

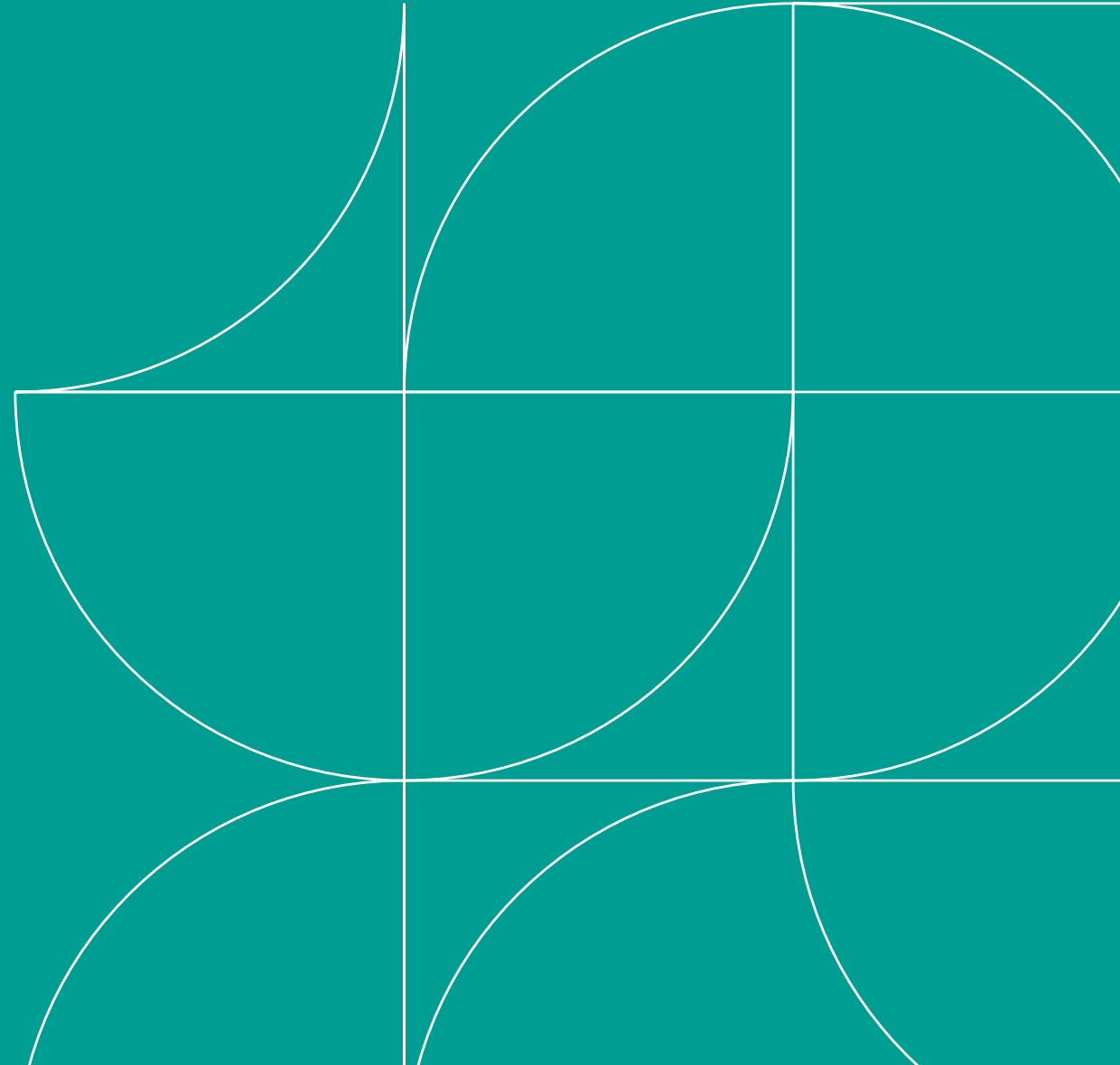


Deeper Dive into the CFPB Taskforce Report Recommendations

Presented by: J. Patrick Kennedy,
James R. Billings-Kang and Michael
E. Jusczyk

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Speakers



Patrick Kennedy
Senior Counsel, Consumer
Financial Services Litigation
Practice Group
Boston



James R. Billings-Kang
Associate, Commercial
Litigation Practice Group
Washington, DC

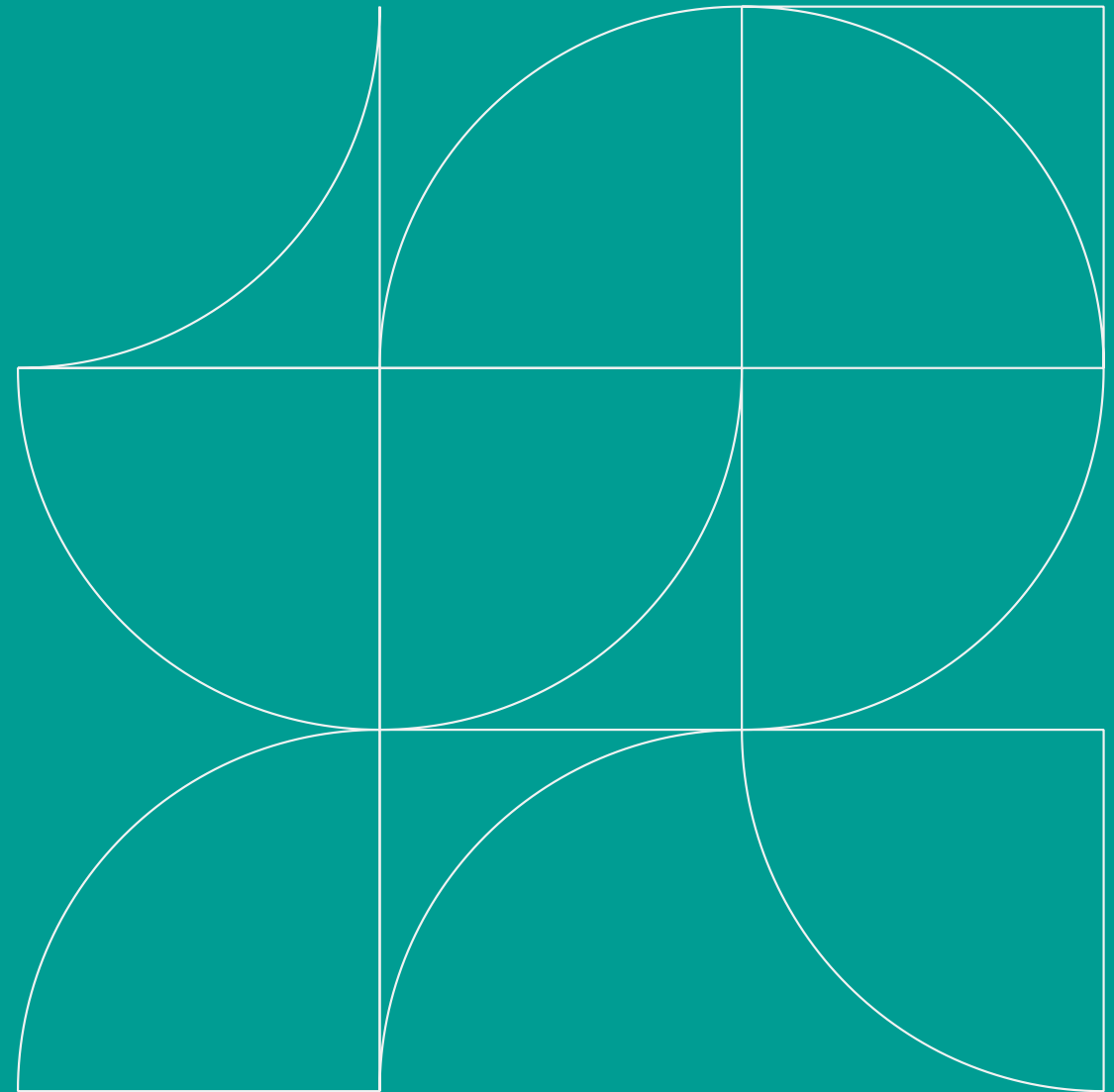


Michael E. Jusczyk
Associate, Consumer
Financial Services Litigation
Practice Group
Boston

Agenda for Today's Webinar

- 01** Background of the Taskforce and its Report
- 02** Legal Challenge to the Taskforce and its Report
- 03** Key Recommendations from the Report
- 04** Predictions for the Report

CFPB Taskforce and its Report: What / When / Why?



CFPB Taskforce and its Report: *What*

- Consisted of **5 Appointed Members** by Trump-Era CFPB Director Kathy Kraninger
- Primarily **Lawyers and Economists** from the Industry Side of the Consumer Financial Products and Services Marketplace
- Taskforce was Launched in January 2020 with a Charge to produce a Consensus Report with a Year

CFPB Taskforce and its Report: What / When / Why?

Director Kraninger gave the Taskforce a broad-based Charge:

- Objective Evaluation to Director regarding the CFPB's current Regulatory Framework
- Examine Legal & Regulatory Framework facing Consumers and Financial Services Providers
- Report of Recommendations to Improve and Strengthen Financial Laws and Regulations

- During 2020:
 - Conducted Research
 - Held Public Meetings
 - Interviewed Market Participants
- CFPB dedicated Staff Members to Assist and Work with Taskforce
- Completed Final Report by the **January 2021 Deadline** despite challenges posed by the COVID-19 Pandemic

Taskforce Workflow and Process

Final Taskforce Report is divided into 2 Volumes: Volume I – Background Info. and Volume II – Recommendations

Report Volume I (800+ Pages of Information)

- Description and Discussion of Consumer Financial Products & Services
- Government Regulation of them
- History of Federal Consumer Law since 1968
- Discussion of Early 1970's Report on Consumer Financial Services Law and Regulation that led to much Legislation
- Provides Background Information, Data, Research, Analysis and Justification for Recommendations in Volume II

vs.

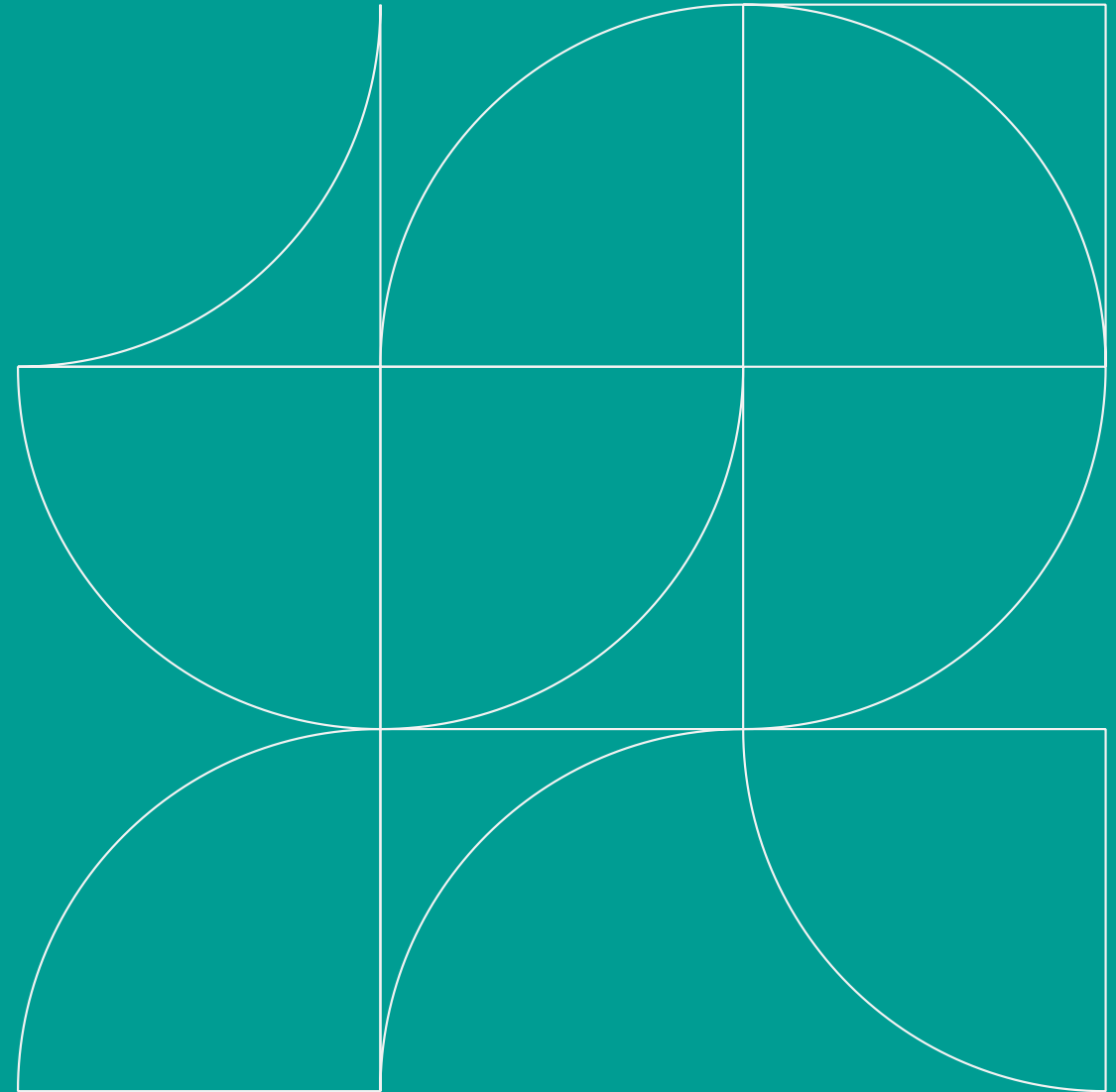
Report Volume II (100 Pages of Recommendations)

- 19 Topical Chapters, Organized Alphabetically
- Challenges and Problems facing CFPB and Market Participants – both Consumers and Industry Product / Service Providers
- Some Recommendations very Detailed and Extensive
- Other Recommendations relatively Focused and Limited

CFPB Taskforce and its Report: *When and Why*

- Taskforce Report Released 2 Weeks Before Inauguration Day
- November 2020 Election – changeover from Republican to Democratic Administration
- President Biden requested CFPB Director Kraninger to Resign: *Seila* Law Supreme Court Decision
- President Biden appointed **Interim Director Dave Uejio**, a Veteran CFPB Staffer
- President Biden nominated **Rohit Chopra as CFPB Director**, currently a Democratic appointed Federal Trade Commissioner
- Chopra awaits a full Senate vote on his Nomination: Voted out of Senate Banking Committee by a split 12 to 12 Vote along Party Lines
- What will Chopra and new CFPB Leadership do with the Taskforce Report?
- Will Legal Challenges Derail any Role it may Play?

Legal Challenges to Taskforce and Report



National Association of Consumer Advocates, *et al.* v. Uejio & CFPB, Case No. 20-cv-11141-JCB (D. Mass)

- Additional plaintiffs: U.S. Public Interest Research Group and Professor Kathleen Engel
- Complaint filed June 16, 2020 alleging violation of the **Federal Advisory Committee Act (“FACA”)**
 - Advisory committee must be **essential** and in the **public interest**
 - A **charter** must be filed after preliminary findings
 - Advisory committee must provide **notice** of meetings, which must be **open**
 - Advisory committee must be “**fairly balanced** in terms of the **points of view** represented and the functions to be performed”
- 4 causes of action: (1) **unlawful creation** of committee; (2) failure to provide **notice** and allow **participation**; (3) failure to disclose committee **materials**; and (4) creation of an **unfairly balanced** committee

Composition of CFPB Taskforce

Plaintiffs alleged that the Taskforce comprised of 5 individuals, none of whom represented the views of **consumer advocates**

- **Todd Zywicki** – Chairman; lobbyist for industry; critical of CFPB
- **Dr. Howard Beales** – industry-focused lobbyist who defends payday loans
- **Dr. Thomas Durkin** – champions payday loans and deregulation w/ Zywicki & Beales
- **William MacLeod** – Kelley Drye lawyer supporting deregulation
- **Jean Noonan** – Hudson Cook lawyer servicing the industry

- Plaintiffs additionally averred that the CFPB **rejected** consumer law experts/advocates like Professor Engel and excluded her views and others supporting **consumer advocacy** through a slanted application/interviewing process
- Concern over **meetings cloaked in secrecy** and inability to meaningfully engage in discussions
- Failure to provide Taskforce **materials**

Request for Declaratory & Injunctive Relief

- Declare that creation and administration of Taskforce violates **APA, FACA, and FACA's implementing regulations**, thereby establishing the Taskforce as unlawful
- Set aside Taskforce **charter, orders, and decisions**
- Enjoin Taskforce from meeting and conducting business
- Order release of all Taskforce materials and creation of **Vaughn index**
- Enjoin CFPB from relying on Taskforce recommendations or advice, *i.e.*, the **Report**

Defendants' Partial Motion to Dismiss, Reply, & Supplemental Briefing

Standing – where is the harm (e.g., informational injury, entitlement to serve on the Taskforce, a Report not to their liking)?
Even assuming harm, what is the redress?

Mootness – controversy is no longer live now that the Report is out and the Taskforce disbanded

- Particularized injury
 - **Informational harm**
 - **Diversion of resources**
 - **Biased selection process**
 - **Exclusion of balanced views**
 - *See NAACP Legal Defense & Educ. Fund, Inc. v. Barr* (Oct. 5, 2020)
- Lawsuit is not moot
 - **Redressability to undo harm** – expenditure of resources to address Taskforce and Report, deprivation of information upon disbanding of Taskforce, and release of biased Report

Plaintiffs' Opposition & Supplemental Briefing

Magistrate Judge Boal's Feb. 25th Ruling

Order Denying Partial Motion to Dismiss

“If . . . the Taskforce was in fact created unlawfully in violation of FACA requirements, then the Plaintiffs have a basis for requesting a declaration that the Defendants’ creation and administration of the Taskforce violated FACA and its implementing regulations; that the Taskforce’s charter and all orders and decisions be set aside; and that the Taskforce be enjoined from meeting, advising the Director, or otherwise conduct business. . . . Similarly, violations of FACA’s requirements can provide a basis for enjoining the use of a committee’s recommendations.”

--Magistrate Judge Boal

- Plaintiffs have **standing** to challenge the:
 - creation of the Taskforce
 - Taskforce’s lack of balance
- Plaintiffs’ claims are not **moot** by virtue of the Report’s release and resignation of the Taskforce members

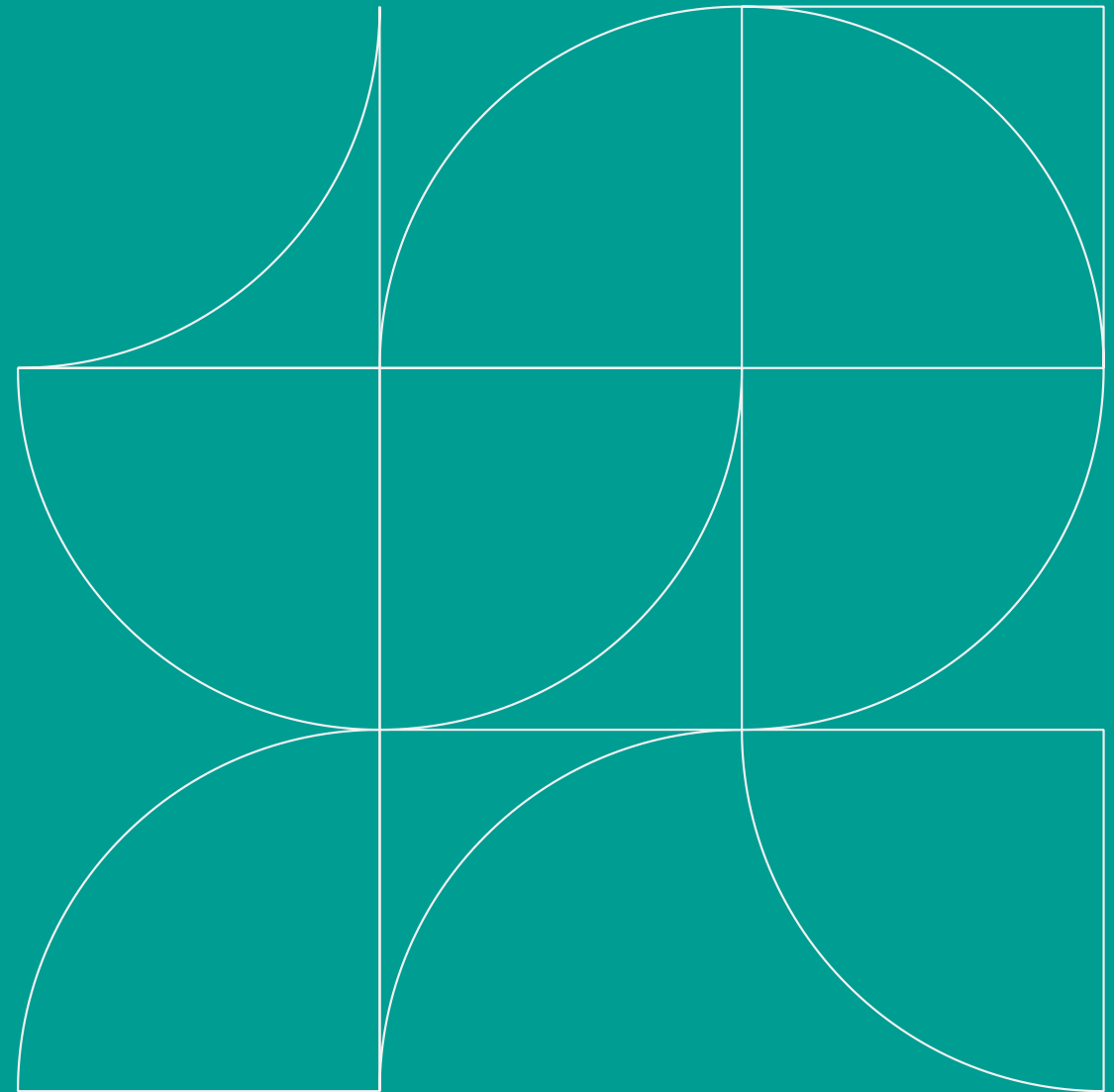
What's Next?

Plaintiffs anticipate filing their **motion for summary judgment** by June 2nd, then Defendants' cross-motion for summary judgment by June 30th, with briefing to end by August 4th.

At the same time, the parties set up this schedule for the purpose of engaging in settlement

NAACP Legal Defense provides insight: to the extent Court grants Plaintiffs' MSJ – **limited use injunction (conspicuous disclaimer)**

Key Recommendations



Animating Principles

“No company can expect to comply perfectly with every aspect of the myriad and often complex rules.”

- Focus on the businesses being regulated
 - business-focused language used throughout
 - Cost-Benefit analysis should “**inform, not justify, policy decisions.**”
- Regulations and Enforcement should focus on **harm** to the consumer
 - as opposed to dictating how businesses are to provide financial services

Animating Principles (continued)

- Consumer Empowerment
 - Bureau can serve consumers by becoming a leader in financial education
 - research and regulate based on how consumers actually make decisions
 - research the effectiveness of Bureau’s past educational outreach
 - research the economic effects of student loans
- Disclosures are often not helpful and consumers are “overwhelmed by blizzard of information”
 - pro forma notice and consent by consumers should not substitute for agency action
- Cost-Benefit Analysis
 - Bureau should examine its past activities and their impacts to understand their effects **on markets**
 - Cost-Benefit analysis should be completed in time to **inform, not justify**, policy decisions

Bureau Reorganization

- **Recommendation:** Reorganize the Bureau in a manner that focuses on each market being regulated, not on the tools the Bureau uses.
- TaskForce acknowledges criticism that the Bureau had been undertaking “regulation by enforcement.”
 - TaskForce also concluded that the Bureau suffers from fragmented oversight
- Potential changes
 - Departments should be dedicated to particular financial **products** or **services**
 - one department should be responsible for oversight of a particular industry from soup to nuts
 - A new Bureau unit should be created to ensure coordination and consistency across markets
 - avoid creating individual fiefdoms

Competition

- Competition should be encouraged to benefit consumers
 - the **cost of doing business** (meaning, compliance with Bureau’s regulations) should be a consideration in determining Bureau’s action
- Steps to be encouraged or considered:
 - regulatory activity to reduce to cost of switching financial providers (e.g., for banking and checking), in order to increase competition and benefit consumers
 - evaluate adopting portions of the European Union’s Open Banking Regime
 - view state licensing laws as barriers to entry that harm competition
 - the Bureau should study the cost (**to providers**) of lending
 - RESPA should be revised to allowed for “packaged settlement” (i.e. one price); Implement and enforce the existing law

Alternative Data

- “Alternative Data” refers to the use of Artificial Intelligence (Machine Learning) to predict risk of default (and prepayment)
- Bureau believes Alternative Data can provide a more real-time picture of cash flow
 - could be especially helpful for thin-file or no-file consumers who would not have been considered for loans under traditional analysis
 - younger consumers expected to benefit the most
- Overall goal is to “increase financial access and inclusion to traditionally underserved customers”

Consumer Credit Reporting (FCRA)

- Regulation V should be expanded and FTC interpretations of the FCRA codified
 - Summaries of consumer rights and notices to end users should be updated
 - FCRA should be amended to cap damages in class actions
- Obligations of CRAs and furnishers in response to disputes should be clarified
 - CRAs report receiving many repeated, frivolous disputes, especially from credit repair organizations
 - Bureau should provide guidance on how to determine if a dispute is frivolous
 - includes supplying examples of frivolous disputes and publishing guidance about how to conduct a reasonable investigation
 - implementing these recommendations would potentially create “safe harbors”
- Bureau should consider guidance to explain how to comply with both bankruptcy rules and FCRA requirements

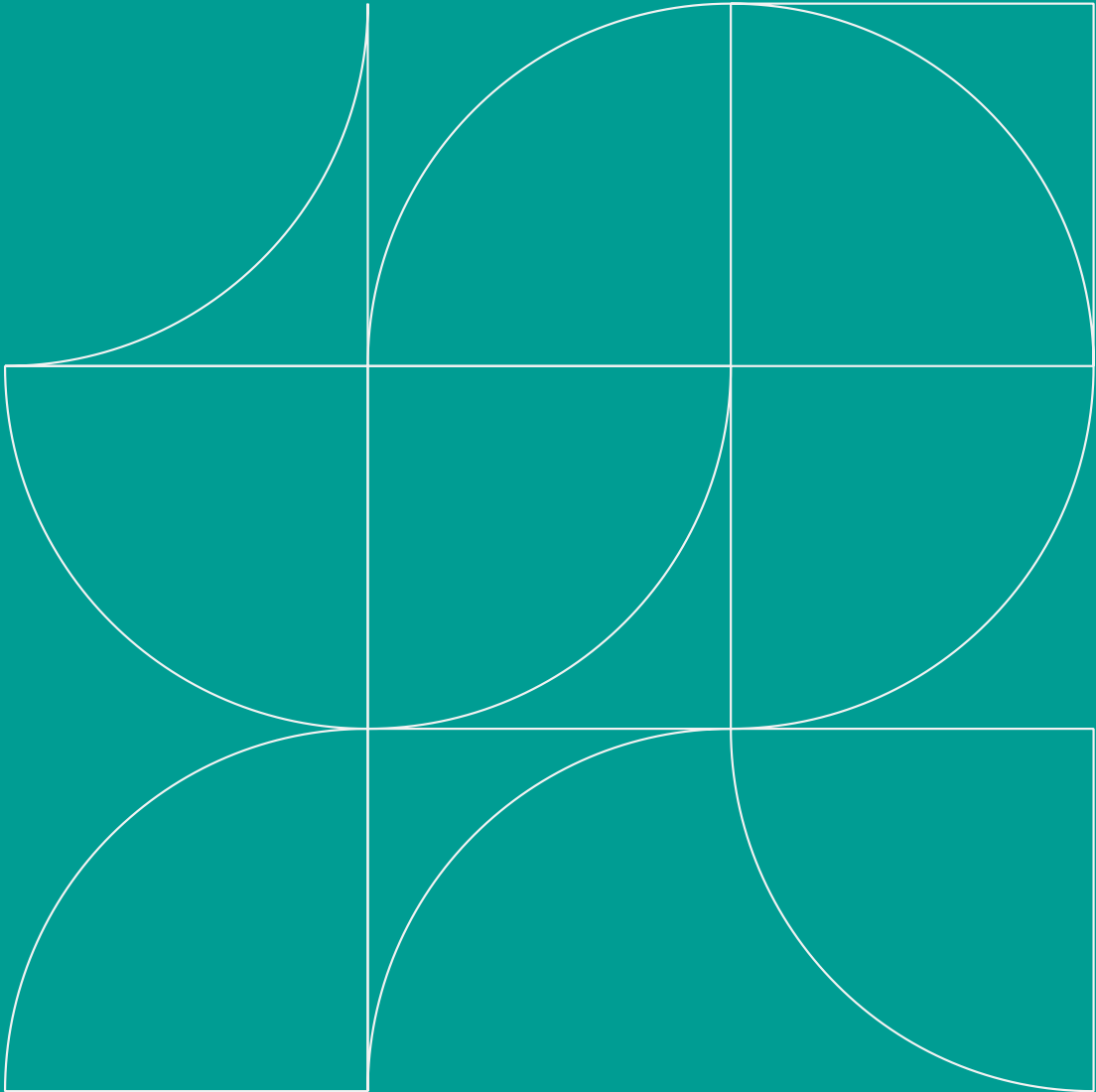
Disclosures

- Bureau considers providing disclosures to be conceptually more attractive than regulation of products and services
- But Bureau is concerned that existing disclosure scheme is not effective and does not educate consumers
 - Warns not to confuse a stack of papers (or computer click-throughs) for consumer understanding
 - Recommends moving away from spelling out exact language in favor of a more flexible, example-based model
 - Regulation Z's credit advertising disclosure requirements should be revised
 - A foreign language disclosure scheme should be developed

Emergency Authority and Enforcement

- The Bureau should be able to relax regulatory requirements during times of a declared national emergency
 - There should be flexibility when the emergency has made compliance with a particular rule impractical
 - The Bureau should be able to provide temporary relief from state laws and regulations, and should explore doing so through its pre-emptive powers
- Enforcement
 - Consumer harm should be the lodestar
 - The Bureau does not expect flawless compliance with all rules and regulations
 - *“No company can expect to comply perfectly with every aspect of the myriad and often complex rules.”*

Predictions



Predictions

- Report is *not binding* on future Bureau action
- **New administration, new focus:**
 - Past Policy Statements have already been rescinded
 - March 11, 2021, the Bureau announced it is rescinding Jan. 24, 2020 “Statement of Policy Regarding Prohibition on Abusive Acts or Practices”
 - *“Going forward, the CFPB intends to exercise its supervisory and enforcement authority consistent with the full scope of its statutory authority”*
 - *“The CFPB has made these changes to better protect consumers and the marketplace from abusive acts or practices, and to enforce the law as Congress wrote it.”*
- Report’s perspectives and recommendations likely to supply ammunition in coming policy debates

**thank
you**

CLE Code: SS-7392

Thank You! Please contact us for more information.



Patrick Kennedy
pkennedy@seyfarth.com
(617) 946-4912



James R. Billings-Kang
jbillingskang@seyfarth.com
(202) 828-5356



Michael E. Jusczyk
mjusczyk@seyfarth.com
(617) 946-8343