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EXPERT ANALYSIS

Will the CFPB Continue Under The Trump Administration?

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Republicans and others in the consumer finance industry often complained that the Consumer Financial Protection Bureau is an unaccountable agency with overreaching regulatory authority. Those critics say the CFPB has harmed consumers by hampering the ability of banks and other financial institutions to make consumer loans.

During his campaign, President Donald Trump pledged to eliminate what he characterized as stifling regulations, including those aimed at the financial sector. Trump's transition team has stated that one of its goals is "to dismantle the Dodd-Frank [Wall Street Reform and Consumer Protection] Act [of 2010] and replace it with new policies to encourage economic growth and job creation."[1]

Evisceration of the Dodd-Frank Act would take congressional action and is unlikely to occur in the short term But based on Trump's stated goals and long-standing complaints by Republicans and others opposed to the power wielded by the CFPB, it is reasonable to expect there will be some effort to rein in the agency's scope and reach.

This effort may include replacing Director Richard Cordray, restructuring the leadership of the agency and moving the CFPB from its independent position within the Federal Reserve to a position within the executive branch controlled by the president.

If you were the CFPB, you would likely be fearful for your health and well-being — if not for your life. After all, the dominant political party in America has fundamental misgivings about your raison d'être . At least one federal court has opined that your leadership structure is unconstitutional.

Also, the new administration has expressed strong misgivings about the cost and burden of government regulation in general and of your agency in particular. Can the CFPB survive? If so, can it regulate effectively?

OVERVIEW OF THE CFPB

The CFPB was created as an "independent bureau" in the Federal Reserve System by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 in response to the financial crisis and resulting economic recession of the late 2000s.

The CFPB's operating budget is set as a percentage of the annual earnings of the Federal Reserve System and is not appro-priated by Congress. The CFPB is headed by a director, who is appointed by the president and confirmed by the Senate, whose term is five years and who, according to the statute, cannot be removed except for cause.

The CFPB's purpose is to implement and enforce federal consumer financial laws to ensure that "all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."[2]

The primary functions of the CFPB are to educate consumers, investigate consumer complaints, monitor financial markets, and enforce consumer protection laws. The agency has sweeping authority to adopt and enforce substantive rules and regulations "as may be necessary or appropriate to enable the bureau to administer and to carry out the purposes and objectives" set out in the Dodd-Frank Act.[3]

The CFPB is authorized to conduct enforcement actions and adjudication proceedings "with respect to any person" to ensure compliance with the consumer protection provisions of the Dodd-Frank Act, including any rules prescribed by the CFPB, and "any other federal law that the bureau is authorized to enforce … unless such federal law specifically limits the bureau from conducting a hearing or adjudication proceeding and only to the extent of such limitation."[4]

The CFPB may also commence a civil action, in its own name, in a U.S. district court or in any state court of competent jurisdiction in which a defendant is located or is doing business, against any person who violates a federal consumer financial law, "to impose a civil penalty or to seek all appropriate legal and equitable relief."[5]

The reach of the CFPB is broad.[6] Although certain entities are excluded from CFPB oversight (such as depository institutions with $10 billion or less in assets, real estate brokers, auto dealers, and those subject to securities, insurance and commodities regulation), there are a vast array of "persons" who are or may become subject to CFPB supervision and enforcement.

Ninety percent of the reported relief provided by the CFPB was recovered from entities charged with illegally deceiving consumers.

Indeed, the CFPB has supervisory authority over non-banks — regardless of size — that operate in certain specific markets. These include mortgage companies (originators, brokers, servicers, loan modification providers and those that provide foreclosure relief services), payday lenders and private education lenders.

Additionally, the CFPB has entered into memoranda of understanding with state attorneys general, the Justice Department and other regulatory authorities to conduct joint enforcement activities.

From its inception through fiscal year 2015, the CFPB initiated about 122 enforcement actions and obtained $11 billion in consumer redress and debt forgiveness.[7]

Ninety percent of the reported relief was recovered from entities charged with illegally deceiving consumers, and 90 percent was recovered in collaboration with other state or federal agencies.[8]

The CFPB reported that in fiscal year 2016, it provided $58 million in redress to 516,000 consumers through supervisory actions and collected $55 million in civil money penalties through enforcement actions.[9]

In 2014 the CFPB's enforcement focused on auto lending, credit cards, debt collection, mortgages, payday lending and student financial aid. In 2015 the agency continued to focus on those areas while adding credit reporting and telephone billing to its list. In 2016 the CFPB added pawn brokers and, through its authority over UDAAP — unfair, deceptive or abusive acts or practices — data security issues to its enforcement focus.

CHANGES TO LEADERSHIP STRUCTURE AND OPERATIONS

In a letter sent to Senate Majority Leader Mitch McConnell, R-Ky., and Senate Minority Leader Chuck Schumer, D-N.Y., the Consumer Bankers Association, Credit Union National Association, Independent Community Bankers of America and National Association of Federal Credit Unions urged Congress to pass legislation to create a five-member commission to run the CFPB.

This proposed change is part of the Financial CHOICE Act, which stands for Creating Hope and Opportunity for Investors, Consumers and Entrepreneurs. The bill was released in July 2016 by House Financial Services Committee Chairman Jeb Hensarling, R-Texas, and passed by the committee in September to replace the Dodd-Frank Act. The bill is expected to be reintroduced early this year.

Additionally, it has been reported that three Republicans senators have introduced another bill (S. 105) that would change the CFPB's leadership structure to a five-person commission, like the leadership of the Federal Trade Commission, Securities and Exchange Commission, and Consumer Product Safety Commission.[10]

The suggested transformation into a bipartisan commission likely would lead to more political deliberations before actions are taken as well as a more measured view of enforcement actions.

In addition to changes to the CFPB's leadership structure, passage of the CHOICE Act would make the CFPB subject to funding through appropriations, rendering it directly accountable to Congress. The CHOICE Act would also require the CFPB to verify the facts of complaints before publishing them and to formalize the procedure for issuing written opinions.

In addition, the CHOICE Act would exempt strongly capitalized banks from certain regulations, provide regulatory relief for community banks and credit unions, and repeal the CFPB's authority to prohibit financial services and products the CFPB deems "abusive."

IS CFPB DIRECTOR ON BORROWED TIME?

Regardless of whether Congress changes the structure of the CFPB, Trump reportedly interviewed former U.S. Rep. Randy Neugebauer, a Texas Republican, for the job of director of the CFPB — even though the current director, Richard Cordray, has stated that he has no intention of stepping down.

Cordray's term does not expire until 2018, and under the Dodd-Frank Act, he can be fired only "for cause."

There has been no indication that the Trump administration would seek to remove Cordray for cause, but it may rely on a recent decision by the District of Columbia U.S. Circuit Court of Appeals to contend that he can be removed even without it. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016).

In *PHH* the D.C. Circuit ruled that that the CFPB's single-director/removal-only-for-cause structure is unconstitutional because it violates the U.S. Constitution's separation of powers.

As a remedial measure, the court severed the removal-only-for-cause provision from the Dodd-Frank Act, giving the president "the power to supervise and direct the director of the CFPB" and to "remove the director at will at any time."

The court stated that the CFPB is no longer an "independent agency" and instead, "now will operate as an executive agency."

The mandate issued in *PHH* has been stayed until the D.C. Circuit rules on the CFPB's petition for rehearing en banc. Under the court's rules, if en banc review is granted, the panel's judgment — but not necessarily its opinion — will be vacated.

Thus, the Trump administration could still take the position that the CFPB is now an executive agency whose director can be removed at the president's will.

Of note, however, is that a group of Democrats from the House of Representatives authored a letter to Trump praising Cordray and requesting that he not be removed.[11] Schumer, joined by fellow Democratic U.S. Sens. Sherrod Brown of Ohio and Elizabeth Warren of Massachusetts, delivered a more direct message to Trump, saying, "Do not tell Richard Cordray he's fired."[12]

Additionally, the Leadership Conference on Civil and Human Rights, National Association for the Advancement of Colored People, National Council of La Raza and National Urban League have issued a joint statement applauding and pledging their support to Cordray.[13]

MORATORIUM ON RULEMAKING

On Jan. 20, White House Chief of Staff Reince Priebus sent a memorandum to executive agencies directing them to temporarily put a hold on all rulemaking.

According to the memorandum, which effectively operates as a moratorium, agencies are prohibited from sending any new regulation to the Office of the Federal Register until an agency head, appointed by the new administration, reviews and approves it.

The moratorium also requires that regulations already submitted to the OFR, but not yet published in the Federal Register, be withdrawn and that implementation of regulations already published but not yet in effect be postponed for 60 days.

Additionally, on Jan. 30, Trump signed an executive order requiring that for every new regulation enacted, two existing regulations must be abolished. The agencies will have to submit their proposed cuts and enactments to the Office of Management and Budget for review.

There is a question, however, as to whether the moratorium and executive order apply to the CFPB and the regulations it penned in 2016. Those regulations include the rule on prepaid accounts under the Electronic Fund Transfer Act and Truth in Lending Act (published Nov. 22, 2016, and effective Oct. 1), the amendments to the 2013 mortgage servicing rules under the Real Estate Settlement Procedures Act and TILA (published Oct. 19, 2016 and effective Oct. 19), and proposed rules concerning mandatory arbitration and payday loans.

At its inception, the CFPB was considered an "independent agency," not an executive agency.[14] But independent agencies usually succumb to a new administration's directives out of respect. In this instance, according to an interview with Cordray conducted by reporters for The Wall Street Journal, CFPB lawyers are "still digesting" the applicability of the freeze on the CFPB.[15]

Based on President Donald Trump's stated goals and others opposed to the power wielded by the CFPB, it is reasonable to expect there will be some effort to rein in the agency's scope and reach.

The Trump administration's position on the application of the Jan. 20 memorandum and the Jan. 30 executive order to the CFPB likely will be revealed by the president's actions regarding Cordray's term. If Trump attempts to remove Cordray while the *PHH* appeal is pending (and takes the position that he can remove Cordray without cause), he will have sent a clear message that he considers the CFPB an executive agency that is required to comply with the memorandum and the executive order.

CHANGES IN ENFORCEMENT

Should changes to the CFPB result in a decrease in enforcement actions on the federal level, Democratic state attorneys general likely will take a more active role in enforcement.

Several federal consumer financial protection laws, including the Truth in Lending Act, the Fair Credit Reporting Act and the Real Estate Settlement Procedures Act, provide state attorneys general with enforcement authority.

In addition, those state attorneys general can be expected to take a more aggressive approach to enforcement of state laws, which often include provisions stating violations of federal law are deemed to be violations of state law.

As a consequence, the issue of which state laws are preempted could take on heightened significance. This is because when enforcing state law, state attorneys general may bring civil actions against national banks or federal savings associations to enforce state laws that are not preempted.

Such authority is expressly provided by the Consumer Financial Protection Act, which codified the U.S. Supreme Court's 2009 decision in *Cuomo v. Clearing House Association LLC*, 557 U.S. 519.

WHAT DOES IT ALL MEAN?

It is difficult to envision a more uncertain future for an agency than the one that the CFPB faces. Nonetheless, the CFPB remains one of the primary agencies charged with federal consumer protection. Administrative agencies form a virtual fourth branch in our government, with independent agencies being the most powerful of the lot.

Although the CFPB may lose its independence and even be forced to fight for its existence and authority during the tenure of a regulation-averse government, it is hard to imagine that the agency will not continue to institute enforcement actions and monitor the consumer financial industry so long as the Dodd-Frank Act endures. But if Dodd-Frank Act dies, all bets are off for the CFPB — and for federal consumer protection as we now know it.

NOTES

[1] Brent A. Sutton, *8 questions about the future of banking regulation under Trump*, Wash. Post, Nov. 23, 2016, http://wapo.st/2k49XKV.

[2] 12 U.S.C.A. § 5511(a).

[3] 12 U.S.C.A. § 1022(b)(1).

[4] 12 U.S.C.A. § 5563(a).

[5] 12 U.S.C.A. § 5564

[6] The federal financial laws over which the CFPB has authority include the following: the Alternative Mortgage Transaction Parity Act, Consumer Leasing Act, Electronic Fund Transfer Act, Equal Credit Opportunity Act, Fair Credit Billing Act, Fair Credit Reporting Act, Fair Debt Collection Practices Act, Federal Deposit Insurance Act (subsections (b) through (f)), Gramm-Leach-Bliley Act (Sections 502 through 508, Privacy of Consumer Financial Information), Home Mortgage Disclosure Act, Homeowners Protection Act, Home Ownership & Equity Protection Act, Real Estate Settlement Procedures Act, SAFE Mortgage Licensing Act, Truth in Lending Act, Truth in Savings Act, Section 626 of the Omnibus Appropriations Act of 2009, Interstate Land Sales Full Disclosure Act, and those set out in the Dodd-Frank Act, including the "unfair, deceptive, or abusive act or practices" (UDAAP) provisions of Dodd-Frank's Title X.

[7] Xhevrije West*, Five Years In, a CFPB Progress Report,* DS News, May 19, 2016, http://bit.ly/2knr2jT.

[8] *Id.*

[9] *See* Consumer Fin. Prot. Bureau, Semi-annual Report of the Consumer Financial Protection Bureau (June 30, 2016), http://bit.ly/2areEh4; Consumer Fin. Prot. Bureau, Semi-annual Report of the Consumer Financial Protection Bureau (Dec. 16, 2016), http://bit.ly/2lpc7FT.

[10] Ben Lane, *Senate Republicans unveil bill to replace CFPB director with committee. Will the third time be the charm?*, Housing Wire, Feb. 1, 2017, http://bit.ly/2kuzZLE.

[11] Letter from Maxine Waters, U.S. Rep., et al. to President Donald Trump (Jan. 9, 2017), http://bit.ly/2kQFQbS.

[12] *Schumer to Trump: Don't fire U.S. consumer agency's head*, Reuters, Jan. 17, 2017, http://reut.rs/2kuBJ4e

[13] Press Release, The Leadership Conference, National Civil Rights Groups Praise Consumer Financial Protection Bureau and its Director (Dec. 21, 2016), http://bit.ly/2kdrXlW.

[14] *See* 44 U.S.C.A. § 3502(5).

[15] *Cordray Mum on Future Rulemaking, Defends Rules on Mortgage Lending*, Wall St. J., Jan. 24, 2017, http://on.wsj.com/2kAMHYq.

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