

CFPB Fall Regulatory Agenda Released

December 6, 2016

Financial Services and Regulation

Without much fanfare, the Consumer Financial Protection Bureau (the “Bureau,” or “CFPB”) recently released its [Fall Unified Regulatory Agenda](#) (“URA”),¹ which describes the Bureau’s regulatory priorities for the next six months. The URA outlines fairly ambitious plans for the coming months, including final action on the controversial arbitration rule and the commencement of “pre-rule activities,” such as convening Small Business Regulatory Enforcement Fairness Act (“SBREFA”) panels if necessary, on overdrafts, debt collection, and several other rules. Although [announced](#) just last week, the [preamble](#) to the CFPB’s URA states that it is current as of October 19, 2016. Given the outcome of the November election, however, it is far from certain whether the CFPB will be able to adhere to its rulemaking plans.

The Final Arbitration Rule

The URA sets a target of February 2017 to issue the Bureau’s final [arbitration rule](#). The Bureau issued a notice of proposed rulemaking (“NPRM”) in May, and the comment period closed on August 22. Currently, many consumer financial services providers require their customers to agree to submit any disputes to arbitration. The proposed rule would prohibit certain such providers from using mandatory arbitration clauses to prevent consumers from participating in class action lawsuits. The proposed rule is controversial, garnering widespread criticism from [industry](#) and [Republican lawmakers](#), and praise from [consumer advocates](#) and [Democratic lawmakers](#).

Though the URA sets a February 2017 target, it was recently [reported](#) that the CFPB is pressing to complete the rule before the new Republican Administration takes office on January 20, 2017. Even if the rule is finalized before the change in administrations, the new Congress, with Republicans in control of both houses, would have the power to nullify the rule without the threat of filibuster under the Congressional Review Act (“CRA”).² The CRA empowers Congress to pass a joint resolution nullifying any rule promulgated by an agency within 60 legislative days of the rule going final by a simple majority vote of both Houses of Congress. Although the resolution is subject to Presidential veto, President Trump would be unlikely to veto a resolution nullifying a CFPB rule, particularly a rule such as the arbitration rule that has drawn sharp criticism from broad segments of industry. The Congressional Review Service has [calculated](#) that any rule finalized after June 2, 2016 may be nullified by the incoming Congress. The most vulnerable rules are the proposed [arbitration rule](#) and the proposed [payday, vehicle title, and](#)

¹ Agencies are required, under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, to publish semiannual regulatory agendas in the Federal Register. These agendas must identify rules that have a significant economic impact on a substantial number of small entities. The URA satisfies this requirement.

² 5 U.S.C. § 801 *et seq.*

[certain high-cost installment loans rule](#). The recently finalized [prepaid cards rule](#), as well as any future rule, may also be at risk of nullification pursuant to the CRA.

Overdrafts

The Bureau has long stated that issuing rules relating to overdraft practices is one of its highest priorities. The CFPB has been preparing for a rule regarding overdrafts since at least 2013, when it released a [white paper](#) on overdraft practices at several large banks. It published a further [report](#) in 2014. These reports highlighted a number of areas of potential regulatory action, such as the practices financial institutions use to implement “opt-in” requirements for overdraft protection, the high incidence of overdraft fees among a small number of account holders, and involuntary account closures.

However, the Bureau’s progress toward an overdraft rule has been slow, in part because overdraft regulation would likely be politically contentious as overdrafts represent a significant source of revenue for community banks. Such pressures are not going to diminish in 2017.

The Spring URA stated that the Bureau was “continuing to engage in additional research,” had “begun consumer testing initiatives relating to the opt-in process,” and set an August 2016 target date for launching pre-rule activities. The Fall URA makes the same statements, but sets a new pre-rule activity date of January 2017.

Although it is possible that the CFPB may seek to convene a SBREFA panel on a possible overdraft rule before or shortly after the new Administration takes office, it is likely that the launch of pre-rule activities will be delayed beyond January.

Debt Collection Rule

The CFPB continues to prepare for a rulemaking regarding debt collection practices. During the summer of 2016, the Bureau convened a SBREFA panel comprised of Fair Debt Collection Practices Act (“FDCPA”)-covered collectors (i.e., third party debt collectors). The URA states that the Bureau intends to convene a second SBREFA panel in 2017 with businesses that collect their own debts, i.e., first-party debt collectors. The URA target for pre-rule activities is February 2017, suggesting that the second SBREFA panel may be convened as early as February.

The 2013 [Advanced Notice of Proposed Rulemaking](#) (“ANPR”) highlighted a number of concerns the Bureau had regarding debt collection practices. These included concerns about the integrity and consistency of information shared between debt owners and debt collectors; whether collectors should be required to disclose when a debt is time-barred; and a variety of other practices that the Bureau might consider unfair, deceptive, or abusive. The ANPR left open the question of how it would apply to first-party collectors. The new SBREFA panel suggests that the Bureau eventually intends to propose a debt collection rule that covers both first-party and third-party debt collectors.

In a [blog post](#) dated December 2, 2016, the CFPB’s Assistant Director for Regulations, Kelly Cochran, stated that the Bureau has been analyzing the results of a survey to obtain information from consumers about their experiences with debt collection and plans to publish a report on the survey in coming months.

Payday, Title, and High-Cost Installment Loans

Significantly, the latest URA does not project a date to issue the final small-dollar loan rule (officially the Payday, Vehicle Title, and Certain High-Cost Installment Loans rule). The CFPB issued an NPRM for [payday, vehicle title, and high-cost installment loans](#) in July 2016, and an accompanying request for information at the same time. The comment period has closed for both.

Because the small-dollar loan rule is likely to be viewed less favorably by the next Administration, there has been [speculation](#) that the Bureau might seek to issue a final rule before January 20, 2017. However, the URA does not make a projection for issuance of a final rule.

A pre-inauguration final rule seems highly unlikely because the Bureau [received](#) around one million comments in response to the NPRM and cannot realistically digest and respond to such a massive body of comments within such a short time frame. A final rule rushed into publication might embolden opponents and raise questions about the thoroughness of the Bureau's analysis and consideration of the comments.

Supervision of Larger Participants in Installment Loan and Vehicle Title Markets

The CFPB must make a "larger participant" rule defining those entities subject to supervisory examinations before it can examine nonbank installment lenders and vehicle title lenders. In the Spring 2016 URA, the CFPB predicted that pre-rule activities would begin on this larger participant rule in December 2016. The most recent URA, however, pushes back the target date for beginning pre-rule activities regarding the supervision of larger participants in the installment loan and vehicle title loan markets, including SBREFA panels (if necessary), to May 2017. The CFPB also is considering whether to require registration of these or other non-depository lenders it is empowered to supervise under Dodd-Frank.

The volume of comments the CFPB received on the proposed small-dollar loan rule may be driving the delay in this larger participant rule. Many entities potentially subject to supervision under the larger participant rule also would be covered persons under the small-dollar rule. Therefore, the Bureau's deferral may reflect a determination to consider the comments on the proposed small-dollar loan rule in developing the larger participant rule.

Technical Corrections and Clarifying Amendments to Home Mortgage Disclosure Act (Regulation C) October 2015 Final Rule

The URA targets March 2017 for the issuance of an NPRM to make technical corrections and to clarify certain requirements under the Bureau's final rule amending Regulation C, issued in October 2015, which implemented amendments to the Home Mortgage Disclosure Act ("HMDA") made by the Dodd-Frank Act.

Harmonizing ECOA and HMDA Race and Ethnicity Information Collection

The URA lists a new rulemaking designed to harmonize the collection of race and ethnicity information under both the Equal Credit Opportunity Act (“ECOA”) and the Home Mortgage Disclosure Act. Currently, under the ECOA’s implementing regulation, Regulation B, creditors are generally prohibited from requesting information about consumers’ race or ethnicity, except to the extent required to monitor compliance with the ECOA.³ The permissible inquiries under Regulation B include only aggregate racial and ethnic categories. In contrast, under a final rule issued by the CFPB in October 2015, HMDA-covered institutions must allow applicants and borrowers to self-identify using disaggregated ethnic and racial categories—for example, by identifying as having a Korean ethnic background rather than simply “Asian”—beginning in January 2018.

The CFPB has already sought to ease this tension between the rules by issuing an [Official Approval](#) in September 2016 approving of a new Uniform Residential Loan Application that might otherwise have violated Regulation B. The new rulemaking is an attempt to address this tension on a wider scale, but is also important to watch because the use of self-identified and disaggregated ethnic and racial categories may impact fair lending analyses.

The CFPB did not previously identify this rulemaking in the Spring URA, but now projects it will publish an NPRM in March 2017.

Business Lending Data (Regulation B)

The URA states that Bureau is also in the process of developing a rule required by section 1071 of the Dodd-Frank Act that would require the collection of information concerning credit applications made by woman-owned, minority-owned, and small businesses. The CFPB is required to make a rule regarding the format of this collection. The URA indicates the Bureau is currently conducting research and outreach, and pre-rule activities are projected to start in March 2017. In the Spring 2016 URA, the Bureau estimated that pre-rule activities would begin in December 2016.

The recent CFPB [blog post](#) indicates that work on this rule is “in the very early stages,” so it is likely that the March 2017 target will slip.

Mortgage Disclosure Rule Clarifications

In August 2016, the CFPB [published an NPRM](#) proposing various amendments to Federal mortgage disclosure requirements under the Real Estate Settlement Procedures Act and the Truth in Lending Act that are implemented in Regulation Z. The proposed amendments memorialize informal guidance on various issues and include clarifications and technical amendments. The NPRM also proposed tolerance provisions for the total of payments, an adjustment to a partial exemption mainly affecting housing finance agencies and nonprofits,

³ 12 C.F.R. § 1002.5(b).

extension of coverage of the integrated disclosure requirements to all cooperative units, and guidance on sharing the disclosures with various parties involved in the mortgage origination process. The comment period closed on October 18, 2016.

The URA sets a March 2017 target for issuing a final rule. This proposal received a modest number of comments and likely can be finalized within the stated time frame.

Amendments Relating to Disclosure of Records and Information

The URA projects that the CFPB will issue final amendments to its rule regarding the disclosure of records and information in April 2017. The Bureau issued an [NPRM](#) in August 2016, which drew criticism because the proposed rule would prevent businesses from publicly disclosing that they had received civil investigative demands or other information about pending CFPB law enforcement investigations. The ACLU, for example, [argued](#) that this rule raised serious First Amendment concerns.

Gramm-Leach-Bliley Act (GLBA) Regulation P

The URA also set a November 2016 target for issuing a final rule modifying Regulation P, which implements portions of the Gramm-Leach-Bliley Act (“GLBA”). The modification would conform Regulation P with a recent legislative amendment to GLBA § 503(f)⁴ in Title LXXV of the Fixing America’s Transportation Act (“FAST Act”) that exempts institutions from the obligation to provide annual privacy notices when they have not changed their privacy policies from the previous time they sent a notification, and they only share consumer information in a manner exempt from notice and opt-out requirements. The legislation supersedes a more restrictive version of the annual privacy notice exemption that the CFPB had previously adopted. The November target has now passed without the Bureau issuing a final rule.

⁴ 15 U.S.C. § 6803(f).

Summary of Rulemaking Dates

Key Rulemakings

<u>Rulemaking</u>	<u>Spring 2016 Projection</u>	<u>Fall 2016 Outcome or Projection</u>
<u>Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z)</u>	Final Rule: July 2016.	Final Rule issued October 2016.
<u>Payday Loans and Deposit Advance Products</u>	NPRM: June 2016.	NPRM issued July 22, 2016; RFI issued November 7, 2016.
<u>Arbitration</u>	NPRM: May 2016.	NPRM issued May 24, 2016. Final Rule: February 2017.
<u>Debt Collection Rule</u>	Pre-rule Activities: June 2016.	Pre-rule Activities: February 2017 (SBREFA Panel on 1st Party Debt Collection: 2017).
<u>Overdraft</u>	Pre-rule Activities: August 2016.	Pre-rule Activities: January 2017.
<u>Business Lending Data (Regulation B)</u>	Pre-rule Activities: December 2016.	Pre-rule Activities: March 2017.
<u>Gramm-Leach-Bliley Act (GLBA) (Regulation P)</u>	NPRM: September 2016.	NPRM issued July 11, 2016. Final Rule was projected for November 2016.
<u>Reconciling Equal Credit Opportunity Act (Regulation B) and Home Mortgage Disclosure Act (Regulation C) Ethnicity and Race Information Collection</u>	Not in agenda.	NPRM: March 2017
<u>Supervision of Larger Participants in Installment Loan and Vehicle Title Loan Markets</u>	Pre-rule Activities: December 2016.	Pre-rule Activities: May 2017.
<u>Amendments Relating to Disclosure of Records and Information</u>	Not in agenda.	NPRM issued August 24, 2016. Final Rule: April, 2017.

Other Rulemakings

<u>Rulemaking</u>	<u>Spring 2016 Projection</u>	<u>Fall 2016 Outcome or Projection</u>
<u>The Expedited Funds Availability Act (Regulation CC)</u>	Final Rule: December 2016.	Final Rule was projected for November 2016.
<u>Consumer Financial Civil Penalty Fund</u>	Final Rule: October 2016.	Final Rule: October 2017.
<u>Amendments to Federal Mortgage Disclosure Requirements Under the Truth in Lending Act (Regulation Z)</u>	NPRM: July 2016.	NPRM issued July 29, 2016. Final Rule: March 2017.
<u>Civil Penalty Inflation Adjustment Rule</u>	Interim Final Rule: June 2016.	Interim Final Rule issued June 14, 2016. Final Rule: January 2017.
<u>Consumer Leasing (Regulation M)</u>	Not in agenda.	NPRM issued August 4, 2016. Final Rule issued November 30, 2016.
<u>Truth in Lending (Regulation Z)</u>	Not in agenda.	Final Rule issued November 30, 2016.
<u>Appraisals for Higher-Priced Mortgage Loans Exemption Threshold</u>	Not in agenda.	NPRM issued August 4, 2016. Final Rule issued November 30, 2016.
<u>Amendments to FIRREA Concerning Appraisals (Automated Valuation Models)</u>	NPRM: September 2016.	NPRM: January 2017.
<u>Technical Corrections and Clarifying Amendments to Home Mortgage Disclosure Act (Regulation C) October 2015 Final Rule</u>	Not in agenda.	NPRM: March 2017.

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