

Client Alert

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Treasury Department's Proposal to Reform the CFPB

This is the third in a series of articles from Hunton & Williams LLP discussing reform efforts related to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) and, specifically, the Consumer Financial Protection Bureau (CFPB). The CFPB was created as a brand-new, start-up independent agency under Dodd-Frank. The first article was a discussion about the questions of the constitutionality of the CFPB due to its arguably unchecked authority to exercise executive power through the CFPB's investigative and enforcement authority,¹ legislative power through rulemaking authority² and judicial power through its authority to rule on enforcement actions with any appeals on such actions being taken to the director of the CFPB.³ Perhaps due to its unprecedented and unchecked power, at least one appellate panel has held that the structure of the CFPB is unconstitutional.⁴ The second article described the current effort in Congress to reform the CFPB in the Financial Choice Act (the FCA). This article discusses the executive branch proposal that was made in the report issued to President Trump by the US Department of the Treasury in June 2017: A Financial System That Creates Economic Opportunities, Banks and Credit Unions (the Treasury Report).

It should be emphasized that similar to the FCA, which has been approved by the House of Representatives and is pending in the Senate, the Treasury Report does not propose a wholesale disbanding of the CFPB or repeal of Dodd-Frank; rather the Treasury Department proposes reforms of a number of issues in Dodd-Frank, including the structure and delegation of authority to the CFPB.

The Treasury Department Analysis of the Structure of the CFPB

Initially, it should be noted that since President Trump was inaugurated, the Treasury Department has conducted an analysis of the structure of the CFPB and identified several concerns, which include:

- The CFPB's structure renders it unaccountable to the American people. As a result of this unaccountability, a panel of the Court of Appeals for the District of Columbia ruled that the current structure of the CFPB is unconstitutional.
- The CFPB's substantive authority is unduly broad, ill-defined and susceptible to abuse. With regard to its substantive authority, the Treasury Department has significant concerns about the CFPB's bringing enforcement actions relating to so-called "unfair, deceptive, or abusive acts and practices" (UDAAP), especially since Dodd-Frank does not define UDAAP with any specificity.
- The CFPB has exercised its authority in a manner aimed at maintaining its discretion, rather than creating a stable regulatory environment.
- The CFPB's regulatory authority is duplicative of the prudential regulators and, as a consequence, unnecessary.

¹ See 12 U.S.C. §5562.

² See 12 U.S.C. §5512(b).

³ See 12 U.S.C. §5563.

⁴ *PHH Corporation v. Consumer Financial Protection Bureau*, 839 F. 3d1 (D.C. Cir. 2016), rehearing *en banc* granted, order vacated (D.C. Cir. 2017) (the "PHH Panel Decision").

The concerns identified by the Treasury Department are similar to those raised by the court of appeals in the PHH Panel Decision and the majority in the Financial Services Committee of the US House of Representatives.⁵

The Treasury Department's Proposal—A Return to the Mainstream

In response to its concerns, the Treasury Department has proposed a restructure of the CFPB that is more modest than the FCA. As it relates to the structure and operation of the CFPB, the Treasury Department recommends the following.

- The CFPB becomes subject to executive oversight by either (a) the director of the CFPB being removable by the president at will or (b) the CFPB being headed by a multimember commission similar to the FTC or SEC.
- The CFPB becomes subject to congressional oversight by receiving its funding through the regular congressional appropriations process (currently, the CFPB is, at last partially, funded by the Federal Reserve and partially self-funded through penalties recovered in enforcement actions).
- CFPB should be required to provide regulated entities with adequate notice of new rules or changes to the rules by complying with typical regulatory public notice and comment procedures.
- Alignment of the CFPB's policies for issuing no action letters such that the process is similar to the process utilized by the SEC, CFTC and FTC.
- In the event that the CFPB institutes an enforcement action seeking sanctions, it must be prosecuted in a district court rather than before an administrative law judge.
- In the event the CFPB intends to make a civil investigation demand on a target, the CFPB should adopt procedures that ensure that the target has clean notice of conduct on issue and laws that the CFPB believes have been violated.
- Congress repeal the CFPB's supervisory authority. The supervision of any entity should be accomplished by the entity's prudential regulator (i.e. the Federal Reserve, OCC or state regulator).

While the Treasury Report's recommendations are more modest than the legislative proposal in the FCA, the recommendations are not likely to satisfy either supporters or opponents of the CFPB. However, the Treasury Report signals that President Trump would likely support reforms that are being proposed in Congress through the FCA.

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⁵ H. Rept. 115-153.