

Moving the Metal: The Auto Finance Podcast — From Federal to Local: CFPB's Blueprint for State Regulators

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Brooke Conkle:

Welcome to *Moving the Metal*, the premier legally focused podcast for the auto finance industry. I'm Brooke Conkle, a partner in Troutman Pepper Locke's Consumer Financial Services practice group.

Chris Capurso:

And I'm Chris Capurso, an associate in Troutman Pepper Locke's Consumer Financial Services practice.

Brooke Conkle:

Today, we are discussing a recent white paper from the Consumer Financial Protection Bureau called Strengthening State-Level Consumer Protections, potentially providing a roadmap for enforcement at the state level over the next four years. But before we jump into that topic, let me remind you to please visit and subscribe to our blogs. We have two great ones that may be of interest to you, [TroutmanFinancialServices.com](https://www.troutmanfinancialservices.com) and [ConsumerFinancialServicesLawMonitor.com](https://www.ConsumerFinancialServicesLawMonitor.com).

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For today, as I mentioned, we're discussing the CFPB's white paper.

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Chris Capurso:

Yes, Brooke. We're covering this release that the CFPB dropped in January, and it's, as I'm sure a lot of you saw, deluge of guidance and documents and everything under the sun that the CFPB dropped before January 20th. Which made all of us think that Director Chopra wasn't going to be there much longer on January 20th, but jokes on all of us because he's, as of the time of this recording, still there.

This guidance document is interesting. It's discussing the kind of connection between the CFPB and state-level agencies, specifically attorneys general, regulators for banking, financial services, things like that, and how these state-level agencies can, the title says it, strengthen consumer protections. A lot of it reads like the CFPB trying to leave a playbook for the state-level agencies saying, "Our time here is done. We leave it to you now." Like the graduating senior leaving it to the junior who's now ascending to the throne in high school.

I mean, the document covers a lot of different things. Once again, in the executive summary, the CFPB has a nice shot at lawyers. The CFPB has been doing that a lot lately. It says large companies and their lawyers have developed more advanced tricks using fine print and product complexity to increase profits at the expense of American families. That line gives you an idea of what this talks about. It talks about what the CFPB has done over the last three-plus years since it took a little while for Director Chopra to get approved, what they've done in the Biden administration, and what they would like the state agencies to pick up from them.

Brooke Conkle:

Chris, that's exactly right. One of the first portions of the white paper is a brief history of the interplay between federal regulators and the states. Essentially, what this section is doing is really trying to legitimize the bulletin and highlight the fact that the federal regulators have been, for years, for lack of a better phrase, really providing benchmarks to the states and saying, "Here is how we have done things at the federal level and states. We strongly encourage you to do things in the same fashion."

The bureau really goes into great detail to track the history of legislative developments with the states modeling their consumer protection statutes after certain model acts from the FTC. As we have talked about in other podcasts with Chris Carlson, this sort of big brother, big sister relationship between the federal regulators and state regulators is not a new thing. We see a lot of movement back and forth from the federal level to the state level, back to the federal level. This is a cooperation that has been going on for many, many years. As seen in this white paper, the bureau is giving the states essentially kind of their marching orders for the next four years.

Chris Capurso:

Yes. It's interesting. We have a section in this guidance document about cooperation between federal and state, between the CFPB and these state agencies. The next section immediately after that is about the CFPB's work empowering those agencies. We go beyond just cooperation to where the CFPB is empowering the state agencies. Like the section Brooke just mentioned, this is also a bit of a history lesson. CFPB dropping the things that they have done in the past to

empower state agencies. They highlight a few specific categories. The first being joint investigations between the CFPB and these state agencies.

The first part of this section really truly reads like a summary. It's a greatest hits of different actions that the CFPB has taken on with state AGs. Specifically, there are some referenced in the auto finance industry for those listening out there. So the CFPB is keeping those top of mind in this document. The CFPB also noted some interesting things about what is important about a joint investigation. They specifically noted that an important component of working with its state partners is sharing information between the two.

I think we've touched on that before with Chris Carlson in both of our wonderful volumes with him. Just the idea that these two agencies can share their knowledge and pursue their goals together with whatever kind of information they can get. The CFPB specifically notes in this joint investigation section the recent non-bank registry. It's interesting because they note all the things that the registry can do, including noting violations of certain state consumer protection laws.

The CFPB also noted that it intends to make the registry public. Dropping the little nugget in there that this is going to be a public registry, talking about information sharing and talking about this wonderful database that they're going to have of all these non-bank entities and all the things they've done, I mean, it could not be any more clear that the CFPB is pointing to this thing. State agencies, take what we've done. Run with it. Enforce your own laws based on some of this information that might be in here.

The second section highlighted was removing obstacles to state-level consumer protection. The CFPB starts off with a bang, noting federal law should be a floor, not a ceiling, for the protection of consumers. We see that in a lot of laws. I mean, there are plenty of consumer financial protection laws where you look at the federal law as a baseline, and then you look at state law to see if they've supplemented it all. A big part of our job is trying to identify the differences between the two and try to help companies comply with both.

The bureau specifically talks about its actions in trying to reconcile federal and state law. The CFPB highlights several different actions it has taken to kind of reconcile federal and state laws, some related to disclosures like, for example, the Truth and Lending Act. We all know the Truth and Lending Act box. Then state laws have perhaps their own requirements for, say, the itemization. There's just some interplay between the two. So the CFPB notes that and its efforts to try to give states some autonomy compared to the federal laws.

The third category is preventing companies from ignoring state laws. This one is full of lines that are very interesting. The first one, I mean, I immediately saw. It's frequently companies with a "move fast and break stuff" mindset believe that violating state laws and regulatory programs is a smart path to profitability. It is such an odd statement. This generalization for all business as if the majority of what Brooke and I deal in state law compliance all the time. It's a very weird blanket statement to talk about a lot of people when all of our clients are very concerned with state law.

The CFPB does note that ignoring state law can also cause companies to commit unfair, deceptive, or abusive acts of practices, which we've seen in some of their actions where there's

a violation of a state law, and then there's a UDAAP claim on top of that. That's something that, obviously, we advise people to be aware of is you can kind of get that double dip. It's always the talk of the low-hanging fruit when there's a disclosure violation or something like that. But then that could turn into a UDAAP itself if the disclosure violation happened to be unfair, deceptive, or if the CFPB wants to know abusive. We'll talk about that in a little bit, state law and abusive.

Finally, the CFPB notes that it has encouraged states to enforce the Consumer Financial Protection Act, the federal law, including the provision making it unlawful for covered persons or service providers to violate any provision of federal consumer financial protection law. We're talking in TILA, the Equal Credit Opportunity Act. Any of those laws, the CFPA makes a violation of those laws, a violation of the CFPA. The CFPB has noted that states can pursue claims and actions against a broader range of entities than the CFPB.

Notable to our listeners, auto dealers, not subject to the CFPB, except apparently through tangential ways such as data pilot, but CFPB is specifically noting that states can go after more entities than the CFPB can, and that CFPB enforcement actions do not put a halt to state actions, simply because the CFPB has an enforcement action against an entity. It doesn't mean that the states have to back off. These are the things that the CFPB is highlighting as things that it has done in the past to help and empower state agencies.

Brooke Conkle:

Yes, Chris. What's interesting is where the bureau goes from there in the white paper is essentially saying that the work is not done. The white paper specifically highlights new challenges that are in the current American economy. As Chris mentioned, the history lesson really just keeps tracking through the white paper. If anybody had an Alexis de Tocqueville quotation on their bingo chart, don't worry. We've got that covered.

As Chris mentioned, there are certain quotations from this portion of the report that frankly are kind of head scratchers. For example, the bureau writes, "There is evidence that the US economy is becoming less dynamic with declining rates of startups and a diminished role for dynamic young businesses in the economy." At the end of an administration, that's kind of a curious thing to highlight, frankly, to say that there is a diminished role of startups in the economy.

But with that backdrop, the bureau really is focused on what it finds to be a lack of competition within the American economy. The bureau really targets two major tech companies and says, "These guys have an outsized impact on the market." It doesn't necessarily tell us where that should wind up, but really lays down targets against certain companies. Also, the bureau expresses concerns over the use of consumer data and how major companies are using consumer information. As we've all heard, the bureau's agenda for the past four years, including junk fees, they've been beating the drum. We will hear that drum drumbeat continue throughout this paper.

Chris Capurso:

The CFPB, we've gone through the history lesson. We've gone through the different types of things that the CFPB has done for cooperation, for empowerment, as I'm always going to

italicize with my voice. But now, we get to the proposals, what the CFPB actually wants states to do. The first one, I alluded to it earlier, the CFPB wants states to incorporate abusive into state law, the abusiveness standard.

Now, as anybody who has dealt with these types of things knows, state law and the FTC Act are typically unfair and deceptive acts or practices or UDAAP. The CFPB has an extra A in there; unfair, deceptive, or abusive acts or practices. Some people call it the double A UDAAP. I prefer the UDAAP. I think that's very funny when I hear somebody say that. But the CFPB is saying it wants states to incorporate UDAAP into their state laws. One interesting thing about this document is they specifically put in green highlighted boxes what they suggest. I mean, it looks like a model law, which is very interesting. I don't know if I've seen that yet.

They specifically recommend that states incorporate the abusiveness standard that the CFPB has. Also, to interpret and construct that term, the way that the CFPB said it should be constructed in its release from last year on abusiveness. Two years ago, my goodness. Time flies. If anybody remembers that release, it was very vague. It was difficult to tell still what abusive is, except that it discussed that a single complaint can cause an abusive practice, which is insanity. It also discussed how form contracts can be abusive, even though the law we've discussed a few times today, the Truth and Lending Act, literally requires a form contract.

Things like that, just very interesting tidbits that they glossed over, but they want states to follow that. So not only do they want the states to incorporate the abuse of standard as the CFPB has it, but also to interpret it the way the CFPB has it. It's almost like they're trying to interject into the way states enforce their laws. They're empowering them. The abuse of one is the one that stood out to me, but the rest of these are very interesting.

The next one is stronger remedies and tools for investigation and enforcement. The CFPB specifically notes that state enforcement agencies, such as attorneys general, should have a relatively, and this is a quote, "unimpeded process to initiate consumer protection investigations." Just friction-free, let's go after them. For example, as the CFPB says, state attorneys general should not have to petition a court prior to issuing a subpoena or a civil investigative demand. I'm sure Brooke has some fun thoughts on that as a litigator. That's interesting in itself, but the bureau goes even further to say that it thinks that states should have the same kind of market monitoring power that the CFPB does.

We've already mentioned the auto data pilot, that kind of keeping a finger on the pulse of industry. The CFPB thinks state enforcement agencies should also have that power, which is going to be great for everybody. You're answering 50 surveys from 50 different AGs with 50 different questions on the same topic. That's what we all want. The CFPB, again, gives us a green box to tell us what they think the state should do. The CFPB recommends the state should consider whether to grant attorneys general market monitoring authority, grant municipality and city enforcers' authority to bring claims for violations of state UDAAPs.

In that specific bullet point, they put in there abusive. They've got to incorporate the thing that just happened. So they're like, "It's not just single A UDAP. This is double AA UDAAP we're talking about." States should consider whether to provide pre-suit investigatory power to state enforcers similar to the CFPBs and whether to grant enforcers authority to obtain full relief for their residents similar to the remedies available to the CFPB.

One thing that they didn't put in that green box that has always been in the background, it's always something our clients have been concerned about, they put it in there as it's not dicta because, obviously, this is not case law. But it's just kind of there. States should consider holding corporate officers personally liable when doing so supports their consumer protection missions. That is a throwaway sentence. It's not in the green box. Maybe the CFPB doesn't consider it important enough to go in a green box, but that's pretty important. They're talking about corporate officers should be able to be personally liable for the violations of the companies when doing so supports a state AG's consumer protection missions.

Who knows what that means? But what it definitely means is that the CFPB is saying executives should potentially be on the hook for liability of the companies for violating consumer financial protection laws.

Brooke Conkle:

Chris, moving on to the section that struck fear in my litigator's heart, the CFPB's next recommendation is that states remove evidentiary hurdles such as the requirement that plaintiffs prove individual monetary harm that frustrate private rights of action. Really, there are three things that the bureau says states should do related to the burden of proof. Just as you mentioned, all three of these are highlighted in a green box that includes brackets essentially saying, "Insert state consumer protection section here."

But those three areas that the bureau says should be done away with are, number one, ascertainable loss to consumers or the class; two, reliance by consumers on a misleading or false claim; and three, monetary harm. What's interesting when I look at those three elements, there are some states that already have consumer protection statutes that do not incorporate these elements. But, frankly, this is a tough ask. Essentially, what the bureau is suggesting is a UDAP standard where it doesn't matter if a consumer saw a claim. It doesn't matter if the consumer saw that claim and relied on it. It does not matter if the consumer saw a claim, whether they relied on it and whether they lost money.

As a litigator, when I think about those elements, I'm asking, what is the personal right that's being vindicated by a lawsuit? Essentially, what is the plane of asking the court to give them? What do I get back for this legal violation? Absolutely, the bureau has packaged this as an easy drop-in to a state statutory regime. But practically speaking, this is going to be tough, frankly, for state legislators to get on board with.

Chris Capurso:

They just get better and better, don't they? The next one, one that I think a lot of people, you can see the bureau going this way. I mean, a lot of their activities. But I don't know. To see it in the green box was jarring. It is you should extend consumer protections to businesses. They specifically talk about entrepreneurs, and the boundary between one's personal or household finances may be hazy. This idea that the sole prop may be using their own funds. Somebody acting by themselves is no different than acting in a consumer capacity, even though the purpose of the credit or whatever they're doing may be commercial.

The interesting part is they don't say sole props. They don't say businesses of a certain size or revenue or anything like that. They just say that UDAAP protections should just extend to businesses. The green box specifically says what you should do is you should change the term consumer to mean an individual, a company, or an organization, or an agent trustee, or a representative acting on behalf of an individual company or organization. That defies what consumer means.

Brooke Conkle:

That's right, Chris.

Chris Capurso:

In so many laws.

Brooke Conkle:

No. Where's the line anymore? Who knows?

Chris Capurso:

I mean, it doesn't really make sense. Just from a definitional structure, it doesn't feel right. But this is, again, an extension of what the CFPB has been doing. You have the small business data collection. You have all sorts of things that they're trying to do with small businesses. But this is interesting because they want UDAAPs to just apply to businesses, so stay UDAAP authority. Now, we're going to be seeing B2B UDAAP actions and the AG's going after people for B2B actions and if the green box gets adopted. But just another one where the line is being crossed pretty harshly, but also the recommended solution just doesn't seem to really make sense.

Brooke Conkle:

The next to last recommendation from the bureau is to authorize forms of private enforcement that can remain viable in the face of forced arbitration. The bureau really has a non-friendly view of arbitration, we'll say, where it describes arbitrations as cases prosecuted before a private judge that a company has selected and cases that may not lead to change in business practices. For those of us who have been involved in arbitration, that is a curious description, I'll say. But it's clear that the bureau really wants states to enact statutes that permit consumers to act as private attorneys general.

Again, the state that the bureau is really highlighting as the gold standard is California, and specifically the California Private Attorney General Act, where consumers are allowed to seek public injunctive relief. The bureau also recommends potentially enacting statutes that provide for qui tam relief at the state level, much like the False Claims Act. All of this is to avoid arbitration, but also to include fee-shifting provisions that would permit successful plaintiffs to recover their attorney's fees. Again, this is potentially more money in the pockets of plaintiffs lawyers.

Finally, the last recommendation that the bureau gave is to ban common schemes in the modern economy, including junk fees and abuse of personal data. As we've seen over the past four years, these have been initiatives that the bureau has been heavily involved in. Specifically, with regard to abuse of personal data, the bureau highlights prohibiting the use of data, including the personal data of minors, giving consumers a right to delete data about them, prohibit the use of data collected for reasons other than providing the consumer a product or service that they have requested.

Then finally, junk fees. It would not be a *Moving the Metal* podcast if we did not talk about junk fees. Again, in the green box, what's included there are many of the requirements of the junk fee rule before it was amended. The hidden fees that the bureau suggests prohibiting are essentially repackaging a final price, much in the way that the FTC proposed the offering price in the CARS Rule. It's this idea that the advertised price really should be the full price of a product or service without any additional charges, whether those charges are hidden or not.

What does all of this mean for auto finance companies? Essentially, the initiatives that we've seen for the past four years could move from the federal level to the state level. This is potentially a good news, bad news scenario for dealers and auto finance companies. As many of the folks in the industry have not necessarily been comfortable with all of the agenda items of the bureau with the past four years, the benefit, however, has been a somewhat uniform compliance effort, right? With initiatives shifting to the state level, we're losing that uniformity, and it can create more compliance challenges for companies that operate in various states.

Can you have the same compliance regime for California as you do for, say, Florida, or what about the same regime for New York as for Georgia? These remain open questions. What the bureau is really hoping for as part of this white paper is for more and more states, including states other than the usual suspects, to pick up the mantle and drive home these initiatives that have made up the federal agenda for the past four years.

Chris Capurso:

With that, that'll wrap it up for today's podcast. Thank you to our audience for tuning in. Don't forget to check out our blogs where you can subscribe to the entire blog or just the specific content you find most helpful. That's the [ConsumerFinancialServicesLawMonitor.com](https://www.consumerfinancialserviceslawmonitor.com) and the [TroutmanFinancialServices.com](https://www.troutmanfinancialservices.com) blogs. While you're at it, why don't you head on over to [troutman.com](https://www.troutman.com) and sign up for our Consumer Financial Services mailing list so that you can stay abreast of current issues and our insightful alerts and advisories, and receive invitations to our industry insider webinars.

Of course, please mark your calendars for this podcast, *Moving the Metal*, which will be releasing every two weeks in 2025. That will be generally on the second and fourth Tuesdays of each month. As always, if you have any questions or if we can help in any way, please reach out to us. Until next time.

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