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Despite Leadership Changes, No Pivot in Priorities Expected for Consumer Financial Services Enforcement

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Both the Consumer Financial Protection Bureau (CFPB or Bureau) and Department of Justice (DOJ) initiated and resolved fewer fair lending and other consumer financial services enforcement actions in 2018 than in previous years. Leadership changes at both agencies may impact agency priorities in 2019, but the trend of fewer enforcement actions seems likely to continue.

Meanwhile, we expect increased activity at state regulatory and enforcement agencies — in part a response to the slowdown at the CFPB — to continue. Finally, the new Democratic majority in the House of Representatives likely will exercise its oversight authority zealously and pressure agencies to increase consumer protection enforcement. (See "Preparing for Democratic Oversight Investigations.") However, with Republicans still in control of the Senate and the White House, we do not expect to see significant legislation enacted or a marked change in the regulatory landscape in 2019.

CFPB

On December 6, 2018, the Senate confirmed Kathy Kraninger to a five-year term as the new director of the CFPB. Kraninger replaces Mick Mulvaney, who was appointed acting director of the agency in November 2017 after its first director, Richard Cordray, resigned. Consumer advocates were critical of Mulvaney, accusing him of weakening the agency's enforcement team and de-emphasizing enforcement as a general matter. Indeed, in the approximately 12 months of Mulvaney's tenure, the Bureau initiated 12 actions and settled 14, whereas during the previous 12-month period, it initiated 47 new actions and settled 42. Mulvaney also reorganized the Bureau's fair lending and student loan offices, reducing both their profile and direct authority, as part of a broad effort to re-examine the Bureau's priorities and processes.

Prior to her appointment, Kraninger served as an associate director at the Office of Management and Budget. Her views on consumer protection are not well-known, and it remains to be seen whether she will continue Mulvaney's emphasis on rulemaking rather than regulation by enforcement, and the extent to which she will fill political positions at the Bureau with new individuals rather than holdovers from Mulvaney's tenure. As her directorship begins, however, Kraninger has considerable support from the financial services industry, and she has not indicated significant disagreement with actions Mulvaney took.

As a result, many of Mulvaney's priorities during his one-year tenure are unlikely to change. In particular, the Bureau is likely to continue its efforts to clarify, via rulemaking, what constitutes "abusive" acts or practices. It also is possible that the Bureau will issue a rule regarding the disparate impact doctrine under the Equal Credit Opportunity Act. Finally, the Bureau appears to remain on path to revise its payday lending rule, which could have significant implications for short-term, small-dollar lenders.

DOJ and Other Federal Agencies

The DOJ also pursued limited consumer financial enforcement under then-Attorney General Jeff Sessions. In 2017 and 2018, the DOJ filed four lawsuits and settled four suits alleging fair lending violations — a marked decline from the level of activity under the Obama administration in 2015 and 2016, when the DOJ filed 15 fair lending lawsuits and settled 14 suits. We have no reason to expect that President Donald Trump's nominee for attorney general, William Barr, would significantly expand fair lending enforcement activity.

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The Department of Housing and Urban Development (HUD), under Secretary Benjamin S. Carson, likewise appears to have scaled back its enforcement activity significantly. In particular, HUD has filed only two secretary-initiated fair housing enforcement actions over the last two years, which is a notable decrease from activity during the Obama administration in 2015 and 2016, when HUD filed seven such actions. Meanwhile, the federal bank regulatory agencies (the Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, National Credit Union Administration and Federal Reserve), which are less political in nature, have continued at a relatively consistent pace in 2018, despite changes to the leadership of many of these agencies.

State Attorneys General

Some states increased their regulatory and enforcement activity during 2018 in response to the decrease in federal enforcement, both by pursuing enforcement of state laws and by exercising their authority under the federal Consumer Financial Protection Act. For example, in August 2018, the New York State Department of Financial Services announced that it would be increasing fair lending enforcement with respect to auto lending. Other states, such as New Jersey and Pennsylvania, likewise announced efforts to create their own consumer protection divisions to protect consumers. This increased focus on consumer protection at the state level should continue during 2019, particularly given that Democrats hold the majority of state attorney general positions.

Political Climate

With split control of the House and Senate, Congress is not likely to pass significant consumer financial services legislation in 2019. However, Rep. Maxine Waters, who became chair of the House Financial Services Committee in January 2019, has stated that one of her priorities is to ensure that the CFPB operates without interference from the Trump administration. We therefore expect the House committee to exercise its investigative powers broadly, both to pressure the Bureau to increase its enforcement activity and to directly investigate activities of concern to the committee. Whether such pressure will lead to increased CFPB enforcement activity, however, is an open question.

Conclusion

While a modest increase in the volume of enforcement activity is possible in 2019 — especially at the state level — we expect it to be largely "more of the same" this year, both in terms of the volume of enforcement and the subjects of interest. In particular, regulatory and enforcement agencies likely will continue to take action where they believe fair lending violations or unfair, deceptive or abusive practices exist, but at levels consistent with 2018.

The industry will keep a close eye on both the CFPB and the DOJ as they move forward under new leadership, and on the House Financial Services Committee as it puts pressure on the Bureau. As ever, financial institutions will be best served by maintaining strong compliance management programs and closely watching for developments at these agencies.

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