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From CFPB to BCFP: A New Bureau of Consumer Financial Protection

James Orescanin

CONSUMER NEWS

FROM CFPB TO BCFP: A NEW BUREAU OF CONSUMER FINANCIAL PROTECTION

James Orescanin, News Editor

Changes are coming for the Consumer Financial Protection Bureau (CFPB). The CFPB was established in 2010, when Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act, following the most severe United States financial crisis since the Great Depression.[1] Among other things, this Act created the Consumer Financial Protection Bureau, a federal executive agency designed to protect consumers from predatory lending practices and other types of financial fraud.[2] In the last year, changes to the CFPB's administration have significantly impacted the ways in which the CFPB will carry out its mission as the sole executive authority in this area. As is often the case, with these changes comes harsh criticism on one hand, and unwavering support on the other. Regardless of one's views on the issue, it will be interesting to see the effects that these changes will bring, and the additional changes that have yet to come.

When the CFPB was created, it was given expansive authority in carrying out it is mission of regulating consumer financial products and services.[3] Among other things, the CFPB was given statutory authority to craft rules to protect consumers from unfair, deceptive, or abusive practices under Federal law,[4] and to create rules which interpreted then existing federal law,

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[1] "Creating the Consumer Bureau", U.S. Consumer Financial Protection Bureau, https://www.consumerfinance.gov/about-us/the-bureau/creatingthebureau/ (last accessed November 13, 2018); *See also* 12 U.S.C.A. § 5491 (West 2010).

[2] *Id.*

[3] *See* Donna M. Goelz & Timothy J. Howard, *The Dodd-Frank Act's Impact on Consumer Litigation*, 100 ILL. B.J. 100, 102 (2012).

[4] *Id. See also* 12 U.S.C.A. § 5531(b) (West 2010).

such as the Truth in Lending Act, and Fair Credit Reporting Act.[5] In addition to this rulemaking authority, the CFPB was granted broad enforcement powers which would allow it to bring civil actions against parties who violated Federal laws or the CFPB's own promulgated rules, through which the CFPB could seek damages, restitution to injured consumers, or public notification regarding the legal violation(s).[6] Utilizing this authority, the CFPB returned an estimated $3.97 billion to American consumers through enforcement actions in just the first seven years of its existence.[7] Finally, the CFPB was granted authority to supervise and investigate various entities which offered financial services, including debt collectors, consumer reporting agencies, and private educational lenders.[8]

At its conception, the CFPB was established as an independent agency, insulated from Congressional intervention.[9] It was designed to be led by a single Director, appointed by the President with the advice and consent of the Senate, and to hold that position for a term of five years.[10] Further, to avoid political interference, the CFPB's Director could only be removed for cause upon a showing of inefficiency, neglect of duty, or malfeasance in office.[11] In addition, the agency was given special rules regarding its significant budget.[12] The Director was given the sole authority to determine the amount of budget reasonably necessary to carry out the CFPB's mission, and that amount was to be paid out by the Federal Reserve, subject to a statutory cap.[13] The CFPB would not need to secure an appropriation from Congress each year.

[5] Goelz & Howard, *supra* note 3, at 102. *See also* 12 U.S.C.A. § 5492(a)(10) (West 2010).

[6] 12 U.S.C.A. § 5565(a) (West 2010).

[7] Ken Sweet, *Under Trump and Mulvaney, CFPB Has Filed No Enforcement Actions Since November*, USA TODAY (April 10, 2018), https://www.usatoday.com/story/money/economy/2018/04/10/under-trump-mulvaney-cfpb-has-filed-no-enforcement-actions/502451002/.

[8] Goelz & Howard, *supra* note 3, at 102.

[9] *See* Susan Block-Lieb, *Accountability and the Bureau of Consumer Financial Protection*, 7 BROOK. J. CORP. FIN. & COM. L. 25, 28-29 (2012).

[10] *Id.* at 38. Notably, the CFPB is the only independent agency in Washington D.C. ran by a single director, rather than a board of commissioners. *Id.* at 39.

[11] 12 U.S.C.A. § 5491(c) (West 2010).

[12] The statute places a statutory cap on the budget available to the CFPB, which is estimated at almost twice that of the Federal Trade Commission, and about half that of the Securities and Exchange Commission. *See* Block-Lieb, *supra* note 9, at 39.

[13] *Id.*

Instead, the Director's request for funding was expressly insulated from review by the Committees on Appropriations of both chambers of Congress, with the budget subject to audit only by the Office of Management and Budget and the Comptroller General of the United States.[14]

At its conception, as with most political creations, there was a blend of both criticism and support. Some critics opposed the administrative design of the CFPB, arguing that allowing a single Director to head the bureau, rather than a bipartisan panel of commissioners, would lead to a lack of accountability.[15] Further, critics took issue with the CFPB's exemption from the Congressional budgetary appropriations process.[16] These critics worried that this scheme allowed the CFPB to request funding with little, if any, oversight.[17] Additionally, critics argued that the CFPB's enforcement powers and rulemaking authority would further complicate the consumer protection market, and that the dysfunction of the consumer protection system resulted from excessive regulation and litigation.[18]

On the other hand, proponents of the CFPB's creation argued that the agency needed its independence in order to carry out its mission free from political interference.[19] These supporters argued that the CFPB's independent authority was crucial, particularly in response to the financial crisis which prompted the CFPB's creation.[20] Further, proponents argued that the creation of the CFPB was necessary for regulating previously unregulated, or inconsistently regulated, financial institutions.[21] Many proponents argued that this type of consistent regulation was "long overdue" and that "[h]ad all mortgage brokers and lenders been subject to a level playing field of consumer protection oversight, many of the abuses leading to the [financial crisis of 2008] might

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[14] *Id.* at 39-40.

[15] *Id.* at 25.

[16] Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 GEO. WASH. L. REV. 856, 872 (2013).

[17] *Id.* at 873.

[18] *Id.* at 907.

[19] Block-Lieb, *supra* note 9, at 28-29.

[20] *Id.* at 37. ("The logic of aggregating regulatory authority and some enforcement authority in [the CFPB] is fairly simple: predatory subprime mortgages were left virtually unregulated by federal agencies, who viewed mortgage lenders as their "clients" rather than as the subjects of regulatory authority").

[21] Ann Graham, *The Consumer Financial Protection Agency: Love it or Hate it, U.S. Financial Regulation Needs it*, 55 VILL. L. REV. 603, 612 (2010).

have been controlled."[22]

Despite the mixed public reviews, the CFPB was successfully created in 2010 and continues to operate today. In the past year, however, there have been significant changes to the CFPB's administration which implicates uncertainty for the future. First, following the last presidential election, newly elected President Trump sought to fire then CFPB Director Richard Cordray and appoint his own Director.[23] This decision led to contentious litigation in *PHH Corporation v. Consumer Financial Protection Bureau*, where the CFPB Director's removal protection[24] was challenged as unconstitutionally upsetting the separation of powers by infringing on the President's executive authority to oversee the agency.[25] Although the Eighth Circuit held that the Director's removal protection was constitutionally valid, thus denying the ability of the president to terminate him without cause, by that time Cordray had already resigned as the CFPB Director to lead an unsuccessful campaign for governor of Ohio.[26] Thus, President Trump elected a temporary CFPB Director, former White House Budget Director Mick Mulvaney, to lead the agency until the President chose a nominee who could be confirmed by the Senate.[27]

Under Mulvaney's leadership, the CFPB began implementing several significant changes. Within months he fired the CFPB's twenty-five member advisory board, after some of the

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[22] *Id.*

[23] Andrew M. Harris, *Court Ruling on CFPB Director Deals Blow to Trump Administration*, BLOOMBERG (January 31, 2018), https://www.bloomberg.com/news/articles/2018-01-31/cfpb-s-director-slot-regains-job-security-on-appeals-reversal.

[24] The statute protects the CFPB Director from removal for any reason other than a showing of inefficiency, neglect, or malfeasance. 12 U.S.C.A. § 5491(c) (West 2010).

[25] *PHH Corp. v. Consumer Financial Protection Bureau*, 881 F.3d 75, 78 (8th Cir. 2018).

[26] *Id.* at 84. *See also* Caitlin Emma, *Republican Mike DeWine Beats Richard Cordray to Capture Ohio Governorship*, POLITICO (November 6, 2018), https://www.politico.com/story/2018/11/06/richard-cordray-vs-mike-dewine-ohio-governor-race-results-2018-963518.

[27] Renae Merle, *The CFPB Now has Two Acting Directors. And Nobody Knows Which One Should Lead the Federal Agency*, THE WASHINGTON POST (November 24, 2017), https://www.washingtonpost.com/news/business/wp/2017/11/24/the-cfpb-now-has-two-acting-directors-and-nobody-knows-which-one-should-lead-the-federal-agency/?utm_term=.22edbf6f53ab.

members criticized his leadership of the agency.[28] That panel traditionally played a role in advising the CFPB's leadership on new regulations and policies, however they were fired after criticizing Acting Director Mulvaney for making "unwise decisions about the [CFPB's] future."[29] Furthermore, perhaps most notably, the agency has attempted to change its public name from the Consumer Financial Protection Bureau to the Bureau of Consumer Financial Protection.[30] Although critics argue that this is a display of pettiness,[31] the "Bureau of Consumer Financial Protection" is actually the name given to the agency under the statute.[32] The CFPB has also made changes regarding its enforcement actions and general policies. Specifically, under Acting Director Mulvaney, the agency has significantly slowed down its enforcement actions and other programs.[33] Reportedly, Acting Director Mulvaney has stated clearly that "[r]egulation by enforcement is done. . . Financial services providers shall be allowed to know what the law is before being accused of breaking it."[34]

Mulvaney has also been attempting to reduce costs of the CFPB, reportedly requesting zero dollars from the Federal Reserve during his first fiscal quarter, and instead relying on the CFPB's $177 million emergency reserve account with the Federal

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[28] Renae Merle, *Mick Mulvaney Fires all 25 Members of Consumer Watchdog's Advisory Board*, THE WASHINGTON POST (June 6, 2018).

[29] *Id.*

[30] Alan Rappeport, *What's in a Name? Consumer Bureau to Find Out*, THE NEW YORK TIMES (June 12, 2018), https://www.nytimes.com/2018/06/12/business/consumer-protection-bureau-mulvaney.html.

[31] *See* Emily Stewart, *Mick Mulvaney Changed the CFPB's Sign to BCFP*, VOX (June 11, 2018), https://www.vox.com/policy-and-politics/2018/6/11/17451292/mick-mulvaney-cfpb-bcfp (referring to the change as being "the pettiest of changes" to the CFPB, and arguing that it is part of an attempt to deemphasize the 'consumer' part of the CFPB's mission).

[32] *See* 12 U.S.C.A. § 5491(a) (West 2010) ("There is to be established in the Federal Reserve System, an independent bureau to be known as the "Bureau of Consumer Financial Protection", which shall regulate. . ."). However, as of the time of writing this article, the CFPB's website still refers to the agency as the 'Consumer Financial Protection Bureau.' *See* "About us", U.S. Consumer Financial Protection Bureau, https://www.consumerfinance.gov/about-us/ (last accessed November 13, 2018).

[33] Sylvan Lane, *Five Ways Mulvaney is Cracking Down on his Own Agency*, THE HILL (June 10, 2018), https://thehill.com/regulation/finance/391443-five-ways-mulvaney-is-cracking-down-on-his-own-agency

[34] *Id.*

Reserve's New York branch.[35] According to Mulvaney, there was no practical reason to maintain the reserve fund started under former Director Cordray, because the CFPB's budget requests had been approved every single time.[36] The CFPB has also proposed to eliminate certain rules proposed by the CFPB under prior Director Richard Cordray, such as a payday lending rule which would require that lenders first assess borrowers' ability to repay payday loans prior to lending the borrower money.[37] Finally, the CFPB has made and proposed cuts to other programs, such as its regulatory authority with regard to the Military Lending Act.[38] Although the CFPB has the statutory authority to ensure compliance with this Act,[39] the CFPB now claims it does not have statutory authority to carry out its previously conducted preventative supervisory audits of such loans.[40]

As a result of these changes, the future of the CFPB as a regulatory force is uncertain. Although it began as an independent regulatory authority with enforcement teeth, it is clear that under the acting Director's leadership, the agency will be carrying out less enforcement actions and narrowing its supervisory focus. However, acting Director Mulvaney will not be with the CFPB forever, and President Trump has already nominated a new head of the agency: Kathy Kraninger, who previously worked at the Office of Management and Budget, overseeing roughly $250

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[35] Sylvan Lane, *Mulvaney Asks Fed to Withhold Additional Consumer Bureau Funding*, THE HILL (January 18, 2018), https://thehill.com/policy/finance/369522-mulvaney-requests-0-from-fed-to-fund-consumer-bureau-for-second-quarter-of.

[36] For context, the CFPB asked for and received $217 million in its funding request for the first quarter of 2018—the last budget request issued under former Director Cordray. According to Acting Director Mulvaney, his decision to use the emergency reserve account rather than request additional funding would save taxpayers $145 million. *Id.*

[37] Payday loans are typically small, short-term, high interest loans. Evan Weinberger, *CFPB Expected to Cut Payday Repayment Tests in Rule Overhaul*, BLOOMBERG BNA (October 19, 2018), https://www.bna.com/cfpb-expected-cut-n57982093184/#.

[38] Francis Monfort, *CFPB Policy on Military Lending Supervision 'Unacceptable,' Says Consumer Group*, MORTGAGE PROFESSIONAL AMERICA (November 4, 2018), https://www.mpamag.com/news/investor-mortgage/cfpb-policy-on-military-lending-supervision-unacceptable-says-consumer-group-115292.aspx.

[39] The Military Lending Act was passed in 2006 to address predatory lending affecting military personnel by capping interest rates made to service members and their families. *Id.*

[40] *Id.*

billion in federal government programs.[41] Supporters of Kraninger's nomination say that she is exactly what the CFPB needs: a seasoned public servant, who has proven herself to be an effective manager of large government bureaucracies, and who will "shake up the status quo."[42] On the other hand, opponents say she has no financial regulation experience and is thus unqualified for the position.[43] In addition, some opponents criticize Kraninger for her alleged involvement in "some of the worst debacles of the Trump administration, including the response to Hurricane Maria in Puerto Rico and the White House's zero-tolerance policy which resulted in the detention and separation of immigrant children and parents at the border."[44]

In spite of the criticisms, President Trump's nomination of Kraninger was confirmed in August by the Senate Banking Committee, and she is currently awaiting Senate nomination hearings.[45] Whether she will be confirmed by the Senate as the new CFPB head, or if President Trump will be forced to nominate a new candidate, has yet to be determined. In the meantime, Acting Director Mulvaney will continue to lead the CFPB with a policy of reducing enforcement actions, cutting costs, and loosening regulations. Thus, regardless of one's political views, it is clear that changes are on the horizon for the CFPB. Most importantly, however, is that the impact that these (and future) changes have on the American consumer has yet to be fully realized.

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41 Irina Ivanova, *How Kathy Kraninger Plans to Run the Consumer Financial Protection Bureau*, CBS NEWS (July 19, 2018), https://www.cbsnews.com/news/how-kathy-kraninger-plans-to-run-the-consumer-financial-protection-bureau/.

42 Thom Tillis, *Kathy Kraninger is What CFPB Needs: Thom Tillis*, USA TODAY (August 8, 2018), https://www.usatoday.com/story/opinion/2018/08/08/kathy-kraninger-what-cfpb-needs-thom-tillis-editorials-debates/37368211/.

43 Chris Arnold, *Democratic Senators Slam Trump's Pick to Run Consumer Financial Protection Bureau*, NATIONAL PUBLIC RADIO (July 19, 2018), https://www.npr.org/2018/07/19/630485854/senators-clash-over-trumps-pick-to-run-consumer-financial-protection-bureau.

44 *Id.*

45 Yuki Noguchi, *Senate Banking Committee Approves CFPB Nominee Kathleen Kraninger*, NATIONAL PUBLIC RADIO (August 23, 2018), https://www.npr.org/2018/08/23/641359610/senate-banking-committee-approves-cfpb-nominee-kathleen-kraninger.