

Client Alert

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Consumer Protection Still a Focus in 2018

With the presidency and both chambers of the United States Congress of the same party, many expected 2017 to bring swift changes to how the federal government approached consumer financial services and products. While 2017 may not have brought sudden and dramatic change to consumer financial services regulation, the year ultimately saw several important initiatives that look to take hold in 2018 at both the state and federal levels.

Developments in 2017

On April 26, 2017, the Financial CHOICE Act was introduced in the House of Representatives. The CHOICE Act, among other goals, proposed to reform the Consumer Financial Protection Bureau by (i) making the director removable at will by the president; (ii) subjecting CFPB actions to increased judicial oversight; (iii) providing for Congressional oversight of the CFPB budget; (iv) prohibiting the CFPB from bringing enforcement actions against what it deems to be unfair, deceptive or abusive acts and practices; and (v) curtailing the CFPB's rule making authority. The CHOICE Act passed in the House of Representatives and is now in the Senate, where its success appears in doubt as the Senate has indicated that it would not bring the CHOICE Act to a vote but, rather, would consider its own similar legislation.

While it remains to be seen whether the CHOICE Act (or some variation resulting from a compromise with the Senate) will ultimately be enacted, the CHOICE Act represents a significant legislative attempt to reform the CFPB and appears to be the beginning of future efforts in both the House and Senate to that end.

In addition to attempts to reform the CFPB, Congress demonstrated a willingness to push back on CFPB regulations, using the Congressional Review Act to reject the CFPB's arbitration rule that would have prevented certain financial institutions from enforcing arbitration clauses in borrower agreements.

Finally, the biggest change came in December, 2017 when Richard Cordray resigned as Director of the CFPB. President Trump appointed Mick Mulvaney, an ardent critic of the CFPB, as acting director.

In light of the foregoing events and initiatives, and other attempts at revising federal oversight of consumer financial products, one could argue that governmental focus on consumer financial products is receding at the federal level and as such, industry focus on such issues can similarly recede. However, as federal oversight may be waning, state oversight of consumer financial products may be rising to fill any void.

The Rise of State Action

While there are numerous examples of state regulators taking action against entities engaged in consumer financial products and services, several developments provide interesting data points on how states may proceed in 2018.

On December 12, 2017, the attorneys general of New York, California, Connecticut, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Mexico, North Carolina, Oregon, Vermont, Virginia and Washington sent a letter to President Trump regarding the president's appointment of Mr. Mulvaney as acting director of the CFPB.

In addition to asserting that Mr. Mulvaney's previous criticisms of the CFPB "should disqualify" him from leading the CFPB, the attorneys general informed the president that "state attorneys general have express statutory authority to enforce federal consumer protection laws, as well as the consumer protection laws of our respective states."

Most strikingly, the letter expressly warned that "[w]e will continue to enforce those laws vigorously regardless of changes to CFPB's leadership or agenda.... If incoming CFPB leadership prevents the agency's professional staff from aggressively pursuing consumer abuse and financial misconduct, we will redouble our efforts at the state level to root out such misconduct and hold those responsible to account."

The warning by the attorneys general of some of the most populous states in the country serves as a clear statement that state governments intend to resume their traditional roles as financial regulators and fill any void in consumer financial product regulation left by receding federal oversight.

Earlier in 2017, we also saw a battle between a state regulator and the federal government to protect state oversight of consumer financial products and services. A suit brought by the New York Department of Financial Services against the United States Office of the Comptroller of the Currency challenged the OCC's ability to enact a proposed program that would grant non-deposit taking financial technology firms a special purpose federal charter. While the suit was ultimately dismissed for lack of standing as the OCC had not yet enacted its proposal, the action by NY DFS clearly evidenced a desire by states to protect their regulatory purview from federal encroachment.

What to Look for in 2018

The prediction for 2018 includes an ebb in federal oversight of consumer financial products and services countered by increased oversight of such matters by state governments.

At the federal level, the CFPB will soon release its Spring Regulatory Agenda which will lay out its active rulemaking plans and regulatory initiatives for the coming year. The Regulatory Agenda should provide important insight into where the CFPB will invest its resources and the manner in which it will seek to pursue its goals. Additionally, careful attention will be placed on the regulatory enforcement actions and investigations the CFPB commences in the coming months as a way to gauge the ferocity with which the CFPB will oversee the consumer financial product space.

It should be emphasized, however, that the letter from the attorneys general and the suit by New York's DFS make clear that state regulators will be monitoring developments at the CFPB closely and will likely move to fill any perceived void created by the new CFPB administration.

Ultimately, industry participants, whether investors, services and product providers, or lenders to said providers, should not view a potential change in federal course as permission to deprioritize compliance with any state and federal consumer compliance regulation but, rather, should continue to invest in such compliance as a means to insulate from any regulatory uncertainty between federal and state regulators.

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