

# Consumer Finance Monitor (Season 5, Episode 31): The U.S. Chamber of Commerce’s Campaign Against CFPB Director Rohit Chopra’s Attempt “to Radically Reshape the American Financial Services Sector”: A Discussion With Bill Hulse, Vice President, U.S. Chamber of Commerce Center for Capital Markets Competitiveness

Speakers: Alan Kaplinsky and Bill Hulse

Alan Kaplinsky:

Welcome to Consumer Finance Monitor Podcast, where we explore important new developments in the world of consumer financial services, and we explain to you their significance, either as a member of industry, or if you are a consumer. I'm Alan Kaplinsky, senior counsel at Ballard Spahr and I'm the former chair of the consumer financial services group at our firm, where I served in that capacity for 25 years.

Alan Kaplinsky:

So today we're going to be talking about a familiar subject, namely the CFPB, which we cover quite a bit on our podcast show, but we're going to be talking about a very important recent development. And let me very briefly tell you a little bit about it, and our guest today is going to tell you a lot more.

Alan Kaplinsky:

So the chamber of commerce several weeks ago announced that it was embarking on a campaign against Rohit Chopra. And one of the documents that got produced at that time said, "Director Chopra is attempting to use the CFPB to radically reshape the American financial services sector." That was a quote from the executive vice president at the chamber.

Alan Kaplinsky:

Rohit Chopra has an out sized view of the CFPB's role and the director's power. By willfully mischaracterizing the state of competition in the market, Chopra is laying the groundwork to force the financial services sector to comport with his personal vision of the appropriate size of companies and what products and services should be offered and under what conditions. No previous CFPB director has thought that they had such power. Rohit Chopra's radical agenda and reckless actions will only hurt consumers, businesses and our economy, and he needs to be held accountable.

Alan Kaplinsky:

Well, I can't think of anybody who is more knowledgeable about the chamber's initiative against or related to Rohit Chopra than our very special guest today, and let me introduce him. His name is Bill Hulse. He is vice president at the US Chamber of Commerce, Center for Capital Markets Competitiveness, and he oversees the day to day operations of the Capital Markets Competitiveness Center. That includes policy development, advocacy, and communications. He also leads the division's policy portfolio as it relates to the CFPB, consumer finance, and FinTech issues. Since joining the chamber in 2018, Bill has served in various other roles most recently as executive director for policy.

Alan Kaplinsky:

Prior to that, Bill worked on the Hill for Congressman Randy Hultgren, Republican of Illinois. And prior to that, when I became aware of Bill was when he was working at the Consumer Bankers Association. So Bill, a very warm welcome to you today. Thank you for being on our podcast show.

Bill Hulse:

Alan, thanks for having me on. Really happy to be here and really happy to have an opportunity to talk about the chamber's work.

Alan Kaplinsky:

So let's start off with an easy question, and that is what types of issues over the years has the US Chamber of Commerce been involved in related to the CFPB?

Bill Hulse:

Sure. So I'll say the US Chamber of Commerce has been involved with the CFPB and debates around the CFPB really since its consideration during the Dodd-Frank Act over 10 years ago. Obviously Title X was a major part of this legislation, including the creation of a new federal agency to regulate consumer financial products and services. At that time, we expressed strong concern about how the agency was being proposed to be structured.

Bill Hulse:

We deal a lot with independent regulatory agencies at the chamber, and we've found that bipartisan commissions with budget oversight from Congress have the right governance to be successful over the long run. Agencies that have significant political independence, like the CFPB are not subject to the checks and balances that are embedded across our form of government. These checks and balances are critical for avoiding overreach and major swings in policy like we're encountering today.

Bill Hulse:

The US Chamber actually issued a report in 2018 recommending a number of reforms to how the agency operates and some statutory changes that Congress can make to improve transparency and accountability. Some of these changes were actually implemented by Directors Mulvaney and Kraninger, but we believe there's much more work to be done.

Bill Hulse:

I'll say too, since the agency was established, we've maintained a great working relationship with each of its directors. It's not to say we always agree. There's always been an open door policy for us to express the views of the broader business community. There are a number of rule makings the CFPB's always engaged in and policy making they're always engaged in, and we've always been engaged right along the way.

Bill Hulse:

In prior years, we've provided input and regulations for debt collection, the various mortgage rules, small dollar credit. And most recently we've provided detailed input to the agency and it's rulemaking to implement Section 1071, small business data collection.

Bill Hulse:

We actually think there's an opportunity here for this rulemaking to do some good, to shed some light about what small businesses are not getting the access to credit that they need or why they might not be getting it, but we also think there's a role for the business community to step in too, to make sure that rule doesn't go too far, have unintended consequences.

Bill Hulse:

Coming up, we're going to file a comment letter with the CFPB relating to its ANPR and credit card late fees. Given that the ANPR suggests the safe harbor developed by the fed is really not where it should be, or maybe should be revisited, we'll probably be engaged on a 1033 rulemaking, if they go that way. And also aware of their work on automated valuation models as well.

Alan Kaplinsky:

Right. And don't forget, Bill, the issue that the chamber was really deeply involved in that I personally was involved in, on behalf of the Consumer Bankers Association and the American Bankers Association, arbitration.

Bill Hulse:

Absolutely.

Alan Kaplinsky:

That's another one, right?

Bill Hulse:

That's another one. That's a big one. And I think that's a great example of wherein the agency overstepped its authority. Happy to get into that as much as we need to today, but that was really an example wherein the CFPB attempted to propagate a rule where, without getting into the details, they couldn't demonstrate that the benefits exceeded the cost.

Bill Hulse:

Congress took that view. We took that view. We sued. Congress intervened with a Congressional Review Act resolution and it was overturned. So there is a record of not just the current actions of the CFPB, but really previous directors as well, just a few years ago that have overstepped their authority.

Alan Kaplinsky:

Yeah, that was Director Cordray, who was involved in that one. Okay, well, let's get to the current campaign. I think it was at the end of June, the chamber launched a campaign to rein in the CFPB. Can you tell our listeners what were the specific actions taken that contributed to this decision?

Bill Hulse:

So there's no single action taken by the CFPB that really said, this is the time we need to act, or this is why we needed to act. But we really feel like in the last eight months, since Director Chopra was sworn in, that the CFPB has turned down a path in terms of how it's talking about the financial industry, how it's engaging the public, and the tools it's making use of to affect policy making.

Bill Hulse:

The CFPB's ongoing disparagement of the financial industry has been pretty alarming. We're constantly frustrated by the CFPB's assertion that the industry is somehow not competitive, especially given they don't really provide any data supporting these findings. Our data shows that the retail and commercial banking sector has in fact actually decreased on concentration in recent years.

Bill Hulse:

Furthermore we're concerned that they're using this idea of, by the lack of competition as a premise to justify or engage in policy making, this is far afield from the CFPB's mandate. Sure, the statute says that the agency should promote competition,

but this does not mean using policy tools to reshape businesses or reshape markets to what is otherwise already functioning really well today.

Bill Hulse:

I'm sure everyone's aware of the agency's use of the term junk fees. These are fees that are legally permissible and well disclosed based upon regulations that the CFPB has had a role in promulgating and enforcing over the years. And so, to turn and come in and tell the industry that the fees that they're charging are somehow junk, when consumers have a number of choices to go and pick a bank or pick a non-bank credit union, et cetera, to go get their products and services is really just not the right way to be engaging the industry and really makes us recoil and think that the agency isn't interested in working with us and that's where we really want to be.

Alan Kaplinsky:

Right. So what are the primary components of the chamber's campaign, Bill?

Bill Hulse:

Yeah. So I'll start off by saying, so we're not proposing to stop the work of the CFPB, far from it. Our campaign is about getting to CFPB back on the right track. It is an important mandate and we believe fair enforcement of the law gives consumers the confidence to participate in the regulated financial system.

Bill Hulse:

I'll say, to that effect, we're constantly providing input to the CFPB's work. On average, I estimate we send maybe a dozen letters to the agency every year, including on almost all of its major rule makings, but this campaign is a little bit of a different tack. We'll do the substantive policy work and do the conversations with the agency to provide them the technical input that they need, but here we really want to bring this conversation out into the open. We really want the broader public to understand that there needs to be more scrutiny of the agency's actions and how they're going about policy making.

Bill Hulse:

So that's in the court of the public opinion, but we also believe it might be necessary to take these conversations to the courts as well. So our campaign has three primary components. You can read about them in detail, on our website, [uschamber.com/finance](http://uschamber.com/finance).

Bill Hulse:

I'll start off by mentioning that the chief council of the US Chamber's Litigation Center sent two letters to the CFPB dealing five concerns that we qualify as unlawful activity, or at least legally dubious. The first letter expresses our concerns with the agency's changes to its examination enforcement manual that defines discrimination and disparate impact as unfair under the agency's UDAP authority.

Bill Hulse:

The second letter raises four other issues. We take concern with the CFPB policy fellowship program, given we believe it's circumvent civil service laws and executive branch guidance that prohibits preferential hiring and conflicts of interest. We take issue with the bureau's revisions to its rules of practice for adjudication procedures. We take issue with the bureau's effective repeal of its 2013 decision not to publish a final decision or order establishing supervisory authority, given it doesn't adhere to the agency's obligations on the Administrative Procedure Act. And finally, we take strong issue with the bureau's interpretive rule, claiming that state attorney generals have the authority to enforce the CFPA.

Bill Hulse:

We also submitted a number of FOIA requests that we believe will shed some light on the current decision making processes of the CFPB, and requests that we believe will turn up information that support our claims about potential unlawful activity by the CFPB. For example, these FOIA requests cover things like communications with state attorneys general, the establishment of the agency's policy fellowship program, a request for the CFPB's procedures and operating manual, given we hope that'll shed some light on the decision making process at the agency that has become increasingly opaque.

Bill Hulse:

We're also interested in information too, regarding Director Chopra's role in, I'll call it the change in leadership at the FDIC at the end of last year, related to the dispute about issuing a proposed rule or RFI regarding bank mergers and acquisition policy.

Bill Hulse:

We're also interested in too, in changes to the decision making process around the changes to the CFPB's examination procedures for UDAP that I mentioned. We also want to know how they're coordinating with the White House potentially or coordinating with FTC potentially as it relates to implementing the president's July 2021 order on competition.

Bill Hulse:

And finally, I'll quickly mention too. We're running ads on this as well. We want the broader American public to understand that we believe overreach is happening here by their government, and that while we do assume that the CFPB has their best interest at heart, that this type of overreach does have unintended consequences, that'll make it more difficult or more expensive for them to access the consumer financial products and services that they have today.

Alan Kaplinsky:

What type of media campaign is ongoing? Does it involve television, is it the internet, in general?

Bill Hulse:

Yeah. In general, we are focused on running digital ads right now. So these are things you might see pop up on social media, around various websites. We found this to be very effective for reaching the broader American public. I'll say too, we've just had increased engagement with the national media as well. We have been speaking with a number of major media outlets within the beltway too. So I've probably spoken to maybe 10 or 15 reporters in recent weeks just to make sure they understand what's actually happening behind the scenes at the CFPB, and to better understand our frustrations and concerns.

Alan Kaplinsky:

You may have another issue Bill to put into your bag. I don't know if you saw the article in the Wall Street Journal a few days ago about, right now it's a rumor, but I've been hearing it from so many people that I tend to believe that there is something going on there, and that is a lot of people have seen how individuals have been defrauded in their use of pay to pay, personal to personal websites like Zelle that they use to pay one consumer to another.

Alan Kaplinsky:

And the fraud that occurred under existing law is not the responsibility of any of the banks that are involved. It was something that years ago when the EFT Act was enacted and where the regs were first issued by the fed, it was decided that it would be unfair to saddle the banking industry and required them to indemnify the consumer for that type of fraud.

Alan Kaplinsky:

But apparently there's something going on at the CFPB, where they are trying to figure out a way in which they can change the existing law and the existing regulation. And if that's what they plan on doing, I say they better do that through the standard

APA procedure of notice and comment and not do it in the stealthy way in which they have promulgated other directives, like the one you mentioned, where they amended the examination manual to make this monumental change to the definition of UDAP.

Bill Hulse:

Yeah, no, we're definitely following those rumors too. And the feedback I have gotten from our member companies is that if guidance or some sort of policy change is issued, at least in the way it was described by the Wall Street Journal and the rumors swirling in Washington, that financial institutions would have to cover the cost of otherwise legitimate transactions that are made to fraudulent actors, that this product would become almost impossible, if not impossible for them to offer.

Bill Hulse:

Let's make clear about what we're saying the fraudulent activity is me. As a consumer, someone reaches out to me and says maybe they're my grandmother, for example, who needs money. And I say, oh, no I really want to help out my grandmother, of course, and so I send money to that person and it turns out it is not the person that is purported to be. That's a legitimate transaction that I've initiated, but me as a consumer, I have the responsibility to understand who's on the receiving end of that money.

Bill Hulse:

I think about if you were to take this transaction outside of the regulated financial system, what if I were to drop cash off at an address that is for the exact same purposes, who would be held liable there? Of course, it's me. I made the decision to take money out and drop cash somewhere.

Bill Hulse:

But a lot of complicated policy questions here, and I don't want to presuppose what the CFPB is considering. And that's why, again, I think, as you mentioned, if we're going to make a significant policy change here, let's do notice and comment rulemaking.

Bill Hulse:

Let's put all the issues out in the public, let's understand what the pros and cons are. I'm sure there are a lot more considerations than what even you and I just mentioned here in the last minute, and let's have the public debate on it. That's what notice and comment's for, and really, that's how you reach the best outcomes that have the broadest buy-in.

Alan Kaplinsky:

I don't know if you saw the open letter, I wrote to Rohit Chopra on our blog recently, where I said to him, stop using all these various vehicles that you're using that enable you by fiat and without any input from any of the stakeholders to decide major issues that apply to the industry and consumers. And I gave examples of what I was talking about.

Alan Kaplinsky:

And they issue interpretive letters and no action letters and compliance sandbox orders and advisories, changes to the exam manual, but the one thing that they haven't touched is a tried and true vehicle that existed with the federal reserve board, and it's fully available to the CFPB, that is the use of the official staff commentaries, which do require notice and comment.

Bill Hulse:

I would say, if we could have a more transparent policy making process out of the CFPB, it's not just that the business community would benefit here, we think consumers would benefit as well. If there are opportunities to discuss understandings

of the law and interpretations of the law without just immediately, and erratically imposing new legal obligations on companies, that's for the best.

Bill Hulse:

And I think the other consideration that is left out of this debate a little bit too, is companies are constantly investing in new products, new marketing, trying to find ways to better serve customers, trying to find ways to reach new consumers, especially underserved communities. This isn't always easy to do, but if they have to run the risk, if they have to consider in the back of their head, that the CFPB might change the law next week or next month, without any sort of notice, it's impossible for them to make these investments. It's just too risky and they're really just going to be focused on today instead of looking forward and growing.

Alan Kaplinsky:

And in particular, I mean the point you make is even more important by virtue of the fact that Rohit Chopra may not be in office any longer than the term of President Biden. And it's possible, we may have a Republican president. If we do, he will be gone and there'll be somebody else there, and that somebody else with a stroke of a pen could revoke a lot of the so-called directives of Director Chopra.

Bill Hulse:

Yeah, absolutely. I mean, I think this is fundamentally, it's an issue with the structure of the CFPB, that especially when you have changes in political party, that you're going to have someone comes in, who has maybe a radically different view, and they are empowered to make a lot of significant policy changes, at least in the short term. But will these things stand the test of time? Probably not.

Bill Hulse:

And so I do wonder too, if this is the type of legacy that any CFPB director would want, right? They don't want to just be able to say they made just short term changes. They really want to be able to say they did some good that's lasting for the long run. And again, here rulemaking is really what'll accomplish that most effectively.

Alan Kaplinsky:

So what kind of a response did you get from Director Chopra?

Bill Hulse:

So I'll say we haven't gotten much of a response. Our most direct outreach to them was the two letters that came from our chief council and they have not been responded to. There was no deadline on the letters, but we do make some pretty specific asks in there about sharing information. And also, for example, too, rescinding the changes to their examination manual for UDAP.

Bill Hulse:

A spokesperson for the CFPB, put out a statement to the press characterizing our efforts as scare tactics. If the CFPB continues down the track it has been on the last six or eight months, then we do think the public should to some degree be scared. Business leaders are scared that they won't be able to meet the needs of their customers. This isn't a place where we want to be. They're also concerned they won't be able to continue to invest just like I had mentioned.

Bill Hulse:

So we're glad we have their attention. We want the broader public's attention here. And we do think they'll share some of our concerns once they have a better understanding of exactly what's happening and what this means for them.

Alan Kaplinsky:

Yeah. So, well, I can say, I got a nicer response to my open letter. I sent a copy of the letter directly to Director Chopra, and one of his aides responded back to me saying that my letter was thoughtful. Okay? So I'm doing pretty good.

Bill Hulse:

That's encouraging.

Alan Kaplinsky:

What I wanted to receive was yeah, your letter was thoughtful and we'd like to engage you and have more discussions about how we could use the official staff commentary. Maybe that will happen, but I'm not holding my breath, that's for sure.

Alan Kaplinsky:

So tell me a little bit more about your policy concerns with the CFPB's changes to its examination manual dealing with UDAP. And for our listeners who may not be familiar with UDAP, that is the provision in Dodd-Frank that proscribes unfair, deceptive and abusive acts and practices. So tell us a little more about that and why the chamber's singled out that issue.

Bill Hulse:

Yeah, absolutely. I think we could maybe devote an entire podcast to this issue. I think there's a lot of history around the CFPB's UDAP authority, the FTC's UDAP authority, given the ambiguity in it, but there's also a number of procedural issues here as well. So we're concerned with both the process and substance of the CFPB's change to the examination manual, so much so that we state in no uncertain terms, it is unlawful.

Bill Hulse:

Just to provide a little context, I think it was in March, the CFPB announced changes to its manual for basically for when you have an examiner go into a financial institution that's supervised by the CFPB, this is what they walk through with that company, with their compliance staff, et cetera, to say, are you adhering to the law? Do you have appropriate procedures in place, compliance mechanisms in place for that?

Bill Hulse:

But this isn't just applicable to companies that are supervised by the CFPB. This interpretation is theoretically applicable for enforcement actions against companies that are not supervised by the CFPB. So in this change to the examination manual, they say that discrimination in short can trigger liability under the ban on unfair acts or practices and accompanying this, there are statements that say discrimination has always been unfair.

Bill Hulse:

First of all, I want to be crystal clear that the business community supports the fair enforcement of existing non-discrimination laws, full stop. What concerns us here, what we take issue with here is that the CFPB is proposing to create new law and they're proposing to do so in a way where they're not even really going about the normal process we were just talking about for notice and comment for creating new law.

Bill Hulse:

Instead, they're just saying they're going to enforce the law in such a way that it has never been enforced before, or never even really been understood to be before. This is being done without any expressed authorization from Congress. This is also really being done in a way too, that's really inconsistent with supreme court precedent as well.



Bill Hulse:

So in our letter we are requesting that the CFPB rescind it changes, otherwise they need to justify why their changes are lawful. Congress separately authorized the CFPB to implement two anti-discrimination laws. One of these is the Equal Credit Opportunity Act. This basically covers extensions of credit for fair lending concerns. And this is for the provision of credit. And then you also have the Home Mortgage Disclosure Act, which essentially relates to the collection of mortgage data to ensure that there isn't any type of discriminatory activity.

Bill Hulse:

However, Congress has always recognized that unfairness and discrimination are very distinct legal concepts each with specific meanings and limited scope, and these concepts have never been interchangeable. The UDAP authority as described in Dodd-Frank doesn't even have any specifics about discrimination. It actually doesn't speak about discrimination at all.

Bill Hulse:

So we're really a little bit confounded by where the CFPB is drawing this interpretation from, and by applying this discriminatory conduct theory to its UDAP authority, it's going to provoke, or not going to provoke, it's already provoked a lot of confusion for consumers about their rights and regulated entities about their responsibilities.

Bill Hulse:

This is the type of legal uncertainty in the financial industry that makes it nearly impossible for them to be confident that the products and services they offer to consumers adhere to the CFPB's arbitrary and malleable definition of unfair. Really, I mean, this is just so much more difficult than that, right?

Bill Hulse:

So, as I mentioned, a lot of this might already be happening behind the scenes today. So the CFPB hasn't brought any sort of public enforcement action saying that a company is, on using its UDAP authority is acting in a discriminatory way. However, they might be going into confidential examinations with companies pointing to their examination manual and saying, do you have compliance procedures in place to ensure that you're not engaging in any kind of the discriminatory or disparate impact activity that we detail in our examination manual?

Bill Hulse:

If that's happening today, no one will know about it because all of this is confidential supervisory information, it's behind closed doors. And really, as we've talked about thematically throughout this podcast, making policy behind closed doors is never the best outcome.

Alan Kaplinsky:

Yeah. I want to add just one point to what you've been saying, Bill and that's the following. Very recently, I did a podcast that actually got released yesterday, was recorded last week and released yesterday, with Cary Coglianesse, who is the director of the Penn Program on Regulations. It's a program, an interdisciplinary program that Penn Law School has had for many years.

Alan Kaplinsky:

And Cary and I talked about a number of things and one of the things was my open letter to Rohit Chopra. And he made a point that I was completely unaware of and I'm looking into it now a lot more carefully, and that is, there have been empirical studies that have been conducted that have shown that when the industry has an opportunity, has notice of a change in a regulation or the law, and is given an opportunity to comment on that proposal, even when the agency doesn't adopt the industry's comment, that the compliance level for people who have an opportunity to comment is much higher than the situation where a regulation is issued by fiat, unilaterally by the head of an agency and there's no opportunity to comment.

Alan Kaplinsky:

And I thought that was really interesting because when you boil it all down, isn't compliance what the CFPB ought to be concerned about, that they ought to make sure that whatever they're doing in this area to change the law or make new law, that companies are complying with it. And it's shown that there's less compliance, if you don't go through notice and comment.

Bill Hulse:

I definitely look forward to going back and listening to that podcast, because that sounds like an excellent point. And I'm not sure what the driving factors of that might be, but I think just ideologically that for me, at least that goes to our democratic form of government, right? You believe in something, if you have the opportunity to engage in it. So for example, my right to vote means that whoever is elected for whatever office, I believe I've had my opportunity to have a say in that and that person is the elected person. That's how this country was established.

Bill Hulse:

But I even think from a business compliance perspective, really getting buy-in from the company about what the rules of the road are, are the exact same thing. And so when you go through that process, you don't just get the compliance, people engaged about what the rules are for complying, you get the business leaders engaged about why we need to comply in this way, you get the policy team engaged on what is the CFPB trying to accomplish.

Bill Hulse:

Because I think at the end of the day, the goals of the CFPB and the goals of the business community are nearly identical, right? And this is to protect consumers from unlawful activity, but really more importantly, to get consumers, to have the confidence to engage in the market for consumer financial products and services. Banks and other financial entities don't win, if consumers are unwilling to do business with them. And that's not a direction we want to be going, so I really appreciate that point.

Alan Kaplinsky:

Right. So getting back to the chamber's initiative, you also raised some pointed concerns with the bureau's changes to administrative adjudication procedures. You've sent two separate letters to the CFPB on this topic. The first letter raises policy issues, and the second letter raises several legal issues, including suggesting that the agency's changes could be unconstitutional. Why are you so concerned with the CFPB's changes to these administrative adjudications?

Bill Hulse:

Yeah. So first and foremost, I think we do believe there is a role for administrative adjudication in some cases, but this shouldn't be used for major considerations of the facts of the case or major considerations of the law. Not everything needs to be adjudicated in federal court, but the changes that the CFPB has made here, again, without any opportunity for input for the public, they just made the changes and said, let us know if you have any ideas and we'll consider them, which to our knowledge, they haven't, is a little bit concerning.

Bill Hulse:

Actually in this case, they didn't even issue a real press release. And this is coming from an agency that has actually been very keen to issue a lot of press release and blog posts. I'll give them that, they're very active in that space. So what exactly is happening behind the scenes here? And that's what we're trying to figure out.

Bill Hulse:

And the changes that they have made to their administrative adjudication, which again, they haven't really used that often in the past, they don't have much track record here, is that they're really stacking the deck against companies. They're making it much more difficult for these companies to defend themselves in administrative adjudication. They're also doing a lot to

empower the director to intervene throughout these cases as well. Additionally the CFPB is making it more difficult for these companies to appeal to Article III federal courts. They institute a number of procedural requirements that make it more difficult for these companies to appeal.

Bill Hulse:

From a policy perspective, we're concerned that the CFPB will attempt to use this administrative adjudication forum to establish new interpretations of the law. This goes back to a lot of what we were talking around with UDAP for example. Director Chopra had some testimony before Congress, I believe it was this spring, but it might have been last fall, stated that his view for clarifying the CFPB's UDAP authority is to establish a durable jurisprudence. One way for him to do that, theoretically might be administrative adjudication, but here he would be doing it in a forum, where he would have really all of the say in terms of what this jurisprudence looks like.

Bill Hulse:

And so from a policy perspective too, you have a director that'll be in office presumably for about four years or so, when you have a new director come in, is this jurisprudence going to stand, or are we going to have the law changed all over again? And so this is really why we think it's important in many, if not most cases to be making use of Article III federal courts. This is a constitutional right for defendants and we think companies would be better served here in most cases.

Bill Hulse:

I'll finally mention too, that we've taken issue with the SEC's use of administrative adjudication over the years, so much so that we have been longtime supporters of legislation in Congress to provide for a right of removal for defendants in the SEC's forum into federal courts. We're similarly working with Congress now to provide a very similar sort of right of removal from the CFPB's forum.

Bill Hulse:

On the constitutional questions, this is really been getting a lot of attention in recent years. It's really been a major topic with scrutiny, both of the SEC and the CFTC. Effectively, the question that is at hand here is if administrative law judges are constitutionally appointed and whether or not the separation of powers has been violated.

Alan Kaplinsky:

So I share all of the concerns that the chamber has, Bill, about using administrative proceedings, but I don't think, at least in the near future, we're going to see any of that happen. And I think it's going to be mostly because of concern about the fifth circuit opinion in the Jarkesy case, where the administrative procedure used by the SEC was held to be unconstitutional by a three-judge panel of the, I think it was the fifth circuit. I hope I got that right.

Alan Kaplinsky:

And for a number of reasons, but I think most notably the fact that it ran afoul of the important provision of our US Constitution that confers a right to trial by jury in most situations. And I think that the logic of that opinion applies point by point to the CFPB as well. And I understand that a petition for rehearing en banc has been filed in that, by the SEC. That may happen, and then it's conceivable that the US Supreme Court could take up the issue.

Alan Kaplinsky:

And the US Supreme Court, I think fortunately the way it's lined up right now, there's a lot of suspicion of the administrative state. And I think that the odds are pretty strong that these administrative hearings, at least in the way that the CFPB was conducting them is going to be held to be unconstitutional and it's going to be the end of it altogether, we'll have to wait and see.

Alan Kaplinsky:

So let me raise another question for you, Bill. The CFPB used a similar approach, a procedural rule to change policy for releasing information to the public about risk determinations that it makes to supervise certain financial institutions. What are the implications for businesses of this change of policy?

Bill Hulse:

Yeah, thanks for bringing that up. So for those of you who aren't familiar with the entities that the CFPB supervises, I'm going to briefly summarize, but effectively they supervise all depositories over \$10 billion in assets. And then there are a number of larger market participants they supervise subject to rulemaking.

Bill Hulse:

And then finally, there's this third category of institutions that they have the authority to supervise, we don't dispute that, that are based on a risk determination, but here's where it gets a little fuzzy is exactly what is the standard that the CFPB is using to establish risk.

Bill Hulse:

So within the statute, I believe there's some considerations around complaints that the CFPB might receive about a company, but after that, it's pretty wide open about any other considerations or material or information the CFPB might deem appropriate.

Bill Hulse:

So the CFPB finalized this rule in 2013, and I think just maybe about six months ago, the CFPB put out a press release saying they are going to be revisiting this, quote, "dormant authority." Well, authorities already been there, but what they did via this procedural rule change is to make a determination that when they make a decision to supervise these non-banks that they believe need to be under their purview, that they may release the risk determination or order.

Bill Hulse:

So in other words, they're going to tell the public why they think this company is risky and why they are supervising it by the CFPB. I believe there's an opportunity in there for that company to object, but at the end of the day, the CFPB makes it very clear that this is subject to the decision by the director and that they don't really want to put any standards in place for when they would make such a determination about releasing this. By the way, is confidential supervisory information, which we talk about in a way it should never be released.

Bill Hulse:

Anyone who deals in this business of compliance knows why this is the case is because there should be a strong supervisory relationship that's built on trust between companies and their regulator. So from a policy perspective here, what does this mean?

Bill Hulse:

Effectively it means the CFPB has unilaterally granted itself the authority to name and shame companies. The CFPB is going to come out and say, this company is risky, here are some thoughts for why, and that we want the entire world to know it. I think the idea here is to have consumers not go to that company. Whether or not the company is actually risky, again, are we going to have the market's say here, or are we going to have a unilateral determination by the CFPB that is made behind closed doors?

Bill Hulse:

There are a lot of knock-on effects here too, right? So think if you're a company like, okay, what if you're that company's near market competitor, you have very similar products or services, what is the public going to think about you when you're adhering to the law and following all of the regulations you're supposed to be?

Bill Hulse:

I'm going to take it a step further. What if you are a, for example, highly regulated bank that is subject to supervision by the CFPB, and they're making a determination about a company that offers a specific product, or what if you happen to be partnering with this company? What does that mean for you, and what does that mean for when your examiners come in and say, why are you doing business with this company the CFPB has deemed to be, quote-unquote, "risky."

Alan Kaplinsky:

Can you expound on the APA issues that you've raised with the CFPB?

Bill Hulse:

So I think the legal concern here is pretty cut and dry. In 2013, the CFPB via notice and comment rulemaking considered and affirmatively decided against releasing risk determinations to the public. Again, they used notice and comment rulemaking to reach this conclusion. If it used notice and comment rulemaking to issue a rule then, it needs to use notice and comment rulemaking to issue a rule now. That's it. And so we absolutely think this procedural rule is potentially subject to an APA challenge, and it's something we're taking an extremely close look at.

Alan Kaplinsky:

Yeah. It is outrageous, Bill, that before the bureau has even done an examination of a company, that it should declare that this is a risky company, and we're now going to start supervising it. It's sort of like you're guilty until proven innocent. I mean, it's just totally contrary to the way things are done in our country, and in particular, in the banking industry, where what happens in bank examinations is to be kept completely confidential.

Alan Kaplinsky:

So a couple of other things before we bring our podcast show to an end, the CFPB has been very public about encouraging state attorneys general to enforce consumer financial protection law. And they issued an interpretive rule very recently in which they seek to clarify the scope of the state's ability to enforce federal consumer financial protection laws. And they got it all wrong, didn't they, Bill?

Bill Hulse:

We don't really know where they got their interpretation from to be clear. So it's never been understood that the Consumer Financial Protection Act authorizes the states to broadly enforce all provisions under the act. What has been understood is that the states have the authority under Section 1042 of Dodd-Frank to enforce prohibitions created by Dodd-Frank itself, i.e., the UDAP prong, unfair, deceptive, abusive acts of practices, but not to enforce other statutes. Think the Truth and Lending Act or the Fair Debt Collection Practices Act.

Bill Hulse:

We really aren't sure necessarily what this interpretive rule means either given it's only an interpretive rule, but it's theoretically trying to empower the states to enforce laws where they don't have the authority to do so. I don't know of any cases where they've tried to yet, but I think it's certainly something, like a legal question that's lingering out there and something where the chamber of commerce would take issue.

Alan Kaplinsky:

Yeah. And we blogged about that, Bill, on our Consumer Finance Monitor blog and pointed out the same thing that you did, that what they put in there, they didn't read Dodd-Frank very carefully because clearly state attorneys general can't enforce the federal consumer financial laws, unless, there's two situations where they can do it, unless the particular federal consumer financial protection law authorizes state attorneys general to do it, or sometimes a state will have a mini Truth and Lending Act, or it will have a statute that in a sense incorporates by reference the federal law and gives the state attorneys general the right to enforce that state law. But yeah, they got it all wrong.

Alan Kaplinsky:

So the final question I have for you, Bill, is what's next from the chamber? There seemed to be in the letters that were written, some maybe veiled threats of litigation, maybe not so veiled, and I'm wondering what's the plan here.

Bill Hulse:

So this isn't a flash in the pan. Maybe you can have me back on in six months or a year, and we can talk about all of the work that we've had to continue to push forward here. But I imagine this is going to be a major focus for the chamber. We mentioned all the FOIA requests that we have filed. We hope this sheds some light on some of the concerns that we're raising, just about the opacity about how the agency is operating, but also maybe provide some information too, about the assertions we make about the agency's violation in the law. This could take a few months. I understand from the timeline from other stakeholders that have submitted, it's taken up to six months recently. We're working through that process right now at the CFPB's FOIA office.

Bill Hulse:

There's also the potential too, that we might have to litigate regarding their non-responsive VistA FOIAs. The US Chamber of Commerce recently sued the CFPB for not responding to what we thought were very reasonable and lawful requests about requests for information there.

Alan Kaplinsky:

Wasn't that the FTC, or was it CFPB?

Bill Hulse:

Yes. Sorry. Yeah, the chamber sued the FTC a couple weeks ago and it's not something we've decided to do at the CFPB yet at this point. We really do think we can hopefully work through getting the information we believe that they're obligated to provide.

Bill Hulse:

But I'll also mention too, I think it's very likely we'll submit some other additional FOIA requests as well. Since announcing our campaign a few weeks ago, we've had a number of stakeholders reach out to us about their concerns with the CFPB, both in terms about, again, the opacity with how the CFPB is operating, but also the concerns of some specific matters. That's not something we'll see in the next couple weeks, but something that we know we are thinking about doing probably later this year.

Alan Kaplinsky:

Yeah. Aside from the FOIA requests and litigation that may ensue because of their lack of responsiveness, what about separate litigation challenging what they've done with amending the exam manual under UDAP?

Bill Hulse:

So the letter that our chief litigator sent to the CFPB regarding its changes to its examination manual that reinterpret or attempt to reinterpret the bureau's UDAP authority is extremely important. We use the words that the agency's actions are unlawful. I think we're very intentional in a choice of our words there. We are very intentional with the legal arguments that we detail in that letter. We're very intentional with some of the precedent from the supreme court we detail in there as well.

Bill Hulse:

I don't want to get ahead of ourselves in terms of us making a determination here, but I do think it's fair to say that we're actively consulting our member companies about their concerns here, and hopefully something we can reach a decision on in the short term.

Alan Kaplinsky:

Yeah. Well, let me add just one other thing, and I'm curious whether the chamber has looked into this issue. It really became important when a couple of months ago, I don't remember the exact date, five judges on the fifth circuit court of appeals in a concurring opinion in the All American Check Cashing case versus the CFPB, they concluded that the CFPB was unconstitutionally created by virtue of the fact that it received its funding from the federal reserve board or federal reserve banks, and was not subject to congressional appropriations. And in a very scholarly opinion written by Judge Jones on the fifth circuit, the reasoning is very, extremely compelling that the CFPB, it needs to be subject to congressional appropriations and the way it's structured now is unconstitutional.

Alan Kaplinsky:

There's yet to be a determination of any appellate court, where it was the holding of the court, and of course the supreme court hasn't looked at the issue yet, but if I were the CFPB, I'd be scared to death of what might be coming down the pike in terms of whether they've been constitutionally created.

Alan Kaplinsky:

And unlike the constitutional problem they had in the Seila Law case, where all that you had to do was strike the for cause language out of the language of Dodd-Frank, that gave the president the right to remove the director. Here there is no severability clause. And so if it's determined the CFPB is unconstitutional, you can't strike its funding. It's got to get funding somewhere. And it just seems to me, that's another issue that it's got to get resolved in the future.

Bill Hulse:

It's an extremely important issue, and I'm glad you raise it. We are very aware of Judge Jones's opinion here. I'll say it too, as you kind of alluded to, very colorful opinion, wherein he effectively casts or describe the current structure of the CFPB as monarchical in a sense, and you have a king that is running the agency. Not talking about the current director, I'm just talking about given the way the agency is structured, it is not aligned with the American form of government.

Bill Hulse:

And so this really brings us back to where I think we were in the top of the podcast where I was talking about how the US Chamber of Commerce has advocated since day one, really day zero for the CFPB to be subject to congressional budget oversight through appropriations from Congress. We think this is a policy remedy that would address not necessarily every concern I've raised today, but certainly quite a few of them.

Bill Hulse:

I also think too, it would really give a lot more credence to the actions of the CFPB, if it is subject to a little bit more political accountability. We really want to be able to believe in Congress and the American people really want to be able to believe in

that the actions that are being taken there have broad buy-in from across our government and not just from one unilateral actor.

Bill Hulse:

On that case, from the chamber's perspective, again, we want the CFPB to be subject to congressional appropriations process. We do want it to have funding, so it can enforce the law. This gets back to my point, too, about giving consumers the confidence to operate in the market and to give them the confidence to know that someone is looking out for their best interests and really, most importantly, making sure that bad actors aren't out there trying to take advantage of individuals.

Bill Hulse:

But it's an interesting case and something that I think we should probably keep a close eye on. As I understand it, over the next few months, this could be a really big issue that Congress is confronted with relatively soon. We could have a situation in which the CFPB exists, but it can't do maybe anything. If it doesn't have funding, as I understand it, I don't think they are allowed to turn the lights on, they can't lift a pencil to do anything. And so we might find ourselves in a very interesting situation.

Alan Kaplinsky:

Yeah, no, I agree. And then it's going to be very interesting to see if a bipartisan group in Congress is able to get together and restore funding through congressional appropriations. And I guess they'd have to revalidate all the actions taken by the CFPB for its 11 years of existence. Whether that legally can be done or not, I'm not sure.

Bill Hulse:

That's a great question too, and I should have thought to dig into it. If that decision is reached where the agency's actions over the last 11 years are invalidated, this is the type of uncertainty too, that the business community is not interested in, right? We want to know what the rules of the road are. Regulated companies have been following these rules since they've gone into place some 10 years ago, some a little bit more recently, and to cast all of that into doubt about what the rules are going forward isn't a scenario where we're looking to reach. And so it's going to be a tricky course here over the next three months maybe, or a year.

Alan Kaplinsky:

You have that right. And by the way, I mentioned the All American Check Cashing case, that may not be the vehicle that ultimately resolves this constitutional issue because the judge in that case, in the district court ordered the parties to go to mediation. And so a magistrate judge is going to try to work out a settlement. If I were the CFPB, I think I'd settle that case lickety-split.

Alan Kaplinsky:

But there is another case in front of the fifth circuit. It involves the CFSA versus the CFPB and it's a challenge to the bureau's payday lending rule. And that has this constitutional issue in front of it, and we're waiting to see what the fifth circuit does with that case. That may very well decide the issue. And if they decide it's unconstitutional, then probably a pretty good chance that the supreme court would end up hearing the case the way they heard Seila Law. And I wouldn't want to bet the farm and the dog and my house on which way they would come out. I think it's very uncertain.

Alan Kaplinsky:

So Bill, thank you very much for being on the program today, and I wish you good luck as you continue to navigate your way through what's going on at the CFPB. Certainly hope that the bureau, rather than casting aspersions on the chamber's motive, if they would sit down with you and talk to the industry and talk also, those talks ought to involve the bank trade associations as well, because it doesn't help anybody for the agency to be at war with the companies that it regulates.



Alan Kaplinsky:

So thank you, Bill. I want to thank all of our listeners today for downloading the program. And with that, I hope everybody else enjoys the rest of their day.