Consumer Finance Monitor (Season 5, Episode 3): What Will 2022 Hold for the Consumer Finance Industry--A Conversation with Special Guests Evan Weinberger, Correspondent at Bloomberg Law, and Jon Hill, Senior Banking Reporter at Law360

Speakers: Alan Kaplinsky, Evan Weinberger, and Jon Hill

Alan Kaplinsky:

Welcome to the Consumer Finance Monitor Podcast where we explore important new developments in the world of consumer financial services. I'm Alan Kaplinsky, Senior Counsel at Ballard Spahr, formerly Chair of the Consumer Financial Services Group at Ballard Spahr. And I'm very, very pleased to be moderating the program that we're going to do today.

Alan Kaplinsky:

But before I do that, let me actually toot our horn a little bit. Toward the end of last year, a company called Good2bSocial selected our podcast show as the second-best law firm podcast show in the country. And I'm extremely proud of that accomplishment. Enough of the horn tooting, however, because we have a lot to cover, and I want to first introduce our two guests for today, who and this is their first time on our podcast show.

Alan Kaplinsky:

First of all, let me introduce Evan Weinberger. Evan is a correspondent at Bloomberg Law based out of Manhattan. He has covered banking and financial services regulation since 2012. He's also covered New York politics and served as a foreign correspondent in Cambodia and several African countries. His work has previously appeared in LOD 360 as well as the Dallas Morning News, the Catholic News Service, and of all publications, the Phnom Penh Post.

Alan Kaplinsky:

So, I now want to introduce Jon Hill. Jon's a senior banking reporter for LOD 360, where he covers the court fights and policy debates that are shaping the future of financial services. Previously, he's written for outlets including The Economist and the Street. And as a Council on Foreign Relations researcher, he assisted authors Sebastian Mallaby on his award-winning 2016 biography of former Federal Reserve Chairman, Alan Greenspan. Before we go any further, I wish both of you, Jon and Evan, a very warm welcome.

Jon Hill:

Thank you very much for having us.

Evan Weinberger:

Thanks for having me.

Alan Kaplinsky:

So, let me say this before jumping into a number of areas I want to cover with both of you. I know both Jon and Evan for some years, because they covered, in a sense, the same beat that I cover. And I'm using that, of course, a little facetiously. They are, I would say, a couple of the premier reporters that covers the consumer finance industry which of course is what we're covering about as far in the Consumer Financial Services Group.

Alan Kaplinsky:

So, over the years, I've had lots of conversations with both of these gentlemen. Usually they're asking me questions, and today I get to turn the tables on them a little bit. So, the topic for today is, "What does the future hold in 2022 for the consumer finance industry?" And I think a lot has changed in just a year, and I want to talk about it first, the Consumer Financial Protection Bureau or the CFPB.

Alan Kaplinsky:

And the question I have for both of you, gentlemen, is how different is the CFPB today compared to what it was a little over a year ago before it was still under the management of Kathy Kraninger as opposed to now, we've got Rohit Chopra in charge. And then, prior to that, we had an acting director David Waigel.

Evan Weinberger:

I guess I would say it's almost like it's two completely different agencies at this point. The Trump era, both Mick Mulvaney and Kathy Kraninger saw a very slow pace on any rulemaking and a very, relatively slow pace in a lot of enforcement actions. And Rohit Chopra has come in there and he wants to make up for some lost time, and he's moving quick on a lot of big things.

Alan Kaplinsky:

Okay. And what do you think, Jon?

Jon Hill:

Yeah, I think that's right. I mean, I think that you could see almost, really from day one of the Biden administration, you got an acting director in. The acting director is putting out blog posts talking about how he's going to center things like pandemic response and racial justice and equity, issues that we really hadn't heard the last couple of leaders of the Bureau discuss, put probably front and center.

Jon Hill:

And you even just see that in the kinds of communications they're putting out now. They're putting out much more fulsome press releases that are really a return to the Cordray style of interaction with the media, interaction with the public and trying to raise the prominence of the Bureau in the public mind as a warrior, really, on behalf of consumers.

Jon Hill:

So, it really does seem to be going in a very different direction. And I think that over the past year, you've really seen the interim leadership bring it in that direction to where you now have a Director Chopra taking over last fall, and he's really been able to hit the ground running as a result.

Alan Kaplinsky:

So, I guess from the standpoint of being a journalist covering the agency, it's more exciting I would think, right, to cover what's going on at the CFPB right now than what happened there for four years prior to that time?

Evan Weinberger:

It's definitely more exciting on a policy front I mean, but honestly, there's some excitement to be had when you're covering disgruntled employees at an agency who are unhappy with the direction and are raising concerns about some things. And you get some really good stuff but it's not necessarily stuff where you see some big policy objective moving forward.

Jon Hill:

Yeah, when else are you going to get to file a FOIA request over a sign change, changing CFPB to BCFP

Alan Kaplinsky:

That's right. That's right. I almost forgot about that monumental event when that occurred. Let's talk about more specifically some of the changes that have occurred. And I guess the way I break down the CFPB, I always put it into three areas. We talk about regulation. We talk about supervision and enforcement. Yeah, you guys probably don't often have to report very much about supervision except to the extent that bleeds into the enforcement area.

Alan Kaplinsky:

But let's first talk about regulation because that's certainly an area that where I think there's a lot going on right now and there wasn't all that much happening, at least not much got accomplished in the four years of the Trump administration. What do you guys think from covering the CFPB in the regulatory area?

Jon Hill:

Well, I mean I think that in this year you're going to be seeing really the two main emphasis being 1033 and 1071. And it's unusual and I'll get to what those are, but basically it's unusual in the sense that these are two leftover Dodd-Frank Act items. We're 10 plus years away now from that law and these are still the loose threads that have been hanging out from that.

Jon Hill:

And so, with 1033, thinking about how consumers access their data and the rights that they have over it and sharing it with other entities whether they be other banks or fintech firms that might be needing to access that data to provide them with services, that's going to be of course I think a really big focus of the Bureau, and it will feed into some of what Director Chopra has talked about as far as promoting competition, trying to prevent a monopoly, a grip on the financial data by large tech firms that might want to control it.

Jon Hill:

And then, also in terms of 1071, I think that also aligns with Chopra's priority on racial justice issues and the broader Biden administration efforts in that area because that's the small business lending data rule. That's the one where we're going to see a handoff for small business lending and I mean already that's generating a lot of interest from industry as well as consumer advocates but it's this really complicated rulemaking that is going to take up a lot of the Bureau's time. With that plus 1033, that it's a lot of bandwidth already consumed right there.

Alan Kaplinsky:

Yeah. I want to get back to a little more specifics on those rulemakings in a minute. But before I do, I'd like to get Evan's overall view of the regulatory environment there.

Evan Weinberger:

Right. I think Jon is right. The other area that you might see some work from the CFPB is on overdraft just because they released their overdraft report a little while ago. And Director Chopra was very critical of a lot of the large banks even though they used 2019 data prior to when a lot of the large banks changed their overdraft policies. And even today, you just saw Bank of America announce a major change to their overdraft policies. But that's coming, I would imagine.

Evan Weinberger:

What's interesting to me is what is probably not on the agenda. I think a lot of consumer advocates wanted the CFPB to take another pass at the Debt Collection Rule which came live at the end of November, beginning of December, and they decided not to.

Evan Weinberger:

And payday is another area where, from folks that I've spoken to, it just seems like there's not that much energy left for the CFPB to make another major effort at a Payday Lending Rule. There's litigation over the rule that the creditor CFPB finalized in 2020. Assuming the CFPB wins and lots of folks I speak to think that they will... the theory that I've heard is that they'll just let that rule come into effect. And then, you've got UDAP which you can use in any number of ways to police the industry without creating a new rule.

Evan Weinberger:

And then, one other area we didn't discuss is buy now, pay later where the CFPB has also put out its own data request on that, information request on that. That could result in a rule but it also could just result in another larger participant role which would allow the CFPB to supervise directly the biggest players in that market which might be all that it needs to really get a handle on it if they wanted to.

Alan Kaplinsky:

I'd add one more area to the mix that both of you mentioned, that is arbitration. Consumer advocates are still clamoring for the CFPB to move in that area. And I know very recently on our podcast show, we had Raj Date as our guest. And of course, Raj was there at the very beginning and at one time he may be been acting director, but he was, let's say, a big mahoff at the CFPB, and I think has a pretty good pulse on what's going on there.

Alan Kaplinsky:

And he was quite certain that arbitration was not an area that Rohit would go into. If I could read between the lines of what he was saying, Rohit is too smart to jump into that bramble bush Cordray spent years trying to develop a rule, wrote a 750-page study, at the end of the day came away with nothing to show for it.

Alan Kaplinsky:

And now, it's even in light of the action taken under the Congressional Review Act, the CFPB's hands are somewhat tied. They can't even do very much in arbitration. They can't adopt the rules similar to what they did before. The study they conducted is too old. It arguably didn't even support the conclusions that they reach and they'd have to start from scratch. So, like to get your thoughts, both of you, if you have any thoughts on arbitration, and I want to circle back to some of the other topics that you mentioned.

Evan Weinberger:

Yeah, I think that you're probably right that that's a lot of energy to expend when you have other things on your agenda. I will say on the Congressional Review Act, it's unclear. Obviously, the rule that was taken out to the CRA is gone. But nobody's ever really... the CRA says you can't put in a substantially similar rule in its place. Nobody really knows exactly what that means, and it's unclear whether you could even challenge one of those in court because there's no judicial review of a lot of this stuff in there.

Evan Weinberger:

So, if they wanted to push it, like let's say they were confident that Joe Biden was going to be elected and Rohit was going to serve out his full five-year term and add some time on his hands. If he wanted to get spicy, he probably could try to do something. It's just a matter of politics is what it is and you never know how long you're going to be there. And he can get fired as soon as a new president takes over-

Alan Kaplinsky:

And the bandwidth too.

Evan Weinberger:

... and the bandwidth. So, you only have so many hours in a day and so many years in a presidential term, so why spend the time on that?

Jon Hill:

Similar dynamic is to play with the payday rule, not the CRA aspect of that but just the... you described it jumping into the bramble patch of that. Why, when you can get so many other things done, would you expend a lot of time on fighting the last war on something like that?

Jon Hill:

You have the similar questions about the CRA and how restrictive it is to the future rulemaking along the particular issue area. I think it played potentially even in this administration at the OCC with the true lender. That was an area where we saw them push out a rule very quickly. At the end of the Trump administration, that ended up getting rescinded by congressional vote. But there's still an appetite both within the industry as well as among consumer advocates to come back and take another pass at that possibly.

Jon Hill:

And I think that is where you actually might begin to see some of these contours of how restrictive the CRA is more fleshed out, because there actually is desire really on both sides for something additional to be done there. It's just that whatever came before was seen as inappropriate and not a really good fit.

Alan Kaplinsky:

Yeah. I think, if I could generalize, again, harkening back to what Raj said, Raj Date, during my interview of him, and that is that Rohit is more likely to concentrate on areas where he can make a mark where it's new and fresh and hasn't been really dealt with before. So, that therefore that would support the idea that debt collection is not an area that he's going to jump into in police this year.

Alan Kaplinsky:

Payday, another one I agree with you, and arbitration, instead concentrate as he has on 1071, 1033. Not so sure whether to expect a rulemaking on overdraft. That's the one that really puzzles me because that's going to be difficult. There's a lot of issues involved in overdraft, in the overdraft area.

Alan Kaplinsky:

And if he's really going to want to get involved in setting fees or getting into a lot of the minutiae of how overdraft payments get processed, I suppose he could come out with a rule banning the use of high-to-low processing maybe. But instead, I tend to think that initially, he is going to use enforcement in that area as the other prior leadership has done.

Jon Hill:

And to that point, Alan, his comments that he made when releasing that report in overdrafts, he really mentioned enforcement first is one of the first tools. That was the first thing he went to in describing how the CFPB will tackle this. And I don't even believe that rulemaking was even in the areas that he talked about but highlighting enforcement and particularly enforcement against individuals, executives, and some of these financial institutions that may have aided and abetted, helped design these overdraft programs that would be considered against the law in some way violating UDAP authority out there.

Jon Hill:

That feels like where he is putting his emphasis in communicating how the CFPB will approach this issue. So, I would agree with you that it seems to be a more enforcement-first approach.

Alan Kaplinsky:

Yeah. And by the way, the one thing I'm seeing at least in the last year in the enforcement area is in many instances, he is naming executives. He is not just naming the company, but he's naming the CEO and other senior management. But the thing is, it's one thing for him to do that with a company that's not really known or fly-by-night company.

Alan Kaplinsky:

Can you imagine if he starts bringing some cases against some of the major banks in the country and names the CEOs or the Chief Financial Officer? Not so sure he's going to go there.

Evan Weinberger:

Well, I mean part of there though is that the big banks of big financial institutions. A lot of the cases where it is the individual, it's either a litigated case or a litigated settlement, the big banks aren't going to probably go to court. And so, there's the negotiation there.

Evan Weinberger:

So, I don't know if they will get to the point where he feels like he needs to go after individuals because the big banks... they have much more of an incentive to play ball with the CFPB then say, "Some of these little guys that..." like you said, "fly-by-night operations are just small places that might be willing to take their chances."

Alan Kaplinsky:

Yeah, particularly... I mean, I've always said to clients when those that are supervised by the CFPB, even when I feel they're in the right and might prevail in litigation with the CFPB, I've said to them, "You really want to go to war with the supervisor? Even if you win, you haven't gotten rid of them. They're still going to come back, and they could be loaded for bear. And you're probably better off not trying to work out a settlement and moving on." Anyway, that's my thought.

Alan Kaplinsky:

But let me get back to the area of regulation again and that is 1071, the small business data collection and regulation if I could call it that for lack of another way of referring to it. Very recently, comment letters have come in from the banking industry. I don't know if you, Jon or Evan have written anything yet on the comment letters, but they're pretty negative.

Alan Kaplinsky:

I mean, I've seen the comment letter from American Bankers Association, Consumer Bankers Association, American Financial Services Association. They ain't happy with what the proposed reg looks like. And wondering if you guys have any thoughts on that?

Jon Hill:

I've taken a look at the ABA letter, and I've taken a look at some of the other ones. I haven't written anything on it yet. But I note that with the ABA letter that you have, this is the way that many of these groups do but they focus on the cost saying, "This is going to be too expensive. This is a very burdensome, expensive undertaking for financial institutions to put in place, the systems you need to comply with and then to maintain compliance with it over the long term."

Jon Hill:

You're laying out a very clear cost and benefits argument for possible litigation. You can just see the groundwork being laid for that argument. Should the Bureau proceed with the rule that is proposed? You can easily imagine these letters being turned into complaints filed in court.

Evan Weinberger:

And to a certain extent, I've read all of those comment letters, and I've read the consumer group's comment letters. I've read comment letters from FinTech Association since they did cover under this as well. There's a certain amount of dog bites man to some of the letters where, "Of course, they're going to say this," "Of course, they want the threshold higher," "Of course, they want some of the..." there's a recognition that there's a lot of information the CFPB is asking for.

Evan Weinberger:

That is in the Dodd-Frank Act and they can't get around asking those questions, so they want to get rid of all of the discretionary questions. And some of them, there's some identifier numbers and issues like that that are in there where it... there are legitimate beefs about some of the discretionary questions the CFPB is asking.

Evan Weinberger:

What that comment letters really highlighted to me is that just how hard it is to do this rule? There are so many complexities in this that aren't even in HMDA and mortgage data collection that just because the structures of small businesses are different, and I look at it and go like, "Yeah, this is really hard, and I see why it took the CFPB this long and basically getting sued to jump into action on this role."

Jon Hill:

How hard it is to write and how, in some sense, questionable its merits, like you can feel that even the Bureau taking this long. And it's not just because it's complex but it's also like, "Yeah. Is this really what we want to do?" This the thing that's going to actually add value to our oversight of the industry to have this information, and you get the sense that maybe what Congress put into the law here was something that maybe wasn't necessarily wanted by even people in the Bureau today.

Jon Hill:

And so, you have to comply with this mandates, congressional mandate to have this rulemaking but you're really not enthusiastic about it and it's also really hard to do at the same time. So, yeah, of course, it's going to take 10 years to do.

Alan Kaplinsky:

And of course, I assume the consumer groups aren't happy either, right? They're never happy this has happened.

Evan Weinberger:

They were pretty pleased.

Alan Kaplinsky:

Are they?

Evan Weinberger:

Yeah.

Alan Kaplinsky:

Okay. I've even read their comment letters here.

Evan Weinberger:

There were some things they didn't like. But overall, I think they were fairly happy with what the CFPB was going toward. They want more. I mean, one of the one of the flash points for the industry groups was in the discretionary questions the CFPB had was they asked about pricing information, and the consumer groups want more.

Evan Weinberger:

They want APR included in there even though they recognize that safer merchant cash advance. Auto loans are based on incoming credit card receipts and things like that. APR isn't a perfect measure for it but they want more data in there and they want it all public, which I think is another thing that the industry was concerned about.

Alan Kaplinsky:

Yeah, yeah. So, let me ask you a more general question evolving out of 1071. But a trend that at least I've noted that there's a type of regulatory creep I think going on with the CFPB little by little getting involved in the small business lending area.

Alan Kaplinsky:

I mean, it is called the Consumer Financial Protection Bureau but yet, there are areas of small business lending that they're already involved in. And the Equal Credit Opportunity Act, the Fair Credit Reporting Act, and now 1071, do you have that feeling, too, that they are little by little broadening their jurisdiction?

Jon Hill:

Not just at the CFPB but across a lot of financial regulators even at the state level and just a recognition that small business credit, you can't neatly be cleaved off into its own category that it's strictly corporate and then you have sophisticated individuals on the other side of it, and therefore you don't need to worry about it in the same way that you do with consumers.

Jon Hill:

In many cases, small business owners are mom-and-pops. They are individuals who are perhaps not as sophisticated but you don't have the same counsel and ability to understand credit degree returns. And so, you have to give them a little bit of extra care from the regulatory side to ensure that they are protected adequately.

Jon Hill:

You also see also small business owners are frequently blurring their finances with their own individual accountants. You have people who use their own credit cards help pay for inventory that they're selling through their small business. And so, there is a blurring level of decrease relative to larger players, less sophistication that I think has created a sense that this is an area that does need to get more regulatory attention that I think you're just seeing at the CFPB, you're seeing at many levels across the country.

Evan Weinberger:

Right, right. And with 1071, I mean there is encroachment there but Congress said, "You have to do this," they don't really have a choice in the matter. But I mean, in general I think that Rohit sees the CFPB's role as very expansive, and he wants to get into areas that wouldn't necessarily think we're CFPB specific. You'd look at the data collection that they're doing with the big tech companies. A lot of those questions are not necessarily consumer finance questions or data protection questions.

Alan Kaplinsky:

Yeah. Or very recently, there was a consent order involving a bail bondsman company that had just happened very recently. And, in my mind, at least the industry felt what they do does not involve an extension of consumer credit. So, I guess it's this idea of pushing the envelope, right? We've heard that expression a lot particularly during the Cordray era.

Alan Kaplinsky:

My own view is we're going to see a lot more of that during Rohit's tenure in office in part because he's not a lawyer unlike Cordray, and he's going to think a little differently than a lawyer thinks. Lawyers tend to worry about things like, "Where do you draw that jurisdictional line?" Whereas, smart non-lawyers say, "Well, if there's abuses going on and consumer harm, why can't we get into it?"

Evan Weinberger:

Well, the other thing that when you think about what Rohit is trying to do, one really important thing to consider is who he's bringing into staff in CFPB. Their new acting general counsel is Seth Brotman who had Rohit's job after Rohit had it, and he's never been the general counsel before. And he thinks a lot like Rohit.

Evan Weinberger:

And so, my understanding inside the Bureau is that the general counsel's office often put the brakes on some of the things that Rich Cordray wanted to do and some of the more aggressive enforcement attorneys wanted to do. Well, now they have a much more aggressive general counsel sitting in that office. Some more aggressive ideas are going to get a lot more consideration than it might have done in the past.

Alan Kaplinsky:

Yeah. Well, in fact I'm glad you mentioned Seth Brotman because during the last administration, I would say he was persona non grata at the CFPB. I don't think he had an audience and now all of a sudden, he is your acting general counsel. Quite amazing.

Alan Kaplinsky:

So, on the regulatory side, let's talk about buy now, pay it later for just a minute or two. I look at it as maybe a more sophisticated layaway plan. Everybody talks about it being the newfangled toy. It's a new credit device, but how new is it? It's a credit extension at a retailer. Sometimes there's no interest charge. Sometimes it's four payments or less than four payments. It's as simple as simple can be and yet, the CFPB is not very happy with that product.

Alan Kaplinsky:

And in many respects, the rate of finance charges a lot less than a payday loan or the effective rate of interest than an overdraft account. But yet, there's no doubt in my mind that they're going to be doing something with buy now, pay it later. Maybe not regulatory but I think it could be in the enforcement area. What do you think?

Evan Weinberger:

I'm not sure how heavy-handed they're going to be on buy now, pay later. I've spoken to a lot of consumer advocates about it and they have concerns but every time our conversation starts, I go, "I usually talk to you about payday lending or things that you're really mad about. This doesn't look as quite the same thing." And they say, "Yeah, no, it's not. We have concerns about it."

Evan Weinberger:

I think their big ones are no check on ability to repay which I don't think works with the buy now, pay later business model. But also, not having the same protections as you do with a credit card on your purchases. And then, the other big one is just the flow of payments. It's not like you get a bill the first or the 15th of every month. It's as you use it, you get another bill. And so, keeping track of what you owe and when you owe it can be a bit tricky if you use the product a lot.

Evan Weinberger:

I think those might be areas where the CFPB would look. But there are a lot of questions but I'm not necessarily have sold the idea that they're going to come and with a big heavy hand, they... I would imagine, I said before a larger participant rule for the market. I think that that is probably likely.

Evan Weinberger:

The interesting thing about a lot of these finance, big buy now, pay it later firms, a lot of them are staffed by former CFPB people. In their general counsel offices and in other areas, government affairs, there are a lot of ex-CFPB folks in a lot of these companies. So, they know what Rohit is going to be looking for.

Evan Weinberger:

The one thing that's tricky is... the main law you would say that the CFPB would want to enforce on them is the Truth in Lending Act but doesn't really apply because it's only for extensions of credit that are more than four and stop for payments. These are four or less for the most part, and so how they thread that needle is going to be interesting. A lot of the companies, though, abide by TILA on their own, because I think they saw that this is an area where regulators could come down on them or find a way to come down on them. So, we'll see.

Jon Hill:

I mean, I think that, soon, the disclosure issues about making sure that people are able to understand exactly what they're getting into, I think that's going to be getting attention but I don't see it being the product that carries with it the same certainly risks for the consumer, perceived risk at least from the CFPB side is something like payday lending which it was really a fundamentally different product.

Jon Hill:

And even just the way that the Bureau talks about it and it's comment it made so far, they're not approaching it with the same presumption that this is a problem that needs to be cracked down on but it's more... we'll see how this actually works. We're going to ask questions and make sure that we're trying to understand the full panoply of risks that could be involved here, but it doesn't seem to have... I don't think they've decided there are risks that need to be confronted directly right now yet the same way.

Jon Hill:

I think that you might see some interest also in how these products get reported in credit reports. That's something that some of the credit bureaus are now moving to try to incorporate to use into their credit reports. And if this is an area that is new and that consumers might not expect them to show up on their credit reports, that I think could get them some Bureau attention and exactly how that gets back in someone's credit score will become a more of an issue a couple years ahead.

Alan Kaplinsky:

Yeah. Let me segue from buy now, pay later into the fintech information gathering, not fintech really. Just the information they're getting from the e-commerce companies, the big companies, the data gathering that they're engaged in. Do you have any speculation or prediction on what tree they're barking up there? What are they after?

Evan Weinberger:

I think it depends on the company that they're asking about. With PayPal and Square and I think to a certain extent, Apple and Google, there's the data collection which is one thing. And I think that partly, he's trying to collect some information that he's going to share with agencies like the FTC and others that have more jurisdiction in that area.

Evan Weinberger:

But there's also a real question about how the payment system works. And he is a former FTC commissioner, so competition is a major focus for him. I think he has a real concern that if, say Apple makes it so that you can only use Apple Pay to buy Apple products or you can only use Apple Pay on a Safari browser, that would be a big problem for him and he tried to find a way to get at that.

Alan Kaplinsky:

Yeah, although, they don't have and I trust jurisdiction. I did read but, yeah, you're saying-

Evan Weinberger:

UDAP is a magical tool that you could use for many, many different things. And then, there's the other side of it which is there's the Facebook part where there is a payments part but there's also the Rohit Chopra hates Facebook part of it from his time at the FTC and that's no small thing.

Evan Weinberger:

He's concerned about a lot of what they're doing, and the final part of it is that the CFPB is really trying to find a way to get into cryptocurrency regulations. Based on the way it's used now is more of a speculative asset or entities or things like that. There's not really a CFPB angle there, but I know he's looking for one.

Evan Weinberger:

And he's brought in people who think a lot about cryptocurrency issues, and so this might be a way to see where he can get involved in that market. When the Fed released its stablecoin report, the CFPB was not a part of that report but they had their own statement saying, "We're watching this too."

Alan Kaplinsky:

Yeah, I haven't seen them do anything in that space yet. For that matter, I haven't seen much happening to any of the banking agencies in that area. They really have... to the extent they dip their toe in the water, it's really been around the periphery. They haven't really jumped in. You have any thoughts on that, Jon?

Jon Hill:

Well, I think it's interesting to look at the language that the director is used to talk about this payment system issue, and he's talked about large tech companies and financial surveillance and deep platforming. Some of the concern that he's raised in connection with this, consumers who might be on these platforms don't necessarily know why they might get kicked off or have their payments restricted.

Jon Hill:

And that is an issue that aligns with a lot of concerns that Republicans also have about the tech industry and being kicked off of platform for political viewpoints and so forth. So, I think it's interesting that he is framed in these terms because it gives him a possible point of commonality with people across the aisle.

Jon Hill:

It can make him, maybe give him some cover as he wants to do these things that he can say, "Well, look, these are issues that you've raised and you also have concerns about," and I think it hits a sweet spot there possibly that he could use to be able to do things that otherwise would just be seen as a bull in a china shop messing around. And I think that this gives him maybe some cover there.

Jon Hill:

It's going to be tough. I mean, I think that the CFPB's inherently something that Republicans are going to be suspicious of, and I think particularly after what Trump did at the FDIC, that's not going to be an area that he gets a lot of cooperation from or makes a lot of friends across the aisle on. But it is an interesting way that he's talked about it to raise these issues that you tie into larger competition concerns and also just the sense that there is a big tech force out there that has power that is concentrated in hands that the rest of the public has no accountability for.

Evan Weinberger:

And I also don't think it was an accident that was his first action, because Jon talks about Republicans. But the other thing that it did was the banking industry had all sorts of statements about just how excited they were that the CFPB was going after big tech, and "Those guys really need to be looked into," and "We're glad the CFPB is looking into their payments product."

Evan Weinberger:

So, after the overdraft report, the kumbaya period was over but it was a pretty savvy thing to say, "I'm going to do something that banks are very happy about, my first real major action in charge of this agency."

Alan Kaplinsky:

Right, right. So, in the enforcement area, I want to turn to a few other areas other than the CFPB. But I suppose what I'm anticipating, I haven't seen very much of it yet. And that is the CFPB flexing its muscles with respect to poor servicing of mortgage loans and student loans, COVID-related. I expected that they were going to try to ferret out whatever abuses have been taking place during the pandemic. But so far, it's really been more talk than action. Don't you just-

Jon Hill:

Just wait, just wait. I mean, I think people I've talked to seemed they've been getting a lot of investigations that have been going in or at the stage where you might actually start to see public enforcement actions develop in the coming year really. Obviously, these things take some time and that there is a whole process that that has to go through.

Jon Hill:

But that the supervision activity that occurred in 2020 is now had enough time to incubate to where you will start to see cases. Who knows exactly how many but cases will start to matriculate to the public stage in the coming year.

Evan Weinberger:

I think part of it is also that the CFPB enforcement division during the Trump era, I don't want to say it was neutered but it was directed to go after... it really did go after smaller players in the market. And then, Rohit has set his sights on big banks, big servicers, the credit bureau, consumer credit bureaus, those kind of companies, and it's just going to take a little while for those enforcement actions to be done because it wasn't really the focus prior to January 20th, 2021. And it just takes time.

Alan Kaplinsky:

Yeah. I mean, we have seen some activity with respect to the big three credit bureaus. I guess, you could say sword rattling. But I haven't... they haven't taken any formal action against any what I would call large bank... but I get your point that there was nothing going on against the large banks when they took over. And I'm sure there is right now but it takes a while to get to the point where you see it something publicly or-

Evan Weinberger:

And again, there's a question of personnel and that there's a new CFPB enforcement director. And when I found out who it was, I spoke to a couple of people and the reactions on the industry side ranged from, "Oh, not that guy," to "That guy is tougher than Richard Cordray," to "We're in trouble." So, just a matter of time I think that he has let everybody loose in there. It's coming. It just takes time.

Alan Kaplinsky:

Right. Let's talk about just a few other topics other than CFPB. We can probably all agree that we didn't really spend a lot of time talking about consumer financial services developments in Congress at least in the next... in 2022. I don't see anything happening, anything major. Do you agree?

Evan Weinberger:

Yeah. And I mean, the only tangentially connected thing could possibly be some of the work that's done on LIBOR-related legislation that could affect how that works out for consumer-facing loans that might reference LIBOR still but that's a stretch and that's going to be pretty in the cards.

Alan Kaplinsky:

Yeah. Let's talk about the prudential banking agencies for a minute. You guys must have been so thrilled with that brouhaha that developed at the FDIC with Chopra and the Democrats being on one side and the chair, Republican Chair of the FDIC being on the other side. That's good stuff, right? Juicy.

Jon Hill:

Oh, yeah. I love getting resignation letters on New Year's Eve, right, as I have other things to do.

Evan Weinberger:

I was on vacation that week, and I didn't know she had resigned until I came back in that Monday.

Alan Kaplinsky:

Okay. Well, anyway, I guess what's happened at the FDIC, I know you just wrote an article about that, Jon. Basically, the bottom line is the Democrats are now in firm control of the FDIC. And even with three people on the board, they're all Democrats. They don't even have to add additional people, right? They've got control there.

Alan Kaplinsky:

And the question is, what can they do? I mean, Community Reinvestment Act, I think they'll collaborate with the Fed and the Comptroller of the Currency. Might they do in the merger guidelines? Yeah, they can fool around with that and make things a lot more difficult to get mergers approved.

Evan Weinberger:

I don't even think they need to do anything on the guidelines. They could just not approve mergers and just look at... if you were going for an industrial loan charter merger... charter bank, I think you might have doubts about whether that's actually going to get through come February 4th and all sorts of things like that. You don't need a big policy. You just need to say no a lot.

Alan Kaplinsky:

Yeah. Yeah, that's good point. They might use their... they have UDAP authority too. Everybody forgets. Everybody always thinks that the CFPB's got a monopoly on using UDAP but the federal banking agencies can do things as well in that area.

Evan Weinberger:

But they don't have that extra A in UDAP for abusive and that's the one that could just be a lot more tools and they can have a lot more fun with it.

Jon Hill:

In particular, I think perhaps an underappreciated area for them is that it's fintech really that a lot of the FDIC, the banks that the FDIC supervises or the banks that are involved in these bank loan partnerships that or the consumer advocates have had really serious concerns about, the whole rental bank phenomenon is really these partnerships are majority state-chartered banks that the FDIC oversees.

Jon Hill:

So, there is an opportunity there for under democratic control for the FDIC to be a lot more tough on these relationships even to go as far as issue new guidelines about how these partnerships can behave appropriately and what consumer compliance needs to be. Whether it goes that far or even just as supervisory channel subjecting them to a more scrutiny and being tougher on them that way, there's really room there for the FDIC to be nudging that forward, putting a finger on the scale there to be a little... making some little more consumer-friendly on that end.

Alan Kaplinsky:

Well, yeah, that's a good point, Jon, and I recall many, many years ago when the Comptroller and the FDIC got very involved in the use of bank partnerships with payday lenders. And first, it was the Comptroller who opted and basically said, "He ordered all national banks to sever their relationships with payday lenders." He politically, I think he was tired of the then... Comptroller of the Currency was tired of taking all the heat he was getting.

Alan Kaplinsky:

Then the same thing happened with the FDIC. They ordered all their state-chartered banks to sever their relationship. Now, we're talking about payday lenders who were charging much higher APRs than a lot of these partnerships, online partnerships are charging now. But I'd certainly be worried if I were in that area that the FDIC is going to become more proactive.

Alan Kaplinsky:

Let me turn to the final area that I want to get your thoughts on, and then we'll wrap things up. And that is the state level, state attorneys, general state departments of banking. I guess, just a general observation that I've noted, I don't know if you guys agree with me or not, that the states seem to have stepped back a little bit, and now that they've got friends at higher places in the federal government. Maybe they don't think that they need to devote the resources that they were devoting during the Trump era to doing enforcement in the consumer finance area. Am I seeing things right?

Evan Weinberger:

That's partly it. There's the other issue that at least the New York Department of Financial Services got caught up in all of the Cuomo scandals. And so, the superintendent had to resign because she was involved in trying to stop all the sexual harassment enquiries and all sorts of stuff like that.

Evan Weinberger:

The new governor, Kathy Hochul appointed Adrienne Harris to be the acting superintendent. She's been doing some stuff but she's not confirmed yet. And actually, there's some movement inside the New York legislature amongst progressives that they're not terribly pleased with her because she worked for an insurance technology firm for a little while.

Evan Weinberger:

So, I don't know how that's going to go. We'll find out in the next little bit, because I think confirmation hearings are going to come this month or next month. But that's slowed DFS down because there's a little bit of uncertainty at the top. California is doing stuff, but they're really focusing on the state of California right now. They're not trying to be, at this point, this big regulator that's stepping in for the CFPB.

Evan Weinberger:

But again, that's also a leadership issue because Manny Alvarez who's the Director of the Department... California Department of Consumer Protection, I forgot the exact acronym for it, but he left to go run Binance with Brian Brooks, the former Acting Comptroller and then realized, "Oh, this Binance place might be a bunch of fraudsters," and quit. But there's nobody... there's an acting chairman in California now but there's not a full-time leader setting new policies and things like that.

Jon Hill:

Yes, seems that the two biggest players are in the midst of these leadership transition periods that just is going to inherently slow things down and make them a little less visibly outwardly active.

Alan Kaplinsky:

Yeah. Before we wrap things up, do either is there an area that we haven't talked about that is, in your view, a really hot area that we ought to be looking out for?

Jon Hill:

I'll start with fair lending. I mean, I think that fair lending is going to be, obviously, Director has talked about it that he wants to make it a major emphasis in his administration, again, blinds with the White House priorities that you've seen lots more messaging around this.

Jon Hill:

And I think you're going to see an interesting exploration of how the Bureau can use its UDAP authority to promote fair lending in areas that aren't... and even be honest with fair lending anti-discrimination policy in areas that are not strictly credit-related, that it's going to be something that you'll see more-

Alan Kaplinsky:

In the intersection of artificial intelligence and fair lending.

Jon Hill:

Exactly, yes. Digital redlining, I think, is the phrase that Director Chopra has used to talk about this phenomenon of algorithmic bias and then how these algorithms can bake into the data that they use discriminatory practices. So, I think, yes, that's going to be a big issue from the CFPB.

Jon Hill:

I think, also the CFPB and the OCC are both partnering with the DOJ on its combating redlining initiative which is supposed to be the biggest initiative of its kind the department has ever undertaken. So, that is going to put, I think, particularly a lot of smaller institutions on notice of possible investigations and enforcement actions.

Jon Hill:

And even the nature of those enforcement actions. If you look at the first one they brought, this is the Trustmark bank case that you'll see an emphasis on marketing and an expectation that financial institutions really have to market affirmatively to all the areas that they serve, and they can't just do what they're doing now and hope that's enough. I think there's going to be a lot more emphasis on marketing as an area for banks to be paying a lot more closer attention to.

Alan Kaplinsky:

How about you, Evan?

Evan Weinberger:

Well, I think, yeah, you mentioned the Trustmark case. I was going to bring up cooperation with the Justice Department. But I think one of the things that we're going to see a lot more is the CFPB either providing information to Justice and the FTC and other agencies or just flat out working with them.

Evan Weinberger:

Lina Khan, who's the chairperson of the FTC, she and Rohit have a very similar way of looking at the world. And they worked together well and they have some overlapping jurisdiction and they have some areas where they don't overlap, but they can find ways to work together. I think that is going to be something that happens a lot.

Evan Weinberger:

I get back to personnel a lot because personnel really is policy. The consumer protection folks at the FTC in the Trump administration, it was a lawyer who worked who had previously represented the Consumer Data Industry Association. Now, the consumer protection team at the FTC is led by former CFPB people who work there under Richard Cordray. So, there's going to be a lot of work in that area and a lot of overlap.

Evan Weinberger:

Competition is going to be a key catchphrase at the CFPB, and they'll find ways to use UDAP to enforce competition policy in certain ways. It'll be creative. I'm sure it'll be challenged in court. And I think that Chopra is okay with UDAP getting challenged in court, because I think he'd rather have the courts decide what is an acceptable use of UDAP rather than writing a rule himself and restricting what he can do. So, I think all of those things are things to watch out for in the next year, two years.

Alan Kaplinsky:

Yeah. And the one thing I don't think you'll jump back into, I'd like to get a quick reaction from both of you and that is going after the auto-finance companies for a dealer markup. The type of investigation I did of Ally Finance several years ago, and they were trying to attain that whole industry to Richard Cordray and they didn't succeed. And I put that in the category of, "That's yesterday's war. They don't want to fight that again. I don't think."

Evan Weinberger:

Certainly not something he's spoken a lot about.

Alan Kaplinsky:

Yeah, yeah. I agree. Okay. Well, this has been a great conversation that I have with both of you today, and really want to thank you for taking as much time as you did to share your thoughts with our listeners. And, of course, I want to thank everybody who has downloaded our show today for listening.

Alan Kaplinsky:

If you want more information on any of these areas, first and foremost, you should be subscribing the Law 360 and to Bloomberg Law, so that you can follow what both of these gentlemen are writing. They are at the very top of what's being written in the consumer finance area.

Alan Kaplinsky:

And then, add our law firm. Make sure you consult our blog which goes by the same name as our podcast show, Consumer Finance Monitor. We've been doing it for when the CFPB got stood up on July 21, 2011, over 10 years right now, and there's a lot of information on there. So, with that, I want to wish everybody a good day.