

Consumer Finance Monitor (Season 5, Episode 29): The Role of Government Regulation and the CFPB's Approach, with Special Guest Cary Coglianese, Professor of Law, University of Pennsylvania Law School, and Director of the Penn Program on Regulation

Speakers: Alan Kaplinsky and Cary Coglianese

Alan Kaplinsky:

Welcome to Consumer Finance Monitor podcast, where we explore important developments in the world of consumer financial services. I'm Alan Kaplinsky, your host today. And I'm senior counsel at Ballard Spahr. Formerly the chair of the consumer financial services group for about 25 years. And I am very pleased that we're going to be talking about a subject today that's becoming of just increasing importance in the consumer financial services world. And my guest today, who I will introduce to you in a moment, is one of the country's leading experts in the area of government regulation. And I look forward to having an interesting discussion today. So let me right now introduce our guest today. My guest is Cary Coglianese. Cary is the Edward B. Shils professor of law and a professor of political science at Penn Law School, where he also is the director of the Penn Program on Regulation.

Alan Kaplinsky:

And this was a program that I wasn't all that familiar with until recently when the director of the CFPB, Rohit Chopra, on March 28th delivered the distinguished lecture on regulation. Now, during that lecture, he didn't really talk about regulations very much. He talked about the problem of corporate recidivism, which is really more of an enforcement issue than a regulatory issue. So before we dive into this issue of regulations and the CFPB, let me, first of all, give a very warm welcome to Cary. Cary, welcome to our show.

Cary Coglianese:

Well, thank you very much, Alan. It's nice to be here. I appreciate it very much. And looking forward to the conversation.

Alan Kaplinsky:

Good. So Cary, rather than my try to describe to our audience what the Penn Program on Regulation does, what its mission is and how that mission is accomplished, I'd like to give you the opportunity to tell our listeners a little bit about the program.

Cary Coglianese:

Sure. Delighted to. The Penn Program on Regulation is a faculty based program that cuts across six major schools at the University of Pennsylvania, which is located here in Philadelphia. It's based at the University of Pennsylvania Carey Law School and weaves together the work of 60 or so faculty from across the university. And we have three primary purposes or missions. One is teaching, which we do not only through our degree programs, but we also offer an executive ed program on regulatory analysis and decision making that draws practitioners from around the world to our training. Second, in addition to teaching, we have a research mission too, and that is what our faculty spend a lot of their time doing. The research areas that we cover run the gamut of regulatory areas. The substantive areas are environmental, and financial, transportation, and healthcare and everything in between.

Cary Coglianese:

And then the last mission or purpose is outreach, where we try to help enlighten and illuminate debates over regulatory policy issues, whether it's by bringing in distinguished lecturers, like when we had Director Chopra in to deliver our annual regulation lecture. But also on a day to day basis, we sponsor a publication called *The Regulatory Review*, which every weekday is producing new content on all things regulatory. And it really has become the go to publication for regulatory issues, drawing readers from all around the world. It's produced by students, edited by them, but sponsored by the Penn Program on Regulation. And I serve as the faculty advisor to that publication.

Alan Kaplinsky:

Can the public subscribe to *The Regulatory Review*, Cary? And if so, how do they go about doing that?

Cary Coglianese:

Sure. Just go to www.theregreview.org, that's all one word, theregreview.org, and you can get the benefit of all that we're producing free of charge, open to the public. Our mission really is to make what is otherwise can be kind of an obscure, hidden, technical, complicated world of regulation more accessible and understandable to the general public. If you want to find out more about what we're doing at the Penn Program on Regulation more generally, you can visit our website at www.pennreg.org. Penn with two Ns, P-E-N-N, and reg, R-E-G, all one word, .O-R-G.

Alan Kaplinsky:

Well, let's now take a dive into this subject, and in particular, what it may mean for the consumer financial protection bureau, which is an agency that both our blog, consumerfinancemonitor.com, and our podcast show follows very, very closely. So on June 17th, the director of the CFPB, Rohit Chopra, came out with a blog that turned a lot of heads, I think is one way to put it. And I want to read to you what the relevant part of the blog, was a rather lengthy blog, but there's really only one portion that's relevant to our discussion today, Cary. And this is what he said, "markets work best when rules are simple, easy to understand and easy to enforce. The CFPB is seeking to move away from highly complicated rules that have long been a staple of consumer financial regulation and towards simpler and clearer rules.

Alan Kaplinsky:

In addition, the CFPB is dramatically increasing the amount of guidance it's providing to the marketplace in accordance with the same principles. Regulators have historically issued overly complicated and tailored rules for the existing regulatory landscape, as opposed to providing basic bright line guidance and rules that can withstand evolution of the marketplace over time. The CFPB aspires to more clearly communicate the agency's expectations in simple and straightforward terms, which will produce more durable guidance and rules, in addition to numerous other benefits. While this task is difficult, we believe it's important to move away from the failed approach of the past. First, unnecessarily complex guidance and rules impede consumer protection, and instead simply increases compliance costs, which benefits larger market players and their high price lawyers. Unnecessary complexity places new entrance in small firms at a disadvantage compared to the larger competitors.

Alan Kaplinsky:

The CFPB plans to issue guidance in a manner that strengthens the compliance posture of all market participants, not just those with the most market power or resources. Second, simple, bright lines allow all parties to better understand the law and policy priorities, but also prevent strategic or intentional misunderstanding or plausible deniability that some companies use to ignore the law. Complexity creates unintended loopholes, but it also gives companies the ability to claim there's a loophole with creative lawyering. Where guidance and rules are straightforward and simple, entities are incentivized to redirect innovation and creativity away from regulatory evasion and towards better serving consumers. Simple, bright lines advantage law abiding companies and disadvantaged law breakers. And third, clarity and simplicity will promote consistency among government agencies responsible for enforcement of the federal consumer financial laws."

Alan Kaplinsky:

I apologize to you, Cary, and to the audience for such a long quote, but there's a lot in what I just quoted from Rohit Chopra's blog. And after I read through it, I wasn't really sure what he meant. The first thing that came to my mind was this concept of principle based regulation versus prescriptive based regulation. And I knew that in some foreign countries, that's the theory that's used in drafting regulations. But then I wasn't really sure of that, because then that seems to be, I thought he might be going to principle based regulations, but he's talking about simple, bright line rules. And I'm not sure if that's really consistent with that. Well, anyway, I know you can't get into Rohit's mind. But after you read it, what did you think it meant?

Cary Coglianese:

Well, as you say, there is a lot there, and there's a lot there that I think everybody should agree with and applaud. Rules shouldn't be unnecessarily complex. For example, often the devil will be in the details though and people will disagree about what kind of complexity is necessary and what kind of complexity is unnecessary. You're certainly right to say that one way that regulators in other parts of the world have been trying to promote the underlying virtues and objectives that are reflected in Director Chopra's statement is through principles based regulation. And the UK, the financial services authority in the UK has since, I think 1990 actually, explicitly adopted what they call a principles-based approach to regulation. Regulators in Canada and elsewhere around the world are aiming to shift to what they call more principles-based regulation.

Cary Coglianese:

Now, I should say that even in the UK and elsewhere around the world where there has been an emphasis on principles-based regulation, they haven't really gotten rid of a lot of prescriptive rules. There's always a blend. And so, the world of regulation often just requires some balance. And I read Director Chopra to be saying, maybe here in the U.S., the balance has gotten a little off and we've lost sight of some of the underlying missions of regulation, which is to shape the behavior of regulated entities. And how do you shape the behavior of regulated entities? Well, in part you do that by communicating with them. I like to say that regulation is actually all about relationships. Regulation is trying to change human behavior. And it's humans at regulatory agencies, like CFPB, that are trying to shape the behavior of the humans in the industry. This is a relational enterprise.

Cary Coglianese:

And if rules have gotten too complex, too much out of line with how people understand and conduct business today, they do need to be revised, updated, clarified. And regulators in writing new regulations should always be thinking about clarity, because a rule has a communicative function. Now, if you go with a principles-based approach, one of the ways that communication is facilitated is by the regulator articulating the big picture principles, the overarching principles that should govern conduct in a particular industry. And this has been used not only, by the way, in financial services, but in a variety of other areas. And we have aspects of it actually in our regulatory system here in the U.S., even in the consumer financial protection world, where we have principles about unfair and deceptive practices that are to be avoided.

Cary Coglianese:

Those kind of principles though, when you articulate them, they can help communicate, can help kind of create a common understanding between the regulator and the regulated community, and that can help guide behavior. And I think that's a good thing. And I think if Director Chopra's telling the rule writers at CFPB, let's try to work on this more, let's go through our old rules and try to update them and clarify them, let's try to add new rules, when we're doing that, make them clear, that's always a good thing too. And he does mention, last thing I'll just say is, as you pointed out, he mentions that there's a role for guidance, not just the way the operative binding rules themselves are written, but also the way the guidance that the agency produces is written. Working on making that clear and directing it toward folks in the industry and what their needs and understandings are, I think is also an important aspect of the statement.

Cary Coglianese:

Let me just conclude by saying the one thing that he says there that is, I think, irrefutable is that this is a difficult task. CFPB has inherited a lot of rules from other agencies. The industry itself is complex. And sometimes you need some complexity to the rules to match the complexity in the industry. But I think he's right to try to focus attention on encouraging regulators at the margins to do their best to make rules as simple and clear as they possibly can.

Alan Kaplinsky:

Yeah. So here's the problem I have, and I speak as an attorney who's devoted almost my entire career to dealing with regulations issued by, CFPB has only been operational for 11 years, but the Federal Reserve Board, the Federal Trade Commission, the banking regulators, the regulators at the state level, banking departments and other regulatory agencies that issue rules, while the laws that apply are not quite as detailed and prescriptive as what's in the internal revenue code and the internal revenue regulations issued by the IRS, it's pretty complicated and it's very prescriptive. And it's typically Congress that is making it sort of dictating what the agency needs to do. Just to give you an example, in 1979, Congress enacted the Truth in Lending Act. Well, prior to that time, there was no law at the federal level and hardly any law at the state level specifying what disclosures a lender would need to make to a consumer before a lender extends credit to that individual.

Alan Kaplinsky:

And all of a sudden Congress enacted this comprehensive statute that mandated disclosures that needed to be made for a whole wide variety of loans. And of course, if you look at 1969 and compare it to where we are today, things were a lot simpler then. The products were a lot simpler. There was no internet to deal with. But even back then, it was a very complicated thing for the Federal Reserve Board to implement through Regulation Z. And it did it, it promulgated Reg Z. And then there was an avalanche of litigation resulting from all the ambiguities that people were seeing in Reg Z. And then Congress came back in 1982, I think it was, maybe it was a little bit earlier, that may have been 1980, and enacted the Truth in Lending Simplification in Reform Act. And they thought that would take care of everything.

Alan Kaplinsky:

Well, not really. That resulted in new regulations being issued and new Reg C, and things have just gotten more and more complicated from there. Despite the appealing rhetoric of Rohit's blog, I don't see in a practice how he's going to be able to do that in the world in which I live.

Cary Coglianese:

Well, let me respond by saying that I think you've put your finger on something really important here about the dynamism that exists in a regulated industry, and therefore the need for dynamism in the world of regulation. We think about regulation, I think too often, as a noun. It's the document that's published in the Federal Register. It's in the Code of Federal Regulations. It's a book. It's words. You can go and you can look at it. I think about this whole enterprise, again, going back to the idea that this is a relational enterprise, as a verb. Rather than regulation, think about regulating. And what you described is, I think, inevitable. And there's no way anybody can really ever get around this. I think the kind of laudable objectives that Director Chopra has articulated in the blog post that we're talking about here are ever-persistent objectives and ever-persistent challenges that regulators face.

Cary Coglianese:

So, I think we just need to recognize that this is an evolutionary, ongoing process. It requires ongoing vigilance, ongoing change, recognition that there will be change in the industry. And there needs to be adaptation in the world of the regulators. There's a new National Academy of Public Administration report that talks about agile regulation. And this is increasingly a focus for a lot of folks in the regulatory world, around the regulatory world in many different countries, how can we make regulation more responsive, more adaptive and more dynamic? And that does require sometimes revisiting rules, revising them, simplifying them, sometimes making them more complex. But it's an ongoing process.

Alan Kaplinsky:

Yeah. Couple things come to mind. First, when he talks about simplification and simplifying, it almost seems like he thinks that regulation should be drafted so that a layman would be able to understand them and apply them to his, whatever business he is managing or she is managing. I mean, I'd like to get your reaction to that. It seems to me that it's the function of a lawyer to interpret regulations and to give advice to clients, big or small, what they need to do in order to be compliant. And I just think it's terribly naive if Rohit thinks that regulation should be drafted so that every Tom, Dick and Harry can understand what they mean and how to go about complying.

Cary Coglianese:

Well, I think for the very reasons that you've suggested, I don't think that can be what he means. But I do think there's even, for lawyers, some challenges in understanding what rules mean and value to making them clear. There's also, keep in mind, in some sectors, differences between the regulated entities. So, there are large players that can hire a battery of lawyers who can really dig in and figure out what the complex requirements mean. And then there may be in many regulatory realms, smaller players who maybe they can afford an attorney, but can't spend a lot of money on legal fees and legal advice either. And so I think what is often the case is that, because again, going back to the point that this is a relational enterprise, because there're differences within an industry, regulators often have to communicate in different ways to different segments of an industry.

Cary Coglianese:

And that sometimes can make the work even more difficult and challenging for regulators, because they not only write rules with a certain flavor and language that can speak to the technical lawyers and the players in the big industries that have compliance management departments and teams and so forth, but also then additional documents, guidance documents, that might be simpler and clearer for the smaller firms. I do think in the realm of consumer finance, we are seeing a fragmentation occurring. We do have the very large banks that continue to play a big role, but we now have these new startups coming in. The emergence of fintech, for example. And there are a lot of new and different players entering the market. So I guess I would read what Director Chopra is saying is perhaps in recognition of this increasing heterogeneity in the regulatory landscape and how to best communicate to different segments of that landscape.

Alan Kaplinsky:

Yeah. Well, the other thing that needs to be factored in, this is just an observation I'm making, and I'm not referring to any particular company, but when it comes to startup companies, particularly FinTech companies that come up with a new idea, some new fancy way of saving time and money for consumers and creating efficiency, and there seems to be no end to the creativity of the people that are doing this, we're dealing with entrepreneurs mostly. And when they begin their business, I've yet to have talk to an entrepreneur who has said to me, the first thing I want to make sure that I understand fully is every law that's going to apply to my business, every federal and every state law, and then I'll figure out how to work my way around the laws.

Alan Kaplinsky:

No, the first thing they work on is the business that they want to get into. And is it practical? What are the risks of that business? Not so much compliance risks, but competitive risks. And so when you talk about making regulations simpler, and one of the stakeholders who you're preaching to here are the entrepreneurs, I sort of wonder about that. That doesn't make a lot of sense to me, because they're not going to be reading the regulations anyway. When they finally get to the point where they have the business and the things under pretty good control, then they'll go talk to a lawyer about, is there anything I need to really worry about here?

Cary Coglianese:

No. And listen, there's plenty of startups that we hear allegations about actually not caring at all about what the law says, even maybe after they've consulted with lawyers. We're talking at this time during a week when the *Washington Post* has released a

series of exposes on Uber and its startup process, and the claims are that Uber really just flouted laws in many localities to get their business started, and sometimes in ways that seem quite revolting. But nevertheless, I haven't studied that directly, but these are the allegations. And I do certainly recognize that. And I recognize that there may be places where an agency like CFPB needs to think about the simplification process more than in other parts of its regulatory canon.

Cary Coglianese:

So, I don't think any regulator needs to or should think about making every word communicable to every possible person. That's just not possible. This is why the first place we create generalizations, because agencies don't have time to speak with every individual entity, or manager, or entrepreneur in a business sector and tell them what they should do. So, you have to write with some degree of generality. And that's true also with thinking about how to optimize on the simplicity versus complexity dimension as well. So, I would suggest that CFPB, and any agency, really think hard about who it is they're trying to communicate with, understand their sector, and then optimize their time and effort. And there's no way that CFPB or any regulator's going to be able to overnight target all of their rules for the kind of assessment and clarification process that I think Director Chopra is talking about.

Cary Coglianese:

So, you have to be selective and they're going to have to look at those parts of the CFPB canon that has the greatest opportunity for improving ultimately the outcomes, the fairness to consumers and the efficiency of markets. These are the larger objectives. And everything that an agency does should be driven by those larger objectives. We sometimes talk about outcomes-based regulation. And another thing I like to say is that all regulations should be outcomes-based, in that regulators should always be thinking about how's the best way for them to achieve their overarching objectives and outcomes? How can we best reduce fraud in the market, for example? Well, then let's think about where we need to put more clarification efforts? Where do we need to put more monitoring efforts? Where do we need to put more enforcement efforts? We can't do it all everywhere. We have to be strategic. And I teach regulators around the world to think about strategy in terms of a concept I call regulatory excellence. And part of regulatory excellence is thinking about where are our priorities.

Alan Kaplinsky:

Right. Let me run by you one other thing, and then we'll turn to another sort of related subject, the issue of guidance. But would you agree with me on this, that the objective of regulations should include the idea of predictability, people should be able to figure out what the regulation means, and it should be something that the industry understands and consumers understand, transparency, making sure that whatever the agency is thinking about, that it's conveyed clearly to all of its stakeholders? And then the third thing is will whatever the agency is issued, and here we're talking about regulations, and I assume most regulations that get issued by certainly by the CFPB, if they are truly regulations as regulations are defined, you need to jump through all the hoops of the Administrative Procedure Act, which requires publishing whatever the proposed regulation is for comment, getting comments, and then publishing it in final form that is seeking input from the public, isn't that important in to any agency? I mean, CFPB, any agency. No agency should regulate by fiat.

Cary Coglianese:

Transparency, public input, and the first virtue you mentioned predictability: Yes, I mean, those are all important virtues of any regulatory system. Let me just say a word about predictability, at least first. We can talk more about public input and transparency as well. But unpredictability, I think one thing to bring this back to, the idea of principles-based regulation, which is really just another way of saying let's write rules in a way that has a sort of a coterminous relationship with the outcomes that we want to specify the overarching goals of the regulation in a principle. And it often means there's a level of generality. So, a principle would be that members of an industry, lenders, should not engage in unfair or deceptive practices. That's a generality. One of the things about predictability, though, is: How does one know exactly where the line is between something that is unfair or deceptive, and where something isn't unfair and deceptive? Is a little bit of spin, which is sort of the nature of advertising, for example? How much of that is allowed?

Cary Coglianese:

Where do you cross the line between acceptable consumer persuasion efforts and unacceptable deceptive practices? Those kind of principles, if they really become the basis for a regulatory system, they give a lot of discretion ultimately to the regulator to determine. And this is a big difference between the U.S. and the UK. In the UK, the financial services authority there has much more independent ability to levy fines and so forth. Whereas here in the U.S., regulators are, in some sense a little bit always on the defensive in that you can take them to court and they have to defend themselves there. And we'll talk a little bit more about that, I'm sure, a little bit with the *West Virginia* case, our courts have, and our whole legal system has historically been set up to be more suspicious of discretion possessed by administrative agencies. So, predictability is not only something that guides businesses and tells them what they have to do, but predictability also is something that gives businesses some assurance of what the regulator will do too, or what the regulator can do.

Alan Kaplinsky:

Yeah. And the notion of getting input from stakeholders, I assume that ought to be a guidepost, that ought to be something that any regulator ought to follow. Because if you don't do that, number one, you start losing credibility, and people think you're just acting in a unilateral way and you're not considering the thoughts of other people. And sometimes the industry, or consumer advocates, or state attorneys general, they have some good ideas to give to the agency that is involved in the rule making agreed.

Cary Coglianese:

Absolutely. Yeah, absolutely. So, there's actually two things that I want to draw out from what you said. First is that public input is important because it can provide regulators with needed information. It's the businesses that know their operations, and the constraints and challenges that they face, and the costs and the benefits from different courses of action best. And regulators need to really draw upon, they're often really reliant upon industry for understanding how they're doing business. If you're going to try to regulate it, you've got to know what's going on in that industry. And so you've got to listen to the industry to get that information. So that's one thing. The second thing though, is that there's a very clear line of social science research that supports the view that people everywhere value what's called procedural justice. They want to be heard before decisions are made that affect them.

Cary Coglianese:

And the imposition of a regulation affects people in an industry. And they will be more likely to accept regulations, to view them as legitimate, to take them seriously, to comply with them, even when the inspector's not around or an auditor's not nearby if they feel like they were developed in a fair way. And there's actually a very good empirical study that was done some years ago, not that many years ago, by some political scientists who did an experiment with this in Vietnam. So obviously it's a different country. But what they were able to do there is actually compare how well businesses complied with regulations in an experimental setting where they took one set of businesses or in one city and applied a set of rules by fiat, as you put it. And another, they had the same rules that came out of a process that allowed at least an opportunity, just even an opportunity, for people to provide input.

Cary Coglianese:

And they then compared, well, once these rules went into effect, were they complied with more? And as you might expect in those cities and segments of the industry, where there was an opportunity to provide input, there was greater compliance.

Alan Kaplinsky:

Yeah. I would love, do you happen to remember off the top of your head who did that study?

Cary Coglianese:

Ed Malesky was one of the coauthors ... Maleski and Taussig did this study, two political scientists. Ed Malesky is at Duke, political scientist there.

Alan Kaplinsky:

Yeah. Great. So let's turn now to the second subject that relates to, again, the issue of regulations, but more toward the idea of, is it a good or bad idea for an agency just to issue what it considers to be a lot of guidance, and to do it in a wide variety of formats, including a blog, such as the blog we talked about at the outset of our podcast, changes to examination manuals, informal interpretations, circulars, no action letters, a compliance sandbox orders? That's the way Rohit Chopra has governed in the short time that he's been in office, which isn't even a year yet. And so I wrote an open letter to him on July 11th that was published in our blog, consumerfinancemonitor.com. And it's an open letter to Rohit Chopra, CFPB director. Isn't it time for the CFPB to restart the best vehicle it has for interpreting the federal consumer financial laws, namely the official staff commentary? So let me describe for our audience what I'm talking about here as simply as I can.

Alan Kaplinsky:

So a lot of the regulations that the CFPB inherited jurisdiction over originally came from the Federal Reserve Board. The regulations dealing with the Truth and Lending Act came from the Federal Reserve Board. Regulations dealing with Equal Credit Opportunity Act came from the Fed. The Electronic Fund Transfer Act. And they're all, most of these, not all of them, but most of them came from the Fed. And when the Fed started regulating it, initially under the Truth and Lending Act, it adopted all these regulations, including Reg Z, for truth and lending. But it found, as I mentioned earlier, that it got inundated with inquiries. People were constantly calling up the agency seeking guidance. They were writing letters to the agency. And the agency was just spending an incredible amount of time and resources and absorbing bandwidth through replying to all these letters, either in the form of what they called unofficial staff letters, or sometimes they called them official staff letters.

Alan Kaplinsky:

In no instance did anything the Fed do through the issuance of letters, they didn't go through the Administrative Procedure Act process. They weren't published for comment. They didn't seek any comments. And typically the letters were only sent to the person who raised the question. They didn't get published in the federal register. There was no internet then so you couldn't put them on a website. There were some private resource companies, like CCH, that would publish these letters. And so if you subscribe to a service, you could get your hands on it. It just got out of hand, I mean, to put it mildly. The agency just didn't have enough people to deal with this and to do its regular business. So that's when the idea came to them after talking to the stakeholders again of publishing this official staff commentary. That didn't mean the Federal Reserve Board got involved in every decision. They did not.

Alan Kaplinsky:

They delegated the authority to the director of the Community and Consumer Affairs, which would be the analog to Rohit Chopra's, director of the CFPB. The idea was once or twice a year for each regulation, they would publish for comment proposed changes to this so-called official staff commentary. They throughout the year would solicit input from all the stakeholders to find out what are really the burning issues. Not the nitty gritty things that were one off situations, but the things that had a systemic kind of impact. And it would be published for comment. They'd get the comments in. They'd issue it in final form. And the official staff commentary clearly binding to the same extent as a regulation. And the Supreme Court in the *Ford Motor Credit vs Mill Holland* case stood for that proposition. But ever since the CFPB got created, the official staff commentary, the old official staff commentary from the Fed is still there. It's remained untouched for 11 years.

Alan Kaplinsky:

There are many, many things that need to be changed about it. And it would comply with these principles of predictability and transparency, and making sure that whatever you do is going to have a binding effect that the courts are going to follow it. But

yet, none of the directors, and I'm not just talking about Rohit, Richard Cordray, and then the directors, acting director and the Director Kraninger, who was there under the Trump Administration, they totally ignored the official staff commentary like it didn't exist at all. And instead, embarked on this process of just issuing things by fiat and calling them different names. And it's gotten really confusing. And the industry doesn't like that, because nobody's seeking their input. So I'd like to get a reaction to that. Am I completely off base here, Cary? Tell me if I am.

Cary Coglianese:

Well, you put your finger on an issue that I think many people who are interacting with a variety of different regulatory agencies are concerned about. A couple of years ago I wrote a consultant report for the Administrative Conference of the United States on ways to improve the accessibility and understanding of what agency guidance might be on particular issues. And subsequently, my report was revised and published in the *Michigan Journal of Environmental and Administrative Law*, called "Illuminating Regulatory Guidance." And it reveals that if one wants to find out what an agency's position is, it can be very difficult to find an authoritative location or source for what that guidance is. And there's a lot of fragmentation occurring.

Cary Coglianese:

Now, to some extent, maybe this is mirroring the world at large, where we have just a more fragmented communication structure. We no longer have broadcasting, but we have narrow-casting. We have social media and the internet, and we have blogs and podcasts like this one that we're talking on right now. And so there's so many different avenues. And maybe to some extent, regulators need to be thinking about how to, again, be relational in this environment, how to communicate with other people. Maybe it does require different avenues. But I do think there is a real need for people who are going and looking for, first of all, what the authoritative guidance might be, even if it's not binding. What's really the most considered position that the agency has taken on a particular issue, how can you find it?

Cary Coglianese:

The recommendation that came out of the Administrative Conference was for agencies to create better management, internal management of keeping track of all of this material, first of all, and providing even at least a one-stop portal where, a one-stop portal where agencies provide access to the public to all this material, and it's organized and it's easily findable. To some extent, I think the CFPB has on its website, some virtues in that regard. If you look, they have something they call "interactive regulation." I'm not sure to me, at least, or to the general public, that means a whole lot. But it seems to be a way that you can go in and you can find not only the regulation, but also all the supplemental guidance related to it. And so one function that you were talking about by this old clearinghouse, if you will, process was centralization and easy access, and knowing where to go for the authoritative position.

Cary Coglianese:

There's another dimension that you're talking about though, too, and that is providing some kind of public input. And again, it may not be necessary for everything. Not everything needs to be one size fits all with how a regulator operates. Regulating is a verb, not a noun. But on the other hand, sure, guidance just for the same reasons that we were speaking about the importance of public input into binding rules, public input can provide information and it can actually foster a greater degree of public trust and legitimacy to agencies' guidance if there's an opportunity for input. Now, sometimes there might not be time for that. Some guidance at some agencies has to be issued quickly to respond to something new. But even when you do that as a regulator, there's always the opportunity to say, "this is what our guidance is today, but we're open to hearing your views. Let us know and we were going to take that into account."

Cary Coglianese:

I do think it's important. I spoke a little bit earlier about regulatory excellence. And in my view, there's three core features, or what I call atoms, to the molecule of regulatory excellence. One is the utmost integrity. Two is stellar competence. But three is empathic engagement. And I think for many, many years, regulators really sort of could get away with perhaps operating in a more insular way where the technicians within an agency were talking with the technicians in the industry. But that world

doesn't exist anymore. I mean, the public's demanding more access and more input across the board. Social media is transforming all sorts of aspects of our social lives. But also it's transforming, I think, public expectations about engagement by regulators with those who are affected by the rules and those who, quite frankly stand to benefit from the rules too.

Cary Coglianese:

And when we're talking about engagement and public input, we shouldn't by any means translate that to mean just input from industry. The reality is that industry often has the resources and is at the table, and they're providing input even if the regulators don't want it. But it needs to be an open process, and one in which even voices that might not be readily heard can be heard. One thing I ask people in the regulatory world to do is, in regulatory agencies, is think about the work you're doing and how it affects actual people. You can get caught up very easily in the technicalities of the rules and the finer points of that, and lose sight of who's really supposed to benefit from these. And when you do start thinking about that, then you can ask, well, wait a minute. Are we hearing from those people? Do we know what they want? And you should be asking those questions and trying to seek out those voices too.

Alan Kaplinsky:

Right. Right. So let's turn to the final topic that I want to discuss with you today, Cary. And that's namely the very recent Supreme Court opinion in *State of West Virginia vs the Environmental Protection Agency*. Wondering if before we get into the interesting question of how that opinion will apply to other agencies and other contexts, wondering if you could describe for our listeners, what did that case involve and what did the Supreme Court hold?

Cary Coglianese:

So, *West Virginia vs. EPA* was a Clean Air Act case involving an EPA climate change regulation. Even though it's an environmental regulation, I do think it has broader applicability, so it's worth spending a little bit of time to understand the case and the issues that it raises. The general issue arose in interpreting a particular wording in the Clean Air Act that gave the EPA authority to regulate systems of emissions control. And the EPA took the view that a system of emissions control could mean what might immediately come to mind for everybody as things like scrubber technology, or some kind of changes in the valves or equipment of a polluting facility. But EPA said it can include that, but it can also include what are called beyond-the-fence line efforts, changes to the fuel sources, or maybe even investments in efforts to reduce energy or investments in alternative sources of energy that are less polluting.

Cary Coglianese:

And the issue before the Court was whether the EPA's broad understanding of a system can apply. The Court was very skeptical of this, in part because it saw what the EPA was doing, as what it called generation shifting, wanting to shift the source of energy generating electricity from coal to cleaner sources, like natural gas, or even renewable sources, like solar energy. And the Court had to decide, did the EPA really have this authority? The language and the statute was broad enough. What is a system? And it could mean a lot of different things to be sure. But the Court said, we can't imagine that this is what Congress really intended. And it invoked what it called the major questions doctrine. And it said it's going to look skeptically on claims by agencies to take statutes and use them in ways that yield major implications for the economy without greater clarity from Congress.

Cary Coglianese:

So, maybe the EPA had this authority. Maybe it didn't. It sure wasn't clear to the majority, the 6-to-3 majority of the Supreme Court. And it said, we're going to require that before an agency undertake something of great economic consequence, like trying to shift energy from coal-based sources to a different kind of source altogether, that's going to require more clarity from Congress. Now, it has important implications in the real world, because Congress is not able often to provide that kind of clarity, especially quite frankly, on issues of major import. There's a lot of gridlock in Congress. So, the worry is that this kind of skepticism that the majority showed under the major questions doctrine might well impede other agencies from acting in

ways that probably fits under the plain language of the statute, but nevertheless has these major implications. Will the court look on those actions in the future by agencies as skeptically as it did the EPA?

Alan Kaplinsky:

Yeah. And that's the question that is really in my industry, again, the consumer finance industry, where there's been a lot of debate going on ever since the opinion came down, with some people thinking that this opinion is sort almost one of a kind it's so extreme, and it involves such an important issue of involving climate change and climate control that you can't read too much more into it, or easily transfer its holding into other contexts. And before we get a little more granular, I'd like to sort of, which camp are you in? Are you in interpret it broadly, or it ought to be cap end to just EPA kinds of issues?

Cary Coglianese:

Well, if you're asking me to forecast the future, I don't have a crystal ball I'm afraid. The court majority in its opinion by Chief Justice Roberts says that this should be a doctrine, the major questions doctrine, should be one that's invoked only in quote, "extraordinary," close quote instances. So that might suggest it won't have greater applicability. On the other hand, that same majority opinion says that the Court has been doing essentially what it did in the *West Virginia* case in a number of other cases involving other agencies in the past. And even if it didn't quite use the language of major questions doctrine in the past, that's what it's done. And it cites decisions involving the Food and Drug Administration, the Department of Health and Human Services, and both the Centers for Disease Control dealing with its eviction moratorium in response to COVID. It cites a case earlier this year involving an Occupational Safety and Health Administration regulation as well. I think that range of citations to different agencies suggest that this will have broader legs than just certainly the Clean Air Act and climate change regulation. That, I think, is certain.

Alan Kaplinsky:

Cary, these other cases, I haven't gone back to read these other cases. But you said they didn't really refer to the major questions doctrine as it's been so denominated now in the EPA case. Did they, in those other cases deal with Chevron deference and a way for the court to limit the use of Chevron deference?

Cary Coglianese:

Well, in some instances, for example, one of the cases that the Court cites in the *West Virginia* Case, it cites the earlier decision by the Supreme Court in *Brown and Williamson vs. FDA*. This was a case in which the FDA had tried to regulate tobacco products, cigarettes. And it came before the Court. And the Court was trying to understand whether the statute gave the FDA that authority. And I think by the literal text of the statute, it did. It says that the FDA has authority to regulate products that were intended to affect or control the body or some functions of the body, and that's what nicotine does. And in fact, the FDA had accumulated all this evidence that the tobacco firms were deliberately manipulating the levels of nicotine in tobacco products for that purpose.

Cary Coglianese:

But it nevertheless said, no, we still don't think that despite that language, it's at all imaginable that when Congress in 1935 adopted the Food Drug and Cosmetic Act, that it was giving the FDA authority to regulate tobacco products. And so, it does arise in cases where the court has cited *Chevron*. It also though has arisen in cases where the court hasn't referred to *Chevron* at all. And it's unclear really going forward what the connection is going to be between this major questions doctrine and *Chevron*. It could be that major questions is something that's invoked to short-circuit getting to step two and *Chevron* deference. It could be, by the way, that *Chevron* deference itself is on the way out. We have a lot of ambiguity about where the court stands on *Chevron* too.

Cary Coglianese:

But no, I think that this is going to be something that's argued about in many cases going forward. And I think it's particularly something that needs to be thought about, because many agencies have the same kind of predicament that the EPA had. And what do I mean by the predicament was they've got an old statute that they're trying to apply in a new context, or to deal with a new problem. And in the consumer finance area, just thinking generally here, you've got older statutes created before the advent of modern technology. And now what do we see? All these fintech innovations coming along. And I can't help but imagine that there will be situations where this doctrine enters into the litigation context as an agency like CFPB is trying to take an older statute and apply it to newer circumstances.

Alan Kaplinsky:

Yeah. Wow. Well, let me maybe conclude by talking about what is really one of the hot issues of the CFPB right now. Very recently, within the last couple months, CFPB revised its examination manual dealing with UDAP, unfair, deceptive and abusive acts and practices. These so-called, the UDAP concept didn't begin with the CFPB. It was a part of the Federal Trade Commission Act going back decades ago. It's an old statute. The abusive prong was not part of what the FTC was given authority over. They dealt with unfair and deceptive, but not abusive. But anyway, what the CFPB did is something that had never been done before by it or the Federal Trade Commission. And what it said is it applies to discrimination of any sort against anybody who you're either thinking of offering a consumer financial services product to, or you've sold one to. And that really has thrown the industry into a tither, to put it mildly, including the U.S. Chamber of Commerce that has embarked on almost a crusade now dealing with Rohit Chopra and some major television campaign they've been doing.

Alan Kaplinsky:

I haven't seen any of the ads, but they are going after them. And this is one of the many examples that they give, that he took a statute that had never been applied to discrimination where there are already other statutes dealing with discrimination, the Equal Credit Opportunity Act and the Fair Housing Act, all dealing with credit, the extension of credit, not dealing with other kinds of products and services that may be offered by banks or other companies selling consumer financial services. And all of a sudden, out of the blue literally, he changed the examination manual and said, from now on the agency will consider any kind of discrimination, even if it doesn't involve a credit product as being forbidden and a violation of UDAP. Didn't go through any notice and comment, which is another issue, which we won't really focus on right now. But my question for you is that case, let's say, gets up to the U.S. Supreme Court. With the six, three split in the court right now, is that a case where they apply this doctrine? Or do they say, no, it's completely distinguishable from the EPA case?

Cary Coglianese:

That's anybody's guess, really. And this is one of the, I think, challenges with understanding what is a major question. There's not a bright line test. It's not clear at all. One might even say it's not even a judicially manageable test, quite frankly. It is partly responsive to the concerns that underlie, in some sense, all of administrative law and all of the administrative state, that is, the concern about delegation from Congress to the agency. What kind of issues should Congress really have a say to make, and which are the issues that an agency can make? And that harkens back to the old non-delegation doctrine, which has been applied as law professors like to say, in one year. The non-delegation doctrine had one good year, and that was in the 1930s when the Court struck down new deal legislation on non-delegation grounds. But it has never, ever since struck anything down on the non-delegation doctrine grounds.

Cary Coglianese:

And part of the reason is the non-delegation doctrine operates on the basis of what is called the intelligible principle test. That Congress, when it delegates authority to an agency, has to do so with an intelligible principle. And I think one of the reasons a non-delegation doctrine isn't used anymore is because nobody knows what an intelligible principle is. An intelligible principle test itself isn't very intelligible. And I wonder if the major questions doctrine itself will be very hard to understand and know when it will be used and when it won't be used, what counts as major, what doesn't? These arguments will be made and it's anybody's guess as to whether it will be picked up. I'm sure it will be picked up by some lower court judges. I think

there's some circuits that will definitely pick this up and strike down agency regulations. What happens when these arguments find their way up to the Supreme Court again? We'll have to wait and see.

Alan Kaplinsky:

Yeah. Okay. Fair enough. Well, that brings us to the end of our show today. We want to really apologize to our listeners for going over an hour. We try to keep it under an hour, but we had so many exciting topics to talk about today, Cary. I didn't want to give short shrift to this subject, which at least I know I'm very excited about and interested in. So first of all, want to thank you for taking your time and appearing on our show today. And I'm sure in the future when things come up, we'll be back in touch with you and maybe have you come on the show again, if there's some major regulatory development. So thank you, Cary.

Cary Coglianese:

Well, thank you very much, Alan. I appreciate the opportunity. You asked great questions. It's been an enjoyable conversation for me too.

Alan Kaplinsky:

Yeah, good. So I want to thank all of our listeners today who download loaded the show, and just remind all of you that our podcast show is a weekly show, as we come out 50 times a year gets released, generally Thursday morning. The only time when we don't have a show released is during December, over the Thanksgiving week and over Christmas week in November and December. But other than that, we will be there for you. And our show is available on whatever platform you may use for your podcast. And you can always get it on our website, ballardsphar.com. Go under Consumer Financial Services Group. And we have a portal on the firm website where you can find our blog and you can find all of our podcast shows, those that have already we've done in the past, we've been going on about four years, we have close to 200, and those we'll be producing in the future. Hope everybody enjoys the rest of their day.