How Does The Senate Vote Affect The CFPB?

December 9, 2011

As expected, the U.S. Senate voted down President Barack Obama's nomination of Richard Cordray as the director of the new Consumer Financial Protection Bureau (CFPB) yesterday.

Despite a concerted lobbying effort by the White House over the past week, 53 senators voted to approve Mr. Cordray and 45 voted against his nomination, well short of the 60 members required to confirm him as director.

The result is unique in that, unlike many federal nominations, this one had little to do with Mr. Cordray's qualifications or the fact that he was nominated by President Obama. The 44 Senate Republicans who declared in May that they would oppose Mr. Cordray's appointment made clear that their refusal to approve the nominee arose from problems they had with the structure of the CFPB, not with the man nominated to lead it or with the man who extended the nomination.

Since shortly after the CFPB was created by the Dodd-Frank Act of 2010, observers raised concerns about the CFPB's funding mechanism, which is based on a percentage of Federal Reserve revenues as opposed to annual appropriations that are reviewed and approved by Congress.

Although Congress participates in appointing the director and receives annual progress reports, it has no fiscal control or oversight over the CFPB - by design. In fact, when the CFPB was devised, one of the chief arguments for funding it separately from the congressional appropriations process was to create an independent consumer financial regulator that was not subject to political influence.

In May, the lawmakers who voiced their opposition insisted that the CFPB be placed under the appropriations process and that the director's role be replaced by a commission, among other changes, before they would approve any nominee.

The CFPB's powers are significantly limited while it has no director.

First, the CFPB cannot initiate enforcement actions for violations of existing consumer financial protection laws, with the exception of several housing laws.[1]

Second, the new agency cannot exercise its authority to adopt new rules prohibiting unfair, deceptive or abusive acts in connection with consumer financial products and services.

Finally, the CFPB cannot exercise its supervisory powers over non-banking financial institutions, such as payday lenders, debt collectors, debt settlement companies, non-bank mortgage lenders and servicers, private student lenders and credit reporting agencies. Without a director, the agency cannot use its authority to require these companies to submit to examinations or provide information or documents in response to investigations.

While the CFPB has hired numerous attorneys, investigators and support personnel to serve as enforcement and regulatory staff, the lack of a director imposes a significant roadblock on its ability to carry out its mission.

This week's vote puts tremendous pressure on the White House to address the Republican block's concerns and to alter the CFPB funding structure.

In the meantime, while the CFPB's enforcement and regulatory staff are apparently "all dressed up," but not quite ready to go, financial businesses that provide services to financially-challenged consumers should assume that this temporary impediment to the agency's ability to exercise its full authority will be resolved in 2012, and should continue implementing "best practice" compliance procedures.

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[1]The agency is authorized to carry out the consumer protection functions related to the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2601 et 18 seq.), the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (12 U.S.C. 5102 et seq.) and the Interstate Land Sales Full Disclosure Act (15 U.S.C. 1701 et seq.) that were previously under the authority of the Department of Housing and Urban Development.

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