Consumer Finance Monitor (Season 5, Episode 24): A Conversation with Special Guest Peggy Twohig, Former CFPB Assistant Director for Supervision Policy and Strategy

Speakers: Alan Kaplinsky and Peggy Twohig

Alan Kaplinsky:

Welcome to Consumer Finance Monitor podcast. A podcast that is sponsored by the law firm of Ballard Spahr. I'm Alan Kaplinsky, senior council at Ballard Spahr, and I'm formally the chair of the consumer financial services group at Ballard Spahr. And we're very pleased that you've joined us today for our podcast where we have a very special guest. Very, very pleased to have with us today Peggy Twohig. And let me give you some details about Peggy. I then have a number of questions that I want to ask Peg, mostly about her tenure at the Consumer Financial Protection Bureau, where she had a very senior role.

Alan Kaplinsky:

So Peggy is a recognized expert in federal consumer financial laws and related policy issues. She worked to protect consumers and financial services markets for close to 30 years in leadership positions at the Federal Trade Commission, Department of the Treasury and the Consumer Financial Protection Bureau. She was the founding executive of the CFPB when the agency was created in 2010, and led the development of the first federal supervision program over non-bank consumer financial companies. Beginning in 2012 as head of the CFBs office of supervision policy, Peggy led the office that was responsible for developing supervision strategy for bank and non-bank markets and ensuring that federal consumer financial laws were applied consistently in supervisory matters across markets and regions.

Alan Kaplinsky:

During her government tenure, Peggy testified before Congress on legal and policy issues related to credit reporting, data security, credit scoring, subprime lending and home equity fraud. Prior to her work at the CFPB, Peggy was director of the office of Consumer Protection at the Department of the Treasury, where she supported the Obama administration's proposal to create a new federal consumer agency as part of financial reform. Immediately before joining treasury, she served as associate director of the Division of Financial Practices at the Federal Trade Commission. In her 17 year tenure at the FTC, she oversaw enforcement, regulatory and policy matters related to consumer financial services, including cases involving fair lending, mortgage lending, and servicing credit reporting debt, debt collection, and financial practice. She was in private practice for some time before that. And she clerked for a federal judge in Ohio after she graduated law school.

Alan Kaplinsky:

So Peggy, those are a lot of achievements and I would be remiss if I didn't mention an achievement that just occurred on April 2nd of this year, where Peggy received a highly coveted American College of Consumer Financial Services Lawyers Senator William Proxmier Lifetime Achievement Award. And for those of you that are interested in more detail about Peggy and why she got the award, the written presentation about her that was actually delivered orally at the American College meeting on April 2nd appears on the website of the American College. There is a list of all the former lifetime achievement award winners, and Peggy's write up will appear there. So Peggy, a very warm welcome to our podcast show.

Peggy Twohig:

Thank you, Alan so much for that warm welcome. I really appreciate being invited here to speak to you on this podcast.

Alan Kaplinsky:

Thank you. So Peggy, we're going to focus today, because I mean, we could actually literally spend a day if we chronicled your entire career beginning at the Federal Trade Commission, there's just so much that you've accomplished. But we're going to focus in the limited time we have on your tenure at the CFPB. You, I know we're involved in standing up the bureau, so I think believe it was July 21st, 2011, the bureau became operational. I remember that day in particular because we launched our blog on that very day, which was then called CFPBmonitor.com. So before I get to some of the specific questions I have for you, I think it would be helpful to our listeners to describe to them the jurisdiction of the CFPB with respect to supervision.

Peggy Twohig:

Sure. So the jurisdiction of the CFB for supervision is quite large. The CFB under the Dodd-Frank Act has supervisory authority to look for compliance with federal consumer financial law, as well as compliance management issues for the largest banks in the country, defined as over 10 billion in assets and more, and all kinds of non-banks. Certain non-bank categories are established in the statute itself. That includes mortgage origination and servicing, payday lending and private student lending. The statute also provides that the CFPB be by rule can add other categories of non-banks through a process called the larger participant rule making, meaning if they're larger participants in other non-bank markets, the CFB has the authority to add that category of market players to its supervisory jurisdiction. And indeed the CFPB has done that with consumer reporting companies, debt collection, auto servicing, student loan, servicing, and remittance providers.

Peggy Twohig:

And then finally, and Alan, I think you're going to mention this later, the CFB also has authority under certain procedural requirements to supervise any non-bank person that is engaging or has engaged in conduct that poses risk to consumers. And that has to be after the bureau has reasonable cause to determine by order and after notice to the person that those types of risks are presented. And finally, the CFPB also have supervisory authority over service providers of the categories of entities I mentioned above, as well as some others,

Alan Kaplinsky:

The supervisory risk category, those that can be done where you can assert supervisory jurisdiction over individual companies that pose a risk to consumers, I was going to mention that at the end, but maybe this is a better spot to mention it. Very recently the CFPB indicated that it was going to utilize that authority and it was proposing to add one additional component to that. And that is if a company were to be targeted by the CFPB for supervision because of the fact that it poses undue risk to consumers, that information would be available to the public. They wouldn't know the outcome of the exam of course, because that's confidential, but they would know that they had been identified by the CFPB. I'm curious, that authority, not what they're adding now about publicizing it, the fact that they've been identified by the CFPB that's new. But the other piece of it was actually in Dodd-Frank and there was a regulation back in, I think, 2013 about it. And my understanding is it's never, during your tenure going up to now, it's never been utilized. Am I right?

Peggy Twohig:

That's basically right, Alan. Part of the rule was actually used. It was the part that provides that non-banks can provide consent to supervision in the settlement of a civil action or administrative action in a consent order. And that actually was used. But other than that, to my recollection, it was not used.

Alan Kaplinsky:

Why do you think it was not used?

Peggy Twohig:

Well, I think this answer could make more sense once we talk about the challenges we've faced and how the program grew over the year. But the reality was given the breadth of the supervisory work we had to do in the largest banks in the country, which by the way that supervisory authority increased every year as more banks hit that 10 billion asset mark, and under the rules at the appropriate time came under supervisory authority, as well as the expanded authority added by larger participant rule over non-banks, plus the statutory authority over non-bank, as well as we added supervisory work, looking directly at service providers over time. So you put all that together and we were stretched pretty thin. CFB has fairly limited resources to apply to this vast non-bank and bank markets to ensure compliance through the supervisory process.

Alan Kaplinsky:

Yeah, I got it. So it's really an issue of the bandwidth back then and not having enough people to really open up this new area.

Peggy Twohig:

Well, and I would say also our determination of where the priorities were every year. We had a prioritization process that I think we'll go into a little bit more, that our judgment was we needed to spend our priorities on what we thought were the biggest risk to consumers at the time. And we always had that tool in our toolkit if we needed it.

Alan Kaplinsky:

Yeah. Got it. So what were the initial challenges in starting up the supervision program at the bureau?

Peggy Twohig:

Well, as you noted, we launched July 21, 2011, but we had one year from the date of enactment of Dodd-Frank the year before to be ready to take over compliance supervision for the largest banks in the country. So that right there is a tall order when you're starting from scratch, but at the same time, we had to plan for the startup of the first ever federal supervision of non-bank consumer financial service providers of many different types. And think about how that would work in conjunction with the supervision of the banks. And we were starting from scratch with everything, to recruit leadership, to recruit headquarter staffing.

Peggy Twohig:

Of course, we needed to hire many, many examiners to start the work. We had to figure out all the foundational elements, the number and location of regional offices, reporting lines, decision making processes, exams, policies, and procedures. It was the full range of issues that are needed to underpin and run a successful supervisory function. And there was a lot to do, so it was very challenging all around. We had a great team to do it. It was clearly and always was a team effort. I had the good fortune to work extremely closely first with Steve Antonakes. And later after Steve became deputy the agency, Paul Sanford in leading the development of the CFPB program, as well as many other talented leaders who are still there helping provide leadership to this day and many regional directors all took part in creating, leading, shaping the program.

Alan Kaplinsky:

Right. Right. So how did the CFPB program as it was being developed compared to other federal and state supervision programs? And I guess when we refer to other federal supervision programs, we're talking principally about the prudential banking regulators, FDIC, Fed and NCUA, and state, of course, the state departments of banking. Most of them have supervisory programs. So how did the CFPB program compare to the other ones?

Peggy Twohig:

Well, we looked to the other federal programs, the federal and state supervision programs, but there were differences from the start. We had the opportunity to create a supervision program that worked for CFPB in particular, and to align it with CFPB's mission and resources. One of the key differences was how we allocated resources across both the bank and non-bank markets. Other federal agencies and state agencies, I believe typically conduct exams on regular cycles. Sometimes those cycles are driven by statutory requirements or regulation, but we organized our programs so that we prioritize the work.

Peggy Twohig:

We developed a prioritization process to allocate how we would use our supervisory resources across the bank and non-bank markets, as well as among particular product lines, based on our assessment of risk posed to consumers. And the reason we took that approach, there were really two, one was first, it was legally required to do that, by the Dodd-Frank Act for non-banks, for the non-bank supervision program. But as a practical matter because of our limited resources, it really made sense to do this for the banks as well, because we did not have enough resource to conduct exams of banks for all compliance areas on a regular cycle. So overall it made sense to look carefully at where we thought the risks were the greatest and make sure we could do quality exams rather than be spread too thin.

Alan Kaplinsky:

So what do you mean Peggy by looking at product lines?

Peggy Twohig:

So if you think of a bank's products and services from a consumer compliance lens, there's lots of different kinds of products that have often very different compliance requirements under completely different statutes and regulations. So when we planned our examination work at banks, we did not try to look at every bank product or service at once in one exam. Rather, we broke it up and focused on one product line, such as mortgage origination or mortgage servicing or credit cards or deposits. And by the way, we approached a non-bank exam this way as well. If the non-bank, say a large non-bank mortgage company had both mortgage origination and mortgage servicing, we'd look at those separately.

Peggy Twohig:

And we also looked at particular compliance areas. We talk about product lines, but it really also applied to particular compliance areas. For example, fair lending. We had exams that focused on just fair lending in certain product lines typically. And we even over time adopted this approach to look at other compliance areas. For example, to look at the furnishing obligations under the fair credit reporting act of say any type of company, a mortgage servicer, credit card company. We found that to really look at that carefully and do quality supervision work we needed to look at that in one exam, soup to nuts. So that is how we broke up the work. And it's also how we stacked up the work between banks and non-banks, so that if there were risks in say a mortgage servicing market, we were looking across kind of apples to apples, banks to non-banks in terms of risk, complaints, all the information that might suggest risk size, and deciding where to focus our supervisory resources.

Alan Kaplinsky:

Yeah. Did you have to train all of the examiners of the CFPB in all these product line and compliance areas, or did certain ones become specialists in certain product lines or compliance areas? I mean, how did that work?

Peggy Twohig:

Well, we decided from the beginning that our examiners would be trained to look at both banks and non-banks. That was in large part driven by the mission in that part of CFBs mission was to ensure we were looking at compliance and making the calls we were making regardless of charter. And that was a difference from the way some states approached it, where they have different depository and non-depository examiners, and sometimes completely different agencies that look at the banks and the non-depository licensed entities in the states. So we did have that goal of making sure our examiners could tackle any kind of entity and we needed that flexibility and nimbleness. On the other hand, we did put a lot of resources into training, the CFB I'm sure still does, through a commissioning program led by Steve and Paul to ensure we had a rigorous training program for examiners. And there's also over time developed the ability for some examiners to obtain particular training in specialty areas. So it's a combination, but in the main, it was very important for examiners to be able to tackle any type of entity and basically any type of issue.

Alan Kaplinsky:

Yeah. So what were other ways that CFPB supervision was different than other supervision programs that existed at other agencies?

Peggy Twohig:

So one other key difference that's near and dear to my heart was the substantive support. We provided examiners through the office that I ran, the office of supervision policy, and it was a very important goal overall of our supervision program, that in all exams, we applied the law consistently to similar practices, whether it was a bank or non-bank, financial companies in all regions. So that we had a consistent findings across the country and across types of entities, if the facts were similar and the analysis required that. To accomplish that objective the office, I ran, the office of supervision policy, we had experts, primarily legal experts, responsible for supporting each exam and conducting the legal analysis of any factual issues that posed potential UDAAP or what we called non-routine regulatory issues. Anything that wasn't cut and dried.

Peggy Twohig:

We organized supervision policy by markets and compliance areas, not by bank and non-bank. So we had teams that focused on origination, mortgage origination, all things origination. Or servicing mortgage servicing, student loan servicing, auto servicing. Deposits and payments issues, consumer reporting, debt collection, among others. And these teams provided expertise to the examiners to support their work in providing expertise on the markets and the market developments, as well as all the relevant laws that applied, because it can get quite complex. And as you know, Alan, it can change over time. We also supported the examination teams through just in time training. And so that was the process whereby examiners just before they're beginning a particular exam, keep in mind those examiners may or may not have ever done a debt collection exam, for example. Some of them may have some of them have not. But they don't necessarily know the latest that other examiners in other parts of the country have found, what facts made a difference, what the issues were, what the latest thinking was. So we would help with just in time trainings. That exam team was set up for success in doing that.

Peggy Twohig:

And I want to note that the office of fair lending served the exact same role before the reorganization that occurred under acting director Mick Mulvaney for fair lending exams. And after that reorganization, that role was moved to supervision policy, which then had a dedicated fair lending team to do that support work. And overall, we were very intent and this helped ensure both quality exam work. And I think consistency across the country and across exam teams.

Alan Kaplinsky:

So another novel aspect of CFPB's supervision program was the publication of supervisory highlights. In fact, I just, I think it was yesterday, a new version of supervisory highlights came out covering I think even a period of time while you were still at the bureau, Peggy. But I have found as an industry lawyer that, that publication has been extremely valuable in giving advice to our clients about issues that the CFPB thinks are sufficiently important to highlight them, albeit on a anonymous basis, that is you properly don't mention the names of the banks that were involved, but you describe in a fair amount of detail in each case, what the issue is. Once the industry is aware of an issue that's highlighted, then they're hardly in a position to claim that they didn't realize the CFPB was going to be interested in a certain thing. So I'm wondering if you could tell us how that came about Peg?

Peggy Twohig:

Sure. Well, supervisory highlights was really born out of the desire to provide more transparency to the public about what CFB examiners were finding in exams while at the same time, maintaining the confidentiality as you noted. The confidentiality of the supervisory process is really critical for it to be effective in examiners obtaining the information they need and the cooperation they need from the entity, on the timeline involved in exams, to evaluate the information, evaluate the findings, and provide the feedback through conversations and exam reports, so that the supervised entity can address problems as soon as possible that the examiners find.

Peggy Twohig:

But the lack of transparency can also be problematic as the public and other supervised entities, but for supervisory highlights, wouldn't really have the benefit of knowing what exactly CFPB is finding in exams. So we came up with the idea of publishing the exam findings without naming names to protect the confidentiality. And as you noted, Alan, this also had the advantage of putting the entire industry on notice of exam findings so they could review their own practices and ensure they were in compliance with the CFOB's expectations. And I'm glad to hear your positive comments, Alan. Supervisory highlights, we did receive very positive feedback from compliance professionals in particular, but the public in general on this publication. And so, as you noted it continues to almost this day.

Alan Kaplinsky:

It does. Yeah. So in terms of substantive focus, what were the priorities for supervision while you were there, Peggy? And how did that change over time?

Peggy Twohig:

Well, at first, the supervision program was starting up in the wake of the great recession and some of the priorities for supervision flowed from the risks that were front and center at that time. That included mortgage servicing for example, was a big issue when we started up. Fair lending was also a priority. And as soon as we could get to it, meaning through a larger participant rule, the highest non-bank priority other than mortgage servicing was to supervise consumer reporting agencies sometimes called credit reporting companies or credit bureaus. They had never been supervised before at the federal or state level, despite their tremendous impact and reach into the lives of consumers.

Alan Kaplinsky:

Are they licensed at the state level, consumer reporting agencies?

Peggy Twohig:

I think some are now. I believe New York started to license them. But at the time, I don't believe they were. I don't believe even to this day, too many states license them. But because of the importance in consumer's lives of credit reports and credit scores, and the fact that they had not been supervised before the first larger participant rule established supervisory jurisdiction over consumer reporting companies. So that was a priority to get going on that work. And next up on the non-bank side was debt collection. That was our second larger participant rule. And all of that was being done and added in addition to of course, the statutory authority for non-banks that was already established. So we were able to do the mortgage ordination servicing work, payday lending were among the top priorities. And then as you know, and as we've discussed over time, other larger percent rules were added and needed to be folded into the prioritization mix.

Peggy Twohig:

But every year the priorities changed somewhat as we evaluated all the data, as we have these different authorities that were coming into play, as markets and risk changed. We looked at consumer complaints, we looked at market developments and we looked at our own exam findings. So that would change over time. For example, as the mortgage market started to improve and mortgage servicing, some of our focus changed from some of the default servicing issues that were very important to look at when the mortgage market was still in shambles and the economy was recovering after the great recession. Over time, we started looking more at what we call performing mortgage servicing issues. Your mortgage servicing issues that would exist in any market, escrow and payment allocation, and all kinds of things that we looked at and found some problems.

Peggy Twohig:

And another example of market developments was early on through supervision, we uncovered problems with credit card add-on products, and then that became a big focus because of our exam findings. And then we kept going, looking at that across the marketplace, and that led to a number of major law enforcement actions early in the CPB's life.

Alan Kaplinsky:

So you were there until you resigned recently. When did you resign by the way from the bureau, just to-

Peggy Twohig:

I retired as of August 31, 2021.

Alan Kaplinsky:

... Okay. So you were there right from the beginning up to that point, and you were there under the leadership of Director Cordray, and I guess there was even an acting director before Richard Cordray. And then you were there under acting Director Mulvaney, and then Director Kraninger, and both Democratic and Republican administrations, quite a bit different in philosophy about the value of the CFPB and its mission. And I'm just wondering what I used to say to my clients during that period of time, the least impacted by the changes in administration are in the supervision area. That it has a larger impact on the regulatory side and on enforcement, but supervision, the examiners still go out and examine and if they find something wrong, they're going to write you up. They're not going to ask whether you're a Republican or a Democrat. So wondering what your, as an insider at the agency, what your perspective was?

Peggy Twohig:

Well, there were some changes to supervision under Acting Director Mulvaney and Director Kraninger. There were some changes in policy that got considerable attention like Acting Director Mulvaney's view that we in supervision, that examiners could not look for violations of the Military Lending Act.

Alan Kaplinsky:

That's changed now, right? Am I right that, that position, that Director Kraninger and Mulvaney took, didn't that get changed in some fashion? I don't remember how, but-

Peggy Twohig:

Yes, that was changed when the administration changed. But in the main, as you observed Alan, the supervisory work continued much as it had in the past, both with exam prioritization, process training, commissioning examiners, conducting exams, issuing exam reports and findings. And then the publication of supervisory highlights continued. There was, as I mentioned, the reorganization directed by Acting Director Mulvaney that moved the office of fair lending to a different part of the organization under headquarters. But the job of fair lending, exam prioritization and support moved to supervision policy, and the fair lending enforcement work were moved to the office of enforcement.

Peggy Twohig:

So that work continued under different parts of the organization. But I'd have to say that I think the primary adverse impact under the leaders in the Trump administration was really the hiring freeze. The hiring freeze that was put into place that lasted for quite some time, really hurt supervision because it take a long time to hire and train examiners, because there's constant attrition, no matter what, for all kinds of reasons. And that's just part of any organization really. And it takes a long time to recruit, train and get those examiners to a point where they can really replace experienced examiners. So that was a change.

Alan Kaplinsky:

... And that hiring freeze lasted until Acting Director Ueijo took over for or from Kraninger?

Peggy Twohig:

No, under Director Kraninger, I can't remember the exact timing, but my best recollection is she permitted us to start hiring again. We were already down quite a bit. So it was from a deficit position that we were trying to get back up to speed. And the other change to supervision, Alan, was a major change because of the pandemic. It wasn't because of really policy or any change in administration. It was because of what was happening in the country and the decision that we reorient our supervision toward the issues that were presenting themselves because of what was happening in the market with the pandemic. And so we retooled a number of our exams to look at a broader swath of issues that were just presenting themselves because of the pandemic.

Alan Kaplinsky:

And am I right, Peggy, that during the pandemic, you were doing fewer in person examinations, that things were being done more remotely for a long period of time?

Peggy Twohig:

Right? Well, the supervision work was being conducted remotely as I think most business in terms of financial services, in terms of that of the marketplace. And so that was true. And we were also conducting a broader and much larger number of not as deep assessments, but quick assessments, prioritized assessments to just focus on the risks that were being presented by the pandemic.

Alan Kaplinsky:

So we're reaching the end of our show Peggy, before we bring it to a conclusion, I'd like to ask you a question about UDAAP and I consider you to be one of the country's leading experts in that subject, by virtue of your lengthy experience of the Federal Trade Commission, dealing with a different version of UDAAP, the single A version that prescribed unfair and deceptive acts or practices. Of course, when Dodd-Frank was enacted, it gave the CFPB the additional authority to deal with abusive acts or practices. So very recently the CFPB came out with a change to its examination policy in which it said that UDAAP going forward would be a tool that the CFPB intends to use to combat both credit and non-credit discrimination.

Alan Kaplinsky:

In other words for many, many years since the enactment of the Equal Credit Opportunity Act, and then the promulgation of regulation B, there under initially by the federal reserve board there, we had very express statutory authority that the agencies could use to go after credit discrimination against various defined protected classes, in connection with a credit transaction. Nothing specific dealing with non-credit transactions. And now the CFPB has said, "Well, UDAAP applies both to credit and non-credit transactions." And it revised their examination manual to some extent. I'm not going to ask you what you think about that change, that wouldn't be fair to you. But I'm very curious in your tenure at the FTC, and then you're almost, I guess, a decade or more time at the CFPB, whether you are aware of you'd have ever been used to combat discrimination, either from a supervision standpoint or an enforcement standpoint, is this all new?

Peggy Twohig:

So, Alan, I can't think of an instance where that was applied quite in the way that CFB has announced in the past, but I will also say that I haven't taken the time to do comprehensive research to see if there's something I'm not remembering off the top. I mean, it is fair to say our focus certainly at the FTC and to my knowledge at the CFB was looking for compliance and enforcing the Equal Credit Opportunity Act to deal with issues of discrimination in financial services markets.

Alan Kaplinsky:

Right, right, right. Okay. For our listeners who are interested in more detail on that particular subject, which is getting a lot attention these days, I would commend you to our blog, consumerfinancemonitor.com, where I engage in a debate with professor Jeff Sovern at St. John's Law School. You can certainly predict our, listeners can predict what side I took on that issue and what side Jeff took. Okay. So we've covered a lot of territory today, Peggy. And the one thing I'm wondering is whether there's based on your vast experience you've had at the FTC and the CFPB, whether there is anything in particular that you could say was a highlight of your career, or is there a low light of your career? I'm more interested in the highlights.

Peggy Twohig:

Thanks for that question, Alan. And thanks again for inviting me to have this conversation here today. I particularly appreciate your interest in the CFB supervision program, because that is behind the scenes and sometimes does not get as much attention as the more public facing work of the bureau. So I very much appreciate that. In terms of my career, I'm just so fortunate to have had the opportunity first at the Federal Trade Commission, and then at CFPB, to work for leaders who valued and appreciated federal career service.

Peggy Twohig:

And as an executive in federal career service, I got so many wonderful opportunities to speak on behalf of the agencies to engage with the leadership, to provide my thoughts and advice. And they always called the shots, no matter what, of course the administration at the FTC or CFB, but I just feel so fortunate and so lucky to have had the opportunities I have had. And of course the incredible opportunity to help create a whole new federal agency from scratch and a whole new approach and federal supervision program. So really could not have asked for more exciting, challenging, and interesting work and with just tremendous talented colleagues, as I said at the outset. So I just feel very, very fortunate.

Alan Kaplinsky:

Yes. Yeah. Well, you are very fortunate and I will say that the government and in particular, the FTC and the CFPB is extremely fortunate that they were able to have somebody with your knowledge and expertise and judgment to be in leadership roles during a very, very important period of time. So again, thank you for being our guest on the show. I want to thank all of our listeners today for downloading the podcast and just remind you that we release a new show generally every week. There are two weeks in November and December during the holidays where we take a mini vacation, but other than that, a new show comes out every week.

Alan Kaplinsky:

We very frequently bring in outside guests like Peggy Twohig today. And also if I could just spend one extra moment to toot our own horn as a podcast show, we've been doing this now for close to five years. And very recently, last year, a social media site for law firms called Good to Be Social ranked our podcast show as the second best law firm podcast show in the country. So we are extremely proud of that. Our podcasts are available anywhere you prefer to get your podcasts and you can even find it on our firm website. And for those of you that prefer to read the podcast rather than to listen to them, we provide transcripts as well. Okay. Well with that want to wish everybody a very good day.