

Lawyer Insights

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Reform of the CFPB Through the Financial Choice Act

by Gregory Hesse and Allison Jacobsen

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The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) established the Consumer Financial Protection Bureau (CFPB), which was created as a brand-new, start-up independent agency under Dodd-Frank. Many have questioned 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 Due at least in part to courts' holding the structure of the CFPB as unconstitutional, the executive and legislative branches of government both have initiatives underway to reform the CFPB. This article discusses the legislative initiative—the Financial Choice Act (FCA) that was proposed in the House of Representatives at the beginning of its term. Subsequently, the House of Representatives, on or about June 12, 2017, passed the FCA and it is currently in committee in the Senate.

It should be emphasized that the FCA does not propose a wholesale repeal of Dodd-Frank; rather it proposes reforms of a number of issues in Dodd-Frank, including the delegation of authority to the CFPB. As it relates to reform of the CFPB, the FCA may prove to be a classic example of compromise—in other words, legislation that fails to completely satisfy anyone. For example, since it was filed, supporters of the CFPB have been criticizing the FCA as being an “unfair attack” on the CFPB and, effectively, anti-consumer.⁵ On the other hand, the FCA will likely be unsatisfactory to the opponents of the CFPB because it does not provide for its wholesale dismantling.⁶

Reform Through the FCA—A Successful Compromise?

To address the constitutional question regarding the separation of powers, the FCA proposes a restructuring of the CFPB such that its focus is only prosecuting enforcement actions. To emphasize, Congress is not eliminating the federal government's role in consumer financial protection; however, it is restructuring the role to address the constitutional infirmities of how the CFPB is structured. To implement the restructuring, the FCA proposes:

- The CFPB to be renamed the “Consumer Law Enforcement Agency” (CLEA) and deemed an independent agency⁷

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- The CLEA will be subject to congressional oversight due to its receiving its funding from the regular congressional appropriations process (currently, the CFPB is, at least partially, funded by the Federal Reserve and partially self-funded through penalties recovered in enforcement actions)
- In the event that the CLEA institutes an enforcement action seeking sanctions, the target of the action can require that the enforcement action be prosecuted in a district court (currently, the targets of enforcement actions do not have this right)
- In the event the CLEA is conducting an investigation and demanding information, the target can bring an action in a district court seeking to quash or otherwise modify the demand (currently, the targets of an investigation do not have the right to seek court intervention)
- The CLEA would no longer have supervisory or examination authority; rather its authority would be limited to rulemaking and enforcement. Supervision and examination would be conducted by the prudential regulators such as the OCC, the FDIC, etc.
- Employees of the CLEA would be placed on the government employee pay scale (according to press reports, employees at the CFPB are paid more than comparable employees in other government jobs)⁸
- It is worth noting that the proposed CLEA would continue to have a single director who will serve a five-year term who cannot be fired except for cause (this is the same as the current law).

Opponents of the FCA warn that it will “obliterate consumer protections.”⁹ Still, it is a far cry from the initial executive summary of the originally proposed legislation related to reform of the CFPB, which included a number of reforms such as the replacement of the current single director with a bipartisan, five-member commission, which is subject to congressional oversight and appropriations.

If the FCA is enacted, the legislation would address and cure the separation of powers issue by giving: (a) Congress direct oversight over the regulations that are being promulgated by the CFPB (and other financial agencies) (thereby reducing the CFPB’s “legislative powers”); (b) Congress increased oversight through the appropriations process; and (c) targets of enforcement actions the option to have those actions heard in a district court (this reduces the CFPB’s “judicial powers”). Thus, the CFPB would be solely an agency with primarily executive powers.

The FCA Is Not a Done Deal

As was noted at the beginning of this article, the FCA is only about a quarter of the way through the process of being enacted into law. While the House of Representatives has approved the FCA, it is still pending before the Senate Banking, Housing and Urban Affairs Committee. As the FCA makes its way through the legislative process, its terms, including those relating to reform of the CFPB, are likely to be modified, and Hunton & Williams will continue to provide updates throughout the process.

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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).

⁵ See “Michelle Singletary: Attack on consumer watchdog agency is unfair,” <http://www.telegram.com/news/20170225/michelle-singletary-attack-on-consumer-watchdog-agency-is-unfair> (August 29, 2017).

⁶ See Victoria Finkle, “Jeb Hensarling Plan Rekindles Debate as Republicans Aim to Dismantle Dodd-Frank,” <https://www.nytimes.com/2016/06/08/business/dealbook/republicans-plan-to-dismantle-dodd-frank-rekindles-a-debate.html> (June 8, 2016).

⁷ While the renaming of the agency is, effectively, a meaningless act, the “optics” of such a renaming may be problematic. Indeed, any efforts to change the name will likely be seen as an attack on part of President Obama’s legacy by his supporters while the failure to change the name may be perceived by his opponents as a failure to reign in the perceived overreach of President Obama’s administration.

⁸ See Gregory Roberts, “Republican Lawmakers Take Action at CFPB Pay Scale,” <https://www.bna.com/republican-lawmakers-aim-n73014448981/> (Dec. 22, 2016). (CFPB “employees could see their salaries fall as much as 25 percent under Republican legislation that would alter the agencies’ pay scale”); Richard Pollock, “Gravy Train Flows Wide and Deep at Elizabeth Warren’s Consumer Agency,” <http://dailycaller.com/2017/02/07/exclusive-gravy-train-flows-wide-and-deep-at-elizabeth-warrens-consumer-agency/>.

⁹ See <https://www.indivisibleguide.com/resource/financial-choice-act-hr-10/> (May 2017).