



CFPB Non-Rulemaking Guidance: A Primer

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Presentation Roadmap

1. Background on the CFPB's increased issuance of non-rulemaking guidance
2. Explain the types of CFPB guidance
3. Examples of recent noteworthy CFPB guidance
4. What about *Loper Bright v. Raimondo*?

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Background: CFPB's Use of Guidance

“Markets work best when rules are simple, easy to understand, and easy to enforce. The CFPB is seeking to move away from highly complicated rules that have long been a staple of consumer financial regulation and towards **simpler and clearer rules**. In addition, the CFPB is **dramatically increasing the amount of guidance** it is providing to the marketplace, in accordance with the same principles.”

-- “Rethinking the Approach to Regulations” [Blog Post](#), CFPB Director Rohit Chopra (Jun. 17, 2022)

Background: CFPB's Use of Guidance

- Under Director Rohit Chopra, there has been a noticeable uptick in CFPB's issuance of guidance outside of the formal rulemaking process
- For example, from Jan. 1 to Dec. 31, 2022, at least 21 pieces of formal non-rulemaking guidance were issued by CFPB
- CFPB has continued to provide informal guidance through the Director's public remarks, press releases, blogs, and other mediums

Background: Guidance Procedural Requirements

- CFPB takes the position that its guidance is not subject to the federal Administrative Procedure Act's (APA) procedural rulemaking requirements, including the notice-and-comment requirements (*see* 5 U.S.C. § 553(b))
- CFPB sometimes has chosen to publish the guidance in the *Federal Register* and solicit public feedback even when not required by the APA
- Other federal procedural rulemaking requirements may not apply to CFPB guidance, *e.g.*, Small Business Review Panel (SBREFA), Regulatory Flexibility Act, Paperwork Reduction Act, Dodd-Frank rulemaking standards for CFPB

CFPB Guidance Explained

- In addition to increasing the volume of guidance, under Director Chopra, CFPB has issued new and different types of non-rulemaking guidance
- Understanding the types of guidance and their intended audience may help inform the potential impact of the guidance for your company



CFPB Guidance Explained

Interpretive Rules	Policy Statements
<ul style="list-style-type: none">- Interpretive Rules- Procedural rules- Advisory opinions	<ul style="list-style-type: none">- Policy statements- CFPB Circulars (since 2022)- Compliance bulletins
<p><u>Other Formal Guidance:</u> Supervisory Highlights, Examination Manuals, Compliance Aids, FAQs, Rule preamble (weight of policy statement?), amicus briefs, etc.</p>	
<p><u>Informal Guidance:</u> Letters to other regulators, press releases, public remarks, blogs, Director statements, tweets, etc.</p>	
<p><u>Innovation Program Tools:</u> Trial Disclosure Policy Waivers, No-Action Letters (<i>no longer issued</i>), Compliance Assistance Approval Orders (<i>no longer issued</i>)</p>	

CFPB Guidance Explained

- **Benefits compared to Rulemaking**
 - Nimbler vehicle; can address targeted issues, and more quickly
 - Can be responsive to stakeholder feedback about rule ambiguities or compliance challenges
 - Depending on statutory authority, interpretive rules can provide safe harbor for compliance
- **Drawbacks compared to Rulemaking**
 - Lack of comprehensive treatment means guidance may leave more questions than it answers
 - Does not benefit from public comments
 - More easily susceptible to agency change in position



Recent Noteworthy Guidance

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Interpretive Rule: Truth in Lending (Reg Z); Use of Digital User Accounts to Access Buy Now, Pay Later Loans (May 22, 2024)

- Buy Now, Pay Later (BNPL) providers are “card issuers” and “creditors” under TILA and Regulation Z and must follow Subpart B (open-end credit provisions) and other provisions
- CFPB interpreted “credit card” under Reg Z to include a digital user account that a consumer can use through a website, mobile app, browser extension, or integration with a merchant platform to access BNPL loans from time to time to make purchases
- Interpretive rule means that BNPL providers must comply with Subpart B open-end credit requirements, including account opening disclosures, periodic statement requirements, a change in terms notice requirement, billing dispute rights, and liability limits for unauthorized transactions
- Subpart G provisions implementing the Credit CARD Act (e.g., ability-to-repay requirement, penalty fee limits) generally do not apply to BNPL providers
- Rule will take effect July 30, 2024

Summer 2024 Supervisory Highlights, Servicing and Collection of Consumer Debt, Issue 34 (July 2, 2024)

- Discusses key findings from auto and student loan servicing companies, debt collectors, and other financial services providers, including findings on deposits and prepaid accounts, and medical credit cards account management
- Details loan servicer activity CFPB identified as not compliant with prohibition on unfair, deceptive or abusive acts or practices (UDAAP), the Electronic Fund Transfer Act (EFTA)/Reg E, and the Fair Debt Collection Act (FDCPA)/Reg F, including those related to:
 - Insufficient notices, excessive hold times, misrepresentation of proper forms for consumers to use, failure to issue EFTA notices, failure to provide debt validation notices, use of misleading information about FDCPA rights and statutes of limitations, harassing and abusive debt collection communications and practices
 - Insufficient service provider oversight (medical payment products), failure to provide account information (or charge fees for such information), and improper account freezes

CFPB Circular No. 2024-01, Preferencing and Steering Practices By Digital Intermediaries for Consumer Financial Products or Services (Feb. 29, 2024)

- Provides guidance on applying abusiveness prohibition’s “reasonable reliance” prong to digital comparison-shopping platform operators and lead generators
- Focuses on comparison-shopping tool operators or lead generators that preference products or services based on receipt of financial or other benefits
- Second time in just over a year the CFPB issued guidance addressing digital comparison-shopping platforms, after the RESPA Advisory Opinion (*see later slide*)
- Omits *any* discussion of disclosure, even though adequacy of disclosure presumably relates to whether the consumer’s reliance is “reasonable”

CFPB/DOJ Joint Statement on Fair Lending for Noncitizen Borrowers (Oct. 12, 2023)

- CFPB and DOJ issued a joint statement about the consideration of immigration status under ECOA
- Statement clarified that while ECOA and Regulation B do not explicitly prohibit consideration of immigration status, they prohibit using immigration status as a proxy to discriminate on basis of national origin, race, or other protected classes
- Clarifies that creditors may consider an applicant's immigration status when necessary to determine the creditor's rights regarding repayment
- Overbroad reliance on immigration status may run afoul of ECOA or other laws

CFPB Circular No. 2023-03, Adverse Action Notification Requirements and the Proper Use of the CFPB's Sample Forms Provided in Reg B (Sept. 19, 2023)

- Shares the CFPB's view that creditors do not satisfy their adverse action notice obligations under ECOA and Reg B by relying on the checklist of reasons provided in Reg B's sample forms for adverse action notices if those reasons do not accurately or specifically identify the principal reasons for the adverse action
- Communicates that creditors may not rely on overly broad or vague adverse action reasons to the extent that they obscure the specific and accurate reasons relied upon
- Focuses on explainability challenges with using artificial intelligence or complex credit models in credit underwriting

Policy Statement on Abusive Acts or Practices (Apr. 3, 2023)

- Summarized CFPB and other agencies' enforcement and supervisory actions
- Purported to provide analytical framework to government enforcers and market for identifying abusive acts or practices
- Director Chopra's [speech](#) on the day of issuance provided additional insights into thinking, including that it will help “promote a visceral understanding of the prohibition”
- CFPB issued prior policy statement in [January 2020](#), which focused on enforcement priorities and was less detailed; rescinded in [January 2021](#)
- Circular on digital comparison-shopping platforms (Mar. 2024) builds on concepts – *see earlier slide*

Registry of Nonbank Covered Persons Subject to Certain Agency and Court Orders (June 3, 2024)

- Requires “covered nonbanks” to register certain “covered orders” with the CFPB for a public registry
- Covered orders in effect on or after Sept. 16, 2024, must be registered
- Rule also requires CFPB-supervised covered nonbanks to review covered orders, describe steps taken to oversee the nonbank’s activities subject to the order, and attest whether the nonbank identified any violations or noncompliance with applicable obligations imposed by the order’s public provisions in the preceding calendar year
- Includes a one-time alternative registration option for covered orders published on the NMLS website
- Final rule effective Sept. 16, 2024, with registration first beginning Oct. 16, 2024. Tiered registration dates based on the type of nonbank (larger participant and supervised covered nonbanks, other CFPB supervised covered nonbanks, and all other covered nonbanks)

What about that recent SCOTUS opinion - *Loper Bright v. Raimondo*?

- U.S. Supreme Court decision overturning *Chevron* deference
 - *Chevron* deference required courts to give deference to an agency's interpretation of an ambiguous statute
- *Loper Bright* establishes that courts will decide the interpretation of ambiguous statutes and returns to *Skidmore* deference
- *Loper Bright* is a landmark decision; however, the full extent of its impact remains an open question
 - Some speculation that *Loper Bright* will result in less non-rulemaking guidance. But, until the non-rulemaking guidance is challenged, it remains the policy position of the agency.
 - Recent 7th Circuit Decision in *CFPB v. Townstone Financial, Inc.* provides insight into the post-*Chevron* landscape

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Thank you!

Questions? Email us:



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