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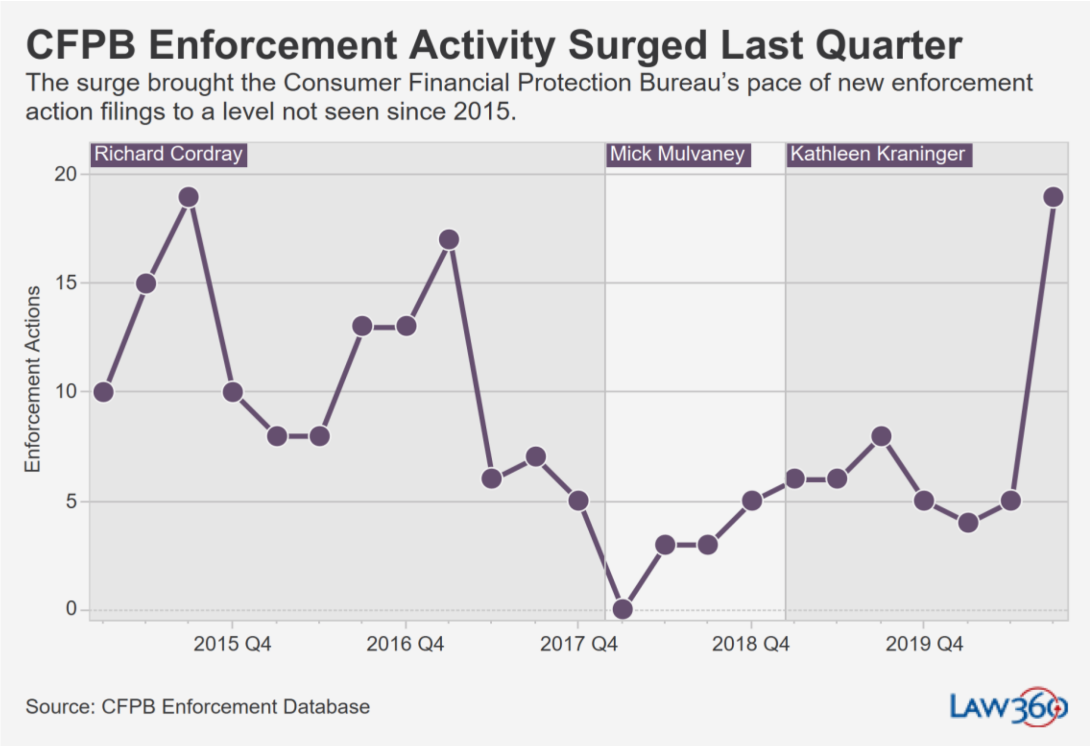
CFPB Enforcement Sees Highest New Case Volume In 5 Years

By **Jon Hill**

Law360 (October 14, 2020, 8:24 PM EDT) -- The Consumer Financial Protection Bureau has often been accused of going soft on businesses under President Donald Trump, but the agency is coming off its busiest quarter for enforcement since before he took office. It's a striking surge in activity that financial services attorneys say is more than a fluke.

Records from the CFPB's online enforcement database show the agency brought 19 public civil and administrative actions in its last fiscal quarter from July through the end of September, a pace nearly four times what it was the previous quarter and more than double what it was the same quarter last year.

In fact, you'd have to go back five years to the tenure of former director Richard Cordray — who was appointed by President Barack Obama — to find a period where the CFPB was filing enforcement actions at an equivalent clip. Unbowed by the pandemic, the consumer watchdog that House Democrats once said was "muzzled" by the Trump administration appears to be hitting its stride again, at least in terms of case volume.



"I've definitely noticed the uptick," said Allen Denson, a Hudson Cook LLP partner who's represented clients before the CFPB. "I think that there were a lot of things pent up that are just now reaching their culmination and coming out. Investigations tend to take years, so that's why you're now seeing the uptick."

A Seila Law connection?

Cordray's departure in November 2017 marked a turning point for CFPB enforcement, which entered a hibernation period where no new cases were filed for five months after Mick Mulvaney became the agency's interim director and initiated a top-to-bottom review of its docket.

Even then, the CFPB only resumed enforcement activity at a much slower pace from Cordray-era levels, drawing frequent complaints from Democrats and consumer advocates that it was abdicating its role as a "cop on the beat," as one of its architects, Sen. Elizabeth Warren, D-Mass., once pitched it.

Under the agency's current director Kathleen Kraninger, CFPB enforcement has been picking up some steam in terms of case volume. The agency also took a trip to the U.S. Supreme Court for a ruling on its constitutionality, a longstanding point of contention that Kraninger said last year was causing "significant delays" in some of its cases and needed to be definitively resolved.

That resolution finally came at the end of June, when the justices ruled in Seila Law v. CFPB that the agency can stay in business so long as the president has free rein to fire its director. But Denson and other attorneys don't see the recent spate of enforcement actions as the agency capitalizing on the constitutional certainty provided by the Seila Law decision.

"I think it's a coincidence," said Eric Mogilnicki, a Covington & Burling LLP financial services partner. "These cases take time to germinate, and the bureau has been working on the assumption that Seila Law wouldn't disrupt its enforcement activities. I can't imagine they were holding back waiting for Seila Law."

Underscoring that point, many of the enforcement actions from the past quarter cover alleged misconduct from years ago, suggesting the cases had been percolating for a while at the agency.

"A lot of these actions are aged conduct, so it's not like [CFPB staff] have brought new cases because they now think they have authority to do it and didn't before," said Allison Schoenthal, a Hogan Lovells partner and head of the firm's consumer finance litigation practice. "I doubt this has much to do with this Supreme Court ruling."

'Firing on all cylinders'

Federal regulatory enforcement activity often picks up after Labor Day as agencies look to wrap up cases and run up the numbers for their annual reports due after their fiscal years close on Sept. 30. Just ask the U.S. Securities and Exchange Commission, which launched nearly two dozen enforcement actions on Sept. 30 this year and more than three dozen cases on the same date in 2019.

But attorneys said the CFPB's recent enforcement surge also fits with a broader pattern of an agency that is settling into the Kraninger era after a difficult transition phase.

"During the [Mulvaney] interim period, a lot of investigations were halted while they were reviewed, and there weren't really new investigations being started," Denson said. "Once Kraninger took over as head, the CFPB restarted initiating new investigations, and it takes time for those investigations to make their way through fact-finding, recommendations, and then negotiations over settlement or filing of lawsuits."

"The new director is now fully integrated, and it seems like she has some comfort with the staff and leadership, and they really seem to have their process in place," he added.

Schoenthal agreed that the latest enforcement numbers show the CFPB is "firing on all cylinders again."

"They're doing enforcement actions," she said. "They're doing rulemaking. They're doing guidance and supervision. Maybe they get criticism, but I think they've actually been pretty busy."

Sweeps season

Some of the enforcement actions from this past quarter may also have simply been easier for the CFPB to bring, enabling it to move more quickly and hit a higher volume of activity.

Almost half of the cases, for example, involved mortgage companies that marketed federally guaranteed home loans to military servicemembers and veterans using mailers that the CFPB said were deceptive, pointing to instances where ads might have characterized an adjustable-rate loan product as "fixed" rate or created a misleading impression of government affiliation, among other alleged misrepresentations.

Given the nature of these purported violations, Mogilnicki said the cases would have been fairly straightforward for the agency to put together.

"These are relatively efficient cases to bring because the documents demonstrate the legal violation," Mogilnicki said. "There's no need for extensive witness testimony. You can see on the face of the advertising if lenders are purporting to have a relationship with the [government] that they don't have."

But while the mortgage companies themselves aren't especially prominent and the fines they agreed to pay to settle with the CFPB aren't especially large — the total is just over $2.6 million — Mogilnicki said this "sweep" approach to enforcement can still provide a strong deterrent against misconduct, sometimes getting even more of a return for the resources invested than a blockbuster case would.

"It's an interesting approach that could be applied by the bureau to other issues," Mogilnicki said. "In fact, if there were a new bureau administration, this focused use of a 'sweep' of related cases could be applied to other issues, such as racial or other discrimination in lending."

The debt collection industry has already been singled out for this kind of scrutiny. Last month, the CFPB announced it had teamed up with the Federal Trade Commission and other state and federal partners for "Operation Corrupt Collector," a nationwide sweep targeting the use of threats, harassment and other illegal tactics by debt collectors.

And although not explicitly framed as a sweep, Denson noted that debt-relief service providers have similarly faced increased attention from CFPB investigations and enforcement in recent months.

"There seems to be a lot of focus on fraudulent practices," Denson said of the agency's enforcement work. "Early on, Kraninger said this was going to be a focus of hers, and she has stuck to that."

Election looming

Yet as Mogilnicki hinted, Kraninger may not be CFPB director for much longer. If former Vice President Joe Biden is elected president next month, it is widely expected that he would move quickly to replace Kraninger next year using the broader removal authority endorsed by the Supreme Court in Seila Law.

Some attorneys who spoke to Law360 speculated that this uncertainty about Kraninger's tenure may have contributed to last quarter's enforcement surge. With her time at the helm potentially coming to an early end, there may be a desire within the agency to tie up as many loose ends as possible before any such transition.

But Denson said the recent uptick in CFPB enforcement activity could be the new normal, particularly now that a crop of pandemic-related investigations is on the horizon. Even if there's turnover at the White House and it winds up costing Kraninger her job, a repeat of the drastic enforcement slowdown that occurred during the interregnum period following Cordray's departure is unlikely, in Denson's view.

"I could see enforcement activity even increasing from here," he said. "I don't expect that there would be a complete cessation of activity like we saw in 2018."

--Editing by Adam LoBelia and Emily Kokoll.