Significant Developments Leave CFPB in Turmoil

Summary: The new year has brought with it a slew of changes over at the CFPB. Although Acting Director Mick Mulvaney (appointed by President Trump back in November) has made it clear that the Bureau will stop “pushing the envelope” on enforcement actions and will re-tool its holistic approach toward regulation, he has also expressed that he has no intention of shuttering the Bureau entirely. With so much changing so quickly, regulated entities likely have more questions than answers, particularly as it relates to future expectations and compliance. Below is an outline of the most recent developments at the CFPB and what it may mean for financial institutions subject to the Bureau’s jurisdiction.

D.C. Circuit Determines CFPB Structure is Constitutional, but Prepares to Hear Case Over Bureau’s Leadership

On January 31, the full U.S. Court of Appeals for the D.C. Circuit (“D.C. Circuit”) reversed an October 2016 decision by the court’s original three-judge panel that had found the CFPB’s single-director leadership structure, which allows the president to remove the CFPB director only for cause (and not for mere policy disagreements, for example), unconstitutional. The original panel had reasoned that the CFPB’s structure, as originally conceived by the Dodd-Frank Act, was unconstitutional because it left the director unaccountable to the president, in violation of the constitutional principles that separate powers among the Executive and Legislative branches. However, the full panel rejected the accountability argument, citing other instances where the president’s removal powers had been constrained, and determined that the Bureau’s single-director structure is constitutional.

What it means and what to expect: The full panel’s decision sets up a potential appeal to the Supreme Court—especially if appeals courts in several other pending cases challenging the Bureau’s structure arrive at different conclusions—that could prove messy because the Trump administration is opposed to the CFPB’s position in the case. For the time being, however, the full panel’s decision upholds the constitutionality of the CFPB’s structure, as conceived by the Dodd-Frank Act, and as such, its director may only be removed by the President for cause.

The full panel’s ruling also stressed the importance of financial regulators’ independence, and the D.C. Circuit may have more to say about this as it prepares hear a separate challenge brought by Leandra English, the CFPB’s deputy director, over the rightful director of the Bureau. As we have previously reported, English was tapped by
former CFPB Director Richard Cordray as his successor, but on the same day, President Trump appointed Office of Management and Budget Director Mick Mulvaney to the post. English challenged the appointment, but a lower court backed Mulvaney’s claim that he is the rightful acting director. As part of her expedited appeal, English argues that the President’s appointment of Mulvaney violates the independence of the CFPB, as established under the Dodd-Frank Act. The D.C. Circuit will likely shed more light on these leadership and independence issues soon—responsive briefs must be filed by February 23.

A New Mission and Strategic Plan for the Bureau – Less Aggressive Enforcement

In the meantime, Acting Director Mulvaney is certainly working to leave his conservative imprint on the Bureau. On January 23, he issued a memo to employees outlining a new mission for the Bureau, which includes treating not only consumers, but also regulated entities, fairly; informing regulated entities more clearly about what is expected of them; and not using enforcement activity to “push the envelope.” Specifically, the memo states that enforcement will focus on quantifiable and unavoidable consumer harm; regulation will take place through rulemaking (rather than through enforcement); and the Bureau’s priorities will be based on data, with the most attention given to the types of complaints the Bureau receives most. For instance, the memo notes that, of the consumer complaints received in 2016, only 0.9% related to prepaid cards and 2% related to payday lending; this suggests that the ongoing rulemakings related to those products/services are unnecessary.

On February 13, Acting Director Mulvaney presented the Bureau’s Strategic Plan for Fiscal Years 2018-2022, which reiterated that the CFPB intends to roll back “unduly burdensome” regulations and will “go no further” than fulfilling the Bureau’s statutory responsibilities under Dodd-Frank. According to the Strategic Plan, the Bureau will use transparent rulemaking and enforcement to ensure fair and equitable access to credit and competitive markets. Notably, the Strategic Plan was released less than a day after a White House budget proposal that would give the Republican-led Congress control over the Bureau’s funds, a move that would allow some of the CFPB’s most active critics to aggressively cut its funding.

What it means and what to expect: Acting Director Mulvaney has made it clear that regulated entities can expect a retreat from “rulemaking by enforcement.” This is further evidenced by the fact that he requested that the Federal Reserve transfer no operating funds to the Bureau for the second quarter. It is important to note, however, that he has also made clear that he has “no intention of shutting down the Bureau” and that the Bureau will be “vigorous in [its] enforcement” of consumer protection laws, where appropriate, and that the $177 million the Bureau has in reserve is sufficient to do so.

A Public Review of the CFPB’s Proper and Appropriate Functions

Acting Director Mulvaney has also announced a public review of the entire CFPB to determine whether the Bureau is fulfilling its proper and appropriate functions. In the coming weeks, the CFPB will publish a series of Requests for Information (RFI) in the Federal Register that seek comment on the Bureau’s functions in an effort to improve outcomes for not only consumers, but also covered entities. The first RFI seeks information on potential changes to the Bureau’s Civil Investigative Demand processes, with the goal of minimizing burdens on participants. Comments must be received by March 27, 2018. The second RFI seeks comment on the Bureau’s adjudicative proceedings, specifically asking whether a contested enforcement action should be heard by a federal district court, which Bureau opponents believe would ensure a more neutral perspective than what is offered by the CFPB’s “in house” suite of administrative law judges. Comments must be received by April 6, 2018. The third RFI requests feedback regarding improvements that can be made the Bureau’s enforcement process, including reducing burdens for those entities subject to such enforcement actions. Comments are due on April 13, 2018. The fourth RFI seeks public comment on the effectiveness and efficiency of the CFPB’s supervision program, with special focus paid to on-site examinations. In the coming weeks, the Bureau will solicit public comment via additional RFIs on other topics of interest, including:
- External Engagement
- Complaint Reporting
- Rulemaking Processes
- Inherited Rules
- Guidance and Implementation Support
- Consumer Education
- Consumer Inquiries

**A CFPB Office is Stripped of Enforcement Power**

On February 1, Acting Director Mulvaney—in what may be the first example of how he intends to effectuate the Bureau’s new mission of moving away from zealous enforcement—told CFPB staff that the Office of Fair Lending and Equal Opportunity, which polices lenders for compliance with anti-discrimination laws, will lose its supervision and enforcement duties and be brought under the purview of the Office of the Director to focus instead on advocacy and education. The move has sparked criticism from consumer advocacy and civil rights groups as one that undermines anti-discrimination work and shifts the focus from protecting consumers to protecting corporations. Acting Director Mulvaney, however, believes that the reorganization will reduce redundancy and make better use of the CFPB’s resources.

**Outlook:** Although Acting Director Mulvaney has indicated no desire to shutter the CFPB entirely, its function will continue to change in the coming months. Regulated entities should take advantage of the opportunity to provide input through the RFI process and likely can expect less aggressive and more targeted enforcement; however, companies must think carefully about how best to navigate these changing regulations and expectations. Additionally, state regulators have promised to fill any consumer protection gaps created by the Bureau at the federal level, so regulated entities should be aware that any retreat by the Bureau may be absorbed by increased activity from the states, particularly those in which Democrats serve as attorneys general or lead a state’s financial regulatory agency.

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