Consumer Finance Monitor (Season 8, Episode 1): Alan Kaplinsky's "Fireside Chat" with Former CFPB Leader David Silberman: His Experience During the Prior Transition from the Obama Administration to Trump 1.0

Speakers: Alan Kaplinsky, John Culhane, Jr., Joseph Schuster, and David Silberman

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, a 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.

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Today's podcast is part two of a webinar that we did on December 16th. Today's podcast will feature my colleagues John Culhane and Joseph Schuster, who will be taking a deep dive into the regulatory area at the CFPB, and in particular will answer such questions as, what will happen to any final regulations of the CFPB issue before January 20th? What will happen to proposed regulations that may still be finalized before January 20th? What will happen to other written guidance? What will be the impact of the Congressional Review Act? What will be the impact of litigation challenges to regulations that have already been issued? What will rule making look like under the new director of the CFPB?

Today's podcast is part of the podcast that we released last week, which consisted of my fireside chat with David Silberman, a former very senior leader of the CFPB for a period of almost 10 years.

Okay, let me introduce our speakers today, and first of all, our very special guest, David Silberman, who is a senior advisor to the Financial Health Network and the Center for Responsible Lending and a lecturer in law at Yale Law School. Also the other two speakers on our program today, John Culhane and Joseph Schuster. And now I'm pleased to hand the program over to Joseph Schuster.

Joseph Schuster:

John and I are going to go into a few of the topics that were discussed in a bit more detail on where the regulation is and what we think could happen to it, and a lot of these were discussed in some degree previously as well. The first one that I want to get into is the credit card late fee rule, and there's been a lot happening with the credit card late fee rule. As you know, the new rule would establish a safe harbor of $8. It does two things, which is going to be important here in a moment. Number one, and the CFPB said that there are two elements to this final rule. It would repeal the previous rule as being not reasonable and not proportional. And the second part that it does, is it sets the safe harbor at $8.

I want to go through just a little bit of what's been happening with this over the past... goodness, seven months of challenge. So there was a challenge back in May that goes into that the CFPB did not set a standard that addresses a number of different things that the card act requires it to review when setting the safe harbor, including whether the fee could serve as a penalty

fee. We had, back in March, a complaint. We've gone through a number of different things. We've tried to move the case. There are within some of the orders actually time tables, different things.

This was our last one where we ended up on August 27th. We had a hearing and the motion to dismiss and transfer venue. And then just 10 days ago, the court rejected both the CFPB's motion to dismiss for lack of standing and transferred the case to the U.S District Court for the District of Columbia, and it rejected the motion to dissolve the preliminary injunctions, the preliminary injunction on the $8 fee stays. There was a lot of language in that decision that talked about how this new safe harbor would deprive credit card issuers of having a penalty. It goes into a number of different things.

Now from here I think... Well the one thing that I'll mention on those orders is, it really only addresses that second part of the final regulation. So there's two parts. There's the one, repeal of the previous rule, and there's the two set, the safe harbor at $8. And this really goes to that the $8 is problematic.

It's looking like the CFPB may not be going to appeal this, which is interesting because we've talked about, and David got into in some detail whether, what the CFPB could do with cases that have had a district court decision, like this one, if they choose not to appeal it. The CFPB did file, just on December 13th, that they're not going to file an answer to the Administrative Procedures Act claims, which the reason to do that would be that they're not going to appeal this decision, that they're going to wait for a final decision and potentially appeal that if it comes within this timeframe.

But again, a new CFPB, if a decision comes, could choose not to appeal that decision and accede to the court's decision in this case. That is one option here, especially given that the credit card late fee rule does fall outside of that August 1st date that we were talking about. So it would require 60 votes in order to go through the Congressional Review Act.

The issue that we need to figure out though is what happens if that's the case with this? Is the previous rule still in effect, or has that not been addressed through the district court, or the first part of it, the repeal of the previous, or does that remain in effect? Now during the preliminary injunction, that previous late fee rule has remained in effect. Issuers have followed that, so I think that there are arguments there. If there is a challenge with respect to that, the new CFPB could in that case go through a notice of proposed rulemaking and come up with the previous same rule and adjust it for inflation, or they could come up with a new rule as well.

Given where this case is in litigation, I think, depending what happens over the next 30-some days, it's likely that we'll see this rule get addressed through court proceedings as opposed to going through the Congressional Review Act. I think that there will be arguments that the previous rule remains in effect, and then I think we'll need to see if the new CFPB adjusts the late fee rule for inflation, which the current CFPB has declined to do. With that, I'm going to turn over to John to talk about the Small Business Data Collection rule.

John Culhane:

Well, we've had a lot of questions about where this rule is going, and I think probably we all have more questions than answers at this point because we're going to have to wait and see, but this is the rule that basically makes small business lending like home mortgage lending under HMDA, and it requires financial institutions to collect and report a significant amount of data beyond the amount of data set forth in Dodd-Frank in connection with credit applications made by small businesses.

The rule was originally going to come effective in August of 2023, but as a result of a litigation, the litigation that I'll say a little bit about shortly, the compliance date was stayed. It's now, the Fifth Circuit has now announced a new effective date. I'll mention that in a minute.

This is not a rule where we're going to have any activity at the congressional resolution level, so given the various options that might exist, it's either going to be administrative action under the new CFPB or a legislative change if there's some bill introduced in the next Congress that will remake the CFPB, perhaps changing its governance, addressing or eliminating abusive practices. This would certainly be a likely candidate for legislation as well.

The litigation doesn't look like it's going to be, maybe will be the kind of vehicle that the industry was hoping for. The lead cases that's been moving forward is the case filed in Texas, and the CFPB actually won that at the district court level. The appeal that went up to the Fifth Circuit, the CFPB sort of won that as well except for the constitutionality of the funding of the CFPB. That issue went up to the Supreme Court, came back.

Obviously the Supreme Court concluded that the funding did satisfy the requirements of the appropriations clause, and now we're back in the Fifth Circuit, nominally in the Fifth Circuit, and the Fifth Circuit panel that heard the case basically has said there isn't going to be a rehearing, so any further action here is going to have to be the result of the CFSA taking the case to the Supreme Court. And it's going to be in a different posture than other cases that we've seen move up in that the CFPB will have won at the district court level and won as well at the Fifth Circuit, since there was no rehearing overturning the panel decision.

That may mean that there still could be Supreme Court Review. There's a lot here that the Supreme Court might want to look at, but this isn't going to be in the posture that we've normally seen cases go up to the Supreme Court out of the Fifth Circuit on cases challenging CFPB action going up out of the Fifth Circuit.

If I had to guess, I would say that there's a really good chance that there'll be a new look at this rule by the CFPB. It's certainly the case that regardless of what the current CFPB thinks, that the expansion of the data collection here is significant and burdensome. We're working with a number of clients to try to get them ready to meet the compliance deadlines, but there are a lot of questions. It's a big lift, and I think a new CFPB director could well decide to reopen this rulemaking proceeding both to look at the number of data elements that are required and also to look more closely at the actual cost of compliance and the cost benefit analysis that had previously been conducted. So again, no CRA litigation. A much tougher road here, and the most likely favorable action for the industry would be at the new CFPB.

Let me talk a little bit about the open banking rule. This is another aggressive rule that I think we all know applies to data providers, third parties and data aggregators, and basically requires data providers to make covered data available electronically to consumers and to authorize third parties in a reliable and secure manner. It's easy to say that. The actual practice is going to be fairly complicated, and there are some significant issues here around the rule. Compliance dates have been now set in tiers, based on the volume of the assets of the financial institution providing the data.

Now this rule was issued and will become effective in January, so it could be subject to a CRA resolution without the risk of a filibuster, but there's some real concern here as to whether there'll be support for a CRA resolution, because there has been some bipartisan support for various aspects of the proposed rule. Proponents of the rule have made a big case that the result of the rule is to move U.S data practices to a place where they're in closer alignment with those in the United Kingdom and European Union, so that may be an uphill battle and that may be just be a fight that Congress chooses not to engage in.

There is litigation pending in the Eastern District of Kentucky. There's a very aggressive argument there being made that the CFPB exceeded its authority under Dodd-Frank by going beyond requiring data providers to provide data to consumers and requiring them to provide data to authorized third parties. There's a lot of concern about increased security risks, while making it difficult, or more difficult for financial institutions and data providers to increase the level of security protection afforded to deposits and data.

Compliance standards are going to third-party organizations which at this point don't exist, so we don't know what those standards will be and we don't know how much data providers will need to do to come into compliance. And I think the big issue with this rule is that it prohibits banks from charging any fees to recover their costs, and they're going to be fairly significant costs in setting all of this up.

So there's litigation pending. We'll have to see what happens with that litigation, but this may also be a candidate for those categories of rules that are going to be revisited by the new CFPB. Just a lot here, sort of a failure on the part of the CFPB to recognize that a lot has happened in the industry and the procedures that are in place and the processes for sharing data are working fairly efficiently, and a lot of critics of the rule have objected to the fact that the CFPB failed to basically put an end to screen scraping once and for all.

Let me move from here to the payday lending rule. The original ability to pay underwriting and record-keeping and reporting requirements were eventually rescinded, leaving in place the payment withdrawal restrictions. Those are the restrictions on initiating automated payments after a second failed payment. We're getting a lot of questions as to how the counting works here. So if you are a financial institution and you have a borrower who has more than one covered loan, a failed payment on one covered loan and a failed payment on a second covered loan basically precludes your initiating any other ACH authorizations on all covered loans until you get a separate note, separate and distinct authorization to go forward.

Now, CRA resolutions were introduced in the House and Senate following the issuance of the original rule, but they failed to pass, and in the litigation the district court has granted the CFPB summary judgment motion. Part of the arguments in the case, as everybody will recall, had to do with the removal of the director. Other issues in the case dealt with the authority of the CFPB to issue the rule in the first place, whether the rule was arbitrary and capricious, violated the non-delegation doctrine and so forth.

Given where things stand now with the panel of the Fifth Circuit having rejected challenges to the rules on all grounds other than the constitutionality of the funding, and given that coming back from the Supreme Court, where we are now is that the Fifth Circuit panel has set a March 30, 2025 effective date in a one-page order using the date that the Supreme Court ruled that the CFPB's funding didn't violate the appropriations clause. And there's been no rehearing on Banque here. So again, this may be a difficult case for litigation as a vehicle for changing the nature of this rule.

Joseph, let me turn it back to you here to talk about the larger participant rule on digital payments.

Joseph Schuster:

Thank you, John. So the larger participant rule covering digital payments was finalized a little bit less than a month ago on November 21st, so it is in that post-August first timeline for potential CRA override. I am not sure if that this rule is necessarily one that will be a strong candidate for CRA, and I'll get into a couple of reasons why here as we go through it. But first of all, a little bit about the rule. It covers entities that process more than 50 million consumer payment transactions a year, and those are transactions that are in U.S. dollars. The original rule had that threshold set at $5 million, so from 5 million to 50 million we're seeing a very large increase.

So the number of entities that would be subject to supervision under this larger participant rule has decreased a fair amount as a result of that. Additionally, for coverage, the entity must not be a small business, based on the small business administration size standards, and there's a number of specific exclusions as well that again, limit who would be subject to this larger participant rule.

So first of all, marketplaces or retailers. If there's facilitation of the payments for the retailers within that marketplace through that retailer, that is not considered a digital payment wallet. Facilitating donations to fundraisers. If you're solely facilitating donations to fundraisers, that would also be outside of this rule. Business to business payments. And there's clarification of the transfer of digital assets including cryptocurrencies, and that was a big one. There were a number of different changes throughout this to very much make clear that this rule is focused on payments as opposed to these digital wallets that can hold these cryptocurrencies and things of that nature.

So you see that it is a very narrow rule in terms of who qualifies as a larger participant under this rule. Given that, with everything else that exists, is this going to be the priority under the CRA? I think it's unlikely, because there's also the way that the CFPB would be able to address this much more easily in the new administration would be to choose who they are going to be conducting examinations of, how they're conducting those examinations, what level of detail, things of that nature. So just because an entity is a larger participant under this rule by itself will not lead to anything substantive.

We are seeing, even when we are advising a number of different banks and credit unions as they hit that 10 billion threshold and become subject to CFPB supervision. And even there, the CFPB has been, even during the current administration, about 18 months behind in terms of looking at things in terms of supervision. So there's certainly optionality for what the CFPB can do, even if this rule does exist.

We are also seeing, and this is why I think the CRA is less likely, there is some bipartisan support of oversight of large technology companies, especially those involved in data collection, financial services and things of that nature. So I think, is it possible that it goes through CRA with other things? It's possible, but given where things are with big tech as it gets referred to, I think we'll just see... We will likely see this rule remain in place and then the use of this rule could wane or be used, depending on where things necessarily go.

The agency and court order registry, this was a rule that I guess... It was finalized, it was issued in June and then it ended up in the federal register in July, so it's before that August 1st deadline that David and Alan were talking about as well. Now this particular rule requires that it covers any non-bank that engages in financial products or services, and it's a non-bank, but it may cover affiliates, things of that nature, and it includes any orders that are final issued by a court or an agency or if they

identify the particular party, and it has to be issued by a certain agency, a federal agency, state agency, or a local agency. And it's really a requirement that these orders be uploaded.

And this is starting to happen, but the timing for this is very much, it is a tiered timing system and I have kind of how that is tiered right now. So there are entities that are right now registered and have been working with the CFPB. The CFPB has held a couple of sessions for how this registry works, and some of the larger participant supervised covered non-banks have attended those. They're working on being registered. They are in the submission period right now and some things have been submitted. And I think David and Alan spoke about this a little bit, that this is already up, it's starting to happen.

Will this be one of the priorities for the new CFPB? I think there's a lot of other things that are out there. I think as we're seeing the late fee, we're going to get into the overdraft fees and NSF fees as well. Given that this is more procedural as opposed to substantive, I think that it is less likely to be a focus of the new administration. But how this gets used, I think that's where there could potentially be a little bit of a shift.

I think that the current CFPB plan of using this, the contract registry, which we'll get into in a little bit as well, to really highlight items that they see as problematic against various participants. I think that this, even though it can exist, focus on it, the focus on compliance with this may not be, likely will not be, at the top of the CFPB's list.

I'm going to then go to interpretive rules, and I want to go into this one to particularly cover the buy now pay later interpretive rule. We've talked about this one a lot in various webinars, and how the CFPB can use interpretive rules. They are much easier than going through the legislative rulemaking process. They do not have the force of law and are not binding. However, it's a very important indication of how the CFPB believes that it can interpret regulation. In the case of the BNPL rule, how it's going to interpret the definition of credit card and creditor under Reg Z and that the interpretation of those definitions contains a lot of important requirements for BNPL providers.

Now, and here again we go into the use of the interpretive rule as opposed to the legislative rule and the CFPB invited comments. The CFPB has, since the issuance of the BNPL interpretive rule, they have issued FAQs for how to comply because there was a lot within the interpretive rule that we had identified was difficult to comply with. What is that digital user account? How do you provide statements? Are the statements at the account level? Are they at the loan level? The CFPB has issued a lot of that through the FAQ.

However, the CFPB has missed a lot of previous interpretations about the definition of credit card and other things that they did do in this interpretive letter. The definition of credit card, it has been interpreted as an account number that accesses open-end credit. BNPL loans are not open-end credit. It is a very broad expanse of beyond what [inaudible 00:26:46] provides and beyond what the Federal Reserve has had as an interpretation for a very long time.

There is, I should say, a lawsuit pending against the NPL interpretive rule by the industry. So kind of getting into the category of, has there been a district court decision or not yet. In this one, there's not. Could this be something that goes... Now here we're in the interpretive rule, so we've talked about the CRA for a lot of things. Given that this is not a legislative rule, there's I think potentially a different process for this. Could a new CFPB come up with a new interpretive rule? Could they simply say that previous interpretations are no longer the interpretations that they're going to be following? Yeah, that's probably the easiest way to remove the interpretive rule as opposed to going through some formal process.

Now, this last bullet, which we had fixed but did not make it into the slides that were uploaded, was, may the CFPB attempt to convert the interpretive rule to a legislative rule and issue a final rule on this the next 34 days?

Possible. I think that that would be a challenge to go through the whole legislative rule making process. There have been comments that have been submitted on this interpretive rule, so is that chance that it's out there. It's a chance. I think the validity of that final rule and how that process looks would be something that could be subject to challenge, but it would certainly create more of a hurdle than I think exists with an interpretive rule.

I think that this interpretive rule is, it was a shock for everybody, so I think that it is something that the CFPB could go through the interpretive rule process, issuing a new interpretive rule, not necessarily redefining going through all these things in detail, but removing and stating that the interpretive rule that was issued on Reg Z for BNPL is no longer the interpretation that they're going to follow, and reverting back to the interpretations that exist in Reg Z and the commentary to Reg Z, which would be much different than what is in this BNPL interpretive rule.

Bank overdraft fees and NSF fees. This was moved into the rules that were issued final just very recently, issued on December 12th. And this position, the final rule has a position that overdraft and overdraft fees would be credit subject to Reg Z. There's a couple of examples here. Now, this is changing a position that has existed since 1969 when the Federal Reserve was responsible for Reg Z. The options that exist under this new rule are that entities can cap overdraft fees at $5; they could cap overdraft fees at an amount that covers costs and losses, or they could comply with lending laws. Again, that's the big change from how Reg-Z has treated overdraft accounts and overdraft services really since its inception, and that view has been reiterated by many others throughout the years as well. So this is a very, very big change in this. This has an effective date of October 1st, 2025, and we'll get into this in more detail in blog posts and possibly future webinars for this site.

We don't have quite the time to get into all the effects of this, but there are a number of downstream impacts. The compliance with lending laws, as I noted. If NMT chooses not to cap overdraft fees at $5 or an amount that covers costs and losses, you're complying with lending laws, and that's, Reg-Z's lending law is very different than how things exist today. There's a number of additional downstream impacts as well. Overdraft services would be subject to Reg-E's compulsory use rule.

Most of the time today overdraft accounts are used and then they are, the amount that is subject to the overdraft service is then swept back when there is money in the depository account. That could be problematic as a requirement in a future state with this. There is already a pending industry lawsuit on this. This again falls in that category of rules, though where there is no district court decision. It's possible that there could be a district court decision within the next 30 days, but I think that's unlikely.

For this one, I suspect that the Congressional Review Act, that this rule is a strong candidate for the Congressional Review Act, given that it really is, you could look at this as introducing a price cap. And even the CFPB talked about how many billions of dollars it would prevent entities from charging to consumers as a result of this. And there will be consequences if this goes into effect, in terms of who is able to obtain depository accounts, effects on unbanked, underbanked individuals. And so I think that this is a strong candidate for that as well.

If it does not go through that Congressional Review Act process, this rule goes into effect October 1st, 2025, so there is plenty of time to do a new rulemaking process before that time. I personally believe though that there's a good chance that the CRA is followed with respect to this one, given the very egregious reductions in the ability, and the implications of this rule are massive. But we'll see what happens with that one.

John Culhane:

Joseph, can I jump back in here before we move on to other proposed regulations? I realized when I discussing the small business lending rule earlier that I conflated the litigation posture of the small business lending rule and the payday lending rule. The litigation around the small business data collection Rule, the CFPB did win in district court. Their summary judgment motion was granted back in August. The case is on appeal to the Fifth Circuit. There's not been a decision at this point. The plaintiff's request for an expedited appeal was granted, but their motion for a stay was denied. So the clock is ticking on the compliance with that rule, although we still have a ways to go.

There also is litigation pending in Kentucky. There's a companion case in Kentucky and there's a related case pending in federal district court in Florida regarding asset-based finance. So litigation is still a possible route for a change to the small business data collection rule, although again, I think there's a good likelihood that the more successful route here is going to be through a new CFPB and a reconsideration of the number of data points and the cost of compliance, and the cost benefits of the rule.

Sorry to interrupt there.

Joseph Schuster:

No, no, thank you, John. That's a good point. I would also add, before we move on to what we think could happen to other proposed regulations that may be finalized before January 20th, there have been a number of questions about the new CFPB being able to modify effective dates and things of that nature without going through a new legislative rulemaking process. And generally the changing and effective dates, as we look at this overdraft fees and CFPB's rule with an effective date of October

1st, there would be a requirement that, changing the effective date has been seen as a substantive rule change requiring that it go through the process of notice, comment, period, all those types of things.

There are instances where if the CFPB or others can show a good cause exception, that changing a date might be possible, but that can be subject to challenge as well. So as we look at something as important as an effective date, that's likely going to require notice, comment, period, the whole legislative rulemaking process. In this case, I think there is time, and some of the other rules that we've looked at that could be a bit more difficult, but we provide that background as well. So as we look at, there are some proposed regulations that could possibly be finalized by January 20th as well. As of last week we had on this list the bank overdraft fees and NSF fees. We have seen that final rule come out that we just addressed.

The earned wage access. This is an interpretive rule. So all those things that I was talking about with respect to the BNPL interpretive rule apply here. The exception here is that this rule has not been finalized. There was a request for comment on this rule. Now there is a question, could they finalize it? If they do, then I think we're in the same position. If they finalize it as an interpretive rule, as the BNPL interpretive rule, as we looked at that, that it could easily be addressed through a new interpretive rule, which does not need to follow the legislative rule-making process.

But the interesting thing, and John and I have discussed this a fair amount is, could there be an attempt to create a legislative rule? Maybe the process for this one is a little bit different than the BNPL one, given that with the interpretive rule, there was a request for comments as well. I think that there is still ambiguity. I think that that process, depending on how they do it and if there's an attempt to create a legislative rule, could be challenging. It likely would be challenging, as we've seen on other rules as well. But within the next 34 days, is it possible? I think it is.

If the rule is not finalized, I think that we will likely still see something from the CFPB. Again, it might not be, the new CFPB, it might not be as formal as issuing a new interpretive rule, but we'll likely see some type of guidance indicating that previous interpretive rules that were not finalized are not interpretive rules that the new CFPB is not going to follow.

The contract clause registry. We heard David and Alan speak a little bit about the contract clause registry, that that has been something that has been out there, but it has not received much focus, much attention at all, even under the current CFPB. And we've seen continual evolutions in terms of what the current CFPB has been trying to do in terms of provisions within contracts that we've seen, the contracts circular indicating where there could be potential UDABs. With respect to contracts, I suspect that the contract clause registry is not one of the top priorities for the current CFPB. We're probably not going to see much movement with respect to this under the new CFPB.

The circular, with respect to contract clause provisions, that is something where, there are some instances where it probably exceeded what the CFPB looks at in terms of contract provisions that may be considered UDABs, but reviewing consumer contracts and how those terms and provisions work is something that, even before the CFPB, has been a focus for examiners. We will likely see career examiners continue to review that the terms and the contract are aligned with the business practices, that they are clear, that there are not problems with respect to how things interact within the consumer contracts or between consumer contracts, the marketing, and how the product works.

Medical debt reporting under the FCRA, and this would be that medical debt could not be reported to consumer reporting agencies. It is possible that this rule could be finalized within the next 34 days, but if it is not, it is unlikely to be a priority for the new CFPB. However, with this rule, it's likely that states will remain active in this space. We are continually seeing states step up in this space. California recently signed a law, and Colorado has a law on the books that prohibits reporting medical debt to CRAs. If this were finalized within the next 34 days, it's unclear whether it would be a candidate for the Congressional Review Act, given how many other things are out there. However, there could be a new focus on a rule-making process with this as well.

With that, I'm going to turn it back over to John to talk about, proposed regulations are not likely to be finalized by January 20th.

John Culhane:

Thanks, Joseph. We're not going to talk about the PACE rule, but we are going to talk about two rules, the data broker rule, which just came out and the mortgage services rule or mortgage servicing rule.

So let me start with the data broker rule. I want to refer you to two blog posts that we just put up about this rule. There's one on the data broker part itself, and then there's a separate post on the far-reaching implications of this rule, which is almost like the rewrite of the Fair Debt Collection Practices Act that the CFPB engaged in. There's an awful lot in this rule regarding the Fair Credit Reporting Act, what's considered a consumer report, how that's defined, who's considered a consumer reporting agency, almost everybody, and how the written authorization permissible purpose should work with a very specific procedure for required authorization and notice, with significant information that has to be provided to the consumer, and a disclosure and description of a method to revoke consent.

Similarly, the CFPB has drilled down on the legitimate business need permissible purpose, I guess, feeling that that permissible purpose has been exploited for review of accounts and for marketing purposes rather than for use in connections with business transactions initiated by the consumer, and whether the account review has really been related to account reviews. I think this one is a prime candidate for just about every possible vehicle that could be used: a Congressional Review Act, reconsideration by a new CFPB, given how much there is in both the data broker component and in the consumer report regular credit reporting component.

It seems inevitable that when there is a final rule, if nothing else happens in the interim, that there will be litigation challenging the rule, and given the position that the CFPB has taken, basically overturning that fairly well-established principles. Going back to the FTC's jurisdiction over the Fair Credit Reporting Act, there's good likelihood that litigation could be successful, particularly since the CFPB won't get deference to its interpretations now that Loper-Bright has removed Chevron deference.

Let me turn from the data broker rule and talk a little bit about the mortgage servicing rule. The mortgage servicing rule really makes some significant changes, although the CFPB describes it as streamlining and expanding loss mitigation procedures and foreclosure protections, and expanding borrower protections. It really takes a procedure well-established under Regulation X and takes us back to the rules that were in place during the pandemic, without, I think a particularly strong support for the need to turn to those rules.

One of the biggest changes is that the rule takes what had been an application-based procedural framework and replaces it with a somewhat amorphous framework where any request for loss mitigation assistance triggers the procedural requirements of the mortgage servicing rule. If we've seen anything in the student loan area, we've seen the CFPB's aggressive interpretation of what constitutes a request in a phone conversation for student loan relief or assistance, and that's a dramatic change here that would basically rewrite or require servicing institutions to rewrite and revisit everything they're doing in the mortgage loss mitigation space.

Now, the comment period on this rule actually ended in September, but given the amount of comments, the volume of comments received and the significant changes including proposal for certain language access requirements spelled out in the preamble, but not the body of the regulation, we think this is one that's unlikely to make it to the finish line before January 20 because there's just so much for the CFPB to digest, and racing to issue a final rule between now and January 20 will automatically invite the challenge that the CFPB didn't fully consider the comments that we received in connection with the rule.

So let me go from here to what will happen to guidance documents. When we did our earlier webinar back in November, we listed a lot of the guidance documents that had been issued during the prior year, and some that were even older than that. It's almost automatic for a new administration and new heads of an agency to come in and revoke all recently issued guidance documents. And I think that we have to expect that will be the case here. And these advisory opinions, which were interpretive rules and could be reviewed under the Congressional, under the CRA process, they're just going to be gone.

So that includes the advisory opinion on the collection of medical debt, the very dramatic circular on unenforceable contract terms, and the advisory opinion on consumer requests for information under Section 1034(C) of Dodd-Frank, maybe even changes to the complaint procedure where the CFPB now seems to be, in its complaint process, seeking information that will allow it to assess the manner in which requests for information are handled.

And that also will pick up, although there's not really any guidance in place at this point, the amendment to the CFPB examination manual that would have deemed any discriminatory practice to be an unfair, deceptive or abusive practice. That provision was added to the exam manual back in March, but removed in connection with the pending litigation back in

September, although not exactly disavowed by the CFPB. That guidance is, to the extent it has any existence right now, is gone, and there could be specific counter guidance issued on this. In the meantime, litigation is still pending and on appeal.

Oh, the impact of the Congressional Review Act. I think we've been talking about that pretty much all through the program. There's significant likelihood that many of the rules in place here will be subject, or at least potentially subject, to a congressional review look-back period, which means that they can be reviewed by Congress without any filibuster and Congress can disaffirm the rule. Thought this might have been a bigger break on the CFPB because a disaffirmance under the Congressional Review Act precludes the regulator from then issuing the same or a substantially similar rule in the absence of new litigation.

But what we've seen instead is, I think the CFPB under CHOPRA trying to get as much done as it can to put the burden on the new administration and the industry to try to unwind what it's done. But the CRA look-back period begins 60 working days prior to congressional adjournment. As David mentioned, it's often difficult for anyone to tell exactly where that period begins, but the Congressional Research Service, as Alan indicated previously, estimated that it was likely to be August one, and so that means a lot of the rules we've been discussing will potentially be swept up into, or could be swept up into a Congressional Review Act review.

Joseph Schuster:

And while that's happening, we had two additional items on there, John, about order-subjecting non-banks to supervisory jurisdiction, and what rulemaking will look like under the new director. I think we've talked about these things, and I know Alan and David spoke about those as well. The piece that I'll add really about the last one is, rulemaking is likely to be much more tailored to what the law requires rather than reinterpreting what the Federal Reserve has had in Reg-Z since 1969; less on the side of what the political agenda is, more in terms of what the established view of the regulation is.

So as we've been preparing entities for exams under the new CFPB, the focus on what the technical requirements of Reg-Z or Reg-E, whatever the underlying provision that's being reviewed, is going to be more of a priority than, we think, than the political agenda and the focus on junk fees or things of that nature. So potentially more of a return to... A lot of examiners are career examiners and will likely see more change over in enforcement, as opposed to supervision and the examiners. And as a result, there may be less of a push to look at things outside of the technical readings of what those regulations have been.

But that's where I'm going to end it with that one. But John, did you have anything else that you wanted to add?

John Culhane:

No, I think that's a good place to stop and turn it back to Alan.

Alan Kaplinsky:

Yeah. Let me ask one question of, I don't know if it's you, John or you Joseph, but on the overdraft fee regulation that just got published, and promulgated I should say. What did they do with the NSF fee part of it? Did that change?

Joseph Schuster:

The overdraft fees would be capped at $5 or the amount that covers costs and losses, or you have to comply with the lending loss.

Alan Kaplinsky:

Yeah, no, but that's dealing with the overdraft fee, but the NSF fee, isn't there a prohibition against charging an NSF fee? Or there was, I thought in the proposal.

Joseph Schuster:

Yes. Yes, you do have that as well.

Alan Kaplinsky:

And that didn't change?

Joseph Schuster:

Correct.

Alan Kaplinsky:

Okay. Good. And then I want to try to clarify one thing with David, if David is still there.

David Silberman:

I am.

Alan Kaplinsky:

Okay. Good, David. The question is, pertains to the payday lending regulation. And the reason why when Mulvaney and then later Kathy Kranniger came into office, they decided just to get rid of the ability to repay portion of it, but they didn't touch the payments portion. Was that decision made by Mulvaney or was it made by Kathy Kranniger, and do you know why they decided to do that?

David Silberman:

So the Bureau announced while Mulvaney was acting director, that it would be reconsidering only the underwriting provisions, and the statement that was issued said it was because those had the primary impact. The formal proposal that was made, the proposed rule that began to implement that, was issued shortly after Kathy Kranniger took office. So ultimately, she had to agree with that. So I couldn't say one or the other, but that was Mick's stated reason at the time.

Alan Kaplinsky:

I see. Okay. All right.

Joseph Schuster:

I want to clarify. I'm sorry. The NSF fee is a separate proposed rule that was not finalized with this overdraft rule as well, so it wasn't addressed in this finalized rule, so that one has not been finalized yet.

Alan Kaplinsky:

Oh, okay.

David Silberman:

That's an NSF fee for, essentially for debit card transaction-

Joseph Schuster:

Right, yes.

David Silberman:

... when it's instantaneous decline. The overdraft rule applies only to banks with assets over $10 billion, and the rule indicates that substantially all of those banks have ceased charging NSF fees. But it doesn't limit them, but it basically assumes them away, assumes that they don't exist anymore for the covered institutions.

Alan Kaplinsky:

Okay. Well, David, as our special guest, do you have any parting thoughts for our audience on this subject, something we may have overlooked?

David Silberman:

I guess the only thing where I would quibble with the discussion is that for interpretive rules, I think the Bureau can say that it's adopting a different interpretation. It could say as to an individual rule, "Here's why we think there's problems with the [inaudible 00:54:14] interpretation. Therefore, we no longer standing by it without announcing a new interpretation." I think they'd be subject to an arbitrary and capricious challenge if they were to simply say, "That's gone. We don't know what our view is, but we're not following that," without giving a reasoned explanation for why they're repealing an interpretive rule. Different for the circulars, which were just in the nature of guidance, but I think interpretive rules, there are some requirements that the Bureau would have to follow if it wanted to change on any given interpretation.

Alan Kaplinsky:

But it wouldn't have to publish it for notice and comment. Right?

David Silberman:

No, definitely it'd have to go through notice and comment just the same way that the initial interpretive rule is issued.

Alan Kaplinsky:

Oh, okay.

David Silberman:

It could conclude that the prior rule was procedurally improper and therefore, but there has to be some reasoned decisions I think, before you get rid of something that is a rule, even whether it was a rule that was promulgated without notice and comment.

Alan Kaplinsky:

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