

LEGAL UPDATES

PUBLISHED: NOVEMBER 7, 2024

Services

Consumer Financial
Services

Credit Unions

Industry

Financial Services &
Capital Markets

Professionals

CHRISTOPHER K.
FRIEDMAN
NASHVILLE:
615.949.2252
CHRIS.FRIEDMAN@
HUSCHBLACKWELL.COM

MARCI V. KAWSKI
MADISON:
608.234.6051
MARCI.KAWSKI@
HUSCHBLACKWELL.COM

MIKE G. SILVER
WASHINGTON:
202.378.5854
MIKE.G.SILVER@
HUSCHBLACKWELL.COM

The CFPB in 2025: What to Expect Following the Election

Flash Webinar on The CFPB in 2025

November 22, 2024 | Noon - 1:00 pm CT

REGISTER NOW

Background

2024 has been an eventful year for the CFPB. As we detailed in June, the CFPB survived its second constitutional challenge at the Supreme Court in *CFSA v. CFPB*, and “[n]ewly emboldened, the CFPB’s already robust policy agenda is only expanding.”

Federal agencies often try to “clear the decks” in an election year, but the CFPB’s pace of rulemaking, guidance, and enforcement activity accelerated noticeably since the *CFSA* decision. Among its actions, the CFPB: (1) released the final Section 1033 rule, (2) proposed guidance that would treat earned wage access products as consumer credit; (3) initiated a rulemaking to address mortgage closing cost “junk fees”; (4) issued a proposed medical debt rule and worked to release a separate proposal to cover data brokers under the Fair Credit Reporting Act (FCRA); (5) issued an interpretive rule stating that Buy Now Pay Later (BNPL) products are subject to Regulation Z’s rules governing credit cards; (6) settled a longstanding fair lending lawsuit; and (7) finalized a rule that requires nonbanks to submit certain consent orders to a publicly-available registry, as well as issuing several other consent orders.

Almost as a throwaway line, we noted in the prior article that the “upcoming election could unsettle that agenda beyond 2024.”

Indeed, November 5 changes everything for the CFPB.

Donald Trump will return to power for a second, non-consecutive term. The United States Senate has flipped to Republican control. And the House of Representatives at this time is too close to call but may be leaning toward staying under Republican control.

These electoral developments will alter the CFPB's leadership, stop the CFPB's current agenda in its tracks, and radically change the agency's approach starting in 2025.

Below, we detail some of the specific implications that we anticipate for the agency and describe how prior administration transitions provide guideposts for what might happen in the new year.

CFPB Leadership Transition

On January 20, Director Rohit Chopra will be serving at the pleasure of President Trump. Like former director Kathy Kraninger, Chopra is expected to resign that day or face the prospect of being fired at will. This contrasts with the last transition from a Democratic to Republican administration, when then-director Richard Cordray stayed on until around 11 months into President Trump's first term. The difference? The Supreme Court's 2020 decision in *Seila Law*, which altered the CFPB's structure under the Dodd-Frank Act to permit the President to fire the CFPB at will rather than only for cause.

President Trump will nominate a new CFPB Director for Senate confirmation who undoubtedly will have a more industry-friendly orientation.

Since Senate confirmation could take many months, President Trump presumably would seek to appoint an acting director under the Federal Vacancies Act—perhaps a current Republican-appointed commissioner at the FTC or FDIC—rather than allow the CFPB's current deputy director, Zixta Martinez, or another Chopra designee to serve in the role. Close CFPB observers will recall the comedic episode in 2018 when the agency briefly had two acting directors, Mick Mulvaney (appointed by President Trump) and Leandra English (Cordray's chief of staff whom he elevated as deputy director on his last day). With *Seila Law* now in effect, such creative succession planning moves would be off the table.

With Chopra leaving the agency, his close cadre of senior advisors would likely leave as well. Our understanding is that all the CFPB's top leadership—including the enforcement and supervision heads and the general counsel—are political appointees, which was not the case during prior transitions. If the new administration were successful at reviving the Schedule F proposal from 2020, deeper cuts could ensue to the agency's ranks.

Rulemaking Agenda: What Rules Are on the Chopping Block?

As noted, the CFPB has been feverishly working to release several significant and complex rules, some of which are at the final stage and some at the proposal phase. The most recent edition of the Unified Rulemaking Agenda outlined the CFPB's plans for the remainder of 2024.

The election results add uncertainty as the CFPB's plans to move forward with these rules, which include:

Section 1033. The CFPB's released its final open banking rule on October 22, the culmination of an eight-year process spanning three presidential administrations. As we previously wrote, industry reaction has been mixed, with tempered-to-positive support from fintech trade groups and data aggregators and criticism from depository institutions and trade groups. The rule already has been challenged in court by a Kentucky bank and two trade associations. The rule provides staged compliance dates ranging from April 1, 2026, to April 1, 2030, depending on a covered entity's size and type. The CFPB may decide to keep the rule in place given how long it was being developed, its issuance under a statutory mandate, and because many industry players have already started to build the operational and technical infrastructure for migrating to an open banking regime for competitive reasons or in anticipation of the final CFPB rule. Alternatively, new leadership could elect to delay implementation to reconsider certain aspects of the rule, including the lack of a liability allocation regime for data security breaches.

Section 1071 Small Business Data Collection. This is another Dodd-Frank Act mandatory rulemaking that has taken many years to come to fruition. Currently, the rule is in an implementation phase, but litigants have challenged the rule in federal court in Texas and the Fifth Circuit early next year will hear an appeal of a district court decision favorable to the CFPB. The CFPB could decide to change its litigation position to support the litigants' challenge, which is what happened after the CFPB issued the payday rule in 2017 and was sued by trade groups after CFPB leadership had turned over.

Overdraft and NSF Fees. CFPB has indicated an intent to finalize the two rules this year. Given the critical posture of industry toward both rulemakings, it is possible, or even probable, that new leadership would delay implementation of one or both rules while it considers whether to revoke them. It is also possible that current CFPB leadership will decide not to even release the final rules

during the lame duck period, to avoid potential risk of a Congressional Review Act nullification (discussed below).

FCRA Data Broker and Medical Debt. In June, the CFPB issued a proposal to prohibit medical debt reporting, and it has been working on a separate proposal to subject data brokers to coverage under the FCRA. Following the election, it is unclear whether the CFPB plans to finalize the medical debt rule or release the FCRA proposal on data brokers. If the CFPB decides to release the data broker proposal before the transition, new leadership will be under no obligation to finalize the rulemaking next year.

Nonbank Registry of Terms and Conditions and Enforceable Orders. The CFPB finalized its rule to stand up a registry of enforceable orders and is slated to finalize its separate rule to create a registry of contract terms and conditions. These proposals have been quite controversial and would likely be scrapped by the new administration.

Mortgage Closing Cost “Junk Fees”. It is very possible the CFPB will not move forward with this rulemaking, which is at the nascent stage (no proposal has been issued). The focus on “junk fees” has been a Biden administration-wide effort which the CFPB has used to brand several rulemaking initiatives. The phrase is viewed as pejorative by many industry stakeholders, and this rulemaking has tenuous premises as we have written.

Credit Card Late Fees. We are skeptical that the CFPB will elect to maintain its Credit Card Late Fee Rule, which will effectively restrict credit card companies from charging more than \$8 as a late fee. We would anticipate the CFPB either withdrawing the rule or changing its position in litigation challenging the rule in the Northern District of Texas.

Note that the list above describes the current, major rulemaking items. A new administration, of course, will revise the agenda to include new items that fall within its policy prerogative. This may take 6-9 months to shake out depending on the time it takes for the Senate to approve a Trump-appointed director and for that new director and his or her team to evaluate the agenda and make decisions about what changes to make.

Guidance: Goodbye to Circulars; Hello to a Revitalized Innovation Office?

The explosion of CFPB non-rulemaking guidance has been a hallmark of Chopra’s tenure. The CFPB since 2022 has issued scores of advisory opinions, interpretive rules, policy statements, and “circular”

vehicles purporting to clarify existing consumer financial law. In public comments, Chopra has doubled down on his pushback of those critical of this approach, tarring private attorneys who advise clients on the vagaries of these documents as “leeches.”

At the same time, the current leadership has wound down its 2019 Innovation Policies issued under former director Kraninger, characterizing them as giveaways to well-heeled stakeholders. The Office of Innovation was demoted in the org chart and rebranded as the Office of Competition and Innovation.

New CFPB leadership likely will swiftly revoke many of the guidance documents issued under Chopra’s leadership, such as the BNPL interpretive rule (which recently was challenged in court) and the recent FCRA circular addressing workplace surveillance. The 2023 UDAAP policy statement could also be vulnerable, although doing so would perpetuate the cycle of the CFPB’s issue/withdraw approach to abusiveness policy statements (recall the 2020 policy statement was withdrawn in 2021). They may also retire the “circular” format.

It is also likely that CFPB leadership will reinvigorate the innovation function. This would come at a welcome time for the CFPB, which under Chopra has taken a surprisingly tech-skeptical approach to policy issues around the use of artificial intelligence in financial services.

Congressional Review Act – A Wild Card?

Under the Congressional Review Act (CRA), 5 U.S.C. 801 *et. seq.*, Congress can pass by a majority vote a joint resolution of disapproval which, if signed by the President, would nullify any “major” rule by an agency. When the CFPB finalizes a rule, it determines whether the rule is “major” and if so, it must submit the final rule to Congress, which then triggers a specific time period for Congress to pass the disapproval resolution. The CRA defines rules subject to the Act very broadly. Such broad definition would almost certainly encapsulate a number of the CFPB’s non-rulemaking pronouncements. In the past, members of Congress have obtained an opinion from the Government Accountability Office that such pronouncements are rules subject to the CRA. Such opinion then triggered the time period for Congress to pass the disapproval resolution.

At least some of the final rules and guidance discussed above will be subject to CRA disapproval in 2025, particularly if the Republicans maintain control of the House. This is what happened in 2017, when Congress passed a disapproval resolution to nullify the CFPB’s 2017 arbitration rule and again in 2018, when Congress passed a disapproval of resolution to nullify the CFPB’s 2013 Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act Bulletin, a non-rulemaking pronouncement.

A CRA resolution doesn't just stop a rule from being in or taking effect; it precludes the agency from issuing a future rule in "substantially the same form." Current CFPB leadership is likely evaluating the tradeoffs of finalizing the remaining rules versus choosing not to finalize them and avoid the possibility that future CFPB leadership sharing similar policy views will be precluded from issuing substantially similar rules.

Enforcement and Supervision

With Enforcement, we would expect there to be a continued steady flow of enforcement activity, perhaps after an initial period of evaluation by new leadership of the pending case docket. As one of the authors noted to American Banker, the CFPB's enforcement docket may look artificially low because a number of cases were on hold pending resolution of the CFSA Supreme Court case. With those cases moving again, we'd expect to see more activity next year. In our experience, both inside and outside the agency, it is a misnomer to assume that enforcement will relax under a Republican administration and that, therefore, compliance can be relaxed as well. Some of the largest ever CFPB consent orders occurred under Mulvaney and Kraninger, and state regulators may again step up to the plate with more aggressive oversight.

On the Supervision side, it is difficult to predict whether the agency will shift course in its prioritization of issues or entities. Under former director Kraninger, the agency emphasized "prevention of harm" via supervision. A return to that approach could occur. The CFPB may also relax use of its so-called "dormant" authority to designate "risky" nonbanks for supervision under Dodd-Frank section 1024(a)(1)(C), an authority used aggressively by current leadership.

Other Implications

With Congress potentially being under unified control of the Republicans, it is possible that legislative efforts to alter the agency's structure and funding may gain traction.

Moreover, efforts could be made to put the agency staff on the General Scale (GS) salary scale and revoke the agreements with the employees' union on remote work.

At the same time, a transition does provide an opportunity for new leadership to reset its relationship with career staff and, as one of the authors argued in an earlier article, reinvigorate the early-years efforts at agency building, even while implementing a new policy agenda.

Flash Webinar on The CFPB in 2025

November 22, 2024 | Noon - 1:00 pm CT

REGISTER NOW

HUSCH BLACKWELL

Husch Blackwell's Mike G. Silver, Christopher Friedman, and Marci Kowski will be presenting a webinar on the election's implications for the CFPB on Friday, November 22, 2024. Join them for a thoughtful and nuanced discussion of the various ways the election will be a gamechanger for the CFPB, including (1) what rulemakings may be left on the cutting room floor, (2) what policy priorities may emerge under new leadership, and (3) how prior administration transitions during the agency's short lifespan will inform what happens next.

This webinar will be beneficial to companies and individuals regulated by the CFPB, and anyone else interested in what changes might be in store for consumer financial services policy and regulation under a new administration.

[This program is pending approval for Colorado, Illinois, Iowa, Kansas, Minnesota, Missouri, Nebraska, Tennessee, Texas, and Wisconsin continuing legal education credit.]