. In offering rewards programs, operators make representations to consumers about how rewards can be redeemed, often developing online interfaces for consumers to use to redeem rewards. A rewards program operator is accordingly responsible for administering the rewards program it offers, including coordinating with its merchant partners or vendors, so that consumers can redeem the rewards that they have earned and selected in accordance with the rewards program.[53]

If systems failures result in consumers losing points when attempting to redeem, it may result in a deceptive practice because consumers would typically have a basis to reasonably believe they were purchasing products or services with their points, which would be false as a result of the failure. It would likely also be unfair because consumers would incur injury as a result of the loss of rewards, with no ability to avoid the harm and no countervailing benefits that outweigh the injury. Even if a rewards program operator ultimately refunds unredeemed points to a consumer, the consumer may be harmed by the consumer's inability to redeem points in the interim,[54] and often consumers end up expending significant time and resources trying to obtain the refund.[55] Consumers cannot reasonably avoid these harms as they do not have control over operators' rewards program administration, including procedures for redeeming points or converting them for use with co-brand or merchant partners.

Again, the CFPB emphasizes that covered persons that offer, provide, or operate credit card rewards programs may commit an unfair or deceptive act or practice when the loss of points due to failures of redemption procedures could arguably be attributed to a merchant partner or service provider. For instance, a covered person may be liable for an unfair or deceptive act or practice when a consumer attempts to transfer rewards points from the online portal of such covered person to the points portal of a merchant partner (*e.g.,* requests a ''conversion'' of credit card rewards points to points at a travel partner), but technical failures on the merchant partner's system result in the consumer losing the points.

About Consumer Financial Protection Circulars

Consumer Financial Protection Circulars are issued to all parties with authority to enforce Federal consumer financial law. The CFPB is the principal Federal regulator responsible for administering Federal consumer financial law, *see* 12 U.S.C. 5511, including the Consumer Financial Protection Act's prohibition on unfair, deceptive, and abusive acts or practices, 12 U.S.C. 5536(a)(1)(B), and 18 other ''enumerated consumer laws,'' 12 U.S.C. 5481(12). However, these laws are also enforced by State attorneys general and State regulators, 12 U.S.C. 5552, and prudential regulators including the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the National Credit Union Administration. *See, e.g.,* 12 U.S.C. 5516(d), 5581(c)(2) (exclusive enforcement authority for banks and credit unions with $10 billion or less in assets). Some Federal consumer financial laws are also enforceable by other Federal agencies, including the Department of Justice and the Federal Trade Commission, the Farm Credit Administration, the Department of Transportation, and the Department of Agriculture. In addition, some of these laws provide for private enforcement.

Consumer Financial Protection Circulars are intended to promote consistency in approach across the various enforcement agencies and parties, pursuant to the CFPB's statutory objective to ensure Federal consumer financial law is enforced consistently. 12 U.S.C. 5511(b)(4).

Consumer Financial Protection Circulars are also intended to provide transparency to partner agencies regarding the CFPB's intended approach when cooperating in enforcement actions. *See, e.g.,* 12 U.S.C. 5552(b) (consultation with CFPB by State attorneys general and regulators); 12 U.S.C. 5562(a) (joint investigatory work between CFPB and other agencies).

Consumer Financial Protection Circulars are general statements of policy under the Administrative Procedure Act. 5 U.S.C. 553(b). They provide background information about applicable law, articulate considerations relevant to the Bureau's exercise of its authorities, and, in the interest of maintaining consistency, advise other parties with authority to enforce Federal consumer financial law. They do not restrict the Bureau's exercise of its authorities, impose any legal requirements on external parties, or create or confer any rights on external parties that could be enforceable in any administrative or civil proceeding. The CFPB Director is instructing CFPB staff as described herein, and the CFPB will then make final decisions on individual matters based on an assessment of the factual record, applicable law, and factors relevant to prosecutorial discretion.

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

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[51] For instance, consumer complaints indicate rewards program operators may interpret as impermissible ''gaming'' or ''churning'' consumer card usage behaviors that are otherwise permissible under cardholder agreements and satisfy objective sign-up promotion criteria, such as closing an account after spending the required amount for a promotional rewards bonus. *See id.* at 14.

[52] Notably, as with devaluation, the rewards program operators have already benefitted from the consumer spending on the relevant card by the time they deny the rewards benefits.

[53] *Cf. In re UniRush and Mastercard Int'l Inc.,* No. 2017–CFPB–0010 (Feb. 1, 2017) (consent order) (finding that failures to adequately test and administer prepaid card program conversion were unfair acts or practices), *https://files.consumerfinance.gov/f/documents/201702_cfpb_UniRush-Mastercard-consent-order.pdf. See also CFPB* v. *Ocwen Financial Corp.,* No. 17–80495–CIV, 2019 WL 13203853 at *30 (S.D. Fla. Sept. 5, 2019) (finding that the CFPB sufficiently alleged CFPA violations regarding add-on products even where add-on vendor was responsible for enrolling borrowers to such add-on products); *see also, e.g., FTC* v. *Bay Area Bus. Council, Inc.,* 423 F.3d at 630 (affirming district court ruling that multiple interrelated corporate and individual defendants were liable under section 5 of FTC Act for deceptive telemarketing scheme); *FTC* v. *Neovi,* 604 F.3d at 1155 (''a single violation of the [FTC] Act may have more than one perpetrator'') (citing *Bay Area*).

[54] *See Credit Card Rewards Issue Spotlight, supra* note 4, at 19 (''the ultimate value to consumers [of converting rewards points to miles or hotel points] depends on a quick and accurate conversion'').

[55] *See id.* at 17 (complaints received by CFPB indicate consumers spend time trying to resolve rewards issues through ''repeated calls, hours on hold, and thorough documentation of the problem at hand'').

Tab 42