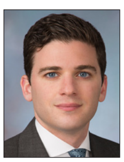
The CFPB Under Trump: Debunking Some Preconceptions

This article was originally published on *Law360* on November 29, 2016.

by Mercedes K. Tunstall, Andrew Caplan and Nathalie Prescott

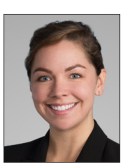
Mercedes K. Tunstall
Public Policy
+1.202.663.8118
mercedes.tunstall@pillsburylaw.com

Mercedes K. Tunstall is a Public Policy partner in Pillsbury's Washington, DC office. She is a former lead counsel for global marketing and deposits at Ally Financial and has also worked in-house for Bank of America. She is a former staff attorney at the Federal Trade Commission.



Andrew Caplan
Public Practices
+1.202.663.8110
andrew.caplan@pillsburylaw.com

Andrew Caplan is an associate in Pillsbury's Public Policy practice and also is located in the Washington, DC office.



Nathalie Prescott
Public Practices
+1.202.663.9453
nathalie.prescott@pillsburylaw.com

Nathalie Prescott is a senior law clerk in Pillsbury's Washington, DC office.

For financial institutions that have been operating under the weight of the **Consumer Financial Protection Bureau** for the past five years—with its aggressive enforcement actions and prolific rulemakings—a Trump administration may seem like welcome news. Indeed, a core tenet of the still-evolving Donald Trump agenda is to roll back the pace and coverage of federal regulations generally, and banking regulations in particular. The presidentelect has at times even called for complete repeal of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Great Recession-era financial reform law that, among other things, gave life to the CFPB.

Notwithstanding this strong rhetoric, we can expect that President-elect Trump's developing federal agenda may in many respects be shaped by his vice president-elect, Indiana Governor Michael Pence, and by extension, congressional Republicans. Prevailing Republican initiatives seek to reform the nascent federal consumer protection watchdog rather than eliminate it. Below, we debunk several potential preconceptions regarding the future status of the CFPB, while also offering an indepth legal perspective on what we are likely to see under the next administration.

Director Cordray's Term as CFPB Director Goes Until 2018: Unlikely

On July 12, 2013, the Senate officially confirmed former Ohio Attorney General Richard Cordray as the first director of the CFPB through a bipartisan, 66-34 vote. This confirmation ended the legal uncertainty that had plagued Cordray's initial appointment by President Barack Obama, which occurred without Senate confirmation during a purported Senate recess in January 2012. President Obama's **National Labor Relations Board** appointments made during the same period were later held invalid by the **U.S. Supreme Court** under the theory that the Senate had not formally entered into recess.[1] This decision logically then cast doubt upon Richard Cordray's own recess appointment although, as noted above, the Senate later removed such doubt through its 2013 confirmation of Director Corday. Immediately thereafter, Cordray adopted all actions taken by the CFPB prior to his official confirmation.

Title X of the Dodd-Frank Act provides the CFPB director with a five-year term, therefore giving Cordray a term that technically expires in July 2018. As originally conceived, the Dodd-Frank Act prevents the president from removing the bureau's director except for cases of "inefficiency, neglect of duty or malfeasance of office."[2] In other words, the Dodd-Frank Act originally protected the bureau's director from atwill removal during the five-year term and, by extension, somewhat insulated the director's agenda from the passing fancies of presidential administrations.

For-cause removal limitations like this are standard issue among independent federal regulatory agencies (see e.g., the **Federal Trade Commission** and the **Federal Energy Regulatory Commission**). The recent case **PHH Corp**. *v. Consumer Financial Protection Bureau* (which we wrote about **here**),[3] however, has put the CFPB's current director structure in doubt. Thanks to the opinion by the U.S. Court of Appeals for the District of Columbia Circuit, Trump's win very well may put Cordray out of a job some time following the January 2017 inauguration.

To recap: The PHH decision found the CFPB's single-director structure to be unconstitutional, the net effect of which would convert the CFPB from an independent agency into an executive agency. If the decision becomes effective (which we discuss further below), Cordray will serve at the pleasure of the president and thereby be removable by Trump, at his discretion. We strongly suspect that Trump would waste little time in removing the Obama-era consumer protectionist.

However, there is uncertainty as to whether and when the D.C. Circuit's decision becomes effective. On Nov. 18, the CFPB filed a petition to the D.C. Circuit requesting an en banc (full panel) rehearing of the decision.[4] This petition automatically stays the effectiveness of the ruling until the D.C. Circuit grants or denies the rehearing request. If granted, the decision will be stayed during the pendency of the rehearing. If denied, the ruling becomes effective, although the CFPB could still file a petition for writ of certiorari to the Supreme Court (this petition must be filed within 90 days of the original Oct. 11 decision) along with a motion requesting a stay of the decision's effectiveness.

If such a stay were granted by the Supreme Court, the CFPB would continue as an independent agency, rather than an executive agency. In other words, Cordray would be protected from at-will removal by the president (until such time as the Supreme Court considers the issue on the merits). As such, the decision may not be effective for at least several months into Trump's administration.

For its part, PHH could at any time file a motion to enforce the decision; if the D.C. Circuit granted the motion, Cordray would then serve at the pleasure of the president until and unless the CFPB won in an en banc rehearing or at the Supreme Court.

Finally, regardless of whether the decision is vacated or its effectiveness stayed, the Trump administration may nonetheless seek to press for Cordray's "for cause" removal or resignation. And whether the CFPB would even seek to maintain such a high-risk game of Russian roulette with the new administration remains to be seen.

CFPB is Business as Usual Unless/Until Congress Changes Things: Not Necessarily

If the D.C. Circuit's PHH decision does become effective, Cordray will be removable at the pleasure of the president. As we note above, such an outcome does not likely translate to a long tenure for Cordray.

But Cordray being shown the door by the Trump administration is not the only change that could confront the CFPB in very short order. If the Trump administration does not name a replacement director, then the CFPB's authority arguably becomes quite limited (again). Followers of the CFPB will recall that there was a time when the CFPB was without a confirmed director due to Congress' initial refusal to approve Cordray's nomination. As a result, its activities were then limited to what the CFPB could do without a director.

Specifically, the Dodd-Frank Act contemplated that in setting up the new CFPB in 2011, the secretary of the Treasury could assume some—but not all—of the new bureau's activities until such time as a director was confirmed by the Senate. These interim authorities included, for example, examining depository institutions with assets above $10 billion and administering the regulations transferred to the bureau from other federal agencies under the Dodd-Frank Act. In contrast, without a Senate-confirmed director, the secretary of the Treasury could not, among other things, exercise the bureau's novel authority to proscribe abusive acts and practices or examine and prescribe rules for nondepository financial institutions now subject to the bureau's authority (arguably one of the bureau's most sweeping mandates).

The section of the Dodd-Frank Act that limits the Treasury secretary's authority in administering a sans director CFPB exists among those portions of Title X that govern the initial transfer of authorities from seven other federal agencies to the new CFPB (upon passage of the

Dodd-Frank Act).[5] It is not crystal clear if these provisions should be triggered each subsequent time the director is removed.

Indeed, the Dodd-Frank Act does provide elsewhere for leadership during times of director absence by requiring the CFPB's deputy director—a position appointed by the director—to serve as acting director during periods when the director is absent or unavailable.[6] This would arguably include Cordray's absence due to presidential removal, meaning that the bureau would not find itself "headless" as in its earliest days. Still, the authority of an acting director is not entirely clear, since a deputy director's appointment is not by the advice and consent of the Senate.[7]

As this would be the first time a CFPB director is potentially removed from office (thus leaving the bureau, at least temporarily, without a formal director), whether the Treasury Department's original pre-director oversight and corresponding limitations apply is an issue of first impression. Any delay by the Trump administration to name a replacement CFPB director (assuming Cordray's ouster) and/or Senate delay in taking up the confirmation would therefore create an environment in which the CFPB's authority to exercise its full suite of powers would be clouded and, at the very most, suspended.

Assuming President-elect Trump does ultimately name a replacement CFPB director who is then confirmed by the Senate, we would expect to see a director with a decidedly different agenda from Richard Cordray. Even in a post-PHH world, the CFPB director still has considerable authority to make internal staff appointments, set the bureau's rulemaking and investigatory/enforcement agendas, and request the specific amount of funding disbursement from the Federal Reserve Board.[8] We would not be surprised to see significantly scaled-back enforcement priorities and funding requests under a Trump-appointed CFPB director, alongside a reshaping of internal staff.

The CFPB's Very Future is Questionable: Probably Not

Likely to the dismay of its regulated institutions, the CFPB will almost certainly continue to exist in some form during the Trump presidency. Prevailing wisdom supports that congressional Republicans seem more inclined to reform the bureau rather than eliminate it, and we would expect Trump to follow these policy positions. Sen. Elizabeth Warren, D-Mass., the original architect behind the bureau, also holds significant sway on the Senate Banking Committee and is unlikely to watch the bureau get axed or reshaped without a significant fight.

Already, congressional Republicans have drafted a comprehensive series of revisions to the Dodd-Frank Act, including a revamp of the CFPB itself. The most recent version of these revisions was introduced in the House of Representatives in September as the Financial CHOICE Act (FCA).[9] Rep. Jeb Hensarling, RTexas, chairman of the House Financial Services Committee, sponsored the bill along with five other Republican co-sponsors.[10] So far, the FCA bill has yet to move beyond committee but Trump's election and the Republicans' maintained lead in Congress will likely reinvigorate the process.[11]

The FCA promises dramatic changes to the CFPB. Specifically, it would overhaul the CFPB's structure by:

- Renaming the CFPB as the Consumer Financial Opportunity Commission (CFOC). This change may be an effort to erase the CFPB's industry-adverse reputation.
- Tasking the new CFOC with the dual mission of protecting consumers and seeking to promote robust market competition, with cost-benefit analyses required for proposed rules.
- Replacing the current single-director structure with an independent and bipartisan five-member commission. Members will be presidentially appointed, hold five-year terms and be headed by a CFOC chair appointed by the president from among the members (see e.g., the FTC). The new commission structure differs from, but still aligns with, the holding in *PHH v. CFPB*, where the D.C. Circuit's opinion transformed the CFPB into an executive agency after finding its current independent structure unconstitutional.
- Creating a CFOC-specific inspector general position.
- Subjecting the CFOC to the congressional appropriations process. Currently, the CFPB director requests funding from the Federal Reserve Board, which is mandated to transfer operating funds to the bureau up to a certain cap. The cap is tied to the Fed's operating expenses: beginning at 10 percent of the expenses in 2011, the cap is now set at 12 percent for the foreseeable future. The new process would eliminate that guaranteed funding, with the effect of reducing the CFOC's independence and increasing its accountability to Congress.

The FCA also makes substantive changes to the CFPB's current authority under the Dodd-Frank Act by:

- Establishing an Office of Economic Analysis with in-house economists that perform cost-benefit analyses of any proposed regulations.
- Repealing the CFPB's authority to prohibit arbitration waivers and to proscribe "abusive" acts and practices.
- Eliminating Chevron agency deference, the prevailing federal standard directing judicial interpretations of federal agency decisions.[12] The FCA strikes provisions in the Dodd-Frank Act expressly providing for Chevron deference of CFPB interpretations of consumer financial laws (**Chevron** deference cuts favorably in the direction of agencies' own interpretations). This change would affirmatively require courts to review CFPB actions de novo, without regard to the bureau's interpretation of its laws.

Regarding the Dodd-Frank Act generally, the FCA also, among other things:[13]

- Repeals the "Volcker Rule," which limits banks' ability to engage in proprietary trading activities.
- Attempts to end "too big to fail" and bank bailouts.
- Eliminates Chevron deference for multiple financial regulatory agencies.[14]

Stay Tuned, We Have Only Just Begun

As this article outlines, there is so much that can occur with the CFPB in the next several months. Meanwhile, the CFPB continues to move forward with its enforcement actions and rulemakings undaunted. Even if the CFPB is scaled back under Trump and congressional Republicans, the shifting focus and compliance priorities will continue to require financial institutions and other covered persons to pay careful attention to what is happening. We are still in for quite the ride.

Endnotes

1 See NLRB v. Noel Canning, 134 S. Ct. 2550 (2014).

2 See 12 U.S.C. § 5491(c)(3).

3 See *PHH Corp., vs. Consumer Financial Protection Bureau*, No. 15-1177 (DC Cir. Oct 11, 2016) .

4 Petition for Rehearing *En Banc, PHH Corp. v. CFPB*, No. 15-1177 (D.C. Cir. Nov. 18, 2016).

5 See 12 U.S.C. § 5586. "The Secretary [of the Treasury] is authorized to perform the functions of the Bureau under this part [Part F, governing the transition from other federal agencies to the Bureau] until the [CFPB] director is confirmed by the Senate in accordance with section 5491 of this part."

6 David Silberman has been the bureau's deputy director since Jan. 7, 2016.

7 On one hand, now that the bureau has assumed its role as transferee, and has commenced a living, breathing program of regulation and enforcement, the division between permissible authorities before and after the transfer date may not be applicable. See 12 U.S.C. § 5492(b), allowing the director to delegate bureau authority to any employee, representative or agent. On the other hand, compare 12 U.S.C. § 5585(b), which places a five-year sunset provision (measured from July 21, 2010) on the Federal Office of Management and Budget's authority to make additional, incidental transfers and dispositions of assets and liabilities to the bureau in connection with functions transferred to the bureau by the Dodd-Frank Act with 12 U.S.C. § 5586, which limits the Treasury secretary's authority to administer a directorless CFPB and does not include such an express sunset, possibly demonstrating congressional intend for that provision to apply each time the bureau finds itself without a formal director.

8 Specifically, each quarter, the director has the authority to determine the amount "reasonably necessary to carry out the authorities of the Bureau" and the Federal Reserve Board transfers that amount to the bureau. 12 U.S.C. § 5497(a)(1). The amount that can be transferred is capped at a fixed percentage of the Federal Reserve Board's operating expenses. In 2016, the cap was 12 percent.

9 Financial CHOICE Act of 2016, H.R. 5983, 114th Cong. (2016). "CHOICE" stands for Creating Hope and Opportunity for Investors, Consumers and Entrepreneurs.

10 Co-sponsors include Scott Garrett, R-N.J.; Randy Neugebauer, R-Texas; Blaine Luetkemeyer, R-Mo.; Bill Huizenga, R-Mich.; and Sean P. Duffy, R-Wis.

11 The FCA was introduced in the House of Representatives on Sept. 9, 2016. That same day it was referred to the Committee on Financial Services, as well as the Committees on Agriculture, Ways and Means, the Judiciary, Oversight and Government Reform, Transportation and Infrastructure, Rules, the Budget, and Education and the Workforce. On Sept. 13, the House Financial Services Committee held a markup session and voted to report the bill, with amendments, by a vote of 30-26 (only one Republican—Bruce Poliquin, R-Maine—voted against the bill).

12 See *Chevron v. Nat'l Res. Def. Council*,467 U.S. 837 (1984).

13 See Financial Services Committee, The Financial CHOICE Act Executive Summary, http://financialservices.house.gov/uploadedfiles/financial_choice_act-_executive_summary.pdf (last visited Nov. 14, 2016).

14 Affected agencies include the CFOC, the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Federal Deposit Insurance Corp., the Federal Housing Finance Agency, the Office of the Comptroller of the Currency, the National Credit Union Administration, and the U.S. Securities and Exchange Commission. H.R. 5983, 114th Cong. § 641(b) (2016).

Pillsbury Winthrop Shaw Pittman LLP | 1540 Broadway | New York, NY 10036 | +1.877.323.4171