

April 25, 2017

House Financial Services Committee Plans Major Changes to Consumer Financial Protection Bureau

One of the cornerstones of the Republican platform during the 2016 elections was to undertake a major overhaul of the *Dodd-Frank Act*, the landmark Obama-era law that spurred over 22,000 pages of new regulations and established the Consumer Financial Protection Bureau (“CFPB”). Shortly after inauguration, President Trump promised to do a “big number” on Dodd-Frank, which he referred to as a “disaster.”¹ But the unique, independent structure of the CFPB that has made it a political lightning rod has also made its reform elusive.

Enter House Financial Services Committee Chairman Jeb Hensarling (R-TX). On April 20, 2017, Chairman Jeb Hensarling released [draft text of the Financial CHOICE Act 2.0](#) (“CHOICE 2.0”). CHOICE 2.0 would dramatically alter the financial regulatory regime, including the CFPB, which Chairman Hensarling has long viewed as a poster child of federal overreach and free market intervention. The committee will hold a hearing on the draft Wednesday, April 26, 2017, and mark up the bill on May 2, 2017.

Under the CHOICE 2.0, the CFPB will be rebranded as the Consumer Financial Law Enforcement Agency. Along with the name change, CHOICE 2.0 would dramatically alter the controversial, independent structure of the CFPB. Currently, the CFPB is overseen by a single director, Richard Cordray, who was appointed under President Obama and is currently serving a five-year term. Despite demands for Cordray to step down, the administration can only remove the director for cause. This has led to a legal challenge over the constitutionality of the CFPB’s single-director agency structure in *PHH Corp. et al., v. Consumer Financial Protection Bureau*, pending before the D.C. Circuit Court of Appeals.

The *PHH* litigation originated from the CFPB’s administrative decision that imposed a \$103 million fine against PHH for allegedly providing illegal kickbacks to mortgage insurers.² PHH appealed this fine, arguing in part that because the CFPB’s director can only be removed for cause, this usurps the president’s Article II powers that establish the executive authority of the president. The D.C. Circuit agreed, ruling in the fall of 2016 that the structure violates Article II of the Constitution.³

Just recently, the D.C. Circuit Court of Appeals entered an order granting the CFPB’s petition for a rehearing *en banc* (which would be before the entire court rather than a three-judge panel) of its original ruling.⁴ One of the questions the court granted for rehearing includes whether the CFPB’s single-director structure violates Article II. The Department of Justice (“DOJ”) previously filed an amicus brief supporting the CFPB’s structure, but then in March 2017, after President Trump was sworn into office, the DOJ reversed course and filed a new amicus brief supporting the court’s finding that the current structure is unconstitutional.⁵

To further complicate the matter, on April 12, 2017, PHH filed its own brief clarifying that it does not support the court or the DOJ’s proposed solution of removing the “for-cause” restriction on firing the director, stating, “The CFPB’s primary constitutional defect, the director’s unaccountability, therefore is not a wart to be surgically removed; Congress placed it right at the agency’s heart, and it cannot be removed without changing the nature of what Congress adopted. That is why the general severability clause that applies to Dodd-Frank at large does not save the CFPB in particular.”⁶

April 25, 2017

CHOICE Act 2.0 adopts the court and DOJ's position. Under the draft, the single-member executive structure would be reformed to allow the president to remove the director at will and without cause. This is a change from the original CHOICE Act 1.0, where the single director structure would have been replaced with a five-member commission. Some speculate that Republicans revised their proposal because the next CFPB director will be selected by President Trump, a Republican, rather than a Democratic White House, giving Republicans the opportunity to repeal Cordray-era reforms without having to navigate a five-person commission.

Among other proposed structural reforms, CHOICE 2.0 would also require congressional approval of its budget. Under the current structure, the CFPB is funded directly by the Federal Reserve, blocking Congress's normal check-and-balance oversight through the annual appropriations process. The CFPB and Federal Housing Finance Agency are the only two federal regulators that are both unappropriated and have a single director that can only be removed for cause.

The CHOICE 2.0 draft would also strip the CFPB of its supervisory and rulemaking authorities, leaving it only with the power to enforce laws—hence the name change. Even within that remaining authority, CHOICE 2.0 eliminates the CFPB's ability to prohibit unfair, deceptive, or abusive acts of practice ("UDAAP") authority. It also blocks the CFPB from restricting the use of arbitration clauses in consumer contracts or regulating payday loans or vehicle title loans, effectively closing the door to two high-profile CFPB rulemakings that have been proposed but not yet finalized.

Although Republicans have a majority in both chambers of Congress, CHOICE 2.0 faces a long road ahead. Legislation requires 60 votes to pass the Senate, where Republicans currently hold 52 seats. In addition, one of those is Sen. Susan Collins (R-ME), who was one of only six Republican members of Congress to support final passage of the Dodd-Frank Act in 2010. More than half of the members of the U.S. Senate and House of Representatives were not in Congress when Dodd-Frank was enacted, leaving a limited voting record on many of the issues raised in CHOICE 2.0.

The only way the 60-vote requirement could be avoided is if proponents instead try to pass CHOICE 2.0 under the budget reconciliation process, a procedure that requires only a majority for passage. Under what's known as the Byrd Rule, however, it must be shown that the legislation is not "extemporaneous" to the budget or, in other words, that it has some real connection to and impact on the budget.⁷ This could leave many proposed financial reforms on the sidelines, including reforms to the CFPB. If passed, however, CHOICE 2.0's structural changes to the CFPB could moot the constitutional questions raised in the *PHH* litigation.

For the time being, we suspect that the CFPB is likely to refrain from putting forward any new final rules, including those planned on small-dollar lending and arbitration. Under the Congressional Review Act ("CRA"), Congress has expedited processes for overturning any newly proposed agency rules. This includes avoiding a filibuster in the Senate with only a majority vote needed. Once a rule is repealed under the CRA, the agency cannot enact a similar rule unless Congress provides it express authority.

On top of this, Director Cordray is reportedly evaluating a run for Ohio governor, and may step down before the end of his term.

April 25, 2017

The effect of all of this is that the fate of the CFPB remains to be seen. This does not necessarily spell inaction in the future. Indeed, the CFPB could ramp up its enforcement actions in the months ahead while the legislative and legal challenges play out. In addition, any rollback of the CFPB's authority could simply decentralize regulatory action by spurring a wave of activity by state attorneys general that are eager to take up the consumer protection mantle.

Richard B. Benenson

Shareholder

rbenenson@bhfs.com

303.223.1203

John Sonsalla

Policy Advisor

jsonsalla@bhfs.com

202.652.2357

Emily R. Garnett

Associate

egarnett@bhfs.com

303.223.1171

¹ Stephen Gandel, "Donald Trump's Friends Seem to Be Borrowing a Lot For People Who Can't Get Loans," *Fortune*, Feb. 3, 2017.

² CFPB, "CFPB Take Action Against PHH Corporation for Mortgage Insurance Kickbacks, July 31, 2015," <https://www.consumerfinance.gov/policy-compliance/enforcement/actions/phh-corporation>.

³ *PHH Corp., et al. v. CFPB*, No. 15-1177 (D.C. Cir., Oct. 11, 2016).

⁴ *PHH Corp., et al. v. CFPB*, No. 15-1177 (D.C. Cir., Feb. 16, 2017).

⁵ *ABA Banking Journal*, "DOJ Reverses Position on CFPB Structure in Amicus Brief," (March 20, 2017).

⁶ Evan Weinberger, "PHH Rejects Trump Bid For Power To Fire CFPB Director," *Law360* (April 12, 2017).

⁷ U.S. House of Representatives Committee on Rules Majority Office, "Summary of the Byrd Rule," http://archives democrats.rules.house.gov/archives/byrd_rule.htm.

This document is intended to provide you with general information regarding changes to the Consumer Financial Protection Bureau. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.