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2018 Should See Trump's Bank Rule Rollback Gain Steam

By **Evan Weinberger**

Law360, New York (January 1, 2018, 3:04 PM EST) -- The first year of the Trump administration's changes to bank regulations was focused on studying the rules that were in place and putting a new team atop the agencies that oversee financial institutions, setting the stage for a rollback of rules that will gain steam in 2018, experts say.

President Donald Trump has managed to get a new leader in place at the Office of the Comptroller of the Currency and has nominees moving through the confirmation process to head the Federal Reserve and the Federal Deposit Insurance Corp. And while the president's choice to lead the Consumer Financial Protection Bureau on an interim basis is currently being challenged in court, the watchdog bureau is already undergoing a sea change in the way it operates.

All of those leadership changes should mean that banks will see a shift in their operating environment that they had been expecting for some time to come over the course of 2018, said Michael Nonaka, a partner at Covington & Burling LLP.

"The people will be in place, the will will be there, so I think there will be more change in 2018," he said.

Along with the changes inside regulatory agencies, a bipartisan bill that would, among other things, subject fewer banks to enhanced capital rules and supervision, is expected to clear Congress at some point early in the year.

Here's what to look for in 2018.

Battle for the CFPB

Former CFPB Director Richard Cordray's Thanksgiving weekend resignation set off a power struggle over the temporary leadership of the federal consumer finance watchdog.

Just before his resignation, Cordray promoted his chief of staff, Leandra English, to deputy director, which under the 2010 Dodd-Frank Act made English the acting director upon Cordray's departure. Hours later, Trump named Office of Management and Budget Director Mick Mulvaney, a fierce CFPB opponent during his time in Congress, to serve as the bureau's acting director.

The two are locked in litigation, but Mulvaney has been driving major change at the CFPB. Those changes are expected to accelerate once Trump has a permanent director in place.

“The long-term operations and vision for the bureau will be set by the director, and that director is going to be very different than Richard Cordray,” Nonaka said.

While the wait is on for Trump to nominate a full-time successor to Cordray, Mulvaney has taken an active approach to his acting directorship.

“He seems to have a different view of the agency’s goals and role,” said Loyal Horsley of Hogan Lovells.

On his first day overseeing the CFPB, Mulvaney called for a 30-day regulatory freeze and said he is reviewing bureau enforcement actions. Since then, the CFPB has ended some investigations, pulled back on a few actions and reopened several completed rulemakings, including a key mortgage data rule**.**

Mulvaney has also said he supports a resolution in the U.S. House of Representatives to repeal the CFPB’s rule mandating that payday and auto title lenders determine a borrower’s ability to repay before issuing a loan and a host of other changes.

While that resolution may not be successful in the Senate, Alan Kaplinsky, the co-practice leader of Ballard Spahr LLP’s consumer financial services group, said he expects that one way or another the payday lending rule could be in danger.

“While it would be an easy way out for Mulvaney, if that were to happen, I think that’s probably not going to work,” he said.

Mulvaney could delay implementation of the rule, which lenders must comply with by August 2019 by putting it up for notice and comment again.

But the payday lending industry is reportedly gearing up for a lawsuit over the regulation, arguing that it could put many lenders out of business. If and when a lawsuit does come, Mulvaney will have another option for dealing with the rule.

“One strategy of Mulvaney might be to lie down on that lawsuit,” Kaplinsky said.

Other parties may move to intervene to defend the rule in that case, but whether they would be able to is unclear, he added.

However, as with much of the CFPB’s history, there is a shadow of litigation hanging over all of Mulvaney’s actions. If English is able to wrest away temporary control of the bureau, she could undo much of Mulvaney’s work to date, which would then likely be reinstated by a permanent director put in place by Trump.

A decision at the district court level in the fight between English and Mulvaney is expected in the coming days, but the legal wrangling is likely headed to the D.C. Circuit.

Shifts at the Federal Reserve

While new leadership at the CFPB is leading to potentially major shifts in policy, Trump’s pick to lead the

Fed and the central bank's regulatory efforts are likely to push for more subtle changes.

Fed chair nominee Jerome Powell, who has served on the Fed's board of governors since 2012, has said he wants to keep the broader regulatory architecture set up by Dodd-Frank and the Basel III international banking accords in place because they have kept the financial system stable since the financial crisis.

Randal Quarles, the Fed's first-ever vice chair for supervision, appears to agree with that position. Powell told the Senate Banking Committee that he sees eye to eye on regulatory issues with his longtime friend.

But that does not mean the Fed will stay still on its rules.

Already, the central bank has proposed increasing the amount of information it provides to banks about the Comprehensive Capital Analysis and Review process, the Fed's stringent stress-testing process.

Those changes, included in a **December proposal**, will allow for banks to have a better idea of how the Fed comes to its conclusions of how they would do in a crisis and whether they should be allowed to engage in share buybacks and dividend payments. But the Fed was careful not to provide too much information in order to avoid allowing banks to game the system.

"It looks to me like it's not a full open kimono," said Tom Delaney, the co-leader of Mayer Brown LLP's global Financial Services Regulatory & Enforcement practice.

But the proposed changes open up "what had been purely a black box," he said.

The other main area where Quarles could have an effect is on the Fed's supervisory efforts. Changes to the way the Fed oversees banks could come quickly, and have a major effect, said Douglas Landy, a partner with Milbank Tweed Hadley & McCloy LLP.

"Quarles' two main things next year are going to be CCAR and working with the supervisory staff on a new approach," he said.

The Fed could also take a look at capital and other rules.

One other thing that will likely affect the Fed in 2018 is legislation currently pending in the Senate.

Congress Could Pass a Banking Bill

The Senate Banking Committee in December moved forward a bipartisan bill that would lift the threshold Dodd-Frank set for banks to be considered systemically important financial institutions, or SIFIs, from $50 billion to $250 billion. The Fed would have the ability to review some of the banks exempted from the SIFI designation to determine whether they require more supervision.

The SIFI designation means that banks are subjected to enhanced supervision, capital and other rules by the Fed. Raising the threshold to $250 billion would drop the number of banks subjected to that extra level of scrutiny from around 40 to around a dozen, according to the Federal Financial Institutions Examination Council, a panel of U.S. regulators.

Critics and supporters of Dodd-Frank have long said that the $50 billion level is too low for subjecting banks to tougher rules, although there is a difference of opinion on whether size is the right way to determine riskiness.

The Senate compromise appears to take into account both of those criticisms.

“It works both ways, but certainly we’re headed in a direction that looks like will get closer to the right balance even though it’s not perfect,” said Don Waack, a Mayer Brown partner.

The legislation, S. 2155, the Economic Growth, Regulatory Relief and Consumer Protection Act, has enough Democratic support to prevent a filibuster and is expected to pass the Senate in early 2018. Because of the narrow compromise that brought the bill, which also provides significant community bank relief, to the brink of Senate passage, it is widely expected that the U.S. House of Representatives will have little room to make changes.

But if and when the bill becomes law, it will have a big impact on the way banks operate, and who oversees them.

The Volcker Rule Will Be Slimmed Down

Another provision of the Senate bill would exempt all banks with $10 billion in assets or less from the Volcker Rule, Dodd-Frank’s ban on proprietary trading.

That would cut out a huge number of banks from the rule, but it is unlikely to be the only changes.

The OCC under former acting Comptroller Keith Noreika put out a request for comment on ways to reshape the Volcker Rule over the summer of 2017, and a report from the Treasury Department also outlined some potential changes to the proprietary trading restrictions.

Those changes could mean more firm definitions for what constitutes proprietary trading, and what kinds of activities are exempt from the regulation.

“I think we have a menu rather than an outline,” Nonaka said.

The Volcker changes are going to be complicated, since the OCC, the Fed, the FDIC, the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission will all have to agree to them.

“When you see a rewrite, you’re going to see all the things they compromise on,” Landy said.

But there is a wide expectation that something will get done on the Volcker Rule, likely in 2018.

Fintech, Fintech, Fintech

One of the biggest developments in financial regulation over the past year has been regulators’ interest in financial technology, or fintech.

That is likely to continue in 2018, said Hogan Lovells counsel Laura Biddle.

“The regulators are, based on our meetings with them, are getting more interested in” fintech, she said.

Work on the OCC’s special charter for fintech firms has slowed due to litigation filed by state regulators, although a lawsuit filed by the New York Department of Financial Services was dismissed in December, with a judge ruling that there was no case to bring since no charters had been issued. A second lawsuit, filed by the Conference of State Bank Supervisors, is still pending.

Joseph Otting, the new comptroller, told reporters in late December that he supported the fintech charter idea and that he was consulting with the OCC staffers working on the proposal. What shape that charter ultimately takes remains to be seen, he said.

“I’m not sure what it looks like, and how it’s funded,” he said, adding that appropriate safety and soundness reviews need to be put in place to prevent risks from building up.

But even without the fintech charter, regulators from the CFPB to the Fed will be looking to find ways to increase oversight of fintech firms while allowing those innovations to evolve.

In particular, the Fed has been looking into ways that fintech, including innovations like the blockchain technology that powers bitcoin and other virtual currencies, can increase the speed at which payments get completed. The CFPB, the Fed and the FDIC have also been looking at how fintech can help those without bank accounts participate in the financial system.

And the development fintech products aimed at helping banks comply with regulations is also a hot topic for both regulators and banks. Smaller banks in particular are looking at the ways so-called regtech can help them comply with anti-money laundering and other compliance issues that are likely to remain even as the Trump regulatory rollback moves along in 2018, Biddle said.

“That’s again where fintech becomes so important, and particularly regtech, because that can be the solution for these banks,” she said.

--Editing by Rebecca Flanagan and Orlando Lorenzo.

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