What truly is surprising about CFPB under Mulvaney?

By: Robert Rozboril, Editor, *Dodd-Frank Update*

Not all surprises are fun, and some are more exciting than others. In the case of the Consumer Financial Protection Bureau (CFPB), they sometimes breed controversy and concern among industry participants.

The fact that **Mick Mulvaney**'s tenure as acting director could extend beyond President **Donald Trump**'s stay in the White House, depending on the Senate's willingness to confirm a new permanent director, could be surprising to anyone unfamiliar with the Federal Vacancies Reform Act.

The nomination of **Kathy Kraninger**, associate director of the Office of Management and Budget (OMB), to become the permanent CFPB director – despite having no direct financial or regulatory experience – would be surprising to anyone not of the commonly held belief that the Trump administration has little interest in nominating a new permanent director with a good chance of receiving Senate approval.

Even if Mulvaney does leave the CFPB in the coming months, as he has said he expects to, his agenda could remain active for months or years to come. That is because Kraninger currently works for Mulvaney at OMB and has expressed similar views about the bureau.

The aforementioned tidbits are not too shocking to many in the industry these days. For insight into what truly could be considered surprising about today's CFPB, *Dodd Frank Update* spoke with BuckleySandler Partner **Jonice Gray Tucker** and Goodwin Partner and the CFPB's former assistant director and head of enforcement **Anthony Alexis** to get a sense of what unexpected occurrences have laid clues for what the industry should expect in the near future.

STICKS AND STONES

Mulvaney's unabashed, industry-conscious approach to leadership at the CFPB has garnered criticism from various consumer advocacy groups and Democrats.

Such criticism strikes Alexis as odd given that, by his recollection, the bureau always has been cognizant of industry concerns when crafting rules and initiating enforcement actions. He noted that the bureau always has been required to issue a Notice and Opportunity to Respond and Advise (NORA) letter to an entity when initiating the enforcement process, providing the entity with information about the bureau's decision to take action and allowing the entity to submit a written response and request a meeting.

"I think the view regarding the subject matter that, in the past, industry concerns were not taken into consideration pertaining to individual enforcement actions is a false narrative," Alexis said. "For example, if they were doing an enforcement action against a particular entity or regarding a particular product, one of the first things they might look at is what the overall impact would be, or, if the CFPB were to proceed, including would the industry be surprised if the CFPB were to pronounce that what industry had been doing for decades was suddenly illegal? People at all divisions throughout the bureau took those types of things into consideration while weighing in on enforcement matters."

There were times the bureau would identify activity that was not illegal without dispute, according to the letter of the law, but was identified as potentially being harmful to consumers, Alexis said. In such instances, bureau staff would suggest a need to alert the industry – through bulletins and other forms of guidance – of the bureau's thought process regarding such activity.

"I think that has always taken place," Alexis said. "People can differ on whether it was effective or not, of course."

SUBJECT TO INTERPRETATION

Alexis said it is still too early to say with authority whether there has been a sea change in the bureau's Office of Enforcement based on the small number of enforcement actions since Mulvaney became acting director.

One thing Alexis does not think will change is the stressed importance on having an effective compliance management system at consumer financial institutions of varying sizes and structures. What may prove variable are the metrics used to gauge whether a compliance system truly is "effective."

"That could possibly change depending on differing interpretations of what is an effective compliance program," Alexis said. "But, I don't see companies abandoning the best practices for creating an effective compliance program in their industry. Compliance programs could vary depending on the size and scale of an entity. They are not one-size-fits-all programs."

Based on the bureau's Strategic Plan in February and an internal memo from Mulvaney to staffers that later was published, the CFPB has signaled that debt collection likely will remain a high priority for the foreseeable future. Alexis noted that the memo and the Strategic Plan seem to signal that its approach in targeting potentially unlawful conduct is designed to show debt collectors that the CFPB's chief concern is in enforcing violations of the law and not to target the industry simply because an entity could be characterized as a debt collector.

He noted that the second goal listed in the Strategic Plan states that the bureau intends to "implement and enforce the law consistently

to ensure that markets for consumer financial products and services are fair, transparent and competitive."

To that the end, the plan states that the bureau intends to "[a] cquire and analyze qualitative and quantitative information and data pertaining to consumer financial products and service markets and companies." It points directly at focusing the "resources" on institutions that pose significant risks based on multiple factors including "field and market intelligence."

Alexis noted that field and market intelligence, "FMI," includes consumer complaints.

UDAAP WAS NEVER GOING ANYWHERE

The fact that the bureau has exercised its authority to enforce against unfair, deceptive or abusive acts or practices (UDAAP) under Mulvaney is not surprising to Alexis despite a number of comments he heard and read from industry professionals saying they believed the CFPB likely would not use its UDAAP authority with Mulvaney in charge, citing statements attributed to Mulvaney and a plain reading of the CFPB's Strategic Plan. The comments themselves were what Alexis found perplexing.

"In the back of my mind I would think, 'That doesn't make sense,' " he said. "UDAAP still exists and the reason it still exists is because there's a huge overlap between the CFPB's UDAAP and the FTC's (Federal Trade Commission) UDAP, which was incorporated by the Federal Reserve Board years ago. So, it felt to me like it would be odd to suggest that they would curb UDAAP when it's cited in the bureau's current Strategic Plan. These struck me as incredibly bold remarks about how a regulatory entity was going to behave, in light of CFPB statements post-**Richard Cordray**."

A MORE DOCILE CFPB

Having worked with numerous trade associations on comment letters in response to the CFPB's call for evidence regarding its functions and practices, Tucker is exceptionally well-versed with the industry's contentions that the bureau has been too aggressive in many areas.

"In recent years, bureau enforcement actions predicated on novel and aggressive legal theories have had significant, costly, and unexpected impacts on entire industries," states one letter on which she advised for the Consumer Bankers Association (CBA), Consumer Mortgage Coalition (CMC) and Financial Services Roundtable (FSR). "By way of example, such actions include the bureau's application of a fair lending 'disparate impact theory' to indirect auto lenders, its stance in connection with RESPA matters, and overreaching in connection with certain actions related to the sale, servicing, and marketing of ancillary products."

Tucker said the fact that fair lending priorities are being recalibrated under the Trump administration is not surprising, noting that many argue fair lending oversight has been overly aggressive for years, but she notes that some of the steps that the new administration has taken have been somewhat unexpected, including the effective dismantling of the CFPB's Fair Lending office as we have known it and ways in which it may choose to curb the viability of disparate impact theory, if only by heeding the stringent limits set forth in the Supreme Court's decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*.

Although the interest in examining disparate impact theory is somewhat unexpected, Tucker said the fact that fair lending priorities are being recalibrated under the Trump administration is not, noting that many argue fair lending oversight has been overly aggressive for years.

Alexis noted some of the criticism the CFPB received over its guidance on automotive lending – which ultimately was repealed via the Congressional Review Act – was because the Supreme Court had not yet resolved the case of *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* regarding the thorny legal issue surrounding the use of "disparate impact theory" versus "disparate treatment theory."

"I think it was perfectly legitimate for the industry to question whether the CFPB should have waited until there was greater court direction, and that's probably what we'll see in the current administration," he said. "They will want to proceed where the law is clear as opposed to arguably gray.

"I do think that if you read everything in context, there were past fair lending enforcement matters in which the industry felt that there was a theory that had not been tested in the legal market before or that there was a change in practice without appropriate notice," Alexis added.

FAIR LENDING THEORIES

The industry may see the manifestation of the shift in priorities around fair lending in a variety of ways, Tucker said. We already have seen a decline in the use of more aggressive fair lending theories that have come under fire over the last several years.

"But we may see actions taken that are more conservative than may have been originally contemplated," she added.

Tucker cites, in particular, the interest in examining the viability of disparate impact theory under Equal Credit Opportunity Act (ECOA) and Regulation B, its implementing regulation. The theory refers to facially neutral policies that, in practice, adversely affect people of a legally protected class more than others in employment, housing and other matters. In cases predicated on disparate impact theory, intent to discriminate is not a requirement, one of the many reasons the use of the theory has been controversial.

"In thinking about cases predicated on disparate impact theory, many have questioned whether we simply will see a dissipation in such actions or if we will see articulated, more formal changes in policy," Tucker said. "Stated another way, you can affect policy by choosing not to pursue aggressive theories, or you can act affirmatively by openly examining issues, crafting new statements of policy, unwinding commentary on statutes, and a variety of other actions. It appears that this administration is not just shifting

the focus with respect to what kinds of cases it's going to bring, which is the easy path, but it may also take on some of these more controversial fair lending issues from a policy standpoint."

Regarding the bureau's recent reorganization that included moving its Office of Fair Lending into the director's office, Alexis said the outcome likely would be a distribution of the fair lending office's functions to natural places within the Office of Enforcement and Office of Examination.

"That struck me as more of a structural operational vision. It could be unfair to say that Mulvaney is hostile to fair lending laws. I think that's unfair to the acting director to suggest he's anti-fair lending by merely pointing to an operational adjustment as the evidence," Alexis said.

READING BETWEEN THE LINES

Characterizing it as a nuance difference that casual observers may not recognize, Alexis said the Mulvaney-led CFPB seems to issue consent orders focused more on couching the orders in statements that objectively are more conclusory, with fewer details in describing the facts of a case.

"They include a little bit higher level description of the product that touched the consumer and more of a conclusory statement about, for example, the manner in which the product was offered or executed and how it violated the law or which law or prong of a law it violated," he said.

In the past, consent orders described in greater detail the facts and circumstances of individual cases to establish that the bureau had jurisdiction to pursue charges, the contours of an offense and that the alleged violation was substantiated through available evidence, Alexis said. In the past, the CFPB's view was such an approach might be more effective when resolving cases in a U.S. District Court, where federal judges tend to place significant emphasis on being able to determine through as many facts as possible contained in the pleading as substantitive evidence before it will concur and enter the order or issue a decision.

There are many types of institutions that prefer public enforcement matters to be handled administratively, given the multiple potential negative collateral consequences of a court filing, Alexis said. By doing so, they seek to resolve cases amicably in hopes of decreasing the number of potential complications associated with having a court involved.

KNOWLEDGE IS POWER...BUT TO DO WHAT?

While she has worked with several organizations in developing their comment letters detailing the industry's concerns about enforcement and CIDs which were quite extensive because of the level of concern regarding certain practices, Tucker said letters discussing concerns about the bureau's supervision practices were shorter, explaining that "supervision is a process where there has been a bit more balance so there were fewer concerns about the exploitation."

Regarding CIDs, she emphasized how extraordinary she found it that in addition to trades, the Federal Trade Commission (FTC) also commented on the bureau's approach, given that the CFPB's rules governing CIDs are modeled after the FTC's.

A likely use of the wealth of information being collected as part of the bureau's call for evidence could be in support the agency's agenda going forward, Tucker said.

"Acting director Mulvaney has key objectives he wants to pursue and comment letters could easily be mined for information supporting these objectives" she said. "Of course there would be additional issues that crop up as well."

We are seeing, and likely will continue to see, changes in this administration's approach to enforcement, according to Tucker, referencing the many statements Mulvaney has made regarding changes, which he has expressed in a positive light.

"The acting director has suggested that the bureau will focus on scale and frequency of harm, and in addition, the actions of this new administration suggest a focus on harm that is quantifiable," Tucker said, "all of which are things that should matter if you are going to take a public enforcement action against a company. On those points and many others, he's going to find support in comment letters. While there may not be a formalized policy directive, we are seeing, and hopefully will continue to see, recalibration with respect to the actions the bureau actually takes."

CFPB? BCFP? Here's how the bureau got its name

It's taken more than nine years, but the truth about the naming of the CFPB appears to have come into focus.

And no, **Elizabeth Warren** didn't do it, as acting director **Mick Mulvaney** has publicly suggested.

"CFPB doesn't exist. CFPB has never existed," Mulvaney told attendees at the recent American Bankers Association (ABA) summit. "That entity does not exist. There is no such thing as the Consumer Financial Protection Bureau. There is the Bureau of Consumer Financial Protection, and when we make our filings with the federal registry, we have always used that name, the Bureau of Consumer Financial Protection. I'm not sure who made the decision. I think I can guess. She might be in the Senate."

Mulvaney is correct – the Dodd-Frank Act never refers to the