

What To Watch As Biden's CFPB Nominee Faces Senate Panel

By Jon Hill

Law360 (March 1, 2021, 9:54 PM EST) -- When President Joe Biden's nominee to lead the Consumer Financial Protection Bureau faces off with senators at his confirmation hearing Tuesday, concerns about enforcement, pandemic relief, fair lending and more could take center stage.

The Senate Banking Committee will consider Rohit Chopra's nomination to become the next permanent director of the CFPB, which is coming off of several years of Trump-appointed leadership widely seen as favoring deregulation and lighter-touch enforcement.

Chopra, a Democratic member of the Federal Trade Commission, will be answering questions alongside fellow Biden nominee Gary Gensler, who is up for consideration as the next U.S. Securities and Exchange Commission chairman.

With two of the most powerful and prominent federal financial regulatory posts on the line, Joann Needleman of Clark Hill PLC said it could be a toss-up for which candidate gets more attention from the senators.

"Gensler could really be the one who's in the bullseye during this hearing, and not so much Chopra," said Needleman, who sees Gensler as having a more polarizing reputation than Chopra, whose confirmation to the FTC in 2018 was by unanimous consent.

And if last month's House Financial Services Committee hearing on the recent GameStop stock trading drama is any guide, there is likely to be ample interest from senators in sounding off on the episode and drilling Gensler on what the proper SEC response should be. That could distract from questioning of Chopra.

"I just don't think Chopra is a super-controversial pick," said Needleman, who is leader of Clark Hill's consumer financial services regulatory and compliance practice groups. "But I could see Gensler getting hammered by Republicans."

Staying out of the spotlight can work to the advantage of a nominee, minimizing the risk of an unforced error that can catalyze opposition and doom confirmation.

Still, Joseph Reilly, senior counsel at McGuireWoods LLP, said he doesn't believe Chopra will skate through the hearing quietly. Because the CFPB is run by a single director rather than a multi-member

commission like the SEC, Chopra will have more latitude than Gensler to reorient his agency's policies, and this potential for a more dramatic swing toward the left at the CFPB could prove more animating to senators, in Reilly's view.

"As important as the SEC is, I think the change in direction at the CFPB is of more concern to senators on both sides of the aisle," Reilly said. "It's something that a number of the Democratic senators are thrilled about, and it's something that a number of the Republican senators are dismayed about."

How aggressive?

For Democrats, Tuesday's hearing offers a chance to emphasize Chopra's consumer protection bona fides and secure his commitment to advancing the Biden administration's racial equity and economic recovery agenda as director of the CFPB.

Progressives see an urgent need to reinvigorate the agency after the exit of its former Trump-appointed director, Kathleen Kraninger, whom Democrats and consumer advocates often accused of being too lax in enforcement and weakening safeguards for consumers through regulatory rollbacks.

Chopra, by contrast, who has argued for making expansive use of enforcement authority in his past writings at the FTC, is expected to revive the hard-charging style of industry oversight seen under the agency's Obama-appointed first director, Richard Cordray.

"[Chopra] would probably be the most aggressive bureau director that could be confirmed," said Gregory Lisa, a former CFPB enforcement attorney who is now a partner at Hogan Lovells. "He's definitely very enforcement-minded, which I think could be a dramatic move for the bureau."

That could delight progressives, but it could also provide Republicans with a strong line of attack against Chopra, allowing them to paint him as dangerously anti-industry in a way that could backfire on consumers at a time of unprecedented economic precarity.

"The industry is very concerned that we're going back to the bureau of the past," Needleman said. "Number one, that means regulation by enforcement."

Cordray was often criticized by Republicans and industry for engaging in so-called regulation by enforcement, which refers to the practice of using targeted enforcement actions to advance legal interpretations and articulate new industry standards rather than using guidance or rulemaking.

Companies may not feel they have been given fair warning of what conduct constitutes a violation in such circumstances, as has often been the complaint about the CFPB's use of its relatively novel authority to bring claims for abusive conduct.

"I imagine you're going to get questioning, at least from one side of the aisle, on 'regulation by enforcement' and the use of abusiveness [claims] in enforcement actions," said Ori Lev, a partner in Mayer Brown LLP's financial services regulatory and enforcement practice and a former CFPB deputy enforcement director.

"I would also expect questioning about individual liability and individual liability at bigger companies, which we have not seen to date from the CFPB," Lev added.

COVID-19 and beyond

In many ways, the shift away from Kraninger has already begun. Since she stepped down in January, for example, the CFPB's Biden-appointed interim director, Dave Uejio, has pledged to ramp up supervision and enforcement, stressing a need for "bold and swift action" to address racial equity and to make sure consumers are getting adequate help from financial firms during the COVID-19 pandemic.

Uejio has also moved to reverse or reconsider certain Trump-era policies, most recently announcing plans to delay and potentially overhaul aspects of the "qualified mortgage" underwriting rules completed at the end of Kraninger's tenure.

But how closely those priorities align with Chopra's is a key question heading into Tuesday's confirmation hearing, according to financial services attorneys who spoke to Law360.

"Acting Director Uejio has provided a lot of material for senators on both sides of the aisle," Reilly said. "He hasn't just been a caretaker at all, and what I would like to see Chopra address is the extent of his agreement with the policy changes that Uejio has already effectuated and what his future plans are."

Chopra will hint at his priorities when he delivers his opening remarks, according to an advanced copy released on Monday.

Highlighting the pandemic's devastating economic impact on many struggling consumers, Chopra will flag concerns about the potential for erroneous credit reporting as well as unlawful foreclosures while vowing to "approach the agency's mission with an open mind and attuned to market realities."

"In the mortgage market, fair and effective oversight can promote a resilient and competitive financial sector, and address the systemic inequities faced by families of color," Chopra plans to say. "Perhaps most importantly, administration of consumer protection laws can help families navigate their options to save their homes."

But attorneys said they expect senators to push Chopra on what exactly his vision for pandemic response entails.

"They're going to focus a lot on the Democratic side on how consumers were treated by the financial services sector during COVID," Needleman said.

Democrats may also seek reassurances that Chopra will restore enforcement powers stripped from the CFPB's fair lending office during the Trump administration and ask what other concrete steps he would take to address racial disparities in consumer financial services.

Uejio, for his part, has suggested that additional fair lending enforcement alone won't cut it, calling for the agency to widen its perspective to "identify and root out unlawful conduct that disproportionately impacts communities of color and other vulnerable populations."

Reilly said such comments could provide a jumping-off point for lawmakers on both sides of the aisle to explore what role Chopra believes the CFPB can play on racial equity issues.

"It's very clear that disparate impact liability under the Equal Credit Opportunity Act is going to become a top enforcement priority at the bureau again, so institutions are going to need to make sure that their

fair lending programs can withstand scrutiny," Reilly said. "But what else does he have in mind?"

Chopra could additionally be pressured to preview his plans for various rulemakings finalized under Kraninger that connect to broader concerns about household finances in the wake of the pandemic. Those include the qualified mortgage rules that Uejio has slated for a compliance date delay as well as last year's mammoth package of debt collection rules, which could also be up for review.

Whether Chopra would pursue new payday loan underwriting standards to replace those that Kraninger officially eliminated last year could likewise come up in that questioning.

"[Democrats] are going to want to know what he's going to do with payday because it's been such a political football," Needleman said.

Senators may also try to draw Chopra into the debate between progressives and the White House over whether Biden should invoke executive authority to grant sweeping cancellations of federal student loan debt of up to \$50,000 per borrower.

Chopra, who served as the CFPB's first student loan ombudsman under Cordray, has previously sounded warnings about the dangers of rising student debt levels and the burdens they place on borrowers, but Lisa noted that the forgiveness debate could prove too much of a political minefield for the nominee to wade into.

"I think he would say regardless of what happens with forgiveness of student debt, I can assure you that debt collection, especially student loan debt, is going to be done properly on my watch," Lisa said.

--Editing by Bruce Goldman.