

What Will Come of the Consumer Financial Protection Bureau Under the Trump Administration?

December 8, 2016 - Donald Trump has made it clear that he intends to make significant changes to the Dodd-Frank financial laws that were responsible for the creation of the CFPB. But what become of the agency itself? If a draft bill by Rep. Jeb Hensarling (R-Tex.) called the Financial Choice Act is any indication, the changes to Dodd-Frank would be dramatic, and the CFPB would be replaced.

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As proposed, Hensarling's bill would gut most of the onerous provisions of Dodd-Frank. We're written many times about the law and the unintended consequences it created. Things such as increased credit card and banking fees and the end of most free checking accounts.

One of the most problematic effects of Dodd-Frank was the creation of the CFPB. It is the only agency in the government that has the authority to make new financial service rules without any congressional or executive oversight. These rules have the force of law.

This past October, the US Appeals Court for the District of Columbia found that the agency's structure was unconstitutional precisely because of the agency's lack of oversight. The court ordered the agency to restructure and to place its director under the supervision of the President. That would mean that the any sitting President would have the power to hire or fire the agency's director. That decision is currently under appeal but we believe that it was made on solid constitutional grounds and is likely to stand.

Without legislation, that would mean that the agency and its director would eventually be directly answerable to the new President. It also means that the President could effectively shutter the CFPB; not an unlikely scenario with the new administration.

Hensarling's legislation says it would rename the agency to the Consumer Financial Opportunity Commission. In reality, the new commission would be a replacement.

The new CFOC (as it would be called) would replace a single director with a five person, bi-partisan commission appointed by the President. The commission would have congressional oversight and significantly more restrictions on its

ability to create new ruler or enforce existing rules. One major change is a requirement that new rules be subjected to a strict cost benefit analysis prior to implementation. That requirement is sorely lacking in Dodd-Frank.

The one area of Hensarling's legislation that we think needs some further work is a portion of the bill that would forbid the CFOC from banning abusive lending product and implementing rules the prohibit arbitration.

While we agree that the power to regulate these products and procedures should be with congress rather than some appointed commission, congress has had a very bad habit of passing laws without understanding their consequences. This is especially true when it comes to laws that usurp the states. For instance, the trading of financial derivatives by banks - one of the primary causes of the financial collapse in 2008 - had been outlawed by 49 states and the District of Columbia until shortly after the turn of the century. That's when Congress usurped state anti-gambling laws (also called bucket shop laws), forbidding the states from regulating derivatives trades. Had members of congress done a little research, they would have realized that around 100 years earlier there was a similar speculative run-up in the market that climaxed in another crash. The state laws were on the books to prevent a repeat of history.

Congress would be well served to pass a law that allows the states to regulate banking within their borders. At the very least, states should have the power to enforce their usury laws and to regulate when, or if, arbitration should be banned for all intrastate transactions.

byJim Malmberg

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