Consumer Finance Monitor (Season 7, Episode 48): Post-Election Insights: Impacts on the Banking and Consumer Financial Services Industry

Speakers: Alan Kaplinsky, John Culhane, Colin Carr, and Ian Katz

Alan Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor podcast where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. This is a weekly podcast show brought to you by the Consumer Financial Services Group at the Ballard Spahr law firm, and I'm your host, Alan Kaplinsky, former practice group leader for 25 years, and now senior counsel of the Consumer Financial Services Group at Ballard Spahr, and I'll be moderating today's program.

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Today's podcast episode is a repurposed webinar that we did on November 12th entitled, Post-Election Webinar: The Impact on the Banking and Consumer Financial Services Industry. At the time of recording, we did not have the final tally for the House or the Senate, and so some of the comments that were made today may not align with the final results. I think to start this webinar using a very time-worn and cliche that bores the heck out of me, but I have to say it, and that is elections have consequences. But in this case, I believe that they are going to have massive consequences in a lot of different areas, but particularly on the banking and consumer finance industry.

So let me, without further ado, let me introduce our presenters for today. I want to first introduce the person who's going to be our first presenter and that is Colin Carr. Colin currently serves as Vice President of Congressional Affairs at the Consumer Bankers Association, or as I like to refer to it, the CBA. Prior to taking this role, Colin worked for Congressman Barry Loudermilk as deputy chief of staff, legislative director, and legislative assistant. Colin also served as a district field representative for Congressman Phil Gingrey. He graduated from the University of Georgia with a BS in political science. Colin is standing in today for Sam Whitfield, who was supposed to be on our program, but unfortunately took ill and he just was unable to make it today, and fortunately, Colin is able to stand in for him.

Let me also introduce another very special guest, somebody I've known for a long period of time, and that's Ian Katz. Ian is the managing director of Capital Alpha Partners. He joined Capital Alpha in 2016 and he oversees the firm's financial institution practice. He brings more than 25 years of experience as a journalist to his Capital Alpha practice. Most recently at Bloomberg, Ian covered financial regulation and market issues, the Federal Reserve, and the Treasury department. He also was a reporter for the series Wall Street's Toxic Exports, which was a finalist for a Gerald Loeb Award in 2019, and he was on a series that won an Overseas Press Club Malcolm Forbes Award in 2008. He was based in South America for a period of 10 years as Businessweek magazine's Brazil bureau chief. He's also vice president of media for the online financial services company, patagon.com. And if you need to reach Ian, ask him any questions at any time, you can reach him... Well, I'm going to let him tell you when he's on because I don't have his email address handy.

So let me tell you what we're planning on doing today in terms of our agenda. We're going to first go to Colin, and he's going to talk about the outcome of the presidential election, which will take no more than five seconds, the outcome of the Senate and the House elections, the anticipated Senate and House leadership, which is very important for the consumer finance and banking industries. He's also going to talk about the possibility of there being legislation that could affect the industry during the lame-duck session, which is continuing right now. And then finally, what the prospects are for bipartisan legislation during the 119th Congress, which begins next year.

After Colin is finished, then we will go to Ian who will talk about the possible new agency appointments that might occur at the CFPB, FTC, OCC, and FDIC. There will be vacancies available at all those agencies. And then we'll finally go to John Culhane who will talk about the impact on CFPB final proposed and possible regulations and other written guidance and interpretive rules. And we will also briefly discuss, all of us will briefly discuss what is likely to happen with respect to the FTC, OCC, and FDIC with respect to rules that have already been issued or other important issues on the agenda.

So with that introduction, it's my pleasure to turn the program over to Colin.

Colin Carr:

Thank you very much, Alan. Thank you for having me. And let me sub for my boss, Sam, here today. I will go through the election results here to start with. Obviously everybody knows the outcomes, but I will try to tell you some interesting little tidbits that maybe you have not already heard.

Of course, former President Donald Trump won all seven of what are considered the swing states, Georgia, North Carolina, Pennsylvania, Michigan, Wisconsin, Arizona, and Nevada. His largest margin of victory of those states was in Arizona where he won by 5.6%. The smallest margin of victory was in Wisconsin where he won by just 0.9%. The electoral map was the same as the map as it was in 2016 with the exception of just one state, and that was Nevada, which voted for a Republican for the first time since 2004, and it was also the first time since 2004 that the Republican candidate won the national popular vote. Trump is currently ahead of the popular vote count by about 3 million votes.

Interestingly, former President Trump got roughly the same number of votes that he did four years ago, just about 1 million more this time than he did in 2020, but Vice President Kamala Harris got about 10 million votes fewer than President Joe Biden did four years ago, so there was a fairly significant drop in Democratic voter turnout.

Trump also improved his performance in every state compared to 2020 except for one, and that was the state of Washington. In every other state, Republican margin was better than it was in 2020. The state with the largest Republican margin was Wyoming, which voted 72% Republican, and the state with the largest Democratic margin was Vermont, which voted 64% for Democrats. Voters reported that their top concerns for the election were the cost of living and the border.

Former President Trump approved his performance among almost all demographic groups. His biggest gains were with Hispanic, Asian, and Black voters, but he performed slightly worse than he did four years ago with voters 65 years old and older, as well as white college-educated women were trending more for Democrats this time. So that's the quick overview of the presidential election.

In the Senate, Democratic Senate candidates faced a very challenging Senate map this time. They had to defend a number of seats that were in states that are typically won by Republicans, and Republicans capitalized on that and were able to flip a net of four seats and Democrats did not flip any seats that are currently held by Republicans. The four states that Republicans flipped were West Virginia, where incumbent Senator Joe Manchin did not run for reelection, and that was a fairly easy win for Republicans with his retirement. And then Republicans defeated three other incumbents in other states. Those were Montana, Ohio, and Pennsylvania.

Interestingly, Democrats were able to defend several seats in states that the Republicans won at the presidential level because the Republican Senate candidates ran several points behind former President Trump in the vote totals. Those were Arizona, Michigan, Wisconsin, and Nevada. The Democrats were able to defend those seats and win by very narrow margins, even while Republicans won those states at the presidential level. So it looks like Republicans will have a total of 53 Senate seats, improving from their current number of 49, and then heading into the 2026 midterm, there will be a number of seats that Republicans will have to defend during the next midterm election.

The House of Representatives, as usual, has taken the longest for the vote count to be completed because a number of races in California and Arizona are very, very close, and those states typically take longer to finish counting their total ballots after the election. But as far as members who were engaged in financial services policy issues, there were about a half a dozen members of the House Financial Services Committee, five Republicans and one Democrat, who were in competitive reelection campaigns, and all six of them won. I believe the closest election was for Congresswoman Young Kim, a Republican from California, but all of them were able to hang on.

Just as of last night, some outlets have begun calling the House majority for Republicans. I have done the math and compiled all of the different races that have been called by at least one outlet, so not all these numbers will be found on every single outlet's platform, but as of now, Republicans have 219 seats, Democrats have 213 seats, and there are three that have not been called by any outlet yet. Republicans currently have a small lead in all three of those races that have not been called by any outlet, so it looks like Republicans are headed for a very, very slim majority of 222 seats, which incidentally, is the exact same number of seats that Republicans have in the House in the current Congress. So incredibly, there is a net change of zero seats as far as the majority margin.

The House result was always expected to be very, very close for a few reasons. The 240-seat majorities that you saw during the 2010s decade, those days are over, and that's because after the 2020 census, both parties and state governments across the country generally drew the House district maps to be as close or as safe as possible for their party, and that means there's only about 25 to 27 House races or House districts that still have competitive elections. So that means for the rest of this decade at least, until the redistricting that will take place after the 2030 census, the majorities in the House are likely going to be very, very small, and that is the case in the current Congress and will be again next Congress.

An interesting historical fact is that it is extremely rare for the House majority to flip in a presidential election year. The last time the House majority flipped in a presidential election year was 1952, and that was the first election of Dwight Eisenhower for president, and the last time before that was 1888. So the historical odds of the House majority flipping are very, very slim in a time like this, but certainly not the case with midterm elections that will be taking place in 2026.

Next, I will get into how these results will impact financial services and banking policy on the legislative side and how the congressional leadership of both the House and Senate chambers and the relevant committees will impact that.

So first of all, in the Senate, with Republicans having a 53-seat majority, they are holding their leadership elections in the Senate Republican Conference tomorrow morning. There are three Republicans running for that position, and after those elections are finished, Republicans will move to select chairs for the various committees in the Senate. Senator Chuck Schumer of New York is expected to remain as the Democratic leader in the Senate.

For the Senate Banking Committee, the current Republican ranking member is Senator Tim Scott from South Carolina. He is expected to ascend to the chairmanship position unless somehow he was to be receiving an appointment to the administration, in which case Senator Mike Rounds of South Dakota is next in seniority to go for that gavel. As far as the Democratic ranking member of the Senate Banking Committee, given that current chairman of the committee, Sherrod Brown from Ohio, lost his reelection, the Democratic ranking member is expected to be either Senator Mark Warner or Senator Elizabeth Warren. Warner would have right of first refusal as he has seniority, but he will have to decide whether he would rather lead the Democrats on the Senate Intelligence Committee or whether he would lead them on the Banking Committee.

Moving over to the House side, House Republican leadership elections are expected to take place next week, but of course in January, the speaker of the house still has to be formally elected on the House Floor. All of the current members of leadership in the House of both parties are expected to run for reelection and likely win. Current Speaker Mike Johnson and Majority Leader Steve Scalise will likely stay in their places, as well as the minority leader in the House, Hakeem Jeffries from New York, and Katherine Clark from Massachusetts being the Democratic whip.

And then in the House Financial Services Committee, this is where there's the most uncertainty. With Republicans expected to be in the majority, the current chair of the House Financial Services Committee is not running for reelection. Republicans have a self-imposed limit of three terms that any one member can serve as the leader of a committee. The current chair is term-limited and he is retiring, so there's a race to replace him as the leader of that committee.

There are several candidates running. One is Andy Barr from Kentucky. He's the current chair of the Financial Institution Subcommittee and is closely focused on banking policy, particularly prudential regulation by the Federal Reserve as well as consumer protection regulation from the CFPB. Congressman French Hill from Arkansas is also running. He is a former banker, served in the Treasury Department, I believe, during the George H.W. Bush administration, started a bank in Arkansas, and has been very focused on capital markets as well as cryptocurrency and stablecoin issues. And then finally, Congressman Bill Huizenga from Michigan is running. He has been very focused on capital markets as well as oversight of the regulatory agencies.

On the Democratic side, Congresswoman Maxine Waters of California is expected to remain as the Democratic leader on that committee. So what sort of policy areas of focus and what direction that committee will take over the next two years of this Congress will heavily depend on which Republican wins the race to be the chair of that committee.

Bigger picture, as far as what we're looking at for the legislative agenda, I would say one of the top agenda items for Republicans in the House and Senate is going to be to extend the 2017 tax reform law. Many of the provisions and tax reductions from that law are set to expire in 2025 and there will be a big effort to extend those, and that is one of the very few pieces of legislation that can actually pass with a simple majority vote in the Senate. It's called a reconciliation bill. The meaning behind that is that Congress can pass a bill to reconcile the actual spending and tax levels of the government with the budget plan that Congress has adopted earlier in the year, and only one reconciliation bill can be enacted every year with a simple majority vote from the Senate, and Republicans are expected to use that in 2025 to extend the 2017 tax reform provisions that are set to expire.

In addition to that, there's a special legislative tool that Congress can use to reverse regulations and rules from regulatory agencies that were adopted near the end of the previous administration, and Congress can do that on a fast-track procedure with just a simple majority vote in the Senate. It looks as if any agency rules that were finalized, and the technical meaning of that would be finalized and published in the Federal Register and transmitted to Congress on or after August 1st of this year, would be eligible for the new Congress to review and pass legislation to reject or nullify those rules on a simple majority vote in the Senate. And I believe during the last time of unified Republican-controlled government in 2017, Republicans were able to use this to eliminate 13 or 14 regulations that had been finalized in the final months of the Obama administration in 2016. So that will be a top agenda item.

You could see Republicans in Congress use this to review the CFPB's overdraft rule or the Section 1033 rule pertaining to consumer data access, but the CFPB's rule on credit card late fees and other rules that precede August 1st roughly will not be eligible for a simple majority vote for repeal in the Senate and would require 60 votes. Those would be highly unlikely to get any support from Democrats, so those rules will not be able to be overturned in that manner.

In addition to that, Senator Tim Scott of South Carolina, who's likely to be the chair of the Banking Committee in the Senate, is expected to focus heavily on housing issues as well as access to capital for entrepreneurs and startup businesses. Republicans typically do a lot of oversight of the regulatory agencies in the administration, but typically that oversight is not as aggressive when the party of the White House is the same as the majority parties in the House and the Senate.

And then of course an enormous amount of time is going to be spent in the Senate holding hearings and confirmation votes pertaining to the White House's nominees to the administration. You may have seen in the news a number of nominees have been put out by the president-elect. Those are not official yet, of course, until the new administration takes office on January 20th, but I would say the vast majority of the Senate's time in the first one to two quarters of next year will be spent processing nominees to the administration.

Moving to the House agenda, similarly, extending the tax reform will be a major focus, but then will be dictated by whoever wins the chairmanship of the Financial Services Committee in the House.

As far as the lame-duck agenda, which is the time in Congress that is between the presidential election or the midterm election, and when the new administration takes office, that will be focused on extending government funding into next year, which is expected to be a short-term extension. And then finally, Congress will need to pass the National Defense Authorization Act, which sets policies for the military every year.

The biggest financial services item that could come into play there is that the sponsors of legislation pertaining to credit routing, it's a bill called the Credit Card Competition Act, every time a bill is moving through Congress, they try to attach that bill in the Senate, so that could be a major financial services item if it is successful and something that a lot of people are watching.

Alan Kaplinsky:

Before we go to you, Ian, let me just mention one other matter that could come into play because I've read recently articles saying that Trump is enamored of the idea of making recess appointments, which has not worked very well in the past unless you get the cooperation of the Senate leadership, and in this case, he's very likely to get that cooperation and he may be able to make recess appointments and they're good for a period of two years, as I understand it. So we may very well see that used as a way to accelerate the appointment of positions that require confirmation of the Senate.

The only other point I want to make is that, although I think it's pretty clear, that you only need a majority vote to confirm appointees of the president or people who the president nominates. You don't need the 60-vote margin, which is generally needed, as Colin pointed out, for any legislation except for reconciliation tax bills or resolutions under the Congressional Review Act. With that, let me turn it now over to Ian.

Ian Katz:

Thanks, Alan. I am going to talk a little bit about the regulators, who the next regulators may be.

First, I want to just make a couple of overarching points, and I think we'll talk a little bit more about this a little bit later in the presentation. You sometimes hear people say that regulators don't want to spend their time undoing what their predecessors did, that they'd rather initiate something themselves. That's traditionally true, but I think with the CFPB in particular, the Republicans and the financial services industry are so angry at Rohit Chopra and so firmly believe that he has overstepped his authority and danced all over the Administrative Procedure Act that I think the next director of the CFPB, regardless of who it is, will spend a lot of time undoing Chopra's rules, guidances, and proposals.

One other thing, there's also a lot of talk that the Trump version of the Republican Party has a strong populist bent and Vice President-elect JD Vance is cited as an example of that. And that's true, fair enough. So there is some risk to the financial services industry that someone could end up in these key financial regulation jobs who is not that industry-friendly, but I think that would be the exception rather than the rule. And my guess would be that there's probably something like a three-quarters or better chance that whoever ends up in the CFPB job will be sympathetic to the industry and to banks in particular. You can't take that to the bank, to pardon the pun, but I do think that probably is the most likely outcome, that you get industry-friendly regulators.

So now, I can take a look at a few of the specific places. At the CFPB, I think one thing to note, if you're not already aware to start, Trump can fire immediately at will the CFPB and the OCC heads on day one, and the most likely outcome there is that he will ask for their resignations, that they'll give it, and sometime on January 20th, you'll hear that they're gone, and you should hear almost immediately that there is an interim or acting head named. That would be the case at the CFPB and the OCC.

Now, at the CFPB, there's some names that have been bandied about, Brian Johnson, former CFPB deputy director during the Trump era, Todd Zywicki, who's a law professor at George Mason University. There's other names that are out there and there's... When you have this, I guess it's like a three-legged table with the OCC, the FDIC, and the CFPB, there's some names that get mentioned for more than one. Over at the FDIC, you have Jonathan McKernan, who's a board member at the FDIC. He could, because he's been confirmed by the Senate, could move over to one of the other positions like the OCC or the CFPB. Though I think longer term, he's actually more of a candidate for the FHFA where he was a counsel before and I believe he would probably be a top candidate to go back. That's Jonathan McKernan.

Travis Hill at the FDIC would be a leading candidate to be chairman of the FDIC, but he could also get shuffled over to one of the other agencies. And there's other names that have been mentioned. Keith Noreika and Brian Brooks, both former acting OCC chiefs, could go back there or maybe even to the CFPB. It's a possibility.

But the big-fish name that probably needs to be thrown out there because I think she could probably maybe not so much write her own job, but would probably be closer at the top of the list, is Michelle Bowman at the Fed who's won a lot of favor with Republicans being one of the lone voices along with Chris Waller at the Fed, but particularly on regulatory matters and some consumer matters has been outspoken. And if she wanted to go to the FDIC or OCC, she probably could.

Having said that, if I were to guess, I would say she's probably more likely to hang out at the Fed for another year and a half or so, and then take the Michael Barr job as vice chair for bank supervision, supervision and regulation, that Michael Barr has now. His term expires in July of 2026. She would probably be the leading candidate to replace him, if she wants that job.

Now, of course there's been some talk that Trump could try to fire Barr at the Fed. I can't rule that out, but I think it's not likely. I think at the end of the day, there's probably not that much juice for the squeeze there. Barr has not been able to get that much done. It probably makes more sense for the Trump administration to just wait him out till mid-2026. Besides, it would probably result in a messy lawsuit if they were to try to fire Barr. And the same could be said for Jay Powell, the Fed Chair. He's not going to step down on his own. I don't think Barr is going to step down on his own either. So you'd have a standoff there if Trump did try to fire one or the other. I lean toward thinking that he won't try to fire either of them, but as you all know, Trump isn't always very easy to predict, so you can't rule that sort of thing out.

Maybe I'll stop there for now, and Alan, if you have any questions you want to throw at me before we move on, go right ahead.

John Culhane:

Should we talk about the FDIC, Ian, a little bit?

Ian Katz:

Sure. So regarding the FDIC, we have this very tricky situation with Marty Grunberg, who has been beleaguered by the workplace, toxic workplace scandal there, and has said he would step down as soon as a successor is confirmed. His idea was probably that the Democrats would get through Christy Goldsmith Romero, who had been nominated by Biden, and had an actual confirmation hearing a few months back, but has not gotten a vote.

This is tricky because he could try to dig in his heels and stay. I lean toward thinking he will resign or announce his resignation because if he were to try to stay, he would be a minority on his own board. That's because the two of the five board members at the FDIC are the heads of the OCC and the CFPB, and those two people, as I mentioned a minute ago, can be fired on day one by President-elect Trump, and they almost surely will be. So it's a question of would Marty Grunberg really want to dig in his heels, stay at the FDIC when he can't get done what he wants to get done?

The other possibility is that Trump could try to fire him for cause because of the workplace scandal there. That would probably also go to court. Who knows where that would end up? The easy way that this could go is Grunberg resigns, and then Trump presents a nominee that would go through the Senate confirmation process, but this could get pretty weird and tricky if Grunberg decides that he's just going to stay hell or high water.

Alan Kaplinsky:

Ian, I don't know whether you want to comment on the FTC. That's a complicated area. I know it's not an area that you watch that agency that closely, but one thing, I guess, that's going to be pretty clear is that there will be a new chair appointed by the president at the FDIC and it will not be Lena Khan. She's got the right though to remain on the board of the FDIC because she has a, I think, it's a seven-year term. So she will be one of the Democratic commissioners.

Do you want to say anything more about the FTC?

Ian Katz:

Sure. Yes, so you're right. Though I don't specialize in the FTC, my colleague who covers telecom and tech, Robert Kaminski at Capital Alpha, he does, and I chatted with him a bit about this this morning. His baseline case, I wouldn't say it's a very, very strong conviction, but his baseline case is that she resigns, and of course her term expired in September, but in her position as chair, you could stay on until you're replaced. But his feeling is more likely than not, she resigns.

Now, as I said, not a super-high-confidence prediction. He does think there's a possibility that she decides to stay and stay on as commissioner and sort of gum up the works, throw sand in the gears, as whatever your favorite cliche is there, and she could do that. But of course, Trump will nominate someone to replace her and then she's out as chair and she could stay on as commissioner. Possible, but I think our thinking is more likely she steps down.

It was also explained to me that essentially, the way it works is there's not that much advantage to her staying on as a commissioner. You have a deadlock either way. And I should note that it's been reported, just to throw out a couple of names, Makan Delrahim, who was the head of the antitrust division at the FTC during Trump's first term, has reportedly talked to the Trump transition team about being chair of the FTC. He would be a fairly logical candidate. There's some other candidates out there, like the current Republican commissioners Melissa Holyoak and also Andrew Ferguson. There's someone who's been closely associated with JD Vance, Abigail Slater, who's been mentioned.

So there's quite a few names that are out there, but sort of similar to the FDIC, the FTC could get very interesting if the current Democratic leader there decides that they just don't want to leave and they're going to have to be dragged out kicking and screaming.

Alan Kaplinsky:

Okay. Well, let me now turn the program over to my colleague John Culhane, who I neglected to introduce at the beginning of the program, and I apologize to you, John, for that.

John is a very senior member of our Consumer Financial Services Group and essentially is one of the few people I know that is a jack of all trades and a master of all as he is familiar with all areas of consumer financial services and it's hard to just pick one area that he's more knowledgeable about. So I know John already has been giving advice to clients on the topic that he's going to talk about, that I know all of you are waiting to hear, and that is regulatory initiatives at the CFPB, both final regs, proposed regs, regs that have not yet been proposed that are in the hopper, and written guidance, and interpretations.

What's going to happen to all of that. John?

John Culhane:

Thanks, Alan. So we're now going to turn to a discussion of the CFPB and although our general topic is the impact on banking and consumer financial services, I think we all know that the CFPB is and has been the 600-pound gorilla in this space, and so it's a agency that we really want to focus on.

I want to explain a little bit about the slides that are here because I don't think we're going to have time to cover all of them, so let me just tell you what's in the deck and you can look at the materials we don't get to at your leisure.

So what I've done here is I've started with CFPB regulatory initiatives. I've got some high-level comments about what we might expect during the remainder of the Biden administration, what we might expect to immediately happen or happen in fairly close proximity to the change of administrations during the Trump administration, and then I've got a laundry list here on the following slides of guidance documents, proposed regulations, final regulations, and then regulations that the CFPB has said they have under consideration, along with some information about the status of those developments so that we can use that to hone in our discussion on some particular initiatives and talk about where they're going to end up.

If we could go back, please. Let me finish the... No, go back. Yeah, that's it. Right there.

Then after those slides, I don't think we're going to get to this, but there are two slides, one that addresses the likely impact on supervision by the CFPB, again for the remainder of the Biden administration and then during the second Trump administration, and then there's also a slide that talks about what we might expect in terms of enforcement activity, again for the remainder of the Biden administration and during the second Trump administration. But I want to focus on regulatory initiatives, and let me start with some high-level remarks.

For the remainder of the Biden administration, a lot of people have asked us, a lot of clients have asked us, "Is Chopra going to go gently into the good night?" I think the answer to that is no. He's going out kicking and screaming. Given his comments about not being deterred by industry critics and lawyers, there's at least some possibility that he's going to continue to have the CFPB shoot out guidance documents, not with the expectation that they're going to survive his term, but more as a signal to state regulators and state attorneys general as to issues that he wants to see them pursue during the Trump administration. It's extremely unlikely that any of the rules under consideration, the mortgage junk fee rule, the revival of regulation AA contract terms, that anything's going to happen with them, that they're going to progress to proposed rules given the time constraints, the other agency priorities here.

It's unclear whether the CFPB will move forward on some of these proposed rules. Colin mentioned at the outset that one of the things hanging over the CFPB's head is the Congressional Review Act. So not only does the CFPB have to complete its review and analysis of any comments its received and draft the final rules, but they've also got to weigh the likelihood of a successful CRA action that would block any further rulemaking on the same subject absent new legislation. That said, the Personal Financial Data Rights Rule, the Section 1033 rule, that's going to be published in the Federal Register, presumably in short order, and it may be that the 60 days will run and it will nominally be effective, even though it's got staggered compliance dates.

How about what can we expect during the Trump administration? New administrations immediately put a freeze on all rulemaking initiatives, as Colin mentioned. That catches proposed rules, final rules not yet published in the Federal Register, and typically, it catches final rules that are not yet effective, and all of those initiatives then are subject to leadership review by the new leadership. I think we can expect most guidance documents, if not all guidance documents, to be canceled following leadership review. Controversial proposed rules, if the past is prologue, are likely to be withdrawn or just go into a black hole and not progress. There's at least some possibility that comment periods on other proposed rules might be reopened. Some proposed rules may be amended, released for further comment. That's typically an action that occurs when there's at least some interest in the direction of the rulemaking proceeding.

It's often hard to reopen final rules, but there's at least some possibility that comment periods may be reopened on final rules, and remembering that the CFPB engaged in some aggressive activities here characterizing some of its initiatives as interpretive rules rather than legislative rules, that would seem to leave the door open if the new leadership wants to do that to reopen those rulemaking proceedings based on the failure to characterize them properly as legislative rules, take comments, and go from there, maybe even cancel those proceedings. And then a lot of these rules are currently the subject of litigation, so the administration's going to have to decide whether and to what extent it wants to defend the rules that are currently the subject of litigation.

So let's jump to guidance documents. Guidance documents by the CFPB that I've noted here basically fall into two categories, circulars and advisory opinions, and then I've included the amendment to the Exam Manual in which the CFPB had previously stated its conclusions that discrimination could be untacked as an unfair practice under its UDAAP authority. The difference between these documents, the CFPB has maintained that circulars are statements of policy. They are not rules, so they're not subject to any Congressional Review Act review, and the CFPB doesn't submit them--query whether that's always a fair characterization--where advisory opinions are intended to be written guidance regarding legal and regulatory obligations and basically to cover issues that might otherwise be addressed through interpretive rules. So typically, they do get submitted for CRA review.

But I thought we should start by talking about maybe the circular on unenforceable contract terms, and I invite Colin and Ian to offer any comments they might have on the likely survival of that circular. Gentlemen, either care to comment?

Ian Katz:

Yeah, I sort of agree with it's hard to know until you know who's going to be there and what the priorities are, but I sort of agree, I think you said earlier that a lot of the guidance is going to be scrapped or reconsidered. I mean, I lean toward thinking that the next CFPB director will be spending much, much, much of their time undoing so much of what was done by Chopra. So I don't have a specific view on that, but I think it probably falls under that category too.

John Culhane:

Well, two of the other documents or initiatives that seem particularly vulnerable are the advisory opinion on medical debt, which is already subject to litigation. That is not only vulnerable from an administrative standpoint, as Colin mentioned, it's within the CRA look-back period. I've included a slide here, we probably won't talk about it, but it lays out the time periods for review. So this initiative would be susceptible to this affirmance by Congress under the CRA review procedure. And then again, there's also two cases have been brought against the CFPB seeking to negate this advisory opinion.

Lastly, the amendment to the Exam Manual, although the CFPB retracted the amendment, they didn't exactly recant the notion, and there's litigation ongoing about that. I think the key question here will be whether the new administration wants to defend this position and how aggressively they want to defend it, depending on where this case stands, but I assume we'll likely be waiting for a Fifth Circuit decision probably as the change in administration occurs.

Ian Katz:

John, can I ask you a really quick question-

John Culhane:

Sure.

Ian Katz:

... to follow up on one of these? On medical debt, do you think there's any chance that maybe that has popular support and that they leave it alone for that reason?

John Culhane:

That's always hard to assess. I think there's certainly been a very aggressive campaign by the CFPB around the horribles about the collection of medical debt, but there's some fairly significant problems created by the position that the CFPB has articulated here. And there's also some fundamental concern that if you put aside the fact that yes, there are errors, there may be other ways to correct those errors, people who legitimately owe their medical debt are not as creditworthy as people who don't have medical debt. And taking that information out of the credit reporting system certainly distorts the credibility or creditworthiness, not credibility, creditworthiness of a lot of individuals. I think that's one that's likely to be revoked, but it's maybe a closer call than the contract term circular.

Proposed rules. Well, none of these rules have gotten to the point where there are any final rules and there's some difficult decisions that, for example, with overdrafts and NSF fees that, as I mentioned, the CFPB is going to have to make if it wants to move forward because of the possibility that the Congressional Review Act action would then slam the door on any further activity in this space, at least prohibit the CFPB from adopting the same rules or any substantially similar rules in the absence of further legislative action authorizing those rules.

We're getting a little short on time. Let me do final rules here.

I think here, the credit card late fees rules is probably one that we're all interested in. That one, I think, we're going to have to see what happens in the litigation. It's possible that the rulemaking proceeding could be reopened. We learned from the last change in administrations that there are some challenges under the Administrative Procedure Act to reopening existing rules that have been adopted, even if they've been the subject of litigation. So we'll have to see what happens there.

But Alan, can you comment on maybe on the status of the litigation here?

Alan Kaplinsky:

Sure.

John Culhane:

The last action was a little ambiguous.

Alan Kaplinsky:

The late fee litigation, I would say, it's one of the most convoluted pieces of litigation that I've ever followed. I mean, the lawsuit has been pending for a long period of time, many months, and no court has yet gotten to the merits of whether or not it is a legitimate regulation or not. They've been dealing principally with issues of venue or where should the lawsuit be brought? It got brought in the Northern District of Texas, the Fort Worth Division, and in front of a very Republican, very conservative judge, but he doesn't want to keep the case. He wants to send it up to the District of Columbia federal district court. And he has tried twice to do that already. And on both occasions, the Fifth Circuit stepped in by recognizing not an appeal because you can't take an appeal from a court order transferring venue, but a writ, a special writ was filed with the Fifth Circuit.

Generally, appellate courts are not willing to entertain those kinds of special petitions. And on both occasions, the Fifth Circuit reversed the federal district court judge in Texas, and it's now back in front of him again. And there was an argument made in September in front of him where the claim was that once again, it ought to be transferred, according to the CFPB, to the District of Columbia District Court, and that the Fort Worth Chamber of Commerce had no standing to bring the case, and the other trade associations don't have any kind of a presence in that particular division in Texas.

For some strange reason, this judge, who has been known to act very promptly, all motions in the case, is sitting on the case. He may be writing something, we might get a decision any day now, or he might decide with the change in administrations to just sit on the case and wait to see what happens from a regulatory standpoint. It's conceivable the case could be mooted. I don't know.

One of the other things I want to add, and this is really a quasi-litigation, quasi, or a government, CFPB enforcement, or a regulatory issue, and that is what is the new director of the CFPB going to do with a lot of these legal challenges that have been made by trade associations, not only to the late fee rule, but do a number of the other final rules? And some of these cases are in the Court of Appeals. Most are in the District Court. They involve what I would call, some of them, examples of Chopra pushing the envelope to cover certain industries that the conventional wisdom was the CFPB didn't have jurisdiction, like the rent-to-own industry.

Then a lot of cases, there's a new constitutional challenge being made based on the fact that the Dodd-Frank Act requires that any funding that the Federal Reserve pays over to the CFPB must come out of combined earnings of the Federal Reserve banks. And since September 2022, there have not been any combined earnings of the Federal Reserve banks. Indeed, there have been massive losses that continue to this day and will likely continue for several years in the future. And in fact, nobody can predict when the Federal Reserve banks will start making money again.

Now, there's a big dispute whether the term earnings means revenues or whether it means profits, which is what I think it means, but what is the new leadership of the CFPB going to do with that? They may, in fact, agree with the argument that I and others have been making, that we've blogged about in our blog, Consumer Finance Monitor, that it violates the Dodd-Frank Act, any of the funding after September 2022, and it's also a constitutional violation that has not been dealt with by the CFSA case.

So I don't know, John, on that one. That's a real sticky wicket, isn't it?

John Culhane:

Yeah. Obviously, that's something that the new leadership will have to decide how they want to address, and it's teed up in a lot of these cases that we've mentioned as well as other cases challenging enforcement actions. I just want to-

Alan Kaplinsky:

I could add, John, that just on last Friday, another lawsuit got filed. This is the first one being filed by a bank. All the other ones involved non-banks. Comerica Bank has brought a declaratory judgment action against the CFPB, Northern District of Texas again, making the same argument, that they have not received lawful funding and without lawful funding, according to the Fifth Circuit, essentially they can't prosecute a lawsuit. So we'll see what happens there. It's going to be very interesting.

John Culhane:

I'm just going to segue briefly back to the final rules, the small business lending data collection rule. It's hard to predict exactly how the new leadership will approach this rule. I think these final rules, as I mentioned, are difficult to reopen and revise because of the need to specify a basis for doing so under the Administrative Procedure Act. Any attempt to do that would almost certainly be challenged by consumer groups and their trade associations. So it may be that the more likely vehicle for addressing this is going to be the litigation that's currently pending in Texas and is now up in the Fifth Circuit regarding the enforceability of that rule.

I think we'll stop there because we're getting a little short of time. Are there any other rules that you want to mention by other agencies, Alan?

Alan Kaplinsky:

Well, yeah, let me just mention one more thing on CFPB very quickly. The open banking rule that recently was finalized under 1033, I believe it is, of Dodd-Frank. I guess of all the final rules, John, I have a sense that that may be one that makes it to the finish line. There is litigation that's been brought challenging it by the Bank Policy Institute, and there are things about that final rule that the industry doesn't like. So this may be a situation that calls for not jettisoning the entire open banking rule because it's really a bipartisan issue, but maybe tweaking it in some fashion to make it more acceptable to the industry.

In terms of other agencies, we've been focused on the CFPB, but the Federal Trade Commission has got some problems too, right, John? They've got a click-to-cancel rule dealing with subscriptions that recently finalized. There's litigation pending already challenging that rule. I think there may be three or four lawsuits challenging that rule. There's the CARS Rule that's now pending before the Fifth Circuit, which the auto dealers hate, and I would think it's going to be too late, I think, to do a CRA override on that, but I would think that might be another possible rule. Once the Republicans have control of the FTC, they may be more accommodating to the dealers.

And I guess there are a few others, right, John?

John Culhane:

Yeah, the one that sticks out, I think, is maybe the rule eliminating non-compete agreements. That also seems ripe for resolution.

Alan Kaplinsky:

Right. And then the other thing I want to mention, and I think we'll end on this, I have two more points to make, the OCC has in front of it an enormous issue that it really, I think, is reluctant to tackle head on. And what I'm referring to is national bank preemption of state laws, and we have been following three different cases that are pending now and three separate circuits where the Supreme Court issued an opinion last term in which it essentially decided nothing. It just said to the Second Circuit Court of Appeals that the standard that court used for evaluating National Bank Act preemption, which was basically the standard in the OCC National Bank Act preemption regulations, was wrong, and that they needed to take a fresh look at that national bank preemption issue, and they needed to look at Supreme Court precedents like the Barnett Bank case and other cases to decide how to deal with that.

Well, so far, the OCC has acknowledged that it's got to take a fresh look at this issue, but it hasn't done very much. It did file an amicus brief in an Illinois case dealing with credit card and debit card fees and whether or not interchange fees can be assessed on taxes and on tips of retailers, involving retailers. But the new OCC comptroller, whoever that might be, is going to really have to dig into the national bank preemption issue.

The final point I want to make is this, that I would expect that in the next four years, you're going to see an even more active state attorney general involvement in the consumer finance area. It happened during the first Trump term. They have the right, I'm sure many of you know, under the Dodd-Frank that state attorneys general can enforce UDAAP, Unfair Deceptive, and Abusive Acts and Practices, a number of them have gotten very used to doing that. And so you can't think that just because the CFPB may be more indulgent of the industry, that that's the beginning and the end of the issue. You've got to worry about state AGs, and particularly those where the state AG is a Democrat. There's still plenty of state attorneys general that are Democratic. That threat is going to loom.

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