

Consumer Finance Monitor (Season 3, Episode 50): An Introduction to Real-Time Payments

Speakers: Alan Kaplinsky, Kate Berry

Alan Kaplinsky:

Welcome to the 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. I'm your host, Alan Kaplinsky, and I share the Consumer Financial Services group at Ballard Spahr. For those of you who want even more information about, I'm sure, some of the topics we'll be talking about today, I would refer you to our blog. Which also goes under the name of Consumer Finance Monitor. We've been doing our blog since 2011, actually when the CFPB first started operating. And every day, literally, new articles are being posted on our blog. And our podcast, we've now been doing for a little over two years, and you can get it anywhere... On our website, ballardspahr.com, or wherever you regularly get your podcasts. It is there.

So, I'm really pleased today to have as our guest, Kate Berry. Kate, I've known for a long time. She is a reporter with the American Banker, and she has covered the 2007, 2008 financial crisis, mortgage lenders, major US banks including Wells Fargo. Her current beat, and I think it's been her beat for a while, and she'll correct me if I'm wrong in a minute, is covering everything that goes on at the Consumer Financial Protection Bureau, or as we affectionately call it, the CFPB. She's won a Neal Award and five awards from the Society of American Business Writers and Editors. She's worked for many newspapers, including the Orange County Register, the Arizona Republic, and the Associated Press. And she started her career as a clerk at the New York Times. And she hails from the Los Angeles area.

Usually, this is a very unusual situation, because I'm used to being called by Kate whenever there's some development at the CFPB... She's covering the story, and she's interested in getting my insight or reaction to a certain development. So she always gets to question me. The tables are turning today, and I'm going to be able to question Kate, and I'm really looking forward to it. So Kate, a warm welcome to our program, and thank you for joining us.

Kate Berry:

Thanks so much Alan, it's a pleasure to be with you.

Alan Kaplinsky:

Yeah. So let's start off with a real softball question. First of all, when did you join the American Banker? And then, when did your focus become the CFPB?

Kate Berry:

So I actually joined American Banker in 2006, just before the financial crisis. I mean, it was very late 2006, and just months later several lenders started going bankrupt because of the financial crisis.

Alan Kaplinsky:

Wow. Wow, that was... And your beat at the time was covering everything that was happening with the banking industry during the recession.

Kate Berry:

Yes, well, you'll remember at the time, non-bank lenders were the first ones to struggle. And I'm based in California, in between Los Angeles and Orange County, where we could cover Countrywide, and Ameriquest, and all of the non-banks that played a huge role in the financial crisis.

Alan Kaplinsky:

Mm-hmm (affirmative). Right. So at what point did you tend to fall consumer developments? When did that occur?

Kate Berry:

So, after the crisis... During and after, I was also covering Wells Fargo, B of A, their response, the response of the banks to the crisis and how they were faring after, essentially, many of them being forced to... And buying some of the non-bank lenders, as you know. B of A buying Countrywide. And then in 2016, I switched beats and started following the CFPB when our former reporter, Rachel Witowski, left American Banker to join the Wall Street Journal. And I covered the first director, Richard Cordray, then the sort of bizarre transition to Acting Director Mick Mulvaney, and then now, Kathy Kraninger.

Alan Kaplinsky:

So you were there, you were covering the CFPB toward the tail-end of Richard Cordray's tenure?

Kate Berry:

That's right.

Alan Kaplinsky:

Yeah. Well that must have been interesting, right? And I can recall, right at the end, that's when he issued the rule pertained to small dollar lending. That came out, and it was one of the last things he did.

Kate Berry:

It was.

Alan Kaplinsky:

And then there was the... Something near and dear to my heart, the Anti-Arbitration rule.

Kate Berry:

That's right.

Alan Kaplinsky:

And actually, I remember getting a call from you. I was on vacation with my wife down in Argentina, and I remember talking to... I don't know if you remember that.

Kate Berry:

I do.

Alan Kaplinsky:

But I was talking to you about that. It had something to do... May have been during the Congressional Review Act situation, where it was nip-and-tuck as to whether Congress was going to be able to override the Anti-Arbitration rule.

Kate Berry:

That is right. And remember, Keith Cordray's, who was the Acting Director of the OCC, played a huge role in getting the arbitration rule CRA'd, essentially.

Alan Kaplinsky:

Yes. Oh, yeah.

Kate Berry:

Punted. Yes.

Alan Kaplinsky:

Yeah. And boy, we covered that thing on our blog. We were-

Kate Berry:

That was huge.

Alan Kaplinsky:

We were cheerleading for Keith, and-

Kate Berry:

That's right.

Alan Kaplinsky:

And we were nay-saying anything that Elizabeth Warren came up with. Yeah, that was... But all I remember is, I was in my hotel room, and I think it must have been one A.M. in the morning, because they were on a different time zone. And I'm looking on my phone, following it on CSPAN, and when the vote came out and we won by one vote, I gave out a enormous shout in the hotel. I must have scared the heck out of all the people there. Anyway, so what I like to do... Let's get back to, you're following the CFPB and you're following Richard Cordray toward the end, and then as I recall, he points a Leandra English wish as Deputy Director, and then Trump wants to appoint Mulvaney or put Mulvaney in an acting position. That must have been a fun situation to follow, right? I mean, then-

Kate Berry:

Well, so you'll remember that that happened over the Thanksgiving weekend.

Alan Kaplinsky:

Yes.

Kate Berry:

In 2017?

Alan Kaplinsky:

Yeah.

Kate Berry:

So basically, I think many people were very angry at the idea, myself included, that my entire Thanksgiving was blown from covering what was happening at the CFPB. And the naming of Leandra English, and I think we since know that she was picked largely because others had been asked, namely the number two at the time, David Silverman, and I'm told he declined, as did others. And English stepped up, but it was-

Alan Kaplinsky:

Do you think... Yeah.

Kate Berry:

Mm-hmm (affirmative). Go ahead.

Alan Kaplinsky:

Do you think Leandra knew at the time, when she got appointed to that position, that she was going to be a part of a lawsuit? Do you think she knew what she was getting into?

Kate Berry:

I don't know that specifically, whether she knew. But she had to have known that it was going to be a brouhaha, if you will, because she was appointed the Acting Director at the same time he left. So she didn't spend any time as the Deputy. It all came in one fell swoop, and was very surprising, I think. But I think, also, she was very young. 34 at the time, and really had no... She was in operations, not in the enforcement or supervision division. I think it was a bit of surprise to people at the Bureau.

Alan Kaplinsky:

Yeah. And I guess, not a lawyer, right? Was she a lawyer? I don't think so.

Kate Berry:

I don't believe so. I'm not sure.

Alan Kaplinsky:

Yeah. Yeah. The whole thing, as I think back on that, the events that occurred at that time, it really, when you think about it, there was a lot of energy wasted on that. Because all people were fighting about is, who is going to be the Acting Director until Trump was able to nominate somebody who would be confirmed by the Senate. And we didn't know how long that was actually going to take. It took longer than I thought. But it just seemed like, in a way, much ado about nothing. Did you feel the same way, or did you think there was something more at stake there? I mean, it was very entertaining.

Kate Berry:

It was unfortunate that it ended up being that way, that there was this... I would call it a, "Shenanigans." Playing politics with these agencies. I don't think citizens expect this, and as a reporter, I didn't expect it. You expect transition, you expect people to behave professionally. Not muck up the next people coming in, the next leaders. And that's what they tried to do, and I think because of that there's a lot of anticipation that that could happen this time around as well. Because it sets the stage for sort of a bad transition.

Alan Kaplinsky:

Yeah, we'll get to that in a bit. Yeah, I want to get to that.

Kate Berry:

And also, I think, per your point, is there was so much wasted energy on the filing of lawsuits, they're going to judges. At one point, this ridiculousness of two people claiming to be the Director of the CFPB, or the Acting Director, at the same time just... It's silliness. That's no way to run a government.

Alan Kaplinsky:

Yeah, that's for darn sure. So then, okay, that sort of gets... Eventually she bows out, and Mick Mulvaney is there. And I remember, I don't know if you wrote the article, but reading that he knew that there was a lot of staffers at the CFPB who had been there under Cordray, and they weren't thrilled or delighted to have Mick Mulvaney now, as their boss. And I think the first day, or maybe soon after he joined, he brought donuts for everybody.

Kate Berry:

Oh, that's right.

Alan Kaplinsky:

As a peace offering.

Kate Berry:

Oh my God.

Alan Kaplinsky:

That's something that sticks out in my mind. So did you ever interview Mulvaney?

Kate Berry:

No.

Alan Kaplinsky:

No.

Kate Berry:

No, they would never allow it, and they had PR people who prevented that.

Alan Kaplinsky:

Really? Okay.

Kate Berry:

Yeah.

Alan Kaplinsky:

Yeah. Well, they were probably-

Kate Berry:

But it wasn't necessary, because he was everywhere. Talking about what he intended to do, saying, I'm not dismantling the agency, putting political appointees in to... What you're saying. To shadow the people who were there, the staff.

Alan Kaplinsky:

Yeah. So I know that you were following the Bureau only for a short time under Richard Cordray, but you've seen the agency the whole tenure, the entire time Mulvaney was there, and you will be covering the agency for the entire time of Director Kraninger.

Kate Berry:

Yes.

Alan Kaplinsky:

What do you think the big differences are? Well, first of all, I assume you agree with my observation that there's quite a bit of difference between Richard Cordray running the agency and Mulvaney, for sure.

Kate Berry:

Absolutely.

Alan Kaplinsky:

Yeah. What about Kraninger? What's your thinking about that? What are the differences you've seen?

Kate Berry:

Well, I think there's been a dramatic change at the CFPB. I would say... We've talked about this in Kraninger's favor, that many industry folks including lawyers that represent financial firms, think that... They think she's brought a breath of fresh air to the Bureau. That she's more centrist, that she's less political than either Mulvaney or Cordray. And of course, we all know that when Mulvaney came in, he essentially put a halt to all enforcement actions for about a year. I mean, he really ground the agency to a halt.

So for a year at least, the CFPB was really a non-entity. They weren't doing anything. Then when Kraninger came aboard, she essentially alerted the industry, in some of her first speeches, that most of their issues would be resolved in private through supervision. And industry, I think, was thrilled. She immediately reduced enforcement actions, she said... I mean, they've picked up since, but one main change between Kraninger and Cordray is the amount of fines, and penalties and restitution borrowers has just plummeted. So the stance under Democrats was, you hit financial firms with big fines, big public actions. You shame everybody into doing what you want. And the opposite has happened under Republicans, which is, you have very few fines, very little restitution, and not a lot of headlines.

Alan Kaplinsky:

Yeah. Well, I remember when Richard Cordray... The first enforcement actions that he brought. And that was well before you were covering the Bureau. They were these big, big-

Kate Berry:

Huge.

Alan Kaplinsky:

Yeah, huge investigations of all the major credit card issuers.

Kate Berry:

That's right.

Alan Kaplinsky:

Yeah. I mean, he went after every one of them. And while Kathy Kraninger has gone after some of the big players, she seems to be focused a little bit more on the non-banks. Some of the low-hanging fruit, I guess I would call... Those obvious scams.

Kate Berry:

No doubt about it. She's playing small-ball, to use a baseball analogy. She's going after one-off fraudster, scam artists. Absolutely. They're looking specifically for fraud, not... And I think other things are being resolved behind the scenes. But I would say, they have filed against banks, but those are actions that began under Cordray and have worked their way over several years to finally being filed under Kraninger.

Alan Kaplinsky:

Yeah. After Mulvaney came in, he put everything on hold for a while, and reportedly looked at all the files that had been open, dealing with investigations. Do you think they got rid of a lot of investigations? Do you have any thoughts on that, or do you think they continued to investigate and they settled, but settled at dollar figures that were way below what Cordray would have agreed to?

Kate Berry:

That is a good question. I can't say I know the answer to that, whether anything was scuttled. I had heard at the time that some were being dropped, and of course, one of the first things he did when he got in was drop an action against a payday lender that had contributed to his own political action committee when he was in the House. That was really within the first month, he dropped... Which is pretty good. If you're a payday lender, and you contribute 10 grand to a political action committee, and then you get an enforcement action dropped. It's a pretty good price to pay.

Alan Kaplinsky:

Well, I won't comment on that, other than to say, it certainly wasn't my client.

Alan Kaplinsky:

So, yeah. Okay. So you're covering Kraninger. During this year, what do you think the biggest story was that you covered at the Bureau?

Kate Berry:

So, it would have to be the Supreme Court ruling in the Seila Law case. Right?

Alan Kaplinsky:

Okay.

Kate Berry:

So, I think because there was so much buildup to this Supreme Court ruling. Many companies during the end of Cordray's tenure were claiming that the CFPB was unconstitutional, and they had filed all these lawsuits. You can't bring an investigation, because it was unconstitutional. And so, finally, they teed up this one case, Seila Law. And the Board did rule that the CFPB was unconstitutional, but it was fairly anticlimactic, I think. Because the remedy was fairly simple. Right? They just struck one clause from the Dodd-Frank Act that said the CFPB Director could only be fired by the President for cause, so that now the President can fire the CFPB Director for any reason, the Supreme Court says. And now, that means that Biden can fire Kraninger immediately when he takes office. And that's the one result of that ruling.

Alan Kaplinsky:

At the time, I was sort of scratching my head and saying, "Why the hell are the Republicans doing that?" That was the argument that they were making. I guess they thought that Trump was going to get re-elected. That was the gamble. Do you think that's what it was?

Kate Berry:

I think, because it takes so long to tee up these cases, I'm not sure there was a calculation about how it was going to end and who would be affected by it. I think it was just, we want to get these cases up, and if only they can claim that it's unconstitutional, maybe they'll get rid of the agency altogether. I think there is actually some view that the agency, 10 years in existence, would somehow just miraculously be wiped out, which didn't happen.

Alan Kaplinsky:

Yeah. That's for sure. So now, even though Seila Law is over at the Supreme Court level, it got remanded back to the Ninth Circuit to figure out what the remedy is going to be. It all started with the CFPB serving a civil investigated demand on this law firm.

Kate Berry:

That's right.

Alan Kaplinsky:

And the law firm resisted it, and the law firm still is resisting the CID. And there was apparently an oral argument at the Ninth Circuit-

Kate Berry:

That's right.

Alan Kaplinsky:

Last weekend one of my colleagues, Barbara Michigan, who manages our blog, she listened to the argument and she said it was pretty clear to her that the result is going to be that the CFPB is going to be able to enforce the CID. Which, that's not-

Kate Berry:

That's right.

Alan Kaplinsky:

Yeah. And so, the-

Kate Berry:

But I'm interested in your view. It was not a great case. There was nothing to the case. I mean, how it got to the Supreme Court, I think, is really a surprise. And that also goes to Kraninger, because she came out and said that she backed Seila Law in taking it to the Court and finding the CFPB unconstitutional, which was... Not even Mulvaney did that.

Alan Kaplinsky:

Yeah, right. Right. Right.

Kate Berry:

So a lot of it was odd.

Alan Kaplinsky:

The twists and turns, yeah. Very strange, and I think ultimately, even though there's still a lot in addition to the Seila Law case, there's the RD Funding case, in the Second Circuit, the All-American Check Cashing case-

Kate Berry:

All-American Check Cashing.

Alan Kaplinsky:

And I think when the dust settles, my guess is that it will be business as usual. That the CFPB... That the courts aren't going to invalidate any of the regulations, and they're not going to say, "Go ahead with the enforcement." So-

Kate Berry:

No, they're going to allow her to ratify everything she's done-

Alan Kaplinsky:

Right, everything. Right.

Kate Berry:

Right?

Alan Kaplinsky:

Right. Right.

Kate Berry:

And move on.

Alan Kaplinsky:

And here we are. Yeah, right. So what do you think, going into next year... The election is behind us, and soon we'll have the new Congress, and we'll have a new President. What do you think the big news at the CFPB is going to be, at least at the beginning of the year? I mean, I know there are a lot of stuff going on. It could be another battle like we saw with Mulvaney-

Kate Berry:

Mulvaney and English.

Alan Kaplinsky:

Yeah, and English.

Kate Berry:

So I think some are pushing for a battle by claiming that... And I've written about this. By claiming that Biden can fire Kraninger, but he actually can't somehow name an Acting Director because of the Federal Vacancies Reformat. I just personally think that she's going to resign on her own. She's going to resign, or Biden's going to ask her to resign, and then she will and it'll be a smoother transition. Because-

Alan Kaplinsky:

Right.

Kate Berry:

Most of what she says is that she's a public servant, and if she's honest in saying she's a public servant, then she'd likely resign.

Alan Kaplinsky:

Yeah. I-

Kate Berry:

So I'm not sure it's going to be the dogfight that many expect, or some are anticipating.

Alan Kaplinsky:

Yeah. Yeah. It's interesting to speculate about it, and it would be a lot of fun reading your articles about it, but I don't think that it's going to happen. I think Biden will... Now, he may have some difficulty getting his new Director, whoever he's got in mind, through the Senate, right? I mean-

Kate Berry:

That's exactly right.

Alan Kaplinsky:

We've got special election in Georgia, and we still don't know who's going to have control of the Senate, and that might influence who he nominates. Don't you think?

Kate Berry:

He had an interview with CNN yesterday, and they even talked about... He talked about the slim majority they have in the House. Which to me, says that... One of the top names that had been floated before the election was Katie Porter. A representative from California, who's a former law professor at UC Irvine, and studied under Warren. And I don't know that that's possible or that she could get confirmed, so I think that throws the calculus of who would be named a permanent Director in flux. Yeah, right?

Alan Kaplinsky:

Yeah.

Kate Berry:

You're right.

Alan Kaplinsky:

Yeah, yeah.

Kate Berry:

Absolutely.

Alan Kaplinsky:

So the names that I've heard are probably the same names that you've heard. Rohit Chopra, from an FDC commissioner. Also, I would say, a protege of Elizabeth Warren.

Kate Berry:

Yes.

Alan Kaplinsky:

Very liberal. Progressive. Chris Peterson, professor at University of Utah Law School, who ran for Governor and lost. I like Chris a lot and I consider him a good friend, but I don't think he's got much of a chance, because he is too progressive. He's been a consultant at the CFPB, and-

Kate Berry:

Yes.

Alan Kaplinsky:

He's actually the guy that wrote all the... He got sent over to the Department of Defense to write the Military Lending Act rules.

Kate Berry:

That's right.

Alan Kaplinsky:

Yeah. And then, you've got... Who else? Who am I leaving out? Rohit. Oh. Patrice Ficklin. If you were to tell me he had to select somebody today, who I think is going to get nominated and I think would get through the Senate, perhaps even if the Republicans maintain control, I think Patrice Ficklin is my leading candidate.

Kate Berry:

Really? So I think she has a real chance of being named acting, because under the FDRA you can name a senior official who's already at the agency. So she could be named acting, definitely.

Alan Kaplinsky:

But then she can't-

Kate Berry:

Whether she would go from acting to permanent, I think it's a possibility.

Alan Kaplinsky:

Yeah. I think, and I'm not 100 percent sure of this, Kate, but I think there's something that says... It may be in the FVRA, the Federal Vacancies Reform Act, for our listeners who may not be familiar. I think there's something that says if you become the Acting Director of an agency, you can't be nominated to be the Director. If somebody, let's say Biden, wants to nominate somebody, he can't name that person Acting Director, so-

Kate Berry:

That's right. So you actually think she'd be nominated for permanent, not acting.

Alan Kaplinsky:

Well, yeah.

Kate Berry:

Interesting. Okay.

Alan Kaplinsky:

I mean, she qualifies to be Acting Director for sure. In order to be an Acting Director... I mean, I don't know who else over at the Bureau right now would be satisfactory to Biden. And satisfactory to Elizabeth Warren, because I think she is going to have an outsize interest in helping Biden pick the permanent... And probably the Acting Director. Both.

Kate Berry:

Absolutely. I agree with you.

Alan Kaplinsky:

And so, to be-

Kate Berry:

If possible, to the degree that they're mapping it out, definitely.

Alan Kaplinsky:

Yeah. Okay. So that's certainly going to be a big issue. What about other things you think that'll... I mean, here's something a client asked me about today. There's all the litigation involving the Small Dollar Lending Rule, and that's really gotten convoluted, right? And I mean, with-

Kate Berry:

What a mess. Yes.

Alan Kaplinsky:

The litigation in Federal Court in Austin, Texas, where CFSA has sued the CFPB. And then it got put on hold while Kraninger revised the regulations to get rid of the ability to repay provisions, but reaffirmed the payment provisions. And-

Kate Berry:

And now they're trying to get rid of the payment provisions. I mean, there's really nothing left in the Payday Rule.

Alan Kaplinsky:

And now there's more litigation going on there. And then, you've got community groups who have sued the CFPB in Federal Court in D.C. claiming that the new rule is invalid. So far, it seems to me these cases ought to get combined in some fashion. It doesn't seem like an economical... A good way of preserving judicial resources, to have two different judges. But I'm wondering... Here's the question. And it's more of a political question than a legal one. And that is, when we get a new Acting Director, or Director, what are they going to do? They may do another 180.

Kate Berry:

I agree.

Alan Kaplinsky:

A flip-flop.

Kate Berry:

Yes. And I think they could-

Alan Kaplinsky:

Do you think that could happen?

Kate Berry:

I definitely think that could happen, where they decide, we're overturning, we're rescinding the Payday Rule a second time. Now, whether they go back to Ability-to-Repay, I don't know. But in many ways, think about it. It's good for Payday, because all of this litigation means there's no Payday Rule.

Alan Kaplinsky:

That's true, but-

Kate Berry:

So all the money they've spent fighting it has been very well spent by not having a national rule for payday lenders.

Alan Kaplinsky:

Right, but I guess the question is, is there enough time for whoever the next four years or after... Is the new Acting Director or Director, to get rid of the Kraninger rule and to promulgate a new rule that the payday lending industry can live with, or will that not get done in four years?

Kate Berry:

I think it's hard to play that one out, because they have to come up with a reason. And Kraninger's reason was the rule didn't conform with research, but the research, as you know, goes many ways. And they already have a former staffer at the CFPB who wrote a parting memo on his way out, saying that the political appointees interfered with the rule, and that alone could be used to try to invalidate it. Whether it's true or not, I believe. You can use things to attempt to invalidate. So I do-

Alan Kaplinsky:

Have you done an article on that? That, I hadn't seen.

Kate Berry:

You may recall, the New York Times wrote a big story on that over the summer, earlier this year.

Alan Kaplinsky:

Oh, okay.

Kate Berry:

The parting shot of one of the staff members saying the political appointees interfered in the rule.

Alan Kaplinsky:

Right. Well all right, so that's going to be a thing. Another thing-

Kate Berry:

But you do wonder, why so much attention on Payday? I'm not even sure in the dollar amounts, why that takes up so much attention.

Alan Kaplinsky:

Well it's a large industry, and it covers... Of course, more than just traditional payday loans.

Kate Berry:

Title loans, yeah.

Alan Kaplinsky:

Well, title loans, and also small dollar installment loans.

Kate Berry:

Yeah. That's right.

Alan Kaplinsky:

So that's a pretty big industry, and a lot of that industry is now online so it's continuing to grow. And it's just-

Kate Berry:

But I would have thought their focus would have been on offshore online lenders, unregulated-

Alan Kaplinsky:

Yeah, but the problem there is the offshore people, they can't-

Kate Berry:

They can't go after-

Alan Kaplinsky:

They can't get their tentacles on them. They're too hard to find.

Kate Berry:

That's right.

Alan Kaplinsky:

And also, I guess they've done a little bit with tribal lending. A little bit, but not a lot in that area. As I'm thinking ahead, the one thing it seems is really different between the Kraninger tenure and Cordray... We haven't had one larger participant rule.

Kate Berry:

That's right.

Alan Kaplinsky:

Under Cordray we had a larger participant rule dealing with prepaid card issue, where student lending servicing remittance providers... Well, payday lending was already part of Dodd-Frank, that they were going to be supervised. But there's been nothing. Do you think that that's going to be a priority? That they'll try to sweep in more non-banks to supervise?

Kate Berry:

I think they will, but I don't know if that's going to be a priority given that they also have rules out that they have to finish on small business loans.

Alan Kaplinsky:

Yes. Yeah.

Kate Berry:

And now you have-

Alan Kaplinsky:

Data access.

Kate Berry:

Data access, which is going to be a massive, massive issue. So I don't know. They need to do it, but they get backed up. So even this administration, I mean, they've done payday, rescinded some [inaudible 00:36:18] and debt collection. Which, I guess is a lot in two years. Considering.

Alan Kaplinsky:

Yeah. Yeah. There'll be no lack of topics for you to write about. That's for sure, right?

Kate Berry:

No, and don't you think, Alan... I think there's going to be a big focus on two areas under Biden. Mortgage servicers in abiding by the CARES Act-

Alan Kaplinsky:

Yeah. Oh, yeah.

Kate Berry:

As they look at issues of income and equality, and they're talking a lot about it. And now I'm blanking on the other one. Not only going after mortgage servicers, but teeing up all these other issues that were left over from Dodd-Frank. Like the small dollar... I'm sorry, small business lending issue. They still have some unfinished business to do more than 10 years after Dodd-Frank.

Alan Kaplinsky:

Right. Right, right. So do you cover just the CFPB, or do you also cover what any of the other agencies are doing in the consumer finance area? Is that a different beat-

Kate Berry:

Well, I don't specifically cover other agencies but I do fill in. For example, on the OCC occasionally, particularly on CRA, this Community Reinvestment Act. They have a new CRA that's-

Alan Kaplinsky:

How about the new proposed Fair Access Rule?

Kate Berry:

Oh, yeah. Fair Access.

Alan Kaplinsky:

Oh my God.

Kate Berry:

I have not written about it, but I hear a lot. I get a lot of comments from sources on fair access.

Alan Kaplinsky:

That is-

Kate Berry:

What's your view of that?

Alan Kaplinsky:

Well, I think Brian, who I have a lot of respect for... I mean, I think he's actually been a very good Acting Comptroller. He is a brilliant lawyer. That's how I knew him, when he practiced law. So fair access, I think he didn't realize what a hornet's nest he was stirring up. I mean, as soon as I read it, I knew it. That the banks were not going to like it at all. And they don't like it, and they say, "Gee. First of all, we're not a public utility. Right? Can't we decide who we want to do business with?" And also, part

of safety and soundness is reputational risk. And if there's a certain industry or sub-industry that we don't want to deal with, because we're concerned about what it'll do to our reputation, and that has an impact on safety and soundness, isn't there some inconsistency there?

Kate Berry:

That they decide themselves. Yeah.

Alan Kaplinsky:

Yeah. And then, the further thing I've heard is there are a lot of industries banks don't get involved in lending to, because they don't have the expertise. They don't understand it. You're going to lend to a company that's doing fracking. Well, you've got to know what you're doing. So are banks going to be required, for all these industries, to hire a lot of people and develop lending programs for them? So I mean, that's what I'm hearing from my banking clients. Now, my payday lend-

Kate Berry:

I hear the same thing.

Alan Kaplinsky:

Yeah. Now, my payday lending clients, yeah... Well, they weren't advocating for this, I don't believe. But I guess if it became final and went through, it would be a good thing for them and a lot of other industries. But they didn't like the operation choke point. They didn't like having banks say, "We've been told by the FTIC that we shouldn't lend to you." That's what they were... Well, this thing is really quite a bit different than-

Kate Berry:

It is, yeah. I mean, I think they don't want it either side. You know? The Obama administration coming out and saying, "Unfavored industries like payday lenders," and sort of letting that be known that they don't want anybody lending to them, well... I don't know if that's where people think the government should be involved. Because then you're going to get into what you have now. You're forced to lend. I don't think banks want that either.

Alan Kaplinsky:

Yeah. Yeah. Well, it'll be interesting to see where that goes.

Kate Berry:

It will be.

Alan Kaplinsky:

I assume there will be a new Acting Comptroller in the not-too-distant future, and probably a new Comptroller. And that it'll be the new Comptroller who really decides what to do with that.

Kate Berry:

Yes.

Alan Kaplinsky:

The final question, and then we'll have to wrap things up, Kate. So do you think that there will be a push again in Congress to amend Dodd-Frank to substitute a five-member Federal Trade Commission for a sole director? What are the odds of that happening?

Kate Berry:

Well, I recall at one point writing that there had been more than 60 bills under Cordray trying to change the CFPB in some way, including making it a commission. And of course, none of them went through. So can you bring a bill that says that? Sure. I'm sure they're teed up already. Absolutely, because I think Republicans are going to go right back and begin their complaining about the CFPB. And that's going to be part of it. But they had their chance if they really believed in a commission, to change it to a commission when they were in power. And they didn't. And so, to now suggest, out of power, that they are going to now push through a commission, I think is not realistic. I don't think that's happening.

Alan Kaplinsky:

Yeah. Yeah, I don't think it's going to happen either, even-

Kate Berry:

And if they get in power again, I imagine they're not going to push for a commission. So-

Alan Kaplinsky:

Yeah. So I think we're in a state of limbo, and the unfortunate thing is that it means that every four years, this agency could do a 180. And it'll keep flipping and flopping, and that's really difficult for everybody. It's difficult for the companies that are supervised and regulated, because you can get whiplash. Not knowing who's the real CFPB? The real C-

Kate Berry:

Well, you know that at some point it's going to come back around to the opposite of what it is now. That's the problem. It makes for interesting coverage, but I think something should be resolved on... CFPB was created because consumers got a lot of bad mortgages that led to the financial crisis. And they need somebody looking out for the citizens. And I don't see how that alone is controversial.

Alan Kaplinsky:

Yeah. Yeah, yeah. Okay. Well, we've gotten to the end of our show today, Kate. And I really want to thank you very much for participating. It's really been fun talking to you for the last 45 minutes or so, and we'll welcome you back sometime next year after we're into the swing of things under the Biden administration, and exchange notes again. Okay?

Kate Berry:

Absolutely. Thanks, Alan.

Alan Kaplinsky:

Yeah. Okay, thank you. So, I just want to remind our listeners that our podcasts are released every Thursday, except when Thursday falls on a legal holiday, so I think there are two Thursdays a month that we skip. And if you have any suggestions or questions that relate to our podcast show, please email them to podcast@ballardspahr.com. Other than that, I want to thank all of you who downloaded our show today. Thank you.