CFPB Bites of the Month – December Top 20

December 18th, 2020 | Eric L. Johnson and Justin B. Hosie

Each month, we host a 30-minute webinar outlining the month's key announcements and takeaways from the CFPB to be considered by financial services providers. It was a particularly busy month at the CFPB, so as an extra special holiday bite, we share our top 20 bites covered during the December 16 webinar.

Bite #20 – CFPB, Federal Reserve & OCC announced higher-priced mortgage loan exemption threshold

The CFPB, the Federal Reserve Board, and the Office of the Comptroller of the Currency announced that the threshold for exempting loans from special appraisal requirements for higher-priced mortgage loans during 2021 will remain at $27,200, as it was in 2020. The threshold amount is based on the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W) as of June 1, 2020. The Dodd-Frank Act amended the Truth in Lending Act (TILA) to add special appraisal requirements for higher-priced mortgage loans, including a requirement that creditors obtain a written appraisal based on a physical visit to the home's interior before making a higher-priced mortgage loan.

Bite #19 – CFPB & Federal Reserve announced Reg. Z & Reg. M thresholds

The CFPB and the Federal Reserve Board announced that the thresholds for determining exempt consumer credit and lease transactions will remain at $58,300 in 2021, unchanged from 2020. The threshold amount is based on the annual percentage increase in the Consumer Price Index (CPI) for Urban Wage Earners and Clerical Workers (CPI-W) as of June 1, 2020, the same CPI used for exempting loans from special appraisal requirements for higher-priced mortgage loans. Although the Dodd-Frank Act generally transferred rulemaking authority under the Truth in Lending Act (TILA) and the Consumer Leasing Act (CLA) to the CFPB, the Federal Reserve Board retains authority to issue rules for certain motor vehicle dealers. Transactions at or below the thresholds are subject to the protections of the Regulations M and Z, while private education loans and loans secured by real property (such as mortgages) are subject to the Truth in Lending Act regardless of the amount of the loan.

Bite #18 – Sued a debt settlement company

The CFPB filed a suit against a debt settlement company and its owners, alleging violations of the Telemarketing Sales Rule (TSR) and the Consumer Financial Protection Act (CFPA). The company allegedly engaged in abusive telemarketing by requesting and taking payments from consumers for debt-relief and credit-repair services before achieving the promised results and before it was legally allowed to do so under the TSR. The CFPB also alleges that the company

used deception in violation of the TSR and CFPA to attract consumers by misrepresenting material aspects of its student loan debt-relief services. The Bureau alleges that the owners are individually liable under the TSR and CFPA because they knew of, directed, and engaged in the violations and substantially assisted the company.

Bite #17 – Settled with a financial company

The CFPB issued a consent order with a financial company, finding that the company's disclosures and advertisements of its auto loan payment program contained misleading statements in violation of the Consumer Financial Protection Act's prohibition against deceptive acts or practices. The program charged fees to deduct payments from consumers' bank accounts every two weeks and then forwarded those payments every month to the consumers' lenders. The Bureau found that the company misrepresented the amount consumers would save when disclosing the program's benefits by not including a $399 enrollment fee in the calculations presented to consumers. The company created the misleading impression that consumers would save money using its product, when in fact, because of the enrollment fee, the program's costs ordinarily exceeded any savings. The Bureau also found that the company's advertising stated that they have helped hundreds of thousands of customers save millions in interest by participating in the program when they had no basis for making this claim.

The Bureau ordered the company and its owner to pay $9,300,000 in redress to more than 100,000 consumers.

Bite #16 – Kraninger spoke at the Academic Research Council meeting

CFPB Director Kathleen Kraninger delivered remarks at the November 2020 Academic Research Council meeting. Her remarks centered on 3 key areas:

- Small business rulemaking
- Credit reporting
- Alternative data

On Dodd Frank Section 1071, which requires financial institutions to collect certain information on women-owned, minority-owned, and small businesses, Director Kraninger noted that a panel under the Small Business Regulatory Enforcement Fairness Act (SBREFA) was convened last month. The SBREFA Panel developed an outline of proposals related to Section 1071, and feedback for that outline was due December 14.

Director Kraninger also highlighted the CFPB's supervisory authority over credit reporting companies and that the Bureau considers it a high priority area. In her final point, Director Kraninger noted that the Bureau is studying the use of alternative data in credit decisions and wants feedback on, among other things, the use of alternative data and any privacy concerns related to such use.

Bite #15 – Launched a refreshed website

The CFPB launched a refresh of its public website, http://consumerfinance.gov, that features additional user functionality, an improved layout, more content, and easier access to information.

The website will include the following enhancements:

An interactive enforcement database

- The new database allows users to quickly find information about the Bureau’s public enforcement actions.
- Users can view interactive graphs tracking cumulative consumer relief, cumulative enforcement actions, and total enforcement actions per year.

Page for petitions

- Petitions for rulemaking will be publicly available on the Bureau’s website.
- Users can now easily search for and find petitions in a centralized location.

Archiving of older content

- Blogs, newsroom pages, and reports older than two years old will now be labeled to provide clarity and identify items that may not be the most up to date resources offered by the Bureau.
- The materials will still be accessible via the search function on the website.
- Users will be able to clearly see if they are being directed to or are using an archived page.

Bite #14 – Granted a no-action letter

The Bureau granted a no-action letter (NAL) to Upstart Network, Inc., regarding its automated model for underwriting and pricing applicants for unsecured, closed-end loans. Issued under the updated NAL Policy from last year, NALs provide increased regulatory certainty that the Bureau will not bring a supervisory or enforcement action against a company for providing a product or service under certain facts and circumstances. Upstart’s automated model uses artificial intelligence (AI) techniques and alternative data.

Bite #13 – Finalized its advisory opinions policy

The CFPB issued its final Advisory Opinions Policy to address regulatory uncertainty in the Bureau’s existing regulations and provide guidance to entities on outstanding regulatory uncertainty. Similar to the advisory opinion programs of many other federal agencies, the Policy is intended to facilitate timely guidance by the Bureau that enables compliance by resolving outstanding regulatory uncertainty. Under the final Policy, entities seeking to comply with regulatory requirements can submit a request to the Bureau where uncertainty exists.

The CFPB will consider certain factors to determine whether a request is appropriate:

- whether the interpretive issue has been noted during prior Bureau examinations as one that might benefit from additional regulatory clarity;
- whether the issue is one of significant importance or one whose clarification would provide significant benefit; and
- whether the issue concerns an ambiguity that the Bureau has not previously addressed through an interpretive rule or other authoritative source.

The CFPB has also set up a website to publish its advisory opinions and provide information on the Policy and kicked off the website with two brand new advisory opinions.

Bite #12 – First advisory opinion – earned wage access programs

The CFPB released an advisory opinion related to Earned Wage Access (EWA) programs, which enable employees to request a certain amount (or share) of accrued wages prior to payday that are later paid back through payroll deductions or bank account debits on the subsequent payday. The Bureau was asked whether EWA providers are offering or extending credit within the scope of Regulation Z.

The advisory opinion noted that an EWA program is not an extension of credit and not subject to Reg. Z if it meets all of the following criteria:

- The provider contracts with the employer.
- The advance does not exceed the amount of earned wages verified by the employer.
- The employee pays no fee, voluntary or otherwise, for the service. The advance must be sent to the account of the employee's choice. If the account receiving the advance is a prepaid account offered by the provider, then certain additional fee restrictions apply to the prepaid account.
- Provider recovers the advance only through payroll deduction from the next paycheck. One additional deduction may be attempted if the first deduction fails for technical reasons.
- If the advance can't be collected through the payroll deduction, the provider can't otherwise collect from the employee.
- The provider must make certain warranties to the employee, including that there will be no fees, no recourse against the employee, and no debt collection activities.
- The provider may not conduct a credit assessment or credit reporting.

Bite #11 – Advisory opinion #2 – education loan products

The CFPB also issued an advisory opinion to clarify that certain education loan products that refinance or consolidate a consumer's pre-existing federal, or federal and private, education loans meet the definition of "private education loan" in Truth in Lending Act and Regulation Z and are subject to the disclosure and other requirements in subpart F of Regulation Z. The opinion ultimately concludes that a private loan that refinances or consolidates a Federal loan incurred expressly for postsecondary educational expenses is, itself, "expressly for postsecondary educational expenses." As a result, such loans are "private education loans" that are subject to the disclosure and other requirements under subpart F of Regulation Z.

Bite #10 – Sued another debt settlement company

The CFPB sued a company for violations of the Telemarketing Sales Rule (TSR) and the Consumer Financial Protection Act (CFPA) in connection with its debt-settlement and debt-relief services. The Bureau alleges that the company engaged in abusive and deceptive acts or practices in violation of the TSR.

Specifically, the Bureau alleges the company:

- requested and received fees before it performed its promised services and before consumers started payments under any debt settlement;
- collected fees, after settling individual debts, based on increased debt amounts after enrollment

rather than the amount of each debt at the time of enrollment;
- failed to disclose to consumers before enrollment when it would make a settlement offer to creditors or debt collectors;
- did not disclose the amount of money or the percentage of each outstanding debt the consumer had to accumulate before the company would make a settlement offer;
- misrepresented to consumers that it would not charge fees for its services until after it settled a debt and consumers made a payment under the settlement; and
- misrepresented in its contracts the debt amount that it would use to determine its fees.

Bite #9 – Ombudsman released its 2020 annual report

The CFPB Ombudsman released its 2020 Annual Report, as it is required to do under the CFPB Ombudsman's Office Charter. The CFPB Ombudsman's Office is an independent, impartial, and confidential resource and its mission is to advocate for fair process in consumer financial protection. The Ombudsman informally assists in resolving process issues with the CFPB that are:

- mentioned in individual inquiries received from consumers, financial entities, consumer or trade groups, and others;
- highlighted in interactions with groups; or
- observed by the Ombudsman.

This year, the report focused on the following topics:

- Clarifications Around the CFPB's Announcement and Processes for Small Business Lending Discrimination Complaints
- Information the CFPB Provides During and at the Conclusion of Examinations
- How Non-Consumers Contact the CFPB on the Phone (Review of 2017 Focus)
- Consumer Complaints Referred to the CFPB from Other Agencies (Review of 2019 Focus)

Bite #8 – Sued an online lender for alleged violations of the MLA

The CFPB sued an online lender making single-payment and installment loans for violations of the Military Lending Act (MLA). The MLA puts in place protections in connection with extensions of consumer credit for active-duty servicemembers and their dependents, who are defined as "covered borrowers." These protections include a maximum allowable annual percentage rate of 36%, known as a Military Annual Percentage Rate (MAPR), a prohibition against required arbitration, and certain mandatory loan disclosures. The Bureau alleges that the online lender has made over 4,000 single-payment or installment loans to over 1,200 covered borrowers in violation of the MLA. The Bureau specifically alleges that the company's violations of the MLA include extending loans with an MAPR that exceeds the MLA's 36% cap, extending loans that require borrowers to submit to arbitration, and failing to make certain required loan disclosures, including a statement of the applicable MAPR.

The action is part of a broader Bureau sweep of investigations of multiple lenders that may be violating the MLA.

Bite #7 – Settled with a mortgage servicer

The CFPB, attorneys general from all 50 states, and bank regulators from 53 jurisdictions settled with a mortgage servicer for violations of the Consumer Financial Protection Act, the Real Estate Settlement Procedures Act (RESPA), and the Homeowner's Protection Act of 1998 (HPA).

Specifically, the Bureau alleges that, in numerous instances, the servicer:

- failed to identify loans on its systems that had pending loss-mitigation applications or trial-modification plans, and as a result failed to honor borrowers' loan modification agreements;
- foreclosed on borrowers to whom it had promised it would not foreclose while their loss mitigation applications were pending;
- improperly increased borrowers' permanent, modified monthly loan payments, mispresented to borrowers when they would be eligible to have their private mortgage insurance premiums canceled, and failed to timely remove private mortgage insurance from borrowers' accounts; and
- failed to timely disburse borrowers' tax payments from their escrow accounts and failed to properly conduct escrow analyses for borrowers during their Chapter 13 bankruptcy proceedings.

If entered by the court, the servicer would be required to pay approximately $73 million in redress to more than 40,000 harmed borrowers, as well as a $1.5 million civil penalty to the Bureau. The other settlements with state AGs and regulators are not included in that amount.

Bite #6 – Settled with a debt collector

The CFPB settled with a debt collector for threatening to sue and suing consumers to collect debts where it did not have a legally required license to do so. The Bureau found that, through 2012, the debt collector purchased and collected consumer debts from debt brokers, and through August 2014, used collections law firms to obtain judgments against consumers. The debt collector continued to collect on those judgments against consumers as well as on a handful of payment agreements it obtained from debtors. The Bureau found that during the period the company was obtaining judgments against consumers, the company threatened to sue, sued, and demanded payment from consumers in Connecticut, New Jersey, and Rhode Island even though the company did not hold the licenses that those states required to sue to collect debts. As a result, the company was not legally entitled to take the actions that it threatened to take against consumers in those states, and thus misrepresented that it had a legally enforceable right to recover payments from consumers in those states through the judicial process in violation of the Fair Debt Collection Practices Act (FDCPA) and the Consumer Financial Protection Act (CFPA).

Bite #5 – Sued a debt collector

The CFPB sued a debt collector for allegedly engaging in deceptive and otherwise unlawful debt collection acts or practices. The debt collector operates bad-check pretrial-diversion programs on behalf of more than 90 district attorneys' offices throughout the United States. The Bureau alleges that in the course of implementing this program, the debt collector violated the Fair Debt Collection Practices Act (FDCPA) and the Consumer Financial Protection Act (CFPA). Specifically, the CFPB alleges that the debt collector used district attorney letterheads to threaten more than 19,000 consumers with prosecution if they did not pay the amount of the check, enroll and pay for a financial-education course, and pay various other fees. The debt collector did not reveal to consumers that it—and not district attorneys—sent the letters. The debt collector also failed to reveal that district attorneys almost never prosecuted these cases, even when consumers

ignored the debt collector's threats. In most cases, the debt collector did not refer cases for prosecution, even if the check writer failed to respond to its collection letter. The debt collector's letters also failed to include disclosures required under the FDCPA.

Bite #4 – Issued two final QM rules

The CFPB issued two final rules related to qualified mortgage (QM) loans, for which lenders are required to determine that consumers have the ability to repay before making the loans.

The first final rule, the General QM Final Rule, replaces the current requirement for General QM loans that the consumer's debt-to-income ratio (DTI) not exceed 43 percent with a limit based on the loan's pricing. Under the General QM Final Rule, a loan receives a conclusive presumption that the consumer had the ability to repay if the annual percentage rate does not exceed the average prime offer rate for a comparable transaction by 1.5 percentage points or more as of the date the interest rate is set.

In the second final rule issued, the Bureau creates a new category for QMs, Seasoned QMs. Seasoned QMs are for first-lien, fixed-rate covered transactions that have met certain performance requirements, are held in portfolio by the originating creditor or first purchaser for a 36-month period, comply with general restrictions on product features and points and fees, and meet certain underwriting requirements.

The General QM Final Rule and the Seasoned QM Final Rule will take effect 60 days after publication in the Federal Register. The General QM Final Rule will have a mandatory compliance date of July 1, 2021.

Bite #3 – CFPB & Arkansas attorney general settled with a home security company

The CFPB and the Arkansas Attorney General settled with a company that sells home security and alarm systems and extends credit to consumers in connection with its sales. The FCRA and its implementing regulation, Regulation V, requires a company to give consumers notice when the company provides consumers with less favorable credit terms based on a review of their credit reports—also known as risk-based pricing. The regulators alleged that the company, in extending credit, charged customers who had lower credit scores higher activation fees, but failed to provide those customers with the required risk-based pricing notice.

If the settlement is entered by the court, the company must pay a $600,000 civil money penalty, $100,000 of which will be offset if the company pays that amount to settle related pending litigation with the State of Arkansas. The settlement would also require the company to provide proper notices under FCRA.

Bite #2 – Released its Fall 2020 rulemaking agenda

The CFPB published its agenda of regulatory matters for November 2020 to November 2021.

The Bureau noted several actions it has already completed, including:

- Releasing an outline to implement Dodd Frank Section 1071 re: women-owned, minority-owned, and small business data collection and reporting;
- Issuing final rules concerning amendments to the qualified mortgage (QM) provisions of

Regulation Z;

- Releasing an Advance Notice of Proposed Rulemaking (NPRM) concerning consumer data access to implement Dodd Frank Section 1033; and
- Issuing the first part of the debt collection final rule.

The Bureau also highlighted some future initiatives, including:

- Issuing the second part of the debt collection rule concerning disclosures;
- Addressing, through rulemaking, the upcoming expiration of the LIBOR index;
- Participating in interagency rulemaking related to implementing amendments made by Dodd Frank to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) concerning appraisals.
- Issuing an NPRM to consider possible amendments to the Bureau's mortgage servicing rules to address actions required of servicers working with borrowers affected by natural disasters or other emergencies; and
- Publishing NPRMSs concerning possible revisions to the 2015 Home Mortgage Disclosure Act (HMDA).

The CFPB also added two long-term items related to:

- The TILA/RESPA Integrated Disclosures (TRID) rule; and
- Payday loans, and the costs associated with such loans.

Bite #1 – Released its small business report

The CFPB released a panel report as part of its rulemaking process under Dodd-Frank Act Section 1071 governing the collection and reporting of small business lending data. A panel was convened pursuant to the Small Business Regulatory Enforcement Fairness Act (SBREFA) that consulted with small entity representatives (SERs) likely to be affected directly by a Section 1071 regulation. The SERs provided feedback on the Bureau's proposals under consideration for Section 1071 and the potential economic impacts of complying with those proposals and discussed regulatory alternatives to minimize potential impacts. The SERs were generally supportive of the Bureau's statutory mission to enact rules under Section 1071 and several SERs stated that a 1071 rulemaking is necessary to better understand the small business lending market. The SERs requested, and the panel agreed, that the Bureau should issue implementation and guidance materials specifically to assist small financial institutions in complying with an eventual Section 1071 rule, and to consider providing sample disclosure language. The feedback from SERs and the panel's findings and recommendations will be used by the Bureau as it prepares a notice of proposed rulemaking to implement Section 1071.

CFPB Bites resumes on January 20, 2021 and keep an eye out for the roundups that follow.