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ISSUE BRIEF

**CFPB Action: Recent Proposed Regulation,  
Information Collection, and Guidance and What  
They Mean for Credit Unions**

Rohit Chopra was sworn in as CFPB Director in October 2021, replacing Acting Director Dave Uejio. Director Chopra has quickly returned the Bureau to something reminiscent of the Cordray era, pursuing regulation by enforcement and using inflammatory language to publicly shame institutions for allegedly violating consumer protection laws. But Director Chopra has only filed a handful of enforcement actions and consent orders and has not yet issued many rulemakings through the notice and comment process.

Although the CFPB has focused its efforts on direct messaging through blog posts, Requests for Information (RFIs), and news appearances, it seems clear that past few months have been an exercise in laying the groundwork for what's to come. Below are summaries of the CFPB's recent actions and statements, ordered from newest to oldest.

## 1. SECTION 1071

In its Spring 2022 regulatory agenda, the CFPB [scheduled a final rule](#) for March 2023 regarding its proposed section 1071 data collection rule. Recently in a stipulation by the parties in the *California Reinvestment Coalition v. CFPB* case, the U.S. Northern District Court of California signed on to a March 31, 2023 deadline for the issuance of the section 1071 rule, confirming the CFPB's scheduled date. The proposed rule would be costly and burdensome as it would require credit unions and credit union service organizations that originated at least 25 covered small business credit transactions in each of the two preceding calendar years to collect and report small business credit application data, including data related to the ethnicity, race, and sex of small business applicants' principal owners. [NAFCU commented](#) on the proposed rule urging the CFPB to adopt common sense definitions, right-sized thresholds, and a reasonable, phased mandatory compliance schedule to ensure that credit unions' support of their small business members is not jeopardized by unnecessary section 1071 compliance burdens. NAFCU also strongly opposed the CFPB's proposal to require, in certain circumstances, that covered financial institution employees make visual observations regarding a small business owner's race and ethnicity. potential statutory amendments.

## 2. OVERDRAFT BLOG POST

On June 16, 2022 the CFPB [published a blog post](#) touting its supervisory efforts toward financial institutions "with a higher share of frequent overdrafters or a higher average fee burden for overdrafts." Specifically, the post highlighted the five consumer-impact

metrics that the CFPB has started asking financial institutions, including: the total annual dollar amount consumers receive in overdraft coverage compared to the amount of fees charged; the annual dollar amount of overdraft fees charged per active checking account; the annual dollar amount of NSF fees charged per active checking account; the prevalence of frequent overdrafters, or the share of active checking accounts with more than 6 and more than 12 overdraft and/or NSF fees per year; and the share of active checking accounts that are opted into overdraft programs for ATM and one-time debit transactions. The CFPB intends to use the information gathered from these questions to identify institutions for further examination and review. Of note, the CFPB praised the banks and credit unions that have changed their overdraft and NSF programs to be less reliant on fees. Additionally, state-chartered credit unions should closely monitor supervisory guidance from their state, such as the [guidance issued](#) by the New York Department of Financial Services (NYDFS) on July 12, prohibiting state-regulated institutions from continuing to offer certain types of overdraft fees.

### **3. CREDIT CARD LATE FEES AND LATE PAYMENTS**

On June 29, 2022, the CFPB issued an [advance notice of proposed rulemaking \(ANPR\)](#) inviting comment on questions related to credit card late fees that financial institutions, including credit unions, collect. The ANPR is an effort by the CFPB to sharply reduce the \$12 billion that financial institutions collect in credit card late fees each year. Specifically, the CFPB sought information to determine whether credit card late fees charged by credit card issuers meet the “reasonable and proportional” standard set by the Credit Card Accountability Responsibility and Disclosure Act, implemented by Regulation Z. The CFPB is evaluating late fees by considering costs incurred by card issues, late fees’ deterrent effect, cardholder behavior, along with other factors. In response to NAFCU’s [request for an extension](#) of the ANPR comment period, on July 15, the [CFPB announced](#) a 10 day extension.

On August 1, 2022, NAFCU responded to the ANPR noting that credit card late fees are not surprise fees and are fully disclosed to consumers. [NAFCU urged](#) the Bureau not to eliminate or reduce the safe harbor fee amounts for credit card late fees as this could negatively affect communities by tightening credit and increasing industry consolidation. This could also result in more expensive products and services to account for the lost revenue, such as increased interest rates for credit products to account for the additional risk and reduced late fee income. Instead, NAFCU recommended that the CFPB search for ways to enhance the deterrent effect of these late fees and adopt changes to its disclosures to make them more adaptable to online

and mobile banking platforms to help financial institutions effectively deliver information about their late fee structures on the platforms consumers use most often. Additionally, in response to the CFPB's RFI on "junk fees," NAFCU [submitted comments](#) objecting to the mischaracterization of well-regulated, well-disclosed fees as "junk fees" and urging the CFPB to utilize its larger participant authority to more closely monitor fee-related practices of under-regulated fintechs.

## 4. NONBANK SUPERVISORY AUTHORITY

On April 25, 2022, the [CFPB announced](#) that it would begin exercising its "dormant authority" under section 1024(a)(1)(C) of the Dodd-Frank Act to supervise nonbank entities—including financial technology or "fintech" firms—that it has determined pose a risk to consumers. On April 29, 2022, the CFPB also published a procedural rule to amend an aspect of its procedures for establishing supervisory authority over a covered person based on a risk determination. Specifically, the rule would add a mechanism for the CFPB to make final decisions and orders in supervisory proceedings public. [NAFCU submitted comments](#) supporting both the decision to exercise supervisory authority of nonbank entities that pose a risk to consumers and the proposed procedural rule to provide the CFPB with a mechanism to release final orders and decisions from the risk determination. The letter also noted that in order to truly address and mitigate the risks posed by certain fintechs, the CFPB must go further and exercise its "larger participant" authority over these entities as well. On August 11, 2022 the CFPB issued a Consumer Financial Protection Circular taking aim at [shoddy data security practices](#) by nonbank companies and financial technology providers and on August 10, 2022 the CFPB has [took action](#) against a fintech for engaging in deceptive acts or practices by lying to consumers, further highlighting the need for more comprehensive supervision.

## 5. REVISED UDAAP EXAM GUIDE

On March 16, 2022, the CFPB published a [revised examination procedure guide](#) for unfair, deceptive, or abusive acts and practice (UDAAP) that indicated the CFPB is targeting discrimination as an "unfair" practice in connection with all financial products and services and not just credit products. This is a serious shift in the CFPB's stance on UDAAP that is likely to expand the reach of the CFPB's anti-discrimination enforcement beyond the scope of the *Equal Credit Opportunity Act* (ECOA). Additionally, CFPB examiners will now review all models, algorithms, and decision-making processes involved in consumer financial products for potentially "unfair" discrimination. The CFPB will also monitor employees and third parties for

discriminatory conduct. While the CFPB has yet to explicitly discuss what types of discrimination are covered under the CFPB's new stance, the CFPB has publicly stated that it will not import disparate impact liability for discrimination.

## 6. DEBT COLLECTION - PAY-TO-PAY

On June 29, 2022, the CFPB issued an [advisory opinion](#) affirming that federal law often prohibits debt collectors from charging “pay-to-pay” or “convenience” fees, which are imposed on consumers who want to make a payment in a specific way, such as online or by phone. The advisory opinion interprets the language in Section 808 of the Fair Debt Collection Practices Act (FDCPA), which prohibits debt collectors from collecting any amount that is not expressly authorized by the underlying agreement or permitted by law. Since credit unions do not collect third-party debts and are therefore not considered debt collectors under the FDCPA, this advisory opinion does not directly apply. However, credit unions that engage the services of third-party debt collectors will need to conduct vendor due diligence to ensure compliance with this interpretation of the FDCPA. Earlier this year, NAFCU submitted a [joint trades amicus brief](#) in the *Thomas-Lawson* case where the CFPB argued that a convenience fee charged by a mortgage servicer may violate the FDCPA.

## 7. RFI ON RELATIONSHIP BANKING AND CUSTOMER SERVICE

On June 21, 2022, the CFPB issued a [request for information \(RFI\)](#) soliciting comment on how consumers can assert the right to obtain timely responses to requests for information about their accounts from banks and credit unions with more than \$10 billion in assets, as well as from their affiliates. The RFI draws attention to increased digitization of banking services and consolidation within the financial sector as possible factors contributing to the erosion of responsive relationship banking models. NAFCU [commented on the RFI](#), noting how credit unions prioritize high touch customer service interactions and use technology to support relationship banking. The letter also drew attention to how inequitable allocation of Regulation E responsibilities in the P2P context has strained credit union staff resources and that the CFPB should interpret statutory provisions of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* which recognize a consumer's right to obtain timely responses to inquiries about accounts (Section 1034(c)) and control financial records (Section 1033). Finally, the letter emphasized that the development of innovative personal finance products can be achieved with responsible access to consumer data; however, such innovation must be fair and safe for the consumer and the credit union.

## 8. BLACK-BOX CREDIT MODELS AND ADVERSE ACTION NOTICES

On May 26, 2022, the CFPB published a [Consumer Financial Protection Circular](#) explaining that anti-discrimination provisions contained in the Equal Credit Opportunity Act (ECOA) and implementing regulations require a lender to provide credit applicants the specific reason(s) for denials and other adverse actions, irrespective of the credit model employed. The Circular makes clear that lenders are not relieved of their ECOA and Regulation B responsibilities simply because the operations and results of credit models using complex algorithms may be opaque or difficult to understand. As credit unions embrace algorithmic underwriting, it is important that they do so in full contemplation of their existing fair lending responsibilities. In response to a request for information regarding credit unions use of artificial intelligence (AI) from the federal financial regulators - including the NCUA - NAFCU [submitted comments](#) detailing how credit unions leverage AI. The letter noted NAFCU's support for regulators to allow credit unions to meaningfully pursue AI and ML technologies but that this pursuit requires a supervisory approach that does not add to already high examination burden.

## 9. OFFICE OF COMPETITION AND INNOVATION

On May 24, 2022, the CFPB [announced the opening](#) of its new Office of Competition and Innovation. This office replaces the Office of Innovation that focused on an application-based process to confer special regulatory treatment on individual companies. The new office will support a broader initiative by the CFPB to analyze new obstacles to open markets and enhance the consumer experience. NAFCU supported the earlier Office of Innovation and its compliance assistance programs. NAFCU welcomed the creation of the new Office of Competition and Innovation as a competitive space but encouraged the CFPB to provide additional clarity on how it intends to accomplish its goals without imposing more regulatory burdens on credit unions. NAFCU supports programs such as sandboxes to allow credit unions to experiment with innovative disclosures and find alternative means of complying with the rules without facing supervisory scrutiny.

## 10. STATE ENFORCEMENT INTERPRETIVE RULE

On May 19, 2022, the CFPB [issued an interpretive rule](#) to describe state-level authorities to enforce the requirements of the *Consumer Financial Protection Act*, CFPB regulations, and other federal consumer financial laws. This authority, which was

established by the *Dodd-Frank Wall Street Reform and Consumer Protection Act*, requires state attorneys general or regulatory agencies to consult the CFPB before initiating a civil enforcement action, and stipulates that CFPB actions would not preempt a state's enforcement activity. Additionally, the rule notes that while the CFPB is not authorized to pursue enforcement against entities like real estate brokers, accountants, tax preparers, and attorneys, and the CFPB has limited authority over auto dealers, the statute does not apply these limitations to state-level authorities. According to the CFPB, states have used this authority in 33 public enforcement actions since the enactment of the Dodd-Frank Act and the CFPB has memorandums of understanding to facilitate these actions with regulators in every state (as well as DC and Puerto Rico) and more than 20 state attorneys general.

## 11. BUY-NOW-PAY-LATER (BNPL)

On December 16, 2021, the CFPB [opened market monitoring orders](#) requiring five providers of BNPL products, Affirm, Afterpay, Klarna, PayPal, and Zip, to provide information about their size, scope, and business practices. On January 24, 2022, the Bureau issued a [notice and request for comment \(RFC\)](#) to gain further information about the BNPL market. The Bureau specifically targeted in its inquiry split-pay companies that offer installments of four or less, i.e. "Pay in 4," and has excluded longer-term point-of-sale installment loans. NAFCU [submitted a comment letter](#) urging the Bureau to release a comprehensive report regarding its findings from the market monitoring orders and RFC, and if warranted, take steps to ensure that under-regulated lenders institute adequate consumer protection practices.

On June 15, 2022, the CFPB [issued a blog post](#) on BNPL and credit reporting that reviewed the harms associated with BNPL providers failing to furnish data to consumer reporting agencies, and recommending an industry-wide adoption of standardized BNPL furnishing codes and formats appropriate to the unique characteristics of the product; consumer reporting companies incorporating BNPL data into core credit files as soon as possible to ensure BNPL data is accurately reflected on consumer reports; and scoring companies and lenders building and calibrating models that account for BNPL loans' unique characteristics. In early 2022, the three major U.S. credit bureaus — Equifax, Experian and TransUnion - all [announced](#) that they will begin including information concerning consumers' BNPL loans on credit reports.

## 12. BIG TECH

On November 5, 2021, the CFPB or Bureau issued a [notice and request for comment](#) regarding the business practices of large technology companies operating domestic payment systems. The notice followed a series of orders the CFPB issued to six large technology companies: Amazon, Apple, Facebook, Google, PayPal, and Square. The orders request information related to the use of consumer data, compliance with consumer financial law, and business practices that could have broader, competitive implications within the marketplace for payments. [NAFCU submitted a letter](#) supporting the CFPB's efforts to better understand the consumer compliance practices of large technology companies operating payments platforms and urged the Bureau to exercise its larger participants authority to place these entities under closer supervision given their importance in the market for consumer payments.