

EXPERT ANALYSIS

The Uncertain Future of the Consumer Financial Protection Bureau

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Since its inception in July 2011, the Consumer Financial Protection Bureau (CFPB) has sought to prove itself as a powerful regulator through significant enforcement actions and settlements.

In 2016, the CFPB continued to aggressively enforce federal consumer protection laws, including imposing its largest civil penalty to date – \$100 million – in a settlement announced in September.

But the CFPB has faced criticism recently from all three branches of government – the Executive, Legislative, and Judicial – that raise questions about the future of the consumer watchdog.

On the Executive front, the election of Donald Trump, a CFPB critic, has placed the future of CFPB Director Cordray in doubt.

At the same time, the courts have taken certain steps to limit the CFPB's authority, and the full Court of Appeals for the District of Columbia Circuit will soon consider whether the Bureau, as structured under the Dodd-Frank Act, is constitutional.

Finally, with Republicans in control of both houses of Congress as well as the White House, the prospects for legislation that would alter important aspects of the Bureau – or even eliminate it altogether – have improved dramatically.

ENFORCEMENT ACTIONS TRENDING DOWNWARD

The CFPB has filed more than 175 enforcement matters to date, including 44 in 2016 and 15 so far in 2017.

These actions have resulted in restitution to consumers totaling more than \$4.5 billion and civil money penalties (CMPs) of more than \$600 million.

As this chart shows, following a very active 2015, the CFPB's restitution and civil penalties from enforcement actions decreased in 2016.

Moreover, the majority of the total penalties assessed in 2016 related to one matter – the CFPB's September 8, 2016, settlement with Wells Fargo regarding sales practices.

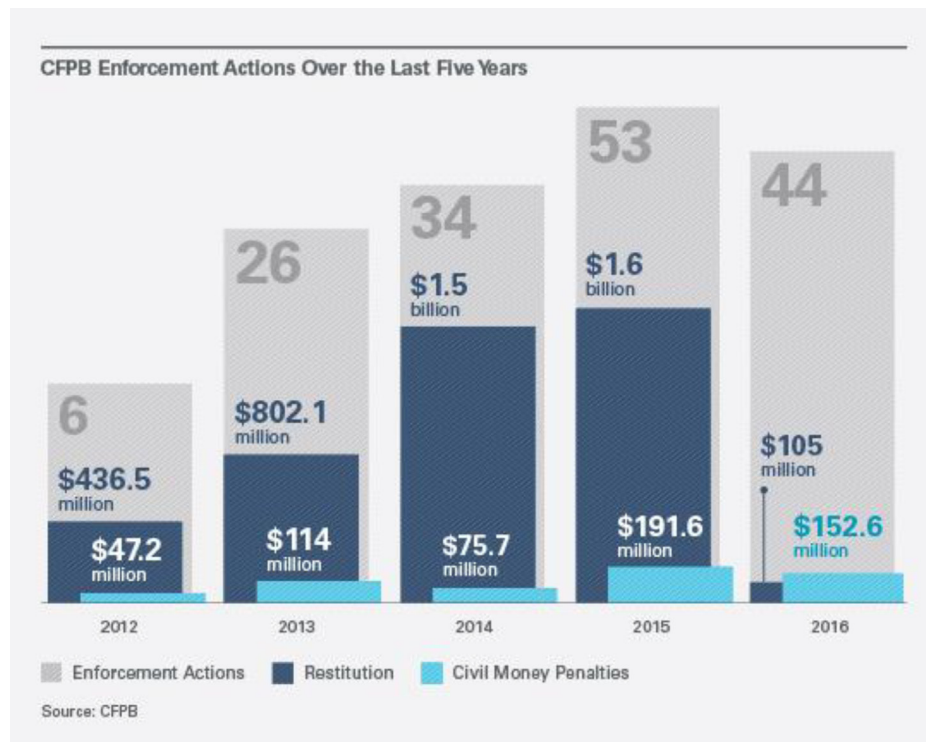
D.C. CIRCUIT TO CONSIDER LIMITS ON CFPB POWER

The D.C. Circuit will issue decisions in two pending cases that could place significant constraints on CFPB authority.

In *CFPB v. Accrediting Council for Independent Colleges and Schools*, the U.S. District Court for the District of Columbia held that the CFPB did not have the authority to issue a civil investigative demand (CID), a type of administrative subpoena, to an accreditor of for-profit colleges.



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This case, decided in April 2016, represents the first time that a federal court has quashed a CFPB CID.

In doing so, the court noted that the CFPB's investigative authority is limited to inquiries regarding potential violations of consumer financial laws, and that there is no "clear nexus" between these laws and the for-profit college accreditation process.

The court also warned, "Although it is understandable that new agencies like the CFPB will struggle to establish the exact parameters of their authority, they must be especially prudent before choosing to plow head long into fields not clearly ceded to them by Congress."

The CFPB appealed this decision to the D.C. Circuit, which heard oral argument in February 2017. A ruling is expected within the next several months.

Another case pending before the D.C. Circuit, *PHH Corp. v. CFPB*, creates the potential for greater disruption to the CFPB's structure.

The *PHH* case has a complicated history.

In 2014, the CFPB filed an administrative action against PHH alleging that the company's captive reinsurance agreements violated the anti-kickback provisions of the Real Estate Settlement Procedures Act.

The case was initially heard at the administrative level, after which an administrative law judge ruled against PHH and assessed damages at \$6.9 million.

Both PHH and the CFPB sought CFPB Director Richard Cordray's review of that decision.

On review, Director Cordray broadened the relief significantly and ordered PHH to pay \$109 million in disgorgement.

PHH appealed to the D.C. Circuit, arguing, among other things, that the structure of the CFPB was unconstitutional.

In October 2016, two of three judges on the D.C. Circuit held that the single-director structure of the CFPB was unconstitutional and a departure from the setup of other independent agencies, which are overseen by multimember commissions.

The court stressed that placing so much power in the hands of a single director was particularly concerning because, given the broad scope of the CFPB's authority and jurisdiction, the agency exercises "massive power."

The court concluded that the provision governing removal of the CFPB director — which authorizes removal by the U.S. president only for cause — violates constitutional separation-of-powers principles.

However, rather than shut down the agency, the panel severed the removal provision from the rest of the statute, a narrow remedy that would allow the CFPB to continue to operate and give the president the authority to remove the director at will.

The CFPB filed a petition for rehearing en banc by the D.C. Circuit, asserting that this "may be the most important separation-of-powers case in a generation."

The court recently granted the CFPB's petition and vacated the October 2016 ruling, with oral argument before the court now scheduled for May 2017.

ELECTION BRINGS MORE UNCERTAINTY TO THE CFPB'S FUTURE

At the political level, President Trump's victory and continued Republican majorities in the House and Senate introduce significant uncertainty with respect to the CFPB's future in three primary ways:

Removal of the director

Now that he has taken office, President Trump may take action to remove Director Cordray even before a final ruling in the *PHH* case.

The president could seek to fire Director Cordray for cause — that is, for "inefficiency, neglect of duty, or malfeasance in office" — citing actions Director Cordray has taken during his term that CFPB critics claim exceeded his authority.

Alternatively, President Trump may conclude that he has the independent authority to decide whether the CFPB's structure is constitutional and remove Director Cordray without cause.

Either action would be controversial and could lead Director Cordray to sue President Trump to get his job back.

Legislative action

On the campaign trail, Donald Trump promised to "dismantle" the Dodd-Frank Act, which created the CFPB.

Although it is unlikely that the law would be repealed in full and the CFPB shut down, the Trump Administration and the Republican Congress are expected to support sweeping changes to the statute and the CFPB's structure and authority, including subjecting the CFPB's budget to Congressional oversight.

Indeed, in late 2016, House Financial Services Chairman Jeb Hensarling, R-Texas, introduced the Financial CHOICE Act, a bill that would require substantial changes to the Dodd-Frank Act and to the CFPB's structure and funding.

Most recently, President Trump signed a broad executive order aimed at the Dodd-Frank Act that sets forth "core principles" with respect to regulating the financial system.

In particular, the Order requires the Secretary of the Treasury to identify laws and regulations that inhibit federal regulation of the financial system in a manner consistent with the core principles.

U.S. Supreme Court

If, as appears likely, Judge Neil Gorsuch is confirmed as a Supreme Court justice, and the *PHH* case eventually makes its way to the Supreme Court, the composition of the Court would make it

more likely that the Court would (1) decide that the CFPB's structure is unconstitutional and (2) possibly reach a broader view of the appropriate remedy, such as invalidating all of Title X of the Dodd-Frank Act, which created the CFPB and introduced the prohibition of unfair, deceptive, or abusive acts or practices.

LOOKING AHEAD

Two CFPB rules have generated significant controversy since they were proposed in 2016 and are likely to be at risk under the new administration and Republican-controlled Congress: one that would prohibit certain mandatory arbitration clauses in consumer financial contracts and another that would restrict certain payday, auto title and high-cost installment loans.

Despite the challenging political landscape for the CFPB, it has recently indicated that priorities for 2017 will include continued focus on redlining, as well as emerging fair lending focus on mortgage and student loan default servicing and small business lending.

While the outcome of these challenges is uncertain, one thing is clear: the wide range of the CFPB's authority, and its exercise of that power, will be scrutinized carefully this year and beyond.



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