

# Financial Executives International (FEI) Dallas Summer Professional Development Series

## Strategic Insights for Financial Leaders: Adapting to Consumer Financial Protection Bureau (CFPB) Trends



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**Michael P. Gallo** serves as a Lecturer Professor at the **G. Brint Ryan College of Business, University of North Texas**, and is associated as Of Counsel with the law firm of **Padfield & Stout, LLP**. He boasts a distinguished career as a legal counsel and finance executive, combining his expertise in business law, banking, commercial equipment finance, and real estate. With a Doctorate of Jurisprudence from Mississippi College School of Law, a Master of Science in Real Estate Finance from Louisiana State University, and a Bachelor of Science in Finance, Michael has developed an extensive knowledge base across a broad range of legal and financial disciplines. His career spans significant roles at M&T Bank Corporation and previously at Xerox Corporation, where he provided critical legal support for financial services and products.

Michael is a frequent speaker and author, recognized for his insights into financial and legal issues, and he also teaches courses in Business Law and Real Estate. Additionally, he serves as an arbitrator for the Texas Comptroller of Public Accounts, adjudicating property values. Active in various prestigious law and finance associations, Michael remains a committed participant in industry conferences and educational initiatives, enhancing his role as a thought leader. He is currently developing a first-of-its-kind comprehensive academic course on commercial equipment finance, expected to launch in Spring 2025. His commitment to professional education and community service, combined with his legal expertise, highlights his holistic approach to his profession and public service.

**Mehul Madia**, special counsel at **Sheppard, Mullin, Richter & Hampton LLP** in the firm's Washington, D.C. office, brings extensive consumer finance and fintech expertise to his role, drawing on over 15 years of experience in both public and private sectors. Mehul's areas of practice include advising many of the nation's leading banks, non-bank financial institutions, lenders, and fintech companies on complex regulatory, enforcement, and litigation matters. With a background as a former senior attorney at the Consumer Financial Protection Bureau (CFPB), he possesses deep insights into federal and state regulatory frameworks and has represented clients before numerous government agencies such as the CFPB, the Department of Justice (DOJ), the Securities and Exchange Commission (SEC), and state regulatory bodies including the New York Department of Financial Services (NYDFS) and the California Department of Financial Protection and Innovation (DFPI).

His legal expertise covers a wide range of compliance and enforcement areas, including matters related to unfair, deceptive, or abusive acts or practices, the Fair Credit Reporting Act (FCRA), the Equal Credit Opportunity Act (ECOA), and the Truth in Lending Act (TILA). From 2020 to 2022, Mehul served as a senior legal advisor to the Associate Director in the CFPB's Supervision, Enforcement & Fair Lending office (SEFL), where he played a crucial role in shaping the enforcement and supervisory strategies of the bureau. Before joining Sheppard Mullin, Mehul gained significant experience in private practice, advising on high-stakes enforcement, litigation, and regulatory matters, and also served as a Special Assistant United States Attorney at the United States Attorney's Office for the District of Columbia.



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**Owen Babcock** joined **Padfield & Stout, LLP** in 2018, bringing with him a wealth of legal expertise from various clerkships in bankruptcy, commercial litigation, and corporate governance. His comprehensive experience equips him to adeptly assist clients with matters related to secured creditors, regulatory affairs, and business litigation. Owen earned a Bachelor of Science in Political Science from Stephen F. Austin State University in 2015, followed by a Juris Doctor from Southern Methodist University Dedman School of Law in 2018. Licensed to practice across all Texas jurisdictions and federal district courts, Owen's legal acumen is well-recognized.

Active within the legal community, Owen is a member of several associations, including the Texas Creditor's Bar Association and the Equipment Leasing and Finance Association (ELFA), among others. He is a frequent speaker on topics such as Anti-SLAPP litigation and Dodd-Frank Section 1071, and he has co-authored numerous authoritative articles on collection practices and financial regulations. Before joining Padfield & Stout, LLP, Owen enhanced his expertise through significant experience in private practice, focusing on consumer financial services and regulatory compliance.



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**Kameron Dodge** is Senior Vice President, Deputy General Counsel and Assistant Corporate Secretary at **Triumph Financial, Inc.**, a publicly traded financial and technology company focused on payments, factoring, and banking. At Triumph, Kam is responsible for wide range of areas across each of its brands including corporate governance, product counseling, data privacy & cybersecurity, regulatory compliance, strategic partnerships, and government relations.

Before joining Triumph, Kam was in private practice with Sheppard Mullin LLP in Washington, D.C. and Jackson Walker LLP in Dallas where he focused on mergers and acquisitions, early stage companies, as well as venture capital and private equity transactions. Kam also serves in the Army Reserve as Judge Advocate currently assigned as a National Security Attorney in United States Indo-Pacific Command with primary duty in Korea. He is a graduate of Northwestern University and the University of Iowa College of Law.



## The CFPB – What is it?



- Comprehend the basics of the Consumer Financial Protection Bureau (CFPB).
- Analyze Current and Prospective Litigation and Regulatory Actions Targeting Late Fees and Other “Junk Fees”
- Understand the Implications of Dodd-Frank Section 1071 and the Recent Decision from the U.S. Supreme Court
- Explore Recent Developments from the CFPB:
  - ✓ Repeat Offender Registry
  - ✓ Emergence of Artificial Intelligence and the implication on the use of Credit Decisioning and Chatbots



## The CFPB – What is it?

### Establishment:

- The CFPB was created in 2010 as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act.
- Enforces federal consumer financial laws and protects consumers in the financial marketplace.
- Consolidated responsibilities from the Federal Reserve, FTC, and HUD.
- Addresses consumer protection failures that contributed to the 2008 financial crisis.
- **Supervises and regulates financial institutions, enforces consumer protection laws.**

### Mission:

- To make markets for consumer financial products and services work for Americans.
- Ensure that consumers are provided with timely and understandable information to make responsible decisions about financial transactions.
- Protect consumers from unfair, deceptive, or abusive acts and practices (UDAAP).

## Achievements and Impact of the CFPB

### Consumer Relief:

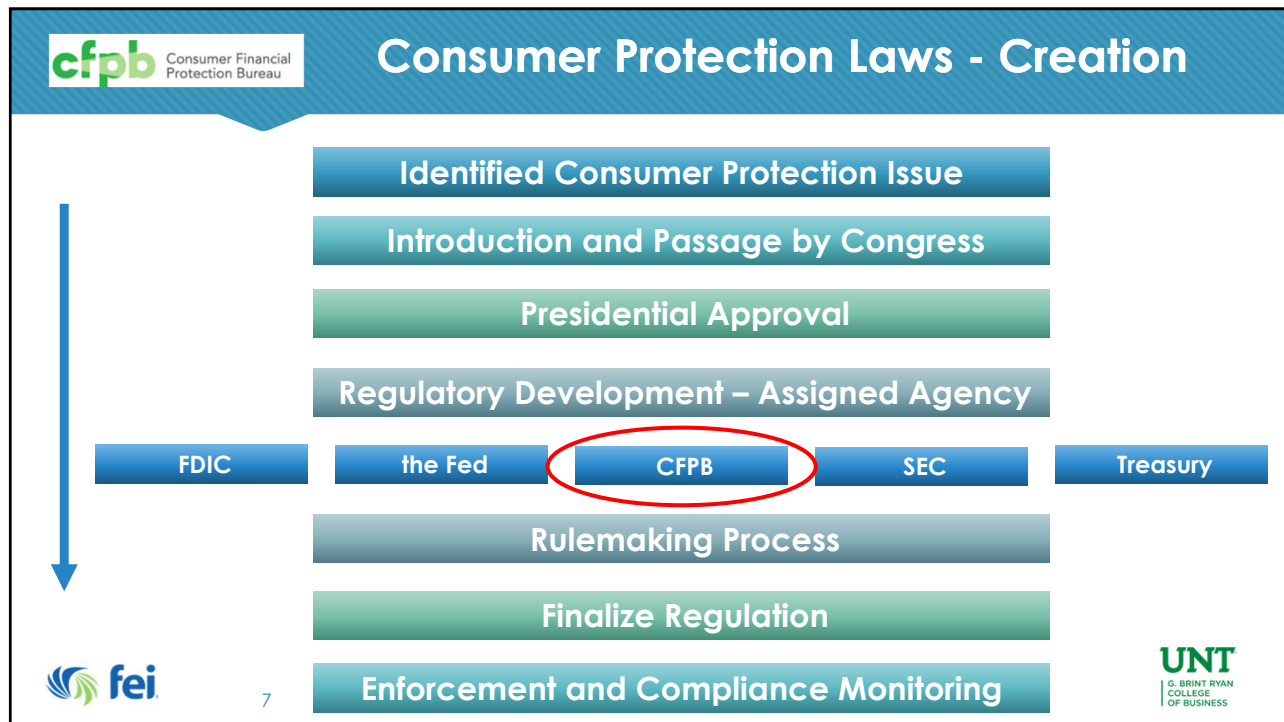
- Since its inception, the CFPB has provided billions of dollars in relief to consumers harmed by illegal practices.
- Notable enforcement actions against major financial institutions, resulting in significant fines and compensation for affected consumers.

### Regulatory Actions:

- Implemented key regulations to protect consumers, such as the Ability-to-Repay and Qualified Mortgage Rule.
- Enhanced transparency and fairness in the mortgage, credit card, and payday lending markets.

### Consumer Complaint Database:

- Established a public database for consumer complaints, enhancing transparency and accountability.
- Helps identify and address systemic issues in the financial services industry.



**cfpb** Consumer Financial Protection Bureau

## Key Examples of Consumer Protection Laws Passed by Congress and assigned to CFPB for Enforcement

**Truth in Lending Act (TILA)**

- Purpose: Requires lenders to provide clear and accurate disclosure of key terms and costs of lending arrangements.
- Key Provisions: Disclosure of the annual percentage rate (APR), finance charges, amount financed, total payments, and payment schedule.

**Fair Credit Reporting Act (FCRA)**

- Purpose: Promotes the accuracy, fairness, and privacy of consumer information contained in the files of consumer reporting agencies.
- Key Provisions: Consumers' rights to access their credit reports, dispute inaccuracies, and be informed if information in their file has been used against them.

**Fair Debt Collection Practices Act (FDCPA)**

- Purpose: Eliminates abusive, deceptive, and unfair debt collection practices.
- Key Provisions: Prohibits harassment, false statements, and other unfair practices by debt collectors. Requires debt collectors to provide validation of debt upon request.


**Equal Credit Opportunity Act (ECOA)**

- Purpose: Prohibits discrimination in any aspect of a credit transaction.
- Key Provisions: Ensures all consumers are given an equal chance to obtain credit regardless of race, color, religion, national origin, sex, marital status, age, or receipt of public assistance.

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OF BUSINESS



Consumer Financial  
Protection Bureau

## Key CFPB Initiatives and Rules Impacting Businesses (Examples of “Regulatory Action”)



**Real Property Actions:**

**Ability-to-Repay and Qualified Mortgage (ATR/QM) Rule:**


- Requires lenders to make a reasonable, good faith determination of a consumer’s ability to repay a mortgage before extending credit.
- Establishes certain protections for lenders making Qualified Mortgages, which meet specific criteria designed to make loans safer and easier to understand.

**Home Mortgage Disclosure Act (HMDA) Rule:**


- Mandates that financial institutions maintain, report, and publicly disclose loan-level information about mortgages.
- Aims to ensure that fair lending practices are followed and to identify possible discriminatory lending patterns.


**TILA-RESPA Integrated Disclosure (TRID) Rule:**

- Combines the Truth in Lending Act (TILA) and Real Estate Settlement Procedures Act (RESPA) disclosures.
- Requires lenders to provide clear and concise disclosures that help consumers understand the key features, costs, and risks of the mortgage loan they are applying for.



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Consumer Financial  
Protection Bureau

## Key CFPB Initiatives and Rules Impacting Businesses (Examples of “Regulatory Action”)

**Lending and Collection Actions:**

**Payday, Vehicle Title, and Certain High-Cost Installment Loans Rule:**


- Establishes strong consumer protections for payday loans, vehicle title loans, and other high-cost installment loans.
- Requires lenders to determine whether the borrower can afford the full amount of each payment when it’s due and offers other consumer protections.


**Prepaid Accounts Rule:**

- Requires financial institutions to provide clear, upfront information about fees and other key terms before consumers acquire prepaid accounts.
- Mandates error resolution and limited liability protections for prepaid account holders.


**Debt Collection Rule (Regulation F):**

- Implements the [Fair Debt Collection Practices Act \(FDCPA\)](#).
- Provides guidelines on how debt collectors may communicate with consumers, including limits on the frequency of contact and disclosure requirements.





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## Key CFPB Initiatives and Rules Impacting Businesses (Examples of “Regulatory Action”)

### General Administrative Actions:

#### Consumer Complaint Database:

- The CFPB's database collects and publishes consumer complaints about financial products and services.
- Allows businesses to track and address consumer issues, fostering transparency and accountability in the financial sector.

#### Consumer Access to Financial Records Rule:

- Supports consumers' rights to access and share their financial information.
- Encourages businesses to develop secure and user-friendly methods for consumers to manage and share their data.

#### Remittance Transfer Rule:

- Protects consumers who send money electronically to foreign countries.
- Requires remittance transfer providers to disclose certain fees, exchange rates, and delivery times, ensuring transparency and fairness in international money transfers.

#### Consumer Complaint Database

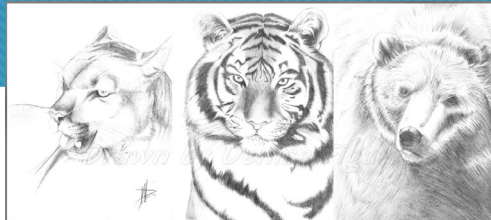
Each week we send thousands of consumers' complaints about financial products and services to companies for response. Those complaints are published here after the company responds or after 15 days, whichever comes first. By adding their voice, consumers help improve the financial marketplace.



## Bully Pulpit, UDAAP and Junk Fees, oh my . . .

### What You Need to Know:

- Regulation through a “Bully Pulpit”
- Expanded use of Unfair, Deceptive, or Abusive Acts or Practices (UDAAP)
- Late Fees and Other “Junk Fees”



## Rulemaking By Any Other Name

- Under the current CFPB Director, Rohit Chopra, administration, the CFPB has undertaken an aggressive effort to reshape the financial services landscape through “**regulatory action.**”
- However, often times the CFPB engages in “regulation” by means other than rulemaking.
  - Advisory Opinions
  - Interpretative Guidance
  - Circulars - General statements of policy. “They provide background information about applicable law, articulate considerations relevant to the Bureau's exercise of its authorities . . . They do not restrict the Bureau’s exercise of its authorities, impose any legal requirements on external parties, or create or confer any rights on external parties that could be enforceable in any administrative or civil proceeding.”
  - Blog Post/Press Release/Research Reports
  - Enforcement



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## Use of the “Bully Pulpit” to Discourage Lawful Practices

### CFPB Finds Credit Card Companies Charged \$12 Billion in Late Fee Penalties in 2020

Largest credit card issuers expected to hike fees further

Significant findings in the report include:

- **Many major issuers charge the maximum late fee allowed under the immunity provisions set by the Federal Reserve Board of Governors in 2010.** 18 of the top 20 issuers set late fees at or near the established maximum level.



**Banks that do not charge NSF fees, or have publicly announced eliminating them\***

**Banks that have not publicly announced elimination of NSF fees, as of April 1, 2022\*\***

Bank of America	Arvest
Capital One	Bank of the West
Citibank	Citizens
Fifth Third	First Horizon
First Citizens	First National Bank Texas/First Convenience Bank
Green Dot	KeyBank
JPMorgan Chase	Huntington
M&T	Santander
PNC	SouthState
Regions	TD Bank
Truist	USAA
U.S. Bank	Woodforest
Wells Fargo	



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# Naming and Shaming

## CFPB Shuttters Lending by VC-Backed Fintech for Violating Agency Order

Google Ventures, Andreessen Horwitz, Kleiner Perkins, and other prominent venture capital firms invested in LendUp



Thomas H. Lee Partners, L.P. and Goldman, Sachs & Co. invested in MoneyGram from as early as 2008. Then, on Feb. 15, 2022, MoneyGram announced a pending sale to Madison Dearborn Partners, LLC, a Chicago-based private equity firm, in a transaction valued at \$1.8 billion, subject to regulatory approvals.



# Use of Research Reports as a Precursor to Action

## Overdraft fees can price people out of banking

By Joe Valenti - MAR 30, 2022

SHARE & PRINT



In 2019, banks and credit unions collected an estimated \$15.5 billion from their customers through overdraft and non-sufficient funds fees. These fees are charged when the financial institution determines that a customer's checking account does not have the funds to cover an expense. They are often assessed for reasons people do not expect or understand, chip away at needed income including public benefits, and take a heavy toll on families living paycheck to paycheck. And, overdraft fees can ultimately drive people out of banking altogether.

While a number of banks have started to lower these fees—and the total volume of fees has started to go down overall—overdraft practices still penalize customers with limited resources and create financial obstacles for them. CFPB research has found that people

Industry and markets

## Medical Credit Cards and Financing Plans

MAY 04, 2023



Financial institutions and fintech companies are generating a growing number of financing mechanisms for families and individuals struggling to pay their out-of-pocket health care expenses. This report focuses on some of these alternative financing products, including medical credit cards and installment loans, that were once used primarily for elective care but now cover everything from ER visits and specialty care to regular checkups.

Financial companies market these products to healthcare providers, who are encouraged to promote them to patients. These medical credit cards and installment loans have largely replaced the low- or no-cost informal payment plans offered to patients directly by their medical providers. The growing promotion and use of medical cards and installment loans can increase the financial burden on patients who may pay more than they otherwise would pay and may compromise medical outcomes.

This report highlights some of the risks to consumers of using financing products such as medical credit cards and installment loans to pay for medical procedures and services. The report provides a background on these products, highlights potential lack of transparency and financial risks to consumers, analyzes data on deferred interest healthcare credit cards, and offers a summary of the terms for a sample of financing products.



## Unfair, Deceptive, or Abusive Acts or Practices (UDAAP)

- **Unfair, Deceptive, or Abusive Acts or Practices (“UDAAP”).** It is a term used in consumer protection laws to describe practices that harm consumers through unfair, deceptive, or abusive actions in the financial marketplace.
- UDAAP regulations are enforced by the CFPB and aim to ensure that consumers are treated fairly by financial institutions and service providers.
- These regulations help protect consumers from practices that could mislead, exploit, or otherwise harm them in financial transactions.



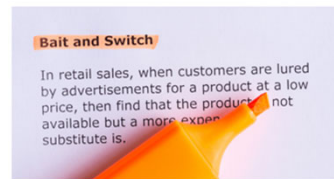
## Broader Use of its UDAAP Theory

- **Section 1031(a)** of the Consumer Financial Protection Act provides the Bureau the authority to use its supervisory and enforcement powers to prevent covered persons from committing unfair, deceptive, and abusive acts and practices.
- **Unfair act or practice:**
  - It causes or is likely to cause substantial injury to consumers;
  - The injury is not reasonably avoidable by consumers; and,
  - The injury is not outweighed by countervailing benefits to consumers or to competition.
- **Examples**
  - Excessive fees and charges
  - Questionable accounting or crediting practices (overdraft rules)
  - Problematic terms hidden in boilerplate.



## Broader Use of its UDAAP Theory

- **Deceptive act or practice:**
  - 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 (reasonable person standard); and
  - The misleading representation, omission, act, or practice is material.
- **Examples:**
  - Misleading sales representations (e.g. auto loans not good for cars depicted)
  - Bait and Switch
  - Limits on collections communications



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## Broader Use of its UDAAP Theory

### “Abusive” practices: Two-pronged standard

- An abusive act or practice:
  - **Materially interferes** with the ability of a consumer to understand a term or condition of a consumer financial product or service; **or**
  - Takes **unreasonable advantage** of:
- A lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
- The inability of the consumer to protect its interests in selecting or using a consumer financial product or service; or
- The reasonable reliance by the consumer on a covered person to act in the interests of the consumer.



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## Broader Use of its UDAAP Theory

Examples:

- **Affirmatively hiding material terms**

- Targeted sale of an otherwise decent consumer financial product or service to those: too unsophisticated to make the decision (elderly, lack of education), or with English language issues (sales in Spanish, terms in English)
- Quasi-fiduciary situations (where consumer is led to assume such a status even if not legally true)
- As a catch-all: Any other conduct that does not fit squarely within unfair or deceptive acts or practices

Hide and seek  
is all fun and games.  
Except when it's  
contract terms.



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## CFPB Policy Statement on Abusive Acts and Practices

- The “lack of understanding” prohibition does not require that you caused it through untruthful statements or other actions or omissions
- You may be guilty of abusive conduct even if the consumer’s lack of understanding was completely unreasonable under the circumstances
- Even if you don’t benefit, even if the condition was not created by you, and even if the experience is typical for other consumers, you may be guilty of taking unreasonable advantage if you are “indifferent to” “negative consumer outcomes.”
- Even following statutory requirements can be abusive where you “reap . . . more benefits” than if the law did not exist. “[E]ntities should not get a windfall due to a gap in understanding, unequal bargaining power, or consumer reliance.” (again, no act or omission?)
- Boilerplate contracts may be abusive because the consumers lack the ability to protect their interests.



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## CFPB's War on "Junk" Fees

- From the beginning of the Chopra administration, there has been a concerted and focused effort to go after so called **"junk fees."**
- "Junk fees" are any "unnecessary, unavoidable, or surprise charge that inflates prices while adding little to no value." (e.g., **service fees, convenience fees, or processing fees**)
  - What they have in common is that they are "part of the price of the product masquerading as fees in order to shield it from the competitive process."
- In consumer finance sector: late fees, overdraft fees, returned deposit fees, pre-paid card fees, pay-to-pay fees.
  - Outside the financial services world: "resort fees" for hotels or "service fees" for concert tickets.
- According to the Bureau, companies have become adept at hiding fees/true cost of services.



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## CFPB's War on "Junk" Fees



- What is the CFPB's problem with junk fees?
  - Add no value to the product or provide no purpose. Bureau is particularly interested in how much money companies make with fees (e.g., \$14 billion in late fees in 2022).
  - Not disclosed
  - Unavoidable
  - Anti-competitive
- Bureau's approach on fees followed a familiar playbook – regulation through means other than rulemaking.



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## CFPB Fights Credit Card Late Fees

- **Credit Card Late Fee Rule** (finalized March 2024)
  - Under TILA credit card companies to assess late fees to consumer of \$30 for the first missed payment, and \$41 for subsequent missed payments.
  - Rule lowers it to \$8 per each missed payment. No inflation adjustment.
  - Applies to companies with one million or more accounts.
- **Rule was immediately challenged in Texas (part of the Fifth Circuit Court of Appeals) by a group of trade associations.**
  - Unlikely the rule will take effect this year.



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## Other CFPB Actions Against Fees

- **Regulatory Actions**
  - "Pay to pay" fees charged by debt collectors violated the Fair Debt Collections Practices Act (Advisory Opinion – June 2022)
  - "Surprise Overdraft" fees can constitute an unfair act or practice if the fee is charged when the customer has sufficient balance at the time a purchase is made. (CFPB Circular – October 2022)
  - Bounced check fee can be an unfair act or practice if indiscriminately charged (CFPB Compliance Bulletin – October 2022)
  - Fees to access basic account information or loan payment statements (Advisory Opinion – October 2023)
- **Regulatory actions to come...**
  - Regulatory rule on NSF fees (though 2/3 of large banks have eliminated them)
  - Regulatory rule on overdraft fees (\$35 → \$3 or \$6)
  - Closing costs - title Insurance, credit report fees and discount points
  - Credit card rewards devaluation and bait-and-switch tactics



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# Dodd-Frank Section 1071





## Discussing Latest Updates, Timing, and Compliance Strategies



# Snapshot of Section 1071

Section 1071	
Under Section 1071* of the Dodd-Frank Act, the Equal Credit Opportunity Act was amended to require financial institutions to compile, maintain, and report to the CFPB certain information about applications for credit made by women-owned, minority-owned, and small businesses to:	
“Facilitate enforcement of fair lending laws”	“Enable communities, governmental entities and creditors to identify business and community development needs and opportunities for women-owned, minority-owned and small businesses”

### Statutory Data Elements

-  • Application number and date received
-  • Type and purpose of the loan or credit
-  • Race, sex and ethnicity of the principal owners
-  • Amount of credit or credit limit applied for
- Action taken by the institution and date of such action
- Gross annual revenue in last fiscal year
- Principal place of business (census tract)
- Amount of credit transaction or credit limit approved



# History of Section 1071

## • Establishment:

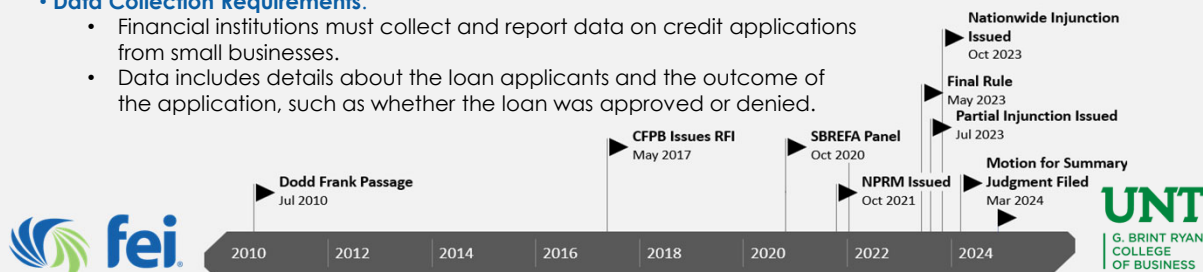
- Enacted as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010.
- Aimed to promote financial stability and consumer protection following the 2008 financial crisis.
- Section 1071 specifically focuses on the collection and reporting of small business lending data.

## • Primary Goals:

- Ensure fair lending practices and identify discrimination in small business lending.
- Facilitate enforcement of fair lending laws and help regulators understand the needs and opportunities in the small business lending market.
- Promote transparency by requiring financial institutions to compile, maintain, and report information about credit applications from small businesses, including those owned by women and minorities.

## • Data Collection Requirements:

- Financial institutions must collect and report data on credit applications from small businesses.
- Data includes details about the loan applicants and the outcome of the application, such as whether the loan was approved or denied.



# Basics of Section 1071

- **“Covered Financial Institution”** = entity that originated at least 100 covered originations for small business loans in each of the two preceding calendar years
- **“Covered originations”** = extension of business credit under Regulation B, including:
  - Loans
  - Lines of credit
  - Credit cards
  - Merchant cash advances
- Covered Financial institutions must inquire of all small business customers (annual revenue < \$5M) who apply for credit whether they are a:
  - **Minority-owned business**
  - **Woman-owned business**
  - **LGBTQTI+-owned business**
- Institutions need to report these transactions annually to CFPB



## Original (Outdated) Timeline for Compliance

- Staged Collection Requirements:
  - 2500+ Covered Transactions – October 2024
  - 500 – 2499 Covered Transactions – April 2025
  - 100 – 499 Covered Transactions – January 2026
- Reporting by June 1 of the following year
- Delayed as Result of Injunction



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## Litigation Status



- July 31, 2023 – Limited Injunction Entered
  - Limited only to Rio Bank, ABA, and TBA
  - Tolling Arguably extends from this date
- October 26, 2023 – ELFA's Application is Granted and Nationwide Injunction Entered
- March 1, 2024 – Motion for Summary Judgment Filed
- April 12, 2024 – CFPB's Opposition and Cross-Motion for Summary Judgment Filed
- May 10, 2024 – Plaintiffs/Intervenor's Reply Brief is Due
- May 16, 2024 – *Community Financial* reversed by SCOTUS
- June 27, 2024 – Status Conference



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## Legal Bases for Challenge



- **Constitutional/Statutory Arguments**
  - CFPB exceeded its authority by including non-statutory data points
    - ✓ Improper reliance on HMDA data
    - ✓ Unreliability caused by low response rates
  - Additional points undermine Dodd-Frank's purpose
- **Administrative Procedures Act Challenges (Arbitrary and Capricious)**
  - CFPB failed to consider important aspects of the Final Rule
  - Improper cost/benefit analysis



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## Other Constitutional/Statutory Challenges

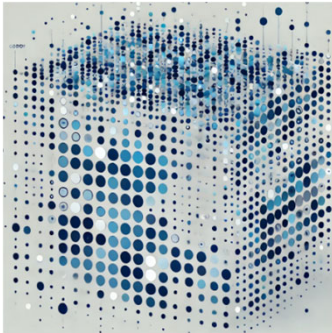
- **Dodd-Frank Provides 13 Data Points, but the Final Rule Contains 81!**
  - In designing the Final Rule, the CFPB focused on the Home Mortgage Disclosure Act
    - Requires mortgagors to report similar data
    - Issues:
      - Mortgage lending was already standardized due to requirements of secondary market purchasers, government insurers, and applicability of the Truth in Lending Act
      - Data points were more relevant to underwriting analysis
      - Demographic data historically collected
      - The CFPB was forced to consider rolling back the additional HMDA data points due to the unexpected costs
  - Unreliability Caused by Low Response Rates
    - PPP response rates are indicative
    - Limited opt-out will skew data
- Expanded Data Points Undermines § 1071's Purpose
- Textual Constraints Ignored by the CFPB



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## Sample of Required Data Fields



- Application unique identifier
- Application Date
- Application method
- Application recipient
- Credit type
- Credit purpose
- Amount applied for
- Amount approved or originated
- Action taken
- Action taken date
- Denial reasons
- Pricing information
- Census tract
- Gross annual revenue
- NAICS code
- Number of workers
- Time in business
- Minority-owned business status
- Woman-owned business status
- LGBTQI+-owned business status
- Ethnicity of principal owners
- Race of principal owners
- Sex of principal owners
- Number of principal owners



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## Administrative Procedures Act Challenges



- **Arbitrary and Capricious**
  - "... agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto Ins.*, 463 U.S. 29, 43 (1983).
  - An agency must respond to significant points and consider all relevant factors raised by public comment. *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021).
- **Flawed Cost/Benefit Analysis**
  - Survey excluded additional data points
  - Low response rate
  - Reliance on HMDA
  - Right of private action
  - ABA's survey and the Motion to Supplement
  - CFPB admits it cannot quantify a benefit to small businesses



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## Administrative Procedures Act Challenges

### One Time Cost Estimates Survey Comparison

One Time Cost Component	CFPB Range	ABA Range
Developing forms and applications	(\$3,200-\$4,600)	(\$4,640-\$1,010,470)
Developing policies and procedures	(\$2,500-\$4,200)	(\$6,368-\$233,923)
Legal/compliance review	(\$3,000-\$7,700)	(\$11,948-\$347,772)
Post-implementation review	(\$4,300-\$18,000)	(\$13,100-\$191,069)
Preparing/planning	(\$6,500-\$20,500)	(\$22,867-\$1,945,203)
Testing/validating systems	(\$3,200-\$11,400)	(\$7,750-\$885,374)
Training staff and third parties	(\$3,500-\$5,300)	(\$13,069-\$593,436)
Updating computer systems	(\$6,900-\$17,400)	(\$19,244-\$2,266,939)
<b>TOTAL</b>	<b>(\$44,800-\$77,800)</b>	<b>(\$112,685-\$7,474,186)</b>



Dan Brown & Kathleen Ryan, *The true cost of too much data*, ABA Banking Journal (Feb. 26, 2024), available at <https://bankingjournal.aba.com/2024/02/the-true-cost-of-too-much-data/>.

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## Administrative Procedures Act Challenges

### Ongoing Cost Estimates Survey Comparison

Ongoing Cost Component	CFPB Range	ABA Range
Exam Prep	(\$14-\$26,592)	(\$6,242-\$151,369)
Geocoding Data	(\$139-\$300)	(\$3,521-\$206,870)
Internal Audit	(\$0-\$127,642)	(\$9,167-\$123,759)
Researching Questions	(\$275-\$826)	(\$5,579-\$160,875)
Resolving Question Responses	(\$0-\$0)	(\$4,009-\$106,896)
Resolving Reportability Questions	(\$222-\$665)	(\$4,504-\$226,606)
Standard Annual Edit and Internal Checks	(\$510-\$27,972)	(\$6,524-\$343,344)
Transcribing Data	(\$1,108-\$31,657)	(\$11,033-\$222,688)
Transferring to 1071 Data Management Software	(\$0-\$1,108)	(\$9,662-\$259,722)
Checking Post Submissions	(\$7-\$105)	(\$3,245-\$207,996)
<b>TOTAL</b>	<b>(\$8,349-\$278,618)</b>	<b>(\$71,944-\$2,010,125)</b>



Dan Brown & Kathleen Ryan, *The true cost of too much data*, ABA Banking Journal (Feb. 26, 2024), available at <https://bankingjournal.aba.com/2024/02/the-true-cost-of-too-much-data/>.

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# Tolling

## Partial Injunction

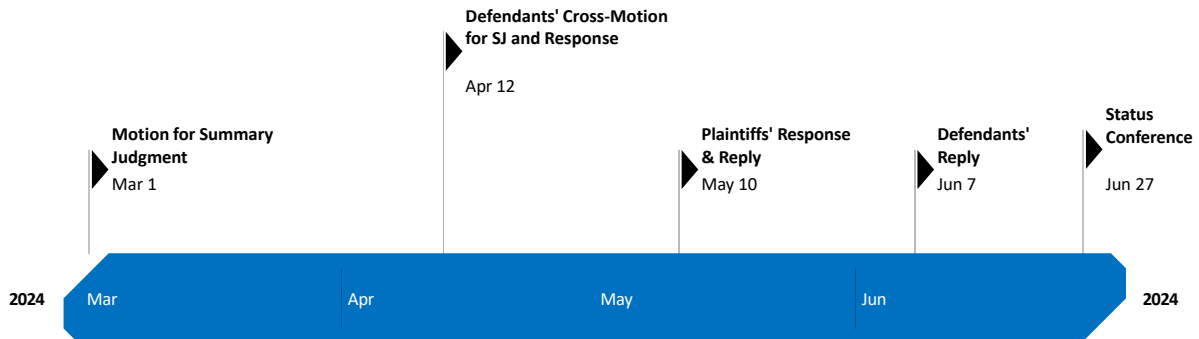
The Court further **ORDERS** that all deadlines for compliance with the requirements of the Final Rule are stayed for Plaintiffs and their members until after the Supreme Court's final decision in *Cnty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, 51 F.4th 616, 623 (5th Cir. 2022), *cert. granted*, 215 L. Ed. 2d 104, 143 S. Ct. 978 (2023). In the event of a reversal in that case, Defendants are **ORDERED** to extend Plaintiffs and their members' deadlines for compliance with the requirements of the Final Rule to compensate for the period stayed.

## Nationwide Injunction

The Court further **ORDERS** that all deadlines for compliance with the requirements of the final rule are stayed for Plaintiffs and their members, Intervenor and their members, and all covered financial institutions until after the Supreme Court's final decision in *Community Financial Services*. In the event of a reversal in that case, Defendants are **ORDERED** to extend Plaintiffs and their members, Intervenor and their members, and all covered financial institutions' deadlines for compliance with the requirements of the final rule to compensate for the period stayed.



# The Foreseeable Future



## Emerging Trends & Developments Amongst Financial Practices and the CFPB

- CFPB's Repeat Offender Registry
- Emergence of Artificial Intelligence  
implication on the use in:
  - Credit Decisioning
  - Chatbots



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### 'Paper Tiger' Finds Its Fangs: Repeat Offenders And The CFPB

CFPB creates registry to detect corporate repeat offenders



#### CFPB Takes Aim at Repeat Offenders, Finalizes "Scarlet Letter" Rule

"The CFPB is working on many fronts to stop repeat offenses. We have established a Repeat Offenders Unit to monitor and track companies subject to our orders."

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#### The Big Story

### Consumer agency establishes 'repeat offender' registry

The Consumer Financial Protection Bureau (CFPB) is establishing a registry to track companies & individuals who repeatedly break consumer protection laws.



© Mattie Nereim

The final rule requires non-bank companies that have been hit with consumer protection-related local, state or federal court or agency enforcement actions to register with the CFPB and a senior executive from the company to attest it is not still offending.

"Too often, financial firms treat penalties for illegal activity as the cost of doing business," CFPB Director Rohit Chopra said in a statement. "The CFPB's new rule will help law enforcement across the country detect and stop repeat offenders."

## The CFPB's Repeat Offender Registry

- Overview and Purpose of the CFPB Repeat Offender Registry:
  - In an ongoing effort to enhance consumer protection and promote transparency within the financial services industry, the CFPB has introduced the **Repeat Offender Registry**.
  - This innovative initiative is designed to monitor and regulate nonbank financial institutions that have a documented history of violating consumer protection laws.
- Purpose and Objectives:
  - The primary goal of the Repeat Offender Registry is to increase accountability and deter nonbank entities from engaging in repeated consumer violations.
  - By making information about past violations publicly accessible, the CFPB seeks to inform and protect consumers, thereby fostering an environment of compliance within the industry.
- Enhancing Consumer Protection
- Promoting Transparency
- Increasing Accountability
- Encouraging Industry Compliance



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## The CFPB's Repeat Offender Registry - Generally

- On June 3, 2024, the Consumer Financial Protection Bureau (CFPB) issued the **Nonbank Registration of Orders Rule**.
- Requires certain nonbanks to register with the CFPB when subject to a **court judgment** or **public consent order** that is connected to potential consumer violations.
- The rule aims to increase transparency and accountability among nonbank entities involved in consumer financial products and services.
- The registrations would be compiled into a database. Who has access to the database?
  - Other regulators
  - Competitors
  - General Public



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## Covered Nonbanks - Exclusions

- **Definition:** Nonbanks offering consumer financial products and services
- **Exclusions:**
  - Insured depository institutions or insured credit unions: e.g., **FDIC-insured banks.**
  - Related persons: Individuals only covered due to their relationship with a covered person, such as controlling shareholders or consultants.
  - States: Includes federally recognized Indian tribes.
  - Natural persons: Individuals not acting as part of a business entity.
  - Certain motor vehicle dealers: Those not significantly involved in offering financial products/services.
  - Charitable contributions: Activities related to charitable contributions excluded from CFPB's rulemaking authority.



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## What triggers the disclosures?

- **When you are caught violating consumer protection laws!**
- These include:
  - Federal consumer financial laws
  - Any law enforced by the CFPB
  - Certain unfair, deceptive, or abusive acts or practice laws (UDAAP) at both the federal and state level.



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## Timing Requirements

### Phased Implementation Submission Periods

Covered Nonbank Type	Registration Submission Period	Registration Deadline
Larger Participant <sup>2</sup> CFPB-Supervised Covered Nonbanks	October 16, 2024 through January 14, 2025	January 14, 2025
Other CFPB-Supervised Covered Nonbanks	January 14, 2025 through April 14, 2025	April 14, 2025
All Other Covered Nonbanks	April 14, 2025 through July 14, 2025*	July 14, 2025*

- **Registration Submission Periods:** Register all covered orders with effective dates from January 1, 2017, to the start of the implementation submission period.
- **Example:** An order effective January 1, 2017, and expiring October 30, 2025, must be registered during the applicable implementation submission period.



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## Covered “Orders”

- **Definition:**
  - Final, public orders issued by agencies or courts relating to investigations or proceedings.
  - Orders issued on or after January 1, 2017, **provided that they are still in effect as of September 16, 2024.**
- **Criteria:**
  - Identifies a covered nonbank by name.
  - Issued by federal, state, or local agencies.
  - Imposes obligations on the nonbank to take or refrain from certain actions.
  - Based on alleged violations of covered laws, including federal consumer financial laws and unfair, deceptive, or abusive acts or practices laws.

*“Does NOT apply to court orders that are approving settlements with private parties, BUT if it is a settlement with the AG, registering is required”*
- **Examples:** Consent orders: Orders issued with the consent of the covered nonbank.



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## Registration - What is Required to be Reported?

- **Who Must Register:** Covered nonbanks with effective orders as of September 16, 2024, or orders becoming effective on or after this date.
- **Required Information:**
  - **Nonbank Identity Information:** Legal name, principal place of business address.
  - **Administrative Information:** Information about affiliates registered with the same order.
  - **Copy of the Covered Order:** Complete, accurate, and nonpublic portions redacted.
  - **Agency and Court Details:** Issuing agencies and courts.
  - **Effective and Expiration Dates:** Dates specified in the order.
  - **Violated Laws:** Laws found or alleged to be violated.
  - **Identifying Numbers:** Docket, case, tracking numbers.

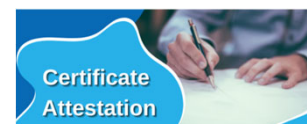


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## Attestation Requirement for Supervised Entities

- **Applies to nonbanks under CFPB supervision with at least \$5 million in qualifying annual receipts.**




- **Annual Review and Submission:**
  - Name and title of an attesting executive for each covered order.
  - Written statement signed by the attesting executive.
- **Executive Tasks:**
  - Oversee the covered nonbank's activities subject to the order.
  - Attest to any identified violations or noncompliance.
- **Record Maintenance:** Maintain records for five years after submission.



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## Ongoing Registration



- **Requirements:**
  - Submit updates or changes within 90 days.
  - Register new covered orders within 90 days of the effective date.
  - Submit revised filings for amendments, terminations, or expirations of previously registered orders.
- **Examples:**
  - Update nonbank's identifying information or administrative information.
  - Amend previously registered orders.
  - Register new orders effective after the start of the implementation period.



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## End of Registration Requirements



- **When Registration Ends:**
  - Registration requirements apply until an order is terminated, expires, or is no longer deemed a covered order.
  - Orders expire 10 years after the effective date unless otherwise specified.
  - Final notice must be filed with CFPB within 90 days of order modification, termination, or expiration.
- **Relief from Further Obligations:**
  - No further registration or written statements required once final notice is filed.



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## Implications and Consequences

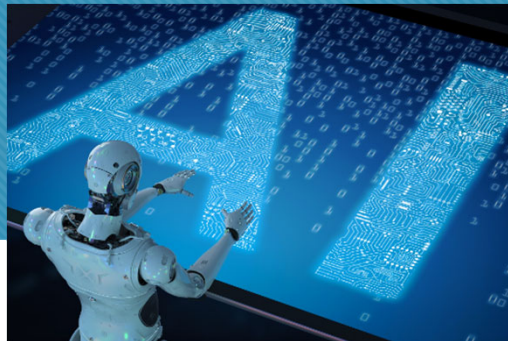
- Deters settlements which can increase risk of litigation
- Increases the leverage of state actors in negotiating orders
- Risk of additional state examinations and investigations
- Risk of the executives having to sign being caught in the cross hairs of company deemed to be a repeat offender
- **Reputational Harm!**



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- Emergence of **Artificial Intelligence** implication on the use in:
  - Credit Decisioning
  - Chatbots



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## Artificial Intelligence (AI) and Machine Learning (ML)

- **Artificial Intelligence (AI) and Machine Learning (ML)** technologies are revolutionizing the financial services industry by enhancing decision-making processes, improving customer experiences, and increasing operational efficiencies.
- However, their use also raises significant concerns regarding transparency, fairness, and compliance with regulatory standards.
- The CFPB has been proactive in issuing guidance to ensure that these technologies are used responsibly in financial services, particularly in areas such as **credit decisioning** and the deployment of **Conversational AI or “chatbots”** for customer interaction.



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## Response to the Emergence of Artificial Intelligence

- CFPB is just now starting to put out guidance over issues of AI
- Following slowly behind others such as the FTC, White House, and the States.
- States seems to be ahead of federal laws in enacting laws and orders regarding AI.
  - **Colorado State Bill is the Nation’s First AI Discrimination Law:**  
*Requires companies that develop and use “high-risk” AI systems to use reasonable care to protect consumers from algorithmic discrimination.*
- Reasoning behind the new focus on AI
  - Consumer complaints have risen dramatically in recent times
  - Around 37% of the US population has interacted with a bank chatbot in 2022 which has led to the Bureau zoning in on the issue.



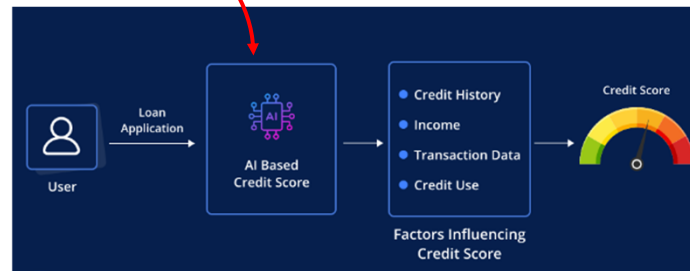
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## AI and ML in Credit Decisioning

AI and ML are increasingly being used in credit underwriting processes to enhance the accuracy and efficiency of credit risk assessments. By analyzing vast amounts of data, these technologies can uncover patterns and insights that traditional models may overlook, leading to more informed credit decisions.

### Machine Learning Algorithms



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## Examples of Machine Learning Algorithms

### 1. Decision Trees:

- A decision tree is a flowchart-like structure where each internal node represents a feature (or attribute), each branch represents a decision rule, and each leaf node represents the outcome.
- **Splitting** ➡ **Branching** ➡ **Leaf Nodes**

### 2. Random Forests:

- A random forest is an ensemble of decision trees. It builds multiple decision trees and merges them together to get a more accurate and stable prediction.
- **Bootstrap Aggregating (Bagging)** ➡ **Random Feature Selection** ➡ **Averaging**

### 3. Gradient Boosting Machines (GBMs):

- Gradient Boosting Machines are a type of ensemble learning method that builds models sequentially, each new model correcting errors made by the previous ones.
- **Sequential Learning** ➡ **Gradient Descent** ➡ **Additive Modeling**

### 4. Neural Networks:

- Neural networks are inspired by the human brain and consist of layers of interconnected nodes (neurons). They are particularly powerful for handling complex patterns and large amounts of data.
- **Layers** ➡ **Neurons** ➡ **Activation Functions** ➡ **Training**



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## CFPB Guidance on AI in Credit Decisioning

### Transparency and Explainability:

- Lenders using AI and ML must ensure that their models are transparent and that the reasons for credit decisions are explainable.
- The CFPB requires lenders to provide specific and accurate reasons for adverse actions, as mandated by the Equal Credit Opportunity Act (ECOA) and Regulation B.
- Generic explanations like 'insufficient credit history' are not acceptable if the decision is based on complex algorithms analyzing non-traditional data.

### Fair Lending Practices:

- The CFPB highlights the need for AI models to comply with fair lending laws.
- This includes avoiding discriminatory practices and ensuring that AI models do not inadvertently perpetuate biases present in the training data.
- Lenders are expected to regularly audit their AI systems to identify and mitigate any discriminatory impacts.

### Compliance and Accountability:

- Lenders must be able to demonstrate how their AI models comply with regulatory requirements.
- This includes maintaining documentation that explains the decision-making process of AI models and how they were validated for fairness and accuracy.
- The CFPB stresses that the complexity of AI systems does not exempt lenders from their compliance obligations.



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## Case Studies and Examples



Several financial institutions have implemented AI-driven credit decisioning systems with varying degrees of success. Case studies illustrate both the potential benefits and the challenges associated with these technologies:

- **Success Story:** A major bank used ML algorithms to analyze transaction data, social media activity, and other non-traditional data sources, resulting in a significant reduction in default rates and improved customer approval rates.
- **Challenge:** Another institution faced regulatory scrutiny when its AI model was found to disproportionately deny credit to certain demographic groups, highlighting the importance of ongoing monitoring and adjustment of AI systems to ensure compliance with fair lending laws.

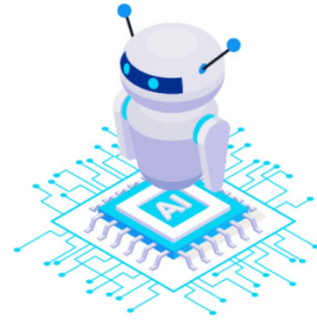


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## AI and Machine Learning in Chatbots

- **Conversational AI or “Chatbots”** powered by AI and ML are being increasingly deployed in financial services to provide 24/7 customer support, handle routine inquiries, and assist with transactions.
  - These chatbots enhance customer experience by providing quick and efficient service while reducing operational costs for financial institutions.
- **Initial “Chatbot”** is a software application mainly employed by businesses to initiate a live conversation through text or speech-to-text instead of calling or talking to the human agent through the phone.
- **Advanced Artificial Intelligence and Machine Learning “Chatbot”** are capable of analyzing consumer behavior and learning from their experiences. Over time, they will be able to deal with intricate customer problems that usually need the attention of a live agent



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## CFPB Guidance on Chatbots

The CFPB has issued guidance aimed at ensuring that Conversational AI or “chatbots” used in financial services operate in a manner that is transparent, fair, and compliant with consumer protection laws. Key aspects of this guidance include:

- **Transparency and Disclosure:**
  - Chatbots must clearly disclose that they are AI-driven and provide customers with the option to interact with a human representative if desired.
  - The CFPB emphasizes that customers should be fully informed about the nature of the interaction.
- **Accuracy and Reliability:**
  - Financial institutions must ensure that chatbots provide accurate information and can handle inquiries reliably.
  - This includes regularly updating and maintaining chatbot databases to reflect the most current and accurate information.
- **Privacy and Data Security:**
  - The CFPB underscores the importance of protecting customer data handled by chatbots.
  - Financial institutions must implement robust data security measures to prevent unauthorized access and ensure compliance with privacy regulations.



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## Case Studies and Examples

The deployment of chatbots in financial services has shown mixed results, with some institutions reporting significant improvements in customer satisfaction and others encountering challenges related to compliance and customer trust.

### Success Story **Clear Disclosure of AI-Driven Interactions:**

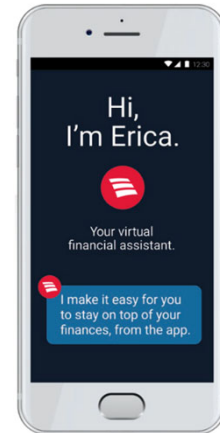
**Fact:** According to a 2023 CFPB report, many consumers feel misled when they are unaware they are interacting with AI.

**Example:** The chatbot for Bank of America, Erica, explicitly states, "Hi, I'm Erica, your virtual financial assistant powered by AI. How can I assist you today?" This disclosure helps set correct expectations for the customer.

### Challenge: **Undisclosed AI Interactions:**

**Example:**

- In 2021, a major bank faced criticism when customers discovered they were interacting with an AI chatbot without being informed.
- The chatbot had been designed to mimic human conversation closely, but customers felt misled when they learned they had not been speaking to a human.
- This lack of disclosure led to a loss of trust and a formal warning from the CFPB.



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# Thank you

# Any Questions?

