Consumer Finance Monitor (Season 8, Episode 5): The Impact of the Election on the CFPB: What to Expect with Supervision and Enforcement During Trump 2.0

Speakers: Alan Kaplinsky, John Culhane, Jr. and Mike Kilgarriff

Alan Kaplinsky:

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

For those of you who want even more information, don't forget about our blog, consumerfinancemonitor.com. We've hosted our blog since 2011 when the CFPB became operational, so there is a lot of relevant industry content there. We also regularly host webinars on subjects of interest to those in the industry. So to subscribe to our blog or to get on the list for our webinars, please visit us at BallardSpahr.com. And if you like our podcast, let us know. Leave us a review on Apple Podcasts, YouTube, Spotify, or wherever you get your podcasts. Also, please let us know if you have any ideas for other topics that we should consider covering or speakers that we should consider as guests on our show.

After our high-level post-election webinar on November 12th, which we repurposed and released as a podcast show on November 27th, our clients expressed great interest in hearing us take a deeper dive into the anticipated changes that will happen at the CFPB and elsewhere once a new acting director or director appointed by President Trump takes over. To that end, we developed and planned a series of three webinars discussing what we will believe will be the large and widespread impact on the CFPB of the election.

On December 16th, we presented the first webinar in our series. It focused on CFPB regulations promulgated and other guidance published by the CFPB under the leadership of Rohit Chopra, along with outstanding proposed regulations. Joining us for the first webinar in this series, David Silberman, who held several senior positions at the CFPB for almost 10 years under both Democratic and Republican administrations. David was at the CFPB during the transitions in director from Richard Cordray to acting Director Mick Mulvaney and then Director Kathy Kraninger.

I had almost a 45 minute fireside chat with David. He provided an insider's view of what the transitions were like and what we might expect during the next transition from Director Chopra to whoever President Trump appoints his acting director and then director during the second Trump presidency. On January 2nd, my fireside chat with David was released as our podcast show. On January 9th, we released, as our podcast show, the second part of that December 16th webinar, which featured several lawyers in our Consumer Financial Services Group who took a deep dive into the area of CFPB regulations and other guidance.

On January 6th, we presented the second webinar in our series. It focused on CFPB supervision and enforcement under Rohit Chopra and the changes in those areas we expect to see during the term of the next acting or regular director appointed by President Trump. During the first part of that webinar, I did a fireside chat with Kathy Kraninger who described how she became the director, how she managed the bureau during her tenure, and what steps she expects the new acting director and director appointed by President Trump to take during Trump 2.0. That was last week's the podcast episode.

Today I'm joined by my colleagues John Culhane and Michael Kilgarriff, who will take a deep dive into their expectations for CFPB supervision and enforcement during Trump 2.0. This entire webinar is available on our firm website.

John Culhane needs no introduction, really. He's been doing I think more webinars and maybe the only person that's been involved in more would be myself. But practiced law with me for well over 30 years. He's one of the charter members of the

American College of Consumer Financial Services Lawyers. And best way I can describe John is say he is the jack of all trades and the master of all trades when it comes to consumer finance.

Mike Kilgarriff is newer to our firm. He's a litigator and has done a lot of litigation with state attorneys general and the CFPB and other government enforcement agencies. So wanted to have him share his wisdom with us. So take it over.

John Culhane:

Alan, I'm going to take the lead on supervision. Mike is going to take the lead on enforcement.

Well, let me kick it off. The topics that we had said we would talk about with regard to supervision included sort of the business tone for supervision, what the focus might be going forward, what the impact would be on staffing and exams, and how the agency might be communicating with supervised entities. So let's start at the top in terms of tone.

Business as usual or more relaxed? Well, it's certainly going to be business as usual in the sense that exams are going to continue, and I'll talk about the impact of likely developments on staffing, but certainly the expectation is that a lot of the same examiners will be involved in exams, unlike enforcement where more turnover is expected. The exact tone is going to depend on the new director and then on the actions the new director takes immediately upon arrival at the CFPB. As we discussed in our earlier webinars, we certainly expect that a lot, if not all, of the supervisory guidance is going to be rescinded. While making actions are going to be paused, some probably will not go forward, some that appear to have been finalized will be reopened.

So there's certainly going to be a different tone and the exact nature of that tone is going to be set by the director, new director. It's unlikely that we're going to have the intense focus on discovering unfair deceptive or abusive acts and practices as seems to have been the case with the current administration of the CFPB. Things to watch for are whether we're going to have a new or substantially revised examination manual. We're on version two. There hasn't been a major update to that supervision and exam manual for some time. This would seem to be the ideal opportunity for that to happen. And it's also possible that self-reporting and remediation will actually result in credits for entities that engage in those activities, reporting instances of non-compliance and remediation for same. Instead of just an invitation for the CFPB to bring an enforcement action and pressure entity to immediately settle.

In terms of staffing, we certainly expect that there will be a hiring freeze immediately. The impact on that hiring freeze is going to depend to some extent on how long it stays in effect. We referenced the hiring freeze that was put in place by Mick Mulvaney. That hiring freeze actually lasted almost a year and during the period of time it was in effect resulted in almost a 14% reduction in staff. So if that happens, and if that has the same impact, obviously it's going to have an effect on exams and examinations.

Other things though that are going to have an impact here, all of the senior staff positions are now political positions, as Kathy mentioned, Schedule C positions. Those individuals are going to be terminated if they haven't resigned at the time of the transition. We also have the possibility of Trump reviving an action that he had taken earlier in his administration where he issued an executive order, referred to as Schedule F, that purported to strip civil service protections from numerous employees, including employees at the CFPB. Now, if that happens, I think, we'd have to expect a reduction in staff, maybe even a significant reduction in staff. And we also have to think about what the impact will be of the Department of Government Efficiency. I think it's likely to propose changes, but if they're legislative, they'll have to work their way through Congress. So it may be that there'll be an emphasis on reinstating, reviving the Schedule F.

So what could the numbers actually look like? It's always hard to get a precise handle on numbers at the CFPB, but in its last financial report, the CFPB was projecting total employees for fiscal year 2025 in the range of 1,850 employees. That's sort of consistent with the growth year to year. Interestingly, the supervision and enforcement staff has always been roughly 44%, 45% of that total. So if that number's knocked down and there's a corresponding reduction in supervision and enforcement employees, then there'll be an impact on examinations and also an impact on enforcement.

In terms of what examinations are going to look like going forward, possibly smaller teams, we really think there's going to be more of a focus on long-established technical requirements of statutes and regulations, less aggressive statutory and regulatory interpretations. You can get a sense of what this focus might be by looking at CFPB supervisory highlights to see what the basic fundamental violations of law are that they've been finding in exams, and then discussing in supervisory highlights. So in the Fair Credit Reporting Act, furnishing complete and accurate information, reporting dates of first delinquency, conducting thorough and timely investigations with disputes, notifying consumer reporting agencies of direct disputes, taking appropriate actions on receipt of an identity theft report.

Under the Equal Credit Opportunity Act and Regulation B, you can draw guidance from the CFPB's annual Fair Lending Report, which identifies violations that were during fair lending examinations. So some of the common violations there and things you should look at are improperly requiring the signature of the applicant's spouse on loan documentation, improperly evaluating age and receipt of public assistance in underwriting credit transaction. And then I think basic stuff with regard to adverse action notices, timeliness and identification of specific reasons for adverse action.

You can also take some guidance from the data put out by the Federal Reserve Board and the FDIC. The Federal Reserve Board publishes a guidance document where they provide guidance similarly on supervisory data. And the FDIC provides a consumer compliance supervisory highlights, which provide an overview of the kind of violations that they're observing. Regulation E, one of the things both agencies observed, failure to conduct timely investigations after receiving notice of an error and then taking appropriate action, kind of a recurring issue in Truth and Lending and Regulation Z, but one that may not apply to all institutions as appropriate disclosures of loan costs with mortgage loans.

Something that will be interesting to watch for is to see whether a new CFPB under a Trump appointed director reinstates the position that Mick Mulvaney took with respect to examining for compliance with the Military Lending Act. You may recall that Director Mulvaney suspended Military Lending Act examinations during his tenure and they didn't resume until June of 2021. In terms of unfair, deceptive and abusive acts and practices, I think it's fair to say that the CFPB policy statement that was so broad that was issued on April 3rd, 2023 will be rescinded.

Maybe we'll go back to the policy statement that Director Kraninger adopted, Alan and Kathy talked about that some. It had three significant points to it with regard to abusive conduct. The CFPB would only find conduct to be abusive when the harm of a particular practice outweighs the benefits of that practice. The CFPB would avoid dual pleading of unfairness or deceptive violations on top of abusiveness, something that's been a fairly common practice under Director Chopra. And monetary relief would be required only when there's been a lack of a good faith effort on the part of the institution to comply with the law.

So we may go back, I think here to what we might think of as classic UDAAP, close examination of advertising and promotional materials and marketing to make sure that significant limitations are prominently displayed. Some of the sort of standard issues that the CFPB has cited in its UDAAP examinations are in the supervision examination manual, dishonoring credit card convenience checks without a proper notice, inadequate disclosures of terms in advertising, misrepresentations about loan terms. Those I think are things to look closely at in connection with preparing for new examinations.

What the communications will look like? The CFPB distinguishes between SR, supervisory directives, supervisory recommendations rather, and identification of matters requiring attention. The CFPB doesn't use the term matters requiring immediate attention, that's more of a Federal Reserve Board term. But it does distinguish in its directives between actions it expects to be taken over a particular period of time and actions it expects to be taken immediately. We'll likely have more supervisory recommendations, maybe more identification of matters requiring attention, but it's likely that there will be fewer PARR letters and fewer referrals to enforcement. I think Mike can comment on that in connection with discussing enforcement.

Whether the risk-based guidance will go away, I guess that would be something we'll obviously be watching for. There was that revival of the dormant authority to supervise entities based on the risk that they pose to consumers that the Chopra administration initiated in 2022. It's had two public supervisory designation orders since then. One directed to an installment lender, one directed at the operator of a peer-to-peer payment platform and stored value product. In connection with that latter supervisory designation, the company involved had ceased its activities in 2024, early in 2024, and that didn't carry any weight with Chopra CFPB. I think that's not going to be the case as we move forward. If a company is no longer engaging in activity, then the CFPB is not going to be looking at it as an entity that you go after on the basis of the risk that it's posing to consumers.

We mentioned funding. Alan, I don't know if you would like to comment here. I'll just make a few observations. The Chopra CFPB asked for $250 million from the Federal Reserve for first quarter of fiscal year 2025, which would be October, November, December. There's no public record of a request for funding for the second quarter of 2025. Usually those requests are made in mid to late December. So unclear what's going to happen there. I think the CFPB's got something like another 250,000 unrestricted available with the Treasury, 250 million available at the Treasury, so it does have some money available.

But Alan, do you want to comment on funding?

Alan Kaplinsky:

Sure, John. And one of the major issues that the new CFPB acting director and or the director is going to have to deal with is what position it's going to take on the latest challenges to the CFPB's funding, which arise by virtue of the language in Dodd-Frank, which says that funding doesn't go through the appropriations process, the congressional process that most of the agencies have to go with. It simply has to make a request to the Federal Reserve Board, which the Federal Reserve Board essentially has to honor. But it's subject to the requirement in Dodd-Frank that it can only be funded out of combined earnings of the Federal Reserve banks, that's the exact language.

Professor Hal Scott at Harvard published a op-ed in the Wall Street Journal several months ago raising a very serious issue, which the current director Chopra has given the back of his hand to. And that is, since September of 2022 when there were no longer any combined earnings of the Federal Reserve banks at that point whether the CFPB could continue to operate under any funding other than any funding that it had already in reserve, which hadn't been utilized yet. And in connection with the half a dozen or so enforcement actions, that issue has been raised as a defense. And while a couple of courts have dealt with it to some extent and have rejected the arguments that have been made by industry, they did not deal with the core issue. And the core issue being whether earnings means revenue as the CFPB would argue and has argued, or whether it means profits, accounting profits. And at least I believe, and a lot of the industry believes that earnings means profits. It doesn't mean revenue under any accounting definition, under GAAP, generally accepted accounting principles, government accounting principles. Director Chopra disagrees with that.

But the issue isn't, what does Director Chopra think of it anymore, or at least as of January 20th, and it's rather, what's the new acting director going to think? Will this be viewed as an opportunity for the new acting director to take some leadership and say, sorry, we can't make any more requests for funding. And indeed, I'm concerned with the funding that the Bureau received after September, 2022. This is all very much in a gray area right now, and I would describe it as a very dark cloud hanging over the Bureau, which is going to be inherited by the new acting and full director.

That's my thoughts, John.

John Culhane:

Mike, can I turn it over to you to talk about enforcement?

Mike Kilgarriff:

Yep, absolutely. I think it's important to remember John's first comment, which is business as usual. I mean, looking at this current CFPB regime, especially over the last year, I mean some of these enforcement actions that have been announced started well before this current administration and date back to the first Trump administration. And so while I think there are a number of factors that are leading to a less aggressive, more focused CFPB, it's an important reminder that anytime there's an examination, anytime you're under supervision, you still have to be mindful of the fact that whether it's a technical violation, a more traditional UDAAP interpretation, that this is still a government entity and an organization that's going to be looking for violations. And so certainly not going to be a blind eye.

I took notes during Dr. Kraninger's interview with Alan. I mean things like don't manufacture. I mean, I'll go to enforcement slide. And I think in many respects, people who are involved with this bureau and had experiences with the last three, well, that resonates with them in terms of manufacturing or expanding the definition of UDAAP. And so John's point about more traditional advertising, more traditional disclosures, fraud, discriminatory behavior is likely what we'll see. But I do just have, and maybe this is the litigator in me, a word of caution that issues that arise in exams today can be tomorrow's enforcement action under a new administration.

So certainly John, Alan, anyone who wants to jump in, by all means. I'm going to talk about, I think from my perspective and our collective perspective, what we think enforcement would look like in terms of predicting the future. And it's interesting because when we look at the first Trump administration, we did have this dual director position for the first, I believe, eight months. And so it is a little hard. I mean, I like the data and as you'll see in the next slide, looking at the data in terms of enforcement actions and dollars collected that first year.

But generally, and I think we're seeing this today, sure, I mean I'm going to bounce around between these two, but you do see, I think a lot of folks have this general assumption that enforcement activity is going to slow down, and for the most part it did a little bit. But where you really see a stark contrast is consumer relief. And this is certainly not my line, but I really like it, I'll take it from another commentator, and it's particularly true for the current administration under Director Chopra. But it appears under the first Trump administration CFPB there were a lot of singles. They were true consumer protection violations, scams and consumer relief was sought, but certainly the volume over the relief was substantially smaller. But you don't really see that big of a difference in the number of enforcement actions. And that might be, as director Kraninger mentioned, given credit to folks who are remediating and doing the right thing and giving weight to that and being transparent and working with industry.

And so what we're seeing and what we anticipate to see is going to be a review of items that have been referred to enforcement. I mean, I know personally with a number of clients who were right on the edge going into the election, things that were referred to enforcement haven't received CIDs. And so the pause is already starting to exist. To echo something else that Director Kraninger said, you're seeing a lot of issues being wrapped up as well. Things that are on the cusp. You're seeing a flurry of lawsuits being filed and settlements being announced. We certainly saw that throughout the fall.

And I think, here, this is my experience, I represented a client that was sued on Inauguration Day, and there was this perception that under the administration change that was going to go away. It never did. In some respects, it's very hard to walk back a litigation. But certainly I think cases that involve regulation by enforcement, pushing the envelope, ones that are on the edge and non-traditional litigation. I mean, those are the real actions that if you're involved with the Bureau today, you should be mapping out your course and thinking through what are your next steps under the new administration because there will be a review.

Again, I think we're echoing this throughout both a supervision and enforcement theme is that we do anticipate less UDAAP and certainly what UDAAP has been interpreted over the last four years as a real stretch in many respects, what's not a UDAAP these days. But a focus on true fraud, true technical violations under the statutes.

I think one thing, and this is again a preview, the third part of this webinar is that I think you saw this under the first Trump administration, Trump administration CFPB, and you certainly saw a reversal is working with state attorneys general, and we heard Director Kraninger talk about her involvement. I think from where I sit in an enforcement standpoint, you're seeing a much more concerted effort. In fact, I believe Director Chopra came out earlier this year or last year with a blog post talking about the concerted effort to work with their enforcement partners in the states. That's likely to shift, and you're likely to see less joint actions being brought by the Bureau and the states collectively working together. And in many respects, I mean I'm seeing this personally, items that would've been taken up by the CFPB are being taken up by the states already.

I have a client that received six subpoenas the day after the election. And so you are seeing the states take on this mantle, not just from a civil liberties standpoint, which I think was the main focus following the election, but certainly from a consumer finance standpoint too. I mean, you have California DFPI, you have a number of the progressive states that are likely to be looking at the CFPB's actions over the last calendar year, especially those quarterly updates by industry and looking into those issues themselves to the extent they aren't already.

And so it's not that the regulatory environment is going to cease, it just might be a different actor that is raising these issues. Certainly I think one of the things that we can take from the prior administration is that enforcement actions won't name individual owners officers management. And as we mentioned from the prior slide, the settlements for these enforcement actions certainly had smaller dollar amounts. And there's probably a number of factors, and obviously that's very individual to the situation. Just looking at the data, that does bear out.

And look, there probably is something to be said about what Director Kraninger mentioned about it has to be weighed when companies are self-reporting and focusing on the remediation. And so certainly over the next four years, our clients, our advice is going to be to when you identify those issues to work on a remediation plan and work with, hopefully, a much more communicative and transparent bureau and have those conversations about the appropriate next steps.

So I mean, look, we'll see. I think of the three of us on this call from Ballard, I'm probably more skeptical about the CFPB funding issue even under this administration. I like going toe to toe with the Bureau and the state AGs. So in some respects I'm like they can stick around as long as as they can. But, we'll certainly have to see. I mean, these issues are ripe for litigation and being brought up in the respective circuits. As Alan mentioned with the funding issue, it's going to be something to watch over the next couple of years to see if that interpretation or an active Congress clarifies that issue with respect to the Bureau.

So John, I think I'll kick it back to you.

John Culhane:

Sure. So what about non-traditional banking institutions? Well, again, probably a bit of a mixed bag. It seems likely that there'll be somewhat less of a focus on non-traditional banking institutions, but Kathy mentioned that that was an issue that she was concerned about when she was director to have a level playing field. I think what we may see is a less expansive view of who is a provider of consumer financial services. So maybe we won't be reaching cell phone companies and the like as happened under Cordray and maybe we won't see quite the big reach for tech companies that we've seen under the Chopra administration.

But there probably will be at least some focus on big tech, that's been a bipartisan area of agreement in Congress. It may well be the case that actions that are currently in process with larger technology providers will continue. Certainly as Mike mentioned, once litigation gets started it's very difficult to roll that back so that I think that explains a lot of what we're seeing now at the end of the Chopra administration as they seem to be reporting new lawsuits almost daily. But it's possible that the focus of exams and investigations may be more narrow and a lot of the reach for big tech seemed to be on the basis of posing risks to consumers, and my expectation is that that's going to be pared back.

Alan Kaplinsky:

John, I know what I'm about to ask you really fits in the regulation domain rather than supervision and enforcement, but are you expecting that that proposed larger participant rule dealing with payment providers, you think it'll be pushed ahead or do you think that that's going to just die at the Bureau?

John Culhane:

I'm inclined to think it's going to die, but there's obviously differences of opinion about that. But I think that all of those proposals that aren't mandated by Dodd-Frank I think those are all going to die on the vine.

Alan Kaplinsky:

Right.

John Culhane:

How to prepare for exams? Well, we've sort of been discussing this as we've been going along more of a focus on technical compliance. So I mentioned some of the statutory issues I think you should be concerned about. That part seems to be less impacted by administrative changes. I think we'll have the continued focus on strong compliance management systems. Maybe we'll move away from this notion that anything that happens is not just a violation of law, it's also an unfair and deceptive act and practice and an indication of a deficiency in an entity's compliance management system. It seems to me we should have the CFPB recognizing that you can have a strong compliance management system and still have things break down from time to time. But well documented policies and procedures are still going to be important, analyzing compliance with existing established interpretations is going to be important. And reviewing customer communications to avoid unfair or deceptive acts and practices and for compliance with the law is going to be important.

We're getting some questions about regulations. Is the junk fee proposal with mortgage is going to die? I think it is. But my opinion is that all of those proposals of regulations that aren't required by Dodd-Frank Act, I think they're all going to die.

Alan Kaplinsky:

One more question for you, John, and then we are going to wrap it up. And that is the contracts advisory that was issued under Roe v. Chopra, which isn't being litigated, but certainly very controversial. The provision that you've got to make sure that everything that's in your consumer financial services contract, it accurately states what the law is that may be applicable in a particular state, and that really has really thrown things into a cocked hat among industry because very often contracts will use language like, except where prohibited by applicable law the following will apply. And that kind of language is specifically prohibited by that guidance. Do you think anything will be done with that?

John Culhane:

I think the document that requires that I think is going to be rescinded, it's not a regulation. But likely that will just move the conversation to the state level and whether various states will consider those kinds of representations or contract terms to be permitted for entities that are licensed and subject to examination in a particular state.

Alan Kaplinsky:

Yeah, no, I think a lot of what Director Chopra has been doing in the last several months, particularly after the election, is signaling to the states, giving them ideas on things that they ought to focus on. And of course, we're going to have, on January 17th we're going to get an insider's perspective what the states might do when we have as our guest, the New Jersey Attorney General Matthew Platkin. So it will be very interesting to see. But what I've been telling clients is don't do anything yet because you may very well find out that some of the more active states are going to pick up on a lot of these signals that Chopra has been delivering. Do you agree, John? Or, Mike?

John Culhane:

Yeah, I think that's the case. Michael, do you agree?

Mike Kilgarriff:

Yeah. I mean, I think we're already seeing it. I mean, I've got a multi-state investigation that I kind of feels like a handoff from the CFPB to the states with a little bit of a playbook. So yeah, I actually think that's going to happen at a broader scale.

Alan Kaplinsky:

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