Consumer Finance Monitor Podcast (Season 9, Episode 41): The CFPB Needs Reform, But Not More Regulatory Whiplash

Speakers: Alan Kaplinsky, David Silberman and Jason Brown

[Alan's Pre-Intro Update Audio Not Transcribed]

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 founder and 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 information, either about the subject that we're going to discuss today, or for that matter, anything else in the world of consumer finance, don't forget to consult our blog, which also goes by the same name as our podcast show, namely Consumer Finance Monitor. We've hosted our blog since 2011 on the very same day that the CFPB became operational.

So there's 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, please let us know about it. You can leave us a review on whatever platform you use today to access our show.

Also, please let us know if you have any ideas for any other topics that we ought to consider covering on our show or speakers that we should consider inviting as guests on our show. So we're going to be discussing today, I think, one of the most important and timely topics in the world of consumer finance and consumer financial protection that there is, namely the future of the CFPB. The CFPB has been at the center of intense debate almost since its inception on, I think it was July 21 of 2010. And with the priorities of the CFPB dramatically swinging depending upon who's occupying the White House at a particular time.

In a recent commentary published by Brookings, two highly experienced experts have put forward what I consider to be very thoughtful proposals aimed at bringing greater stability and effectiveness to the agency. So today I'm delighted to be joined by the co-authors of that piece, which is published on May 20th and it's called the CFPB: Where to Go From Here. Let me take this opportunity now to introduce our distinguished guests. First, let me introduce Jason Brown. Jason is a visiting fellow at the Brookings Institute and former assistant director for research at the CFPB where he led the agency's research efforts. Jason, a very warm welcome to our show.

Jason Brown:

Thanks a lot, Alan. Very happy to be here.

Alan Kaplinsky:

And next, David Silberman. David is former acting deputy director and longtime associate director for research markets and regulation at the CFPB who now serves as senior advisor to the Financial Health Network and continues to shape the policy discussions as an expert and an educator. This is actually the second appearance of David on our show.

I was delighted to have David to actually do what I characterize as a fireside chat with David on a webinar on December 16th of '24, which was right before Trump 2.0 began. We discussed David's experience during the prior transition from the Obama administration to Trump 2.1. We repurposed that webinar as a podcast show that got released on January 2nd, 2026. So David, welcome back. Delighted to have you back to share your thoughts with our audience.

David Silberman:

Thanks, Al. It's a pleasure to be back. Although given the prognostications I made last time around, I'm not sure why you want to have me back, but great to be here.

Alan Kaplinsky:

I did take the opportunity to re-listen to our chat and I don't think anybody could have prognosticated what's been going on during Trump 2.0, not only the CFPB, but in a lot of different areas. Well, anyway, your article I thought was very thought-provoking and I have a number of questions that I'd like to ask both of you. And so I'm going to start with you, Jason. Can you give our listeners a quick overview of why you decided at this time to write this particular article?

Jason Brown:

Sure. So as you noted, Trump 2.0 has been some surprising administration in many ways. And we know they've wanted to reduce the footprint in the presence of the federal government across the board, but it has shown special hostility towards the CFPB. We've seen them in effect stopping most of the work of the agency, barring the staff from coming into the building, trying to just shut the agency down altogether, and that level of hostility has been pretty unusual.

The other financial regulators haven't experienced that kind of targeting, but the hostility has been building for some time, didn't come from out of nowhere. As you noted, there's been a lot of controversy with the CFPB over the years. And while there've been a lot of contentious debates over the policy direction of the CFPB, we thought that both of us who care very much about the mission of the CFPB thought that it would be helpful to take a step back and think less about what the CFPB should do, but how the CFPB should do it.

So to try to build some consensus around a set of structural changes that would try to stabilize the agency and turn it into a more typical financial regulator, when that changes over time with changes in leadership, changes in the market, but where there is some continuity in how it carries out its mission.

Alan Kaplinsky:

Okay. So you're both obviously being alumni of the CFPB during, I guess you would say its better years when it was a very impactful, very important agency. I'm sure you both have some thoughts on the successes that you've had and the successes that the CFPB has had, otherwise there'd be nothing you'd want to preserve. What do you see? And I'm going to go to you David and Jason, if you want to chime in, certainly feel free to do so. What do you see as the agency's most important achievements and why are they worth preserving?

David Silberman:

So I guess since I was at the CFPB from the very beginning when it was actually an implementation team, not an agency, and at least before the last year, I would've said one of the most important accomplishments was building a stable, durable agency that could survive transitions and that we'd survive the first transition in Trump one. And it's easy to underestimate simply what was involved in starting from nothing, having no staff, no office space, no computer systems, no processes or anything.

And within a year standing up an agency, creating a consumer response function, creating a non-bank supervision program, creating a research infrastructure, a research program. Just simply accomplishing all those things was, I would've said in and of itself a great accomplishment, although it seems to have proved much less durable than I would've thought when we were together last on the show, Alan.

When I sort of drill down to more sort of specific substantive accomplishments, and I guess somewhat parochially perhaps because I was deeply involved in it, the set of mortgage rules that were issued in 2013, which implementing provisions of the Dodd-Frank Act, which otherwise would've been self-executing, bringing clarity to what those provisions meant, creating some exceptions and adjustments using our authorities, I think that enabled those rules to take effect in a way that avoided potential large disruptions of the mortgage market.

None of those rules were challenged in court. They were generally widely accepted and they've created an infrastructure for the mortgage market that has continued to enable it to be healthy. I would say that the larger participant rules, which for the first time brought the large consumer reporting agencies under federal supervision and led to sort of an ongoing supervision program, which I think significantly upped their game in terms of the accuracy of the information that they're taking in and that they're able to spit out.

I would point to that as a second sort of large accomplishment. And then certainly some of the big enforcement actions that received a lot of attention, the initial litigations cases around add-on products being sold to credit card customers, which I confess when I was in the market, I was vigorously urging our clients to do as much as they could because it was money that dropped almost completely to the bottom line. It was a lot of revenue and not a lot of costs. But curbing those practices, the Wells Fargo fake account loss enforcement action, another sort of I think major accomplishment of the bureau, certainly during the time I was there.

Alan Kaplinsky:

Okay. Jason, do you have anything you want to add?

Jason Brown:

No, I think David summed it up pretty well. It was really impressive what they did in the very early years standing up the agency and just implementing Dodd-Frank. It was quite a set of accomplishments.

Alan Kaplinsky:

Right, right, right. Certainly I agree, even though myself, I don't do mortgage regulatory work. We have a separate mortgage banking group that does that. I've been reminded again and again by my colleagues in the mortgage banking area that the worst thing that could ever happen would be for the CFPB to disappear and for us to go back to square one.

I know they're very, very grateful for what the CFPB did during that period of time. So let's talk about the problem as I think we all perceive it, and that is the fact that there is what has been called policy whiplash. Can you walk us through, David, the biggest examples that you've seen of policy whiplash and why these swings are so damaging to both consumers and the industry?

David Silberman:

So I can give it a try at least and mindful that a certain amount of whiplash is when you have an agency that has now been held to be an executive branch agency where the director serves under the control of the president and you have the kind of whiplash we experience in the political arena from President Obama to President Trump to President Biden to President Trump again, you're going to have, excuse me, a certain amount of whiplash no matter what we do.

So I started off at the CFPB working for Elizabeth Warren. Towards the end of my career, I was working for Mick Mulvaney. They're not the same person and that was what we call the whiplash, that was a large shift. But at that time, at least Mick Mulvaney, to his credit, was of the view that his job, although he had opposed the creation of the CFPB in the executive branch, his job was to carry out the laws that Congress had entrusted to the CFB. He was very clear not to do more than that Congress had authorized to do as he saw it.

It was a very different bureau, but there was a certain measure of continuity both in personnel and in policies. That's changed over the last year and whether one talks about repealing 67 or something like that, Bolton and interpretive rules, advisory opinions, not just ones issued during the Biden administration, but going back some issue during Kathy Kraninger's term, some issue back in 2012, the Bolton that was issued after the Wells Fargo case to try and give financial institutions guidance as to how to deal with incentive compensation, repealing writ large everything that had been done over the previous 12 years or so, dropping every single enforcement action that was brought over the past that was pending at the time on January 20th, not just those that were brought in the last couple of months of the administration where certainly one can question whether that was an appropriate use of power once the election had taken place, but undoing all the enforcement actions and then trying to undo some of the compliance, some of the consent decrees.

Those are sort of what I'd point to as kind of above and beyond whiplash, if you will, as opposed to the acceptable level of whiplash. The impact on consumers, obviously I worry about it as we see this sort of veering to what I would call the far right and some of it just very substantively, the Reg B rule that the Bureau issued, which says that financial institutions no longer have to test for disparate impact, no longer have to try and find least discriminatory alternatives, are free to affirmatively discriminate in their marketing as long as they don't put up a no blacks need apply kind of sign, but can target their marketing to particular racial and ethnic groups, can target where they do business.

I think that has potentially profound effects for consumers. Beyond that, creating the message that seems to be going through is that compliance is a choice, not a requirement. Now I say that I believe most financial institutions want to do right by their customers. They want to comply with the law.

They need to know what the law is, but there certainly are some bad actors and the world has to know that there'll be an aggressive enforcement about those who are trying to bring down the market and they're near to be clear rules of the road so that companies can create compliant products and not have to price in the risk that this could turn out to be this way or that way, the other thing. And where there's that uncertainty, I think it affects the ability of companies to do the things they want to do. It weakens the compliance function and this voice that the compliance people have within the internal deliberations of financial institutions and ultimately consumers are the losers.

Alan Kaplinsky:

Okay. Let's turn now to the actual reform proposals and I'm going to go through each one and ask you or one of you to comment on it. Reform number one, which is called congressional prescriptiveness. Your first recommendation is for Congress to be more prescriptive about the CFPB's duties and set minimum performance standards. What would that look like in practice and how feasible is it politically? Let me ask you that one, David.

David Silberman:

Sure. So the problem we're trying to get at here, Jason was talking about, is a leadership that is fundamentally hostile to the basic mission of the bureau and trying to put some guardrails around that. That's challenging to do as we acknowledge, but the administration has ultimately acknowledged, at least in its court filings, that it has an obligation to execute, carry out those things that are statutory mandates.

So we've suggested that to the extent there are ambiguity as to what it is the CFPB is required to do, Congress should resolve those ambiguities, look at Dodd-Frank and see what's uncertain. To make that a little more concrete, if you look in the statute, the director is supposed to issue semi-annual reports and it's supposed to report on activities in a number of different areas. I think a fair implication of that is that those are areas in which the bureau is expected to have done things.

There wasn't the idea of the report to say, "Oh, we haven't bothered with this, but that's not as explicit as it could be." So you could amend the statute to make clear that each of these areas, these are mandatory obligations rather than discretionary. Beyond that, we've suggested there may be an opportunity to put in some kind of performance standard so that not just you have to do exams, but you have to do a certain number of bank exams, a certain number of exams of non-depository institutions, a mandate that you have to do not just any research reports, but a certain number of research reports or reports on at least X number of topics.

Now, we're mindful that that's not a panacea that a director that wanted to could make that a check the box exercise and could say, "Yes, I did 15 exams. And what that consisted of is I asked for one piece of paper." And said, "Yes, this is great." So that ultimately legislating good behavior is really hard, but that we think nonetheless there is some opportunity to bring some improvement to reduce some of these wild swings with these kinds of performance standards.

Alan Kaplinsky:

Okay. Let's go to reform number two. I labeled that career leadership. You suggest insulating key operational positions like heads of supervision, enforcement and research as career roles rather than political appointees. Why is this important for consistency? Jason, let me throw that one to you.

Jason Brown:

Yeah. So having political appointees is really important in order for the director to be able to execute his vision and priorities, to have people who report to him and are trusted by him to carry out those visions and priorities. So David and I were in the policy and research division, and the whole time I was there, there was a political appointee heading that. And that made sense as the priorities change with the change in leadership, you have somebody there in the chain of command who can give that direction.

But what we're isolating here are some positions that had been held by career staff that in the last administration, the director had kind of directly chosen people when the positions were vacant. And these were, in our minds, operational positions, supervision, enforcement, even general counsel that have specific statutory responsibilities and where it's really helpful, I think, to have some consistency in how the bureau interprets the statute over time.

Now, the director, of course, has to make all of the decisions and is accountable for all of the decisions. So you would expect some decisions to be made to change and depending on the director, but you do see in other financial regulators that the positions that we're talking about do tend to be held by career staff. And that does give at least the director, whoever he or she may be, some consistency in the views of the staff and some consistency in the way the bureau thinks about things.

Alan Kaplinsky:

Go ahead, David.

David Silberman:

Sort of a specific example that may help us make this a little concrete. You'll remember that when Mick Mulvaney was appointed acting director, there was a question or a dispute as to who actually was the acting director, whether the deputy director who had been appointed by Richard Cordray ascended or whether the president could name a new acting director. We had a general counsel at the time who was a career person, had come from the state department actually, been a long time state department person, was hired.

She advised us that in her view, she consulted with OLC, the office of legal counsel advised us that in her view, the president had the power to appoint an acting director and then Mulvaney was the acting director and that we, the staff therefore accepted that advice and moved forward in that way. If the general counsel had been a clinical appointee at the moment at which Richard Cordray resigned, that general counsel's term would've also have ended and we would've had this sort of odd kind of vacuum rather than the continuity of a career person giving advice that everybody was comfortable following and that enabled us to move forward.

Alan Kaplinsky:

Right. Well, let me ask you this. That suggestion that you made, would that require congressional action or do you contemplate that there would have to be congressional action to implement that suggestion? Either one of you.

David Silberman:

Yeah. It wouldn't require congressional action. It would require congressional action to assure it continues. A director. Let's answer the question. The director could appoint a career person into these various positions, and then the question would become if a new director came in, could they remove those people from those positions or not? And I guess that may turn on whether these are classified as these policymaking positions or whether this new rule that puts a whole lot of people at serving at will survives judicial review.

Alan Kaplinsky:

Right, right. Okay. Reform number three. I call this rulemaking versus enforcement. It focuses on curbing rulemaking by supervision or enforcement through better appeals processes and venue restrictions. How would these mechanisms work and improve fairness? David?

David Silberman:

As you said, we've tried to put together kind of a package of proposals, all of which are designed on the one hand to reinvigorate rulemaking as a tool, and on the other hand, to take away the temptation to use supervision enforcement as an alternative to rulemaking. So a big disincentive to engaging in rulemaking is rulemaking is time-consuming if it's done well, somewhat costly.

If you know that at the end of the day, whatever rule you issue is going to be challenging court and it's going to be challenged in a court and we have a system where the challengers can choose their forum and in some venues can actually choose their judge because it's a single judge venue, it's understandable why a director would say, "Look, I'm not going to spend all this time and effort going through this rulemaking, which is just going to get tied up in courts and ultimately not going to go anywhere. Let me try and if I go through enforcement, I can choose where I bring the case rather than letting the opponents to what I'm doing choose where I'm going to bring the case."

So there are a number of statutes in other areas of administrative law which say that first, the challenges to rule start at the appellate court level rather than the district court level, which makes enormous sense since this is not a factual dispute where you have discovery and all that. This is simply an on the record review. So it's not clear that district court review adds anything to the process other than takes time, and that then concentrate review in a single court, typically the DC circuit, and that makes it rulemaking more attractive, remove some of the disincentive.

On the other hand, to sort of take away the temptation to sort of go the other route, we've suggested that there should be an independent appeals process for two types of decisions that are otherwise immunized from review. So enforcement cases, you actually obviously can litigate and ultimately get a judge to decide, but there's cost associated with that, reputational cost as well as out-of-pocket litigation costs, and so we've suggested that both.

And then supervisory orders, matters requiring attention, it's not at all clear whether they're challengeable in court other than by defying them and having the bureau bring an enforcement action. So we've suggested that there should be some room for an independent appeal of MRAs and of settler sue decisions, that is a decision by the director to authorize suit that would create some kind of independent panel. And the key to the proposal is that this be independent, neutral and expert.

Probably the best way to do that, as we suggest, is to include some folks with experience in the financial services industry representing financial services, advising financial services firms, some folks with experience representing consumers, and perhaps they could then choose a neutral. I'm not sure exactly how to make this work. But that's the sort of basic concept is to create this kind of independent appeals process for those kinds of decisions and at the same time, to remove the disincentives from rulemaking.

Alan Kaplinsky:

Right. There is some precedent, am I right? With respect to some of the other agencies like the Federal Trade Commission, I think if you want to challenge a rule of the FTC, or maybe it's certain types of rules of the FTC, you have to go directly to a court of appeals.

David Silberman:

I don't know about the FTC. I'm a former labor lawyer, so I know that OSHA rules go directly to the courts of appeals. NLRB decisions or unruled, any challenge from the NLRB goes directly to courts of appeals. FTC, unless-

Alan Kaplinsky:

Well, I know for example, a few years ago, the FTC promulgated a rule that applied principally to automobile dealerships. It had some implications also for companies that were financing installments, sale contracts of automobiles. And that, the challenge got filed in the court of appeals. I don't think they're required to go to the DC circuit.

David Silberman:

No, you're right. Yeah, but you're right now I think about the credit practice, if you want to go way back to 1985, the credit practices rule that the FTC issued was challenged in the DC circuit, the FTC, the first big sort of UDAAP case.

Alan Kaplinsky:

Yeah. So of the non-legislative reforms that you've mentioned, could a new director implement them immediately without needing any action from Congress? Jason?

Jason Brown:

Yeah. Like you were saying about the operational positions being filled by career staff, that's something that you don't need a law for a director to do. And I think a lot of these things that we're talking about, if you just had a director doing it, that would be fine. It wouldn't necessarily be as durable as having it in law, but you would still be moving in the right direction. So I think there are things that we talked about legislatively.

For instance, we've suggested that Congress implement an appeals process for supervisory and enforcement decisions to serve as a check on those decisions and ensure some consistency in how those decisions are made. Again, a director could institute one himself or herself, and we are seeing the OCC and the FDIC move in that direction unilaterally right now. But beyond that, there are some oversight actions that could take place again without legislation where we think there's been some failures recently, and that could bring some accountability and some transparency to what the bureau is doing.

Alan Kaplinsky:

Right. Let's talk about the role of oversight. How important is stronger congressional oversight? A more active inspector general and peer review of research in restoring credibility to the agency? Jason?

Jason Brown:

Yeah, so I think they're all important. So take congressional oversight, for instance. The director's been serving for over a year. He wasn't confirmed to the position. He has another full-time job as a budget director. The Dodd-Frank Acts requires that the director testify twice a year before the Senate Banking Committee and the House Financial Services Committee.

I don't think he's gone once to do that. And he hasn't given really many interviews in his capacity as the head of the CFPB, which maybe would be understandable if he were acting like a caretaker, but he's not acting like a caretaker, like what you usually see in people holding positions like this in an acting capacity. He's made several major changes to the CFPB regarding staffing, scope of work, regulatory policy, and the public hasn't had the benefit of an explanation for these moves, and they haven't really been subject to scrutiny except when they end up in court.

All of these moves are consequential and the effects may not really be felt until he's long gone. So as these moves are being made, it's important for those who have a longer interest in the health and functioning of the Bureau to be able to scrutinize them. And that's why we're saying Congress should call him to testify. And these hearings often have a performative aspect to them, but they do hold both Congress and the director to some level of accountability.

Beyond that, as you said, the Inspector General, that's an area where we've though that we've been just a little. I think they've just been baffled why they really aren't weighing in on any of these moves. They have investigatory power and they can do things that say others can't do in terms of getting information for what the Bureau is up to and why, and report for the public and report to Congress. This seems exactly like the kind of thing that they should be looking at, but they haven't.

Talk about peer review of research, that was something that the Bureau had started a few years back for really significant research that shaped policy, that was crucial to policy. The peer review was done by an outside federal advisory committee, the Academic Research Council. These are accomplished academics who have no conflict of interest, aren't on the Bureau's payroll and would provide peer review in the kind of research that was being used to shape policy.

And just as an example, in the last administration, the Academic Research Council provided peer review of a piece of research on clean energy financing that was used to shape the PACE rule and just point out that that rule is one of the major rules of the last administration that stands to this day. So I think it's helpful to have this kind of objective rigorous review of the work that underlies the work of the Bureau.

Alan Kaplinsky:

Am I right that they did away with the Academic Research Council during Trump 2.0? I haven't heard anything.

Jason Brown:

That's right. Yeah. They got rid of all of the federal advisory committees that weren't required by statute. I think that's unfortunate because the ARC had come to serve a really useful. It was always useful in terms of shaping the research, but really in validating the work that the Bureau was doing seemed like you're losing out on a really useful tool when you scrap those committees.

Alan Kaplinsky:

Right. Yeah, go ahead.

David Silberman:

And we point out in the article, whenever the CFPB issues a rule based on evidence, one of the first attacks on the CFPB is, show us your evidence. We don't see the evidence. That's in some ways a cynical criticism because the Bureau has two sources of data. One is data that's confidential, that it's obtained from financial institutions that it can't be released because it's confidential, and the other is data that's been purchased and is proprietary.

So it's really very hard to make the data available. But what peer review can do is to validate the methodology, having expert outside people who are independent to say, "Yes, we've looked at this. The methodology is sound, the assumption's being made, whatever." And for those who are seriously interested in making sure the research is objective rather than scoring political points, it I think play a very valuable role and did play a valuable role for a time.

Alan Kaplinsky:

Right. So Jason, do you see any realistic path for bipartisan support for these kinds of structural reforms that you've proposed?

Jason Brown:

Well, I'm an optimist. So as grim as the situation might seem for those who really care about the CFPB, there are parallels to the past under Trump 1. So under Trump 1, as David was describing, you had the OMB director who was pretty hostile to the creation of the CFPB and critical of it once it was operational, serving as acting director for a period.

He admittedly didn't go to the extremes as the current acting director did to kill the agency. But what happened after he left was he was replaced by Kathy Kraninger, a trusted colleague. She was a dedicated public servant who demonstrated a lot of interest in good governance. She was confirmed by the Senate, had to answer to her leadership decisions before Congress. Russ votes must be up soon, and that's an opportunity to bring in leadership who will dedicate themselves to the long-term interests of the Bureau.

And so the latest news is that Director Kraninger's deputy, Brian Johnson, has been nominated to be the director. He probably has a tougher job than she did given the turmoil the Bureau's had for the last year and a half, but he is a dedicated public servant, a consumer finance expert who I'm sure will respect his role. I hope that will breed goodwill and bring some momentum to some of the changes that will help stabilize the bureau over the long term.

Alan Kaplinsky:

I agree with you on that. In fact, he was the candidate that I wish Trump had nominated right from the beginning. He was someone I was pushing for very hard. I got to know him very well while I was at the CFPB and after he left the CFPB. I can say from firsthand experience, he has the expertise, he's got the experience, he is a Republican for sure, but he's going to do his job. He wouldn't be somebody that you would appoint to tear down the Bureau because he believes that the Bureau is performing an important function.

Let's talk about looking ahead and that is, it's not going to be easy, obviously. There've been a lot of suggestions that have been made over the years how to reform the Bureau. But of the things that you've recommended, and if only one or two of these reforms were adopted, which ones would have the biggest positive impact on the CFPB's ability to fulfill its mission? David?

David Silberman:

Yeah. Before I take a crack on that, let me just go back a step and say just to third what you and Jason were saying. I worked closely with Brian Johnson. We see the world very differently. We come out very differently on lots of issues, but I agree with two of you that he is somebody who first believes in the role of the executive branch in carrying out the statute, faithfully executing the laws.

I think assuming he was left free to do so, he would develop his own agenda designed to achieve the statutory goals of assuring that consumers have access to financial products and services, that the markets for those services are fair, transparent, and competitive. He would do that in a very different way than I would if I were in that position, but in a democratic country, that should be the case. So agree completely on that.

Now to the question you actually did ask me, from my perspective, if the packets were of reforms designed to address the disincentives to rulemaking and the incentives to engage in enforcement and using supervision enforcement to make law, those if we were able to accomplish those and those would be the most difficult things to get through probably, I think they would also make the biggest difference.

I should say, I probably should have said it earlier that rulemaking by enforcement is a moniker that can mean different things to different people. I don't believe it's the case that the only time enforcement's appropriate is if you can point to a specific language in the federal register, the code of federal regulations, which says this conduct violates this law. It's not feasible in my view to try and specify every set of facts that constitute an unfair practice or deceptive practice.

If that were the rule, you could never have brought the case against Wells Fargo for opening accounts for people without their authorization because there's not a rule that specifically said you can't do that because nobody actually, I think, ever though that they needed to have such a rule. But there are cases in which rulemaking enforcement can try to use enforcement to try and change the law or change really settled understandings I think is problematic. And so the proposals we put forward to try and address that I think would be the most significant proposals.

Alan Kaplinsky:

Yeah. Let's talk about some of the other reforms that have been proposed by others. I know you mentioned in your article a few of them. One is that instead of there being a sole director, there ought to be similar to the Federal Trade Commission, some bipartisan commission maybe of five people, three that are appointed by the president as reflecting the views of the administration currently in power, and two others that would represent the other party. You don't think very highly of that. And why is that?

David Silberman:

So as I said, I'm a former labor lawyer and there was a time in the history of the Labor National Relations Board, '50s and '60s, where members who were appointed by president of one party would be reappointed by president of other party, and there were a lot of stability to the NLRB. That ceased to be the case 40 years ago maybe, plus or minus. I experienced as much policy whiplash as a labor lawyer as the NLRB transitioned from President Carter to President Reagan, from President Reagan.

Well, actually President Bush to President Clinton. And I think the reason for that is that with multi-member commissions, as you say, there tends to be two members of one party, three of the other party. When a new president comes in, the chair changes, the old chair resigns, and within a matter of months, the political composition of the body has changed and the policy shifts start.

So I don't think there's a lot of evidence in the last 20, 30, 40 years suggesting that these commissions. The Federal Reserve Board is a special case. If we could have a body with seven-year terms and multiple, maybe you could create that, but these kind of three, two commissions, I don't think there's a lot of evidence suggesting that they bring a lot of stability. And that was true before the current administration, which has taken upon itself the authority to remove members of these commissions and not fill vacancies.

And before what the conventional wisdom says will be the decision in the FTC case in which the Supreme Court is likely to overturn Humphrey's executor and say that all members of multi-member commissions serve at the pledge of the president. So I don't think even if Humphrey executors were good law, there'd be a lot to recommend the multi-member commission model and in the current environment, even less so.

Alan Kaplinsky:

Yeah. Although it's been surprising to me, and maybe I'd love to hear what either of you think about this. It seems like somehow the Federal Trade Commission has, even though it's now managed by, I don't know if it's two or three members of the same party, the changes haven't been that dramatic, at least on the consumer protection side. I don't focus on the antitrust area so much, but I'm scratching my head. How did the FTC avoid all the chaos and the disruption that the CFPB has experienced? Do either of you have a view on that?

David Silberman:

I agree. I think it's a curiosity. I guess I think the changes FTC have been somewhat larger than you suggest, Alan, at least in terms of any kind of substantive regulation. So the rule regarding the non-compete rule-

Alan Kaplinsky:

Yeah. But in the enforcement area, they're still quite active.

David Silberman:

Yeah. And I think it goes back to what you said about Brian. Chris Mufarrige, who heads the Bureau of Consumer Protection, who Jason and I work with in the CFPB, he has a very different philosophy of regulation than I think either of us do, certainly than I do, but certainly believes that there's a role for government in rooting out deceptive practices and assuring that consumers have the information they need to make choices and is pursuing an active agenda around that. It's the kind of agenda I think a Brian Johnson would bring to the CFPB as opposed to what I see as really. What I think over the last year we've seen is nihilism rather than any kind of coherent regulatory philosophy.

Alan Kaplinsky:

Right, right, right. What other reforms have been proposed by others that don't seem to be workable?

Jason Brown:

Well, there's the idea of putting the CFPB on a sort of an appropriation, you have it subject to annual appropriations. David and I discussed that, and we don't see that that really gets you much of anywhere. Congress is certainly able to change the funding of the bureau as they did last year with the One Big Beautiful Bill Act, I think is what it's now called, and in reducing the cap, the cap that the bureau can draw from the Federal Reserve.

So they're able to influence the funding, but having the Bureau caught up in the ... Well, it's not even annual, it's many times a year drama around appropriations, we don't see that really serving consumers or the market, and the other financial regulators seem to do just fine without being subject to appropriations. And so we would suggest that we maintain the current funding structure.

David Silberman:

Right. I would say, Alan, reasonable people can disagree whether it's a matter of political theory or agencies should be subject to annual appropriations, but I don't know that anybody could plausibly suggest that that would be a way of reducing political whiplash of going to Congress every year. It seems almost the antithesis of trying to create stability is having this annual jump ball around funding and what kind of riders get put on and you can't use money for this, you have to use money for that, whatever. That's not a way to bring stability, whatever else it may bring.

Alan Kaplinsky:

Right, right, right. I recognize that your recommendations were issued, I think May 20th, your article got published by Brookings. What's the feedback that you've received? Has it been generally positive or have there been some critiques that you've heard from other people? Either one of you?

David Silberman:

Jason, do you want to take it?

Jason Brown:

Sure. I'll give a start. I've heard people who kind of share a desire, a belief in the mission of the Bureau, but also an appreciation that there's not one way for the Bureau to execute its mission and that it is understandable that there's going to be change at the Bureau, but a desire to kind of manage those changes. So I think people who maybe spent some time at the Bureau, but also maybe under different administrations, I think the piece resonated with them a lot, at least the people who've been coming to me and sharing positive feedback.

David Silberman:

Right. I agree with Jason. There were some criticisms on LinkedIn, I'm sure you saw it, Alan, of particularly focused on, somewhat surprising in my view, the idea of trying to have some positions be career positions seems to have generated some amount of controversy. On the other hand, one of your colleagues on the financial services bar, not at Ballard Spahr, but at Covington wrote a piece that is suggesting that this agreeing for at least a need to try and look for bipartisan solutions that would move us forward.

Alan Kaplinsky:

Right, right. Sure. Yeah, I saw some comments posted on LinkedIn that seemed to focus on what I guess I would call, what was it, reform? Which one was that? I think was it the fourth one? No, maybe the fifth one, career leadership, that they disagreed with you on that. I thought you had the better of that argument, but for what that's worth.

Jason Brown:

I think there was some concern that we were criticizing the actual people who served in those positions as direct appointees of the director, and that really wasn't the point we were trying to make. They were not patronage appointments, people who were unqualified or unsuited for the position. That's not it at all. It was really just a desire structurally to have some stability and consistency in those positions.

Alan Kaplinsky:

Yeah. Well, I think we've come to the end of our program. I don't know if either of you ... Is there any question that I didn't ask you that our listeners ought to be aware of?

David Silberman:

I can't think of any. It's been great doing this with you, Alan.

Alan Kaplinsky:

Yeah.

Jason Brown:

Yeah, no, this has been a lot of fun. I really appreciate the opportunity.

Alan Kaplinsky:

Well, I really, really want to thank you for sharing your very deep expertise and these thoughtful recommendations with our audience today. Your decades of experience inside the CFPB and outside the CFPB give these proposals some real weight and credibility. My key takeaways from the conversation are, number one, there's absolutely no question in my mind that the CFPB has delivered what I call meaningful accomplishments that benefit consumers, but extreme policy swings have eroded trust on all sides by all the constituents.

Structural guardrails such as clear statutory expectations, stronger career leadership, better checks on enforcement as rulemaking could help create the stability that both consumers and responsible financial institutions need. And that while legislation is ideal for the biggest changes, many of these improvements can begin internally with strong leadership. My hope is Bruce Johnson gets nominated. Well, he's nominated already, but that his nomination sails through and he gets confirmed and he gets put in.

We actually have a director of the CFPB, which reminds me of one other reform before I let you go. And that is, it seems to me there's a need for the Vacancy Reform Act to be amended because it to me is nuts that an acting director appointed at the beginning of Trump's term, that his term has lasted this long. Now his term is going to be up after very soon, but I just hope that by that time, if there isn't somebody in that office, then the deputy director Paoletta, I think his name is, he will be the new acting director until Johnson gets confirmed. So do you guys agree with me that we got to do something about that Vacancy Reform Act?

David Silberman:

Yeah. I haven't though a lot about it, but I tend to. And indeed, had there not been some machinations around setting up a nomination and pulling it back relatively quickly, the acting director could actually have served even longer than. His term now will be up in August, but the Vacancy Reform Act would have given him an additional six or eight months, I think, but for the fact that they nominated somebody and pulled him back and then nominated somebody else and pulled him back and that shortened the length of the acting term.

Alan Kaplinsky:

Right, right. That's for sure. Well, this discussion reminds me that good consumer protection doesn't have to mean regulatory whiplash. More predictable, credible CFPB would serve markets and serve consumers and serve the industry far better in the longer run. We need some longer term thinking rather than what we're experiencing right now, but there is a definite need for reform and I commend both of you for the effort you've put into this. If you have any questions or suggestions for our show please email us at podcast@ballardspahr.com, stay tuned each Thursday for a new episode. Thank you very much for listening and have a good day.