

The CFPB 4.0

A Year of Changes: New Director, New Developments, New Directions

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We've recently seen an unprecedented level of change at the Consumer Financial Protection Bureau (CFPB) including new leadership (twice), new activity, and a new take on the agency's small-dollar lending rules. Nothing may be more emblematic of this change than the name of the agency itself. The agency name has volleyed back and forth from the name provided by Congress – “Bureau of Consumer Financial Protection” – to the name given by former Director Richard Cordray, Consumer Financial Protection Bureau, back to the Congressional name under Acting Director Mick Mulvaney's “name correction initiative,” and then back to CFPB under new Director Kraninger. For this spring 2019 *Currents* Magazine, we thought readers would value an overview of the drastic and often dramatic changes to the Bureau over the last year and what to make of the CFPB's new Director, new developments, and what appears to be a new direction.

NEW DIRECTOR

Last December, the Senate confirmed Kathleen Kraninger to serve as director of the Consumer Financial Protection Bureau. By way of background, Kraninger is a graduate of Georgetown University Law Center in 2007 and an undergraduate alumnus of Marquette University. After law school she served as a Peace Corps volunteer in Ukraine, worked in various roles with the Departments of Homeland Security and Transportation, and then at the Office of Management and Budget (OMB) working closely with Mulvaney.

In her Opening Statement during the Senate Banking Committee confirmation hearing, she noted that in her time volunteering for the Peace Corps teaching in the former Soviet Union, she saw “firsthand the devastating impact of communism, the economic consequences of central planning, and the absence of free markets and the rule of law.” She also cited the attacks on September 11, 2001, as a call “to help our country in a time of need,” and a basis for her service in the Departments of Transportation and Homeland Security. Kraninger's statements and experiences suggest a dedicated public servant with an instinct to help others, but with a healthy understanding of the potentially harmful impact caused by heavy-handed regulation.

In signaling her approach to leadership, Kraninger highlighted for the Senate that throughout her career, she has “focused on implementing commonsense solutions to complex problems” and delivering real value for the American people.” In response to questions related to small-dollar lending, she indicated that “continued competition in the small-dollar lending space” would be helpful, but was careful “not to prejudge the issue” because of the rulemaking “on the regulatory docket.” Although Senator Elizabeth Warren threatened to block the nomination, on December 6, 2018, the Senate voted 50-49 to confirm Director Kraninger.

One of Kraninger's first publicized actions as Director was to end Mick Mulvaney's “name correction initiative,” when she announced that she “officially halted all ongoing efforts to make changes” that “related to the name correction initiative.” In a pragmatic move, rather than undergoing the expenses related to a potential change, which Elizabeth Warren said would cost between \$9 million and \$19 million, Director Kraninger noted that she cares “much more about what we do than what we are called.” She added: “My birth certificate says Kathleen, but I also answer to Kathy. I think we can do the same here.” The move signaled a break from Mulvaney's “by the book” approach, and may also serve as an early example of the Director's propensity for a commonsense focus, rather than the more ideological stances taken by prior Director Cordray and Acting Director Mulvaney.

NEW DEVELOPMENTS

Since Director Kraninger's confirmation, it's clear that the CFPB has been more active in enforcement than it was under Mulvaney. According



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to Allen Denson, one of our Hudson Cook partners focused on regulatory enforcement actions, since Director Kraninger's confirmation, the CFPB has “in two months issued nearly as many enforcement actions as it did during Mulvaney's entire term.” Denson's count of enforcement actions includes published settlements and lawsuits filed by the Bureau. Since the issuance of Civil Investigative Demands (CIDs) are not public, we cannot be exact with comparisons, but anecdotally we have seen the Bureau go from issuing no new CIDs (and closing some) under Mulvaney to opening several new CIDs in the early months under Kraninger. The inactivity of the Mulvaney Bureau likely had many causes including the initial fight over who was the actual Director, Mulvaney's double-duty with the OMB and temporary role with the CFPB, and the inefficiencies that come with a fundamental shift in any agency. While we certainly do not envision an activist-type Cordray Bureau under Kraninger, we do predict more activity than under Mulvaney, if only because the Bureau has settled in after the recent disruptions.

Since the beginning of Kraninger's term, the CFPB has already entered into six publicly announced settlements including with a bank, jeweler, credit broker, and both internet and storefront small-dollar lenders. Denson notes that the settlement amounts have generally been higher than what we saw with the Mulvaney-led Bureau. We also know that the

Supervision team at the CFPB is issuing new exam requests, and as mentioned the Enforcement team has already issued new CIDs. So, in many respects, Director Kraninger is taking a far more assertive law enforcement role than her immediate predecessor. Despite more activity under Kraninger, the Bureau has been more willing to listen to the weaknesses of their claims and has seemingly done away with (or reigned in) the failed fiction writers who drafted Press Releases under the Cordray Bureau. This is welcomed and in line with Kraninger's professed commonsense approach.

NEW DIRECTIONS

Not only has the Bureau been more active under Director Kraninger than it was under Acting Director Mulvaney, but the new Director also appears to be taking the agency in new directions. On January 25, the Bureau announced various leadership changes including a new Policy Associate Director for External Affairs; new West Regional Director; new Acting Chief Communications Officer; new Deputy Associate Director for External Affairs; and a new Director for the Office of Minority and Women Inclusion.

With respect to general policy changes, on January 17, the CFPB asked Congress for clear authority to supervise for compliance with the Military Lending Act (MLA), to ensure that lenders subject to the CFPB's jurisdiction comply with the MLA, so "service members and their families are provided with the protections of that law." The CFPB also announced policy guidance and rule assessments related to mortgage regulations in late December and January, shortly after Director Kraninger took office.

Of course, the two changes that may be of most interest to readers include a February 27 announcement about prepaid cards, and the February 6 announcement about the small-dollar lending rule. First, regarding the system for prepaid card issuers to submit account agreements, the CFPB announced "a streamlined electronic submission system for prepaid account issuers to submit their account agreements." The system allowed for issuers to register before the April 1, 2019 effective date of the CFPB's prepaid card rule, which includes a requirement to submit agreements (including fee information) to the CFPB. As of February 27, the CFPB allows prepaid issuers to register for the CFPB's online channel. In tandem with the announcement of the new registration system, the CFPB also released various compliance materials including a user guide, quick reference guide, FAQs, and a recorded webinar, all available on the CFPB's website.

The other big announcement, which has been the subject of many discussions by our readers, by the authors of this article, and others, is the announced notices related to the small-dollar rulemaking issued on February 6. Specifically, the CFPB announced that it was proposing to rescind the rule's requirements that covered lenders make certain prescriptive underwriting determinations before issuing payday, single-payment vehicle title, and

longer-term balloon payment loans (otherwise known as the "ability to repay" provisions). In a separate notice issued the same day, the CFPB proposed to delay the August 19, 2019 compliance date for the ability to repay provisions until November 19, 2020. In the Press Release announcing the proposal, Director Kraninger was quoted as stating that "[t]he Bureau will evaluate the comments, weigh the evidence, and then make its decision. In the meantime, I look forward to working with fellow state and federal regulators to enforce the law against bad actors and encourage robust market competition to improve access, quality, and cost of credit for consumers." More evidence of a commonsense and pragmatic approach to regulating.

The CFPB's proposal suggested there was insufficient evidence and legal support for the mandatory underwriting provisions in the 2017 final rule. The proposal specifically claimed the basis for the conclusions in the prior rulemaking were not supported by "robust and reliable evidence." The CFPB noted the underwriting provisions "would reduce access to credit and competition in states that have determined that it is in their residents' interests to be able to use such products, subject to state-law limitations." The Bureau's actions and comments suggest a thoughtful and reasoned approach to fulfilling the agency's role.

Neither proposal would reconsider the provisions of the small-dollar rule governing payments. Those payment provisions, set to become effective on August 19, 2019 will prohibit covered lenders from making a new attempt to withdraw funds from an account after two consecutive attempts have failed, unless consumers provide a new consent for further withdrawals. The payment provisions also require such lenders to provide various consumer notices. Those include written notice before making their first attempt to withdraw payment, as well as a notice before subsequent attempts that involve different dates, amounts or payment channels.

On February 20, 2019, the Bureau published a "Small Entity Compliance Guide" highlighting "information that may be helpful when implementing the payment-related requirements." The Guide reminds covered entities of the general compliance date but notes that the date "is currently stayed pursuant to a court order issued in *Community Financial Services Association v. CFPB*, No. 1:18-cv-00295 (W.D. Tex. Nov. 6, 2018). As a result, lenders have no obligation to comply with the Rule until the court-ordered stay is lifted." On March 1, 2019, the parties to the lawsuit filed a joint status report updating the court on the recent rule proposal. The report also indicated that the parties were engaged in discussions about how the litigation should proceed, given that the rule proposal did not address the payments provisions, and that the parties would either file an updated joint report or separate reports on March 8, 2019. This article was submitted for publication prior to that date.



FISCA and others have worked tirelessly to explain the flaws in the small-dollar rule as originally conceived by former Director Cordray's Bureau. By issuing these proposals, the CFPB appears to now understand the impact the small-dollar rule may have on consumer access to credit. Beyond the impact on consumers, the industry, and the states that allow small-dollar lending, it also appears that the CFPB's new leadership recognizes the studies on which the prior rulemaking relied were not based on solid evidence. Under new leadership, the CFPB now seems to acknowledge that the agency's prior approach incorrectly applied facts and legal standards underlying its conclusions and rulemaking.

Responses to the Bureau's new proposals were due March 18, 2019, for the proposal to delay the compliance date for the prescriptive underwriting provisions, and due May 15, 2019, for the proposal to rescind those prescriptive underwriting provisions. Both are due by 11:59 p.m. Eastern Time on their respective due dates. In the meantime, FISCA is coordinating efforts to respond to the proposals, and to request that the CFPB extend the compliance date and consider elimination of the payment provisions. We encourage readers to submit responses to the proposals and to notify consumers about the rulemaking and the opportunity to comment. ■

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