



Taskforce on Federal Consumer Financial Law Listening Session

*August 31, 2020
10:30am to 11:30am Eastern*

Organization: Treasury Assistant Secretary for Financial Institutions

CFPB Participants: Todd Zywicki, Bill MacLeod, Howard Beales, Nat Weber, Ashlie Tarpley, Jeff Magliato, and Cheryl Parker-Rose

Treasury Participants: Jeffrey Dinwoodie and Robert Greene

Purpose: On Monday August 31, 2020, Taskforce Chair, Todd Zywicki, and Taskforce Members, Bill MacLeod and Howard Beales met remotely via WebEx with Jeff Dinwoodie and Robert Greene of the Department of Treasury as part of the Taskforce's commitment to engage with external stakeholders to gain insights regarding the financial service industry and financial consumer protection laws. The group discussed opportunities to improve, strengthen, and modernize consumer financial protection laws.

Discussion:

1) Introductions:

- a) Jeff Dinwoodie joined the Treasury in July and serves as the Principal Deputy Assistant Secretary for Financial Institutions. Prior to his current role, he served as Chief Counsel for Chairman Clayton at the SEC. During the winter of 2016, he served as an attorney for the presidential transitional team and worked with the Bureau and SEC as part of that effort. Jeff also worked as an associate at Davis Polk, during which time he advised entities on transactions, compliance questions and enforcement issues. Additionally, he served as a staff attorney at the SEC for three years.
- b) Rob Greene joined the Treasury as a Senior Advisor in June 2020. Prior to the Treasury, he worked overseas as a contractor handling issues related to Chinese regulations, financial technology, and telecommunications. He also worked as a consultant on asset management issues, served as a staffer for the House Financial Services Committee, and worked at think tanks for Harvard and George Mason.

2) Regulatory modernization and flexibility (*see discussion prompts*):

- a) The group discussed the concept that failing to update regulations is a policy decision. There needs to be widespread recognition that the regulator/policymaker has to make a

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conscious decision about whether to update, change or modernize a law or continue with the status quo. Both choices are policy decisions. On the one hand, there may not be an opportunity or the bandwidth to update/change regulations; on the other hand, it may be more efficient to punt the issue down the road (e.g. when considering complex policy calls). There should be a recognition that continuing with the status quo is a deliberate choice. This is not to suggest that there is an undue bias toward maintaining the status quo. Instead, it is a recognition that change requires friction and hard work. Things accumulate on the side of the ledger of leaving the status quo because change may require breaking eggs. Deciding to keep the status quo is a decision and should be a decision that weighs all policy ramifications. Inertia is a powerful force. A lot of times there is a recognition that there is an issue but the issue is left unaddressed because the process to try to resolve it drags along. There is no deliberate decision to forgo trying to resolve the issue.

- b) Regulators should be continually looking backward at regulations on the books and aggressively looking forward to what regulations are needed. The idea is to determine if there are new market conditions, new technology, new consumer tastes that might render a regulation unnecessary or warrant amending a regulation, etc. There should be an understanding that the landscape is continually changing. There should be a recognition across the board that there is no end state of regulatory nirvana. Instead, it is a continuous management of regulations with updating and readjusting.
- c) It has been observed that financial regulation is unusually prescriptive. The prescriptiveness could promote obsolescence. There is a Harvard Law Journal article framing out the pros and cons to principal-based v. prescriptive approach to rulemaking. But the subject, in general, evokes thoughts of fairness, due process, and regulation by enforcement.
- d) Regulation by enforcement happens a lot. It's incumbent on regulators to have humility in identifying what the regulations are and if those regulations may be difficult to understand (especially for small entities). This is in opposition to situations in which an entity is making an excuse for noncompliance. When there's a rush to issue regulations, that's when the playing field is muddled and soaks money out of economy because institutions have to pay consultants and others to unwind regulatory mess. Regulators need to give a good, fresh look at whether the regulation is sufficiently clear.
- e) Thematically consistent with the idea of considering whether a rule is difficult to understand is the idea of sub-regulatory guidance. In the context of a given agency, this would mean placing mandatory obligations on the regulated population outside of rulemaking, requirements, and the overall rule process. There are some efficiencies. Sub-regulatory approaches can help shade in and provide more clarity when there's a lack of regulatory clarity. The challenge is when this approach is used to short-circuit tried and true transparent notice of rulemaking. Regulators need to be on the lookout for when sub-regulatory guidance is being abused.
- f) With respect to regulatory fragmentation and duplication, the group discussed the idea of focusing on working within the patchwork system to make it the best possible rather than thinking about magical changes that could be made to the system. One could argue there are too many agencies acting in the regulatory landscape. That's one conversation. But a

realistic point to consider in the meantime is that there is an existing regulatory patchwork, and it's incumbent on agencies to do formal work to coordinate addressing these issues (e.g. Financial Stability Oversight Council). Agencies should continually think about ways to coordinate and connect with other agencies. This is on the staff within these agencies at all levels. They need to think through and have relationships and connectivity. Absent large, wholesale change to the financial regulatory regime, this is probably the best way to make the regulatory framework more effective. The current agency heads are a special group in terms of the level of coordination among their staff. There will always be turf battles. But there should be continued focus on maintaining a level of coordination.

3) On information and education (see discussion prompts):

- a) The group discussed the role of financial literacy and education. There is an essential role of financial literacy. Financial literacy would help address a lot of the issues and conundrums in the financial services market. It unlocks a lot of potential and addresses a lot of underlying issues.
- b) A lot of programs are not that effective even though a considerable amount of money is spent on them, and it's worth considering why that is. Studies have shown that underbanked and other communities that fall outside the financial system do not bank due to: 1) inadequate amount of funds; 2) lack of trust in financial institutions; 3) concerns around privacy; and 4) high account fees. When you think about these four reasons, financial literacy addresses all of them, in part. It's part of a larger philosophy that is an alternative to a top-down approach in which consumers do not have to become educated on a subject and instead rely on federal regulators to look after them. A philosophy that supports financial literacy/education puts the onus on consumers to educate themselves which only works if the federal government provides them with the appropriate tools.

4) On competition and innovation (see discussion prompts):

- a) Issues regarding emerging technology and cyber risks and the protection of data needs to be at the forefront of all conversations. There has been a continued digitalization of our economy, and cyber risk is part in parcel of all of this. With respect to thinking through the protection of data, regulators should consider civil liberties.
- b) It is harmful to society when regulators collect data and create the impression that they have or can get a sense of what is going on in the market with it; but in reality, the data is being collected and funneled but regulators do not have the ability to harness the data and do what they want to with it. This becomes a risk given the amount of data pouring into the agency. An example of this issue can be seen in the Dodd-Frank Act (DFA) in the context of derivatives and transparency around transactions. The Bureau raced to implement the DFA and announced they were collecting swaps data, but the Bureau was only collecting the information not necessarily using it for any real purpose.
- c) With respect to competition, it is essential to think about issues around economies of scale. Regulators should think deeply about the dynamic of having regulatory requirements that might favor large incumbents which may be able to meet the

requirements with greater ease as compared to small or startup firms. There is an ongoing need to be conscious of the dynamics and the role regulations can play in preventing small firms from competing. On the other hand, compliance is the cost of doing business and it is not a valid excuse to say we cannot afford a compliance team or legal counsel. Ignorance of the law is not an excuse. The Treasury looks at scaling regulatory compliance issues to entities and other regulators should too.

- d) The group did not have sufficient information to assess issues regarding scaling BSA/AML regulations and determining the costs and benefits of these regulations.
- e) In the payment space, banks have a big role but not necessarily service providers. There's a question of whether it would be beneficial to pull these types of businesses into regulatory parameters that already exist given there are some existing regulations around certain activities service providers provide. Alternatively, it may make sense to create a new regulatory regime governing these actors. This is an area where there's a lack of federal regulatory fence around these issues, so states have filled in the gap. It's unclear how efficient it is for these entities to have to comply with 50 state requirements. The payment systems area is one Treasury and other banking regulators have been looking into in addition to matters concerning digital currencies and other payments generally.
- f) A 2018 report to the President on FINTECH digs into the payment systems issue and is available here: https://home.treasury.gov/sites/default/files/2018-08/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financials-Fintech-and-Innovation.pdf?mod=djem_b_fintech_20180302.
- g) While Treasury does not have a devoted team that assesses whether certain activity in the financial services market has an anti-competitive effect, two teams at Treasury likely consider these issues. These issues are within the scope of issues considered by the Chief Economist. Also, the Treasury's Office of Financial Institution Policy within the Office of Financial Institutions considers these issues as well.
- h) There is a dearth of competition law or antitrust considerations. SEC has given this a lot of thought over the past year. When there's not an anti-trust component that jumps out in the context of a certain activity, it is easy to dismiss it. On the other hand, it's part in parcel of dynamics that should be addressed. The SEC entered into a Memorandum of Understanding with the DOJ antitrust division regarding the sale of market data. Overall, it would be beneficial for the regulatory community to enhance competition law expertise and continue to think about this issue at large.

5) On inclusion and access (see discussion prompts):

- a) Expanding the payment sphere appears to be a barrier to financial inclusion and a lot of companies know how to make great products for underserved/underbanked communities. Forcing them to have a banking account may be a choke point.
- b) It has been an emphasis of treasury and bank regulators to think through if there are ways in traditional banking systems to create more opportunities for underserved/underbanked communities (e.g. neighborhoods without banks). There is a desire to continue with those efforts in the regulatory banking sphere. There are currently a number of different programs, e.g. Monetary Depository Institutions program and the Community Development Financial Institutions Fund.

- c) The group discussed the positive impact of new technologies that aren't currently regulated providing services similar to banks. There's a lot of focus on unbundling and a lot of value in doing so (e.g. China's payment system). It is tricky to balance the need for regulatory parameters and the desire not to create undue barriers (e.g. in the areas of data, privacy protection, cyber security standards, etc.). A lot of good work can be done. Regulators should think about how to create a more unified licensing regime across the states in the absence of a federal regulatory regime. They should also think through how we can have a less duplicative regulations.
- d) With regard to payment systems in China, these systems are linked to bank accounts. Additional research on these systems can be provided.
- e) The group was unaware of any article or study assessing whether and which consumer protection regulations create a barrier to different groups entering or acting in the financial marketplace.

Potential recommendations:

- 1) The Bureau should create a program to continually assess and review the existing regulatory landscape to determine whether existing regulations are necessary or due for updating and whether additional regulation is needed. (REF: 2b).
- 2) Regulators should consider data privacy and cyber security issues and risks presented by emerging technology as part of all regulatory activities (REF: 4a).
- 3) Regulators should emphasize financial literacy and education and determine which methods for educating consumers work (REF: 3).
- 4) Regulators should avoid collecting data absent a defined purpose and the ability to use the data for that purpose (REF: 4b).
- 5) Bureau should consider scaling regulations and compliance requirements to the characteristics of a regulated entity (REF: 4c).
- 6) Regulators should create a unified regime for innovative technologies providing services similar to banks (REF: 5c)
- 7) Regulators should issue more regulatory guidance (REF: 2e).
- 8) Regulators should continue to identify and focus on opportunities to coordinate regulatory efforts (REF: 2f).

Potential Action Items:

- 1) Research regarding China's payment system regime can be provided.
- 2) Research whether there are Treasury reports regarding the cost of AML compliance and specifically its effect on financial inclusion and whether it has an effect on products/services being provided.
- 3) A Harvard Law Journal article regarding the pros and cons of principal-based versus prescriptive regulation can be provided.