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Is the CFPB Circling the Wagons Yet?

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On June 8, the U.S. House of Representatives passed House Financial Services Committee Chairman Jeb Hensarling's (R-Texas) Financial Choice Act of 2017 by a vote of 233-186. The vote was straight down party lines, except for one Republican who voted against the bill. One Democratic representative called the bill a "middle finger to consumers, regulators, investors and the market." The Bill now faces an uphill battle in the Senate. Were it to pass the Senate in its current form, Choice Act 2.0 would dramatically change the Consumer Financial Protection Bureau (CFPB or Bureau) and greatly benefit RV dealers across the country. For example, the Bill would remove the CFPB's authority to police "unfair, deceptive or abusive acts or practices." Further, the Bureau would lose its ability to restrict pre-dispute mandatory arbitration agreements in retail installment sales contracts.

The latest version of the Choice Act, or "Choice Act 2.0," is aptly named because it is based on an earlier version ("Choice Act 1.0") from the preceding Congress. Choice Act 2.0 would significantly alter the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) that created the CFPB.

Although the bill passed the House, there is little chance of the bill surviving the Senate in its current form, due to the strong possibility of a Democratic filibuster in the Senate. To survive a filibuster, it takes 60 votes to proceed to a vote on a bill. Currently, the GOP has 52 seats in the Senate, which would require 8 Democrats to vote with the GOP to pass the bill. Rather than face these numbers, the Senate will likely draft a companion bill, with the same intent to reform the Dodd-Frank Act.

This version of Choice Act 2.0 attempts a more elegant approach to financial reforms than Choice Act 1.0. It begins by changing the name of the CFPB to the Consumer Law Enforcement Agency (CLEF) and adopts some of the earlier proposals for changing the CFPB, including:

- Retaining its sole-director structure but making the director removable at will by the president (currently, Director Richard Cordray may be removed by the president only "for cause").

- Limiting its rulemaking authority to the statutes enumerated in Title 10 of the Dodd-Frank Act (e.g., Truth in Lending Act, Consumer Leasing Act, etc.).

- Repealing its unfair, deceptive and abusive acts and practices (or "UDAAP") authority entirely.
- Eliminating its supervisory authority.
- Preventing the Bureau from restricting arbitration agreements in connection with the offering or providing of consumer financial products.
- Repealing its market monitoring authority.
- Eliminating its mandatory advisory boards.

Whereas an earlier version of Choice Act 2.0 eliminated the CFPB's consumer education functions, this version makes all the Dodd-Frank-mandated offices optional, at the discretion of the director. These offices would include the Office of Fair Lending and Equal Opportunity, the Office of Financial Education, the Office of Servicemember Affairs, and the Office of Financial Protection for Older Americans.

This version of Choice Act 2.0 does some other things as well:

- Makes the agency subject to the federal appropriations process.
- Does not repeal the consumer complaint database provisions but does prohibit the CLEF from publishing any data collected.
- Makes receipt of a Civil Investigative Demand subject to appeal to a U.S. District Court.
- Nullifies the CFPB's auto lending guidance-CFPB Bulletin 2013-02 (published March 21, 2013) would have no force or effect.

Finally, and perhaps most important, the bill would establish an Office of Economic Analysis that would review rulemaking and require any proposed rulemakings to include certain analyses, such as identification of the need for regulation and the regulatory objective, an explanation of why the private market or local government can't address the problem, an analysis of adverse impacts, and a quantitative and qualitative cost benefit analysis. Additionally, that office would review enforcement actions and report directly to the director. Currently, economists are embedded in various units and answer to lower-level leadership that is often looking for a particular outcome. Bypassing assistant and associate directors, and their deputies and giving the economists freedom to provide their unvarnished analysis to the director will arguably create better rules and enforcement based on pure analysis, as opposed to predetermined outcomes. It would cause the Bureau to operate more like the data-driven agency it fancies itself to be than has been possible up to now.

The Bill now moves to the U.S. Senate, where it faces an uphill and fierce battle. The CFPB has several allies in the Senate, including Senator Elizabeth Warren, who are staunch defenders of the agency and its mission. With 60 votes needed in the Senate to pass the bill, it is likely that fundamental changes to the bill would be required in order for it to pass, be reconciled with the House and make its way to President Trump's desk.

A likely aid to the passage of the bill however, is a recent U.S. Treasury Department report. The U.S. Treasury Department released its first of four reports in response to President Trump's February Executive Order (Executive Order 13772 on Core Principles for Regulating the United States Financial System) requesting a comprehensive review of financial regulations. As one might expect, the report was extremely critical of the CFPB. The report stated that the CFPB was created to pursue an important mission, "but its unaccountable structure and unduly broad regulatory powers have led to regulatory abuses and excesses." Further, the report stated that "(t)he CFPB's approach to enforcement and rulemaking has hindered consumer choice and access to credit, limited innovation, and imposed undue compliance burdens, particularly on small institutions."

The report proposes many legislative and regulatory changes, including:

- Restructuring the CFPB by placing it under a bipartisan commission or making the director removable at will by the president.
- Making the CFPB subject to the Congressional appropriations process.
- Removing the CFPB's supervisory authority and returning the supervision of nonbanks back to the state regulators.
- Limiting access to the CFPB's consumer complaint database to federal and state agencies, and not the general public.
- Clearly defining the unfair, deceptive, and abusive acts or practices (UDAAP) standard.
- Reforming the CFPB's civil money penalty fund.
- Mandating that the CFPB promulgate regular review of all its regulations.
- Requiring the CFPB to promulgate rules before adopting novel positions in enforcement actions.
- Bringing enforcement actions in federal district court rather than in administrative proceedings.
- Reforming the Civil Investigative Demand process to ensure subjects of an investigation receive the benefit of existing statutory protections, backed by judicial review.
- Coordinating regulatory tools and examinations across federal and state agencies.
- Requiring rigorous cost benefit analyses for financial regulations.
- Modifying the CFPB's mortgage rules, delaying implementation of the Home Mortgage Disclosure Act (HMDA) reporting requirements, and placing a moratorium

on an additional mortgage-servicing rule.

The report's recommendations may be used to craft legislation to bolster economic growth or used to bolster the Choice Act 2.0 in the Senate. Are the CFPB and its protectors circling the wagons yet? I think they are, based on the recent actions of the CFPB and Director Cordray to finalize their Arbitration Rule and the staunch defense of the Final Rule by the CFPB's protectors, including Senator Elizabeth Warren and Representative Maxine Waters. Stay tuned to the Senate as that's the next battleground.

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7037 Ridge Road, Suite 300, Hanover, Maryland 21076
410.684.3200

hudsoncook.com