

Consumer Finance Monitor (Season 7, Episode 50): Consumer Federation of America (“CFA”) Speaks Out About CFPB’s and FTC’s Direction During the Trump Administration

Speakers: Alan Kaplinsky, Erin Witte and Adam Rust

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 show brought to you by the Consumer Financial Services Group at the Ballard Spahr law firm. And I'm your host, Alan Kaplinsky the former practice group leader for 25 years, and now senior counsel of the Consumer Financial Services Group at Ballard Spahr, and I'm very pleased to be moderating today's program.

For those of you who want more information, either about the topic that we're going to discuss today or for that matter, anything else in the consumer financial services world, don't forget to check out our blog, which also goes by the name of Consumer Finance Monitor. There is a lot of content on the blog. We've hosted it since July 21st, 2011, the very same day that the CFPB became operational. We also regularly host webinars on topics that are of interest to those in the industry. So if you want to subscribe to our blog or to get on the list for our webinars, you can visit us at ballardspahr.com. If you like our podcast show today, please let us know about it. You can leave us a review on whatever platform you're using, whether it's Apple Podcasts, YouTube, Spotify. Also, please let us know if you have ideas for other topics that we should consider covering or speakers that we should consider as guests on our show.

Today's program is about the election, the election that took place on November 5th. Seems like it was a long time ago, but it really is not that long ago. The election of reelection of President Trump for another term in office, the election of House of Representatives and in the Senate where now it's clear that Republicans have control of both the House and the Senate, although not by a large margin, particularly in the House. Significantly, Republicans do not have the requisite 60 votes in order to block a filibuster so that most legislation that Congress deals with in the course of the year requires 60 votes in the Senate, a minimum of 60 votes in order to become law. The only exception to that that I think may be of interest to our audience is that under the Congressional Review Act, any regulation that was promulgated roughly after August one of this year can be repealed or overruled by a simple majority in the Senate and the House and the signature of the President.

So as I said, this is going to deal with the election, but we're going to get a perspective on what this all means from the consumer point of view. We've already done a webinar on this topic. We did the webinar on November the 12th where we focus mostly on the impact on the industry, but today we're going to talk about consumer protection and the impact on consumers.

I can't think of two people more qualified to address that topic than my two guests today, and I'm now going to introduce them to you. Erin Witte is the director of consumer protection for the Consumer Federation of America. She leads the CFAs advocacy efforts in areas like auto sales and financing, junk fees, forced arbitration, multi-level marketing schemes, aviation consumer protection, and others. Before joining CFA was an assistant attorney general at the Virginia Attorney General's office during Mark Herring's administration where she focused on predatory lending. So let me before I introduce your colleague, Erin, very warm, welcome to you. Delighted to have you on the program.

Erin Witte:

Thank you so much, Alan. It's really a pleasure to be here. As you can imagine, my title is quite broad. The director of consumer protection really can encompass so many different things, but in my position at CFA, what I've tried to do is bring my background and my experience of representing and advocating for real people to my areas of advocacy. So when I was a

new lawyer and I was in private practice at a firm in Northern Virginia, a lot of cases that came to me were against car dealers. So I ended up developing a practice that involved suing many car dealers for defrauding consumers. So I've circled back to that in advocacy and that's really been one of my top areas and things that I focus on, is auto sales and finance.

I have a decent amount of experience forced arbitration and the impact that they have on individuals being able to bring cases. So that's another area that I focused on. I also dealt with that a little bit at the AG's office from a different perspective. But primarily what I tell people is that my jurisdiction, for lack of a better word, really overlaps with the Federal Trade Commission because of their focus on unfair and deceptive conduct. So I've worked a lot on the FTC's particular rule makings over the past four years. Including things like junk fees, click to cancel, the beginnings of their earnings claim.

Alan Kaplinsky:

The cars rule I guess.

Erin Witte:

And the cars rule has been probably my top area that I've focused on in the past few years.

Alan Kaplinsky:

Great. Let me introduce your colleague now. Adam Rust is the director of financial services at CFA, and he coordinates regulatory and legislative activities for CFA. And leads CFA's work in fintech, payments, non-bank lending and banking policy. He's testified before the Senate Banking Committee and the House subcommittee on housing and insurance. So Adam, a warm welcome to you as well.

Adam Rust:

Thanks, Alan. I'm really excited about this. Obviously this is a pretty timely topic, so I'm excited to be here and discuss that. So my title sounds fairly broad and certainly banking is a part of it, things like credit cards, bank mergers and topics like that. But an exciting part of the work is also fintech. Now this is an interesting time because there are so many evolutions, so many innovations taking place in the marketplace. So I get to work on that quite a lot. So one of the topics we'll cover today, part of my work as an advocate has always been defending the CFPB. The CFPB performs a lot of great work on behalf of consumers, but it's also something where there's been a need to address just the ongoing legal status of the CFPB.

Alan Kaplinsky:

Well, let's jump into the election and let me start with the very old cliché, and that is elections have consequences. You hear that every single time, particularly when there is a presidential election and the president who was elected is from a different party. So let me start with this question and I'll go to you first, Erin, and then I'd like to hear what Adam says. Are there any issues that you think are particularly urgent for the CFPB or the FTC, as we enter the end of the Biden administration, there isn't much time left?

Erin Witte:

Yeah. So I think there are a lot of things that have happened in the past four years that from the advocacy perspective, we think have been real gains and real wins for real people. I'm going to start with the Federal Trade Commission and then I'll transition to a little bit of the Consumer Financial Protection Bureau, but I'll let Adam answer that more substantively. I think at the FTC we have really turned the tide there. The FTC has focused a lot on the experiences of real people and their intersection with the marketplace as well as some financial services. So to that end, I think there are some loose ends to tie up about this different kind of tactic that the FTC has taken in the past four years that has been remarkably effective for consumers. They've issued a lot of rules and initiated a lot of rulemakings during the past four years, but there are some ends to tie up.

I think a big one is the FTC's junk fees rulemaking, which has been proposed as an industry-wide rule that would require businesses to tell you the upfront all-in price. Right upfront, right from the first advertisement. So at this point, it's still in the

NPRM stage, the Notice of Proposed Rulemaking, and what that means is that it hasn't been finalized yet. The standard operating procedure that we've seen for folks who oppose the rule, industries who are affected by it, is to file a lawsuit in a Fifth Circuit that challenges it. And of course, as you mentioned and alluded to before, we expect that there may be a Congressional Review Act challenge as well.

If they decide to finalize during the end of this administration, which I certainly hope that they do. We expect to see some challenges. I don't know what the final rule will look like, whether it will be industry-wide, whether they will have the same mechanisms and the same tools that they proposed, but I think that that's really a pretty urgent issue for the Federal Trade Commission at this point.

We mentioned before, we briefly mentioned the cars rule, and at this point that rule has been finalized, but it's being challenged in the Fifth Circuit. I feel really good about our odds there. I think that the rule's going to survive that challenge. And when that comes back to the commission to implement the rule, it'll be up to the commission to decide how they do that and when they do that. Of course it depends on what the Fifth Circuit decides, but I would say that that's a pretty fairly urgent issue for the commission.

Alan Kaplinsky:

Erin, have they already held oral argument on the cars rule?

Erin Witte:

They have.

Alan Kaplinsky:

And I'm wondering, I haven't listened to the audio of the oral argument. I'm wondering how it went.

Erin Witte:

Yeah, I think there was some skepticism about the National Auto Dealers Association's challenges to the rule. The bench had a few questions about the arguments from NADA about the FTC's authority to even issue this rule. NADA takes the position that the FTC didn't have this authority based on some provisions of the CFR that pertained to the FTC, and how that relates to the specific authority that Congress granted to the FTC when they enacted Dodd-Frank and car dealers were carved out of the CFPA and then given to the FTC. From my perspective, I think the court pretty skeptical of that argument, and that is really this wholesale attack on the rule from NADA that says the FTC didn't have authority. But I don't know that that's going to succeed, and that's my read on it for sure. And I certainly hope that it does because it's an extremely common sense rule that's long overdue.

Alan Kaplinsky:

That rule, I take it, cannot be, it was finalized too long ago, so it cannot be overridden by the Congressional Review Act.

Erin Witte:

Right. I think the CRA deadline has certainly passed on that one.

Alan Kaplinsky:

But I guess a risk exists that once we have a new chair of the FTC and the FTC is controlled by Republicans, it's conceivable that they might repeal that rule by going through another rulemaking or tinker with the rule.

Erin Witte:

Yeah, I think we're going to see, I think that the Fifth Circuit's ruling will be very instructive about what happens next. The challenges to the rule in the Fifth Circuit are this wholesale attack on the rule. I don't think we saw too many piecemeal

individual attacks in the substance of the rule, and it had to do more with their authority and a few other arguments. And I think that will be instructive about what happens next. Certainly the commission. If they are so inclined and if that's really how they want to spend their time, is rolling back this rule about upfront pricing in cars, could if they want to. I think they'd have to be pretty motivated to undo a rule that has a lot of voter support.

Alan Kaplinsky:

Do you know when they adopted the rule, and I don't remember, did the two Republican commissioners dissent from the rule?

Erin Witte:

So it was proposed in July of 2022. It was a three one vote I think at that point. No, I'm sorry, I think it was a four one vote. I can't remember. It did have Republican support, I think at the NPRM stage. And then in the finalization that happened before the current Republican commissioners were on the commission, so they did not actually vote on this particular finalized cars rule.

Alan Kaplinsky:

What else, other than you mentioned the junk rule and you're expecting it'll be a final version of that issued anytime.

Erin Witte:

Yeah, I don't know. It's unclear to me. I hope that they do, but it's unclear whether they're going to finalize it.

Alan Kaplinsky:

And what else, click to cancel?

Erin Witte:

Click to cancel has been finalized and it's already being, like I said, this standard operating procedure for industries affected by the rules to challenge it in the Fifth Circuit. But interestingly, the click to cancel rule has been filed in a few different circuits. I think there's four lawsuits that have been filed at this point, fifth, sixth, eighth and 11th. So my understanding is that there will be a spinning of the wheel to decide which circuit it ends up in. But thankfully, the FTC did already finalize that rule.

Alan Kaplinsky:

Any other things at an FTC?

Erin Witte:

With the FTC, there's a few rules that haven't, I think they're a different level of urgency because they haven't necessarily reached the NPRM stage, they're still in the ANPR stage. With those I would raise the business opportunity rule updates, the earnings claims rule that specifically focuses on deceptive earnings claims, and the commercial surveillance rule. So the level of urgency is an interesting question because I think from a consumer and individual human perspective, all of these rules are urgent. We desperately need these rules to give guidance to folks about what to expect, to give the FTC the tools it needs to meaningfully address this conduct and get restitution back for people. From the agency's perspective about how they're prioritizing it and what the urgency may be to get something across the finish line, I really don't know. But I certainly hope that they will do as much as they possibly can during this time.

And I'll bring up one thing about the Consumer Financial Protection Bureau before I pivot to Adam to cover more of that. The CFPB undertook this incredible, and I think really underappreciated effort to collect auto finance data in the past few years. And they issued their market monitoring orders to I think nine auto finance companies that represent different positions in the auto finance sector. We know that there's a lot of different players here. So the CFPB collected an enormous amount of

data about tens of millions of auto finance contracts, and not only at origination, but also their performance over time, including repossession.

So we saw one report from the CFPB about that that pertained to negative equity and auto finance. And I think a lot of folks, even auto finance representatives, really found that very useful and interesting. I think that that was published earlier this year. We haven't seen another report about that. I know that they've got a lot on their plate, but I think that's another area where I would personally really like to see some more information about that before the close of this administration.

Alan Kaplinsky:

Before I go to Adam, talk a little bit more about the CFPB during this, we'll call it the lame duck session. The FTC last year, as I recall, finalized regulation dealing with endorsements or sponsorships of products and services. And I don't recall whether, at least I don't remember that being challenged in court. Though I take it that one probably is final, I think.

Erin Witte:

You're referring to the fake reviews rule?

Alan Kaplinsky:

Well, yeah. Yes.

Erin Witte:

So the fake reviews rule has been finalized, and I don't think that that's been challenged. I mean, that's a pretty clear use of their authority and very realistic response to the marketplace. And I'll say that one did have a lot of industry support, because we saw comments in that rulemaking process about how businesses are really harmed by fake reviews when one competitor buys a bunch of bad reviews for their other competitor and things like that. So I think that one had a lot of broad and widespread support.

Alan Kaplinsky:

Okay. So Adam, let's talk more about CFPB during the lame duck session. What would you add?

Adam Rust:

Well, so I mean one of the interesting things about my work at CFA is that also Erin and I do have some overlap. I want to say that as soon as the election results came out, advocates immediately circled up to ask this very question, what needs to be done in the next nine weeks? And I have heard from times when the director has made the comment that, every day that he comes to work, he thinks about the number of days left in the administration because that was his deadline for getting things done.

Looking forward, I think there are a few rules that finishing them would be very important. I think that starts with the overdraft rule. Now one of the characteristics of the overdraft rule is probably everyone's had an overdraft. Not many people will mention it or acknowledge it or admit it, but it's true that this is an experience that bothers almost everyone. This is a situation where you feel like the bank, it's something in its interest that was contradictory to your interest and you're paying a penalty fee that's far beyond what's necessary. So finishing that rule seems very urgent in my view. It'll save consumers, we're not quite sure how much because of the variation in how the proposed rule was written, but it's certain that it will help save them millions of dollars.

In most instances, receiving an overdraft fee is a surprise. And of course, industry contends that overdraft is an option and many people use it knowing there'll be a cost, but decide to go ahead because they perceive the alternative to be worse. Well, the nice thing about the proposed rule is it accommodates both of those perspectives. And the proposed rule establishes a structure for an overdraft line of credit, which it defines as credit and regulates as credit. And accordingly, it has an ability to

repay analysis and the gamut of lending protection. So the case is more consistent with a surprise. There's a cap that the bank can charge, but there's flexibility here.

The rule says that the fee has to be consistent with costs. So if the bank can do the math, show the costs are higher, the proposal permits a correspondingly higher fee, net-net, it's written well in my opinion. I understand it's unpopular in some circles, but it will save consumers a lot of money. And as a pocketbook issue, the CFPB is in good stead here. And you'd have to imagine that Congress, and particularly in one as closely divided as this Congress, people from both sides of the aisle will be reticent to fight the fight for more big bank fees.

Alan Kaplinsky:

If that does get finalized, that's probably almost certain to be challenged, don't you think in court?

Adam Rust:

I think it's possible it would be challenged by CRA or in court. I think this whole idea of shopping for forums and the law is a continental breakfast is something that it's a real shame that that's occurred, it's a real shame that there's a specialty court almost set up for it. If it went through CRA, I think that speaks to the contradiction between a populist agenda and serving the interests of big banks. Because we know who cares about overdraft, it's large banks. I think that the neo banks deserve a little bit of credit here, they're the ones that largely introduced practices to offer accounts without overdraft, show that it could be done. And then we've seen banks follow suit, some of them with overdraft-free accounts. There's no consensus evidence that banks have to charge high overdraft fees.

Alan Kaplinsky:

What else other than overdrafts is on the agenda?

Adam Rust:

Well, so another one that I think is similar to overdraft ruling that it's something that a lot of people understand the implications that could hurt a lot of people, is the proposed rule on medical debt. There's evidence that medical debt is actually itself not entirely predictive of your credit worthiness for loans. That's something that the CFPB has research to demonstrate. I think that's just a really common sense rule that needs to be completed, that'll make a difference. A hundred million Americans have some kind of medical debt. A lot of people are just confused, you get a bill and you say to yourself, "I wonder if my insurance company has spoken with my hospital. I wonder if this is going to be changed later." You just don't know. It's so confusing.

So a lot of people have debt that they're not sure that they're actually going to owe. There are a lot of people, this is a point the director made, that pay medical debt that they know they don't owe just because they want to protect their credit score. That's coercion. That's a systemic failure of our financial services system. So that's one that I hope the administration can complete.

Alan Kaplinsky:

That I take it is an amendment to the Fair Credit Reporting Act, right?

Adam Rust:

Yes.

Alan Kaplinsky:

The CFEB had also been talking about a broader amendment to the Fair Credit Reporting Act, covering things other than medical debt. I doubt whether they're going to get to that before the end of the term. At least that would surprise me.

Adam Rust:

They have been doing a lot of work on it, but you're correct, they're at an earlier stage on that.

Alan Kaplinsky:

What about, one of the proposals that got issued a long time ago was to create a registry of contract terms. It would've required companies, and I think it only applied to supervised non-banks. That didn't apply to other non-banks and it didn't apply to the banking industry. But it would've required a registry that is a company, a non-bank supervised bank to report to the CFPB any contract provisions in consumer-facing contracts that are contrary to federal or state law. And you'd have to report to the CFPB and they actually, I think it went broader than that.

Now that I think about it, it covered any waiver of a right that existed under law. That if you put into a contract a waiver of a right, you would have to... Such as like an arbitration provision, which purports to waive the right to trial by jury or a class action waiver, either a standalone class action waiver or one contained in an arbitration provision. You'd have to report that to the CFPB and there are a list of about eight or nine things. We don't have time to get into them all. That seems to have disappeared or gone into a black hole. I can't find out where that stands and if the CFPB plans to do anything about it. Do you have any insight on that?

Adam Rust:

Still, I have that rule's been proposed and that the proposal came out February 1st, 2023, comments were done in April. And then yes, we haven't heard as much. That's another common sense thing, it was part of their market monitoring function to identify when practices are occurring that are contradictory to what consumers deserve. Those are the legal protections. There are companies out there seeking conditions to take those protections away.

Erin Witte:

Yeah, I thought that one was particularly, I'm sorry, Adam, I just would love to jump in on this a little bit. I've colloquially referred to this as trash contract terms. That's how I refer to this rule. That's not how the bureau has referred to it at all.

Alan Kaplinsky:

I call it name and shame.

Erin Witte:

Yeah, I mean it is these provisions in contract that are there to limit consumer's rights. And because you put it in a contract, the business or the company can enforce it. And so the company has already told millions of individuals that that's in their contract. So is puzzling to me why industry would oppose this, because it's something that they've already put out there in the ether with millions of people. And then there's this pretty widespread opposition and real hostility towards telling the CFPB what they've already done. I think it makes tremendous sense. I think that they should be shamed for putting these terms in contracts and then relying on them.

Like I said, I represented individuals in court where these contracts are used as a weapon against consumers when they're cross examining someone at trial about, didn't you read this? Didn't you see it? Didn't you understand it? And so it's not just like a defense mechanism for industry, but it's a real weapon that they can use as a sword and a shield, and I think they should be shamed for that. So I don't know what's going to happen with that rule. It's unclear to me whether it'll be finalized, but you're right, it's been some time.

Alan Kaplinsky:

They did issue, finalize a different public registry that is going to require, with some exception, that if you're a party to a consent order or with the CFPB or any other federal agency or any state agency, or even a local agency, you've got to report

that to the CFPB and that will be available on the CFPB's website. And that has been finalized but not implemented as yet. I'm wondering what will happen with that, if either you have a thought on that. I assume you think that's pretty important too.

Erin Witte:

Yeah, I mean along the same lines of what I said before, this information is already out there. It's already public, it's already accessible. Putting it in one place with the bureau makes complete sense because of their position in the consumer finance regulation marketplace. And I think that what happens with that, it will be a question of how strongly non-compliance is enforced or paid attention to and what the bureau decides to do with that information.

Alan Kaplinsky:

So let's turn now to January 20th of 2025, and I assume that on that date or before that date, the current director will either resign or shortly after the inauguration, he will be terminated by President Trump. Because he's got under the seal of law opinion of the Supreme Court, he's got unfettered discretion to terminate for cause or without cause the director. And there's going to be a new director, we don't know yet who that's going to be. A lot of names have been bandied about, so it's hard to speculate how that new director is, what he or she is going to do. But what kind of changes are you expecting? And maybe we'll start with you, Adam, and then go to Erin.

Adam Rust:

I do think you're right to suspect that it's possible that the new director will be named, or that the existing director will no longer be working for the CFPB almost immediately. That seems to be a clear priority. I think as a baseline statement about this, the CFPB is not going to go away. There have been many efforts to weaken it, and then most recently even to subject it to appropriations. And the Supreme Court populated largely by Republican appointees and led by, in this case, an opinion that was written by Clarence Thomas said, "No, that's just not legitimate." So the CFPB is going to continue to exist. It's going to continue to have things to do that are very popular with consumers. That won't change.

Will there be differences in how things are managed and accomplished? Absolutely, yes, I think so. I think we'll see a return to things like sandboxes, those were really popular in the prior administration. That to me is concerning because it makes this assumption that consumer protections are somehow automatically a zero-sum game with innovation. Personally, I think if you have an innovation that's reliant on an exemption from regulations, well, that seems like an example. It's sidestepping. I'm worried that there will be newfound support for deregulation that protects a particular industry in the name of innovation. I do think that we need to bear in mind that the CFPB has bipartisan support outside of Washington. 91% of people would say they support regulation of financial services. Over 80% say they support the CFPB's mission, and that's the case also with over 80% of Republicans. There is widespread support for the CFPB.

Alan Kaplinsky:

Well, I'd like to drill down a little bit if you don't mind, Adam, and because there are a number of final regulations, we haven't really mentioned them yet, that were issued by the CFPB during this past year. And one of them deals with credit card late fees and reduces the credit card late fee down to \$8 per delinquency. Another one deals with a collection of data, data collection on small business loans, and that's the subject of litigation. The \$8 late fee regulation is being litigated so far in federal court in Texas. Further litigation is now up before the Fifth Circuit dealing with the collection of data on small business loans. The CFPB prevailed in the lower court, it's now up on appeal. And then you have the open banking regulation that was fairly recently finalized, dealing with consumers having control over their own data and being able to share it with other third parties.

Don't you think that all three of those regulations are going to be very carefully scrutinized by the next director? And they might not prevail the regulations I'm talking about, they may be thrown out either in court or back to a new director to proposing a regulation to repeal or amend the existing regulations.

Adam Rust:

Well, so 1071 that has survived the process of CRA.

Alan Kaplinsky:

That's the data protection small business.

Adam Rust:

Yes, it is the small business lending data rule that's survived. The CRA won, but then the president vetoed it. So at this point, there's a lawsuit about that, but it really won't be up to the director to rewrite that rule. That rule stands. Now the the new director could potentially look at that appeal and say, "Are we going to fully pursue our appeal?" There's possibly that. But the credit card late fees rule, that's another one that's I think broadly understood by consumers to be addressing a problem. Every day that that rule has stayed, Americans pay 27 million in late fees that they wouldn't have otherwise had to pay.

The last one you mentioned is 1033. I think that's an interesting one, because we know that we need to get the United States closer to open banking. That's totally worth acknowledging. We are behind not just the UK, but even Brazil. We deserve to have the world's best payment system, until we get to open banking or at least closer, we won't. I know that there's some aspects of that rule that weren't popular with everyone.

Alan Kaplinsky:

And that's been challenged too, lawsuit got pulled by the Bank Policy Institute.

Adam Rust:

It has. But I really think 1033 is something that needs to go forward, and if we were to push back against it, we'd be doing a disservice to our entire payment system. Screen scraping is clunky. Frequently, it doesn't work correctly. It's a blunt tool for sharing information or ordering funds transfers. Working from the perspective that 1033 is not reversed, I expect people will look back at our current system with some degree of disbelief, even not totally but still. By then they'll have learned to understand the difference and they will have grown accustomed to being able to see where their data is being used and having options to limit access or even to spend access.

I remember being on a panel at a payments conference right before the prepaid rule, and I suggested that QR codes could be a great way to support better disclosures, especially in the context of J Hooks in stores where space is really finite and there's not really much room for a disclosure because it quickly starts to compete with the branding. There was a CEO on that panel of a large prepaid company, and he flatly rejected the concepts. Absolutely, he thought I was being naive that anyone would ever use a QR code. But looking back, I kind of think we all understand now how QR codes can serve a purpose and how customers will use them. But at the time there were sort of some gaps in technology that hadn't been developed, right? QR codes, they dovetailed with increased smartphone usage, but I think moving to open banking can be similar, right? It will encourage the adoption of new things, and then looking back, we'll all know we were better off for it.

Alan Kaplinsky:

And then the other thing that's still out there is litigation regarding an important change to the UDAAP exam manual that defined as an unfair practice, any form of discrimination. Going well beyond what's covered already by the Equal Credit Opportunity Act or the Fair Housing Act. And that got challenge and it's up before the Fifth Circuit now, the lower court invalidated that guidance. That was not a regulation, it was in the form, but it was a lot less formal than that. And then the CFPB withdrew it, so it doesn't even exist as such anymore. But my guess is that's probably, the new director is probably not going to push that issue, I don't think.

Adam Rust:

Probably won't push it. I think this is something where also would invite Erin to jump in, but I think you're probably not going to be surprised that I would say the is fundamentally unfair. That shouldn't be a reach. I think the bureau did some interesting things in the fair lending space, very appreciative that the Townstone decision, that worked out. Discouragement is the heart of redlining. I think if you permit discouragement to become an allowed activity, it's essentially like putting a sign up

in front of an institution that says, "We're not serving everyone." So that was, I think a good anti-discrimination win. And 1071 is also, circling back to 1071, that's also fundamentally an anti-discrimination rule.

Alan Kaplinsky:

Erin, do you have anything you'd like to add to the litany of regulations that the CFPB issued and they certainly were very active in not only the past year, but going back to the beginning of Rohit Chopra's term in office?

Erin Witte:

Yeah, I have a couple of thoughts to add to this. Well, I have a lot of thoughts, a couple that I'll add here. I should say that. One is about the Townstone case. I want to point out that we're having this discussion about what's going to change with the CFPB, and I want to remind folks that Townstone was, I think, initiated during the Mulvaney administration. So one thing that I think is going to stay the same is enforcing the law. Enforcement will always be a part of what the CFPB does. And so we think about the CFPB can tend to be a bit of a lightning rod in this partisan war, but these are not partisan issues. Protecting consumers is not partisan. It has morphed into that due to industry interests getting involved and not wanting to be subject to some of these rules. But I think that's an important reminder that I want to talk about, is we're like, "What's the same? What's going to change?" I do think enforcement is going to continue to be a big role of the bureau no matter who's at the helm.

Alan Kaplinsky:

I would just underscore the point you made. The data that exists shows that during the last, while Mulvaney and Kraninger were in office during the last Trump administration, they actually brought more enforcement actions in court than Rohit Chopra has deemed. The dollars are different. I totally agree with you, there'll continue to be a lot of enforcement investigations and losses, it's not going to end. But two things I think will be different, I'd like your reaction to it.

Erin Witte:

Well, can I respond to one thing quickly? The difference with administrations and their enforcement. Director Chopra was dealing with this cloud of the CFSA litigation hanging over his head. So it stayed a lot of litigation and probably impacted some of the enforcement choices that they made.

Alan Kaplinsky:

Well, no, that's a good point. So what I see happening is that the litigation that gets brought and the investigations, new investigations that are launched, they're going to deal more with things that are clearly within the CFPB's jurisdiction. Going against companies engaged in fraudulent behavior or scams, every bet's bipartisan, nobody likes that. What I think there'll be less of are situations where the CFPB, at least according to industry, is pushing the envelope, trying to expand their jurisdiction beyond what the industry believes. Give you one example in the non-banking area, rent to own. The rent to own product, at least the conventional wisdom at the CFPB and elsewhere was that that wasn't credit, therefore not covered, not under the jurisdiction of the CFPB. But Rohit Chopra decided otherwise, and he is brought a lawsuit against a rent to own company. That type, I think we'll see less of that, the so called pushing the envelope. And then the settlement dollars I think will be less, they won't be a side with you.

Erin Witte:

I think there's some truth to that. I want to point out with this distinction about the rent to own or whether this is credit, this question about what is credit has bounced around for many, many years as you know better than most people. One enforcement action that did happen during a Republican administration that dealt with this specific question was Future Income Payments, and whether or not extending payments based on someone's future pension was the extension of credit. And the Republican administration found that it was and brought that enforcement action. So these questions have been around for a long time. And I think that this regulatory arbitrage, as the director likes to say, the way that he phrases this is the

question that will continue to come up over and over again. And as we think about where the bureau may focus their enforcement, we have to think about also who these companies are targeting. With future income payments, we're thinking about pension scams, so we're thinking about older people and things like that, like senior citizens and then military personnel are frequently targeted.

Alan Kaplinsky:

That's always bipartisan, anything involving the military.

Erin Witte:

And just playing around with what's credit and what's not, I mean, that happens all the time.

Alan Kaplinsky:

Well, you have it now in the Earned Wage Access interpretive rule, which is similar to what you're talking about. People being able to put in a day's work and want to get paid at the end of that day, even though their actual payday might not be for another two weeks. They have come out with an interpretive rule, it's pretty controversial. I think it'll probably get repealed by the new director, but who knows? You can't say for sure. Buy now, pay later is another area where I think with the CFPB, I would view it as pushing the envelope. Trying to take a closed end installment product or you pay with the down payment and three more installments, to try to use the open end truth in lending regime to try to regulate buy now, paid later. Very controversial. Don't remember if that's been challenged yet in court. I think it may have been, but that also, I think, is going to be interesting to see what happens.

Erin Witte:

One thing I want to point out is that as we're thinking about, we're focusing a lot on the bureau and whether the interpretations, the guidance, the opinions from the bureau are going to be rolled back. I think it's really important to remember that that's not the end of this discussion about how some of these products are evaluated. We've got states looking at this, we've got private attorneys bringing these cases, and so these theories or things that have been explained by the bureau to give guidance to businesses as well as consumers. If a new administration decides they're going to undo that, that's definitely not the end of this discussion and how these will be challenged and how a court looks at this. Loper Bright cuts both ways.

So I think we have to remember that how a court looks at this is going to depend on context in which it is brought to them. And a future administration deciding that they don't want to use this guidance anymore doesn't necessarily mean a court will never hear that question, and it certainly doesn't indicate how they'll rule on it.

Alan Kaplinsky:

Right. I agree with you, you said sometimes you better be careful what you wish for. A patchwork quilt of 50 state laws dealing with some of these newer products, that's not going to be good for the industry for sure. So yeah, I hear you.

Adam Rust:

I wanted to circle back. So these questions of fintech, I want to get to those, but just circling back to the thing that was mentioned at the end, which is the bipartisan nature of support of service members. One point that I think we need to pay attention to is the question of supervision of the MLA. During the last administration legal theory was pursued that said that it wasn't up to the bureau to supervise for MLA. I hope we don't see that resurrect itself. This administration rewrote that rule and reversed it. So we do want to have bipartisan support for the military.

One place that is really relevant, and it has to do with a pretty significant proposed rule that we haven't mentioned, is the larger participant rule for payment apps and digital wallets. I think that's a pretty urgent one to finish. How many people are now using one of these apps to transfer funds? How many cases are these, the apps where scams are happening repeatedly? How many times is it the case that service members are using apps to arrange a deposit for when they come back or for when their household is seeking to rent something? We need to address this emerging tech because there are some blank spots. I hear

frequently from industry, we don't want regulation through enforcement, we want supervision. That's a more meaningful, reasonable way to conduct the relationship between private industry and firms. And so this is just a glaring example of where supervision is clearly needed, the bureau sought it. I hope that the next administration follows through and finishes that.

So I want to get back to your question on urban wage advance. The CFPB issued an interpretive rule and as a result, it doesn't have the same level of durability. The CFPB under new leadership could write a new interpretive rule, and opinions might differ on the extent of procedures that are required to do that, but it's certainly going to be less difficult than changing a formal final rule or passing a new law. I think we need to keep the EWA rule. I understand what people say, but these are free products, except it turns out they're not. There's research to show that they're actually expensive just in a way that's different from other forms of high-cost lending. They're used frequently and the model is tied up in shipping and paying for immediate funds settlement. So in the end, it's expensive when those fees are paid nine times a quarter and they don't improve worker financial health.

So a recent study did reveal that if a worker was in the practice of using a payday loan, then they were more likely to use a payday loan or have an overdraft when they started to use an EWA service. More than a quarter took out 25 advances per year. That did cover, perhaps, their immediate need, but then they don't catch back up. So a hallmark of what the CFPB is doing, that they use research to try to understand how consumers are using these services. The data shows the EWA is not a lifeline, it's a drain. I think it's important to understand industry voices are loud and clear that they want this exemption that covers other types of lending. This is a case where I think advocates see things from the same lens as depositories, there shouldn't be an exemption from consumer protection for big tech. With BNPL, again, this was not a formal rulemaking, it was a product of a process that started with an RFI involved market research, solicited notice and comment, and resulted in a final interpretive rule.

It's a perfect example where opposition to a rule occurs, not because of its content, but just because there's an orientation against regulation. The rule, it simply says that it's a foreign credit. It simply says it's like a credit card or a charge card, and that it could be regulated, should be regulated under the same standards. Opposition to the BNPL rule is tantamount to saying big tech needs to be treated differently. So yes, it's being used in the same way, it's literally side by side with card options in your online cart. Why is it reasonable for a purchase to be made with a card? It comes with dispute and charge back rights, but not one used by a BNPL service. It's just the same thing, a consumer's borrowing money, they intend to pay it back in a sequence over time. They deserve that billing statement. That's common sense. I know that I review my credit card statements frequently. Why does BNPL deserve to be different?

Alan Kaplinsky:

Right. So there's a lot of accomplishments, certainly CFA and other consumer advocacy groups would consider that FTC and CFPB have made during the last several years. As you reflect back, I mean you've mentioned a number of them already. Is there anything else that we may not have touched upon, either Erin or Adam?

Erin Witte:

I talked about this already a little bit with the Federal Trade Commission and this shift in the dynamic there. I think that is a remarkable accomplishment for the FTC. You know, when I was at the AG's office, and even in private practice, I viewed the FTC as like a big law firm that brought a lot of cases. And they were really good at bringing enforcement cases, but their place in the market and figuring out this ecosystem and what they could do to affect change for real people has taken a pretty dramatic shift during this administration. I don't work as much on the competition side, so I'm not going to talk about the antitrust work.

But truly in the Bureau of Consumer Protection, I think they have done some phenomenal work. They have pivoted to a lot of rulemakings. Some of that is in part because of the ruling in AMG Capital that limited their ability to do their job, get money back for people who have been defrauded. But in these rulemakings, I think the Federal Trade Commission has really focused on real people and what they're experiencing. Like I said at the outset, the cars rule has been an achievement that I am really proud to have worked on and supported. And I think the FTC should be extraordinarily proud of the work that they've done there. Despite these challenges that they're facing, which we knew were going to come, we see car dealer opposition frequently to any interest in regulating any aspect of their business.

Alan Kaplinsky:

And they are a pretty potent lobbying force as everybody learned with the Dodd-Frank Act, that they were able to get an exemption from being covered by the CFPB.

Erin Witte:

Right. And the exchange for that exemption, a meager exchange in my opinion, was giving the FTC a rule that they have now used the past decade to build up and to develop a really strong record in support of what their actual very modest proposal is, that I definitely support. But the fact is that there is a lot of, it takes a lot to get a rule like this across the finish line with the opposition from the car dealer industry. So I think they deserve a lot of credit for that. Click to cancel is another huge accomplishment. We've seen Republican support for this issue historically, and even for legislation that went further than what the actual finalized rule proposes. So I think that's a great accomplishment. We're seeing a lot of challenges to it, but of course we are, standard operating procedure.

And then one other thing I want to talk about the FTC, a big accomplishment for them is the Invitation Home lawsuit that they filed. A little bit outside of the finance scope of this, but suing for violations of consumer law in rental housing. We have not seen the FTC get involved here. Like I said, I'm a consumer protection lawyer. I've practiced this issue for years and years, and it has always felt like there's a bit of a division between landlord, tenant and consumer protection, despite this significant overlap of the most affected and vulnerable populations. So seeing the Federal Trade Commission really look carefully at this issue, listen to what actual humans are telling them and what they're experiencing, and bring this enforcement action to bring these issues to light has just been a really great accomplishment for them.

Alan Kaplinsky:

Adam, anything to CFPB accomplishments?

Adam Rust:

I had something that I thought might be, it's a little bit under the radar, a little bit of fitting the pieces of the puzzle together, but one of the things I wanted to call out and praise this bureau for was the interesting way that they went about their market monitoring and supervision authority. So I have a number of examples to paint this picture, but what I think the broad brush is, they looked at markets in a different way. Which was to go ground up and think about individual consumers in different ways and that we're all different.

So for example, the report about medical debt in Alaska, that was interesting to show that native communities were more likely than other communities to have medical debt in collections on their records. Even though 38% of Native communities in Alaska do not have any kind of health facility. To show that algorithms are being used to surveil workers, and yet the protections that any kind of reporting would normally have are in place. Things like adverse action notices, just being able to know how your record was being utilized. Looking at things like the cost of cash in rural America, people who are no longer having the benefit of branch networks. Service members not taking advantage of their SCRA benefits, not utilizing those and calling on more efforts to make sure that banks and lenders informed them of that privilege.

One of the ones that I thought was really important was the human trafficking Debt Bondage Repair Act, which they quickly then implemented within the people who have now left bondage, human trafficking, their credit reports are frequently messed up. That's part of the ways that people are held in check. Addressing that issue, all these kinds of things. One more example is just employer-driven debt. That's a new thing. That's something they identified that people are being held in debt because they received job training and then left their job.

You know there are ways of recognizing the idea of an average consumer experience to say, "That it really isn't accurate," right? But instead, what's more fitting to say, "Is that we all have different experiences." And shifting that lens from a broad sense of the market and then into individual segments within business sectors makes a lot of sense because again, it's thinking about the experiences of individuals. That's something I thought this bureau did really well. I hope the next one does it the same way, because I think it's something that really serves in a practical way to elevate the feelings, the needs, the experiences of consumers. And these are the kinds of actions that get held up in the Senate. The school lunch fee report, for example,

paying a fee to reload your school lunch, right? We know that's wrong. Why are payment processing companies intercepting dollars from working families who are just trying to feed their kids? That's not right. And when that came out, it went on television right away it went into Congress, and then the USDA changed it. That's a really impactful way to do what sounds like a technical job.

Alan Kaplinsky:

So I've got two more things I want to mention. One, you can't have any kind of consumer finance podcast show or webinar without mentioning artificial intelligence or AI, and what the impact of that technology is going to be. I want to get your opinion on that and we'll close with that. But before we get there, you all already mentioned that states were anticipating the possibility that Trump may win and there could be big changes in Congress and at the agencies. And we're probably going to roll back the clock to what the states did during their first Trump administration, where they definitely tried to fill that void to the extent that they felt that the CFPB was no longer being as attentive to the needs of consumers. Erin, let me go to you and then Adam, I assume we're going to see a big acceleration in this area, states more involved.

Erin Witte:

I think we've already seen folks taking up that mantle and being very ready to move forward. I'll also say that CFA, our organization is a federation of state and local organizations. So we believe very, very strongly in this boots on the ground perspective and the power of local groups to affect change. So I'm talking a little bit more about policy as CFA, but from an enforcement perspective, when we think about Attorneys General, absolutely, and that's something that I think we are going to strongly encourage. The FTC and the CFPB may change, but I think that what they've really done during this administration is empower states to be able to pursue some of these things that they were doing during these four years.

I talked briefly about how just because the new administration might decide to affect one opinion or one regulation, that doesn't mean other states or individuals can't do it on their own. And continue to bring these issues to light and pursue them when they find violations of law. The tools might look different for AGs versus the federal government, but many of the laws are not. States modeled their UDAP statutes after the FTC Act. So I think that we're going to be able to see states look back at what the FTC has done, how they've used their authority. And rely on that going forward as a source of authority for how they can use their own UDAP statutes. And of course, I would be remiss if I didn't emphasize, remember, and hope to see a lot more of going forward, is that the CFPB does not have a monopoly on the CFPA, the Consumer Financial Protection Act. States can use it, especially abusiveness and especially against car dealers. We've seen state legislatures picking up steam on things like junk fees and medical debt. I think we're going to continue to see those efforts going forward and preserve a lot of these gains that we've made.

Alan Kaplinsky:

Right. Adam?

Adam Rust:

Well, so I agree, your insight that what's happening in the states is going to be on everyone's mind going forward. And I think advocates are going to be playing a little bit of offense and then a lot of defense. So I'll point out a place where there's an opportunity for offense. That's the work that's been taking place on the Depository Institutions Deregulation and Monetary Control Act, DIDMCA. Alan, I know you've written about this. This is already bubbling up in states. There's already been some success, Iowa, Puerto Rico technically in Colorado, but not quite. That didn't get...

Alan Kaplinsky:

We are involved as an amicus in the Colorado guild, so be careful.

Adam Rust:

Well, and you've written a good blog too, so it's out there. But I think we'll be playing defense on Earned Wage Advance, which we mentioned that earlier. And absolutely, there's a lot of effort to make that not be regulated as credit. It's more of that seeking an exemption for fintechs from consumer protection, just not quite right. Same thing in BNPL. And then I believe there are over 50 bills in state houses right now on crypto. We haven't mentioned crypto, and there's just too much there to cover, but that's another place where I hope there are enough advocates to do the job of protecting consumers. Because that's a tough one if you're not in the industry. Tech bros are winning on that one, and we'll be playing defense where we can.

Alan Kaplinsky:

Right, right. So let's conclude with, just so that we can say we've checked the AI box. So Erin, do you have any thoughts on what you think, how that's going to have an impact next year?

Erin Witte:

Yeah, I mean, of course AI will continue to have an impact and we are going to be waiting to see how agencies approach this. I think that the current administration has very much taken the position that the same laws apply no matter what tool you use to violate the law. So if AI is being used to violate the law, they're violating the law. So I respect that approach, I support it. I'm not sure what we're going to see going forward. I do think it's an opportunity for some bipartisan work, maybe at the state legislature level, maybe with agencies to the extent that that's part of the calculus going forward. But I mean I think it will certainly continue to be an issue and I really, really hope that we are able to figure out the best and most effective way to actually help people instead of serving business interests.

Alan Kaplinsky:

Adam.

Adam Rust:

So thank you for the question, Alan. I think you've probably read some of the things that CFA has written about the search for lesser discriminatory algorithms. So in the context of how AI changes the way that regulators approach applying ECOA to the use of AI, I think that there is a lot happening there. I think I've heard from industry on occasion that they would also appreciate some work in this category. So things like supervisory highlight on where AI has been used in a way that's appropriate, trying to empower champions in financial institutions to say that AI can be used.

I think that there's a lot of uncertainty about data to use for model training. I mean, is it really appropriate to behave in a situation where a small lender in a place like Idaho is using their local customer base as the means to train their data? That's probably something that a regulator could step in and fix. I think the idea that came out of the monitorship that Relman Colfax completed with Upstart, that really made a point about this tension between accuracy and fairness. And their key point was, there's probably a range of uncertainty in anyone's calculation of what the actual most accurate model is. But if there's some range of uncertainty, that might be an opportunity to do a, tilt a model towards being more fair.

So yes, I think we're going to see AI in a lot of places. We haven't even talked about chat bots or marketing or places where it's already being utilized. And then the last one I want to just mention is the opportunity to use AI to detect fraud for scam prevention. I think that banks in particular, a bank to bank transfer is different than a bank to non-bank to bank transfer. Real-time communication between a sender and receiver, that's an opportunity to use AI in a way that'll make a meaningful difference for how many people are being scammed. So many people.

Alan Kaplinsky:

All right. Well, I want to thank both of you, Erin and Adam for taking the time to join us today on the podcast show. Really appreciate that. To make sure that you don't miss any of our future episodes, subscribe to our show on your favorite podcasts platform, be it Apple Podcasts, YouTube, Spotify, or whatever platform you may use. And don't forget to check out our blog, consumerfinancemonitor.com for daily insights about the consumer finance industry. If you have any questions or suggestions

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