LAW360

Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

CFPB's Proposed Overdraft Rule Evokes A Dickensian Tale

By **Eric Mogilnicki and David Stein** (January 26, 2024, 6:33 PM EST)


Eric Mogilnicki

One day earlier this month vividly demonstrated that, when it comes to administrative law, Washington, D.C., is reminiscent of Charles Dickens' "A Tale of Two Cities."

For the power of federal agencies, "it was the best of times, it was the worst of times, ... it was the epoch of belief, it was the epoch of incredulity."[1]

The epoch of belief was represented by the Consumer Financial Protection Bureau, which believes it has the authority to issue, as it did on Jan. 17, **a** significant reinterpretation of a 50-year-old federal statute.


David Stein

Three hours later, and about a mile away, the epoch of incredulity was in evidence, as the U.S. Supreme Court entertained arguments that federal courts should stop the long-standing practice of judicial deference to agency interpretations of federal laws.

The resolution of this tension between vigorous agency action and judicial concerns about administrative overreach will have profound effects on the CFPB's regulatory agenda.

The CFPB's proposed rule reinterprets the 1968 Truth in Lending Act, declaring that overdraft credit is an extension of credit entitled to a raft of disclosures and protections under TILA and its implementing regulation, Regulation Z.[2]

The proposed rule also declares that a fee for allowing an overdraft is a finance charge, unless the financial institution has total assets of $10 billion or less, or charges overdraft fees less than or equal to a breakeven amount representing either a CFPB-designated safe harbor amount or the average of the financial institution's costs and charge-off losses for overdraft credit that is not subject to a finance charge or payable in more than four installments.[3]

The proposed rule conflicts with the determination of the Federal Reserve Board, when it adopted Reg Z in 1969, that overdrafts are not extensions of credit, and so overdraft fees are not finance charges under TILA.

The Federal Reserve's determination rested on TILA's statutory definition of "credit" as "the right granted by a creditor to a debtor to defer payment of a debt or to incur a debt and defer its payment."[4]

Overdraft services, in 1969 and still today, are offered to consumers as a courtesy with financial institutions retaining the discretion to pay or decline to pay items that would overdraw a consumer's account.

Therefore, since 1969, overdraft programs have not been viewed as credit within the meaning of TILA and Regulation Z, because consumers do not have the right to overdraw their accounts — in other words, the right to "incur a debt and defer its payment."

Over five decades after the Federal Reserve's determination, the CFPB has seemingly decided that federal law on overdrafts should change. CFPB Director Rohit Chopra explained that this is because the facts on the ground have changed, as "overdraft began as an occasional convenience with a modest fee" has "morphed this market into a junk fee harvesting machine."[5]

However, the underlying law has not changed: TILA still does not include courtesy or discretionary overdrafts within the definition of "credit."

While the proposed rule criticizes the Federal Reserve's original approach for allowing "very large financial institutions to avoid statutory requirements when extending certain overdraft credit,"[6] it blithely disregards the roots of the Federal Reserve's approach in TILA's statutory definition of "credit," which is the foundation for any product to be covered by TILA and Regulation Z.

Instead, the CFPB proposal makes a policy choice that is different from the one Congress made in drafting TILA.

The bureau would "extend consumer credit protections that generally apply to other forms of consumer credit to certain overdraft credit" because "[t]hese changes would allow consumers to better compare certain overdraft credit to other types of credit" through enhanced disclosures, "and would provide consumers with several substantive protections that already apply to other consumer credit."[7]

Having proclaimed that overdraft fees are junk fees, and that consumers deserve to have them treated as extensions of credit,[8] the CFPB draws some curious distinctions.

To begin, the proposed rule would regulate only very large financial institutions with total assets in excess of $10 billion. Consumers at smaller financial institutions — which currently account for about a third of all overdraft charges[9] — would not derive the benefit of enhanced disclosures or additional substantive protections.

The bureau's sole explanation for this exclusion is that smaller financial institutions face "different circumstances ... in adapting to the proposed regulatory framework."[10] This justification seems thin and unsupported by the facts at a time when the CFPB director also insists that overdraft fees "take a heavy toll on families living paycheck to paycheck."[11]

Similarly, the bureau's insistence that overdraft fees should be treated like all other credit does not match its substantive proposal, which would allow financial institutions to not treat overdraft fees as finance charges if those fees are sufficiently low.[12] The bureau has not yet decided how low would be low enough.[13]

In effect, even so-called very large financial institutions would not have to treat overdraft fees as a finance charge if the fees are at or below the breakeven amount.[14] Conversely, those same

institutions would be required to treat overdraft fees as a finance charge if the overdraft fees exceed the breakeven amount.[15]

This distinction finds no support in the statutory language. TILA defines the term "finance charge" to mean "the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit," except for charges payable in a comparable cash transaction.[16]

There is no other circumstance in TILA or Regulation Z where a fee's characterization as a finance charge is determined by the dollar amount of the fee or the asset size of the institution granting credit.

In deciding that some overdraft fees are finance charges, but others are not, the bureau is not merely reinterpreting TILA, but creating the kind of nonstatutory exception that it insists the Federal Reserve Board created in 1969.[17]

The difference is that the Federal Reserve Board's interpretation aligned with the TILA definition of "credit," whereas the CFPB proposes arbitrary distinctions for the disclosure of finance charges based on the size of the financial institution or the dollar amount of the overdraft fee.

Just hours after the bureau issued its proposed overdrafts rule, the Supreme Court heard argument in two cases, Loper Bright Enterprises v. Raimondo and Relentless Inc. v. Department of Commerce, in which the petitioners seeking to overturn the landmark case of Chevron v. Natural Resources Defense Council.[18]

In Chevron, the Supreme Court decided that the courts should defer to an agency's reasonable interpretation of an ambiguous statute.[19]

The factual issue argued before the court on Jan. 17 involved the decision of the National Marine Fisheries Service to require that herring fishermen foot the bill for at-sea monitors.[20]

However, the legal issues in these Supreme Court cases directly pertain to the hours-old overdrafts rule proposed by the CFPB, and to several other CFPB initiatives.

In Loper Bright Enterprises, the former solicitor general representing the petitioners began his argument for abandoning Chevron deference with the argument that such deference created so much flexibility that it facilitates agency flip-flopping.[21]

Throughout their questions at oral argument, Justices Neil Gorsuch and Brett Kavanaugh echoed and expanded on this concern.

Justice Kavanaugh asserted that Chevron deference "ushers in shocks to the system every four or eight years, when a new administration comes in."[22]

Justice Gorsuch added that such additional instability occurs because Chevron deference does not distinguish between agency interpretations that are contemporaneous and uniform, and interpretations that are "novel and out of the blue and inconsistent with everything that came before. "[23]

The concerns expressed during the oral argument were nominally over deference to the National Marine Fisheries Service, but they apply with equal force to any judicial review of the CFPB's proposed

rule on overdrafts.

There is no doubt that the proposed overdraft rule reflects the change in administrations, as President Joe Biden announced that his administration proposed the rule as one part of a "broader plan to lower costs for hardworking families."[24]

And the bureau's approach to TILA explicitly rejects a Federal Reserve Board approach that was contemporaneous with the passage of the statute and uniformly followed for five decades.

The justices also expressed concerns that touch on other aspects of the CFPB's activities. Justice Kavanaugh explained that sea changes in regulation occur because a new administration has "disagreement with the policy of the prior administration and they're using what Chevron gives them and what they can't get through Congress to do it themselves."[25]

This comment resonates with much of the bureau's policy agenda during an era of legislative gridlock. Indeed, large numbers of members of Congress and senators have urged the bureau to take actions that they cannot pass in the U.S. House of Representatives and Senate.[26]

Similarly, Justice Gorsuch expressed concern with agencies' use of interpretive rules without notice and comment rulemaking.[27] He made this point to counter the government's argument that procedural hoops serve as a counterweight to regulatory instability.[28]

Justice Gorsuch's point does not apply to the proposed overdrafts rule, which will go through a formal notice and comment process. But it does cast a shadow over the vast amount of the bureau's policy agenda, which has been announced through such varied mechanisms as circulars, policy statements and advisory opinions.

To cite one example, the current CFPB rescinded the prior administration's policy statement on the meaning of the prohibition on abusive acts and practices, and replaced it with a starkly different policy statement on the same subject without any public process.[29]

In sum, the Supreme Court's decision and reasoning in the Loper Bright Enterprises and Relentless cases could affect the CFPB's proposed rule on overdrafts — and much of the CFPB's regulatory agenda — as surely as it resolves the concerns of the herring fishermen who brought those cases.

More generally, the ruling may finally resolve whether this is the best of times or the worst of times for the administrative state.

We already know how a similar tension is resolved at the close of "A Tale of Two Cities": an idealistic lawyer is sent to the guillotine, where he calmly accepts his demise and promises that better days lie ahead.

The Supreme Court may soon let us know if the CFPB's overdraft rule, and regulatory agenda, will suffer the same fate.

Eric Mogilnicki is a partner and David Stein is of counsel at Covington & Burling LLP.

employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Charles Dickens, A Tale of Two Cities, page 1.

[2] Proposed 12 C.F.R. § 1026.62(a)(2).

[3] Proposed 12 C.F.R. §§ 1026.62(b)(1) and (d).

[4] 15 U.S.C. § 1602(f); see also 12 CFR 1026.2(a)(10) (similarly defining "credit" as "the right to defer payment of a debt or to incur a debt and defer its payment").

[5] Prepared Remarks of CFPB Director Rohit Chopra on Overdraft Lending Press Call, January 16, 2024 ("Chopra Remarks"), available at https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-on-overdraft-lending-press-call/.

[6] Consumer Protection Bureau Proposed Rule on Over Draft Lending: Very Large Financial Institutions, Docket No. CFPB-2024-0002 ("Proposed Rule") at 4. This article uses the page numbers of the pdf version of the Proposed Rule found at cfpb.gov. The Proposed Rule will be published in the Federal Register in the near future.

[7] Proposed Rule at 6.

[8] See Chopra Remarks.

[9] Proposed Rule at 33.

[10] Id.

[11] Chopra Remarks.

[12] Proposed Rule at 6-7.

[13] Id.

[14] Id. at 61.

[15] Id.

[16] 15 U.S.C. § 1605(a).

[17] Proposed Rule at 4-5.

[18] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

[19] Id. at 467 U.S. 842-845.

[20] Loper Bright Enterprises et. al. v. Gina Raimondo, Secretary of Commerce, et. al., Supreme Court No. 22-451, oral argument transcript at 3-4, argument of Paul Clement. This transcript is available

at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-451_o7jp.pdf.

[21] Id. at 5.

[22] Relentless v. Department of Commerce, Supreme Court No. 22-451, oral argument transcript at pp 96-97 "Relentless Transcript"). This transcript is available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-1219_e2p3.pdf.

[23] Relentless Transcript at 128-129.

[24] Statement from President Joe Biden on the CFPB's Proposed Rule to Curb Overdraft Fees, January 17, 2024, available at https://www.whitehouse.gov/briefing-room/statements-releases/2024/01/17/statement-from-president-joe-biden-on-the-cfpbs-proposed-rule-to-curb-overdraft-fees/.

[25] Relentless Transcript at 98.

[26] For example, a coalition of almost a hundred Senators and Representatives wrote, on December 13, 2023, a letter to CFPB Director Rohit Chopra urging the CFPB to take action to limit the use of arbitration clauses in consumer financial services products. The letter asserts, without further explanation, that "[t]hough Congress has limited the use of forced arbitration for certain sectors and cases, the Bureau is best positioned to issue a rulemaking on forced arbitration for financial products and services. See letter at: https://www.warren.senate.gov/imo/media/doc/2023.12.13%20Letter%20to%20CFPB%20on%20Forced%20Arbitration%20Rule.pdf.

[27] Relentless Transcript at 95.

[28] Id. at 94-95.

[29] See 85 Fed. Reg. 6733 (Feb. 6, 2020) (setting forth a CFPB Policy Statement on Abusive Acts or Practices; 86 Fed. Reg. 14808 (March 19, 2021) (rescinding the 2020 Policy Statement]; 88 Fed. Reg. 21883 (April 12, 2023) (announcing new Statement of Policy on Abusive Acts and Practices.