

Legal Update

One Down, Four to Go? A Look at Kathy Kraninger's First Year as CFPB Director and What is Ahead in 2020

Just over a year ago, on December 6, 2018, the US Senate confirmed Kathy Kraninger as the next director of the Consumer Financial Protection Bureau (the "CFPB" or the "Bureau"), ending Mick Mulvaney's year-long tenure as acting director. While the Bureau's first director, Richard Cordray, was known for his aggressive enforcement of consumer financial law, Mick Mulvaney represented the other extreme and worked to limit the use of enforcement and roll back regulations promulgated by the Cordray Bureau. Kraninger has forged her own path and cannot be labeled as easily as either Cordray or Mulvaney. Under Kraninger, we have seen a sharp uptick in Bureau enforcement, as well as the surprising decision to no longer defend the constitutionality of the agency, a stance that was even too extreme for Acting Director Mulvaney. In this Legal Update, we take a closer look at the CFPB during the first year of Kraninger's leadership and discuss what to expect in the year ahead.

Leading an Unconstitutionally Structured Agency

Perhaps the most significant and surprising development of the Kraninger CFPB to date is the agency's conclusion that its structure is unconstitutional. The Bureau had previously

taken the position that its structure was constitutional. Even under former Acting Director Mick Mulvaney, who once described the agency as a "sick, sad" joke,¹ the Bureau defended its constitutionality, and, for the first nine months of Kraninger's tenure, the Bureau did the same.

The US Supreme Court will hear a case challenging the Bureau's constitutionality in March 2020. The challenge focuses on the fact that the agency is led by a single director who is appointed to a five-year term and is removable only for "inefficiency, neglect of duty, or malfeasance in office."² That is, the director is removable only for cause and cannot be removed at will by the president. It is for this reason that Richard Cordray continued to serve as Bureau director nearly a full year into the Trump presidency.

It is understandable that the Bureau would want the courts to resolve the question of its constitutionality. The agency has faced repeated challenges to its structure for years, and, in testimony before the House Financial Services Committee, Kraninger explained that litigation over the Bureau's constitutionality has caused "significant delays to some of [the Bureau's] enforcement and regulatory actions."³ Indeed, the very case that the Supreme Court

will hear is a lawsuit brought by the CFPB to enforce a civil investigative demand it had issued back in February 2017, which has been held up due to the constitutional question.

The remedy for any constitutional problem may be to simply strike the “for cause” removal provision, allowing the Bureau to operate as usual on a going forward basis. Interestingly, this result would benefit a new Democratic administration if one were to take power in 2021. If the director is only removable for cause, Kraninger likely would serve a five-year term that would expire in December 2023. On the other hand, if the director is removable at will, a new administration could replace Kraninger in January 2021.

While the case is pending, the Bureau says that it can still take action even though it concedes that it is unconstitutionally structured. It continues to litigate, bring enforcement actions, draft rules, supervise entities and otherwise proceed with business as usual. Kraninger explained that her position is that “this question will not stop the Bureau from fulfilling our statutory responsibilities. We will continue to defend the actions that the Bureau takes now and has taken in the past.”⁴

Uptick in Enforcement and Litigation

Under Mick Mulvaney, enforcement slowed significantly. Mulvaney announced only 11 new enforcement matters during his 12-and-a-half months as director compared to the 47 new cases Director Cordray announced in his final year as director. When Kraninger was confirmed, there was much speculation about whether she would follow in Mulvaney’s footsteps and be reluctant to use the Bureau’s enforcement authority.

Reviewing her first year, Kraninger has proven far more willing to use enforcement than Mulvaney. In her first year, Kraninger announced 22 new cases, double the number Mulvaney filed. Seventeen of these new cases

have been resolved through settlement and an additional five are contested, demonstrating that Kraninger is willing to litigate cases the Bureau is unable to settle. Additionally, Kraninger settled several matters initially filed by Director Cordray. Somewhat surprisingly, the CFPB has continued to bring new enforcement matters, including by filing lawsuits, after announcing that it believes it is unconstitutionally structured.

Kraninger required civil money penalties (“CMPs”) at a slightly higher rate than both Mulvaney and Cordray. Of the 17 new cases brought under Kraninger that the Bureau settled, about 94 percent involved a CMP; by comparison, about 70 percent of the new cases filed under Mulvaney that the Bureau settled and about 82 percent of the new cases filed and settled during Cordray’s last year involved a CMP. The amount of the CMPs Kraninger imposed were also higher than those imposed by Cordray and Mulvaney, when we exclude the \$1 billion CMP Mulvaney assessed in one case as an outlier. Of the 16 new cases Kraninger announced in her first year that she settled with a CMP, the average CMP was over \$7 million. This compares to an average CMP of about \$1.3 million for both the new cases Mulvaney announced that he settled with a CMP (excluding the \$1 billion CMP) and for the new cases announced during Cordray’s final year that he settled with a CMP.⁵ The Kraninger Bureau has been criticized, however, for failing to require consumer redress.

The industries targeted in the Bureau’s enforcement actions over the last year are those that have been in the Bureau’s crosshairs since its inception, including the mortgage servicing, debt collection, consumer reporting and student-lending industries. Similarly, the nature of the claims the Bureau has brought under Kraninger’s leadership are like those brought under both Cordray and Mulvaney. Under Kraninger, the CFPB continued to exercise the Bureau’s UDAAP (“Unfair,

Deceptive or Abusive Acts or Practices”) authority, bringing UDAAP claims in the majority of the enforcement actions announced during her first year.

Notably in one case, the Bureau even brought an abusiveness claim.⁶ When Director Cordray resigned, it was unclear if the CFPB would continue using its abusiveness authority in enforcement cases. Unlike deception and unfairness, which have been extensively developed, abusiveness is a newer concept that is not as well-defined, and, for that reason, abusiveness claims are labeled “regulation by enforcement” by Bureau critics. It appears that while the Bureau may use abusiveness infrequently, it remains a tool in the Bureau’s arsenal.

Additionally, the CFPB has continued to open new investigations over the last year, and new civil investigative demands issued by the Bureau contain more information about the investigation in the Notification of Purpose statement. These statements previously tended to be broad and vague, but, in April 2019, the Bureau announced that it would begin providing entities with more information about the investigation, including more information about the potentially applicable provisions of law that may have been violated, in Notification of Purpose statements. It is possible that these changes may lead to more narrowly tailored requests from the Bureau, but, in our experience, Bureau investigations tend to be as intense as ever, with the Bureau requesting voluminous amounts of information on short deadlines.

Over the next year, we expect to continue to see the Bureau announce additional settlements and lawsuits. Since investigations tend to take years to resolve, most of the cases announced this year involve investigations that likely were opened under former Director Cordray. As we proceed, we will increasingly see Director Kraninger’s influence on the agency’s enforcement priorities.

Continuing Mulvaney’s Legacy through Rulemaking

Early in her tenure, Kraninger promised to “articulat[e] clear rules of the road for regulated entities that promote competition, increase transparency, and preserve fair markets for financial products and services.”⁷ Changes to an agency’s rulemaking priorities take time to fully emerge because rulemaking, by design, is a slow and iterative process, but the Bureau’s rulemaking activity under Kraninger to date seems to reveal a continuation of many of former Acting Director Mulvaney’s priorities. Two of the most notable rulemaking developments relate to the Bureau’s 2017 rule governing payday, vehicle title and certain high-cost installment loans (the “Payday Lending Rule”) and debt collection, both priorities embraced by Mulvaney.

First, in a clear rollback of Cordray-era regulation and a continuation of the rulemaking agenda announced by former Acting Director Mulvaney, the Bureau delayed the underwriting requirements of the Payday Lending Rule.⁸ The Bureau also proposed to rescind the underwriting provisions completely.⁹ The Bureau’s fall 2019 rulemaking agenda estimates that it will issue a final rule on this topic in April 2020.¹⁰ If the underwriting provisions are rescinded, the only provisions of the original rule that would remain are the provisions about making payment withdrawals and a few other provisions relating to maintaining written policies and procedures to ensure compliance with the payment provisions. These provisions were scheduled to go into effect in August 2019, but, to complicate matters, the rule became subject to a legal challenge, and a federal court has issued an order staying the entire rule.¹¹ The court can lift the stay at any time, and, if it does, the payment provisions will go into effect.

Second, in May 2019, the CFPB issued a proposed debt collection rule.¹² This rule has been in the works for years, originating with

Cordray and continuing under Mulvaney. Debt collection is a top source of complaints to the Bureau, and the Bureau has been active in this area through enforcement actions, supervisory activity, issuance of guidance and submission of amicus briefs, but neither the Bureau nor any other federal agency has promulgated any significant debt collection rules in the 40-plus years of the Fair Debt Collection Practices Act's ("FDCPA") existence. The proposed rule brings clarity to FDCPA requirements and adapts the FDCPA to modern-day technology.¹³ Importantly, the rule only covers debt collectors covered by the FDCPA. However, even if a collector is not covered by the FDCPA, the Bureau views the practices prohibited by the FDCPA as potential UDAAPs when undertaken by any person engaged in collection activities.

In addition, the Bureau's long-term regulatory agenda continues to include an abusiveness rulemaking.¹⁴ In 2018, Mulvaney announced that he planned to undertake a rulemaking to clarify abusiveness, and, under Kraninger, the Bureau is continuing to consider this rulemaking. Among other things, the Bureau also released guidance describing modifications it intends to apply to Home Mortgage Disclosure Act ("HMDA") data before it makes it available to the public¹⁵ and temporarily adjusted the threshold for reporting HMDA data.¹⁶ Other planned regulatory items include doing away with regulatory provisions that extend qualified mortgage status to loans that are eligible to be purchased or guaranteed by Fannie Mae or Freddie Mac;¹⁷ addressing which institutions must report HMDA data, what data they must report and what data the agency will make public;¹⁸ implementing Section 1071 of the Dodd-Frank Act, which requires institutions to report on information concerning credit applications made by women-owned, minority-owned and small businesses;¹⁹ addressing concerns that Regulation Z's loan originator compensation requirements are unnecessarily restrictive;²⁰ and developing ability-to-pay rules

for Property Assessed Clean Energy financing, which the Bureau was directed to do by 2018 amendments to the Truth in Lending Act ("TILA").²¹

Focus on Prevention of Harm through Supervision

It appears that the Bureau under Kraninger continues to supervise entities in much the same way as the Bureau has since its inception, with some changes around the edges. Bureau examiners identified similar types of compliance concerns as the Bureau has for years, continuing to cite UDAAP violations, including an abusiveness finding.²² Kraninger also continued to conduct supervisory activities in many of the same industries as the Bureau under both Mulvaney and Cordray, including the debt collection, mortgage and automobile loan servicing, and credit card industries. However, there are some indications that the Bureau has ceased examinations for compliance with the Military Lending Act ("MLA") given Kraninger's request that Congress "explicitly grant the Bureau authority to conduct examinations specifically intended to review compliance with the MLA."²³ It is also possible that the Bureau has stopped examining entities for the servicing of federal (as opposed to private) student loans. The Bureau is being sued by a non-profit advocacy group that asserts it has done just that.²⁴

After being sworn in, Kraninger stated that she would seek to use supervision to foster a culture of compliance and as an opportunity to prevent violations.²⁵ Consistent with these statements, the three editions of *Supervisory Highlights*—a regular Bureau publication that discusses CFPB supervisory findings and developments—released under Kraninger focused on the prevention of harm.²⁶ These editions emphasized remedial actions companies took to address Bureau concerns and only discuss monetary

remediation in cases where consumer injury seems readily calculable. Significantly, the second and third editions of *Supervisory Highlights* released this year (the only ones that covered examinations that occurred during Kraninger's tenure) reference no public enforcement actions stemming from supervisory activity.²⁷ These may be indications that, under current leadership, exam findings are less likely to result in referrals to enforcement and are more likely to be dealt with through the supervisory process, with a focus on practice changes and remediation for calculable harm.²⁸

Like the sole edition released under Mulvaney, the CFPB's *Supervisory Highlights* issued under Kraninger emphasized that "it is important to keep in mind that institutions are subject only to the requirements of relevant laws and regulations," and that the purpose of disseminating *Supervisory Highlights* is to "help institutions better understand" how the Bureau examines them for compliance—statements that were not present in *Supervisory Highlights* issued under Cordray and that signal a shift in how the Bureau approaches its supervisory role.

Engagement with Stakeholders: Innovation and Outreach

Over the last year, the Bureau increased its efforts to engage industry and encourage flexibility and innovation in the marketplace by launching several new or revised initiatives. First, the Bureau launched a revised No-Action Letter policy that offers a stronger statement that the Bureau will not pursue enforcement action and is less onerous than the Bureau's prior policy that led to the issuance of only one No-Action Letter.²⁹

In addition, the Bureau announced a Compliance Assistance Sandbox policy that allows companies facing regulatory uncertainty to apply for approvals which provide applicants a safe harbor from liability under TILA, the

Electronic Fund Transfer Act and the Equal Credit Opportunity Act for specific aspects of the product for a certain period of time (generally two years).³⁰

Next, the Bureau also announced a revised Trial Disclosure Policy.³¹ Trial disclosure programs are expressly authorized by the Dodd-Frank Act and are designed to allow companies to develop disclosures that improve upon model forms within the Bureau's jurisdiction.³² The Bureau's Trial Disclosure Policy provides protections from liability associated with the disclosure requirements. No companies participated in the Bureau's prior trial disclosure program, and the revised policy aims to encourage participation in the program.

The Bureau is also engaging with stakeholders by hosting symposia and workshops. In April, the Bureau announced a symposia series designed to encourage a "proactive and transparent dialogue to assist the Bureau in its policy development process, including possible future rulemakings."³³ To date, the Bureau has hosted symposia on topics including, among others, the abusiveness prong of the Bureau's UDAAP authority³⁴ and Section 1071 of the Equal Credit Opportunity Act,³⁵ both topics on which the Bureau is engaged in rulemaking. In addition, earlier this month, the Bureau hosted (in conjunction with the Federal Trade Commission) a workshop on accuracy in consumer reporting.³⁶

Collectively, these efforts demonstrate the Bureau's focus on engaging the industry and may provide the industry with additional opportunities to share feedback with the Bureau and play a more substantial role in shaping Bureau policy.

A Look Ahead

One of the more significant developments over the coming year likely will be the Supreme Court's decision on the Bureau's constitutionality. Although Kraninger's term is not set to expire

until 2023, if the Supreme Court decides that the CFPB's structure is unconstitutional and opts to strike the "for cause" removal provision, then a new president could appoint a new director in 2021.

Under Kraninger, the Bureau has substantially increased its enforcement activity, continued supervising entities and sustained many of Mulvaney's rulemaking initiatives. Over the coming year, we expect the Bureau to continue to be active in enforcement, supervision and rulemaking. For all the rhetoric from both sides of the aisle, for those companies subject to the CFPB's authorities, the core reality has remained the same since the CFPB's inception—they need to take compliance seriously and carefully follow the CFPB's pronouncements regarding its policies, priorities and practices.

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Endnotes

¹ *Credit Union Times*, "CFPB a 'Sick, Sad Joke': Onsite Coverage" (Sept. 10, 2014).

² 12 U.S.C. § 5491(c)(3).

³ CFPB, "Remarks by Director Kathleen L. Kraninger before House Financial Services Committee" (Oct. 16, 2019), available at: <https://www.consumerfinance.gov/about-us/newsroom/remarks-director-kathleen-kraninger-before-house-financial-services-committee/>.

⁴ *Id.*

⁵ To calculate the averages, we used any lesser amount imposed on respondents after the Bureau deemed part of the payment to be satisfied.

⁶ See our analysis of this case [here](#).

⁷ CFPB, "Speech at the Bipartisan Policy Center By Kathleen L. Kraninger" (April 17, 2019), available at: <https://www.consumerfinance.gov/about-us/newsroom/kathleen-kraninger-director-consumer-financial-protection-bureau-bipartisan-policy-center-speech/>.

⁸ "Payday, Vehicle Title, and Certain High-Cost Installment Loans; Delay of Compliance Date; Correcting Amendments," 84 Fed. Reg. 27907 (June 17, 2019), available at: <https://www.federalregister.gov/documents/2019/06/17/2019-12307/payday-vehicle-title-and-certain-high-cost-installment-loans-delay-of-compliance-date-correcting>.

⁹ "Payday, Vehicle Title, and Certain High-Cost Installment Loans," 84 Fed. Reg. 4252 (Feb. 14, 2019), available at: <https://www.federalregister.gov/documents/2019/02/14/2019-01906/payday-vehicle-title-and-certain-high-cost-installment-loans>.

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¹⁰ CFPB, "Payday, Vehicle Title, and Certain High-Cost Installment Loans," Fall 2019 Regulatory Agenda, available at: <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201910&RIN=3170-AA80>.

¹¹ *Order, Cmty Fin. Svcs. Ass'n, Ltd. v. Consumer Fin'l Prot. Bureau*, No. A-18-CV-0295LY (W.D. Tex. Aug. 6, 2019) (ordering that the stay of the compliance date is to be continued in full force and effect).

¹² Debt Collection Practices (Regulation F), 84 Fed. Reg. 23274 (May 2, 2019), available at: <https://www.consumerfinance.gov/policy-compliance/rulemaking/rules-under-development/debt-collection-practices-regulation-f/>.

¹³ See our prior coverage of the rule [here](#).

¹⁴ CFPB, "Abusive Acts and Practices," Fall 2019 Regulatory Agenda, available at: <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201910&RIN=3170-AA88>.

¹⁵ CFPB, "Disclosure of Loan-Level HMDA Data" (Dec. 20, 2018), available at: https://files.consumerfinance.gov/f/documents/HMDA_Disclosure_FPG_-_Final_12.21.2018_for_website_with_date.pdf.

¹⁶ "Home Mortgage Disclosure (Regulation C)," 84 Fed. Reg. 57946 (Oct. 29, 2019), available at: <https://www.federalregister.gov/documents/2019/10/29/2019-22561/home-mortgage-disclosure-regulation-c>.

- ¹⁷ “Qualified Mortgage Definition Under the Truth in Lending Act (Regulation Z),” 84 Fed. Reg. 37155 (July 31, 2019), available at: <https://www.federalregister.gov/documents/2019/07/31/2019-16298/qualified-mortgage-definition-under-the-truth-in-lending-act-regulation-z>. See our discussion of the Advanced Notice of Proposed Rulemaking [here](#). Kris Kully, “CFPB to Rip Off the Patch?” (July 29, 2019).
- ¹⁸ “Home Mortgage Disclosure (Regulation C) Data Points and Coverage,” 84 Fed. Reg. 20049 (May 8, 2019), available at: <https://www.federalregister.gov/documents/2019/05/08/2019-08979/home-mortgage-disclosure-regulation-c-data-points-and-coverage>; “Home Mortgage Disclosure (Regulation C),” 84 Fed. Reg. 20972 (May 13, 2019), available at: <https://www.federalregister.gov/documents/2019/05/13/2019-08983/home-mortgage-disclosure-regulation-c>.
- ¹⁹ CFPB, “Business Lending Data (Regulation B),” Fall 2019 Regulatory Agenda, available at: <https://www.reginfo.gov/public/do/eAgendaViewRule?publd=201910&RIN=3170-AA09>.
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- ²² CFPB, *Supervisory Highlights*, Issue 19 (Sept. 2019) at 3 – 4, available at: https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-19_092019.pdf.
- ²³ CFPB, “Consumer Financial Protection Bureau Asks Congress for Clear Authority to Supervise for Compliance with the Military Lending Act” (Jan. 17, 2019), available at: <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-asks-congress-clear-authority-supervise-compliance-military-lending-act/>.
- ²⁴ Complaint for Declaratory and Injunctive Relief, *Student Debt Crisis v. Consumer Fin'l Prot. Bureau*, No. 2:19-cv-10048 (C.D. Cal. Nov. 25, 2019).
- ²⁵ CFPB, *supra* note 7.
- ²⁶ CFPB, *Supervisory Highlights*, Issue 18 (March 2019), available at: https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-18_032019.pdf; CFPB *Supervisory Highlights*, Issue 19 (Sept. 2019), available at: https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-19_092019.pdf; CFPB, *Supervisory Highlights*, Issue 20 (Dec. 2019), available at:

https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-20_122019.pdf.

- ²⁷ The most recent edition of *Supervisory Highlights* does not identify the time period covered by its review but notes that it reports on “more recent supervisory findings.”
- ²⁸ See our prior coverage of *Supervisory Highlights* [here](#) and [here](#).
- ²⁹ CFPB, “Policy on No-Action Letters” (Sept. 6, 2019), available at: https://files.consumerfinance.gov/f/documents/cfpb_final-policy-on-no-action-letters.pdf.
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- ³² 12 U.S.C. § 5532(e)(1).
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