

What To Expect From The CFPB This Year

By **Eric Mogilnicki and David Stein** (January 1, 2024, 8:02 AM EST)

Change has been the one constant in the 12 years since the Consumer Financial Protection Bureau first opened its doors.

The U.S. Supreme Court has reshaped the bureau's structure and may do so again; bureau directors have built programs and precedents, only to see them dismantled by their successors; and proposed rules have faced a gauntlet of notice and comment, litigation and congressional review.

And the potential for such upheaval at the CFPB is never greater than during an election year. With that in mind, this article describes some of the opportunities and challenges ahead for the bureau in 2024.

The Supreme Court

The Supreme Court will decide in 2024 whether the CFPB's funding mechanism — through which it requisitions funds from the Federal Reserve Board, up to a statutory cap — violates the appropriations clause of the Constitution.

The U.S. Court of Appeals for the Fifth Circuit concluded that it did, and therefore vacated the payday lending regulation that the CFPB had promulgated using such funding.[1] The U.S. Court of Appeals for the Second Circuit disagreed, and allowed the enforcement of a civil investigative demand issues by the CFPB.[2] In seeking certiorari, the CFPB asserted that the Fifth Circuit's approach "threatens to inflict immense legal and practical harms on the CFPB, consumers, and the Nation's financial sector." [3]

The Supreme Court heard oral argument for CFPB v. Community Financial Services Association of America on Oct. 3. The questioning suggested that the more progressive members of the court believed this appropriations mechanism was constitutional, and that some members of the conservative majority were concerned with invalidating a funding mechanism with roots in the country's earliest history and in current use by other agencies, including the Federal Reserve, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation.

Still, there remains the possibility that the Supreme Court could, in the months ahead, overturn the way the bureau is funded and cast a shadow on its current and past activities.



Eric Mogilnicki



David Stein

There are other pending Supreme Court cases that could also affect the way the CFPB does business.

For instance, the U.S. Securities and Exchange Commission v. Jarkesy,[4] argued on Nov. 29, raises the possibility that the court could rule that administrative proceedings cannot impose civil penalties without violating the Seventh Amendment guarantee of a jury trial.

While the CFPB rarely uses administrative proceedings to adjudicate disputes, it routinely uses that forum to settle cases that include civil money penalties.

In addition, Loper Bright Enterprises v. Raimondo and Relentless Inc. v. Department of Commerce[5] raise the issue of whether courts should defer to an agency's reasonable interpretation of ambiguous laws. Scheduled for oral argument on Jan. 17, 2024, these cases could affect judicial review of CFPB regulations, with follow-on effects on how aggressively the bureau regulates in the years ahead.

Enforcement

Since Director Rohit Chopra took office in October 2021, the bureau's enforcement activities have held fairly constant, at about 20 newly announced cases each year.

That may well change in 2024, as the bureau plans to add 75 full-time employees to the existing 150 enforcement attorneys and staff. CFPB Enforcement Director Eric Halperin indicated that "[t]hese additional resources will enable us to open more investigations ... and meet resource demands from our increasing number of matters in contested litigation." [6]

In addition to these new resources, the bureau will have additional incentives to prove its worth during an election year. Having ensured that the CFPB director serves at the pleasure of the president in the case of Seila Law LLC v. CFPB in 2020,[7] the Supreme Court implicitly encouraged the director to please the president. One way to do so — and to demonstrate the need for the CFPB — would be to bring splashy, high-profile enforcement actions prior to the 2024 election.

What would an election year enforcement push look like?

For one thing, it might alter the usual ratio of consent orders to complaints. The bureau resolves most matters through consent order settlements, but such agreements take time to negotiate and memorialize. In contrast, the bureau can file a complaint on its own schedule. So, an election year push could mean that the bureau announces more than the usual handful of enforcement actions that have not been resolved.

Another possible outcome of an election year enforcement push would be an increase in the ratio of civil money penalties to consumer redress. The relationship of these two measures of consumer harm by the bureau has long been unclear and uneven.

However, while the facts of a case generally limit the consumer redress the bureau may seek, a headline-seeking bureau has enormous flexibility to seek to impose eye-catching civil money penalties. For example, the one \$2 billion penalty obtained by the bureau under Director Rohit Chopra is larger than all the consumer redress obtained by bureau enforcement during his tenure.

The bureau may well seek to hit another home run in the late innings of the presidential election.

Regulation: Rules To Be Finalized

The bureau is likely to pursue an active regulatory agenda in 2024, shaped in part by the upcoming 2024 election. This agenda includes a set of rules that are likely to be finalized in the first half of 2024.

The bureau had slated the final Section 1071 small business data collection rule — issued in March and a centerpiece of its fair lending agenda — to become effective for the largest covered financial institutions in October 2024.[8] However, in *Texas Bankers Association v. CFPB*, the U.S. District Court for the Southern District of Texas has stayed the rule until the Supreme Court resolves the constitutionality of the bureau's funding structure,[9] and will address the plaintiffs' other claims if the bureau prevails on the constitutional issues.

In addition, Congress passed a joint resolution on Dec. 1 under the Congressional Review Act, disapproving the final rule, which was sent to the president on Dec. 14.[10] The White House previously stated that it would veto the disapproval.[11] These headwinds indicate that small business data collection will not be required for many months to come, and that the final rule could be substantially revised if a new administration and new bureau director takes office in early 2025.

Early in 2024, the bureau is expected to finalize its proposed rule on credit card late payment fees.[12] The proposed rule, which is facing significant industry pushback, would (1) reduce Regulation Z's safe harbor for credit card late fees to \$8 from the current level of \$30 for a first-time late payment, to \$41 for subsequent late payments, (2) prohibit late fees greater than 25% of a cardholder's required minimum payment, and (3) eliminate the automatic annual adjustment for inflation.

Other proposed rules awaiting final action in 2024 relate to a registry of nonbanks that use form contracts, a registry of nonbanks subject to enforcement actions, the application of ability-to-repay requirements to Property Assessed Clean Energy financing transactions, and an interagency rule on automated valuation models.

The bureau may well sprint to finish several of these rules by spring 2024. Such an effort would seek to minimize the risk that a new Congress and administration — if any — will use the Congressional Review Act to disapprove of rules promulgated in the second half of 2024.

Under the CRA, a joint resolution of disapproval must be filed within 60 days of an agency submitting its rule to Congress — but the 60 days are measured by congressional sessions rather than calendar days. Given the thin congressional calendar in most election years, any rule that is not finalized and submitted to Congress by May or June 2024 is taking on a risk of disapproval under the CRA in early 2025.

Such disapprovals occurred in both 2017 and 2021 as a result of changes in Congress and the president in the last two presidential elections. This risk provides a powerful incentive for the CFPB to expedite its ongoing rulemaking efforts.

Regulation: Rules in Progress

There are three rules that the CFPB is aiming to advance and, in two instances, may finalize before the 2024 election: (1) the proposed rule on personal financial data rights, published Oct. 31;[13] (2) the proposed rule defining larger participants of a market for general-use digital consumer payment applications, published Nov. 17;[14] and (3) a rule to further interpret the Fair Credit Reporting Act which is under development but not yet proposed.[15]

First, the proposed rule on personal financial data rights would implement Section 1033 of the Dodd-Frank Act. The comment period closed on Dec. 29. The proposed rule is designed to allow authorized third parties to access consumers' financial data with the consumer's express consent. It also would substantially restrict the secondary use of such data for marketing and resale.

The proposed rule advances several themes Chopra has made a mainstay of his tenure — spurring competition, giving consumers greater opportunity to vote with their feet, and strengthening consumer privacy. We anticipate the bureau will issue a final rule before the 2024 election.

Second, the proposed larger participant rule defines a market for general-use digital consumer payment applications and would place larger nonbank participants in this market under direct supervision.

The two primary categories of larger participants would be digital wallet providers and person-to-person payment providers that provide or facilitate at least 5 million consumer payment transactions annually. This proposal, if finalized, would expand the bureau's supervisory authority and fulfill Chopra's longstanding goal of imposing greater oversight on large fintechs engaged in consumer payments.[16] Here again, the supervision of large fintech companies is likely to be an attractive election issue, and so a final rule could be issued by midyear.

Third, the bureau is considering proposing a rule to provide new interpretations of various aspects of the Fair Credit Reporting Act. While the contours of the proposed rule are not yet clear, the bureau's outline of proposals and alternatives under consideration includes limits on or the elimination of reporting medical debt collection items; a ban on consumer reporting agencies selling credit header data — i.e., identifying information — for non-FCRA regulated purposes, including fraud prevention and law enforcement purposes; and the regulation of certain data brokers as consumer reporting agencies.

The bureau may believe this issue carries election-year appeal: it announced this rulemaking initiative at a press call with Vice President Kamala Harris that focused on removing medical debts from credit reports.[17] While a proposal could be issued well before the 2024 elections, a final rule is not likely in 2024.

Finally, the bureau's regulatory agenda lists potential rulemakings that would make overdrafts qualify as Regulation Z credit and treat certain not sufficient funds fees as Unfair, Deceptive, or Abusive Acts or Practices. Even if the bureau launches those rulemakings in the coming months, it is unlikely that final rules could be issued in 2024.

Guidance

While the CFPB publishes its agenda for notice-and-comment rulemaking, it also issues less formal guidance through a host of means, including policy statements, advisory opinions, circulars, blog posts and speeches. The bureau often issues such guidance without conducting public outreach, which makes it difficult to know the topics the bureau is considering and the positions it may take.

For example, the bureau did not provide any advance notice when it rescinded the bureau's policy statement on abusive acts and practices in March 2021, nor when it issued a new policy statement on abusive acts and practices in April. Accordingly, we offer no predictions here, save to note that any guidance that the bureau issues in 2024 will be particularly vulnerable to reconsideration if the bureau is under new management as a consequence of the 2024 election.

Conclusion

In sum, large swaths of the CFPB's 2024 regulatory agenda depend upon 2024 not being the last year of the current regime. Similarly, because enforcement investigations often take a year or longer, the CFPB's plans to massively increase enforcement resources in 2024 is largely a long-term investment.

Accordingly, 2024 will be the year when we learn whether the bureau has been patiently laying the groundwork for the next two years of Chopra's five-year term or will have some of its highest priorities supplanted before they are fully realized.

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

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[1] Consumer Financial Services Association of America, Ltd., v. Consumer Financial Protection Bureau, 51 F.4th 616, 642 (5th Cir. 2022).

[2] Consumer Financial Protection Bureau v. Law Offices of Crystal Maroney, P.C., 63 F.4th 174 (2d. Cir. 2023).

[3] Petition for a Writ of Certiorari, Consumer Financial Protection Bureau v. Community Financial Services Association of America, Limited, et al. No. 22-448 (filed Nov. 14, 2022).

[4] Securities and Exchange Commission v. George R. Jarkesy and Patriot 28, L.L.C, Supreme Court No. 22-859.

[5] Loper Bright Enterprises, et. al. v. Gina Raimondo, et al., Supreme Court No. 22-451; Relentless, Inc. et. al. v. U.S. Department of Commerce, et. al., Supreme Court No. 22-1219.

[6] CFPB plans to hire 50% more enforcement Attorneys, Support Staff, Kate Berry, American Banker, October 5, 2023.

[7] Seila Law, LLC v. Consumer Financial Protection Bureau, ___ U.S. ___, 140 S. Ct. 2183 (2020).

[8] 88 Fed. Reg. 35150 (May 31, 2023).

[9] Texas Bankers Association et al. v. CFPB et al., Order Granting Interventors' Motions for Preliminary Injunction, slip op., Civ. Action No. 7:23-CV-00144 (S.D. Tex. Oct. 26, 2023); Texas Bankers Association et al. v. CFPB et al., Order Granting In-Part and Denying In-Part Plaintiffs' Motion for Preliminary Injunction, slip op., Civ. Action No. 7:23-CV-00144 (S.D. Tex. July 31, 2023).

[10] S.J. Res. 32, available at <https://www.congress.gov/bill/118th-congress/senate-joint-resolution/32/actions>.

[11] Executive Office of the President, Statement of Administration Policy (Oct. 21, 2023), available

at SAP.pdf" rel="noopener noreferrer" target="_blank"><https://www.whitehouse.gov/wp-content/uploads/2023/10/SJRes32-SAP.pdf>.

[12] 88 Fed. Reg. 18906 (Mar. 29, 2023).

[13] 88 Fed. Reg. 74796 (Oct. 31, 2023).

[14] 88 Fed. Reg. 80197 (Nov. 17, 2023).

[15] CFPB, Small Business Review Panel for Consumer Reporting Rulemaking, Outline of Proposals and Alternatives under Consideration (Sept. 15, 2023), available at https://files.consumerfinance.gov/f/documents/cfpb_consumer-reporting-rule-sbrefa_outline-of-proposals.pdf.

[16] 86 FR 61182 (Nov. 5, 2021); CFPB Press Release, CFPB Orders Tech Giants to Turn Over Information on their Payment System Plans (Oct. 21, 2021), available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-tech-giants-to-turn-over-information-on-their-payment-system-plans/>; CFPB Report, The Convergence of Payments and Commerce (Aug. 2022), available at https://files.consumerfinance.gov/f/documents/cfpb_convergence-payments-commerce-implications-consumers_report_2022-08.pdf; Prepared Remarks of CFPB Director Rohit Chopra at the Federal Reserve Bank of Philadelphia's Annual Fintech Conference (Sept. 7, 2023), available at <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-at-the-federal-reserve-bank-of-philadelphias-annual-fintech-conference/>.

[17] See Prepared Remarks of CFPB Director Rohit Chopra on Medical Debt at a Press Call Hosted by Vice President Kamala Harris (Sept. 21, 2023), available at <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-on-medical-debt-at-a-press-call-hosted-by-vice-president-kamala-harris/>.