



MEMORANDUM

TO: Federal Financial Analytics Clients
FROM: Karen Petrou
DATE: October 31, 2022

There is little question that electoral politics powered the President's launch last week of a new Administration "junk-fee" campaign. How most of these fees matter to the majority of households fuming as they can't handle prices at the food store and fuel pump is yet to be seen, but politics is only part of the reason for the CFPB's high-priority blitz against "surprise" fees". Politics is easily understood, if not practiced to maximum advantage. Regulatory actions founded on moral philosophy are not only a compliance conundrum, but also an intellectual quandary.

Question for today's class: is it right for Rohit Chopra to set rules regardless of the niceties of the rulemaking process when he believes certain acts or practices violate the natural rights of the U.S. citizenry? This may seem a hyperbolic description of the CFPB's spate of enforceable pronouncements, but it's the way I read many of them.

Take for example the latest edict on overdraft fees. As FedFin's in-depth analysis will detail later today, the CFPB's circular details a raft of laws and rules governing overdraft fees, going on to say how nice they all were but how little they matter anymore.

Because technological delivery can, the CFPB says, obscure fund availability, the Bureau concludes that fees which comply with every provision of each applicable law and rule are still unfair, deceptive, and/or abusive. Disclosures that comply with every provision in each law and rule also no longer suffice, the Bureau believes, and thus depository institutions have an obligation – indeed, a moral imperative – to protect consumers from fees the Bureau believes they cannot reasonably avoid because neither law nor rule now gives them the information and then the power necessary to do so. As a result, banks that dot all i's and cross all t's are still evil-doers if certain overdraft fees are charged.

I won't dispute the fact that finance moves fast and current disclosure practices are replete with information asymmetry that benefits the provider. But the consumer depredations the CFPB now sanctions are at least as much the fault of outmoded law as immoral banks. Perhaps more than any other business charter, banks are built for compliance, not innovation. Squadrons of expensive lawyers and compliance staff scrub each policy and procedure, and senior management and boards of directors are responsible for reviewing them – that's what laws and rules say and that's what most banks do. There are outliers and bad actors, but that is an enforcement failure, not a moral dilemma. Thus, it's not so much that banks are miscreants – even the CFPB acknowledges that they are following the rules. Rather, it's that the rules are no good anymore and banks must thus be better.

It's easy to throw stones at the CFPB for its flagrant disregard of due process. It's not as straightforward to chastise it for what is essentially a civil-disobedience construct for consumer-finance regulation.

Rohit Chopra is essentially saying that law and rule may be disregarded because they have failed to protect the most vulnerable against market depredations that victimize those the federal government is sworn to protect. He is, in essence, lying down in the middle of the road to protest an action – think what was once lawful lunch-counter discrimination – to force change without first changing law.

Putting the surprise-overdraft fee rule in the hallowed context of courageous civil-rights protests is indeed a stretch. However, the essence of moral philosophy is reasoning from the obvious to the obscure to understand the difference between those who justly defy the state and those who take the law into their own hands.

The CFPB's position on this moral spectrum is ambiguous because the CFPB now both makes rules and breaks them. This gives Mr. Chopra a unique position of power both to throw himself in the middle of a road and to stop traffic with the authority of a policeman on the beat.

Without consulting the public before taking sweeping action, Mr. Chopra is the sole arbiter – some might say dictator – of financial policy across the broad sweep of the jurisdiction he grandly surveys. If the Bureau's analysis – i.e., that none of its actions has perverse consequences – proves right, then the U.S. will have a consumer-finance system fit both for purpose and the public good. In short, the happy result of a consumer-finance benevolent despot. But, if Mr. Chopra's judgment errs, then one man will leave consumer finance much the worse for all this hard wear.