

In The CFPB Playbook: No Lazy, Hazy Days Of Summer

By **Eamonn Moran** (September 30, 2024)

As the Consumer Financial Protection Bureau continues to expand its oversight of the financial services industry and beyond, staying abreast of its activity is more important than ever. In this Expert Analysis series, former CFPB personnel provide recaps discussing the most noteworthy developments from each quarter.

The lyrics to Nat King Cole's classic song "Those Lazy, Hazy, Crazy Days Of Summer" remind us of those childhood days of summertime bliss — living at a gentler pace and making time for the simpler pleasures in life. While this summer was a scorcher of heat and haze for many, apparently no one at the Consumer Financial Protection Bureau took a summer vacation, and there is no sign of a slowdown.



Eamonn Moran

The CFPB continues to push forward in the wake of the U.S. Supreme Court's May 16 decision in CFPB v. Community Financial Services Association of America that the current funding structure for the agency is constitutional and in advance of the November election.

In that vein, and in what has become the norm at the agency under Director Rohit Chopra's leadership, the CFPB continues to "fire on all cylinders" and advance arguably aggressive and expansive interpretations of consumer financial statutes and regulations.[1]

Only time will tell the real impact of the end of Chevron deference on the CFPB's rulemakings, statutory interpretations, policies and other policy initiatives.

This article provides a short overview of key regulatory and policy developments and noteworthy CFPB activity — a grab bag of rules and guidance, markets and research reports, circulars, consumer advisories, events, and announcements — from the third quarter that will affect different segments of the consumer financial services industry.

CFPB Flexes Its Muscles Over Paycheck Advance/Earned Wage Access Products

On July 18, the CFPB issued a proposed interpretive rule to regulate offerings in the paycheck advance marketplace.[2] The proposed interpretive rule would deem many paycheck advance products, oftentimes marketed as "earned wage advances" or "earned wage access" products, as consumer loans subject to the Truth in Lending Act.

This step would, among other obligations, require market participants to provide consumers with certain disclosures regarding finance charges. Many requirements would not apply to paycheck advance products that are no-fee, and therefore free, to the consumer.[3]

The CFPB is proposing to replace the 2020 advisory opinion with this proposed interpretive rule.

The comment period closed on Aug. 30. The CFPB stated that it "intends to publish a final interpretive rule after considering comments received." [4]

In the interim, paycheck advance providers should closely monitor any further developments from the CFPB while recognizing that this is one more example of the CFPB's broader effort to deem nontraditional financial products as "credit" for purposes of consumer financial protection laws.

To underscore some potential operational and compliance challenges, the interplay between this proposed interpretive rule and state laws that have taken a different approach also remains to be seen.

CFPB Proposes to Streamline Mortgage Servicing Rules for Challenged Borrowers

On July 10, the CFPB issued a proposed rule that would amend mortgage servicing regulations that were originally issued in 2013, went into effect in 2014 and have been amended several times since.[5]

The proposal reflects the CFPB's significant expansion of borrower protections during the loss mitigation process, but various aspects of the proposed language have led to some key open questions and concerns that will need to be clarified.

These issues include:

- Uncertainty surrounding the potential channels through which a borrower could make a "request for loss mitigation assistance," which is of critical importance since this triggers the proposed foreclosure protections and fee restrictions;
- Concerns that the means by which a borrower can "communicate" and remain "responsive" for purposes of a loss mitigation review cycle may result in abuse and unnecessary delays in loss mitigation reviews;
- Uncertainty concerning the steps that servicers must complete to satisfy the proposed safeguard for unresponsive borrowers; and
- Concerns that the proposed fee protections would impair creditors' contractual rights.

Supervisory Highlights: Focus on Loan Servicing, Debt Collection and Medical Payment Products

In addition, the CFPB issued so-called supervisory highlights that found financial institutions sharing key findings in the areas of auto and student loan servicing and debt collection — including credit card debt collection — and underscores consumer complaints concerning medical payment products and flags concerns with providers preventing access to deposit and prepaid account funds.[6]

According to these highlights, CFPB examiners found various instances of unfair, deceptive, or abusive acts or practices at companies servicing auto loans and student loans.

Nonrulemaking Priorities

The CFPB also continues to use markets and research reports, circulars and consumer advisories to highlight areas of regulatory concern.

First, the CFPB warned in a circular to law enforcement agencies and regulators that companies may be violating Section 1057 of the Consumer Financial Protection Act by requiring employees to sign broad nondisclosure agreements that could deter whistleblowing.[7]

Second, the CFPB continued its ongoing initiative to combat so-called junk fees and made inroads to expand this effort beyond banking, credit cards and personal loans. The CFPB provided a so-called issue spotlight report concerning transaction fees and other fees charged by school lunch payment processing companies that partner with school districts to process students' school lunch payments.[8]

Additionally, as part of its ongoing assessment of how consumers access cash and coins, the CFPB issued an issue spotlight report regarding the increasing costs associated with accessing cash, through both out-of-network ATM fees and "cash-back fees" that consumers are paying when getting "cash back" while completing purchases with a debit or prepaid card at certain retailers.[9]

The CFPB stated that it "will continue to monitor developments related to the fees consumers pay for accessing cash," while warning that this issue is in part a result of "the underlying failure of banks and credit unions to adequately supply cash throughout the country in an affordable manner." [10] Chopra commented that the CFPB "will be working to ensure that consumers and business across the country can have a free option to access their own money." [11]

Third, the CFPB cautioned the public on how to spot potential unfair and deceptive practices in the residential solar power sector, and encouraged consumers to file complaints of suspicious behavior.

In an issue spotlight report and a consumer advisory, the CFPB warned of "risks stemming from the presentation and structure of 'solar-specific' loans, which are often facilitated by large [FinTech] firms via a point-of-sale partnership with solar installers." [12]

Along with the Federal Trade Commission, the U.S. Department of the Treasury and other agencies, the CFPB also launched an interagency partnership to coordinate governmental efforts to prevent predatory practices and better protect consumers in the residential solar financing sector.

Fourth, the CFPB issued an advisory opinion and research report on a form of home seller financing that is often referred to as contracts for deed, also called land contracts, installment land contracts, land sales contracts or bonds for deed. [13]

The advisory opinion confirms that the consumer protections and creditor obligations under the Truth in Lending Act and Regulation Z apply to transactions in which a consumer purchases a home under a "contract for deed."

Fifth, the CFPB urged strict artificial intelligence compliance in its response to a Treasury Department request for information. [14] In its letter, the CFPB emphasized that companies using AI must comply with federal consumer financial protection laws, and that there is no exception for new technologies.

The agency underscored that it seeks to ensure that AI is used to benefit consumers, and that it is on guard against AI being used to exploit legal loopholes or to engage in regulatory

arbitrage.

Sixth, on Aug. 16, Chopra issued a blog post regarding the CFPB's recently issued a buy now, pay later, or BNPL, interpretive rule.[15]

Furthermore, Chopra affirmed that the CFPB will provide a no-action position with respect to any BNPL lender "while it is transitioning into compliance in a good faith and expeditious manner," and noted the CFPB's expectation that "other federal and state regulators will follow the same path," but the basis of such expectation was left unsaid.[16]

This announcement may only be marginally helpful, however, as it appears that the CFPB decided not to extend the effective date — which was July 30 — but is instead saying that it will not enforce the rule right away.

On Sept. 18, the CFPB delivered as promised by issuing its BNPL interpretive rule FAQs, which identify categories of Regulation Z provisions and specific Regulation Z sections applicable to BNPL products under the rule, and also include a section specific to periodic statement considerations.[17]

Seventh, in connection with the U.S. Department of Transportation's launch of an inquiry into the rewards programs of the four largest U.S. airlines, Chopra stated that "[t]he CFPB will continue to scrutinize the relationship between big credit card companies and big airlines," with a focus on potential unfair or deceptive practices.[18]

Eighth, the CFPB issued its annual report on debt collection, with a focus on certain consumer protection issues in medical and rental debt collection.[19]

Finally, the CFPB issued a consumer financial protection circular reminding financial institutions that they risk violating the Electronic Fund Transfer Act and Regulation E if they do not have proof that they have obtained consumers' affirmative consent, or opt-in, before providing overdraft services, including the charging of overdraft fees, for ATM and one-time debit card transactions.[20]

According to the CFPB, "[t]he prevalence of violations related to overdraft opt in underscores the need for effective supervision and enforcement of Regulation E's overdraft opt-in provisions." [21]

This circular marks the latest step in the CFPB's work regarding overdraft services and junk fees, and illustrates how the Electronic Fund Transfer Act and Regulation E remain key priorities of consumer protection enforcement.

Eamonn K. Moran is a partner at Holland & Knight LLP. He previously served as an adviser for the U.S. Department of the Treasury and counsel for the Consumer Financial Protection Bureau.

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[1] Rohit Chopra, CFPB Dir., Prepared Remarks Regarding the Supreme Court's Decision

in CFPB v. CFSA (May 17, 2024), <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-regarding-the-supreme-courts-decision-in-cfpb-v-cfsa/>.

[2] See Truth in Lending (Regulation Z); Consumer Credit Offered to Borrowers in Advance of Expected Receipt of Compensation for Work, 89 Fed. Reg. 61358 (July 31, 2024) (to be codified at 12 CFR Part 1026).

[3] CFPB Proposes Interpretive Rule to Ensure Workers Know the Costs and Fees of Paycheck Advance Products (July 18, 2024), available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-interpretive-rule-to-ensure-workers-know-the-costs-and-fees-of-paycheck-advance-products/>.

[4] 89 Fed. Reg. at 61359.

[5] See Streamlining Mortgage Servicing for Borrowers Experiencing Payment Difficulties; Regulation X, 89 Fed. Reg. 60204 (July 24, 2024) (to be codified at 12 C.F.R. pt. 1024).

[6] See Supervisory Highlights: Servicing and Collection of Consumer Debt, Issue 34 (Summer 2024), available at https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-34_2024-07.pdf.

[7] See Consumer Financial Protection Circular 2024-04 (July 24, 2024), available at <https://www.consumerfinance.gov/compliance/circulars/consumer-financial-protection-circular-2024-04/>. Section 1057 of the Consumer Financial Protection Act provides anti-retaliation protections for covered employees and their representatives who provide information to the CFPB or any other federal, state, or local law enforcement agency regarding potential violations of laws and rules that are subject to the CFPB's jurisdiction. 12 U.S.C. § 5567.

[8] See Issue Spotlight: Costs of Electronic Payments in K-12 Schools (July 25, 2024), available at <https://www.consumerfinance.gov/data-research/research-reports/issue-spotlight-costs-of-electronic-payments-in-k-12-schools/>.

[9] See Issue Spotlight: Cash-back fees (August 26, 2024), available at <https://www.consumerfinance.gov/data-research/research-reports/issue-spotlight-cash-back-fees/>.

[10] Id.

[11] See Preserving free access to money in your account, by Rohit Chopra (August 27, 2024), available at <https://www.consumerfinance.gov/about-us/blog/preserving-free-access-to-money-in-your-account/>.

[12] See Issue Spotlight: Solar Financing (August 7, 2024), available at <https://www.consumerfinance.gov/data-research/research-reports/issue-spotlight-solar-financing/>; Consumer advisory: Steer clear of costly and complex loans for solar energy installation (August 7, 2024), available at <https://www.consumerfinance.gov/about-us/newsroom/consumer-advisory-steer-clear-of-costly-and-complex-loans-for-solar-energy-installation/>.

[13] Truth in Lending (Regulation Z); Consumer Protections for Home Sales Financed Under

Contracts for Deed (August 13, 2024), available at https://files.consumerfinance.gov/f/documents/cfpb_contract-for-deed_advisory-opinion_2024-08.pdf; Report on Contract for Deed Lending (August 13, 2024), available at https://files.consumerfinance.gov/f/documents/cfpb_contract-for-deed_report_2024-08.pdf; Consumer advisory: Help is available for people facing housing problems because of a contract for deed (August 13, 2024), available at <https://www.consumerfinance.gov/about-us/newsroom/consumer-advisory-help-is-available-for-people-facing-housing-problems-because-of-a-contract-for-deed/>.

[14] CFPB Comment on Request for Information on Uses, Opportunities, and Risks of Artificial Intelligence in the Financial Services Sector (August 12, 2024), available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-comment-on-request-for-information-on-uses-opportunities-and-risks-of-artificial-intelligence-in-the-financial-services-sector/>; see also Report on Contract for Deed Lending (August 13, 2024), available at https://files.consumerfinance.gov/f/documents/cfpb_contract-for-deed_report_2024-08.pdf; Consumer advisory: Help is available for people facing housing problems because of a contract for deed (August 13, 2024), available at <https://www.consumerfinance.gov/about-us/newsroom/consumer-advisory-help-is-available-for-people-facing-housing-problems-because-of-a-contract-for-deed/>.

[15] What Buy Now, Pay Later lenders are doing to be upfront with borrowers (August 16, 2024), available at <https://www.consumerfinance.gov/about-us/blog/what-buy-now-pay-later-lenders-are-doing-to-be-upfront-with-borrowers/>.

[16] Id.

[17] Buy Now, Pay Later Product FAQs, available at <https://www.consumerfinance.gov/compliance/compliance-resources/consumer-cards-resources/buy-now-pay-later-bnpl-products/buy-now-pay-later-product-faqs/>.

[18] Statement of CFPB Director Rohit Chopra Regarding the Transportation Department's Probe Into Airline Rewards Programs (September 5, 2024), available at <https://www.consumerfinance.gov/about-us/newsroom/statement-of-cfpb-director-rohit-chopra-regarding-the-transportation-departments-probe-into-airline-rewards-programs/>.

[19] Fair Debt Collection Practices Act CFPB Annual Report 2024 (September 5, 2024), available at <https://www.consumerfinance.gov/data-research/research-reports/fair-debt-collection-practices-act-cfpb-annual-report-2024/>.

[20] Consumer Financial Protection Circular 2024-05: Improper Overdraft Opt-In Practices (September 17, 2024), available at <https://www.consumerfinance.gov/compliance/circulars/consumer-financial-protection-circular-2024-05/>.

[21] Id.