

THE POST-ELECTION FINTECH WORLD: ARE HAPPY DAYS (FOR BANKERS) HERE AGAIN?

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FinTech Alert

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In the days following the U.S. federal elections that resulted in the election of Donald Trump as President and Republican control of the 115th Congress, FinTech companies, banks, and other financial institutions are increasingly asking whether they still need to worry about compliance with the landmark Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Consumer Financial Protection Bureau ("CFPB") regulatory actions, and other financial services regulations.

It is true that there will likely be some significant regulatory changes, but it is a little too early for industry participants to pop the champagne corks. Here are our thoughts about some of the top issues impacting FinTech companies, banks, and other financial institutions:

DODD-FRANK AND THE CFPB

Created under Dodd-Frank in response to the financial crisis of 2007–2008, the CFPB's stated aim is "to make consumer financial markets work for consumers, responsible providers, and the economy as a whole." Since its inception, the CFPB has regulated the consumer financial services marketplace through sweeping rulemakings, including the recent issuance of a long-awaited final rule for prepaid accounts.^[1] Precedent-setting enforcement actions also have been increasingly utilized by the CFPB in lieu of, or as a precursor to, rulemakings promulgated in accordance with the Administrative Procedure Act. Policymakers, banks, and others within the broader financial services industry have criticized the CFPB for regulatory overreach and for imposing burdensome, duplicative regulations on market participants that ultimately impact on consumer choice.^[2]

It is no surprise, therefore, that revising the CFPB's structure and operations to try to make the agency more transparent and accountable is among the top priorities of both the incoming Administration and Congress as part of reform of Dodd-Frank. Some version of House Financial Services Committee Chairman Jeb Hensarling's (R-TX) financial reform legislation (H.R. 5983, the "Financial CHOICE Act" or "FCA"), will undoubtedly serve as a basis for any reform efforts undertaken in the early days of the Trump Administration and the new Congress.

Although the CFPB will likely survive in the new Administration and Republican-led House and Senate, the FCA furnishes a blueprint for the kinds of reforms that likely will be made.

The FCA contains provisions that would make significant modifications to the structure of the CFPB by making it an independent agency outside of the Federal Reserve to be headed by a five-member commission, instead of a single director. The FCA would rename the CFPB the "Consumer Financial Opportunity Commission" and would give the agency the mission of consumer protection and competitive markets. The FCA would also subject the CFPB's funding to the Congressional appropriations process. The FCA also includes provisions designed to

address the CFPB's use of enforcement actions by repealing the agency's authority over "abusive practices" in the consumer financial services industry. In addition, the FCA also contains H.R. 5413, the "CFPB Data Accountability Act," which would require the CFPB to verify a consumer complaint prior to posting it on the CFPB's website.

DURBIN AMENDMENT

The FCA also contains a provision that would repeal the "Durbin Amendment," which limited the interchange fees that banks charge merchants to process electronic debit transactions. Following enactment of Dodd-Frank, many payments industry participants raised concerns that small banks and low-and moderate-income consumers have been adversely impacted by the Durbin Amendment, while retailers have disproportionately benefited. Given the anticipated focus of the Trump Administration and new Congress on the promotion of financial market innovation and competitiveness, it is increasingly likely that changes to this provision could be considered as part of broader financial regulatory reform efforts. Whether it will be entirely repealed is another question. Merchants, who fought hard for the Durbin Amendment by arguing that the high fees imposed by major banks and the payment networks were unfair, can be expected to vigorously oppose such an effort.

REGULATORY OUTLOOK

The regulatory outlook for the CFPB for the near future will likely be impacted by a number of important factors, including the outcome of the CFPB's recent petition to the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), which requested the full D.C. Circuit to rehear *PHH Corp. v. CFPB*.^[3] The petition follows the recent holding in *PHH* by a three-judge panel of the D.C. Circuit that the CFPB's existing structure is unconstitutional and that the director of the CFPB serves at the pleasure of the President.^[4] President-elect Trump currently has the ability to remove current CFPB Director Richard Cordray "for cause" and to nominate a replacement to be confirmed by the Senate. Such a change in the director of the CFPB before the D.C. Circuit makes a decision on whether to rehear *PHH* could have significant implications for the CFPB's regulatory activities. Republicans in the 115th Congress also are expected to use the Congressional Review Act ("CRA") to repeal certain regulations recently issued during the Obama Administration. However, many of the CFPB's rules are expected to remain in place but be subject to additional Congressional scrutiny. Notably, some Congressional Republicans have previously expressed concerns about the broad scope of the CFPB's rule on prepaid accounts, although it is not yet clear whether the rule will be among the regulations that could be the focus of repeal efforts through use of the CRA. Additionally, Congressional Republicans will likely subject the CFPB's operations to heightened oversight and will probably seek to repeal the agency's authority to prohibit arbitration agreements and to issue guidance related to indirect automobile lending.

ENFORCEMENT OUTLOOK GENERALLY

Although the CFPB's activities may be reduced through reformation of the agency or an appreciable change in its leadership, such changes are also likely to be accompanied by heightened regulatory and enforcement efforts by state government officials and an increase in efforts by consumers to seek redress in the courts. Anticipating that

the incoming Administration could result in a reduction of enforcement activities against banks and financial institutions at the federal level, many state attorneys general are indicating that they will step into the vacuum to protect consumers if necessary. It has been widely reported,^[5] for example, that both New York and California attorneys general intend to fill any regulatory enforcement void created by the incoming Administration. Nevertheless, a shift in the CFPB's enforcement priorities may have a lasting impact on financial institutions and financial markets.

CONCLUSION

Going forward, payments companies and other consumer financial services industry participants should certainly monitor changes in laws, regulations, and enforcement actions closely as they seek to better understand these changing legal and regulatory dynamics and the nature of the regulations with which they will be required to comply.

NOTES:

[1] See, Eric A. Love, Judith Rinearson and Linda C. Odom, *CFPB Finalizes Expansive Prepaid Account Rule Creating New Compliance Hurdles*, K&L Gates Legal Insight, (Nov. 2016), <https://www.fintechlawblog.com/wp-content/uploads/2016/11/FinTech-blog-4-Nov-2016-CFPB-Finalizes-Expansive-Prepaid-Account-Rule-Creating-New-Compliance-Hurdles.pdf>.

[2] See, e.g., Press Release, House Financial Services Committee, Who will protect consumers from the overreach of the Consumer Financial Protection Bureau? (Mar. 3, 2015), <http://financialservices.house.gov/news/documentsingle.aspx?DocumentID=398764>.

[3] See, Respondent Consumer Financial Protection Bureau's Petition for Rehearing En Banc, No. 15-177 (D.C. Cir. Nov. 18, 2016) (Doc. #1646917).

[4] See, *PHH Corp. v. Consumer Financial Protection Bureau*, No. 15-1177 (D.C. Cir. Oct. 11, 2016).

[5] See, e.g., Joel Stashenko, *Trump Presidency Could Shift Regulatory Spotlight to State and AG*, N.Y. Law Journal, Nov. 14, 2016.

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