SPECIAL ALERT: TRUMP ADMINISTRATION INITIATES "REGULATORY FREEZE"

On January 20, Reince Priebus, Chief of Staff to President Trump, issued a memorandum to the heads of executive departments and agencies initiating a regulatory review to be headed by the Director of the Office of Management and Budget ("OMB"). Congressman Mick Mulvaney (R-SC) has been nominated to fill that position.

On behalf of the President, the memorandum asks the following of the agency and department heads:

- *No new regulations:* "[S]end no regulation to the Office of the Federal Register (the 'OFR') until a department or agency head appointed or designated by the President after noon on January 20, 2017, reviews and approves the regulation."
- *Withdraw final but unpublished regulations:* "With respect to regulations that have been sent to the OFR but not published in the Federal Register, immediately withdraw them from the OFR for review and approval."
- *Delay the effective date of published but not yet effective regulations:* "With respect to regulations that have been published in the OFR but have not taken effect, as permitted by applicable law, temporarily postpone their effective date for 60 days from the date of this memorandum" and consider notice and comment to further delay the effective date or to address "questions of fact, law, or policy." Following the delay, regulations that "raise no substantial questions of law or policy" would be allowed to take effect. For those regulations that do raise such questions, the agency or department "should notify the OMB Director and take further appropriate action in consultation with the OMB Director."

Rulemakings subject to statutory or judicial deadlines are exempt, and the OMB Director has the authority to grant further exemptions for "emergency situations or other urgent circumstances relating to health, safety, financial, or national security matters, or otherwise."

Impact on the CFPB

For the moment, it does not appear that the memorandum applies to the CFPB, which was established as an independent agency by the Dodd-Frank Act. Although a panel of the D.C. Circuit concluded in *CFPB v. PHH Corporation* that the CFPB Director was subject to "at will" removal by the President, this decision is currently stayed while the CFPB seeks reconsideration by the full D.C. Circuit, a process that is expected to take weeks or, if reconsideration is granted, months to resolve. Our understanding, based on public remarks by Director Cordray this morning, is that the Bureau has not yet reached a conclusion regarding the application of the memorandum. Of course, the Bureau could choose to comply voluntarily with the memorandum. And if Richard Cordray is removed or resigns as CFPB Director, a Director appointed by President Trump would likely abide by the memorandum.

For the time being, however, this memorandum is unlikely to impact CFPB rules that have already been finalized but have not yet taken effect, such as the Bureau's rule on prepaid card accounts and its amendments to the mortgage servicing rules and the Home Mortgage Disclosure Act (HMDA) reporting requirements. However, because CFPB rulemaking requires coordination with other agencies that are subject to the memorandum (particularly the OMB), it could be difficult for the Bureau to finalize proposed rules (such as the payday and arbitration proposals) and issue new proposals (such as rules on debt collection, overdrafts, small business data collection, and larger participants in the installment lending market). Specifically, in many cases, federal statutes such as the Congressional Review Act, Regulatory Flexibility Act, Paperwork Reduction Act, and Small Business Regulatory Enforcement Fairness Act require the CFPB to obtain input on the potential impacts of its regulations from OMB and the Office of Advocacy at the Small Business Administration. The Dodd-Frank Act also requires the CFPB to consult with the prudential banking regulators, the Federal Trade Commission, and other agencies regarding its rulemakings. While it is unclear whether these agencies can block CFPB rulemakings, they can, at a minimum, slow the Bureau's ability to impose new requirements on industry.

If you have questions about the "freeze" or other related issues, visit our Consumer Financial Protection Bureau practice for more information, or contact a BuckleySandler attorney with whom you have worked in the past.