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The CFPB in 2025: What to Expect Following the Election


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1


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2

Presentation Roadmap

1. CFPB Leadership Transition
2. Congressional Review Act – A Wild Card?
3. Rulemaking Agenda: What Rules Are on the Chopping Block?
4. Guidance: Goodbye to Circulars; Hello to a Revitalized Innovation Office?
5. Enforcement and Supervision
6. Other Implications

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3

CFPB Leadership Transition

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4

CFPB Leadership Transition

- January 20th: Direct Rohit Chopra will be serving at the pleasure of President Trump
 - *Seila Law*: Permits the President to fire the CFPB director at will, rather than only for cause
 - Like Kathy Kraninger in 2021, Chopra is expected to resign on January 20th, or risk being fired at will
- Chopra's close cadre of senior executives and advisors will likely follow Chopra out the door

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5

5

CFPB Leadership Transition

New CFPB Director

- President-elect Trump has not yet announced nominee for CFPB Director
- Trump's nominee will undoubtedly be more industry-friendly
- Must be confirmed by Senate

Acting Director

- Approval of a Senate-confirmed CFPB Director could take many months, so Acting Director will run the agency for potentially much of 2025
- Federal Vacancies Act will limit pool of potential nominees

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6

6



7

Prior Administration Changes

How much is past prologue for what will happen now?

- Transition from Rich Cordray to Mick Mulvaney/Kathy Kraninger
- Transition from Kathy Kraninger to Dave Uejio/Rohit Chopra
- Recurring themes
 - Shifting tool choice focus (rulemaking, guidance, enforcement, supervision, innovation)
 - Disclosure vs. substantive regulation; principles based vs. prescriptive rules
 - Maturation of agency as an organization, or lack thereof
- Expect the unexpected!

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8

8



9

Congressional Review Act

Congress may nullify any “major” rule by an agency

- Requires majority vote & signed by President
- When the CFPB finalizes a rule, it determines whether the rule is major and, if so, it submits the final rule to Congress
- The CRA defines rules subject to the Act very broadly
 - Almost certainly encapsulates many CFPB non-rulemaking pronouncements

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10

Congressional Review Act in 2025

- At least some of the final rules and guidance discussed below will be subject to CRA disapproval in 2025
- Effect: CRA resolution doesn't just stop a rule from being in or taking effect. Rather, it precludes the agency from issuing a future rule in "substantially the same form"
- Current CFPB leadership is likely evaluating tradeoffs of finalizing vs. not finalizing remaining rules to avoid preclusion
 - Larger Participant Rule to Supervise Digital Payment Apps released yesterday, so indicates they are moving full steam ahead

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11

11

Rulemaking Agenda: What Rules Are on the Chopping Block?

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12

Rulemaking Agenda: What's on the Chopping Block?

Revocation of Notice-and-Comment Rules under APA

- Unlike CFPB guidance, final rules cannot be retracted by stroke of pen. CFPB must initiate new rulemaking process to unwind rules
- Agency must acknowledge and explain its reasoning for agency reconsideration of policy choices in final rules
- 2017 payday rule is paradigmatic example of the procedural challenges that make unwinding a rule a difficult, but not impossible, exercise

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13

13

Rulemaking Agenda: What's on the Chopping Block?

Section 1033 Open Banking Rule:

- CFPB may decide to keep rule in place given its long development, issuance under a statutory mandate, and because many industry players have begun to implement it
- Stakeholder reaction has been mixed, and positive in some quarters. Could lessen likelihood of successful CRA resolution
- Alternatively, new leadership could elect to delay implementation to reconsider certain aspects (e.g., lack of liability allocation regime for data security breaches)
- Impacts of lawsuit in Kentucky – will CFPB continue to defend the rule?

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14

14

Rulemaking Agenda: What's on the Chopping Block?

Overdraft and NSF Fees

- CFPB had indicated intent to finalize these rules this year
- Potential outcomes:
 - Won't release (unlikely)
 - Vulnerability to CRA resolution, particularly the overdraft rule
 - New administration could initiate process to revoke

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15

15

Rulemaking Agenda: What's on the Chopping Block?

Section 1071 Small Business Data Collection

- Currently, the rule is in an implementation phase, but litigants have challenged the rule in federal court in Texas
 - 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
 - Not the first time: CFPB flipped sides on the payday rule in 2017 after CFPB leadership turned over

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16

16

Rulemaking Agenda: What's on the Chopping Block

FCRA Data Broker and Medical Debt Rulemaking

- In June, CFPB issued a proposal to prohibit medical debt reporting; likely to finalize rule, but may be subject to CRA or revocation
- CFPB has been working to release a separate Notice of Proposed Rulemaking to subject data brokers to coverage under the FCRA; likely DOA under new leadership

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17

17

Rulemaking Agenda: What's on the Chopping Block

Mortgage Closing Cost “Junk Fees”

- CFPB is in early stages to write a rule to address mortgage closing costs; issued RFI earlier this year. Most likely, this will not move forward.
- “Junk Fees” have been a Biden administration-wide effort which CFPB used to brand several rulemaking initiatives
 - The phrase is viewed as pejorative by many industry stakeholders, and this rulemaking has tenuous premises

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18

18

Rulemaking Agenda: What's on the Chopping Block

Nonbank Registry of Terms and Conditions and Enforceable Orders

- The CFPB finalized a 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 will likely be scrapped by the new administration

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19

19

Rulemaking Agenda: What's on the Chopping Block

Credit Card Late Fees

- We are skeptical that the CFPB will elect to maintain its Credit Card Late Fee Rule
 - Effectively restricts credit card companies from charging more than \$8 as a late fee
- We anticipate the CFPB either to withdraw the rule or change its position in litigation challenging the rule in the Northern District of Texas

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20

20



21

Non-Rulemaking Guidance

The explosion of CFPB non-rulemaking guidance has been a hallmark of Chopra's tenure

- Since 2022, the CFPB has issued scores of advisory opinions, interpretive rules, policy statements, and "circular" vehicles
- Chopra has doubled down on his pushback of those critical of this approach

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22

Non-Rulemaking Guidance

The new CFPB leadership will likely swiftly revoke many of the guidance documents issued under Chopra's leadership

- BNPL interpretive rule
- FCRA circular addressing workplace surveillance
- 2023 UDAAP policy statement
- Earned Wage Access interpretive rule (pending finalization)
- RESPA Advisory Opinion on Comparison Shopping Tools

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23

23

Innovation Program and Policies

Potential Change in Approach to Innovation Issues

- Current leadership wound down 2019 Innovation Policies
 - Characterized as giveaways to well-heeled stakeholders
 - Philosophy is best way to facilitate innovation to enforce law equally and not issue one-off regulatory relief measures
- New CFPB leadership may reinvigorate innovation function
 - More direct engagement with industry stakeholders (established and fintech)
 - Bringing back potential vehicles such as No Action Letters

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24

24

Enforcement and Supervision

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25

Enforcement

- We expect there to be a continued steady flow of enforcement activity
- Should *not* assume that enforcement will relax under a Republican administration, and states will also fill gaps

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26

26

Supervision

It is difficult to predict whether the agency will shift course in its prioritization of issues or entities

- Under Kraninger, agency emphasized “prevention of harm” via supervision. May see a return to this approach
- CFPB may also relax use of its so-called “dormant” authority to designate “risky” nonbanks for supervision, which is used aggressively by current leadership

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27

27

Other Implications

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28

Other Implications

Agency's Structure

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

GS Salary Scale

- Efforts could be made to put the agency staff on the GS salary scale and revoke the agreements with the employees' union on remote work

Institution Building

- Transition may provide an opportunity to reset its relationship with career staff and reinvigorate the early-years efforts at agency building

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29

29

Questions?

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30

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