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An Uncertain Future For Fair Lending Enforcement At CFPB

By **Melanie Brody, Ori Lev and Tori Shinohara** (March 1, 2018, 10:47 AM EST)

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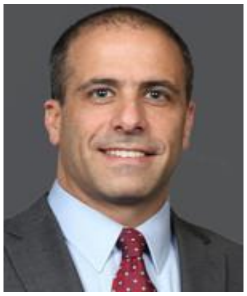

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Since the Consumer Financial Protection Bureau's inception in 2011, the Office of Fair Lending and Equal Opportunity has been a powerful force within the agency. As reported by multiple sources,[1] in late January, Acting Director Mick Mulvaney announced that the Office of Fair Lending will be transferred from where it currently resides — in the Division of Supervision, Enforcement, and Fair Lending (SEFL) — to the Office of the Director, where it will become part of the Office of Equal Opportunity and Fairness.

Despite the similar nomenclature, the priorities of the Office of Fair Lending and the Office of Equal Opportunity and Fairness are vastly different, with the latter having oversight over equal employment opportunity and diversity and inclusion initiatives within the CFPB. The move likely signals a substantial curtailment of CFPB fair lending enforcement activities.

Section 1013 of the Dodd-Frank Act mandated the establishment of an Office of Fair Lending and the statutory language provides that the Office of Fair Lending "shall have such powers and duties as the Director may delegate to the Office, including":

- Providing oversight and enforcement of federal fair lending laws (including Equal Credit Opportunity Act and Home Mortgage Disclosure Act);
- Coordinating fair lending efforts with other federal agencies and state regulators;
- Working with the private industry and consumer advocates on the promotion of fair lending compliance and education; and
- Providing annual reports to Congress on the bureau's efforts to fulfill its fair lending mandate.

Although there is some ambiguity regarding whether the functions of the Office of Fair Lending outlined in the Dodd-Frank Act are permissive or mandatory, the CFPB to date had in fact given the Office of Fair Lending the powers and duties listed in the statute. Office of Fair Lending attorneys historically have played a substantial role in overseeing fair lending examinations and bringing fair lending enforcement actions. Indeed, the Office of Fair Lending has come under fire for “regulation through enforcement” and for “pushing the envelope” through its aggressive enforcement of federal anti-discrimination statutes against lenders on the basis of statistical analyses (i.e., dealer markup and redlining).

In its Fair Lending Report released last year, the bureau’s then-Director Richard Cordray touted its “historic resolution of the largest redlining, auto finance, and credit card fair lending cases.” Cordray also identified redlining, mortgage loan servicing, student loan servicing, and small business lending as the bureau’s fair lending priorities going forward.[2] Under the bureau’s new leadership, fair lending issues evidently will no longer be a top priority.

As a result of the restructuring, the Office of Fair Lending will no longer have supervisory or enforcement responsibilities. According to an email sent by Mulvaney to CFPB staff that was leaked to several news outlets (and later confirmed by the CFPB to be accurate), the Office of Fair Lending’s new focus will be on advocacy, coordination and education. Although SEFL as a whole will still maintain responsibility for fair lending supervisory and enforcement matters, this restructuring signals a de-emphasis on fair lending and likely will lead to a significant decrease in the number of fair lending examinations, investigations and enforcement actions brought by the bureau. Indeed, Congress presumably required the establishment of a separate fair lending office out of recognition that having such an office would ensure a persistent attention to fair lending issues. Stripping the office of supervisory and enforcement responsibilities will similarly result in less of a focus on those issues. Although SEFL leadership and staff are likely to continue to pursue fair lending matters, those matters will now compete for attention and resources with the myriad other issues over which the CFPB has jurisdiction.

In response to rumors of the bureau’s “restructuring”, 54 Democratic senators and representatives sent a letter[3] to the bureau demanding that it provide Congress with “all documents and communications” relating to the decision to bring the Office of Fair Lending under the Office of the Director. The letter states that the undersigned Democratic members of Congress are “troubled” by Mulvaney’s move to reorganize the Office of Fair Lending and strip the Office of its supervisory and enforcement responsibilities. In the letter, the Democratic lawmakers also expressed skepticism about how such a shift would continue to protect consumers from unlawful discrimination. Although the full details of the reorganization are still murky, the letter calls the move “worrisome” and notes that it would “undoubtedly hinder” the bureau’s fair lending efforts. The letter also requests that the bureau respond to a number of questions, including, among others:

- Did the CFPB perform a legal analysis to determine whether stripping the Office of Fair Lending of its enforcement authority would hinder the CFPB’s ability to carry out its statutory mandate to provide oversight and enforcement of federal fair lending laws?

- How will bringing the Office of Fair Lending under the control of the Office of the Director modify the bureau’s decision-making process with regard to enforcement and other actions to protect consumers from unfair discrimination?

- Did Mulvaney or any other CFPB employee consult with or discuss this reorganization with any outside entities — including lobbyists or representatives of the banking or financial services industry — prior to announcing the reorganization?

- Is the CFPB considering any substantial changes to its approach to the enforcement of fair lending laws, including changes to the CFPB’s interpretation of these laws?

The proposed reorganization of the Office of Fair Lending is just one of several recent noteworthy changes at the bureau since Mulvaney took over in November of last year. If there had been any lingering questions about the bureau's new direction, Mulvaney put those to bed when he sent an email to bureau staff and published a public op-ed in which he stated unequivocally that the CFPB will no longer "push the envelope" and that it will not look for an "excuse to bring lawsuits."[4]

Noticeable shifts in the bureau's policies and priorities started in December of last year, less than one month after Mulvaney was named acting director of the bureau. For example, the bureau announced that it will not require financial institutions to resubmit their 2018 Home Mortgage Disclosure Act data collected pursuant to new regulatory reporting requirements unless data errors are "material."[5] The bureau's public statement about the HMDA also indicated that the bureau intends to reconsider certain aspects of the HMDA rule that was finalized back in 2015, including its coverage thresholds and discretionary data points.

In addition to the bureau's reconsideration of the 2015 HMDA rule, the bureau has stated publicly that it intends to reconsider the already-finalized payday lending rule.[6] The bureau has also changed course on the enforcement front with respect to payday lending, dropping a lawsuit against four payday lenders that the CFPB previously accused of violating the Truth-in-Lending Act and the Dodd-Frank Act's prohibition against unfair, deceptive, or abusive acts or practices.[7]

Other noteworthy developments during Mulvaney's short tenure include asking the Federal Reserve for $0 to fund the bureau's operations for the second quarter of 2018; [8] revamping the bureau's mission statement to focus on identifying and addressing outdated, unnecessary or unduly burdensome regulations; and publishing a serious of requests for information seeking information about the bureau's enforcement, supervision, rulemaking, market monitoring and education activities.[9] With all of the developments at the bureau over the last several months, industry participants are left to wait and see what happens next and what the lasting effects of such changes will be.

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[1] https://theintercept.com/2018/02/01/cfpb-mick-mulvaney-lending-housing-discrimination; https://www.washingtonpost.com/news/business/wp/2018/02/01/trump-administration-strips-consumer-watchdog-office-of-enforcement-powers-against-financial-firms-in-lending-discrimination-cases/?utm_term=.1f3dbc5fc59a.

[2] https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201704_cfpb_Fair_Lending_Report.pdf.

[3] https://www.brown.senate.gov/download/banking-21618.

[4] https://www.documentcloud.org/documents/4357880-Mulvaney-Memo.html;

https://www.wsj.com/articles/the-cfpb-has-pushed-its-last-envelope-1516743561.

[5] https://files.consumerfinance.gov/f/documents/cfpb_statement-with-respect-to-hmda-implementation_122017.pdf.

[6] https://www.consumerfinance.gov/about-us/newsroom/cfpb-statement-payday-rule.

[7] https://files.consumerfinance.gov/f/documents/201704_cfpb_Golden-Valley_Silver-Cloud_Majestic-Lake_complaint.pdf.

[8] https://files.consumerfinance.gov/f/documents/cfpb_fy2018_q2_funding-request-letter-to-frb.pdf.

[9] https://www.consumerfinance.gov/about-us/newsroom/acting-director-mulvaney-announces-call-evidence-regarding-consumer-financial-protection-bureau-functions.