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What To Expect If The CFPB Changes Course In 2021

By **Eric Mogilnicki and David Stein** (January 15, 2020, 2:21 PM EST)

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The Consumer Financial Protection Bureau may continue on its current trajectory for a decade or longer. CFPB Director Kathleen Kraninger's term does not end until 2023, and she may be reappointed or succeeded by a like-minded director who serves another five-year term. Financial institutions know how to prepare for such continuity.

This article is designed to help financial institutions prepare for another possibility: if the CFPB changes course — in perspective, personnel and policies — as soon as 2021. Such change is not a foregone conclusion, and so what follows is a look down a path that the bureau may not take. But looking down that alternate path is an important exercise for any financial institution that does not want to risk being unprepared a year from today.

A change in course at the bureau would require several dominos to fall. First, it would require the election of a new, Democratic president. Second, the new president would have to appoint a new director.

That may not be easy: Current law authorizes Kraninger to serve for most of the next presidential term. However, there are several paths toward a new director:

- The U.S. Supreme Court could decide, in the pending Seila Law LLC v. CFPB, that current law unconstitutionally limits the president's authority to terminate the director without cause;
- The new president could seek to terminate Kraninger under the "inefficiency, neglect of duty or malfeasance" standard in current law; or
- Kraninger could resign to pursue other opportunities, or on the grounds that — consistent with her position in Seila Law — the president should be able to choose a new director.

Third, this article assumes that a new director would share the worldview of the Democrats most closely associated with the bureau, such as Sen. Elizabeth Warren, D-Mass., and former CFPB Director Richard Cordray.

None of these preconditions to change is certain, but they are plausible enough to warrant some consideration by regulated financial institutions. For example, the possibility of new bureau leadership means that actions taken by financial institutions in 2020 may be subject to new enforcement perspectives as soon as 2021.

In the longer term, new bureau leadership may pursue new initiatives and regulations that would both flip the script on the ways in which former CFPB Acting Director Mick Mulvaney changed the bureau's direction, and pursue long-held progressive priorities. This article provides some initial thoughts to help financial institutions prepare now for the possibility of change next year.

The Bully Pulpit

Just as Mulvaney introduced his tenure with a promise to stop pushing the envelope in enforcement, a new director would likely set a new tone for the bureau that emphasized the need for the CFPB to be creative and aggressive in exercising its full powers to protect consumers.

The rhetoric employed by Mulvaney — that the bureau works for both "those who take loans, and those who make them" — would likely be replaced by a sharp focus on the bureau's role as an advocate for consumers. None of this shift in emphasis would alter the bureau's statutory authority and responsibilities, but a new tone at the top could affect the way the bureau's 1,500 employees approach their jobs.

The Budget

Mulvaney and Kraninger have pared down the bureau's budget from over $600 million in 2017 to an estimated $504 million in 2020, in part by enforcing a two-year long hiring freeze that was only recently lifted. However, if a new director takes office in 2021, she or he would have the authority to requisition over $700 million from the Federal Reserve in 2021. That would provide the new director with enormous opportunities to quickly increase headcount and launch new initiatives.

Enforcement

Promptly after replacing Cordray, Mulvaney instituted a review of all of the cases in the CFPB's enforcement pipeline. As a result, some cases that appeared to be moving toward significant enforcement action were dropped or resolved inexpensively. A new director is likely to institute a similar review of the enforcement pipeline, though with the opposite result: Cases that appear moribund in 2020 could become active and expensive to resolve in 2021.

The enforcement pipeline could also be supplemented in a variety of ways. The line between supervision and enforcement could move, leading to public enforcement actions for issues that previously could have been resolved through the confidential examination process. Such a shift could include moving long-standing supervisory matters to enforcement if the new bureau leadership decides that they have not been resolved adequately or quickly enough.

In the longer run, the enforcement pipeline could be fed by a host of new enforcement investigations fueled by rejuvenated enforcement division holdovers from the Cordray administration and new hires from consumer advocacy groups and state attorneys general offices. To facilitate this new effort, a new director may consider decentralizing decision-making so that enforcement attorneys need to jump through fewer hoops to initiate inquiries and issue and modify civil investigative demands.

Regulation

The pipeline of proposed regulations is typically more transparent and slower moving than the enforcement pipeline, but it is still subject to changes in direction. For example, Mulvaney delayed the effective date of the payday rule promulgated in the last months of Cordray's tenure, and Kraninger has proposed to reduce its scope.

While there is some asymmetry in the regulatory process — it is easier to slow rulemaking than speed it up — the bureau's 2020 regulatory agenda comes with a caveat that any regulation that is not completed and effective in 2020 may never be implemented.

Instead of completing the bureau's 2020 regulatory agenda, a bureau with new leadership could embark on a series of new proposed regulations in 2021. Indeed, if the Supreme Court rules that the director's five-year term may be cut short by the president at any time, a new director may feel some urgency to initiate the long rulewriting process as quickly as possible.

If a new director sought to move relatively quickly on the regulatory front, there is some raw material nearby. For example, a new director could seek to resuscitate the provisions of the payday loan rule that are expected to be excised in 2020, or to reopen any debt collection rules finalized in 2020 to propose the tougher standards proposed by consumer advocates. A third option for a new director could be to resume consideration of student lending servicing rules, which Mulvaney removed from the regulatory agenda he inherited from Cordray

In the longer term, a new director may launch entirely new rulemakings designed to spell out specific applications of statutory language. For example, a new director might launch a rulemaking to formalize a bureau bulletin that maintains that the general prohibition on unfair, deceptive and abusive practices prevents first-party debt collectors from engaging in practices currently explicitly prohibited only for third-party debt collectors.

In addition, a new director may pursue an initiative under Section 1033 of the Dodd–Frank Wall Street Reform and Consumer Protection Act, which relates to the availability of data to consumers, to promulgate an open-banking rule that details consumers' rights to access and share their financial data

Fair Lending

Fair lending issues would likely be high on a new director's agenda. One of Mulvaney's structural changes to the bureau was to move fair lending into the director's office. This move was followed by a two-year period during which the CFPB brought no fair lending enforcement cases.

A new director would almost certainly reverse both the structural change and the apparent inertia in fair lending enforcement. Armed with the additional resources described above, and allied with a new attorney general, the bureau would be in a position to bring fair lending cases relatively quickly.

Fair lending examinations have been ongoing, and new bureau leadership could lead to additional referrals of issues from those examinations to CFPB enforcement. In addition, it seems likely that enforcement would take a fresh look at the fair lending investigations conducted over the past three years that did not result in enforcement. A bureau under new leadership might also consider bringing cases based on allegations of disparate impact under the Equal Credit Opportunity Act.

A new director may also consider structural and regulatory initiatives relating to fair lending. Fair Lending may move out of the director's office and back to the division that contains supervision and enforcement — or become a division unto itself.

In addition, a new director might establish a new office for fair lending testing, as currently proposed by Rep. Al Green, D-Texas, who serves on the House Financial Services Committee. On the regulatory front, the bureau might press ahead with a small-business data collection rule in an effort to enhance fair lending oversight and enforcement in small business lending.

Focus on Vulnerable Populations

Shortly after his appointment, Mulvaney sent an email to the CFPB staff that explicitly rejected the notion that the bureau was designed to take sides. Instead, he emphasized that "we work for the people. And that means everyone. ... There is a reason that Lady Justice wears a blindfold and carries a balance, along with her sword."

A new director would be much more likely to see the bureau as an advocate, rather than a dispassionate judge. They would likely agree with Warren that the current system tilts sharply in favor of big businesses and and that the bureau must fight to balance the scales.

In keeping with this advocacy role, a bureau under new leadership would likely focus on serving vulnerable populations. At present, the bureau already has several offices designed to serve particular groups, including the Office of Older Americans, the Office of Servicemember Affairs and the private education loan ombudsman.

Each of these offices would likely get new leadership, resources and authority. In addition, some recent policy changes could be reversed. For example, the private education loan ombudsman may become the student loan ombudsman again, and the bureau would likely return to its former policy of examining lenders for compliance with the Military Lending Act.

Moreover, the bureau may expand its efforts to reach other vulnerable populations. For example, a new director could create additional offices that focus on the needs of consumers whose limited English proficiency, disability or lack of immigration documentation make them an easy mark for consumer financial fraud.

Emergencies Ahead

In addition to the agenda that a new director would bring to the bureau, there may be issues thrust upon the bureau in 2021 and beyond. For example, student and subprime auto lending are both at all-time highs, and each has been characterized by some observers as a bubble that may soon burst.

If a crisis materializes, bureau leadership will be of signal importance. The emphasis of the current bureau leadership on consumer choice and the efficiency of markets suggests that it might be reticent to quickly or forcefully intervene in response to an increase in nonperforming loans.

In contrast, a new director might view such an increase in much the same way that Warren and others viewed the mortgage crisis: as a problem created by undisciplined lending practices, misleading disclosures and regulatory failures that requires a swift and strong government response. The difference between these two perspectives could have major consequences for who bears the cost of any major disruption in consumer financial lending.

What to Do Now

No one knows what the upcoming election will bring to the nation — or to the CFPB. As Yogi Berra said, "It's tough to make predictions, especially about the future." But a careful financial institution will use 2020 to plan for a 2021 in which it could face new scrutiny and new regulations.

Some financial institutions were surprised by the new agency's perspective and vigor when the bureau was launched in 2011. No one should be surprised if 2021 brings about almost as much change in the regulation of consumer financial services.

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