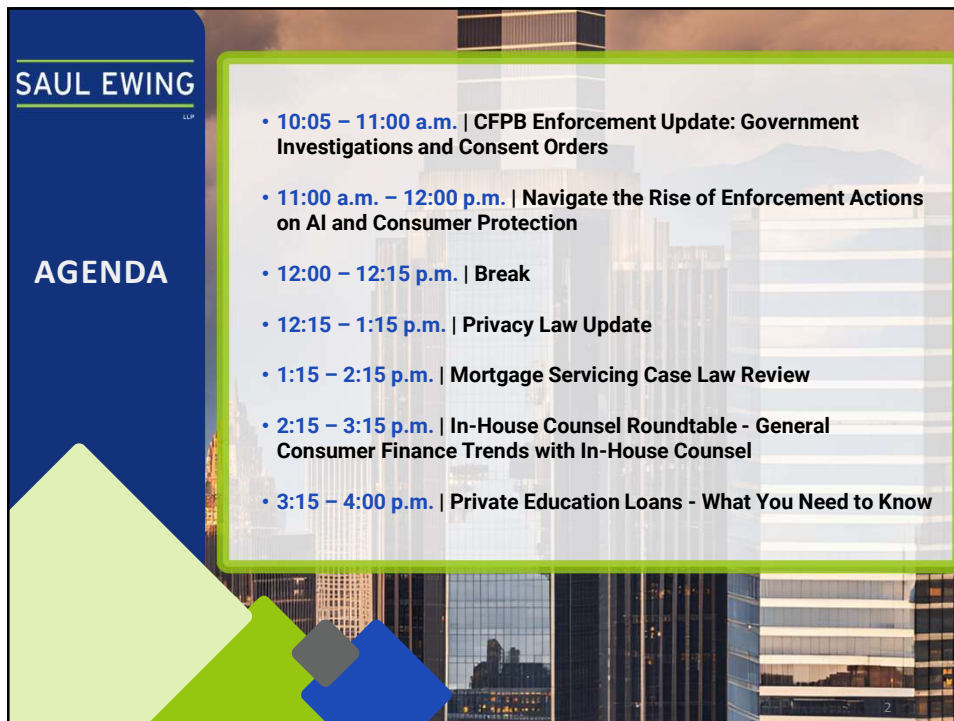








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## CFPB Enforcement Update: Government Investigations, Enforcement and Consent Orders

**Trip Riley**, Saul Ewing, Partner & Chair of the  
Consumer Financial Services Litigation and  
Enforcement Practice

**Jason McElroy**, Saul Ewing, Partner

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## The CFPB Has Been Active

- The CFPB reported 23 new enforcement actions filed so far this year, consistent with recent years.
- The CFPB published significant new final and proposed rules, advisory opinions, supervision findings, enforcement proceedings, and circulars (detailed interpretations) covering a wide range of new and established financial products this year.
- CFPB director Rohit Chopra reportedly indicated on a November 8<sup>th</sup> call that the CFPB was still considering adopting additional regulations prior to the new administration.

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## CFPB - Townstone Financial

- CFPB's first redlining case brought against a nonbank mortgage lender and broker.
  - Relied upon ECOA's amended implementing regulation that proscribed discrimination against "prospective" applicants, not just applicants.
- District Court dismissed, holding the statute did not speak to "prospective" applicants, only actual applicants. Effectively striking down the regulations language.

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## CFPB - Townstone Financial

- CFPB appeals NDILL's decision to 7<sup>th</sup> Circuit.
- Circuit Court reverses even after demise of Chevron Doctrine by SCOTUS.
  - Uses its own interpretation of ECOA to hold it includes protections for prospective applicants who may be discouraged from applying for credit.
- Remanded for trial on 1st Amendment defenses.
- Settlement: Individual dismissed. Townstone to only pay \$105,000.
- Ramifications of 7<sup>th</sup> Circuit's decision.

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## CFPB - Navient

- On September 12, 2024, the court entered a stipulated final judgment and order against the student loan servicer Navient.
- Allegations:
  - Navient steered numerous student loan borrowers into costly repayment options and deprived student borrowers of opportunities to enroll in more affordable income-driven repayment programs.
- Navient paid a \$20 million penalty and provided \$100 million for redress.
- The order permanently bans the company from servicing federal Direct Loans and forbids the company from directly servicing loans issued under the Federal Family Education Loan Program (FFELP) or acquiring, with limited exceptions, any FFELP loans.

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## CFPB – CFPA, FCRA

- On July 9, 2024, the CFPB issued an order against Fifth Third Bank, N.A. (“Fifth Third”) concerning its servicing of motor vehicle loans.
- Fifth Third generally required borrowers to maintain insurance on the vehicle that served as collateral for the loan. If borrowers did not, Fifth Third could force-place physical-damage coverage.
- The CFPB alleged a variety of bad actions by Fifth Third:
  - Fifth Third placed unnecessary force-placed insurance on motor vehicle loans; charged premiums for force-placed insurance policies that had terminated; and failed to provide sufficient notice to consumers of increased monthly payments
  - Fifth Third deceived borrowers about the time required to cancel force-placed insurance policies and about the total amount due in right-to-cure letters
  - Fifth Third furnished inaccurate information to consumer reporting agencies regarding repossessions.
  - Fifth Third failed to notify consumers of increases in the amounts of preauthorized electronic-fund transfers due to force-placed insurance, in violation of the Electronic Fund Transfer Act.
- The order requires Fifth Third to come into compliance with the law, pay redress, and pay a \$5 million civil money penalty.

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## CFPB – CFPA, FCRA, TILA, EFTA

- On July 26, 2024, the Bureau filed a lawsuit against Acima Holdings, LLC and Acima Digital, LLC (collectively, "Acima"), and Acima's founder and former CEO, Aaron Allred ("Allred").
- Acima offers consumers a means to "lease-to-own" consumer goods. The CFPB alleges that these leases were actually credit transactions and allegedly violated multiple laws
  - Acima violated the CFPA by misleading consumers about the nature and terms of their agreements, misrepresenting contract requirements like autopay, and providing deceptive advertisements and training to merchants.
  - Acima violated the Fair Credit Reporting Act by furnishing inaccurate information about its customers to consumer reporting agencies.
  - Acima violated the Truth in Lending Act by failing to provide required disclosures to consumers, including the annual percentage rate and finance charges.
  - Acima violated the Electronic Fund Transfer Act by conditioning their extension of credit to consumers on repayment by preauthorized electronic fund transfers.
- The government is seeking both injunctive relief and monetary penalties.

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## CFPB – Real Estate Settlement Procedures Act

- On August 21, 2024, consent order against Fay Servicing, LLC, a residential mortgage servicer.
- A previous order in 2017 addressed Fay Servicing's alleged failure to provide mortgage borrowers with required protections against foreclosure, kept borrowers in the dark about critical information concerning the process for applying for foreclosure relief, and dual tracked the loan foreclosure and relief efforts.
- Alleged violations of Regulation X, the CFPA, the Homeowners Protection Act, Regulation Z, and committed unfair and deceptive practices by failing to abide by the terms of the 2017 order.
- The order imposes several penalties on Fay Servicing:
  - Required to pay \$3 million in consumer redress, a \$2 million civil money penalty, and to invest \$2 million to update its servicing technology and compliance management systems.
  - The order also puts limitations on compensation to Edward Fay, the Founder/CEO of the company.

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## ECOA, FHA & CFPA – REVERSE REDLINING

- On September 13, 2024, the United States District Court for the Southern District of Texas denied in part the defendants' motion to dismiss in [CFPB v. Colony Ridge, Case No. 4:23-cv-04729](#).
  - The Court held that the Consumer Financial Protection Bureau (CFPB) and the U.S. Department of Justice (DOJ) plausibly stated a claim for reverse redlining against three of the four defendants pursuant to the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691(a)(1), the Fair Housing Act (FHA), 42 U.S.C. § 3605, and the Consumer Financial Protection Act (CFPA), 12 U.S.C. §§ 5531, 5536.
- The CFPB and DOJ allege a land developer and two of its affiliates (the "developer"), and a mortgage processing company for violations of the FHA, ECOA, and the CFPA by engaging in reverse redlining by targeting limited English proficiency (LEP) Hispanic mortgage loan applicants on the basis of their race or national origin.
  - Allege developer heavily marketed its subdivision, largely consisting of vacant lots, to Hispanic-LEP consumers with easy financing and no credit checks, but in reality, was selling properties that would cost more to pay off and build on than most applicants could afford.
  - Alleged the developer did not request any documentation to support applicants' self-reported ability to pay the loans the company offered.
  - Alleged that the developer's "interest rates routinely exceed typical prevailing rates."
  - Alleged that the developer only provided the actual mortgage documents, including the application itself and required disclosures, in English, despite the borrowers' limited English language proficiency.

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## CFPB, TILA, and the Truth in Savings Act (TISA) Unauthorized Accounts

- July 9, 2024, CFPB consent order against a national bank accused of allegedly opening unauthorized accounts on behalf of consumers.
- According to the CFPB's [amended complaint](#), the bank opened deposit and credit-card accounts in consumers' names, transferred funds from consumers' existing accounts to new, improperly opened accounts, enrolled consumers in unauthorized online-banking services, and activated unauthorized lines of credit on consumers' accounts.
- Order requires the bank to pay a \$15 million penalty and provide redress to harmed customers. The bank would also be prohibited from setting performance-management and sales goals for employees that could encourage them to open unauthorized accounts.

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## Consumer Financial Protection Act

- Reliant Holdings, Inc d/b/a/ Horizon Card Services
- Court filing alleging violations of the CFPA and Truth in Lending Act
  - Reliant allegedly advertised a regular credit card but instead provided a membership card that could only be used to buy goods from Reliant's online store.
  - Charged \$300 annually on line of credit which started at \$500 or \$750.
  - Advertised refunds in "less than a minute" but refused to provide refunds until customers escalated to their bank.
- CFPB is seeking injunctive relief, redress, and civil monetary penalties.

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## Consumer Financial Protection Act

- Order against New Day Financial, LLC.
- Found that New Day had violated the CFPA by consistently misstating in the net benefit worksheets how borrowers' "previous" monthly mortgage payment would compare to the "new" monthly mortgage payment after refinancing with NewDay USA.
- \$2.25 Million Civil Penalty.
- Injunctive relief forcing company to fix their "net benefit" analysis worksheets moving forward.

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## Consumer Financial Protection Act

- Ejudicate, Inc., d/b/a Brief.
- Order issued October 10, 2024 finding:
  - Ejudicate is a private arbitration company that commenced arbitration proceedings against consumers who had never consented to their authority.
  - Ejudicate falsely represented itself as a neutral and impartial forum for consumer debt arbitrations and failed to disclose that Ejudicate had financial interests aligned with the creditor.
- Order permanently bans Ejudicate from arbitrating disputes that concern a consumer financial product or service.
- Civil Penalty of \$1 (due to Ejudicate's inability to pay).

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## FCRA

- September 2024, Consent Order with TD Bank, N.A.
- Violated FCRA/Regulation V in connection with its credit card offerings
  - Knowingly submitted inaccurate information to consumer reporting agencies
  - Failed to properly investigate consumer disputes
  - Failed to provide date of first delinquency
  - Failed to establish and implement reasonable written policies and procedures regarding the information furnished to consumer reporting agencies
- \$7.76 million consumer redress
- \$20 million civil money penalty
- TD Bank required to develop plan to prevent future violations

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## Equal Credit Opportunity Act, CFPA, Fair Housing Act

- Fairway Independent Mortgage Corporation
- Complaint alleged racial discrimination against applicants for mortgages in Birmingham, including the redlining of majority-Black and high-Black areas in the Birmingham MSA.
- Proposed consent order filed jointly by DOJ and CFPB. If entered by the court, the order requires Fairway to:
  - Invest \$7 million in a loan subsidy program.
  - Open or acquire a new loan production office or full-service retail office in a majority-Black neighborhood in the Birmingham MSA.
  - Spend \$1 million on advertising and outreach, consumer education, and partnerships with community based organizations to serve the credit needs of majority-Black neighborhoods in the Birmingham MSA.
  - Pay civil money penalty of \$1.9 million.

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## CFPA & Truth in Lending Act

- CFPB filed suit against Climb Credit, Inc. on October 17, 2024.
- Climb offers online student lending for short term vocational programs at partner schools. Climb claimed to vet the partner schools despite allegedly not doing so, violating the CFPA and Truth in Lending Act.
- CFPB is seeking injunctive relief to prevent future violations and monetary relief in the form of redress to consumers and the imposition of civil money penalties.

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## CFPA & Truth In Lending Act

- Goldman Sachs Bank USA, Apple Inc
  - Goldman and Apple Inc. offered Apple Card, a credit card integrated with Apple software that offers both market-rate APRs and interest-free financing for qualifying Apple products.
- Alleged violations of Truth in Lending Act for:
  - failing to send acknowledgement notices and resolution letters within the required periods.
  - making adverse reports to consumer reporting agencies regarding amounts disputed in billing error notices prior to completing the requirements for billing error resolution.
  - failing to conduct reasonable investigations for disputes that qualified as billing error notices.
  - holding consumers liable for amounts at issue in claims of unauthorized use before conducting a reasonable investigation.
- Alleged Goldman misled consumers into thinking that purchases of certain Apple devices would be enrolled in the interest free program offered.
- Order requires Goldman pay \$19.8 million in redress and a \$45 million civil penalty.
- The separate order against Apple requires it to pay a \$25 million civil money penalty and to come into compliance with the law.

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## Consumer Financial Protection Act

- Consent Order against VyStar Credit Union October 31, 2024 for violation of CFPA.
- VyStar launched a new online and mobile banking platform prematurely. As a result of the outage and subsequent limited functionality VyStar:
  - Assessed fees for failure to make timely payments.
  - Restricted access to customers funds.
- Order imposed a \$1.5 million civil penalty along with any consumer owed redress. It also requires VyStar to establish a governance committee to ensure proper management of projects involving consumer facing banking systems.

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## Consumer Financial Protection Act

- Consent order against Navy Federal Credit Union for violations of CFPA.
- Alleged that from 2017-2022, Navy Federal charged overdraft fees on ATM withdrawals and debit card purchases despite customers' accounts displaying sufficient funds at the time of the transaction. This was a result of a delay in the posting of credits to members accounts from person to person payment networks.
- \$80 million in consumer redress/ \$15 million civil money penalty.

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## Consumer Financial Protection Act

- Global Tel Link Corporation and its subsidiary Telmate, LLC.
- Global Tel Link provides money transfer services to incarcerated individuals.
- Alleged that Global Tel Link violated the CFPA by:
  - failing to disclose to consumers complete fee schedules for money transfers.
  - emptying and then retaining the funds from consumers' accounts after a period of inactivity, without sufficient notification.
  - blocking consumers' accounts when a money transfer was charged-back, and charging a fee to unblock the account even if chargeback was wrongfully filed.
- The consent order requires Global Tel Link to pay \$2 million in redress, and \$1 million in civil penalties and return any money held in inactive accounts.

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## Supervisory Highlights: Add-On Products

The CFPB has identified the market for add-on products as particularly problematic:

- **Add-On Product Categories:**
  - Credit products (e.g., GAP insurance) end when the loan is paid off.
  - Vehicle products (e.g., service contracts) may continue after loan termination.
- **Abusive Practices Found:**
  - Collection of payments for add-ons consumers did not agree to.
  - Failure to conduct title checks for salvage vehicles, resulting in void GAP coverage.
  - Incorrect itemization of amounts financed, not identifying payees for optional products.
  - Onerous requirements for cancellation, such as requiring two in-person visits to dealerships.
  - Denial of cancellation requests despite contract terms allowing refunds.
  - Failure to ensure refunds of unearned premiums after early loan termination.
  - Miscalculation or delay in refunding add-on product premiums.

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## Supervisory Developments

- The CFPB has released several advisory opinions, circulars and proposed rules in the fall of 2024.
  - Issued a Buy-Now Pay Later Product FAQ in September.
    - Intended to clarify interpretive rule set out in May 2024.
    - Does not intend to seek penalties for violation of this rule on any BNPL lender who is transitioning into compliance with the new rule in a good faith and expeditious manner.
  - Issued an advisory opinion on consumer protections for home sales financed under contracts for deeds.
  - Joined other federal regulators to propose rule to standardize data submitted to Federal financial agencies.

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## Supervisory Developments

- CFPB warns against intimidation of whistleblowers.
  - On July 24, 2024, the CFPB issued a circular to law enforcement agencies and regulators explaining how companies may be breaking the law by requiring employees to sign broad nondisclosure agreements that could deter whistleblowing.
- CFPB proposes rule on earned wage access.
  - On July 18, 2024, the CFPB proposed an interpretive rule explaining that many paycheck advance products, sometimes marketed as “earned wage” products, are consumer loans subject to TILA.

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## Supervisory Highlights

- The CFPB’s Fall 2024 *Supervisory Highlights* focused on the Bureau’s efforts in the auto-finance market.
- They have identified trends of significant violations:
  - At origination, auto-finance companies are marketing annual percentage rates incorrectly and are failing to disclose prepayment penalties.
  - Companies are wrongfully repossessing vehicles, or repossessing third parties vehicles without a recorded lien.
  - Loan servicers are failing to adhere to their disclosed payment allocation methodology for post maturity loans.
  - Servicers are failing to provide consumers with their title in a timely fashion following loan payoff.

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## FTC – LEAD GENERATION

- On January 2, 2024, the Federal Trade Commission (FTC)'s consent order with a California-based lead generator resolved allegations that the company facilitated illegal telemarketing calls. This lead generator owned the domain to several websites and sold thousands of leads to third parties for telemarketing purposes.
- Alleged the lead generator of owning over 50 websites that were actually "consent farms" or websites designed to trick individuals into both providing personal information and consenting to receive telemarketing calls without adequate disclosure.
  - Websites led consumers to believe they were entering their information to receive a quote for a home mortgage refinance loan, but instead of receiving that quote, the consumer's contact information was stored in a database and later sold to third parties as telemarketing leads.
- \$7 million judgment against the lead generator and its president, both were banned from "initiating or helping others initiate telemarketing robocalls."

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## STATE OFFICES OF ATTORNEYS GENERAL AFFILIATED BUSINESSES

- D.C.; Maryland; and Pennsylvania Offices of Attorneys General attack on title insurance agency and mortgage brokerage affiliated businesses.
  - DCOAG's settlement with numerous affiliated title agencies.
  - MDOAG's current investigation of numerous affiliated title agencies.
  - PAOAG's and CFPB's investigation of certain affiliated mortgage brokerages.

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## STATE OFFICES OF ATTORNEYS GENERAL ARTIFICIAL INTELLIGENCE

- State AGs are increasingly focusing on regulating artificial intelligence (AI) as the technology proliferates. While there are few state laws currently that address AI, state AGs have indicated that they can utilize privacy and consumer protection laws to regulate it. The AGs have focused on how AI systems utilize personal identifying information, facilitate fraud using deepfakes, and perpetrate bias and discrimination in decision-making processes.
- A bipartisan group of AGs [sent a letter](#) to the Federal Communications Commission warning of potential fraud where AI is used to imitate human voices in telemarketing campaigns.
- Massachusetts AG Andrea Joy Campbell issued an [advisory](#) detailing how companies can potentially violate the Massachusetts Consumer Protection Act by misrepresenting the reliability of an AI system or falsely advertising the quality of AI systems. The advisory also warns that anti-discrimination laws may be implicated if AI makes decisions based on legally protected characteristics.
- Colorado became the first state to [enact](#) a law regulating the use of AI by requiring AI developers to use “reasonable care” to protect consumers from any known or foreseeable risks of “algorithmic discrimination.” The Colorado AG will have exclusive enforcement authority with the ability to seek up to \$20,000 in civil penalties when the law takes effect on February 1, 2026.

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## STATE OFFICES OF ATTORNEYS GENERAL FINANCIAL SERVICES GENERALLY

- From Connecticut to California, AGs have taken diverse and impactful actions to regulate financial practices. Connecticut expanded its AG’s authority to [enforce](#) Dodd-Frank provisions, granting independent subpoena power over out-of-state banks. This move aligns Connecticut with other states and may influence national banking trends.
- Minnesota [passed](#) key provisions of the Debt Fairness Act. The bill bans automatic transfer of medical debt to spouses, prohibits reporting medical debt to consumer reporting agencies, and caps garnishment levels based on income.
- New York AG Letitia James has been particularly active, filing a [lawsuit](#) against Yellowstone Capital for alleged predatory lending practices targeting small businesses. In a separate case, James secured a \$77 million [judgment](#) against three merchant cash advance companies for alleged exploitative lending practices.
- Massachusetts reached a \$1.8 million [settlement](#) with student loan servicer Nelnet over alleged faulty notices regarding income-driven repayment plans.

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**Annual Consumer Financial Services  
Litigation Webinar**  
Significant Developments in Consumer  
Financial Services Litigation, Enforcement  
and Compliance

**Thank you!**

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**Questions?**

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**Navigate the Rise of  
Enforcement Actions on  
Artificial Intelligence and  
Consumer Protection**


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## AI Is Not New and Has Many Uses

- AI – “Intelligence” of machines or technology that mimics human intelligence; no universally-accepted definition
- 1950’s – emerging use of machines for reasoning, problem-solving, etc.
  - 1952 – Arthur Samuel developed a computer program that could independently play checkers
  - 1955 – “Artificial Intelligence” coined at a Dartmouth workshop
- Nov. 30, 2022 – ChatGPT launches
- AI was a part of our life before ChatGPT
  - Siri, Alexa
  - Habit monitoring and social media feeds
  - Deepfakes
  - Facial recognition technology
  - Self-driving cars
  - Strategic games

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## AI Terminology

- **Machine Learning (ML)** – AI involving algorithms that enable computer systems to iteratively learn from data and make decisions, inferences, and predictions
- **Generative AI (GenAI)** – AI that can produce “new” content in a manner that mimics human output
- **Large Language Model (LLM)** – Based on a “neural network” with millions or billions of parameters
- **Hallucination** – Generating fictitious data
- **Automated or algorithmic decision-making** – An AI system that makes decisions without human involvement

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## What is a Large Language Model (LLM)?

- A probabilistic model of language
  - Content creation – text, images, audio files, videos, software code
- Produces output based on probabilities and patterns in the data
  - Looks for the next likely word using predictive analytics
  - Optimized for contextual fluency, not accuracy
- An LLM does not “know” the answers to a user’s prompt

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## Corporate AI Use Cases

- Employees want to use AI
  - Add efficiencies to processes, enhance ability to explore data, and obtain insights about customers, the company, and competitors
  - Help employees collaborate, brainstorm, and communicate
- Common corporate uses:
  - Marketing can use GenAI to quickly create advertising materials, update websites, write social media posts, and make videos using AI actors/avatars and voices
  - Knowledge and contract management
  - Data analysis, consumer behavior forecasting, and targeted advertising
  - Assess competitor strategies, products, and IP
  - Fraud detection, KYC, AML
  - Employment practices – applicant review, facial or voice recognition, background checks, and skills testing
  - Process automation and optimization
  - Customer interaction and service (e.g., chatbots)

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## The Emerging Consumer Protection Legal Framework

- How are legislators and regulators thinking about the risks to consumers presented by AI?
  - A combination of existing and new statutes
    - FTC Act, Securities Exchange Act, state laws
    - Colorado AI Act, Utah GenAI Act
  - Focus on bias and discrimination in access to employment and important services
  - Transparency and accurate communications with the public; and,
  - Data privacy and the rights of individuals

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## The FTC Act and 1934 Securities Exchange Act

- The FTC Act will be relied on by the FTC and state Attorneys General
  - Section 5 – prohibits “unfair or deceptive acts or practices in or affecting commerce”
  - Section 6(b) – FTC has ordered companies to file Special Reports regarding their investments and partnerships with AI companies that have invested in AI developers
- Securities Exchange Act
  - Section 10(b) and Rule 10b-5 – a basis for claims concerning disclosures about AI technologies
  - Not just the SEC, but class action litigations

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## What are the authorities saying about AI?

- 4/25/23 CFPB, FTC, and EEOC Joint Statement
  - Addresses the adverse effects AI may have on consumers
  - Shows the agencies will monitor the impact of ADM AI systems on the public
- 4/16/24 – Massachusetts Attorney General Advisory
  - All businesses that use consumer-facing AI will be subject to the Massachusetts Consumer Protection Act and other relevant federal and state laws
  - Anti-discrimination and federal consumer protection statutes regulating unfair and deceptive business practices

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## What are the authorities saying about AI?

- 9/4/24 – SEC Office Hours Video
  - SEC Chair warns public companies, investment advisers, and broker-dealers against “AI washing”
    - Claim to use AI when you are not
    - Claim to use AI for a particular purpose
  - Noted an increase in AI disclosures by public companies
  - Public companies may be required to explain how they use the term “AI”
    - How and where it is being used by the company, and
    - Is the AI developed by the company or supplied by others?
- Reiterates comments from 12/5/23

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## Colorado’s AI Act – “High Risk” Systems

- The first comprehensive US risk-based AI legislation for companies that do business in Colorado
  - Similar approach to the EU’s AI Act
- Focus is on “high risk systems” – can result in the denial of important services to consumers
  - Educational and employment opportunities
  - Financial and lending services
  - Healthcare and insurance
- AI developers and deployers must use reasonable care to protect consumers from known or reasonably foreseeable risks of algorithmic discrimination
  - Disclose use of high risk AI systems to consumers
  - Implement risk management policies that address AI
- AI deployers must conduct AI impact assessments annually

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## AI and Algorithmic Discrimination

- California Assembly Bill (AB) 2930
  - Failed to pass in 2024, but stay tuned in 2025
  - Prohibits “algorithmic discrimination”
    - An ADM system contributes to unjustified differential treatment or impacts disfavoring people based on various protected characteristics
  - Employers who use ADM tools must:
    - Conduct an impact assessment
    - Notify applicants of ADM system use
    - Implement governance program and technical protections

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## AI and Algorithmic Discrimination

- NYC Local Law 144 (2023) – using AI in hiring and job promotion decisions
  - Prohibits employers and employment agencies from using an automated employment decision tool (AEDT) in NYC unless a bias audit was performed
  - Employers must give notice that AI tools will be used and provide a summary of the audit on their websites
- June 2024 – NY Insurance Circular Letter No. 7
  - Applies when an insurer uses AI or External Consumer Data and Information Sources (ECDIS) in underwriting or pricing
  - The concern is unfair and unlawful discrimination based on protected class
  - AI system bias testing and validation is required
  - Insurers must disclose and explain adverse decisions to applicants

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## AI and Algorithmic Discrimination – CFPB Edition

- Equal Credit Opportunity Act
  - September 2023
  - Clarifies CFPB’s position that, when utilizing algorithmic credit decisioning, the adverse action notice must describe with sufficient specificity the actual reason for the adverse action taken with respect to the consumer
- Appraisals
  - 7/1/24 Rule – effective 7/1/25
  - Places requirements on companies that use automated valuation models in the mortgage industry
- FCRA – Employment Decisions
  - 10/24/24 Circular
  - Confirms CFPB’s position that employers who make employment decisions based on background dossiers, algorithmic scores, and other third-party consumer reports must comply with the Fair Credit Reporting Act

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## AI and Consumer-Facing Chatbots

- Identify the risks of customer-facing chatbots
  - Data privacy and PII – need rules to address how that information is collected, handled, disposed of
  - Hallucinations – you may be liable for discriminatory or false information
    - Air Canada – had to honor discount promised by chatbot
- Utah’s AI Policy Act – A GenAI statute
  - “Regulated occupations” must “prominently” disclose that a customer is interacting with GenAI (i.e., a chatbot)
    - Broadly applies to accountants, healthcare professionals, cosmetologists, contractors, and other licensed occupations
  - Utah’s statute states that existing state and federal consumer protection laws will apply to GenAI in the same manner
  - Cannot avoid liability by blaming the GenAI system

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## Common Legislative Themes

- Burden and potential liability on AI deployers, not just AI tool developers
- Implement AI governance policies
- Mandatory impact assessments and audits
- Disclose use of AI to potentially affected individuals
- Provide the right to opt out of AI ADM use
- *Key Takeaway – Develop a formalized approach to managing AI risk!*

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## AI Consumer Protection Enforcement

- SEC Enforcement
  - AI Washing – vague or inflated claims about AI use to boost brand, get investors, or gain a competitive edge
  - March 2024 – Delphia (USA) Inc. and Global Predictions Inc.
    - Agreed to pay a combined \$400,000 in penalties for false and misleading statements about AI use for investment selection
  - June 2024 – Ilit Raz and Joonko Diversity, Inc.
    - Raz made claims about Joonko's use of "AI-based technology," a "proprietary algorithm" and "machine learning," when no such tech existed
    - Statements made in presentations and marketing materials provided to private equity and venture capital firms, as well as to individuals, for the purpose of raising private capital
    - Filed securities fraud claims in NY federal court alleging the owner of a company misled investors about how its AI platform worked, use of ML, and algorithms
    - DOJ filed an indictment the same day as the SEC suit

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## AI Consumer Protection Enforcement

- The FTC's "Operation AI Comply"
  - AI tools being used to mislead the public
  - AI-powered fraudulent schemes
- 9/25/24 – FTC Announces Action Against Companies for Deceptively Using AI
  - DoNotPay – misleading claims about an AI service touted as “the world’s first robot lawyer”
  - Ascend Ecom – falsely claimed that AI-powered tools would help consumers earn thousands of dollars a month in passive income by opening online storefronts
  - Rytr – marketed an AI-review writing assistant; provided paid subscribers with the means to generate false content for writing reviews
- 11/21/23 – FTC Authorized Issuance of compulsory process in investigation of “involving certain products and services that use or claim to be produced using artificial intelligence . . .”
  - Intends to utilize this process to investigate potential violation of antitrust and consumer protection laws

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## EEOC and Algorithmic Discrimination

- EEOC v. iTutorGroup – Not alleged as AI specifically
  - EEOC sued claiming that the company’s employment application software automatically rejected female applicants age 55 and older and male applicants age 60 or older
  - Named plaintiff initially applied for position using her real birthdate and her application was rejected. The next day, she applied using a more recent birthdate and submitted an otherwise identical application and was offered an interview
- Settled in September 2023
  - **\$365,000** paid by s
  - Extensive continued training for employees who hire tutors
  - Issuance of a more robust anti-discrimination policy
  - EEOC monitoring at least the next **five years**

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## Compliance Through Governance

- AI risk management should be part of an organization's risk management strategy and tailored to the organization
- AI adoption best practices
  - Establish an AI task force, working group, committee
  - Cross-functional team of SMEs and who own AI
  - Implement written AI policies for the organization
    - Leverage existing policies (cyber, privacy, DLP, IP)
    - Identify use cases, permitted and prohibited activities
    - Stress respect for ethical use, minimizing biased outcomes, and IP and data privacy rights
    - Accountability for violations
  - AI Impact/Bias Assessment and Vendor Diligence

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## AI Adoption Best Practices

- Implement a risk management framework
  - NIST, IAPP, ISO 42001
  - AI governance by design
- Understand the risks of AI tools
  - Review Terms of Use for publicly available platforms
  - AI/SaaS vendor diligence and contract review
  - Conduct AI Impact and Risk Assessments
  - Demo products and limited roll-out
- Communication – Executive buy-in and messaging
  - Do not want to be seen by employees as stiflers of innovation and creativity

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## AI Adoption Best Practices

- Risk management is not “set it and forget it”
- Need to regularly revisit the following:
  - Who is using AI with your data?
    - Employees, contractors, vendors, or suppliers
  - What AI tools are being used – publicly available v. enterprise/licensed systems
  - Employee monitoring, training, and awareness
  - What is the impact of using AI on the business, and the rights of individuals, groups, and society (e.g., ESG)?
- Develop metrics over time to understand how AI is being used and how the company can adapt to its needs and the technology

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### Thank You!

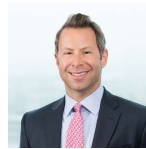
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<b>Trip Riley</b>	<b>Jason McElroy</b>	<b>Sandy Bilus</b>	<b>Matt Kohel</b>
			

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<b>Tom Laser</b>	<b>John Marty</b>	<b>Brandon Sherman</b>	<b>Patrick Tracey</b>
			

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## Privacy Law Update 2024

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Alexander “Sandy” Bilus, CIPP-US, CIPM  
John Marty, CIPM  
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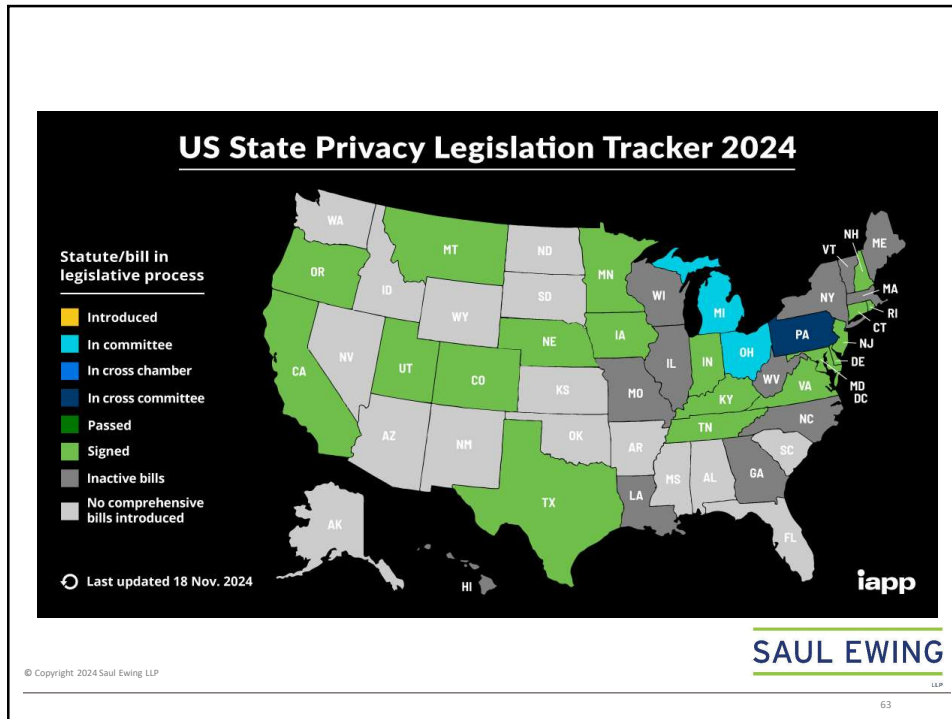
## Agenda

- Developments under State Privacy Laws
- Recently finalized CFPB rules regarding “Open Banking” and Digital Payment Apps
- Recent Trends in Privacy Litigation

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## State Privacy Law Trends

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## New Jersey Privacy Law and Enforcement

- New privacy law effective January 15, 2025
  - Applies to NJ businesses that control or process the personal data of at least 100,000 consumers or those that derive revenue from the sale of personal data of at least 25,000 New Jersey residents
  - Exempts entities covered by the Gramm-Leach-Bliley Act (GLBA) and data protected under Fair Credit Reporting Act (FCRA)
  - Provides rulemaking authority to the Division of Consumer Affairs
- New Jersey was a member of the \$52 million multi-state settlement with Marriott International, Inc.

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## Maryland State Privacy Law

- Effective October 1, 2024
- Applies to entities that control or process data of 35,000 or more consumers
- Uniquely imposes strict use and data minimization of “sensitive data”
- Prohibits controllers from selling or processing personal data of a consumer for the purposes of targeted advertising if the controller knew or “should have known” that the consumer is under 18
- Exempts entities covered by GLBA and data protected under FCRA

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## New Texas Initiatives and Settlement

- June: Attorney General Ken Paxton announces Data Privacy and Security Initiative
- July: AG Paxton announces \$1.4 billion settlement with Meta relating to the company’s practice of capturing personal biometric data
- August: AG Paxton files a lawsuit against General Motors over the use of technology to collect, record, analyze, and transmit driving data that was subsequently sold to insurance companies
- October and November: Civil investigation demand sent to National Public Data and seven companies issued notices

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## Pennsylvania's New Breach Notification and Privacy Law Efforts

- Pennsylvania now requires that its Attorney General Office is notified for breaches that impact more than 500 residents
- Credit monitoring also is now required when certain information is impacted
- A Pennsylvania privacy law continues to move through the state Senate after being passed in the state House of Representatives

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## Consumer Financial Protection Bureau (CFPB) Report Regarding State Privacy Law

- Released November 12, 2024
- Examined federal and state-level privacy protections for consumers' financial data
- Of the 18 new state data privacy laws passed between 2018 and July 2024, all have exemptions tied to federal regulations for financial data and financial products and services
- CFPB: "States should consider whether they wish to continue to exempt these activities from the consumer rights and protections their comprehensive state privacy laws provide"

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## New Rules via the CFPB

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## Personal Financial Data Rights ("Open Banking")

- Finalized October 22, 2024
- Provides consumers a right to know and the right to access the data that is being collected
- Covered entities that seek to access consumer data must disclose their data use, obtain consent, and limit collection/retention (among other requirements)
- Provides consumers the right to freely transfer bank data, "pay-by-bank", and allow potential competitors make loans using data held by other institutions
- Compliance dates of April 1, 2026 and April 1, 2030 (depending on the size of the institution)
- Applies to "Regulation E financial institutions"; "Regulation Z card issuers"; "Payment Facilitators"; and "Third Parties"

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## Digital Payment Apps Oversight

- Finalized November 21, 2024 Applicable to companies handling over 50 million transactions per year (currently seven non-banks will be subject to the rule)
- Goal of rule is to ensure digital app payment is regulated similarly as a large bank via *proactive examinations*
- Areas of Focus
  - Privacy and Surveillance
  - Disputes relating to Errors and Fraud
  - Closing and Freezing of Accounts (“Debanking”)

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## Data Privacy Litigation Trends

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## Website Data Collection Lawsuits

- Recent wave of class action lawsuits
- Targeting companies that collect information about their website users
- Considerations for websites and platforms that use:
  - Cookies
  - Facebook/Meta Pixel and Web Beacons
  - Google Analytics
  - Chat Bots
  - Session Replay Software
  - Third-party powered search/tools

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## Recent Examples

- *Smidga v. Spirit Airlines*, No. 2:22-CV-1578-MJH, (W.D. Pa. Apr. 5, 2024) (appeal pending)
  - Claims based on Pennsylvania's Wiretap Act (among others)
  - Matter dismissed due to lack of standing
- *Vita v. New England Baptist Hosp.*, 494 Mass. 824 (Mass. 2024)
  - Plaintiff had standing under Massachusetts law to pursue action via the Massachusetts Wiretap Statute
  - Matter dismissed as the Massachusetts Wiretap Statute only applies to *secretly intercepted* communications

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## Website Data Collection Best Practices

- Privacy Policy
  - Disclose use of data collection tools
  - Disclose what is collected and why
  - Disclose what is shared with third parties and why
- Terms of Use
  - Consider arbitration provision (but understand the risks)
  - Consider venue provision
- Cookie Banner
  - Ask for affirmative agreement

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## In Closing

- US privacy law remains a patchwork of provisions with increasing enforcement activity
- The CFPB continues to develop the regulatory space with respect to financial institutions
- The Plaintiffs' Bar will continue to be creative
- Use two-factor authentication

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Questions?

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# Mortgage Servicing Case Law Review

December 12, 2024

Patrick S. Tracey  
Thomas A. Laser

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## About Us



**Patrick S. Tracey**  
Partner  
Boston

- Seasoned commercial litigator with over 20 years of experience representing businesses and organizations in complex litigation matters.
- Represents clients in connection with class actions, shareholder disputes, regulatory investigations, cybersecurity issues, financial fraud and consumer finance matters.
- Has a pragmatic business-oriented strategy for resolving matters to reduce exposure and minimize risk to companies.
- Previously served as senior vice president and head of litigation at a major national bank.



**Thomas A. Laser**  
Associate  
Chicago

- Experience handling a variety of matters involving complex commercial disputes, both at the trial and appellate level, including litigating claims for consumer financial services companies.
- Previously served as a judicial law clerk at the Circuit Court of Cook County in Chicago.

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## Qualified Written Requests ("QWRs")

- QWRs are formal letters that a borrower can send to their mortgage servicer to request information or report an error.
- Mortgage servicer obligations regarding QWRs set forth in various statutes and regulations:
  - 12 U.S.C. § 2605 – statute itemizing the various disclosure, notice, loan treatment, and other obligations placed on mortgage servicers.
  - 12 C.F.R. § 1024.35 – federal regulation describing error resolution procedures.
  - 12 U.S.C. § 2605(e) requires a servicer to acknowledge receipt of a QWR; make appropriate changes to the account of a borrower, such as crediting of late charges or penalties; and conduct a reasonable investigation and either correct the error or provide the borrower with a written explanation for why the account is correct. 12 C.F.R. § 1024.35 parrots these requirements for a notice of error.
- QWRs continue to be a source of consumer litigation.

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## QWRs (Continued)

- QWRs must be related to servicing
  - Complaints about loan modifications do not count as a QWR.
  - See *Morgan v. Caliber Home Loans, Inc.*, 26 F.4th 643, 651 (4th Cir. 2022) (“[C]orrespondence limited to the dispute of contractual issues that do not relate to the servicing of the loan, such as loan modification applications, do not qualify as QWRs.”).
- Notably, no cause of action for a borrower who simply disagrees with the servicer’s response/action.
  - See *Finster v. U.S. Bank, N.A.*, 245 F. Supp. 3d 1304, 1316 (M.D. Fla. 2017) *aff’d* at 723 F. App’x 877 (11th Cir. 2018); *Hodge v. Bank of NY Mellon*, Civil Action No. 3:18-CV-3040, 2020 WL 1035243, at \*8 (N.D. Tex. Feb. 12, 2020) (RESPA “does not require the servicer to provide the resolution or explanation desired by the borrower.”).

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## QWRs (Continued)

- Courts are mixed as to whether there exists a private right of action under 12 C.F.R. § 1024.35.
  - No private right of action: *Roes v. Specialized Loan Servicing, LLC*, Civil Action No. 1:17-cv-00246, 2018 WL 3636543, at \*3 (E.D. Tenn. July 31, 2018); *Brown v. Bank of N.Y. Mellon*, Civil Action No. 1:16-cv-194, 2016 WL 2726645, at \*2 (E.D. Va. May 9, 2016); *Miller v. HSBC Bank U.S.A., N.A.*, Civil Action No. 13 Civ. 7500, 2015 WL 585589, at \*11 (S.D.N.Y. Feb. 11, 2015).
  - Private right of action: *Jones v. Wells Fargo Bank, N.A.*, Civil Action No. ELH-18-8, 2018 U.S. Dist. LEXIS 155985, at \*26 (D. Md. Sep. 12, 2018); *Larson v. Nationstar Mortg., LLC*, Civil Action No. PX-18-0780, 2018 U.S. Dist. LEXIS 193233, at \*9 (D. Md. Nov. 13, 2018)

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## QWRs - Damages

- Must show pattern or practice to obtain damages
  - What suffices for pattern and practice? Must be more than a single instance.
    - See *Asare-Antwi v. Wells Fargo Bank, N.A.*, 855 F. App'x 370, 373 (9th Cir. 2021) ("Asare-Antwi alleges only one RESPA violation, and a single alleged failure to respond to a QWR is not a pattern or practice entitling him to statutory damages."); *Lage v. Ocwen Loan Servicing, LLC*, 839 F.3d 1003, 1011 (11th Cir. 2016) ("we can safely say that one RESPA violation, standing alone, does not constitute pattern or practice.")
- Must show damages, which may be actual or statutory
  - Actual = any damages which are causally related to the QWR failure
  - Statutory = damages set by statute, recoverable only upon a showing of a pattern or practice of compliance failures. See *Miranda v. Ocwen Loan Servicing, LLC*, 148 F.Supp.3d 1349, 1354-56 (S.D. Fl. 2015) (distinguishing actual damages from statutory damages)
  - However, "if a plaintiff fails to show actual damages, she likewise may not claim statutory damages for any alleged pattern or practice of noncompliance." *Akkus v. Rocket Mortg., LLC*, 715 F.Supp.3d 726, 734 (D. Md. 2024).

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## QWRs – Damages (Continued)

- Damages must be causally connected
  - "allegations that a servicer breached a duty under RESPA without causing any actual harm fails to state a claim under the statute." *Fox v. Statebridge Co., LLC*, 629 F.Supp.3d 300, 310 (D. Md. 2022).
  - See *Baez v. Specialized Loan Servicing, LLC*, 709 F. App'x 979, 983 (11th Cir. 2017) ("A cost that is incurred whether or not the servicer complies with its obligations is not a cost that is caused by, or a 'result of,' the failure to comply."); *Fowler v. Bank of Am., Corp.*, 747 F. App'x 666, 670-71 (10th Cir. 2018) (adopting the standard in *Baez* to affirm dismissal of RESPA claims).
- Untimely responses alone are generally insufficient
  - See *Pearson v. Select Portfolio Servicing, Inc.*, Civil Action No. PX-17-1624, 2018 WL 1035768, \*2 (D. Md. Feb. 23, 2018) (dismissing RESPA claims under 12 CFR 1024.36 that claimed inadequate and untimely response); *Whittaker v. Wells Fargo Bank, N.A.*, Civil Action No. 6:12-cv-98-Orl-28GJK, 2014 WL 5426497, at \*10 (M.D. Fla. Oct. 23, 2014) ("the Court rejects Plaintiff's assertion that he was damaged by a late response . . .").

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## QWRs – Damages (Continued)

- Emotional distress?
  - Again, courts are mixed.
    - *Akkus v. Rocket Mortg., LLC*, 715 F.Supp.3d 726, 734 (D. Md. 2024) (emotional damages “cannot, on their own, establish actual damages.”).
    - *Moore v. Wells Fargo Bank, N.A.*, 908 F.3d 1050, 1060 (7<sup>th</sup> Cir. 2018) (“We have held that emotional distress can support a claim for damages under RESPA.”).
- Postage fees incurred to address alleged failure to respond to QWR recoverable as economic damages?
  - No - “postage fees are insufficient to state a claim for actual damages.” *Akkus*, 715 F.Supp.3d at 735.

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## QWRs - Standing

- Generally must establish actual damages, rather than merely statutory/procedural error
- Any claim that raises only statutory damages (without also raising actual damages) is susceptible to an argument that the plaintiff has no particularized, concrete injury. *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016); *Transunion LLC v. Ramirez*, 594 U.S. 413 (2021)
- *Aduayi v. PHH Mortg. Servs.*, 2024 WL 1018441 (D. Mass. March 8, 2024)
  - Court dismissed putative class action for lack of Article III standing because plaintiff failed “to allege anything beyond an informational injury”
- **Note** – Article III standing is an attack on subject matter jurisdiction, and cannot be waived. This can be raised at any point, even on appeal for the first time. See *Nat. Res. Def. Council v. Pena*, 147 F.3d 1012, 1021 (D.C. Cir. 1998) (“Standing is a threshold jurisdictional question . . . and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings.”) (cleaned up).

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## Fair Debt Collection Practices Act ("FDCPA")

- Statute of Limitations: every violation triggers the one-year statute of limitations
  - "every alleged FDCPA violation triggers its own one-year statute of limitations . . . ." *Brown v. Transworld Systems, Inc.*, 73 F.4th 1030, 1040 (9th Cir. 2023)
  - In *Brown*, filing lawsuit to collect on previously discharged debt served as the basis for the complaint and started the one-year statute of limitations
- Standing
  - Article III standing entails three elements: (1) injury in fact; (2) causation; and (3) redressability.
  - Procedural/statutory violations will not suffice. *Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, 48 F. 4th 1236, 1247-48 (11th Cir. 2022)
  - Confusing the consumer does not suffice to confer standing. *Osorio v. Transworld Systems, Inc.*, No. 22-2013, 2024 WL 1827242 (3rd Cir. April 26, 2024) ("Osorio did not plead any harm besides confusion itself, so we cannot reach the merits of her claim.").

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## FDCPA – Pay-to-Pay and Convenience Fees

- Pay-to-pay or convenience fees are fees charged by businesses to allow consumers to make payments in a particular way, such as by phone or online
- Section 808(1) of the FDCPA prohibits debt collectors from collecting "any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law."
- In order to pass muster under the FDCPA, the fee must either:
  - Be expressly authorized by the underlying agreement creating the debt, or
  - Be expressly permitted by law.
- Recent litigation over whether a mortgage constitutes a "debt" and whether mortgage servicers are "debt collectors" within the purview of the FDCPA

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## FDCPA – Pay-to-Pay and Convenience Fees

- The FDCPA defines a “debt” as “any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.” 15 U.S.C. § 1692a(5).

## FDCPA – Pay-to-Pay and Convenience Fees

- The FDCPA defines a “debt collector” as “any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests.” 15 U.S.C. § 1692a(6).

## FDCPA – Pay-to-Pay and Convenience Fees

- Definition of “debt collector” includes exceptions, including—and as relevant for mortgage servicers—an exception for:
  - “any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.” 15 U.S.C. § 1692a(6)(F)

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## FDCPA – Pay-to-Pay and Convenience Fees

- Can a mortgage servicer’s imposition of pay-to-pay or convenience fees violate the FDCPA? **Yes.**
  - Mortgage servicer’s imposition of pay-to-pay fee in connection with mortgage payments constituted a “debt” pursuant to FDCPA such that fees held to be impermissible. *DiSimone v. Select Portfolio Servicing, Inc.*, No. 20-CV-3837, 2024 WL 4188851, \*11-12 (E.D. N.Y. Sept. 13, 2024).
  - Pay-to-pay fees charged by mortgage servicer held unlawful under FDCPA. *Booze v. Ocwen Loan Servicing, LLC*, No. 20-80135, 2023 WL 5026984, \*2 (S.D. Fla. Aug. 1, 2023), *appeal docketed*, Nos. 23-1257-J, 23-12579-H (11th Cir. 2024).
- Key factors dictating the result include whether the mortgage loan is in default and the content of the servicer’s communications surrounding imposition of the fee. See generally *Mathieson v. Wells Fargo Bank, N.A.*, No. 8:20-cv-2728, 2021 WL 4078140 (M.D. Fla. Sept. 8, 2021).

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## FDCPA – Pay-to-Pay and Convenience Fees

- The CFPB issued an advisory opinion in July 2022 to help settle the issue.
- The advisory opinion’s stated purpose was “to affirm that this provision prohibits debt collectors from collecting pay-to-pay or “convenience” fees, such as fees imposed for making a payment online or by phone, when those fees are not expressly authorized by the agreement creating the debt or expressly authorized by law. This advisory opinion also clarifies that a debt collector may also violate section 808(1) when the debt collector collects pay-to-pay fees through a third-party payment processor.” 87 Fed. Reg. 39733 (July 5, 2022).

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## Fair Credit Reporting Act (“FCRA”)

- Duty to investigate consumer disputes
  - FCRA requires persons that furnish information to a credit reporting agency (“CRA”) to reasonably investigate certain disputes raised by the consumer
  - In *Harris v. Broker Solutions, Inc.*, No. 23-55486, 2024 WL 1714270 (9th Cir. April 22, 2024), consumers alleged that furnisher submitted inaccurate information about them to a credit reporting agency and failed to reasonably investigate their dispute with regard to the information
  - In this context, the “reasonableness of a furnisher’s investigation procedures depends on “what it learned about the nature of the dispute from the description in the CRA’s notice of dispute.” *Id.* at \*1.
  - Because the consumers alleged only generally that the furnisher had reported inaccurate information about their loan, the furnisher’s correction of the information furnished to the CRA constituted a reasonable investigation. *Id.* at \*1.
  - Summary judgment in favor of the furnisher affirmed. *Id.* at \*2.

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## Real Estate Settlement Procedures Act ("RESPA")

- *Akkus v. Rocket Mortgage, LLC*, 715 F.Supp.3d 726 (D. Md. 2024) – court held that a routine violation of *any* RESPA provision is enough to constitute “a pattern or practice of noncompliance with this section” capable of creating a claim under § 2605(g)
- Two sets of mortgagors brought three-count, putative class action against mortgage servicer, Rocket Mortgage, alleging RESPA violations:
  - Failure to pay taxes from mortgagors’ escrow accounts (count I);
  - Failure to respond to or investigate QWRs (counts II and III).
- Rocket Mortgage moved to dismiss

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## RESPA – *Akkus v. Rocket Mortg.* (Continued)

- RESPA requires loan servicers to “make payments from the escrow account” of any borrower “for taxes, insurance premiums, and other charges in a timely manner as such payments become due.” 12 U.S.C. § 2605(g).
- Borrowers may recover for any actual damages which are causally connected to a violation, and statutory damages not to exceed \$2,000 per individual if a defendant has “a pattern or practice of noncompliance with the requirements of this section.” 12 U.S.C. § 2605(f)(1)(B), (f)(2)(B).
- Rocket Mortgage argued that:
  - (1) plaintiffs/borrowers could not establish pattern or practice because no allegations that Rocket Mortgage repeatedly violated the same RESPA provision;
  - (2) plaintiffs/borrowers could not rely on their single, personal experience to establish a pattern or practice; and
  - (3) plaintiffs/borrowers could not rely on other alleged RESPA violations by Rocket Mortgage which did not result in a judgment.

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## RESPA – *Akkus v. Rocket Mortg.* (Continued)

- Court rejected each of Rocket Mortgage’s arguments on the RESPA claim
  - “the Court finds that the plain meaning of the words ‘pattern or practice of noncompliance with this section,’ read in context, require RESPA plaintiffs to show that the defendant has repeatedly violated § 2605. The absence of the word ‘subsection’ from the statute is noteworthy, and it indicates that Congress did not intend to confine ‘pattern or practice’ to a single subsection.”
  - While plaintiffs/borrowers relied primarily on their own experiences, they “are two separate couples alleging RESPA violations in separate jurisdictions and circumstances, and they further allege that other class members have suffered similar violations in loan servicing. ”
  - Finally, “while many courts have refused to accept pending or settled lawsuits or consumer complaints as proper allegations in support of statutory damages claims, . . . this is not true of all courts that have encountered this issue . . . [and] Plaintiffs have established a pattern or practice of noncompliance[.]”

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## CFPB Guidance

- Pay-to-pay and convenience fees
  - In April 2024, the CFPB published a special report regarding the imposition of illegal fees by residential mortgage servicers
  - Key findings from the report, as well as implications for servicers, include:
    - Widespread instances of inspection fees and late fees that exceed amounts allowed by mortgage loan agreements, failure to waive COVID-related late fees, failure to timely make insurance and tax payments on behalf of borrowers, resulting in penalties to borrowers, and other improper fees
    - In many instances, servicers have been ordered to refund fees, implement safeguards to prevent future violations, update notices to describe certain fees in more detail, were subject to inspection, or faced other CFPB-mandated remediation measures

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## CFPB Guidance (Continued)

- In May 2024, the CFPB issued a request for information from consumers regarding alleged “junk fees” charged by mortgage lenders, settlement service providers, and mortgage servicers.
  - The CFPB’s request states that median total loan costs for home purchase loans increased by 36% from 2021 to 2023; median dollar amount per loan was almost \$6,000 in 2022
  - The request seeks information surrounding:
    - Whether certain fees cause hardship for consumers;
    - Whether certain fees are necessary to close the loan;
    - The degree of variance among closing costs for different consumers;
    - The degree to which consumers shop for closing costs;
    - How fees are set, which fees have increased most in recent years, and what is driving the increase in rising closing costs;
    - Whether lenders should be tasked with negotiating closing costs (rather than consumers);
    - What studies/data are available to measure the impacts of these closing costs on consumers.

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# Questions?

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**In-House Counsel Roundtable**

**General Consumer Finance Trends with In-House Counsel**



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***Private Education Loans  
What You Need to Know***

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**Brandon S. Sherman**

December 12, 2024

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## LEGAL DISCLAIMER

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## ABOUT BRANDON SHERMAN



### PRACTICE AND EXPERIENCE

- Member of Saul Ewing's Higher Education Practice Group with more than 17 years of experience.
- Previously served as Senior Counsel to the Deputy Secretary, U.S. Dept. of Education.
- Counsels clients on the rules and procedures related to federal financial aid, private education loans, cybersecurity, marketing & advertising practices, accreditation, and transactional issues.

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# AGENDA

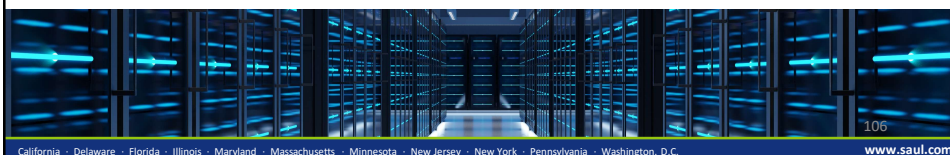
1. Background
2. Regulatory oversight
3. Disclosures
4. Loan servicing and collection
5. Emerging issues
6. Trump Administration
7. Q&A



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## Private Education Loans

- Private education loans are typically used to cover the shortfall between the cost of higher education programs and available financial aid, which can include loans made by the Department under the Federal Direct Loan Program.
- Private education loans can also be used to finance the cost of attending institutions ineligible to participate in the Federal Direct Loan Program, and they may also be used by borrowers who are ineligible for Direct Loans.



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## Private Education Loans

- Private education loans:
  - “An extension of credit that... [i]s extended to a consumer expressly, in whole or in part, for postsecondary educational expenses, regardless of whether the loan is provided by the educational institution that the student attends” and are “not made, insured, or guaranteed under title IV of the Higher Education Act of 1965.” 12 C.F.R. § 1026.46(b)(5)
- A private education loan does not include:
  - An extension of credit under an open end consumer credit plan, a reverse mortgage transaction, a residential mortgage transaction, or any other loan that is secured by real property or a dwelling; or
  - An extension of credit in which the educational institution is the lender if:
    - The term of the extension of credit is 90 days or less; or
    - An interest rate will not be applied to the credit balance and the term of the extension of credit is one year or less, even if the credit is payable in more than four installments.

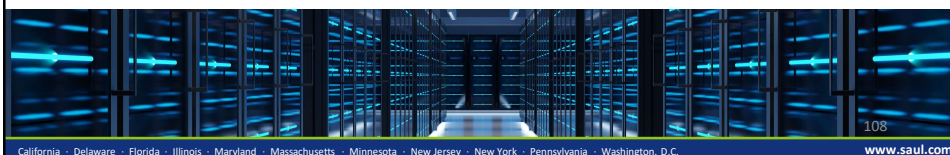


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## Private Educational Lenders

- If a college or university solicits, makes, or extends private education loans, it is considered to be a private educational lender subject to the Federal Reserve's regulations on such loans.
- Covered educational institution means:
  - An educational institution that meets the definition of an institution of higher education, as defined in paragraph (b)(2) of this section, without regard to the institution's accreditation status; and
  - Includes an agent, officer, or employee of the institution of higher education. An agent means an institution-affiliated organization as defined by section 151 of the Higher Education Act of 1965 or an officer or employee of an institution-affiliated organization.

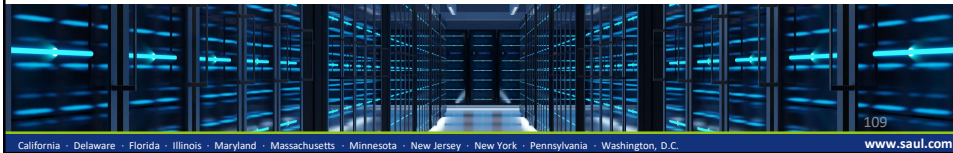
12 C.F.R. Part 1026



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## Regulatory Oversight

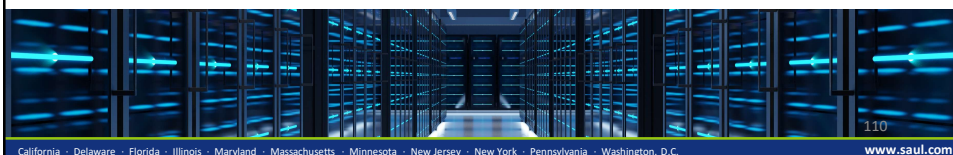
- Federal
  - Consumer Financial Protection Bureau (“CFPB”)
  - U.S. Department of Education (“Department”)
  - Federal Trade Commission (“FTC”)
  - Preemption
- Congress



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## Regulatory Oversight

- States
  - State attorneys general
  - State authorizing agencies
- Accreditation agencies



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## TILA Disclosures

- **Approval disclosures**

- Approval disclosures must, among other things, be **clear and conspicuous**, and made **prior to the consummation of the loan**.
- In addition, certain information must be disclosed, including:
  - Interest Rates
  - Fees and default or late payment costs
  - Repayment terms
  - Cost estimates
  - Eligibility
  - Alternatives to private education loan

12 C.F.R. § 1026.47

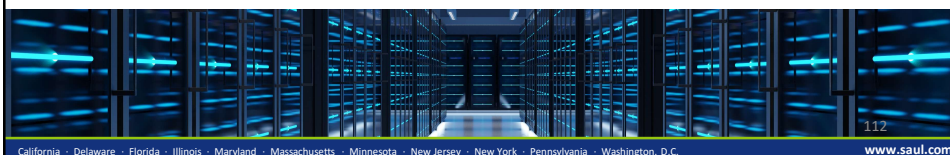


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## TILA Disclosures

- **Final disclosures**

- After the consumer has accepted the loan, the creditor shall disclose to the consumer the information required by § 1026.18 and the following information:
  - Interest rate
  - Fees and default or late payment costs
  - Repayment terms
  - Cancellation right
    - A statement that:
      - Funds may not be disbursed until the cancellation period expires.
      - Disclosure must state the exact date on which the acceptance period expires.



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## Equal Credit Opportunity Act

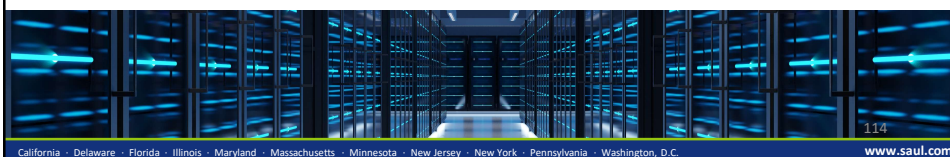
- The Equal Credit Opportunity Act (“ECOA”) makes it **unlawful to discriminate against any applicant for credit** with respect to any aspect of a credit transaction:
  - On the basis of race, color, religion, national origin, sex, sexual orientation, gender identity, marital status, or age (provided the applicant has the capacity to contract);
  - Because all or part of the applicant's income derives from any public assistance program; or
  - Because the applicant has in good faith exercised any right under the Consumer Credit Protection Act.



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## Other CFPB Requirements

- Fair Credit Reporting Act
  - Requires entities that furnish information to consumer reporting agencies to have reasonable written policies and procedures to ensure the accuracy and integrity of information they furnish to consumer reporting agencies.
  - Prohibits entities from pulling another person's report unless it is for a valid reason.
- Gramm-Leach-Bliley Act
  - Privacy Rule
    - FERPA exception
  - Safeguards Rule
- Electronic Fund Transfer Act
  - Establishes the rights, liabilities and responsibilities of participants in electronic fund transfer systems.



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## Unfair and Deceptive Practices

Generally, the standards the CFPB will use in assessing UDAAPs are:

- A representation, omission, act, or practice is deceptive when:
  - The representation, omission, act, or practice misleads or is likely to mislead the consumer;
  - The consumer's interpretation of the representation, omission, act, or practice is reasonable under the circumstances; and
  - The misleading representation, omission, act, or practice is material.

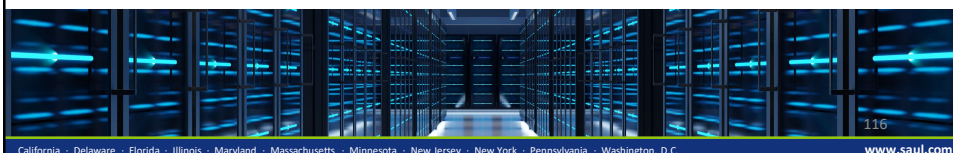


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## Unfair and Deceptive Practices

- In examining private student loan origination, CFPB examiners should:
  - Asses for potential violations of law in connection with the advertising or marketing of private education loans.
  - Understand how private education loans are developed and marketed to consumers.
  - Evaluate representative samples of all marketing and advertising materials,
    - including print, electronic, and other media, such as the Internet, email and text messages, telephone solicitation scripts, agreements and disclosures for the product(s) and service(s).
  - Understand the extent of any relationships that the private education lender has with service providers to advertise, offer, or provide loans.

Source: CFPB Examination Procedures



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## Private Education Loan Applicant Self-Certification

- A lender [school] must obtain a signed, completed Private Education Loan Applicant Self-Certification from the loan applicant before initiating a private education loan.
  - The applicant may get a copy of the form from the private lender and submit it to your school for completion or confirmation.
  - The school may also, at its option, provide the information needed to complete the form directly to the lender.
- The school must ensure that information about private education loans is presented in such a manner as to be distinct from information about Title IV loans.
- The school must, upon the request of the applicant and discuss the availability of federal, state, and institutional student financial aid.

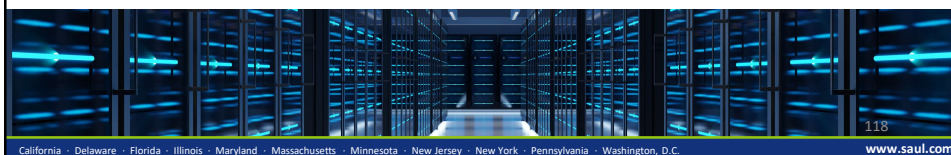
34 C.F.R. § 601.11



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## Preferred Lender Arrangement

- Preferred lender arrangement (“PLA”)
  - An agreement between a lender and a school under which the lender provides education loans to the students at the school and that involves the school recommending, promoting, or endorsing those loans.
- An arrangement does not exist if:
  - The private education loan made to a student attending the school is made by the school or by an institution-affiliated organization of the school and the loan is funded by the school or its institution-affiliated organization’s own funds;
  - Funded by donor-directed contributions; or
  - Made under a state-funded financial aid program, if the terms and conditions of the loan include a loan forgiveness option for public service.



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## PLA Annual Report

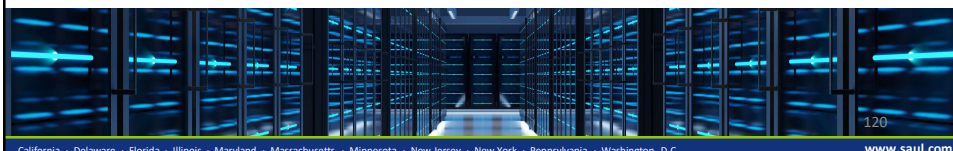
- Prepare and submit to the Department, that includes, for each lender that participates in a preferred lender arrangement with such covered institution or organization –
  - Detailed reasons why the entity participates in a PLA with each private education lender, including why the terms and conditions of each loan provided pursuant to a PLA are beneficial to borrowers.
  - Must ensure the report is made available to the public, and current and prospective students.



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## Code of Conduct

- If a school participates in a Direct Loan program, it must **publish and enforce a code of conduct** that includes bans on the following:
  - Revenue-sharing arrangements with any lender.
  - Directing borrowers to particular lenders or delaying loan certifications, and offers of funds for private loans to students in exchange for providing concessions or promises to the lender for a specific number of FSA loans or private education loans,
  - A specified loan volume, or
  - A preferred lender arrangement.
- The code of conduct **applies to the officers, employees, and agents** of the school and must also prohibit employees of the financial aid office from receiving gifts from a lender, guaranty agency, or loan servicer.
  - This includes gifts given to their family members, or any other individual if there is reason to believe the gift was knowingly given because of the official position of the agent



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## Co-Branding

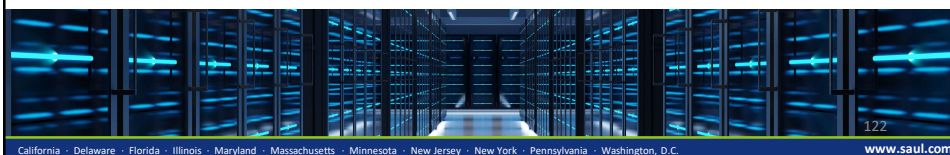
- Prohibits use of **school's name, logo, mascot**, etc. in a way that implies endorsement
- **Safe harbor**
  - Marketing does not imply endorsement if there is a clear and conspicuous disclosure that the school does not endorse
- A school that participates in a preferred lender arrangement must not agree to the lender's use of its name, emblem, mascot, or logo in the marketing of private education loans to students attending the school in any way that implies that the loan is offered or made by the school instead of the lender.
- This prohibition also applies to other words, pictures, or symbols readily identified with the school.
  - The school or its affiliate must also ensure that the name of the lender is displayed in all information related to the private education loans.



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## State Licensing Laws

- State laws governing licensure of private student loan lenders
- Maryland
  - Student Financing Companies (any entity if the business of securing, making, or extending student financing products must register with OFR via NMLS and report student financing data).
- Colorado
  - The Colorado Student Loan Equity Act requires private education creditors to register with the Department of Law.



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## Loan Servicers

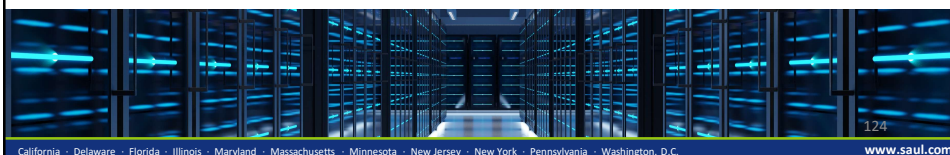
- Student loan servicers handle three types of student loans:
  - Entities servicing outstanding loans under FFELP
  - Entities servicing Direct Loans originated by the Department
  - Entities servicing private student loans, made without borrowers' involvement



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## Loan Servicing

- Servicing, in general, is the day-to-day management of a borrower's loans.
- Loan servicing typically includes:
  - Maintaining borrowers' account records
  - Sending loan statements
  - Receiving payments from borrowers, reporting to creditors, attempting default aversion activities for delinquent borrowers
  - Providing borrowers with information and facilitating enrollment in a range of benefits and programs (including loan forgiveness programs)



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## Federal Student Loan Servicing

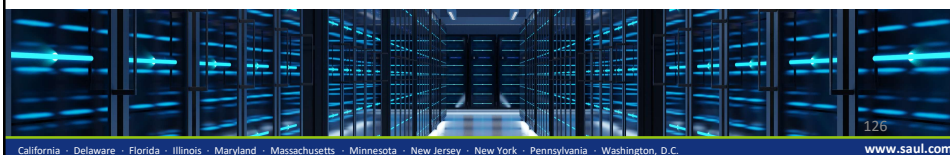
- A federal loan servicer is a company that the Department assigns to handle the billing, payment management, repayment plans, and other services on a federal student loan on the Department's behalf
- U.S. Department of Education's Press Release: Biden-Harris Administration Announces Framework for Student Loan Servicer Accountability To Protect Borrowers Nationwide (November 9, 2023)
  - Applies to the servicing of federal student loans
    - Framework for Student Loan Servicer Oversight and Accountability to Protect Borrowers
      - Servicer Oversight – Monitoring
        - Direct servicer monitoring, Partnering with federal and state regulators, and leveraging borrower complaints
      - Servicer Accountability – Actions
        - Withholding Payment, Suspending or Re-allocating Borrowers, Contractor Performance Report, Corrective Action Plan
    - Helping borrowers harmed by servicer issues
    - Moving toward a modern servicing system – Unified Servicing and Data Solution (USDS)



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## Federal Student Loan Servicing

- Department of Education enforcement actions:
  - MOHELA
    - The Department claimed that MOHELA failed to process more than 460,000 applications for borrowers on income-driven repayment plans, preventing those borrowers from accessing more-affordable monthly payments.
  - Navient
    - The Department claimed that Navient, "among other illegal actions, steered numerous student loan borrowers into costly repayment options."
    - "Navient also illegally deprived student borrowers of opportunities to enroll in more affordable income-driven repayment plans and forced them to pay much more than they should have."
    - "Under the terms of the order, Navient would have to pay a \$20 million penalty and provide \$100 million in redress for harmed borrowers."



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## State Loan Servicing Laws

Example: California

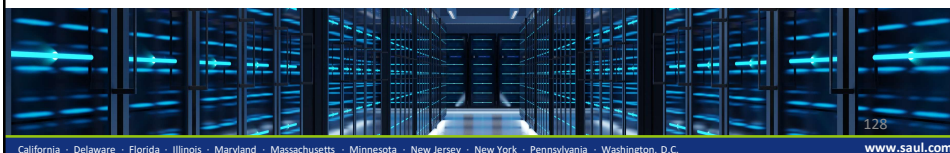
- Subject to limited exclusions, the Student Loan Servicing Act prohibits a person from engaging in the business of servicing a student loan in this state without a license.
- The act of servicing includes any of the following activities related to a student loan:
  - Performing both of the following:
    - Receiving any scheduled periodic payments from a borrower or any notification that a borrower made a scheduled periodic payment;
    - Applying payments to a borrower's account pursuant to the student loan terms or the contract governing the servicing.
  - During a period when no payment is required on a student loan, performing both of the following:
    - Maintaining account records for the student loan.
    - Communicating with the borrower regarding the student loan on behalf of the owner of the student loan promissory note.
- Interacting with a borrower related to that borrower's student loan to help the borrower avoid default on their student loan or facilitate the activities described in paragraphs 1 or 2.



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## Loan Collection

- Concerns raised by the CFPB:
  - Placing enrollment restrictions
  - Withholding transcripts
  - Improperly accelerating payments
  - Failing to issue refunds
  - Maintaining improper lending relationships



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## Loan Collection

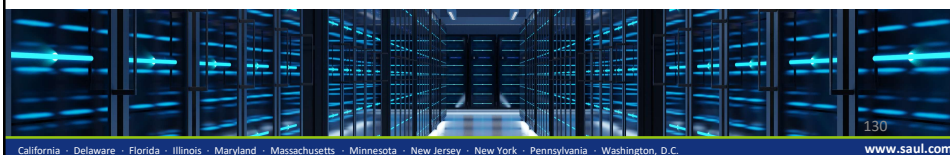
- Transcript Withholding
  - CFPB
    - The CFPB's examinations found that the blanket withholding of transcripts to pressure borrowers is an abusive practice under the Consumer Financial Protection Act.
  - U.S. Department of Education regulations:
    - An institution "will not withhold official transcripts or take any other negative action against a student related to a balance owed by the student that resulted from an error in the institution's administration of the title IV, HEA programs, or any fraud or misconduct by the institution or its personnel."
  - State laws
    - Some states, including New York, California, and Colorado, have banned transcript withholding.



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## Income Share Agreements

- Income Share Agreements ("ISA")
  - Traditionally, private education loans have been loans made by lenders to help students pay the costs of higher education.
  - These loans typically have a fixed or variable interest rate, and borrowers repay the loans in regular installments over a period of time.
  - ISAs have these features too, though they are often marketed as an alternative to conventional student loans to help students pay postsecondary education expenses.



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## Income Share Agreements

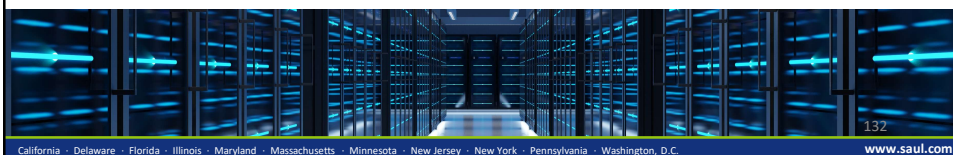
- Income share agreements are credit products where providers advance money to consumers to finance their education. In exchange for the advanced money, students generally promise to make payments based on a percentage of their income until either they have repaid a defined amount or a specified period has elapsed.
- “Since the Department’s authorizing statute and regulations expressly incorporate the TILA definitions, it follows that any product, including an ISA, that meets the TILA and Regulation Z definitions of a private education loan also meets the definition of that term under the HEA and the Department’s regulations.”



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## BloomTech

- Under the agreements at issue, students could attend BloomTech if they agreed to pay the school a percentage of their monthly income from a qualifying job with an income of at least \$50,000 after they graduate.
- The CFPB issued a [Consent Order](#) against a student loan originator for misleading borrowers about ISAs, failing to provide required disclosures, and violating the prohibition against prepayment penalties for private education loans.
- The CFPB concluded in its Consent Order that a student loan originator’s ISAs are private education loans under TILA.
- The CFPB’s order permanently bans BloomTech from all consumer lending activities and rescinds income share agreements for graduates.



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## Tuition-Payment Plans

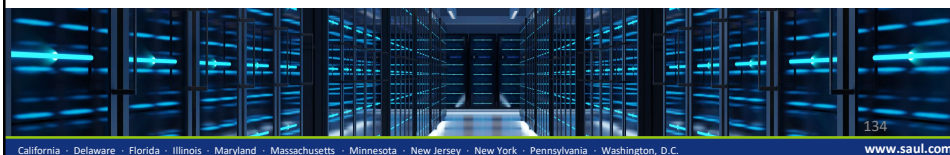
- Tuition payment plans are interest-free, but colleges (along with the third-party service providers that facilitate payments) commonly charge enrollment fees, late fees, and returned payment fees.
- These plans allow students to spread the cost of tuition and other educational expenses across several payments over the course of a single semester or term.
- These tuition payment plans vary and may be paid in as few as two to four installments or in many installments stretching beyond the length of one year.



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## CFPB Report on Tuition Payment Plans

- “While tuition payment plans are generally marketed as alternatives to loans, **many tuition payment plans should be understood as a type of loan.**”
- CFPB found that “almost all colleges offer some sort of tuition payment plan, and millions of students use this product each year.”
- Risks identified by the CFPB:
  - Inconsistent disclosures
  - Automatic enrollment and forced use
  - High costs related to payment
  - Debt collection practices
  - Contract terms



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## CFPB Report on Servicemembers and Veterans with Student Loans

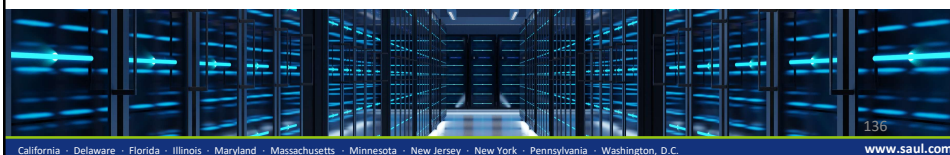
- CFPB report on challenges facing servicemembers and veterans with student loans.
- The report found:
  - Servicemembers, military families, and veterans report challenges when trying to contact or get help from their student loan servicer:
    - Servicemembers reported servicing errors preventing enrollment in income-driven repayment plan.
    - Withholding of transcripts by colleges and universities may prevent servicemembers and veterans from receiving promotions, securing employment, or completing their degrees.



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## Annual Report of the CFPB Student Loan Ombudsman

- The [report](#) highlights challenges facing borrowers, such as:
  - Servicer failures that cause borrowers to pay inflated amounts that jeopardize their financial well-being
  - Legal challenges to the SAVE program are delaying loan relief
  - Customer service “doom loops” and inaccurate communications



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## Bankruptcy

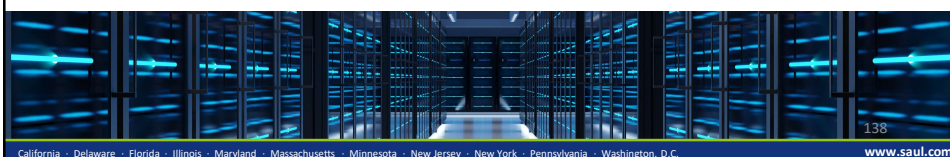
- The CFPB expects servicers to proactively identify student loans that are discharged without an undue hardship showing and permanently cease collections following a standard bankruptcy discharge order.
  - In its student loan servicing oversight work, the CFPB plans to pay particular attention to:
    - Whether student loan servicers continue to collect on loans that are discharged by a bankruptcy discharge order;
    - Whether servicers and loan holders have adequate policies and procedures to identify loans that are discharged by a bankruptcy discharge order and loans that require the borrower to go through an adversarial proceeding to demonstrate that they meet the undue hardship standard; and
    - Whether servicers provide accurate information to borrowers about the status of their loans and the protections that bankruptcy offers.



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## CFPB Enforcement

- Examiners Manual
- CFPB Ombudsman
- Potential penalties



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## CFPB Enforcement

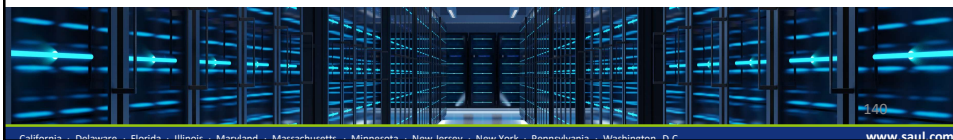
- CFPB examiners should obtain and review, as applicable, each entity's:
  - Organizational charts and process flowcharts;
  - Board minutes, annual reports, or the equivalent to the extent available;
  - Relevant management reporting;
  - Policies and procedures;
  - Rate sheets;
  - Fee sheets;



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## CFPB Enforcement

- CFPB examiners should obtain and review, as applicable, each entity's: (cont'd):
  - Loan applications, loan account documentation, notes, disclosures, and all other contents of loan underwriting and servicing of account files;
  - Underwriting guidelines;
  - Loan servicing contracts;
  - Loan transfer policies and procedures;
  - Payment posting and allocation policies and procedures;
  - Policies and procedures relating to alternative repayment plans, including income-based repayment plans, deferment, forbearance, and public service loan forgiveness;

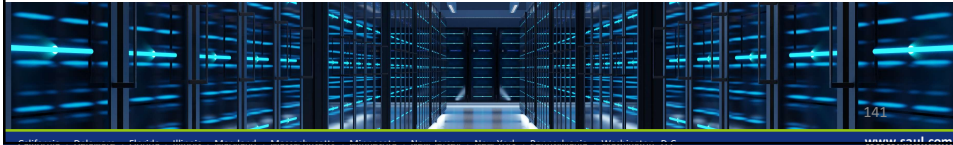


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## CFPB Enforcement

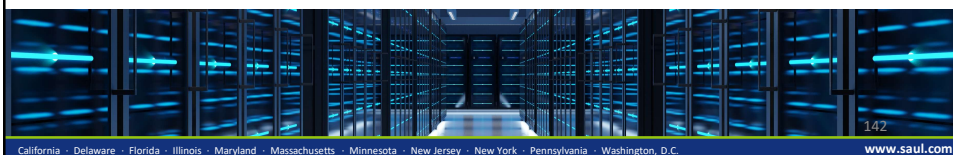
- Operating checklists, worksheets, and review documents;
- Relevant computer program and system details;
- Service provider due diligence and monitoring procedures and service provider contracts;
- Compensation policies;
- Historical examination information;
- Audit and compliance reports;
- Management's responses to findings;
- Training programs and materials;
- Advertisements and co-marketing or co-branding agreements; and
- Complaints.



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## U.S. Department of Education Enforcement

- Program reviews and annual compliance audit
- Potential penalties



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## Election Impact

### Trump administration policy objectives:

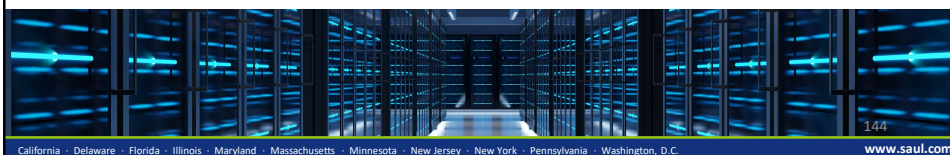
- U.S. Department of Education
  - Leadership changes
  - Policy Guidance
  - Coordination with other agencies
  - Enforcement posture
- CFPB
  - Authority
  - Leadership changes
  - Enforcement



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## Election Impact

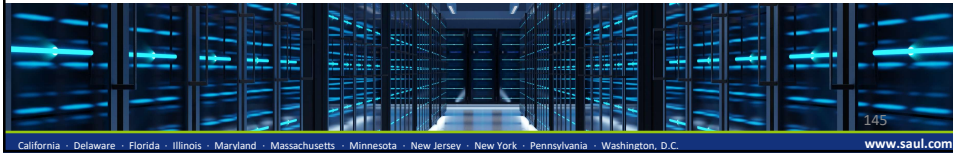
- Congress
  - Congressional oversight
  - Legislation
- States
  - Enforcement
  - Legislation



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# QUESTIONS?



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## Resources

- [Dear Colleague Letter- Income Share Agreements and Private Education Loan Requirements \(GENERAL-22-12\)](#)
- [FSA Handbook](#)
- [CFPB Examination Procedures](#)
- [BloomTech CFPB Consent Order](#)



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