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The CFPB's Eventful Year: Key Developments Before and After Rich Cordray's Resignation

By Lucy Morris*

Last spring, the Consumer Financial Protection Bureau was on a roll, riffing its consumer protection drumbeat. A year later, its powerful rhythm has been slowed; in its place, we hear an erratic heartbeat. Anyone following the CFPB knows that this has been an eventful year for the Bureau, with changes happening on an almost-daily basis at times. This article explores the CFPB's eventful year, where it is today, and what to expect from the Bureau going forward.

Before Cordray's Resignation

As the CFPB's first Director, Rich Cordray used all the Bureau's tools to protect consumers. Law enforcement was his favorite tool of choice. For example, a year ago, in *CFPB v. Golden Valley Lending*, the CFPB sued four online lenders for allegedly collecting on debts that consumers did not owe, because the loans exceeded usury rates in the consumers' home states. This was the same theory used in the Bureau's *CashCall* case, with one very important difference. In *Golden Valley Lending*, the Bureau sued *arm-of-the-tribe* lenders who share in the Tribe's sovereign rights. This was one of several aggressive law enforcement actions taken by the Bureau last year under Cordray. The Bureau also brought enforcement actions against mortgage servicers, student loan servicers, credit bureaus, national banks, auto lenders, and others. In addition, the Bureau flexed its supervisory muscle. Last September, the Bureau touted that it had required supervised entities to return $14 million to over 100,000 consumers, for law violations identified during exams.

Last year, Cordray pushed hardest on the rulemaking front, issuing two groundbreaking rules. First, in July, the Bureau announced a final Arbitration Rule. The Arbitration Rule banned class action waivers in mandatory arbitration agreements used by consumer finance companies, effectively taking away any incentive for lenders to require arbitration. Then, in October, the agency announced its final Payday Rule, requiring small dollar lenders to assess a consumer's ability to repay to avoid trapping the consumer in a cycle of debt. Both the Arbitration Rule and the Payday Rule were years in the making, and together represented a crowning achievement for Cordray.

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Things started to turn against Cordray in November, when the Arbitration Rule was overturned under the Congressional Review Act. Perhaps sensing things to come – and with his sights on becoming Ohio's next governor – Cordray attempted a coup of sorts. The day after Thanksgiving, he named his Chief of Staff, Leandra English, as the CFPB's Deputy Director and then resigned, arguing that English was the Acting Bureau Director under the Dodd-Frank Act. Later that day, President Trump appointed Mick Mulvaney as Acting Director, pursuant to the Vacancies Reform Act, setting up a fight over the Bureau's leadership.

<u>After Cordray's Resignation</u>

Anyone following the news knows that Acting Director Mulvaney has won the battle over control of the Bureau. Following that infamous Thanksgiving weekend, Mulvaney has left his mark in more ways than one. This January, under Mulvaney, the Bureau announced that it would engage in rulemaking to reconsider the Payday Rule. The very next day, the Bureau announced a "call for evidence" about the Bureau's functions, and over the next few weeks followed up with Requests for Information seeking comment on enforcement, supervision, rulemaking, complaint handling, and other activities.

In a complete reversal of Cordray's aggressive enforcement posture, Mulvaney told staff that the Bureau would bring enforcement actions only where "quantifiable and unavoidable" consumer harm exists and that it would no longer "push the envelope" of the law or engage in "regulation by enforcement." As if to prove this point, Mulvaney's Bureau dismissed the *Golden Valley Lending* against the four tribal lenders. In addition, the Bureau announced plans to restructure the Office of Fair Lending, stripping that unit of direct enforcement authority, and Mulvaney encouraged state attorneys general to lead on enforcement. As of May, under Mulvaney, the Bureau had only filed one new enforcement action.

Apart from enforcement, Mulvaney's Bureau has made other announcements and changes that run counter to the previous administration. In April, Mulvaney proposed legislative changes that would curb the Bureau's independence, such as subjecting the agency's funding to Congressional appropriations. More recently, he has expressed plans to end public access to the CFPB's complaint database, which Cordray had put in place to put pressure on companies to respond to customers. In more symbolic moves, Mulvaney now refers to the agency as the "Bureau of Consumer Financial Protection" rather than "*Consumer* Financial Protection Bureau," and has adopted a traditional (some would say, boring) government seal.

<u>What to Expect After Mulvaney</u>

One could be forgiven for feeling whipsawed by these wild pendulum swings in the Bureau's first seven years of existence. One thing that's certain – the pendulum will swing back and the only question is when. Mulvaney's term officially ends on June 22, 2018. But so long as President Trump makes a nomination for CFPB Director before June 22, Mulvaney can continue to serve as Acting Director until the nominee is confirmed by the Senate. Separately, Leandra English continues her litigation to unseat Mulvaney, arguing that it is unlawful for Mulvaney to wear two hats – as the *Administration's* Office of Management and Budget Director and as head of an *independent* agency in the CFPB.[1]

While this sorts out, companies should remain vigilant about compliance. Eventually, the pendulum will swing back. And in the meantime, state attorneys general and other agencies will be watching.

[1] After writing this article, President Trump nominated Kathy Kraninger as the next Bureau Director, allowing Mulvaney to stay in place as Acting Bureau Director pending her confirmation. Shortly after the Kraninger nomination, Leandra English dropped her lawsuit.