



2023 Preview

# Chopra's Last Stand

The CFPB Will Move Forcefully on a Wide  
Swatch of Industries

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# Introduction

Capstone believes Consumer Financial Protection Bureau (CFPB) Director Rohit Chopra's top priorities for 2023 are clear. Chopra is focused on large industry operators, technology companies offering consumer finance products and collecting consumer data, and product fees, especially when unavoidable. We see varied implications for companies and industries across the consumer finance market.

Chopra has generally shied away from rulemaking in favor of guidance and the power of the "bully pulpit." However, as he looks to cement policy changes in the time before President Biden's current term ends in January 2025, we believe he will turn to rulemaking in targeted areas, for example by lowering the safe harbor level for credit card late fees.

At the same time, the Constitutional challenge to the appropriations mechanism now used to fund the CFPB will loom over the bureau's activities. We expect the Supreme Court to weigh in on the issue by the end of June 2023. A decision unfavorable for the CFPB would make it more difficult for the bureau to push through substantial policy changes at a moment when its future is being negotiated.

Next year will be influential for consumer finance policy, with agencies—including the CFPB and Federal Trade Commission (FTC)—seeking to complete important rulemaking by mid-2024 within Biden's current term. To achieve this goal, the particular rules should be proposed by the end of 2023.

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# A Deeper Look

## Supreme Court Considers Constitutionality of CFPB's Funding Method

Winners and Losers from the Pending Supreme Court Case	
Winners	Companies facing CFPB enforcement including MoneyGram International Inc. (MGI), TransUnion (TRU), and Ace Cash Express and companies facing CFPB investigations including Block, Inc. (SQ), Credit Acceptance Corp. (CACC), Enova International, Inc. (ENVA), Equifax, Inc. (EFX), Oportun Financial Corp. (OPRT), and Rent-A-Center, Inc. (RCII)
Losers	Industries reliant on CFPB rules for regulatory clarity, such as disclosures for mortgages, overdraft, debt collection, and student loans

Uncertainty over the constitutionality of the CFPB's funding structure will weigh on the bureau until the issue is resolved by the US Supreme Court. In October 2022, a three-judge panel for the US Court of Appeals for the Fifth Circuit ruled unanimously in *Community Financial Services Association of America Ltd (CFSA) v. CFPB* that the bureau is funded through unconstitutional means. The CFPB appealed the ruling to the Supreme Court, which will decide whether to side with the bureau and maintain the status quo or rule against it, forcing Congress to amend the funding structure.

If the CFPB loses, Congress will have to directly appropriate its funding. In addition to the amended funding method (which likely will lead to less money for the agency), we expect the bureau's critics in Congress would seek further changes to the CFPB, including a potential shift to a commission leadership model from the current single director.

The Supreme Court granted a motion that delayed the deadline for CFSA to file its opposition to the CFPB's petition for a *writ of certiorari* until January 13, 2023. CFSA indicated that it would also file a cross-petition appealing aspects of the case where the Fifth Circuit ruled in favor of the CFPB. The timeline allows the CFPB to file its opposition to the cross-petition in time for the Supreme Court justices to consider the

petitions during their February 17<sup>th</sup> conference. We believe the most likely outcome is that the Supreme Court grants *certiorari* and hears the case in the current session with arguments by the end of April and a decision published by the end of June.

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If the Supreme Court does not hear the case in the current session, we expect the Justices will hear it in the 2023 term, with a decision published by the end of June 2024. To date, the CFPB is generally going about business as usual while waiting for a decision. The bureau is continuing to take enforcement actions and agree to consent orders, although some ongoing litigation—such as the case concerning Populus Financial Group (which does business as ACE Cash Express), which is within the Fifth Circuit jurisdiction—has been stayed. Generally, we believe this legal overhang will

make CFPB slower to act, as the overhang gives companies, especially those within the Fifth Circuit (Louisiana, Mississippi, and Texas), a means to challenge CFPB enforcement or civil investigative demands (CIDs).

It follows that, without intervention by the Supreme Court, any challenges to future rulemakings brought within the Fifth Circuit would similarly vacate the rules.

If the Supreme Court fails to clarify issues concerning the CFPB—either through a stay of the Fifth Circuit decision or by hearing the CFPB’s appeal—the bureau’s activities will be severely hindered in 2023. In addition to legal challenges to enforcement actions and CIDs, any guidance or regulations issued by the CFPB would be at risk of being vacated.

The CFSA case ruled on by the Fifth Circuit centered around the bureau’s Small Dollar Lending Rule, which the court ultimately vacated nationwide. It follows that, without intervention by the Supreme Court, any challenges to future rulemakings brought within the Fifth Circuit would similarly vacate the rules, based on this precedent. The uncertainty could delay rulemaking processes, such as the bureau’s consideration of the credit card late fee safe harbor, for which the CFPB released an Advance Notice of Proposed Rulemaking (ANPRM) in June 2022.



Source: [Adam Szuscik](#) on [Unsplash](#)



## Administration Wide Crackdown on “Junk Fees”

Winners and Losers from Administration Wide Crackdown on “Junk Fees”	
Winners	Compliance providers, low/no fee alternative models including certain earned wage access and buy now, pay later (BNPL) companies, banks eliminating overdraft including Ally Financial Inc (ALLY) and Capital One Financial Corp. (COF)
Losers	Auto dealers including AutoNation Inc (AN), Group 1 Automotive, Inc. (GPI), Asbury Automotive Group, Inc. (ABG), CarMax, Inc (KMX), Carvana Co (CVNA) Lenders with ancillary product offerings including Enova International Inc (ENVA), Elevate Credit Inc (ELVT), and Curo Group Holdings Corp (CURO) Private-label and subprime card issuers including Bread Financial Holdings Inc. (BFH) and Synchrony Financial (SYF) Banks that rely on overdraft fees for revenue including BancFirst Corporation (BANF), Regions Financial Corp (RF), Community Bank System, Inc. (CUB) and Toronto-Dominion Bank (TD)

The Biden administration’s attack against “junk fees” is likely to translate to concrete action in 2023. The White House published a [blog post](#) in October 2022 written by three members of President Biden’s National Economic Council (NEC) criticizing the fees and encouraging additional administrative action. This followed the FTC’s Notice of Proposed Rulemaking (NPRM) for auto dealers and the commission’s broader ANPRM addressing junk fees in all consumer offerings.

The push against junk fees began with an expansive request for information (RFI) from the CFPB in January 2022 and was regularly cited in the bureau’s public statements, guidance, enforcement actions, and research reports. We anticipate that the time passed since the RFI will allow the CFPB to sharpen its focus on junk fees and finalize actions initiated in the past year.

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What the bureau means by “junk fees” is not always clear. Director Chopra’s initial statement mentioned a wide swath of

optional and mandatory fees in the consumer finance industry, and some outside it. The blog post by NEC officials established four categories of junk fees, which we discuss below, and which we use to guide our expectations for the CFPB in 2023.

### 1. Mandatory fees that hide the full price of a product or service

This type of fee is the primary target of the FTC’s October 20<sup>th</sup> Junk Fee ANPRM which aims to make hotel resort fees and event ticket service charges more transparent. The concerns are more limited in the consumer finance industry where fees and related disclosures are often regulated on the state or federal level.

One of the CFPB’s areas of focus here has been payment processing fees, especially in industries where the consumer has little to no choice. In 2022, the bureau released an advisory opinion on “pay-to-pay” or convenience fees from third-party debt collectors, which are prohibited by the Fair Debt Collection Practices Act (FDCPA). We anticipate the advisory opinion could suggest increased enforcement activity in the debt collection market in 2023 after years of subdued scrutiny alongside lower industry volumes.

The bureau also took an enforcement action against JPay in 2021, before announcing the “junk fee” push, for fees on cards that people being released from prison were

forced to use government benefits. We believe that fees for products that consumers are forced to use, or are difficult to avoid or switch, such as bank and credit card fees will be increasingly scrutinized in 2023.

## 2. Surprise fees that consumers learn about after the purchase

Existing regulations make “surprise” fees less common in the consumer finance industry. However, we expect regulators to focus on the quality of disclosures and ensuring that consumers truly consent to additional fees or products.

One likely target of this effort is the ancillary products that are often tied to personal loans or auto financing. The FTC’s auto dealer NPRM seeks to increase the transparency for voluntary protection products by requiring the dealer to publish a list of product pricing and obtaining the consumer’s signature to decline purchasing the vehicle with no add-ons. While we do not expect the rule to be finalized in 2023, the FTC and state regulators are likely to continue to pursue enforcement action against auto dealers related to ancillary products.

Additionally, the CFPB, which has not taken an enforcement action against an auto lender since May 2021, could increase its focus on the industry. Subprime auto lender Credit Acceptance Corp. (CACC) received a Notice and Opportunity to Respond and Advise (NORA) letter from the bureau in January 2022 before receiving a new civil investigative demand (CID) in March 2022. NORA letters typically precede some type of enforcement action by the bureau. While the scope of the investigation is not clear, the CFPB could use enforcement to continue to refine its standards for auto lender oversight of dealer practices.

Similar concerns regarding awareness of add-on products could be a focus for personal lenders. In August, six attorneys general (AGs) sued Mariner Finance, a near-prime installment lender, alleging violations of state and federal consumer protection laws. The AGs argued that

Mariner included add-on products, like credit insurance and non-credit products such as auto club memberships, without the consumer’s consent and rushed borrowers through electronic agreements.

Small dollar lenders, particularly those with high ancillary product attach rates, could face increased regulatory scrutiny.

State and federal regulators often have focused campaigns on certain industries or products. We believe that small dollar lenders, particularly those with high ancillary product attach rates, could face increased regulatory scrutiny. This would impact near-prime installment lenders, like OneMain Holdings Inc. (OMF), which, like Mariner, voluntarily limit loans to a 36% annual percentage rate (APR) and have generally been viewed more favorably by regulators than higher-cost competitors. Other small dollar lenders, that offer some loans above 36% APR, such as Enova International Inc (ENVA), Elevate Credit Inc (ELVT), and Curo Group Holdings Corp (CURO), may face similar concerns.

## 3. Exploitative or predatory fees, where the fees far exceed the cost to the provider

We believe regulators will increasingly focus on fees that they view as excessive, although the regulatory approach is more challenging than the “low-hanging fruit” provided by fees that are hidden or not properly disclosed to consumers.

We expect the CFPB to advance its rulemaking process and propose lowering the threshold for credit card late fees in 2023. The bureau released an ANPRM in June 2022. Capstone assigns a 90%

probability that it releases a proposal for a lower threshold by the end of June 2023, which would be particularly negative for private-label and subprime card issuers, including Bread Financial Holdings Inc. (BFH) and Synchrony Financial (SYF). A proposal by mid-2023 would likely result in a final rule by mid-2024, with the modified safe-harbor threshold in place by the beginning of 2025.

Separately, we believe the CFPB will continue to put pressure on banks to reduce or eliminate overdraft fees through a combination of public statements and enforcement actions, though rulemaking is less likely. In September 2022, the bureau reached a consent order with Regions Financial Corp (RF) regarding “illegal surprise overdraft fees.” In October, the CFPB released a Consumer Financial Protection Circular clarifying its view and stating, “overdraft fees assessed by financial institutions on transactions that a consumer would not reasonably anticipate are likely unfair.” We expect enforcing this policy will be a priority in 2023.

Bank overdraft income has declined as a result of CFPB regulatory scrutiny, leading many banks to change to their policies (such as limiting the number of overdrafts, allowing grace periods to cure the overdraft, or eliminating the fees altogether). Total bank overdraft income of \$5.8 billion through the third quarter of 2022 (0.8% of total income), down 5.5% y/y and down 32.7% compared to \$8.6 billion (1.2% of total income) through the first three quarters of 2019. Several banks remain highly exposed to overdraft fees including BancFirst Corporation (BANF), Regions, Community Bank System, Inc. (CBU) and Toronto-Dominion Bank (TD) which generated 4.5%, 4.1%, 4.0%, and 3.8% of their total income from overdraft through the first three quarters of 2022. The average of 4.1% of total income from overdraft for these four banks is down from an average reliance of 5.3% through the same time period in 2019.

Other fees common in the consumer finance industry are likely to face scrutiny for providing little to no value. For example, the FTC’s proposed auto dealer rule notes concerns around anti-theft products that may not be effective, which could pressure lenders that finance these add-ons. Similarly, regulators are likely to focus on whether fees, such as convenience or expedited service fees, align with actual provider costs for manpower or shipping to provide the item more quickly.

#### **4. Fraudulent fees where a provider misrepresents whether they will charge a fee**

These “fraudulent fees” are applied when a provider promises no fees, but either imposes them later if a consumer doesn’t opt out, limits the primary service offerings if an “optional” fee is not paid, or causes the consumer to otherwise incur fees from as a result of the provider’s actions. While similar to “surprise fees,” we believe that a crackdown on these fraudulent fees will primarily focus on how providers disclose their pricing models. For example, consumer advocates have criticized claims around buy now, pay later models that claim zero fees, arguing that consumers may face fees, such as overdraft charges, from their financial institutions as a result of the offering.

Industries where there are tighter limits on fees could also be targeted for enforcement. Historically, the debt settlement industry, which is prohibited from charging consumer fees before any payments are made to creditors, has been a target for enforcement. We anticipate that the CFPB and FTC will continue to focus on illegal upfront fees, including those described as fees for other services, although we believe the larger, more mature, industry operators have adapted to the regulators’ expectations. A strict approach to fee limitations makes it difficult for new participants to enter the market or grow scale to compete with entrenched competitors.



## Evolving Pandemic Protections into Resilient Regulation

Winners and Losers from Evolving Pandemic Protections into Resilient Regulation	
Winners	None
Losers	Mortgage servicers including Rithm Capital Corp (RITM), Mr. Cooper Group Inc. (COOP), PennyMac Financial Services Inc (PFSI), UWM Holdings Corp (UWMC), Rocket Companies Inc (RKT), UWM Holdings Corp (UWMC) National Credit Reporting Agencies: TransUnion (TRU), Equifax Inc. (EFX), and Experian PLC (EXPN on the London exchange), Subprime auto lenders including Credit Acceptance Corporation (CACC)

We expect the CFPB to remain focused on the treatment of borrowers in 2023, particularly as regulators weigh “lessons learned” from their pandemic response and look to permanently codify some of the borrower protections and loss mitigation tools that were deployed. We believe regulators will transition from their recent focus on backward-looking pandemic treatment of consumers through enforcement actions, to a forward-looking interest in making some pandemic-era flexibilities for consumers permanent. Within this approach, the CFPB is likely to focus on mortgage servicing, credit reporting, and auto repossessions.

In the near term, we expect the CFPB to remain focused on mortgage servicer treatment of borrowers coming out of the pandemic—with a particular eye for their compliance with COVID-era borrower protections. Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, which Congress passed in 2020, borrowers with federally-backed mortgages experiencing financial hardship were granted certain protections—most notably a forbearance period during which they were not required to make principal and interest payments on their mortgage. Other borrower protections implemented by federal housing regulators included mandatory loss mitigation policies that required servicers to take extra care when interacting with and managing financially distressed borrower accounts. Throughout 2021, the CFPB issued several warnings emphasizing that servicers were expected to strictly comply with the COVID-19 borrower protections in place.

The CFPB has demonstrated a willingness to ensure compliance with the pandemic-fueled accommodation requirements. On November 17<sup>th</sup>, 2022, it issued an enforcement action against nonbank Carrington Mortgage Services for violating the Consumer Financial Protection Act (CFPA) by engaging in deceptive acts or practices regarding mortgage forbearances. The CFPB found that Carrington failed to implement many of the pandemic-related protections provided to borrowers with federally backed mortgages experiencing hardship. Specifically, the CFPB alleged that Carrington misled borrowers into paying improper late fees, deceived consumers about forbearance and repayment options, and inaccurately reported borrowers’ forbearance status to credit reporting companies. As a result, the CFPB fined Carrington \$5.25 million to be paid to the CFPB’s victims relief fund and ordered the lender to repay any late fees not already refunded to harmed borrowers.

Looking ahead, we expect housing regulators to streamline the process for borrowers to receive loan accommodations. On September 22<sup>nd</sup>, the CFPB issued an RFI on ways to support automatic short-term and long-term loss mitigation for homeowners experiencing financial disruptions. Federal Housing Finance Agency (FHFA) Director Sandra Thompson and Federal Housing Administration (FHA) Commissioner Julia Gordon have both endorsed similar actions. While future reforms to loss mitigation policies remain uncertain, Capstone expects the changes will come with an increased focus on compliance and treatment of borrowers—an

underappreciated risk that industry participants and stakeholders should not overlook.

## We expect housing regulators to streamline the process for borrowers to receive loan accommodations.

CFPB Director Chopra has also focused on increased loan defaults in the auto market. Throughout 2022, the bureau warned of vehicle affordability challenges resulting from the market conditions created by the pandemic and exacerbated by ongoing supply chain issues. The CFPB thought the pricing dynamics could spur aggressive and potentially illegal repossession tactics after repossession volumes plummeted through the pandemic in response to consumer stimulus, state moratoriums, and loan flexibility programs.

In March, the bureau released a supervisory report highlighting wrongful auto repossessions by servicers, finding that, in some instances, auto servicers misled consumers about the amount of their final loan payments after their normal payments were deferred due to financial difficulties—largely resulting from the COVID-19 pandemic. The CFPB has indicated it will take action against illegal repossessions and “sloppy servicing” of auto loans, through examinations and enforcement actions. As auto loan performance deteriorates—according to Fitch Ratings, the subprime 60+ day delinquency rate of 5.3% in September 2022 was the highest since 5.6% in February 2020—we expect auto loan servicing to be a CFPB priority into the new year.

Similarly, the CFPB has been acutely focused on improving credit reporting

accuracy, particularly given the dynamic credit environment since the pandemic started. The March supervisory report that highlighted auto repossession concerns found that credit reporting companies failed to conduct reasonable investigations into disputed debts, and a litany of enforcement actions against lenders within the past year have included credit reporting violations. In April 2020, the CFPB released a policy statement outlining the responsibilities of credit reporting companies and furnishers during the pandemic, reinforcing CARES Act provisions that require lenders to report to credit bureaus that consumers are current on their loans if they have sought relief from their lenders due to the pandemic. While extending some flexibility to lenders and credit bureaus in their timeliness of investigating disputes (which the bureau has since removed under Democratic leadership), the bureau emphasized the importance of ensuring accurately reported payment information.

Meanwhile, its fall supervisory highlights report, released in November 2022, identified a trend of credit reporting companies and data furnishers failing to address and update incorrect information on credit reports, violating the FCRA. The report coincided with a CFPB circular affirming the responsibilities of credit reporting companies and information furnishers to investigate consumer report disputes. We expect this to be a continued focus by the CFPB in 2023 as it carries out additional examinations and looks to enhance the accuracy and recourse for consumer credit reports.

Looking ahead to 2023, we believe that mortgage servicing, auto repossessions, and credit reporting will be at the forefront of CFPB scrutiny, transitioning from enforcement actions into guidance, in order to rectify pandemic-era violations and formalize consumer protections afforded during the course of the pandemic.

## Outstanding Civil Investigative Demands

While civil investigative demands (CIDs) are not typically made public by regulators, companies usually disclose receipt in regulatory filings. Several publicly listed consumer finance companies have acknowledged CIDs from the CFPB, FTC, Department of Justice (DOJ), as well as

state attorneys general. Below, we highlight the details of outstanding CIDs from federal regulators or large multi-state investigations, which we believe are worth monitoring for potential future enforcement actions.

Company	Industry	Regulator	CID Concerns	Latest CID
<b>Oportun Financial (OPRT)</b>	Small-Dollar Lending	CFPB	Legal collections practices during the pandemic	October 2022
<b>Enova International, Inc. (ENVA)</b>	Small-Dollar Lending	CFPB	Loan processing issues	April 2022
<b>Rent-A-Center, Inc. (RCII)</b>	Rent-to-own	CFPB, Multi-state AGs investigation	Account management for virtual lease-to-own transactions	October 2020 (CFPB) April 2022 (multi-state)
<b>Credit Acceptance Corporation (CACC)</b>	Auto Finance	CFPB	Origination and collection of consumer loans, TPPs, and credit reporting	March 2022
<b>Equifax, Inc. (EFX)</b>	Credit Reporting	CFPB	Consumer disputes process	December 2021
<b>Block, Inc. (SQ)</b>	Payments	CFPB	Transmitting funds, providing payment processing	August 2021
<b>Visa Inc. (V)</b>	Card Network	FTC/ DOJ	Inhibiting merchant choice, competition with other payment methods and networks	March 2021 (DOJ) June 2020 (FTC)
<b>Mastercard Inc (MA)</b>	Card Network	FTC	Inhibiting merchant choice, competition with other payment methods and networks	June 2020
<b>Curo Group Holdings Corp (CURO)</b>	Small-Dollar Lending	CFPB	Inducing refinances, improperly contacting third parties on consumer debt, and unauthorized for electronic funds transfers	April 2020

## Outstanding CFPB Litigation

In a June blog post by the CFPB, Director Chopra announced his intention to move away from “overly complicated and tailored rules,” toward “bright-line” guidance and rules that can evolve with market movements. This has resulted in relatively few new rulemaking processes compared to a robust pace of press releases and guidance from the bureau. The bureau has initiated two rulemaking processes under Director Chopra which add to the slew of

processes previously set in motion by the CFPB. The June blog post also indicated a handful of areas where the CFPB was reviewing existing rules inherited from other agencies, which could result in changes. In addition to the CFPB, the FTC issued an NPRM in June regarding auto dealer requirements which would impact auto lenders. Below we highlight our rulemaking expectations for 2023.

Rule	Status	2023 Expectation
<b>Section 1071: Small Business Lending</b>	NPRM comment period ended in January 2022	The CFPB agreed to a court-ordered deadline of March 31, 2023, to issue a final rule
<b>Section 1033: Consumer Access to Financial Records</b>	The comment period on the proposed Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) outline ends January 25, 2023	The CFPB will host a SBREFA panel then release the panel’s recommendations within 60 days of the comment period ending.
<b>Small Dollar Lending Rule</b>	The Fifth Circuit vacated the rule in an October 2022 decision which the CFPB has appealed to the Supreme Court.	The Supreme Court is likely to hear the CFPB’s appeal in 2023 and address the constitutionality of the CFPB’s appropriations model and status of the rule
<b>Property Assessed Clean Energy Finance (PACE)</b>	The bureau issued an ANPRM in March 2019	Based on the Spring 2022 regulatory agenda, the CFPB expects to release an NPRM in May 2023
<b>Automated Valuation Model Amendments to FIRREA (1989)</b>	SBREFA outline released in February 2022	Based on the Spring 2022 regulatory agenda, the CFPB expected to release an NPRM in December 2022. We believe a NPRM could be released in 2023.
<b>FTC Auto Dealer Rule</b>	The FTC issued an NPRM for a Motor Vehicle Dealers Trade Regulation Rule in June 2022	We expect the FTC to work throughout 2023 to progress in this rulemaking, but do not expect the rule to be finalized until the first half of 2024
<b>Credit Card Late Fees ANPRM</b>	The CFPB released an ANPRM in June 2022	We expect the bureau will issue an NPRM by the end of June 2023
<b>Registry of Nonbanks to Detect Repeat Offenders</b>	The CFPB issued an NPRM in December 2022	We expect the rule to be met with industry pushback, and likely face legal challenges when finalized, which we expect in 2023
<b>Qualified Mortgage (QM) Rules</b>	No rulemaking initiated to date, listed as an area for review	Given comments from the bureau, we expect any rule would explore ways to streamline modification and refinancing, as well as assess aspects of the “seasoning” provisions
<b>Fair Credit Reporting Act (FCRA) Changes</b>	No rulemaking initiated to date, listed as an area for review	We expect the CFPB to initiate rulemaking or release guidance clarifying credit reporting agencies’ responsibilities related to consumer disputes in 2023.

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