

KEEPING UP WITH THE BUREAU EPISODE 1: OVERVIEW OF CFPB AND STATE AG INITIATIVES/EXPANSION

AIRD SEPTEMBER 1, 2022

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Chris Willis (00:05):

Welcome to the Consumer Finance Podcast. I'm Chris Willis, the co-leader of Troutman Pepper's Consumer Financial Services Regulatory practice. And I'd like to welcome you to the first of a special new four-part series called, *Keeping Up With the Bureau*. Basically, what's been going on is the CFPB has been doing so much and releasing so much publicly that we're providing this special four-part series to try to let everybody catch up on what's going on with the CFPB. Of course, before we get into today's topic, let me remind you to visit and subscribe to our blog, at consumerfinancialserviceslawmonitor.com, where we post new things every day about what's going on in the consumer finance industry.

And don't forget to check out our other podcasts. We have lots of them. We have the *FCRA Focus*, focused on credit reporting, *The Crypto Exchange*, which is about all things crypto, and our privacy and data security podcast, *Unauthorized Access*, and all of them are available on all popular podcast platforms. And hey, if you like our podcast, let us know, leave us a review on your podcast platform of choice. So, today's episode, the first in our special four part, "Keeping Up With The Bureau" series is going to be about recent CFPB moves to encourage federal law enforcement and cooperation with the Bureau by State Attorney Generals offices. So, we're lucky today to have two of my partners to help talk through the issue of CFPB State AG cooperation, and that's Stefanie Jackman and Ashley Taylor. Stefanie is a partner in our Consumer Financial Services Group. She's with me in Atlanta. And Ashley is a partner in our State Attorney General Group, which is really the most preeminent State AG group in the country. And he's based in our Richmond Office. So, Stefanie, Ashley, welcome to the podcast and thanks for being here today.

Stefanie Jackman (01:54):

Thanks Chris.

Ashley Taylor (01:55):

Thank you, Chris.

Chris Willis (01:57):

So, Ashley, let me start with you. The idea of cooperation between the CFPB and State Attorneys General isn't new. In fact, it's something that we saw when the Bureau launched. Would you mind going through for our audience, the historical background about cooperation between the CFPB and State Attorneys General?

Ashley Taylor (02:14):

Thank you, Chris. This is a back to the future moment, I feel like. When the CFPB was first created, there was a lot of controversy around the authority of the director. And most folks have forgotten that the first director was Richard Cordray, why was that and is that so significant

relative to how the Bureau operates today? Richard Cordray was a two-time attorney general from the State of Ohio. So, he had a very strong working relationship with his colleagues, the other State Attorneys General around the country. So, when he became director of the CFPB, one of the first things he did was come to a NAAG meeting. The National Association of Attorneys General, often called the National Association of Aspiring Governors. And he had a session where he focused on cooperation and teaming up with state AGs, and he discussed a memorandum, an MOU, a memorandum of understanding, designed to facilitate the sharing of information between the CFPB and the states.

And at the time, he articulated a focus on debt collection. So that really created the foundation for this cooperation between the CFPB and the states and General Cordray, then Director Cordray, understood the dynamic of multi-state cooperation. He understood how meetings became appropriate forms to share information among states. And he brought that to the surface, and he advised everyone that his job as director was to make sure that CFPB had in his words, a seat at the table. And there was a high degree of coordination early on. They did enter into an MOU, and we saw a flurry of cooperation and coordination and enforcements those first few years of the CFPB's existence.

Chris Willis (04:08):

And so, Ashley, you mentioned it's a back to the future moment, and I have to say, I agree. But Stefanie, let me go to you for that. Tell the audience about some of the recent things that the Bureau has done under its new leadership, under the current administration, directed towards cooperation with State Attorneys General?

Stefanie Jackman (04:25):

I'd be happy to do that. The CFPB has been really active, especially this year more so. Ashley says back to the future, definitely back to the future with a healthy dose of moving forward as well. Just over the past few months, starting May 19th, the CFPB put out an interpretive rule that was seeking to clarify the scope, at least in the CFPB's view of the ability of states to enforce federal consumer financial protection laws, the ones that were transferred to the CFPB under the Dodd-Frank Act for a primary interpretive and enforcement authority, and encouraging the states, looking at their press release that came with this interpretive rule from May, just the three bolded points, I think really demonstrate the CFPB is actively encouraging and inviting state regulators and state AGs to come to the table and join them in continuing to enforce and evolve consumer protection under not just state law, but federal law.

For instance, this is in quotes, "States can enforce the Consumer Financial Protection Act, including the provision, making it unlawful for covered persons or service providers to violate any provision of a Federal Consumer Financial Protection Law. States can pursue claims and actions against a broad range of entities on that point in its announcement or in its interpretive role." The CFPB talked about reminding the states, they may even be able to enforce against banks in some instances, and can take parts of the Dodd-Frank Act that the CFPB is not empowered to enforce for instance, against the auto-dealing industry. And perhaps do the same if there's a state law that gives broader authority over that industry, to the state AG. And then the last bolded bullet point in their press release, "CFPB enforcement actions do not put a halt to state actions." The CFPB is signaling we are not going to interfere. In fact, we're seeing the CFPB continue to coordinate as it has done in the past, but even more so with states now, just recently, there was a joint enforcement action with the New York Attorney General against an alleged, quote, "Repeat offender."

The CFPB sees a lot of alleged repeat offenders. That was announced in on April 21st of this year. And then we have a launch of circulars that have been coming out starting in May, right after the CFPB put out this call to arms, to the state AGs, talking about efforts by the CFPB to say what they think about different laws and what they think they mean. And that they're hoping the CFPB's stated purpose in putting those circulars out is to guide enforcement by state regulators and knowing the CFPB's views on how the law should apply.

Chris Willis (07:08):

So, it sounds obviously that there's a lot of encouragement going on by the CFPB to get the states more involved in enforcing federal law, and a lot of effort by the Bureau to show the path to State Attorneys General about where their authority is. At least according to the Bureau's interpretation of Dodd-Frank. And I guess that raises the specter of us having more enforcement investigations on federal law issues by State Attorney General's offices. And so, I think it would be really useful for our audience, Stefanie, for you and then Ashley to highlight maybe some of the differences between the way CFPB enforcement investigations work, and the way state AG enforcement investigations work so that the audience can be oriented towards how it may look different when the state AGs start looking to enforce federal laws. Stefanie, let me start with you and start to highlight some of those differences. And then we'll turn to Ashley for some follow up.

Stefanie Jackman (08:00):

I think one of the first differences you have to understand between the CFPB when it's investigating an entity versus a state AG, is the CFPB is not an elected official in the way that a state AG is, so they can be subject to different considerations and pressures and constituencies. Another thing you have to understand is the CFPB is essentially your judge, jury, and executioner. So, for instance, when you're getting a civil investigative demand, which is really the only tool the CFPB has in the enforcement realm to obtain documents, information and testimony, under its regulations in the Dodd-Frank Act, it is the one that has approved the CID, approved the scope of the questions, approved the statement of purpose. So, when you come back as the recipient and start talking about things you think are over-broad or inappropriate, or even overreaching as the case may be, and considering filing a motion to quash, which you are at least under CFPB rules required to do as part of the investigatory process, that's going to be decided ultimately by the CFPB director who authorized the CID in the first place.

So, it can be difficult to get any real traction or ability to pressure the CFPB to make adjustments and refine the scope of request that can be quite burdensome in the investigatory phase, because you're asking the same entity that thought it was okay to now basically say, well, all right, maybe it wasn't okay what we originally asked for. And in my experience over the last 10 years, that can be a very tall order to sell to the CFPB and lately their willingness to revise and adjust and remain responsive to claims of burden and other difficulties, it's a difficult conversation to have. A recent example that I had in an investigation is actually a client's being requested to reproduce the exact same documents that it produced two years ago in an exam to the CFPB. And those documents are now four to five years old because of the passage of time.

And we asked that the CFPB obtain them presumably from supervision and that fell on deaf ears. That shocked me because as I put it in my meet and confer, that's burden 101 in court, but they are, as of right now requiring that client to reproduce volumes of material, some of which may not even be available anymore, given the passage of time that the Bureau already has in

its possession. But that I think is a function of Chris that we've seen this over the years. Exam and the excuse me, supervision and the investigatory enforcement side do not actually coordinate. They don't have the same agendas. They don't share information frequently at least. In fact, the investigatory team seemed surprised that there'd been an exam and unaware of that, and that's not the first time I've encountered that in an investigation. And then I think the last major difference besides the elections, the sensitivity to burden, who's ultimately the decision maker, is that the CFPB there really isn't a lot of opportunity to negotiate for confidentiality, non-disclosure, redactions. They don't allow you to redact in the enforcement context for, as a general rule, I should say, for any kind of irrelevant or out of scope information. Now, the CFPB's regs say it will not release information provided in response to a CID if there's a FOIA request for that information, but I always mark every document, subject to FOIA exemption before. And there are things that we have seen come out over the years in response to FOIA request. I remember that one of the other defense firms in this space has sent FOIA requests and obtained information over the years. So, it can be a little bit disconcerting to provide a lot of sensitive, confidential, proprietary information relating to your business, relating to your customers, and have no authority to really scope that back.

Chris Willis (11:50):

Thanks a lot, Stefanie. And now Ashley, let me turn to you. I mean, you're a veteran of more State Attorney General investigations than I could probably count. So, what would you say are some of the major differences in your mind that our listeners ought to be aware of between the way the state AGs operate and what they might have become accustomed to with the CFPB?

Ashley Taylor (12:09):

Chris, I would identify for distinct differences between the CFPB and state AGs in the enforcement context. The first, and I'll build on what Stefanie mentioned, is that the state AGs are elected officials, that creates a different dynamic. Frankly, some companies and clients, when they first engage our firm operate under a misunderstanding and misinterpret the term political for arbitrary, and totally driven by political motives. That's not what I mean by political. These are legal issues that arise against a political backdrop, which means that these are statewide elected officials except for a few states where they're appointed. But these are statewide elected officials who need to be sensitive to the public mood. And that's what I explain to clients by political. It's not an arbitrary political whim. It's someone who needs to be by virtue of their position sensitive to what's going on in their state, on the ground.

But fundamentally these are legal issues, but you have to analyze them against a political backdrop. So that's the first distinction I would raise relative to the CFPB. The second distinction I would raise is that, and this is particularly true when we've seen over the last 20 years, particularly after the large tobacco settlement. State AGs can engage in enforcement actions, Chris, individually, or they can come together in a multi-state context. And that's one of the first questions we ask of a client who's received a CID, are they sure it's just one state or other states working together in coordination? The dynamic and approach for a single state is fundamentally different than the dynamic and approach you would take in a multi-state context. Again, the CFPB is a single federal agency. When you have 15 or 20, or God forbid, 40 plus states making inquiries of you as a company, it creates a different dynamic and a different set of challenges.

The third distinction I would make is, again, something that Stefanie highlighted, when the CFPB issues a CID, they have made the decision internally. There's a top to bottom process for

a CID to be issued by the CFPB. In the state context, every state is different. And by that, I mean, when a CID is issued by California, it means something relative to the approval process within the state of California to issue a CID. When a CID is issued by Missouri, it's a different approval process within the office. So, what that means is that as a company, you can't look at a CID from any particular state and make any assumptions. You have to understand the approval process that occurs within a state to truly understand whether or not within a state, an assistant AG may have authority on their own to issue a CID, or a state may have a process where there is preapproval within the office all the way up the chain before a CID is issued, but you need to understand what that issuance of a CID really means and not overreact, but also not under-react.

And that's a key distinction between the CFPB and the states. When the CFPB issues a CID it's been vetted top to bottom within that agency, you have to understand that every state is different with respect to their CID approval process. And finally, there is a fundamental difference with respect to redactions and confidentiality between the CFPB and states. Several states have somewhat developed statutes relative to confidentiality. Some have very little statutory structure upon which you can engage in a confidentiality discussion. And states generally are very concerned about public disclosure. That is, they feel an obligation to the public to be very responsible. And there is a FOIA request, a Freedom of Information Act request, as a policy they want to have an open records policy more generally. That stands in direct conflict with our interest in an investigation of being transparent in a way that doesn't unnecessarily expose a company's trade secrets or proprietary information.

So again, if you have a multi-state investigation, you need to understand the confidentiality rules in every state, both the formal rules and the informal rules. By informal rules, I mean, there are some protocols and policies that states have developed over the years, even if there's not a clear statutory framework. And you mentioned our experience, Chris, as a team, and it's a function of our experience and the broad-based team that we have here, where we understand what each state has by way of an unwritten policy, or an expectation relative to redactions, aggressive identification of information as proprietary trade secret, what that means relative to FOIA requests, and how states will treat it. Even those states that have statutory frameworks in place relative to confidentiality, none of the statutory frameworks are complete. They all have holes. For example, very few states address the issue of what happens to a company's documents at the end of an investigation.

No one wants their documents sitting in a box in an AG's office for 10 to 15 years, where the assistant AG who worked on the matter is no longer there. A FOIA request comes in and the current staff doesn't know what to do with the document, so they turn them over. But the statutes generally are unclear as to what happens at the end of the case. So that's, again, something that needs to be negotiated and states have expectations and protocols that they've developed over the years. And it's not smart to ask a state to do something that they will never do, but you want to ask state to do something that's consistent with other agreements they've reached. So those would be the four ways that I would distinguish state AG investigations from CFPB matters.

Chris Willis (18:20):

That is really helpful, Ashley. So, thank you for that. And now that we've talked about some of the procedural differences between the way the states work and the way the Bureau works, why don't we speculate for the audience together about what are the likely areas where we may see states take up the CFPB's invitation and start to investigate issues under federal law that they

might not have done before. And Ashley, let me start with you. What do you think are some examples of some of the areas where we're going to see the state AGs invigorated by the urging on that we've recently seen from the CFPB?

Ashley Taylor (18:57):

I think states will continue to be aggressive in a couple of areas. I would cite privacy and the concern around bank model programs. Stefanie, you should really expand on the bank model program point. I'm not going to steal your thunder, because Chris, I want to focus on something that we don't have to guess about. We don't have to read the tea leaves. We have actually an interpretive rule issued by the CFPB relative to the Fair Credit Reporting Act, encouraging states to understand the limited nature of preemption as it pertains to the Fair Credit Reporting Act. What's most interesting about this interpretive rule is that it was prompted by a case in New Jersey, in which the New Jersey Attorney General's Office was enforcing the seat of FCRA, and the council for the defendant argued that the matter was preempted by federal law. That dispute led the CFPB to issue an interpretive rule making clear that state laws are not preempted unless they conflict with the FCRA. And indeed, they wanted to make it clear that states could be even quote, "More strict than federal law." They're encouraging states in this regard to be very active, and you can understand why. In the context of a State Attorney General, and this is a dynamic that companies should understand. They are close to consumers. By that, I mean, think about what an AG does as a part of their regular business, that is, running for statewide office or governing. They're going to parades, they're going to state fairs, they're in the community. And when they're out in the community, consumers, real people, talk to them and tell them their problems. So, they are closest to the consumer. And so an aggressive enforcement under the FCRA as encouraged by the CFPB makes perfect sense in that context, because they are most likely to be able to respond to whatever dynamic they're hearing on the ground from a number of consumers. And the CFPB wants that aggressive action to bolster and expand the general jurisprudence regarding FCRA.

Chris Willis (21:11):

Stefanie I'd love to hear from you on this too. What do you think the states are going to get up to giving this urging by the CFPB?

Stefanie Jackman (21:17):

Well, I agree with Ashley on privacy and credit reporting and completely, but also he invited me to talk a little bit more about the bank partnership lending model, which is a place where we see concerted effort by the states individually, and in ways that suggest there's information sharing in coordination, although not perhaps a traditional multi-state that Ashley and his team are very accustomed to dealing with, but Ashley and I are involved in handling a number of these matters right now. And it's an area that strikes me as really ripe for state AGs, as opposed to the CFPB, because if you have the CFPB taking the lead here, they've certainly taken a position which is to encourage the state AGs in these activities publicly and behind the scenes. But for them to take the lead, really sets them up for a potential incongruence with the OCC and FDIC, who are responsible for overseeing banks who may be involved in these types of partnerships.

And it strikes me as more appropriately led by the OCC, FDIC, who are, I think, unsettled on these issues and gathering information and evaluating different approaches. But when you start looking at this through the opposite side, as not an effort involving the banks, but their partners who would otherwise be subject to state usury laws, but for that partnership, it's really right in

the wheelhouse of State Attorney Generals to enforce usury laws against non-banks. So, it's an easier fit, I think, both legally and politically to have the states taking the lead there, and that's going to continue to happen, I think for some time. I also wonder if we'll see state enforcement of Regulation F, and to what extent. We have seen that get some traction in California. Elsewhere, I've actually had occasion to reach out to regulators in some of the more consumer-oriented states and having broader collection laws that can apply to creditors.

There's a number of states that incorporate the FDCPA, including some that incorporate it and apply it to creditors collecting their own debts, California and Maryland being two great examples. We have seen the LA District Attorney and other regulators in California adopting at least parts of Reg F outside of the FDCPA collections context, particularly call recordings and things relating to call frequency, but it remains to be seen if other states are going to follow suit, and to what extent. I've had occasion to reach out to a few of them on behalf of clients. And what I've found is that outside of California, the regulators don't appear to have adopted a position one way or the other yet, some even seem a bit caught off guard by the no names question. So, I think what that tells me is much like the CFPB, they're going to leave it to litigation to kind of work out the rules of the road, at least in the short-term, but it'll be one to watch as we move forward. And again, if we see state AGs adopting and incorporating Reg F standards more broadly within their states, I think the first place we're going to see it is on contact frequencies, not just calls, but perhaps text and email. We have DC tapping those, New York City and Massachusetts have long had some taps on texts that are less than Reg F. So, it'll be an area to watch.

Chris Willis (24:33):

And I also wonder whether the CFPB's announcements may get some of the state's more interested in pursuing discrimination issues, like fair lending, fair housing, appraisal bias, those sorts of things. We've had a couple of states manifest some interest in those issues in the past several years, and they have several ongoing investigations related to that within our office. And so, I wonder if we're going to see more on the anti-discrimination front from states as well, but let me close the podcast by just asking both of you this one last question. The CFPB finds a lot of cases to bring an enforcement through its supervision process, where it goes in, and it looks at basically everything in a financial institution and has a very high degree of ability to find whatever issues it's looking for. State Attorneys General don't have examination authority. So, Stefanie starting with you, how do we think the state AGs are going to find cases to investigate in the first place under federal law or these areas where you and Ashley just detailed?

Stefanie Jackman (25:33):

I think there'll be really three main sources, Chris of opportunities for State Attorney Generals to consider enforcement activity complaints, complaints that are submitted directly to them, complaints that go to outside entities, like the Better Business Bureau, FTC, CFPB, complaints that are going through grip sites, anywhere that consumers can complain, state AGs can source information, which is why complaint management remains a really important tool in not only assisting consumers who may be experiencing some sort of confusion or frustration or other issue, but also in trying to manage our overall risk profile with regulators and in private litigation. We also could see the CFPB referring cases directly to states that they gain through their own investigations or other supervisory and enforcement activities, to the extent that they would like to partner or would like a state to take the lead. And then you could also see consumer advocates, they're very active and engaged with regulators at federal and state level. So, what

they're talking about, experiences that their constituency share with them, those can also be sources of information to state AGs for enforcement.

Chris Willis (26:44):

So, Ashley, I'm going to let you have the last word here. Do you think that the state AGs are going to be hampered by their lack of examination authority and their ability to find and bring cases?

Ashley Taylor (26:53):

They have not been traditionally hampered by their lack of examination authority. As Stefanie said. And as I mentioned earlier, they are very close to the consumers, they're on the ground and through the formal complaint process and through their interaction with citizens, they are in the information flow relative to issues of consumers at the time. There's also obviously the consumer groups and the continuing communication between plaintiff's lawyers and certain state AGs by way of informing state AGs of trends that they are seeing. That's another source of information that the states have, and they are closely monitoring the activity of private plaintiff's lawyers as well. So that's something else that I think we will see more of. And what most folks don't appreciate, Chris, I think is that because the states communicate through these ad hoc and standing committees, and there's a consumer protection committee, and there's an antitrust committee.

If you're operating in a state and there is an issue in that state, it's very likely that assistant AG is going to, they will communicate with other states to ask states, are you seeing this in your state? And that is one way that states receive information through the multi-state network. These relationships are built through enforcement actions and once an assistant AG works well with another assistant AG and another state, they tend to maintain an open line of communication and bounce ideas off of each other, or ask if they are seeing similar trends. So that's something again that companies should be aware of and understand that when they're communicating with one investigator in a state or with one assistant AG, they're likely communicating with other states as well.

Chris Willis (28:37):

Thanks a lot, Ashley, that's really important insight that you've shared with our audience, and Stefanie, let me thank you for being on the podcast as well today, and great that the two of you were available to help us launch our new special four-part series on, *Keeping Up With the Bureau*. I'd also like to thank our audience, of course, for listening to this and the other parts of the series and our podcast in general. And I'd like to remind everybody to visit our blog, consumerfinancialserviceslawmonitor.com and hit that subscribe button so that you can get all of our daily insights into what's going on in the industry, and head on over to troutman.com and add yourself to our consumer financial services email list so that you can get copies of our alerts and our webinar invitations. And of course, in addition to this special four-part series, stay tuned for our regular episodes of this podcast every Thursday afternoon. Thank you all for listening.

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