

# When It Comes To CFPB Agenda, Expect The Unexpected

By **Michael Flynn** (March 3, 2023)

On Jan. 4, 2023, the Office of Information and Regulatory Affairs in the Office of Management and Budget released the Fall 2022 Unified Agenda of Regulatory and Deregulatory Actions reports on the actions that administrative agencies plan to issue in the near and long term.[1]

Included is the Consumer Financial Protection Bureau's regulatory agenda for 2023.[2] This article first considers steps the CFPB may take beyond the actions set out in the agenda, then analyzes highlights of the agenda and concludes with a discussion of how the agenda does not set forth the likely full range of CFPB rulemaking-related activities in 2023. Institutions must therefore plan for the unexpected.



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## The Likelihood of Other CFPB Rule-Related Activities Not In the Agenda

Even before analyzing the agenda, it should be noted that the proposed rulemaking efforts listed in therein will likely not represent all the activities the CFPB will undertake in 2023.

In the last two years, the CFPB has received a great deal of criticism for engaging in what might be called quasi-rulemaking — activities that are perceived by many as substantive rule changes without going through the public notice-and-comment requirements of the Administrative Procedure Act.

This criticism has arisen in regard to aggressive public comments and pressure, various circulars and advisory opinions promulgated by the CFPB, amendments to its examination protocols and even an amicus brief that suggests a position contrary to the current applicable regulation, all of which have often set forth significant changes in existing interpretations of rules or existing rule requirements. A few recent examples include:

- The CFPB used public comments and postings and published guidance to indicate its displeasure with overdraft fees, without any notice of rulemaking or other formal document to address the legal allowance or disallowance of such fees. The pressure caused many banks to eliminate or reduce overdraft fees.[3]
- The bureau issued an advisory opinion that pay-to-pay charges and convenience charges are not allowed for debt payments under the Fair Debt Collection Practices Act unless the original agreement provided for that or it is allowed under applicable law.[4]
- The CFPB issued a circular in which it declared that financial institutions that do not have adequate data security measures may be committing unfair, deceptive or abusive acts or practices violations and can be held accountable.[5]

- The bureau amended its examination manual to say that discrimination in any financial product is a potential unfair, deceptive or abusive acts or practices violation, greatly expanding its asserted jurisdiction over discrimination matters beyond its statutory authority over the lending activities covered by the Equal Credit Opportunity Act. This provoked a strong pushback by trade associations, a rare public attack on such trade associations by the CFPB, and a lawsuit by those trade associations seeking to limit the CFPB's authority in this area.[6]
- On Nov. 30, 2022, in *Lyons v. PNC Bank NA*, an action by an individual borrower against a lender, the CFPB filed an amicus brief asking the U.S. Court of Appeals for the Fourth Circuit to overturn the district court's ruling for the defendant bank, and asserted that home equity lines of credit, or HELOCs, are covered under the Truth-in-Lending Act prohibition on a creditor transferring deposit account funds to offset amounts owed under a HELOC.[7] The CFPB has been criticized for ignoring the Federal Reserve's long-standing practice of regulating credit cards and HELOCs separately, ignoring common understandings of the proper interpretation of these regulatory provisions, and not engaging in any advance notice-and-comment activity before asserting its position.[8]

While some of these actions may be seen, at least by the CFPB and perhaps others, as complying with APA requirements and therefore legitimate, their frequent use by the CFPB raises the strong possibility that in 2023, the CFPB will utilize similar actions to seek to define or alter rule requirements beyond what is set forth in the agenda.

### **Key Takeaways**

The CFPB has set forth in the agenda planned activities under the categories of final rule stage activities, notice of proposed rulemaking, or NPRM, proposed activities, and pre-rule activities. Several key points warrant comment:

#### ***Continuing Efforts to Limit Financial Institutions' Fee Collections***

There is a strong focus on restrictions on bank and credit card fees, with three possible activities including credit card late fees, nonsufficient funds fees and possible amendments to Regulation Z with respect to the special rules for determining whether overdraft fees are considered finance charges.

The CFPB has made its concern about unnecessary or excessive fees known, and this focus in the agenda is a part of that ongoing effort.

#### ***Nonbank Financial Institutions***

The proposal for "Nonbank Registration — Nonbank Covered Persons Subject to Certain Enforcement Orders" states that the CFPB is developing an NPRM.

In fact, the CFPB recently published that proposed rule on Dec. 12, 2022. The rule provides that covered consumer financial services institutions must (1) register with the CFPB any order or judgment from a regulator and any consumer regulatory enforcement judgment, and (2) have an executive certify in writing annually that any prior such order or judgment

has not been violated.[9]

For two other subjects which the agenda stated that the CFPB was developing NPRMs, it has already issued NPRMs concerning (1) credit card late fee penalties[10] and (2) a registry of standard terms in consumer contracts[11].

### ***Unspecified Changes to Fair Credit Reporting Act Regulations***

The CFPB is also considering amending Regulation V in regard to the Fair Credit Reporting Act. It does not say what type of amendments are being contemplated.

### ***Rules for Financial Institutions' Obligations to Make Transaction Data Available***

The CFPB continues to study how to implement the Dodd-Frank Wall Street Reform and Consumer Protection Act requirement that regulations address the obligation of a covered entity — for example, a bank — to make available to consumers, upon request, transaction data and other information concerning a consumer financial product or services that the consumer obtains from the covered entity.

The regulation will undoubtedly require financial institutions to develop and implement extensive new processes and procedures for such data collection and distribution. Similarly, the CFPB is expected to issue a final rule to finalize its proposed rule on small business lending data collection.[12]

Like any proposal regarding making transaction data available, the proposed rule makes it clear that under this expected new small business data lending collection rule, financial institutions will again have to develop and implement extensive new processes and procedures for such data collection and reporting to the government.

### ***Others***

The CFPB continues to work with the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Federal Housing Finance Agency to address the Dodd-Frank amendments to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 requiring implementing regulations for quality control standards for automated valuation models.

In regard to property assessed clean energy, or PACE, financing, the CFPB is working to prepare a proposed rule to implement statutory requirements mandating that regulations must carry out the purposes of TILA's ability-to-repay requirements, currently in place for residential mortgage loans, with respect to PACE financing, and apply TILA's general civil liability provision for violations of the ability-to-repay requirements the bureau will prescribe for PACE financing.

### **Conclusion**

The CFPB's agenda provides a meaningful, although not complete, picture of the CFPB's likely regulatory rulemaking activity in 2023.

The agenda does provide some meaningful guidance to consumer financial institutions regarding some important rulemaking initiatives that the CFPB is pursuing. However, the agenda likely does not reflect the full planned scope of the CFPB's rulemaking-related

activities in 2023, and institutions should keep that in mind in their planning for 2023 and beyond.

Important planned activities in the agenda pertain to several areas where the CFPB has shown a strong focus, including continued work on limiting fees charged by financial institutions; creating registries — likely available to the public — for nondepository financial institutions regarding key terms and provisions in consumer agreements, and listing of regulatory consent orders and judgments entered into by such nondepository financial institutions; and making available to consumers transaction data and other information concerning a consumer financial product or service that the consumer obtains from the covered entity.

As noted above, operationally some of these rulemaking activities would limit institutions' ability to charge various fees, and others would cause institutions to have to build out extensive new processes to collect and report small business lending data and to make transactional data available to customers.

However, in planning compliance activities and staffing, institutions must understand that these agenda activities do not represent the full scope of the CFPB's likely rulemaking or quasi-rulemaking activities in 2023.

First, as noted above, the CFPB has made extensive use of circulars, advisory opinions, amicus briefs, and other means of setting out regulatory interpretations and positions, in a manner that may be perceived as actual rulemaking. The agenda does not discuss or disclose any such quasi-rulemaking activities the CFPB may be considering for 2023.

Second, the CFPB continues to state its intention to address areas not covered by the agenda.

As recently as March 2, the CFPB issued a report analyzing perceived issues with so-called buy-now-pay-later arrangements.[13]

In his comments about the report, Director Rohit Chopra stated that the CFPB is "working to ensure that borrowers have similar protections and that companies play by similar rules." [14] It seems likely that the CFPB will continue to focus on new areas in which it perceives issues that it will wish to address, even if they are not included in the agenda.

In summary, the agenda is a useful tool for determining what rulemaking issues institutions must plan to address in 2023 and beyond. It does identify some specific key regulatory issues that institutions may need to focus on, be prepared for and plan around.

However, it by no means constitutes a complete guide for institutions attempting to plan compliance focus areas, staffing of compliance and other risk and oversight units, and anticipated operational process changes and expansion. It is not a complete list of CFPB issues that institutions may face.

As always, institutions should operate on the assumption of a very active CFPB engaged in rulemaking and quasi-rulemaking in many areas, including some that are presently not expected.

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[1] See 2022 Unified Regulatory Agenda and Regulatory Plan, Office of Management and Budget (<https://www.whitehouse.gov/omb/briefing-room/2023/01/04/2022-unified-regulatory-agenda-and-regulatory-plan/>).

[2] The CFPB agenda may be found at [https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION\\_GET\\_AGENCY\\_RULE\\_LIST&tPubId=202210&agencyCode=&showStage=active&agencyCd=3170](https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&tPubId=202210&agencyCode=&showStage=active&agencyCd=3170).

[3] See CFPB Bulletin 2022-06: Unfair Returned Deposited Item Fee Assessment Practices, October 26, 2022 ([https://files.consumerfinance.gov/f/documents/cfpb\\_returned-deposited-item-fee-assessment-practice\\_compliance-bulletin\\_2022-10.pdf](https://files.consumerfinance.gov/f/documents/cfpb_returned-deposited-item-fee-assessment-practice_compliance-bulletin_2022-10.pdf)); (Klein, Getting Over Overdraft, Brookings Institute Report, November 7, 2022 (<https://www.brookings.edu/research/getting-over-overdraft/>)).

[4] Debt Collection Practices (Regulation F): Pay-to-Pay Fees, June 29, 2022 <https://www.consumerfinance.gov/rules-policy/final-rules/advisory-opinion-on-debt-collectors-collection-of-pay-to-pay-fees/>).

[5] Consumer Financial Protection Circular 2022-04, Insufficient data protection or security for sensitive consumer information, August 11, 2022 ([https://files.consumerfinance.gov/f/documents/cfpb\\_2022-04\\_circular\\_2022-08.pdf](https://files.consumerfinance.gov/f/documents/cfpb_2022-04_circular_2022-08.pdf)).

[6] See CFPB Press Release, Unfair, Deceptive, or Abusive Acts or Practices (UDAAPs) examination procedures, March 16, 2022 (<https://www.consumerfinance.gov/compliance/supervision-examinations/unfair-deceptive-or-abusive-acts-or-practices-udaaps-examination-procedures/>); Revised CFPB Unfair, Deceptive, or Abusive Acts or Practices (UDAAPs) examination procedures, revisions published March 16, 2022 ([https://files.consumerfinance.gov/f/documents/cfpb\\_unfair-deceptive-abusive-acts-practices-udaaps\\_procedures.pdf](https://files.consumerfinance.gov/f/documents/cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures.pdf)).

[7] Lyons v. PNC Bank, N.A., (US Fourth Circuit), Brief of Amicus Curiae Consumer Financial Protection bureau in Support of Neither Party, November 30, 2022 ([https://files.consumerfinance.gov/f/documents/cfpb\\_lyons\\_amicus-brief\\_2022-11.pdf](https://files.consumerfinance.gov/f/documents/cfpb_lyons_amicus-brief_2022-11.pdf)).

[8] Lyons v. PNC Bank, N.A., (US Fourth Circuit), Brief for American Bankers Association as Amicus Curiae in Support of Appellee and Affirmance, February 3, 2023 (<https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2023/02/1573000-1573238-https-ecf-ca4-uscourts-gov-n-beam-servlet-transportroom-servlet-showdoc-00419219481.pdf>).

[9] CFPB Proposed Rule, Registry of Nonbank Covered Persons Subject to Certain Agency and Court Orders, January 30, 2023, 88 FR 6088 (<https://www.federalregister.gov/documents/2023/01/30/2022-27385/registry-of-nonbank-covered-persons-subject-to-certain-agency-and-court-orders>).

[10] CFPB Proposed Rule, Credit Card Penalty Fees (Regulation Z), February 1, 2023, <https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-rule-to-rein->

in-excessive-credit-card-late-fees/.

[11] CFPB Proposed Rule, Registry of Supervised Nonbanks That Use Form Contracts To Impose Terms and Conditions That Seek to Waive or Limit Consumer Legal Protections, 88 FR 6906, February 1, 2023, <https://www.federalregister.gov/documents/2023/02/01/2023-00704/registry-of-supervised-nonbanks-that-use-form-contracts-to-impose-terms-and-conditions-that-seek-to-waive-or-limit-consumer-legal-protections>.

[12] CFPB Proposed Rule, Small Business Lending Data Collection under the Equal Credit Opportunity Act (Regulation B), 86 FR 56356, October 8, 2021, <https://www.federalregister.gov/documents/2021/10/08/2021-19274/small-business-lending-data-collection-under-the-equal-credit-opportunity-act-regulation-b>.

[13] CFPB Report, Consumer Use of Buy Now, Pay Later: Insights from the CFPB Making Ends Meet Survey, March 2, 2023 (<https://www.consumerfinance.gov/data-research/research-reports/consumer-use-of-buy-now-pay-later-insights-from-the-cfpb-making-ends-meet-survey/>).

[14] CFPB Press Release, CFPB Publishes New Findings on Financial Profiles of Buy Now, Pay Later Borrowers, March 2, 2023 (<https://www.consumerfinance.gov/about-us/newsroom/cfpb-publishes-new-findings-on-financial-profiles-of-buy-now-pay-later-borrowers/>).