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Consumer Financial Protection Bureau Update

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A degree of uncertainty hangs over the Consumer Financial Protection Bureau (CFPB) following the November 2017 resignation of its first director, Richard Cordray. On his last day in office, Cordray appointed his chief of staff, Leandra English, to the position of deputy director, intending that she become acting director upon his resignation. Immediately thereafter, President Donald Trump appointed Office of Management and Budget Director Mick Mulvaney as acting director, prompting a legal challenge by English. On January 12, 2018, Judge Timothy J. Kelly of the U.S. District Court for the District of Columbia denied English's motion for an injunction prohibiting Mulvaney from acting on behalf of the Bureau. Two days later, English filed a notice of appeal with the U.S. Court of Appeals for the District of Columbia Circuit as well as a notice indicating that she would seek expedited treatment of her appeal.

Meanwhile, Mulvaney has signaled that the agency will be moving in a radically different direction than during Cordray's tenure. In particular, he has stated that he will seek to slow down (and in some cases reverse) Bureau rulemaking, and that the Bureau will adopt a significantly different approach to enforcement. And while Mulvaney's tenure at the CFPB is temporary, the priorities of any confirmed director are expected to more closely resemble Mulvaney's than Cordray's.

The changes that Mulvaney has proposed would undoubtedly be welcomed by the financial services industry, which has faced a challenging enforcement and compliance environment under the CFPB. In the Bureau's first six years, it brought more than 200 actions, obtained nearly $5 billion in consumer restitution and assessed more than $700 million in civil money penalties. During the same period, the Bureau published more than 60 final rules, along with numerous informal guidance directives.

Although the cadence and nature of Bureau enforcement and rulemaking are likely to change, a look at past activities is nonetheless instructive, as the underlying laws that the Bureau enforces — including the Consumer Financial Protection Act and Equal Credit Opportunity Act — remain the same.

Enforcement Actions Spur Litigation

As in most years, the majority of the CFPB's public enforcement actions in 2017 were settled without litigation by agreed-upon consent orders. The Bureau announced numerous such settlements last year across the consumer financial services industry, including: an action against Experian alleging that the credit bureau deceived consumers and violated the Fair Credit Reporting Act based on the company's description of its credit scores; an action against Fay Servicing alleging that the mortgage servicer illegally began foreclosure proceedings against certain homeowners; and an action against certain American Express subsidiaries alleging discrimination against consumers on the basis of national origin by offering terms and conditions on its Spanish-language card products and products offered in Puerto Rico, the U.S. Virgin Islands and other U.S. territories that were less favorable than on their English-language card products and products offered in the 50 states.

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While all of these actions were resolved without litigation, the number of companies that elected to contest CFPB enforcement proceedings rather than settle increased in 2017. Whether these decisions were related to the merits of the cases or to Cordray's imminent departure is a matter of some debate. What is clear, however, is that a number of courts have shown a willingness to reject CFPB liability and damages theories, a development that could spur even more challenges to Bureau enforcement proceedings. In the litigation arena, notable decisions include:

- ***Intercept Corp.* (March 17, 2017).** In a case alleging that a third-party payment processor and its executives had "systematically enabled" certain debt collectors and lenders to collect debts that they were not legally owed, the court held that the CFPB's complaint did not contain sufficient factual allegations to back up its claims.
- ***Borders & Borders, PLC* (July 13, 2017).** In a case alleging violation of the Real Estate Settlement Procedures Act's (RESPA) anti-kickback provisions in the mortgage title insurance industry, the court granted summary judgment against the Bureau, ruling that the defendants satisfied the requirements for RESPA's "affiliated business arrangements" safe harbor.
- ***Nationwide Biweekly Administration, Inc.* (September 8, 2017).** In a case in which the CFPB sought $74 million in restitution from a company alleged to have misled consumers in connection with a mortgage "interest-minimizer" program, the court agreed that the defendants' conduct had been deceptive but declined to order them to pay any restitution, holding that the CFPB did not meet its burden of establishing a basis for consumer restitution.
- ***Universal Debt Solutions, LLC* (August 25, 2017).** In a case alleging that a number of payment processors participated in an unlawful debt collection scheme, the court dismissed all counts against the processors as a sanction against the CFPB for its "bad faith" conduct in discovery and "blatant disregard" for the court's instructions.

To be sure, the CFPB obtained a number of its own court victories in 2017 (including a ruling from a Pennsylvania court allowing its case against student loan servicer Navient to proceed). But the spate of court rulings against the CFPB in 2017 likely means that more targets will decline to settle CFPB charges and take their chances in court.

Mixed Results on Rulemaking

In 2017, the CFPB issued two rules that generated significant public interest — one regulating the use of arbitration agreements, and another requiring an ability-to-pay analysis for certain consumer credit products, such as payday loans, before the loans are originated.

The arbitration rule, which would have prohibited certain financial service providers from using predispute arbitration agreements to block consumer class actions in court, was issued in July 2017 and was to take effect two months later. However, in what was widely viewed as a rebuke to Cordray, Congress exercised its rarely used prerogative under the Congressional Review Act to issue a joint resolution disapproving of the arbitration rule. In November 2017, President Trump signed the joint resolution, thereby rendering the rule "of no force or effect."

Separately, the Bureau finalized the Payday, Vehicle Title, and Certain High-Cost Installment Loans Rule (the Payday Rule) in November 2017, with an effective date of January 16, 2018. The rule requires that before originating short-term loans, lenders determine if a borrower can afford the loan payments while meeting basic living expenses. The rule also caps the number of loans made in succession to a borrower to three and creates additional loan payoff options for consumers.

Significantly, the final rule was narrower than the Bureau's original proposal, which would have extended ability-to-pay and other requirements to certain longer-term installment loans with interest rates greater than 36 percent. Nonetheless, industry opposition to the Payday Rule has been stiff, with many commenters asserting that the restrictions would leave millions of Americans with no access to credit. On January 16, 2018, the CFPB announced that it intends to commence rulemaking to reconsider the Payday Rule.

Finally, yet another of Cordray's noted achievements was undone in December 2017, when an opinion from the Government Accountability Office (GAO) effectively invalidated the Bureau's 2013 compliance bulletin on the applicability of fair lending laws to indirect auto lending, stating that the bulletin constituted a "rule" and therefore was required to have been presented for review under the Congressional Review Act. The GAO opinion not only negates any precedential weight of that bulletin, which the Bureau had relied on in obtaining several hundred million dollars in settlements, but also raises questions about whether other CFPB bulletins also may be subject to effective invalidation under the Congressional Review Act.