Consumer Finance Monitor Podcast (Season 8, Episode 39): New Consumer Financial Services Fintech Business Opportunities Arising from Deregulation at the CFPB during Trump 2.0 – Part 1

Speakers: Alan Kaplinsky, Kristen Larson, John Culhane Jr., Ron Vaske, John Socknat, and Dan Wilkinson

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. 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. Yes, it goes by the same name as our weekly podcast show. We've hosted our blog since 2011, so there is a lot of relevant industry content there, including the topics that we're going to be talking about today.

We also regularly host webinars on subjects of interest to those in the industry. 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, please let us know about it. You can leave us a review on Apple Podcast, YouTube, Spotify, or wherever you obtain 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 inviting as guests on our show.

Now, today's podcast and the podcast that we're going to release next week constitute a repurposing of a webinar that we did on August 12 of this year. As we have seen over the past seven months, the regulatory landscape at the CFPB and other federal agencies that have jurisdiction over banks and other consumer financial services providers shift in a very dramatic way under the second Trump administration. Banks and FinTech companies are exploring new pathways for innovation and market expansion. Over the past several months, we've closely tracked, we've blogged about, we've conducted podcasts on other webinars on the major deregulatory moves by the CFPB, the FTC, the Federal Prudential Banking agencies.

Now, actually by popular demand, because several of our followers of our webinars have wanted to know, well, what opportunities are presented by this new deregulatory environment? So that's what we're going to do today. We're not going to be getting into the so much the nitty-gritty of what has happened at the CFPB and how it's only a shadow of what it used to be prior to January 20 of this year, we're going to discuss how these changes that have occurred have opened the door to new and expanded consumer financial services business models and opportunities. We'll explore which consumer financial services products are now more viable than they were when the CFPB was under the stewardship of Rohit Chopra. We'll talk about how recent deregulatory actions have reduced barriers to entry and compliance costs. And finally, most importantly, the extent to which each product remains subject to oversight under state law, including licensing and other regulatory requirements that are applicable under state law.

We are not saying at all that the products that we're going to be covering today have been totally deregulated. That's not the message. But the message is that the heavy supervision and enforcement that used to repose with the CFPB appears to have disappeared and probably won't reappear unless until a Democrat is elected president. Here are our upcoming webinars. We actually have another webinar on the very important opinion in the birthright citizenship cases before the Supreme Court. On September 3, we'll be taking what I would call the proverbial deep dive into the Genius Act in the future of stablecoins. And then, I'm very pleased to let everybody know that on September 9, we have as our guest on a webinar, Malini Mithal, who is in a leadership position at the Federal Trade Commission, and she will be on that webinar personally along with our own, John Culhane.

Beyond that, to the introduction of today's speakers, literally, every one of our speakers today is a regular participant and presenters on our webinars and on our podcasts. I'm not going to really spend any time on them, except to point out the new person that you have not seen on our webinars before. I'm very pleased to introduce to you, Dan Wilkinson. Dan is an associate in our Consumer Financial Services group, works out of our Denver office, and has a wealth of experience most gained in another law firm, large firm from which Dan came. Dan has been with us for less than a year, I believe, but he really is playing a very important role for us. Without further ado, my pleasure to turn the program over to Kristen, who is going to talk about the Genius Act, and we're going to run very quickly through each of these topics and each of our speakers. You will not see me again until the very end of the webinar when I will close it out. So Kristen, the floor is yours.

Kristen Larson:

Thanks, Alan. We wanted to touch briefly on the Genius Act that was recently passed, and the reason we're going to just touch briefly on this is because we will have the upcoming webinar on this that'll go into much greater detail on this for you. The law was passed to establish a regulatory framework for stablecoins. Those are digital assets tied to the value of the US dollar and other reference instruments. The act specifically defines government entities that will oversee the stablecoin issuers. There's the prudential regulators like the OCC, the Federal Reserve, FDIC and CUA, and there's the Stablecoin Review Committee that's composed of the Secretary of the Treasury, the Chair of the Board, the Chair of the Corporation, and then, there's the state payment stablecoin regulators that will also have some authority as well.

Now, excluded from this definition notably are the SEC, the CFPB, the Commodity Futures Trading Commission. Under this act, they do not play a role. The law will make it illegal for any person other than a permitted payment stablecoin issuer to issue a payment stablecoin in the United States, and it includes numerous requirements for both issuers and custodians of stablecoins. I referenced here the law if you want to look at it, along with the White House fact sheet. And then, on this next slide, this is the formal definition that's been provided of stablecoin. And again, it's a digital asset that's designed to be used as a means of payment or settlement. Notice they use the terms payment of settlement, which excludes investment and can be exchanged or redeemed for a future stable fixed amount of monetary value of national currency or deposit. The definition excludes digital assets that are national currency or deposit that are security and commodities. That's all we're going to address with this. If you're more interested in stable coins, please stay tuned for our next webinar and I'm going to turn it over to Ron.

Ron Vaske:

Thank you, Kristen. I think one of the areas where regulation has been impacted by the new Trump administration, and this is not to downplay the deregulatory effects in other areas, but probably the most stark is in the crypto space. I'm going to talk about crypto-backed lending, but before I do, I want to just give you an [inaudible 00:10:17] here of how much things have changed from the Biden era to the Trump era. Most specifically at the banking agencies, really nothing at the CFPB, but at the OCC, the FDIC and the Federal Reserve, and then also some at the Department of Justice, everything really has changed. Essentially, the Trump team has withdrawn all of the Biden-era guidance, replaced it with some, but for the most part withdrew it, explaining that they're going to re-evaluate it and publish additional guidance in the future. Most particularly significant to banks is withdraw of the requirement for prior notice to engage in crypto activities and regulatory non-objection before engaging in certain crypto activities.

Those things are gone. Keep in mind, however, that you still have to comply with all laws, including any state laws which may implicate licensing and other limitations, state guidance. A number of states have even published guidance on activities that banks may engage in with respect to crypto that would apply to, certainly, at least to state banks. And of course, all of this has to be done in accordance with safe and sound banking practices. I cite a few of the or three of the things that the agencies have withdrawn from here. The second one, most particular, confirms that national banks and federal savings associations may buy and sell assets held in custody at the customer's direction, and this is important in the FinTech world, they're permitted to outsource to third parties, the bank permissible crypto asset activities. The activities that banks can do, they can outsource. In other words, they can engage in a bank sponsorship, a partnership with a FinTech to perform these functions. So there's some opportunity there.

Importantly, state banks would have similar authority in any state that has a wild card statute. Need to look at your particular state law to determine how that works, but they do have, under FDIC and Federal Reserve rules, the ability to engage in those activities as long as to the same extent as national banks would. Department of Justice has issued a memo earlier this year that says how they're going to shift how they're dealing with enforcement with respect to digital assets in crypto. In particular, they say, we're not going to regulate through enforcement anymore. They're going to focus on prosecuting individuals who victimize digital asset investors or those who use digital assets for criminal activities such as terrorism, narcotics, organized crime, human trafficking, hacking and cartel and gang financing. Outlined here, some additional interagency statements that the FDIC and the FED have withdrawn, really the same thing as the OCC providing mostly that the notice and non-objection is no longer a requirement.

A joint statement on crypto asset activities, specifically crypto asset safekeeping, came out just last month. Each of the banking agencies, clarifies that the banks can engage in safekeeping, have to do it in compliance with law. In particular, AML Bank Secrecy Act laws of terrorist finance laws and OFAC sanctions laws, and need to clearly define what the bank's role is. In the fiduciary agreement, it has to be clear what the bank's responsibilities are and what they're not.

Let's move forward. Talking about crypto-backed loans and credit products. I think, probably the most complicated aspect of this, aside from what you do with the collateral if you have to take it back, is how you perfect your security interest. And it's going to vary from one state to the next. There are 24 states and the District of Columbia that have adopted the 2022 amendments to the UCC includes new Article XII, which deals with digital assets, and the regime under that that addresses how to perfect a security interest in any controllable electronic record, which would include cryptocurrency. There, you do it by filing a UCC financing statement or preferably by control. Control involves the power to by an identifiable person, so the secured party to avail of the benefits, the exclusive power to transfer and prevent the use of that cryptocurrency by the borrower.

You can take control by direct control, which would mean the secured party taking possession of the private key for the crypto or through a custodian, which is probably the most common, where it would be done through an agreement between the borrower, the secured party, and the custodian. It essentially says that the custodian will follow the lender's instructions rather than the borrower's instructions with respect to disposition of those assets. In states that have not adopted Article XII, perfection could only be achieved by filing a UCC financing statement. The problem here is, and/or perfection under Article XII if you're going to file a financing statement is, you need to be pretty specific about what that collateral is. And probably, the only way to do this, unless it's an all-assets filing, be to specific key in the UCC financing statement. That's not very palatable to most borrowers, because they would be really identifying themselves publicly with that particular crypto, which defeats the anonymity characteristic that is involved in crypto assets. Some things related to crypto and mortgage lending that John Socknat's going to talk about.

John Socknat:

Great. Thank you, Ron. I just want to talk briefly about, as Ron said, crypto in the mortgage industry. As with other asset classes, there's definitely growing interest from borrowers and lenders regarding leveraging digital assets as part of the lending process. In the mortgage space, one of the most significant current impediments to borrowers leveraging digital assets is how the GSEs deal with crypto. Currently, Fannie and Freddie require conversion of crypto instruments to US dollars before they can be counted as assets for underwriting purposes. That may change, perhaps not surprisingly, given the Trump administration's public support for crypto. In June, Bill Pulte, who's the new director of the FHFA directed Fannie and Freddie to prepare a proposal for consideration of cryptocurrency as an asset for reserves with without conversion of the crypto to US dollars. I think it's worth noting that Pulte has publicly disclosed his investment in various digital assets.

That announcement generated a lot of positive comments from the industry. If the GSEs can ultimately get comfortable with crypto as viable assets, I think that most certainly would be beneficial to the broader market and give them comfort with digital assets, given that the GSEs generally set the tone for assessing credit worthiness across the industry. Now, on the heels of that directive, on July 29, Senator Lummis from Wyoming introduced the 21st Century Mortgage Act of 2025, which would essentially permit Fannie and Freddie to consider digital assets to be included without conversion to US dollars. The mortgage industry certainly will be watching. Back to you, Ron.

Ron Vaske:

Thanks, John. We'll move on to credit builder loans, and first, let's talk about what are credit builder loans, because I realize some people may not be familiar with them. What they really are is just an advance by a lender into a savings security account that's owned by the borrower. The borrower never receives any proceeds of the loan, it goes into the account. The account secures the bank, the deposit account secures the loan, and that then is used to help borrowers establish credit. The borrower is required to make monthly payments or monthly payments in some cases are deducted right out of the security account, so they happen automatically. And then, all of this loan activity, the payment activity is reported to the three major credit bureaus, which then establishes a credit history for that borrower. Things that you still need to be thinking about though, with respect to credit builder loans, they're more suitable as credit builders as the name suggests, than they are for credit repair.

The impact that they might have on improving a person's credit, who already has bad credit, is a lot less predictable than actually just establishing and building a new credit history. You've got to be careful with other misleading statements over-promising what it might do. Be very careful with how you describe what it does say. You will report to the bureaus without necessarily promising that it's going to build a positive credit history. And then, if you are suggesting that it might repair any credit, that probably implicates the Credit Repair Organizations Act, which prohibits deceptive acts and practices, as well as upfront fees. Be careful about inflecting that. And then, also keep in mind applicable state small dollar loan laws that would likely apply, including state licensing, and then, regulations that are typical of state payday lending type of laws. With that, I'll pass it over to Dan, who can talk to us about earned wage access.

Dan Wilkinson:

Thanks, Ron. Earned wage access is a type of transaction where a provider offers the consumer access to wages that the consumers earned but has not yet been paid for by their employer attempting to solve a problem of the lag between working and actually getting paid for a consumer. These providers can either be a third party or they can be integrated into the employer. One of the big issues with this is whether or not these types of products are considered credit. And if they are, then Reg Z and TILA will apply. In 2020, the CFPB released an advisory opinion stating that certain earned wage access products are not credit if they meet certain requirements such as the provider only provides the amount of accrued wages and no more, that the earned wage access product is not, has no recourse against the consumer, and there's no underwriting or credit reporting involved with these transactions.

However, in 2025, the CFPB, in the last days of CFPB director Chopra, rescinded this 2020 rule arguing that the analysis was significantly flawed and that it would lead to substantial regulatory uncertainty. However, in May of this year, the CFPB under the Trump administration rescinded this 2025 advisory opinion, going back to the original opinion that certain earned wage access products are not credit.

Based on this, we really think there's a lot of room here for earned wage access providers to make new products and expand their products based on the Trump administration kind of pulling to that, they're not going to deem this as credit and then Reg Zs probably not going to apply depending on how the actual product is structured. In addition to federal laws, there are new states making earned wage access laws. Some of them are contradictory to each other. Some expressly provide that earned wage access products are not credit. Some allow for the imposition of fees such as membership fees, maybe fees for the consumer to get paid faster. And again, the voluntary fee of a tip where a consumer will pay the provider at the end after getting their product. With that, I'm going to turn it over to John.

John Culhane Jr.:

Thanks, Dan. I'm going to talk about income share agreements here. Unlike some of the other products that we've discussed, this isn't a product where the CFPB had issued circulars or alerts or guidance documents or regulations or anything of that sort. This was the quintessential CFPB regulation by consent order. As a result, there's no clear articulation as to exactly what the CFPB's legal analysis was in these actions that it brought. Probably, the best way of assessing what that analysis might've been is by looking at papers that were written by the Student Borrower Protection Center essentially attacking income share agreements. I think everybody in our audience probably knows that income share agreements are agreements where, in return for a payment of money or an advancement of funds, consumer agrees that they will make payments based on their income.

These agreements were fairly prevalent in the education financing space right up to the time that the CFPB entered into its first consent order with Better Future Forward.

Better Future Forward was an income share provider. It still is an income share agreement provider that works with a lot of schools and colleges and universities and vocational schools. The CFPB asserted that Better Future Forward engaged and deceptive conduct in asserting that income share agreements are not loans. And then, based on that assertion, there were a number of additional assertions that followed that with education finance, these obligations would require the three-part private education loan disclosures that are required by the Truth and Lending Act and Regulation Z, disclosures at the time of application, at the time of approval, and then, a final disclosure prior to consummation. There also was an assertion that the payment caps that were a common feature of income share agreements at the time constituted prepayment penalties in violation of the Truth and Lending Act, which prohibits the assessment of prepayment penalties with private education loans.

Then there was sort of a boilerplate assertion that the company offered consumer financial products or services that were not in conformity with federal consumer financial law. So it violated the Consumer Financial Protection Act. Again, no clear articulation of the CFPB's rationale here, we just have the consent order. That came out in September of 2021. About two years later, the CFPB entered into a stipulated judgment along with some 11 state attorney's general with a company called Pre-Hired. Pre-Hired provided vocational training programs for software sales representatives. Their income share agreements typically required a trainee to pay somewhere between 12.5% and 16% of their income over a four to eight year period, or until they had paid off a $30,000 ceiling. The $30,000 being the cost of the programs that Pre-Hired offered.

The assertions here simply tracked the assertions in the Better Future forward consent order. The CFPB asserted that Pre-Hired engaged in deceptive conduct in asserting the income share agreements are not loans. The CFPB did not treat Pre-Hired as an entity that would be subject to private education loan disclosures. So here, it asserted that Pre-Hired failed to give the standard four box closed end credit disclosures, the amount financed, the APR, the finance charge, the total of payments, though there were other allegations as well. As part of this stipulated judgment, Pre-Hired agreed to refund some $4.2 million. And while it's a bit hard to tell what the CFPB is doing in the way of victim compensation at this point, there was a post. There is a post on the CFPB's website dated May 27 that notes the ongoing distribution of victim compensation. The Pre-Hired settlement stipulated judgment, was then followed by a consent order with a Bloom tech, a for-profit vocational school, probably better known to members of our audience as the Lambda School. Then, it was subsequently Bloom Institute of Technology before becoming Bloom Tech.

The assertions here were similar to the ones against Better Future Forward and against Pre-Hired. The company engaged in deceptive conduct in asserting that income share agreements were not loans. The company failed to give closed end credit disclosures and there were other allegations as well. That's where things stood at the end of the Biden administration and the Chopra regime. There have not been any pronouncements from the Trump administration about income share agreements, though. One possibly Hopeful Development here is one that Dan mentioned, which is the rescission of the earned wage access opinion, including that earned wage access products did constitute extensions of credit that may mean that the current CFPB is at least open to revisiting the issue of whether income share agreements are credit. The theory under which income share agreements were attacked as credit was that they constituted the deferment of debt.

That being part of the definition of credit in the Truth and Lending acting in Regulation Z. However, the CFPB never wrestled with, nor did the Student Borrower Protection Center wrestle with the fact that the commentary to the definition of credit under the Truth in Lending Act and Regulation Z and comment two a 14-1 provides a number of examples of contingent obligations and concludes that those obligations are not credit. And if they're not credit, then they're not the deferral of a debt either, since that's part of the definition. But anyway, that's where we are. No pronouncements from the Trump administration. Some possible signals based on developments with other products that the Trump administration might be amenable to reconsidering the positions it's taken here.

And so, the activity that really is key at this point has occurred at the state level. The most significant development here is in Illinois. The Illinois Legislature passed an amendment to the Student Loan Servicing law, adding an Article VII on educational income share agreements. Now, that bill was enrolled on June 20 and sent to the governor, but it has not yet been signed, so it is not yet law. We'll probably know sometime next week. Well, we'll know for sure next week whether it's going to become law because under Illinois procedure, bills that are passed by the Legislature become law if the governor doesn't act within 60 days. Obviously, we're coming up on that 60-day timeframe. Illinois doesn't have the pocket veto.

What does this law do? Well, at a very high level, just a few points, it purports to deem educational income share agreements, credit and private education loans under the Truth and Lending Act. I'm not sure that's a determination that a state can dictate, but that certainly signals the position that the state is going to take in any enforcement action. It places a limit on payments. They may not exceed 8% of the consumer's income. Somewhat like other products that we've seen, there's an additional cap based on total payments for income share agreements and educational loans that will obviously require some due diligence to get that information on the part of providers. The educational loan part will be easy. The income share agreement part may be a little bit more difficult at present. Sets an income threshold for determining whether payments are due at $47,000. That amount will adjust annually. It sets a rate cap that's either 9% or a higher rate if dictated by the auction of ten-year constant maturity treasury notes, that may be a little bit tricky depending on how that's interpreted.

In calendar year 2024, there was sort of a re-initiation of an auction, assuming that counted then. That's how I've got the 10.235% figure here. Provides for a maximum of 180 monthly payments over a 240-month period. We're talking about twenty-year obligations that includes payment clauses. There are numerous and very specific exclusions from covered income, spousal income, which rubs up a sort of a chronic issue with income share agreements and joint tax returns.

Retirement funds are excluded, so that's IRA distributions, pensions and annuity, social security benefits, also various forms of governmental aid, et cetera. The law does allow, or the bill does allow for a provider to specify an early completion payment cap, but that cap can't be a prepayment penalty as defined under the Truth and Lending Act. Not a lot of elaboration as to how that is going to work, but since there's interest rate, presumably the cap can't exceed the amount that would be paid principal and interest due at the time of payment. Again, not law yet, probably will become law next week assuming the governor doesn't act. Let me stop here and turn it back to Dan to talk about rent-to-own products. Dan?

Dan Wilkinson:

Thanks, John. I'm going to talk about both rent-to-own and lease-to-own financing products, which are similar in the way that both of them, at the end of the term, the consumer has the option to obtain title to the property. The big difference is the time of the actual term. In rent-to-own transactions, the consumer will agree to rent the property for a short period of time usually, such as a month or two months, and then it will auto-renew. Every month, it'll auto-renew, and then, at the end of maybe a longer specified time, such as a year, if the consumer has continuously made these payments, then the consumer will own the product.

Whereas, in a lease-to-own transaction, the consumer enters into a full lease term, and at the end of that term, will have the option to make an additional payment to become the owner of the product. Rent-to-own transactions are typically governed under a specific state law. And then, lease-to-own transactions are a lot of times subject to State Retail Installment Sales Act, and it's also subject to the Federal Leasing Act. Under the Biden administration, the CFPB had generally been pretty active in enforcing against rent-to-own and lease-to-own products.

But based on everything else we've seen, we think that there's a good chance the Trump administration may not be as active in enforcing these, in enforcement against these types of products. And then, in addition to the rent-to-own and lease-to-own transactions, there's also the straight consumer leasing, where a consumer leases a product, and then, at the end of the product, at the end of the term, there's no chance for the consumer to purchase the product outright or become the owner outright. Instead, they just give the product back. And so, we're seeing right now a lot of innovation in what people are offering. We've seen leasing offerings such as saunas, automotive parts that can install in people's cars, sports paraphernalia, things that go get installed in people's houses. In addition, we're seeing big companies, especially tech companies, interested in offering their products with leases and with no option to purchase where the consumer leases it and then gives it back at the end.

These transactions are likely going to be subject to the Consumer Leasing Act and the Uniform Partial Code in every state. And so, we're seeing a big uptick in these types of products. People interested in maybe even things like handguns now, because the Trump administration may have a different view on the types of products that can be leased in a transaction like this.

Alan Kaplinsky:

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