Consumer Finance Monitor (Season 4, Episode 8): The Times at the CFPB are A-Changing: Perspectives on the CFPB Under Acting Director David Uejio and Director Rohit Chopra: Part II

Speakers: Alan Kaplinsky, Chris Willis, John Culhane, Heather Klein

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.

Alan Kaplinsky:

I'm very pleased to present to you today, part two of a webinar that we recently produced in which we focus on the new CFPB. And by the new CFPB, I'm referring to the nomination of Rohit Chopra as a new Director of the CFPB, and the appointment of Acting Director, David Uejio, until Rohit Chopra actually gets confirmed by the Senate and sworn in.

Alan Kaplinsky:

On our podcast last week, which was part one of this two part series, we featured Richard Cordray. And part two, my colleagues, Chris Willis, it'll first be Heather Klein then it will be John Culhane and then Chris Willis, will each have presentations. And at the very end, if we have time, there will be some questions and Richard Cordray will once again answer a few questions. And so without further ado, let me get you right to the webinar and my colleague, Heather Klein.

Heather Klein:

Thank you, Alan. So I'm sure that you all would rather hear from Richard Cordray than me, but my role in this distinguished panel is to share some findings from a review of Commissioner Chopra's statements as an FTC Commissioner. We have a couple of years of dissenting statements and other speeches to go by to try to get a sense of how his views as an FTC Commissioner may shape his time as future CFPB Director. So at the outset, I think that it's helpful to add my own thoughts about Commissioner Chopra's mindset about the role of the CFPB.

Heather Klein:

He has said in his FTC Commissioner speeches that he views the role of enforcement regulation, policy making. He views very strong regulatory enforcement, supervision and policy making to be necessary to support competitive markets and innovation. So while he views the pursuit of practices that are harmful to consumers as being a noble thing to root out of the market, there is, in addition, this mindset that it goes to a deeper underpinning of how the market works, that markets can only function efficiently when there is strong competition, and enforcement and regulation facilitate that. So that's my first point.

Heather Klein:

Before moving on to talking about some of the specific subject areas that Rohit Chopra will pursue as CFPB Director and I'll talk about that, I'll talk about his theory of enforcement. I would like to offer, if I may, a couple of other thoughts about how he'll behave as Director.

Heather Klein:

And one of those as Alan mentioned comes from my time a decade ago, as an intern on the CFPB implementation team, while Rohit was working there, I worked with him on a couple of projects relating to the scope of the Bureau's authority in the student loan market and how the Bureau could use it so you'd have authority in that market to pursue for-profit colleges.

Heather Klein:

And in working with Rohit, I was really struck by how, as Richard Cordray mentioned, Rohit thinks very creatively. And as an FTC Commissioner, we've also seen his inclination and willingness to really use the scope of statutory authorities to maximize regulators impact.

Heather Klein:

So, as Commissioner he has lamented that the FTC did not use its authorities in regulating auto finance and debit card processing to its fullest. He also lamented that the FTC was not appropriately staffed to support its enforcement attorneys with technology issues. So, as CFPB director, my belief is that Rohit will really look at the statutory authorities with fresh eyes, even though we've been living with the Dodd-Frank act for a decade, he brings that creative mindset to the Bureau's authorities, and he's willing to push, not necessarily push the envelope in areas that folks might question whether the Bureau has authority, but he's willing to maximize the use of the statutory authorities that the Bureau does have.

Heather Klein:

So to drill down on this, I want to talk for a few more minutes about areas that he talks about as FTC Commissioner, that we can glean some hints about what he might do as CFPB Director. And I'll focus on fair lending, credit reporting, debt collection, and consumer contracting more generally.

Heather Klein:

So, as FTC Commissioner, he has spoken about machine learning and artificial intelligence and the need for disparate impact analysis to evaluate whether machine learning and artificial intelligence are producing proxies for race and other protected classes, and the need for disparate impact analysis to uncover unlawful discrimination. We all know that fair lending is going to be a focus of the Bureau. And Rohit is very well aware of the need to use disparate impact analysis and then focus on some of these cutting edge technologies.

Heather Klein:

He's also very interested in the impact of credit reporting on discrimination in the credit markets, in an enforcement action that the FTC took against a tenant screening background company. He lamented that the inaccurate reporting of criminal records had a potential impact on their housing and the ability of consumers to secure their housing based on inaccurate credit reporting.

Heather Klein:

He's also been very vocal about issues of fairness in the small business lending markets. So we expect him to plow ahead with the Section 10-78 rulemaking. On credit reporting as FTC Commissioner, he was obviously very involved in data security issues, and he had some scathing remarks of some of the credit reporting agencies' data security practices. We expect he may use the CFPB UDAAP authority and its supervisory authority over larger participants in the credit reporting market to further probe credit reporting agencies' data security practices. And as I mentioned, inaccurate credit reporting and the follow on impact that that has in access to credit, we think will also be a focus of Director Chopra. And debt collection. As Commissioner Rohit had some interesting things to say in, in regards to debt collection. And so we might glean some hints about where the Bureau might act.

Heather Klein:

So one open question that we've been hearing from a lot of clients is what does the new debt collection rule mean for creditors? Well, as Commissioner Rohit Chopra seems to be in support for additional regulation of creditors collecting their own debt, in particular for ensuring accuracy in the collection sale of debt and for call frequency limitations on creditors, he seems interested in using the Bureau's UDAAP authority to extend the debt collection role to creditors.

Heather Klein:

And then in consumer contracts, an issue near and dear to the DNA of the Bureau is disclosures. Of course, that's an issue near and dear to the heart of consumer credit regulation. As Commissioner Rohit has talked about deception and electronic contracting and one-sidedness of contracts for consumer credit and small business credit. So we expect him to be very attentive to those issues as well.

Heather Klein:

I also want to segue and spend a couple of minutes talking about what we can glean from his statements as FTC Commissioner, as to his enforcement philosophy. We know that enforcement is going to be ramped up under really any democratic appointee, but particularly Director Chopra because of his strong history, working at the CFPB and consumer advocacy organizations. He was at the, I think, CFA Consumer Federation of America before going to the FTC.

Heather Klein:

So what do we know in terms of his enforcement philosophy? So it's very interesting because as FTC Commissioner, he was, of course, in the minority and now acting chair of the commission, Rebecca Slaughter, often could not prevail against vis-a-vis their Republican-appointed commissioner in a number of settlements and consent orders that the commission entered into.

Heather Klein:

So we have these very interesting dissenting statements written by Commissioner Chopra, and often joined by Commissioner Slaughter, explaining to them the direction that they wish the commission had gone and how the commission should have acted in various actions.

Heather Klein:

So I've woven together a few themes from these statements. One is, who does future Director Chopra believe should be the defendant in an enforcement action. Secondly, the decision to litigate versus settle, and thirdly, how can an enforcement settlement be structured to discourage future breaches of the law and to best protect consumers.

Heather Klein:

And just being mindful of the time, I'll try to run through these, but I hope it's coming across that these are issues that I'm very excited about and enjoy talking about, so please feel free to reach out for further discussion after the webinar.

Heather Klein:

So who does he believe should be the defendant in an enforcement action? Large companies. He was disappointed that the FTC often took action against small companies, or did not, in his view, effectively penalize large companies for their action. So he won't be afraid to take on large companies.

Heather Klein:

He won't be afraid to take on private equity firms, who he feels are intimately involved in the running and management of consumer financial services company. And he won't be afraid to take on individual members of management and the board.

Heather Klein:

As to whether a regulatory agency should litigate or settle a matter, as FTC Commissioner he explained that there are resource constraints on agency, but the cost of litigation is often, in some cases, worth it in order to effectively discourage companies from future wrongdoing. So he said in trials we get to find out the whole story, told from both sides and by the actual individuals who called the shots. And that large companies don't get to settle and get let off the hook for their actions. So that may make negotiating settlements harder because he holds this strong belief in getting to the facts and publicizing wrongdoing, alleged wrongdoing that companies have done.

Heather Klein:

In terms of his views on how to structure a settlement to change defendant's incentives, and ensure that they will not be repeat offenses. He believes, of course, in strong monetary remedies, potential dismissal of senior management and board directors, changes to executive compensation, outright bans on certain business practices, and public reporting so that defendants have the onus to monitor their own compliance with settlements. And so that monitoring is transparent to consumers and regulators.

Heather Klein:

I probably scared you a bit. John Culhane is going to scare you more with some student loan remarks. And then Chris Willis will probably scare us further with more enforcement remarks. But happy to talk more with any of you after the webinar. Thank you.

John Culhane:

Thanks, Heather. We're a little pressed for time. So I was going to provide a little history of Rohit's tenure the CFPB and some of the key actions that he took or supported in the space while he was there, provide you with, I think, a summary of industry reaction to Rohit, and then talk about the 2012 supervisory, or the student loan ombudsman report, which I think is instructive both by way of history and as a way of identifying areas of potential concern as we look back to what's happened over the last 10 years or so. And then talk about some likely areas of focus. I'm going to do that pretty quickly. And we can always say more about this if you have questions, but I want to leave time for Chris to talk about enforcement.

John Culhane:

So, very briefly, as Richard Cordray mentioned, Rohit was appointed as Student Loan Ombudsman by the Secretary of the Treasury back in October of 2011. And he held that position until he resigned in June of 2015. So he was there almost four years. During that period he produced three Student Loan Ombudsman reports, one a year, starting in 2012. The complaint portal was stood up and student loan complaints began, or that the CFPB began taking student loan compliance in March of 2012. And from there, we just had a variety of actions in this area. One more that I want to mention, because I think it's worth looking back to again as instructive, is the report that he did or co-authored, The Next Front? Student Loan Servicing and the Cost to Our Men and Women in Military. I think it's instructive to look back at that as a possible guide to future actions, as well.

John Culhane:

What was the industry reaction? Well, Rohit's mantra was assist borrowers, promote transparency, hold accountable those who break the law, and that the way to do this was to track trends as a means of unearthing problems. And I think the industry concerns about all of this were that, while well-intentioned, the way this was done wasn't always fair to the industry. Rohit's got a big concern about the amount of student loan debt. Student loan servicing has very little to do with the actual amount of debt. That's a larger societal issue. And there was very little discussion about things like the increasing cost of college, the credentialing going on in the marketplace, the actual benefits to somebody throughout their career from having graduated from college.

John Culhane:

Out of the bat, and something that Rohit was very proud of, was equating student loan servicers with mortgage servicers. If you go back to 2011, those people were the scum of the earth. So that was really kind of a tough place to start for student loan servicing.

John Culhane:

And then just briefly a very large reliance on, by the industry's perception, large reliance on anecdotal unverified evidence obtained through the complaint process as indicative, not of people obtaining results that maybe weren't necessarily optimal, but as demonstrating violations of law. I'm not going to talk about the 2012 report, but again, I'd recommend reviewing that because I think it's instructive. Let's just skip ahead so that Chris has some time, and talk about what's likely to happen in this area and what some issues are likely to be going forward.

John Culhane:

Right off the bat, I think we have to expect that the CFPB will wander into a supervisory memorandum of understanding with the Department of Education and renew its MOU with state attorneys general and other state agencies. I think we have to expect the CFPB to, as an agency, to encourage the submission of complaints. Complaints have been steadily dropping over the last four years. That trend I think is going to turn around and be turned on its head.

John Culhane:

Key issues, I think we'll see the Bureau focus on the administration of federal benefits, the delivery of military benefits and compliance with the Servicemembers Civil Relief Act. Rich alluded to this. Heather did, as well. Entering and exiting from COVID relief. I think we're going to see a lot of focus on co-signer issues, but those issues go back to the 2012 Ombudsman's report. In this space, artificial intelligence and machine learning models and testing for disparate impact servicing. There have been regular reports that minorities are disadvantaged. And that servicing outcomes, I think we'll see a lot more focus on that. Collections. As Heather mentioned, collections is an area that's going to get a lot of emphasis.

John Culhane:

And it's noteworthy that as FTC Commissioner, Rohit actually submitted a comment to the CFPV in connection with the debt collection role-making, warning that student loan servicers were likely to unbundle accounts in order to increase the number of collection calls that they can make the borrowers. So I think we'll see a search for evidence that that activity is going on, as well.

John Culhane:

In terms of our topic for this, or our title for this program, Just a Reminder, You Better Start Swimming or You'll Sink Like a Stone. And with that, let me turn it over to Chris.

Chris Willis:

Thanks a lot, John. Well, let me just take a couple of minutes to share my thoughts about enforcement. In a lot of ways, you've heard previews of all of this from the other speakers, including Rich and Heather, and now from John, as well. But like in terms of a summary of what I expect from an enforcement standpoint under a new CFPB leadership, both the Acting Director and Director Chopra when he's confirmed, is I expect it to look a lot like enforcement looked in the first few years of the CFPB's existence, between 2011 and 2017.

Chris Willis:

So what does that mean, that's different from what we've had over the last three years? Well, number one, I think it just means more enforcement and that doesn't just mean the enforcement group at the Bureau initiating more CIDs. Importantly, I think it also means that more issues that are discovered in supervision during exams will result in enforcement investigations and consent orders than has been the case over the last three years.

Chris Willis:

Over the last few years, we've seen a lot of propensity by the Bureau to identify violations, send par letters, but then resolve those through confidential supervisory resolutions, MOUs, MRAs, things like that. And that I think is likely to be reversed under a new administration where more of those will be referred to enforcement for a public enforcement action. So, that's more enforcement.

Chris Willis:

Then I think you're going to see a shift in terms of the types of entities, and Heather alluded to this. If you look at the record of enforcement over the last couple of years, there've been some notable exceptions to this, but there've been a lot of actions taken against what I call whack-a-mole type entities. You know, small debt settlement firms, or foreclosure rescue scams, or other phantom debt collectors, very small, sort of fringe, truly fraudulent enterprises that are fraudulent by their nature, and who don't impact a huge number of consumers and don't have a lot of money to pay back to consumers. Whereas I think if you look back at the early years of the CFPB, you saw a lot greater emphasis on large, more mainstream financial institutions who had relationships with more consumers, and where the consent orders would be correspondingly larger in terms of dollars.

Chris Willis:

So I think I'm looking for a sort of change in emphasis from what I call whack-a-mole against these small fringe players to more mainstream larger financial services companies. So I believe that emphasis is coming, and with that comes larger dollars. Again, as Heather previewed for us, Rohit Chopra has made statements like that at the FTC. It doesn't take a particularly creative imagination to understand that the Bureau has the authority to order restitution and to seek civil monetary penalties for violations of law that are essentially limitless in amount under the provisions of Dodd-Frank. And so the point is, if there are violations of law, we would expect the monetary consequences of them to be larger today than perhaps they would have been say a year ago or two years ago from the CFPB. So more enforcement, larger subjects and larger dollars.

Chris Willis:

And then the final point that I wanted to make is, I think we're going to see a reinvigoration of particular areas of enforcement. And fair lending is one that's really on my mind. That's an area that's highly politically visible, and one where the presence of CFPB has done some. For example, the Townstone case, the first redlining case against a non-bank mortgage originator.

Chris Willis:

But I think there's a lot of desire for the Bureau to go in a more aggressive direction with respect to fair lending issues, both the traditional ones, red lining, judgmental underwriting, judgmental pricing, differential treatment of people based on protected characteristics, but also for the Bureau to address some of these newer issues, like the use of alternative data, the use of machine learning algorithms for various purposes, from fraud screening to underwriting, to pricing, to even collections. And so, and Rohit has made some comments and interviews about the desirability of examining those practices more closely to see if they're justified by business necessity. And if there are less discriminatory alternatives.

Chris Willis:

So those are my thoughts about what I think we're likely to see from the Bureau from an enforcement vein over the next several years. And, we've experienced a lot of this before because we had a similar, very high level of focus on enforcement during Director Cordray's days as the head of the CFPB. So I think basically if you were paying attention between 2011 and

2016, 17, you're going to get a likely similar sort of experience with the CFPB during these upcoming years. So, Alan, I think you have a couple of parting comments that you want to make before we close out the webinar.

Alan Kaplinsky:

And I guess before I do, I see Rich, I know you have to run very quickly, but I'm wondering if you have any parting comments, either things that you've thought of on your own, or in response to anything my colleagues have said.

Richard Cordray:

Yeah. I, I don't disagree with really anything that I have heard, and the sort of full picture of the things Rohit has been interested in at the FTC. One of the things you can count on is that he will make sure that the Bureau is using its full complement of tools. We have a very broad toolbox at the Bureau, enforcement, supervision, regulation, the ability to do research and publish the results, the use of consumer complaints and the reporting on consumer complaints and what they tell us as a snapshot of what's going on among the American consumer population. And as I said, Rohit will be a tremendous talent in teaming up with others across the federal government. And I believe the Biden administration will be very welcoming and open to ensuring that the other federal officials leading those other departments and their personnel are working closely with the CFPB.

Richard Cordray:

I also, again, would stress that there has been a bit of a muscling up of state enforcement and state involvement in consumer finance over the last four years due in part to alarm at the retreat of the Trump administration on those issues. And States are long-used to dealing with some of these issues, but have been aggressively taking a role. And I think there's an opportunity for close partnership between the CFPB and state attorney general in enforcement actions and investigations, and the CFPB and state financial regulators in both using supervision and regulation. And I believe that there will be an emphasis on that close cooperation and strategizing together. And I think that will make both the federal and state arms of financial consumer protection more effective as the result.

Alan Kaplinsky:

I mean, I would be remiss if I didn't mention that Rich was very much involved in the enactment of the new California law, which is being referred to as the mini-CFPB law, and that's really gotten a lot of attention nationally. Do you think, Rich, that other states will emulate what California did? Do you think there will be some more statutes that look very much like a mini-CFPB?

Richard Cordray:

Yeah, we will see. I mean, certainly the New York Department of Financial Services has been a pretty effective regulator for some time. Now they cover other areas that go beyond the CFPB, insurance securities and the like, and by the way, the California Department of Financial Protection and Innovation also has a broader mandate, although insurance is an elected official in California. But I do think because of its unique size, the size of its economy and of its population and the resources they can bring to bear, California is in a special position, but New York is also an important player.

Richard Cordray:

And in other States it tends to vary depending on the size and resources of different offices, the traditional device, which can vary from state to state between the attorney general on the one hand and financial regulators on the other, and their willingness to be involved and active on these issues. And again, that's not easily predictable from one state to another. Whether more will legislate a kind of mini-CFPB, I think it's hard to say at this point, but I do think you're going to get strong partnership between the CFPB and state officials. And I think that's all of the good for consumers, but it's something that your clients are going to have to be careful and think about and watch out for. And they're going to have to have broader lines of communication than they might otherwise be inclined to have.

Alan Kaplinsky:

Yeah. Well, Rich, thank you very much for taking your time today and to share with our vast audience your thoughts on what the new leadership the CFPB is going to look like. Also want to thank all of our listeners today. And just mention one final thing that we are doing in response to this very dramatic shift that we're expecting in the way the CFPB is going to operate in the next four years. We always have been involved in helping clients prepare for CFPB examinations. We did that right after Dodd-Frank was enacted, particularly among the non-banks, who had never been examined by anybody. Well now people in the last four years perhaps have gotten a little bit lax and not quite as attentive to compliance as they should be. And not as, let's say, worried about the CFPB as they used to be.

Alan Kaplinsky:

And so we are putting together programs where we will examine existing supervised entities by the CFPB, and focusing not on the full array of things that the CFPB looks that when it does the exam, but focusing on a lot of the hot button issues that we've talked about today, and the things that we know that the new regime at the CFPB is going to be focused on.

Alan Kaplinsky:

So if you're interested in talking to us about that, feel free to contact either me or, and any of the speakers to Ballard today. The contact information is on the slide that faces you now. And so with that, I want to thank, I've already thanked Rich, but I want to thank our, my colleagues at Ballard Spahr, and I hope everybody has a very good day for the remainder of it. Thank you again.