# Regulatory Update

## Community Bankers for Compliance

## 2nd Quarter 2023

**Non-Members of CBC Program**
www.younginc.com
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(case sensitive)

# Instructors for the CBC Program

## *Bill Elliott, CRCM, Senior Consultant and Director of Compliance Education, Young & Associates, Inc.*

Bill Elliott has over 40 years of banking experience. As a senior compliance consultant and manager of the compliance division with Young & Associates, Inc., Bill works on a variety of compliance-related issues, including leading compliance seminars, conducting compliance reviews, conducting in-house training, and writing compliance articles and training materials.

Bill's career includes 15 years as a compliance officer and CRA officer in a large community bank, as well as working at a large regional bank. He has experience with consumer, commercial, and mortgage loans, and has managed a variety of bank departments, including loan review, consumer/commercial loan processing, mortgage loan processing, loan administration, credit administration, collections, and commercial loan workout.

## *Sharon Bond, CRCM, Consultant, Young & Associates, Inc.*

Sharon Bond is a consultant in the compliance department at Young & Associates, Inc. where she specializes in Consumer Compliance. Sharon works on a variety of compliance-related issues, including leading compliance seminars, conducting compliance reviews for all areas of compliance, conducting in-house training, and writing compliance articles and training materials. With over 30 years of industry experience, she has a strong background in mortgage lending and in federal consumer compliance laws and regulations. Sharon was an Associate National Bank Examiner with the Office of the Comptroller of the Currency (OCC) for five years. She holds the designation of Certified Regulatory Compliance Manager (CRCM) and the Six Sigma Qualtec Black Belt certifications.

## *Dale Neiss, CRCM, Consultant, Young & Associates, Inc.*

Dale Neiss is a compliance consultant with Young & Associates, Inc. With over 30 years of banking experience in Denver, CO, Dale has developed and implemented compliance management systems, loan review and community reinvestment act (CRA) programs, and enterprise risk management (ERM) framework for multiple banks. He has held the titles of Compliance and Loan Review Manager, BSA and CRA Officer, and Enterprise Risk Management Director. Prior to his Denver, CO banking experience, Dale began his banking career with the Office of the Comptroller of the Currency in Indianapolis, IN as an associate national bank examiner. At Young & Associates, Inc., he provides consulting and training, as well as writes articles and compliance manuals. He holds the designation of Certified Regulatory Compliance Manager (CRCM) by the Institute of Certified Bankers in Washington, D.C. Dale earned a Bachelor of Business Administration degree in Finance and Management from Kent State University.

# Table of Contents

# Agency News Items

## *CFPB: What's Ahead for Wells Fargo and Its Customers (January 17, 2023)*

**Link**

https://www.consumerfinance.gov/about-us/blog/whats-ahead-for-wells-fargo-and-its-customers/

**Text**

Recently, the CFPB took action against Wells Fargo Bank for breaking federal consumer protection laws that apply to financial products, including auto loans, mortgages, and bank accounts. Wells Fargo is required to pay more than $2 billion to customers who were harmed, plus a $1.7 billion fine that goes to the victims' relief fund.

One in three American households is a Wells Fargo customer and affected by its corporate culture and business practices. If you have a Wells Fargo account, here's information to help you understand whether you may have been harmed, how payments are being distributed, and what else to watch for.

**Customers with three types of accounts were harmed**

More than 16 million accounts at Wells Fargo were subject to their illegal practices, including misapplied payments, wrongful foreclosures, and incorrect fees and interest charges.

***Auto Loan Customers***

- Some auto loan borrowers prepaid for GAP coverage, which insures the amount owed on a car loan if you have an accident or your car is stolen. Wells Fargo acted unfairly by not refunding money when the loan terminated early—for example, if it was paid off ahead of schedule.
- Some customers' auto loan payments were not applied correctly to their balances, leading to higher interest charges, late fees, and wrongful repossessions.
- Some auto repossessions were also mismanaged, including how the vehicles were sold after repossession.

***Mortgage Loan Borrowers***

- Some mortgage loan borrowers were unfairly turned down when they requested modifications to their loan to avoid foreclosure. They also may have been charged incorrect fees and other costs.

- Wells Fargo wrongly reported some customers as deceased, overstated attorney fees that meant applications were denied instead of approved, and brought thousands of wrongful foreclosure actions.

***Bank Account Holders***

- Some customers were unfairly charged surprise overdraft fees on debit purchases and ATM withdrawals, even if they had enough money in their account at the time of the transaction.
- Some customers were charged monthly fees when they shouldn't have been. Wells Fargo advertised no fees if a customer made "10 or more debit card purchases and/or payments" in a month, but the bank limited the types of eligible payments and didn't count debit transactions that posted days later.
- Some customers' money was unfairly "frozen" for weeks if Wells Fargo suspected a single deposit was fraudulent.

**Payments to Consumers Harmed by Wells Fargo**

The CFPB's enforcement action against Wells Fargo requires them to pay more than $2 billion to customers harmed between 2011 and 2022.

Wells Fargo is required to have a plan for each of the violations in the order, and we will supervise their repayments to customers. If you're eligible to receive money, the company is required to notify you. You don't need to take any action to receive your payment. Some customers have already received their payments.

If you believe you are eligible for a payment and have not received it yet, you should first contact Wells Fargo at 844-484-5089, Monday through Friday from 9:00 a.m. to 6:00 p.m. ET. If that does not resolve the issue, you can submit a complaint to us online.

The amount of the payment varies. For automobile repossessions, you could be reimbursed at least $4,000. Wells Fargo will also pay $77.2 million to approximately 3,200 customers who had issues working with the company to modify their loan payments to avoid foreclosure.

**Beware of Payment Scams**

If anyone claims they can get you compensation or asks for money upfront, it's a scam. If this happens to you, please contact the CFPB right away: (855) 411-2372, 8 a.m. to 8 p.m. ET, Monday through Friday.

**The CFPB never requires you to pay money to receive a redress payment. We never ask for your account information or personal data to send you a payment, or before you can cash a check we've issued.**

**What to do if you are treated unfairly by Wells Fargo or another financial company**

If you're having a problem with a financial institution, first try to resolve it directly with the company. They can generally answer questions unique to your situation and the products and services they offer.

If that doesn't resolve the problem, you can submit a complaint to the CFPB online or by calling (855) 411-CFPB (2372). We'll forward your complaint to the company and work to get you a response. Most companies respond to complaints within 15 days.

And if you witness potential misconduct as an employee or former employee at a financial company, you can send an e-mail to whistleblower@cfpb.gov. We review every submission.

**What You Need to Do**

Please review and share with team members; either for your personal information or to share with your FIs customers who may also be Wells Fargo customers.

## *FRB: Policy Statement on Section 9(13) of the Federal Reserve Act (January 27, 2023)*

### Link

https://www.federalregister.gov/documents/2023/02/07/2023-02192/policy-statement-on-section-913-of-the-federal-reserve-act

### Text

The Federal Reserve Board issued a policy statement to promote a level playing field for all banks with a federal supervisor, regardless of deposit insurance status. The statement makes clear that uninsured and insured banks supervised by the Board will be subject to the same limitations on activities, including novel banking activities, such as crypto-asset-related activities.

The statement also makes clear that uninsured and insured banks supervised by the Board would be subject to the limitations on certain activities imposed on national banks, which are overseen by the Office of the Comptroller of the Currency. The equal treatment will promote a level playing field and limit regulatory arbitrage.

In addition, the statement reiterates that banks must both ensure that the activities they engage in are allowed under the law, and conduct their business in a safe and sound manner. For instance, a bank should have in place risk management processes, internal controls, and information systems that are appropriate and adequate for the nature, scope, and risks of its activities.

In recent years, the Board has received a number of inquiries, notifications, and proposals from banks regarding potential engagement in novel and unprecedented activities, including those involving crypto-assets. In response, the Board's statement specifies how it will evaluate such inquiries, consistent with longstanding practice. Today's action would not prohibit a state member bank, or prospective applicant, from providing safekeeping services, in a custodial capacity, for crypto-assets if conducted in a safe and sound manner and in compliance with consumer, anti-money laundering, and anti-terrorist financing laws.

This policy statement is effective on February 7, 2023.

**What You Need to Do**

This is primarily informational; however, please review and share with appropriate team members.

## *FRB: Consumer Compliance Outlook (January 31, 2023)*

**Link**

https://d31hzlhk6di2h5.cloudfront.net/20230131/f6/16/ff/27/98fbd585721c63bd97124490/Issue_4_CCO_2022.pdf

**Text**

Editor's Note: The material in the *Consumer Compliance Outlook* is the intellectual property of the 12 Federal Reserve Banks and cannot be copied without permission.

The latest issue of *Consumer Compliance Outlook* is available for download. This issue includes the following articles and features:

- Overview of Special Purpose Credit Programs Under the Equal Credit Opportunity Act

  Because of the renewed interest in SPCPs and the recent guidance, *Consumer Compliance Outlook* is publishing this article: 1) to discuss the requirements for establishing a compliant SPCP, 2) to provide examples of SPCPs that some financial institutions have implemented, 3) to review the recent government-sponsored enterprises' (GSEs) SPCP plans, and 4) to provide an update on the Community Reinvestment Act (CRA) and SPCPs in the 2022 CRA rulemaking proposal.

- Federal Reserve Consumer Affairs Letter for 2022 and 2021

  Consumer Affairs (CA) letters address significant policy and procedural matters related to the Federal Reserve System's consumer compliance supervisory responsibilities. CA letters are numbered sequentially by year. For example, the second CA letter issued in 2022 is numbered CA 22-2. Letters that have been superseded or contain confidential supervisory information are not included. When the same issue is also addressed in a Supervision and Regulation (SR) letter, the SR letter is also noted.

**What You Need to Do**

This is primarily informational; please share with appropriate team members.

# *CFPB: Agency Contact Information (March 20, 2023)*

**Link**

https://www.govinfo.gov/content/pkg/FR-2023-03-20/pdf/2023-05216.pdf

**Initial Text**

The Consumer Financial Protection Bureau (Bureau or CFPB) is issuing this final rule to make non-substantive corrections and updates to Bureau and other Federal agency contact information found at certain locations in Regulations B, E, F, J, V, X, Z, and DD, including Federal agency contact information that must be provided with Equal Credit Opportunity Act adverse action notices and the Fair Credit Reporting Act Summary of Consumer Rights. This final rule also revises the chapter heading, makes various non-substantive changes to Regulations B and V, and provides a Bureau website address where the public may access certain APR tables referenced in Regulation Z.

**Dates**

The rule is effective April 19, 2023. However, the mandatory compliance date for the amendments to appendix A to Regulation B, appendix A to Regulation J, and appendix K to Regulation V is March 20, 2024. See part V for more information.

**Summary of Final Rule**

The Bureau is making non-substantive corrections and updates to Federal agency contact information located in several regulations. This includes correcting the zip code in the Bureau's mailing address found at certain locations in Regulations B, E, J, Z, and DD; replacing the name of a former Bureau division specified at certain locations in Regulations B, E, F, X, and Z with the name of a new, expanded Bureau division or updating references to officials of the former division to instead refer more generally to Bureau officials; and updating other Federal agency contact information in appendix A to Regulation B, which must be included in Equal Credit Opportunity Act (ECOA) adverse action notices, and appendix K to Regulation V, which contains the model form of the Fair Credit Reporting Act (FCRA) Summary of Consumer Rights. The Bureau is also changing the header of 12 CFR chapter X from "Bureau of Consumer Financial Protection" to "Consumer Financial Protection Bureau," and making various non-substantive corrections in Regulations B and V. Finally, the Bureau is updating the comment for appendix J to Regulation Z in the Official Interpretations of Regulation Z to add a URL (website address) at which the public may access a new Bureau website that contains certain APR tables. Previously, the public could only request the tables from the Bureau at its postal mailing address.

In Regulation B, implementing ECOA, the Bureau is amending appendix A, which contains Federal agency contact information that creditors must include in ECOA adverse action notices. The Bureau is correcting the contact information in appendix A for the following agencies: the Bureau; the Office of the Comptroller of the Currency (OCC); the Federal Deposit Insurance Corporation (FDIC); the National Credit Union Administration (NCUA); the Department of

Transportation (DOT); the Surface Transportation Board (STB); the United States Department of Agriculture, Agricultural Marketing Service (USDA– AMS); the United States Small Business Administration (SBA); the Securities and Exchange Commission (SEC); and the Federal Trade Commission (FTC). The Bureau is also correcting its own contact information in appendix D, which sets forth the process by which entities may request official Bureau interpretations of Regulation B, and removing an obsolete sentence located in section 1002.9(b)(1).

In Regulation E, implementing the Electronic Fund Transfer Act (EFTA), the Bureau is correcting and updating its own contact information in appendix C, which sets forth the process by which entities may request official Bureau interpretations of Regulation E. Appendix C to Regulation E currently designates the "Associate Director and other officials of the Division of Research, Markets, and Regulations" as the officials authorized under the Act to issue official interpretations. Because the Division of Research, Markets, and Regulations no longer exists, the Bureau is updating this language to reflect that fact, and instead indicate more generally that "duly authorized officials of the Bureau" may provide official interpretations of Regulation E.

In Regulation F, implementing the Fair Debt Collection Practices Act (FDCPA), the Bureau is correcting its own contact information in appendix A, which sets forth the process by which States may apply to the Bureau to exempt a class of debt collection practices from the requirements of the FDCPA and Regulation F, and in the introduction section of Supplement I, which sets forth the process by which entities can request official interpretations of Regulation F.

In Regulation J, implementing the Interstate Land Sales Full Disclosure Act (ILSA), the Bureau is correcting its own contact information in appendix A, which contains model forms and clauses that land developers must provide to prospective land buyers under certain circumstances.

In Regulation V, implementing the FCRA, the Bureau is amending the model form in appendix K for the Summary of Consumer Rights. Consumer reporting agencies must provide a Summary of Consumer Rights when making a written disclosure of information from a consumer's file or providing a credit score to a consumer, and the FCRA also requires certain other persons to provide a Summary of Consumer Rights to consumers under specified circumstances. The Bureau is correcting the contact information in the Summary of Consumer Rights model form for the following agencies: the OCC, FDIC, NCUA, DOT, STB, USDA– AMS, and SBA. The Bureau is also amending the Summary of Consumer Rights model form to update references to obsolete business types and to make other technical corrections.

In Regulation X, implementing the Real Estate Settlement Procedures Act (RESPA), the Bureau is correcting its own contact information in the definition of "Public Guidance Documents" in section 1024.2(b), which contains the procedure by which entities can request copies of public guidance documents from the Bureau, and in the introduction section of Supplement I, which sets forth the process by which entities can request official interpretations of Regulation X.

In Regulation Z, implementing the Truth in Lending Act (TILA), the Bureau is correcting its own contact information in appendices A, B, and C. Appendix A sets forth the process by which States may request a determination from the Bureau regarding whether a State law is inconsistent with or substantially the same as TILA and Regulation Z. Appendix B sets forth the process by which States may apply to the Bureau to exempt a class of transactions from the requirements of TILA and Regulation Z. Appendix C sets forth the process by which entities may request official Bureau interpretations of Regulation Z. The Bureau is also correcting its own contact information in the comment for appendix J, located in the Official Interpretations in Supplement I. Appendix J sets forth the actuarial equations and instructions for calculating the annual percentage rate in closed-end credit transactions. The Bureau maintains Annual Percentage Rate Tables to assist in performance of these calculations, and the comment for

appendix J in the Official Interpretations describes a process that entities may use to request these tables from the Bureau. In addition to correcting the Bureau's zip code in its postal address provided there, the Bureau now makes the tables available to the public on its website and is updating the comment to appendix J in the Official Interpretations to add a URL at which the public may access the website.

In Regulation DD, implementing the Truth in Savings Act (TISA), the Bureau is correcting its own contact information in appendix C, which sets forth the process by which States may request a determination from the Bureau regarding whether a State law is inconsistent with TISA and Regulation DD.

**Sections Omitted**

Background

Legal Authority

Section-by-Section Analysis

**Effective Date**

Consistent with the requirements of the Administrative Procedure Act, the amendments made by this final rule will take effect 30 days after publication in the *Federal Register*. However, to provide affected entities with adequate time to implement changes to the forms referenced in appendix A to Regulation B (ECOA adverse action notices), appendix A to Regulation J (Receipt, Agent Certification and Cancellation Page), and appendix K to Regulation V (Summary of Consumer Rights), the Bureau is allowing optional compliance with those changes until March 20, 2024. The Bureau anticipates this phase-in period will allow affected companies to make any needed modifications to the systems used to produce the forms as a part of regular updates made to those systems. Nevertheless, the Bureau encourages entities to correct their forms at the earliest feasible date to ensure consumers have accurate contact information for the relevant Federal agencies.

**Sections Omitted**

Dodd-Frank Act Section 1022(b) Analysis

Regulatory Flexibility Act Analysis

Paperwork Reduction Act

Congressional Review Act

**Authority and Issuance – Appendix A to Regulation B**

***Agencies To Be Listed in Adverse Action Notices***

The following list indicates the Federal agency or agencies that should be listed in notices provided by creditors pursuant to § 1002.9(b)(1). Any questions concerning a particular creditor may be directed to such agencies. This list is not intended to describe agencies' enforcement authority for ECOA and Regulation B. Terms that are not defined in the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the meaning given to them in the International Banking Act of 1978 (12 U.S.C. 3101).

1. *Banks, savings associations, and credit unions with total assets of over $10 billion and their affiliates:* Bureau of Consumer Financial Protection, 1700 G Street NW, Washington, DC 20552. Such affiliates that are not banks, savings associations, or credit unions also should list, in addition to the Bureau: Federal Trade Commission, Consumer Response Center, 600 Pennsylvania Avenue NW, Washington, DC 20580.

2. To the extent not included in item 1 above:

a. *National Banks, Federal savings associations, and Federal branches and Federal agencies of foreign banks:* Office of the Comptroller of the Currency, Customer Assistance Group, P.O. Box 53570, Houston, TX 77052.

b. *State member banks, branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act:* Federal Reserve Consumer Help Center, P.O. Box 1200, Minneapolis, MN 55480.

c. *Nonmember Insured Banks, Insured State Branches of Foreign Banks, and Insured State Savings Associations:* Division of Depositor and Consumer Protection, National Center for Consumer and Depositor Assistance, Federal Deposit Insurance Corporation, 1100 Walnut Street, Box #11, Kansas City, MO 64106.

d. *Federal Credit Unions:* National Credit Union Administration, Office of Consumer Financial Protection (OCFP), Division of Consumer Compliance Policy and Outreach, 1775 Duke Street, Alexandria, VA 22314.

3. *Air Carriers:* Assistant General Counsel for Office of Aviation Consumer Protection, Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590.

4. *Creditors Subject to Surface Transportation Board:* Office of Public Assistance, Governmental Affairs, and Compliance, Surface Transportation Board, 395 E Street SW, Washington, DC 20423.

5. *Creditors Subject to Packers and Stockyards Act:* Nearest Packers and Stockyards Division Regional Office.

6. *Small Business Investment Companies:* Associate Administrator, Office of Capital Access, United States Small Business Association, 409 Third Street SW, Suite 8200, Washington, DC 20416.

7. *Brokers and Dealers:* Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

8. *Federal Land Banks, Federal Land Bank Associations, Federal Intermediate Credit Banks, and Production Credit Associations:* Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090.

9. *Retailers, Finance Companies, and All Other Creditors Not Listed Above:* Federal Trade Commission, Consumer Response Center, 600 Pennsylvania Avenue NW, Washington, DC 20580.

**Appendix D to Part 1002 [Amended]**

Appendix D to part 1002 is amended in paragraph 2 by:

- Removing "Division of Research, Markets, and Regulations" and adding "Division of Research, Monitoring, and Regulations" in its place; and
- Removing "20006" and adding "20552" in its place.

**Changes to Electronic Funds Transfers (Regulation E**

***Appendix C to Part 1005 - Issuance of Official Interpretations***

***Official Interpretations***

Interpretations of this part issued by duly authorized officials of the Bureau provide the protection afforded under section 916(d) of the Act. Except in unusual circumstances, such interpretations will not be issued separately but will be incorporated in an official commentary to this part, which will be amended periodically.

***Requests for Issuance of Official Interpretations***

A request for an official interpretation shall be in writing and addressed to the Bureau of Consumer Financial Protection, 1700 G Street NW, Washington, DC 20552. The request shall contain a complete statement of all relevant facts concerning the issue, including copies of all pertinent documents.

***Scope of Interpretations***

No interpretations will be issued approving financial institutions' forms or statements. This restriction does not apply to forms or statements whose use is required or sanctioned by a government agency.

**Editor's Note**

Only the relevant changes are shown below.

**Changes to the Debt Collection Practices Act (Regulation F)**

***Appendix A to part 1006***

- In the second sentence of section II, by removing "Division of Research, Markets, and Regulations" and adding "Division of Research, Monitoring, and Regulations" in its place; and
- In the first sentence of section VI(b)(i), by removing "Division of Research, Markets, and Regulations" and adding "Division of Research, Monitoring, and Regulations" in its place.
- Supplement I is amended by revising the introduction to read as follows:

***Supplement I to Part 1006 - Official Interpretations***

***Introduction***

*1.* ***Official status***. This commentary is the vehicle by which the Bureau of Consumer Financial Protection supplements Regulation F, 12 CFR part 1006. The provisions of the commentary are issued under the same authorities as the corresponding provisions of Regulation F and have been adopted in accordance with the notice-and comment procedures of the Administrative Procedure Act (5 U.S.C. 553). Unless specified otherwise, references in this commentary are to sections of Regulation F or the Fair Debt Collection Practices Act, 15 U.S.C. 1692 et seq. No commentary is expected to be issued other than by means of this Supplement I.

*2.* ***Procedure for requesting interpretations***. Anyone may request that an official interpretation of the regulation be added to this commentary. A request for such an official interpretation must be in writing and addressed to the Assistant Director, Office of Regulations, Division of Research, Monitoring, and Regulations, Bureau of Consumer Financial Protection, 1700 G Street NW, Washington, DC 20552. The request must contain a complete statement of all relevant facts concerning the issue, including copies of all pertinent documents. Revisions to this commentary that are adopted in accordance with the rulemaking procedures of section 553 of the Administrative Procedure Act (5 U.S.C. 553) will be incorporated in the commentary following publication in the **Federal Register**.

*3.* ***Comment designations***. Each comment in the commentary is identified by a number and the regulatory section or paragraph that it interprets. The comments are designated with as much specificity as possible according to the particular regulatory provision addressed. For example, comments to § 1006.6(d)(4) are further divided by subparagraph, such as comment 6(d)(4)(i)–1 and comment 6(d)(4)(ii)–1. Comments that have more general application are designated, for example, as comments 38–1 and 38–2. This introduction may be cited as comments I–1, I–2, and I–3.

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**Changes to Land Registration (Regulation J)**

Omitted, as not significant to attendees.

**Changes to the Fair Credit Reporting Act (Regulation V)**

***Appendix K to Part 1022 - Summary of Consumer Rights***

The prescribed form for this summary is a disclosure that is substantially similar to the Bureau's model summary with all information clearly and prominently displayed. The list of Federal regulators that is included in the Bureau's prescribed summary may be provided separately so long as this is done in a clear and conspicuous way. A summary should accurately reflect changes to those items that may change over time (e.g., dollar amounts, or telephone numbers and addresses of Federal agencies) to remain in compliance. Translations of this summary will be in compliance with the Bureau's prescribed model, provided that the translation is accurate and that it is provided in a language used by the recipient consumer.

| **A Summary of Your Rights Under the Fair Credit Reporting Act** |
|---|
| omitted |

**Changes to the Real Estate Settlement Procedures Act (Regulation X)**

Section 1024.2 is amended in paragraph (b) in the last sentence of the definition of "Public Guidance Documents" by removing "Associate Director, Research, Markets, and Regulations" and adding "Assistant Director, Office of Regulations, Division of Research, Monitoring, and Regulations" in its place.

Supplement I is amended by revising the introduction to read as follows:

***Supplement I to Part 1024 - Official Bureau Interpretations***

***Introduction***

1. ***Official status.*** This commentary is the primary vehicle by which the Bureau of Consumer Financial Protection issues official interpretations of Regulation X. Good faith compliance with this commentary affords protection from liability under section 19(b) of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. 2617(b).

2. ***Requests for official interpretations.*** A request for an official interpretation shall be in writing and addressed to the Assistant Director, Office of Regulations, Division of Research, Monitoring, and Regulations, Bureau of Consumer Financial Protection, 1700 G Street NW, Washington, DC 20552. A request shall contain a complete statement of all relevant facts concerning the issue, including copies of all pertinent documents. Except in unusual circumstances, such official interpretations will not be issued separately but will be incorporated in the official commentary to this part, which will be amended periodically. No official interpretations will be issued approving financial institutions' forms or statements. This restriction does not apply to forms or statements whose use is required or sanctioned by a government agency.

*3.* ***Unofficial oral interpretations.*** Unofficial oral interpretations may be provided at the discretion of Bureau staff. Written requests for such interpretations should be sent to the address set forth for official interpretations. Unofficial oral interpretations provide no protection under section 19(b) of RESPA. Ordinarily, staff will not issue unofficial oral interpretations on matters adequately covered by this part or the official Bureau interpretations.

*4.* ***Rules of construction.***

(a) Lists that appear in the commentary may be exhaustive or illustrative; the appropriate construction should be clear from the context. In most cases, illustrative lists are introduced by phrases such as "including, but not limited to," "among other things," "for example," or "such as."

(b) Throughout the commentary, reference to "this section" or "this paragraph" means the section or paragraph in the regulation that is the subject of the comment.

*5.* ***Comment designations.*** Each comment in the commentary is identified by a number and the regulatory section or paragraph that the comment interprets. The comments are designated with as much specificity as possible according to the particular regulatory provision addressed. For example, some of the comments to § 1024.37(c)(1) are further divided by subparagraph, such as comment 37(c)(1)(i)–1. In other cases, comments have more general application and are designated, for example, as comment 40(a)–1. This introduction may be cited as comments I–1 through I–5.

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**Changes to The Truth in Lending Act – (Regulation Z)**

***Appendix A to Part 1026 [Amended]***

Appendix A to part 1026 is amended in the first sentence of the first paragraph immediately after the subheading *Request for Determination* by removing "20006" and adding "20552" in its place.

***Appendix B to Part 1026 [Amended]***

Appendix B to part 1026 is amended in the "Application" section in the second sentence by removing "20006" and adding "20552" in its place.

***Appendix C to Part 1026 [Amended]***

Appendix C to part 1026 is amended under "Requests for Issuance of Official Interpretations" by:

- Removing "Division of Research, Markets, and Regulations" and adding "Division of Research, Monitoring, and Regulations" in its place; and
- Removing "20006" and adding "20552" in its place.

***Supplement I - "Appendix J - Annual Percentage Rate Computations for Closed-End Credit Transactions" - Official Interpretations***

* * * * *

**Appendix J—Annual Percentage Rate Computations for Closed-End Credit Transactions**

*1.* ***Use of appendix J.*** Appendix J sets forth the actuarial equations and instructions for calculating the annual percentage rate in closed-end credit transactions. While the formulas contained in this appendix may be directly applied to calculate the annual percentage rate for an individual transaction, they may also be utilized to program calculators and computers to perform the calculations.

*2.* ***Relation to Bureau tables.*** The Bureau's Annual Percentage Rate Tables also provide creditors with a calculation tool that applies the technical information in appendix J. An annual percentage rate computed in accordance with the instructions in the tables is deemed to comply with the regulation. Volume I of the tables may be used for credit transactions involving equal payment amounts and periods, as well as for transactions involving any of the following irregularities: odd first period, odd first payment and odd last payment. Volume II of the tables may be used for transactions that involve any type of irregularities. These tables may be obtained from the Bureau, 1700 G Street NW, Washington, DC 20552, upon request. The tables are also available on the Bureau's website at: *https:// www.consumerfinance.gov//resources/ applicable-requirements/annual-percentage-rate-tables/*.

* * * * *

**Changes to Truth in Savings – Regulation DD**

***Appendix C to Part 1030 [Amended]***

Appendix C to part 1030 is amended in the second sentence of paragraph (b) by removing "20006" and adding "20552" in its place.

**What You Need to Do**

Note: the effective date of this final rule is April 19, 2023; however, the mandatory compliance date for certain amendments is March 20, 2024. Determine which amendments will require your institution to make necessary changes.

# Section 2: COVID-19 Pandemic

***Note: This section is a continuation of Pandemic Preparedness that appeared in last quarter's Regulatory Update. These articles cover December 30, 2022 through March 31, 2023.***

**There are no items for this Quarter**

# Lending Issues

## *FRB: Changes to Home Mortgage Disclosure Act (HMDA) Loan Volume Reporting Threshold for Closed-end Mortgage Loans (January 31, 2023)*

**Link**

https://www.federalreserve.gov/supervisionreg/caletters/caltr2301.htm

**Text**

This letter addresses the impact on financial institutions supervised by the Federal Reserve of recent changes as a result of litigation related to the HMDA reporting threshold for closed-end mortgage loans.

***Background***

In May 2020, the Consumer Financial Protection Bureau (CFPB) published a final rule amending Regulation C (Home Mortgage Disclosure) to, among other things, increase from 25 to 100 the threshold for reporting data about closed-end mortgage loans, so that institutions originating fewer than 100 closed-end mortgage loans in either of the two preceding calendar years would not have to report such data effective July 1, 2020. In September 2022, the U.S. District Court for the District of Columbia vacated that portion of the rule.

As a result of the court's order, the CFPB published a technical amendment in December 2022 updating the Code of Federal Regulations to reflect a reporting threshold of 25 closed-end mortgage loans in each of the two preceding calendar years. Separately, the CFPB stated:

The CFPB recognizes that financial institutions affected by this change may need time to implement or adjust policies, procedures, systems, and operations to come into compliance with their reporting obligations. In these limited circumstances, in allocating the CFPB's enforcement and supervisory resources, the CFPB does not view action regarding these institutions' HMDA data as a priority. Thus, the CFPB does not intend to initiate enforcement actions or cite HMDA violations for failures to report closed-end mortgage loan data collected in 2022, 2021, or 2020 for institutions subject to the CFPB's enforcement or supervisory jurisdiction that meet Regulation C's other coverage requirements and originated at least 25 closed-end mortgage loans in each of the two preceding calendar years but fewer than 100 closed-end mortgage loans in either or both of the two preceding calendar years.

***Guidance for financial institutions supervised by the Federal Reserve***

Like the CFPB, the Board of Governors of the Federal Reserve System (Board) recognizes that financial institutions affected by the change to the HMDA reporting threshold for closed-end mortgage loans may need time to implement or adjust policies and procedures, systems, and

operations to come into compliance with their reporting obligations. This letter serves as notice that, consistent with the CFPB, the Board does not intend to cite HMDA violations or take enforcement action for not collecting or reporting closed-end mortgage loan data originated in 2022, 2021, or 2020 by Federal Reserve-supervised financial institutions that meet Regulation C's other coverage requirements and originated at least 25 closed-end mortgage loans in each of the two preceding calendar years but fewer than 100 closed-end mortgage loans in either or both of the two preceding calendar years.

Reserve Banks are asked to distribute this letter to the Federal Reserve-supervised institutions in their districts that may be impacted by the HMDA loan volume reporting threshold requirements for closed-end mortgage loans, as well as to their supervisory and examination staff. If supervised financial institutions have questions about the guidance set forth in this letter, they are encouraged to contact the responsible Federal Reserve Bank. In addition, questions may be sent via the Board's public website.

**What You Need to Do:**

For FRB-supervised FIs; please review and share with appropriate team members.

## *OCC: Home Mortgage Disclosure Act: Loan Origination Threshold Changes (February 1, 2023)*

**Link**

https://www.occ.gov/news-issuances/bulletins/2023/bulletin-2023-5.html

**Text**

The Office of the Comptroller of the Currency (OCC) issued this bulletin to inform banks and OCC examining personnel that the loan origination threshold for reporting Home Mortgage Disclosure Act (HMDA) data on closed-end mortgage loans has changed. Due to a recent court decision, the threshold for reporting is now 25 closed-end mortgage loans originated in each of the two preceding calendar years.

### *Highlights*

- Banks that originated at least 25 closed-end mortgage loans in each of the two preceding calendar years but fewer than 100 closed-end mortgage loans in either or both of the two preceding calendar years (referred to collectively as affected banks) may need to make adjustments to policies and procedures to comply with reporting obligations. These changes may require time to implement.
- The OCC does not intend to assess penalties for failures to report closed-end mortgage loan data on reportable transactions conducted in 2022, 2021, or 2020 for affected banks that meet Regulation C's other coverage requirements.

- Examinations conducted in affected banks regarding HMDA reportable transactions from 2022, 2021, or 2020 will be diagnostic to help banks identify compliance weaknesses.
- Collection and submission of 2023 HMDA data will provide affected banks with an opportunity to identify gaps in and make improvements to their HMDA compliance management systems.

***Background***

On September 23, 2022, the U.S. District Court for the District of Columbia issued an order vacating the 2020 HMDA Final Rule as to the loan volume reporting threshold for closed-end mortgage loans. As a result, the loan origination threshold for reporting HMDA data on closed-end mortgage loans reverted to the threshold established by the 2015 HMDA Final Rule. Banks that originate at least 25 closed-end mortgage loans in each of the two preceding calendar years (25-loan threshold) are subject to HMDA data collection and reporting requirements. This is a change to the 100-loan threshold set by the 2020 HMDA Final Rule.

**What You Need to Do:**

For OCC-supervised FIs; please review and share with appropriate team members.

## *FDIC: Supervisory Approach Regarding Changes to HMDA's Closed-End Mortgage Loan Volume Reporting Threshold (February 3, 2023)*

**Link**

https://www.fdic.gov/news/financial-institution-letters/2023/fil23006.html

**Text**

The Federal Deposit Insurance Corporation (FDIC) issued this Financial Institution Letter to inform supervised institutions of recent changes regarding the Home Mortgage Disclosure Act (HMDA) reporting threshold for closed-end mortgage loans and the FDIC's supervisory approach for enforcing related requirements. For FDIC-supervised institutions that meet Regulation C's coverage requirements, the threshold for reporting data on closed-end mortgage loans is now 25 loans in each of the two preceding calendar years. In addition, for closed-end mortgage data collected in the years 2022, 2021, or 2020, the FDIC does not intend to initiate enforcement actions or cite HMDA violations for certain failures to report such loan data, as described in detail below.

***Highlights:***

On September 23, 2022, the United States District Court for the District of Columbia (Court) issued an order vacating the CFPB 2020 HMDA Final Rule regarding the loan volume reporting threshold requirements for closed-end mortgage loans.

- As a follow-up to the Court's decision, the CFPB issued a statement on December 6, 2022, indicating that the Court's decision means that the threshold for reporting closed-end mortgage loan data pursuant to HMDA is now 25 loans in each of the two preceding calendar years, which was the threshold established by the CFPB's 2015 HMDA Final Rule, rather than the 100-loan threshold set by the CFPB's subsequent 2020 HMDA Final Rule. The CFPB also announced that for those financial institutions subject to its jurisdiction, it does not intend to initiate enforcement actions or cite HMDA violations for failures to report closed-end mortgage loan data collected in 2022, 2021, or 2020, if the institutions (1) meet Regulation C's other coverage requirements and (2) originated at least 25 closed-end mortgage loans in each of the two preceding calendar years but fewer than 100 closed-end mortgage loans in either or both of the two preceding calendar years.
- Like the CFPB, the FDIC recognizes that financial institutions affected by this change may need time to implement or adjust policies, procedures, systems, and operations to come into compliance with reporting obligations. Accordingly, for closed-end mortgage data, the FDIC plans to implement a supervisory approach for FDIC-supervised institutions consistent with the CFPB's approach. For FDIC-supervised institutions that (1) are subject to Regulation C's other coverage requirements, and (2) originated at least 25 closed-end mortgage loans in each of the two preceding calendar years, but fewer than 100 closed-end mortgage loans in either or both of the two preceding calendar years, the FDIC does not intend to initiate enforcement actions or cite HMDA violations for failures to report closed-end mortgage loan data for 2022, 2021, or 2020.
- While any FDIC-supervised institution may elect to report data voluntarily for those years, the FDIC does not expect those institutions to collect and report data retroactively for closed-end mortgage loans covered by the Court's order vacating the CFPB 2020 HMDA Final Rule. Institutions affected by the Court's order, and that meet the reporting thresholds of 25 closed-end mortgage loans in each of the two preceding calendar years as of 2023, should start collecting data in 2023 and reporting data in 2024.

**What You Need to Do:**

For FDIC-supervised FIs; please review and share with appropriate team members.

## *CFPB: A Regulatory and Reporting Overview Reference Chart for HMDA Data Collected in 2023 (February 9, 2023)*

**Link**

***https://files.consumerfinance.gov/f/documents/cfpb_reportable-hmda-data_regulatory-and-reporting-overview-reference-chart_2023-02.pdf***

**Text**

The CFPB published the Regulatory and Reporting Overview Reference Chart for HMDA Data Collected in 2023. This chart is intended to be used as a reference tool for datapoints required to be collected, recorded, and reported under Regulation C, as amended by the HMDA Rules issued on October 15, 2015, on August 24, 2017, on October 10, 2019, and on April 16, 2020. Relevant regulation and commentary sections are provided for ease of reference. The chart also incorporates the information found in Section 4.2.2 of the 2022 Filing Instructions Guide and provides when to report not applicable or exempt, including the codes used for reporting not applicable or exempt from section 4 of the 2022 Filing Instructions Guide for ease of reference. This chart does not provide data fields or enumerations used in preparing the HMDA loan/application register (LAR).

**What You Need to Do:**

For FIs subject to HMDA, please utilize this resource to assist with your 2023 data collection.

## *CFPB: 2023 Institutional and Transaction Coverage Charts (March 15, 2023)*

**Link**

HMDA Institutional Coverage: https://files.consumerfinance.gov/f/documents/cfpb_hmda-institutional-coverage_2023.pdf

HMDA Transactional Coverage: https://files.consumerfinance.gov/f/documents/cfpb_hmda-transactional-coverage_2023.pdf

**Text**

The CFPB published the 2023 HMDA Institutional Coverage Chart and 2023 HMDA Transactional Coverage Chart.

**What You Need to Do:**

Useful reference material; please share with appropriate staff.

## *CFPB: 2022 HMDA Data on Mortgage Lending (March 20, 2023)*

**Link**

https://www.consumerfinance.gov/about-us/newsroom/2022-hmda-data-on-mortgage-lending-now-available/

**Text**

The Home Mortgage Disclosure Act (HMDA) Modified Loan Application Register (LAR) data for 2022 are now available on the Federal Financial Institutions Examination Council's (FFIEC) HMDA Platform for approximately 4,394 HMDA filers. The published data contain loan-level information filed by financial institutions and modified to protect consumer privacy.

To increase public accessibility, the annual loan-level LAR data for each HMDA filer are now available online. Previously, users could obtain LAR data only by making requests to specific institutions for their annual data. To allow for easier public access to all LAR data, the Consumer Financial Protection Bureau's (CFPB) 2015 HMDA rule made the data for each HMDA filer available electronically on the FFIEC's HMDA Platform. This year, in addition to institution-specific modified LAR files, users can download one combined file that contains all institutions' modified LAR data.

Later this year, the 2022 HMDA data will be available in other forms to provide users insights into the data. These forms will include a nationwide loan-level dataset with all publicly available data for all HMDA reporters; aggregate and disclosure reports with summary information by geography and lender; and access to the 2022 data through the HMDA Data Browser to allow users to create custom datasets, reports, and data maps. The CFPB will later also publish a Data Point article highlighting key trends in the annual data.

HMDA users may find the CFPB's Beginner's Guide to Accessing and Using HMDA Data useful for background on HMDA and tech tips for understanding and analyzing the data.

https://files.consumerfinance.gov/f/documents/cfpb_beginners-guide-accessing-using-hmda-data_guide_2022-06.pdf

The 2022 HMDA Loan Application Register data can be found on the FFIEC's HMDA platform: https://ffiec.cfpb.gov/data-publication/modified-lar.

**What You Need to Do:**

For HMDA reporters: review the 2022 HMDA Data. Others may also be interested.

## *CFPB: Final Rule – Small Business Lending (March 30, 2023)*

**Link**

https://files.consumerfinance.gov/f/documents/cfpb_1071-final-rule.pdf

**Text**

The Consumer Financial Protection Bureau (CFPB) has finalized a rule required by Congress to increase transparency in small business lending, promote economic development, and combat unlawful discrimination. Lenders will collect and report information about the small business credit applications they receive, including geographic and demographic data, lending decisions, and the price of credit. The rule will work in concert with the Community Reinvestment Act, which requires certain financial institutions to meet the needs of the communities they serve. The increased transparency will benefit small businesses, family farms, financial institutions, and the broader economy.

***Supporting Economic Growth and Combatting Illegal Discrimination***

The nation's 33 million small businesses employ nearly half of all private sector workers in the U.S. and account for the majority of new job creation. Operators of small and local businesses finance their enterprises through a variety of sources, including loans from banks, credit unions, and nonbank finance companies. Many of these businesses have a relationship with a local financial institution to help grow their business.

However, there is currently limited data on small business entrepreneurs' access to credit, and no comprehensive information available about small business lending. For decades, the government has assembled data pursuant to Congressional mandates on residential mortgages. Now, for the first time, data on small business lending will give investors and lenders more insights to identify new opportunities that support economic growth, help policymakers measure the effectiveness of any government programs, and provide a data-driven approach to detect potential discrimination.

The pandemic-era Paycheck Protection Program, for example, would have benefited from the kind of small business lending data that will be captured by this rule. Such data could have led to better targeted, more effective lending during the COVID-19 public health emergency.

The rule finalized today will:

- **Provide a comprehensive view of small business lending:** The rule covers lenders making over 100 covered small business loans per year, which accounts for more than 95 percent of small business loans by banks and credit unions. Like with mortgages, lenders will submit data points required by Congress, as well as additional data points that are typically already included in lender files.

- **Cover diverse forms of credit by all types of lenders:** The rule covers closed-end loans, lines of credit, business credit cards, online credit products, and merchant cash advances by banks, credit unions, and other lenders. Non-depository financial institutions — a growing sector accounting for roughly $550 billion in financing to small businesses — will be required to collect and report data, as will banks, savings associations, and credit unions. Online lending by nonbanks is a rapidly evolving market that particularly impacts minority entrepreneurs.
- **Use straightforward definitions and streamlined forms:** To make it easy for lenders to know on which applications to collect data, the rule defines a small business as one with gross revenue under $5 million in its last fiscal year. The rule also includes a streamlined sample form for lenders to use, if they so choose, to collect demographic data from small business credit applicants.

***Ensuring a Smooth Transition to Collect Small Business Lending Data from Lenders***

In 2010, Congress enacted requirements that would result in lenders making data available to the public about their small business lending activity in Section 1071 of the Consumer Financial Protection Act. However, the CFPB did not issue rules to implement this requirement. The California Reinvestment Coalition sued the CFPB in 2019, leading to a court order requiring the CFPB to finalize the rule by March 31, 2023.

The CFPB has undertaken significant planning to simplify implementation and prepare for the submission of data from thousands of lenders. While many of these lenders already report mortgage data, the CFPB recognizes that small business lending has a number of key differences. After considering a wide range of feedback and thousands of public comments, the CFPB is finalizing the rule and planning for implementation in ways that will:

- **Phase in implementation for the largest lenders first:** The CFPB found that there were key differences in how large financial institutions would implement the rule, compared to relationship-based local lenders. The final rule requires the largest lenders, which account for most of the small business lending market, to collect and report data earlier than smaller lenders. Specifically, lenders that originate at least 2,500 small business loans annually must collect data starting October 1, 2024. Lenders that originate at least 500 loans annually must collect data starting April 1, 2025. Lenders that originate at least 100 loans annually must collect data starting January 1, 2026.

  While the rule announced today requires data collection and reporting for those that make at least 100 loans annually, the rule will still cover the vast majority of bank small business lending, based on the CFPB's analysis. Lenders originating less than 100 loans per year will still be required to adhere to fair lending laws.
- **Streamline and improve demographic and financial data collection:** Small businesses will be able to self-identify as women-, minority-, or LGBTQI+-owned. Lenders will be able to rely on the financial and other information provided by the small business. Loan officers will not be required to make their own determinations of an applicant's race, ethnicity, or any other demographic information.
- **Reduce duplicative reporting requirements:** Loans reportable under the Home Mortgage Disclosure Act will not need to be reported under the small business lending rule. The rule is also designed to work in concert with rules under the Community Reinvestment Act's reporting requirements. Under the regulators' Community Reinvestment Act

proposal, data submitted under the CFPB's rule would satisfy the relevant Community Reinvestment Act requirements.

- **Allow for the use of new digital tools developed by industry and technology partners:** The rule finalized today allows financial institutions to work with third parties, including industry consortia, to develop services and technologies that will aid in collecting and reporting data. While individual lenders are ultimately responsible for ensuring fair and accurate collection and reporting, the rule permits them to work with third parties, including industry consortia and other partners, to collect and report data in ways that are tailored to their business model. For example, the CFPB plans to provide Application Programming Interfaces in an open-source environment to spur the development of accurate and efficient data reporting tools.

- **Give extra time to lenders with strong records of service to meet the needs of the communities they serve:** The CFPB intends to issue a supplementary proposal that would, if finalized, provide additional implementation time for small lenders that have demonstrated high levels of success in serving their local communities, as measured by their performance under relevant frameworks like the Community Reinvestment Act and similar state laws.

To emphasize financial institutions' obligations to collect this important data, the CFPB is also issuing a policy statement noting that it intends to focus its supervisory and enforcement activities in connection with the new rule on ensuring that lenders do not discourage small business loan applicants from providing responsive data, including responses to the requests to provide demographic information about their ownership.

Read a fact sheet about the rule:

https://files.consumerfinance.gov/f/documents/cfpb_small-business-lending-rule-fact-sheet_2023-03.pdf

Read an executive summary of the final rule:

https://files.consumerfinance.gov/f/documents/cfpb_sbl_executive-summary.pdf

Read the enforcement policy statement:

https://files.consumerfinance.gov/f/documents/cfpb_1071-enforcement-policy-statement.pdf

The CFPB is providing many plain language resources to help lenders prepare to comply with the rule. Additional technical resources, such as an online filing instructions guide, are intended to facilitate data collection and reporting. These webpages will be updated to include additional resources in the coming months, and lenders may sign up to receive updates and ask technical and compliance questions about the final rule by emailing SBLHelp@cfpb.gov.

**What You Need to Do:**

Please begin reviewing the final rule as well as the supplemental information. This may be the main topic at either Q3 or Q4 CBC.

## *CFPB: Updates to Mortgage Servicing Examination Procedures (January 18, 2023)*

**Link**

https://www.consumerfinance.gov/compliance/supervision-examinations/

**Text**

This update incorporates additional risks to consumers identified since the last revision and also reflects risks related to changes in how mortgage servicers handle loss mitigation in light of COVID-related changes.

After completing the risk assessment and examination scoping, examiners should use these procedures, in conjunction with the compliance management system review procedures, to conduct a mortgage servicing examination.

The examination procedures contain a series of modules, grouping similar requirements together. Depending on the scope, each examination will cover one or more of ten different modules.

**What You Need to Do:**

This is primarily informational; however, if your FI is a mortgage servicer, you may find this information helpful in preparing for an examination.

## *CFPB: Alternative to Foreclosure (January 20, 2023)*

**Link**

https://www.consumerfinance.gov/about-us/blog/for-many-struggling-mortgage-borrowers-with-home-equity-selling-their-home-could-be-an-alternative-to-foreclosure/

**Text**

Mortgage servicers are often the first to communicate with struggling homeowners about options available to them to avoid foreclosure. In today's market, many homeowners, including those potentially facing foreclosure, have sufficient equity in their homes that a traditional sale

could be a better alternative to foreclosure. Servicers can remind homeowners that a traditional sale might be one option to avoid foreclosure. Servicers can (and, in many circumstances, are required to) refer homeowners to a HUD-approved housing counseling agency to discuss their options. And servicers may want to suggest homeowners contact a real estate agent if the distressed homeowner is considering selling their home.

### *Foreclosures are relatively low but still affecting thousands*

As a result of the ongoing pandemic, many homeowners are facing foreclosure, especially those who were delinquent at the start of the pandemic and who therefore may be at heightened risk. Although foreclosure starts are relatively low compared to pre-pandemic levels, according to Black Knight's mortgage data, November 2022 saw an increase of 23,400 foreclosure starts, which represented two consecutive months of increases.

Figure 1: Loans in Foreclosure and New Foreclosures Started

Omitted

### *Foreclosures can be expensive for homeowners*

The foreclosure process can be expensive for homeowners and affects wealth accumulation, which is further impacted by the costs of the foreclosure process. A homeowner's average cost from a completed foreclosure was approximately $12,500 (in 2021 dollars, after adjusting for inflation), as noted in the Mortgage Servicing COVID-19 Final Rule. The costs and fees associated with foreclosure can reduce the proceeds a homeowner may get from selling their home. Generally, these fees include late charges, title fees, property maintenance charges, and legal fees associated with the mortgage servicer's foreclosure attorney.

Foreclosure damages a consumer's credit and stays on their credit report for seven years. Given that, homeowners may end up paying higher interest rates on future home purchases and on other products they buy with credit, even if those credit products are not related to owning a home.

### *Selling the home may be a better alternative to foreclosure and can make financial sense for homeowners with equity*

Given rising rents, it may make economic sense for many struggling homeowners who are delinquent or could be at risk of delinquency to remain in their home, if possible. A payment deferral, standalone partial claim, or loan modification is often the preferred option. However, if these or other home-retention options are unaffordable for a homeowner, a traditional sale is one strategy to help them avoid foreclosure.

### *Many struggling homeowners have accumulated equity*

Black Knight reports that the share of total equity on mortgaged properties is sizable, and 81 percent of homeowners in active foreclosure had at least 10 percent equity in their home as of Q3 2022.

Figure 2: Home Equity on Mortgaged Properties

Omitted

***Customer service representatives, real estate professionals, and housing counselors can help in the traditional sale process***

Servicers are reminded that Regulation X requires servicers to reach out to delinquent borrowers promptly to discuss available loss mitigation options. Servicers may, in those conversations, in addition to reviewing other available options, discuss the possibility of a traditional sale with the homeowner. A traditional sale may benefit a homeowner compared to the short-term and long-term effects of foreclosure when a loan modification or short-term loss mitigation option is not available.

There are resources servicers can use to help homeowners understand the option of a traditional sale for homeowners who may otherwise be at risk of losing their home to foreclosure. For example, Appendix MS-4(B) to Regulation X contains sample language that can be used to inform homeowners of the option to sell their home.

Often, the mortgage servicer's phone representatives are the first line of communication with homeowners. For this reason, servicers are encouraged to provide information and training to representatives, so they are ready to have conversations with equity-positive homeowners facing foreclosure about the possible advantages of selling the home. Of course, conversations about selling the home cannot substitute for the Regulation X requirement that mortgage servicers present all available loss mitigation alternatives to borrowers.

To help homeowners who are considering a traditional sale, servicers can point out ways that homeowners can find current estimates of their home's value. Online sites and local real estate professionals can provide free estimates of property values. Real estate professionals with firsthand experience and local knowledge can help homeowners understand the housing environment, housing supply shortages, and seasonal shifts in home sales. All of this can help inform a homeowner's decision about when and if to put their home on the market.

Servicers can also direct homeowners to a housing counselor who can help them understand the implications of each foreclosure avoidance option. Servicers can provide the CFPB's Find a Housing Counselor tool to homeowners.

**What You Need to Do:**

This is primarily informational; however, please share with appropriate team members.

## *CFPB: Guidance to Protect Mortgage Borrowers from Pay-to-Play Digital Comparison-Shopping Platforms (February 7, 2023)*

**Link**

https://www.consumerfinance.gov/rules-policy/final-rules/real-estate-settlement-procedures-act-regulation-x-digital-mortgage-comparison-shopping-platforms-and-related-payments-to-operators/

**Text**

The Consumer Financial Protection Bureau (CFPB) issued 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: (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 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.

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.

This advisory opinion is effective on February 13, 2023.

## I. Advisory Opinion

### *A. Background*

#### *1. RESPA Section 8*

The Real Estate Settlement Procedures Act (RESPA) 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. RESPA section 8(a) provides that no person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred 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.

RESPA and its implementing Regulation X 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 high settlement charges caused by certain abusive practices that have developed in some areas of the country." Among the RESPA statutory purposes is the "elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 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.

Further, Congress in 1983 amended RESPA to permit what are now called affiliated business arrangements subject to certain conditions. 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. 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." 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.

### *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. 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. 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), which the CFPB has applied, as relevant, since 2011, when Congress transferred responsibility for RESPA to the CFPB from HUD.

***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. 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." 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. 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."

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." 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." 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." 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 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."

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. 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. RESPA does not apply to extensions of credit to government or governmental agencies or instrumentalities. It also does not apply to extensions of credit primarily for business, commercial, or agricultural purposes.

### *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 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. 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. 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.

#### *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.

Steering is a form of referral because it is an action directed to a person that exerts affirmative influence.

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. 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 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. 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. 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." 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).

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. 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.

### *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." 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." 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." Moreover, under Regulation X, "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."

RESPA section 8(c)(2) does not provide a defense to payment of referral fees because referrals are not compensable services under RESPA. 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, 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" 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).

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, 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.

### *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. 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" or other compensable services. The higher charge paid by some providers thus can be "evidence of a violation of section 8," 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, the HUD CLO Policy Statement did not identify that scenario as the only problematic one under RESPA section 8 with respect to CLOs. 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." 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. 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." 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 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. 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). 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. 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." 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). 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). 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 (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).

***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." 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.

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. 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. 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; Regulation B, 12 CFR part 1002, which implements the Equal Credit Opportunity Act; and the Telemarketing Sales Rule. Additional laws and regulations that may apply include the Federal Trade Commission Act, the Telephone Consumer Protection Act, 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.

**What You Need to Do:**

This Advisory Opinion applies to any "person" to which RESPA section 8's prohibitions apply; please share with appropriate team members. NOTE: this Advisory Opinion does not apply to extensions of credit primarily for business, commercial, or agricultural purposes.

## *OCC: Revisions to Fair Lending Booklet (January 12, 2023)*

**Link**

https://www.occ.gov/publications-and-resources/publications/comptrollers-handbook/files/fair-lending/index-fair-lending.html

**Text**

The Office of the Comptroller of the Currency (OCC) issued version 1.0 of the "Fair Lending" booklet of the *Comptroller's Handbook*. This booklet provides information and examination procedures to assist OCC examiners in assessing fair lending risk and evaluating compliance with the Fair Housing Act, Equal Credit Opportunity Act, and Regulation B, the consumer protection regulation that implements the Equal Credit Opportunity Act.

The revised booklet replaces the booklet of the same title issued in January 2010. Also rescinded is OCC Bulletin 2010-4, "Compliance Policy: Fair Lending – Revised Booklet," which transmitted the prior version of this booklet.

***Highlights***

The revised booklet:

- reflects changes to laws and regulations since this booklet was last published.
- reflects the current OCC approach to fair lending examinations.
- includes new and clarified details on examination scenarios.
- includes clarified and expanded risk factors for a variety of examination types.
- includes clarifying edits regarding supervisory guidance, sound risk management practices, and applicable legal standards.
- revises certain content for clarity.

| **What You Need to Do:** |
| --- |
| The "Fair Lending" booklet applies to the OCC's supervision of community banks. |

# Depository Issues

There are no Depository Issues for this period.

# Other Issues

## *CFPB: Unlawful Negative Option Marketing Practices (January 19, 2023)*

**Link**

https://www.consumerfinance.gov/compliance/circulars/consumer-financial-protection-circular-2023-01-unlawful-negative-option-marketing-practices/

**Text**

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.

***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. 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 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. 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.

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. The FTC's enforcement cases have also frequently relied on the Restore Online Shoppers' Confidence Act (ROSCA) and the Telemarketing Sales Rule (TSR). 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."

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. 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. In other enforcement actions involving negative option practices, the CFPB has found or alleged that consumer reporting companies, debt relief companies, credit repair companies, payment processors, and service providers 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. 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.

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. 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.

***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. 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.

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 representation or omission is deceptive if it is likely to mislead a reasonable consumer and is material. 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." 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. 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.

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.

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. 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.

**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. 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.

With respect to deception, as noted, a representation is deceptive if it is likely to mislead a reasonable consumer and is material. 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.

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. 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.

**Cancellation. I**t 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. 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. 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.

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 reasons for delays in processing consumers' cancellation requests." Depending on the facts and circumstances, such conduct may constitute an unfair, deceptive, or abusive act or practice in violation of the CFPA.

**What You Need to Do:**

This is primarily informational; however, please share with appropriate team members.

## *CFPB: Banks' Overdraft/NSF Fee Revenue Declines Significantly Compared to Pre-pandemic Levels (February 7, 2023)*

**Link**

https://www.consumerfinance.gov/data-research/research-reports/banks-overdraft-nsf-fee-revenue-declines-significantly-compared-to-pre-pandemic-levels/

**Text**

Since late 2021, several banks have announced changes to their overdraft programs that have been expected to reduce overdraft/non-sufficient fund (NSF) fee revenue. Our most recent analysis finds that bank overdraft/NSF fee revenue:

- was 43% lower in the third quarter of 2022 than in the third quarter of 2019 before the COVID-19 pandemic onset – suggesting $5.1 billion less in fees on an annualized basis;
- was 33% lower over the first three quarters of 2022 compared to the same period in 2019; and
- has trended downward in each quarter since the fourth quarter of 2021.

At the same time, we have not observed correlating increases in other listed checking account fees, which suggests that banks are not replacing overdraft/NSF fee revenue with other fees on checking accounts.

This analysis of bank call report data follows our previous analyses of trends in checking account fee revenue published in December 2021 and July 2022.

***Overdraft/NSF Fee Revenue***

Bank overdraft/NSF fee revenue was lower in 2020 and early 2021 than before the pandemic, which was likely largely due to pandemic-related stimulus checks pushing up average checking account balances. In the second half of 2021, as the pandemic stimulus wound down, overdraft/NSF fee revenue rebounded somewhat but began decreasing again through the third quarter of 2022 – likely due to changes in bank policies.

Across the first three quarters of 2022, combined overdraft/NSF revenue was $5.8 billion, compared to $8.6 billion across the first three quarters of 2019—a decrease of 33%. For the third quarter of 2022 alone, reported overdraft/NSF revenue was $1.8 billion, compared to $3.1 billion in the same quarter in 2019—a decrease of 43%.

Overdraft/NSF revenue often varies based on seasonal patterns, but it trended downward throughout the first nine months of 2022, as banks reported $2.11 billion, $1.90 billion, and $1.75 billion during the first, second, and third quarters, respectively. This trend suggests that overdraft/NSF policy changes are starting to impact bank revenues.

Figure 1 shows the reported bank overdraft/NSF fee revenue by quarter, beginning in the first quarter of 2019.

Figure 1: Quarterly overdraft/NSF revenue Q1 2019 to Q3 2022

Omitted

Table 1 shows overdraft/NSF revenue changes across specific banks and groups of banks. The individual banks listed were the largest generators of overdraft/NSF revenue in 2021, with each collecting more than $200 million in these fees.

Table 1 also shows trends among four groups of banks that generated $200M or less in OD/NSF fee revenue in 2021, consisting mainly of small and midsize banks (referred to as "small/midsize bank groups").

Despite the overall decrease in overdraft/NSF fee revenue, we continue to see significant differences across banks and groups of banks. While this evidence is indirect and does not control for changes in the number, composition, or behavior of accountholders, the variations likely reflect, at least in part, changes in overdraft/NSF programs.

Table 1: Change in overdraft/NSF fee revenue through the third quarter of 2022 versus pre-pandemic 2019 baseline and 2021 for select individual banks and groups of banks

Omitted

The eight individual banks listed in Table 1 all report declines in their overdraft/NSF fee revenue across the first three quarters of 2022 relative to the same period in 2019. Specifically:

- **Bank of America** experienced the most significant decline (69.3%), which may reflect the reduction of its overdraft fee to $10 and the elimination of NSF fees, among other changes.
- **PNC** (55.0%) and **U.S. Bank** (41.4%) also experienced declines above 40% as compared to 2019. PNC has implemented a limit of one overdraft fee per day and eliminated NSF fees, among other changes. U.S. Bank has implemented a $50 negative balance cushion and a grace period until the end of the next day before an overdraft fee is charged, as well as eliminated NSF fees.
- **JPMC** and **Truist** experienced declines of 37.3% and 36.5%, respectively. JMPC has implemented a $50 cushion and grace period until the end of the next day. Both banks have eliminated NSF fees.
- **Wells Fargo** (17.2%), **TD Bank** (19.4%), and **Regions Bank** (19.6%) experienced relatively smaller declines.

All the small/midsize bank groups also report reduced overdraft/NSF revenues through the first three quarters of 2022 compared to those of 2019. Banks that reported between $50 and $200 million in overdraft/NSF fee revenue during 2021 reported the most significant decrease (31.0%). In contrast, those reporting between $2 million and $10 million reported the least significant decrease (4.4%).

One midsize bank within the $50 million to $200 million group, Capital One, experienced a drop in overdraft/NSF fee revenue of 98.1%, which is larger than any of the select individual banks, during the first three quarters of 2022 compared to the same period in 2019. Capital One eliminated all overdraft and NSF fees in early 2022.

### *Other Listed (Maintenance and ATM) Fee Revenue*

Call reports require banks to list consumer deposit account revenue from three sources: 1) combined overdraft and NSF fees, 2) periodic maintenance fees, and 3) ATM fees. We refer to these three types of fees as "listed fees." In Table 2 (structured similarly to Table 1), we report changes in listed fees other than overdraft/NSF fees, i.e., maintenance and ATM fees, to examine whether certain fees may have been increased to replace reduced overdraft/NSF fee revenue.

We did not identify a clear correlation between declines in overdraft/NSF fee revenue and increases in other fee revenue.

Table 2: Change in other listed (maintenance and ATM) fee revenue through the third quarter of 2022 versus pre-pandemic 2019 baseline and 2021 for select individual banks and groups of banks

Omitted

Among the eight larger individual banks, compared to the pre-pandemic 2019 baseline, there was a divergence of experiences in other listed fee revenue. However, there is no clear correlation between decreases in overdraft/NSF and increases in other listed fee revenue. Of the three banks with the most significant declines in overdraft/NSF fee revenue since 2019, Bank of America's other listed fee revenue dropped 7.9%, while PNC's increased 26.4% and U.S. Bank's decreased 1.5%. In terms of dollar amounts, the declines in overdraft/NSF fee revenue across all eight banks for the first nine months of 2022 ($2.2 billion) far exceeded the net increase in listed fee revenue ($61 million). Banks with $10 million to $50 million and banks with $50 million to $200 million in 2021 overdraft/NSF revenue on average reported less revenue from other listed fees than before the pandemic; in contrast, banks with $2 million to $10 million in 2021 overdraft/NSF revenue saw increases averaging 12.1%. Across all reporting banks, other listed fee revenue decreased by $11 million from 2019 to 2022, even as overdraft/NSF fee revenue decreased by $2.8 billion.

We will continue to track overdraft/NSF fees, and we are considering rulemaking activities related to these fees. We will also continue to follow other listed account fees to discern to what extent these fees might create barriers to account access.

For our latest review of overdraft/NSF policies, please see the most recent table tracking overdraft fees and policies across banks, as well as the most recent chart on NSF fee practices.

For further discussion of trends in these practices, see our February 2022 analysis, April 2022 analysis, and July 2022 analysis.

**What You Need to Do:**

This is primarily informational; however, please share with appropriate team members.

# *CFPB: Supervisory Highlights Junk Fees Special Edition (March 8, 2023)*

**Link**

https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights-junk-fees-special-edition_2023-03.pdf

**Text**

***Introduction***

This special edition of *Supervisory Highlights* focuses on the Consumer Financial Protection Bureau's (CFPB or Bureau) recent supervisory work related to violations of law in connection with fees. As part of its emphasis on fair competition the CFPB has launched an initiative, consistent with its legal authority, to scrutinize exploitative fees charged by banks and financial companies, commonly referred to as "junk fees."

Junk fees are unnecessary charges that inflate costs while adding little to no value to the consumer. Theses unavoidable or surprise charges are often hidden or disclosed only at a later stage in the consumer's purchasing process or sometimes not at all.

The CFPB administers several laws and regulations that may touch on fees including, but not limited to, the Credit Card, Accountability, Responsibility and Disclosure Act of 2009 (CARD Act), the Fair Debt Collection Practices Act (FDCPA), Regulation Z, and the prohibition against unfair, deceptive, or abusive acts or practices (UDAAP) under the Consumer Financial Protection Act of 2010 (CFPA).

The findings in this report cover examinations involving fees in the areas of deposits, auto servicing, mortgage servicing, payday and small dollar lending, and student loan servicing completed between July 1, 2022, and February 1, 2023. To maintain the anonymity of the supervised institutions discussed in Supervisory Highlights, references to institutions generally are in the plural and the related findings may pertain to one or more institutions.

***Supervisory Observations***

***Deposits***

During examinations of insured depository institutions and credit unions, Bureau examiners assessed activities related to the imposition of certain fees by the institutions. This included assessing whether entities had engaged in any UDAAPs prohibited by the CFPA

***Unfair Authorize Positive, Settle Negative Overdraft Fees***

As described below, Supervision has cited institutions for unfair unanticipated overdraft fees for transactions that authorized against a positive balance, but settled against a negative balance (i.e., APSN overdraft fees). They can occur when financial institutions assess overdraft fees for

debit card or ATM transactions where the consumer had a sufficient available balance at the time the financial institution authorized the transaction, but given the delay between authorization and settlement of the transaction the consumer's account balance is insufficient at the time of settlement. This can occur due to intervening authorizations resulting in holds, settlement of other transactions, timing of presentment of the transaction for settlement, and other complex processes relating to transaction order processing practices and other financial institution policies. The Bureau previously discussed this practice in Consumer Financial Protection Circular 2022-06, Unanticipated Overdraft Fee Assessment Practices ("Overdraft Circular").

Supervision has cited unfair acts or practices at institutions that charged consumers APSN overdraft fees. An act or practice is unfair when: (1) it causes or is likely to cause substantial injury to consumers; (2) the injury is not reasonably avoidable by consumers; and (3) the injury is not outweighed by countervailing benefits to consumers or to competition.

While work is ongoing, at this early stage, Supervision has already identified at least tens of millions of dollars of consumer injury and in response to these examination findings, institutions are providing redress to over 170,000 consumers. Supervision found instances in which institutions assessed unfair APSN overdraft fees using the consumer's available balance for fee decisioning, as well as unfair APSN overdraft fees using the consumer's ledger balance for fee decisioning. Consumers could not reasonably avoid the substantial injury, irrespective of account-opening disclosures. As a result of examiner findings, the institutions were directed to cease charging APSN overdraft fees and to conduct lookbacks and issue remediation to consumers who were assessed these fees.

Supervision also issued matters requiring attention to correct problems that occurred when institutions had enacted policies intended to eliminate APSN overdraft fees, but APSN fees were still charged. Specifically, institutions attempted to prevent APSN overdraft fees by not assessing overdraft fees on transactions which authorized positive, as long as the initial authorization hold was still in effect at or shortly before the time of settlement. There were some transactions, however, that settled outside this time period. Examiners found evidence of inadequate compliance management systems where institutions failed to maintain records of transactions sufficient to ensure overdraft fees would not be assessed, or failed to use some other solution to not charge APSN overdraft fees. In response to these findings, the institutions agreed to implement more effective solutions to avoid charging APSN overdraft fees and to issue remediation to the affected consumers.

The Bureau has stated the legal violations surrounding APSN overdraft fees both generally and in the context of specific public enforcement actions will result in hundreds of millions of dollars of redress to consumers. As discussed in a June 16, 2022 blog post, Supervision has also engaged in a pilot program to collect detailed information about institutions' overdraft practices, including whether institutions charged APSN overdraft fees. A number of banks that had previously reported to Supervision engaging in APSN overdraft fee practices now report that they will stop doing so. Institutions that have reported finalized remediation plans to Supervision state their plans cover time periods starting in 2018 or 2019 up to the point they ceased charging APSN overdraft fees.

### *Assessing multiple NSF fees for the same transaction*

Supervision conducted examinations of institutions to review certain practices related to charging consumers non-sufficient funds (NSF) fees. As described in more detail below, examiners conducted a fact-intensive analysis at various institutions to assess specific types of NSF fees. In some of these examinations, examiners found unfair practices related to the assessment of

multiple NSF fees for a single transaction.

Some institutions assess NSF fees when a consumer pays for a transaction with a check or an Automated Clearing House (ACH) transfer and the transaction is presented for payment, but there is not a sufficient balance in the consumer's account to cover the transaction. After declining to pay a transaction, the consumer's account-holding institution will return the transaction to the payee's depository institution due to non-sufficient funds and may assess an NSF fee. The payee may then present the same transaction to the consumer's account-holding institution again for payment. If the consumer's account balance is again insufficient to pay for the transaction, then the consumer's account-holding institution may assess another NSF fee for the transaction and again return the transaction to the payee. Absent restrictions on assessment of NSF fees by the consumer's account-holding institution, this cycle can occur multiple times.

Supervision found that institutions engaged in unfair acts or practices by charging consumers multiple NSF fees when the same transaction was presented multiple times for payment against an insufficient balance in the consumer's accounts, potentially as soon as the next day. The assessment of multiple NSF fees for the same transaction caused substantial monetary harm to consumers, totaling millions of dollars. These injuries were not reasonably avoidable by consumers, regardless of account opening disclosures. And the injuries were not outweighed by countervailing benefits to consumers or competition.

Examiners found that institutions charged several million dollars to tens of thousands of consumers over the course of several years due to their assessment of multiple NSF fees for the same transaction. The institutions agreed to cease charging NSF fees for unpaid transactions entirely and Supervision directed the institutions to refund consumers appropriately. Other regulators have spoken about this practice as well.

In the course of obtaining information about institutions' overdraft and NSF fee practices, examiners obtained information regarding limitations related to the assessment of NSF fees. Supervision subsequently heard from a number of institutions regarding changes to their NSF fee assessment practices. Virtually all institutions that Supervision has engaged with on this issue reported plans to stop charging NSF fees altogether.

Supervision anticipates engaging in further follow-up work on both multiple NSF fee and APSN overdraft fee issues. In line with the Bureau's statement regarding responsible business conduct, institutions are encouraged to "self-assess [their] compliance with Federal consumer financial law, self-report to the Bureau when [they identify]likely violations, remediate the harm resulting from these likely violations, and cooperate above and beyond what is required by law" with these efforts. As the statement notes, "…the Bureau's Division of Supervision, Enforcement, and Fair Lending makes determinations of whether violations should be resolved through non-public supervisory action or a possible public enforcement action through its Action Review Committee (ARC) process." For those institutions that meaningfully engage in responsible conduct, this "could result in resolving violations non-publicly through the supervisory process."

### *Auto Servicing*

During auto servicing examinations, examiners identified UDAAPs related to junk fees, such as unauthorized late fees and estimated repossession fees. Additionally, examiners found that servicers charged unfair and abusive payment fees.

***Overcharging late fees***

Examiners found that servicers engaged in unfair acts or practice by assessing late fees in excess of the amounts allowed by consumers' contracts. Auto contracts often contain language that caps the maximum late fee amounts servicers are permitted to assess. The servicers coded their systems to assess a $25 late fee even though some consumers' loan notes capped late fees at no more than 5% of the monthly payment amount. The $25 late fee exceeded 5% of many consumers' monthly payment amounts. Excessive late fees cost consumers money and thus constitute substantial injury. Consumers could not reasonably avoid the injury because they do not control how servicers calculate late fees, had no reason to anticipate that the servicers would impose excessive late fees, and could not practically avoid being charged a fee. And the injury to consumers was not outweighed by benefits to consumers or competition.

In response to these findings, the servicers ceased the practice and refunded late fee overcharges to consumers.

***Charging unauthorized late fees after repossession and acceleration***

Examiners found that servicers engaged in unfair acts or practices by assessing late fees not allowed by consumers' contracts. Specifically, the contracts authorized the servicers to charge late fees if consumers' periodic payments were more than 10 days delinquent. But, under the terms of the relevant loan agreements, after the servicers accelerated the loan balance, the entire remaining loan balance became immediately due and payable, thus terminating consumers' contractual obligation to make further periodic payments and eliminating the servicers' contractual right to charge late fees on such periodic payments. Despite this, the servicers continued to collect late fees even after they repossessed the vehicles on periodic payments scheduled to occur subsequent to the date on which the loan balances were accelerated. When consumers redeemed their vehicles by paying the full balance, they also paid these unauthorized late fees; these unauthorized fees caused substantial injury to consumers. Consumers could not reasonably avoid the late fees because they had no control over the servicers' late fee practices. And the injury to consumers was not outweighed by benefits to consumers or competition.

In response to these findings, servicers ceased the practice and refunded late fees to consumers.

***Charging estimated repossession fees significantly higher than average repossession costs***

Examiners found that, where servicers allowed consumers to recover their vehicles after repossession by paying off the loan balance or past due amounts, servicers charged a $1,000 estimated repossession fee as part of the amount owed. This estimated repossession fee was significantly higher than the average repossession cost, which is generally around $350. By policy, the servicers returned the excess amounts to the consumer after they received the invoice for the actual cost from the repossession agent. Examiners found that the servicers engaged in unfair acts or practices when they charged estimated repossession fees that were significantly higher than the costs they purported to cover. The relevant contracts permitted the servicers to charge consumers default-related fees based on actual cost, but here the fees significantly exceeded the actual cost. Charging the fees caused or was likely to cause substantial injury in the form of concrete monetary harm. For consumers who paid the amount demanded, deprivation of these funds for even a short period constituted substantial injury. Furthermore, some consumers may have been dissuaded from recovering their vehicles because the servicers represented that

consumers must pay a $1,000 estimated repossession fee in addition to other amounts due. Some consumers may have been able to afford a $350 fee but not a $1,000 fee, and therefore did not pay and permanently lost access to their vehicles. Consumers could not reasonably avoid the injury because they did not control the servicers' practice of charging unauthorized estimated repossession fees. And the injury was not outweighed by countervailing benefits to consumers or competition because the fee exceeded costs necessary to cover repossession.

In response to these findings, the servicers ceased the practice of charging estimated repossession fees that were significantly higher than the actual average amount and provided refunds to affected consumers.

***Unfair and abusive payment fees***

An act or practice is abusive if it "takes unreasonable advantage of … the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service."

Examiners found that servicers engaged in unfair and abusive acts or practices by charging and profiting from payment processing fees that far exceeded the servicers' costs for processing payments, after the consumer was locked into a relationship with a servicer chosen by the dealer. Examiners observed that the servicers only offered two free payment options—preauthorized recurring ACH and mailed checks—which are only available to consumers with bank accounts. Approximately 90 percent of payments made by consumers incurred a pay-to-pay fee. The servicers received over half the amount of these fees from the servicers' third-party payment processor as incentive payments, totaling millions of dollars.

Examiners concluded that these practices took unreasonable advantage of consumers' inability to protect their interests by charging consumers fees to use the most common payment methods to pay their auto loans, after the consumer was locked into a relationship with a servicer, that far exceeded the servicers' costs. Servicers leveraged their captive customer base and profited off payment fees through kickback incentive payments. These consumers were unable to protect their interests in selecting or using a consumer financial product or service because the dealer, not the consumer, selected the servicer. Consumers thus could not evaluate a servicer's payment processing fees, bargain over these fees, or switch to a servicer with lower-cost or more no-fee payment options.

In addition, examiners found that these practices were unfair. The payment processing fees constituted substantial injury. Because consumers did not choose their auto loan servicers, they could not reasonably avoid these costs by bargaining with the servicer over the fees or switching to another servicer; moreover, consumers without bank accounts, who were unaware of the payment structure, or who have other obstacles to ACH or check payments, could not use the free payment methods and thus could not reasonably avoid paying the fees. And the injury to consumers was not outweighed by benefits to consumers or competition.

In response to these findings, Supervision directed the servicers to cease the practice.

***Mortgage Servicing***

In conducting mortgage servicing examinations, examiners identified a number of UDAAPs and a Regulation Z violation related to junk fees. Examiners found that servicers charged consumers junk fees that were unlawful related to late fee amounts, unnecessary property inspection visits, and private mortgage insurance (PMI) charges that should have been billed to

the lender. Servicers also failed to waive certain charges when consumers entered permanent loss mitigation options and failed to refund PMI premiums. And servicers charged consumers late fees after sending periodic statements representing that they would not charge late fees.

***Overcharging late fees***

Examiners found that servicers engaged in unfair acts or practices by assessing late fees in excess of the amounts allowed by their loan agreements. Specifically, where loan agreements included a maximum permitted late fee amount, the servicers failed to input these late fee caps into their systems. Because the systems did not reflect the maximum late fee amounts permitted by their loan agreements, the servicers charged the maximum allowable late fees under the relevant state laws, which frequently exceeded the specific caps in the loan agreements. The servicers caused substantial injury to consumers when they imposed these excessive late fees. Consumers could not reasonably avoid the injury because they do not control how servicers calculate late fees and had no reason to anticipate that servicers would impose excessive late fees. Charging excessive late fees had no benefits to consumers or competition. Examiners concluded that servicers also violated Regulation Z by issuing periodic statements that included inaccurate late payment fee amounts, since they exceeded the amounts allowed by the loan agreements. In response to these findings, servicers waived or refunded late fee overcharges to consumers and corrected the periodic statements.

***Repeatedly charging consumers for unnecessary property inspections***

Mortgage investors generally require servicers to perform property inspection visits for accounts that reach a specified level of delinquency. Generally, servicers must complete these property inspections monthly. To satisfy this requirement, servicers hire a third party that sends an agent to physically locate and view the property. The servicers then pass along the cost of the property inspection to the consumer, with fees ranging from $10 to $50.

Examiners found that in some instances a property inspector would report to servicers that an address was incorrect, and that the inspectors could not locate the property because of this error. Despite knowing that the address was incorrect, the servicers repeatedly hired property inspectors to visit these properties. Examiners found that servicers engaged in an unfair act or practice when they charged consumers for repeat property preservation visits to known bad addresses. Charging consumers for property inspection fees to known bad addresses caused consumers substantial injury. Consumers were unable to anticipate the fees or mitigate them because they have no influence over the servicers' practices, and the services did not inform consumers that they had bad addresses. And the injury caused by the practice was not outweighed by countervailing benefits to consumers or competition.

In response to the findings, the servicers revised their policies and procedures and waived or refunded the fees.

***Misrepresenting that consumers owed PMI premiums***

Examiners found that servicers engaged in deceptive acts or practices by sending monthly periodic statements and escrow disclosures that included monthly private mortgage insurance (PMI) premiums that consumers did not owe. These consumers did not have borrower-paid PMI on their accounts; instead, the loans were originated with lender-paid PMI, which should not be billed directly to consumers. After receiving these statements and disclosures some consumers made overpayments that included these amounts.

A representation, omission, act, or practice is deceptive when: (1) The representation, omission, act, or practice misleads or is likely to mislead the consumer; (2) The consumer's interpretation of the representation, omission, act, or practice is reasonable under the circumstances; and (3) the misleading representation, omission, act, or practice is material. The servicers' statements were likely to mislead consumers by creating the false impression that PMI payments were due. It was reasonable for consumers to rely on the servicers' calculations to determine the appropriate monthly payment amount. Finally, the misrepresentations were material because they led to overpayments. In response to these findings, the servicers refunded any overpayments.

***Charging consumers fees that should have been waived***

The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) directs servicers of federally backed mortgages to grant consumers a forbearance from monthly mortgage payments if the consumer is experiencing a financial hardship as a result of the COVID-19 emergency. During the time a consumer is in forbearance, no fees, penalties, or additional interest beyond scheduled amounts are to be assessed. While the CARES Act prohibits fees, penalties, or additional interest beyond scheduled amounts during a forbearance period, consumers sometimes accrue these amounts during periods when they are not in forbearance. For example, a servicer could appropriately charge a late fee if a consumer was delinquent in May 2020 and then entered a forbearance in June 2020.

When consumers with Federal Housing Administration-insured loans exited CARES Act forbearances and entered certain permanent loss mitigation options, the Department of Housing and Urban Development (HUD) required servicers in certain circumstances to waive late charges, fees, and penalties accrued outside of forbearance periods.

Examiners found that servicers engaged in unfair acts or practices when they failed to waive certain late charges, fees, and penalties accrued outside forbearance periods, where required by HUD, upon a consumer entering a permanent COVID-19 loss mitigation option. Failure to waive the late charges, fees, and penalties constituted substantial injury to consumers. This injury was not reasonably avoidable by consumers because they had no reason to anticipate that their servicer would fail to follow HUD requirements, and consumers lacked reasonable means to avoid the charges. This harm outweighed any benefit to consumers or competition. In response to the finding, the servicers improved their controls, waived all improper charges, and provided refunds to consumers.

***Charging consumers for PMI after it should have been removed***

The Homeowners Protection Act (HPA) requires that servicers automatically terminate PMI when the principal balance of the mortgage loan is first scheduled to reach 78 percent of the original value of the property based on the applicable amortization schedule, as long as the borrower is current. Examiners found that servicers violated the HPA when they failed to terminate PMI on the date the principal balance of the mortgage was first scheduled to reach 78 percent loan-to-value on a mortgage loan that was current. As a result, consumers made overpayments for PMI that the servicers should have cancelled. In response to these findings, the servicers refunded excess PMI payments and implemented additional procedures and controls to enhance their PMI handling.

***Charging late fees after sending periodic statements listing a $0 late fee***

Examiners found that servicers sent periodic statements to consumers in their last month of forbearance that incorrectly listed a $0 late fee amount for the subsequent payment, when a late fee was in fact charged if a payment was late. For example, consumers whose loans were in a forbearance period that ended on October 31st received a periodic statement during October billing for the November 1stpayment; the periodic statement listed a $0 late fee amount. But because the November 1stpayment was due after the forbearance period ended, the servicers then charged these consumers their contractual late fee amount if they missed the November 1st payment, despite sending statements listing a $0 late fee.

Examiners found that this practice was deceptive. Consumers' interpretation that they would incur no late fee was reasonable under the circumstances; consumers reasonably assume that the payment amounts and fees servicers tell them to pay are accurate and truthful. And the misrepresentations were likely to be material because consumers may have elected to make a timely periodic payment if the servicers had accurately advised a late fee would be assessed.

In response to this finding, the servicers updated their periodic statements and waived or refunded late fee charges for the specific payments.

## Payday and Small-Dollar Lending

***Splitting and re-presenting consumer payments without authorization***

Examiners found that lenders, in connection with payday, installment, title, and line-of-credit loans, after unsuccessful debit attempts, split missed payments into as many as four sub-payments and simultaneously or near-simultaneously represented them to consumers' banks for payment via debit card.

Examiners found that lenders engaged in unfair acts or practices when they re-presented split payments from consumers' accounts without their authorization to do so simultaneously or near-simultaneously. As a consequence, consumers incurred or were likely to incur injury in the form of multiple overdraft fees, indirect follow-on fees, unauthorized loss of funds, and inability to prioritize payment decisions. Injury was not reasonably avoidable because lenders did not disclose, and consumers had not authorized, same-day, simultaneous or near-simultaneous split debit processing. Substantial injuries were not outweighed by countervailing benefits to consumers or to competition.

In response to these findings, lenders were directed to: (1) provide remediation; (2) stop engaging in split-debit or other payment re-presentment attempts following an initial failed debit attempt, without first obtaining the consumer's authorization as to the manner and timing of the re-presentments; and (3) stop the practice of splitting the single amount owed into several debit attempts, unless the consumer has sufficient time between each debit attempt to learn of any successful debits and to take action to avoid incurring unwanted consequences, such as bank overdraft fees, indirect follow-on fees, unauthorized loss of funds, or inability to prioritize payment decisions.

***Charging borrowers repossession-related fees not authorized in automobile title loan contracts***

Examiners found that lenders engaged in unfair acts or practices when they charged borrowers fees to retrieve personal property from repossessed vehicles and to cover servicer charges, and withheld the personal property and vehicles until borrowers paid the fees. The practices caused or were likely to cause substantial injury when lenders, through their repossession agents, withheld personal property and vehicles until consumers paid unexpected personal property retrieval fees and agent fees for vehicle redemption. In addition to being subject to unexpected fees, borrowers faced being denied access to or destruction of property such as medical equipment and vehicles necessary for basic life functions. Potential countervailing benefits to consumers or to competition did not outweigh the substantial injuries caused.

Lenders were directed to enhance their compliance management systems to prevent these practices and to provide remediation to affected consumers.

***Failure to timely stop repossessions, charging fees and refinancing despite prior payment arrangements***

Examiners found that lenders engaged in unfair acts or practices by failing to stop vehicle repossessions before title loan payments were due as-agreed, and then withholding the vehicles until consumers paid repossession-related fees and refinanced their debts. The practice caused or was likely to cause substantial injury by depriving consumers of their means of transportation and of the contents of their vehicles including medication, by causing them to spend time reclaiming the vehicles, and by imposing repossession fees and refinancing costs. Consumers had no way to stop lenders from disregarding payment agreements specifically designed to prevent repossession. Therefore, they could not reasonably anticipate or avoid the injuries caused. Countervailing benefits of the practice, such as the cost of implementing controls to prevent wrongful repossessions, did not outweigh the substantial injury caused.

Lenders were directed to enhance their compliance management systems to prevent these practices and to provide remediation to affected consumers.

**Student Loan Servicing**

***Charging late fees and interest after reversing payments***

Examiners found that servicers engaged in unfair acts or practices by initially processing payments but then later reversing those payments, leading to additional late fees and interest for consumers. Although the servicers' policies did not allow student loan payments to be made with a credit card, customer service representatives erroneously accepted credit card payment information from some consumers over the phone and then processed those credit card payments. Subsequently, the servicers manually reversed the payments because they violated their policies. As a result, consumers became delinquent on their accounts and suffered substantial injury in the form of late fees, negative credit reporting, and additional accrued interest. Consumers could not reasonably avoid the injury because they could not anticipate that servicers would reverse payments after initially accepting them, and the servicers did not send notices explaining the reversals in all cases. Moreover, the servicers did not provide consumers with an opportunity to make a payment with another method before reversing the payments. Finally, retroactively reversing credit card payments, as opposed to implementing measures to prevent such payments

in the first instance, has no benefits to consumers or to competition.

In response to these findings, the servicers enhanced controls to ensure that payment processing systems will not accept credit card payments and to train customer service representatives to inform consumers at the time of payment that credit cards are not accepted. Additionally, Supervision directed the servicers to reimburse any late fees and correct any negative credit reporting as a result of reversed credit card payments.

## Supervisory Program Developments

### *Recent Bureau Supervisory Program Developments*

Set forth below are CFPB-issued circulars, bulletins, advisory opinions, and proposed rules regarding fees.

#### ***CFPB proposed a rule to curb excessive credit card late fees***

On February 1, 2023, the CFPB proposed a rule to curb excessive credit card late fees that cost American families about $12 billion each year. The CFPB's proposed rule would amend regulations implementing the CARD Act to ensure that late fees meet the Act's requirement to be "reasonable and proportional" to the costs incurred by issuers to handle late payments. Specifically, the proposed rule would lower the immunity provision for late fees to $8 for a missed payment and end the automatic annual inflation adjustment. The proposed rule would also ban late fee amounts above 25% of the consumer's required payment.

#### ***CFPB issued circular on unanticipated overdraft fee assessment practices***

On October 26, 2022, the CFPB issued guidance indicating that overdraft fees may constitute an unfair act or practice under the 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. As detailed in the circular, 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 fees 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.

#### ***CFPB issued bulletin on unfair returned deposited item fee assessment practices***

On October 26, 2022, the CFPB issued a bulletin stating that 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 CFPA.

***CFPB issued advisory opinion on debt collectors' collection of pay-to-pay fees***

On June 29, 2022, the 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.

**What You Need to Do:**

Pay close attention to the CFPB findings. Review and discuss with appropriate team members in your FI. This will most likely be an area of intense scrutiny at future compliance examinations.

## *FFIEC: CRA Data Entry Software for 2023 (February 17, 2023)*

**Link**

https://www.ffiec.gov/software/software.htm

**Text**

Version 2023 for the CY 2023 CRA data due March 1, 2024 is now available. Each software version is year-specific (i.e. 2022 reporting requires 2022 CRA DES and not 2023 CRA DES).

The software must be installed locally on a hard disk; it is NOT network compatible.

| **What You Need to Do:** |
| --- |
| For CRA reporters, you should have your IT staff download the 2023 software. |

## *OCC: Revised Comptroller's Licensing Manual Booklet (February 7, 2023)*

**Link**

https://www.occ.gov/publications-and-resources/publications/comptrollers-licensing-manual/files/licensing-booklet-branch-closings.html

**Text**

The Office of the Comptroller of the Currency (OCC) issued the "Branch Closings" booklet of the *Comptroller's Licensing Manual*. The revised booklet replaces the booklet of the same title issued June 2017, makes corrections where necessary, and contains updated guidance.

This booklet of the *Comptroller's Licensing Manual* provides the OCC's policies and procedures for filings and customer notices pertaining to closings of national bank and federal savings association branches.

**What You Need to Do:**

For OCC-supervised FIs; this is primarily informational; however, please share with appropriate team members.

# Bank Secrecy Act

## *FinCEN: Alert on Human Smuggling Along the Southwest Border of the United States (January 13, 2023)*

**Link**

https://www.fincen.gov/sites/default/files/shared/FinCEN%20Alert%20Human%20Smuggling%20FINAL_508.pdf

**Text**

The Financial Crimes Enforcement Network (FinCEN) is issuing this alert to better aid financial institutions in the detection of financial activity related to human smuggling along the U.S. southwest border ("SW border"). Human smugglers engage in the crime of transporting people across international borders through deliberate evasion of immigration laws, often for financial benefit. Human smuggling can endanger lives and have devastating consequences because criminal organizations involved in human smuggling value profit over human life. This alert builds upon FinCEN's previous 2014 and 2020 human smuggling and human trafficking advisories, while providing trends and typologies specifically related to human smuggling occurring along the SW border. This alert also provides red flag indicators to help financial institutions better identify transactions potentially related to human smuggling and reminds financial institutions of their Bank Secrecy Act (BSA) reporting obligations. It further supports ongoing initiatives by the U.S. Government to combat human smuggling and human trafficking. Human smuggling and human trafficking are also included in FinCEN's anti-money laundering and countering the financing of terrorism priorities (AML/CFT) published in June 2021.

| | |
|---|---|
| **Human Smuggling:** Acts or attempts to bring unauthorized persons to or into the United States, transport them within the United States, harbor unauthorized persons, encourage entry of unauthorized persons, or conspire to commit these violations, knowingly or in reckless disregard of illegal status. | **Human Trafficking:** The recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting a person for the purpose of a commercial sex act (sex trafficking), in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age, or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery (forced labor). |

**Human Smuggling on the SW Border**

In fiscal year (FY) 2020, during the height of the COVID-19 pandemic, less than 500,000 encounters occurred at the SW border, a 53 percent decrease from the prior year. However, in FY2021, there were 1.7 million encounters and over 2.3 million encounters in FY2022. Illicit actors seeking to make a profit by smuggling migrants across the SW border have exploited this volume of migration activity, which is being driven by a variety of factors, including oppressive and corrupt regimes in countries such as Venezuela, Cuba, and Nicaragua. Extremely harsh terrains and travel conditions, combined with the potential detection by law enforcement and the threat of violence posed by cartels controlling territory along smuggling routes across Central America and Mexico, make it difficult for migrants to travel from their home countries and reach the SW border without the assistance of smugglers. According to the Financial Action Task Force (FATF), in 2019, approximately two-thirds of migrants transiting through Mexico hired a guide to cross into the United States. As such, individuals from Latin America as well as irregular migrants from across the globe risk their lives and pay sums ranging from hundreds of dollars to over $10,000 to human smuggling networks and organizations in an attempt to cross into the United States through the SW border. According to the Homeland Security Operational Analysis Center, human smuggling along the SW border generates an estimated $2 billion to $6 billion in yearly revenue for these illicit actors.

Migrants often seek to enter the United States in hopes of greater economic opportunity, family reunification, or to flee from violence and conflict. Despite these aspirations, many migrants face exploitation or mistreatment by human smuggling organizations who prey upon them for financial gain and have little regard for their well-being or physical care. Upon arrival in the United States, some migrants' status and circumstances may make them vulnerable to human trafficking or other forms of exploitation. Transnational human smuggling networks profit from the exploitation of migrants and routinely expose them to violence, injury, and even death. For example, in June 2022, 53 migrants seeking to enter the United States died in San Antonio, Texas while being smuggled in a tractor trailer. This tragedy, as well as other recent events involving the deaths of migrants, illustrates how dangerous human smuggling into the United States can be and how smuggling organizations exploit human beings for profit.

While a majority of migrants encountered at the border originate from Mexico and the Northern Triangle countries of El Salvador, Guatemala, and Honduras, a growing number of encounters are with migrants originating from South America, the Caribbean, Europe, and Asia.

**SW Border Used to Smuggle Migrants into United States From Around the World**

In 2021, U.S. courts sentenced a Bangladeshi national to 46 months in prison for his role in a scheme to smuggle undocumented individuals from Mexico into the United States. Between March 2017 and June 2019, Mohamed Milon Hossain conspired with and assisted human smugglers operating out of Bangladesh, South and Central America, and Mexico to bring numerous undocumented migrants from Bangladesh to the U.S. border in exchange for payment. Hossain operated out of Tapachula, Mexico, where he maintained a hotel that housed the individuals on their way to the United States. Hossain provided plane tickets and other assistance for the individuals to travel from Tapachula to Monterrey, Mexico, where his coconspirator Moktar Hossain assisted their illegal crossing into the United States.

In 2019, U.S. courts sentenced a Jordanian national to 36 months in prison for his role in a conspiracy to bring aliens to the United States and actually bringing Yemeni aliens through Mexico into the United States. During the second half of 2017, Moayad Heider Mohammad

Aldairi conspired with others to smuggle at least six Yemeni nationals across the Texas border and into the United States in exchange for payment. Aldairi admitted his role in transporting the aliens from Monterrey, Mexico to Piedras Negras, where he directed them to cross the Rio Grande River into the United States.

### How Human Smuggling Networks Operate

Smuggling operations along the SW border are typically conducted by networks of smaller groups and organizations that perform different functions along smuggling routes. These networks can be extensive and complex and include individuals who may, among other functions, organize the initial travel arrangements, facilitate lodging, and provide services to guide or facilitate the actual crossing of the SW border. These networks often are associated in some way with transnational criminal organizations (TCO), such as drug cartels that "control" territory through which smuggling operations take place. These associations range from the smuggling networks paying a portion of their illicit gains as a "protection tax" to a TCO for safe passage to more direct involvement by the TCO in the day-to-day operations of the smuggling networks.

**Human Smuggling and Organized Crime**

In November 2020, the United States, in coordination with El Salvador, Guatemala, and Honduras, arrested 36 individuals and issued criminal charges against hundreds of individuals involved in a human smuggling operation controlled by MS-13 and the 18th Street Gang. These TCOs are also suspected of being involved with a number of other crimes, including human trafficking, narcotics trafficking, and murder.

Human smuggling involves two main phases: solicitation and transportation. During the solicitation phase, smugglers advertise their services, for example, by posing as seemingly legitimate businesses such as travel agencies or work recruiters, and build trust with migrants seeking smuggling services. Smugglers acting in a solicitation role will often share the same national origin or related ethnic background as the migrants they smuggle. Historically, much of the solicitation was done by word of mouth, but with the rapid development of social media and other technology, smugglers have been able to leverage various platforms to reach a broader audience and potential pool of migrants.

During the transportation phase, smuggling networks often use social media platforms—particularly those that offer end-to-end encrypted communication—to coordinate along the route. Smugglers have also been using social media to recruit third parties to serve as part of the smuggling operation along the SW border. One example involves the recruitment of unaffiliated truck drivers based in the United States to smuggle migrants across the SW border. This is advantageous to the smuggling networks because crossing the SW border presents one of the largest risks of apprehension by law enforcement associated with the journey. By contracting out this portion of the operation to third parties, smuggling networks insulate themselves to a degree because these contracted individuals lack knowledge of the network's operations or chain-of-command.

### Illicit Finance Typologies

As previously reported in FinCEN's 2014 Advisory, migrants generally pay smugglers in one of three ways: 1) payment in advance, in which the migrant or the migrant's relatives provide full payment to the smuggler before traveling; 2) partial payment, in which a migrant pays some portion upon departure and the remaining balance is paid in full upon arrival, and 3) payment on arrival, in which the migrant's relatives pay the full fee to the smuggler after the migrant is successfully smuggled. These payments are still primarily conducted in cash, but the use of wire transfers is also common. Migrants who cannot afford full payment might also enter into work agreements with the smugglers to assist along the smuggling route or upon arrival to the United States. However, migrants who cannot afford full payment, are unable to pay any outstanding debt upon arrival in the United States or do not voluntarily enter into work agreements may be vulnerable to human trafficking, to include commercial sex trafficking, forced labor, fraud, kidnapping, and other forms of exploitation, once within the United States.

The methodologies used by human smuggling networks to launder their illicit gains remain largely the same as previously reported. Because human smuggling is often tied to larger criminal organizations, these often overlap with money laundering methods used by TCOs.

- ***Cash Placement and Layering into the Formal Financial System:*** Cash is still the primary method migrants use to pay smugglers. Smuggling networks often engage in bulk cash smuggling and, among other money laundering methods, also engage in cash purchases of high-value assets, including real estate and businesses. In some cases, smugglers avoid depositing their cash proceeds into a financial institution and instead use them to finance their living expenses, to purchase luxury items, or to support their drug or gambling habits. For example, in 2021, the DOJ indicted members of a human smuggling network alleged to have reaped more than $200 million from a human smuggling scheme that exploited migrants for labor. This network allegedly laundered the funds through cash purchases of land, homes, vehicles, and businesses; and by funneling millions of dollars through casinos.
- ***Funnel Accounts:*** Smuggling fees, often paid by the family members of migrants already settled in the United States and disguised as remittances, are sent to funnel accounts at financial institutions with branches or locations along both sides of the SW border. Smuggling networks may seek to establish accounts with financial institutions with a large U.S. presence to allow for easy collection of payments from the families of those being smuggled and who may be located throughout the United States.
- ***Alternative Payment Methods:*** In addition to payment via cash, human smugglers also use mobile payment applications and other forms of peer-to-peer (P2P) networks to transfer funds. For example, smugglers may use P2P networks to collect payments from migrants to cover the expenses necessary for their travel from the country of origin to their final destination.

### Financial Red Flag Indicators of Human Smuggling

FinCEN has identified the following financial red flag indicators to assist financial institutions in detecting, preventing, and reporting suspicious transactions associated with human smuggling. Because no single financial red flag indicator is determinative of illicit or suspicious activity, financial institutions should consider the relevant facts and circumstances of each transaction, in keeping with their risk-based approach to compliance.

1. Transactions involving multiple wire transfers, cash deposits, or P2P payments from multiple originators from different geographic locations either across (1) the United States, or (2) Mexico and Central America, to one beneficiary located on or around the SW border, with no apparent business purpose.
2. Deposits made by multiple individuals in multiple locations into a single account, not affiliated with the account holder's area of residence or work, with no apparent business purpose.
3. Currency deposits into U.S. accounts without explanation, followed by rapid wire transfers to countries with high migrant flows (e.g., Mexico, Central America), in a manner that is inconsistent with expected customer activity.
4. Frequent exchange of small-denomination for larger-denomination bills by a customer who is not in a cash-intensive industry.
5. Multiple customers sending wire transfers to the same beneficiary (who is not a relative, and may be located in the sender's home country), inconsistent with the customer's usual business activity and reported occupation.
6. A customer making significantly greater deposits—including cash deposits—than those of peers in similar professions or lines of business.
7. A customer making cash deposits that are inconsistent with the customer's line of business.
8. Extensive use of cash to purchase assets, such as real estate, and to conduct transactions.

**Reminder of Relevant BSA Obligations and Tools for U.S. Financial Institutions**

*Suspicious Activity Reporting*

*Other Relevant BSA Reporting*

*USA PATRIOT ACT Section 314(b) Information Sharing Authority*

**Suspicious Activity Reporting**

A financial institution is required to file a SAR if it knows, suspects, or has reason to suspect a transaction conducted or attempted by, at, or through the financial institution involves funds derived from illegal activity; is intended or conducted to disguise funds derived from illegal activity; is designed to evade regulations promulgated under the BSA; lacks a business or apparent lawful purpose; or involves the use of the financial institution to facilitate criminal activity, including sanctions evasion. All statutorily defined financial institutions may voluntarily report suspicious transactions under the existing suspicious activity reporting safe harbor.

When a financial institution files a SAR, it is required to maintain a copy of the SAR and the original or business record equivalent of any supporting documentation for a period of five years from the date of filing the SAR. Financial institutions must provide any requested SAR and all documentation supporting the filing of a SAR upon request by FinCEN or an appropriate law enforcement or supervisory agency. When requested to provide supporting documentation, financial institutions should take special care to verify that a requestor of information is, in fact, a representative of FinCEN or an appropriate law enforcement or supervisory agency. A financial institution should incorporate procedures for such verification into its BSA compliance or AML program. These procedures may include, for example, independent employment verification with the requestor's field office or face-to-face review of the requestor's credentials.

*SAR Filing Instructions*

FinCEN requests that financial institutions indicate a connection between the suspicious activity being reported and the activities highlighted in this alert by including the key term "**FIN-2023- HUMANSMUGGLING**" in SAR field 2 (Filing Institution Note to FinCEN), as well as in the narrative, and by selecting SAR field 38(g) (human smuggling). Financial institutions that suspect human trafficking activity should also select SAR field 38(h) (human trafficking) and highlight other advisory or alert keywords in the narrative, if applicable.

*Financial institutions wanting to expedite their report of suspicious transactions that may relate to the activity noted in this alert should call the Financial Institutions Toll-Free Hotline at (866) 556-3974 (7 days a week, 24 hours a day).*

Financial institutions should include any and all available information relating to the account and locations involved in the reported activity, identifying information and descriptions of any legal entities or arrangements involved and associated beneficial owners, and any information about related persons or entities involved in the activity. Financial institutions also should provide any and all available information regarding other domestic and foreign financial institutions involved in the activity; where appropriate, financial institutions should consider filing a SAR jointly on shared suspicious activity.

**Other Relevant BSA Reporting Requirements**

Financial institutions and other entities or persons also may have other relevant BSA reporting requirements to provide information in connection with the subject of this alert. These include obligations related to the Currency Transaction Report (CTR), Report of Cash Payments Over $10,000 Received in a Trade or Business (Form 8300), Report of Foreign Bank and Financial Accounts (FBAR), Report of International Transportation of Currency or Monetary Instruments (CMIR), Registration of Money Service Business (RMSB), and Designation of Exempt Person (DOEP). These standard reporting requirements may not have an obvious connection to illicit finance, but may ultimately prove highly useful to law enforcement.

*Form 8300 Filing Instructions*

When filing a Form 8300 involving a suspicious transaction relevant to this alert, FinCEN requests that the filer select ***Box 1b*** ("suspicious transaction") and include the key term "**FIN2023-HUMANSMUGGLING**" in the "**Comments**" section of the report.

**Information Sharing**

Information sharing among financial institutions is critical to identifying, reporting, and preventing human smuggling and human trafficking. Financial institutions and associations of financial institutions sharing information under the safe harbor authorized by section 314(b) of the USA PATRIOT Act are reminded that they may share information with one another regarding individuals, entities, organizations, and countries suspected of possible terrorist financing or money laundering. FinCEN strongly encourages such voluntary information sharing.

**What You Need to Do:**

Share this information with the BSA Officer and relevant staff.

## *FinCEN: Imposition of Special Measure Prohibiting the Transmittal of Funds Involving Bitzlato (January 18, 2023)*

**Link**

https://www.fincen.gov/sites/default/files/shared/Order_Bitzlato_FINAL%20508.pdf

**Text**

The U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) issued an order that identifies the virtual currency exchange **Bitzlato Limited** (Bitzlato) as a "primary money laundering concern" in connection with Russian illicit finance. This is the first order issued pursuant to section 9714(a) of the Combating Russian Money Laundering Act, as amended, and highlights the serious threat that business operations that facilitate and support Russian illicit finance pose to U.S. national security and the integrity of the U.S. financial sector. The order prohibits certain transmittals of funds involving Bitzlato by any covered financial institution.

In the order, FinCEN determined that Bitzlato is a financial institution operating outside of the United States that is of primary money laundering concern in connection with Russian illicit finance. Bitzlato plays a critical role in laundering Convertible Virtual Currency (CVC) by facilitating illicit transactions for ransomware actors operating in Russia, including Conti, a Ransomware-as-a-Service group that has links to the Government of Russia.

As described in the order, Bitzlato is a virtual currency exchange offering exchange and Peer-to-Peer (P2P) services. Bitzlato maintains significant operations in and connected to Russia and to Russian illicit finance through its facilitation of deposits and funds transfers by Russia-affiliated ransomware groups or affiliates, and transactions with Russia-connected darknet markets. FinCEN's investigation found that these connections include, but are not limited to, facilitating deposits, funds transfers, and transactions involving Conti and the Russia-connected darknet market Hydra, which is the subject of both U.S. sanctions and law enforcement actions that have shuttered its operations. Following Hydra's closure in April 2022, Bitzlato continued to facilitate transactions for growing Russia-connected darknet markets, including BlackSprut, OMG!OMG!, and Mega.

In the course of its investigation, FinCEN also found that Bitzlato has taken few meaningful steps to identify and disrupt illicit use and abuse of its services. Bitzlato does not effectively implement policies and procedures designed to combat money laundering and illicit finance, and has advertised a lack of such policies, procedures, or internal controls. As a result, Bitzlato facilitates a substantially greater proportion of money laundering activity in connection with Russian illicit finance compared to other virtual currency exchanges. Bitzlato's continued facilitation of Russia-connected darknet markets, even after public action targeting darknet markets, further illustrates its ongoing engagement with illicit actors and lack of adequate controls. As described in the order, effective February 1, 2023, covered financial institutions are prohibited from engaging in a transmittal of funds from or to Bitzlato, or from or to any account or CVC address administered by or on behalf of Bitzlato.

The order aims to enhance U.S. national security and the integrity of the U.S. financial system through increased transparency and facilitates the detection of illicit financial activity involving

digital assets, including CVC. This action is an example of Treasury using its available tools to target Russian illicit financial activity and counter the ransomware threat. Russia is a haven for cybercriminals, where the government often enlists cybercriminals for its own malicious purposes. The majority of ransomware incidents reported to FinCEN in the second half of 2021 were conducted by Russia-related ransomware variants, indicating that Bitzlato is part of a larger ecosystem of Russian cybercriminals that are allowed to operate with impunity in Russia.

This action also holds accountable an actor who is responsible for facilitating illicit activities and reaffirms Treasury's global leadership in combating the abuse of digital assets. As set out in the 2022-2026 Department of the Treasury Strategic Plan, Treasury is committed to increasing transparency in the domestic and international financial system. This includes through using Treasury tools to hold accountable actors in the ecosystem involved in or facilitating illicit activities and cut them off from the international financial system, as identified in the Action Plan to Address Illicit Financing Risks of Digital Assets.

Frequently Asked Questions on this action can be found here:

https://www.fincen.gov/sites/default/files/shared/FAQs_Bitzlato%20FINAL%20508.pdf

**What You Need to Do:**

Share this information with the BSA Officer.

## *FinCEN: Alert on Potential U.S. Commercial Real Estate Investments by Sanctioned Russian Elites, Oligarchs, and Their Proxies (January 25, 2023)*

**Link**

https://www.fincen.gov/sites/default/files/shared/FinCEN%20Alert%20Real%20Estate%20FINAL%20508_1-25-23%20FINAL%20FINAL.pdf

**Text**

The Financial Crimes Enforcement Network (FinCEN) issued this alert to all financial institutions regarding potential investments in the U.S. commercial real estate (CRE) sector by sanctioned Russian elites, oligarchs, their family members, and the entities through which they act (collectively, "sanctioned Russian elites and their proxies"). In March 2022, FinCEN issued an alert on the risk of sanctions evasion by sanctioned Russian elites and their proxies involving high-value assets, including both residential and commercial real estate. This alert specifically highlights sanctions evasion-related vulnerabilities in the CRE sector and is based on a review of Bank Secrecy Act (BSA) reporting indicating that sanctioned Russian elites and their proxies may exploit them to evade sanctions.

Further, and in light of Russia's continuing war of aggression against Ukraine, this alert is part of a sustained effort by FinCEN to urge financial institutions to remain vigilant in identifying and promptly reporting suspected sanctions evasion by sanctioned Russian elites and their

proxies. The U.S. Department of the Treasury, acting through the Office of Foreign Assets Control (OFAC), has imposed wide-ranging sanctions on certain Russian elites, their proxies, and others who have provided support for Russia's brutal war in Ukraine. As such, the alert complements ongoing U.S. government efforts to isolate sanctioned Russian persons from the international financial system. It is also part of a broader effort by the Department of the Treasury to effectively implement the U.S. Strategy on Countering Corruption by seeking to increase transparency in U.S. real estate transactions and prevent corrupt elites and other illicit actors from hiding their ill-gotten wealth in the U.S. real estate market.

This alert provides financial institutions with guidance on identifying potential sanctions evasion activity in the CRE sector by providing potential red flags and typologies related to this activity. It also reminds financial institutions of their BSA reporting obligations and, for certain institutions, their customer due diligence (CDD) obligations. FinCEN has derived the typologies and red flags below from its analysis of BSA data, open-source reporting, and information from law enforcement partners.

### *Sanctions Evasion Risks and Vulnerabilities in the Commercial Real Estate Market*

FinCEN assesses that sanctioned Russian elites and their proxies are likely attempting to exploit several vulnerabilities in the CRE market in order to evade sanctions. The CRE market presents unique challenges for financial institutions in detecting sanctions evasion. First, CRE transactions routinely involve highly complex financing methods and opaque ownership structures that can make it relatively easy for bad actors to hide illicit funds in CRE investments. For example, CRE transactions nearly always involve private companies or institutional investors as the buyer and/ or seller. As such, trusts, shell companies, pooled investment vehicles, or other legal entities are regularly used on both sides of CRE transactions. The standard use of such legal entities in CRE deals is typically due to the high value of the properties (ranging from the low millions of dollars to the billions of dollars) and the need for buyers and sellers to limit their legal, tax, and financial liability. In addition, several layers of legal entities are frequently involved as CRE buyers or sellers, and they may be domiciled in offshore jurisdictions. Further, these legal entities often have a large number of investors behind them and, as a result, it can be difficult for a financial institution to identify all of the beneficial owners. As discussed further below and based on BSA reporting, sanctioned Russian elites and their proxies may seek to further obfuscate their involvement in a CRE transaction by decreasing their percentage of ownership in an investment below the threshold set by a bank's CDD protocols.

Other features of CRE present opportunities for those engaged in illicit finance schemes, including sanctioned Russian elites and their proxies. For instance, the relative stability of the CRE market and the high value of CRE properties provide them with an easy way to store large amounts of wealth. In addition, there is the potential for steady income that CRE properties can generate for their owners.

Foreign investors also make up a large percentage of U.S. CRE transactions. The lack of transparency in the CRE market and the stability of returns in this market may have attracted a significant number of illicit actors among those foreign investors in recent years, including sanctioned Russian elites and their proxies. According to one study of 2021 U.S. CRE transactions, 8.4 percent of those surveyed reported that they closed a sale with a foreign client residing abroad, and this figure was above 10 percent for several years prior to the pandemic.

Some features of the CRE market discussed here are generally based on legitimate business decisions, but they can make it challenging for financial institutions to identify the underlying source or sources of funds and whether politically exposed persons (PEPs) or corrupt elites are

involved. For instance, since the use of multiple legal entities is common in CRE transactions, financial institutions should not underestimate the potential for this practice to be part a larger scheme of illicit financial activity such as sanctions evasion.

## Typologies Associated with Possible Money Laundering and Sanctions Evasion in the CRE Market

FinCEN has identified methods of potential sanctions evasion in the CRE market that sanctioned Russian elites and their proxies may be exploiting. These typologies and the red flag indicators in the following section represent only a sampling of typologies and indicators of possible sanctions evasion or other illicit activity. They should not be considered an exhaustive list. Moreover, financial institutions should be aware that other bad actors engaged in various types of illicit financial activity, such as money laundering, may use these or other methods to invest in CRE.

### *The Use of Pooled Investment Vehicles in CRE*

CRE investors seeking to evade sanctions, including sanctioned Russian elites and their proxies, may use pooled investment vehicles, including offshore funds, in order to avoid CDD and beneficial ownership protocols established by financial institutions, thereby allowing them to evade detection. In many cases, owing to the number of investors involved in a fund, an individual investor will own less than 25 percent of the fund and their ownership interest will therefore fall below the threshold for beneficial ownership screening by banks that work with funds in CRE financing. Even if banks lower their threshold below 25 percent to 10 percent, which is common with respect to financial institutions' CDD requirements for high-risk customers, investors seeking to evade sanctions may lower their interest in a fund to just below that threshold to avoid the bank's detection. These investors may in fact be general partners that have actual control of the fund, but their ownership interest will fall under a bank's bespoke CDD ownership threshold.

### *The Role of Shell Companies and Trusts*

Sanctioned Russian elites and their proxies may use shell companies and trusts, whether based in the United States or in other jurisdictions, in order to conceal their ownership stake in a CRE property. Particularly in high-value CRE properties, many layers of legal entities and trusts may be involved, and they may be spread across multiple jurisdictions around the world. These features can make it difficult for BSA-regulated financial institutions to identify the beneficial owners of these entities. Furthermore, legitimate businesses (e.g., real estate development or asset management companies) will also frequently, even if unwittingly, be part of CRE ownership structures involved in a sanctions evasion scheme, creating an additional challenge for financial institutions in identifying the bad actors.

### *The Involvement of Third Parties*

The use of third parties to invest in CRE on behalf of a criminal or corrupt actor is a common tactic for laundering money and engaging in other illicit finance schemes in the CRE space. Sanctioned Russian elites and their proxies may use relatives, friends, or business associates to set up the legal entities to invest in CRE projects, or they may create trusts through which to invest in the properties and to hold the assets. When analyzing trusts for which a sanctioned person was at any time the grantor/settlor, trust protector, trustee, or beneficiary, financial institutions should take particular care to ensure that sanctioned persons do not have a present, future, or contingent property interest in the trust.

### *Inconspicuous CRE Investments That Provide Stable Returns*

Sanctioned Russian elites and their proxies also may seek to avoid detection by investing in CRE projects that are less likely to be noticed by the general public or that would potentially draw unwanted attention. These CRE projects can vary tremendously in kind, but they need not be high-end or luxury properties and could include CRE in the multifamily housing, retail, office, industrial, or hotel sectors. In many cases, sanctions evaders may seek out inconspicuous investments so long as they provide stable returns.

Furthermore, there are no central geographic hubs where sanctioned Russian elites and their proxies may be focusing their U.S. CRE investments. As a result, it is just as likely that attempted sanctions evasion is occurring in the CRE markets in small- to mid-size urban centers and throughout the United States as it is to take place in the largest cities.

## The Role of Financial Institutions in CRE Transactions

Various types of financial institutions with regulatory obligations under the BSA are involved in CRE transactions and should apply a risk-based approach to identifying and reporting potential sanctions evasion by sanctioned Russian elites and their proxies. For example, banks frequently work with market participants that are seeking financing for CRE projects, including developers, private investment vehicles, and various other types of companies. Banks are also one of the BSA-regulated financial institutions with CDD obligations, requiring them to verify the beneficial owners of legal entity customers. Banks therefore may be in a position to identify and report suspicious activities associated with sanctioned Russian elites and their proxies including PEPs, among banks' CRE-related customers.

Insurance companies are another type of financial institution with obligations under the BSA, and they play a significant role in CRE financing. At year-end 2021, insurers held $556.7 billion in CRE debt. Insurance companies may in some cases be in a position to determine whether their CRE-related activities have exposure to sanctioned Russian elites and their proxies.

Furthermore, the CRE market frequently involves loan syndication, which may include banks, life insurers, and other types of BSA-regulated financial institutions. As noted at the end of this alert, Section 314(b) of the USA PATRIOT Act provides financial institutions with the ability to share information with one another on suspected money laundering or terrorist activities under a safe harbor that offers protections from liability. FinCEN strongly encourages this information sharing to occur with respect to potential CRE-related sanctions evasion by sanctioned Russian elites and their proxies, including during the process in which loans are developed and structured.

## Financial Red Flags Involving Commercial Real Estate

Financial institutions should be vigilant in monitoring, detecting, and reporting suspicious activity that may be indicative of sanctions evasion in the CRE market. As part of this effort, FinCEN encourages financial institutions to consider the following red flags. Since no single financial red flag indicator is determinative of illicit or suspicious activity, financial institutions should consider the relevant facts and circumstances of each transaction, in keeping with their risk-based approach to compliance.

1. The use of a private investment vehicle that is based offshore to purchase CRE and that includes PEPs or other foreign nationals (particularly family members or close associates of sanctioned Russian elites and their proxies) as investors.
2. When asked questions about the ultimate beneficial owners or controllers of a legal entity or arrangement, customers decline to provide information.

3. Multiple limited liability companies, corporations, partnerships, or trusts are involved in a transaction with ties to sanctioned Russian elites and their proxies, and the entities have slight name variations.
4. The use of legal entities or arrangements, such as trusts, to purchase CRE that involves friends, associates, family members, or others with a close connection to sanctioned Russian elites and their proxies.
5. Ownership of CRE through legal entities in multiple jurisdictions (often involving a trust based outside the United States) without a clear business purpose.
6. Transfers of assets from a PEP or Russian elite to a family member, business associate, or associated trust in close temporal proximity to a legal event such as an arrest or an OFAC designation.
7. Implementation of legal instruments (e.g., deeds of exclusion) that are intended to transfer an interest in CRE from a PEP or Russian elite to a family member, business associate, or associated trust following a legal event such as an arrest or an OFAC designation of that person.
8. Private investment funds or other companies that submit revised ownership disclosures to financial institutions showing sanctioned individuals or PEPs that previously owned more than 50 percent of a fund changing their ownership to less than 50 percent.
9. There is limited discernable business value in the CRE investment or the investment is outside of the client's normal business operations.

**Reminder of Relevant BSA Obligations and Tools for U.S. Financial Institutions**

*Suspicious Activity Reporting*

*Other Relevant BSA Reporting*

*USA PATRIOT ACT Section 314(b) Information Sharing Authority*

**Suspicious Activity Reporting**

A financial institution is required to file a SAR if it knows, suspects, or has reason to suspect a transaction conducted or attempted by, at, or through the financial institution involves funds derived from illegal activity; is intended or conducted to disguise funds derived from illegal activity; is designed to evade regulations promulgated under the BSA; lacks a business or apparent lawful purpose; or involves the use of the financial institution to facilitate criminal activity, including sanctions evasion. All statutorily defined financial institutions may voluntarily report suspicious transactions under the existing suspicious activity reporting safe harbor.

When a financial institution files a SAR, it is required to maintain a copy of the SAR and the original or business record equivalent of any supporting documentation for a period of five years from the date of filing the SAR. Financial institutions must provide any requested SAR and all documentation supporting the filing of a SAR upon request by FinCEN or an appropriate law enforcement or supervisory agency. When requested to provide supporting documentation, financial institutions should take special care to verify that a requestor of information is, in fact, a representative of FinCEN or an appropriate law enforcement or supervisory agency. A financial institution should incorporate procedures for such verification into its BSA compliance or AML program. These procedures may include, for example, independent employment

verification with the requestor's field office or face-to-face review of the requestor's credentials.

*SAR Filing Instructions*

FinCEN requests that financial institutions indicate a connection between the suspicious activity being reported and the activities highlighted in this alert by including the key term "**FIN-2023-RUSSIACRE**" in SAR field 2 (Filing Institution Note to FinCEN), as well as in the narrative. Financial institutions may highlight additional advisory or alert keywords in the narrative, if applicable.

*Financial institutions wanting to expedite their report of suspicious transactions that may relate to the activity noted in this alert should call the Financial Institutions Toll-Free Hotline at (866) 556-3974 (7 days a week, 24 hours a day).*

Financial institutions should include any and all available information relating to the account and locations involved in the reported activity, identifying information and descriptions of any legal entities or arrangements involved and associated beneficial owners, and any information about related persons or entities involved in the activity. Financial institutions also should provide any and all available information regarding other domestic and foreign financial institutions involved in the activity; where appropriate, financial institutions should consider filing a SAR jointly on shared suspicious activity.

**Other Relevant BSA Reporting Requirements**

Financial institutions and other entities or persons also may have other relevant BSA reporting requirements to provide information in connection with the subject of this alert. These include obligations related to the Currency Transaction Report (CTR), Report of Cash Payments Over $10,000 Received in a Trade or Business (Form 8300), Report of Foreign Bank and Financial Accounts (FBAR), Report of International Transportation of Currency or Monetary Instruments (CMIR), Registration of Money Service Business (RMSB), and Designation of Exempt Person (DOEP). These standard reporting requirements may not have an obvious connection to illicit finance, but may ultimately prove highly useful to law enforcement.

*Form 8300 Filing Instructions*

When filing a Form 8300 involving a suspicious transaction relevant to this alert, FinCEN requests that the filer select ***Box 1b*** ("suspicious transaction") and include the key term "**FIN-2023-RUSSIACRE**" in the "**Comments**" section of the report.

**Due Diligence**

Banks, brokers or dealers in securities, mutual funds, and futures commission merchants and introducing brokers in commodities (FCM/IBs) are required to have appropriate risk-based procedures for conducting ongoing customer due diligence that include, but are not limited to: (i) understanding the nature and purpose of customer relationships for the purpose of developing a customer risk profile; and (ii) conducting ongoing monitoring to identify and report suspicious transactions and, on a risk basis, to maintain and update customer information.37 Covered financial institutions are required to identify and verify the identity of beneficial owners of legal entity customers, subject to certain exclusions and exemptions.38 Among other things, this facilitates the identification of legal entities that may be owned or controlled by foreign PEPs.

*Senior foreign political figures and due diligence obligations for private banking accounts*

In addition to these due diligence obligations, under section 312 of the USA PATRIOT Act (31 U.S.C. § 5318(i)) and its implementing regulations, covered financial institutions must implement due diligence programs for private banking accounts held for non-U.S. persons that are designed to detect and report any known or suspected money laundering or suspicious activity conducted through or involving such accounts. Covered financial institutions must establish risk-based controls and procedures for ascertaining the identities of nominal and beneficial owners of such accounts and ascertaining whether any of these owners are senior foreign political figures, and for conducting enhanced scrutiny on accounts held by senior foreign political figures that is reasonably designed to detect and report transactions that may involve the proceeds of foreign corruption.

*Anti-money-laundering/countering-the-financing-of-terrorism (AML/CFT) program and correspondent account due diligence requirements*

Financial institutions are reminded of AML/CFT program requirements, and covered financial institutions are reminded of correspondent account due diligence requirements under Section 312 of the USA PATRIOT Act (31 U.S.C. § 5318(i)) and implementing regulations. As described in FinCEN Interpretive Release 2004-1, the AML/CFT program of a money services business (MSB) must include risk-based policies, procedures, and controls designed to identify and minimize risks associated with foreign agents and counterparties.

**Information Sharing**

Information sharing among financial institutions is critical to identifying, reporting, and preventing sanctions evasion or other illicit financial activity in the commercial real estate sector. Financial institutions and associations of financial institutions sharing information under the safe harbor authorized by section 314(b) of the USA PATRIOT Act are reminded that they may share information with one another regarding individuals, entities, organizations, and countries suspected of possible terrorist financing or money laundering. FinCEN strongly encourages such voluntary information sharing.

**What You Need to Do:**

Share this information with the BSA Officer.

# *FinCEN: Alert on Nationwide Surge in Mail Theft-Related Check Fraud Schemes Targeting the U.S. Mail (February 27, 2023)*

**Link**

https://www.fincen.gov/sites/default/files/shared/FinCEN%20Alert%20Mail%20Theft-Related%20Check%20Fraud%20FINAL%20508.pdf

**Text**

In light of a nationwide surge in check fraud schemes targeting the U.S. Mail (hereinafter "mail theft-related check fraud"), the Financial Crimes Enforcement Network (FinCEN) is issuing this alert to financial institutions to be vigilant in identifying and reporting such activity. Mail theft-related check fraud generally pertains to the fraudulent negotiation of checks stolen from the U.S. Mail. Fraud, including check fraud, is the largest source of illicit proceeds in the United States and represents one of the most significant money laundering threats to the United States, as highlighted in the U.S. Department of the Treasury's most recent National Money Laundering Risk Assessment and National Strategy for Combatting Terrorist and other Illicit Financing. Fraud is also one of the anti-money laundering/countering the financing of terrorism (AML/CFT) National Priorities.

FinCEN is issuing this alert in close collaboration with the United States Postal Inspection Service (USPIS) to ensure that SARs filed by financial institutions appropriately identify and report suspected check fraud schemes that may be linked to mail theft in the United States. This alert provides an overview of a recent surge in mail theft-related check fraud, highlights select red flags to assist financial institutions in identifying and reporting suspicious activity, and reminds financial institutions of their reporting requirements under the Bank Secrecy Act (BSA).

The information contained in this alert is derived from FinCEN's analysis of BSA data, open-source reporting, and information provided by law enforcement partners.

**Emerging Trends in Mail Theft-Related Check Fraud Schemes**

Despite the declining use of checks in the United States, criminals have been increasingly targeting the U.S. Mail since the COVID-19 pandemic to commit check fraud. The United States Postal Service (USPS) delivers nearly 130 billion pieces of U.S. Mail every year to over 160 million residential and business addresses across the United States. From March 2020 through February 2021, the USPIS received 299,020 mail theft complaints, which was an increase of 161 percent compared with the same period a year earlier. BSA reporting for check fraud has also increased in the past three years. In 2021, financial institutions filed more than 350,000 SARs to FinCEN to report potential check fraud, a 23 percent increase over the number of check fraud-related SARs filed in 2020. This upward trend continued into 2022, when the number of SARs related to check fraud reached over 680,000, nearly double the previous year's amount of filings.

### Mail Theft Risks and Vulnerabilities

Criminals committing mail theft-related check fraud generally target the U.S. Mail in order to steal personal checks, business checks, tax refund checks, and checks related to government assistance programs, such as Social Security payments and unemployment benefits. Criminals will generally steal all types of checks in the U.S. Mail as part of a mail theft scheme, but business checks may be more valuable because business accounts are often well-funded and it may take longer for the victim to notice the fraud. There have been cases of Postal Service employees stealing checks at USPS sorting and distribution facilities. However, according to USPIS, mail theft-related check fraud is increasingly committed by non-USPS employees, ranging from individual fraudsters to organized criminal groups comprised of the organizers of the criminal scheme, recruiters, check washers, and money mules.

| | |
|---|---|
| **Check Washers:** Check washing involves the use of chemicals to remove the original ink on a check to replace the payee and often the dollar amount. Fraudsters may also copy and print multiple washed checks for future use or to sell to third-party criminals. | **Money Mules:** A money mule is a person (whether witting or unwitting) who transfers or moves illicit funds at the direction of or on behalf of another. |

These criminals, located throughout the country, target USPS blue collection boxes, unsecured residential mailboxes, and privately owned cluster box units at apartment complexes, planned neighborhoods, and high-density commercial buildings. Mail theft can occur through forced entry or the use of makeshift fishing devices, and increasingly involves the use of authentic or counterfeit USPS master keys, known as Arrow Keys. Arrow Keys open USPS blue collection boxes and cluster box units within a geographic area, and a number of recent cases involve organized criminals violently targeting USPS mail carriers with the intent of stealing Arrow Keys. There have also been cases of corrupt Postal Service employees who unlawfully provide Arrow Keys to criminal actors to facilitate mail theft. Illicit actors may also copy and sell stolen Arrow Keys to third-party fraudsters on the dark web and through encrypted social media platforms in exchange for convertible virtual currency.

### Typologies of Mail Theft-Related Check Fraud and Associated Money Laundering

After stealing checks from the U.S. Mail, fraudsters and organized criminal groups may alter or "wash" the checks, replacing the payee information with their own or fraudulent identities or with business accounts that the criminals control. During check washing, these illicit actors also often increase the dollar amount on the check, sometimes by hundreds or thousands of dollars. Washed checks may also be copied, printed, and sold to third-party fraudsters on the dark web and encrypted social media platforms in exchange for convertible virtual currency. In some cases, victim checks are also counterfeited using routing and account information from the original, stolen check. Illicit actors may cash or deposit checks in person at financial institutions, through automated teller machines (ATMs), or via remote deposit into accounts they control, and which they often open specifically for the check fraud schemes. Criminals may also rely on money mules and their pre-existing accounts to deposit fraudulent checks. Regardless, once the checks are deposited, the illicit actors often rapidly withdraw the funds through ATMs or wire them to other accounts that they control to further obfuscate their ill-gotten gains. The criminals may further exploit the victims by using personal identifiable information found in the stolen mail for future fraud schemes such as credit card fraud or credit account fraud.

### Financial Red Flags Relating to Mail Theft-Related Check Fraud

FinCEN, in coordination with USPIS, has identified red flags to help financial institutions detect, prevent, and report suspicious activity connected to mail theft-related check fraud, many of which overlap with red flags for check fraud in general. As no single red flag is determinative of illicit or suspicious activity, financial institutions should consider the surrounding facts and circumstances, such as a customer's historical financial activity, whether the transactions are in line with prevailing business practices, and whether the customer exhibits multiple red flags, before determining if a behavior or transaction is suspicious or otherwise indicative of mail theft-related check fraud. In line with their risk-based approach to compliance with the BSA, financial institutions are also encouraged to perform additional due diligence where appropriate.

1. Non-characteristic large withdrawals on a customer's account via check to a new payee.
2. Customer complains of a check or checks stolen from the mail and then deposited into an unknown account.
3. Customer complains that a check they mailed was never received by the intended recipient.
4. Checks used to withdraw funds from a customer's account appear to be of a noticeably different check stock than check stock used by the issuing bank and check stock used for known, legitimate transactions.
5. Existing customer with no history of check deposits has new sudden check deposits and withdrawal or transfer of funds.
6. Non-characteristic, sudden, abnormal deposit of checks, often electronically, followed by rapid withdrawal or transfer of funds.
7. Examination of suspect checks reveals faded handwriting underneath darker handwriting, giving the appearance that the original handwriting has been overwritten.
8. Suspect accounts may have indicators of other suspicious activity, such as pandemic-related fraud.
9. New customer opens an account that is seemingly used only for the deposit of checks followed by frequent withdrawals and transfer of funds.
10. A non-customer that is attempting to cash a large check or multiple large checks in-person and, when questioned by the financial institution, provides an explanation that is suspicious or potentially indicative of money mule activity.

**Mail Theft-Related Check Fraud Reporting Hotline for Victims**

In addition to filing a SAR, as applicable, financial institutions should refer their customers who may be victims of mail theft-related check fraud to the USPIS at 1-877-876-2455 or https://www.uspis.gov/report to report the incident.

**USPIS Tips to Prevent Mail Theft**

FinCEN recommends as a best practice that financial institutions refer their customers to www.uspis.gov/tips-prevention/mail-theft for tips from the USPIS on how to protect against mail theft.

If customers appear to be a victim of a theft involving USPS money orders, refer them to https://www.usps.com/shop/money-orders.htm for guidance on how to replace a lost or stolen money order.

**Reminder of Relevant BSA Obligations and Tools for U.S. Financial Institutions**

*Suspicious Activity Reporting*

*Other Relevant BSA Reporting*

*USA PATRIOT ACT Section 314(b) Information Sharing Authority*

**Suspicious Activity Reporting**

A financial institution is required to file a SAR if it knows, suspects, or has reason to suspect a transaction conducted or attempted by, at, or through the financial institution involves funds derived from illegal activity; is intended or conducted to disguise funds derived from illegal activity; is designed to evade regulations promulgated under the BSA; lacks a business or apparent lawful purpose; or involves the use of the financial institution to facilitate criminal activity. All statutorily defined financial institutions may voluntarily report suspicious transactions under the existing suspicious activity reporting safe harbor.

When a financial institution files a SAR, it is required to maintain a copy of the SAR and the original or business record equivalent of any supporting documentation for a period of five years from the date of filing the SAR. Financial institutions must provide any requested documentation supporting the filing of a SAR upon request by FinCEN or an appropriate law enforcement or supervisory agency. When requested to provide supporting documentation, financial institutions should take special care to verify that a requestor of information is, in fact, a representative of FinCEN or an appropriate law enforcement or supervisory agency. A financial institution should incorporate procedures for such verification into its BSA compliance or AML program. These procedures may include, for example, independent employment verification with the requestor's field office or face-to-face review of the requestor's credentials.

**SAR Filing Instructions**

FinCEN requests that financial institutions indicate a connection between the suspicious activity being reported and the activities highlighted in this alert by including the key term "**FIN-2023- MAILTHEFT**" in SAR field 2 ("Filing Institution Note to FinCEN"), as well as in the narrative, and by selecting **SAR Field 34(d) (check fraud)**. Financial institutions may highlight additional advisory or alert keywords in the narrative, if applicable.

*Financial institutions wanting to expedite their report of suspicious transactions that may relate to the activity noted in this alert should call the Financial Institutions Toll-Free Hotline at (866) 556-3974 (7 days a week, 24 hours a day).*

Financial institutions should include any and all available information relating to the account and locations involved in the reported activity, identifying information and descriptions of any legal entities or arrangements involved and associated beneficial owners, and any information about related persons or entities involved in the activity. Financial institutions also should provide any and all available information regarding other domestic and foreign financial institutions involved in the activity; where appropriate, financial institutions should consider filing a SAR jointly on shared suspicious activity.

**Other Relevant BSA Reporting Requirements**

Financial institutions and other entities or persons also may have other relevant BSA reporting requirements to provide information in connection with the subject of this alert. These include obligations related to the Currency Transaction Report (CTR), Report of Cash Payments Over

$10,000 Received in a Trade or Business (Form 8300), Report of Foreign Bank and Financial Accounts (FBAR), Report of International Transportation of Currency or Monetary Instruments (CMIR), Registration of Money Services Business (RMSB), and Designation of Exempt Person (DOEP). These standard reporting requirements may not have an obvious connection to illicit finance, but may ultimately prove highly useful to law enforcement.

**Form 8300 Filing Instructions**

When filing a Form 8300 involving a suspicious transaction relevant to this alert, FinCEN requests that the filer select **Box 1b** ("suspicious transaction") and include the key term **"FIN-2023-MAILTHEFT"** in the **"Comments"** section of the report.

**Information Sharing**

Information sharing among financial institutions is critical to identifying, reporting, and preventing mail theft-related check fraud or other illicit financial activity. Financial institutions and associations of financial institutions sharing information under the safe harbor authorized by section 314(b) of the USA PATRIOT Act are reminded that they may share information with one another regarding individuals, entities, organizations, and countries suspected of possible terrorist financing or money laundering. FinCEN strongly encourages such voluntary information sharing.

For Further Information

Questions regarding the contents of this alert should be addressed to the FinCEN Regulatory Support Section at frc@fincen.gov.

**What You Need to Do:**

Share this information with the BSA Officer.

## *FinCEN: FATF Suspends the Membership of the Russian Federation, and Identifies Jurisdictions with AML/CFT/CPF Deficiencies (March 9, 2023)*

**Link**

https://www.fincen.gov/news/news-releases/financial-action-task-force-suspends-membership-russian-federation-and

**Text**

The Financial Crimes Enforcement Network (FinCEN) is informing U.S. financial institutions that the Financial Action Task Force (FATF), an intergovernmental body that establishes international standards for anti-money laundering, countering the financing of terrorism, and countering the financing of proliferation of weapons of mass destruction (AML/CFT/CPF), issued

a public statement on February 24 at the conclusion of its plenary meeting announcing its suspension of the Russian Federation's membership from FATF. The statement notes that "the Russian Federation's actions unacceptably run counter to the FATF core principles aiming to promote security, safety, and the integrity of the global financial system." The FATF further urged "all jurisdictions to remain vigilant of threats to the integrity, safety and security of the international financial system arising from the Russian Federation's war against Ukraine." The FATF also reiterated "…that all jurisdictions should be alert to possible emerging risks from the circumvention of measures taken in order to protect the international financial system and take the necessary measures to mitigate these risks." Since Russia's invasion of Ukraine in February 2022, FinCEN has published four alerts highlighting for U.S. financial institutions red flags for potential illicit financial activity, including sanctions and export controls evasion, by entities and individuals supporting Russia's war against Ukraine.

The FATF also updated its lists of jurisdictions with strategic AML/CFT/CPF deficiencies. U.S. financial institutions should consider the FATF's stance toward these jurisdictions when reviewing their obligations and risk-based policies, procedures, and practices.

On February 24, 2023, the FATF removed Cambodia and Morocco from its list of *Jurisdictions under Increased Monitoring* and added South Africa and Nigeria to the list.

The FATF's list of High-Risk Jurisdictions Subject to a Call for Action remains the same, with Iran and the Democratic People's Republic of Korea (DPRK) still subject to FATF's countermeasures. Burma remains on the list of *High-Risk Jurisdictions Subject to a Call for Action* and is still subject to enhanced due diligence, not countermeasures.

As part of the FATF's listing and monitoring process to ensure compliance with its international standards, the FATF issued two statements: (1) Jurisdictions under Increased Monitoring, which publicly identifies jurisdictions with strategic deficiencies in their AML/CFT/CPF regimes that have committed to, or are actively working with, the FATF to address those deficiencies in accordance with an agreed upon timeline and; (2) High-Risk Jurisdictions Subject to a Call for Action, which publicly identifies jurisdictions with significant strategic deficiencies in their AML/CFT/CPF regimes and calls on all FATF members to apply enhanced due diligence, and, in the most serious cases, apply counter-measures to protect the international financial system from the money laundering, terrorist financing, and proliferation financing risks emanating from the identified countries.

### *Jurisdictions Under Increased Monitoring*

With respect to the FATF-identified *Jurisdictions under Increased Monitoring*, U.S. covered financial institutions are reminded of their obligations to comply with the due diligence obligations for foreign financial institutions (FFI) under 31 CFR § 1010.610(a) in addition to their general obligations under 31 U.S.C. § 5318(h) and its implementing regulations. As required under 31 CFR § 1010.610(a), covered financial institutions should ensure that their due diligence programs, which address correspondent accounts maintained for FFIs, include appropriate, specific, risk-based, and, where necessary, enhanced policies, procedures, and controls that are reasonably designed to detect and report known or suspected money laundering activity conducted through or involving any correspondent account established, maintained, administered, or managed in the United States. Furthermore, money services businesses (MSBs) have parallel requirements with respect to foreign agents or foreign counterparties, as described in FinCEN Interpretive Release 2004-1, which clarifies that the AML program regulation requires MSBs to establish adequate and appropriate policies, procedures, and controls commensurate with the risk of money laundering and the financing of terrorism posed by their relationship with foreign agents

or foreign counterparties. Additional information on these parallel requirements (covering both domestic and foreign agents and foreign counterparts) may be found in FinCEN's Guidance on Existing AML Program Rule Compliance Obligations for MSB Principals with Respect to Agent Monitoring. Such reasonable steps should not, however, put into question a financial institution's ability to maintain or otherwise continue appropriate relationships with customers or other financial institutions, and should not be used as the basis to engage in wholesale or indiscriminate de-risking of any class of customers or financial institutions. Financial institutions should also refer to previous interagency guidance on providing services to foreign embassies, consulates, and missions.

The United Nations (UN) adopted several resolutions implementing economic and financial sanctions. Member States are bound by the provisions of these UN Security Council Resolutions (UNSCRs), and certain provisions of these resolutions are especially relevant to financial institutions. Financial institutions should be familiar with the requirements and prohibitions contained in relevant UNSCRs. In addition to UN sanctions, the U.S. Government maintains a robust sanctions program. For a description of current Office of Foreign Assets Control (OFAC) sanctions programs, please consult OFAC's Sanctions Programs and Country Information.

***High-Risk Jurisdictions Subject to a Call for Action***

With respect to the FATF-identified *High-Risk Jurisdictions Subject to a Call for Action*, Burma remains in this category and FATF urges jurisdictions to apply enhanced due diligence proportionate to the risks. As a general matter, FinCEN advises U.S. financial institutions to apply enhanced due diligence when maintaining correspondent accounts for foreign banks operating under a banking license issued by a country designated by an intergovernmental group or organization of which the United States is a member, as noncooperative with respect to international anti-money laundering principles or procedures, and with which designation the U.S. representative to the group or organization concurs. U.S. financial institutions should continue to consult existing FinCEN and OFAC guidance on engaging in financial transactions with Burma.

In the case of DPRK and Iran, the FATF-identified *High-Risk Jurisdictions Subject to a Call for Action*, specifically, counter-measures, financial institutions must comply with the extensive U.S. restrictions and prohibitions against opening or maintaining any correspondent accounts, directly or indirectly, for North Korean or Iranian financial institutions. Existing U.S. sanctions and FinCEN regulations already prohibit any such correspondent account relationships.

The Government of Iran and Iranian financial institutions remain persons whose property and interests in property are blocked under E.O. 13599 and section 560.211 of the Iranian Transactions and Sanctions Regulations (ITSR). U.S. financial institutions and other U.S. persons continue to be broadly prohibited under the ITSR from engaging in transactions or dealings with Iran, the Government of Iran, and Iranian financial institutions, including opening or maintaining correspondent accounts for Iranian financial institutions. These sanctions impose obligations on U.S. persons that go beyond the relevant FATF recommendations. In addition to OFAC-administered sanctions, on October 25, 2019, FinCEN found Iran to be a Jurisdiction of Primary Money Laundering Concern and issued a final rule, pursuant to Section 311 of the USA PATRIOT Act, imposing the fifth special measure available under Section 311. This rule prohibits U.S. financial institutions from opening or maintaining correspondent accounts for, or on behalf of, an Iranian financial institution, and the use of foreign financial institutions' correspondent accounts at covered United States financial institutions to process transactions involving Iranian financial institutions (31 CFR § 1010.661).

***Countries Removed***

For jurisdictions removed from the FATF listing and monitoring process, U.S. financial institutions should take the FATF's decisions and the reasons behind the delisting into consideration when assessing risk, consistent with financial institutions' obligations under 31 CFR § 1010.610(a) and 31 CFR § 1010.210.

If a financial institution knows, suspects, or has reason to suspect that a transaction involves funds derived from illegal activity or that a customer has otherwise engaged in activities indicative of money laundering, terrorist financing, or other violation of federal law or regulation, the financial institution must file a Suspicious Activity Report.

Questions or comments regarding the contents of this release should be addressed to the FinCEN Regulatory Support Section at frc@fincen.gov.

**What You Need to Do:**

Share this information with the BSA Officer.

## *FinCEN: Initial Beneficial Ownership Information Reporting Guidance (March 24, 2023)*

**Link**

https://www.fincen.gov/news/news-releases/fincen-issues-initial-beneficial-ownership-information-reporting-guidance

**Text**

The Financial Crimes Enforcement Network (FinCEN) published its first set of guidance materials to aid the public, and in particular the small business community, in understanding upcoming beneficial ownership information (BOI) reporting requirements taking effect on January 1, 2024. The new regulations require many corporations, limited liability companies, and other entities created in or registered to do business in the United States to report information about their beneficial owners—the persons who ultimately own or control the company—to FinCEN.

The following materials are now available on FinCEN's beneficial ownership information reporting webpage, www.fincen.gov/boi:

- Answers to Frequently Asked Questions about the reporting requirement.
- One Pagers on Key Filing Dates and Key Questions.
- An Introductory Video and more detailed Informational Video about the reporting requirement.

Additional guidance will be published at www.fincen.gov/boi in the coming months, to include a Small Entity Compliance Guide. Please check back often for more information.

FinCEN will not be accepting any beneficial ownership information before January 1, 2024. Information on how to submit beneficial ownership information to FinCEN will be forthcoming.

Businesses with questions about the upcoming reporting requirements may contact FinCEN at https://www.fincen.gov/contact.

## BENEFICIAL OWNERSHIP REPORTING – KEY QUESTIONS

*This document is explanatory only and does not supplement or modify any obligations imposed by statute or regulation. Please refer to the beneficial ownership information reporting final rule, available at www.fincen.gov/boi, for details on specific provisions.*

**1. Does my company have to report its beneficial owners?**

While certain types of entities are exempt, if you are a small corporation or LLC, you will likely be required to report your beneficial ownership information to FinCEN. A key factor in determining whether your company will have to report is whether you had to file a document with your state's secretary of state or a similar office to create your company or, for foreign companies, register it to do business in the United States.

**2. Who is a beneficial owner of my company?**

A beneficial owner is any individual who exercises substantial control over your company, or who owns or controls at least 25 percent of your company.

**3. Does my company have to report its company applicants?**

There can be up to two individuals who qualify as company applicants — (1) the individual who directly files the document that creates, or first registers, the reporting company; and (2) the individual that is primarily responsible for directing or controlling the filing of the relevant document. Your company is only required to report its company applicants if it is created or registered on or after January 1, 2024.

**4. What specific information does my company need to report?**

A reporting company will need to provide: (1) its legal name and any trade name or DBA; (2) its address; (3) the jurisdiction in which it was formed or first registered, depending on whether it's a U.S. or foreign company; and (4) its Taxpayer Identification Number (TIN). For each of your company's beneficial owners and each company applicant (if required), your company will need to provide the individual's: (1) legal name; (2) birthdate; (3) address (in most cases, a home address); and (4) an identifying number from a driver's license, passport, or other approved document for each individual, as well as an image of the document that the number is from.

**5. When and how should my company file its initial report?**

If your company is created or registered before January 1, 2024, file by January 1, 2025. Otherwise, file within 30 calendar days of receiving actual or public notice from your state's secretary of state or similar office that your company was created or registered. FinCEN will accept reports electronically beginning January 1, 2024. 6. What if there are changes to or inaccuracies in reported information? Your company will have 30 days to report any changes to reported information. For updates, the 30 days start from when the relevant change occurs. For

corrections, the 30 days start after you become aware of, or have reason to know of, an inaccuracy in a prior report.

**What You Need to Do:**

Review and share with appropriate staff members. This document may prove useful as we move through this process.

## *CFPB: Servicemember Reports About Identity Theft are Increasing (January 12, 2023)*

**Link**

https://www.consumerfinance.gov/consumer-tools/educator-tools/servicemembers/servicemember-reports-about-identity-theft-are-increasing/

**Text**

In 2021, military consumers—who include active duty servicemembers, veterans, and military family members—reported nearly 50,000 cases of identity theft to the Federal Trade Commission (FTC). Between 2014 and 2022, military consumer complaints to the CFPB about debts they said resulted from identity theft increased nearly fivefold, from just over 200 annually in 2014, to more than 1,000 in 2022.

Identity theft can quickly reverse a good credit report, filling it with unknown, maxed-out credit card accounts or collections accounts for mystery debts. It can spell trouble for anyone, but for servicemembers, identity theft resulting in negative information on a credit report can lead to the loss of a security clearance or even discharge.

Nationwide consumer reporting companies (NCRCs) must be responsive to the identity theft and credit concerns of servicemembers, veterans, and military families. We also encourage financial institutions to consider how they can strengthen their protections against identity theft. The CFPB will continue to use its available tools to ensure that NCRCs and financial institutions take appropriate action when servicemembers report identity theft.

**What You Need to Do:**

Review your FIs ID Theft procedures; strengthen where possible.