THE NATIONAL LAW JOURNAL
JUNE 3, 2016
Online Feature
An ALM Publication

Taking Stock of CFPB's Frenzied Agenda

BY ROBERTO J. GONZALEZ

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CFPB Director Richard Cordray.

From its early days under the wing of the U.S. Treasury Department and Elizabeth Warren, through the controversial recess appointment and delayed confirmation of Director Richard Cordray, the Consumer Financial Protection Bureau's strategy has been to keep its foot firmly on the gas despite clouds of legal uncertainty and criticism. CFPB can boast, among other things, that it issued the historic mortgage regulations required by Dodd-Frank and obtained $11.2 billion in consumer relief through enforcement action settlements.

CFPB has continued to produce a frenzy of rulemaking and enforcement activity, including yesterday's proposed rule that would fundamentally transform payday and related lending.

Last month, CFPB launched an ambitious proposal to ban arbitration clauses that prevent class action litigation. And a host of additional regulatory activity is slated for the rest of the year. The agency, however, has recently encountered some losses in court: A recent attempt to enforce a civil investigative demand was rebuffed on jurisdictional grounds, and its position was rejected by the Supreme Court in *Spokeo*.

A more fundamental legal threat, however, looms over CFPB as it awaits the D.C. Circuit's decision on the constitutionality of its structure.

Transforming payday, auto title, and related lending

On June 2, CFPB issued a 1,300-plus page proposed rule covering payday, auto title, deposit advance, and other short-term and longer-term loans with certain features. CFPB seeks to end what it calls "debt traps" that lead vulnerable consumers to repeated and expensive borrowing. The agency itself recognizes that the rule could drive a significant number of storefront payday lenders out of business.

The proposed rule would permit lending only to consumers who pass a "full payment test," which is a determination that the consumer has the ability to repay the loan when due and still meet basic living expenses and major financial obligations. The proposal, however, provides exceptions to this test for certain short-term loans under $500 and certain longer-term loans with "less risky" features. In addition, lenders would be required to use credit reporting systems to report and obtain information on covered loans, and lenders would be restricted regarding the number of loans they could make to the same consumer during certain timeframes. Lenders would also be required to give notice before attempting to debit payment from a consumer's bank account and to limit the number of such debits.

Unlike CFPB's "ability to repay" mortgage rule, which was specifically required by Dodd–Frank, CFPB has created its payday "ability to repay" rule—and its suite of favored exempt loan products—out of whole cloth. To do this, CFPB relied heavily on its authority to prohibit "unfair" and "abusive" acts and practices. Indeed, this represents the first major abusiveness rulemaking since Dodd-Frank enshrined that controversial concept. To find a practice "abusive," CFPB must find that it "materially interferes" with a consumer's ability to understand the terms of a financial product or "takes unreasonable advantage of" a consumer's lack of understanding of material risks or his inability to protect his own interests.

The elaborate case CFPB builds in support of its "unfair" and "abusive" findings includes propositions such as that lenders have built a "business model that—unbeknownst to borrowers—depends upon the consumer's lack of capacity to repay such loans without needing to reborrow."

Given the difficulty of proving such propositions, and the lack of precedent on the meaning of "abusive," any final rule would be ripe for legal challenge.

Banning arbitration clauses that prevent class actions

On May 5, CFPB proposed a similarly ambitious rule that would ban, going forward, arbitration clauses that prevent consumers from filing or participating in class actions. The proposal would also require companies to submit records about arbitrations to CFPB, which CFPB will likely post to its website in some form and use to detect problematic practices in arbitrations and underlying consumer transactions.

The proposed rule has a broad sweep, including (with various exceptions) credit cards, deposit accounts, consumer loans (*e.g.*, payday, auto), credit reporting, debt collection, mobile payment apps, and wireless carrier third-party billing services.

By CFPB's own estimate, more than 53,000 companies would have new class action exposure. The costs for industry, however, are the benefits in CFPB's eyes: Class action exposure, the agency reasons, will incentivize companies to increase their compliance with consumer protection laws. CFPB's final rule must be grounded in a study of arbitration clauses that it was required to conduct and in what is in "the public interest" and for the "protection of consumers"—standards whose application can be debated both in the rulemaking process and in court.

More regulations ahead

A raft of additional rulemaking activity is expected later this year, including proposals on overdrafts and debt collection; final rules on prepaid cards and mortgage servicing; a proposed rule to clarify mortgage disclosure requirements; and a proposed rule to give CFPB supervisory authority over larger installment and auto-title lenders.

In announcing its priorities over the next two years, CFPB also flagged the potential for rulemaking on consumer reporting and furnisher accuracy and private student lending.

The enforcement front

Meanwhile, CFPB has pursued an even more aggressive enforcement agenda.

After an initial wave of credit card add-on cases against banks and smaller cases against alleged fraudsters running debt relief and other scams, CFPB has in some respects settled into a pattern of moving from one sector to the next, bringing an enforcement action against one or more relatively big players to show the rest of the industry what practices it would like to see changed.

Indeed, CFPB Director Richard Cordray has warned that it would be "compliance malpractice" for executives not to take "careful bearings" from consent orders against their fellow companies. Notable enforcement actions have targeted auto lenders for fair lending violations; a fintech company for misrepresenting its data security practices; a bank and a debt buyer for faulty data practices; and a private college for harmful lending practices.

Needless to say, industry protests about "regulation by enforcement" do not appear to have moved the agency. By contrast, complaints about an industry pet peeve—the often colorful language in CFPB press releases that accompany a consent order—seem to have found a receptive ear in the CFPB's Ombudsperson, who recommended that press releases stick more closely to the consent orders.

CFPB's challenges in court

The agency has sometimes swung and missed.

On April 21, in *CFPB* v. *Accrediting Council for Independent Colleges and Schools*, the U.S. District Court for the District of Columbia rebuffed the agency's attempt to enforce a civil investigative demand against a for-profit college accreditor, because the laws CFPB administers do not address, regulate, or implicate the accrediting process. U.S. District Judge Richard Leon warned that new agencies like CFPB "must be especially prudent before choosing to plow head long into fields not clearly ceded to them by Congress."

In *Spokeo, Inc.* v. *Robins*, the Supreme Court, 6-2, rejected the position taken by CFPB and the Solicitor General in an amicus brief. The court held that the alleged violation of a "procedural requirement" of the Fair Credit Reporting Act is not sufficient to establish Article III standing. Rather, a plaintiff must adequately allege that a statutory violation caused him real harm (whether tangible or not) or the risk of such harm. *Spokeo* is a significant decision that will limit standing—and class action certification—under various laws administered by CFPB, although the extent of this impact remains unclear.

Finally, in *PHH Corporation* v. *CFPB*, the D.C. Circuit is considering a challenge to an administrative penalty imposed by CFPB. During the oral argument in April, the court expressed great interest in the plaintiff's separation-of-powers challenge to the agency's structure—specifically, the agency's single director, who is removable only "for cause," can determine the agency's funding (within limits), and is not checked by a multimember commission structure. A fundamental question for CFPB is whether the court would simply strike down the "for cause" removal provision in Dodd-Frank or impose a more drastic remedy that would expose the agency's previous actions to invalidation. CFPB is unlikely to slow down as it waits for a decision.

Roberto J. Gonzalez *is a litigation partner in the Washington office of Paul, Weiss, Rifkind, Wharton & Garrison. He previously served as CFPB's Principal Deputy General Counsel. William Durbin, Damon Andrews and Connie Sung, associates at Paul, Weiss, contributed to this article.*