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GUEST COMMENTARY

A VIEW FROM WASHINGTON: DON'T BANK ON 2016 ELECTION TO CHANGE CFPB

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While Washington begins to focus on the 2016 Presidential campaign, most of the country yawns, knowing they have months before they have to start paying attention to Presidential politics. Many in the consumer financial services industry, however, look forward not so much to the election itself, but to the magic date of Jan. 20, 2017 -- the inauguration of the next President. That date, I have heard from various clients and consumer financial services executives knee-deep in CFPB exams or enforcement activity, is significant because then “the adults will be back in charge.” While Republican-leaning executives may be slightly more vocal in their desire for Jan. 20, 2017, to arrive, the sentiment that the next President, of either party, will “pump the brakes” on the frenetic pace of CFPB examination, investigation, and enforcement activities in the consumer financial services space, is a common one.

Having served in the Civil Rights Division of a Republican Justice Department, I would be the first to acknowledge that “elections matter” in terms of the broad regulatory and enforcement environment. That is particularly so in terms of the traditional cabinet agencies such as DOJ or HUD. However, the unique structure of the CFPB makes election matter less in terms of its agenda and activities. Those expecting the agency to turn on a dime should the political winds shift in Washington, risk being severely disappointed. Here is why this is so:

Cordray is not going anywhere

Upon inauguration of a new President, cabinet secretaries resign their positions and new leadership of the cabinet undergoes Senate confirmation. For example, on Jan. 20, 2017, Attorney General Loretta Lynch and every political appointee at the Department of Justice will exit, and in the early months of 2017, a new Attorney General, Deputy Attorney General, numerous Assistant Attorneys General and other key appointees will be subject to Senate confirmation. While that process occurs, a transition team of political leadership, selected by the incoming President's transition team, will manage the bureau.

Therefore, literally on day one, the final authority on major policy or enforcement questions within the CFPB shifts to people more aligned with the new President. This layer of leaderships serves at “the pleasure of the President,” meaning they are all at-will employees, and the minute their activities become a political problem for the President, they can be removed. Such a system ensures the promises and priorities of the President are generally kept.

Moreover, the confirmation process allows the Senate to raise any issues Senators or their constituents might have with the Department's enforcement priorities or techniques, and, if the issue is significant enough, permits a Senator or group of Senators to hold up a nomination in exchange for commitments from the nominee relating to those issues. Thus, aside from the potential for new political affiliation and philosophy for Department leadership, the confirmation process itself provides an opportunity for the Senate to leverage its advice and consent authority to “rein in” an agency it views as out of control or acting beyond its authority, even if the political party controlling the executive branch remains unchanged.

None of the above applies to the CFPB. Director Cordray is appointed for a 5 year term, and does not serve “at the pleasure of the President” but can be removed by the President only in narrow circumstances. The CFPB will almost undoubtedly be led by him until his term expires on July 15, 2018. The normal process by which cabinet agencies are “refreshed” after election of a President does not apply, so in the life of the CFPB, the date January 20, 2017 does not take on particular significance.

CFPB's budget outside of appropriations process

Typical cabinet agencies are funded through Congressional appropriations. This fact necessitates Cabinet secretaries to take seriously Congressional concerns about how their agency is being run, particularly the concerns of the House and Senate congressional committees responsible for appropriating funds for their agency. There is a reason we see cabinet heads and other senior cabinet officials periodically subject themselves to a beating on Capitol Hill that will be replayed on the evening news -- those House members or Senators asking the questions write the budget for that agency. An agency that is recalcitrant in the face of changing political tides risks seeing its budget cut (or particular portions of its budget -- related to the matter of controversy -- cut).

Once again, not so for the CFPB. Because it is funded through the Federal Reserve and not via Congressional appropriations, the budgetary process does not provide any leverage over the bureau to force change. Advocates for such a system tout the “independence” of the CFPB. But with independence comes insulation from the processes that typically cause agencies to change direction to reflect the political realties in Washington, which are themselves a reflection of the political mood of the country. While Cordray has agreed to testify before Congress, rest assured that those conversations would take on a different tone if the people asking the question controlled the purse-strings.

Vast majority of CFPB hires are career civil servants

In any cabinet agency, the vast majority of employees doing the day-to-day work of the agency are “career” employees, meaning they are protected civil servants who are not replaced when the Executive branch changes hands. “Career,” however, does not necessarily mean “apolitical” -- it is hardly a shock that those hiring are more likely to choose employees with an outlook or philosophy similar to their own.

In most agencies, this balances itself out over time. For example, in a typical agency, the longest-serving employees were likely hired during the Reagan and George H.W. Bush presidencies, but the employees just behind them, in terms of seniority, were hired during the Clinton years or the George W Bush years, and the more recent hires during the Obama Presidency. There is always a “bench” of people who have served under both Republicans and Democrats and understand how priorities of policy might differ under each.

In contrast, because the CFPB did not exist until the Obama Presidency, all of its employees are recent hires, and given the mission of the CFPB and its early leadership, employees with a consumer advocacy background or inclination (*e.g.*, Legal Aid lawyers or consumer advocates) were most likely to apply for and be hired into the available positions. None of the bureau's employees have ever served under different political leadership at the CFPB and the “balancing” effect of hiring over time, present at the federal agencies, is absent.

Thus, at the bureau, the recent history of enforcement and examination is the only history it has -- the bureaucracy knows of only one way things “have always been done” and that is the way they are done now. In addition to the absence of budgetary or personnel leverage, this lack of history for the CFPB will make change, particularly rapid change, unlikely.

Settle in for the long haul

Constitutional scholars can debate whether the novel and unique structure of the CFPB violates principles of separation of powers (I think it may), but pragmatists should be cognizant of the fact that, absent judicial or legislative intervention that alters the structure of the CFPB, the CFPB is insulated to a considerable degree from the shifting political winds in Washington.

Any major change would likely have to be structural, taking the form of new legislation providing for greater Congressional oversight and control over the CFPB -- a tall order.

Jan. 20, 2017, is therefore not nearly as significant a date for the CFPB as many in consumer financial services industry likely hope.

Footnotes

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