

Midwest Financial Services Regulatory & Compliance Conference

August 19, 2016



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Welcome & Introductions

Kurt Tunnell, Managing Partner, Bricker & Eckler

David Stein, Of Counsel and Chair, Consumer
Financial Services Group, Bricker & Eckler



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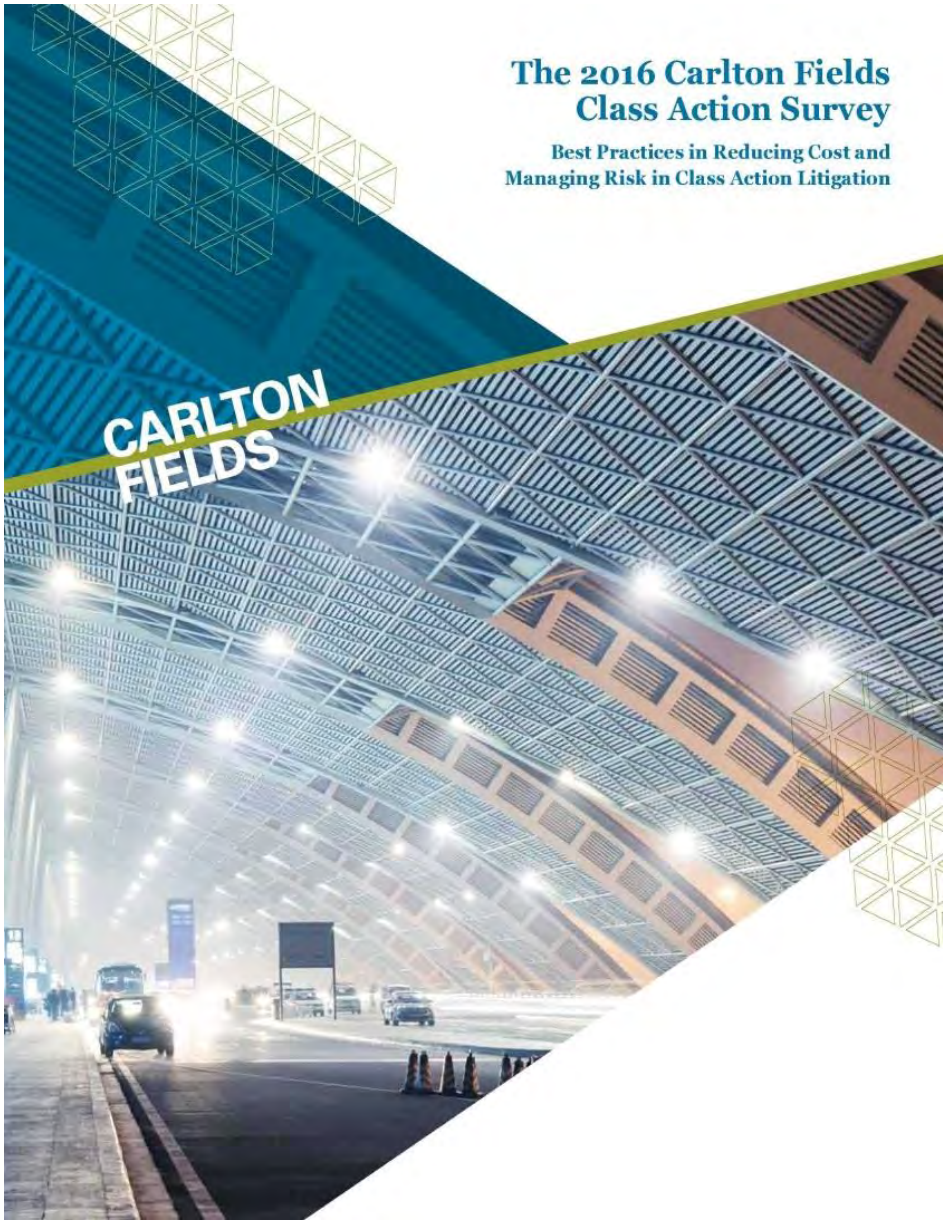
Litigation Trends

Drew Campbell, Partner and Chair, Class Action
Group, Bricker & Eckler



The 2016 Carlton Fields Class Action Survey

Best Practices in Reducing Cost and
Managing Risk in Class Action Litigation



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Litigation Trends

- Corporate spending:
- 2014: \$2.03 billion
- 2015: \$2.10 billion
- 2016: \$2.14 billion (est.)

Percent of Companies Handling One or More Cases by Risk Level



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Litigation Trends

- Pending Class Actions:
- 2014: 53.8%
- 2015: 60.6%

PRACTICE	MATTERS	SPENDING
CONSUMER FRAUD	24.6%	25.0%
LABOR & EMPLOYMENT	24.1%	22.6%
PRODUCT LIABILITY	10.1%	10.5%
ANTITRUST	7.6%	7.9%
SECURITIES	7.3%	7.9%
INSURANCE (EXCLUDING CONSUMER FRAUD)	7.0%	6.9%
DATA PRIVACY	4.8%	3.4%
INTELLECTUAL PROPERTY	0.1%	0.1%
OTHER (INCLUDING REGULATORY AND FALSE ADVERTISING)	14.3%	15.7%

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Litigation Trends

- Regulatory scrutiny
- Judicial receptivity
- Judicial hostility

Spokeo, Inc.



Robins v. Spokeo, Inc., 742 F.3d 409 (9th Cir. 2014)

- “Congress’s provision of a private cause of action to enforce a statutory provision implies that Congress intended the enforceable provision to create a statutory right,” and
- “the violation of a statutory right is usually a sufficient injury in fact to confer standing.”

Spokeo, 742 F.3d at 412



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Spokeo, Inc. v. Robins, Supreme Court Case No. 13-1339

- “Whether Congress can confer Article III standing upon a plaintiff who suffers no concrete harm and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based upon a mere violation of a federal statute.”

Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (May 16, 2016)

- An injury must be “concrete.”
- “A ‘concrete injury’ must be ‘*de facto*’; that is, it must actually exist.”
- It must be “‘real,’ and not ‘abstract.’”

Spokeo, 136 S. Ct. at 1548



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Spokeo, Inc. v. Robins

- Intangible injuries can be concrete.
- “Congress may ‘elevat[e] to the status of legally cognizable injuries, *de facto* injuries that were previously inadequate at law.’”

Spokeo, 136 S. Ct. at 1549



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Spokeo, Inc. v. Robins

- “does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right”

Spokeo, 136 S. Ct. at 1549



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Spokeo, Inc. v. Robins

- “Article III standing requires a concrete injury even in the context of a statutory violation.”
- “Robins could not . . . allege a bare procedural violation, divorced from any concrete harm . . .”

Spokeo, 136 S. Ct. at 1549



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Spokeo, Inc. v. Robins

- A “risk of real harm can satisfy the requirement of concreteness.”
- “[T]he law has long permitted recovery by certain tort victims even if their harms were difficult to prove or measure.”

Spokeo, 136 S. Ct. at 1549



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Spokeo, Inc. v. Robins

- “[T]he violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact.”
- “In other words, a plaintiff in such a case need not allege any additional harm beyond the one Congress has identified.”

Spokeo, 136 S. Ct. at 1549 (emphasis in original)



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Spokeo, Inc. v. Robins

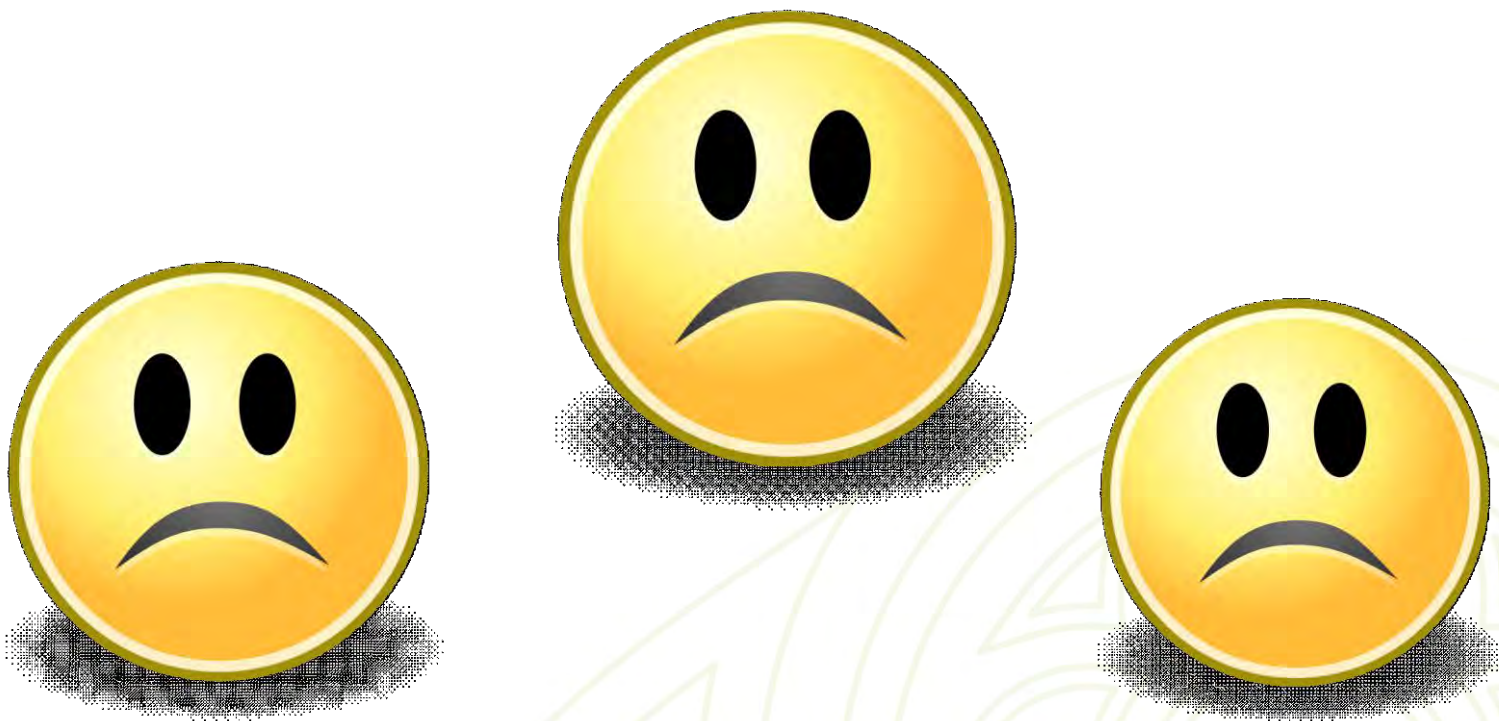
- “Bare procedural right”

VS.

- “Violation of a procedural right”

Spokeo, Inc. v. Robins

- Takeaways:
- Standing defenses remain viable for statutory claims
- Concrete = “must actually exist”
- Even intangible injury “must actually exist”



Telephone Consumer Protection Act



TCPA

- Statutory damages of \$500 to \$1,500 per call.
- No cap.

47 U.S.C. 227(b)(3)

TCPA

- “The TCPA has become a juggernaut: a destructive force that threatens companies with annihilation for technical violations that cause no actual injury or harm to any consumer.”

The Juggernaut of TCPA Litigation: The Problems with Uncapped Statutory Damages, B. Wahlquist, Manatt, Phelps & Phillips, LLP



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TCPA

- “[I]t’s no surprise the TCPA has become the poster child for lawsuit abuse”

In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 30 FCC Rcd. 7961, 8073 (2015) (dissenting statement of Comm’r Pai)

TCPA

- “I think the TCPA should be known by its real acronym—“Total Cash for Plaintiffs’ Attorneys.”

John Eggerton, *FCC’s Hoffman Looks Back, Moves Forward*,
Broadcasting & Cable (Mar. 23, 2015)



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Poll: Just How Big Has TCPA Litigation Become?

Question: Considering the TCPA was passed in 1991, by what % have TCPA plaintiffs increased since 2007?

- 25%
- 250%
- 2,500%
- More than 25,000%

Answer: ?

Source: ACI's 26th National Conference on Consumer Finance Class Actions & Litigation, July 28-29, 2016, "The TCPA: Litigation & Settlement Trends, New Plaintiff Theories, Emerging Defense Strategies, Class Certification Issues, and Staying Ahead of the Curve in the Face of Complex & Unclear Rules," R. Frank Springfield, Partner, Burr & Forman LLP; John C. Lynch, Partner, Troutman Sanders LLP; Joseph J. Siprut, Founder and Managing Partner, Siprut PC; and C. Brad Schuelke, Assistant Attorney General, Texas Attorney General's Office

Poll: Just How Big Has TCPA Litigation Become?

Question: Considering the TCPA was passed in 1991, by what % have TCPA plaintiffs increased since 2007?

25%

250%

2,500%

More than 25,000%

Answer: 26,400%³

3. See WebRecon LLC, *Out Like a Lion . . . Debt Collection Litigation & CFPB Complaint Statistics, Dec 2015 & Year in Review* (Jan. 18, 2016), <http://webrecon.com/out-like-a-lion-debt-collection-litigation-cfpb-complaint-statistics-dec-2015-year-in-review/> (last visited July 22, 2016).

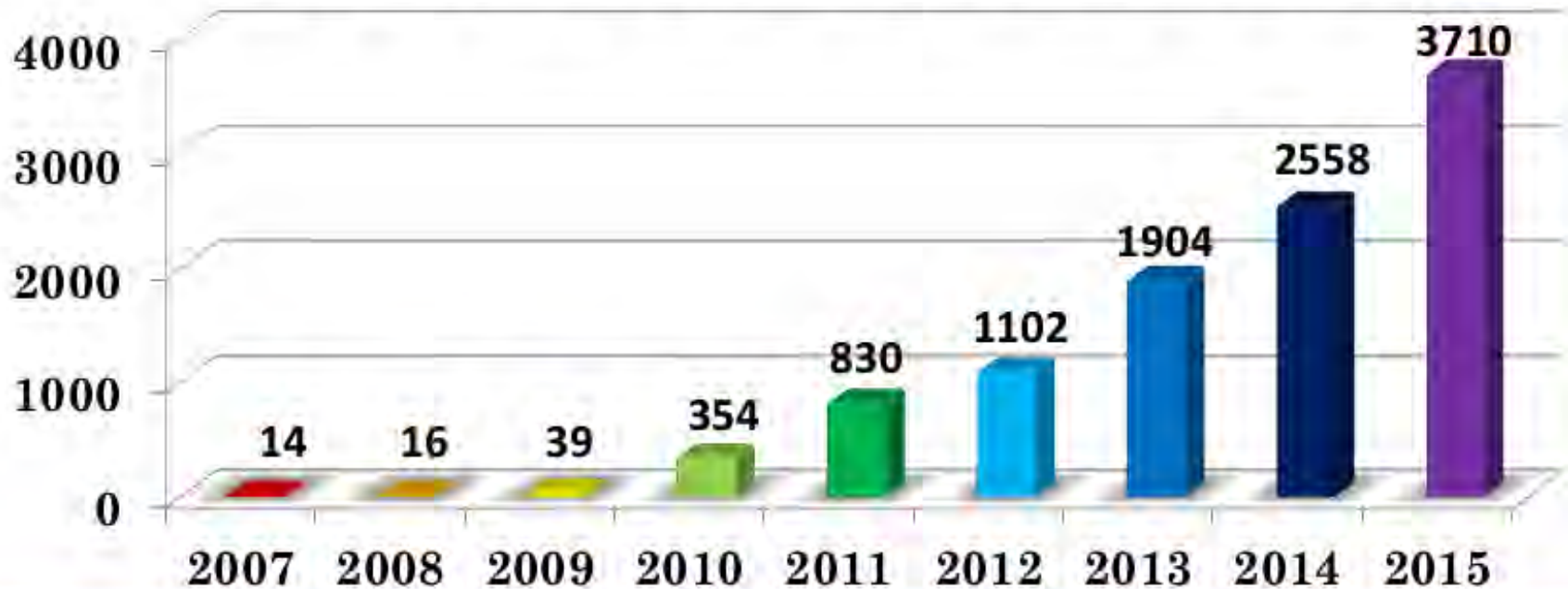
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Skyrocketing Litigation

Total TCPA Litigants by Year (2007 to 2015)⁴



4. See WebRecon LLC, *Out Like a Lion . . . Debt Collection Litigation & CFPB Complaint Statistics, Dec 2015 & Year in Review* (Jan. 18, 2016), <http://webrecon.com/out-like-a-lion-debt-collection-litigation-cfpb-complaint-statistics-dec-2015-year-in-review/> (last visited July 22, 2016).

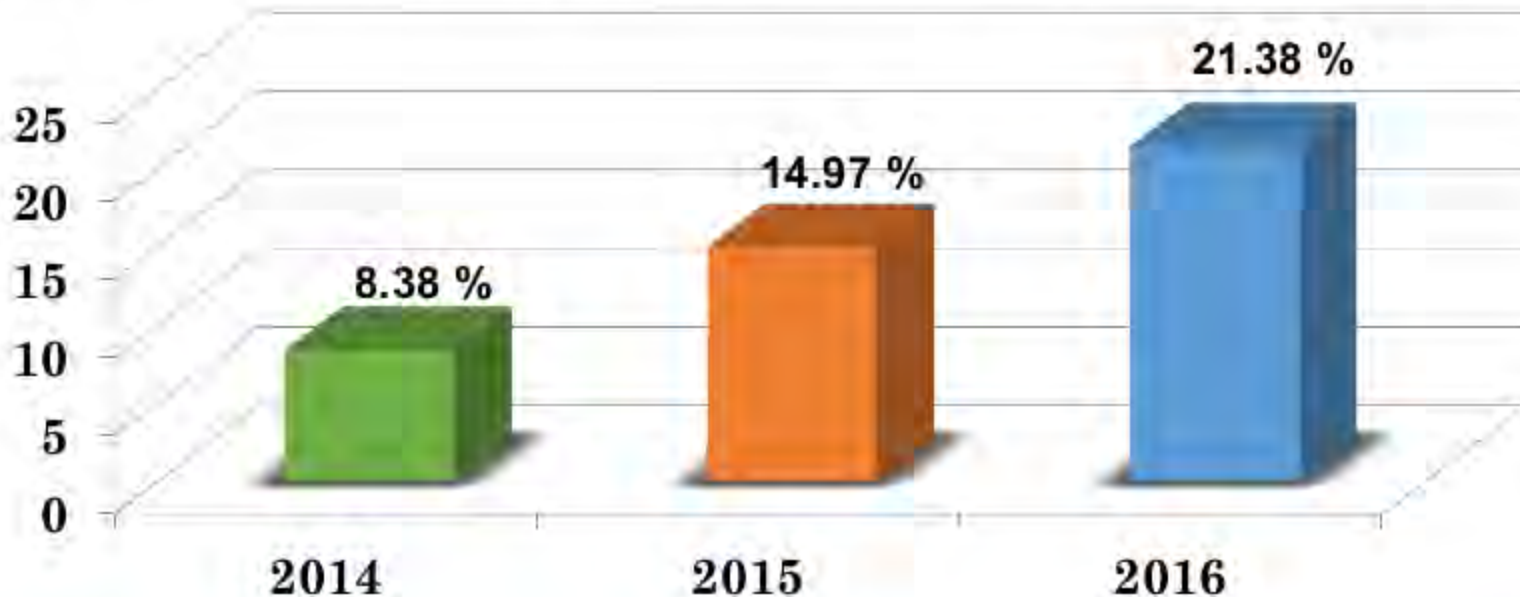
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Class Action Trends

TCPA Cases Filed as Class Actions by Year (2014 to 2016)²⁵



25. See WebRecon LLC, *Debt Collection Litigation & CFPB Complaint Statistics* (August 2014 to May 2016), <http://webrecon.com/category/fdcpa-case-statistics/> (last visited July 22, 2016).

Source: ACI's 26th National Conference on Consumer Finance Class Actions & Litigation, July 28-29, 2016, "The TCPA: Litigation & Settlement Trends, New Plaintiff Theories, Emerging Defense Strategies, Class Certification Issues, and Staying Ahead of the Curve in the Face of Complex & Unclear Rules," R. Frank Springfield, Partner, Burr & Forman LLP; John C. Lynch, Partner, Troutman Sanders LLP; Joseph J. Siprut, Founder and Managing Partner, Siprut PC; and C. Brad Schuelke, Assistant Attorney General, Texas Attorney General's Office



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TCPA

- Sue-It-Yourself
- www.KillTheCalls.com
- “Suing Telemarketers—Simple and Cheap”

TCPA

- “Adding up the above numbers, you can see that I invested \$195.00 . . . and received a total of \$6,160.00. . . .”
- “Such is obviously a good return on my investment and I doubt that I spent more than three hours total on everything . . .”

TCPA

- How To Sue A Telemarketer
- www.ImpactDialing.com/2012/05/how-to-sue-a-telemarketer/

TCPA

- Social networking companies:
 - *Nunes v. Twitter, Inc.*, No. 14-02843 (N.D. Cal.)
 - *Glauser v. GroupMe*, No. 11-cv-2584 (N.D. Cal.)

TCPA

- Sports franchises:

- *Friedman v. LAC Basketville Club, Inc.*, No. 2-13-cv-00818 (C.D. Cal.)

- *Wojcik v. Buffalo Bills, Inc.*, No. 8:12-cv-02414 (M.D. Fla.)

TCPA

- Pharmacies:

- *Rooney v. Rite Aid Corp.*, No. 3:14-cv-01249 (S.D. Cal.)

- *Lowe v. CVS Pharmacy, Inc.*, No. 1:14-cv-3687 (N.D. Ill.)

TCPA

- Travel and entertainment companies:
 - *Practice Mgt. Support Servs., Inc. v. Cirque Du Soleil, Inc.*, No. 1:14-cv-0232 (N.D. Ill.)

TCPA

- Retailers:

- *Chesboro v. Best Buy Co.*, No. 2:10-cv-00774
(W.D. Wash.)

- *Maier v. J.C. Penney Co.*, No. 3:13-cv-00163
(S.D. Cal.)

TCPA

- Online service providers:
 - *Russell v. 29 Prime, Inc.*, No. 1:13-cv-12814 (D. Mass.)

TCPA: Class Certified

- *Dr. Robert L. Meinders D.C, Ltd. v. Emery Wilson Corp.*, No. 3:14-cv-596, 2016 WL 3402621 (S.D. Ill. June 21, 2016)
- Whether there is a “reliable and administratively feasible” way to identify class members is not required under 7th Cir. precedent.

TCPA: Class Certified

- *Sandusky Wellness Ctr. v. Medtox Sch., Inc.*, No. 15-1317, 2016 WL 1743037 (8th Cir. May 3, 2016)
- Class was ascertainable because the “recipient” is “the person who subscribes to the fax number,” which could be ascertained through fax logs.

TCPA: Class Certified

- *Bee, Denning, Inc. v. Capital All Group*, 310 F.R.D. 614 (S.D. Cal. 2015)
- Plaintiffs produced call log evidence to ascertain numbers called by the Defendants.
- Disregarding the argument that the call log failed to distinguish between cellular and residential numbers despite recognizing the “merits” of the argument.

TCPA: Class Denied

- *Barrett v. ADT Corp.*, No. 2:15-cv-1348, 2016 WL 865672 (S.D. Ohio March 7, 2016) (Smith, J.)
- Class was over-broad because it was not limited to consumers who did not give prior express consent, which would have required individualized fact-finding to ascertain.

TCPA: Class Denied

- *Leyse v. Lifetime Entm't Servs.*, No. 1:13-cv-5794, 2015 WL 5837897 (S.D.N.Y. Sept. 22, 2015)
- Motion for cert. denied because the list of call numbers could not be discovered, rendering class unascertainable.

TCPA: Class Denied

- *Sherman v. Yahoo! Inc.*, No. 3:13-cv-41, 2015 WL 56044000 (S.D. Cal. Sept. 23, 2015)
- Yahoo had list of numbers that were sent, the list did not include contact data from which class could be readily ascertained.
- Issue of prior express consent required individualized fact-finding, and rendered the plaintiff atypical and inadequate class representative.

TCPA: Recent Settlements

- *Ossola v. Am. Express Co.*, No 1:13-cv-4836 (N.D. Ill.)
- \$9.25 million, approved 7/6/16
- 798,000 people who received automated telemarketing calls from 7/3/09 and 3/15/16, and 3,200 received automated debt collection calls from 7/3/09 to 12/31/13

TCPA: Recent Settlements

- *James v. JP Morgan Chase Bank, NA*, No. 8:15-cv-2424 (M.D. Fla.)
- \$3.75 million, approved 6/24/16
- 675,000 who received ATDS calls made to reassigned cell phone numbers

TCPA: Recent Settlements

- *In re Portfolio Recovery Assocs., LLC*, TCPA Litigation, No. 3:11-md-2295 (S.D. Cal.)
- \$18 million, settlement reached 4/25/16
- 7.4 million who received ATDS calls between 12/23/06 and 7/1/13

TCPA: Recent Settlements

- *Hooker v. Sirius XM Radio, Inc.*, No. 4:13-cv-03 (E.D. Va.)
- \$35 million, settlement reached 4/5/16
- Class = all trial users of Sirius XM service who received ATDS calls from 2/1/08 to present

TCPA: Recent Settlements

- *In re Capital One TCPA Litigation*, No. 12-cv-10064 (N.D. Ill. 2/12/15)
- \$75.5 million
- Rejecting Defendant's argument that the terms of their customer constituted the necessary prior consent.

TCPA: Recent Settlements

- *Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 1104462 (N.D. Ill. 3/23/15), approving \$40 million settlement of TCPA class action
- *Rose v. Bank of America Corp.*, No. 11002390 (N.D. Cal. 8/29/14), approving \$32 million class settlement

TCPA Hot Issues

- Reassigned numbers
- When mobile phone number is reassigned to another consumer who doesn't consent to calls
- Safe Harbor

TCPA Hot Issues

- Definition of ATDS
- “equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator, to dial such numbers.”

TCPA Hot Issues

- Hot issue: Does “capacity” refer to the present or potential capacity of a device?

TCPA Hot Issues

- “Right now, the TCPA applies to ‘automatic telephone dialing systems’—think clunky, 1980s-era machines that can automatically dial every number from 000-0000 to 999-9999.”

TCPA Hot Issues

- “After this Order, each and every smartphone, tablet, VoIP phone, calling app, texting app—pretty much any phone that’s not a ‘rotary-dial phone’—will be an automatic telephone dialing system.”

Dissenting Statement of Commissioner Ajit Pai, available at <https://www.fcc.gov/article/doc-333993a5>



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TCPA Hot Issues

- Revocation of Consent
- “In any reasonable way at any time.”

TCPA Hot Issues

- Text messages subject to the Act.

TCPA Hot Issues

- Vicarious liability.
- June, 2015 FCC Order does not address.

TCPA Hot Issues

- “. . . may be held vicariously liable under federal common law agency principles for a TCPA violation by a third-party telemarketer.”

In the Matter of Dish Network, LLC, 28 F.C.C. Rcd. 6575 (05/09/13)

TCPA Hot Issues

- “. . . or where a seller ratifies the acts of its telemarketer by knowingly accepting their benefits.”

In the Matter of Dish Network, LLC, 28 F.C.C. Rcd. 6575 (05/09/13)

TCPA Hot Issues

- Wrote, reviewed, or approved the script.
- Give permission to use the seller's name, mark, or identifying information.
- Knew that vendor was violating the TCPA.
- Whether the agreement expressly contemplated telemarketing.
- Access to information systems.

What Are VoIP Numbers?

- “Voice over Internet Protocol (VoIP), is a technology that allows you to make voice calls using a broadband Internet connection instead of a regular (or analog) phone line.”¹⁰
- Examples include:



10. See FCC, *Voice Over Internet Protocol (VoIP)*, <https://www.fcc.gov/general/voice-over-internet-protocol-voip> (last visited July 19, 2016).



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Source: ACI's 26th National Conference on Consumer Finance Class Actions & Litigation, July 28-29, 2016, "The TCPA: Litigation & Settlement Trends, New Plaintiff Theories, Emerging Defense Strategies, Class Certification Issues, and Staying Ahead of the Curve in the Face of Complex & Unclear Rules," R. Frank Springfield, Partner, Burr & Forman LLP; John C. Lynch, Partner, Troutman Sanders LLP; Joseph J. Siprut, Founder and Managing Partner, Siprut PC; and C. Brad Schuelke, Assistant Attorney General, Texas Attorney General's Office

TCPA Hot Issues: VoIP

- A Party may not use an ATDS to call:
 - (1) A cell phone; or
 - (2) any other phone “for which the called party is charged for a call.”

47 U.S.C. 227(b)(1)(A)(iii)



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TCPA Hot Issues: VoIP

- “[W]hether under the TCPA’s ‘charged call provision’ a call to [plaintiff’s] VoIP number constitutes a call ‘to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or any service for which the called party is charged for the call’”

Klein v. Just Energy Group, Inc., No. 2:14-cv-1050, 2016 WL 3539137, at *6 (W.D. Pa. June 29, 2016)



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TCPA Hot Issues: VoIP

- *Lynn v. Monarch Recovery Mgt.*, 953 F. Supp.2d 612, 625 (D. Md. 2013)
- “The Court found that Lynn's VoIP service, which he had attached to his residential telephone line, charged him for each of the calls initiated by Monarch.”

TCPA Hot Issues: VoIP

- Under a plain reading of the “unambiguous . . . prohibition of the call charged provision” the Defendant was liable under the TCPA.

TCPA Hot Issues: VoIP

- *Karle v. Southwest Credit Sys.*, 2015 U.S. Dist. LEXIS 112500 (D. Mass. June 22, 2015), at *20-21

TCPA Hot Issues: VoIP

- “Plaintiff has not shown there is a question of material fact as to whether . . . she was “charged for [Credit Acceptance’s] call[s]. *47 U.S.C. § 227(b)(1)(A)(iii).*”
- “The evidence demonstrates that the calls were made to a telephone number assigned to a Comcast VoIP home telephone line, not a cell phone.”

TCPA Hot Issues: VoIP

- *Ghawi v. Law Offices of Howard Lee Schiff, P.C.*, 2015 U.S. Dist. LEXIS 152080 (D. Conn. Nov. 10, 2015), at *12-13
- “in light of the purpose of the TCPA—’to prohibit the use of [autodialers/prerecorded calls] to communicate with others by telephone in a manner that would be an invasion of privacy,’

TCPA Hot Issues: VoIP

- “there is no apparent conceivable reason on the record why the use of a VoIP number to connect to a cell phone should be treated differently from a direct call to a cell phone”

TCPA Dos and Don'ts

- **Do:** Laser Focus On Compliance
- **Do:** Obtain Express Written Consent Prior To Initiating or Sending Telemarketing Calls to Consumers
- **Do:** Provide One or More Opt-Out Mechanisms

TCPA Dos and Don'ts

- **Do:** Provide One or More Opt-Out Mechanisms
 - The process should be able to capture, document, and process the opt-out request that **ENSURES** that contact will cease post-opt-out.
 - Make it easy: text “stop” or “end” or something similar.

TCPA Dos and Don'ts

- Written letter sent to the caller requesting that it “cease all future communications.”—**Works**

Miceli c. Orange Lake Country Club, Inc., No. 6:14-cv-1602, 2015 WL 508621, at *1, 5 (M.D. Fla. Aug. 5, 2015)



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TCPA Dos and Don'ts

- Oral statement that “calls were annoying and the she did not want to be called.”—
Works

Galbreath v. Time Warner Cable, Inc., No. 7:14-cv-61, 2015 WL 9450593, at *1 (E.D.N.C. Dec. 22, 2015)

Osorio v. State Farm Bank, F.S.B., 746 F.3d 1242, 1255-56 (11th Cir. 2014)



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TCPA Dos and Don'ts

- Using the caller's website to “elect to no longer be contacted through an autodialer.”—**Works**

Haysbert v. Navient Sols., Inc., No. 2:15-cv-4144, 2016 WL 890297, at *2, 10 (C.D. Cal. Mar. 8, 2016)



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TCPA Dos and Don'ts

- Texting the word “stop” to unsubscribe from future text messages—**Works**

Reardon v. Uber Techs., Inc., 115 F. Supp.3d 1090, 1102 (N.D. Cal. 2015)



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TCPA Dos and Don'ts

- Third party notice sent from a bankruptcy court that informs the caller that an automatic stay is in place—**Doesn't Work**

Cholly v. Uptain Group, Inc., No. 1:15-cv-50-30, 2015 WL 9315557, at *3 (N.D. Ill. Dec. 22, 2015)



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TCPA Dos and Don'ts

- Telling the caller that “it could contact [the debtor’s] attorney with any further questions.”—**Doesn't Work**

In re Runyan, 530 Bankr. 801, 807 (Bankr. M.D. Fla. 2015)

TCPA Dos and Don'ts

- Asking not to call “at home or at work” but which do not mention the cell number at issue—**Doesn't Work**

Johnson v. JPMorgan Chase, No. 4”14-cv-1706, 2015 WL 7301082, at **2 (S.D. Tex. Nov. 18. 2015)

TCPA Dos and Don'ts

- Equivocation: “do not call like in the morning and during the work day because I’m working and I can’t really be talking”—**Doesn't Work**

Schweitzer v. Comenity Bank, No. 9:15-cv-80665, 2016 WL 412837, at *1, 3-5(S.D. Fla. 2016)

TCPA Dos and Don'ts

- **Do:** Require Vendors and Marketing Partners to Be in Compliance with the TCPA
- **Do:** Review and Categorize Messages Sent
- **Do:** Keep “Informational” Messages Content-Neutral

TCPA Dos and Don'ts

- **Do:** Make Consent Forms Clear, Conspicuous, and User-Friendly:
 - Receiving telemarketing messages
 - Via ATDS

TCPA Dos and Don'ts

- Need:
 - Signature (may be digital)
 - Clear, specific authorization
 - Include the phone number
 - Consent not required as a condition to purchase

TCPA Dos and Don'ts

- **Do:** Keep All Records of Consent for at Least Four Years

TCPA Dos and Don'ts

- **Do Not:** Assume That Written Consent Received in the Past Remains Valid
- **Do Not:** Place Unnecessary Restrictions on the Scope of Consent
- **Do Not:** Assume That A Device Is Not an ATDS

TCPA Dos and Don'ts

- **Do Not:** Assume That Using A Third Party Vendor Provides A Safe Harbor From TCPA Liability

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Arbitration and Class Action Waivers

- *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2010)
- (enforcing arbitration and class action waiver in consumer cellular telephone contract, ruling that the FAA preempts conflicting state law provisions)

Arbitration and Class Action Waivers

- *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013)
- (class action waivers are enforceable and do not deny a plaintiff substantive rights simply because individuals claims of minimal value would effectively proceed on a class basis)

Arbitration and Class Action Waivers

- *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015)
- (enforcing arbitration and class action waivers in consumer agreement in connection with claims arising from early termination provision)

Arbitration and Class Action Waivers

- “[T]sunami that is wiping out existing and potential consumer and employment class actions.”

Sternlight, Jean (2012), [Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice](#), Oregon Law Review 90 (3): 703–727. Retrieved October 29, 2013.

Arbitration Clause Usage

Percent of Companies



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Arbitration and Class Action Waivers

- Dodd-Frank Act:
 - Public interest
 - Protection of consumers

Dodd-Frank Act §1028



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Arbitration and Class Action Waivers

- *But:*
 - Restriction or prohibition must be consistent with the findings of the CFPB study.

Dodd-Frank Act §1028



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Arbitration and Class Action Waivers

- Two Parts to the Proposed Rule:
 - First: Prohibits class actions waivers

Proposed Rule § 1040.4(a)(1)



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Arbitration and Class Action Waivers

- “We agree that neither we nor anyone else will use this agreement to stop you from being part of a class action case in court. You may file a class action in court or you may be a member of a class action even if you do not file it.”

Proposed Rule § 1040.4(a)(2)(i)



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Arbitration and Class Action Waivers

- Second: Reporting requirements:
 - A copy of the claims and any counterclaims;
 - A copy of the pre-dispute arbitration agreement;

Arbitration and Class Action Waivers

- The details of any award;
- Communications regarding dismissal of arbitration because of failure of the provider to pay fees; and

Arbitration and Class Action Waivers

- Communications that its pre-dispute arbitration agreement does not comport with fairness principles, rules or other requirements of the arbitral forum.

Proposed Rule § 1040.4(b)



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Arbitration and Class Action Waivers

- Who Is Covered?
 - Consumer credit services;
 - Automobile leases;
 - Debt management, debt settlement or modification of consumer credit terms, or avoidance of foreclosure;

Arbitration and Class Action Waivers

- Credit reporting;
- Deposit accounts, electronic funds transfer accounts, or money transfer services;

Arbitration and Class Action Waivers

- Payment processing services, check cashing, check collections, or check guaranty services; or
- Debt collection.

Proposed Rule § 1040.3(a)



INCompliance

Arbitration and Class Action Waivers

- Challenges To The Rule?



Arbitration and Class Action Waivers

- Whether consumers fare differently in arbitration as compared to litigation?
- Whether consumers fare better in arbitration than in class action litigation?

Arbitration and Class Action Waivers

- **CFPB Asserts:**

- Small number of arbitration claims because harm is difficult to detect.

- **But:**

- Fees are disclosed on monthly statements

Supplementary Information at 96-97



INCompliance

Arbitration and Class Action Waivers

- **CFPB Asserts:**

- Class actions are more effective means of providing relief.

Arbitration and Class Action Waivers

- **But:**

- 61% of class actions resolved on an individual basis, or dismissed by the plaintiff;
- 10% were dismissed on a defendant's motion; and
- \$425 MM out of \$2.1 BB in class relief went to the lawyers.

Supplementary Information at 103



INCompliance

Arbitration and Class Action Waivers

- **CFPB Asserts:**

- Arbitration agreements “block many class action claims . . . and discourage the filing of others.”

Arbitration and Class Action Waivers

- **But:**

- Defendants filed an arbitration-based motion in only 16.77% of the class actions it studied; and
- Only 8% of those motions were granted.

Supplementary Information at 92



INCompliance

Arbitration and Class Action Waivers

- **CFPB Asserts:**
 - “more effective means of securing relief for large numbers of consumers affected by common legally questionable practices.”

Arbitration and Class Action Waivers

- **But:**
 - Consumers recover, on average only about \$32 in class settlements; and
 - Very few class members actually make a claim against settlement funds.

Supplementary Information at 123, n.418



INCompliance

Arbitration and Class Action Waivers

- **CFPB Asserts:**

- “[T]he presence of class action exposure will affect companies’ incentive to comply” and
- The costs of litigating class actions are justified as a necessary component of an enforcement scheme.

Supplementary Information at 123, n.418 & at 131



INCompliance

Arbitration and Class Action Waivers

- **But:**
 - “potentially ruinous liability” created by class actions that “places pressure on the defendant to settle even unmeritorious claims.”

Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co., 559 U.S. 393, 445 n. 3 (2010) (Ginsburg, J. dissenting)

Arbitration and Class Action Waivers

- CFPB lacks data to determine whether costs are passed on to consumers.

Supplementary Information at 80, n.326



INCompliance

Arbitration and Class Action Waivers

- When will the Proposed Rule take effect?
- 30 days after the final rule is published in the Federal Register, likely in the third quarter of 2017.

Supplementary Information at 80, n.326



INCompliance

Arbitration and Class Action Waivers

- Which agreements will be covered?
- “The proposed rule would apply only to agreements entered into after the end of the 180-day period beginning on the regulation’s effective date.”
- Likely second quarter, 2018.

Proposed Rule § 1040.4(a)(iii)



INCompliance

Arbitration and Class Action Waivers

- Exceptions:
 - Rule will apply to contracts entered into before the effective date if account ownership changes, e.g., sale or merger.
 - Modifications, amendments, and implementations of terms do not create a new agreement subject to the proposed rule **UNLESS:**

Arbitration and Class Action Waivers

- A provider is considered to have “entered into” a new contract if the changes “constitute a new product or service.”

Arbitration and Class Action Waivers

- Narrow exception:
 - General purpose, re-loadable prepaid cards that are on the shelves as of the effective date.
 - No need to include the required language in the customer agreement if the provider does not have any way to contact the consumer.

Arbitration and Class Action Waivers

- **But:**

- If the provider has, or later obtains consumer contact information, the provider must contact the consumer and provide an amended agreement with the required language.

Proposed Rule § 1040.5(b)



INCompliance

Mazzei v. The Money Store,
2016 U.S. App. LEXIS (July 15,
2016)



INCompliance

Questions?

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Panel Discussion: Managing Enterprise Legal & Compliance Risk

Tom Eck, SVP, Associate General Counsel, Huntington
National Bank

Grady Williams, VP and Chief Compliance Officer,
Nationwide Bank

Moderator: David Stein, Of Counsel and Chair, Consumer
Financial Services Group, Bricker & Eckler





Managing Legal Risk

Tom Eck
Associate General Counsel

The first step in managing legal risk is defining it

- The Basel Committee in the Basel II accord classified “legal risk” as a subset of “operational risk,” but there is still no standard definition.
- Huntington’s Legal Department defined legal risk in a Legal Risk Management Policy created in conjunction with defining the department’s overall mission:

Legal Risk – is any current or prospective risk to earnings or capital that arises primarily from any of the following:

- a defective transaction, defined as any transaction between Huntington and a third party (a) that is not reflected in a written agreement; (b) which does not allocate rights and obligations and associated risk in the manner intended by Huntington; (c) that may be void or unenforceable, in whole or in part; (d) that is entered into inadvertently; or (e) that relies upon a security arrangement that is, or may be, defective;
- legal proceedings, defined as (a) actual or threatened lawsuits; or (b) government investigations or enforcement actions;
- defective legal interpretations;
- changes in laws or regulations;
- defective corporate governance; or
- the failure to adequately protect Huntington’s intellectual property assets

The next step is building the proper controls

		Policy/Procedure	Additional Controls
Defective Transaction	→	<ul style="list-style-type: none">• TPM/Sourcing Policies• Legal Advice Standard	<ul style="list-style-type: none">• Internal Audit• Legal Risk Assessment
Legal Proceedings	→	<ul style="list-style-type: none">• Litigation Procedures• Outside Counsel Guidelines	<ul style="list-style-type: none">• Internal Audit• Legal Risk Assessment
Defective Interpretations	→	<ul style="list-style-type: none">• Legal Advice Standard	<ul style="list-style-type: none">• Internal Audit• Legal Risk Assessment• Corporate Compliance
Changes in Laws	→	<ul style="list-style-type: none">• Regulatory Change Management Policy• Legal Advice Standard	<ul style="list-style-type: none">• Internal Audit• Legal Risk Assessment• Corporate Compliance
Defective Governance	→	<ul style="list-style-type: none">• Corporate Governance Policy	<ul style="list-style-type: none">• Internal Audit• Legal Risk Assessment• Corporate Compliance
Intellectual Property	→	<ul style="list-style-type: none">• Intellectual Property Policy	<ul style="list-style-type: none">• Internal Audit• Legal Risk Assessment

Legal Advice Standard Highlights

Provision of Legal Advice

- Only attorneys in the Legal Department may give legal advice
- Only Legal may make determination of a violation of law
- Sets guidelines for in-house attorneys engagement of outside counsel/peers

Engagement of Legal Department Attorneys

- List of segment/subject matter attorneys on Legal's intranet page
- The Legal Department must be notified immediately if a colleague receives legal docs

Retaining Outside Counsel

- Only attorney in the Legal Department may engage outside counsel unless direct engagement by business segment is already approved
- Legal and TPM jointly approve additions to preferred counsel list

Contract Review

- Contracts must be in writing
- Business segments should determine what non-vendor contracts should have Legal review
- Vendor contracts reviewed under Third Party Management Policy

Legal-ish Matters Not Handled by Legal Dept.

- Compliance
- Sourcing
- Insurance Claims
- Collections

Appendix

- Regulatory Guidance
 - OCC Comptrollers Handbook: Litigation and Other Legal Matters at <http://www.occ.treas.gov/publications/publications-by-type/comptrollers-handbook/pub-ch-m-litigation-and-other-legal-matters.pdf>
 - Federal Reserve draft white paper, *The Management of Legal Risk by Financial Institutions* at http://www.federalreserve.gov/SECRS/2005/August/20050818/OP-1189/OP-1189_2_1.pdf on Legal Risk
- Huntington Legal Department's Mission Statement:

To be trusted teammates in realizing our vision to be the best performing regional bank in the nation by providing accurate, creative and timely legal advice.

Nationwide Bank |

Managing Compliance Risk

Grady E. Williams Sr. - Nationwide Bank Compliance

Compliance with consumer laws and regulations is integral to the Bank's business strategy. Violations and noncompliance can significantly impair a bank's reputation, value, earning ability and business opportunity



Nationwide[®]
is on your side

Director's Responsibility For Compliance

Directors are responsible for providing their banks with a **compliance management program** that includes **preventive, detective** and **corrective** measures to insure compliance with banking laws and regulations.

Preventive

- Help prevent violations from occurring, which can include:
 - Training
 - Policies and procedures,
 - internal controls

Detective

- Identify or notify of undesirable events, - errors or violations of law.
 - Compliance Reviews / Audits
 - Active board / mgmt oversight,
 - Risk monitoring and Mgmt. Info systems

Corrective

- Corrective action plans that assign responsibility, for timely completion;
- Quality assurance or control processes to identify and correct conditions that led to the error or violation; and
- Information systems that keep problems in the forefront until they are corrected.

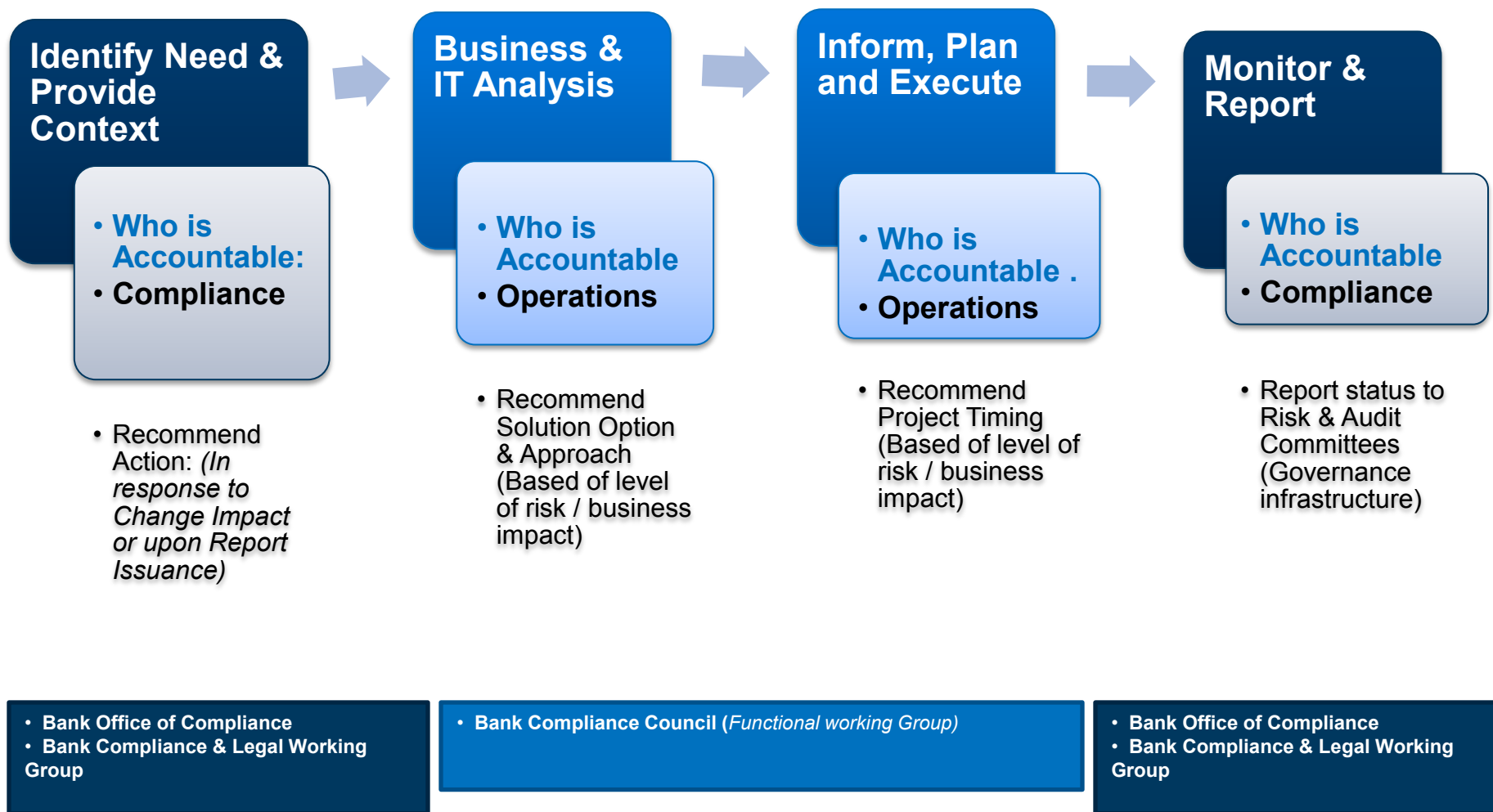
Compliance Risk Management Program Infrastructure

The elements of Nationwide Bank's Compliance Management Program are consistent with the US Federal Sentencing Guidelines (USFSG) criteria for an **effective Compliance & Ethics program**, are fully aligned with Federal regulatory requirements, and Nationwide's Corporate Compliance Policy.

<i>Program Elements</i>	<i>Definition</i>	<i>Risk Mitigation Activities</i>
High Level Responsibility	<ul style="list-style-type: none"> Foster and promote compliant business practices and ethical conduct 	The Compliance Program <ul style="list-style-type: none"> Overseen & Supported by the Audit Committee/Board of Directors Management Encourages Compliant Business Practices Management & Board Reporting <ul style="list-style-type: none"> Compliance Dashboard/CRA Score Card Detailed Reports on Assessment Activity
Risk Assessments	<ul style="list-style-type: none"> Facilitate effective risk management and optimal business decision making 	Compliance Risk Assessment <ul style="list-style-type: none"> Establish Basis for Prioritized Program Activities Risk Ratings Aligned with Enterprise Risk Management Framework
Written Policies & Procedures	<ul style="list-style-type: none"> Establish appropriate standards of conduct and enable timely alignment of day-to-day business activities with regulatory requirements 	Business Change Management Support <ul style="list-style-type: none"> Compliance Desk Procedures Operational Compliance Working Group; Regulatory Change Management Policy & Procedures Management Large Project Support: BEACON, NAMC Integration, Equity Project, etc.
Education & Training	<ul style="list-style-type: none"> Create and deliver Compliance training that is easily understood by the business and enables desired behavior 	Education & Training Program <ul style="list-style-type: none"> Core Sessions for All Bank Associates Specialized Sessions for Associates in Key Risk Areas
Monitoring & Testing	<ul style="list-style-type: none"> Evaluate business activities, systems and controls to prevent and detect compliance issues 	Compliance Monitoring & Testing <ul style="list-style-type: none"> Compliance Testing Document Review
Response, Prevention & Corrective Action	<ul style="list-style-type: none"> Identify compliance issues, ethics issues, and ensure complaints are timely addressed including Program modification to prevent reoccurrence 	Complaint Resolution & Issue Management <ul style="list-style-type: none"> Track Issues via Aggregate Issues Log Consultation & Guidance Monitor Regulatory Complaints
Reporting	<ul style="list-style-type: none"> Report to governing authorities and facilitate adequate oversight and accountability Ensure external regulatory reporting and filing requirements are adequately addressed 	Regulatory Reporting & Filing <ul style="list-style-type: none"> BSA/AML (suspicious activity and currency transaction reports, & MLRS data) HMDA & CRA loan data filing Licensing & Registration, Financial, etc
Regulatory Relationship Management	<ul style="list-style-type: none"> Manage exam teams, including initial and follow up requests to meet regulatory expectations Reduce duplications of findings and sanctions Proactively work to influence regulators 	Managing Regulatory Exams & Relationships <ul style="list-style-type: none"> Exam Management Infrastructure Internal Audit Liaison for Compliance Needs Violations, Issues & Matters Requiring Attention (MRA) Tracking

COMPLIANCE RISK MANAGEMENT RACI Chart

High-level Overview of Accountability



COMPLIANCE RISK MANAGEMENT

Rule Change – Detailed RACI Chart (*Exhibit*)

(Implementation of New/Changing Compliance Requirements)

Category of Activity		Compliance, Legal & Other Assessment Functions			Bank Functional & Support Areas							Governance Framework			
		OOC	OGC	Ops	Pro	CrRSK	Mkt	IT	Fin	VEN	OAF	BGT	SLT	BRC	BOD
Identify Need & Provide Context <i>for Scope & Risk</i>	Monitor & Advocate - Monitor Proposed rule changes for alignment with business strategy and initiate advocacy efforts as warranted for alignment w/ NW's business objectives and risk appetite	C,R	A	C	C	C	C	C	C	N/A	N/A	N/A	I	I	I
	Identify new Compliance requirements - Identify new Rule changes, assess applicability /relevance to the business and level of impact	A	C	C	C	C	C	C	C	C	N/A	N/A	N/A	N/A	N/A
	Determine associated risk - Evaluate level of risk and potential consequence of non-action	A	C,R	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Notify LOB of compliance requirement - Notify impacted LOB of Rule change - provide understanding of specific compliance requirements, relevance, implementation date, and risk/consequence of non-action	A	C	I	I	I	I	I	I	I	N/A	N/A	N/A	N/A	N/A
	Recommend Action - Recommend implementation of compliance requirement based on level of risk (VL, L, M, H, S)	A	C	I	I	I	I	I	I	I	N/A	I	I	I	N/A
Business & IT Analysis - Recommend Solution & Approach	Manage Project Scoping - Coordination with all impacted LOBs, support teams and vendor partners to evaluate and determine viable practical business and IT solution options to accomplish compliance requirement	C	I	A,R	R	R	R	C,R	R	R	N/A	I	N/A	N/A	N/A
	Determine Cost - Coordinate with all impacted LOBs, support teams and vendor partners to determine total cost of implementation	C	I	A,R	C	C	C	C,R	C	C	N/A	I	N/A	N/A	N/A
	Recommend Solution Option - Recommend cost-efficient practical solution option to accomplish compliance requirement based on Risk Level	C,I	I	A,R	I	I	I	C,R	I	N/A	N/A	C	N/A	N/A	N/A
Inform, Plan and Execute	Recommend Project Timing - Recommend Timing of compliance requirement implementation project	C	C	A,R	I	I	I	C,R	I	N/A	N/A	C	I	I	N/A
	Execute Plan - Coordinate with all impacted LOBs, support teams and vendor partners to Plan & Drive timely implementation of compliance requirement	C	I	A,R	R	R	R	C,R	R	R	N/A	I	N/A	N/A	N/A
Monitor & Report	Status Report - Monitor and report status of timely implementation of compliance requirement	A,R	I	R	I	I	I	I	I	I	N/A	I	I	I	I

The Anatomy of an MRA

The Office of the Comptroller of the Currency (OCC) **Matters Requiring Attention** (MRAs)

The OCC and other Federal Regulators currently use the **Five Cs format** of enhanced standard MRA communication, to enable consistent reporting, monitoring / tracking, and resolution .

The Five Cs

Concern

- Deficient bank practice that deviates from sound governance, internal control, or risk management principles, or results in substantive noncompliance

Cause

- Notes the root cause of the concern when it is evident

Consequence

- Continuation of the practice could affect the bank's condition, including its financial performance or risk profile
- Inaction could lead to violations of law or additional supervisory actions, including enforcement actions or civil money penalties

Corrective Action

- Board and management action to address the concern and eliminate the cause

Commitment

- The bank's action plan, including specific milestones, completion date, and staff who are accountable for implementation

Open Categories

A concern is either "open" or "closed." Within the meaning of "open," a concern may be categorized several ways in formal written communication to the board and management and for reporting purposes:

Self-Identified

- A unresolved concern the bank initially discovered

New

- The concern was not previously identified

Pending Validation

- The OCC verified the bank implemented corrective action, but insufficient time has passed to demonstrate sustained performance
- OCC has not validated the sustainability of the corrective action

Past Due

- Effective/sustainable corrective action was not implemented within the expected timeframe

Repeat

- The same or a substantially similar concern has recurred

Escalated

- Accompanies communication to the bank in an MRA, the OCC addressed the uncorrected concern in an enforcement action

Questions?



HMDA and Fair Lending

**Midwest Financial Services Regulatory & Compliance Conference
August 20, 2016**

**Ken Markison
Vice President and Regulatory Counsel
Mortgage Bankers Association**

Introduction/Context

- Fair Lending has garnered considerable attention from the CFPB, the Department of Justice (DOJ) and HUD
- These agencies have made fair lending and enforcement a priority
- Such enforcement has relied heavily on analysis of HMDA data
- New and expanded HMDA data will be reported for 2018 that is likely to increase fair lending claims
- Fair Lending continues to be very high priority for companies and is likely to become even more so as implementation of the new HMDA rule approaches

Session

- Fair Lending and HMDA Background
- Use of HMDA Data in Fair Lending Enforcement
- What New Data Brings
- Questions

Legal Overview: Fair Lending Laws, CRA and HMDA

- Equal Credit Opportunity Act (ECOA) and Fair Housing Act (FHA) prohibit discrimination in, among other things, residential mortgage transactions on the basis of race, national origin and other basis.
- Community Reinvestment Act (CRA) incents depository institutions to help meet the credit needs of the communities in which they operate, including low- and moderate-income neighborhoods.
- Home Mortgage Disclosure Act (HMDA) requires most entities that make dwelling-secured loans to collect and report a series of data points, including applicant race and ethnicity, about each covered loan application they receive.
- Government agencies and others use HMDA data to compare lenders' service to protected classes to determine compliance with ECOA and FHA (among other matters).

HMDA History

Originally enacted in 1975, HMDA requires depository and non-depository institutions to collect, report, and disclose data about:

- Originations,
- Mortgage purchases, and
- Applications not resulting in mortgages.

The HMDA has three main purposes:

- To provide information to the public and communities on whether lenders are serving the housing needs of communities;
- To help public officials determine where to put public sector investments to attract private investment;
- To identify possible discriminatory lending patterns and enforce anti-discrimination statutes.

HMDA History (cont'd)

Traditionally:

Federal Reserve was responsible for overseeing and enforcing HMDA;
Regulations were codified as part of Reg. C; and
Federal Financial Institutions Examination Council (FFIEC) provided HMDA guidance – “Getting it Right”

Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), enacted in 2010:

Transferred regulatory authority and other functions to the Consumer Financial Protection Bureau (CFPB);
Significantly expanded the required information; and
Authorized the CFPB to require other, additional information.

New HMDA Rule Issued by the CFPB

On October 15, 2015, the CFPB issued a new HMDA rule which changes coverage in several different ways:

Adds an additional screen for institutions covered;

- Expands reporting coverage for non-depository institutions;
- Reduces coverage for depositories;

Increases transactions covered;

- Preapprovals – not applicable for multifamily;

Greatly increases data elements to report;

Clarifies and expands multifamily loan reporting – dwelling definition;

Applies CFPB balancing test to determine which data to disclose publicly;

Includes a rule implementation schedule; and

Requires a new reporting format.

HMDA Data Points – Overview

Overview

- New Rule = 48 Data Points
 - Current = 23
 - New = 25
- One data point may involve numerous data fields
- Appendix A (Form & Instructions for Completion of HMDA LAR) deleted & information moved to:
 - Commentary
 - 2018 File Specs document
 - Data Specs document
 - CFPB will provide in near future
- Information still not complete:
 - Will be dynamic learning/implementation process as new information is provided

Data Points – At a Glance

Current data points (both modified / unmodified data)

Legal Entity Identifier	Loan Purpose	Loan Amount	County	Sex	HOEPA Status
Universal Loan Identifier	Preapproval	Action Taken	Census Tract	Income	Lien Stat
Application Date	Construction Method	Action Taken Date	Ethnicity	Type of Purchaser	Reason for denial
Loan Type	Occupancy Type	State	Race	Rate Spread	

Data points identified in the Dodd-Frank Act

Property Address	Total Loan Costs, or Total Points and Fees	Non-Amortizing Features	Loan Term	Introductory Rate Period	Mortgage Loan Originator NMLSR Identifier
Age	Property Value	Application Channel	Credit Score	Prepayment Penalty Term	

Data Points – At a Glance

Data points added under CFPB's discretionary authority

Origination Charges	Debt-to-income Ratio	Total Units	Open Ended Line of Credit	Manufactured Home Secured Property Type	Automated Underwriting System
Discount Points	Combined Loan-to-Value Ratio	Multifamily Affordable Units	Business or Commercial Purpose	Manufactured Home Land Property Interest	Reverse Mortgage
Lender Credits	Interest Rate				

Key HMDA Implementation Dates

The key upcoming dates to be aware of are:

- **January – December 2016:** No new regulatory requirements;
- **January 1, 2017:** Low-volume depository institutions reporting;
- **January 1, 2018:** Institutional and transactional coverage; data collection, recording, reporting, and disclosure;
- **January 1, 2019:** Enforcement and amendments to reporting provisions; and
- **January 1, 2020:** Quarterly reporting provisions – large lenders

New Reporting Standards

- New reporting standards will use industry standard format, MISMO, in most cases.
- New reporting standards will be compatible with a tool, created by the CFPB, to permit edit checking of data prior to submission.
- CFPB will be central distributor of data within the framework of new reporting standards, and financial institutions will no longer be required to provide data to those requesting the data.

More Is Ahead

A. Resolution of privacy issues and determination of which data items are to be made public and in what form.

B. Resubmission requirements

- CFPB Request for Information – Comments March 14, 2016
- MBA commented and discussed the appropriate margin of errors that should and should not continue

C. Technical requirements for reporting

- Recent issuance by the CFPB
- More expected throughout the summer

Data Demands Review

Fair lending necessitates examinations of lender's HMDA data.

Interest of CFPB in peer comparisons demands review of peer data

Interagency Fair Lending Examination Procedures

Cases – Hudson City, Associated Bank, Eagle Bank

Future claims likely based on lack of business justification for particular underwriting approaches; data likely explanatory.

Fair Lending

- Primary legal theories of illegal lending discrimination:
 - Overt discrimination
 - Disparate treatment
 - Disparate impact
- Regulators and enforcement agencies **use HMDA data** to identify differences in treatment and impact

Disparate Impact

Supreme Court *Inclusive Communities* Ruling

- Upheld disparate impact under Fair Housing Act
 - In June 2015, Supreme Court explicitly ruled that Fair Housing Act allows lawsuits based on “disparate impact” 135 S.Ct. 2507 (2015)
- Requires “**robust causality**” between policy & resulting effect
- Court emphasized claim should be limited in scope, & is intended to eliminate policies that are “arbitrary, artificial and unnecessary”

HMDA Data – Common Claims

Pricing

- Minorities pay more than non-minorities for same product or service
- Results from LO use of overages, discretionary pricing, brokers w/ different pricing, and different rate sheets in same lending area

Underwriting

- Standards & overlays that have a discriminatory impact (e.g., FICO score restrictions, maternity leave, disability payments)

HMDA Data – More Common Claims

Steering & Reverse Redlining

- Minority consumers steered to less desirable loan products or terms
- Certain loan products offered only in predominately minority areas

Redlining

- Minorities have limited or no access to credit as compared to non-minorities
- Few branch offices or brokers in minority neighborhoods

HMDA Data – Redlining

Redlining Investigations

- Major priority
- Analysis focuses on comparative evidence of institution's treatment of areas with contrasting racial or national origin character
- Indicators of potential redlining include significant differences in **HMDA data**:
 - Numbers of applications received, withdrawn, approved but not accepted & closed for incompleteness
 - Loans originated in areas in institution's market with relatively high concentrations of minority group residents compared with areas of relatively low concentrations of minority group residents

HMDA Data – Redlining (cont'd)

- Government agencies use HMDA data to identify institutions that are underperforming their peers in minority area lending
 - Many different ways to use HMDA data to compare an institution's lending activity against that of its peers
 - Institution's inactivity in an underserved area where it is acknowledged that competitors are active supports inference of redlining
 - If the institution is as active as other institutions, it would appear that it is not avoiding business in the area
- Recent settlements illustrate ways government agencies analyze HMDA data for redlining

HMDA Data – Redlining (cont’d)

Hudson City (CFPB & DOJ, Sept. 2015):

- Alleged Hudson failed to locate its branches, LOs, mortgage brokers, advertising efforts, & CRA assessments in predominately African American & Hispanic areas
- “Analysis of Hudson City’s mortgage applications . . . as compared to its peers showed disparities in lending to majority-Black and Hispanic neighborhoods between Hudson City and its peers. These disparities show that there were applicants seeking mortgage loans in majority-Black and Hispanic areas”
 - **Peer example:** 0.1% of loan applications came from high-Black and Hispanic areas in the Camden MSA compared to 4.4% for the Bank’s peers (44 times as many)
- **Penalties:** \$5.5M fine; \$25M payment to loan subsidy program; spend \$1M on targeted advertising & outreach to affected neighborhoods; spend \$1M on local partnerships & education

HMDA Data – Redlining (cont'd)

Associated Bank (HUD, May 2015):

- Compared to other lenders, Bank's lending in majority-minority census tracts was lower than in other neighborhoods
 - Underserving neighborhoods with significant African-American or Hispanic populations, despite high demand
 - Disproportionately denying apps of African Americans or Hispanics

Eagle Bank & Trust (DOJ, Sept. 2015):

- Bank served credit needs of majority-white census tract residents in St. Louis MSA to a significantly greater extent than for majority-African-American census tract residents
- **Peer example:** 1.9% of Bank's applications were from majority African-American census tracts whereas 11.1% of comparable lenders' applications were from majority African-American census tracts (over 5 times as many)

HMDA Data Accuracy

- Significant CFPB focal point & now more important than ever for institutions to ensure HMDA LARs are as accurate as possible
- CFPB has communicated its data accuracy expectations through Bulletins, Supervisory Highlights, and enforcement actions
 - In October 2013, CFPB issued **CFPB Bulletin 2013-11**
 - Must develop & maintain HMDA compliance management system (CMS) designed to ensure the accuracy of HMDA data
 - Comprehensive policies, procedures & internal controls
 - Regular, internal pre-submission HMDA audits
 - Reviews of regulatory changes, training, corrective action
 - Responsible individual(s), board/management oversight
- Use **resubmission guidelines** to manage compliance & facilitate corrective action on self-identified errors

HMDA Data Accuracy (cont'd)

Enforcement Considerations

- In addition to requiring correction & resubmission, CFPB may also take public enforcement action
- In deciding whether to pursue enforcement, CFPB will consider:
 - Size of the LAR and error rate
 - Whether the error was self-identified and corrected
 - Previous error rates

Enforcement Actions

- Oct. 2013: CFPB issues Consent Orders against a bank (Washington Federal) & a non-bank (Mortgage Master) for HMDA data inaccuracies
- CFPB found that the institutions' "compliance systems were inadequate and that they had severely compromised mortgage lending data"
- Consent Orders required the institutions to pay civil penalties, correct and resubmit their HMDA LARs, and implement HMDA CMS

Consent Orders Are Guidance

- CFPB wants institutions to treat Consent Orders as compliance directives
- In March 9, 2016 speech, Director Cordray stated that:
 - ***“ . . . it would be ‘compliance malpractice’ for executives not to take careful bearings from the contents of these orders about how to comply with the law . . . ”***
 - ***“ . . . [the Bureau is] working toward a pattern of actions that conveys an intelligible direction to the marketplace, so as to create deterrence that can be readily understood and implemented.”***
 - ***“[Consent orders] provide detailed guidance for compliance officers across the marketplace about how they should regard similar practices at their own institutions.”***

Old v. New HMDA Data

Today: “The HMDA data alone cannot be used to determine whether a lender is complying with fair lending laws. They do not include many potential determinants of loan application and pricing decisions, such as the applicant’s credit history, the debt-to-income ratio, the loan-to-value ratio, and others.” (FFIEC Press Release 2015)

Tomorrow:

Credit score	Interest rate and rate spread
DTI ratio	Discount points
CLTV ratio	Origination fees
AUS results	Lender credits

Old v. New (cont'd)

- Location:
- Today Regulators focus on census tracts for CRA, and for traditional redlining analyses
- Tomorrow HMDA data will contain property address
- Today Regulators may focus on activity around branches and storefronts; they may require new retail locations to remedy redlining
- Tomorrow HMDA will show the NMLS ID number for the loan officer; and will show wholesale v. retail activity

Old v. New (cont'd)

- Meeting credit needs through loans and purchases
- Today Regulators count loans originated and purchased loans as part of a bank's CRA examination
- Tomorrow The ULI will allow regulators to determine whether banks are buying and selling loans
- Tomorrow HMDA will show the type of lending (and price) in bank's assessment area

Adjustable rate mortgages	Prepayment penalties
Negative amortization	Reverse mortgages

Summing Up - Takeaways

Challenges Ahead

New rule will bring major challenges to mortgage industry, including:

- Extensive implementation costs for systems and business process changes (specifically for new reporters) immediately on the heels of TRID; and
- Increased litigation risk.

HMDA has been a major source of fair lending claims in the past. The new data will allow the government and plaintiffs to analyze lender application and loan data, along with the risk factors used to evaluate the impact on protected classes.

While HMDA's purpose is to shed light on lending practices, data can be misused to present unfair claims, causing significant reputational harm.

HMDA – Effects

More available information = more scrutiny

- **Data integrity** is critical
- CFPB is **data-driven** agency
- Significant risk for not getting it right (e.g., CFPB enforcement actions, fair lending exposure)
- **Supervisory examinations**
 - Reviewed first & sets tone for the rest of the exam
- **Fair Lending/CRA monitoring device**
 - New data gives government and private litigants access to significantly more key data
 - Hard to do a reliable peer comparison on new data points for at least the first year
- **Compliance with other laws**
 - Regulator access to key data in electronic form for almost every loan file your company touches

HMDA – Takeaways

Key Takeaways

- Start implementation process **NOW**
 - **Self-assessment**
 - Current data points: identify revisions made; transactional coverage changes
 - New data points: What isn't clear? What additional guidance do you need?
 - What can you implement **before the effective date**?
- **Understand the requirements ASAP**
 - New reporters & those with newly covered or niche products even more urgent
 - Will be a dynamic learning/implementation process as new information is provided
- **Test** expected values for more than just HMDA accuracy – **think proactively**
 - **Begin identifying and correcting** potential concerns now
 - **Review, analyze, scrub, test, and review** again before submitting

MBA's Upcoming Training Forums and Workshops

Compliance Essentials HMDA Implementation Workshop

- This will be a full day workshop covering all aspects of the rule.
- Date: September 28, 2016; Location: Los Angeles, CA
- Link: <https://www.mba.org/store/events/classroom-course/hmda-implementation-workshop-los-angeles-ca>
- Attendees of today's call can receive a 5% discount at checkout by using the promo code **CMCMBA**

The MBA's forum and workshops include:

- An in-depth review of the rule itself;
- A drill down on the new data points to collect;
- A review of technology challenges the industry will be facing; and
- In-depth discussions of fair lending implications.

***Please contact Tricia Migliazzo at 202.557.2858 or tmigliazzo@mba.org for more information on this, other MBA resources on this and other topics, and for becoming a member of the MBA.**

MBA's HMDA Compliance Essential Resources

Compliance Essentials HMDA Resource Guide

Essential background about the rule, data points, and coverage

Sample policies and procedures

Checklists for implementation

Edited by Ken Markison and authored by professionals in the legal industry.

For more information:

- [https://www.mba.org/store/products/publications-and-guides/ce-home-mortgage-disclosure-act-\(hmda\)-resource-guide](https://www.mba.org/store/products/publications-and-guides/ce-home-mortgage-disclosure-act-(hmda)-resource-guide)
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Questions?



Keynote Address

Congressman Steven E. Stivers,
United States House of Representatives



UDAAP: The Gift That Keeps On Giving

David Stein, Of Counsel and Chair, Consumer
Financial Services Group, Bricker & Eckler



INCompliance

Breaking down UDAP

Unfair

Deceptive

Abusive

Act or

Practice

Setting the stage

- UDAAP and UDAP
- CFPB v. FTC v. States v. Prudential Regulators
- Everyone is watching

What was UDAAP's intended purpose?

- Traditionally, aimed at deceptive centering around advertising and marketing practices
- 2010 – Dodd-Frank Act introduced the issue of “abusive” conduct

UDAP and UDAAP

- FTC Act and Dodd-Frank both prohibit acts and practices that are:

Unfair
and/or
Deceptive

- Dodd-Frank added the word ABUSIVE

Simplicity

- "Unfair" can be applied to any act or practice where harm to consumers cannot be reasonably avoided and is not outweighed by countervailing benefits
- "Deceptive" can be applied to any act or practice that may mislead, or is likely to mislead, a consumer (based solely on a consumer's reasonable interpretation thereof)

Abusive conduct

- Institution materially interferes with the consumer's ability to understand a term or condition of a product or service.
- Institution takes unreasonable advantage of consumer's lack of understanding of the material risks, costs or conditions of a product or service.
- The inability of the consumer to protect his or her interests in selecting or using a consumer financial product or service.
- The reasonable reliance by the consumer on an institution to act in the consumer's interest.

What is missing?

INTENT

- Institutions can be liable for UDAAP whether or not they have intentionally acted to deceive, abuse or harm consumers
- Big departure from common law fraud and misrepresentation

Why is this the gift that keeps on giving?

- There is no conceivable limit to how any act or practice might not fall into the web of UDAAP
- Congress' broad language enables enforcement actions and civil claims in nearly any set of facts
- This is a huge gift to consumers

A gift for you: a redress for every grievance!



The fishing net

- Think of UDAAP as a net, thrown to catch *any* practice that consumers may feel is unfair or out of their control



It's a very big net



It can be used to catch many fish



Why is this important?

- UDAAP considerations must be applied to every business decision and process that will have any effect on consumers
- In other words: this is no longer about marketing – it is about **EVERYTHING**
- UDAAP should have its own “risk bucket” in any company’s risk management plan

Who should be worried? Everyone

- CFPB enforcement extends to all non-depository institutions and to those with more than \$10 billion in assets
- FTC enforcement extends to any institution engaged in interstate commerce, including depositories
- OCC, FDIC, state financial regulators, all have enforcement power and examination guidelines related to UDAAP

What should I be doing?

- UDAAP laws may require significant modifications to a financial institution's risk management program.
- If present compliance activities are only focused on front-end marketing, then it is time to re-think your institution's entire process.
- UDAAP regulations can apply to every stage and activity of the service/product life cycle.

Birth to grave

- Compliance activities should be involved in all stages of the product/service life cycle, from birth to grave.
- This includes:
 - Monitoring during product development
 - Understanding and then building controls on how products and services interact and affect consumers
 - Evaluating operations as well as marketing, advertising and sales processes
 - Overseeing the post-sales servicing and consumer interaction
- Compliance must serve as a second set of eyes, scrutinizing every action from a UDAAP perspective.

Consistency

- To ensure that product or service execution is compliant with UDAAP at every juncture, apply this test:

"Are all communications to the consumer consistent throughout the cycle?"

– For example:

- Do disclosures accurately describe the actual product or service?
- If a product has been modified or updated, have consumer disclosures and notices also been modified?
- Do the language in the sales script and actual sales actions match the consumer's expectations?
- Are customer service policies and practices consistent with disclosures and fair play?
- Are third-party vendors on the same page and have you taken steps to ensure that their activities, services or disclosures are also in compliance with UDAAP?

How to explain this to people who hate compliance people?

- The company must ensure that every product or service can pass the “mother test.”

"Would my mother understand this service or product; would she be able to make an informed decision?"

- Business units should come to understand that using one's "mother" as a standard of measurement is so that one can imagine themselves in the role of a person one would not want to see deceived.

Red flags

- Identify red flag areas that pose exceptional UDAAP risks.
 - For example, products sold on a commission basis or with any kind of incentive carry a higher risk of pushing the envelope and, therefore, external scrutiny.
 - Scrutinize sales scripts or monitor sales calls to ensure that no deceptive or misleading claim is made in the course of the transaction.
- Questions for compliance:
 - What are my company's high risk areas? What are our red flags?
 - Who is accountable to supervise and report on these risk areas?
- Other red flags: performance metrics tied only to speed of resolution; metrics tied only to profitability; areas of repeated complaint with no supervisor hierarchy

More than sales...

- Do not forget the backend processes. These are the post-sales interactions with customers that are expected in the servicing of the account. Any of these interactions could be subject to UDAAP violations:
 - Price
 - Product features being delivered
 - Poor service
 - Lack of attention/lack of follow-up
 - Misstatements or other errors by customer service representatives (often the result of faulty training)

Pay attention to the data

- Customer complaints are a necessary source of information for compliance managers.
- UDAAP violations can be uncovered by reviewing and tabulating the complaints received for each issue or high risk area.
- If one issue seems to be the target of many complaints, then it should be investigated for possible violations.
- Failure to do so will likely be considered a failure of the compliance management system.

Lessons from the CFPB

- The CFPB will ask:
 - “what the consumer understood and when they understood it”
- The **potential** for consumer harm is sufficient to find a violation has occurred
- UDAAP evaluation is part of every CFPB examination
 - Relatively few and minor instances of technical compliance deficiencies can lead to adverse UDAAP findings
 - UDAAP are more common in mortgage servicing exams than in mortgage origination exams (proof that marketing and sales practices are not the presumed focal point of deceptive activity review)
 - RESPA’s 2013 loan servicing and loss mitigation rules were intended to guard against unfairness – complex guidelines with significant consumer protections

What do regulators look for?

- Customer service logs
- Corrective action resulting from complaints
- Internal governance system to create clear expectations, education and accountability
- Areas of repeated conduct with no modification to systems
- Lack of analysis as to effectiveness of system

Where is UDAAAP developing?

- Spring 2016: CFPB set forth data security guidelines in a UDAAAP decision
- Stating that consumer's online experience would be "secure" was deemed to be a UDAAAP violation when an institution was hacked
- Consumers were in no position to protect themselves from a cyber event directed to the company

Failing to implement reasonable data security guidelines

- Weak or no adoption of P & P for data security
- Failing to identify reasonable foreseeable data security risks
- Lack of appropriate employee training in data security
- Lack of encryption technology
- All of these were UDAAP violations

In re: Dwolla, Inc. – CFPB 2016



INCompliance

Third party oversight

- Company sold consumer information to debt collector
- Debt collector used deceptive tactics
- Company did not perform due diligence on the third party, it merely sold consumer information
- Company was liable for UDAAP violations

In re: Eric Sancho dba Lead Publisher – CFPB
2016



INCompliance

Operations errors

- Discrepancy in system caused deposits to be credited incorrectly to consumer account
- Company knew of problem
- Failed to adequately explain to consumers the process of rectifying the discrepancies

In re: RBS Citizens Financial Group – CFPB
2015



INCompliance

Debt collection – more than FDCPA consumer protection

- False or unsubstantiated representations about debts owed
- Some attempts dealt with time-barred debts
- Threats of imminent litigation were not true
- Other violations of FDCPA
- All violations of UDAAP

In re: Portfolio Recovery Associates – CFPB
2015



INCompliance

Debt collection

- See CFPB Bulletin 2013-07: FDCPA standards are also clear prohibitions under UDAAP
- See CFPB Bulletin 2013-08: Illustrates debt collection activities that are often associated with collector misrepresentation; UDAAP principles

Loan modifications – close scrutiny

- Many cases of servicers failing to communicate clearly or accurately with consumers during the loan modification or foreclosure process
- Clear example: *In re: Residential Credit Solutions* – CFPB 2015

FTC – data security/UDAAP?

- Dental practice software – not marketed to consumers – sold to professionals
- Patient data was supposed to be encrypted, but was not protected with up to date processes
 - HIPAA violation
- Failure to take reasonable precautions meant that consumers were unprotected and harmed
- \$250,000 fine and 20 years in the “penalty box”

The courts

- “Unfair Conduct” need not be unscrupulous or unethical. *FTC v. Sperry & Hutchinson*, 405 U.S. 233 (1972)
- Third Circuit used that case to justify enforcement of UDAAP for a company’s failure to adequately provide consumers with appropriate data security. *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236 (3d Cir. 2016).
- Result: FTC (and CFPB) can regulate any unfair conduct. ***Scienter* is not an element of “unfair.”**

Negligence standard?

- Duty
- Breach of duty
- Causation
- Damages

With no requirement of intent, and no need to prove unethical conduct or unscrupulous behavior – what other actions could be a UDAAP violation?

Any consumer harm?

- Anytime a consumer conducts business with any institution, any minor error or broken process may cause consumer harm.
- Should UDAAP apply?
- What is fair or unfair? Where do you draw the line?

Customer service

- 2015 *Greentree* case – lack of customer service controls violated UDAAAP, RESPA and FDCPA
- Question: What role does compliance have in developing scripts, processes and training of loan servicing and default management staff?

UDAAP and disclosures: modern problems

- Disclosures used to be thought of as clear and focused documents sent to a consumer on a particular topic
- Online and digital marketing now means that disclosures need to accompany the fast and moving world of the internet

When and how to make a disclosure?

- Any time a statement *can* be interpreted in a confusing manner, it must be accompanied by an explanation (disclosure)
- Any disclosure must be “clear and conspicuous”
- Failure = UDAAP violation

FTC's guideline

- Clear and conspicuous means the disclosure is:
 1. **Prominent** – *the consumer is likely to notice it*
 2. **Presented in an easy and non-contradictory manner** (*from which the consumer will not be distracted*)
 3. **Placement** is *where a consumer would ordinarily expect to find it*
 4. **Proximity** of disclosure to the statement is *close*

How to manage digital compliance?

- Close examination and continued monitoring of representations and data associated with digital advertisements
- Document an understanding of what customers may see, feel and choose to examine on a web page
- Evaluate the effectiveness of online disclosures through objective criteria

Hot advertising issues

- Native advertisements (look like an article)
- Hyperlinks
- Disclosures that are hard to find, locate or take a consumer elsewhere

Interplay with other legal guidelines

- Truth in Lending Act
 - Loan terms
 - Adequate Disclosures
 - TRID
- RESPA
 - Origination
 - Servicing
 - TRID
- GLBA
- FDCPA
 - Regulation N – MAP Rule
- Others?

MAP Rule

- 12 C.F.R. §1014
- CFPB and FTC are closely watching
- Comprehensive list of forbidden practices
- List is not exhaustive

Question: Who is accountable for MAP compliance in your organization?

What should you be doing now?

- Understand application of UDAAP to your business group
- Define each product, service and practice in terms of application and potential for harm to a consumer
- Break down marketing/advertising, sales process, provision of product/service and create UDAAP check points
- Create accountability within business unit
- Execute a plan for oversight and control

What can make a difference?

- Functional compliance management system
- Documented history of preventing or correcting problem areas
- Internal governance
- Training and education

Questions?

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Fair Lending Case Update & Examination Trends

Jackie Mallett, Of Counsel, Bricker & Eckler



INCompliance



The quest for equality

“We have come some of the way, not near all of it. There is much yet to do.”

*President Lyndon B. Johnson, upon signing the
Fair Housing Act, April 11, 1968*



INCompliance

The Dodd-Frank charge

- CFPB's Office of Fair Lending and Equal Opportunity
- Oversight and enforcement of fair lending laws
- *“ensure the fair, equitable, and nondiscriminatory access to credit for both individuals and communities”*

Priorities areas

- Mortgage lending
- Auto lending
- Credit card market
- Small business lending

*Fair Lending Report of the Consumer Financial
Protection Bureau, April 2016*



INCompliance

Areas of concern: mortgage lending

- Redlining
- Underwriting
- Pricing
- HMDA data integrity

Areas of concern: direct auto lending

- Credit approvals and denials
- Interest rates quoted by lender to dealer (buy rates)
- Discretionary markup or adjustments to buy rates

Fair lending laws

- Equal Credit Opportunity Act
- Fair Housing Act
- Community Reinvestment Act
- Home Mortgage Disclosure Act
- Ohio anti-discrimination law – R.C. 4112.021

Equal Credit Opportunity Act

- Prohibits discrimination in credit transactions based on:
 - Race or color
 - National origin
 - Religion
 - Sex
 - Marital status
 - Age
 - Receipt of income from a public assistance program
 - Exercise of any right under the Consumer Credit Protection Act

Fair Housing Act

- Prohibits discrimination in residential real estate-related transactions based on:
 - Race or color
 - National origin
 - Religion
 - Sex
 - Familial status
 - Handicap

The enforcers



cfpb



Office of the
Comptroller of the Currency



INCompliance

Recent CFPB and DOJ cases

- Hudson City Savings Bank
- Provident Funding Associates
- Fifth Third Bank
- American Honda Finance Corporation
- Toyota Motor Credit Corporation
- BancorpSouth Bank

Hudson City Savings Bank

- Complaint alleged violations of ECOA and FHA
- Engaged in redlining
- Discouraged applicants in majority-black-and-Hispanic neighborhoods in 3 metropolitan statistical areas
 - NYC, Long Island, Northern NJ
 - Philadelphia, Camden, Wilmington
 - Bridgeport, Stamford, Norwalk CT

Hudson City Savings Bank

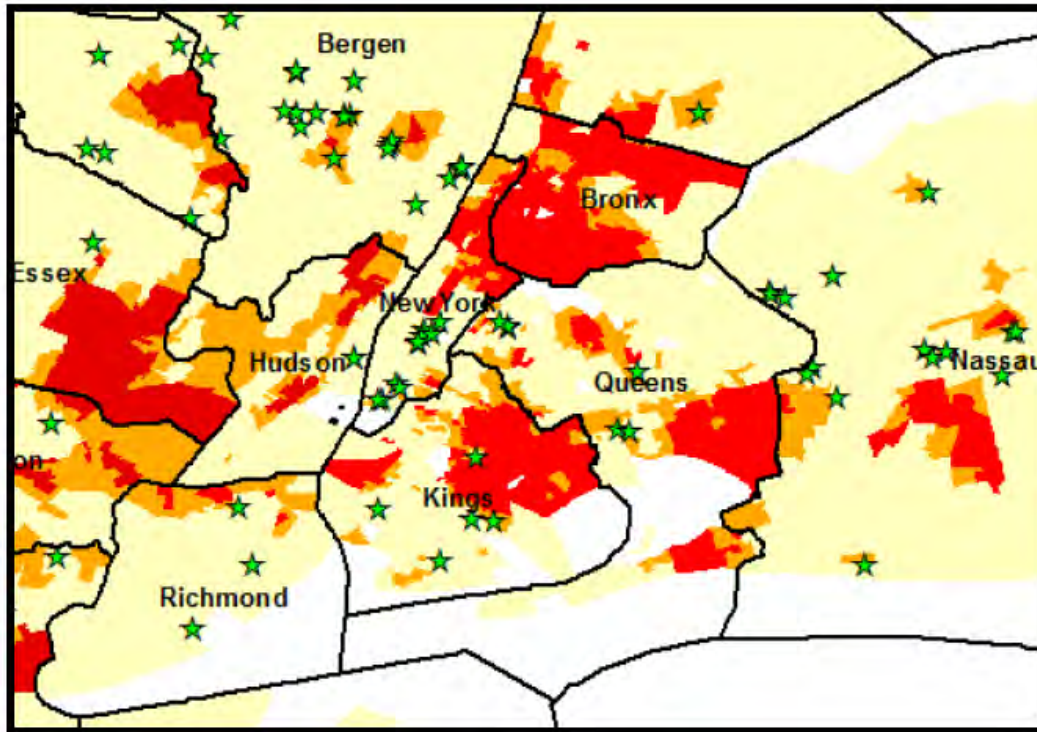
- Discouraged majority-black-and-Hispanic consumers by:
 - Placing branches and loan officers outside of majority-black-and-Hispanic neighborhoods
 - Selecting mortgage brokers located outside of those neighborhoods
 - Advertising outside of those neighborhoods

Hudson City Savings Bank

- Avoided locating branches and loan officers in majority-black-and-Hispanic communities
- Avoided using mortgage brokers in majority-black-and-Hispanic communities
- Excluded majority-black-and-Hispanic communities from its marketing
- Excluded majority-black-and-Hispanic communities from its CRA assessment areas

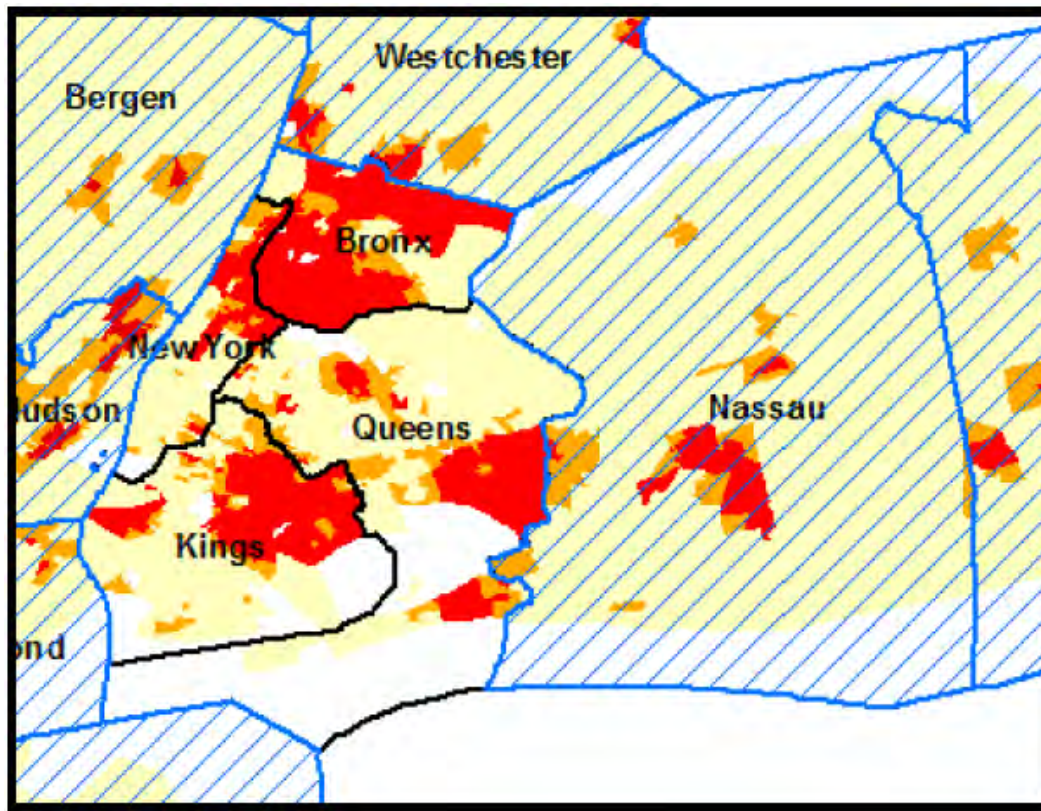
Hudson City Savings Bank

- New branch locations



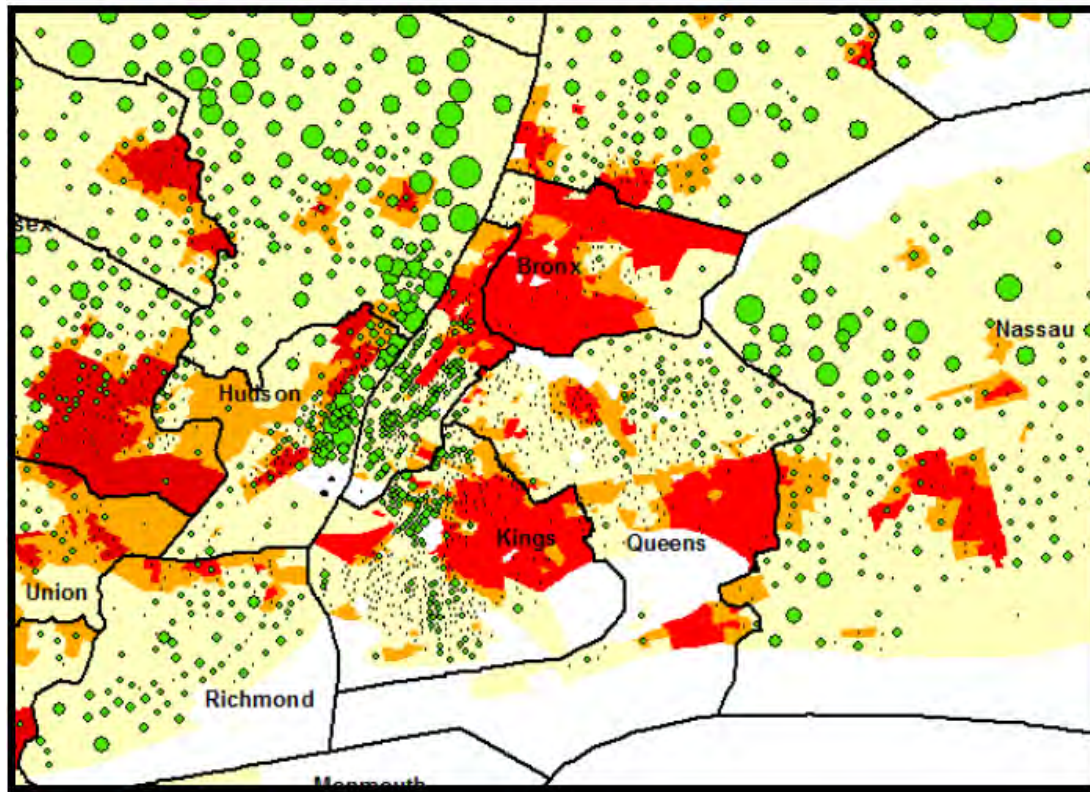
Hudson City Savings Bank

- MSA CRA assessment area



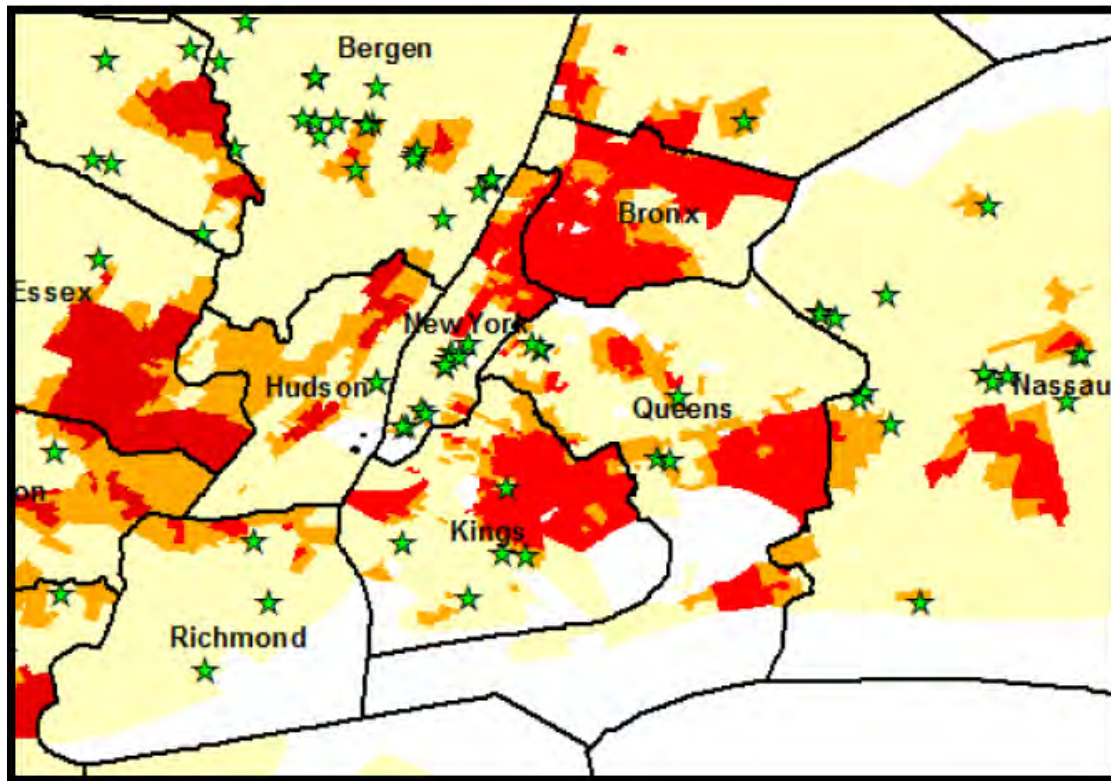
Hudson City Saving Bank

- Loan application volume



Hudson City Savings Bank

- Mortgage broker locations



Hudson City Savings Bank

- Compared Hudson City's mortgage applications in the 3 MSAs to its peers
- One sentence fair lending policy
- No fair lending policies or procedures for compliance monitoring

Fifth Third Bank

- Complaint alleged violations of ECOA
- Permitted car dealers to charge higher rates to consumers on the basis of race and national origin
- Dealers were allowed incredible discretion to include markups in interest rates on car loans
- Markups not based on creditworthiness or other objective criteria related to borrower risk
- Allowed up to a 2.5% markup

Auto lending

- Determined discrimination by using a proxy methodology that combines geography-based and name-based probabilities
- Based on public data from the US Census Bureau
- Used Bayesian Improved Surname Geocoding method
 - Difficulties identifying and compensating harmed consumers using this model because it uses probabilities

Effects of discretion

- African-American borrowers were charged approximately 35 basis points more than non-Hispanic whites
- Hispanic borrowers were charged approximately 36 basis points more than non-Hispanic whites
- The bank's policy and practice of allowing dealer markups to occur based on race and national origin constituted discrimination

Misery loves company

- American Honda Finance Corporation
- Toyota Motor Credit Corporation

Provident Funding Associates

- Complaint alleged violations of FHA and ECOA
- Charged African-American and Hispanic borrowers higher total broker fees on wholesale mortgage loans

Provident Funding Associates

- Paid brokers a YSP when the interest rate exceeded the risk-based par rate
- Brokers had unguided discretion to set interest rate above par rate
- Unguided discretion in setting fees charged to borrowers
- Total broker fees capped at 3.5% of total loan amount

Provident Funding Associates

- African-American borrowers paid on average total broker fees 38.6 basis points more than white borrowers
- Hispanic borrowers paid on average total broker fees 25.5 basis points higher than white borrowers

Provident lessons

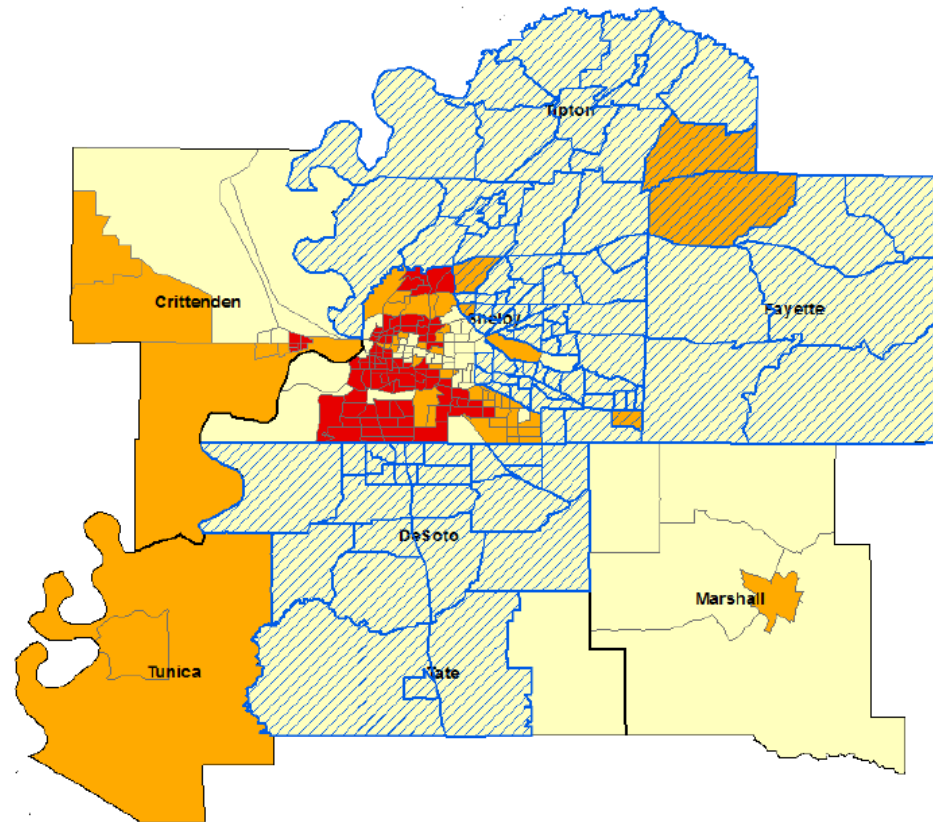
- No subjective and unguided discretion to brokers for setting compensation
- Require brokers to justify and document how they charge total broker fees through a broker agreement
- Use HMDA data to monitor and correct disparities

BancorpSouth Bank

- Alleged violations of FHA and ECOA
- Engaged in redlining
- Rejected African-American applications at higher rates
- Charged higher fees to African-Americans
- Policy and procedure to send denials out sooner for African-Americans

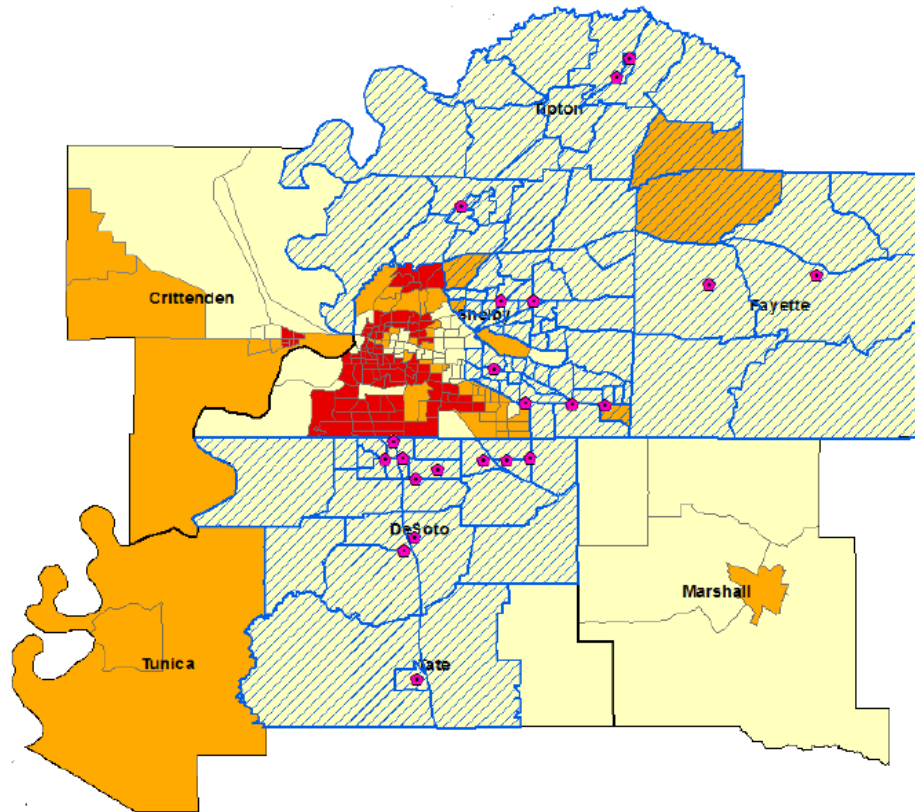
BancorpSouth Bank

- CRA assessment area



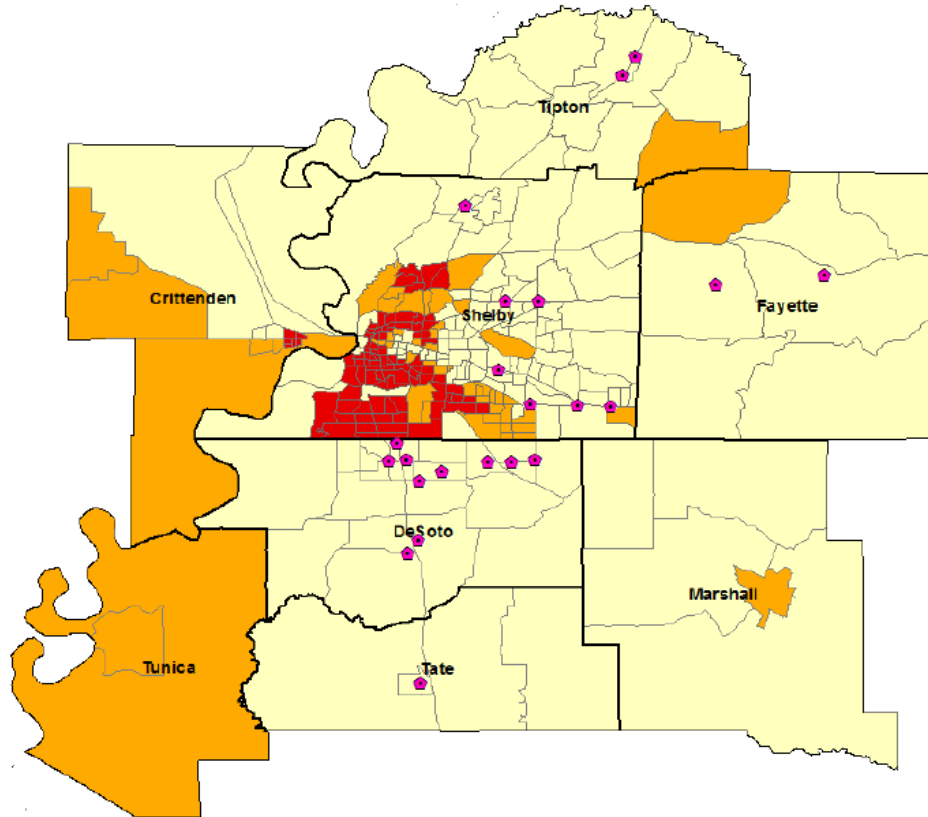
BancorpSouth Bank

- CRA assessment area and branches



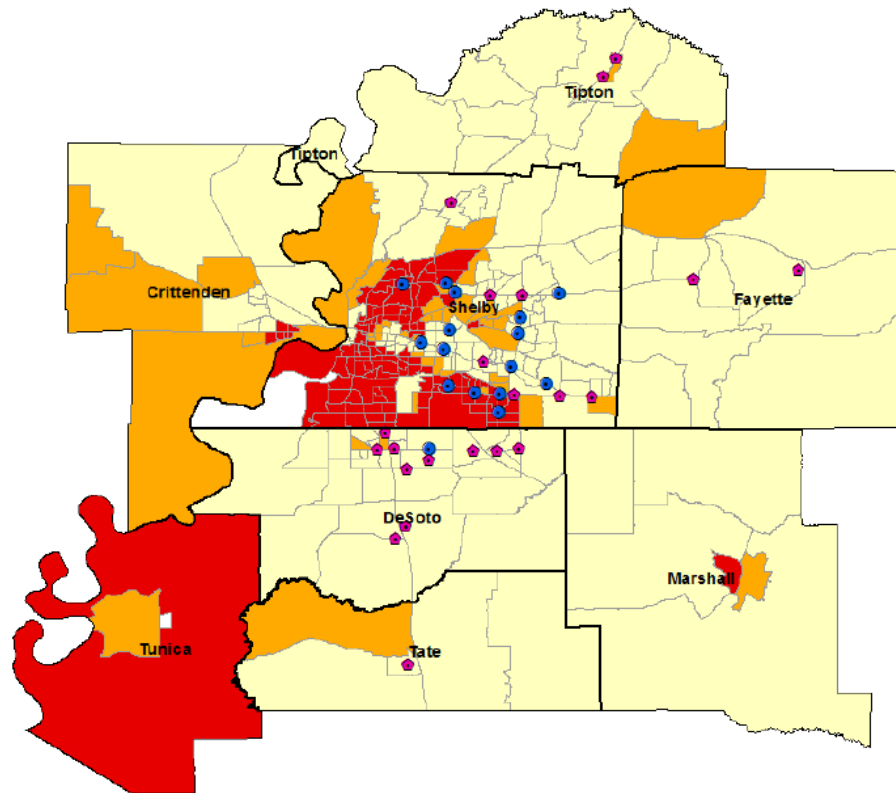
BancorpSouth Bank

- Branch locations



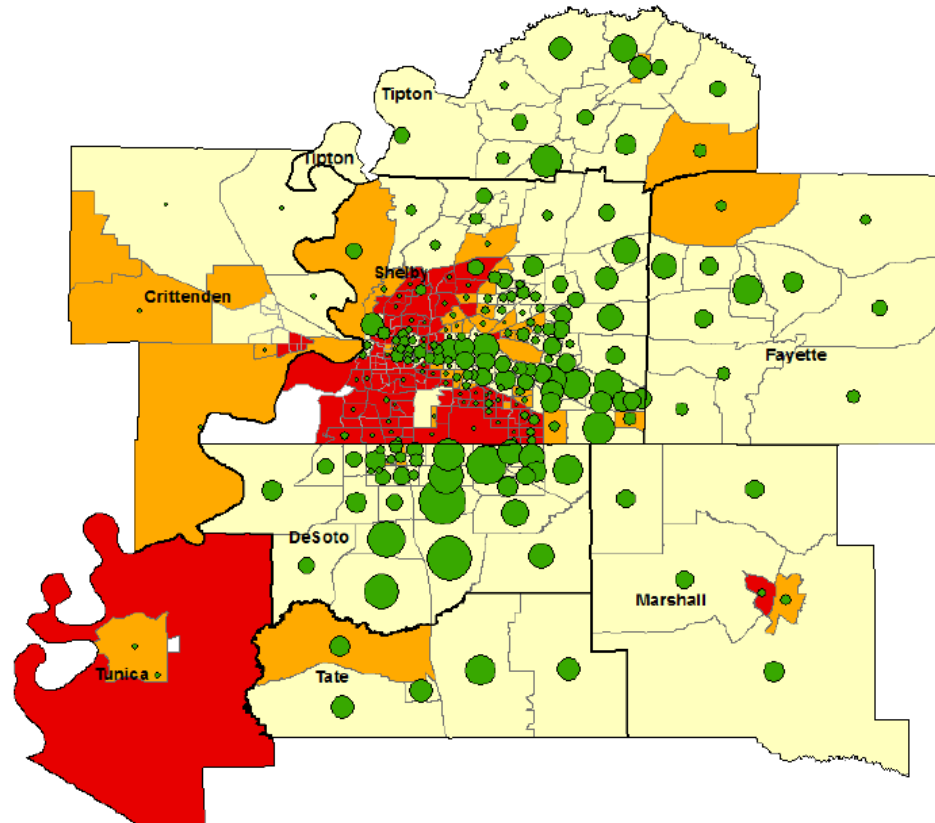
BankcorpSouth Bank

- Branch locations and viable branches



BankcorpSouth Bank

- Application volume



BancorpSouth Bank

- Excluded majority-minority neighborhoods from its CRA area
- Loan policy provided that CRA assessment area was the primary trade area – other trade areas were “undesirable”
- Amended CRA area did not result in new branches in minority neighborhoods
- Amended CRA did not increase applications from minority neighborhoods, which were low compared to peers

BancorpSouth Bank

- *“Plaintiffs do not have authority to enforce the CRA and do not purport to do so here.”*
- Evidence of discrimination in violation of ECOA and FHA
- Prudential regulators

Database Search

CRA Database Search: Ratings and Performance Evaluations

Search national bank CRA ratings and performance evaluations and get lists of banks examined for CRA compliance.



INCompliance

BancorpSouth Bank

- Concentrated branch locations
- 22 branches in the Memphis MSA located outside of majority-minority neighborhoods
- The bank obtained market analysis from 2 consultants who both recommended branch expansion in Memphis MSA
- Knew minority applications were low compared to peers, but opened only 1 branch in minority neighborhood – after CFPB action started

BancorpSouth Bank

- Few applications from majority-minority neighborhoods from 2011-2013
- 9% of applications came from majority-minority neighborhoods – 51.6% of the MSA's tracts are majority-minority
- 91% of applications from majority-white neighborhoods – 48.4% of the MSA's tracts are majority-white

BancorpSouth Bank

- Bank granted employees substantial discretion to decide whether to approve a mortgage loan application
- Bank's General Loan Policy provided minimal guidance and was silent on how an applicant's credit score should affect underwriting decisions
- Statistical regression analysis showed African-Americans denied loans at a rate 9.5% higher than white applicants

BancorpSouth Bank

- 2011-2013 denial rates
 - 1st lien mortgage loans: 11.9% higher denial rate
 - 2nd lien mortgage loans: 12.5% higher denial rate
 - Unsecured home improvement loans: 12.1% higher denial rate
- Concluded: 300 African-American applicants were denied mortgage loans based on race

BancorpSouth Bank

- Bank granted unfettered discretion to loan officer to set mortgage loan pricing
- *“Loan Pricing is not an exact science, and it is intended that Loan Officers have some flexibility in the pricing of credits.”*
- No process or documentation of factors LOs used to set price

BancorpSouth Bank

- Statistical regression analysis for 2011-2013 loans showed:
 - 1st lien mortgage loans: 30.3 bps higher than APRs of white borrowers
 - 2nd lien mortgage loans: 63.9 bps higher than APRs of white borrowers
- On average, African-Americans paid \$360 more than white borrowers for each year of loan

BancorpSouth Bank

- Discriminatory denial policy
- Minorities turned down in 21 days
- White applicants not subject to shorter review period

BancorpSouth Bank

- Discrimination in application inquiries
- Secret shopper using matched-pair tests
- Quoted high fees to African-American tester
- Lower purchase price for African-American despite white tester having lower down payment and lower income
- Advising white tester on locations
 - “nice, quiet neighborhood”
 - “really good school district”
 - “properties hold their value really well”

Secret shoppers

- Used for first time by CFPB in BancorpSouth
- Referred to as “matched-pair tests”
- Sounds like entrapment, but legal
- Goal is to see whether a lender treats one potential borrower different from another

Secret shoppers

- Looking for the following differences in minority v. majority-white applicants:
 - Higher pricing offered
 - Higher FICO score needed
 - Closing and payment estimate not provided
 - Higher down payment required
 - Additional junk fees charged
 - Employee's overall treatment and demeanor toward applicants

Lessons

- Develop a written fair lending policy
- Compare yourself to your peers
- Limit discretion in pricing and underwriting
- Establish pricing and underwriting guidelines
- Limit exceptions and document exceptions when granted
- Train employees

What does HMDA have to do with fair lending?

- Ethnicity
- Race
- Gender

X. INFORMATION FOR GOVERNMENT MONITORING PURPOSES			
<p>The following information is requested by the Federal Government for certain types of loans related to a dwelling in order to monitor the lender's compliance with equal credit opportunity, fair housing and home mortgage disclosure laws. You are not required to furnish this information, but are encouraged to do so. The law provides that a lender may not discriminate either on the basis of this information, or on whether you choose to furnish it. If you furnish the information, please provide both ethnicity and race. For race, you may check more than one designation. If you do not furnish ethnicity, race, or sex, under Federal regulations, this lender is required to note the information on the basis of visual observation and surname if you have made this application in person. If you do not wish to furnish the information, please check the box below. (Lender must review the above material to assure that the disclosures satisfy all requirements to which the lender is subject under applicable state law for the particular type of loan applied for.)</p>			
BORROWER <input type="checkbox"/> I do not wish to furnish this information		CO-BORROWER <input type="checkbox"/> I do not wish to furnish this information	
Ethnicity: <input type="checkbox"/> Hispanic or Latino <input type="checkbox"/> Not Hispanic or Latino		Ethnicity: <input type="checkbox"/> Hispanic or Latino <input type="checkbox"/> Not Hispanic or Latino	
Race: <input type="checkbox"/> American Indian or Alaska Native <input type="checkbox"/> Native Hawaiian or Other Pacific Islander		Race: <input type="checkbox"/> American Indian or Alaska Native <input type="checkbox"/> Native Hawaiian or Other Pacific Islander	
Race: <input type="checkbox"/> Asian <input type="checkbox"/> Black or African American <input type="checkbox"/> White		Race: <input type="checkbox"/> Asian <input type="checkbox"/> Black or African American <input type="checkbox"/> White	
Sex: <input type="checkbox"/> Female <input type="checkbox"/> Male		Sex: <input type="checkbox"/> Female <input type="checkbox"/> Male	
To be Completed by Interviewer This application was taken by: <input type="checkbox"/> Face-to-face interview <input type="checkbox"/> Mail <input type="checkbox"/> Telephone <input type="checkbox"/> Internet	Interviewer's Name (print or type)		Name and Address of Interviewer's Employer
	Interviewer's Signature Date		
	Interviewer's Phone Number (incl. area code)		

How to make the data fair

- Eliminate discretionary pricing
- Eliminate/reduce “exceptions”
- Automate underwriting and eliminate or document exceptions
- Be aware
- Be timely

Data!

- HMDA info turns into data
- Data is uploaded to the government
- Available for public inspection
- The data tells the story, good or bad
 - Pricing/APR
 - Denial
 - Withdrawals
 - Approval rates

The consequences

- Hudson City Savings Bank
 - \$25 million direct loan subsidies
 - \$2.25 million community outreach programs
 - \$5.5 million penalty
- Provident Funding Associates
 - \$9 million damages to harmed borrowers
- BancorpSouth Bank
 - \$4 million direct loan subsidies
 - \$800,000 community outreach program
 - \$2.78 million to harmed consumers
 - \$3 million penalty

The consequences

- Fifth Third Bank
 - \$18 million to harmed borrowers
- American Honda Finance Corporation
 - \$24 million to harmed borrowers
- Toyota Motor Credit Corporation
 - \$21.9 million to harmed borrowers

Fair lending compliance management system

- An up-to-date fair lending policy statement
- Regular fair lending training for all employees, officers and board members
- Ongoing monitoring for compliance with fair lending policies and procedures, and corrective action
- Ongoing monitoring for compliance with other policies and procedures intended to reduce fair lending risk, i.e. loan officer discretion, and corrective action

Fair lending compliance management system

- Review of lending policies for potential fair lending violations, including potential disparate impact
- Regular statistical analysis of loan-level data for potential disparities on a prohibited basis in pricing, underwriting and other aspects of credit transaction
- Regular assessment of marketing of loan products
- Meaningful oversight of fair lending compliance by management and board of directors

CFPB advice

“...the lower the quality of an institution’s fair lending CMS, the higher the institution’s fair lending risk.”

Fair lending report of the Consumer Financial Protection Bureau, April 2014



INCompliance

Top OMBA violations

- Not providing state-specific disclosures
 - MLODS and MLODS Addendum
 - Ohio Homeowners Protection Act disclosure and acknowledgment
- Tip: Notice of Escrow of Taxes not necessary if loan estimate is timely provided
- Special account
- Advertising if loan originators create their own ads on Facebook, LinkedIn, etc.
- Failing to display certificates and licenses

Questions?

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Cybersecurity Update



Midwest Financial Services Regulatory & Compliance Conference

August 19, 2016

Chris Debo, CISA

Senior Manager, Technology Advisors

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Partner, Chair, Cybersecurity Practice



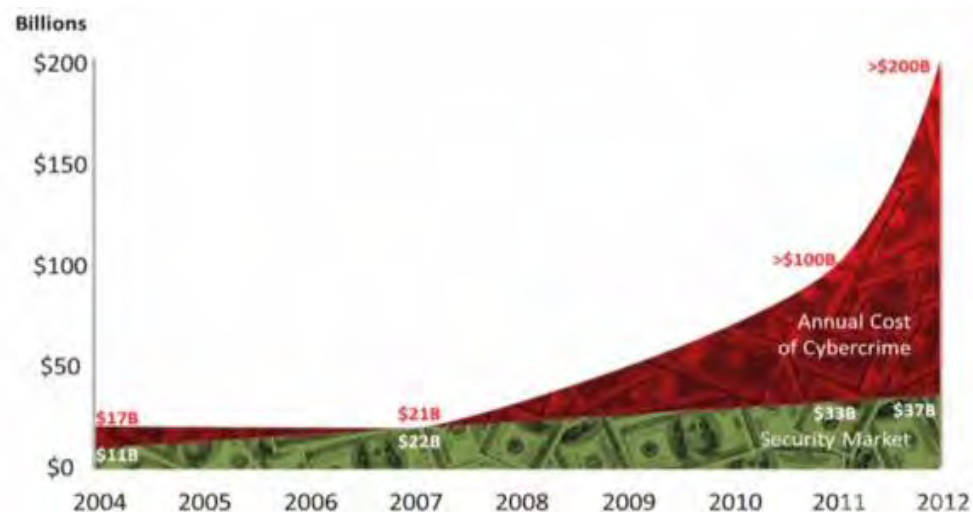
Big Thinking. Personal Focus.

Learning Objectives

1. Cybersecurity – 2016 Update
2. Explore Breach Anatomy
3. Understand Social Engineering Risks
4. Protecting Your Organization

Cyber Crime Proliferation

- Cyber crime now costs the global economy \$445 billion a year
 - Source: Center for Strategic and International Studies
- **The cyber crime black market is now more profitable than the global drug trade**
 - Source: RAND Institute
- Cyber crime costs are now drastically eclipsing cybersecurity costs
 - Source: OECD



Cyber Crime is Global



Source: <http://map.ipviking.com>

What Cybercriminals Steal – And Why

- Personally Identifiable Information (PII)
 - Identity theft
- Bank Credentials (e.g., online banking, PIN numbers)
 - Theft of funds
- Debit/credit card data
 - Access to credit, sale of data, identity theft
- Email addresses
 - Sale of data, phishing operations
- Intellectual property, data, other content
 - Blackmail, sale of data, avoid paying IP royalties, sabotage

Types of Cyber Attacks

- Two basic types:
 - Targeted
 - Opportunistic
- Targeted attacks up 91% (source: ISACA)
- Opportunistic attacks still account for 75% (source: Verizon)

- Published Every Year Since 2008
- 50 Global Organizations
- 82 Countries Represented
- Over 100,000 Security Incidents
- 3,141 Confirmed Breaches (up 130% since 2014)



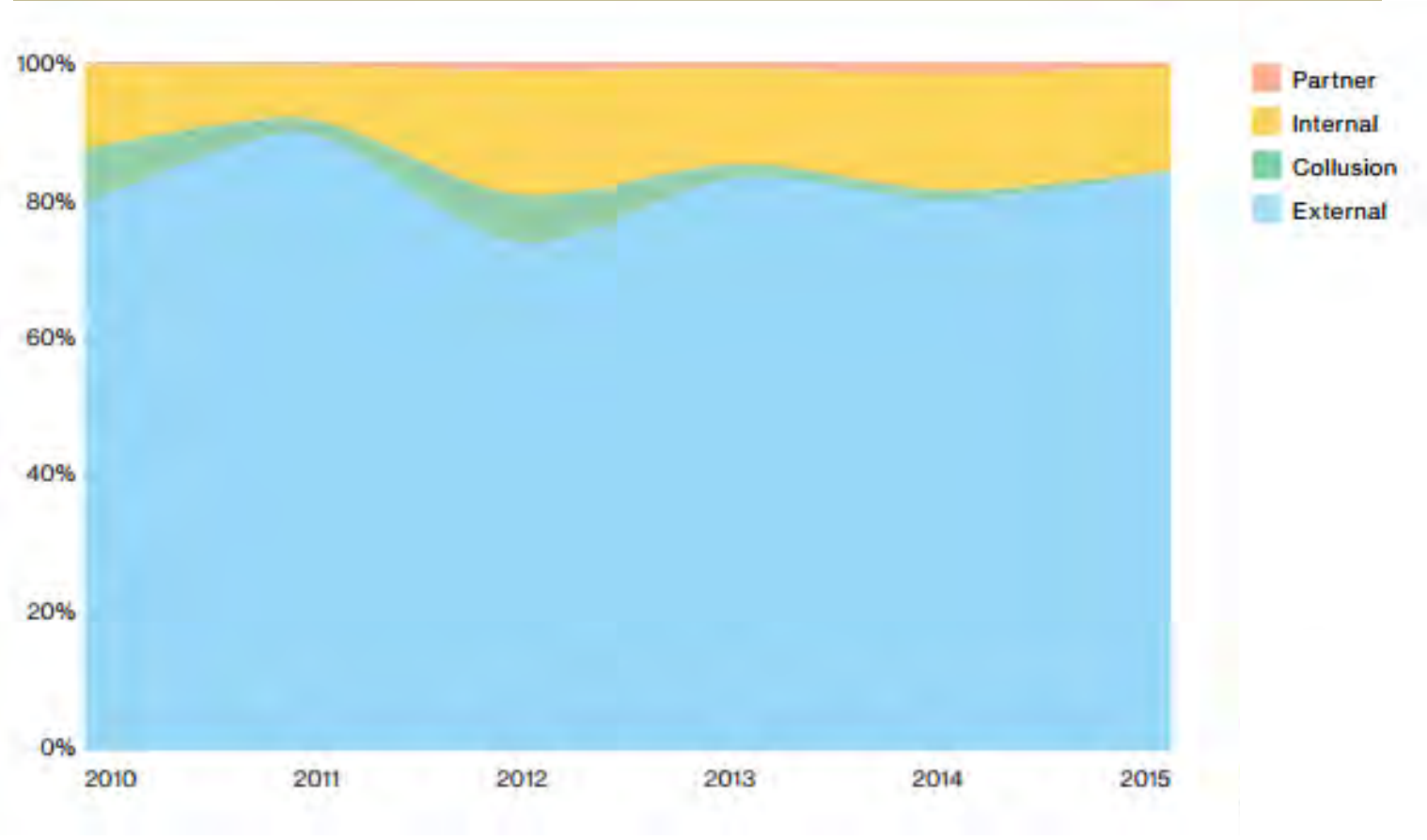
Breaches vs. Incidents

- **Incident:** A security event that compromises the integrity, confidentiality or availability of an information asset.
- **Breach:** An incident that results in the confirmed disclosure of data to an unauthorized party.

Verizon Data Breach Report – Takeaways

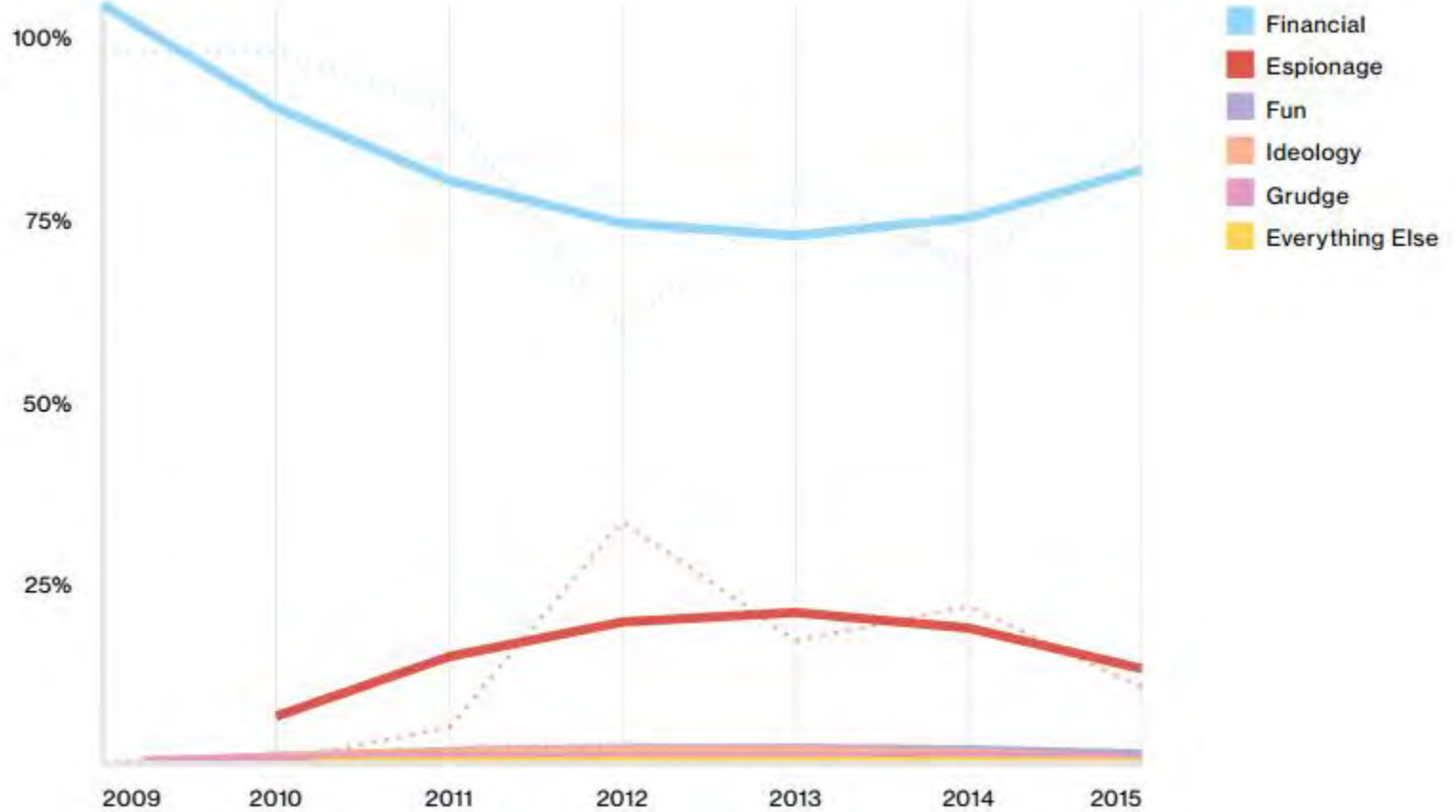
- Employees at core of most attacks
 - **Stolen credentials primary cause 80% of time**
 - 78% of intrusions “relatively easy”
- Social engineering most common attack vector
- 92% of breaches came from outside the organization
 - 55% from organized crime
 - 19% affiliated with other state agencies
- 89% of breaches driven by financial or espionage motive
- 69% discovered by external parties
- 66% took months or more to discover

Percent of Breaches by Threat Actor Over Time



Source: Verizon Data Breach Report

Percent of Breaches By Motive Over Time



Source: Verizon Data Breach Report

Confirmed Incidents by Industry

Industry	Total	Small	Large	Unknown
Accommodation (72)	362	140	79	143
Administrative (56)	44	6	3	35
Agriculture (11)	4	1	0	3
Construction (23)	9	0	4	5
Educational (61)	254	16	29	209
Entertainment (71)	2,707	18	1	2,688
Finance (52)	1,368	29	131	1,208
Healthcare (62)	166	21	25	120
Information (51)	1,028	18	38	972
Management (55)	1	0	1	0
Manufacturing (31-33)	171	7	61	103
Mining (21)	11	1	7	3
Other Services (81)	17	5	3	9
Professional (54)	916	24	9	883
Public (92)	47,237	6	46,973	258
Real Estate (53)	11	3	4	4
Retail (44-45)	370	109	23	238
Trade (42)	15	3	7	5
Transportation (48-49)	31	1	6	24
Utilities (22)	24	0	3	21
Unknown	9,453	113	1	9,339
Total	64,199	521	47,408	16,270

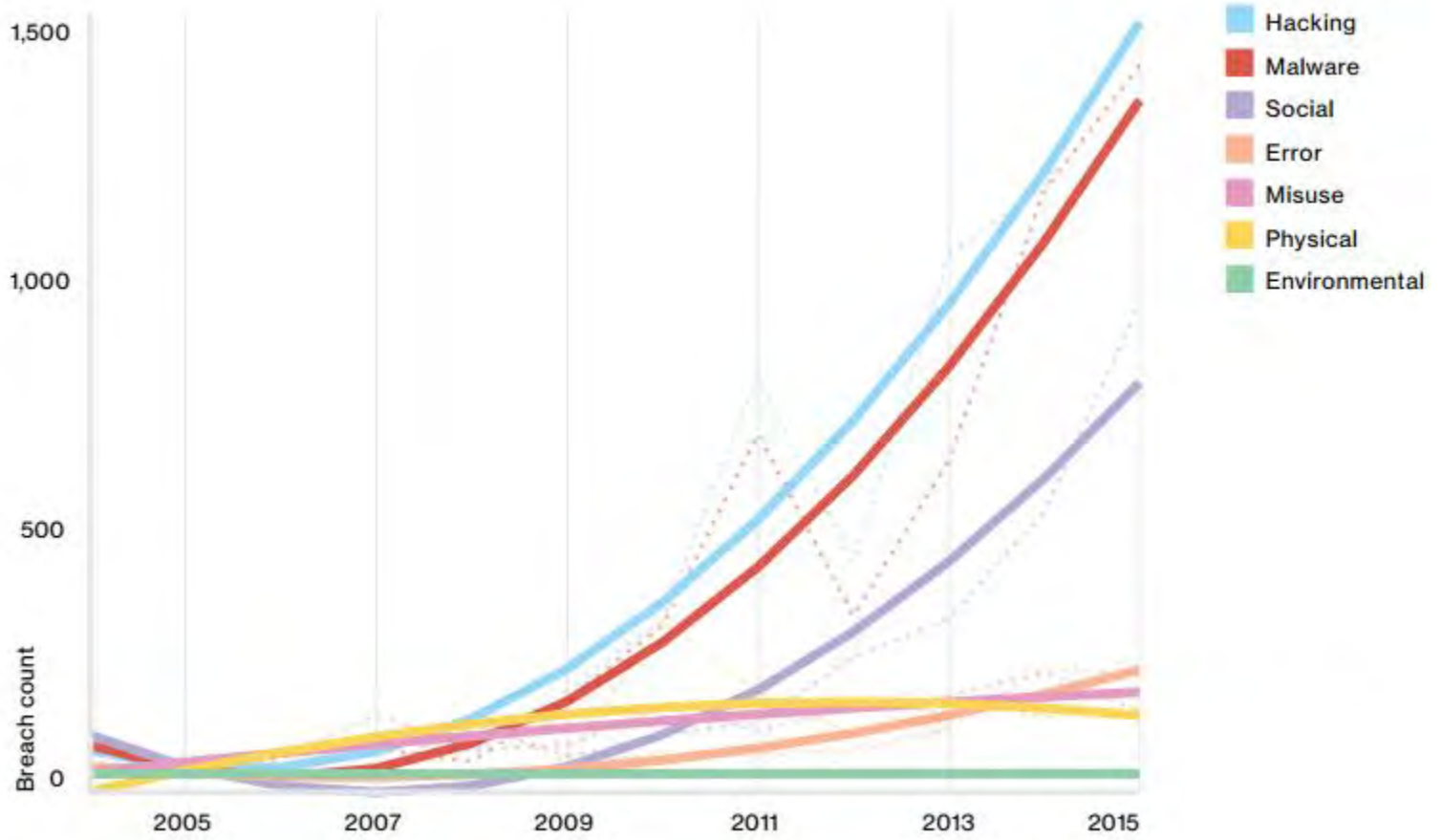
Source: Verizon Data
Breach Report

Confirmed Breaches by Industry

Industry	Total	Small	Large	Unknown
Accommodation (72)	282	136	10	136
Administrative (56)	18	6	2	10
Agriculture (11)	1	0	0	1
Construction (23)	4	0	1	3
Educational (61)	29	3	8	18
Entertainment (71)	38	18	1	19
Finance (52)	795	14	94	687
Healthcare (62)	115	18	20	77
Information (51)	194	12	12	170
Management (55)	0	0	0	0
Manufacturing (31-33)	37	5	11	21
Mining (21)	7	0	6	1
Other Services (81)	11	5	2	4
Professional (54)	53	10	4	39
Public (92)	193	4	122	67
Real Estate (53)	5	3	0	2
Retail (44-45)	182	101	14	67
Trade (42)	4	2	2	0
Transportation (48-49)	15	1	3	11
Utilities (22)	7	0	0	7
Unknown	270	109	0	161
Total	2,260	447	312	1501

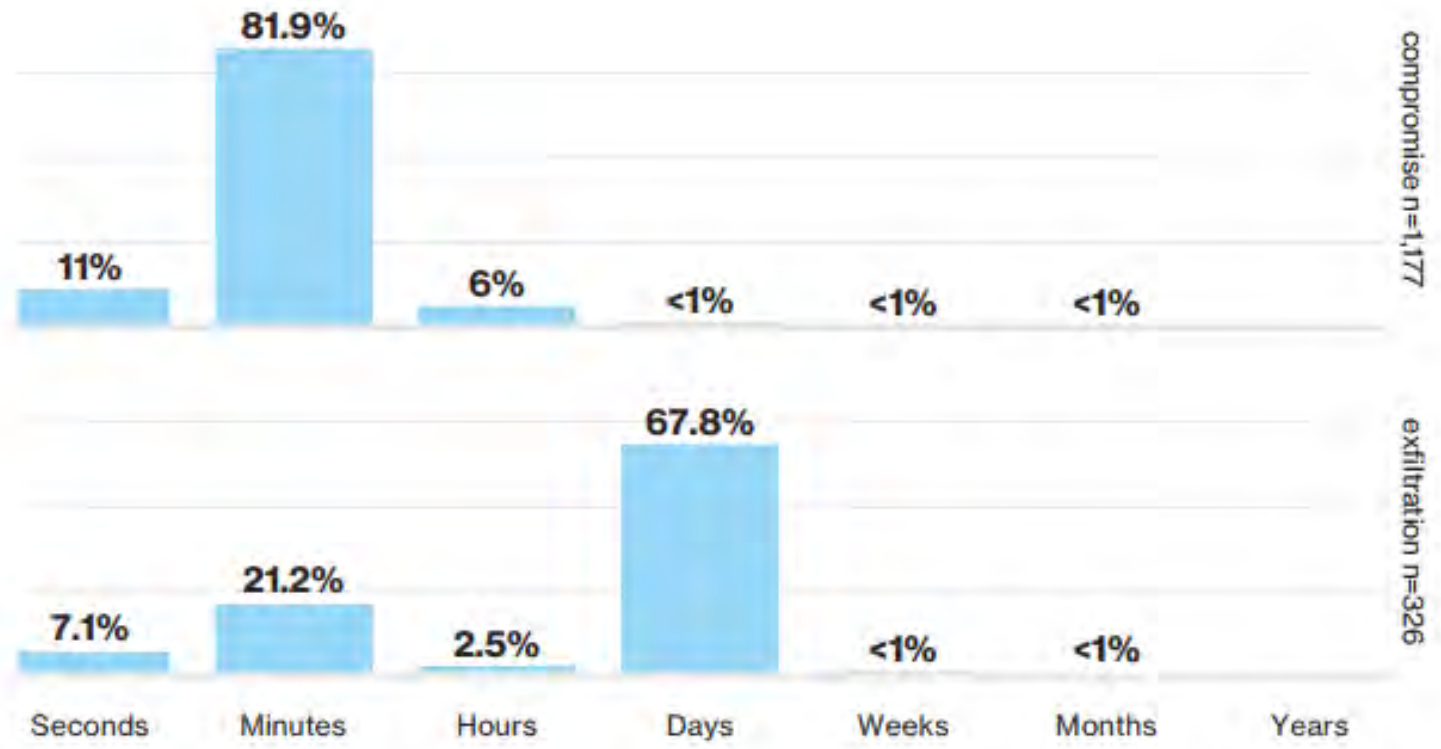
Source: Verizon Data
Breach Report

Threat Action



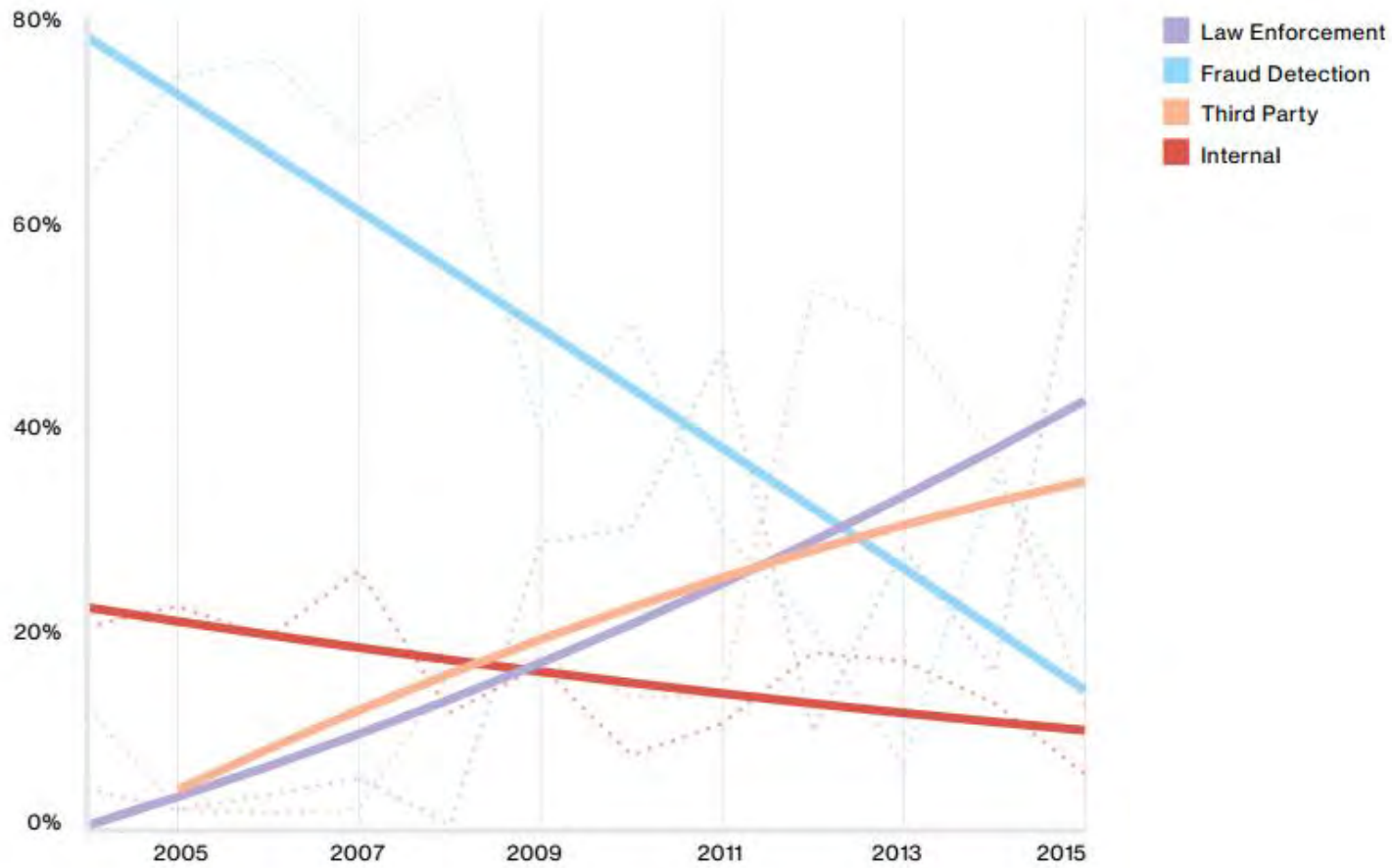
Source: Verizon Data Breach Report

Time to Compromise vs. Exfiltration



Source: Verizon Data Breach Report

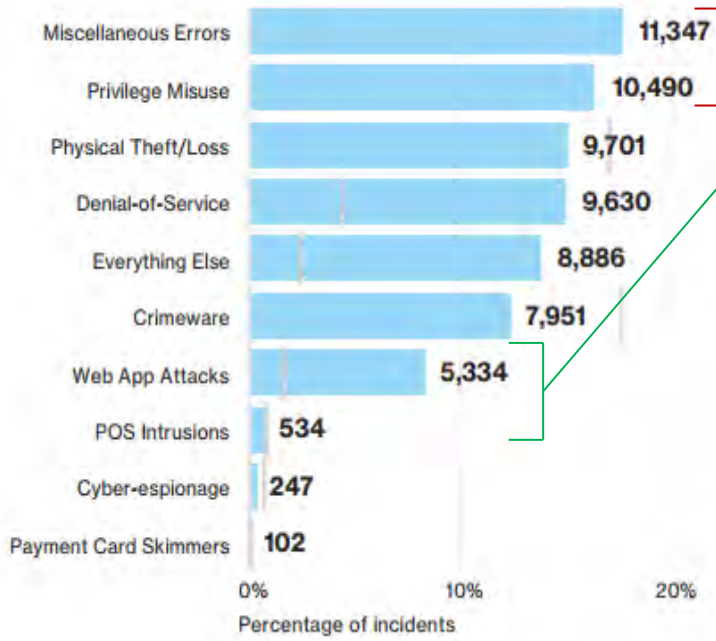
Breach Discovery Method



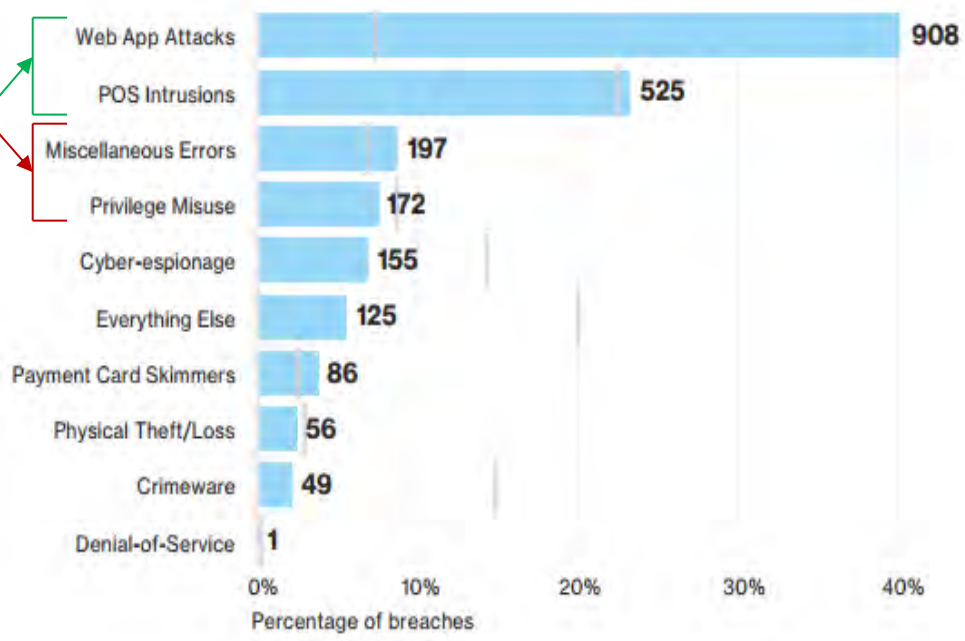
Source: Verizon Data Breach Report

Incident vs. Breach by Attack Pattern

Incidents



Breaches



Source: Verizon Data Breach Report

Five Largest Breaches of 2015

1. Anthem – 80 million records
2. Ashley Madison – 37 million records
3. US Office of Personnel Management – 25 million
4. Experian/T-Mobile – 15 million
5. Premera BlueCross BlueShield – 11.2 million

LastPass ****

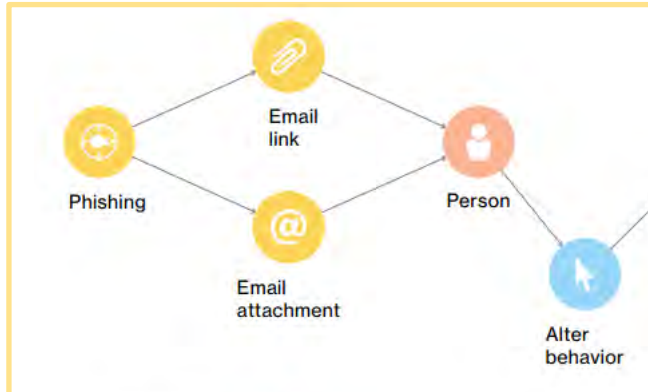


]HackingTeam[

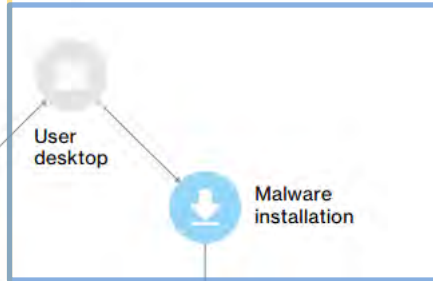
- Employees are often the first – and last – line of defense
- According to recent Symantec research, only 3% of malware attempts to exploit technical flaw; 97% tries to trick humans through social engineering

Anatomy of a Breach

1. Recon



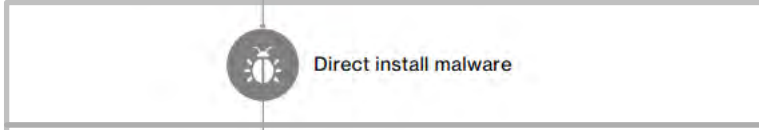
2. Weaponize & Deliver



3. Exploit



4. Install



5. Command & Control



6. Action



Social Engineering Example - Phishing

Phishing: Attempting to acquire information such as usernames, passwords, and credit card details by masquerading as a trustworthy entity in an electronic communication.

I've shared [Survey Questions.docx](#)
Click to open:
[Survey Questions.docx](#)

Online Docs makes it easy to create, store and share online documents, s

This email has been scanned by the Symantec Email Security.cloud s
For more information please visit <http://www.symanteccloud.com>

Your account is suspended.

Your NetworkMeet account has been suspended due to unauthorized or illegal access.

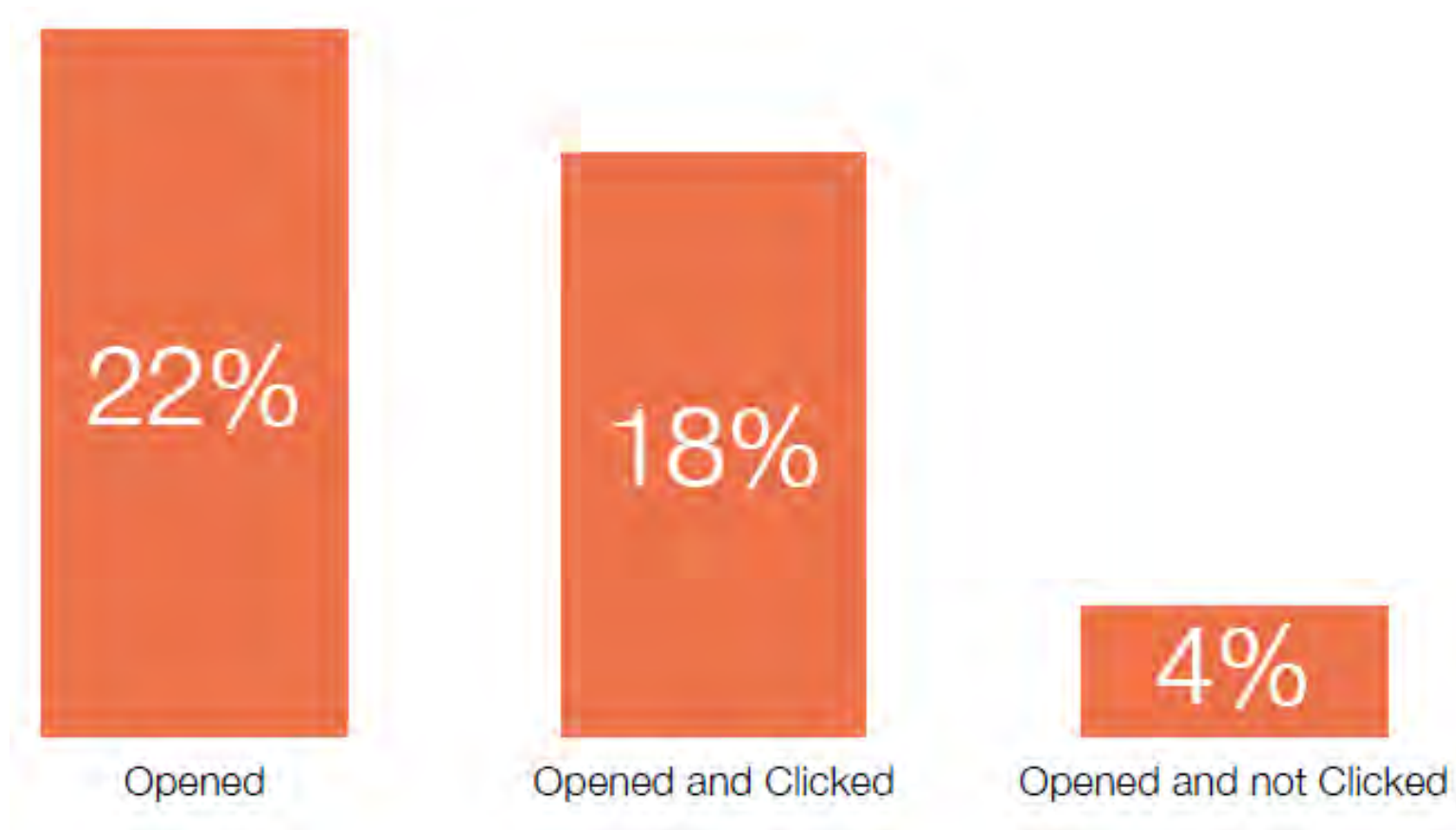
And for your security, we recommend you to connect and resolve your problem before that your WebEx account will be blocked from our NetworkMeet services.

[Sign in](#) Sign in to re-enable your account.

Delivering the power of collaboration,
NetworkMeet Team

ACT-L-001

Phishing – Typical Response Rates



Phishing E-mails: What to Look For

TO:

- ✓ Don't recognize others on list

Subject:

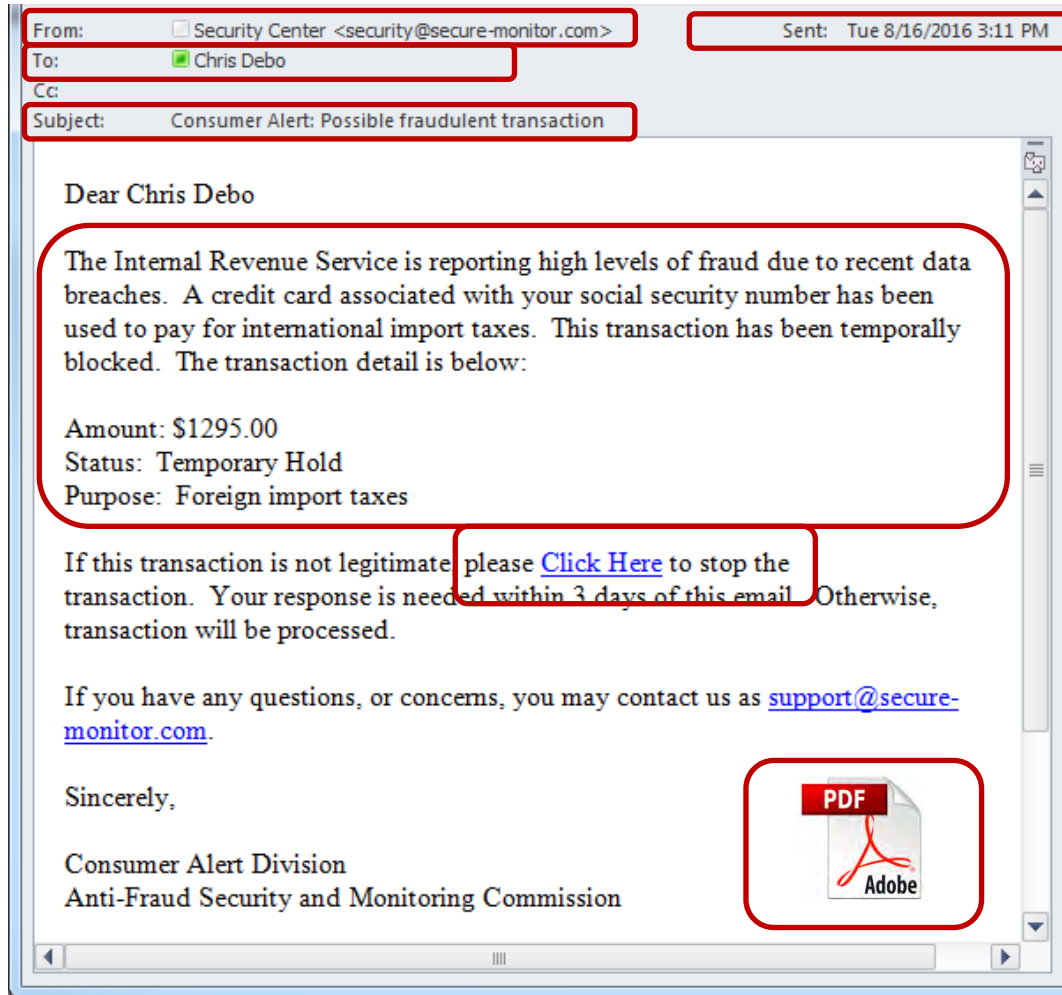
- ✓ Vague, unusual or not in reply

Content:

- ✓ Irrelevant or unexpected
- ✓ In reply to something never sent

Attachments:

- ✓ Unexpected or possibly dangerous file type



FROM:

- ✓ Don't recognize sender
- ✓ Suspicious domain

Date:

- ✓ Sent at unusual or unexpected time

Hyperlinks

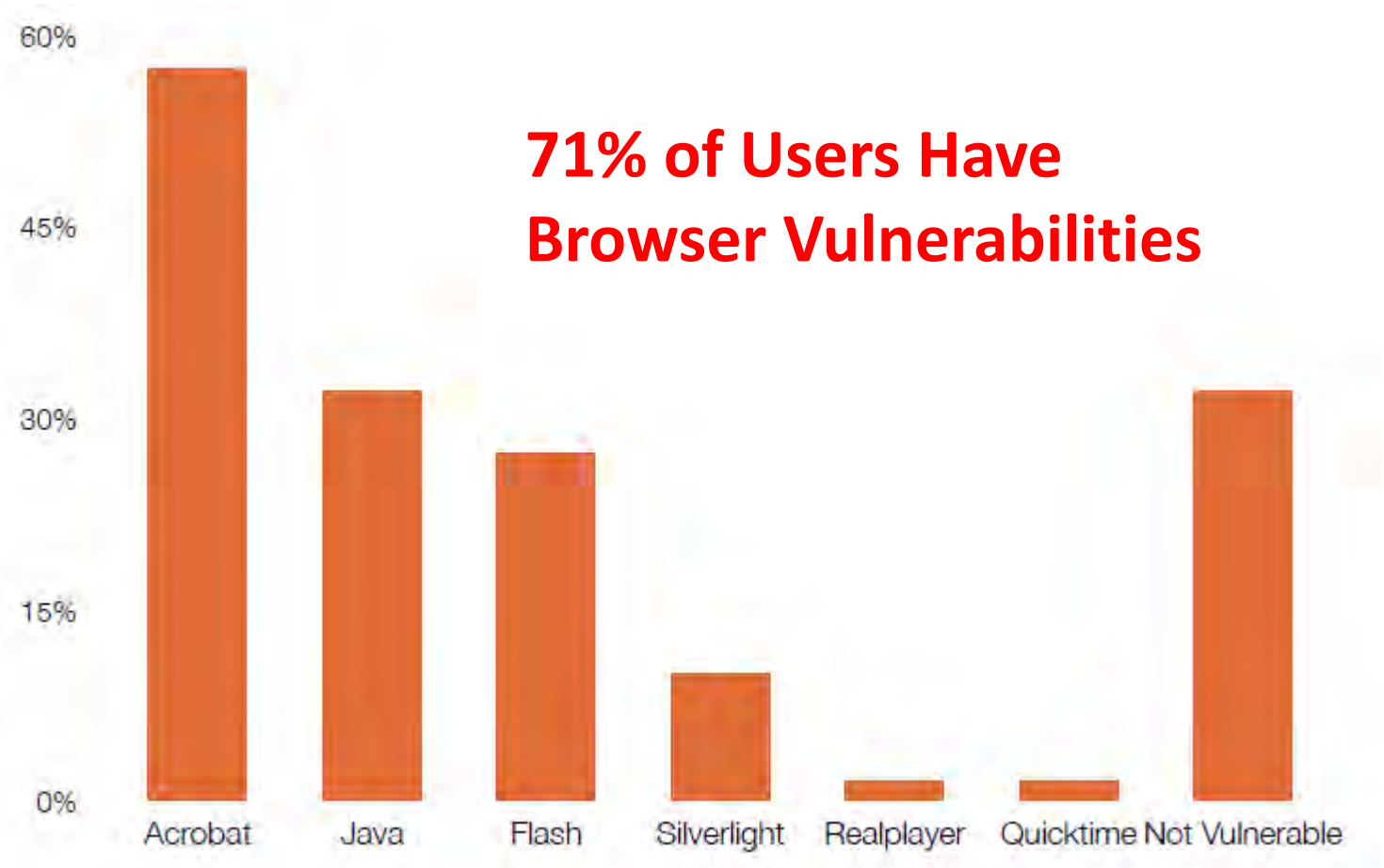
- ✓ Long, unrecognizable or misspelled
- ✓ URL does not match when hovering

3 Primary Ways that E-mail Phishing Succeeds



- 1. Download of malicious software via an attachment**
 - Allows the attacker to install malware that tracks keystrokes and obtains screenshots
 - Malicious software can also “sniff” the network and provide additional information that the attacker can use to attack beyond the infected workstation
- 2. Following a link to a “spoofed” site and entering credentials**
 - Online banking credentials
 - Webmail (typically the same as network) credentials
- 3. Following a link to a malicious web site that exploits browser vulnerabilities**

Typical End-User Browser Vulnerabilities



Examples of Vulnerable Plug-ins



ADOBE® AIR™



Microsoft®
Silverlight®



QuickTime

Spooferd Web Site Plug-In Exploit Example



Malware Example: Ransomware

“ By the way, we got hit by a ransomware virus that encrypted 5 of our servers. The user clicked on a facebook email requesting a password change. She clicked on it 3pm Sunday and we worked all night and were 90% up by Monday 8am. Was not a good time. Several other firms in the area just recently got hit. Some twice. ”



1. Cover the Essentials First

- ✓ Lock doors and windows
- ✓ Store valuables in safe

2. Understand Risk

- ✓ What do you have to protect?
- ✓ Where is it? Who has access?

3. Monitor

- ✓ Alarm system and alerts
- ✓ Patrol car

4. Prevent Social Engineering

- ✓ Educate children
- ✓ Peephole in door

5. Prepare for the Worst

- ✓ Intrusion response
- ✓ Law enforcement
- ✓ Attorney
- ✓ Insurance



1. Cover the Essentials First

- ✓ Restrict physical access
- ✓ Secure firewall
- ✓ Basic network security
- ✓ Deploy anti-virus and anti-malware
- ✓ Block malicious web content
- ✓ E-mail spam filters
- ✓ Establish and enforce password policies
- ✓ Restrict and review user access
- ✓ Encrypt and secure portable devices
- ✓ Use secure wireless
- ✓ Backup and disaster recovery

2. Understand Risk

- ✓ eDiscovery: Know where your data is
- ✓ Data classification scheme
- ✓ Business impact analysis and IT risk assessments
- ✓ Logical access: Know who has access to sensitive data
- ✓ Identify third-party data exchange partners
- ✓ Know regulatory environment
- ✓ Quantify impact of breach

3. Monitor

- ✓ Logical access: Periodically review who has access to data
- ✓ Monitor internal activity (e.g., super-user data access, invalid login attempts)
- ✓ Monitor external activity (e.g., remote access attempts, exfiltration of data)
- ✓ Invest in automated security monitoring and alerting tools
- ✓ Network vulnerability assessment and penetration test
- ✓ System and software patching
- ✓ Retain system logs
- ✓ Monitor third-party service providers for compliance

4. Prevent Social Engineering

- ✓ Educate employees
- ✓ Perform phishing simulations
- ✓ Harden e-mail and web filters
- ✓ Update web browsers and plugins
- ✓ Limit ability to download software
- ✓ Invest in new endpoint protection tools (\$)

5. Prepare for the Worst

- ✓ Have a comprehensive and tested disaster recovery plan
- ✓ Cyber insurance
- ✓ Incident response plan
- ✓ Have attorneys review policies, compliance plans, and governance structures
- ✓ Know who to contact in the event of a breach

What To Do If a Suspected Breach Occurs

1. Investigate to determine likelihood of breach and disclosure of personal information
 - Should be prompt and reasonable
2. If there is a reasonable likelihood of misuse, those impacted must be notified immediately
3. In Ohio, if the breach is more than 1,000 residents, national credit reporting agencies must also be notified



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