

## Recent Developments in Federal Consumer Law

November 20, 2019

Erin Bryan

[Bryan.erin@Dorsey.com](mailto:Bryan.erin@Dorsey.com)

Joseph Lynyak

[Lynyak.joseph@Dorsey.com](mailto:Lynyak.joseph@Dorsey.com)

Steve Wells

[Wells.steve@Dorsey.com](mailto:Wells.steve@Dorsey.com)

### Agenda

- CFPB historical developments and evolution
- The current administration of Director Kraninger
- CFPB regulation
- CFPB enforcement
- Constitutionality and the Supreme Court

## A Brief CFPB History

- CFPB was created by the Dodd Frank Act in 2010
- Specific intention to be the “new sheriff” in town
- Significant powers exercised by a single Director
  - Virtually all federal consumer laws transferred from the FRB to the CFPB
  - Authority to adopt and modify federal consumer laws held *solely* by the Director
- Insulated from influence of the Executive and Legislative branches of the Federal Government
  - Intention to avoid “regulatory capture”
  - Removal of the Director by the president permitted only “for cause”
  - Indirect (and substantial) funding from FRB revenues

## Director Cordray

- Recess appointment in January 2012—and later deemed invalid
- Ultimately confirmed by the Senate in July 2013
- Director Cordray adopted an aggressive (pro consumer) supervision and enforcement strategy
- Examiners were pushed to make adverse industry findings
  - Examination recommendations reviewed and often reversed by CFPB
  - Enforcement attorneys imbedded in examination teams
- Regulation through enforcement – Director Cordray pushed the envelope
  - Extensive use of new UDAAP authority
- Public high profile enforcement actions and large civil money penalties



## Director Mulvaney

- Director Cordray resigned in November 2017 to run for Governor of Ohio
- The President appointed Mick Mulvaney, head of OMB, as Acting Director (while continuing to run OMB)
- Acting Director Mulvaney announced the end of regulation by enforcement
  - Made other changes (*i.e.*, renamed the CFPB the “BCFP”)
  - Adopted a conservative interpretative approach regarding the CFPB’s authority
  - Installed political operatives into operating divisions at the CFPB



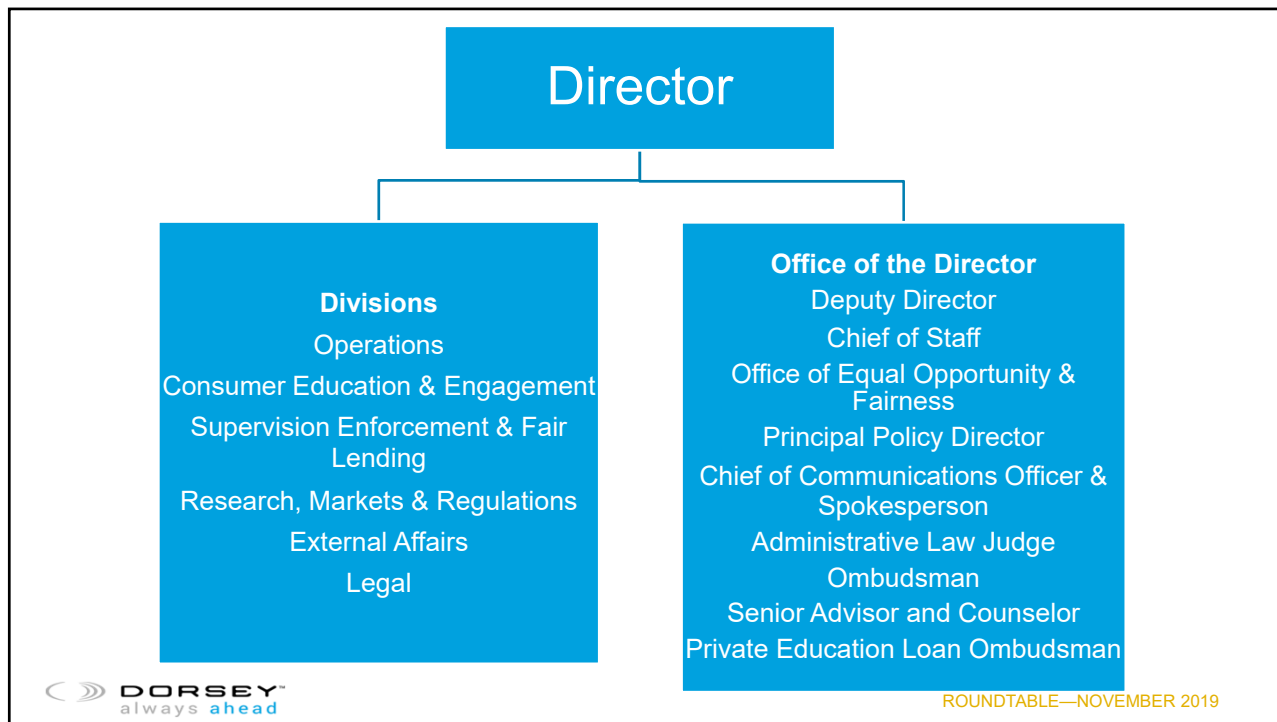
## Director Kraninger


- Kathy Kraninger was nominated as Director in June 2018 and confirmed by the Senate in December of 2018
- Worked at OMB for Mulvaney
- A career civil servant
  - No identifiable consumer knowledge
- Far less confrontational than Mulvaney
  - Reverted to the name “CFPB”



Consumer Financial  
Protection Bureau





- ## CFPB'S Broad Authority
- The CFPB has general regulatory authority over providers of an array of consumer financial products and services, and includes—
    - *Rulemaking Authority*
      - The power to issue and amend consumer regulations under its jurisdiction
      - Has issued literally tens of thousands of pages of proposed and final regulations
      - Under Director Mulvaney reopened virtually all regulations to public comment
        - To date very little response to public comments received
    - *Supervisory Authority*
      - The power to examine and impose reporting requirements on a broad range of financial institutions
        - Banks greater than \$10 billion in assets directly examined by the CFPB
    - *Enforcement Authority*
      - The power to directly enforce the consumer protection laws and regulations under its jurisdiction
      - The power to directly litigate in court (*i.e.*, without getting DOJ involvement)
-  ROUNDTABLE—NOVEMBER 2019

## Rulemaking Authority

- General APA rulemaking
  - SBREFA limitation
  - UDAAP
- FSOC limitation—really?



## CLE Code

## Recent CFPB Regulations

- **2019-20 Regulatory Agenda (as announced in May 2019):**
  - Implementation of Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018
  - Section 1071 - Small Business Data Collection
  - **Payday Lending Rule**
  - HMDA Rule
  - **Debt Collection Rule**
  - Remittance Transfer Rule
  - **Ability to Repay/Qualified Mortgage Rule (“QM Patch”)**
  - Review of Existing Regulations
    - Assessment of TILA-RESPA Integrated Disclosure (TRID) Rule pursuant to section 1022(d) of the Dodd-Frank Act
    - Plan for conducting reviews under section 610 of the Regulatory Flexibility Act (RFA)

## Recent CFPB Regulations

- **Payday Lending Rule- Timeline**
  - **2016:** CFPB issued a proposed rule entitled Payday, Vehicle Title, and Certain High-Cost Installment Loans (the “Payday Lending Rule”).
  - **2017:** CFPB issued its final Payday Lending Rule.
  - **February 6, 2019:** CFPB issued proposed rules to rescind the mandatory underwriting provisions of the final Payday Lending Rule and to delay the compliance date for those provisions.
  - **June 17, 2019:** CFPB issued a final rule to delay the compliance date for the mandatory underwriting provisions of the final Payday Lending Rule from August 19, 2019 to November 19, 2020 because:
    - CFPB believed that mandating compliance by August 19, 2019 with portions of the Rule that the Bureau expected to rescind would impose significant and potentially unwarranted costs on industry participants, create substantial revenue disruptions that could impact the ability of some market participants to stay in business, and restrict access to consumer credit.
    - A 15 month delay would allow the Bureau adequate opportunity to review comments on its Reconsideration NPRM regarding the Mandatory Underwriting Provisions and to make any changes to those provisions before affected entities incurred significant costs that would impair their ability to remain in business and before consumers experienced a restriction in their ability to choose the credit they prefer.

## Recent CFPB Regulations

Sections of the 2017 Payday Lending Rule	The Delay Final Rule:
<p><i>General</i> §§ 1041.1 to 1041.3 and Official Interpretations</p>	<ul style="list-style-type: none"> <li>Removes the definition of “covered person” and reserves §1041.2(a)(9).</li> <li>Corrects § 1041.3(e)(2) by changing “this section” to “this paragraph (e)(2)” in the borrowing history condition requirement for the alternative loan conditional exemption.</li> </ul>
<p><i>Underwriting</i> §§ 1041.4 to 1041.6 and Official Interpretations</p>	<ul style="list-style-type: none"> <li>Delays the August 19, 2019 compliance for §§ 1041.4 to 1041.6 to November 19, 2020.</li> </ul>
<p><i>Payments</i> §§ 1041.7 to 1041.9 and Official Interpretations</p>	<ul style="list-style-type: none"> <li>Corrects § 1041.9(c)(3)(viii) by changing the URL referenced in the regulatory text to match the text used in Model Form A-5.</li> </ul>

Source: Consumer Financial Protection Bureau

## Recent CFPB Regulations

Sections of the 2017 Payday Lending Rule	The Delay Final Rule:
<p><i>Information Furnishing, Recordkeeping, Anti-Evasion, Severability, and Dates</i> §§ 1041.10 to 1041.15 and Official Interpretations</p>	<ul style="list-style-type: none"> <li>Delays the August 19, 2019 compliance date to November 19, 2020 for § 1041.10 and § 1041.12(b)(1) through (3).</li> <li>Adds § 1041.15 explaining the rule’s effective and compliance dates.</li> <li>Revises Comment 10(b)-1 so that the dates in an example conform to the delayed compliance date for most Mandatory Underwriting Provisions.</li> <li>Revises § 1041.11(c) and (d) and related commentary so that the dates listed conform to the delayed compliance date for most Mandatory Underwriting Provisions.</li> </ul>
<p><i>Model Forms and Clauses</i> Appendix A to Part 1041</p>	<ul style="list-style-type: none"> <li>Does not amend the language or format of the Model Forms and Clauses, but adds headings in Appendix A. Model Forms A-1 and A-2 relate to requirements for which the compliance date is delayed to November 19, 2020.</li> </ul>

Source: Consumer Financial Protection Bureau

## Recent CFPB Regulations

- **Debt Collection Rule (Regulation F)- Timeline**

- **1978:** Fair Debt Collection Practices Act (FDCPA) became effective.
  - FDCPA governs the activity of debt collectors (as defined in the FDCPA).
  - Intended to eliminate abusive, deceptive, and unfair debt collection practices, protect reputable debt collectors from unfair competition, and encourage consistent state action to protect consumers from abuses in debt collection.
- **2012:** Dodd-Frank Act became effective. Under Dodd-Frank, the CFPB became the first federal agency to possess the authority to issue substantive rules for debt collection under the FDCPA.
- **2013:** CFPB issued an ANPRM, seeking comment, data, and information from the public about debt collection practices.
- **May 7, 2019:** CFPB issued a proposed rule to amend Regulation F, which implements the FDCPA, to prescribe Federal rules governing the activities of debt collectors covered by the FDCPA.
- **August 2, 2019:** CFPB announced extension of comment period until September 18, 2019.
- **Current status:** Comment period closed. Over 12,000 comments were received.

## Recent CFPB Regulations

- **Debt Collection Rule (Regulation F)- Overview**

- **CFPB’s proposed rule addresses communications in connection with debt collection; interpret and apply prohibitions on harassment or abuse, false or misleading representations, and unfair practices in debt collection; and clarify requirements for certain consumer-facing debt collection disclosures.**
- **What’s new?**
  - Changes to definitions of “debt collector”, “consumer” and “debt”
  - Provisions for electronic communication safe harbor (for unintentional communication with unauthorized third party about a consumer’s debt when trying to communicate with the consumer by email or text message)
  - Consumer option to unsubscribe
  - Communication medium, time, place, content, and frequency restrictions
  - Prohibitions against collecting time-barred debt, debt parking
  - Restrictions on transfers of debt
  - Requirements for disclosures and validation notices (including model form)



## Recent CFPB Regulations

- **Debt Collection Rule (Regulation F)- Government/Agency Responses**
  - **FTC:**
    - Comment expressed “support” of the proposed rule in all respects.
    - Urged additional consideration of some issues.
    - Emphasized its historical role in fair debt collection enforcement.
  - **Small Business Administration—Office of Advocacy**
    - Outlined concerns with the Regulatory Flexibility Act (RFA), particularly Bureau’s failure to include sufficient support for its flexibility analysis and exclusion of findings on cost of implementation.
    - Objects to inclusion of UDAAP provisions, which it argues create “uncertainty and legal risk for first party creditors.”
  - **Senate Letter:**
    - A consortium of 26 democratic senators submitted a letter to the CFPB criticizing the proposed rule for not going far enough to protect consumers.

## Recent CFPB Regulations

- **Debt Collection Rule (Regulation F)- Industry Responses and Criticism**
  - **Comments submitted by industry groups including Consumer Bankers Association, Consumer Relations Consortium, and The Association of Credit and Collection Professionals (ACA International).**
  - **ACA International:**
    - Praised CFPB’s attempt to create uniformity and consistency under the FDCPA.
    - The 154-page letter expressed significant concerns about the content of the proposed rule, including:
      - Restrictions on time/place/frequency of calls will increase costs, the length of time it takes to resolve a debt and litigation and will ultimately harm consumers.
      - Consumers increasingly prefer modern electronic communications but the bureau’s proposed electronic flowchart for electronic disclosures is overly complex and could make it infeasible for many collectors to use electronic methods of communication.
      - E-SIGN consent forms for email are unnecessarily complicated.
      - The uniform validation notice creates ambiguities regarding itemization, the tear-off form check box and failure to address litigation over interest accrued, among others.
  - **Consumer Relations Consortium:**
    - The 76-page letter expressed similar concerns to those articulated by ACA International.
    - The letter proposed:
      - A safe harbor for reasonable processing times for consumer requests.
      - A creditor “Right to cure” that mirrors California’s Rosenthal Fair Debt Collection Practices Act.
      - Changes to the form of validation notice, including flexibility on formatting and alternative safe harbor text blocks.

## Recent CFPB Regulations

- **Debt Collection Rule (Regulation F)- Consumer Advocate Responses and Criticism**
  - **Comments submitted by consumer advocacy groups including state attorneys general, legal aid organization and the National Consumer Law Center.**
  - **Advocates claims the proposal will protect debt collectors at the expense of consumers.**
  - **Joint Letter from Consumer Advocates urged the Bureau to:**
    - Impose stricter limits on telephone calls, clarify that consumers can simply say “stop calling,” and prohibit messages left with employers or other third parties.
    - Prohibit emails, texts or direct messages without people’s consent, allow consumers to simply reply “stop,” and prohibit use of hyperlinks to deliver notices.
    - Eliminate any “safe harbor” for collection attorneys who make false, deceptive or misleading representations and require them to review original account documents before filing lawsuits.
    - Prohibit debt collectors from threatening or filing lawsuits after the legal deadline, and also from other efforts to collect time-barred debt, which is too old to collect without mistakes or deception.
    - Improve the model validation notice.
    - Improve the ban on “parking” debts on credit reports by requiring notice by mail unless the consumer consents to electronic communication, and extend the ban on sale of certain debts to include time-barred and disputed debts as well.

## Recent CFPB Regulations

- **Mortgage Rules/ Qualified Mortgage (“QM”) Patch**
  - Generally, Regulation Z requires creditors to make a reasonable, good faith determination of a consumer’s ability to repay any residential mortgage loan and that all mortgage borrowers have a debt-to-income ratio of below 43 percent (“ATR/QM Rule”).
  - Loans that meet Regulation Z’s requirements for QMs obtain certain protections from ATR/QM Rule liability.
  - The so-called “QM Patch” temporarily extends QM protections to loans eligible for purchase or guarantee by Fannie Mae or Freddie Mac a (“GSE QM Loans”).
  - The QM Patch is scheduled to expire no later than January 10, 2021.
  - CFPB plans to allow the temporary QM Patch to expire in January 2021 or after a short extension, if necessary, to facilitate a smooth and orderly transition away from the GSE QM Loan category.
  - CFPB is considering whether to propose revisions to Regulation Z’s general QM definition in light of the upcoming expiration and has issued an ANPRM to request information about possible revisions.

## CFPB Enforcement Authority

- Includes the authority to—
  - Issue Civil Investigative Demands (“CIDs”)
  - Initiate civil litigation without permission (except the Supreme Court)
  - Commence administrative proceedings
    - Decided by the Director
  - Enforce FTC regulations defining unfair/deceptive practices
  - Impose civil money penalties—up to \$1 million per day (adjusted for inflation)
  - Impose broad remedial measures—
    - Rescission or reformation of contracts
    - Refund of moneys
    - Restitution
    - Disgorgement of profits
    - Compensation for unjust enrichment, and
    - Recovery of other damages

## Interpretative Guidance—October 9, 2010

- The White House has issued two Executive Orders
- Agency Guidance Documents
  - An agency must—
    - Publish its guidance on the internet
    - Review its guidance and rescind guidance that should no longer be effective
    - Finalize regulations for issuing guidance
    - Follow additional procedures before issuing a significant guidance document—including, among other things, notice and comment and approval from a senior agency official
- Transparency and Fairness in Civil Administrative Enforcement
  - An agency may not use guidance documents to impose new standards of conduct
  - An agency may only enforce standards that are public and would not cause unfair surprise
  - An agency must—
    - Publish in the Federal Register any claim of new or expanded jurisdiction
    - Provide an opportunity to be heard before taking enforcement action
    - Propose procedures for encouraging voluntary self-reporting by regulated parties in exchange for penalty reductions
    - Adhere to standards set out in the Paperwork Reduction Act when they ask regulated parties for information without issuing a formal administrative subpoena or civil investigative demand

## CID Policy

- On April 23, 2019, the CFPB announced that it was amending its CID policy
- Each CID “shall state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation.”
- Provide more info about the potentially applicable provisions of law that may have been violated
- Specify the business activities subject to CFPB’s authority
- In investigations where determining extent of CFPB’s authority over relevant activity is one of the significant purposes of the investigation, that issue should be identified
- The CFPB has yet to publish the amended policy...

## Enforcement 2019

- USAA Federal Savings Bank—January 3, 2019
  - Violations of stop payment requests for EFTs and error resolution procedures
  - \$12 million in restitution
  - \$3.5 million CMP to the CFPB
- Sterling Jewelers—January 16, 2019
  - Opening of unauthorized credit card accounts and imposition of insurance
  - \$10 million CMP to the CFPB
  - \$1 million CMP to the State of New York
- Mark Corbett—January 23, 2019
  - Violation of veterans’ contract rights
  - \$1 CMP
- Enova International, Inc., January 25, 2019
  - Unauthorized debiting of consumers’ bank accounts and failure of honor loan modifications
  - \$3.2 million CMP to the CFPB

## Enforcement 2019

- NDG Finance Corp, *et al.*—February 1, 2019
  - Proposed settlement with foreign-based payday lending entities
    - Banned from conducting business in the U.S.
    - No CMPs
- Cash Tyme—February 5, 2019
  - Settlement with payday lender for UDAAP violations
    - Prohibited from debiting consumers' bank accounts without authorization
  - \$100,000 CMP to the CFPB
- Conduent Educational Services, Inc., May 1, 2019
  - Ordered to adjust student loan balances
  - \$3.9 million CMP to the CFPB
- PGX Holdings, Inc.—May 2, 2019
  - Lawsuit filed alleging violations of the Telemarketing Sales Rule
- Forster & Garbus, LLP—May 17, 2019
  - Lawsuit filed against a debt collections law firm for UDAAP violations

## Enforcement 2019

- Servis One, Inc.—May 29, 2019
  - Settlement for mortgage loan servicing violations
  - \$200,000 CMP to the CFPB
  - Restitution in the amount of \$36,500
- Freedom Mortgage Corporation—June 5, 2019
  - Settlement for inaccurate HMDA and Regulation C reporting
  - \$1.75 million CMP to the CFPB
- Student CU Connect CUSO, LLC—June 14, 2019
  - Settlement with loan servicer that assisted ITT Educational Services
  - Ordered \$165 million in student loan forgiveness

## Enforcement 2019

- Equifax, Inc.—July 22, 2019
  - National settlement for UDAAP violations for data breach affecting 147 million customers
  - \$425 million for credit monitoring and damages to consumers
  - \$100 Million CMP to the CFPB
- ITT Educational Services—August 12, 2019
  - Settlement and injunction against the origination of additional student loans
  - \$60 million judgment (questionable collectability in bankruptcy proceeding)
- Andrew Gamber, *et al.*—August 14, 2019
  - Settlement with brokers of high-interest loans to veterans and other consumers
    - Bans defendants from the industry
  - \$2.7 million in restitution
  - \$1 CMP
  - \$75,000 CMP to the State of Arkansas

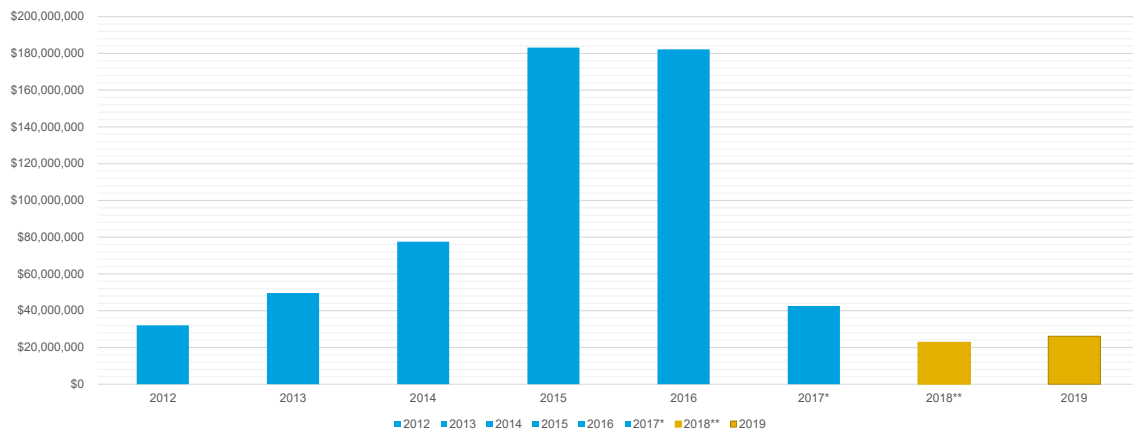
## Enforcement 2019

- Maxitransfers Corporation—August 27, 2019
  - Settlement with provider of remittance transfer services for violations of the EFTA
  - \$500,000 CMP to the CFPB
- Asset Recovery Associates, Inc.—August 28, 2019
  - Settlement with debt collection company for UDAAP violations
  - \$200,000 CMP to the CFPB
  - Restitution in the amount of \$36,800
- Certified Forensic Auditors, LLC—September 6, 2019
  - Settlement for UDAAP violations relating to the sale of financial advisory services and mortgage assistance relief to consumers
  - \$493,000 CMP to the CFPB
    - Only \$5,000 agreed to be collected

## Enforcement 2019

- FCO Holdings, Inc., *et al.*—September 25, 2019
  - Lawsuit filed alleging FCRA and Regulation V violations
- Katharine Snyder, Performance Arbitration Company, *et al.*—October 1, 2019
  - Lawsuit filed alleging UDAAP violations for brokering high-interest loans to veterans and other consumers
- Consumer Advocacy Center—October 30, 2019
  - Lawsuit filed seeking temporary and permanent injunction against debt relief company for UDAAP violations

CFPB Enforcement: Penalty Collections by Year

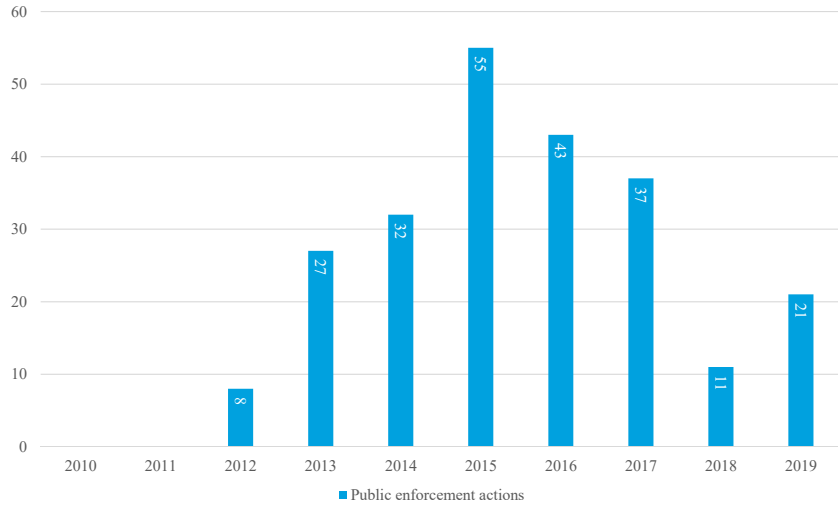


\* Former Director Richard Cordray officially stepped down on November 24, 2017.

\*\* Excludes record-breaking \$1 billion mortgage and auto penalty against Wells Fargo (subsequently reduced to \$500,000,000).

Data Source: Consumer Financial Protection Bureau

Public CFPB Enforcement Cases and Total CFPB Employees by Year, 2010-2019.

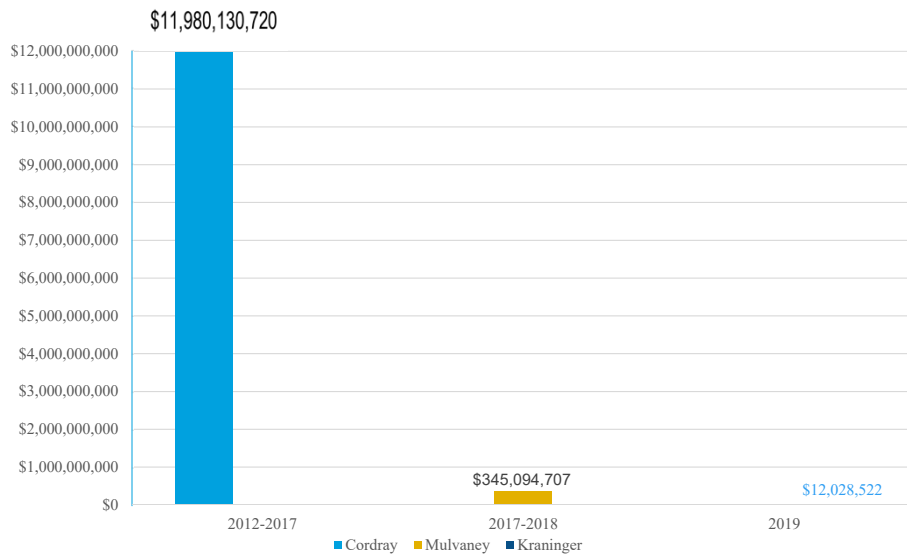


Source: Consumer Federation of America (March 2019)



ROUNDTABLE—NOVEMBER 2019

Total Consumer Relief Line Chart



Source: Consumer Federation of America (March 2019)



ROUNDTABLE—NOVEMBER 2019



## Is the CFPB Constitutional?

- On October 18th, 2019, the Supreme Court granted certiorari to determine whether the CFPB complies with constitutional requirements for single-person executive agencies
  - *Seila Law LLC v. Consumer Financial Protection Bureau*, 923 F.3d 680 (9<sup>th</sup> Cir. 2019)
- Questions presented—
  - Whether the vesting of substantial executive authority in the CFPB, an independent agency led by a single director, violates the separation of powers
  - If the CFPB is found to be unconstitutional on the basis of separation of powers, can 12 U.S.C §5491(c)(3) be severed from the Dodd-Frank Act?
- The DOJ has taken the position that the CFPB is unconstitutional
  - Director Kraninger has agreed with the DOJ that the CFPB is unconstitutionally structured
  - Paul D. Clement has been requested, as amicus curiae, to support the 9<sup>th</sup> Circuit's decision

## Independent Agencies

- *Humphrey's Executor v. United States*, 295 U.S. 602 (1935)
  - FTC commissioner fired by FDR for his policies
    - Humphrey contested the removal
    - He died and his estate's representative continued the case to obtain back pay
    - The Roosevelt Administration challenged the constitutionality of independent multi-commissioner agencies
  - The Supreme Court held that Congress could create independent agencies without violating Article II's executive authority
    - The Court held that multi-commissioner agencies are appropriate because they are "non-partisan" and made up of "a body of experts appointed by law and trained by experience"

## Nerdy Constitutional Fun

- *PHH v. CFPB*—the *en banc* review
  - Upheld the constitutionality of the CFPB
  - CFPB's RESPA claims and penalties reversed
- *CFPB and New York v. RD Legal Funding, LLC*, 332 F. Supp. 3<sup>rd</sup> 729 (S.D.N.Y.)
  - Struck down the CFPB as being unconstitutionally defective
  - Severability not available
- *CFPB v. All American Check Cashing, Inc.*, 2018 U.S. District LEXIS 131595
  - Oral argument held and pending appellate decision
- *Collins v. Mnuchin*, 2019 U.S. App LEXIS 27001 (Sept 6, 2019)
  - FHFA found to be unconstitutional
  - CFPB distinguished

## Three Cases to Watch

- *Humphrey's Executor v. U.S.*, 295 U.S. 602 (1935)
- *Morrison v. Olsen*, 487 U.S. 654 (1988)
- *Free Enterprise Fund, v. Public Accounting Oversight Board*, 561 U.S. 477 (2010)

## Speakers



### Joseph T. Lynyak III, Dorsey & Whitney LLP

Joe Lynyak is a financial services partner in Dorsey & Whitney's Financial Services Practice. Focusing his practice on the regulation and operation of financial service intermediaries, he provides counsel on strategic planning, application and licensing, legislative strategy, commercial and consumer lending, examination, supervision and enforcement and general corporate matters. He has extensive expertise across a comprehensive range of issues before federal and state regulatory agencies such as the Federal Reserve Board, OCC, FDIC, NCUA, CFPB, SEC, FTC and California and New York Banking Departments. Mr. Lynyak's representative clients include foreign and domestic banks, savings associations, credit unions, holding companies and mortgage banking companies. He can be contacted via email at [Lynyak.joseph@Dorsey.com](mailto:Lynyak.joseph@Dorsey.com) or at 310.386.5554.

## Speakers



### Steven J. Wells, Dorsey & Whitney LLP

Steve Wells is a partner in Dorsey & Whitney's Trial Group. For over thirty years, Steve has tried business cases and argued appeals in courtrooms across the nation. He works with clients to resolve disputes early by thoroughly investigating the facts and the law, identifying key issues, and collaborating closely with clients to understand their business goals. Steve understands that, often, winning at all costs is not winning at all. But when push comes to shove, Steve advocates persuasively for his clients from trial level courts to the highest court in the land – as his track record of trial and appellate wins reflects. He can be contacted via email at [wells.steve@dorsey.com](mailto:wells.steve@dorsey.com) or at (612) 340-7809.

## Speakers



### Erin Bryan, Dorsey & Whitney LLP

Erin Bryan is a financial services attorney in Dorsey & Whitney's Financial Services Practice. Erin's practice consists of regulatory, compliance, default, and bankruptcy matters. She is a member of the Firm's Banking & Financial Institutions Group and its Consumer Financial Services Group, among others. She advises clients on the Bank Secrecy Act (and other anti-money laundering provisions), collections, consumer lending, credit reporting, default servicing, the Dodd-Frank Act, electronic banking, government examination/supervision, licensure, mortgage (origination, servicing, and warehouse lending), privacy, product development, and technology. She can be contacted via email at [Bryan.Erin@Dorsey.com](mailto:Bryan.Erin@Dorsey.com) or at 612.492.6931.

## Questions?