Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

After Year With Mulvaney, CFPB Enters Kraninger Era

By **Jon Hill**

Law360 (December 6, 2018, 9:29 PM EST) -- Mick Mulvaney is leaving behind a Consumer Financial Protection Bureau that's had some of the bark and bite taken out of it, but as Kathleen Kraninger steps up to become the agency's next director, the consumer financial watchdog hasn't necessarily gone to sleep, financial services attorneys told Law360.

The Senate voted 50-49 along party lines to confirm Kraninger as director of the CFPB on Thursday, just over a year after President Donald Trump tapped Mulvaney to lead the agency on an interim basis following the departure of former director Richard Cordray.

Financial services attorneys said that Kraninger is set to inherit an agency that has seen a slowing of its enforcement activity and a thawing of chilly relations with industry during Mulvaney's year-long tenure.

"The bureau is less aggressive in its regulatory approach overall, and while similar legal theories and claims continue to be pursued in enforcement actions, the threat of crippling punishment by the bureau is lesser," said Quyen Truong, a partner at Stroock & Stroock & Lavan LLP and former CFPB assistant director. "There has been a significant shift in that respect."

Michael Benoit, chairman of Hudson Cook LLP, said that under Mulvaney, the agency has come a long way from the "new cop on the beat" attitude that surrounded its creation in the Dodd-Frank Act and the subsequent installation of Cordray as its first director.

"That set the tone for the Cordray bureau, and they never really shook it, nor did they do much that would indicate to industry that they were even interested in shaking that picture of themselves," Benoit said. "Here now, you have a bureau that appears to be interested in working with industry and realize that part of a regulator's duty isn't just to enforce the law, but also to help regulated companies understand how to comply with the law."

'A New Mission'

Mulvaney, who also heads up the Office of Management and Budget, made it clear early on in his tenure as acting director that he was there to rein in the CFPB, an agency that many Republican lawmakers and financial services players viewed as having run roughshod over industry with heavy-handed regulation and enforcement during the Cordray era.

“The CFPB has a new mission: We will exercise, with humility and prudence, the almost unparalleled power Congress has bestowed on us to enforce the law faithfully in furtherance of our mandate,” Mulvaney wrote in a January op-ed in the Wall Street Journal. “But we go no further. The days of aggressively ‘pushing the envelope’ are over.”

One of the most visible manifestations of this “new mission” has been the sharp decline in the volume of enforcement actions. Under Mulvaney’s leadership, for example, the CFPB has filed only two new actions in federal district court, a precipitous drop from the 19 filed in Cordray’s last year as director. The agency has announced consent orders in 10 more administrative proceedings on Mulvaney’s watch, down from 26 the year before he arrived.

And while attorneys who spoke to Law360 said that investigations are still continuing at the CFPB — albeit out of the public eye — there are signs of a slowdown there, too. Since Mulvaney took over, for example, the agency hasn’t gone to court to enforce any new civil investigative demands. It’s also taking longer for investigations to turn into enforcement actions — over the past fiscal year, the average time between the launch of an investigation and the filing or settling of an action ticked up by two months to 25 months, according to the agency’s latest financial report. That’s above the agency’s own 24-month target.

“From all appearances, the number of new matters they’ve opened must be miniscule,” said Ori Lev, a partner in Mayer Brown LLP’s financial services regulatory and enforcement practice and a former CFPB deputy enforcement director. “We just recently started hearing about people receiving administrative subpoenas in new matters. There were probably almost no new matters being opened for many months, which will probably impact the pipeline going forward.”

When the agency does take enforcement actions, attorneys said the CFPB has showed a greater willingness to negotiate a resolution, reflecting Mulvaney’s view that lawsuits are a “last resort.”

“Public enforcement activities have resumed in recent months, but there is more opportunity for dialogue and less punitive impact from those actions,” Truong said. “Supervision also has become more open to dialogue between institutions and the bureau where there are not clear violations of law.”

Policymaking has also slowed and taken on a less aggressive posture. Since Mulvaney’s arrival, for example, the agency has shelved plans to write new rules around issues like overdraft services, student loan servicing and small business lending data collection, while at the same time, it has moved to rewrite a set of payday lending regulations that has riled the industry and Republican lawmakers.

In addition, Mulvaney has worked to establish an Office of Cost-Benefit Analysis inside the CFPB, an answer to the common industry criticism of the agency during the Cordray era that it didn’t pay enough attention to the financial impact its rulemaking could have on businesses.

The office’s creation highlights the way Mulvaney has also left his mark on the internal structure of the agency. In addition to peppering the CFPB’s divisions with political appointees, he announced plans to strip the supervision and enforcement responsibilities of the agency’s fair lending office and demote a separate students-focused office by folding it into another part of the bureau.

He’s laid the groundwork for potentially more extensive changes, too, through a series of requests for information that the CFPB began issuing in January on a wide range of agency policies and procedures surrounding rulemaking, enforcement and more.

Watchdog or Lapdog?

While the financial services industry has applauded many of these and other changes that have taken place at the CFPB over the past year, Democrats and consumer advocates see Mulvaney's time at the helm as having been a baleful enterprise for both the agency and the people it's charged with protecting.

"Rather than follow the spirit of the law, Mr. Mulvaney has consistently sought to undercut the Bureau, keep Congress and the public in the dark, and put his thumb on the scale in favor of industry's wishes," concluded a minority staff report released last month by Sen. Sherrod Brown, D-Ohio, ranking member of the Senate Banking Committee. "It is hard to know exactly how much harm consumers are suffering as a result."

Linda Jun, senior policy counsel at Americans for Financial Reform, seconded this view of Mulvaney's legacy, saying that one prime example of his efforts was his move to rebrand the CFPB as the BCFP, or Bureau of Consumer Financial Protection.

Mulvaney has argued that the name change is intended to signal the agency's newfound determination to stick to the statute — Dodd-Frank says the agency is "to be known as the 'Bureau of Consumer Financial Protection'" — but critics have said that, by putting the "consumer" part second, the change is really just a reflection of Mulvaney's true priorities, not to mention petty.

"The name really demonstrates where we are — an agency that's meant to protect consumers has, after Mulvaney's one year there, shifted the focus away from that very primary mission," Jun said. "I think our initial concerns about him were well-founded given what he's done in the past year. He's really changed the direction of the work that the agency was doing."

But Joann Needleman, who heads Clark Hill PLC's consumer financial services regulatory and compliance practice, rejected the idea that the CFPB has moved away from being watchdog and toward being a lapdog under Mulvaney.

"I just don't see where the deregulation is," Needleman said. "The bureau is up and running, and for the most part, people stayed and they're doing their work, but I think the approach of the bureau is very different under Mulvaney in that it's much more measured and thoughtful to ensure that the statute is being followed."

Part of the problem, according to Needleman, is that Cordray is being used as the baseline to evaluate Mulvaney, and that's not necessarily the correct comparison to draw. Although there has been an apparent decline in enforcement activity relative to Cordray, for example, he was in "hyperdrive" by the end of his tenure, Needleman said.

Meanwhile, Needleman said it may not be as readily visible to the public, but the agency's supervision work has continued apace, and compliance has remained embedded as part of the culture at supervised companies. Those firms aren't going to just abandon controls that they've spent millions putting into place, particularly when they can't count out emboldened state attorneys general jockeying to fill any vacuum left by the CFPB, Needleman said.

"From my experiences talking to people at the bureau, the work is still moving forward. I think companies understand that, and I certainly encourage all my clients not to think of this as a vacation," Needleman said. "I don't know of anyone who's now turning a blind eye to the expectations of the bureau just because of Mulvaney."

Lev, who acknowledged that some of the past year's changes — like reorganizing the fair lending office — have had a substantive impact on CFPB activities, said he's nevertheless surprised to see how much continuity there has been under Mulvaney. Among other things, the agency is still pressing ahead with a rulemaking on debt collection, it has kept up its consumer education programs and its approach to supervision remains largely the same, Lev noted.

Moreover, the legal claims that the CFPB has pursued in enforcement actions haven't always been that different, Lev said.

Under Cordray, for example, the agency's use of its authority to police "unfair, deceptive or abusive acts or practices," or UDAAPs, became a source of widespread frustration within the financial services industry, which felt the terms were too open to interpretation and inconsistently applied. But while a pivot away might have been predictable once Mulvaney took over, Lev pointed out that the majority of new enforcement actions brought since then have involved UDAAP claims.

"There's been a lot of press about the few cases Mulvaney dropped, but there's been less press about the cases he's decided to pursue and to pursue the same legal arguments and claims that Cordray and the bureau had brought in the first instance," Lev said.

The Road Ahead

Whatever one thinks of Mulvaney's legacy, it's now up to Kraninger to forge her own as only the second permanent director that the CFPB has ever had. That would be a tall order for anyone, but financial services attorneys told Law360 that she will face a special challenge in grappling with Rep. Maxine Waters, D-Calif., and the impending Democratic control of the House Financial Services Committee — a prospect her soon-to-be predecessor never had to confront.

"Ostensibly the bureau is supposed to be free from politics," said Stephen Ornstein, co-leader of Alston & Bird LLP's consumer financial services group. "But Kraninger is going to have her hands full dealing with the House and dealing with Maxine Waters, who is going to be someone who can't be ignored."

Truong expects lawmakers will turn up the scrutiny not only on the changes that Mulvaney has made over the past year, but also on the unfinished business he's leaving behind for Kraninger to take across the finish line. The agency has indicated that it plans to roll out potential changes in January to its payday lending regulations, for example, and it has slated March for proposing rules around debt collection communication practices and consumer disclosures.

"And of course, there are the special challenges of assuming leadership of a regulatory agency that has a very extensive regulatory toolbox but is under a great deal of scrutiny," Truong said. "That necessarily involves a steep learning curve for the new director."

How well Kraninger will fare is an open question. Cordray and Mulvaney both arrived at the CFPB with lengthy political careers behind them and experience in the public eye, whereas Kraninger — who has been serving as associate director for general government under Mulvaney at OMB — has spent most of her career tucked away in government and was virtually unknown when the White House announced her nomination in June.

That's helped stoke criticism of her credentials from Democrats and consumer advocates, who have also drawn attention to her lack of a background in either consumer protection or financial services. Her well-reviewed performance at her Senate confirmation hearing in July succeeded in quelling some nerves on the right and within industry, but months later, there still isn't much known about how Kraninger will lead the CFPB.

"She is a relative unknown," Lev said. "I'm very curious to see what she will want to do first because I don't know what her priorities or views are. We all generally share the assumption that she'll be like Mulvaney because she was his deputy at OMB, but beyond that, we don't really know."

But Needleman is confident that Kraninger will keep a steady ship.

"She's obviously a very bright woman," Needleman said. "I think the biggest concern has always been her lack of financial services experience — as in, knowing the markets — but then again, Cordray didn't know the markets that well, either. There will be a lot of on-the-job training."

To that end, Needleman urged companies to meet with CFPB staff as soon as possible after Kraninger arrives in order to strengthen relationships and lay down a marker for desired policy priorities.

Ornstein said Kraninger can also help to shade in any lingering ambiguity about her attitudes by making it clear early on that she supports the mission of the CFPB and intends to enhance consumer protection in a way that affords greater access to credit.

"The goals don't have to be mutually exclusive," Ornstein said. "You can be supportive of the industry and consumers, so I think you still will have enforcement actions and still will have [civil investigative demands]. It just will have a different focus."

--Editing by Pamela Wilkinson and Emily Kokoll.

Update: This story has been updated to clarify comments from Jun.