Identity Crisis: Companies in CFPB Crosshairs Seize on the Mulvaney Moment

A tumultuous transition of power at the CFPB spurs different strategies by companies jockeying for attention.

By C. Ryan Barber | UPDATED Jan 05, 2018 at 06:38 AM

By the Sunday after Thanksgiving, Helen Mac Murray, a financial services lawyer in Ohio, had already started drafting a letter to the Consumer Financial Protection Bureau. It had been a tumultuous holiday weekend. The resignation of the agency’s director, Richard Cordray, spurred competing claims for the agency’s acting directorship and a lawsuit over the leadership. On his way out the door, Cordray elevated his chief of staff, Leandra English, to the role of deputy director. Within hours of the announcement of Cordray’s departure, the Trump administration named White House budget director Mick Mulvaney as the agency’s acting chief.

In the appointment of Mulvaney—a former Republican congressman who had once called the CFPB a “joke”—Mac Murray saw an opportunity. A federal judge in San Francisco had just weeks earlier ordered her client Nationwide Biweekly Administration Inc. to pay a nearly $8 million civil penalty for deceptive marketing practices related to a mortgage repayment program. In one respect, the judgment against was a victory, Mac Murray said. The judge, Richard Seeborg, refused to approve the $74 million in restitution that CFPB enforcement lawyers wanted. And, although Seeborg imposed an injunction
barring Nationwide Biweekly Administration from making certain statements he found misleading, the court order left room for the company to resume operations and, in time, pay the civil penalty.

To buy her client time, Murray asked for the judge to stay the civil penalty judgment “pending posttrial motions.”

The CFPB’s response was due on Mulvaney’s first day. That Monday, hours after Mulvaney strolled into the agency’s headquarters with a sack of doughnuts in hand, CFPB enforcement attorneys argued that the stay should not be granted without Nationwide Biweekly Association posting a bond. Mac Murray saw the move as an “end run” around Mulvaney. The next day, she overnighted a letter—addressed to “Acting Director Mick Mulvaney”—alerting him to the enforcement office’s move. Mac Murray said she did not receive a direct reply, but the next day, the CFPB enforcement team withdrew its earlier filing and said it took “no position” on the posting of a bond.

“It just proved the pure vengeance of the bureau, for them to sneak in the objection on Monday, hoping the boss wasn’t looking,” Mac Murray told The National Law Journal. “It showed the vengeance that was there.”

A CFPB spokesman declined to comment.

For the First Time, a Transition of Power
Mac Murray’s overture was likely just the first of many to come as the CFPB—long vilified by Republicans in Congress and business advocates—transitions these next few months under new leadership for the first time since its creation in 2011. Cordray had been the agency’s first Senate-confirmed leader.

Indeed, in the immediate aftermath of Mulvaney taking the helm at the CFPB, companies in the agency’s crosshairs were plotting their own strategies for seizing on the transition of power to slam the door on investigations or escape ongoing litigation altogether, according to several defense attorneys in the consumer finance sector.

Those defense lawyers, many of whom spoke on the condition of anonymity to avoid compromising matters they have before the agency, described a range of strategies for drawing Mulvaney’s attention. For instance, companies in open litigation with the CFPB could file motions that require a response from the agency that might come under Mulvaney’s review or whomever is confirmed as the agency’s new director. The strategy, as one lawyer said, would be “to do anything that would force the hand of the agency, to find some way of putting the agency in the position to address the case—essentially require the CFPB to act.”

Many lawyers expect to see an increase in the number of formal challenges to agency subpoenas—known in CFPB parlance as “petitions to modify or set aside” civil investigative demands—that trigger an administrative appeal adjudicated by the agency director.

Under Cordray’s tenure, many defense lawyers considered filing such an appeal to be a fool’s errand, as the challenges were consistently struck down and resulted in an earlier disclosure of the CFPB probe. But under Mulvaney and whomever is confirmed as the permanent director, defense lawyers expect to have a more sympathetic ear in those appeals.
For financial industry lobbyists, the standoff has fueled renewed consideration of transforming the agency into a multimember commission akin to the Securities Exchange Commission and Federal Trade Commission. The CFPB’s most vocal critic on Capitol Hill, House Financial Services Committee Chairman Jeb Hensarling, has called for such a change in the past, but last session proposed legislation that would enable the president to easily remove the agency’s director.

“If the CFPB were structured as a bipartisan commission, as originally intended, we could have avoided [this] circus,” said Richard Hunt, president of the Consumer Bankers Association. Mulvaney was settling in as the CFPB’s acting director in December. Meanwhile, the Trump administration was moving to nominate a permanent replacement.

On his first day, Mulvaney imposed a 30-day freeze on new hiring and regulations and said he would be briefed on the agency’s “100 or so” open cases. Noting the fact that the CFPB, in November, was going through its first significant transition of power, Mulvaney said it would be “naive” to think the agency would operate under the Trump administration as it did under President Barack Obama.

“I’m a member of the executive branch of government, we intend to execute the laws of the United States, including the provisions of Dodd-Frank that govern the CFPB. That being said, the way we go about it, the way we interpret it, the way we enforce it will be dramatically different under the current administration than it was under the last,” he said.

Mulvaney said he planned to split his time evenly between the CFPB and his corner of the Trump administration—the Office of Management and Budget—spending three days a week at each. During Mulvaney’s first week, a Trump-appointed federal judge declined to grant a temporary restraining order blocking his appointment, finding that the Federal Vacancies Reform Act allowed the administration to name an acting director. The CFPB’s general counsel, Mary McLeod, took the same stance in a memo released over the Thanksgiving week. That memo put the agency’s top lawyer at odds with English, who with the backing of Democratic lawmakers argued that the Dodd-Frank Act laid out a clear succession plan in which the deputy director would step in to lead the agency in the “absence or unavailability” of the director.

In a ruling from the bench, U.S. District Judge Timothy Kelly said, “On its face, the [Federal] Vacancies Reform Act does appear to apply to this situation.” He added that the text of the law “does not say that VRA would not be available in this situation.”

English renewed her legal challenge the following week with a request for a preliminary injunction blocking Mulvaney’s appointment. Kelly has not yet reached a decision on the injunction.

English’s efforts have already brought about one result: A raised profile for the CFPB that will likely bring closer attention to the changes under the new regime.

On the first day of the agency’s post-Cordray era, the celebrity chef Jose Andres seemed to think the staff at the agency could use a drink. With Thanksgiving in mind, English welcomed staff back from the holiday weekend with an email thanking them for their service. In an email of his own, Mulvaney told them to “disregard any instructions you receive from Ms. English in her presumed capacity as acting director.”
So a couple minutes after 3:15 p.m., with happy hour bearing down on Washington, Andres offered CFPB officials a first beer or glass of wine—or perhaps something stronger—on the house.

“@CFPB team members! i know [it’s] confusing,” Andres tweeted. “To have two bosses? Please bring a proof you work there to any of our DC restaurants and first drink is on us.”

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