Insights: Alerts

Trump Administration Sets Forth Recommendations for Consumer Finance Regulatory Reform

JUNE 21, 2017 Written by Gary R. Bronstein, Christina M. Gattuso, Edward G. Olifer,

On June 12, the U.S. Department of the Treasury released a comprehensive report setting forth the Trump Administration's vision for regulatory reform in the banking sector. [1] Specifically, this report focuses on the depository system, covering banks, savings associations, and credit unions of all sizes, types, and regulatory charters. This report responds to Executive Order 13772, which President Donald J. Trump issued on February 3, and which established his Administration's policy to regulate the U.S. financial system in a manner consistent with a set of "Core Principles." [2]

Along with providing some background on the U.S. depository system, the U.S. financial regulatory structure and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), the report provides a series of findings and recommendations related to bank regulation, consumer lending, and commercial credit. This bulletin focuses on the report's discussion concerning the Consumer Financial Protection Bureau (CFPB), consumer credit, residential mortgage lending, and provisions of the Dodd-Frank Act regarding small business lending. Most of the recommendations concerning consumer credit reflect the Administration's underlying criticisms of the CFPB and the Dodd-Frank Act.

By starting with the premise that the CFPB's "unaccountable structure and unduly broad regulatory powers have led to regulatory abuses and excesses," the report highlights the Administration's belief that the CFPB's approach to enforcement and rulemaking "has hindered consumer choice and access to credit, limited innovation, and imposed undue compliance burdens, particularly on small institutions." The report identifies the following CFPB-related recommendations:

- **The CFPB's Structure** : The Administration proposes to restructure the CFPB's structure "to ensure that it is accountable to elected officials and, ultimately, to the American people." If the Director is not made removable at-will by the President (which the report deems the "most straightforward remedy"), the Administration proposes that the alternative should be a restructuring of the CFPB as an independent multimember commission or board. This recommendation comes as no surprise since the Administration has argued this position in the ongoing litigation in the case of *PHH Corp. v. Consumer Financial Protection Bureau*, which is currently before the U.S. Court of Appeals for the District of Columbia Circuit.
- **The CFPB's Funding** : The Administration recommends that the CFPB should be funded through the annual appropriations process, and the agency should be subject to OMB apportionment.[3] Additionally, the Administration recommends that the CFPB's Consumer Financial Civil Penalty Fund should be reformed to permit the CFPB to retain and use only those funds necessary for payments to the *bona fide* victims of activities for which the CFPB has imposed civil money penalties, and it should remit any excess funds to the

Treasury.

- **Reforms to the CFPB's Investigative & Enforcement Authorities** :

1. The Administration believes that the CFPB should be required to issues rules or guidance subject to public notice and comment procedures before bringing enforcement actions in areas where clear guidance is lacking or where the agency's position departs from the historical interpretation of the law (a position which seems based in the Administration's views of the CFPB's posture in the *PHH* case). This recommendation is also based on the premise that the CFPB should seek monetary sanctions only in cases where a regulated party had reasonable notice — under a CFPB regulation, judicial precedent, or FTC precedent — and that its conduct was unlawful.[4]

2. The Administration calls for the CFPB to adopt regulations that more clearly articulate its interpretation of the UDAAP (unfair, deceptive, and abusive acts and practices) standard. If the CFPB concludes a new practice is problematic in the broader market, it should conduct notice and comment rulemaking to prohibit the practice, rather than continuing to rely on case-by-case enforcement to develop the UDAAP standard.

3. The Administration believes that the CFPB should align its policies for issuing no-action letters or analogous documents with the policies of the SEC, CFTC, and FTC.

4. The Administration recommends that the CFPB should bring enforcement actions in federal district court rather than use administrative proceedings due to (a) the undefined scope of UDAAP and resulting uncertainty for market participants and (b) the lack of procedural protections for respondents in administrative proceedings. At a minimum, to the extent the CFPB continues to pursue some enforcement actions through administrative adjudications, the Administration recommends that it promulgate a regulation specifying binding criteria when deciding whether to bring an action in federal court or before an administrative law judge (ALJ) in the first instance.

5.The Administration proposes that the CFPB's civil investigative demand (CID) process should be reformed to ensure subjects of an investigation receive the benefit of existing statutory protections, backed by judicial review,[5] and for the CFPB to adopt procedures to ensure that review of a CID appeal remains confidential if requested. Relatedly, the Administration calls on Congress to amend the Dodd-Frank Act to permit persons who receive a CID to proactively file a motion in federal district court to modify or set aside a CID, rather than limiting recourse to an appeal to the Director.[6]

- **Expanding Retrospective Regulatory Review**: The Administration seeks the CFPB to regularly review all regulations that it administers "to identify outdated or otherwise unnecessary regulatory requirements imposed on regulated entities." Such review should occur, at the very least, once every 10 years for all regulations that the CFPB administers, and should include solicitation of public comment on regulations that are outdated, unnecessary, or unduly burdensome. The CFPB should also provide a public report summarizing any significant issues raised by public comments and a discussion of how the CFPB will address regulatory burdens associated with such issues. Any regulations deemed outdated, unnecessary, or unduly burdensome should be eliminated.
- **Improving Safeguards for Consumer Complaint Database**: The Administration recommends reforms to the CFPB's Consumer Complaint Database, making the underlying data available only to federal and state agencies, and not to the general public.

- **Eliminating the CFPB's Supervisory Authority** : The Administration calls on Congress to repeal the CFPB's supervisory authority, and entrust the prudential regulators to supervise banks and state regulators with the supervision of nonbanks.

The report also contains a number of recommendations for regulatory reform of the mortgage origination process, mortgage servicing standards, and private sector secondary market activities. The Administration believes that these recommendations, if appropriately implemented, could increase the availability of mortgage credit, increase consumer choice, and decrease the subsidization and market share of government-supported mortgages. These recommendations include certain adjustments, modifications, and revisions to the CFPB's Ability to Repay/Qualified Mortgage (ATR/QM) Rule, TILA-RESPA Integrated Disclosures (TRID) Rule, Loan Originator Compensation Rule, and Home Mortgage Disclosure Act (HMDA) Rule. The report also calls on the CFPB to place a moratorium on additional rulemaking in mortgage servicing, while the industry updates its operations to comply with the existing regulations and transitions from the Home Affordable Modification Program (HAMP) to alternative loss mitigation options.

With respect to small business lending, the report calls for the repeal of Section 1071 of the Dodd-Frank Act, which requires the CFPB to establish regulations and issue guidance for small business loan data collection.

Next Steps

The short- and long-term prospects for the recommendations contained in this report remain uncertain. On May 24, the U.S. Court of Appeals for the D.C. Circuit held *en banc* oral argument in the rehearing of the *PHH* case, and the constitutionality of the CFPB's structure was the central issue at the oral argument. The decision in this case will likely resolve the lingering questions regarding the constitutionality of the CFPB's structure, pending any potential final say by the U.S. Supreme Court. Some of the recommendations are contained in the Financial CHOICE Act,[7] which was recently passed by the U.S. House of Representatives, but its outlook remains uncertain in the U.S. Senate, where Senate Majority Leader Mitch McConnell (R-KY) has expressed a lack of optimism in Congress' ability to pass legislation to amend Dodd-Frank. Regardless of any potential legislative changes, we anticipate policy changes at the CFPB over the next year tied to the likely departure of Director Richard Cordray after his term expires in July 2018 (or earlier if the D.C. Circuit's decision in the *PHH* case renders the CFPB Director removable by the President "at will").

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[1]U.S. Department of the Treasury, *A Financial System that Creates Economic Opportunities: Banks and Credit Unions*, June 2017, available at https://www.treasury.gov/press-center/press-releases/Documents/A%20Financial%20System.pdf. Subsequent reports will cover: (a) capital markets: debt, equity, commodities and derivatives markets, central clearing, and other operational functions; (b) the asset management and insurance industries, and retail and institutional investment products and vehicles; and (c) non-bank financial institutions, financial technology, and financial innovation.

[2]The Core Principles are: (a) Empower Americans to make independent financial decisions and informed choices in the marketplace, save for retirement, and build individual wealth; (b) prevent taxpayer-funded bailouts; (c) foster economic growth and vibrant financial markets through more rigorous regulatory impact analysis that addresses systemic risk and market failures, such as moral hazard and information asymmetry; (d) enable American companies to be competitive with foreign firms in domestic and foreign markets; (e) advance American interests in international financial regulatory negotiations and meetings; (f) make regulation efficient, effective, and appropriately tailored; and (g) restore public accountability within federal financial regulatory agencies and rationalize the federal financial regulatory framework.

[3]OMB apportionment would require the agency to obtain OMB approval for a plan to use its budgetary resources.
[4]The Administration notes that this reform "would not deprive the CFPB of the ability to target and stop practices not previously understood to be prohibited, as the agency would retain the authority to issue a cease-and-desist order or initiate an enforcement action seeking injunctive relief."
[5]In particular, the report recommends that the CFPB should adopt guidance to ensure that all of its CIDs comply with the standard set forth by the D.C. Circuit in the ACICS case, which would require that subjects being investigated for a potential violation of federal consumer financial laws receive clear notice of the conduct at issue, along with a description of the specific laws the CFPB believes may have been violated.
[6]The Administration believes that this reform "would bring the CFPB's procedures in line with the protections provided under the Department of Justice's authority to issue CIDs related to False Claims Act violations."

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