

MEMORANDUM

To: Republican Members of the Committee on Financial Services

From: Financial Services Committee Republican Staff

Date: October 25, 2020

Subject: Full Committee Hearing

On Wednesday, October 27, 2021 at 10:00 a.m., the Committee on Financial Services will hold a hearing entitled “Bringing Consumer Protection Back: A Semi-Annual Review of the Consumer Financial Protection Bureau.”

Witness:

- The Honorable Rohit Chopra, Director, Consumer Financial Protection Bureau

Republican Theme: CFPB is unaccountable agency that has a history of regulatory overreach under the guise of consumer protection.

Republican Goal: Republicans will use the hearing to show:

- The CFPB structure and funding mechanism must be reformed to ensure accountability to the American people.
- Reverting to regulation by enforcement will stifle innovation and restrict access to credit for all consumers.
- Overreach and a return to excessive regulation will only harm small businesses and consumers at a time when they need regulatory certainty.

Background

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) established the CFPB and requires the CFPB Director to publish a semi-annual report on the Bureau’s activities and to testify on the report before the House Financial Services Committee and the Senate Banking Committee.¹ On October 8, 2021, the CFPB issued the Spring 2021 Semi-Annual Report to Congress, covering the Bureau’s activities from October 1, 2020 and ending March 31, 2021.²

Former Director Kathleen Kraninger resigned on January 20, 2021. On that same day through September 30, 2021, the CFPB was overseen by Acting Director, Dave Uejio, who had held a

¹ 12 U.S.C § 5496.

² <https://www.consumerfinance.gov/data-research/research-reports/semi-annual-report-consumer-financial-protection-bureau/>.

number of positions within CFPB since 2013, including acting chief of staff and chief strategist. Uejio undertook a number of actions during his tenure that are typically reserved for Senate-confirmed Directors such as rescinding policy statements and delaying rules.³ He's been praised by individuals like Senator Warren for his aggressive approach.

On September 30, 2021, the Biden Administration's nominee for Director of the CFPB, Rohit Chopra, was confirmed by the Senate by a vote of 50-48. Chopra, a former consumer advocate, helped establish the CFPB in 2010 alongside Sen. Elizabeth Warren after the financial crisis. He served as the Bureau's first Private Education Loan Ombudsman under former Director Richard Cordray. In 2018, Chopra was confirmed as a Democratic member of the Federal Trade Commission, where he has served until his confirmation.

The CFPB's Unconstitutional Leadership Structure

The Dodd-Frank Act established the CFPB as an independent agency.⁴ Unlike other federal financial agencies, the CFPB does not have an executive board, does not have an independent Inspector General, and does not allow meaningful oversight of the director.

On June 29, 2020, the Supreme Court ruled in *Seila Law LLC v. Consumer Financial Protection Bureau* that the CFPB's leadership structure is unconstitutional. The CFPB is led by a single director who is appointed by the president and confirmed by the Senate for a term of 5 years. The Dodd-Frank Act stated the president may only remove the director from office for "inefficiency, neglect of duty, or malfeasance in office."⁵ The court determined this leadership structure violates the separation of powers.

In 2017, the CFPB issued a civil investigative demand to Seila Law LLC for information and documents relating to the firm's business practices.⁶ Seila Law LLC refused to comply with the investigative request stating that the leadership structure of the CFPB was unconstitutional. The Court, agreed, holding that the director of the CFPB must be removable by the President.

In rendering its decision, the Court reasoned that there are only two exceptions to the President's unrestricted removal power: 1) agencies led by a group of principal officers and 2) inferior officers who have limited duties and no policymaking or administrative authority.⁷ Since the CFPB is an independent agency that is run by a single individual, it does not fall under either exception. The Court held that executive officials must be subject to "ongoing supervision and control of the elected president."⁸ In addition, the Court struck down the for-cause-removal provision, finding it unconstitutional.

The Court stated that the remaining provisions of the Dodd-Frank Act were fully operative. Chief Justice Roberts wrote that "there is nothing in the text or history of the Dodd-Frank Act

³ See letter from Financial Services Committee Republicans to Director Chopra, dated October 14, 2021.

⁴ 12 U.S.C. Chapter 53, Subchapter V.

⁵ 12 U.S.C. § 5491(c)(3).

⁶ *Seila Law LLC v. Consumer Financial Protection Board*, (591 U. S. ____ (2020)).

⁷ *Id* at 13.

⁸ *Id* at 4.

that demonstrates Congress would have preferred no CFPB to a CFPB supervised by the President.”⁹ The Court stated that the severability analysis of the CFPB does not stop Congress from pursuing alternative responses to this issue.¹⁰

The Supreme Court’s ruling supports the Republican position that the CFPB’s leadership is unconstitutional. Republicans had argued that a single director removable only for inefficiency, neglect, or malfeasance violates the separation of powers. Thus, the CFPB is an untouchable and unaccountable agency.¹¹

On July 7, 2020, the CFPB approved most of the regulatory actions taken by the Bureau from January 2014 through June 30, 2020.¹² In light of the Supreme Court decision, the Bureau took this step out of an “abundance of caution” in order to “resolve any possible uncertainty” about the effectiveness of prior actions.¹³ The approval of previous regulatory actions provides the financial marketplace with certainty that the rules are binding even after the decision in *Seila Law*.¹⁴

On January 20, 2021, Inauguration Day, Director Kraninger resigned as CFPB Director, at the request of the Biden Administration. On the same day, Dave Uejio became the Acting Director of the CFPB.

The CFPB’s Unaccountable Funding Mechanism

The CFPB operates outside of the annual Congressional appropriations process, and instead receives funding through direct transfers from the Federal Reserve System.¹⁵ However, the Fed does not exercise authority over the CFPB or its budget. The director is required only to submit a letter to the Federal Reserve Board of Governors each quarter certifying the amount of funds that is reasonably necessary for carrying out the authorities of the Bureau.¹⁶ The Federal Reserve transfers the requested amount to the Bureau for operations. The Bureau’s funding differs than that of other regulators, including the Federal Trade Commission, the Commodity Futures Trading Commission, or the Securities and Exchange Commission. This process affords very little oversight of the CFPB’s budget.

Regulatory and Policy Actions

Throughout 2021, the CFPB conducted a series of actions, including but not limited to: 1) finalizing a COVID-19-related mortgage servicing rule; 2) proposing a small business lending data collection rule; 3) revoking policy statements regarding the Bureau’s authority over “abusive” acts and practices and COVID-19-related flexibility; 4) issuing orders to technology platform companies about their payments services; 5) resuming examination of financial

⁹ Id at 33.

¹⁰ Id at 36.

¹¹ <https://republicans-financialservices.house.gov/news/documentsingle.aspx?DocumentID=407548>

¹² <https://www.consumerfinance.gov/about-us/newsroom/cfpb-ratifies-prior-regulatory-actions/>

¹³ Id.

¹⁴ Id.

¹⁵ 12 U.S.C. § 5497

¹⁶ 12 U.S.C. § 5497

institutions' compliance with the Military Lending Act; 6) interpreting discrimination prohibitions to include sexual orientation or gender identity; and 7) proposing to delay the effective dates of the 2020 Debt Collection Final Rule and 2020 Qualified Mortgage Final Rule.

Mortgage Servicing Rule

On June 28, 2021, the CFPB finalized a rule to give consumers and mortgage servicers an additional, temporary time period to prevent foreclosures, abandoning a proposal that would have essentially imposed a foreclosure moratorium until 2022.¹⁷ The rule went into effect August 31, 2021.

The final rule places temporary restrictions on new foreclosures through December 31, 2021, unless one of the “temporary special COVID-19 loss mitigation procedural safeguards” are met:

- Borrower has been evaluated for all options other than foreclosure and there are no available options to avoid foreclosure.
- Borrower has abandoned the property
- Borrower is more than 120 days behind on their mortgage payments and has been unresponsive to servicer outreach for 90 days
- Borrower was more than 120 days delinquent prior to March 1, 2020.

The final rule also 1) requires servicers to make certain disclosures about the availability of resolution options and financial counseling when contacting a delinquent borrower and 2) permits servicers to offer streamlined loan modification options to borrowers with COVID-19-related hardship based on the evaluation of an incomplete application.

The temporary rule only applies to mortgages on principal residences and generally does not apply to small servicers.

Small Business Lending Data Collection Rule

On September 1, 2021, the CFPB issued a proposed rule to implement Section 1071 of the Dodd-Frank Act which amended the Equal Credit Opportunity Act (ECOA) to require the collection of small business lending data.¹⁸

Under the proposal, the CFPB will require covered financial institutions to collect and report data on credit applications by small businesses that will be stored in a comprehensive database at the Bureau. Lenders will be required to report the amount and type of small business credit applied for and extended, demographic information about small business credit applicants,

¹⁷ <https://www.consumerfinance.gov/rules-policy/final-rules/protections-for-borrowers-affected-by-covid-19-under-respa/>

¹⁸ <https://www.consumerfinance.gov/rules-policy/rules-under-development/small-business-lending-data-collection-under-equal-credit-opportunity-act-regulation-b/>

including whether the applicant business is owned by women or minorities, and key elements of the price of the credit offered, among other data.

Covered lenders include depository institutions, online lenders, CDFIs, lenders involved in equipment and vehicle financing, commercial finance companies, governmental lending entities, and nonprofit nondepository lenders that originated at least 25 covered credit transactions for small businesses in each of the two preceding calendar years. The proposal does not include an asset-based exemption threshold for depository institutions or any other general exemptions for particular categories of financial institutions. Covered transactions include loans, lines of credit, credit cards, and merchant cash advances.

Rescission of Policy Statement on UDAAP Authority

On March 11, 2021, the CFPB, under former Acting Director Uejio, rescinded its January 2020 policy statement, “Statement of Policy Regarding Prohibition on Abusive Acts or Practices.”¹⁹ The Bureau indicated it would exercise the supervisory and enforcement authority consistent with the full scope of its statutory authority under the Dodd-Frank Act as established by Congress.²⁰

The 2020 policy statement clarified how the Bureau would use its “abusive” authority and included the following principles:

- Focusing on citing or challenging conduct as abusive in supervision and enforcement matters only when the harm to consumers outweighs the benefit
- Generally avoiding “dual pleading” of abusiveness and unfairness or deception violations arising from all or nearly all the same facts, and alleging “stand alone” abusiveness violations that demonstrate clearly the nexus between cited facts and the Bureau’s legal analysis
- Seeking monetary relief for abusiveness only when there has been a lack of a good-faith effort to comply with the law, except the Bureau will continue to seek restitution for injured consumers regardless of whether a company acted in good faith or bad faith.²¹

Rescinding the 2020 policy statement suggests the Bureau intends to return to the practice of regulation by enforcement that was employed by former Director Cordray and experienced by financial services firms under the Obama Administration. One of the more egregious approaches to enforcement under Cordray was the opaque and iterative practice of using its “unfair, deceptive, and abusive acts or practices” (UDAAP) authority under Section 1031(d) of the Dodd-Frank Act.²² While some precedent exists regarding the interpretation of “unfair” or

¹⁹ <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-rescinds-abusiveness-policy-statement-to-better-protect-consumers/>.

²⁰ Id.

²¹ <https://www.consumerfinance.gov/about-us/newsroom/cfpb-announces-policy-regarding-prohibition-abusive-acts-practices/>.

²² 12 U.S.C. § 5531

“deceptive,” there is no precedent or definition of the term “abusive.” Moreover, the statute provides no real guidance as to what constitutes an “abusive act or practice.” To date, the Bureau has not clarified the scope and meaning of UDAAP through the Administrative Procedure Act (APA) rulemaking process. In fact, Democrat-led CFPBs have historically used the UDAAP authority on a case-by-case basis to go after businesses. This enforcement practice has impacted a variety of financial services firms, and consumers by extension, by creating uncertainty in the consumer financial market.

Rescission of COVID-19-Related Flexibility

On March 31, 2021, the CFPB rescinded seven policy statements and removed itself from two joint agency statements issued in 2020 that provided temporary flexibilities for consumer lending institutions, including supervisory and data reporting relief.²³ The CFPB also rescinded a 2018 bulletin regarding supervisory communications.²⁴ The rescissions were effective April 1, 2021, giving financial services firms one day’s notice. In rescinding the statements, the CFPB stated that financial institutions had a year to adapt their operations to the difficulties posed by the pandemic.

The CFPB issued policy statements between March 26 and June 3, 2020 to provide enhanced regulatory flexibility and clarity to support industry participants’ response to the impacts of the pandemic.²⁵ The policy reversal removed reasonable flexibility for lenders to continue to serve their customers during the uncertain time and appeared to be in contradiction with some of the Bureau’s other actions ostensibly taken in the name of pandemic support.

Rescinded Policy Statements

- Statement on Bureau Supervisory and Enforcement Response to COVID-19 Pandemic (March 26, 2020)
- Statement on Supervisory and Enforcement Practices Regarding Quarterly Reporting Under the Home Mortgage Disclosure Act (March 26, 2020)
- Statement on Supervisory and Enforcement Practices Regarding CFPB Information Collections for Credit Card and Prepaid Account Issuers (March 26, 2020)
- Statement on Supervisory and Enforcement Practices Regarding the Fair Credit Reporting Act and Regulation V in Light of the CARES Act (April 1, 2020)
- Statement on Supervisory and Enforcement Practices Regarding Certain Filing Requirements Under the Interstate Land Sales Full Disclosure Act (ILSA) and Regulation J (April 27, 2020)

²³ <https://www.consumerfinance.gov/about-us/newsroom/cfpb-rescinds-series-of-policy-statements-to-ensure-industry-complies-with-consumer-protection-laws/>.

²⁴ *Id.*

²⁵ <https://www.consumerfinance.gov/about-us/newsroom/cfpb-rescinds-series-of-policy-statements-to-ensure-industry-complies-with-consumer-protection-laws/>

- Statement on Supervisory and Enforcement Practices Regarding Regulation Z Billing Error Resolution Timeframes in Light of the COVID-19 Pandemic (May 13, 2020)
- Statement on Supervisory and Enforcement Practices Regarding Electronic Credit Card Disclosures in Light of the COVID-19 Pandemic (June 3, 2020)

Rescinded Bulletin

- Bulletin 2018-01: Changes to Types of Supervisory Communications

Revoked Joint Agency Statements

- Interagency Statement on Loan Modifications and Reporting for Financial Institutions Working with Customers Affected by the Coronavirus (April 7, 2020)
- Interagency Statement on Appraisals and Evaluations for Real Estate Related Financial Transactions Affected by the Coronavirus (April 14, 2020)

Orders to Technology Companies

On October 21, 2021, the CFPB issued orders to collect information on the business practices of large technology companies operating payments systems in the United States.²⁶ The 55-page questionnaire requesting information on how data on consumers is collected, used, and stored were issued to Google, Apple, Facebook, Amazon, Square, and PayPal.²⁷ The CFPB indicated it will also study the practices of the Chinese tech giants that offer payments services, such as WeChatPay and Alipay.

Military Lending Act Authority

On June 16, 2021, the CFPB issued an interpretive rule to clarify that it has the authority to examine supervised financial institutions for conduct that violates the Military Lending Act (MLA).²⁸ The MLA imposes a 36% annual percentage interest rate cap for active-duty military members and their dependents.²⁹

In 2018, the CFPB discontinued MLA-related examination activities, based on its stated belief that Congress did not specifically confer examination authority to the CFPB with respect to the MLA. Former Director Kraninger requested Congress provide the Bureau with explicit MLA authority. In issuing the interpretive rule, current CFPB leadership stated it does not find the Bureau's prior position persuasive and will resume MLA-related examination activities.

²⁶ <https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-tech-giants-to-turn-over-information-on-their-payment-system-plans/>.

²⁷ https://files.consumerfinance.gov/f/documents/cfpb_section-1022_generic-order_2021-10.pdf

²⁸ <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-interpretive-rule-on-authority-to-resume-examinations-regarding-the-military-lending-act/>

²⁹ 10 U.S.C. § 987

Discrimination on Basis of Sexual Orientation and Gender Discrimination

On March 9, 2021, the CFPB issued an interpretive rule to clarify that it will interpret the Equal Credit Opportunity Act (ECOA) to prohibit lending discrimination based on sexual orientation or gender identity.³⁰ On June 15, 2020, the U.S. Supreme Court ruled in *Bostock v. Clayton County, Georgia*³¹ that the prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964 encompasses sexual orientation discrimination and gender identity discrimination. The CFPB indicated it will review and update relevant Bureau publications and guidance in accordance with the interpretive rule. The CFPB also noted it would take enforcement action under ECOA where appropriate.

Debt Collection Rules

On September 1, 2021, the CFPB withdrew a proposal to delay the effective date of the 2020 Debt Collection Final Rules and confirmed the final rules will take effect on November 30, 2021.³² In April 2021, the CFPB stated that the proposed delay was intended to allow stakeholders affected by the pandemic additional time to review and implement the rules.³³

Qualified Mortgage Rule

On April 27, 2021, the CFPB issued a final rule to delay the mandatory compliance date of the 2020 General Qualified Mortgage (QM) Loan Definition Final Rule from July 1, 2021 to October 1, 2022.³⁴ The CFPB cited its reasoning for extending the compliance date as ensuring access to responsible, affordable mortgage credit and preserving flexibility for consumers affected by the COVID-19 pandemic and its economic effects.³⁵

Attached Legislation

- **H.R. 4120, the Comprehensive Consumer Credit Reporting Reform Act (Pressley)** would remove important predictive data from credit reports; arbitrarily shorten the time period adverse, but accurate, information remains on a consumer's credit report and prohibit the inclusion of adverse information related to a delinquent or defaulted private education loan on a consumer's credit file if the consumer has made nine on-time payments; remove predictive medical information from credit reports, ultimately increasing healthcare costs for those who need medical services most; grant the Consumer Financial Protection Bureau (CFPB) authority to regulate and control credit

³⁰ <https://www.consumerfinance.gov/about-us/newsroom/cfpb-clarifies-discrimination-by-lenders-on-basis-of-sexual-orientation-and-gender-identity-is-illegal/>.

³¹ 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020).

³² <https://www.consumerfinance.gov/about-us/newsroom/cfpb-confirms-effective-date-for-debt-collection-final-rules/>.

³³ <https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-delay-of-effective-date-for-recent-debt-collection-rules/>.

³⁴ <https://www.consumerfinance.gov/rules-policy/final-rules/qualified-mortgage-definition-under-truth-lending-act-regulation-z-general-qm-loan-definition-delay-mandatory-compliance-date/>.

³⁵ *Id.*

scoring model development—a private sector process that relies on sophisticated, proprietary algorithms and predictive scoring data; require the nation-wide credit reporting agencies to purchase from other entities and provide credit information to consumers for free upon request (i.e., a credit score, an educational credit score, an explanation of how that credit score is calculated, and any previous credit score in the consumer’s file); limit the ability of employers to obtain a complete picture of a potential employee during the hiring process by prohibiting the use of credit history as a factor in employment decisions unless allowed by law or in a national security investigation; and impose a complex, costly, and burdensome process for consumers to initiate a reinvestigation and appeal process to dispute inaccurate information, grants injunctive relief for consumers, and authorizes attorney’s fees for prevailing parties in litigation

- **H.R. 4277, the Overdraft Protection Act of 2021 (Maloney)** would amend the Truth in Lending Act (TILA) to require additional restrictions and disclosures for overdraft fees, ultimately limiting options for consumers who use overdraft as an emergency financial product. It would limit the number of overdraft fees a bank may charge on a monthly and annual basis, prevent financial institutions from re-ordering transactions to increase overdraft fees, and force financial institutions to provide consumers with the opportunity to opt-in to overdraft coverage for all transactions.
- **H.R. 5484, the Financial Compensation for CFPB Whistleblowers Act (Green)** would establish a whistleblower program incentivizing the reporting of consumer fraud and abuse to the CFPB, while protecting the confidentiality of the whistleblower’s identity. It would nullify pre-dispute arbitration clauses as a condition for employment, except for in relation to collective bargaining agreements.
- **H.R. ____, the Protecting Your Credit Score Act (Gottheimer)** would require the three nationwide credit reporting agencies create a shared online “portal” to allow unlimited and free consumer access to credit information, credit freezes, and dispute resolution; require complete Social Security Numbers (SSNs) be used to confirm a consumer’s identity without setting appropriate standards to protect the information; create additional opportunities for trial attorneys to exploit the litigation system, ultimately raising the cost of credit for all consumer; and expand the statutory authority of the Consumer Financial Protection Bureau (CFPB).
- **H.R. ____, the Small Business Lending Disclosure Act (Velazquez)** would amend the Truth in Lending Act (TILA) to expand the CFPB’s supervision authority over small business financing.
- **H.R. ____, the Ensuring Pay Equity Act** would amend the Dodd-Frank Act to require certain pay equity audits. It would require the Offices of Minority and Women Inclusion at the federal financial regulatory agencies to conduct internal pay equity audits every two years and to report those findings to Congress.
- **H.R. ____, the Holding Megabanks Accountable Act** would require Boards of Directors of global systemically important banks (GSIBs) to include directors with

current and relevant banking or regulatory experience, of which non-compliance would be deemed “unsafe and unsound.” The bill prohibits directors from serving on the board of more than 3 public companies or more than 2 public companies if the director is in a key board leadership role and prohibits firm executives from serving in key board leadership roles. Violations will result in removal and future prohibition from serving on bank boards.

- **H.R. _____, the Preventing Unfair Foreclosures Act** would codify CFPB’s temporary mortgage servicing rule (set to expire Dec. 31, 2021) under Regulation X requiring 120 days of delinquency before the start of a foreclosure, improve written notices during the mortgage servicing process, establish data sharing requirements between CFPB and other federal agencies, and otherwise improve the mortgage servicing process for homeowners.
- **H.R. _____, the Private Student Loan Parity Act** would clarify and explicitly codify that the definition of private student loans covered by the Truth in Lending Act (TILA) includes Income Share Agreements (ISAs), while expanding the definition to encompass other forms of credit extended to students pursuing a postsecondary education, including coding bootcamps and other unaccredited educational programs.
- **H.R. _____, the Promoting Fair Lending to Small Businesses Act** would grant the CFPB new supervisory and fair lending enforcement authority of non-depository lenders to small businesses that collect and report data pursuant to Section 1071 of the Dodd-Frank Act.