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The Coming Transformation of the CFPB in the Biden Administration: What to Expect and How to Prepare

In June 2020, the Supreme Court in *Seila Law* struck down the for-cause removal protection that applied to the director of the Consumer Financial Protection Bureau (“CFPB”) and thereby effectively converted the CFPB from an independent agency into an executive agency. As a result, on President Biden’s inauguration day, the Trump-appointed director of the CFPB, Kathy Kraninger, resigned. President Biden named David Uejio, the CFPB’s chief strategy officer, to serve as the agency’s acting director, and he announced his intention to nominate Rohit Chopra as the CFPB’s Director. Chopra, who is currently an FTC commissioner, is a close ally of Senator Elizabeth Warren and was a founding member of the CFPB and served as its first student loan ombudsman.

We should expect CFPB to transform in the coming months as a result of two related factors:

First, if and when Chopra is confirmed, he likely will take a significantly more aggressive approach to using CFPB’s considerable rulemaking, supervision, and enforcement authorities than the outgoing CFPB leadership. And Acting Director Uejio has already commenced this shift and listed his two priorities for the CFPB as “relief for consumers facing hardship due to COVID-19” and “bold and swift action on racial equity.”¹ We should expect a return to a Richard Cordray-like CFPB (Cordray recently said of Biden’s recent picks, “We’re all birds of a feather”²), although Chopra, who has an MBA and was formerly at McKinsey, will certainly chart his own path and have his own distinct priorities and style.

Second, as a result of *Seila Law*, the CFPB is for the first time an executive agency and part of the president’s administration. As then-Professor Elena Kagan explained in her famous article, “Presidential Administration,” it is the overriding tendency of recent presidents to harness executive agencies’ rulemaking and other authorities and use them as extensions of their own policy and political agendas.³ Given the CFPB’s broad authorities, its ample funding through the Federal Reserve, and the extent of consumer hardship during the pandemic, it would not be surprising if President Biden fully weaponizes the CFPB in the service of his agenda. Presidents do this through formal means, such as the issuance of executive orders or memoranda “requesting” that an agency take certain rulemaking or other action. Presidential control can also come about through the numerous discussions that occur on an ongoing basis between White House staff and the leadership of executive agencies. As Kagan observed, speaking from her experience in the Clinton White House, “the White House in large measure set the administrative agenda for key agencies, heavily

influencing what they would (or would not) spend time on and what they would (or would not) generate as a regulatory product.”⁴

As a result, a Chopra-led CFPB that is part of the Biden Administration will likely aggressively deploy the agency’s rulemaking, supervisory, enforcement, and other authorities to address the financial challenges faced by consumers during the pandemic, boost fair-lending enforcement and seek greater penalties and remedies across the range of enforcement activity, and renew or initiate more assertive approaches to regulating payday lending, student loans, credit reporting, and other sectors. We will likely see these initiatives announced over time by the CFPB, the White House, and sometimes a combination of the two.

Although not as front-burner, the CFPB will also likely devote substantial attention to issues of fintech, innovation, and “open banking,” both in a supporting and policing capacity. In this regard, we expect that Chopra will bring from the FTC his experience on issues of technology, big data, privacy, and transparency.

Below, we describe issue areas that will likely see heightened CFPB activity, and we conclude with some practical suggestions for companies that are preparing for these changes.

Areas to Watch

These are some of the key areas that a Chopra-led CFPB in the Biden Administration are likely to address:

- ▶ *Consumer Treatment During COVID-19.* We expect that the CFPB’s first priority will be monitoring companies’ treatment of consumers in light of the pandemic and taking supervisory and enforcement action where companies’ practices are deemed to be unfair, deceptive, and/or abusive (“UDAAP”), discriminatory, or otherwise contrary to law. The CFPB’s efforts will include ensuring compliance with provisions of the CARES Act, which imposed certain consumer protections, such as forbearance periods for federal mortgages and students loans, as well as policing companies’ self-initiated efforts to provide forbearance, repayment, and other accommodations to consumers. This will build on and expand work that was already underway during Director Kraninger’s tenure. On January 19, 2021, the CFPB published a special edition of *Supervisory Highlights*⁵ focused on its COVID-19 “prioritized assessments,” which were rapid supervisory inquiries to banks, loan servicers, debt collectors, and other companies regarding their practices during the pandemic. The report highlighted several areas of risk (including those listed below), which may provide bases for UDAAP and other investigations in the months to come. Acting Director Uejio has stated that the CFPB must take “swift action now, in order to make sure our actions help people in the middle of the crisis,” and he directed CFPB’s enforcement office to “expedite enforcement investigations relating to COVID-19 so that we can take action now to ensure that industry gets the message that violations of law during this time of need will not be tolerated.”⁶
- ▶ *General Issues.* During the pandemic, Bureau-regulated entities experienced increased call volumes from consumers requesting relief or disputing charges, which corresponded with greater wait times and call loads. Several entities experienced a backlog of accommodations requests or provided inaccurate information about accommodations.
- ▶ *Mortgage and Loan Servicing.* The Bureau highlighted several areas of risk for mortgage servicers, including: providing incomplete or inaccurate information regarding forbearances, failing to timely process forbearance requests, and enrolling borrowers in automatic or unwanted forbearances and then informing consumer reporting companies that the accounts had been placed in forbearance.

- ▶ *Student Loan Servicing.* The prioritized assessments revealed several issues in servicers' implementation of CARES Act provisions relating to student loans, such as providing incorrect or incomplete information about available payment relief options in written communications to numerous consumers; and failing to provide information to borrowers seeking payment assistance regarding the full range of payment relief options, including switching to income-based repayment or other non-standard repayment options that could provide long-term relief.
- ▶ *Credit Card Account Management.* The CFPB found credit card issuers have run into some compliance-related challenges in implementing relief programs, including failure to obtain necessary consumer consent for electronic disclosures, difficulty meeting regulatory requirements to address consumer disputes, and adjustments in monitoring and testing schedules for credit card operations.
- ▶ *Consumer Reporting and Furnishing.* The CFPB noted risks of consumer harm posed by inaccurate reporting of accommodations and other information (in violation of the CARES Act's amendments to FCRA or otherwise) and the failure to timely resolve disputes by credit reporting companies.⁷
- ▶ *Deposits.* The CFPB identified several shortcomings in some banks' handling of pandemic-related issues, including failure to implement state-level protections to consumers' access to the full amount of their government benefits, failure to clearly communicate how and when provision credits would be revoked, and failure to implement policies and procedures that fairly and consistently operationalized account fee waivers.
- ▶ *Small Business Lending.* The CFPB found that some lenders adopted policies that restricted access to Paycheck Protection Program (PPP) small business loans beyond the eligibility requirements of the CARES Act and that this raised potential fair lending concerns.
- ▶ *Fair Lending.* Amplified concerns about the intersection of racial justice and economic inclusion are likely to bring greater attention toward discriminatory lending practices and fair lending compliance. Acting Director Uejio has already named fair lending enforcement as a "top priority" and stated that he will "elevate and expand existing investigations and exams and add new ones to ensure we have a healthy docket intended to address racial equity."⁸ We expect that, in line with President Biden's campaign statements,⁹ the CFPB will reverse a 2018 reorganization that relocated the Office of Fair Lending and Equal Opportunity ("OFLEO") and removed its enforcement and supervisory authorities.¹⁰ Between December 2017 and January 2021, under Trump-appointed leadership, the CFPB had filed only one fair-lending enforcement action for racially discriminatory lending practices.¹¹ In addition, Chopra has indicated strong support for the use of disparate impact analysis for detecting unlawful discrimination in fair lending cases, citing the difficulties in uncovering direct evidence of discriminatory intent.¹²
- ▶ *Student Lending.* Chopra previously served as the CFPB's student loan ombudsman and frequently called for increased accountability and oversight of the student-loan servicing industry while in that role.¹³ The CFPB will undoubtedly step up oversight of student loan providers and servicers, focusing, among other things, on student loan servicers that fail to respond to complaints, process payments incorrectly, or place borrowers in the wrong repayment plan.¹⁴
- ▶ *Payday Lending.* In July 2020, the CFPB rescinded part of a regulation issued under Director Cordray that required payday lenders to reasonably determine, as a prerequisite for underwriting, that borrowers had the ability to repay their loans.¹⁵ The new CFPB is likely to seek to reinstate this requirement, which had been intended to protect borrowers from a cycle of debt resulting from the need to repeatedly re-borrow at high interest rates.¹⁶ Additionally,

Acting Director Uejio announced that he was reversing the previous director's decision not to supervise lenders with regard to the Military Lending Act.¹⁷

- ▶ *Credit Reporting.* We expect a CFPB under Chopra to strongly scrutinize the credit reporting industry. In a recent statement, Chopra stated that “[i]t is critical that bad actors not be allowed to weaponize the credit reporting system against consumers.”¹⁸ What is more, President Biden had proposed creating a public credit reporting agency within the CFPB, which would use rental history, utility bills, and other non-traditional sources of data to evaluate credit.¹⁹ Whether or not this idea comes to pass, there will be significant attention to credit reporting and concerns over racial and economic inclusion.
- ▶ *Debt Collection.* The CFPB will likely continue to strengthen debt collection regulation and enforcement. In response to the CFPB's debt collection rulemaking, which was finalized in late 2020, Chopra submitted a comment letter in which he urged the CFPB to specifically consider the rule's impact on student loan borrowers, highlighting what he described as their limited market power and the need to prevent disparate treatment in excessive calls or harassment by student loan collectors to similarly situated borrowers.²⁰ Chopra has described the Trump-era CFPB's debt collection enforcement as “tepid,”²¹ and he has called for closer cooperation between the CFPB and the FTC in debt collection enforcement actions.²²
- ▶ *Data Security.* Although the CFPB has broader UDAAP and penalty authorities than the FTC, the CFPB has so far taken few enforcement actions in the area of data security. Other than the Dwolla settlement in 2016,²³ in 2019 the CFPB, along with the FTC and a large majority of states, reached a settlement with Equifax over its 2017 data breach.²⁴ The CFPB found that Equifax engaged in unfair and deceptive practices, in part, by failing to implement reasonable data security measures. As concern over data security grows, we expect that the CFPB will increase its enforcement and other activities in this area.
- ▶ *Customer Access to Financial Information.* In October 2020, the CFPB issued an advanced notice of proposed rulemaking to develop regulations to implement Section 1033 of the Dodd-Frank Act, which requires banks and other consumer financial services providers to give consumers or their designees access to their transaction and other account information.²⁵ The Bureau sought input in nine areas: costs and benefits of consumer data access; competitive incentives; standard-setting; access scope; consumer control and privacy; other legal requirements; data security; data accuracy; and other information.²⁶ Given the importance of this issue to the relationship between traditional financial institutions and fintech providers, as well as its implications for consumers, we expect Chopra to advance this rulemaking.
- ▶ *Individual Liability.* Over the years, the CFPB has at times brought enforcement actions against individuals, such as owners and presidents, in addition to their companies, to hold them accountable for consumer protection violations.²⁷ With the OCC having recently launched an unprecedented approach to individual accountability in the consumer protection context with its enforcement actions against Wells Fargo's board chair and CEO and the leaders of various functions (legal, compliance, human resources, audit),²⁸ a Chopra-led CFPB may be motivated to follow suit.

Preparing for Increased CFPB Activity

Companies that are regulated by the CFPB should revisit their compliance programs and risk management frameworks to ensure that they are calibrated to the risks posed by a more aggressive CFPB. Such an effort may include:

- ▶ assessing consumer protection policies, procedures, training, and controls (and monitoring and internal audit mechanisms) to ensure that they are up-to-date and reflect recent regulations, enforcement actions and trends, and changes to product offerings;
- ▶ evaluating the stature, staffing, and resources of the compliance function to ensure that they are sufficient;
- ▶ renewing efforts by senior leadership to set an appropriate tone from the top and disseminate messages on the importance of consumer fairness, ethics, and legal compliance (and ensure that there is an “echo from the bottom,” *i.e.*, that these messages are actually reaching their intended audiences);²⁹
- ▶ ensuring that there is a channel for accepting and responding to consumer complaints and that this complaint data is monitored to indicate areas of heightened risk, particularly during the pandemic (and ensuring that there is a mechanism for employees to report unethical or problematic conduct);
- ▶ strengthening fair-lending compliance efforts, including around forbearance and other accommodation options during the pandemic;
- ▶ evaluating advertising, contracts, call scripts, and other disclosure made to consumers over the course of their experience with the product or service and through various channels (in-person, online, mobile) to identify and mitigate unfair, deceptive, and abusive acts and practices (UDAAP) risk (given the flexible and evolving nature of UDAAP enforcement, some companies also vet their products and services against a broad set of consumer fairness “principles” as a way of surfacing potential UDAAP concerns);
- ▶ relatedly, assessing whether the CFPB may expect greater disclosure (*i.e.*, disclosure that inches down the continuum to fiduciary-like duties) to consumers when choosing between particularly complex products, product features, and forbearance options and whether it could be alleged that the company is improperly “steering” consumers towards certain options;³⁰
- ▶ ensuring that any representations about data security and privacy protections are accurate and that reasonable controls are in fact in place;
- ▶ evaluating whether compensation incentives (whether tied to sales, cross-selling, servicing, or collection metrics) are appropriately calibrated and monitored to avoid incentivizing harmful practices;³¹
- ▶ assessing the quality of monitoring vendors and other third-parties that could have a critical impact on consumer treatment;
- ▶ considering a third-party, privileged review of business practices or offerings that are higher risk (and in connection with this, considering a fresh “inventory” of all applicable statutes, regulations, and guidance to ensure that none have been missed along the way); and
- ▶ renewing attention to small or stagnating business lines or business units, or business units with unclear reporting structures, which can be a breeding ground for risk.

By the same token, private equity firms and others that invest in CFPB-regulated companies should consider making consumer protection-related diligence a priority in upcoming transactions, and should consider engaging with their portfolio companies about strengthening their compliance footing.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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- ¹ Dave Uejio, The Bureau Is Taking Much-Needed Action to Protect Consumers, Particularly the Most Economically Vulnerable, (Jan. 28, 2021), <https://www.consumerfinance.gov/about-us/blog/the-bureau-is-taking-much-needed-action-to-protect-consumers-particularly-the-most-economically-vulnerable/>.
- ² Evan Weinberger, CFPB's New Temporary Director Pressing Forward with Biden Agenda, BLOOMBERG LAW (Jan. 22, 2021), <https://news.bloomberglaw.com/banking-law/cfpbs-new-temporary-director-pressing-forward-with-biden-agenda>.
- ³ See Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2248–49 (2001).
- ⁴ *Id.* at 2248.
- ⁵ See CFPB, Supervisory Highlights: COVID-19 Prioritized Assessments Special Edition (Issue 23) (Jan. 19, 2021), https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-23_2021-01.pdf.
- ⁶ Uejio, *supra* note 1.
- ⁷ See CFPB, Consumer Reporting FAQs Related to the CARES Act and COVID-19 Pandemic (last updated June 16, 2020), https://files.consumerfinance.gov/f/documents/cfpb_fcra_consumer-reporting-faqs-covid-19_2020-06.pdf.
- ⁸ Uejio, *supra* note 1.
- ⁹ The Biden Plan for Investing in Our Communities Through Housing, <https://joebiden.com/housing> (last visited Dec. 28, 2020). See also Biden-Sanders Unity Task Force Recommendations 18 (Aug. 2020), <https://joebiden.com/wp-content/uploads/2020/08/UNITY-TASK-FORCE-RECOMMENDATIONS.pdf>.
- ¹⁰ See Renae Merle, Trump Administration Strips Consumer Watchdog Office of Enforcement Powers in Lending Discrimination Cases, WASH. POST (Feb. 1, 2018), <https://www.washingtonpost.com/news/business/wp/2018/02/01/trump-administration-strips-consumer-watchdog-office-of-enforcement-powers-against-financial-firms-in-lending-discrimination-cases>; Press Release, Americans for Financial Reform, Joint Statement: Changes to CFPB Fair Lending Office Undermine Anti-Discrimination Work (Feb. 1, 2018), <http://ourfinancialsecurity.org/2018/02/joint-statement-changes-cfpb-fair-lending-office-undermine-anti-discrimination-work>.
- ¹¹ See Press Release, CFPB, Consumer Financial Protection Bureau Files Suit Against Mortgage Creditor for Discriminatory Mortgage-Lending Practices (July 15, 2020), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-files-suit-against-mortgage-creditor-discriminatory-mortgage-lending-practices>; CFPB, Fair Lending Report of the Bureau of Consumer Financial Protection 30 (Apr. 30, 2020), https://files.consumerfinance.gov/f/documents/cfpb_2019-fair-lending_report.pdf; Min. Staff Rep. of S. Comm. on Banking,

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- ¹² See Statement of Commissioner Rohit Chopra, FTC (May 27, 2020), https://www.ftc.gov/system/files/documents/public_statements/1576002/bronx_honda_final_rchopra_bronx_honda_statement.pdf.
- ¹³ See CFPB, Written Testimony of Rohit Chopra Before the Committee on the Budget (June 4, 2014), <https://www.consumerfinance.gov/about-us/newsroom/written-testimony-of-rohit-chopra-before-the-committee-on-the-budget/>.
- ¹⁴ See Zack Friedman, 10 Ways Biden May Change Student Loans, FORBES (Jan. 27, 2021), <https://www.forbes.com/sites/zackfriedman/2021/01/27/10-ways-college-debt-can-change-under-biden/?sh=13d016276ac1>.
- ¹⁵ See Scott Horsley, CFPB Strips Some Consumer Protections For Payday Loans, NPR (July 7, 2020), <https://www.npr.org/2020/07/07/888499021/cfpb-strips-some-consumer-protections-for-payday-loans>.
- ¹⁶ At least one member of the Biden Administration's CFPB Transition Team has criticized the current version of the Payday Rule. See Press Release, HOPE Policy Institute, HOPE Statement on CFPB Repeal of Payday Lending Protections (July 7, 2020), <http://hopepolicy.org/news/hope-statement-on-cfpb-repeal-of-payday-lending-protections>.
- ¹⁷ Uejio, *supra* note 1.
- ¹⁸ Statement of Commissioner Rohit Chopra, FTC (Nov. 25, 2020), https://www.ftc.gov/system/files/documents/public_statements/1583802/chopra_statement_for_midwest_recovery_systems.pdf.
- ¹⁹ See Task Force Recommendations, *supra* note 9, at 18; Biden Housing Plan, *supra* note 9.
- ²⁰ Rohit Chopra, Comment Letter on Notice of Proposed Rulemaking on Debt Collection Practices (Regulation F) (Sept. 18, 2019), https://www.ftc.gov/system/files/documents/public_statements/1544795/chopra_-_comment_submission_on_cfpb_proposed_debt_collection_rule_9-18-19.pdf.
- ²¹ See Examining Legislation to Protect Consumers and Small Business Owners from Abusive Debt Collection Practices: Hearing Before the H. Comm. on Fin. Servs., 116th Cong. 6, 17 (2019) (statement of Rohit Chopra, Comm'r, FTC), <https://www.congress.gov/116/chr/CHRG-116hhrg42354/CHRG-116hhrg42354.pdf>.
- ²² See Chopra Statement, *supra* note 18.
- ²³ *In the Matter of Dwolla, Inc.*, CFPB No. 2016-CFPB-0007 (Mar. 2, 2016). See Paul, Weiss Client Memorandum, The CFPB Enters the Cybersecurity Arena with its First Enforcement Action (March 4, 2016), <https://www.paulweiss.com/media/3377203/4mar16cyberalert.pdf>.
- ²⁴ See Press Release, CFPB, FTC and States Announce Settlement with Equifax Over 2017 Data Breach (July 22, 2019), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-ftc-states-announce-settlement-with-equifax-over-2017-data-breach/>.
- ²⁵ See Press Release, CFPB, Consumer Financial Protection Bureau Releases Advance Notice of Proposed Rulemaking on Consumer Access to Financial Records (Oct. 22, 2020), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-releases-advance-notice-proposed-rulemaking-consumer-access-financial-records>.
- ²⁶ See Consumer Access to Financial Records (Advance Notice of Proposed Rulemaking), 85 Fed. Reg. 71003, 71009 (Nov. 6, 2020).
- ²⁷ See, e.g., *Consumer Financial Protection Bureau v. CashCall, Inc.*, No. 15-7522, 2016 WL 4820635 (C.D. Cal. Aug. 31, 2016).
- ²⁸ See Paul, Weiss Client Memorandum, OCC Takes Unprecedented Enforcement Actions Against Eight Former Wells Fargo Executives (Jan. 28, 2020), <https://www.paulweiss.com/media/3979287/28jan20-occ-wells-fargo.pdf>.
- ²⁹ See Paul, Weiss Client Memorandum, Increasing Regulatory Focus on Reforming Financial Institution Culture and Addressing Employee Misconduct Risk (Feb. 21, 2018), <https://www.paulweiss.com/practices/litigation/financial-institutions/publications/increasing-regulatory-focus-on-reforming-financial-institution-culture-and-addressing-employee-misconduct-risk?id=25998>.
- ³⁰ For example, the CFPB has alleged that a student loan servicer engaged in unfair and abusive acts practices by "steering" borrowers into forbearance by failing to inform them—or to inform them adequately—about income-driven repayment plans. Complaint at 3, *Consumer Financial Protection Bureau v. Navient Corp.*, No. 17-cv-00101, 2017 WL 191446 (M.D. Pa. Jan. 18, 2017).
- ³¹ See Paul, Weiss Client Memorandum, The CFPB Issues Guidance on Effective Compliance Oversight Over Sales and Other Incentives (Dec. 1, 2016), <https://www.paulweiss.com/practices/litigation/litigation/publications/the-cfpb-issues-guidance-on-effective-compliance-oversight-over-sales-and-other-incentives?id=23340>.