

Lenders Compliance Group

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CFPB: The Headless Horseman

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COMMENTARY: by **JONATHAN FOXX**

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At this writing, we are almost a week away from the Designated Transfer Date - the date on which the Consumer Financial Protection Bureau (CFPB) receives its enumerated authorities - and nobody has been chosen, appointed or nominated to head the new agency. Several suggestions for the principal position abound, primarily Elizabeth Warren.

How can such a monumental lack of political discipline, by Democrats and Republicans alike, be accounted for?

CFPB: Laws

The CFPB, created by the Dodd-Frank Act, on July 21st it will receive authority over:

- Alternative Mortgage Transaction Parity Act (AMTPA)
- Community Reinvestment Act (CRA)
- Consumer Leasing Act (CLA)
- Electronic Funds Transfer Act (except the Durbin interchange amendment) (EFTA)
- Equal Credit Opportunity Act (ECOA)
- Fair Credit Billing Act (FCBA)
- Fair Credit Reporting Act (except with respect to sections 615(e), 624 and 628) (FCRA)
- Fair Debt Collection Practices Act (FDCPA)
- Federal Deposit Insurance Act, subsections 43(c) through 43(f)(12) (FDIA)
- Gramm-Leach-Bliley Act, sections 502 through 509 (GLBA)
- Home Mortgage Disclosure Act (HMDA)
- Home Ownership and Equity Protection Act (HOEPA)
- Real Estate Settlement Procedures Act (RESPA)
- S.A.F.E. Mortgage Licensing Act (S.A.F.E. Act)
- Truth in Lending Act (TILA)
- Truth in Savings Act (TISA)
- Omnibus Appropriations Act- Section 626 (OAA)
- Interstate Land Sales Full Disclosure Act (ILSFDA)

In just a few days, the CFPB is going to have authority over the above-stated enumerated laws through rulemaking, orders, guidance, interpretations, policy statements, examinations, and enforcement actions.

The CFPB will be assigned primary authority to enforce the aforementioned laws, but other federal regulators, including the Department of Housing and Urban Development (HUD), the banking agencies, and the Federal Trade Commission, will retain overlapping, secondary enforcement authority over certain requirements. State Attorneys General will be empowered to enforce federal laws under the CFPB (subject to any existing limitations in the laws to be transferred to the CFPB's authority). State consumer financial protection laws would not be preempted, except to the extent that they are inconsistent with federal law (although such state laws could be stricter than the federal laws, in which case they would not be preempted by federal law).

CFPB: Products

The CFPB will have oversight over many financial products and services, including, but not limited to, credit extension; credit counseling; loan servicing; Credit Reporting Agencies, their agents and affiliates; real property leases; real estate settlement services; real estate appraisals; depository accounts; financial advisory services; exchange of funds and transmittal of funds; consumer custodial fund services; so-call "stored value cards;" check

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cashing; debt management, settlement, and collection services; payment processing services; and, a catch-all "other products and services" (as the CFPB so defines).

CFPB: New Offices

There will be various units and offices: a research unit to monitor the consumer financial products and services market, and a unit to collect and track complaints; three new offices to be established within one year of the Designated Transfer Date, an Office of Fair Lending and Equal Opportunity, an Office of Financial Education, an Office of Service Members Affairs; and, an Office of Financial Protection for Older Americans, which must be established within 180 days after the Designated Transfer Date. Furthermore, there will be a Private Education Loan Ombudsman to process complaints from borrowers of private education loans.

CFPB: Staff

In addition to the CFPB's responsibility to build its own staff and administrative operations, it will collaborate with the federal banking agencies and HUD to choose employees to be transferred from their agencies to the CFPB. All such employee transfers are to be fully effectuated not later than 90 days after the Designated Transfer Date.

CFPB: Director

The Director must establish all units and offices within specific time frames, include various coordinating and administrative mandates, provide for reporting requirements to Congress, and must see to it that the various components of the CFPB function through interacting participation within and across all CFPB units and, where applicable, certain federal and state agencies and regulators.

In addition to the foregoing, the Director must also establish the Consumer Advisory Board and appoint its members. By July 21st, as well as its receiving other authorities pursuant to Dodd-Frank, the CFPB must, among other things, conduct research relating to consumer financial products and services, develop its nationwide consumer complaint response center, plan and take steps to implement the risk-based supervision of non-depository entities, and prepare for the opening of outreach offices.

"You say yes, I say no / You say stop and I say go, go, go" (Beatles)

Whatever your political persuasion these days, it is irrefutable that this new agency is soon coming into its powers!

Some people believe that the Director should be industry friendly; others believe the Director should be consumer friendly. Does it occur to any of them that these predilections are not mutually exclusive?

Some legislators want to defund the CFPB or "defang" it (as one Congressperson has opined); others want it to have full funding and all the enforcement powers granted by Dodd-Frank.

But defunding an agency that is set to receive all the enumerated laws is entirely counterproductive, inasmuch the industry will depend on it for oversight of these laws. And the CFPB, as required by Dodd-Frank, that is deprived of enforcement powers is virtually no agency at all: this is to "defang" it without regard for the consequences.

Every compliance officer knows that compliance means nothing without enforcement!

"I say high, you say low / You say why, and I say I don't know" (Beatles)

We all know that the President cannot make a recess appointment if Congress is not in recess, notwithstanding the "pro forma sessions" that may be conducted in order to keep the Congress "in session." Essentially, the tactic is for opposition legislators - primarily Republicans - to prevent an appointment of anybody at all to the CFPB unless the CFPB is changed.

As to confirming an appointment, at this time the President has put forth almost 300 civilian appointments this year, but fewer than 100 of them have been confirmed by the Senate - and these are instances where there is no opposition! Indeed, there are 15 judge nominees who have already been unanimously approved by the Senate Judiciary Committee, but their nominations have not even been sent to the floor of the Senate.

Importantly - and, at this late date, inexplicably - President Obama has not even announced his choice for the Director! How can consumers or industry expect congressional action when the President himself won't choose?

At this time, Elizabeth Warren is standing up the CFPB. She is the very person who devised the idea of a consumer financial protection agency and then advocated in the halls of Congress, in speeches, lectures, and interviews throughout the United States, for its creation. Since September 17, 2010, she has been building the CFPB in accordance with the requirements of Dodd-Frank.

While proponents and opponents lambast each other, and a Director is not appointed, the stakes for the mortgage industry continue to grow ever higher and perilous. The many enumerated laws being fully empowered into the CFPB on July 21st affirmatively require substantive, continuous, and very careful oversight.

The individual who manages that agency matters!

Headless Horseman

- "The dominant spirit, however, that haunts this enchanted region, and seems to be commander-in-chief of all the powers of the air, is the apparition of a figure on horseback, without a head. It is said by some to be the ghost of a Hessian trooper, whose head had been carried away by a cannon-ball, in some nameless battle during the Revolutionary War, and who is ever and anon seen by the country folk hurrying



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the Revolutionary War, and who is ever and anon seen by the country folk hurrying along in the gloom of night, as if on the wings of the wind."

- Washington Irving, "The Legend of Sleepy Hollow"

The principal character in "The Legend of Sleepy Hollow" is Ichabod Crane, a school teacher. Sleepy Hollow is believed to have been located in the area of Tarrytown, NY. Ichabod is killed quite dramatically when the headless horseman, a ghost - and it is believed that ghosts can't cross water! - throws his severed head across a bridge, over the water, and hits poor Ichabod off his horse. The next morning, Ichabod's hat is found nearby, and beside it is a shattered pumpkin. Ichabod was never seen in Sleepy Hollow ever again. In Irving's story, one is led to conclude that the headless horseman was really no ghost at all, but Abraham van Brunt (aka "Brom Bones"), Ichabod's rival for the hand in marriage of Katrina van Tassel, the beautiful daughter of a rich farmer.

Any agency without a head is crippled, but, given the mandates arrogated to the CFPB, not to have a Director immediately is especially debilitating to consumers and mortgage industry participants alike.

Instead of being rivals, like Ichabod Crane and Brom Bones, it is in the interest of both consumers and industry to lobby for a strong CFPB, under the direction of a wise, knowledgeable, and experienced leader.

This is not a job for a career bureaucrat. It requires a Director with considerable managerial, legal, political, and financial knowledge, all of which ideally would be expressed through a balanced temperament, a focused and incisive mind, a fierce consumer advocacy, and sophisticated communication skills.

It seems that Sleepy Hollow has relocated to the Congress of the United States.

What do you think?

I would welcome your comments.



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