Alan Kaplinsky:

Welcome to the consumer finance monitor podcast, where we explore important new developments in the world of consumer financial services, and what they mean for your business, your customers, and the industry. I'm your host today, Alan Kaplinsky, and I'll be moderating today's program.

Alan Kaplinsky:

For those of you who want more information about the subject we'll be talking about today, which I'll introduce to you in a moment, or anything else in the world of consumer finance, make sure you consult our blog, consumerfinancemonitor.com. We also put on a regular webinars and webcasts, on subjects of interest to those of you in the industry.

Alan Kaplinsky:

And if you want to subscribe to our blog, you can do it right on our blog. Or if you want to get on our invitation list for webinars and webcasts, you should just email or go on ballardspahr.com, send an email to me or to anybody else that you know at Ballard Spahr and we certainly will put you on the list.

Alan Kaplinsky:

So, let me tell you what we're going to talk about today, give you a very brief introduction, because we're going to get into a lot of detail and I want to get to our guest very quickly. So we're going to talk about a topic called, Earned Wage Access. It's a really hot topic these days, largely, I won't say largely, but at least in large part, because of the gig economy.

Alan Kaplinsky:

So, if you think of Uber drivers and Lyft drivers or DoorDash, or any of the members of the gig economy, where people might actually have more than one job, and they're not generally employees of the company for whom they're performing the services, they're independent contractors. After they've performed a day of work, they want to get paid for that, they don't want to have to wait for the... It could be anywhere up to a couple of weeks to get paid. I mean, that's generally how employees get paid. They want to get the money quicker and it's really more important than it's ever been in the environment that we're living right now in the pandemic, where people are living much more paycheck to paycheck.

Alan Kaplinsky:

Let me now introduce our speakers for today. First of all, our guest today, and then I will introduce second guest. Our honored guests today is Jesse Silverman. Jesse is currently the general counsel at a company called Steady. It's the leading extra income platform for the American workforce. And in a minute, first question I'm going to ask is for Jesse to describe what Steady does.

Alan Kaplinsky:

Prior to him being at Steady, he was the head regulatory counsel for a company called LendUp a San Francisco based FinTech lender, focused on expanding access to credit, which raised over 125 million in investor capital, issued over 1.7 billion in loans during his tenure at the company. And then he previously spent four years in the CFPB office of enforcement. He was there during the Richard Cordray era. He initially built out the Bureau's enforcement team, managed all hiring in addition to investigating and bringing actions against a wide range of financial institutions for violations of federal consumer finance laws.

Alan Kaplinsky:

Prior to his time at the Bureau, he was an attorney for the Connecticut department of banking, focusing on issues related to non-depository lenders, payment processors, and money transmitters. Welcome to our program Jesse, pleasure to have you.

Jesse Silverman:

Thank you, Alan. Thanks for having me.

Alan Kaplinsky:

Yeah. And then regular on our podcast show, it's my pleasure to introduce my partner, James Kim. James works out of our Manhattan office, whenever that office decides to open up again. And James has been with us for several years. Prior to that he was with another law firm, we won't mention the name of that firm because they're a competitor. And then prior to that, similar to Jesse, James spent several years in the enforcement division working in the Manhattan office of the CFPB. So, I'm sure that's how James got to know Jesse, I would guess.

Alan Kaplinsky:

So, let's begin our program, Jesse, with you telling us what does Steady do and why you and your company would have an interest in the subject we're talking about today?

Jesse Silverman:

Sure. So Steady as you noted is an extra income platform, and really what that is at the base level, we're talking about, how do people find better opportunities to earn a living? And as we've seen over the last, probably 10, maybe even a little bit earlier, it started the American workforce itself is changing pretty dramatically. The days of everyone being a W2 employee are waning. And the days where people are earning a living through a sort of a portfolio of income opportunities, 1099 opportunities, that is for better or worse, that is the changing face of the American workforce.

Jesse Silverman:

And even those who do have steady W2 income, many of them are also earning extra income through 1099. And again, I'm saying that broadly, lots of people might think about Uber or Lyft or DoorDash, but it's really Home Depot hires a massive amount of part-time work during the holidays. Kroger's Grocery Store, so it really is broader.

Jesse Silverman:

And what we've seen is I like to joke that these companies have AI working for them to maximize their shifts. We wanted to turn that back to the consumers, to the workers, to let them have some AI, help them maximize their earning opportunities. And what makes us probably a little bit different is one, we're largely focused on that low to moderate income, so we're often talking about hourly work rather than full-time work.

Jesse Silverman:

But what we do is we take lots and lots of data, and I know this is going to sound somewhat trite, because everyone claims that they're using big data and they're using machine learning and AI, but let me tell you we really are. We will take for instance, the community earnings, and we can say, Hey, people in your community who look like you, based on these factors, they are earning $17 an hour at Kroger's, you're making $15 an hour at CVS. If you go to Kroger's with your skillset, you can earn $2 more an hour. And just to be clear, those numbers are completely hypothetical, those are not the actual hours from CVS or for Kroger, I don't know what those are.

Jesse Silverman:

But we're using the machine learning to help identify ways that people in their community can earn more money. And I got to say, it's a challenge, there are so many factors that go into how a person earns his or her living, but that's what we're focused on. And with that, I describe us as, we're not quite FinTech, we're FinTech adjacent, we work with lots and lots of Fin Techs and one of the issues that has been on our radar for two years now has been early wage access, because there is a real problem with these sort of timing mismatch between earning an income and getting paid.

Jesse Silverman:

And so that is a massive problem for our particular demographic, I'm sure we're going to get into this even deeper. But we have been examining the earned wage access markets for a year and a half, we've decided to focus for the time being on helping individuals find a better work, but we are definitely staying around this issue and we are going to be back in this issue. That's really where we come in.

Alan Kaplinsky:

Yeah. Very interesting, Jesse. So James, why don't you describe to us in a little more detailed than I did what is Earned Wage Access?

James Kim:

Sure. Thanks Alan. And to respond to your comment or question earlier, yes, I did meet Jesse when we were both at the CFPB. In fact, our offices were two doors down from each other and it was a lot of fun working with him. So, just stop there, but-

Jesse Silverman:

I just went into his office to steal his work, sort of like copying off his desk.

James Kim:

So, earned wage access, in many ways it's exactly what it sounds like, but there's a lot of looseness out there, meaning people use the term loosely in a very imprecise manner. So the actual market, so to speak for this product is quite broad and includes things that are not true earned wage access. So let me explain for a second.

James Kim:

So, fundamentally earned wage access can be and often is, as Jesse said, a way for consumers to access wages that they have actually earned, but have yet to be paid out because of the disconnect between working everyday and the traditional every two week, monthly, bimonthly pay schedule. So it's a way to access those burned wages early.

James Kim:

So, there are companies that provide that primarily through two channels, by contracting with employers and partnering with employers to offer this kind of service, right? And their revenue stream could be a combination of charging fees either to the employer and or to the end user, to be employee and repayment on the earned wage is typically a payroll deduction.

James Kim:

You can have the same type of service direct to consumer, right? In that sense, there's got to be a different mechanism probably for the earned wage access company to assess what your earned wages are, right? Because they may not have a direct connection to the employer's system or payroll. But the key there is those are money paid out based on some empirical data showing that you've worked and earn those wages either through the employer channel or through a direct to consumer model.

James Kim:

But this market, as I said is loose, there are companies out there, and this is really more the direct to consumer camp, that are offering essentially what are unsecured small dollar advances. I'm not going to say their credit, right? Because they may not actually fall under the definition of credit, but they're advances of some type, sometimes recourse sometimes non-recourse, and there isn't a formal mechanism to measure how much you've actually worked and earned. In that sense it really is a new fangled version of a FinTech consumer friendly payday loan, essentially.

James Kim:

But again, I want to be careful here, this product, I think the right term is it's an advanced, it's not necessarily credit or loan, right? And so there's a lot of it's very fact specific, but that's a long way I think of answering your question, Alan. It's a hot market, but it's very fluid and a lot of people are approaching this market problem from different perspectives. And so people say earned wage access that I think often mean any combination of those various products services business models.

Jesse Silverman:

I think there's two, there's one more sort of variant strain in there as well, which is, I would describe it as early ACH access, but it largely fits into that same category. And you can see it with some of the Neo banks, a good example is Chime Bank where they say, Hey, your money is in your account. Most banks are going to sit on that money until it quote-unquote clears ACH. We're going to give it to you early up to two days early.

Jesse Silverman:

So there's a sort of variant strain on that earned wage access and it's really just trying to cut off the ACH clearance spot, but I feel like that fits into the same category.

Alan Kaplinsky:

Yeah, well, this sounds like a very basic question, but I guess is it fair to say that this product, earned wage access, and I understand it could mean a lot of different variations. That it really evolved out of the payday loan product, which as we all know has always been very controversial because of the high APRs that people would pay for a payday loan. Is that true that that's a part of the thinking that to create a product that would compete with the payday loan that would be more consumer-friendly?

Jesse Silverman:

I personally think that's definitely right, I'm not sure if it's the entire story, but it's a very big part of the story and I can say this having both worked at the regulator of payday lenders and having worked at small dollar lenders themselves. I've got pretty good insight that there is a small, but not insubstantial cohort of consumers who legitimately have more than sufficient income, but the timing is simply inconsistent.

Jesse Silverman:

So for that percentage of the users, and again I've seen different numbers, but I would say somewhere between 30 to 40% of the small dollar users fit into that category pretty nicely, they have irregular but sufficient income, and their expenses don't match the timing of that income.

Jesse Silverman:

For those people, this product is fantastic, I mean, this is just absolutely a fantastic product. And I mean that in the sort of broadest sense, in that, not just the very narrowly defined earned wage access, but even the advanced ACH, even the advance on the checks. And again, we're going to get down into the weeds I'm sure, but this is a fantastic product, which from a 10,000 foot view, I have found fascinating and I've had lots of conversations with lots of state regulators about this.

Jesse Silverman:

And I think that there's some confusion about what to do, because they all to recognize that on balance, this is a better product than many of the most usurious, the most predatory loans out there, but they're not quite sure what exactly to do with it yet. And I think this opinion, which we'll dive into is sort of the planting a flag as we start to define what this industry looks like, but there's a lot that usually the regulators have taken an opinion. I think this product is generally good, I think this product is generally bad, I've seen lots of just shrug shoulders with this particular product saying, I like it, I think it's better than the alternatives, but I don't know, is this credit or not? I'm not sure.

Alan Kaplinsky:

Right. Right. Yeah. Well, that's a good segue into the next issue, which I'd like to get views of both of you about, and that is, what are the regulatory issues with the product? I mean you referred to is it credit or is it not credit, why does that matter whether it's credit or not?

Jesse Silverman:

Well, I mean, I'll take the first pass, James, definitely jump in at any point here. But to me, I view all of these products on a spectrum, right? There is a spectrum of the most credit like and the least credit like. I mean the least credit like is what we're going to dive into with this, where there is an arrangement with the employer and whether that's a third party providing the earned wage access, or it's the employer itself doing something, they have access to actual earned income data.

Jesse Silverman:

They're not speculating what Jesse Silverman may or may not have earned this week, they know with certainty so that when they allow me access to that money before the regular two week or four week pay cycle, or one week, they know exactly what I've earned, they are literally handing over the cash that I have earned, they just don't pay because of lots of historical reasons about the timing of payments.

Jesse Silverman:

But then on the other end, you've got... I don't know how, on the extreme other end, you've got what looks an awful lot like lending to me, they're saying the words paycheck, or they're saying the word wages, but the reality is they don't know what you've made, they're not validating what you've earned and they're charging you a fee or a tip or whatever it is on that extension of money, at the bleeding edge, on the other side it gets harder and harder for that to not look like credit.

Jesse Silverman:

What they have seen to have done even the ones on the bleeding end of the sort of credit side, they charge a membership fee, they don't charge on the dollars loaned or the money access. Again, on the other end it's so hard for me to not just instinctively call it a loan, that is the question, so I'll try and stop calling it a loan, it is an extension of money.

Jesse Silverman:

But the fees on that they're charging membership fees, which under Reg Z is sort of excluded from the definition of finance charges, and they're sort of hoping that it doesn't get classified as credit. But even within that spectrum, you have such a wide variety of fees and the way that these fees are billed, some it's just a straight, you pay $2 a month, some it's you pay $5 a month, plus $2 to access some money. Other it's you pay $2 a month and then you give a completely unspecified tip.

Jesse Silverman:

And that you guys someday should have an entire other blog about the concept of tipping and look at that under consumer finance laws, I have been absolutely fascinated to find that consumers will routinely pay more money for their financial products if they're paying in the form of a tip rather than an APR, but I feel like that's a whole other blog for you guys to cover.

Alan Kaplinsky:

Let me ask James. Jesse referred to credit and I take it that the problem as a matter of federal law, if something is characterized as credit, you have to worry about whether a whole panoply of federal consumer protection laws apply to the transaction. Most importantly, the truth in lending out, but then there's equal credit opportunity act and the fair credit reporting act and on and on and on. But there are state law issues as well, right James? I mean if it's considered credit, what are the implications there?

James Kim:

Yeah. So Alan, you definitely, along with Jesse identified, I think some of the federal law issues, is it an extension of credit and then more narrow within that are you subject to TILA? But my view on this space is the state law is the primary challenge, because you have 50 different state laws, how do they define credit? How do they define loan or credit obligation? They use so many different terms to capture different flavors or forms of credit or loans.

James Kim:

And California's new law, for example, has a new definition of debt that could be recourse or not recourse. So is it a form of debt that's covered by the new California law that is going to be enforced by the California mini CFPB?

James Kim:

So, there's the difficulty of assessing 50 different state laws and whether you're subject to licensing requirements, lending requirements, but also state wage loss, right? So even if you're not an extension of credit, you have to be mindful of state wage laws that may have restrictions on payroll deductions.

James Kim:

So, I don't think the three of us are experts in this area, but we were active in this space enough. And I've worked with some of our colleagues in our labor and employment group here, and I've seen some of these surveys that we've done in some of the state law analysis.

James Kim:

And a lot of States as you would expect are pretty open or silent on the issue, and so you can confidently do payroll deductions without worrying about running up against state wage laws. But then there are, as it always is a handful of Tuft States, right? And they're the States you'd expect, right? Consumer friendly, typically blue States, that have tight restrictions on when you can deduct from someone's payroll, from their wages, right? it may be very specific circumstances, it has to be a loan.

James Kim:

So, it's backwards, right? it's forcing you to offer a loan product. Sometimes the loan has to be made by the employer and not necessarily a third party, right? And then there are certainly restrictions on fees, that the employee should get a hundred cents on his or her dollar and not be forced to pay fees to access their wages beyond taxes and other standard things.

James Kim:

There's a combination of consumer finance laws, but then there are the state wage laws that people need to be aware of.

Alan Kaplinsky:

And I take it, what I'm hearing from you, James, is that there's a tension under state law. That under labor laws, you want it characterized as a loan, because if it's characterized as somebody's pay, then you get into issues of you can't deduct a fee from the pay, or it's a wage assignment. It raises a whole bunch of other issues, it's almost like a catch 22 here.

James Kim:

Yes. In certain States, but listen, if you're trying to scale and have a 50 state program, a handful of States that tend to be large markets States, promising States for you, yeah, it's a problem. And so, yeah, there's no easy answer on this. I give credit for people like the CFPB to try give some clarity and we'll get to the advisory opinion from the CFPB in a second, but it only gives you a piece of a puzzle, because you got to piece together as you said, and reconcile, and sometimes there's tension that cannot necessarily be reconciled with state wage laws.

Alan Kaplinsky:

Yeah. Well, let's get to this advisory opinion that was issued by the CFPB. And first of all just preliminarily, since when did the CFPB start issuing advisory opinions, I know when you guys were there, if I contacted the CFPB and said, I'd like you to give me an opinion on something, I think you'd say go a fly kite, right? You wouldn't do it. So what do they do? Who created this idea?

James Kim:

Well, I'll take it. This is a short answer I think, this is a Paul Watkins kind of, I think, the office of innovation may have started under acting director Mulvaney, but definitely most of the work has been done under the current director Kraninger.

James Kim:

So yeah, this is one of those interesting areas where the office of innovation has been aggressively pushing out a variety of different programs in this space. So they have a sandbox, they have trial disclosures, they have no action letters, they have advisory opinions.

James Kim:

So, these are all kind of the brain child of Paul Watkins in the office of innovation, which by the way, I always like pointing this out, and I don't mean this as a form of criticism that despite the general Republican mantra of the CFPB needs to kind of stay within its lanes and stick to what its statutory mandate is. None of this is in the statute, right? So this is them kind of in a positive way, I think promoting, taking a policy position, being proactive when they're not necessarily required to do so by the statute.

Alan Kaplinsky:

Right. Yeah, go ahead.

Jesse Silverman:

Good. I just want to add one, because as someone who has been on almost every side of these advisory opinions, having drafted them when I was in the state, having not drafted them when I was at the CFPB, because we weren't doing them and then having needed them when I was in the industry on the other side. I'm just a firm believer that it is really, it's a pain to do when you're on the government side, because it's sort of, it's kind of all risk, very little reward, right?

Jesse Silverman:

You get the opinion wrong, you don't think through the implications, it's a lot easier to handle a situation, in fact, that you've had a chance to investigate and reach some conclusions rather than a cold opinion when you can't think through all the implications.

Jesse Silverman:

So, I get that it's hard on behalf of the government side, the government lawyer, somewhere saying, Oh man, I got to think through all these implications without real-world facts. But the flip side is, I think it's just incumbent upon regulators, and there are lots of States who do this very well and lots of States who don't, if I may company, and I'm seeking to understand what the nuance in this law means, what the gray area is, the regulators should try and respond and provide some guidance.

Jesse Silverman:

And like I said, there are lots of States who do this fantastically well, other States that simply won't touch it at all. And on the industry side, I'm left to say, all right, I've flagged what to me feels like a very clear gap in the guidance, and you're not telling me how to stay on the right side of the law. It feels like you're just waiting for me to do something and decide that doesn't feel good for the regulators, doesn't feel good for the companies, and it definitely isn't positive for the consumers. The regulators are waiting for them to be Guinea pigs to see if they get harmed, and then they'll reach a conclusion.

Jesse Silverman:

So, I'm a huge fan, all of that is a long way of saying, I'm a huge fan of advisory opinion.

Alan Kaplinsky:

Okay. So James, why don't you describe this advisory opinion that the CFPB recently issued, dealing with earned wage access? Maybe the best way to describe that is to describe the product and then what the CFPB concluded.

James Kim:

Sure. So about two weeks ago the Bureau issued an advisory opinion on earned wage access, and I'll kind of very quickly summarize it. In a nutshell, they made the strikes so really small, they narrowly defined the product to be limited to the employer channel, right? So no direct to consumer, they didn't prohibit it, but the scope of the opinion, the comfort or the clarity they want to give is limited to products offered through the employment channel, the amount of the advance or the money dispersed to the consumer has to match and cannot exceed the amount of actual earned wages verified by the employer.

James Kim:

The repayment mechanism, so to speak is through a payroll deduction. Presumably that means you can't hit someone's bank account, and here's the important part, no fee. With a very curious footnote, the footnote is the company providing earned wage access may charge nominal fees, nominal not defined, but we'll kind of assess on a case by case basis, whether such nominal fees charged to the consumer will kind of take you outside of the scope of the advisory opinion.

James Kim:

So, if you hit all of those marks, again, I think really restrictive, then the conclusion is, the legal analysis or the legal opinion is that you're not an extension of credit. And Alan, you made this point earlier, so please elaborate, but that's very intentional, they didn't say, you're not subject to truth or lending, they made a broader, they said you are not an extension of credit.

James Kim:

So, we'll get into it in a little bit, but Alan, I know that you had some interesting thoughts about why you thought they wanted to make it broader extension of credit, not extension of credit versus not subject to TILA.

Alan Kaplinsky:

Yeah, well, my thinking was that the Bureau had more than this particular product in mind, if it was really it wanted to just issue a very narrow opinion about this product, honestly, I don't think they would have even bothered with an advisory opinion, they would have just told the company, you've got nothing to worry about here. Why did you even come to us with this request?

Alan Kaplinsky:

So, I really think there is some ulterior motive that the Bureau has, not sure exactly what other kinds of products will be encompassed by this opinion, because this particular product is just a small part of a much larger universe of products. All of them dealing with earned wage access, some where consumers do pay a fee. Sometimes as Jesse explained, sometimes there's no required fee, but consumers are asked to pay a tip or something that's totally voluntary, but yet human nature being what it is, if you ask for a tip, people very often will provide a tip.

Alan Kaplinsky:

So I'm not sure, and what I find really troubling is if I were offering a different kind of earned wage access product, one where it was direct to consumer, the consumer was paying some kind of a fee, I would worry about it. Because the question would be, does that fee constitute a finance charge under the truth and lending act?

Alan Kaplinsky:

And I'm worried about all the state laws that you mentioned James, a Little bit earlier, some that might trigger licensing, some might implicate the application of state usury law. State usury laws can be very low. Pennsylvania, it's the general usury law is 6%, unless you have a special kind of a license.

Alan Kaplinsky:

So, I think the CFPB was hoping that, and also recognizing that this is the CFPB under Kathy Kraninger not under Richard Cordray or whoever the next director is going to be under president Biden. They were hoping I think to open this up a little bit more than I think they were successful in doing. Yeah, tell me, what do you think, Jesse?

Jesse Silverman:

So, I think that it is fascinating for what it didn't address. To me there are lots and lots of very complicated nuances in there, but to me, the million dollar question is I know what I have to do if I want to be considered absolutely not credit under this opinion. But is the inverse implication also true if I'm doing something different? Does that mean that I am offering credit?

Jesse Silverman:

That's a huge, huge question to answer. And they seem to have just invited more advisory opinions on this subject. And for the life of me, I can't figure out why, if we've got a problem that covers a hundred different points, we've answered five of them, we know the other 95 exists, why didn't we take the time to address those as well in the advisory opinion? If I'm a company operating in this space, I have walked away probably with more questions than I have answers.

Jesse Silverman:

I mean, we talked about earlier that there's a range of practices that people tend to lump together as earned wage access, so I appreciate that they're putting a stake in the ground about starting to define what those are. But for instance, I don't know that there's any company right now, there's lots of companies that contract with the employers, there's lots of companies that give the consumers options about where the funds go, they're not recourse loans, they don't report to the CRAs.

Jesse Silverman:

So, they tick off almost every box in this opinion, but I don't think they're getting paid by payroll deduction. They're getting paid by access to the user's bank account. That seems to me to be the only sort of different. So there are a number of company... And then obviously there's the, I said that the question was a million dollar question.

Jesse Silverman:

The real million dollar question is what are the acceptable fees? You know what I mean? How do you say you can't charge fees except for nominal fee? And then not define it at all.

Jesse Silverman:

So again, I come out of this saying, I appreciate the effort, I appreciate the fact that they're putting a flag in the ground to try and define it. I don't know what they're trying to define exactly. There's the fair lending laws, as you guys mentioned, there's so many open questions, state registration, this doesn't get anywhere near, this just doesn't get anywhere near it.

Jesse Silverman:

So, I feel like, I mean, if I'm in this narrowest band, there are probably some providers out there that will look at this opinion and say, okay, I'm already close enough, I can be repaid by payroll deduction, I've got a relationship with, Even has a massive relationship with Walmart, they're directly contracting with the company themselves. So I think there is an opportunity for a segment of the industry to get a lot of comfort, everyone else's is going to be left scratching their head.

Alan Kaplinsky:

Yeah. So James, do you agree with Jesse?

Jesse Silverman:

You better.

James Kim:

I do. And listen, no doubt that this opinion raises more questions than it answers. So let me give you a couple of my specific kind of things that I want to focus on. One is the fee issue. Let's face it, I get charged fees all the time for stuff, and that doesn't make it credit, right? And so when a company is legitimately providing value and giving consumers a meaningful, consumer-friendly service that's an alternative to bank overdraft fees and payday loans, to say categorically you cannot charge a fee for it, except for some rare instances of nominal fees. That's not rooted in the law, there is nothing I'm aware of that says, if you don't charge a fee, it's not an extension of credit. Okay. In fact, you can not charge a fee and still be an extension of credit. Right?

James Kim:

So, I just fundamentally disagree with that. And so what does this tell me? I agree with you, Alan, I think the agenda here is more than just to clarify a technical legal issue, in my view, they are trying to influence the market in a way that you can argue might not be appropriate or effective, right? Which is to push the market away from certain things, push them away from tipping. By the way the advisory opinion specifically says tipping is verboten, it would make it [crosstalk 00:42:30]-

Jesse Silverman:

That's the one thing I'm sure of. The only thing I'm sure of is you can't collect a tip.

James Kim:

But at the same time, they're trying to push the market toward a certain product, right? Employer channel, no fees, payroll deduction. It's so restrictive though, and we talked about the wage issue, right? The restrictions and payroll deduction. One of the ways you solve for that restriction is to go through the employer channel, but instead of taking money from payroll, you take it from the bank account that gets the direct deposit. So that indirectness, right? you're not directly taking from payroll, you're waiting until it hits the bank account, that's one of the solutions to getting around the wage restriction in certain States, according to this advisory opinion, that option may not be available to you.

James Kim:

So, are you really in a better place? I just don't think so. So again, I appreciate Jesse's point that it's difficult to conceive of every scenario, but if you're going to take an advisory opinion, that is not just resolving a technical legal issue, but in my view, trying to promote, but discourage certain business practices and promote other business models, then the criticism that we're giving here, I think is fair game.

Alan Kaplinsky:

Yeah. Well, let me, I've got one more question, and then we'll need to wrap it up. And that is, looking ahead to the future, I mean, we're on the cusp of having a new president sworn in on January 20th. And that new president will be able to, under the Supreme court opinion and seal of law, will be able to remove Kathy Kraninger as director or the CFPB. And the new president will probably be able to name an acting director to his liking. But there's some question there, some legal questions, but I think that's very likely.

Alan Kaplinsky:

And then the president of course will be able to nominate a new director of the CFPB to technically a five-year term. And that individual, I think is likely to be a lot more pro-consumer, progressive, whatever you want to call it, than Kathy Kraninger. Because I just have a hunch that Elizabeth Warren is going to whisper in Joe Biden's ear, saying, this is who I recommend. And then of course, the outcome of the run-off elections in Georgia are coming up will determine whether the Dems or the Republicans control the Senate. So a lot may depend upon who's got control of the Senate in terms of how progressive or how consumer leaning or anti-industry the next person running the CFPB is going to be.

Alan Kaplinsky:

As we know, things can change very rapidly at the CFPB with a change of administrations. We've seen it from Cordray, Mick Mulvaney and Kraninger, and I think we're going to see it happen again. We don't even know who the next director is, let alone know what that person thinks about these early wage access products, and even the advisory opinion, I assume that could be withdrawn at some point.

Alan Kaplinsky:

And so this is a particularly difficult time, I mean, on top of all the issues that you both have raised today about the unanswered questions, we don't even know if there's a very basic opinion dealing with a very narrow part of the market even has much of a life. So, let me first go to you, Jesse, and then I want to get James to talk about the future. If you're looking to getting into this business, what do you do?

Jesse Silverman:

Well, hopefully my uncertainty has come through in response to almost every other question. So that's a tough one, but if I'm reading the tea leaves, I think that there are enough people who believe that this is a better alternative to traditional small dollar lending. That I think that there is going to be a way for this product to survive under a both administration.

Jesse Silverman:

I don't think this product is the best for every person, but there is no product that's the best for every person. But the other interesting thing is you're starting to see employers and again, I'm going to use that phrase because whether, Uber and Lyft and DoorDash, they've fought very hard to not be employers, but they continue to evolve to be ever more employer-like, and I think just yesterday DoorDash announced a new program, a new financial services program where you can basically opt in if you are a DoorDasher, you can opt in and you get paid that day automatically.

Jesse Silverman:

So, if you go out and you work four hours for DoorDash, that money is then deposited into your preloaded card that day, and tips get loaded in there. And there's some weird vagaries to that program as well, in that that's not a consumer banking account, it's a business prepaid card account. So there are nuances there I haven't contemplated. But all of this comes down to the history of American wages is largely been just the administrative cost in time, it takes a long time to process payroll, it takes a long time to transfer the money to the banks and have the ACH process be secure. Technology has changed that, the barriers to paying someone on the day that they have earned their wage have certainly reduced if not all, but disappeared.

Jesse Silverman:

So I think that you're going to see lots of different actors in this space, some are going to be doing it like even through the companies, some are going to do it like DoorDash, where they're just offering their own financial products that allow you to get paid that day. And I think there is going to be a big benefit for the consumers who have unequal... uncertain income, but sufficient income. So I'm a firm believer that people are going to find a way to make it work, I just think it's a fantastic product for that group of people.

Alan Kaplinsky:

James, what do you think of what the future holds in store for this product? Now, you heard Jesse say that DoorDash in effect is sort of doing an end run around the product, they're just saying you work for us, we'll pay every day, nothing wrong with that. That to me doesn't seem to implicate whether there's a credit extension. They're not saying to their drivers, or I don't think that if you want to get paid today, we'll pay you a little less money than we'll pay you in two weeks when we... is our regular pay day. That would raise issues.

Alan Kaplinsky:

But if they're under the regular program, they just pay you every day, that's nice, that's a nice way for them to compete with other companies that don't do that. So, James, what do you think about the product, in the future and under a more progressive consumer oriented Elizabeth Warren appointee at the Bureau?

James Kim:

So, a couple things here, I'm familiar with the DoorDash program, but it's interesting, I'll look it up. I suspect that if they offer it themselves, air quotes themselves, it's going to be through a FinTech partner, especially if they're going to load the funds onto a card product, as opposed to direct deposit, And card prepaid suggests at least some fees. So the wage law issue is still there, even if it's not a credit product.

James Kim:

On the federal front, I totally agree, we'll see what happens under a new CFPB. It could be that this advisory opinion is short lived, and then the next step would be that they would actually do the reverse, right? Which is the only way the CFPB has jurisdiction over the product is if it's an extension of credit, if it's not an extension of credit, they don't have jurisdiction. So they may actually want to capture this product as much as they can by classifying it as a credit product.

James Kim:

But to me the real, the thing that I am personally looking for in the next six months is really on the state front, because again, I think the primary risk is at the state level. And we know firsthand from our involvement that New York department of financial services for a while has been leading a multi-state, I wouldn't say investigation, but informal inquiry to kind of research and get information about this industry. Rumor is that there should have published earlier this year, their report on the product, but I guess it's late, but if people recall New York DFS use this playbook to informally study the online lending industry resulting in a report that was public. And so I expect that they'll do the same.

James Kim:

And I also know firsthand that the California, the new California regulators, so the DBO, which has been rebranded to be the department of financial protection and innovation is also doing their kind of inquiry into the state. So this is not public yet, but they are, those two leading state regulators are actively studying the industry, interacting with market participants. And the output of that is what I'm curious to see in the next six months.

Alan Kaplinsky:

Okay. Well, we've come to the end of our program today and first of all, want to thank our very special guest Jesse Silverman, a pleasure having you on our program today. Also want to thank James Kim, my colleague and partner, and who incidentally, I almost forgot. And I was remiss in mentioning that chambers just came out with their ratings of the top FinTech groups in the country, and top FinTech lawyers.

Alan Kaplinsky:

And not only did our group, our FinTech lawyers within our consumer and financial services group get rated very high in chambers, but James Kim and Kim Phan, one of our privacy and data security lawyers got ranked this year. So, congratulations to you, James. But anyway, the final thank you goes of course to our listeners who downloaded our program today and took the time to hear what we had to say. So, with that, I wish everybody. Thank you.