



Supplemental Materials



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The Trump Effect

What to Expect from the Regulatory Agencies

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Overview

- The Players
- Rulemaking Developments
- Expectations for Supervision & Enforcement

The Players

- Agency Leadership = Policy
- OCC:
 - Single agency head
 - Comptroller Curry's term expires April 2017
 - Comptroller is appointed by the President with advice and consent of the Senate
 - Removable at will

FDIC Leadership

- Board of Directors: three directors appointed by the President (and confirmed by the Senate) plus the Comptroller of the Currency and the Director of the CFPB
 - Chair Gruenberg's term expires November 2017 (intends to fill term)
 - Vice-Chair Hoenig's term expires April 2018
 - One director position is currently vacant
- The Federal Insurance Deposit Act (FDI Act) is silent as to whether and for what reasons a President may remove an independent director
 - No court has addressed the question

Federal Reserve Board Leadership

- 7 Governors, appointed by the President and confirmed by the Senate
 - Governors serve a 14 year term (Terms are staggered to ensure stability and continuity)
 - Chair and Vice-Chair serve a 4 year term
- Governors removable only for cause
- No requirement for partisan balance
- Currently, three vacancies to be filled, including the position of Vice Chairman for Supervision (created by DFA)

Federal Reserve Board Leadership

- Chair Yellen's chair term ends 2/2018; Board term 2020 (intends to fill chair term)
- Vice-Chair Fischer's vice-chair term ends June 2018; Board term ends 2020
- Governor Powell's Board term expires 2028
- Governor Brainard's Board term expires 2026
- Governor Tarullo's Board term expires 2022
 - resignation effective in April
- Two additional vacancies

CFPB Leadership

- Single Director appointed by the President, confirmed by the Senate
- 5 year term
- Removable only for cause – “inefficiency, neglect of duty or malfeasance”
- Director Cordray's term expires July 2018
 - Has expressed intention to serve out his term
 - Rumored to be considering a run for Governor of Ohio

PHH v. CFPB

- Three-judge panel of the D.C. Circuit held the CFPB's single director structure was unconstitutional, struck the "for cause" provision – **decision vacated**
- *En Banc* rehearing, oral argument scheduled for scheduled for May 24, to address:
 - Is the CFPB's structure consistent with Article II of the Constitution, and if not, is the proper remedy to sever the for-cause provision of the statute?
 - May the court appropriately avoid deciding that constitutional question given the panel's ruling on the statutory issues in this case?
 - If the *en banc* court, which has today separately ordered *en banc* consideration of *Lucia v. SEC* concludes in that case that the administrative law judge who handled that case was an inferior officer rather than an employee, what is the appropriate disposition of this case?

PHH v. CFPB

- PHH opening brief: the CFPB's "constitutional infirmities extend far beyond limiting the President's removal power...the proper remedy is to strike down the agency in its entirety."
- DOJ Brief: agrees that the structure violates the separation of powers but agrees with the three-judge panel that the proper remedy is to strike the "for cause" removal restrictions.

PHH v. CFPB

If the full court affirms the decision below

- CFPB is an executive agency, and its rules would be subject to review by OMB's Office of Regulatory Information (OIRA)
- Would DOJ support a cert petition by the CFPB to the Supreme Court?

CFPB Leadership

Open Questions:

- President Trump's authority to fire Cordray
- President Trump's appetite for firing Cordray
- Cordray's response
- Future structure of the CFPB
 - Commission?
 - Subject to appropriations?

Rulemaking Developments

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Headwinds to CFPB Rulemaking

- Congressional Review Act
- Trump Administration Memoranda and Executive Orders

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Congressional Review Act

- Agencies must submit major rules to House and Senate and the Comptroller General for review
- Within 60 days of “continuous session” Congress may pass a “joint resolution of disapproval” to overturn a rule
 - According to the legislative calendar, the CRA will apply to any rule received after May 30, 2016
- Cannot be filibustered; a simple majority vote in the Senate (or 51 votes) in favor of the resolution sends it to the President
- A new rule that is “substantially the same as such a rule may not be issued”

Priebus Regulatory “Pause” memo:

- Send no regulations to the *Federal Register (FR)* until a Trump appointee reviews “questions of law, fact and policy” (paragraph 1)
- Delay by at least 60 days the effective date of final rules that have not yet been published in the *FR* (paragraph 2) and final rules that have been published but have not gone into effect (paragraph 3)
 - Applies to “any substantive action normally published in FR” and expressly includes guidance documents
- Encourages agencies to request public comment
- Applies to executive agencies

Rules subject to Reg. Pause Memo

Final Rules that have been published but are not yet effective and “raise substantial questions of law or policy” (Paragraph 3(b)):

- DoD’s Military Lending Act rules applicable to credit cards (effective October 3, 2017)
- FinCEN’s Customer Due Diligence rule (effective May 11, 2018)

FinCEN’s proposal to apply BSA/AML rules to investment advisors (comments closed November 2) falls within paragraph 1 delaying rules that have not yet been finalized.

“Two-for-One” Executive Order

Executive Order on Reducing Regulation and Controlling Regulatory Costs – “Two-for-One” EO

- Applies to “significant rules,” rules that would impose costs > \$1 million
- Agency must identify 2 rules to be repealed that will offset the cost of the new rule
- Does not apply to independent agencies
 - However, OIRA encourages “independent regulatory agencies to identify existing regulations that, if repealed or revised, would achieve cost savings that would fully offset the costs of new significant regulatory actions.”

EO: Comprehensive Plan for Reorganizing the Executive Branch

- Requires OMB Director to propose a plan within a year to reorganize the executive branch, including recommendations to eliminate unnecessary agencies, components of agencies, or programs
- The order appears to apply to independent regulatory agencies, including the CFPB
 - References 5 USC 551(1)'s definition of "agency"
- Requires each agency within 180 days to submit to OMB a plan to reorganize the agency to improve its "efficiency, effectiveness, and accountability"
- Requires the OMB Director to request comment on ideas for improving the organization and functioning of the executive branch

Core Principles for Financial Regulation

Executive Order directing the Treasury Secretary to consult with members of the Financial Stability Oversight Council and report to the President regarding whether Federal financial regulatory law and policies comply with 7 Core Principles:

- empower Americans to make independent financial decisions and informed choices, save for retirement, and build individual wealth;
- prevent taxpayer-funded bailouts;
- foster economic growth and vibrant financial markets through more rigorous regulatory impact analysis;
- enable American companies to be competitive with foreign firms in domestic and foreign markets;
- advance American interests in international financial regulatory negotiations and meetings;
- make regulation efficient, effective, and appropriately tailored; and
- restore public accountability within Federal financial regulatory agencies and rationalize the Federal financial regulatory framework

CFPB Regulatory Agenda

Prepaid Final Rule:

- Final rule published on November 22, 2016
- Within the CRA “window”
- CRA resolutions were introduced in the House and Senate in February
- March 9 proposal to delay the effective date from October 1, 2017 to April 1, 2018
 - Makes it harder to use CRA to void the rule
 - Signal of intent to comply w/Regulatory Pause Memo?
 - Timing of new effective date – may have a Trump appointee at CFPB so rule may undergo change

CFPB Regulatory Agenda

- Final Rules:
 - Arbitration,
 - December 2016 Unified Regulatory Agenda (URA) projects 2/2017 as a target date for a final rule
 - Reportedly “on the shelf” due to CRA threat
 - Amendments to the CFPB confidentiality rules
 - Would permit the sharing of confidential supervisory information with **any** agency for which the information is “**relevant to** the exercise of the Agency’s statutory or regulatory authority”
 - Would impose an illegal gag order on recipients of a CID
 - URA target date 5/2017
 - Reportedly tabled due to strong opposition expressed by commenters, including ABA, ABA and ACLU

CFPB Regulatory Agenda

- Small Dollar Lending Final Rule (Payday Rule)
 - URA does not project a date for publication of a final rule
 - 1,400,000 comments – less than half have been uploaded to Regulations.com
 - Unlikely to be finalized under Director Cordray's tenure
 - Substantial modification of the proposal by Trump appointee is anticipated

CFPB Regulatory Agenda

- Debt Collection
 - 2014 ANPR suggested that the Bureau would proceed with two rules:
 - amendments to the Fair Debt Collection Practices Act to regulate third-party debt collectors
 - UDAAP rule to regulate creditors collecting their own debt (First-party collectors)
 - URA projects “pre-rule activities” in 2017
 - Cites analysis of a consumer survey, which was the subject of a CFPB report published in January 2017

CFPB Regulatory Agenda

- Rule to implement DFA §1071
 - Amends ECOA to add another HMDA-like data collection and reporting obligation
 - Requires data to be collected and reported on lending to “women-owned, minority-owned, and small business”
 - URA projects pre-rule activities to begin in 3/2017

Updated URA Submissions Due 3/31/2017

March 6 OIRA Memo directs agencies to comply with “Two-for-One” EO in URA submissions by:

- Estimating total incremental costs of any new significant regulatory actions
- Identifying two existing regulatory actions the agency plans to eliminate or propose for elimination

Memo “encourages” independent regulatory agencies to comply.

Expectations for Supervision and Enforcement

Supervision

Short-term expectations:

- Little change until new appointments are in place at the banking agencies and CFPB

Longer-term:

- Remember leadership = policy
- Can rescind guidance, interpretive Q & As, revise exam procedures, re-direct examination focus

Enforcement

Short-term: stepped up CFPB enforcement

- 16 enforcement actions or consent orders between January 1 and March 15, 2017 (Compared to 8 during the same time period in 2016)

Longer-term

- Again, Leadership = Policy
- More effort to address issues through supervision rather than escalating to enforcement
- More targeted investigations and CIDs
- Smaller (less “news-worthy”) Civil Money Penalties
 - Reliance on a matrix? Closer attention to the relationship between the wrong and the redress?
- Less regulation by enforcement

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Legislative Update

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Legislative Update

- The Trump Effect – Shortening Legislative Calendar
 - Breakdown of Healthcare
 - CR/Govt Shutdown and Debt Ceiling
 - Tax Reform (more on this later)
 - Start of the election season
- CHOICE Act
- Tailored Regulation
- Senate Banking Committee Work
 - Crapo/Brown
 - Moderate Dems

Tax Reform

- House GOP Blueprint is the only proposal in writing
 - Details still being considered
- Lowers rates, broadens base and removes almost all deductions except for mortgage interest deduction and charitable contributions
- Paid in large part by the border adjustment tax
 - \$1.2 trillion pay for
 - Has already been met with stiff resistance
- Concern for banks is if additional pay-fors are considered, punitive bank taxes may be considered.

The Financial CHOICE Act

- House Financial Services Committee Chairman, Jeb Hensarling will soon reintroduce the Financial CHOICE Act.
- A memo of new changes has been leaked but the legislation itself is still being drafted.
- Many of the provisions are based on measures that have been considered or reported by the Committee individually and by bloc.
- Many of the provisions repeal various sections of the Dodd-Frank Act.

The Financial CHOICE Act

- The CHOICE Act contains ABA supported regulatory relief provisions:
- A safe harbor from QM rules for mortgages held in portfolio (H.R. 1210)
- Require financial regulators to tailor regulations based upon the capital structure, riskiness, complexity, size and other risks (H.R. 2896)
- Establish an Office of Independent Examination Review to permit examination appeals (H.R. 1941)

The Financial CHOICE Act

- The Fed's Small Bank Holding Company threshold would be raised from \$1 billion to \$5 billion (H.R. 3791)
- Prohibits regulation agencies from forcing a bank to terminate customers accounts (H.R. 766)
- Mutual savings institutions would be provided greater flexibility to exercise national bank powers without changing charters (H.R. 1660)

The Financial CHOICE Act

- Strongly capitalized and well managed banks would receive relief and be exempt from certain DFA and Basel capital requirements if the bank (1) maintains a leverage ratio of at least 10 percent and (2) the bank has a composite CAMELS rating of 1 or 2.
- Repeals Durbin interchange amendment.
- Congressional approval would be required for major rules to go into effect and a cost benefit analysis would be required.

The Financial CHOICE Act

- CFPB Reforms
 - Previous version created a 5-person commission instead of a single director
 - Changes mentioned in a leaked document.
 - New version turns the director into a political appointee who can be fired by the President.
 - New version limits enforcement discretion and would eliminate many of the consumer complaint databases
 - Good and bad news for supervision.

Tailored Regulation

- ABA's big request is to support the "Taking Account of Institutions with Low Operation Risk" – The TAILOR Act.
- Unfocused regulations need to stop.
- Many regulations have been indiscriminately applied to the whole industry.
- ABA and the state banker associations developed a legislative proposal that empowers and directs regulators to make sure that rules, regulations and compliance burdens only apply to segments of the industry where it is warranted.
- Everyone generally agrees that regulations should be tailored to the banks' business model and risk.

Senate Work

- Chairman Crapo and Ranking Member Brown have not yet started working on regulatory relief, but all members expect that to start soon.
- Moderate Dems worked with Crapo in 2014 on a proposal that then-Chairman Shelby refused to consider. Goal is to encourage Members to reconsider that proposal.
- On the Dem side of the Senate Banking Committee, new members lean strongly to the left and gives Brown room to move proposals in that direction.