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**Practice Groups:****Consumer Financial Services****Financial Institutions and Services Litigation****Public Policy and Law**

## Down But Not Out: The CFPB's Future May Be Uncertain, But Industry Participants Must Remain Vigilant

**By Dan Crowley, Soyong Cho, Jennifer Nagle, Roger Smerage, Jeremy McLaughlin, Mark Roszak, and Brandon Dillman**

Since its inception, the Consumer Financial Protection Bureau (“CFPB”) has been a lightning rod, and there is little dispute that recent events threaten, at a minimum, the current operational structure of the CFPB and possibly its future existence. Specifically, the constitutionality of the CFPB has been under direct judicial attack and President-elect Trump’s incoming administration, and legislative reform that may follow, threatens to make good on Mr. Trump’s plan to “dismantle the Dodd-Frank Act,” which created the CFPB, “and replace it with new policies to encourage economic growth and job creation.”<sup>1</sup> In the aftermath of these developments, there has been no shortage of predictions on the CFPB’s future and some predictions allude to a near certain doomsday for the agency.<sup>2</sup> But many may have rushed to judgment. While the continued existence of the CFPB is certainly an open question, it is more likely that the CFPB will receive a makeover, not a shutdown.

Whatever the future of the agency, participants in the financial industry need to recognize that, for now, the CFPB is alive and well. The CFPB’s agenda—present and future—must remain on the radar and inform business and compliance decisions. Here, we take a look at recent developments, explore the CFPB’s current rulemakings, and consider what those agenda items may look like as we move into 2017.

### Recent Threats to the CFPB: An Agency in Limbo

In recent months, the CFPB has faced a number of challenges to its authority and structure that have created uncertainty about the agency’s future.

#### *Judicial Developments*

The first blow to the CFPB came in *PHH Corp. v. CFPB*,<sup>3</sup> a decision that received significant press. In *PHH*, the D.C. Circuit held that the agency’s leadership structure—a single director who can be removed only for cause—violates the separation of powers requirement of the

<sup>1</sup> See Jesse Hamilton & Elizabeth Dexheimer, *Trump’s Transition Team Pledges to Dismantle Dodd-Frank Act*, BLOOMBERG, Nov. 10, 2016, <https://www.bloomberg.com/news/articles/2016-11-10/trump-s-transition-team-pledges-to-dismantle-dodd-frank-act>.

<sup>2</sup> See, e.g., Michelle Singletary, *Trump’s Election Does Not Bode Well for the Consumer Financial Protection Bureau*, WASH. POST, Nov. 15, 2016, [https://www.washingtonpost.com/business/get-there/trumps-election-does-not-bode-well-for-the-consumer-financial-protection-bureau/2016/11/15/70618360-ab48-11e6-977a-1030f822fc35\\_story.html?utm\\_term=.be076e838a49](https://www.washingtonpost.com/business/get-there/trumps-election-does-not-bode-well-for-the-consumer-financial-protection-bureau/2016/11/15/70618360-ab48-11e6-977a-1030f822fc35_story.html?utm_term=.be076e838a49); James Rufus Koren, *Trump Administration Could Upend Post-Crisis Financial Reforms, Weaken CFPB*, L.A. TIMES, Nov. 9, 2016, <http://www.latimes.com/business/la-fi-trump-dodd-frank-20161109-story.html>.

<sup>3</sup> 839 F.3d 1 (D.C. Cir. 2016), *petition for reh’g filed* (Nov. 18, 2016). For a detailed review of the *PHH* court’s decisions on various aspects of the Real Estate Settlement Procedures Act, see K&L Gates Alert, [“Not A Close Call”: The D.C. Circuit Restores The Safe Harbor To Section 8 of RESPA](#).

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Constitution.<sup>4</sup> The court ruled that to preserve the single-director structure, the director had to be removable at will by the President.<sup>5</sup> The *PHH* ruling is a looming threat to the CFPB's current structure, which, if the D.C. Circuit's decision is upheld, will necessarily require some measure of modification to address the way in which the directorship is structured.

Following on the heels of *PHH*, the CFPB is also facing other challenges to its authority in the courts. During CFPB Director Richard Cordray's recess appointment<sup>6</sup>—which was later nullified by the Supreme Court in *NLRB v. Noel Canning*<sup>7</sup>—the CFPB had initiated an enforcement action against various individuals and related companies in the business of providing mortgage assistance relief services, alleging that they had engaged in unfair and deceptive practices and alleged violations of Regulation O arising out of purported mortgage relief offers. In that action, styled *CFPB v. Gordon, et al.*,<sup>8</sup> the CFPB prevailed and obtained a judgment for over \$11 million in restitution. Defendants appealed the district court's decision to the Ninth Circuit, challenging (1) the CFPB's Article III standing to maintain an enforcement proceeding which had been initiated during the time Director Cordray lacked constitutional authority and (2) the validity of Director Cordray's August 2013 ratification of CFPB actions during the period before his Senate confirmation.<sup>9</sup> In a 2-1 decision, the Ninth Circuit ruled in the CFPB's favor, but one of the defendants has petitioned the Supreme Court for review.<sup>10</sup> If the Court takes the case, its decision could materially impact the validity of all of the CFPB's regulations and enforcement actions prior to August 2013.

With *PHH* concluding (for now) that the CFPB's directorship structure is unconstitutional and *Gordon* questioning the validity of certain CFPB actions on other constitutionality grounds, a trend may be developing toward judicial challenges to the validity of the CFPB as an agency and the propriety of its enforcement activities. Industry participants who have been, or are, the subject of CFPB enforcement actions or investigations should think critically about how these developments impact those proceedings and what next steps should be considered. Yet, *PHH*, and any progeny that follows, should not be taken by the industry as a get-out-of-jail-free card. It is unlikely that the results of these proceedings, or any other judicial proceedings, will dismantle the CFPB entirely, and the agency will likely continue to exist in some form in 2017 and beyond.

### *Trump and the Financial CHOICE Act*

Although *PHH* and *Gordon* may have placed a target on the CFPB's back, the more direct threat to the CFPB likely will come in political and legislative form. Efforts to reform the CFPB have been in the works for some time, spearheaded in large part by Congressman Jeb Hensarling (R-Tex.), the current Chairman of the House Financial Services Committee. In June 2016, Congressman Hensarling introduced the Financial CHOICE Act of 2016

<sup>4</sup> 839 F.3d at 8-9. The CFPB has since filed a petition for rehearing *en banc*. See Respondent CFPB's Petition for Rehearing *en banc*, *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016) (No. 15-1177).

<sup>5</sup> 839 F.3d at 8.

<sup>6</sup> President Obama appointed Richard Cordray as the Director of the CFPB during a congressional recess in January 2012.

<sup>7</sup> 134 S.Ct. 2550 (2014). In January 2013, President Obama reappointed Mr. Cordray, who was subsequently confirmed by the Senate in July 2013. After his confirmation, Director Cordray purported to ratify all actions taken during the interim period between the initial appointment and the reappointment.

<sup>8</sup> No. 12-cv-06147 (C.D. Cal. July 26, 2013).

<sup>9</sup> *CFPB v. Gordon, et al.*, 819 F.3d 1179, 1187-88, 1191 (D.C. Cir. 2016), *petition for cert. filed* (U.S. Nov. 17, 2016).

<sup>10</sup> Petition for a Writ of Certiorari, *Gordon v. CFPB*, No. 16-673 (U.S. Nov. 17, 2016).

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("FCA")<sup>11</sup> to reform, rather than repeal, Dodd-Frank. The FCA would rebrand the CFPB, giving it a new name—the Consumer Financial Opportunity Commission—and a new mandate: "to increase competition and enhance consumer choice," in addition to continuing its previous role as consumer finance watchdog.<sup>12</sup> If the FCA were enacted in its current form, any subsequent agency decision would have to balance consumer protection *and* market competition.

The FCA, as proposed, would also eliminate the position of CFPB director and replace the position with a five-member commission made up of Senate-approved presidential appointees.<sup>13</sup> The FCA envisions staggered five-year terms for commissioners with no more than three members from the same political party,<sup>14</sup> similar to other independent governmental agencies such as the Federal Trade Commission and the Federal Communications Commission.<sup>15</sup> The FCA would also engender congressional oversight by bringing the agency into the traditional appropriations process and by requiring routine agency investigations through the use of an inspector general.<sup>16</sup> With respect to substantive issues, the FCA would eliminate the CFPB's ability to prohibit pre-dispute arbitration agreements, as well as its role in classifying certain financial practices as "abusive" (it would retain its authority to regulate unfair and deceptive practices, however).<sup>17</sup>

In September 2016, the House Financial Services Committee approved the FCA by a 30-26 vote. Other committees to which the bill was referred, however, have yet to act on it, with the 114th Congress soon coming to a close. As such, the FCA, in its current form, may not progress much further. But Mr. Trump's election may breathe new life into the spirit of the FCA. President-elect Trump's economic agenda includes a stoppage on all financial regulation,<sup>18</sup> consistent with Congressman Hensarling's position that over-regulation contributed to the financial crisis of the late 2000s.<sup>19</sup> The two also share the same interpretation of the nation's economic recovery since 2008, which they each describe as being slow and weak.<sup>20</sup> In a speech on November 16, 2016, Congressman Hensarling applauded Mr. Trump's election and echoed much of the same language Mr. Trump used during his campaign relating to job creation, increased capital lending, and over-regulation.<sup>21</sup> Mr. Trump's threat to dismantle Dodd-Frank<sup>22</sup> appears to be consistent with the FCA's proposal to restructure the CFPB and diminish its authority, and it would not be a surprise to

<sup>11</sup> H.R. 5983, 114th Cong. (2016). For coverage of other aspects of the FCA, see K&L Gates Alerts, [The Financial CHOICE Act: Dodd-Frank Reform \(Not Repeal\)](#), [Details Emerge about the Financial CHOICE Act](#), and [The Financial CHOICE Act: Legislative Text Revealed](#).

<sup>12</sup> See Financial CHOICE Act of 2016, H.R. 5983, 114th Cong. §§ 311(a), 316(a)(2) (2016).

<sup>13</sup> *Id.* at § 311(b). This is a change that would likely correct the constitutionality issues identified in *PHH*.

<sup>14</sup> *Id.* at § 311(b)-(c).

<sup>15</sup> See 15 U.S.C. § 41; 47 U.S.C. § 154.

<sup>16</sup> Financial CHOICE Act of 2016, H.R. 5983, 114th Cong. §§ 312, 313 (2016).

<sup>17</sup> *Id.* at §§ 337, 338.

<sup>18</sup> See Kevin Cirilli & Jennifer Jacobs, *Trump to Propose Moratorium on New Financial Regulations*, BLOOMBERG, Aug. 8, 2016, <https://www.bloomberg.com/politics/articles/2016-08-08/trump-to-propose-moratorium-on-new-financial-regulations>.

<sup>19</sup> See Jeb Hensarling, Remarks of Chairman Jeb Hensarling to the Economic Club of New York, as Prepared for Delivery (June 7, 2016), [http://financialservices.house.gov/uploadedfiles/hensarling\\_ny\\_econ\\_club\\_speech\\_june\\_7\\_2016.pdf](http://financialservices.house.gov/uploadedfiles/hensarling_ny_econ_club_speech_june_7_2016.pdf).

<sup>20</sup> Compare *id.* ("the slowest and weakest economic recovery in our history") with *Financial Services*, President-elect Donald J. Trump, <https://www.greatagain.gov/policy/financial-services.html> (last visited Nov. 20, 2016) ("the American people remain stuck in the slowest, weakest, most tepid recovery since the Great Depression").

<sup>21</sup> See Jeb Hensarling, Remarks as Prepared for Delivery to Exchequer Club (Nov. 16, 2016).

<sup>22</sup> See, *supra*, note 1 and accompanying text.

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see the Trump administration and Congressman Hensarling work together on forming, in Hensarling's words, "a 2.0 version" of the FCA.<sup>23</sup>

Whatever the form and timing of such legislation, however, it will likely continue to face challenges in the 115th Congress. Although Republicans will control both chambers, the FCA—or any derivative thereof—will need full Republican support and support from at least eight Democratic Senators to avoid filibuster. There are, however, other procedures that could be used to pass legislation impacting the CFPB without requiring a supermajority vote in the Senate, such as through the reconciliation process. Given Mr. Trump's plan to reign in various aspects of the federal government, as well as his international trade, national security, and other priorities, it remains to be seen if sweeping CFPB reform will be at (or even near) the top of the new administration's agenda. It may be some time before the CFPB sees any changes at all.

### The State of the CFPB Agenda: 2016-2017

In 2016 alone, the CFPB has issued multiple new rules and interpretations, including but not limited to the following:

- Operations in Rural Areas Under the Truth in Lending Act (Regulation Z); Interim Final Rule (effective date March 31, 2016), implementing exemptions to TILA qualified mortgage and higher-priced mortgage requirements for certain small creditors operating in areas that are considered rural or underserved;<sup>24</sup>
- Truth in Lending (Regulation Z) Annual Threshold Adjustments (CARD Act, HOEPA and ATR/QM) (effective date January 1, 2017), updating certain dollar amount thresholds under the Credit Card Accountability Responsibility and Disclosure Act of 1994, the Home Ownership and Equity Protection Act of 1994, and the Dodd-Frank Act based on annual percentage change in the consumer price index;<sup>25</sup>
- Safe Harbors from Liability under the Fair Debt Collection Practices Act for Certain Actions Taken in Compliance with Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (effective date October 19, 2017), creating certain safe harbors from liability under the FDCPA for communications made in compliance with the new mortgage servicing rules;<sup>26</sup>
- Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (effective date October 19, 2017), implementing various amendments concerning (1) successors in interests; (2) delinquency; (3) requests for information; (4) force-placed insurance; (5) early intervention; (6) loss mitigation; (7) crediting of prompt payments; (8) periodic statement disclosures; and (9) small servicers;<sup>27</sup>

<sup>23</sup> See Elizabeth Dexheimer, *Hensarling Says He's Willing to Tweak Dodd-Frank Overhaul Plan*, BLOOMBERG, Nov. 16, 2016, <https://www.bloomberg.com/news/articles/2016-11-16/hensarling-says-he-s-willing-to-tweak-dodd-frank-overhaul-plan>.

<sup>24</sup> 81 Fed. Reg. 16,074 (Mar. 25, 2016) (to be codified at 12 C.F.R. § 1026.35).

<sup>25</sup> 81 Fed. Reg. 41,418 (June 27, 2016) (to be codified at 12 C.F.R. § 1026). The rule's amendment to § 1026.53(b)(1)(ii)(b) became effective immediately.

<sup>26</sup> 81 Fed. Reg. 71,977 (Oct. 19, 2016) (to be codified at 12 C.F.R. § 1006). A portion of the interpretation of the rule, set out in Part II.A of the interpretation, becomes effective on April 19, 2018.

<sup>27</sup> 81 Fed. Reg. 72,160 (Oct. 19, 2016) (to be codified at 12 C.F.R. §§ 1024, 1026). Certain amendments will not become effective until April 19, 2018, however.

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- Status of New Uniform Residential Loan Application and Collection of Expanded Home Mortgage Disclosure Act Information About Ethnicity and Race in 2017 (effective date January 1, 2017), approving recently revised Uniform Residential Loan Application and Regulation C requirement that financial institutions allow consumers to self-identify with disaggregated racial and ethnic categories beginning in 2018;<sup>28</sup>
- Prepaid Accounts under the Electronic Fund Transfer Act (Regulation E) and the Truth In Lending Act (Regulation Z) (effective date October 1, 2017), implementing new protections for consumers with prepaid accounts;<sup>29</sup>
- Fair Credit Reporting Act Disclosures (effective date January 1, 2017), implementing annual update to the ceiling on allowable charges under § 612(f) of the Fair Credit Reporting Act, which remains at \$12.00 for 2017;<sup>30</sup> and
- Consumer Leasing (Regulation M) Annual Threshold Adjustments (effective date January 1, 2017), updating the comments and interpretations concerning the calculation method of the dollar amount for the exemption thresholds under the Consumer Leasing Act and TILA.<sup>31</sup>

In addition to a robust repertoire of final rules in 2016,<sup>32</sup> the CFPB has also issued a number of proposed rulemakings, some of which may be in jeopardy in light of the recent developments threatening the CFPB's authority:

- **Proposed Pre-Dispute Arbitration Agreement Rule.** On May 5, 2016, following a study mandated under the Dodd-Frank Act concerning the use of arbitration in consumer financial products and services, the CFPB issued a proposed rule that prohibits the use of pre-dispute arbitration agreements incorporating class action waivers in consumer financial products and services contracts.<sup>33</sup> The proposed rule, if implemented, would increase the number of class actions resolved in court rather than through individual arbitration, and may lead to more class actions being brought in court, as well. During the proposed rule's comment period, which ran through August 22, 2016, the CFPB received thousands of comments, including responses, partisan and bipartisan alike, that opposed

<sup>28</sup> 81 Fed. Reg. 66,930 (Sept. 29, 2016).

<sup>29</sup> 81 Fed. Reg. 83,934 (Nov. 22, 2016) (to be codified at 12 C.F.R. §§ 1005, 1026). The addition of § 1005.19(b) does not become effective until October 1, 2018, however.

<sup>30</sup> 81 Fed. Reg. 81,745 (Nov. 18, 2016).

<sup>31</sup> 81 Fed. Reg. 86,256 (Nov. 30, 2016) (to be codified at 12 C.F.R. §§ 213, 1013).

<sup>32</sup> The new Republican-controlled administration and Congress may have a limited window during which to invalidate certain of these new rules through the Congressional Review Act ("CRA"), which provides that, within certain detailed procedural parameters, new rules may be blocked with a resolution supported by 30 Senators and a simple majority vote. See 5 U.S.C. §§ 801-808; see also Maeve P. Carey, et al., *The Congressional Review Act: Frequently Asked Questions*, Congressional Research Service, Nov. 17, 2016, <https://fas.org/sgp/crs/misc/R43992.pdf>. The effect of such a vote is to invalidate the entire rule, including those portions already in effect. 5 U.S.C. § 801(f). And once a rule is invalidated, a similar rule cannot be promulgated unless Congress passes a new law authorizing the agency in question to do so. 5 U.S.C. § 801(b)(2). The CRA has been infrequently used, but the dynamics of President-elect Trump's incoming administration may offer opportunities for the Republican majority to defeat CFPB rules outside of the normal voting procedures. See also Christopher M. Davis & Richard S. Beth, *Agency Final Rules Submitted on or After June 13, 2016, May Be Subject to Disapproval by the 115th Congress*, CRS Insight IN10437 (Dec. 15, 2016), <https://fas.org/sgp/crs/misc/IN10437.pdf>.

<sup>33</sup> See 81 Fed. Reg. 32,829, 32,925-26 (May 24, 2016) (proposed 12 C.F.R. § 1040.4(a)). For more coverage of the proposed arbitration rule, see K&L Gates Alert, [CFPB's Proposed Rule Would Put the Brakes on Pre-Dispute Arbitration Clauses in Consumer Financial Contracts](#).

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the rule in full or in part.<sup>34</sup> The CFPB is in the process of reviewing those comments but, given the controversy over the proposed rule and the recent developments targeting the CFPB and financial regulation (as noted above, the FCA would eliminate the CFPB's rulemaking authority in this area), its ultimate promulgation is an open question.

- **Proposed Payday Loan Rule.** On June 2, 2016, the CFPB issued a proposed rule to extend certain consumer protections to cover payday loans.<sup>35</sup> While the exact contours of the proposed rule depend on the type of loan at issue (short-term loans or longer-term, high-cost loans), the proposal generally would render it an abusive and unfair practice for a lender to extend a payday loan to a consumer without first analyzing the consumer's ability to repay the loan. In the alternative, lenders will have means to avoid the "ability-to-repay" analysis by offering loans with specific parameters designed to minimize the risk of continued debt, while still providing consumers loans that meet their needs. The comment period for the proposed payday loan rule ended on October 7, 2016, and the rule was met with both support and consternation. Among other comments, all of which are still under review by the CFPB, the Small Business Administration's Office of Advocacy submitted a letter urging the agency make various changes in order to lighten the burden of the proposed rule on small businesses.<sup>36</sup> With President-elect Trump's campaign promise of helping small businesses by removing burdensome regulations, this rule may face an uphill battle towards finalization.<sup>37</sup>
- **Proposed TRID Amendments.** On July 29, 2016, the CFPB proposed amendments and clarifications to the TILA-RESPA Integrated Disclosure Rule ("TRID") that went into effect in 2015 and overhauled industry disclosure standards.<sup>38</sup> The 293-page proposed amendments touch on many significant issues for the mortgage industry, such as tolerance levels and privacy issues pertaining to loan disclosures. The deadline to submit comments on the proposal was October 18, 2016, and those comments are still under review. Because this rulemaking would amend an existing rule rather than create a new rule, it may be least impacted by recent developments.

The CFPB may try to push through the foregoing proposed rulemakings with closed comment periods before President-elect Trump's inauguration on January 20, 2017. Rulemakings, however, require procedural approval from the Office of Information and Regulatory Affairs, which could delay any attempted finalization of the rules.

### Conclusion

The CFPB has taken a number of hits over the past several months, and there are many open questions about what comes next for the agency. But judicial, legislative, and political changes tend to travel at a slow pace, even on the verge of a new administration, so the

<sup>34</sup> See, e.g., Bi-Partisan Letter from Members of the U.S. House of Representatives (Sept. 7, 2016); Letter from Republican Senators and Members of U.S. House of Representatives (Aug. 22, 2016); Letter from Democratic Members of the U.S. Senate (Aug. 3, 2016); Letter from Democratic Members of the U.S. House of Representatives (Aug. 3, 2016).

<sup>35</sup> 81 Fed. Reg. 47,863 (July 22, 2016) (proposed 12 C.F.R. § 1041).

<sup>36</sup> Letter from Hon. Darryl L. DePriest & Jennifer A. Smith, Office of Advocacy, to Hon. Richard Cordray, Director (Oct. 7, 2016), <https://www.regulations.gov/document?D=CFPB-2016-0025-148567>.

<sup>37</sup> For more coverage on the proposed payday rule, see K&L Gates Alert, [Payday Loans Under Attack: The CFPB's New Rule Could Dramatically Affect High-Cost, Short-Term Lending](#).

<sup>38</sup> 81 Fed. Reg. 54,317, 54,317-87 (Aug. 15, 2016) (proposed 12 C.F.R. § 1026). For details on the proposed TRID amendments, see K&L Gates blogpost, [CFPB Issues Notice of Proposed Rulemaking to Clarify "Know Before You Owe": Some Welcome Guidance on TRID But Cure And Liability Issues Not Addressed](#).

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CFPB is likely not going anywhere anytime soon. While the changing landscape may present roadblocks to passage of the agency's current proposed rulemakings, and may subject CFPB rules and actions to inquiry and challenge, the agency's final rules and authority continue to govern relevant industry practices for the time being. Thus, industry participants cannot throw caution to the wind. We will continue to monitor developments on the CFPB's future and any of its final or proposed rules in the new year.

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