A Look Back At Mulvaney's CFPB, And What's Ahead In 2019

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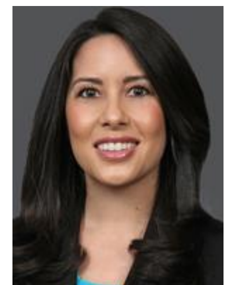
Just one year ago, as you were contemplating what to do with your leftover Thanksgiving turkey, a storm was brewing at the Consumer Financial Protection Bureau, also known now as the Bureau of Consumer Financial Protection. On Nov. 24, 2017, then-Director Richard Cordray resigned. His last act was to appoint his chief of staff, Leandra English, as the agency's deputy director, with the expectation that English would become the next acting director. Later that day, President Donald Trump named U.S. Office of Management and Budget Director Mick Mulvaney as acting director, and, two days later, a legal battle ensued in the D.C. Circuit. Since then, Acting Director Mulvaney changed the name of the bureau, declined operating funds from the Fed, publicly decried the bureau's prior mission, and rolled back supervisory, regulatory and enforcement activities. On Dec. 6, 2018, the Senate confirmed Kathy Kraninger as the next director of the CFPB. In this article, we take a closer look at how the CFPB, looks lafter one year of Mulvaney's leadership and what to expect in the year ahead.



Tori Shinohara

Comings and Goings: Staffing Changes at the Bureau

Not surprisingly, many former bureau employees have moved on, from line attorneys to senior enforcement personnel, and Mulvaney brought in a number of political appointees. He has also reorganized various aspects of the bureau, most notably in the area of fair lending. Mulvaney moved the Office of Fair Lending and Equal Opportunity from the Division of Supervision, Enforcement, and Fair Lending, or SEFL, where it had supervisory and enforcement authority, to the Office of the Director, where it serves as solely a policy office; fair lending supervision and enforcement activities remained within SEFL. The rationale was to have one office that handles enforcement matters and one that handles supervision (rather than two of each). Separately, Mulvaney moved the Office for Students and Young Consumers into the bureau's financial education office.

Anjali Garg

Other high-profile moves include the August 2018 departure of the student loan ombudsman of the bureau, Seth Frotman, who announced his resignation from the bureau in public fashion. In his resignation letter, he accused Mulvaney and Trump of undermining the bureau and the bureau's ability to protect consumers. He claimed that the "current leadership" of the bureau undermines the agency's independence and actively shields "bad actors from scrutiny." He cited leadership's decision to suppress a report about student account fees as an example of harming students. The bureau did not comment on Frotman's resignation.

Christa Bieker

We expect more personnel changes and potentially new political hires once Kraninger begins her tenure, but, for now, the personnel shake-up and reorganization appear to have slowed down.

Mulvaney's Call for Evidence: A Re-Examination of Bureau Practices

One of Mulvaney's first initiatives was a "call for evidence to ensure that the Bureau is fulfilling its proper and appropriate functions to best protect consumers."[1] Mulvaney indicated that the bureau would be "critically examin[ing] its policies and practices to ensure they align with the Bureau's statutory mandate."[2] To that end, the bureau published a series of requests for information, or RFIs, seeking comments on virtually all of the bureau's activities — from enforcement to supervision to its handling of consumer complaints. Beginning in January 2018, the bureau published 13 RFIs seeking comments on such topics as enforcement (including civil investigative demands, or CIDs, and associated processes), supervision, guidance, rule-making, market monitoring, data, consumer complaints and education activities.

At the time, Mulvaney's "call for evidence" suggested the potential for sweeping changes to core bureau functions and processes. After requesting comments on a broad range of topics, however, it is unclear exactly what, if any, changes the bureau will make based on comments received through the RFIs. No major announcements have come out of the RFI process to date, but the bureau did announce some modest alterations in response to comments received on the RFI on external engagements. In June 2018, the bureau announced that it is reconstituting its advisory groups with new and smaller membership and ramping up outreach to external groups. The bureau also stated that it plans to increase its strategic outreach through regional and national town halls and regular national calls.

The RFI process provides an opportunity for Kraninger, if she so chooses, to bring about more change in how the bureau operates. The RFIs and the public comments submitted in response to them should provide her a menu of options from which to choose as she moves to put her imprint on the agency.

Litigation and Enforcement Trends: Less of More of the Same

In January 2018, Mulvaney declared that the bureau had pushed its last envelope with respect to enforcement activities.[3] However, looking back on enforcement activities during Mulvaney's first year, the theme that comes to mind is "less of more of the same" — there was less enforcement overall, but the enforcement activity that did occur was more of the same, with similar unfair, deceptive and abusive acts and practices, or UDAAP, claims as the bureau has been bringing since its inception.

The numbers tell the story of "less." In the past year, the CFPB has brought nine enforcement actions — eight settlements and one lawsuit — and settled one previously filed lawsuit. In contrast, in his last year in office, Cordray brought 47 new enforcement actions, 16 of which were contested and 31 of which were filed as settled cases. But that is where the differences end.

Although it is very challenging to compare remedies imposed in different cases, a look at the numbers suggests a rough equivalence between the Cordray and Mulvaney bureaus. Of the 31 cases the bureau settled in Cordray's last year, 26 included a civil money penalty, or CMP, about half of those (14) included a penalty greater than $1 million, and the average penalty in those 26 cases was about $1.5 million. By contrast, eight of the nine settlements under Mulvaney involved a CMP — roughly the same percentage as under Cordray. In almost half of those cases, the penalty amount announced by the bureau was deemed satisfied by payment of a lesser amount. Excluding from the calculation the record-setting and average-skewing penalty of $1 billion announced against a large bank, the average penalty amount in the six remaining penalty cases was about $1.5 million — in line with the average from the prior year — and half of the cases involved penalties in excess of $1 million.[4]

More surprisingly, the nature of the claims that the CFPB has brought and defended has not changed substantially under Mulvaney. The bureau under his leadership has filed briefs supporting novel theories of abusiveness that were first asserted under Cordray, and Mulvaney's bureau recently brought its first abusiveness claim in the context of a payday lender that also offered check-cashing services.[5] This claim was brought in October 2018, just days after Mulvaney announced that the bureau would consider engaging in rule-making to define abusiveness because it is not well-defined in the case law. In that matter, the bureau found an abusive practice where the respondent used the check proceeds to pay off outstanding payday loan debts and provided only the remaining funds to the consumer. The consent order notes that this practice was disclosed to consumers at the time they took out loans with the company and that consumers, in fact, signed an acknowledgement in the applications that they had received these disclosures. The bureau nevertheless found this conduct abusive because the disclosures sometimes occurred months or years before the check-cashing transaction and because the company took steps to not inform consumers coming in for check cashing services that their check proceeds may be set off against any outstanding debt. These practices, in the bureau's words, "nullified" the disclosures that consumers had been provided and constituted an abusive practice.

While this abusiveness claim was reminiscent of the bureau's abusiveness claim in a prior case involving check cashing, it was surprising that a market-oriented director like Mulvaney would choose to bring such a claim when the conduct was expressly disclosed to the consumer and ultimately entailed no more than the recovery of funds that had been lent to the consumer. The claim at issue could just as easily have been cast as an unfairness claim.

Moreover, notwithstanding all the rhetoric about the end of regulation by enforcement, several of the bureau's claims asserted UDAAP violations for conduct that had not been clearly prohibited or whose contours are more amenable to rule-making. For example, a recent consent order involved claims that the failure to timely forward consumer payments to debt buyers is an unfair practice. What "timely" means, however, is entirely unclear and seems well-suited to the debt collection rule-making in which the bureau is currently engaged. Similarly, the bureau has brought unfairness claims regarding debt collection activity involving first-party collectors, who are not covered by the Fair Debt Collection Practices Act. This issue, too, is part of the pending debt collection rule-making.

More generally, the bureau has continued to enforce the prohibition on UDAAP. Indeed, eight of the nine cases brought under Mulvaney include UDAAP claims, and five of them were based solely on UDAAP. In that respect, the new CFPB is very much like the old CFPB (and the Federal Trade Commission) in that UDAAP claims have continued to be the bread and butter of enforcement. Based on the bureau's enforcement actions over the past year, there is no reason to think that will change.

Finally, perhaps the most important recent development on the enforcement front is the fact that the bureau seems to have opened new enforcement investigations. All of the enforcement actions announced under Mulvaney's leadership to date likely involved investigations that had been opened prior to his arrival at the bureau. In the past month, however, the bureau has issued civil investigative demands, or CIDs in new investigations, which is the first sign of such enforcement activity under the new regime. This may mean that the new leadership at the bureau has made decisions about where and how it wants to deploy the agency's enforcement resources. Under Cordray, the enforcement office had its own strategic plan that identified those market areas that enforcement wanted to address in the coming year. Presumably, Mulvaney's team wanted to review those priorities before authorizing new investigations.

These first new investigations of the Mulvaney era, therefore, may suggest that a new enforcement strategic direction has been adopted and that we will see more investigations opened in the near future. If that's the case, we may gain greater insights into the areas of priority for the agency. Now that Kraninger has taken over, there may well be another period of upheaval and change. But, for now, it appears that we can expect less of more of the same.

Rulemaking: Regulation Through Regulations

Shortly after being appointed as the acting director of the bureau, Mulvaney promised "more formal rule-making and less regulation by enforcement."[6] Not surprisingly, the new bureau's formal rule-making process is just as slow as the old bureau's, though Mulvaney has been quick to respond to industry concerns on regulations that were in process as of last November. The two most notable developments were related to the payday lending rule and UDAAPs.

First, at the beginning of the year, Mulvaney signaled that the bureau would engage in notice and comment rule-making to reconsider the payday lending rule that the bureau finalized in October 2017.[7] The bureau has since announced that it expects to issue a notice of proposed rule-making by January 2019 that will address both the merits and the compliance date (currently August 2019) of the rule.[8] Notably, the bureau intends to revisit only the ability to repay provisions and not the payment provisions of the rule.[9] To complicate matters, in a lawsuit brought by trade associations challenging the validity of the rule, the court stayed the implementation date of the rule but did not provide a new implementation date.[10] Instead, the court stayed the rule indefinitely "pending further order of the court." We expect the court to revisit this issue after the bureau issues its promised notice of proposed rulemaking.

Second, Mulvaney has signaled that the bureau will consider clarifying the meaning of "abusiveness" through the rule-making process.[11] The generalized prohibition on

UDAAPs has been on Mulvaney's radar since the beginning of his tenure, though, as discussed above, it has continued to rely heavily on UDAAP claims in its enforcement work. Rule-making to further define abusiveness would mitigate some of industry's concerns about what constitutes a UDAAP, but, as in many things, the devil is in the details. The abusiveness rule-making is in the category of "long-term" rule-making on the bureau's latest rule-making agenda, suggesting we may not see any action in this space for some time.

In the nearer term, the bureau indicated that it intends to issue a notice of proposed rule-making addressing debt collection-related communication practices and consumer disclosures by March 2019. The bureau explained that debt collection remains a top source of the complaints it receives, and both industry and consumer groups have encouraged the bureau to modernize FDCPA requirements through rule-making. The bureau did not specify whether its proposed rule-making would be limited to third-party collectors subject to the FDCPA, but its reference to FDCPA requirements suggests that is likely to be the case. This is another area of continuity with the Cordray CFPB, which conducted a substantial amount of prerule activity regarding debt collection, though one would expect that the substance of a proposed rule will be different under Kraninger than it would have been under Cordray. In addition to the debt collection rule-making, we can expect guidance governing public disclosure of data under the Home Mortgage Disclosure Act, or HMDA.

The remaining regulatory actions include industry-friendly moves, such as relief under the HMDA; technical corrections to mortgage servicing rules and the Truth in Lending Act-Real Estate Settlement Procedures Act integrated disclosure rule, or TRID; interim final rules to implement amendments to the Fair Credit Reporting Act and Gramm-Leach-Bliley Act; and updates to the 2016 prepaid rule, including extending the effective date to April 1, 2019. Mulvaney's bureau also finalized portions of a 2016 proposed rule regarding the disclosure of records. The bureau has also shelved certain rules that had been on the regulatory agenda under Cordray, including the overdraft services rule and a student loan servicing rule, and delayed the creation of the small business lending data collection rule.

Supervision: Guidance on Guidance

Mulvaney's CFPB has taken a number of steps, along with other financial regulators, to reduce the impact of supervisory guidance and examinations. In a joint statement with federal prudential regulators in September 2018, the agencies explained that "supervisory guidance does not have the force and effect of law, and the agencies do not take enforcement action based on supervisory guidance."[12] The agencies further stated that supervisory guidance is meant to outline supervisory expectations and articulate a general view regarding appropriate practices, but guidance should not serve as the basis for enforcement actions.

Similarly, in a bulletin discussing types of supervisory findings, the bureau stated that supervisory findings are not legally enforceable.[13] This was the only bulletin of the Mulvaney era. And notably absent from the Mulvaney bureau's first and only edition of Supervisory Highlights was introductory language found in prior versions emphasizing the corrective action that the bureau had required of supervised entities. Instead, it emphasized that "institutions are subject only to the requirements of relevant laws and regulations."[14] However, that issue of Supervisory Highlights revealed that the bureau continued to conduct supervisory activities in many of the same industries and identified similar types of

compliance concerns as the bureau did under Cordray.[15] Indeed, it appears that Mulvaney has not introduced "check-the-box" examinations focused solely on technical compliance with regulations but has continued the bureau's practice of examining compliance management systems and for UDAAP concerns.

The statements about the unenforceability of supervisory findings and guidance were released against the backdrop of congressional disapproval of the bureau's 2013 bulletin on indirect auto lending. The Government Accountability Office concluded that the bureau's 2013 bulletin on indirect auto lending qualified as a "rule" subject to the Congressional Review Act even though, according to the GAO, it is informal guidance that "offers clarity and guidance on the Bureau's discretionary enforcement approach."[16] In May 2018, Trump signed a joint resolution of Congress to repeal the bulletin, marking the first, and so far only, time the CRA has been used to repeal agency guidance. The repeal prohibits the bureau from issuing a substantially similar rule unless specifically authorized by law to do so.[17]

Separately, the bureau is considering changes to the Trial Disclosure Program, or TDP, to help spur additional innovation in the financial services marketplace.[18] The TDP permits covered persons to conduct trial disclosure programs and provides a safe harbor (or waiver) from the corresponding applicable regulatory requirements. Under Cordray, the bureau did not approve a single trial disclosure. The potential changes to the TDP, along with the creation of a new Office of Innovation, suggest that the bureau may take a more active role in helping to foster innovation than it did under Cordray's Project Catalyst.

Collectively, these efforts signal the bureau's (and other regulators') industry-focused approach to supervision and an effort to encourage flexibility and innovation in the marketplace. We expect this trend to continue in the year to come.

Bureau Reports: Fulfilling Statutory Mandates

In 2018, the bureau released more than a dozen reports. Most of the reports were published because of a statutory mandate. These include the 2018 Financial Report, the Consumer Response Annual Report, and the Fair Debt Collection Practices Act Annual Report. Only a few reports published by the bureau were not explicitly required by statute, including a report on geography of credit invisibility and a report on final student loan payments and broader household borrowing. These "optional" reports, published by the bureau's Office of Research, have always included an introductory note indicating that they are occasional reports that are "intended to further the Bureau's objective of providing an evidence-based perspective on consumer financial markets, consumer behavior, and regulations to inform the public discourse."[19] Under Mulvaney, this introductory language is now accompanied by a statutory citation to the Dodd-Frank provisions permitting the publication of such reports.[20] Although this addition is minor, it underscores Mulvaney's intention that all actions taken by the bureau are firmly rooted in statutory requirements.

This theme was made even more apparent in the first semiannual report released under Mulvaney's leadership.[21] The report tracked exactly with the nine elements that are outlined in the Dodd-Frank Act for inclusion in reports to Congress, and it did not include information above and beyond the statutorily required elements, unlike previous reports that had been published under Cordray's leadership. But the reason this report made waves

was not because of the content in the report itself, but the introduction and press release that were issued along with it. Mulvaney used the press release and introductory letter as an opportunity to reiterate his view that the bureau is too powerful. He stated the power wielded by the director could "all too easily be used to harm consumers, destroy businesses, or arbitrarily remake American financial markets."

In his introduction letter, Mulvaney suggested that Congress created an agency that is designed to ignore due process and asked for four key changes: (1) that the bureau be funded through congressional appropriations; (2) to require legislative approval of major rules; (3) to ensure that the director be answerable to the president; and (4) that the bureau should have its own independent inspector general. It remains to be seen whether the new Congress will heed these calls for reform, but the new Democratic majority in the House makes such sweeping changes unlikely in the coming years.

A Look Ahead

Though many entities in the bureau's previous line of fire were hopeful that Mulvaney's arrival would mean wholesale and sweeping change immediately, when you step past the headlines, progress toward Mulvaney's vision of the bureau has been slow. Nevertheless, Mulvaney has gradually changed the face of the CFPB. Aside from changing the seal and the name, the acting director has rolled back or delayed regulations, reduced the impact of the bureau's supervisory functions, and substantially slowed the pace of enforcement.

The unresolved RFI process leaves open the possibility that Kraninger will impose more substantial process and organizational changes, though that will depend on her vision for the agency. Ultimately, what we expect in the coming year is more of the same — a somewhat steady stream of regulatory changes coupled with modest enforcement activities. Unlike Mulvaney, Kraninger will have a full five-year term to implement her agenda and will have the benefit of not having "acting" attached to her title. Whether that means more gradual or more urgent change is the big open question as we head into the new year and a new era for the bureau.

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[1] CFPB, "Acting Director Mulvaney Announces Call for Evidence Regarding Consumer

Financial Protection Bureau Functions” (Jan. 17, 2018), available at https://www.consumerfinance.gov/about-us/newsroom/acting-director-mulvaney-announces-call-evidence-regarding-consumer-financial-protection-bureau-functions/.

[2] Id.

[3] Mick Mulvaney, The Wall Street Journal, “The CFPB has Pushed Its Last Envelope” (Jan. 23, 2018), available at https://www.wsj.com/articles/the-cfpb-has-pushed-its-last-envelope-1516743561.

[4] This figure is based on the lesser amount imposed on respondents after the Bureau deemed part of the payment to be “satisfied.”

[5] Ori Lev, Mayer Brown Legal Update, “What’s in a Name? That Which We Called the CFPB Is Still Bringing UDAAP Claims” (Oct. 25, 2018), available at https://www.mayerbrown.com/Whats-in-a-Name-That-Which-We-Called-the-CFPB-Is-Still-Bringing-UDAAP-Claims-10-25-2018/

[6] Mulvaney, supra note 3.

[7] CFPB, “Statement on Payday Rule” (Jan. 16, 2018), available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-statement-payday-rule/.

[8] CFPB, Fall 2018 Regulatory Agenda, available at https://www.reginfo.gov/public/do/eAgendaMain.

[9] CFPB, “Public Statement Regarding Payday Rule Reconsideration and Delay of Compliance Date” (Oct. 26, 2018), available at https://www.consumerfinance.gov/about-us/newsroom/public-statement-regarding-payday-rule-reconsideration-and-delay-compliance-date/.

[10] Order, Cmty Fin. Srvs. Ass’n, Ltd. v. Consumer Fin’l Prot. Bureau, No. A-18-CV-0295-LY (W.D. Tex. Nov. 6, 2018).

[11] CFPB, Fall 2018 Regulatory Agenda, available at https://www.reginfo.gov/public/do/eAgendaMain.

[12] CFPB, et al., “Interagency Statement Clarifying the Role of Supervisory Guidance” (Nov. 11, 2018), available at https://s3.amazonaws.com/files.consumerfinance.gov/f/do_cuments/interagency-statement_role-of-supervisory-guidance.pdf.

[13] CFPB, Bulletin 2018-01, “Changes to Types of Supervisory Communications” (Sept. 25, 2018), available at https://s3.amazonaws.com/files.consumerfinance.gov/f/do_cuments/bcfp_bulletin-2018-

01_changes-to-supervisory-communications.pdf. The Bulletin explains that the bureau will use Matters Requiring Attention to address violations of consumer financial law, remediation of harmed consumers, and weaknesses in compliance management systems, or CMS, that examiners found are directly related to violations of law. The bureau will use Supervisory Recommendations when examiners have not identified a violation of law but have observed weaknesses in CMS. The new category of Supervisory Recommendations signifies that the bureau views that failure to have a CMS program itself is not typically a violation of consumer financial law.

[14] CFPB, Supervisory Highlights, Issue 17, Summer 2018, available at https://s3.amazonaws.com/files.consumerfinance.gov/f/do_cuments/bcfp_supervisory-highlights_issue-17_2018-09.pdf.

[15] Id.

[16] GAO, Letter to Hon. Patrick Toomey (Oct. 19, 2017), available at https://www.gao.gov/assets/690/687879.pdf.

[17] It is unclear, however, what this means in the context of agency guidance. If agency guidance is an interpretation of existing statutes and regulations, and Congress repeals only the guidance/interpretation but not the existing statutes (or regulations, if applicable), it is possible that an agency could simply attempt to return to its initial stance (for instance, a CFPB director could possibly refocus on indirect auto lenders, using an approach similar to that announced in the CFPB's 2013 Bulletin).

[18] Ori Lev and Anjali Garg, "BCFP's Focus on Innovation Continues with Revival of the Disclosure Sandbox; Comments are Due October 10, 2018" (Sept. 11, 2018), available at https://www.cfsreview.com/2018/09/bcfps-focus-on-innovation-continues-with-revival-of-the-disclosure-sandbox-comments-are-due-october-10-2018/.

[19] See, e.g., CFPB, "Semi-annual Report of the Bureau of Consumer Financial Protection" (April 2018), available at https://s3.amazonaws.com/files.consumerfinance.gov/f/do_cuments/cfpb_semi-annual-report_spring-2018.pdf.

[20] 12 U.S.C. 5493(d).

[21] CFPB, supra note 19.