***The Consumer Finance Podcast* x *Regulatory Oversight* Podcast —**
State Regulators Step Up: Responding to the CFPB's New Leadership
Host: Chris Willis
Guest: Jesse Silverman, James Kim, Stephen Piepgrass, Lane Page
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Chris Willlis:

Welcome to this special joint edition of *The Consumer Finance Podcast* and the *Regulatory Oversight* Podcast. I'm Chris Willis, the co-leader of Troutman Pepper's Consumer Financial Services Regulatory Practice. And we're bringing you this podcast today to talk about what we think the reaction of state regulators and legislatures will be to events that are going on at the CFPB. And this is a topic that's evolving very quickly. There are changes in activities going on at the CFPB that are changing seemingly on almost hourly basis. So we're not going to try to summarize those because it'll probably be obsolete by the time we post this episode. But what's not going to change, we think, is the reaction of the states to this situation as it unfolds. And that's what we want to talk to you about today, and I'm joined by several of my colleagues to talk about that.

Now, one of the things that I love most about being at Troutman Pepper Locke is the very close collaboration that we have between our Consumer Financial Services Practice Group and our RISE Practice Group, which contains our state attorney general practice. We work together constantly on matters involving the consumer financial services industry, and we both believe that this is going to be a time when the states are going to be very motivated to assert themselves in the consumer financial services industry. And that's why we're doing the podcast today.

Joining me in the podcast are several of my colleagues. Stephen Piepgrass, who's the practice group leader of our RISE Practice Group, which RISE stands for Regulatory Investigation, Strategy and Enforcement. Stephen's the practice group leader of that. We've also got my colleagues from Consumer Financial Services, James Kim and Jesse Silverman, both of whom used to be at the CFPB in enforcement prior to being in private practice. And Jesse has a lot of background also as a state financial services regulator, which I think makes him very qualified to comment on what we're about to talk about. And then we also have Lane Page, who's an associate in both groups who works on financial services matters both on state and federal enforcement and compliance matters all the time with all of us.

Everybody, welcome to the podcast. And let's just jump in and start talking about what we think the state reaction to this will be. Jesse, let me start with you. There's been a series of actions by the incoming administration that I think we could accurately describe as evidencing some significant hostility to the CFPB and a desire to curtail its operations. We don't know exactly where that's going to land, but I think that sentiment is clear. What do you think the sort of psychological reaction of state regulators will be to this set of development says it's unfolding?

Jesse Silverman:

Hostility is a very politically correct way to frame this narrative. But yeah, thanks, Chris. So having lived through several cycles now, I was a state regulator for many years. I was a state regulator while the feds were controlled by the Republicans and when they were controlled by the Democrats. I then was a regulator at the CFPB in the early days, obviously, under the Democrats. I was then in-house general counsel when the CFPB was controlled by Republicans. So I have seen every single version of this life cycle. And there's definitely some trends, right? And we can see, as you noted, there's the hostility. The question is, what do we think the states are going to do?

And I can tell you, having lived through it and been a state enforcement attorney, there's definitely a strong appetite to pick up the slack that everyone expects the CFPB to leave behind. As I've seen over 25 years, regulation tends to hit a stasis, a steady state. It's more a function of who is engaging in the regulation, right? When it's the CFPB, you see the states fall back. When the CFPB falls back, the states come forward.

And look, let's be clear, they don't call AGs aspiring governors for nothing, right? Those state AGs, they're looking to make a name for themselves, many of them. They're going to be aggressive, and this is going to be among the best platforms that they have to do that. So I expect that we're going to see a lot of action. And same thing goes with many of the state banking regulators. And I'm sure we'll touch on this later as well. But same with the state legislature, right? The state legislature, they're not immune from politics either. So they're going to see this, a weakening of consumer protection as their invitation to step in and fill that void. And they can just pass laws, right? They're not issuing guidance. They're not doing rules, they're just going straight statutory change. So we are going to see that.

Chris Willis:

Yeah, and I think, Jesse, to underline your point, the roughness of some of the treatment of the CFPB that we've seen in the first few weeks of the incoming administration I think will add even greater urgency to the state's motivation to act in this area, and you can already see it in their public statements.

Jesse Silverman:

Absolutely. And Chris, I should add one important point, which is the outgoing administration at the CFPB, they knew this full well, right? So this is not a surprise to anyone that this brand of the CFPB was going to be a little more curtailed. So they left the States with a very, very explicit roadmap on how the states can leverage Dodd-Frank and can leverage the CFPB and the work that they do. That is an absolute roadmap. There is no mystery to this. This is not us looking into the crystal ball. This is something they explicitly did for the states.

Chris Willis:

Yeah. And so let's talk about what that plan may look like in execution. And you mentioned, Jesse, attorney generals, the state financial services regulators and legislatures. Let's take each of those and talk about what the state actors may be able to do. Stephen, you are the one who leads our RISE Practice Group, which includes what I consider to be the best state attorney general practice in the country. It was a huge attraction for me and our team when we joined Troutman now three years ago. Talk to me with your familiarity with attorneys general, their priorities and their options about what you think we may see from them over the next few years in response to a weakening of the CFPB.

Stephen Piepgrass:

Yeah. Thanks, Chris. I think we will absolutely see the AGs serving sort of this gap-filling role. They talk about that themselves. At the staff level, the AGs, AG senior staff and line lawyers have been working hand-in-hand with the CFPB on many of their investigations. You see information sharing and really joint efforts by both working together. Because of that, I think you'll see almost a seamless transition from the CFPB to the states.

And as Jesse referenced, just in January, the CFPB issued its report on strengthening state-level consumer protection that's a roadmap for the states. The AGs are clearly following that. The other thing I think we look at, each state is unique in many ways, but there are some usual suspects that are more aggressive than others. And especially the Democratic States, I think you'll see them doing a lot of this, what they perceive as gap-filling. You'll see Massachusetts, Pennsylvania, New York, New Jersey, California, Illinois, DC, all stepping up efforts in the consumer protection space, and specifically when it comes to financial services, which to put in another plug is one reason why we were so excited to have you join us a few years ago, Chris. Really bolstering both the subject matter expertise and the venue expertise that we bring together. I think it'd be interesting to hear from James Kim a little bit in speaking to one of the issues you mentioned about Dodd-Frank and the role of AGs in actually enforcing under that.

James Kim:

Thanks, Stephen. I'll do the dryer kind of brief legal part of this discussion. I think a lot of people already know that state AGs under Title X of Dodd-Frank have the right to bring federal claims in federal court in addition to enforcing their own state laws. It's a little bit of a refresher there. But I think there's a misperception out there that state AGs are limited to bringing UDAAP claims in federal court when the reality is they can bring federal claims to enforce any of the federal consumer financial laws, the 18 statutes that the CFPB owns and enforces as well as their enabling rules.

And so I just want to remind people of that and just kind of call out what the legal basis is for that. Under section 12 U.S.C. 5481, there's a definition of federal consumer financial law, which includes all of the enumerated laws and their enabling rules. Now, if you connect that with the section that gives state AG's authority to bring lawsuits, which is 12 U.S.C. 5552(a)(1), it explicitly says they can bring CFPA claims in federal court for violations of federal consumer financial law. That's how they sweep in all of those other statutes.

And we've seen, for example, the New York Attorney General plead, and these are public documents in complaints filed in federal court, for example, a Reg E claim under the Electronic Fund Transfer Act. They bring a Reg E claim. It's styled as a CFPA claim because they have to kind of go through this statutory provision in Dodd-Frank, but it's really a derivative claim. It's an

EFTA Reg E claim that is styled as a Dodd-Frank claim. Let's move on, but I just wanted to lay out that there is I think black and white statutory authority for the state AGs to enforce all of these laws and rules, not just UDAAP claims.

Jesse Silverman:

I just want to draw one other piece of connective tissue here just to highlight this connection, which is several of our former CFPB enforcement attorney colleagues are in fact staffing those attorney general offices, right? You can look in Pennsylvania. You can look in Washington. You can look in California. So that connection is direct, right? These are experienced enforcement attorneys at these state AGs. They know what they're doing.

James Kim:

Yeah. New York, Colorado as well at a high level. Chris D'Angelo, former CFPB enforcement attorney, is a deputy attorney general in New York. And the administrator of the Colorado Consumer Credit Code is a former CFPB attorney. And they've been at those state agencies for several years now, like nearly a decade.

Chris Willis:

We know that the state attorneys general have a lot of legal authority under their state laws and under Dodd-Frank to do a lot of enforcement with respect to the financial services industry. And we would anticipate, I guess, Stephen, that we're going to see an outpouring of that enforcement both by individual state AGs and by consortiums of multistates. That seems reasonably likely to you, doesn't it?

Stephen Piepgrass:

Oh, absolutely, Chris. The multistate is one of the AG's most powerful tools, and it's the way that they can work, bring their leverage to bear on an entire industry across the whole country, working together, connecting dots and then bringing common claims against a company.

I mentioned earlier, Chris, the usual suspects as being Democratic states primarily. One interesting thing that we're following though is somewhat aggressive enforcement action, even by Republican states. And I think we may see that amping up as well with the CFPB pullback. And interestingly, I think this is actually connected with the Trump administration and its version of Republicanism, which is much more populist than what we've historically seen.

Historically, you could rely on Republican states to think about businesses and want to be perceived as being business-friendly, a place where you can operate without too many constraints. The Trump Republican Party is a little bit different, and there is a significant consumer protection angle to that. And I think some of the discomfort with CFPB that you're seeing with the pullback is actually a higher comfort level with sending that authority to the states, right? The federalism concern. If that's some of what's behind this pullback, I think we'll actually see a ramp up in enforcement actions, not just by the Democratic states, but by the Republican states as well, really pushing on that populist angle.

Chris Willis:

And as I hear you say that, Stephen, I'm thinking about Texas. Texas, I think is a perfect example of this.

Stephen Piepgrass:

100%. It's a perfect example.

Chris Willis:

Let's move on to the next category of state regulators. And James, I'm going to turn to you to start with on this. There are a number of state financial service regulators like New York and California that are very active both in terms of examinations and enforcement. And then there are others who aren't quite as active. What do we think might happen with them as a result of the potential curtailment of the CFPB's activities? And what can they do?

James Kim:

I think pretty much everything that's been said about state AGs apply to state banking regulators, right? It's typically the same blue state agencies, but we do see red and purple state banking regulators being aggressive. Texas being a good example. I also want to highlight the relationships. A lot of the examiners at the CFPB came from state banking regulators and vice versa. You have long-standing personal and professional relationships.

And then there are actual rules in place that allow for and govern the information sharing between the CFPB and state banking regulators. So people may think to themselves, "Well, CSI, confidential supervisory information, has high levels of protection, shouldn't be shared, are not public." That's all generally true, but there are explicit rules in place that allow the CFPB to share information with federal banking regulators as well as state banking regulators. And Chris, I know you had some thoughts on that.

Chris Willis:

Yeah. And the thing is we may not think that that sharing of information may be very prevalent under a new administration with the CFPB, but it was extremely prevalent over the last four years. We had numerous instances where we had state regulators conducting examinations of non-bank clients that were subject to their jurisdiction by agencies like New York Department of Financial Services or California DFPI, where it was clear that the most recent CFPB exam of that entity had been fully disclosed to the state financial service regulator to the point that the states would issue supervisory letters or reports of examination that verbatim copied the list of MRAs that the CFPB had given that entity in the prior exam. Or they asked exam questions where they would copy and paste those MRAs and say, "What have you done to clear these or comply with these?"

And so Jesse mentioned the playbook, as did Stephen, of preparing the state regulators to sort of take over following a potential curtailment of the CFPB. And I really think it's important for our listeners to understand that that didn't just happen with the AGs. It was actively going on with information transfers to the state financial service regulators prior to the administration change, which makes them very much in a position to continue to follow up on and pick up the ball where the CFPB left it off.

Jesse Silverman:

And Chris, I just want to draw another corollary. Like Stephen mentioned, the multistates, and the power, and the leverage that comes from that among the AGs. But one of the aspects of state regulation that's changed very much over the last, I don't know, let's say 10 to 15 years has been multistate coordination among the bank regulators as well.

I was part of a team at CSBS, the Conference of State Banking Supervisors, called Vision 2020, which was designed to sort of harmonize and make state banking regulation a little more efficient. And through that process, they've really started to work together in ways that they didn't previously. You can see that with multistates, money transmitter exams. These are things that didn't happen before. Even the connective sharing tissue amongst the states themselves has increased substantially over the last several years.

Chris Willis:

Let's pick up the third sort of leg of our tripod of what the states might do in reaction to events at the federal level, and that's the legislative front. Lane, I want to bring you into the conversation at this point. There's a lot that states have been doing and might do with respect to legislation. Why don't you talk to the audience some about that?

Lane Page:

Yeah, thanks, Chris. I think an important point to note is that legislators can move pretty quickly, can move without a lot of resources, which not all states have, to enact new laws that will empower both the financial regulators and private litigation consumers to enforce consumer protection laws. And we saw the CFPB laid out a roadmap for states to do just that by incorporating terms such as abusive into their laws or by giving the government agencies broader tools, more power to go after financial services companies. And also to allow for private litigation, to allow for enforcement without the need to prove monetary harm. We really kind of expect that states might respond to this lack of federal oversight by creating new laws that allow enforcement from both consumer protection agencies, but also consumers themselves. And we know that there are states that are pretty good, pretty quick at doing this already like New York, California, Connecticut, Illinois. But like we've been discussing, we kind of expect a broader spectrum of states to become more active in this area.

Chris Willis:

Well, and the thing is, Lane, when states start legislating in our industry, we have the phenomenon of them not all doing the exact same thing. They don't sit there and adopt a uniform law and make it easy for industry to comply. There are variations in the state laws based on whatever considerations may exist in each state. In one way, it's kind of worse in the sense that you've got to have a different compliance approach for every state.

Lane Page:

Right. I completely agree. I think when the CFPB is very active and other federal regulators are very active, companies can really focus on just complying with federal law because that's what's being enforced. But when these states are coming in and acting on new laws, they're going to have some type of flavor like what the federal laws have, but they're going to vary. They might be broader. Companies might have to apply new restrictions that are state-specific on their practices that is really a lot harder to follow and comply with.

Chris Willis:

Yeah. James, what's your thought on this?

James Kim:

Yeah. This kind of fragmented and often inconsistent approach by the states is, I think, especially acute with non-banks and fintechs who are trying to innovate and offer new products and services. For example, buy now, pay later earned wage access, you could just see in state legislation rulemaking and guidance there are wildly different approaches. I just wanna highlight that it's an excellent point and there's concrete examples that are being played out like as we speak.

Chris Willis:

Okay. With all of this activity already happening and likely to ramp up with the states, again, with legislatures, with state financial service regulators, and with the attorneys general, Lane, what can the industry do to try to keep track of what's going on so that they know the environment they're operating in?

Lane Page:

Thanks, Chris. I'll say that there are various sources out there, one of them being Troutman's multiple blogs that we have going on. We have a Consumer Financial Services specific blog, but we also have a state regulator blog. We are constantly tracking what's going on at both the federal and the state level. And we are really now starting to focus – well, we've been focusing, but are placing a more specific focus on state regulators, both AGs and the other financial regulators like New York DFS, California DFPI, and focusing on what they're doing and trying to report back fairly quickly to the industry to keep it apprised of what's going on and also to be able to help our clients be able to track what's going on.

Chris Willis:

And Stephen, our monitoring of what goes on at the states isn't limited to just what they release publicly on websites and press releases, is it?

Stephen Piepgrass:

That's exactly right, Chris. As you know, we have a team of a dozen-plus lawyers in our state AG practice who actually go to the state AG meetings all across the country. It seems like one happens at least once a month. In fact, we've got a team of about six who are out in LA right now for the Democratic Attorneys General Association, DAGA meeting. And by attending those, we're able to keep our finger on the pulse of what's going on, what the AGs are thinking about.

I know one of the topics of discussion today at that meeting is going to be this pullback at the CFPB and what Democratic AGs in particular can do to fill in the gap. That's the kind of thing we monitor every day for our clients. And then we weave that into our recommendations that we make for them. And we're often also interacting at those meetings with senior staff who are the ones leading these investigations. We've got a holistic approach to this that allows our clients to really know what's going on in the industry and take proactive steps to make sure that they're well-positioned. Avoiding investigations if possible, but if one occurs, putting them in a good position to respond to it.

Chris Willis:

I'm gonna close out the podcast by giving each of you an opportunity to talk about what should the industry do from a strategy standpoint in light of the phenomenon that we've been talking about for the last roughly 20 minutes. But I want to tell the audience first what we're doing as a law firm at Troutman Pepper Locke about this. Because as soon as we saw the result of the election, we knew that something like this was going to happen, and we began planning for it immediately.

And so we've formed a joint task force, a working group that includes the people on this call and some other members of our Consumer Financial Services and RISE groups, the whole purpose of which is to monitor what's going on with the states and make sure that we're in a position to assist clients with matters with state attorneys general and state financial services regulators. The people you hear talking on this call are working very closely together to do exactly that.

Let's talk now about what industry should do in connection with the situation. Jesse, let me start with you. If you're an industry player, what do you do to strategize for the next four years living under the kind of phenomenon that we've been talking about?

Jesse Silverman:

Well, before I get to the largest strategy, I just want to point out that, as Stephen mentioned with respect to the AGs, we have similar activity going on with the state banking regulators. In fact, today is the NMLS Conference, CSBS, the Conference of State Banking Supervisors Annual Conference, and we have some of our colleagues down there doing the exact same fact-finding and strategy discussions with the state banking regulators, as Stephen mentioned, with the AGs. We are covering the whole waterfront there, to your point, in anticipation of what we know is going to happen.

Now, taking it more to the strategy. I mean, there's one point. And I don't know that this is really state-specific, but it's an important reminder that I wanna make to all clients, basically every company, examinations are backward-looking tools. So the things that you do today, when you think nobody is watching, that's going to be examined at some point in the future, right?

If the CFPB comes back and comes to life in four years, they're going to be examining what you guys were doing today. Don't forget that examinations are backward-looking tools. That's a very important point that lots of people forget. And then with respect to the states, we've talked about this. And having been the GC of a state-based lender, I can tell you that dealing with 50 state laws, it's like running 50 separate businesses. It makes it incredibly challenging. It introduces operational complexity, which of course increases risk.

You really have to stay on top of each of those state laws and those state legislators and what the banking regulators are saying, because to each of those individual state banking regulators, what they say is the most important thing that is being said, right? They all believe that they are their own little kingdom. And to many extents, they are. You might think, "Oh, you know what? It's just Delaware, or it's just Connecticut, or there's some other small states." But I assure you, they have lots of power and lots of authority. Really, you're just going to have to stay on top of it for each of those states in order to run your business effectively.

Chris Willis:

James, let me turn to you next. What kind of words of wisdom would you share with the industry to take account of the situation that I think we're gonna be facing over the next few years?

James Kim:

Well, I think the overall headline and theme here is to remain vigilant and not get complacent. But I think more specifically and practically, complaints I think remain one of the key ways that you can draw unwanted attention to yourself. With the focus that we're having with state agencies, I'd say any complaints that you think touch, or are routed by, or may be seen by a state AG or state banking regulator should get extra special white glove attention.

Chris Willis:

I think that's a great point. Stephen, what's your parting comment for the audience?

Stephen Piepgrass:

I think for many years, companies thought the best strategy was to keep your head down, keep it below the bunker, and hope you don't get hit. That's changed. We're now at a point where you have to have a holistic, proactive strategy for dealing with government regulatory scrutiny at the state level, and it should combine a number of different disciplines in your company. You can't afford to have the general counsel separated from your government relations function, for example; they need to be talking to each other. You need to be monitoring legislation and think about whether you ought to have some sort of a lobbying approach, particularly if it's legislation that could affect an entire product line. The GR and GC functions need to be talking compliance, investigations, litigation. Think about it holistically. That's how we set up our practice for that very reason, because that's the approach companies need to take in situations like this.

I mentioned changing from the keep your head below the bunker mentality. If you know that your industry is a focus, if you know that whatever business line you're rolling out is unique, novel, likely to draw scrutiny, consider having an offensive strategy where you actually go to these meetings, introduce yourselves to the regulators, and explain why your product is really the gold standard in the industry.

There are a lot of creative ways to either avoid scrutiny or position yourself well if an investigation is going to occur. We'd love to talk with you if you're in the industry and thinking about this. We do this for a lot of different clients. And when you have a good story to tell, tell it. Don't let that story be framed by someone who's really out to get you. That would be my advice.

Chris Willis:

Yeah, thanks, Stephen. And I'm glad you mentioned the government relations aspect of it and the legislative angle because it gives me an opportunity to remind our listeners that not only do we have preeminent practices with state attorneys general. And we have a lot of connections and a lot of experience with state financial services regulators. We have a government relations team here at Troutman Pepper Locke as well. It's called Troutman Pepper Locke Strategies. They specifically do lobbying at the state level for financial services companies. And so that's part of the overall service offering that we can give to clients to do exactly, Stephen, what you just suggested.

Jesse Silverman:

I always tell clients, if the first time the AG or the regulator is hearing from you is when you've responded to a subpoena, you are starting in the wrong position. You want them to know you and like you, frankly, before that day, not after.

Chris Willis:

That's great advice. All right, Lane, I'm going to give you the last word in the podcast. What would your parting thought be to the industry in response to the state activity that we're foreseeing?

Lane Page:

Thanks, Chris. I think here we're used to seeing kind of the same themes from the CFPB over the last four years and similar themes from the state regulators. But now that the CFPB and the rest of the federal government are probably pulling back and state attorney generals and other regulators are going to come in and pick up the slack as our expectation, we aren't quite sure of what areas they're going to focus on, if it's going to be the same things they've been focusing on in the past four years, or if they will take a new approach to what their priorities are. I think it's important to not just stay apprised of legislation press releases, but also to stay in touch with other people in the industry with attorneys who are experienced and who work with other companies in their industry and stay in touch with other counsel and competitors to know what is going on behind the scenes. To know what's being focused on during exams, during investigations, and to be prepared to respond to that in the future if you become a target at some point.

Chris Willis:

Well, and frankly, the consumer advocates too, Lane. I mean, the consumer advocates, what they complain about today is what regulators are investigating tomorrow. We've always found that to be true. It was certainly true of the CFPB during the last four years, and I think it will continue to be true with respect to the very direct line between consumer advocates and certain of the state attorneys general and state financial services regulators. I think it's important for that to be part of people's sort of assessment of the state of play as well.

Well, gentlemen, I want to thank all of you for being on the podcast today. I want to thank the audience for listening and also urge the audience to subscribe to both of the blogs, the *Regulatory Oversight* blog that's maintained by the RISE group and *Consumer Financial Services Law Monitor* that our CFS group puts out. And just know that by subscribing to those blogs, you're going to see that we're monitoring what's going on at the state level very carefully and reporting on it as quickly as we can.

We're going to stay tuned to see what happens at the federal level, but let's not take our eye off the ball of what's going on with the states because there's going to be a lot of action there over the last four years. Thank you all for listening.