

**BUREAU OF CONSUMER FINANCIAL PROTECTION**

**12 CFR Chapter X**

**Ratification of Bureau Actions**

**AGENCY:** Bureau of Consumer Financial Protection.

**ACTION:** Ratification.

**SUMMARY:** The Bureau of Consumer Financial Protection (Bureau), through its Director, is ratifying a number of previous actions by the Bureau. This includes the large majority of the Bureau's existing regulations, as well as certain other actions. This ratification provides the public with certainty, by resolving any potential defect in the validity of these actions arising from Article II of the United States Constitution.

**DATES:** This ratification is issued on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] and relates back to the original date of each action that it ratifies.

**FOR FURTHER INFORMATION CONTACT:** Christopher Shelton, Counsel, Legal Division, at 202-435-7700. If you require this document in an alternative electronic format, please contact *CFPB\_Accessibility@cfpb.gov*.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The Bureau was established by the Consumer Financial Protection Act of 2010 (CFPA).<sup>1</sup> Section 1011(c)(3) of the CFPA provided that the President may remove the Director of the

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<sup>1</sup> Pub. L. 111-203, title X, 124 Stat. 1376, 1955-2113 (2010).

Bureau only for inefficiency, neglect of duty, or malfeasance in office.<sup>2</sup> The Bureau's first Director was appointed on January 4, 2012.<sup>3</sup>

On June 29, 2020, the Supreme Court held in *Seila Law LLC v. CFPB* that the CFPA's removal provision violates the separation of powers.<sup>4</sup> The Court further held that "the CFPB Director's removal protection is severable from the other statutory provisions bearing on the CFPB's authority. The agency may therefore continue to operate, but its Director, in light of our decision, must be removable by the President at will."<sup>5</sup> "The only constitutional defect we have identified in the CFPB's structure is the Director's insulation from removal."<sup>6</sup>

## II. Overview of this Ratification

To resolve any possible uncertainty the Bureau, through its Director, has decided to ratify a number of official actions from January 4, 2012 to June 30, 2020 (Ratified Actions).<sup>7</sup> Under established case law, any agency may, through ratification, "purge[] any residual taint or prejudice left over from" a potential defect in a prior governmental action.<sup>8</sup> The Bureau is issuing this ratification out of an abundance of caution, and this ratification is not a statement that the Ratified Actions would have been invalid absent this ratification.

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<sup>2</sup> 12 U.S.C. 5491(c)(3).

<sup>3</sup> From January 4, 2012 until July 17, 2013, Director Richard Cordray served as a recess appointee, but his recess appointment was not constitutionally proper in light of the Supreme Court's subsequent decision in *NLRB v. Noel Canning*, 573 U.S. 513 (2014). See *CFPB v. Gordon*, 819 F.3d 1179, 1185-86 (9th Cir. 2016) (upholding the Bureau's ratification of actions from that period, 78 FR 53734 (Aug. 30, 2013)).

<sup>4</sup> 591 U.S. ---- (2020) (slip op.).

<sup>5</sup> *Id.* at 3.

<sup>6</sup> *Id.* at 32.

<sup>7</sup> Some of the Ratified Actions were previously ratified by the Bureau in August 2013. See *supra* note 3. The Bureau has used the end date of June 30, 2020, in an abundance of caution in order to include 85 FR 39055 (June 30, 2020), which the Bureau released on its Web site on June 23, 2020.

<sup>8</sup> *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 13 (D.C. Cir. 2019).

Part III of this document sets forth the ratification, while part IV discusses the ratification, part V discusses certain actions that are outside the scope of the ratification, and finally part VI addresses some additional administrative law matters.

### **III. Ratification**

The Bureau, through its Director, hereby affirms and ratifies the following actions from January 4, 2012 to June 30, 2020 (collectively, the Ratified Actions):

1. Each document published by the Bureau in the “Rules and Regulations” category of the *Federal Register*,<sup>9</sup> except the July 2017 rule titled “Arbitration Agreements”<sup>10</sup> and the November 2017 rule titled “Payday, Vehicle, and Certain High-Cost Installment Loans.”<sup>11</sup> Aside from those two exceptions, this includes but is not limited to all amendments to the Bureau’s regulations in 12 CFR chapter X, as well as the Bureau’s actions in issuing joint regulations with other agencies.
2. Each consumer information publication issued by the Bureau under Regulation X, 12 CFR part 1024, and Regulation Z, 12 CFR part 1026.<sup>12</sup>
3. Each notice titled “Fair Credit Reporting Act Disclosures.”<sup>13</sup>
4. The official approval titled “Final Redesigned Uniform Residential Loan Application Status Under Regulation B.”<sup>14</sup>

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<sup>9</sup> The Office of the Federal Register places each document published in the *Federal Register* in one of four categories: “Presidential Documents,” “Rules and Regulations,” “Proposed Rules,” or “Notices.” See 1 CFR 5.9.

<sup>10</sup> 82 FR 33210 (July 19, 2017).

<sup>11</sup> 82 FR 54472 (Nov. 17, 2017).

<sup>12</sup> These consumer information publications are reflected in the notices of availability at 79 FR 1836 (Jan. 10, 2014); 80 FR 17414 (Apr. 1, 2015); 80 FR 57154 (Sept. 22, 2015); 85 FR 35292 (June 9, 2020).

<sup>13</sup> 77 FR 20011 (Apr. 3, 2012); 77 FR 74831 (Dec. 18, 2012); 78 FR 79410 (Dec. 30, 2013); 79 FR 74068 (Dec. 15, 2014); 80 FR 72711 (Nov. 20, 2015); 81 FR 81745 (Nov. 18, 2016); 82 FR 53481 (Nov. 16, 2017).

<sup>14</sup> 82 FR 55810 (Nov. 24, 2017).

5. The preemption determination titled “Electronic Fund Transfers; Determination of Effect on State Laws (Maine and Tennessee).”<sup>15</sup>
6. The Bureau’s concurrences with respect to the April 2018 and October 2019 rules by the three Federal banking agencies and the July 2019 and April 2020 rules by the National Credit Union Administration, each titled “Real Estate Appraisals.”<sup>16</sup>

In the event that the Bureau’s ratifying of any individual Ratified Action or the application of this ratification to any person or circumstance is held to be invalid for any reason, the remainder of this ratification is severable and shall continue in force.<sup>17</sup>

#### **IV. Discussion of the Ratification**

The Bureau’s Director is familiar with the Ratified Actions and has also conducted a further evaluation of them for purposes of this ratification. Accordingly, the Director is making an informed decision to ratify them.

Based on the Director’s evaluation of the Ratified Actions, it is the Director’s considered judgment that they should be ratified. This decision is reinforced by the fact that, based on the Bureau’s experience as a regulator of markets for consumer financial products and services, the Director is acutely aware that many of the Ratified Actions have engendered significant reliance interests. Consumers, the business community, State and local governments, and other individuals and entities have all relied upon the validity of the Ratified Actions in organizing their activities. This ratification secures those existing reliance interests by avoiding doubt as to the validity of the actions following the Court’s decision in *Seila Law*. The Bureau’s ratification

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<sup>15</sup> 78 FR 24386 (Apr. 25, 2013).

<sup>16</sup> See 83 FR 15019 (Apr. 9, 2018); 84 FR 35525 (July 24, 2019); 84 FR 53579 (Oct. 8, 2019); 85 FR 23909 (Apr. 30, 2020).

<sup>17</sup> Additionally, this ratification does not waive any statute of limitations or other restriction on challenges to the Ratified Actions.

does not foreclose the Bureau from revisiting the Ratified Actions through rulemaking or other initiatives when warranted going forward.

## **V. Actions Outside the Scope of the Ratification**

As noted above, this ratification does not include two actions that were published in the “Rules and Regulations” category of the *Federal Register* during the relevant time periods. First, the July 2017 rule titled “Arbitration Agreements”<sup>18</sup> is not within the scope of the ratification. Prior to the compliance date of that rule, Congress passed, and the President signed, a joint resolution under the Congressional Review Act that “disapproves the rule” and provides that the “rule shall have no force or effect.”<sup>19</sup>

Second, the November 2017 rule titled “Payday, Vehicle Title, and Certain High-Cost Installment Loans”<sup>20</sup> is also not within the scope of this ratification. The Bureau has revoked the mandatory underwriting provisions of that rule. The Bureau has separately ratified the payment provisions of the rule. The entire rule is subject to litigation and its compliance date has been stayed.<sup>21</sup>

The Bureau is considering whether ratifications of certain other legally significant actions by the Bureau, such as certain pending enforcement actions, are appropriate. Where that is the case, the Bureau is making such ratifications separately. On the other hand, the Bureau does not believe that it is necessary for this ratification to include various previous Bureau actions that

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<sup>18</sup> 82 FR 33210 (July 19, 2017).

<sup>19</sup> Pub. L. 115-74, 131 Stat. 1243 (2017).

<sup>20</sup> 82 FR 54472 (Nov. 17, 2017).

<sup>21</sup> Order, *Cnty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, No. 1:18-cv-00295 (W.D. Tex. Nov. 6, 2018) (Dkt. No. 53).

have no legal consequences for the public, or enforcement actions that have been finally resolved.

## VI. Administrative Law Matters

Courts have “consistently declined to impose formalistic procedural requirements” for ratifications by agencies.<sup>22</sup> An agency need not “repeat” or “redo” the original administrative process, such as the notice-and-comment procedures of the Administrative Procedure Act (APA).<sup>23</sup>

Moreover, the APA’s notice-and-comment procedures are not applicable by their terms to this ratification. As case law explains, a ratification “relates back” to the prior action, and it is treated as effective at the time the prior action was done.<sup>24</sup> It follows that this ratification is not a “rule” as defined by the APA, because it is not an “agency statement of general or particular applicability and *future effect* . . . .”<sup>25</sup> Instead, the Bureau is ratifying a number of existing actions, including existing rules, with effect on the original dates of those actions. Further, this is not a “rule making” as defined by the APA, because the Bureau is not “formulating, amending, or repealing a rule.”<sup>26</sup> Accordingly, this ratification is not subject to the APA’s notice-and-comment procedures for “rule makings.”<sup>27</sup>

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<sup>22</sup> *State Nat’l Bank of Big Spring v. Lew*, 197 F. Supp. 3d 177, 184 (D.D.C. 2016) (citing *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 706 (D.C. Cir. 1996); *Doolin Sec. Sav. Bank, FSB v. Office of Thrift Supervision*, 139 F.3d 203, 214 (D.C. Cir. 1998); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 120 (D.C. Cir. 2015)).

<sup>23</sup> *State Nat’l Bank*, 197 F. Supp. 3d at 184 (quoting *Legi-Tech, Inc.*, 75 F.3d at 706; *Doolin*, 139 F.3d at 214) (internal brackets omitted).

<sup>24</sup> See, e.g., *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 602 (3d Cir. 2016).

<sup>25</sup> 5 U.S.C. 551(4) (emphasis added). Similarly, the procedures for certain “rules” under the Congressional Review Act are not applicable. See 5 U.S.C. 804(3) (providing that for purposes of the Congressional Review Act the “term ‘rule’ has the meaning given such term in section 551” of the APA, with certain exceptions).

<sup>26</sup> 5 U.S.C. 551(5).

<sup>27</sup> 5 U.S.C. 553. Similarly, the procedures for certain “rules” under the Regulatory Flexibility Act are not applicable. See 5 U.S.C. 601(2) (defining a “rule” for purposes of the Regulatory Flexibility Act as, in relevant part,

Even if notice-and-comment procedures were required for this ratification, they have already been satisfied by the original rulemaking processes for the relevant Ratified Actions.<sup>28</sup> Additionally, as a further alternative basis, the Bureau finds that new notice-and-comment procedures for this ratification would be “impracticable” and also “contrary to the public interest.”<sup>29</sup> This is because, based on experience as a regulator of markets for consumer financial products and services, the Bureau believes that prompt issuance of this ratification is important in order to avoid public uncertainty about the status of the Ratified Actions after *Seila Law*. Had the Bureau not promptly issued this ratification, that uncertainty could have had a deleterious effect on the ongoing operations of the affected markets, given the significant role of the Ratified Actions in these markets. This authoritative ratification resolves that uncertainty.

Dated: July 7, 2020.

/s/ Kathleen L. Kraninger

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**Kathleen L. Kraninger,**

*Director, Bureau of Consumer Financial Protection.*

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“any rule for which the agency publishes a general notice of proposed rulemaking pursuant to” section 553 of the APA).

<sup>28</sup> In ratifying the Ratified Actions, the Bureau ratifies the procedural steps, including issuance of notices of proposed rulemaking, that were necessary to issue the Ratified Actions.

<sup>29</sup> 5 U.S.C. 553(b)(B). For the same reasons, even assuming this were a rulemaking, there would also be “good cause” to waive the normal requirement that a rule be published not less than 30 days before its effective date. 5 U.S.C. 553(d).