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Consumer Financial Services Cos., Meet The New Boss

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In November 2016, the consumer financial services world absorbed a seismic shock with the unexpected election of President Donald Trump. One of the most significant repercussions is that Consumer Financial Protection Bureau Director Richard Cordray, who is well-known for his "regulation by enforcement" ethos, appears unlikely to lead the bureau through the end of his term in July 2018. If, in its rehearing en banc in the PHH Corp. case, the D.C. Circuit finds that the president can remove the CFPB director without cause, Cordray's tenure as director could end precipitously.


Melanie Brody

Even if the full D.C. Circuit holds that the bureau is constitutionally structured and its director can only be removed for cause, Trump is all but certain to replace Cordray as soon as his term expires in July 2018 — that is, if Cordray doesn't resign before then to run for governor of Ohio. A Trump appointment of a new CFPB director seen as more industry-friendly would most likely reduce the number of enforcement actions brought by the bureau. Nevertheless, providers of consumer financial services should not assume that their enforcement risk will disappear along with Cordray.


Stephanie C. Robinson

While the CFPB consumes much of the oxygen in the consumer finance enforcement sphere, state attorneys general also play an important role in bringing enforcement actions. Indeed, in recent years, state attorneys general and the bureau have worked hand-in-hand to bring and settle enforcement actions against a variety of consumer financial services companies, including debt collectors, credit card providers and retail sales financing companies. A coalition of state attorneys general have made clear in a recent motion to intervene in the PHH Corp. case that they view themselves on the front line of consumer protection, and the attorneys general have several powerful tools at their disposal to fulfill this role.[1] If Trump replaces Cordray, and the CFPB scales back its enforcement activity, it's likely that state attorneys general will seek to fill the breach.


Francis L. Doorley

PHH Corp. and Cordray's Future

The Dodd-Frank Act handed a great amount of enforcement power to the CFPB, and under Cordray's watch, the bureau has not been shy about exercising these powers. Since its inception, the bureau has brought enforcement actions against or served civil investigative demands upon nearly all types of actors in the consumer financial services space (and even some that are arguably outside of it).[2] Cordray's term as director does not expire until 2018, and under the Dodd-Frank Act he is removable only for cause — a difficult standard to

meet.[3] This has allowed Cordray and the bureau to leverage their enforcement power forcefully for most of the bureau's history.

The ground began to shift under Cordray's feet, however, when last October, a three-judge panel of the D.C. Circuit issued its long-awaited opinion in PHH Corp.[4] Among other matters, the D.C. Circuit panel determined that the structure of the bureau, which vested its powers in a single director removable only for cause, violates the U.S. Constitution.[5] Rather than shut down the bureau until Congress revised the structural flaw, as the petitioners had asked the panel to do, the court simply severed the for-cause removal provision from the Dodd-Frank Act.[6] This made Cordray removable at will by the president.[7] However, Cordray's tenure still appeared safe: after all, Hillary Clinton was considered the runaway favorite to win the presidential election less than a month away.[8] Clinton was a vocal supporter of the CFPB, all but assuring that Cordray would remain director for at least the remainder of his term.[9]

After Trump's election, Cordray's fate became uncertain. Notwithstanding that the D.C. Circuit granted the CFPB's motion for rehearing en banc in PHH Corp., speculation is growing that the Trump administration is compiling a dossier to prove that Cordray can be removed for cause.[10] It is also possible that the full D.C. Circuit will essentially adopt the prior panel holding that Cordray serves at-will, and that Trump will follow Republican senators' calls to remove Cordray without cause.[11] No matter whether Trump attempts to remove Cordray with or without cause, it seems all but certain that Cordray will not serve as director past 2018. Presumably a Trump-appointed replacement would significantly scale back the bureau's prolific enforcement regime.

Democratic state attorneys general have taken notice of Cordray's uncertain future. On Jan. 23, 2017, the attorneys general of 16 states and Washington, D.C., filed a motion to intervene in the bureau's petition for rehearing en banc in the PHH Corp. case. The attorneys general sought to intervene "based on their key role in enforcing consumer protection laws and regulations on behalf of their constituents, and protecting consumers from abuses in consumer finance."[12] The attorneys general argued that if the D.C. Circuit panel's ruling that the director is an at-will employee is upheld, the bureau will essentially become a political agency; the bureau could then intervene in consumer protection actions brought by the attorneys general and undermine them.[13] The attorneys general argued that the PHH Corp. ruling "will undermine the power of the state attorneys general to effectively protect consumers against abuse in the consumer finance industry" and noted that "[g]iven the position of the president-elect and the new administration, it is urgent that the state attorneys general intervene in order to protect the interests of their states and their states' citizens in an independent CFPB."[14]

The D.C. Circuit panel denied the motion on Feb. 2, 2017, removing the possibility of the attorneys general appealing an adverse en banc ruling to the U.S. Supreme Court.[15] Reading between the lines, the motion strongly suggests that these attorneys general intend to pursue all available means to provide for robust consumer finance enforcement in their states, regardless of the eventual disposition of PHH Corp. Although their path to support the CFPB through the D.C. Circuit is closed, state attorneys general still have the ability to be strong enforcers of consumer financial laws.

Section 1042 of the Dodd-Frank Act

The state attorneys general have several powerful tools at their disposal to help them fill any void that may be left by scaled-back CFPB enforcement. First, Section 1042 of the Dodd-Frank Act grants state attorneys general the ability to enforce the Dodd-Frank Act and regulations promulgated under the act's authority against entities within their jurisdiction.[16] In order to bring an action under Section 1042, the state attorney general must first provide a copy of the complete complaint to be filed and written

notice describing the action or proceeding to the bureau and any prudential regulator.[17] In response, the bureau may intervene in the action as a party and upon intervening may remove the action to federal court, be heard on all matters and appeal any order or judgment of the court.[18] Section 1042 authorizes state attorneys general to secure the remedies provided by the Dodd-Frank Act, which include civil money penalties of up to $1 million per day for knowing violations of law.[19]

While a Trump administration CFPB could theoretically intervene to argue against an enforcement action, Section 1042 does not provide the bureau with wholesale veto authority over an action brought by a state attorney general. Thus, Section 1042 represents a potential work around of the bureau on enforcement matters. State attorneys general have used Section 1042 to bring actions against, among others: payday lenders for unfair, deceptive and abusive acts or practices[20]; a law firm for violations of the Dodd-Frank Act and the Mortgage Assistance Relief Services Rule (Regulation O)[21]; and for-profit colleges and their in-house student lending units for unfair and abusive practices in violation of the Dodd-Frank Act.[22]

In addition to Section 1042, other consumer financial laws provide state attorneys general a right of action. For example, the Truth in Lending Act and Fair Credit Reporting Act authorize state attorneys general to bring actions to enforce certain provisions of the law.[23] In addition, the Real Estate Settlement Procedures Act grants state attorneys general a right of action against persons violating the anti-kickback provisions of the act.[24]

Even in the absence of a strong enforcement presence at the bureau, state attorneys general may use Section 1042 to take it upon themselves to enforce the provisions of the Dodd-Frank Act. While the attorneys general are limited to enforcing Section 1042 only to the extent they have jurisdiction over an entity, it nonetheless represents a viable path for state attorneys general to ensure that consumer finance companies doing business in their states comply with federal consumer financial laws and regulations. Should the CFPB decrease its enforcement activity under the Trump administration, we expect to see an increase in actions brought by state attorneys general under Section 1042 or the authority granted under specific consumer financial laws.

State UDAP Authority

While Section 1042 provides a powerful tool for state attorneys general, many of the state attorney general enforcement actions in the consumer finance sphere have been brought under state laws prohibiting unfair and deceptive practices.[25] All 50 states and Washington, D.C., have a consumer protection statute that prohibits unfair or deceptive practices, and nearly all grant enforcement authority to the state attorney general.[26] Even if an overhaul of the Dodd-Frank Act eliminates Section 1042, state attorneys general will retain their enforcement authority under state law with respect to unfair or deceptive practices.[27] Under these statutes, state attorneys general may generally conduct investigations, bring actions and recover civil penalties or obtain injunctive relief against entities engaging in unfair, deceptive or fraudulent acts.[28] Attorneys general may also coordinate among themselves to enter into multistate actions or settlements.

While enforcement actions brought by the bureau have captured headlines, state attorneys general have also been active in enforcing their states' consumer protection statutes against consumer financial services companies. In the past year, attorneys general in California, Illinois, Massachusetts and New York[29], among other states, have brought numerous actions against a wide variety of consumer financial services providers. Below, we summarize some of these actions to provide insight into where attorneys general may focus their efforts going forward.

- **Student Lending and For-Profit Schools:** The Illinois attorney general sued a student loan debt relief company for deceptive business practices, alleging that the company charged high fees and promised services that it did not in fact deliver.[30] The Massachusetts attorney general entered into an assurance of discontinuance with a student loan servicer to resolve allegations that the servicer failed to properly process students' applications for federal repayment plans.[31] The attorney general also alleged that the servicer engaged in harassing debt collection practices.[32] The Massachusetts and California attorneys general also entered into consent judgments with for-profit higher education companies to settle allegations that they misled students and falsified job placement statistics, among other allegations.[33]

- **Auto Finance:** Attorneys general in New York and Massachusetts brought enforcement actions against auto dealers for unfair and deceptive acts related to financing and add-on products. The Massachusetts attorney general entered into an assurance of discontinuance with two national auto finance companies to settle allegations that they charged excessive interest rates on their subprime auto loans.[34] The lenders agreed to forgive outstanding interest on the loans and reimburse consumers for the interest they had already paid on the debts.[35] The New York attorney general also brought a number of enforcement actions against auto dealers alleging deceptive practices regarding the sale of credit repair, identity theft protection, warranties and service contracts that were not properly disclosed.[36]

- **Payday and Title Lending:** The Illinois attorney general entered into a $3.5 million settlement with a short-term lender that allegedly originated small-dollar loans with unlawful interest rates.[37] The enforcement action alleged that the lender deceptively offered revolving credit with interest rates far in excess of Illinois' 36 percent limit by concealing the interest as "required account protection fees."[38] The attorney general also entered into settlements with five other lenders offering similar products.[39] The Massachusetts attorney general also obtained an injunction against a title lender that originated loans with finance charges of up to 619 percent, in excess of Massachusetts' civil usury limit of 12 percent.[40] The attorney general alleged that the title lender engaged in abusive practices by targeting economically vulnerable borrowers, then seizing and selling their otherwise paid-off cars when the borrowers defaulted.[41] The Virginia attorney general recently entered into a settlement to resolve claims that a payday lender deceived borrowers into taking out loans with interest rates that exceeded Virginia's state usury laws.[42] The attorney general alleged, in relevant part, that the payday lender used its purported Native American tribe affiliation to misrepresent to borrowers that no state or federal laws limited the interest rates on its loans.[43]

- **Retail Sales Financing:**The attorneys general of California, Illinois, Massachusetts and New York, along with 45 other state attorneys general, entered into a $95.9 million multistate settlement with a retail sales finance company to resolve allegations that it used unfair and deceptive practices in the sale and financing of consumer goods.[44] The settlement alleged that the financing company charged high interest rates by inflating the sale price of its goods. The settlement also alleged that the financing company failed to provide disclosures in its financing agreements.

The attorneys general have not limited their enforcement activity to nonbank entities. In 2016, attorneys general also brought or settled enforcement actions against banks or their affiliates involving allegations related to investment account fees, privacy and mortgage origination and servicing practices. These recent enforcement actions indicate that state attorneys general are ready and willing to use their

UDAP enforcement broadly across the consumer finance spectrum. The state attorneys general's active use of their anti-UDAP statutes may be a harbinger of ramped-up state enforcement actions under a Trump administration CFPB.

Conclusion

Providers of consumer financial services are no doubt closely monitoring Trump's actions on the bureau and Cordray. While there may be cause for celebration if the president removes Cordray from his post, consumer financial services providers should not let their guard down. State attorneys general will almost certainly seek to fill any void left by decreased CFPB enforcement, and have a variety of tools at their disposal to enforce state and federal consumer financial laws.

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[1] See, e.g. Attorney General George Jepsen, AG Jepsen Leads Coalition Seeking to Intervene, Defend Federal Consumer Financial Protection Bureau, Jan. 23, 2017, available at http://www.ct.gov/ag/cwp/view.asp?Q=589490&A=2341 ("State attorneys general were the first voices to warn of the financial fraud that lead to the 2008 financial crisis and remain on the front lines of preventing deceptive and abusive financial practices.").

[2] See, e.g., Ori Lev, Another CFPB Appeal is Heading to the DC Circuit, Mayer Brown Consumer Financial Services Review, Jun. 13, 2016, available at https://www.cfsreview.com/2016/06/another-cfpb-appeal-is-heading-to-the-d-c-circuit/; Ori Lev, If at First You Don't Succeed, Try, Try Again: The CFPB Pushes Its Jurisdiction Once More, Mayer Brown Consumer Financial Services Review, June 9, 2016, available at https://www.cfsreview.com/2016/06/cfpb-cid-enforcement-action/.

[3] 12 U.S.C. § 5491(c)(3). The Supreme Court has limited removal for cause to situations involving "inefficiency, neglect of duty, or malfeasance in office." See Humphrey's Executor v. United States, 295 U.S. 602, 620 (1935).

[4] The PHH Corp. case arose out of a 2014 enforcement action brought by the CFPB for alleged violations of the Real Estate Settlement Procedures Act. An administrative law judge held a trial, found PHH liable, and recommended disgorgement of $6.44 million. On appeal, Cordray affirmed the ALJ on liability, but unilaterally increased the disgorgement penalty to over $109 million. PHH's appeal to the DC Circuit followed.

[5] PHH Corp. v. CFPB, 839 F.3d 1, 36 (D.C. Cir. 2016).

[6] Id. at 8.

[7] Id. at 39.

[8] On the day that the PHH Corp. opinion was issued, it was widely understood that Clinton had a roughly 80 percent chance of winning the election, based on polling figures at the time. See, e.g. Nate Silver, Election Update: Women Are Defeating Donald Trump, FiveThirtyEight, Oct. 11, 2016, available at http://fivethirtyeight.com/features/election-update-women-are-defeating-donald-trump/ (last visited Jan. 30, 2017) .

[9]See Yuka Hayashi, Hillary Clinton Backs CFPB in Main Street-Wall Street Debate, Wall St. J., Oct. 7, 2015, available at http://blogs.wsj.com/washwire/2015/10/07/hillary-clinton-backs-cfpb-in-main-street-wall-street-debate/.

[10] Kate Berry, Dems: CFPB's Cordray Would Sue If Forced Out, Am. Banker, Jan. 17, 2017, available at https://www.americanbanker.com/news/dems-cfpbs-cordray-would-sue-if-forced-out.

[11] Kate Berry, Fire Cordray, Two GOP Senators Tell Trump, Am. Banker, Jan. 17, 2017, available at https://www.americanbanker.com/fire-cordray-two-gop-senators-tell-trump.

[12] Motion to Intervene by Attorneys General of the States of Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Mississippi, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont and Washington, and the District of Columbia, PHH Corp. v. CFPB, No. 15-1777 (D.C. Cir. Jan. 23, 2017).

[13] Id.

[14] Id.

[15] See Order, PHH Corp. v. CFPB, No. 15-1777 (D.C. Cir. Feb. 2, 2017).

[16] Section 1042 is codified at 12 U.S.C. § 5552. Under Section 1042, a state attorney general may not bring an action against a national bank or federal savings association to enforce the Dodd-Frank Act, but is permitted to bring an action against these entities to enforce a regulation prescribed by the Bureau under the Dodd-Frank Act. 12 U.S.C. § 5552(a)(2).

[17] Id. § 5552(b)(1)(A).

[18] Id. § 5552(b)(2).

[19] Id. §§ 5552(a)(1); 5565(c)(2)(C).

[20] Commonwealth of Pennsylvania v. Think Fin. Inc., 2016 WL 183289 (E.D. Pa. Jan. 14, 2016).

[21] Office of the Attorney Gen. v. Berger Law Grp. PA, 2015 WL 5922933 (M.D. Fla. Oct. 9, 2015).

[22] Illinois v. Alta Colleges Inc., 2014 WL 4377579 (N.D. Ill. Sept. 4, 2014).

[23] 15 U.S.C. §§ 1640(e); 1681s(c).

[24] 12 U.S.C. § 2607(d)(4).

[25] The Federal Trade Commission has authority to bring UDAP enforcement actions under Section 5 of

the FTC Act. 15 U.S.C. § 45(a). Additionally, the Office of the Comptroller of the Currency has authority to enforce UDAP violations against national banks and their operating subsidiaries and federal savings associations. See OCC Advisory Letter 2002-3; 12 U.S.C. § 1818.

[26] See, e.g., Cal. Bus. & Prof. Code § 17200; Conn. Gen. Stat. § 42-110b(a); 815 Ill. Comp. Stat. Ann. § 505/2; Mass. Gen. Laws Ch. 93A, § 2(a); N.Y. Exec. Law § 63(12); Va. Code Ann. § 59.1-200(A)(14). The Utah Consumer Sales Practices Act grants UDAP enforcement authority to the Division of Consumer Protection of the Utah Department of Commerce. See Utah Code Ann. § 13-11-3(3).

[27] Section 1042 provides additional authority for state attorneys general to pursue "abusive" acts or practices under the Dodd-Frank Act, except against a national bank or federal savings association. State attorneys general would lose this authority if Section 1042 were eliminated, as well as the ability to obtain the large civil money penalties provided by the Dodd-Frank Act.

[28] See, e.g., Cal. Bus. & Prof. Code § 17206; Mass. Gen. Laws Ch. 93A, § 6; Va. Code Ann. §§ 59.1-201(A); 203.

[29] We chose a sample of these states because of their large populations and the fact that their Democratic attorneys general either joined the motion to intervene in the PHH Corp. appeal or have expressed pro-CFPB views, indicating these states are likely to be active in consumer financial services enforcement. California's attorney general was not sworn in until after the motion was filed; as a member of Congress, California Attorney General Xavier Becerra was a vocal supporter of the CFPB. See, e.g. U.S. House Committee on Financial Services Democrats, More Than 100 House Democrats Send Letter Urging Strong CFPB Payday Rule, Sept. 28, 2016, available at http://democrats.financialservices.house.gov/news/documentsingle.aspx?DocumentID=400086.

[30] Illinois Attorney General Lisa Madigan, Madigan Announces Consumer Top 10 Complaints List, Files Another Student Loan Debt Lawsuit, March 7, 2016.

[31] See Attorney General of Massachusetts, AG Healey Secures $2.4 Million, Significant Policy Reforms in Major Settlement with Student Loan Servicer, Nov. 22, 2016.

[32] Id.

[33] See Attorney General of Massachusetts, AG Healey Submits Application to the U.S. Department of Education to Cancel Loans for Thousands of For-Profit Schools Students, July 26, 2016; State of California Department of Justice, Attorney General Kamala D. Harris Obtains $1.1 Billion Judgment Against Predatory For-Profit School Operator, March 23, 2016.

[34] Attorney General of Massachusetts, Thousands of Massachusetts Drivers to Receive $7.4 Million in Relief on High-Interest Auto Loans from Two Lenders, March 16, 2016.

[35] Id.

[36] Attorney General Eric T. Schneiderman, A.G. Schneiderman Announces Settlements With Four Auto Dealer Groups For Deceptive Practices That Resulted In Inflated Car Prices, April 21, 2016; Attorney General Eric T. Schneiderman, A.G. Schneiderman Announces Settlement Securing Over $100k in Restitution For Customers of Auto Dealership That Used Deceptive Practices, June 21, 2016; Attorney General Eric T. Schneiderman, A.G. Schneiderman Announces $1.6 Million Settlements With Auto

Dealerships That Illegally Charged Thousands of Customers for Hidden Purchases, Dec. 8, 2016.

[37] Illinois Attorney General Lisa Madigan, Madigan Reaches $3.5 Million Settlement With Lender for Selling Product with Hidden, Sky-High Interest Rates, Oct. 6, 2016.

[38] Id.

[39] Id.

[40] Attorney General of Massachusetts, AG Stops Online Auto Title Lender from Collection on Illegal Loans Made to Massachusetts Consumers, March 18, 2016.

[41] Id.

[42] See Complaint in Intervention, Commonwealth of Virginia ex rel. Herring v. CashCall Inc., No. 3:14-cv-258-JAG (E.D. Va. Jan. 25, 2017); Commonwealth of Virginia Office of the Attorney General, CashCall to Refund Millions to Virginia Consumers Over Illegal Online Lending Scheme, Jan. 31, 2017.

[43] Commonwealth of Virginia Office of the Attorney General, CashCall to Refund Millions to Virginia Consumers Over Illegal Online Lending Scheme, Jan. 31, 2017.

[44]See, e.g., State of California Department of Justice, Attorney General Kamala D. Harris, 49 Other Attorneys General, Reach $95 Million Settlement with USA Discounters for Targeting Military Servicemembers with Deceptive Marketing and Illegal Debt Collection Practices, Sept. 30, 2016.
