

Expect More Regulatory Action From Chopra's CFPB

By **Marci Kawski and Lauren Capitini** (October 28, 2021, 5:43 PM EDT)

After a long-awaited party-line vote, Rohit Chopra was confirmed as the next director of the Consumer Financial Protection Bureau on Sept. 30. As the CFPB enters its next era of governance, the provocative question is "What's to come?"

While certainly one cannot predict with any level of certainty, Chopra did leave behind an extensive record of comments, statements and official communications in and out of his various government roles that provide ample clues to the marketplace regarding his position on a number of key issues. Examining Chopra's record could allow market participants to prepare for what we expect to be a newly invigorated CFPB.

Chopra's communications showcased several themes. Based on those themes, we anticipate the major areas of focus for a Chopra-led CFPB to be as follows:

- Data security;
- Promoting competition;
- Data-enabled consumer discrimination;
- A more robust regulatory toolkit; and
- Meaningful enforcement mechanisms.

To the extent there is one, the common denominator among these various concerns is a more active regulatory posture. We expect this activity to result in not just a faster tempo of regulatory action, but also a broader scope of action that will affect the entire financial services community, from small, niche operators to the largest financial institutions in the U.S.

Data Security

Chopra's public comments on the commercial use of data showcase a deep and abiding distrust of both the means of large-scale data collection as well as the ends to which those data are employed.

For instance, in 2018, Chopra commented in an International Association of Privacy Professionals podcast that "[w]e have got to think hard about this to make sure that the internet was supposed to democratize content and enterprise. And if it is not doing that, that's got to be fixed."



Marci Kawski



Lauren Capitini

Last year, in his capacity at the Federal Trade Commission, Chopra co-authored a statement^[1] urging policymakers

to consider whether there are limits to the amount of data one company can collect and compile, the types of data one company can combine, and the ways in which data can be used and monetized. The scale and scope of data collection that large companies are engaging in has made them — and us — sitting ducks for malicious actors.

Chopra has frequently noted the mutually reinforcing imperatives of data privacy and data security, noting that one cannot be had without the other. He has also framed data security in terms that are far broader than financial services, explaining that the issue is of paramount concern from a national security standpoint.

Simply put, the consumer financial services industry should brace for a raft of mandates, directives and accusations concerning its use of data.

Promoting Competition

As one might expect of a sitting FTC commissioner, Chopra is concerned with competition and has expressed a desire for greater government engagement with shaping market conduct. In several of Chopra's public comments, he noted the importance of promoting a fair market and doing so by setting clear rules of the road.

In his 2020 dissenting statement to the FTC's Zoom Video Communications Inc. decision,^[2] Chopra, who was a commissioner at the time, noted that

[m]arkets benefit when there are simple, clear rules of the road. This allows honest businesses to know what is and is not permissible. This especially helps small businesses and startups. On the other hand, ambiguity helps large incumbents who can hire lawyers and lobbyists to sidestep their obligations.

This, of course, begs the question as to whether a Chopra CFPB will promulgate more rules under its unfair, deceptive or abusive acts and practices rulemaking authority — or it will create clear rules by way of regulation by enforcement.

Furthermore, because Chopra views data as one of the defining commercial inputs of today's economy, many of his views on competition serve as an extension of his data security concerns. In a 2018 interview with the European Data Protection Law Review,^[3] Chopra called the current circumstance an all-hands-on-deck moment in which "[u]nderstanding the intersection between data protection and competition has never been more important."

In the interview, Chopra stated that "[t]he digital economy should not be dominated by a handful of incumbents," and he has signaled elsewhere that some current market practices, such as data hoarding, require greater scrutiny to ensure a more equal footing among market participants.

This is certainly reminiscent of President Joe Biden's July 2021 executive order, in which he stated that "today a small number of dominant Internet platforms use their power to exclude market entrants, to extract monopoly profits, and to gather intimate personal information that they can exploit for their own advantage."

In that same executive order, Biden encouraged the CFPB to promulgate rules implementing Section 1033 of the Dodd-Frank Act, which require lenders to provide account and transactional data to the consumer or her or his agent — e.g., a data aggregator — upon the consumer's request.

The thinking is that easy porting of such data will allow other financial services providers access to the information necessary to compete with the consumer's incumbent financial services provider. There is little doubt that Chopra will use the opportunity to promulgate rules that will, in his view, promote competition.

Data-Enabled Consumer Discrimination

The possible discriminatory use of large-scale data collection is something that has occupied a great deal of Chopra's thought. He has expressed on numerous occasions his misgivings regarding specific technologies that, when coupled with the mining techniques of big data analysis, can have discriminatory effects, including a negative impact on access to consumer credit.

In 2019, Chopra, an FTC commissioner at the time, expressed the following in his comments on the U.S. Department of Housing and Urban Development's proposed rule amending the Fair Housing Act's discriminatory effects standard,[4] known as the disparate impact rule:

The proposed safe harbors rest on the false assumption that it is possible for an algorithm to operate free from bias and that neutral inputs produce neutral outputs. Overwhelming empirical evidence and HUD's own experience prove this is a fallacy.

As evidence thereof, he cited HUD's complaint against Facebook Inc., which "provide[s] an important window into the bias that is baked into algorithms."

According to the complaint, Facebook "collects millions of data points about its users, draws inferences about each user based on this data, and then charges advertisers for the ability to microtarget ads to users" based on those inferences.[5] According to Chopra, "[t]his is a system built to selectively target and exclude people based on predictions about their behavior... [wherein] 'neutral' inputs such as 'likes' on Facebook can serve as a proxy for a protected class, giving ... a green light to discriminate."

Moreover, facial recognition software is one such technology about which Chopra has expressed concern. In prepared remarks before the Asia Pacific Privacy Authorities Forum[6] in December 2020, Chopra derided the shortcomings of such technology that lead to an allegedly high mismatch rate for people of color.

We expect a Chopra CFPB to place a heightened focus on the use of a modern technology and the potential for discriminatory effects. Indeed, at the 10-day mark in his reign as the CFPB's director, he proclaimed at a joint U.S. Department of Justice, CFPB and U.S. Office of the Comptroller of the Currency press conference[7] announcing a redlining enforcement action that the agency will be "closely watching for digital redlining, disguised through so-called neutral algorithms, that may reinforce the biases that have long existed."

Given current events — the effects of the COVID-19 pandemic and the current racial strife — this should not come as a surprise.

More Robust Regulatory Toolkit

Part of the renewed vigor that Chopra would like the CFPB to exhibit involves making sure the bureau is availing itself of all the tools at its disposal. Across the spectrum of administrative activity — from studies and investigations to rulemakings and enforcement actions — Chopra would likely work to ensure that the CFPB is utilizing all possible measures accorded to it by law.

In a statement commemorating the 10th anniversary of the bureau,[8] Chopra said, "[i]f we want a marketplace that works, the public must ensure that regulators use every tool available to rein in firms that abuse their power and break the law."

As a commissioner, Chopra often lamented that the FTC did not have the tools it needed to successfully crack down on illegal practices and, moreover, criticized the FTC for failure to avail itself of the tools it did have.

For example, in his 2020 dissenting statement to the FTC's Zoom decision,[9] Chopra chided the FTC for having "rarely voted to authorize agency staff to sue national players for misconduct" and encouraged the FTC to "do more to safeguard against any perception about the agency's unwillingness to litigate."

At the CFPB, Chopra will have more tools at his disposal. In fact, in his first month as the CFPB director, Chopra issued orders pursuant to Section 1022(c)(4) of the Consumer Financial Protection Act to order Big Tech companies — Amazon.com Inc., Apple Inc., Facebook, Google LLC, PayPal Holdings Inc. and Square Inc. — regarding their payment business plans and practices.

Section 1022(c)(4) of the act gives the bureau authority to gather information regarding an organization, business conduct, markers, and activities of covered persons and service providers for monitoring purposes.

Specifically, the bureau requested the tech companies hand over information pertaining to collection and use data, access policies and consumer protection under laws such as the Gramm-Leach-Bliley Act and Electronic Fund Transfer Act.

Interestingly enough, the orders capture many of the themes highlighted in this article.

Furthermore, Chopra will have access to other tools to explore developing products and services. Sections 1061 and 1062 of the Dodd-Frank Act provide for the CFPB's authority to commission studies in order to explore, according to the CFPB's website,[10] "how consumers interact with financial products and services to help identify potential problems in the marketplace."

In keeping with the foregoing themes, one imagines the CFPB under Chopra would develop studies that examine the collection and use of consumer data, as well as the impact of data harvesting on protected classes of borrowers and the availability of credit. We anticipate these studies would inform rulemaking and may help hone the focus of the bureau.

Section 1062 also provides the CFPB with the authority to conduct trial disclosure programs, such as the Know Before You Owe program, which resulted in the development of Truth in Lending Act and Real Estate Settlement Procedures Act integrated disclosure rules[11] for mortgage lenders. One would expect similar efforts in the near future that would increase the disclosure requirements across many different kinds of consumer lending.

All in all, we expect the CFPB to avail itself of all the tools in its toolbox, including robust enforcement.

Meaningful Enforcement Mechanisms

Finally, we believe that Chopra will take a long, detailed look at mechanisms of enforcement and enforcement priorities at the bureau. Chopra has frequently gone on the record to state his dissatisfaction with what he views as largely ineffectual penalties handed down by financial services industry regulators.

He contends that one of the best ways to deter bad behavior is by making a big splash with big entities; while at the FTC, he indicated a desire "to shift some of [the FTC's] enforcement to focus on firms that have nationwide impact in terms of harming consumers."

He has been publicly critical of the actions by the FTC against Facebook and Google — in Chopra's eyes, the penalties were wholly insufficient. In his dissent to the FTC's In re: Facebook settlement, he stated "[t]he settlement's \$5 billion penalty makes for a good headline, but the terms and conditions, including blanket immunity for Facebook's executives and no real restraints on Facebook's business model, do not fix the core problems that led to these violations."

Part of Chopra's dissatisfaction with the Facebook decision was the failure to hold executives accountable for their actions. This theme repeated itself in several writings — that is, the need to go after the individuals who "[called] the shots."^[12] In a joint statement in 2019 on its TikTok Inc. decision, Chopra, a commissioner at the time, said the following:

When any company appears to have made a business decision to violate or disregard the law, the Commission should identify and investigate those individuals who made or ratified that decision and evaluate whether to charge them.

Additionally, another point of contention in the Facebook decision was the weak penalty and failure to consider ill-gotten gains. This concept of stripping away companies' ill-gotten gains repeats itself often in Chopra's works. In 2019, Chopra criticized the Facebook and Google decisions in a hearing before the U.S. House of Representative's Judiciary Subcommittee on Antitrust, Commercial and Administrative Law^[13] by saying that these decisions

did little to fix the core problems that fueled these companies' data abuses. ... Big fines are not big penalties for the world's biggest companies. As we have seen time and time again, when a company can simply pay a fine from its ill-gotten gains, this isn't a penalty — this is an incentive.^[14]

Compare this to Chopra's praise^[15] in January of the FTC's proposed order with Everalbum Inc., which rebranded as Paravision AI, a company that develops and markets facial recognition technology. Here, the FTC's proposed order required Everalbum to "forfeit the fruits of its deception." In the order, Everalbum was required to delete the facial recognition technologies enhanced by improperly obtained photos. Chopra referred to this component of the order as "an important course correction."

Based on Chopra's comments in the many pages reviewed, we predict a more aggressive enforcement posture (at least against large actors), imposition of higher civil penalties, and the stripping away of any fruit off the poisonous tree. Moreover, if Chopra's comments at the FTC are any indication, we also anticipate a more litigious CFPB under Chopra's reign.

Conclusion

Certainly, the CFPB under Chopra and the Biden administration will be a very different agency from that of the Trump era. While it is unclear if Chopra's directorship would equal or exceed the regulatory zeal of the bureau under former Director Richard Cordray, Chopra has opined on a number of topics — and done so with a frequency — suggesting a much more active bureau under his leadership than what we have seen in several years.

And if month one is any indication, we think we might be right.

Businesses engaged in consumer financial services, especially large industry actors, would do well to prepare now for an expansion in the scope and tempo of the CFPB enforcement by examining current procedures and practices and stress-testing compliance programs against a more constricting set of regulatory requirements.

Marci Kowski is a partner and leader of the consumer financial services practice group at Husch Blackwell LLP.

Lauren Capitini is senior counsel at the firm.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] https://www.ftc.gov/system/files/documents/public_statements/1567795/final_statement_of_rchopra_re_safeguards.pdf.

[2] https://www.ftc.gov/system/files/documents/public_statements/1582914/final_commissioner_chopra_dissenting_statement_on_zoom.pdf.

[3] https://www.lexxion.eu/wp-content/uploads/2019/10/Commissioners-interviews_-Rohit-Chopra-1.pdf.

[4] https://www.ftc.gov/system/files/documents/public_statements/1549212/chopra_-_letter_to_hud_on_disparate_impact_proposed_rulemaking_10-16-2019.pdf.

[5] https://www.hud.gov/sites/dfiles/Main/documents/HUD_v_Facebook.pdf.

[6] https://www.ftc.gov/system/files/documents/public_statements/1585034/chopra-asia-pacific.pdf.

[7] <https://www.consumerfinance.gov/about-us/newsroom/remarks-of-director-rohit-chopra-at-a-joint-doj-cfpb-and-occ-press-conference-on-the-trustmark-national-bank-enforcement-action/>.

[8] https://www.ftc.gov/system/files/documents/public_statements/1578363/chopra_-_statement_on_dodd-frank_anniversary.pdf.

[9] https://www.ftc.gov/system/files/documents/public_statements/1582914/final_commissioner_chopra_dissenting_statement_on_zoom.pdf.

[10] <https://www.consumerfinance.gov/data-research/research-reports/>.

[11] <https://www.consumerfinance.gov/compliance/compliance-resources/mortgage-resources/tila-respa-integrated-disclosures/>.

[12] https://www.ftc.gov/system/files/documents/public_statements/1512078/chopra_-_truth_about_tech_4-4-19.pdf.

[13] https://www.ftc.gov/system/files/documents/public_statements/1549805/chopra_-_opening_statement_at_hearing_on_online_platforms_and_market_power_part_3_10-18-19.pdf.

[14] Of course, as we know, in April of this year, the U.S. Supreme Court handed the FTC a big blow on the ability to collect those ill-gotten gains. In *AMG Capital Management, LLC v. Federal Trade Commission*, 141 S. Ct. 1341 (2021), the Court held that §13(b) of the Federal Trade Commission Act does not authorize the Commission to seek, or a court to award, equitable monetary relief such as restitution and disgorgement. FTC has long relied on such authority to obtain monetary relief directly from courts, but according to SCOTUS, such FTC must go through administrative proceedings, as set forth in §5 of the Act, to obtain relief for consumers.

[15] https://www.ftc.gov/system/files/documents/public_statements/1585858/updated_final_chopra_statement_on_everalbum_for_circulation.pdf.