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Toomey: Under Chopra, CFPB is More Out of Control Than Ever Before

Washington, D.C. – In his opening statement at today’s U.S. Senate Banking Committee hearing, Ranking Member Pat Toomey (R-Pa.) said that under Director Rohit Chopra’s leadership, the Consumer Financial Protection Bureau (CFPB) is abusing and exceeding its authorities to pursue a far-Left agenda.

Pointing to Chopra having both discarded the rulemaking process for a controversial new regulation and rigged procedural rules against businesses accused of wrongdoing, Senator Toomey said its past time for Congress to bring accountability to the CFPB by making it subject to the appropriations process and enacting other needed reforms.

Ranking Member Toomey’s remarks, as prepared for delivery:

Mr. Chairman, thank you.

The CFPB began its existence under the Obama administration as a lawless and unaccountable agency. Unfortunately, under Director Chopra, the CFPB is more out of control than ever before. It’s once again pursuing a subversive far-Left agenda by abusing—and exceeding—its authorities.

Three weeks ago, the CFPB announced an unprecedented claim of new authority, without congressional authorization or even a public notice-and-comment rulemaking process. Rather, it simply issued a fiat. The CFPB claimed the authority to sue financial services providers for discrimination without any evidence of discriminatory intent.

Now, I want to make clear that Congress charged the CFPB with enforcing laws that protect against discrimination in consumer finance. The CFPB should enforce those laws.

But that’s not what it’s doing here. Instead, the CFPB unilaterally decided that Dodd-Frank’s grant of authority to prevent unfair, deceptive, or abusive acts or practices, known as UDAAP, now includes disparate impact liability.

The idea of disparate impact liability is that a statistical difference in outcomes between demographic groups is proof of discrimination even when there is no discriminatory intent. For example, if more Asian than Hispanic customers use a bank’s overdraft service, and thus pay more in overdraft fees, the CFPB could claim the bank’s overdraft policy has a disparate impact, and issue harsh punishments.

In many American households, women manage the checkbook, so in theory the CFPB could claim overdraft policies have a disparate impact on women. In the past, when overseeing auto-lenders, the CFPB has “discovered” discrimination even on the part of lenders who didn’t know the race of the borrowers they were accused of discriminating against.

The problem is Dodd-Frank did not authorize disparate impact liability under UDAAP. In the 12 years since Dodd-Frank was enacted, the CFPB has never claimed that the law did. And Congress never contemplated that it would.

That’s because Dodd-Frank’s unfair acts or practices language was taken from the Federal Trade Commission Act of 1914. And for a century, the FTC has never once treated that language as including disparate impact liability.

To make matters worse, the CFPB implemented this controversial change in law without an open and transparent rulemaking. Instead, the CFPB issued a press release announcing it had updated its supervision manual.

This is all particularly troubling given the Obama CFPB’s controversial history with disparate impact enforcement against lenders under the Equal Credit Opportunity Act. That enforcement campaign was not authorized by statute and was based on bad data and a fatally flawed methodology. This notably led Congress to overturn the CFPB’s disparate impact guidance for auto lending in 2018.

Now, invoking UDAAP, the CFPB is attempting to supervise for disparate impact not only in lending, but in all consumer financial services and products—in effect extending the very policy that Congress recently overturned. A harmful consequence of this unauthorized stealth rulemaking is that it will create tremendous uncertainty among regulated entities.

Every decision and action businesses take, including even their advertising and marketing, may subject them to disparate impact liability, despite their often having no way of knowing whether a disparate impact will occur. Unfortunately, we can expect the CFPB to continue disregarding its rulemaking obligations in the future.

The CFPB recently changed its rules of adjudication to make it easier to engage in regulation by enforcement. This grossly unfair practice occurs when agencies fail to set clear rules of the road before bringing enforcement actions.

Under these new rules, Director Chopra can bypass an administrative law judge in enforcement cases and rule directly on substantive legal issues. As a result, he can now authorize his staff to bring an enforcement case based on a novel legal theory and then he can personally rule that it’s a valid theory.

These are not the only examples of the CFPB’s overreach under Director Chopra. He has consistently sought to involve the CFPB in competition and antitrust law, which is outside its

jurisdiction.

For example, the CFPB has falsely justified its campaign against bank overdraft fees as a means of “promoting competition.” And it has demanded information from tech companies operating payment systems to examine whether they’re acting “anticompetitively.”

At the same time, the CFPB is taking actions that will harm competition. It has proposed an overly burdensome data collection rule for small business lending that will likely increase credit costs and adversely affect competition by driving lenders out of the market.

Unfortunately, the CFPB is not the only agency that’s out of control because of Director Chopra. Last year, he helped lead a hostile and illegitimate takeover of the FDIC, where he sits on the board.

Director Chopra and FDIC Director Marty Gruenberg—whose FDIC term expired over three years ago—took unprecedented actions to force out FDIC Chairman Jelena McWilliams.

Upon seizing control, they are now using the FDIC to advance their left-wing partisan agenda. In the process, they recklessly destroyed institutional norms built up over the FDIC’s 88-year history, and severely damaged the longstanding principle that financial regulators should operate free from partisan politics.

King Louis XIV famously said, “L’etat c’est moi,” meaning “I am the state.” All political authority rested with one man. It seems the CFPB under Director Chopra believes it has similar authority.

Under Director Chopra, the CFPB is more out of control than ever before, and the contagion is spreading. It’s past time for Congress to bring accountability to the CFPB by making it subject to the appropriations process and enacting other needed reforms. The current Congress won’t do that. The next one should.