Consumer Finance Monitor (Season 3, Episode 35): A Special Edition to Mark Episode 100 of Consumer Finance Monitor Podcast: How the Consumer Financial Protection Bureau Has Changed under the Trump Administration and Could Change under a Biden Administration

Speakers: Alan Kaplinsky and Chris Willis

Alan Kaplinsky:

Welcome to the Consumer Finance Monitor Podcast where we explore important new developments in the world of consumer finance and what they mean for your business, your customers and the industry. Today is a very important day for the Consumer Finance Monitor Podcast. This is actually the 100th podcast that we are releasing. We started our podcast program in September, two years ago and with the exception of a couple of weeks when holidays fell on a Thursday, we have issued and released podcasts.

Alan Kaplinsky:

We've done 50 for each year since the program began. So I'm Alan Kaplinsky, the chair of the Consumer Financial Services Group and I'm very pleased to have with me today, Chris Willis who is the deputy chair of the Consumer Financial Services Group and the chair of the litigation portion of our group. What we want to do today because this is a special program, I'm going to talk a little bit about the origin of our podcast show and then we thought we would turn to the CFPB which, notwithstanding the change in administrations has remained a very important regulator in the consumer financial services world.

Alan Kaplinsky:

If you don't believe that now, we will have convinced you of that by the time we're done. So Chris, let me introduce you and I understand you've got... Why don't you start off. And the format can be very informal with each of us asking different questions either related to the podcast show, how it got going and what the future holds in store and then we're going to talk about the CFPB under Kraninger. So go ahead, Chris.

Chris Willis:

Yeah. Thanks, Alan and I'd like to add my comments about this being our hundredth podcast. It's a really special occasion for us. We're so happy to have been doing this now for two years and looking forward to doing it for years to come. But the podcast was originally your idea, Alan. I remember distinctly when you came and sent me an email and said, "Hey, should we do a podcast?" So the listeners probably want to know why did we initiate this podcast two years ago? What was the reason for it?

Alan Kaplinsky:

Sure. Well, to be honest about it, Chris, the real impetus for doing the podcast came from my youngest son. My youngest son one day was talking to me about what do we do. What kinds of business development initiatives is our Consumer Financial Services Group involved in and I bragged about the fact that we have produced a blog, the very first blog at our law firm that got launched on July 21, 2011, the very day the CFPB got stood up. I talked about all the webinars that we do each year, anywhere from 40 or 50 a year. I talked about the e-alerts that we issue and a variety of other things.

Alan Kaplinsky:

He looked at me rather puzzled and he said, "Well, what demographic are you trying to appeal to?" And I told them we're trying to appeal to everybody that's in the consumer financial services industry. He said to me, "But dad, if that's your intent, how come you don't have a podcast show? Because that's what younger folks are listening to." So that got me thinking about it, Chris and it became pretty clear to me particularly after talking to you and other people in our group that we really had a void and the different types of communication that we were using to talk to our clients, to talk to the industry and we embarked upon a podcast show. At first, it was like everything else. We were the first blog at our law firm and we were the first podcast show. So it was a little controversial, but thankfully we were able to get it done.

Chris Willis:

How would you articulate what you thought our goal was in launching the podcast? And you've mentioned part of it is that to appeal to a younger demographic, but what other goals did you have in mind and more importantly do you think we've achieved those goals?

Alan Kaplinsky:

Sure. Yeah. The main goal here was to bring important information about the consumer financial services industry to our audience quicker than we could do with a webinar where it takes more planning and you have to send out e-invitations and you have to prepare slides. It's a lot more detailed, a lot more complicated than doing a podcast. Some people like to get their information orally. They don't read blogs. A lot of people like our blog. I mean we have thousands and thousands of subscribers to our blog, but I felt, and I think it was a feeling shared by the rest of the leaders of our group that we needed a podcast to round out the various kinds of media that we were using to communicate better with our clients and with the industry.

Chris Willis:

One thing that's interesting as an aside, Alan is although the idea was that we thought that this would appeal to younger people in the consumer finance industry. A lot of the comments that I've gotten over the couple of years that we've been doing it have been from very senior people in the industry. People who are at near retirement age or even who have retired, who listen to it on a regular basis and that's true for people at consumer advocacy groups and even within the government. So the point is I don't think that podcasts are limited in their appeal just to a younger demographic. I think it really stretches the whole age range.

Alan Kaplinsky:

No, I agree with you and indeed ever since we launched our podcast, I myself have started listening to other podcasts which is something that I never did before. Like everything else, that is technology driven. Usually younger folks are the first to figure out how something can enhance their education or their lifestyle and then eventually it gets up to older folk like me. But Chris, let me ask you as you said at the beginning, we were hopeful that this podcast show has a very long life and I'm sure it will. What are your expectations for the show going forward?

Chris Willis:

Well, I mean I think most importantly the expectation is we're going to keep doing it and there's no reason that we shouldn't keep doing it because the sun will die before news stops happening in the consumer financial services world. It's one of the great things about the consumer finance industry is there's always something happening. So keeping ourselves apprised of it and keeping our listeners apprised to it, first of all means continuing to do it.

Chris Willis:

I think we have made a lot of efforts particularly this year, the second year of the podcast to increase the diversity of the speakers that we present. It started off as just being people from our law firm and really a handful of people in our law firm that we're participating. But one of the things that we've done and that I really want to continue doing is to, A, feature more people from within our group and within our firm even in other practice groups, which we've done this year. But also we've had a very heavy influx of outside speakers, people from government agencies, people from non-profit groups, people from consumer financial services companies.

Chris Willis:

So that really to me, continuing to expand the network of people who actually appear on the podcast to offer ourselves and to our listeners the perspectives of a wide variety of people with different sets of information to offer them. To me, that's the biggest priority is to continue covering the news, cover a broad variety of news items that are of interest to a lot of different people in the industry, but include those people from outside our firm that we've started to do. I want to expand that.

Alan Kaplinsky:

Yeah. Well, that's a good point and I mean during the last year, in fact during since the pandemic began, we've had former Director Cordray do a podcast with us. We've had Andrew Smith who is the head of the Bureau of Consumer Protection at the Federal Trade Commission. We've had state attorneys general in states that are very active. We really have had a lot of outside guests particularly government speakers and I think that's added a lot of luster to our program.

Alan Kaplinsky:

I think that the other thing that we should continue to do is to focus on, for lack of a different term, I'll call thought leadership. In other words similar to the way we do our blog and similar to the way we do our webinars. We do more than report the news. We really dig a lot deeper and we try to look for trends or how one issue relates to another issue and what the real meaning is of a particular development. And it's often something that our clients have never thought of and in effect, we're offering something of real value.

Alan Kaplinsky:

So let's turn now to the second thing that I said we were going to talk about namely the CFPB. And I said at the beginning that the CFPB turned out, I think to be much more of an important factor in the last couple of years and frankly almost from the beginning of the Trump administration beginning with acting Director Mulvaney but much more so under Director Kathy Kraninger. They were not quite the impotent agency that a lot of people thought that they would be.

Alan Kaplinsky:

I thought we would start out by having you, Chris, who I think more than anybody within our group has dealt with the agency since its very beginning. You've known a lot of the players there and the players that have been active during the Kraninger era. I'm wondering if you could tell us what you think the most significant changes have been at the CFPB because of the change of administrations?

Chris Willis:

Yeah, sure. And the interesting thing is as you noted, the changes weren't as dramatic as consumer advocates may make them out to be in attacking the bureau or as industry perhaps hoped they would be thinking that they'd get a friendlier referee so to speak with a Republican appointed director. I mean, I guess we can break it down into rulemaking supervision and enforcement. From a rulemaking standpoint, you did have the Republican appointed directors go back on some of the things that the prior CFPB had tried to do particularly in the area of small dollar lending.

Chris Willis:

You had a reversal in a significant part of the small dollar lending rule, but at the same time you also saw the debt collection rulemaking take form and we're expecting the actual rules to come out in a couple of months in October of 2020 according to the latest release from the CFPB. And that rulemaking is not a wholly industry friendly, anti-consumer rule, rather it's very balanced honestly and shows a real conscious effort to balance both the interests of consumers and industry with regard to debt collection. I think, there's been certainly some changes in rulemaking, but they haven't flipped the pendulum all the way over to the industry side. I think, they've just become, I think a bit more balanced.

Chris Willis:

With supervision, we've really seen... Supervision just continue to do what it always did. I detected almost no difference in what happened in supervision under the Republican appointed directors versus what we had seen under Director Cordray. They still did the same intensity and number of exams. They still found violations. And in fact, starting in 2017, we started seeing lots more par letters being sent, lots more violations of law being asserted. One thing that did happen was there used to be a lot more referrals from supervision into enforcement prior to 2017 and we saw a decrease in that occurring.

Chris Willis:

We saw more issues being finally resolved in supervision under the Republican appointed directors, but consumers were still being protected, remediation was still being paid. Business practices were still being changed to respond to the bureau's allegations of violations of the law. It was just happening in the supervisory context rather than as much in enforcement.

Chris Willis:

So supervision continued to do exactly the job that it always seemed to be doing with not much interruption or change from my perspective. And then on the enforcement side, what's interesting is you had a very vigorous period of enforcement from the inception of the bureau until about 2016 or early 2017 and even before Director Cordray resigned, we saw a pretty significant drop off in enforcement activity in the early to mid part of 2017.

Chris Willis:

That remained the case for the next couple of years from my perception and then we saw a gradual pickup in enforcement activity starting in 2019, which to my view has really accelerated in 2020. So we see enforcement being very active now, launching lots of new investigations, moving forward in ones that have been open for a while and bringing them to conclusion and not by closed letter through either litigation or consent orders.

Chris Willis:

We've seen CFPB enforcement file a contested lawsuit against a large bank earlier this year at the beginning of 2020 and file a number of other contested enforcement actions that they intend to litigate. There were phases in what enforcement did in terms of greater or lesser activity, but I think we're right back to a phase of greater activity now at least as far as I can see. So I think you put all that together and I really don't think the facts support the concept that today's CFPB under Kathy Kraninger as director is the lapdog of the industry. In fact, I think the empirical record shows quite the opposite. That may not fit into the political narrative that some people want to tell, but that's what I see.

Alan Kaplinsky:

Yeah. So you're right. The consumer advocates have not been happy with the performance of Kathy Kraninger. The Democratic leadership certainly in the house, in the house financial services committee led by Maxine Waters judging from the various appearances that Kathy Kraninger has made before that committee. It's been rather hostile, for sure. One of the things that it always is pointed out is the dollars recovered for consumers. The millions of dollars that the bureau recovered when Cordray led the bureau and the civil money penalties, and how those numbers have declined quite a bit. So how do you answer that, Chris.

Chris Willis:

And those statistics are based on only half the equation because in supervision, the bureau can enter into memoranda of understanding or simply issue matters requiring attention to a supervised entity and tell them to provide remediation and restitution to consumers, and the bureau does that. So money is paid back to consumers through the supervisory process that wouldn't be tracked by those statistics at all. And I think if you don't include those, you're not telling the whole story. And if you did, I think you'd see that the numbers are quite a bit larger than the consumer advocates and the Democrats would have us believe.

Alan Kaplinsky:

So are you saying that under Cordray, they didn't really use supervisory actions to obtain restitution? They were more much more focused on public enforcement proceedings, investigations and that one of the the differences perhaps between the two administrations is that Kathy Kraninger was not really out there to tout a big dollar figure on the home page of the CFPB website, but rather was trying to get relief to consumers who needed it to get it done quickly and to get it done quietly.

Chris Willis:

And that's my perception is that remediations were basically moved from enforcement back into supervision where they were originating rather than having so many of them result in public enforcement orders, consent orders for example. The thing is, the money was getting back to consumers either way. I don't think it's a fair criticism of the current leadership of the CFPB to say that it's abandoned consumers or that consumers are no longer getting restitution or to point to these enforcement dollar figures as the barometer of whether consumers are being treated fairly because, again, it doesn't tell the whole story because so much is happening in supervision.

Alan Kaplinsky:

Yeah. So you tell an interesting story about the current CFPB, the current leadership. One that's not often told in the general media. That's not what sells papers and indeed there was, I don't know if you saw an article in the Washington Post a couple of weeks ago that just excoriated the CFPB for being so feeble and for not doing anything to help consumers, particularly consumers that have been very badly affected by the pandemic. But it's really unfair. I guess that sells newspapers and the story that you tell based on your firsthand experience, it's not something that the general media are going to get terribly excited about.

Chris Willis:

But while we're talking about political leadership, politically appointed leadership at the CFPB, let me ask you this. We have a general election coming up, a presidential election coming up in November of 2020 and what if Joe Biden becomes the president? Do you think there'll be a sea change at the CFPB if Biden is the next president? What do you think will happen if that occurs?

Alan Kaplinsky:

Well, I think there will be a sea change, and I am anticipating... This sea change will occur not so much because Joe Biden is very extreme and very progressive in his thinking. But he is going to be surrounded by people who I think are going to have a great deal of influence about the future direction of the CFPB. And of course, I'm thinking first of all of Senator Elizabeth Warren who wrote the blueprint for the CFPB. We know she's very unhappy about what's happening at the CFPB these days.

Alan Kaplinsky:

Assuming Joe Biden gets selected, after the inauguration, I would expect that it would not take very long for him to replace Kathy Kraninger, probably initially with an acting director of the bureau because a new director of the bureau of course would require confirmation by the senate and those things tend to take time. That's not going to be the only appointment that the new president would have to make. But I would think rather quickly, there will be at least an acting director and that acting director, I would think will very much... Or I should say that Elizabeth Warren will very much have the ear of that acting director and there will be a lot of things that I think will change.

Alan Kaplinsky:

It won't happen overnight. It didn't happen overnight when Trump, after Cordray resigned, but I think over a period of a few months, you will see more enforcement activity. Probably more of it, the type of activity that gets the big headlines. I would think the banks will certainly... Some of the larger banks will be in the crosshairs of the CFPB because when they go after a large bank, they get a lot of print. The media is very interested in that. So I think the amount of activity will increase. You're going to see less of... There'll still be a focus on supervision, but it'll I think shift back the other way again where the enforcement arm of the CFPB is really predominant.

Alan Kaplinsky:

And I would expect that they're going to be tough. There'll be some changes in the enforcement area of the bureau, I'm sure over time and their demands will increase and I think that's going to be one big change. Another thing, I think that I'm quite concerned about because we do have a lot of clients that are affected by the rule and I'm talking about the small dollar lending rule where we are right now is that the CFPB recently finalized a rule where they got rid of the most draconian part of the rule dealing with ability to repay.

Alan Kaplinsky:

They left in place payment provisions which the industry is not happy with. There's some very troubling parts of the payments provisions including the fact that it covers debit cards, which I don't think it was intended to cover. But it's a mess. There's litigation in Texas that just got revived recently. And my understanding is that the industry is going to attack the payments provisions. But I would expect that a new director of the CFPB will, assuming that the congress has not overridden the new rule which essentially repealed the ability to repay provisions assuming that under the Congressional Review Act that the new rule does not get overridden and that could very well happen. I would expect that the new director or acting director will try to figure out some way, Chris to get the old rule in place again to revive the old rule perhaps either in the litigation that is going on or new litigation that might get filed in the future or through a new rulemaking.

Alan Kaplinsky:

So there's going to be I think trouble ahead unfortunately with respect to a topic that literally has been a great matter of a dispute within the bureau, within the industry among consumer advocates ever since the bureau was created. I wish they could bring some finality to that area so that that industry would have the certainty that they need to conduct business properly. I'm just not optimistic about that. And then, I think we'll see more larger participant rules. We'll get to that I know a little bit later in our discussion.

Alan Kaplinsky:

We'll see it during the entire Trump administration. They did not add any new sub-industries to the list of companies and non-banks that they would supervise and examine. I think there will be changes in that area. There'll be changes I'm sure in other areas that did not get that too much attention during the Trump administration.

Alan Kaplinsky:

So I do see a sea change coming. I think it might actually be... I mean, part of the problem with the bureau is the way the thing got structured, this whipsawing effect, I think is going to become a very common occurrence. If there's a change in who is the president of the country every four years going from a Republican to a Democrat to a Republican, this bureau is in for a really rocky time. And I think the industry is going to have a lot of difficulty. What do you think?

Chris Willis:

Well, I agree with you that there will be a big emphasis on bringing the CFPB back to more enforcement activity because, again, the Democrats and the consumer advocates have this narrative that says the CFPB is ineffective because it's not doing enough enforcement. Well, the solution to that is we need to show more enforcement. So I think you're right that we're going to have another movement of resolution of matters out of supervision and into enforcement. I agree with you on the payday lending rule, the small dollar rule that that there will be an effort to resurrect the rule that has originally been conceived under Cordray's leadership of the CFPB.

Chris Willis:

Then the other thing that you didn't mention, but I would like to mention is, I think we'll see a return to very overtly aggressive fair lending enforcement. There's been a lot of discussion about that and even though the bureau is actually doing a lot on fair lending right now, both in supervision and enforcement like look at the Townstone redlining case that was just brought. It's been criticized for not doing enough on fair lending.

Chris Willis:

So I think there would be a lot of pressure from the White House and from the Democratic Party for whoever becomes the next CFPB director to put a lot more emphasis on fair lending and to show more activity in that direction. Alan, speaking of whoever the next director might be, would you like to make a prediction. Who do you think the next director of the CFPB might be?

Alan Kaplinsky:

All right.

Chris Willis:

If there's a Biden win of the White House in November.

Alan Kaplinsky:

Yeah. Well, again, I'm going to give you a name, but I don't think Vegas is giving any odds to this point on who that might be. But I think there's a pretty good chance that Rohit Chopra might be the next director or acting director. But I think he worked at the CFPB. He had an important position there with respect to student lending and then after the change in administrations, he managed to get appointed by President Trump to the Federal Trade Commission to fill a vacancy. Of course, the FTC, it has to be a bipartisan commission with... It's a five-member commission and three are Republicans and two are Democrats.

Alan Kaplinsky:

He's one of the Democrats and I've been following what Rohit has been doing while at the FTC and he's very often a dissenting voice there. He would fit the bill I think perfectly for an Elizabeth Warren and therefore, I think, Joe Biden.

Chris Willis:

I'm going to make a different prediction and I have no inside information whatsoever, so this is pure speculation on my part. But I think a really logical choice under a Biden administration would be Patrice Ficklin who's the director of Fair Lending at the CFPB, and has been since the Cordray directorship. I based that on, she's still at the agency. She still occupies a pretty public role. So she's seen in public and very associated with the agency still and has been a very constant presence at the agency, and I think has conducted herself in a very good way through this administration in terms of preserving her credibility and her leadership within the organization.

Chris Willis:

But the other thing that makes me think that that might happen is not only do I think there'll be a general interest in reviving Fair Lending as a priority area for the CFPB and of course who better to do that than Patrice Ficklin. But remember, that one of the greatest affronts according to the Democrats and the consumer advocates that was done to the CFPB under this administration was the breakup of the Fair Lending office and stripping it of some of its power and sort of relegating it to direct supervision by the director, taking its personnel away, taking its enforcement authority away, et cetera. And what better way to right that wrong than to make the Fair Lending director, the director of the CFPB. It has a certain symmetry to it and that's why I thought it might be an appealing option for the White House if Biden were to win the presidency.

Alan Kaplinsky:

Yeah. There are a lot of ifs here, but we'll have to see how it all plays out. So Chris, what kind of advice are you providing to clients what they should be doing to prepare for the potential change in leadership at the bureau?

Chris Willis:

I think in general it means taking into account the uncertainty and the possibility that we may get a more aggressive bureau in 2021. And that means making more conservative decisions on risk tolerance particularly on issues that we think will be sensitive to a change in administration. So that would primarily in my mind revolve around UDAP and fair lending issues where we may have believed that the current CFPB would be tolerant with respect to a particular issue under a fair lending analysis, say something to do with modeling or something like that.

Chris Willis:

One would expect that... Or where the bureau hasn't done anything, for example with respect to targeted advertising on social media platforms. We haven't seen the CFPB do anything in that regard that I'm aware of. So if you're anticipating that a new invigorated bureau will be in place with regard to those issues, you'd naturally be more conservative I think in making choices in that regard. Keep in mind, the statute of limitations under a co is now five years. It was made five years by Dodd-Frank.

Chris Willis:

So there's a lot of opportunity to reach back from 2021 back to 2016 for example. Similarly with UDAAP, it doesn't have as long of a statute of limitations. The CFPB's UDAAP authority is a three-year statute of limitations period, but nevertheless that's plenty long for something that an institution decides to do today to be examined under heightened standards or heightened rigor under a new administration or for an industry participant to worry that it may be chosen as an opportunity for the bureau to make a political statement about how much tougher it is today than it was yesterday. I think in general, it just means making more conservative risk tolerance calls on things like UDAAP and fair lending issues.

Alan Kaplinsky:

Right, right, okay.

Chris Willis:

So Alan, we've already talked about what may happen with the small dollar lending rule. We have the debt collection rule that's about to occur in October, the final rule is supposed to come out in October. At least so the CFPB has told us. What do you think might happen with respect to that rule if it is finalized in October as planned?

Alan Kaplinsky:

Well, yeah. I probably ought to ask you that question because you really have been following that rule very closely and indeed I know you've submitted, I think several comment letters to the bureau about it. I'm going to defer to you on that one, Chris.

Chris Willis:

And the thing is as I've told you my characterization of that rule as it was proposed last year. The proposed rule that came out in May of 2019, I thought was very judiciously balanced between consumer and industry interests. There was a lot of opposition to it on both sides actually. There were things that the industry really didn't like about it and there were things that consumer advocates really didn't like about it.

Chris Willis:

I worry though that if the Democrats not only take the White House, but both branches of congress, both houses of congress. They would feel the need to do an override of that rule under the Congressional Review Act. That would be unfortunate because a lot of aspects of that rule are really necessary to provide certainty both to industry and to consumers about the Fair Debt Collection Practices Act, which is riddled with inconsistent court decisions and riddled by the fact that the statutory language hasn't been updated since the '70s and doesn't really reflect modern reality. So I think it would actually be unfortunate if that happened, but I'm worried that it could happen.

Alan Kaplinsky:

Let me push back a little on that although I am a little concerned to challenge you on something you've been following this closely. But wouldn't it make more sense for the consumerists to say, "Okay, let's not override the rule. Half a loaf is better than no loaf at all." Instead, why not try to get the bureau to begin another rulemaking to get rid of the things it doesn't like and to add things that were omitted. Why wouldn't that make more sense, Chris?

Chris Willis:

That would be much more sensible and that's what should happen if you were acting rationally, for sure. And the thing is that the debt collection rule is going to come out right as the administration changes over. It's going to come out in October of '20 and probably not be in effect until October of '21 because the bureau proposed a one-year compliance period for it, because it is a very sprawling rule. So that's plenty of time in the next administration to do another notice and comment rulemaking and fix the debt collection rule.

Chris Willis:

Then you don't have the problem created by the Congressional Review Act override, which would be to forbid the CFPB from making any similar rule without an authorization from congress. So it would definitely make more sense to revisit this through rulemaking rather than the CRA. I just worry that there'll be this legislative need to do something about it to correct the injustice that's being perpetrated by the rulemaking at least according to some people and that impetus might not be able to be resisted. I hope that it is because it wouldn't be a good result for anyone.

Alan Kaplinsky:

Are the consumers upset over the fact that the rule that's going to be finalized will not cover creditors collecting their own debts? Is that something that sticks in their craw?

Chris Willis:

I think that's part of it, but there's other aspects even on the third party side that I think they don't like. So for example, there's no frequency limit on emails and text messages. The frequency limits are only with respect to phone calls. So they don't like that. I think they believe the rule makes it too easy for debt collectors to send emails and text messages that may be visible to third parties and thereby lead to third party disclosure risks.

Chris Willis:

So the CFPB for example took the view that the idea that someone may see something on your mobile device over your shoulder is really your problem as a consumer because you're the one who can fix it. You can just turn those notifications off. I don't think consumer advocates agree with that assessment. I think they think that's a bigger risk and that the behavior of debt collectors needs to be controlled in order to prevent that risk. Those are a couple of examples of even debt collector related issues that I think there was dissatisfaction on the consumer advocate side.

Alan Kaplinsky:

Of course, another thing that we haven't talked about that I think will move ahead a lot more rapidly if we have a new administration, will be the rule which the CFPB is required to promulgate dealing with small business lending where the companies will have to take HMDA type data and keep track of that to see if there's discrimination against women and minorities. Would you agree with that, that'll be a high priority?

Chris Willis:

It will, but what's interesting is the current CFPB is being forced to pursue it by the settlement it reached with the California Reinvestment Coalition back earlier or maybe it was late last year or early this year. And in fact on this podcast, we had the lawyer who represented the group in California, Nathan Shaw talk about that. So they actually have a schedule under which they're supposed to do that rulemaking now. I think the difference is if the rule gets finalized under a new administration, it will be more onerous for industry and perceived to be more helpful to fair lending enforcement as formulated by a Democratically appointed CFPB director than perhaps we would get today.

Chris Willis:

But the timeline is set by the settlement already, so the bureau has to do it on a certain schedule that's being supervised by the court in doing so. But back to the issue of how the political winds may change things, let's talk about something that's not directly related to the CFPB and that's arbitration. We had the CFPB under Director Cordray promulgate a final arbitration rule that would have essentially precluded pre-dispute arbitration for Consumer Financial Services. It was narrowly overridden by congress under the Congressional Review Act, so now the CFPB can't do an arbitration rulemaking unless congress authorizes it. But if the Democrats run the table in November and capture the White House in both houses of congress, what do you think may happen with arbitration.

Alan Kaplinsky:

Well, first of all let me push back a little bit on what you said about the CFPB being disabled from promulgating another arbitration rule that's not entirely accurate. They can't promulgate a substantially similar rule to the one that was overridden under the Congressional Review Act. And of course, you'll recall, Chris that the rule that that was overridden was a rule that prohibited the use of class action waivers in consumer arbitration agreements.

Alan Kaplinsky:

But it didn't bar the use of arbitration agreements altogether. So it's interesting, I had as my guest on our show, a month or so ago Deepak Gupta. And you know Deepak is a very well-known and highly respected consumer advocate, who's argued many cases in front of the Supreme Court and he's really an expert in the consumer finance world and knows a lot about the CFPB. I was saying to him, I thought that the biggest threat to arbitration was not the CFPB, but rather congress itself, because every year congress introduces a bill that would purport to ban the use of arbitration in consumer contracts among other kinds of contracts.

Alan Kaplinsky:

In fact, this year the house of course controlled by Democrats did indeed pass such a bill, but it's never been taken up in the senate. If it turns out that the senate is in control of Republicans, and it seems to me... I'm sorry is in control of Democrats after the election and the houses, and you have a Democratic president, it seems to me that the greater threat is for congress to act. But Deepak said he disagreed. He thought that the CFPB would revive the topic of arbitration. We didn't get into the detail of what he thought the CFPB might do.

Alan Kaplinsky:

I think what Deepak was thinking is that they might come out with a role banning arbitration altogether. He didn't say that, but as I was thinking during the program what could the CFPB do that may not be substantially similar to the rule that was overridden, I suppose the complete outright ban might be such a thing. But I think the problem that the bureau would have there is that the record that they created a substantial record with lots of comment letters, three different hearings that were held. I testified at all three of the hearings on behalf of the industry.

Alan Kaplinsky:

The record was not there to support a complete ban on arbitration. So I think they'd more or less have to go back to the drawing board and create a new record and I think what concerns me more than the bureau would be congress.

Alan Kaplinsky:

Now, while there's really probably good chance the Democrats will end up with control of the senate, they won't have a filibuster proof majority. That is they're not going to have 60 Democrats. So they're going to have to... In order to get it done, I think they would have to change the rules to get rid of the filibuster. They've already gotten rid of the filibuster for certain kinds of appointments like appointments to the bench. They can get rid of it as it pertains to legislation and that's my nightmare scenario about arbitration, Chris.

Chris Willis:

Yeah. I share your view in that regard.

Alan Kaplinsky:

Let me ask you... I mentioned the larger participant rules that the CFPB has the right to issue under certain circumstances and certainly in the Cordray era, they came out with a whole bunch of them including regulating third-party debt collectors, debt buyers, money transmitters, and I could go on and on.

Chris Willis:

Credit reporting agencies?

Alan Kaplinsky:

Yeah, credit reporting agencies. Nothing has happened under the Trump administration. Do you see other industries that might be targeted by the CFPB in that area?

Chris Willis:

Well, the one that the bureau had talked about doing, prior to the administration change but sort of never got around to was installment lenders. Entities that make unsecured personal installment loans essentially. That one because it was sort of unfinished business from Cordray's directorship, would seem to be top of the list there. It wouldn't surprise me to see them extend their supervisory authority over not just the lenders, but also the platforms that are not lenders that rather facilitate loans through a bank model for example, for a bank that may itself not be subject to CFPB supervision because it's too small.

Chris Willis:

So that one is the one that I think is most likely and particularly you have a lot of consumer protection noise around online installment lenders with these true lender attacks like we saw in Colorado for example. So I think that would be further impetus for them to make installment lenders the next larger participant role.

Alan Kaplinsky:

Yeah. I would agree with you. And I think that it's very unlikely that they'll let another four years go by without trying to sweep within their supervisory jurisdiction other sub-industries within consumer finance and I think the installment lenders are certainly a prime target. It's now a much larger industry than it was when the CFPB got created because of the advent of online marketplace lending. So I definitely agree with that. Let's turn to some of the newer technologies. What do you think will be the impact on the use of emerging technologies like artificial intelligence or the use of big data?

Alan Kaplinsky:

Do you think they will be quite as... I guess indulgent is the wrong word, but under the Republican administration, they formed a separate office of innovation at the CFPB and there seem to be a lot of interest in making sure that whatever they do that it does not impede technology, new technologies in any way. Do you see a new head of the CFPB acting the same way or do you think things might slow down a bit?

Chris Willis:

Well, you could reach either conclusion on this, but I'm going to go with the glass half full conclusion. The thing is the use of alternative data and AI models was recognized by the Cordray CFPB as representing an opportunity for financial inclusion for people who didn't have sufficient credit bureau files to be underwritten using credit bureau trade lines essentially. And the CFP published several reports on credit invisibles and highlighted the millions of American adults who don't have a credit profile.

Chris Willis:

The Cordray CFPB is the one who issued the no action letter to Upstart which was using alternative data to underwrite its Sloan products. And in fact, Patrice Ficklin wrote a blog post a year or so later saying, "Hey, we've been monitoring what's been going on with Upstart and it looks fine from a fair lending standpoint." All of that happened under the Cordray administration and with Patrice Ficklin who was appointed during that administration. So you've got to think that they will have understood and continue to understand that suppressing those technologies or making industry participants afraid to use them just means freezing the credit system in a way that excludes people who are credit invisible and that's not desirable. I don't think from the CFPB standpoint.

Chris Willis:

So even though there's a lot of consumer group talk about how artificial intelligence contains hidden biases and the use of big data can be a fair lending problem. I think the CFPB knows better than that from its own empirical research. And I mean the research that happened when Richard Cordray is the director. So I'm cautiously optimistic that there will not be a clamp down on the use of those technologies, but rather guidance that is intended to encourage the industry to use it in a responsible way sort of like what we saw with the interagency statement that came out in January of 2020 with the CFPB and the federal banking regulators.

Alan Kaplinsky:

Yeah. Data aggregation is another thing that comes to mind where as I recall Richard Cordray was really an advocate of that, like the idea of giving consumers more access to information about themselves. He liked it. I think the current administration likes it. I would expect that things would continue the same. Don't you think?

Chris Willis:

I do, yeah. I think political discourse notwithstanding, the people who've really studied this issue at the CFPB understand that it's a positive for consumers. I don't think they're going to be blown by political winds into doing something that they think is negative for consumers.

Alan Kaplinsky:

Right, right, right. So we're drawing to the end of our podcast, Chris. And I think a good question for us to ponder as we draw things to a close is as a result of the [inaudible 00:56:49] opinion of the Supreme Court, we know now that the president, whoever it might be, it's got the right for good, bad or no reason at all to remove the director from office, and then to put somebody in place who is more to his or her liking. Ever since the bureau got created going back to its enactment in July of 2010, there's been a lot of controversy swirling around this issue of should you have a one person director or should you have a commission that's more like the Federal Trade Commission.

Alan Kaplinsky:

A lot of people think and I would count myself among them that having a one-member commission whether that member is a Democrat or a Republican is not a good idea. I just think it reposes too much power in one individual. When you have a five-member commission, while the majority of the commissioners may change every four years, I think that the FTC, I think it's a better way of governance for something as important as the management of the CFPB.

Alan Kaplinsky:

So the question is how do you change it? The only way to change it is to get congress to amend the consumer financial protection act to substitute a five-member commission for a single director as the method for governing the CFPB. The Republican and the Democratic parties have never been able to agree that this is the way to go. Initially, when Dodd-Frank was adapted, the version of it that was passed in the house which was supported by Elizabeth Warren called for a five-member commission, but by the time the legislation got over the senate, the Democrats were clearly in control and they were able to change it to a one member director.

Alan Kaplinsky:

At least I don't see any push right now coming from either party to change it. And when I asked Deepak Gupta the question, I said, "Why wouldn't you support it, Deepak?" And I told him, you we talked about the last four years and he said, "We're willing to... Consumer advocates are willing to suffer," this is essentially what he said, "For four years under a directorship we don't like rather than to go to a five-member commission. Because we know sometimes the Democrats will be in control. They'll have one individual like they did with Cordray and like they may have again." So what do you think, Chris about that?

Chris Willis:

I agree with you on both points. I mean, first of all, it would be better policy for the bureau to have more stability in its operations, stability in its positions, et cetera that would come from having a five-member commission rather than the whipsawing that you've described earlier in the podcast that we get from having successively appointed directors each of whom may be motivated to show how bad his or her predecessor was by doing things in the total opposite way.

Chris Willis:

I think it'd be better for consumers and better for industry and it would certainly provide more continuity and predictability in the law so that people know like what the law is and what they're supposed to do. But I also perceive that you are correct that neither side wants to go in that direction because each side believes that they can advantage themselves or their constituencies by swinging the directorship of the bureau one way and then the other depending on how the political winds blow.

Chris Willis:

And at root, in order for this problem to be solved requires rationality and good policy to override partisan politics. In today's America, how likely do we think that is to happen? Unfortunately in the camp it says not very likely.

Alan Kaplinsky:

Yeah, unfortunately. Well, Chris, I think we've covered a lot of territory during the past hour. So we're going to draw our podcast to a close right now. Thank you for joining me today on our 100th centennial podcast recording. I hope our listeners continue to remain as loyal to us as they've been for the first hundred podcasts. We get a lot of downloads. It's a very popular show and we promise you that going for the next hundred shows, next two years that we're going to continue to make this a very vibrant show and we're going to make it even more interesting because we're going to have a lot more outside guests and I think we're going to cover a lot of topics that are going to be of tremendous interest to the industry.

Alan Kaplinsky:

So you can find our podcasts on our website. You can get them on whatever your favorite podcast platform may be, be it Apple or Google Play or Spotify. And as I indicated, we release a new show, generally every Thursday of the week. Also, if you like our podcast show, leave a review for us, let us know about it. Let us know if there's something you don't like and we can improve. And make sure you follow what we say on our blog because it's very, very active. And today, alone, I looked at five different articles that were published on our blog.

Alan Kaplinsky:

During the pandemic, we have really stepped up our game. We're doing more podcasts. We're doing more webinars. Not podcasts, webinars and we're doing more blog articles. So I encourage you to follow all the media which we employ in our firm. So I hope all of you enjoyed the rest of your day. Thank you.