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What Is Happening With the CFPB?

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We have been waiting to see how things are shaking out for the now-beleaguered Consumer Financial Protection Bureau ("CFPB"). A month out from Trump's inauguration, we are still in a position of wondering if there will be a future for the agency in this administration.

Formally dismantling the CFPB would require Congress to act, of course, but the new administration has already taken extreme steps to defund the agency and reduce its workforce. After initially **appointing the Secretary of Treasury, Scott Bessent**, as of January 31st as the Acting Director of the CFPB, Trump eventually appointed Russell Vought, the Director of the Office of Management and Budget, as the Acting Director, which was approved by the Senate on Friday, February 7th. In line for the permanent Director position is Jonathan McKernan, a former member of the Board of Directors of the Federal Deposit Insurance Corporation ("FDIC"), whom Trump appointed on February 11th. The Senate has yet to vote on approving McKernan's appointment. McKernan has a strong regulatory background in financial services, having worked at Treasury and the Federal Housing Finance Agency, as well as serving as counsel to Ranking Member Pat Toomey (R-PA), who sits on the Senate Committee on Banking.

In addition, as of February 14th, the District Court for the District of Columbia approved a **temporary restraining order** ("TRO") in a **case brought against Acting Director Russell Vought** by the National Treasury Employees Union, among others. The TRO not only prevents Vought from destroying CFPB data, terminating CFPB employees except for cause, and transferring, relinquishing, returning or reducing "the amount of money available to the CFPB . . . other than to satisfy the ordinary operating obligations of the CFPB." The next hearing in the case has been set for March 3rd, during which the court will consider turning the TRO into a preliminary injunction.

Against this backdrop, the activities of the CFPB have ground to a complete halt, with Vought directing CFPB employees to engage in no work. So, **what does this mean for the industry?**

The CFPB is the primary consumer financial services regulator at the Federal level. It has primary responsibility for supervision of and enforcement against banks, non-banks and service providers. The CFPB has sole responsibility for interpreting laws like the Truth In Lending Act and Regulation Z, and the Electronic Funds Transfer Act and Regulation E (the "Alphabet Regs"). This means that without legislation to amend the Consumer Financial Protection Act ("CFPA"), no other agency will be able to engage in rulemakings related to these laws. Further, there is another section of the CFPA that also gives the CFPB exclusive authority to "issue guidance" regarding these laws, as well as a broader set of consumer financial marketplace issues. Effectively this means that no other Federal agency is even able to put out industry guidance on most consumer financial protection concerns.

As many commenters have pointed out, it is true that there are several Federal agencies that have concurrent abilities to not only enforce the consumer financial services "Alphabet Regs", but also to enforce the unfair, abusive or deceptive provisions of the CFPA. Each of the Federal Reserve, FDIC, Office of the Comptroller of the Currency, National Credit Union Administration and the Federal Trade Commission ("FTC") may engage in such enforcement against the entities under their jurisdiction. And, the prudential regulators (*i.e.*, not the FTC) have the ability to examine and supervise banks for compliance with consumer financial services laws. But, as noted above, none of these Federal agencies may interpret the Alphabet Regs, change them or issue guidance regarding them.

Additionally, the FTC has what is called "remainder jurisdiction" over financial services entities – they can bring enforcement actions against any financial services entities except banks, credit unions and insurance companies. So they, in effect, are now the only Federal agency that can enforce consumer financial services regulations against fintechs, credit bureaus, mortgage brokers and payday lenders. The FTC has no supervisory capabilities and it is an agency subject to Congressional appropriations, meaning that they make do with a slender budget, especially as compared to the prudential regulators and the CFPB. Even if the newly appointed FTC Chairman, Andrew Ferguson, was zealous about enforcing consumer protection laws, the FTC would not be able to cover more than just a small fraction of what the CFPB covered.

In addition to these concurrent capabilities at the Federal level, the state attorneys general are also empowered to enforce the CFPA and the consumer financial services laws “with respect to any entity that is State-chartered, incorporated, licensed, or otherwise authorized to do business under State law.” With respect to national banks or Federal savings associations, the state AGs can enforce the Alphabet regs, but may not enforce the CFPA against them. This could mean that state AGs are likely to take more interest in addressing lending problems themselves. And even if the CFPB is partially restored to working order, we can expect New York and California to drive a lot more of the national conversation on consumer financial services laws throughout this administration.

If the CFPB were effectively shuttered for the next four years, banks and credit unions would likely face more uneven enforcement of the consumer financial services laws at the hands of the states. Also, banks and credit unions would be subject to consumer financial services compliance examinations and supervision by their prudential regulators, which is how it worked prior to the passage of the CFPA. The prudential bank regulators are famously less concerned about consumer financial services compliance and will most certainly be rusty in addressing these issues themselves, which likely will lead to uncertainty and uneven supervision, as well. Importantly for the industry, this means that non-banks would no longer be subject to supervision, which is something that leveled the playing field for over-regulated banks.

So, while this all may seem like “a break” for banks and the consumer financial services industry, for the financial services companies that are interested in being responsible about compliance, this “break” will be accompanied by a high degree of uncertainty as to where potential enforcement actions could be coming from and on what issues. And for the companies that are not interested in being responsible about compliance, this breakdown in enforcement, regulation and supervision could end up being a field day that could significantly harm consumers well before any of the other regulators and enforcement agencies have had a chance to realize what is happening, which could be very bad for the economy overall.