

## Two CFPB Announcements Bolster Parallel State Enforcement Efforts

June 7, 2022 | [Lucy E. Morris](#) and [Robert D. Tilley](#)

Since October 2021, when Rohit Chopra took over as Director, the Consumer Financial Protection Bureau ("CFPB") has taken a number of steps to assert its leadership role in the patchwork of regulatory jurisdiction and prohibitions that govern the consumer finance industry. Recently, the CFPB made two noteworthy announcements on this front. First, the CFPB aimed to reinforce the Bureau's role as "the principal regulator responsible for administering the federal consumer financial laws," by launching a new system to guide other enforcement agencies on how the CFPB intends to enforce these laws. Second, the CFPB issued an interpretive rule asserting that state authorities hold broad power to enforce the range of federal consumer financial protection laws, either in coordination with the CFPB or in its absence. However, because CFPB took both of these actions under provisions of the Administrative Procedures Act ("APA") that are exempt from notice-and-comment requirements, it is not clear how much practical effect either will have.

On May 16, 2022, the CFPB announced that it will issue a series of *Consumer Financial Protection Circulars* "to provide guidance to other agencies with consumer financial protection responsibilities on how the CFPB intends to enforce consumer financial law."<sup>[1]</sup> As the CFPB stated in the inaugural *Circular*, these publications will each be authorized by the Director and published on the CFPB's website and in the Federal Register. The CFPB's press release explained that enforcement authority for federal consumer financial law is "spread among a large set" of agencies, including, "most notably, state attorneys general and state regulators." As a result, "it is important for state and federal government agencies to consistently enforce" these laws. The CFPB expects that its *Consumer Financial Protection Circulars* will "promote consistency among enforcers" and also "increase transparency for the benefits of the public and regulated entities." In the ensuing weeks, the CFPB has issued two substantive *Circulars*. In the first—an apparent warning to companies that make cryptocurrencies and other digital assets available to retail investors—the CFPB announced a joint focus with the FDIC on the misleading use of the FDIC's name or logo in connection with risky, uninsured financial products.<sup>[2]</sup> In the second, consistent with Director Chopra's recent focus on "algorithmic bias," the CFPB affirmed that creditors must provide notices required by the Equal Credit Opportunity Act even when their underwriting decisions are made by complicated algorithms, artificial intelligence, or machine learning.<sup>[3]</sup>

Later the same week, on May 19, 2022, the CFPB issued an interpretive rule that "describes states' authorities to pursue companies and individuals that violate the provisions of federal consumer financial protection law."<sup>[4]</sup> The interpretive rule explains that state agencies have broad authority to bring civil enforcement actions under the Consumer Financial Protection Act of 2010 ("CFPA"), including not only its prohibition on unfair, deceptive, and abusive acts or practices, but also its lesser-used "prohibition on covered persons and service providers violating other enumerated Federal consumer financial laws," including the Fair Credit Reporting Act and the Truth in Lending Act.<sup>[5]</sup> In addition, the interpretive rule asserts that certain limits on the CFPB's authority under the CFPA do not apply to state agencies. Finally, the CFPB emphasized that states' authority to bring such cases is complementary to its own, and nothing prevents states from bringing concurrent actions "to stop or remediate harm that is not addressed by a CFPB enforcement action against the same entity."<sup>[6]</sup>

Notably, Director Chopra foreshadowed his intention to promote state enforcement actions shortly after starting in the head role at the CFPB. In December 2021—less than two months into his tenure—Director Chopra detailed these plans at a meeting of the National Association of Attorneys General. In his prepared remarks, he promised that the "CFPB will be taking steps to promote enforcement of federal consumer financial protection law by state attorneys general," including by encouraging state authorities to bring claims under the CFPA, and "clarifying the wide variety of claims that states can bring under the CFPB's statute."<sup>[7]</sup> In light of Director Chopra's consistent emphasis on this topic, we expect that the CFPB may take additional steps in the future to encourage and support state agencies that pursue enforcement actions under the CFPA and other federal consumer financial protection laws.

However, the CFPB's recent announcements do not have the force of law, and their real-world impact may be limited. The CFPB stated that it will issue the *Circulars* as "general statements of policy" under the rulemaking provision of the APA.<sup>[8]</sup> Similarly, the CFPB's release concerning state enforcement authority took the form of an interpretive rule. Under the APA, both interpretive rules and general statements of policy are generally exempted from notice-and-comment or hearing requirements.<sup>[9]</sup> As a result, courts treat both of these agency pronouncements very differently than legislative rules.<sup>[10]</sup> Interpretive rules and general statements of policy generally do not receive *Chevron* deference from courts; rather these provisions impact judicial decisions only to the extent that courts find their analysis to be persuasive.<sup>[11]</sup> The DC Circuit has described these types of non-binding, non-legislative rules as legally "meaningless," because the agency guidance "does not tell regulated parties what they must do or may not do in order to avoid liability."<sup>[12]</sup> Indeed, the CFPB has acknowledged the limited legal effect of its newly-announced *Circulars*, explaining that they "do not restrict the Bureau's exercise of its authorities, impose any legal requirements on external parties, or create or confer any rights on external parties that could be enforceable in any administrative or civil proceeding."<sup>[13]</sup>

Due to these limitations, the CFPB's interpretive rule on state enforcement authority was most notable for the things it did not say. For example, the interpretive rule provides a multi-page analysis supporting state agencies' authority to enforce various provisions of the CFPA, but it is completely silent as to the potential remedies they may recover. The CFPA provides, without limitation, for at least eight categories of relief, including restitution, disgorgement, damages, and civil money penalties.<sup>[14]</sup> However, by its terms, the statute limits civil money penalties to administrative actions brought by the Bureau or judgments awarded by a court "in favor of the Bureau."<sup>[15]</sup> As a result, we are not aware of any enforcement action in which a state agency, litigating in the absence of the CFPB, has been awarded a judgment that included a civil money penalty under the CFPA. In addition, to the extent that the CFPB argues that states are included in the CFPA's authorization for "the Bureau" to seek civil money penalties, that position would undermine one of the CFPB's primary arguments in this new interpretive rule: that the CFPA's limitations on the authority of "the Bureau" do not similarly limit state enforcement authority.<sup>[16]</sup>

Perhaps as a nod to this statutory limitation, the CFPB's interpretive rule includes some unusual language that seems intended to conflate state and federal authority. In the background section recounting historical practices and the purposes of the CFPA, the Bureau describes Congress as "provid[ing] States with their own Bureau enforcement authority" in the form of the CFPA.<sup>[17]</sup> In its press release, the CFPB also acknowledged that it has "plans to consider other steps to promote state enforcement of federal consumer financial protection laws," citing to Director Chopra's December remarks to the group of state attorneys general.<sup>[18]</sup> In those remarks, Director Chopra announced that he "directed CFPB staff to explore ways that states could be able to get more out of the remedies available under the [CFPA]," explicitly suggesting that the Bureau could seek civil penalties that states "could then use to bolster deterrence in their states," and pursue rule changes to allow states to access victim relief funds when CFPB does not join in a particular lawsuit.<sup>[19]</sup> These remarks suggest that Director Chopra and the CFPB understand the difficulties that states will face in seeking civil money penalties under current law.

The types of informal policy announcements that CFPB has recently favored do have advantages. Without the need for lengthy notice-and-comment procedures, the CFPB can move quickly to clarify its priorities and disseminate its preferred legal interpretations to companies within its jurisdiction and to other government agencies. These announcements will likely lead some market participants to abandon business practices that CFPB disfavors, which the Bureau would surely view as a victory. Similarly, if the CFPB's emphasis on promoting state enforcement leads state policymakers to invest in their own enforcement apparatus, that could be a more durable change than any substantive tweak to regulatory policy. Particularly in light of the Supreme Court's *Seila Law* decision limiting the CFPB's structural insulation from political oversight, and more recent rumblings in lower courts,<sup>[20]</sup> Director Chopra's enforcement agenda may be best served by preserving flexibility for a broad range of enforcement agencies. In the meantime, we expect the CFPB to continue making its policy preferences and legal interpretations known through its *Circulars* and other less-formal policy announcements.



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- [1] *Consumer Financial Protection Circular 2022-01* (available at <https://www.consumerfinance.gov/compliance/circulars/circular-2022-01-system-of-consumer-financial-protection-circulars-to-agencies-enforcing-federal-consumer-financial-law/>); see also CFPB Press Release: CFPB launches new system to promote consistent enforcement of consumer financial protections, May 16, 2022 (available at <https://www.consumerfinance.gov/about-us/blog/cfpb-launches-new-system-to-promote-consistent-enforcement-of-consumer-financial-protections/>).
- [2] *Consumer Financial Protection Circular 2022-02* (available at <https://www.consumerfinance.gov/compliance/circulars/circular-2022-02-deception-representations-involving-the-fdics-name-or-logo-or-deposit-insurance/>).
- [3] *Consumer Financial Protection Circular 2022-03* (available at <https://www.consumerfinance.gov/compliance/circulars/circular-2022-03-adverse-action-notification-requirements-in-connection-with-credit-decisions-based-on-complex-algorithms/>).
- [4] CFPB Press Release: CFPB Bolsters Enforcement Efforts by States, May 19, 2022 (available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-bolsters-enforcement-efforts-by-states/>).
- [5] Final Interpretive Rule, Authority of States to Enforce the Consumer Financial Protection Act of 2010, 12 CFR Chapter X (available at [https://files.consumerfinance.gov/f/documents/cfpb\\_section-1042\\_interpretive-rule\\_2022-05.pdf](https://files.consumerfinance.gov/f/documents/cfpb_section-1042_interpretive-rule_2022-05.pdf)).
- [6] CFPB Press Release: CFPB Bolsters Enforcement Efforts by States, May 19, 2022 (available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-bolsters-enforcement-efforts-by-states/>).
- [7] CFPB Press Release: Director Chopra Remarks - December NAAG Meeting, December 7, 2021 (available at: <https://www.consumerfinance.gov/about-us/newsroom/director-chopra-remarks-december-naag-meeting/>).
- [8] See CFPB Website: About *Consumer Financial Protection Circulars* (available at <https://www.consumerfinance.gov/compliance/circulars/about/>).
- [9] 5 U.S.C. § 553(b)(3)(A).
- [10] *National Min. Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014).
- [11] *Id.* at 251 ("Legislative rules generally receive *Chevron* deference, but interpretive rules and general statements of policy often do not."); *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044-45 (D.C. Cir. 1987) (quoting *Batterton v. Marshall*, 648 F.2d 694, 702 (D.C. Cir. 1980)).
- [12] *Id.* at 252.
- [13] CFPB Website: About *Consumer Financial Protection Circulars* (available at <https://www.consumerfinance.gov/compliance/circulars/about/>).
- [14] 12 U.S.C. § 5565(a)(2).
- [15] *Id.* § 5565(c)(5)(A), (B).
- [16] See Final Interpretive Rule, note 5 *supra* ("Because Congress applied these limitations in sections 1027 and 1029 only to the Bureau, they do not extend to States exercising their enforcement authority under section 1042.").
- [17] Final Interpretive Rule, note 5 *supra*.
- [18] CFPB Press Release: CFPB Bolsters Enforcement Efforts by States, May 19, 2022 (available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-bolsters-enforcement-efforts-by-states/>).
- [19] CFPB Press Release: Director Chopra Remarks - December NAAG Meeting, December 7, 2021 (available at: <https://www.consumerfinance.gov/about-us/newsroom/director-chopra-remarks-december-naag-meeting/>).
- [20] *CFPB v. All Am. Check Cashing, Inc.*, (5th Cir. 2022) (Jones, J. concurring) (calling into question the constitutionality of CFPB's funding structure).

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