

April 13, 2022

# CFPB Files Suit Against TransUnion and Senior Executive

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## Complaint Alleges Violations of 2017 Consent Order and Various Consumer Protection Laws and Reflects CFPB Director Chopra's Focus on "Recidivist" Companies, Executive Accountability, and Alleged Credit Reporting Agency Misconduct

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### SUMMARY

Yesterday, the Consumer Financial Protection Bureau ("CFPB") filed suit against TransUnion, two of its subsidiaries, including TransUnion Interactive, Inc. ("TUI"), which markets and sells credit-related products such as credit scores, credit reports, and credit monitoring, and a longtime senior executive at TUI (the "Complaint").<sup>1</sup> The Complaint alleges that TransUnion, the two subsidiaries, and the senior executive violated a consent order the CFPB and the corporate defendants entered into in 2017 to resolve the CFPB's findings that the corporate defendants engaged in deceptive acts and practices in the marketing and sale of credit products in violation of the Consumer Financial Protection Act of 2010 ("CFPA") (the "2017 Consent Order").<sup>2,3</sup> The Complaint also alleges that the corporate defendants violated the Electronic Fund Transfer Act ("EFTA")<sup>4</sup> and its implementing regulation, Regulation E,<sup>5</sup> and the Fair Credit Reporting Act ("FCRA")<sup>6</sup> and its implementing regulation, Regulation V.<sup>7</sup> In our view, the Complaint is a significant development that should be considered by all persons subject to CFPB jurisdiction and, in particular, those subject to extant enforcement measures, as it demonstrates the CFPB's intent to pursue a number of Director Chopra's stated priorities: punishing corporate recidivism, holding executives accountable, and addressing alleged credit reporting agency misconduct.

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## THE COMPLAINT AND DIRECTOR CHOPRA'S PRIORITIES

### A. CORPORATE RECIDIVISM

Addressing “corporate recidivism” has been a longstanding priority of Director Chopra. Within days of his confirmation in his previous role as a Commissioner at the Federal Trade Commission (“FTC”), he authored a memorandum addressed to other Commissioners and FTC staff on “Repeat Offenders.”<sup>8</sup> Shortly after his confirmation as CFPB Director, Chopra advised the Senate Banking Committee in testimony that “the CFPB will sharpen its focus on repeat offenders, particularly those that violate agency or federal court orders.”<sup>9</sup> Most recently, in a speech at the University of Pennsylvania Law School titled “Reigning in Repeat Offenders” (the “Penn Law Speech”), Director Chopra expressed his view that “[c]orporate recidivism has become normalized and calculated as the cost of doing business” and outlined his plans to establish dedicated units within the CFPB to enhance the detection of repeat offenses and corporate recidivists, including closer scrutiny to ensure orders are being followed.<sup>10</sup> Much of his stated focus was on large financial institutions, which he believes are afforded “special treatment:” “While small firms can get hit hard with penalties that threaten their viability and their operators fear imprisonment, many large institutions see the law as mere expenses on their income statements.”<sup>11</sup> Director Chopra argued that structural remedies, rather than monetary penalties, provide a stronger deterrent effect for large firms. He maintained that under the CFPB, “the CFPB may seek ‘limits on the activities or functions’ of a firm for violations of laws, regulations, and orders,”<sup>12</sup> and provided several examples of structural remedies: (i) caps on size or growth, (ii) bans on certain types of business practices, (iii) divestitures of certain product lines, (iv) limitations on leverage or requirements to raise equity capital, and (v) revocation of government-granted privileges, such as access to federal deposit insurance.

Consistent with this emphasis on punishing corporate recidivism, the Complaint is largely focused on the defendants’ alleged violations of the 2017 Consent Order. The Complaint alleges that the corporate defendants failed to take actions specifically required by the 2017 Consent Order, such as providing a checkbox requiring consumers to affirmatively consent to automatic renewal after a free trial<sup>13</sup> and providing a simple mechanism by which consumers could cancel purchases and stop recurring payments.<sup>14</sup> Likewise, the Complaint asserts that the corporate defendants continued practices that were prohibited by the 2017 Consent Order, including misrepresenting the nature of a monthly credit monitoring product by making it seem as if it were simply a way to view one’s credit score<sup>15</sup> and further misrepresenting that payment information was simply for identification purposes rather than making it clear that consumers were purchasing something.<sup>16</sup>

In the press release announcing the CFPB’s filing of the Complaint, Director Chopra states: “TransUnion is an out-of-control repeat offender that believes it is above the law. I am concerned that TransUnion’s leadership is either unwilling or incapable of operating its businesses lawfully.”<sup>17</sup> The press release also alleges that, after being informed that it was violating the 2017 Consent Order, TransUnion did not “work

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constructively with the CFPB to make quick fixes and come into compliance.”<sup>18</sup> Although the Complaint does not explicitly seek any of Director Chopra’s structural remedies, the CFPB asks the court to “grant additional injunctive relief” as the court deems appropriate. It is possible that, through this request, the CFPB will pursue one or more of Director Chopra’s specified (or other) structural remedies. Other forms of relief sought by the CFPB include damages, refunds and restitution to consumers, disgorgement, and civil money penalties.<sup>19</sup>

### **B. EXECUTIVE ACCOUNTABILITY**

A second longstanding priority of Director Chopra’s is executive accountability, particularly in the context of corporate recidivism. Again, his interest in this topic pre-dates his confirmation as CFPB Director,<sup>20</sup> but was most recently articulated in the Penn Law Speech. In that speech, Director Chopra emphasized the role of individual liability, noting that “agency and court orders bind officers and directors of the corporation, and so do the laws themselves.”<sup>21</sup> He argued that, to level the playing field with small companies, when large financial institutions “get in trouble,” regulators and enforcers should be “quick to target the ‘top brass.’” In the context of repeat offenses and order violations where senior officers and directors play a role, he advocated for charges against the individuals. With respect to large firms in particular, he advocated for more frequent dismissal of senior management and board members and lifetime occupational bans. In addition, Director Chopra encouraged close attention to executive compensation and said important remedies may include clawbacks and forfeitures and use of deferred compensation to pay fines.

As noted above, a longstanding executive of TUI is named as a defendant in the Complaint. The Complaint alleges that the executive controlled the manner in which TUI marketed credit-related products to consumers and was legally obligated under the 2017 Consent Order to ensure the corporate defendants’ compliance with the order but failed to do so despite being aware of the non-compliance.<sup>22</sup> The Complaint alleges specific conduct evincing his non-compliance, maintaining that “[the senior executive], along with others, determined that complying with the [2017 Consent] Order would reduce TUI’s revenue and created a plan to avoid implementation of the requirements”<sup>23</sup> and that he determined using the checkbox required by the 2017 Consent Order resulted in fewer enrollments and less revenue and therefore “instructed TUI to cease using the checkbox in Affiliate marketing, leading to millions of enrollments that violated the [2017 Consent] Order.”<sup>24</sup> The Complaint seeks the same remedies with respect to the senior executive as the corporate defendants, which, with respect to the executive, could include monetary penalties or a court-issued injunction that would affect his employment status. The more draconian sanction of a ban from the industry is not spelled out in the Complaint.

### **C. CREDIT REPORTING AGENCY ACCOUNTABILITY**

A third and final priority of Director Chopra is holding credit reporting agencies accountable. Again, his interest in this topic pre-dates his confirmation as CFPB Director. As an FTC Commissioner, for example, Chopra encouraged the CFPB to use its authority to prevent “bad actors” from “weaponiz[ing] the credit

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reporting system against consumers.”<sup>25</sup> Moreover, in the weeks following his confirmation as CFPB Director, seven Senators urged him to “take strong action” to reform the credit reporting industry.<sup>26</sup> Recently, in the context of medical debt, he highlighted “the contamination of the system by coercive credit reporting”<sup>27</sup> and questioned whether the decision of TransUnion, Equifax, and Experian to adjust how they report medical debt indicates they are acting as a “cartel.”<sup>28</sup> Earlier in his tenure as Director, the CFPB issued a report that was critical of the complaint responses of the big three credit reporting agencies and an advisory opinion concluding that credit reporting agencies violate the FCRA by matching consumer records solely through matching first and last names, which can result in cases of mistaken identity.<sup>29</sup>

Credit reporting agency activities have been a CFPB focus for some time. The CFPB has taken public enforcement measures against each of the “Big Three” (and various other credit reporting agencies), including the 2017 Consent Order. Indeed, prior to Director Chopra’s confirmation, in July 2021, the CFPB released an enforcement compliance bulletin alerting credit reporting agencies that the CFPB will be focused on reviewing compliance with their FCRA obligations to provide only accurate information in consumer reports.<sup>30</sup> Director Chopra’s interest and position may suggest more vigorous enforcement of the FCRA not only with respect to credit reporting agencies, but also with respect to other credit information furnishers as well as users.

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## IMPLICATIONS

The Complaint alleges that the defendants blatantly and repeatedly disregarded the requirements of the 2017 Consent Order. Accordingly, the Complaint may reflect what the CFPB believes was an extreme case of corporate and individual misconduct, and does not necessarily foreshadow similar enforcement measures against persons subject to CFPB consent orders who do not achieve full compliance notwithstanding meaningful, good faith efforts. Nevertheless, the Complaint is a significant development that should be considered by all persons subject to CFPB jurisdiction and, in particular, those subject to outstanding enforcement measures, as it demonstrates the CFPB’s intent to pursue several of Director Chopra’s previously-articulated priorities, as outlined above.

In addition, the CFPB will likely continue to look for opportunities to hold senior executives responsible, in particular at large financial institutions. The Complaint alleges that TUI’s senior executive had “actual knowledge of, or recklessly disregarded” his employer’s 2017 Consent Order violations in connection with his responsibilities for ensuring compliance with the outstanding order.<sup>31</sup> The Complaint also alleges that he took affirmative action to violate the 2017 Consent Order in order to preserve the firm’s profits.<sup>32</sup> These allegations suggest that, at least in this case, the CFPB is not necessarily charging an individual under a strict liability or negligence theory, but where there is evidence of affirmative misconduct.

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ENDNOTES

- 1 The suit was filed in the United States District Court for the Northern District of Illinois. *Consumer Financial Protection Bureau v. TransUnion, TransUnion, LLC, TransUnion Interactive, Inc., and John Danaher*, April 12, 2022, available at [https://files.consumerfinance.gov/f/documents/cfpb\\_transunion\\_complaint\\_2022-04.pdf](https://files.consumerfinance.gov/f/documents/cfpb_transunion_complaint_2022-04.pdf).
- 2 12 U.S.C. § 5481 *et seq.*
- 3 *In re TransUnion Interactive, Inc., et al.*, January 3, 2017, available at [https://files.consumerfinance.gov/f/documents/201701\\_cfpb\\_Transunion-consent-order.pdf](https://files.consumerfinance.gov/f/documents/201701_cfpb_Transunion-consent-order.pdf) [hereinafter 2017 Consent Order].
- 4 15 U.S.C. § 1693 *et seq.*
- 5 12 C.F.R. 1005.
- 6 15 U.S.C. § 1681 *et seq.*
- 7 12 C.F.R. 1022.
- 8 See, e.g., Commissioner Rohit Chopra, *Memorandum 2018-01*, May 14, 2018, available at [https://www.ftc.gov/system/files/documents/public\\_statements/1378225/chopra\\_-\\_repeat\\_offenders\\_memo\\_5-14-18.pdf](https://www.ftc.gov/system/files/documents/public_statements/1378225/chopra_-_repeat_offenders_memo_5-14-18.pdf).
- 9 Statement of Rohit Chopra Before the Senate Committee on Banking, Housing, and Urban Affairs, October 28, 2021, available at <https://www.banking.senate.gov/imo/media/doc/Chopra%20Testimony%2010-28-211.pdf>.
- 10 Rohit Chopra, *Reigning in Repeat Offenders*, available at <https://www.consumerfinance.gov/about-us/newsroom/reining-in-repeat-offenders-2022-distinguished-lecture-on-regulation-university-of-pennsylvania-law-school/>.
- 11 *Id.*
- 12 *Id.*
- 13 Complaint at ¶¶ 92–104.
- 14 *Id.* at ¶¶ 138–155.
- 15 *Id.* at ¶¶ 32–44.
- 16 *Id.* at ¶¶ 78–91.
- 17 CFPB, *CFPB Charges TransUnion and Senior Executive John Danaher with Violating Law Enforcement Order*, April 12, 2022, available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-charges-transunion-and-senior-executive-john-danaher-with-violating-law-enforcement-order/>.
- 18 *Id.*
- 19 Complaint at 53.
- 20 See, e.g., FTC, *Joint Statement of Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter*, February 27, 2019, available at [https://www.ftc.gov/system/files/documents/public\\_statements/1463167/chopra\\_and\\_slaughter\\_musically\\_tiktok\\_joint\\_statement\\_2-27-19\\_0.pdf](https://www.ftc.gov/system/files/documents/public_statements/1463167/chopra_and_slaughter_musically_tiktok_joint_statement_2-27-19_0.pdf).
- 21 Rohit Chopra, *Reigning in Repeat Offenders*, available at <https://www.consumerfinance.gov/about-us/newsroom/reining-in-repeat-offenders-2022-distinguished-lecture-on-regulation-university-of-pennsylvania-law-school/>.
- 22 Complaint at ¶¶ 166–170.
- 23 Complaint at ¶ 171.

ENDNOTES (CONTINUED)

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- 24 *Id.*
- 25 See, e.g., FTC, *Statement of Commissioner Rohit Chopra*, November 25, 2020, available at [https://www.ftc.gov/system/files/documents/public\\_statements/1583802/chopra\\_statement\\_for\\_midwest\\_recovery\\_systems.pdf](https://www.ftc.gov/system/files/documents/public_statements/1583802/chopra_statement_for_midwest_recovery_systems.pdf).
- 26 See Letter from Brian Schatz et al. to the Honorable Rohit Chopra, November 10, 2021, available at [https://www.schatz.senate.gov/imo/media/doc/cfpb\\_letter.pdf](https://www.schatz.senate.gov/imo/media/doc/cfpb_letter.pdf).
- 27 Rohit Chopra, *Prepared Remarks of Director Rohit Chopra on New CFPB Medical Debt Report*, March 1, 2022, available at <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-director-rohit-chopra-on-new-cfpb-medical-debt-report/>.
- 28 Rohit Chopra, *Director Chopra's Opening Remarks to the Consumer Advisory Board*, April 6, 2022, available at <https://www.consumerfinance.gov/about-us/newsroom/director-chopras-opening-remarks-to-the-consumer-advisory-board/>.
- 29 CFPB, *CFPB Takes Action to stop False Identification by Background Screeners*, November 4, 2021, available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-to-stop-false-identification-by-background-screeners/>.
- 30 CFPB, *As Federal Eviction Protections come to an End, CFPB Warns Landlords and Consumer Reporting Agencies to Report Rental Information Accurately*, July 1, 2021, available at <https://www.consumerfinance.gov/about-us/newsroom/as-federal-eviction-protections-come-to-an-end-cfpb-warns-landlords-and-consumer-reporting-agencies-to-report-rental-information-accurately/>.
- 31 Complaint at ¶ 169.
- 32 *Id.* at ¶ 171.

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