HUSCH BLACKWELL

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The Uncertain Future of the Consumer Financial Protection Bureau

Since the inception of the Consumer Financial Protection Bureau in July 2011 as part of the Dodd-Frank Act, the financial services industry has watched as the Bureau has proposed a large number of regulations and created law by entering into consent decrees with financial institutions and a host of other creditors. There is no argument that the CFPB has radically changed the manner in which the financial services industry is regulated with its preferred method of legislating through consent decrees. Recently, however, it has been under scrutiny by each branch of the government because of what many see as its potential overreach in power. Recent case law, new bills and presidential executive orders are aimed at reining in the CFPB and its aggressive director, Richard Cordray.

Husch Blackwell's Financial Services & Capital Markets team is watching these developments and advising clients on the effects of the potential changes. This particular alert addresses the recent executive order by President Trump to "dismantle" the Dodd-Frank Act and how the administration's "Core Principles for Regulating the United States Financial System" are likely to pertain to providers of consumer financial services.

When enacted in 2010, the Dodd-Frank Act was intended to ensure that the government was taking all appropriate measures to avoid another financial crisis and the devastating effect of such a crisis on the global economy. Although the main public reason given for enactment of Dodd-Frank was to rein in the excesses of Wall Street, the Act also created the Consumer Financial Protection Bureau "to protect consumers from abusive financial services practices."

The Act transferred to the CFPB the power to enforce by examination, investigation and litigation the numerous consumer financial protection laws previously administered by other federal agencies (e.g., the Truth in Lending Act, the Equal Credit Opportunity Act, the Fair Credit Reporting Act), as well as to make new rules and regulations regarding these and other mandates set forth in the Act (e.g., pre-dispute arbitration agreements). The Act also granted the CFPB the power to prevent "unfair, deceptive, and abusive acts or practices." Since that time, the CFPB has wielded its authority by taking more than 107 enforcement actions and assessing more than $589 million in civil penalties against consumer financial services providers, as well as issuing thousands of pages of new regulations.

The CFPB's actions have evoked substantial heated discussion on both sides of the debate. Now, through an executive order signed February 3, 2017, President Trump has signaled that he intends to change the Dodd-Frank Act and the operations of the CFPB.

In his order, Trump set forth seven "core principles" that will guide his administration in regulating the U.S. financial system. Although no specific details are given, much of the order appears aimed at minimizing the powers of the CFPB. For example, the core principles include "foster[ing] economic growth and vibrant financial markets through more rigorous regulatory impact analysis that addresses system risks and market failures, such as moral hazard and information asymmetry"; "mak[ing] regulation efficient, effective, and appropriately tailored"; and "restor[ing] public accountability within Federal financial regulatory agencies and rationaliz[ing] the Federal financial regulatory framework."

In his prepared remarks on the order, White House Press Secretary Sean Spicer focused on the Act's effect on consumer financial services. The "Dodd-Frank Act is a disastrous policy that's hindering our markets, reducing the availability of credit, and crippling our economy's ability to grow and create jobs," he said. "It imposed hundreds of new regulations on financial institutions while establishing an unaccountable and unconstitutional new agency that does not adequately protect consumers. Perhaps worst of all, despite all of its overreaching, Dodd-Frank did not address the causes of the financial crisis, something we all know must be done. It did not solve the 'too big to fail,' and we must determine conclusively that the failure of a large bank will never again leave taxpayers on the hook."

However, other than perhaps formalizing Trump's policy on the Act and the CFPB in an official document, the order itself really has few teeth. Execution of the core principles is limited by the boilerplate language found in every executive order, including that the order is to "be implemented consistent with applicable law. . ." The Act is still applicable law and is not, by virtue of the executive order, in any way repealed.

Despite its sweeping generalities, when all is said and done, the only action the order requires is for the Secretary of the Treasury to "consult" with the heads of agencies that compose the Financial Stability Oversight Council (FSOC), which includes the CFPB, and report periodically to the president on which laws, regulations and other acts are consistent with the core principles and which inhibit them. In an ironic twist, the FSOC was created by the Act but has little to no oversight of the CFPB. The only check it has on the CFPB is that a member of the FSOC may petition the council to set aside a final regulation if, as the council's name implies, it "would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk."

Nonetheless, the order is clearly the administration's first step toward what Trump called on the campaign trail a "dismantling" of the Act. It also shores up the recent trend in attitude toward the Act and the CFPB: the D.C. Circuit Court of Appeals' potential reconsideration of its decision in *PHH Corporation, et. al. v. Consumer Financial Protection Bureau*, which held that the structure of the CFPB is unconstitutional, and a recent memo by Rep. Jeb Hensarling, chairman of the powerful House Financial Services Committee, that set forth desired changes to the Act and the CFPB that he intends to propose in this Congress. Sen. Ted Cruz and Rep. John Radcliffe have recently introduced companion legislation to abolish the CFPB.

Undaunted by these pending actions, however, the CFPB proceeds with its same statutory authority. We caution our clients, therefore, to stay the course and proceed in the ordinary course of business – the ordinary course being that watchful eyes must continue to be trained on the CFPB and its actions.

What's Next?

We anticipate that the next major development in this area will likely be a decision by the D.C. Circuit on whether to grant the CFPB's petition for the entire panel of judges on the circuit to rehear arguments in the *PHH* case. If the request is denied (meaning the D.C. Circuit's decision that the CFPB structure is unconstitutional stands), it remains to be seen whether the Department of Justice will permit the CFPB to petition for a writ of certiorari to the U.S. Supreme Court for review of the D.C. Circuit's decision.

We can expect Congressman Hensarling to take additional steps to gather support in his committee for his bill to change the Act, including provisions relating to the CFPB. Once a bill is introduced, we will know more about potential changes. Finally, many speculated that Director Cordray would be a first-day casualty of the new administration. Although such speculation was perhaps surprisingly incorrect, a number of scenarios as to Cordray's future nevertheless exist, many of which depend on what happens in the D.C. Circuit and in Congress. The administration, in the meantime, has been fairly tight-lipped on whether it will attempt to remove and replace Cordray.

Our Governmental Affairs team is on Capitol Hill monitoring developments, which we will report as they occur.

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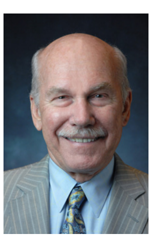

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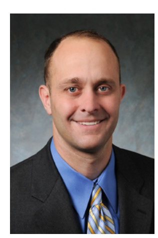

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