

CFPB Bites of the Month - 2023 Annual Review - Fintech

January 17, 2024 | [Catherine M. "Cathy" Brennan](#), [Eric L. Johnson](#) and [Justin B. Hosie](#)

In this article, we share a timeline of our monthly "bites" for 2023 applicable to fintech. The Consumer Financial Protection Bureau (CFPB) and its director, Rohit Chopra, continued the agency's focus on the everyday consumer and how such consumer interacts with financial services providers increasingly through mobile apps, an almost daily activity that impacts not only how consumers spend and receive money, but what information they knowingly (or, perhaps more importantly, unknowingly) give away in these financial transactions or processes.

Bite 9: Director Chopra's Prepared Remarks at Fintech Conference

On September 7, 2023, CFPB Director Chopra spoke to the Federal Reserve Bank of Philadelphia's Annual Fintech Conference about the payments system. Highlighting the CFPB's issue spotlight on the role of BigTech in mobile payments published on the same day, Chopra noted that banking and payments are not regulated just by government regulations but also by guidelines imposed by private actors outside the democratic process. He further claimed that when essential facilities succumb to unchecked private control, this can undermine the free market. Director Chopra said that BigTech's entrance into the payments system has deepened consumer engagement on their technology platforms, harvested and potentially monetized transaction related data, and exploited traditional financial sector fee streams. He also claimed that the rise of the "tap-to-pay" ecosystem has allowed the two major mobile phone companies to develop a monopolistic dominance over payments. Finally, he expressed concerns that the largest firms will be able to stifle competition and fairness, and called on regulatory agencies to equalize the playing field. The report indicates that consumers' use of tap-to-pay options has grown considerably in recent years, nearing an estimated \$300 billion on the three largest platforms, with some analysts estimating that digital wallet tap-to-pay transactions will grow by over 150 percent by 2028. According to the report, the two most dominant mobile operating systems impose different regulations on contactless payments. One restricts all third-party applications from using the technology, and the other could change its policy to add similar restrictions. According to the CFPB, these restrictions can reduce consumer choice and hamper innovation. The CFPB claims that developers could create payment solutions that better meet consumer needs without these technological roadblocks. The CFPB forecasted that it was undertaking a rulemaking effort to clarify consumers' personal financial data rights and interoperability across consumer financial products.

Bite 8: CFPB Publishes New Findings on BNPL Users

On March 2, 2023, the CFPB published a report analyzing the financial profiles of Buy Now, Pay Later (BNPL) consumers. According to the CFPB, BNPL consumers are more likely to use other types of credit products like credit cards, personal loans, and student loans than BNPL products. The CFPB claimed that BNPL consumers are also more likely to exhibit measures of financial stress than non-users. The CFPB also asserted that BNPL users are more likely to be highly indebted, have revolving balances, or have delinquencies on their credit cards compared to consumers who do not use BNPL products, and that BNPL users are more likely to use payday loans, pawn transactions, and bank account overdrafts. The CFPB said that its report debunked the idea that BNPL users do not have access to other forms of credit as they are more likely to use other credit products. The CFPB found that BNPL users have lower credit scores on average than non-users, are more likely to have a credit record in another account, are more likely to be delinquent by more than 30 days on other credit accounts, and have higher usage of other loan products. In connection with the report, Chopra said the CFPB is "working to ensure that borrowers have similar protections and that companies play by similar rules."

Bite 7: Chatbots in Consumer Finance

On June 7, 2023, the CFPB released a spotlight on the use of artificial intelligence (AI) chatbots, used to simulate a human-like response to customers and reduce customer service costs. Chopra stated that "many" financial institutions use AI to steer users to chatbots, which can lead to "customer frustration, reduced trust, and even violations of the law." The CFPB estimated that about 37% of Americans have interacted with a bank's chatbot in 2022 and noted that the top 10 commercial banks in the country engage with customers using chatbots. The CFPB claimed that several risks can arise from the use of chatbots, including:

- Noncompliance with federal consumer financial protection laws by providing inaccurate information or failing to realize a consumer is invoking their federal rights,
- Diminished consumer service and trust, and
- Harm to consumers, including the potential to steer consumers to the wrong product or service.

The CFPB indicated that it will continue to monitor the market and will expect financial institutions to use chatbots in a manner consistent with their customer and legal obligations.

Bite 6: CFPB Issues Guidance to Address Abusive Conduct in Consumer Financial Markets

On April 3, 2023, the CFPB issued a policy statement explaining the federal prohibition on "abusive conduct" and summarizing a decade of CFPB activity in this area. The CFPB

noted that abusive conduct includes (1) obscuring key features of a product or service, or (2) leveraging certain circumstances—like gaps in understanding, unequal bargaining power, or consumer reliance—to take unreasonable advantage. The policy statement also described how abusive conduct can arise from the use of what the CFPB calls "dark patterns," business models that set consumers up to fail, kickbacks, self-dealing, and profiteering from captive customers.

Bite 5: CFPB Issues Guidance on Negative Option Subscription Fees

On January 19, 2023, the CFPB issued a circular affirming that companies offering "negative option" subscription services must comply with federal consumer financial protection law. Negative option programs include (1) subscription services that automatically renew unless a consumer affirmatively cancels and (2) trial programs that charge a reduced fee for an initial period and then automatically raise the fee. Under these programs, the CFPB indicated that sellers interpret a consumer's silence or a failure to cancel an agreement as continued acceptance of the offer. The circular claimed that these programs are especially harmful when paired with behavior the CFPB calls "digital dark patterns." According to the CFPB, "digital dark patterns" are design features used to deceive, steer, or manipulate users into behavior that is profitable to the company, but harms consumers or is contrary to their intent. The CFPB stated that negative option programs risk violating the federal prohibition on unfair, deceptive, or abusive acts and practices when they fail to disclose material terms clearly and conspicuously, fail to obtain consumers' informed consent, and mislead or impede consumers wishing to cancel.

Bite 4: CFPB Comment Letter Focused on Earned Wage Access

On December 1, 2023, the CFPB announced that it sent a comment letter to the California Department of Financial Protection and Innovation (DFPI) about the DFPI's earned wage advance proposal. The CFPB took the position that earned wage advances, also known as income-based advances, have long been part of what the CFPB calls the country's "consumer lending market." According to the CFPB, state agencies provide critical oversight of companies that provide these consumer financial products. The CFPB claimed that, "by treating wage advance products as loans," the "DFPI's proposal takes a similar approach to federal law—the Truth in Lending Act and the regulation that implements it." The CFPB believes that states should ensure that costs are accurately reflected and fully disclosed in what the CFPB called the "cost of credit." The CFPB said that it plans to offer guidance on these products to clarify the application of federal law, noting that its previous advisory opinion on this topic had a "very narrow scope (that) should not be misrepresented."

Bite 3: CFPB Proposes Rule to Establish Public Registry of Terms and Conditions in Form Contracts

On January 11, 2023, the CFPB proposed a rule to establish a public registry of terms and conditions used in form contracts. The proposed rule would establish a public registry of supervised nonbanks' terms and conditions. The registry would include those terms provided in "take it or leave it" form contracts that claim to waive or limit consumer rights

and protections. The proposed rule would apply to nonbanks subject to CFPB supervisory jurisdiction, including payday lenders, private student lenders, and mortgage companies. Companies deemed "larger participants" operating in student loan servicing, automobile financing, consumer reporting, consumer debt collection, and international remittances would also be subject to the proposed rule. Examples of terms and conditions that would be included in the registry include those that waive servicemembers' legal protections, "undermine" credit reporting rights, limit lender liability for bank fees caused by a lender's repeated debit attempts, and mislead consumers by using unenforceable waivers in mortgage contracts. In addition to the terms and conditions published on the registry, the CFPB would also publish company information such as the company's legal name, state of incorporation or organization, headquarters and principal place of business addresses, and unique identifiers. Comments on the proposed rule closed April 3, 2023.

Bite 2: CFPB Proposes Rule on Personal Financial Data Rights to Jumpstart Competition and Accelerate Shift to Open Banking

On October 19, 2023, the CFPB proposed a new rule to give consumers more control over financial data and new protections against data misuse. This proposed rule would implement Section 1033 of the Consumer Financial Protection Act, which charged the CFPB with implementing personal financial data sharing standards and protections. According to the CFPB, this rule would ensure that consumers can access their data without paying "junk fees," will give people a legal right to grant third parties access to financial information, and will promote data portability so consumers can walk away from financial relationships and move their data to competing products and services. The proposal would limit the use of consumer data to the specific purpose requested by the consumer. The CFPB would implement the proposal's requirements in phases, requiring compliance by larger providers first. In addition, community banks and credit unions with no customer digital interface would be exempt from the rule's requirements. In prepared remarks, Chopra said that this proposal will help decentralize the financial services market, give consumers more control, and allow smaller institutions and startups to compete fairly with major market players. Comments on the proposed rule closed December 29, 2023.

Bite 1: CFPB Proposes New Rule on Digital Wallets and Payment Apps

On November 7, 2023, the CFPB proposed a new rule to subject fintech companies and other providers of digital wallets and payment apps to CFPB supervision. The CFPB's Notice of Proposed Rulemaking defined a market for general-use digital consumer payment applications that would cover funds transfer apps and digital wallets, subjecting this market's larger participants to the CFPB's supervisory authority. The CFPB indicated that the proposed rule would ensure that these nonbank financial companies, specifically larger companies with more than 5 million transactions per year, adhere to the same rules as large banks, credit unions, and other financial institutions the CFPB already supervises. According to the CFPB, fintech companies operating in consumer finance markets blur the traditional lines that have separated banking and payments from commercial activities, and this can put consumers at risk, especially when traditional banking safeguards like deposit insurance do not apply. The CFPB also noted that it has

opened the Office of Competition and Innovation to ensure a level playing field for new firms to compete with Big Tech in the consumer finance space. Comments on the proposed rule closed January 8, 2024.

We expect in 2024 that the CFPB will continue its march towards eliminating or reducing consumer fees that the CFPB has determined have no value to consumers, including its long-awaited rule to cut credit card late fees to \$8. We further anticipate that the CFPB will work to position itself as a protector of the consumer dollar, attacking both overdraft practices and insufficient funds fees. Data will also continue to be a hot topic, with the CFPB pushing for greater consumer control of their own data while simultaneously targeting those who traffic in consumer data. All this, of course, will likely occur amid the backdrop of the CFPB's continued push to supervise as many financial services businesses as it can under its broad authority to determine what industries it can regulate under its "larger participant" authority.

Still hungry? Please join us for our next CFPB Bites of the Month. Here is our [lineup](#) for 2024. If you missed any of our prior Bites, [request a replay](#) on our website

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