

2024 TCFA Membership Meeting
Legal Update

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Today's Topics



Acquisition Charge Increase



Corporate Transparency Act



TCPA – revoking consent



CFPB Update

CFPB Constitutionality Lawsuit
Nonbank enforcement registration
Heights Finance Lawsuit

Acquisition Charge Increase

- Amendment to 7 Tex. Admin. Code 83.605
 - **Subch F lender may now collect an acquisition charge that does not exceed the lesser of:**
 - **12.5% of the cash advance, or**
 - **\$125**
 - \$125 will last through June 2025, then be adjusted annually based on CPI
 - Maximum acquisition charge for a \$400 loan would increase from \$40 to \$50. For a loan of \$1,000 or more, the maximum acquisition charge would increase from \$100 to \$125
 - Effective July 11, 2024 (when published in Texas Register)
 - Work with software providers - calculation and TILA disclosures

AC Charge Increase

• Procedural History

- 2013: OCCC set max acquisition charge at lesser of 10% of the cash advance or \$100
- 1/2024: OCCC seeks precomments re: increase max acquisition charge (F) and max admin fee (E)
 - OCCC proposed to increase dollar amount to \$125, with annual CPI adjustment
 - TCFA attended stakeholder meeting and filed precomments
 - TCFA proposed to adjust percentage to 12.5% and increase max dollar amount to \$150, with a CPI adjustment
- 3/1/2024: OCCC proposes rule amendments: increase to lesser of 12.5% or \$125, with CPI adjustment
 - TCFA filed comments in support
- 3/18/2024: as required by law, OCCC requested review by Governor's Regulatory Compliance Division (reviews rules for compliance with law and anti-competitive effect)
- 6/12/2024: Governor's Office determines proposed rule consistent with state policy, approved rule, and stated rule may be adopted and implemented
- 6/21/2024 – Texas Finance Commission adopts final rule

Corporate Transparency Act



Requirements

Requires every Reporting Company in U.S. that does not meet an exemption to file with FinCEN an Initial Beneficial Ownership Report that identifies each Beneficial Owner



Report Due Date

Depends on when the entity was formed:

- Formed before Jan 1, 2024 = by Jan 1, 2025
- Formed during 2024 = 90 days from formation
- Formed after 2024 = within 30 days of formation

Corporate Transparency Act

- **Definition of “Reporting Company”**

- Any entity that is a corporation, LLC, or otherwise created by the filing of a document with a secretary of state or similar office
 - Virtually every type entity that has been formed or registered with US state
 - Likely excludes most trusts and general partnerships

- **23 Listed Exemptions**

- Large companies: more than 20 employees, more than \$5 million in gross receipts or sale in prior year tax return, and a US physical office
- SEC-reporting companies
- Certain regulated financial services companies such as banks, credit unions, registered securities broker-dealers (but NOT installment lenders)
- Insurance companies
- Tax-exempt entities

Corporate Transparency Act

- **Definition of “Beneficial Owner”**

- Individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise (i) exercises substantial control over the entity; or (ii) owns or controls not less than 25 percent of the ownership interests of the entity

- **Exceptions**

- minor children;
- individual acting as a nominee, intermediary, custodian, or agent on behalf of another individual (in which case that individual would be the beneficial owner);
- employee of the reporting company, acting solely as an employee, whose substantial control over or economic benefits from the entity are derived solely from the employment status;
- an individual whose only interest in a reporting company is a future interest through a right of inheritance; and
- a creditor of the reporting company

Corporate Transparency Act

Initial Reports must contain information about Beneficial Owner and Reporting Company:

Information about Beneficial Owner

- (i) beneficial owner's full legal name
- (ii) date of birth
- (iii) current address (current as of the date on which the report is delivered);
- (iv) either (a) a unique identifying number from an acceptable identification document (e.g., a passport, driver's license) or (b) a FinCEN identification; and
- (v) image of the document that provides the unique identifying number

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Information about Reporting Company

- (i) full legal name;
- (ii) any d/b/a or trade name;
- (iii) complete current address;
- (iv) the State, Tribal, or foreign jurisdiction of formation; and
- (v) the Internal Revenue Service (IRS) Taxpayer Identification Number (TIN) (including an Employer Identification Number (EIN)) of the reporting company

Corporate Transparency Act

- **Penalties**

- Civil penalty of \$500 per day for failing to file report
- Individuals may also be fined up to \$10,000 or imprisoned for up to 2 years upon conviction for willfully failing to file or willfully filing inaccurate information

- **Amendments**

- Must report “any change with respect to information previously submitted to FinCEN concerning [the] reporting company or its beneficial owners”
- Changes include transfers of ownership due to death, sales of additional ownership interests, any changes to an identifying document previously submitted, e.g., changes in name, address, and/or identifying number
- Due within 30 calendar days after the date on which the change occurs

- **FinCEN website:** <https://fincen.gov/boi>

TCPA – FCC Rule on Revoking Consent

Best practice is to obtain express consent.

Lenders may have prescribed a certain way for customers to revoke consent or opt out.

New rule (47 CFR 64.1200) changes revocation process:

- Consumer may revoke prior express consent by any reasonable method
 - Reasonable methods listed: STOP or similar opt-out text, website, telephone number
 - Can't require consumers to use the method in your consent document
- When customer uses a method not listed in rule (email), a rebuttable presumption exists that customer revoked consent in reasonable manner
- Must honor request within “a reasonable time not to exceed ten business days” (can make one confirmation text)

CFPB Constitutionality Lawsuit

- ***CFPB v. Cmty. Fin. Servs. Ass'n of Am. vs. CFPB*, United States Supreme Court, May 16, 2024**
 - CFPB directly funded by Federal Reserve. Federal Reserve approves yearly funding requests from CFPB director, as long as 12% or less of Federal Reserve budget
 - Funding mechanism challenged as violating Appropriations Clause because allowed CFPB to self-determine its funding from the Federal Reserve, instead of obtaining funds directly from Congress
 - Supreme Court disagreed, holding funding mechanism is constitutional
 - Based on Constitution's history and text, appropriations need only identify a source of public funds and authorize expenditure of those funds for designated purposes to comply with the Appropriations Clause
 - To that end, scheme complies with Appropriations Clause by authorizing CFPB to draw from combined earnings of Federal Reserve System to carry out its duties

CFPB Constitutionality Lawsuit

- **Since the Supreme Court decision**

- CFPB reinitiated aggressive enforcement and rulemaking activity
- CFPB hired 75 new full-time positions in its Enforcement Division
- Lawsuits that were stayed are moving again
- Payday Loan Rule case remanded back to 5th Circuit (trade groups trying to seek rehearing of other argument the USSC did not reach)
- CFPB says Payday Loan Rule will go into effect Mar 30, 2025

- **Issue about “combined earnings” of Federal Reserve**

- CFPB only allowed under Dodd-Frank Act to be funded out of “combined earnings of the Federal Reserve System”
- No combined earnings of Federal Reserve System beginning Sept 2022
- This issue still available to be litigated

CFPB Nonbank Enforcement Registry

- 12 CFR pt. 1092
 - <https://www.consumerfinance.gov/rules-policy/final-rules/registry-of-nonbank-covered-persons-subject-to-certain-agency-and-court-orders/>
- Certain nonbank entities must register with CFPB and provide data concerning enforcement orders involving consumer protection laws
 - Finalized rule on June 3, 2024
 - Rule effective Sept. 14, with registration to begin Oct. 16
 - Varying implementation and registration deadlines depending on type of covered nonbank

CFPB Nonbank Enforcement Registry

- **Covered Nonbank:** Any nonbank that is “covered person” under Dodd-Frank Act
 - Includes traditional installment lenders
 - Larger participant CFPB-supervised covered nonbanks
 - Other CFPB-supervised covered nonbanks
- **Covered Orders:** final, written public orders issued by agencies or courts, including consent orders, that:
 - Identify the covered nonbank by name as a party subject to order
 - Issued at least in part in action brought by fed, state, or local agency
 - Has public provisions that impose obligations on nonbank to take or refrain from certain actions
 - Has obligations based on alleged violation of Federal consumer laws, other laws enforced by CFPB, UDAAP laws, and a rule or order (including listed state laws)
 - Has effective date on or after Jan 1, 2017

CFPB Nonbank Enforcement Registry

- **Covered Orders continued:**

- **List of Texas statutes**

- Tex. Bus. & Com. Code Ann. sec. 17.46 – deceptive trade practices
 - Tex. Bus. & Com. Code Ann. sec. 17.50 – deceptive trade practices; relief to consumers
 - Tex. Bus. & Com. Code Ann. sec. 17.501 – AG involved in deceptive trade practice class action
 - Tex. Fin. Code Ann. sec. 180.153(2), (11) – residential mortgage prohibited practices
 - Tex. Fin. Code Ann. sec. 308.002 – deceptive advertising by lender
 - Tex. Fin. Code Ann. sec. 341.403 – deceptive advertising by lender
 - Tex. Fin. Code Ann. sec. 392.303 to 392.304 – debt collection activities
 - Tex. Fin. Code Ann. sec. 393.305 – CSO fraudulent or deceptive conduct
 - Tex. Fin. Code Ann. sec. 394.207 – deceptive advertising by debt counseling or services business
 - Tex. Fin. Code Ann. sec. 394.212(a)(9) – prohibited conduct of debt counseling or services biz

CFPB Nonbank Enforcement Registry

- **Do you have to register?**

- Yes, if you have a covered order that must be registered

- 12 CFR 1092.202(b)(1): “Each covered nonbank that is identified by name as a party subject to a covered order . . . shall register as a registered entity with the nonbank registry”

- Legal challenges expected, but you should begin identifying whether you have any covered orders to register

CFPB Nonbank Enforcement Registry

- **Registration Information**

- Information on covered orders that remain in effect as of Sept 16, 2024 or have an effective on or after Sept 16, 2024

- **Entity information**

- Identifying information about covered entity and affiliates affected by same order

- **Covered Order information**

- A PDF upload of the fully executed covered order, with non-public portions redacted
- Issuing or initiating (if different) agencies or courts
- Effective date of order, and date of expiration (if any)
- Covered laws found to have been violated or, for consent orders, alleged to have been violated
- Any docket, case, tracking, or other identifying numbers for the order

- **Expiration of reporting obligation**

- Reporting obligation applies until order deemed to expire or its provisions terminated
- 10 years, unless order states otherwise

CFPB Nonbank Enforcement Registry

- **Annual attestation by *supervised* nonbanks by March 31**
 - Annually review and submit written statement concerning registered covered orders
 - For orders with effective date on or after the entity's implementation date (essentially, newer orders, not those dating back to 2017)
- **Executive Officer**
 - Provide name and title of attesting executive for every covered order
 - Highest ranking executive officer or individual with managerial/oversight responsibility
 - Whose duties include ensuring compliance with consumer financial laws, knowledge of systems and procedures, and control over entity's efforts to comply with order
- **Written statement**
 - Written statement, signed by executive, for each order
 - Describe steps taken to review and oversee entity's activities subject to order during prior year
 - Attest whether, to executive's knowledge, during preceding year, entity identified any violations or instances of noncompliance with any applicable obligation imposed in the order's public provisions

CFPB Nonbank Enforcement Registry

- **Timing – Tiered implementation**

Covered Nonbank Type	Implementation Submission Period	Registration Deadline
Larger Participant 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

CFPB Nonbank Enforcement Registry

- **Timing – Tiered implementation**

- During implementation submission periods, entities must register covered orders that:
 - Have effective date from Jan 1, 2017 through the start of covered nonbank's submission period; and
 - For covered orders issued prior to Sept 16, 2024, the order remains effective as of Sept 16, 2024.

- **Update Filings**

- 90 days to file an update on:
 - Changes to covered nonbank's identifying information
 - Amendments to previously registered covered order
 - New covered orders
 - Termination or expiration of a registered covered order

Other CFPB Activities

- Supervision of Installment Lenders
- Notice regarding Contract Fine Print
 - Warns that using illegal or unenforceable terms in contracts is UDAAP
- Rules over next month or so (to avoid Congressional Review Act)
 - Contract Terms Registry – likely only *supervised* nonbanks
 - Terms or conditions that waive consumer rights or limit ability of consumer to enforce rights, including arbitration provision
 - Prohibition on NSF fees on certain declined transactions
 - Financial institutions and depository banks, probably not installment lenders, but need to track
- Pending Lawsuits
 - Challenge to credit card late fee rule
 - Challenge to small business lending rule
 - Challenge to UDAAP exam manual

Covington/Heights Finance Lawsuit

- **Lawsuit stayed**

- Lawsuit filed on August 22, 2023
- The District Court of South Carolina stayed the case on March 26, 2024, pending the Supreme Court's ruling on the constitutionality of the Bureau's funding structure (*CFPB v. Cmty. Fin. Servs. Ass'n of Am. vs. CFPB*)
- Supreme Court ruled in Bureau's favor on May 16, 2024
- On May 24, 2024, Heights Finance notified the District Court that it had filed for bankruptcy under Chapter 11 of the Bankruptcy Code. District Court automatically stayed case on May 30, 2024, pending bankruptcy proceedings
- On June 4, 2024, Bureau moved to lift the stay, arguing the District Court has retained jurisdiction over the case under the Police/Regulatory Exception of the Bankruptcy Code, which provides that automatic stay does not apply to proceedings by governmental units to enforce police or regulatory power
- District Court has not yet ruled on the motion

City/County Preemption Bill

- **Appeal pending**

- HB 2127 – City/County Preemption Bill (eff. Sept. 1, 2023).
 - Prohibits city/county regulations in field of regulation occupied by numerous other state codes, including the Finance Code
 - Exception for regulation of CSOs under Chapter 393, Finance Code
 - Could affect ordinances that regulate Chapter 342 F lenders
- City of Houston filed suit arguing bill is unconstitutional on various grounds, including that the bill violates home rule powers of cities.
- On August 30, 2023, Travis County District Judge Maya Guerra Gamble signed an order declaring the Act unconstitutional in its entirety.
- State of Texas appealed to the Third Court of Appeals in Austin. Briefing occurred. Oral argument not yet scheduled.
- Because no injunctive relief was requested nor given, HB 2127 remains in effect while the appeal is pending.