

The 2020 Elections: What to Expect in Consumer Finance in 2021 and Beyond

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The short history of the Consumer Financial Protection Bureau (CFPB) has resulted in a wild ride for the financial sector with respect to rulemaking and enforcement of consumer finance laws. Turbulent times for the CFPB and industry may continue, in light of the possibility of a change in administration following the 2020 presidential election coupled with continued economic fallout of the COVID pandemic.

The U.S. Supreme Court ruled earlier this year that a President may fire a CFPB director at will. Consequently, Trump-appointed and current CFPB Director Kathleen Kraninger almost certainly would be replaced if former Vice President Joe Biden is elected President. Given the uncertainty of two very different agendas, what can businesses that operate under the purview of federal regulation expect going forward in terms of enforcement, rulemaking, and supervision?

To this end, we will address some of the chief concerns of the financial services industry:

- How would rulemaking and enforcement priorities shift under a new administration and a possible new CFPB director?
- What will the altered economic landscape caused by the COVID pandemic mean for business operations?
- How would a new administration approach innovation in financial services?

Shifting Priorities: Enforcement

The CFPB has brought fewer enforcement actions over the past few years. This may result from Director Kathleen Kraninger's relatively short tenure in the position. Or, it may be because most of 2020 has been consumed with COVID-related concerns, or some combination of the two. Still, her stated priorities have always placed enforcement behind education, prevention, and supervision. In fact, the number of investigations under Kraninger stands at about 30 per year, versus approximately 35 per year under the first director of the Bureau, Richard Cordray. In addition, the amount of assessed fines is significantly lower. Under a new administration, it is fair to expect an increase in both the number of investigations and the amount of fines sought.

While Kraninger has brought some larger cases, most of her efforts have focused on pursuing bad actors, fraud, and smaller, clear-cut matters. By contrast, Cordray was more interested in larger, more complex enforcement cases with dramatic results. It would not be surprising to see a return to larger, bolder enforcement actions under a new administration. For example, fair lending is not an area that the current administration prioritizes,

but that could change under a Biden administration. The industry also could expect a renewed focus on mortgage servicing, particularly in light of the concerns about looming mortgage foreclosures as unemployment and underemployment drag on in the wake of the COVID pandemic.

Shifting Priorities: Rulemaking

Under the current administration, the agenda for rulemaking seems to be highly process-based. Examples include LIBOR implementation, or highly technical and necessary rulemaking, which is consistent with its emphasis on deregulation. The rulemaking areas that may be priorities for a new administration include:

- Implement a regulation to address the repealed payday rule;
- The resumption of larger participant rulemakings, particularly for finance companies — a topic that has not been discussed much in recent years, but would be consistent with the Bureau’s direction under Cordray, and a likely shift under a Biden administration to enlarge the Bureau’s jurisdiction;
- Ending the “abusive” rulemaking that has the potential to fence in the Bureau’s enforcement authority.

Another Enforcement Issue

The Bureau recently announced a proposed divisional reorganization that would significantly alter how its enforcement decisions are made. Under the proposed reorganization, decisions regarding investigations and enforcement would become the responsibility of a renamed unit, the Office of Supervision Policy. This unit would handle both supervisory and enforcement issues with the goal of easing tensions between the Offices of Enforcement and Supervision.

Critics argue, however, that the proposed reorganization would strongly limit and undermine the ability of the Office of Enforcement to pursue independent investigations. For example, in a [letter](#) to Kraninger, Senator Sherrod Brown, the ranking Democrat on the Senate Committee on Banking, Housing, and Urban Affairs, set out the contested nature of the proposed reorganization. Brown said the reorganization would clearly “diminish the resources, authority, and ultimately the effectiveness” of the office, and that while Kraninger had the present authority and discretion to reorganize the enforcement division, so does her “potential successor.” In short, a reorganization of the enforcement division may be in the works, but the long-term future of these changes clearly depends upon who occupies the White House after Noon on January 20, 2021.

The Economic Fallout of COVID

In addition to causing a global health crisis, the COVID pandemic has created a national economic crisis for both consumers and businesses. It bears noting that the CFPB was created as a response to the 2008 mortgage crisis. As in 2008, it is fair to anticipate that COVID will make it difficult for some borrowers to meet their immediate financial obligations. In addition, some creditors and servicers are going to be more active in extending credit or modifying credit terms and others may be more aggressive with underwriting, servicing, and collecting debt. This presents the opportunity for bad actors to emerge on the lending and servicing side, so the financial services industry needs to consider potential pitfalls and areas where the CFPB may extend additional scrutiny.

Credit reporting, too, may be the subject of additional attention. More specifically, the issue of whether people who are under forbearance agreements should be subject to negative credit reporting notations will be in play. This may require a change in process for many consumer finance companies.

While appearing to provide certain consumer protections in light of the pandemic, this also raises the question of whether more relaxed credit reporting under COVID would be reliable, since people who actually paid on time would be weighed the same as those who did not. Ultimately, it may make credit more expensive for everyone, because reporting will not accurately predict a borrower's true credit risk. Pricing under our credit system typically operates as a risk-based model, so the question becomes: if a report is redacted or a system modified to reflect the financial anomaly of the past year, is this report still an accurate indicator of creditworthiness?

Innovation and Data Security

Innovation is generally prized in both industry and government. Better systems of data collection and uses for this information are constantly developing. The question going forward will center on how this information is being used, stored, sold, or disseminated. For example, will the consumer be advised if your company is using artificial intelligence, and how?

In addition, with so many people working from home, the issues of data security and privacy likely will expand in scope. Personally identifiable information (PII) is being accessed by employees working from a variety of locations that may not be as well protected as a call center or a secure office environment. In some instances, these flexible working conditions may violate laws that require licensees to work at a state-licensed location. Clearly, to manage the realities of current circumstances, accommodations to existing regulations will need to be made, but many of these decisions are still a work in progress.

Under a new administration, it is a safe bet that a new director would place more emphasis on data usage, privacy protection, and consumer understanding of how information is actually going to be used, sold, and analyzed, but what that may mean is pure speculation. To date, the European Union has been the global leader regarding data privacy and security, but here in the United States, the states have set the pace, particularly California. Are other states poised to follow suit? What about the federal government? This remains to be seen, but it is certainly a significant topic that consumer finance companies should have on their radar.

Questions? Contact the authors or any member of our [consumer financial services compliance team](#).

Related people

Brian Fink

Kelly Lipinski