Expert Analysis

After Trump's Policy Purges, Who Speaks For The Victims?

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The carnage continues in Washington, D.C., and it shows no signs of letting up. President Donald Trump intends to ask Congress to make changes to drastically weaken the influence and independence of the U.S. Consumer Financial Protection Bureau.

In his 2019 budget plan released in February, Trump proposed cutting the bureau's budget and restricting its enforcement powers "to prevent actions that unduly burden the financial industry and limit consumer choice." The bureau's five-year strategic-vision statement echoed the administration's goal, describing the bureau's intention to begin acting with "humility and moderation" — it seems toward cheaters.

In 2017, the CFPB distributed $261.9 million from its civil penalty fund to 232,000 victimized consumers. Since the fund began making disbursements in 2013, it has paid $12 billion to more than 29 million consumers.

But never mind that. In his semiannual report to Congress, former Republican congressman and CFPB interim director Mick Mulvaney — the person who once compared government regulations to a "slow cancer," called the very bureau he's running a "sad, sick joke" and even sponsored legislation to kill the CFPB — recently asked lawmakers to restructure the

bureau to give Congress control over its budget and to require congressional approval for any new major rules. He also asked Congress to provide the president with more power over the bureau's director.

These requests mark a significant shift for the CFPB, which was designed to operate free from political influence, receiving its funding from the Federal Reserve instead of Congress. These changes would undercut the bureau's independence and ability to craft new rules to protect consumers and would place the bureau on a short political leash firmly under congressional and White House control.

Since he took over as interim director, Mulvaney has systematically worked to shut down the CFPB and to curb its influence. According to the Washington Post, he has delayed implementing key regulations and has imposed fewer penalties against financial institutions and other corporations accused of wrongdoing. CFPB enforcement actions have plummeted from an average of three to five each month during the past four years to zero since Mulvaney took charge in November.

But the destruction doesn't stop there. Since Trump named Mulvaney acting CFPB chief (over the objection of Leandra English, the bureau's former deputy director, who under the Dodd-Frank Act was allowed to serve as its acting director "in the absence or unavailability of the Director," but whose request for an injunction against Mulvaney's appointment was denied by a Trump-appointed D.C. federal judge — which denial is now on appeal to the D.C. Circuit), Mulvaney has suspended disbursements from its civil penalty fund. Though the freeze was supposed to run only through last December, it's unclear whether the CFPB has lifted it.

Remarkably, the CFPB has requested no funding from the Federal Reserve for the second quarter. Mulvaney points to a surplus that he intends to spend down — a surplus that former director Richard Cordray maintained to cover unexpected costs.

Mulvaney has also declined to implement a rule intended to rein in notorious payday lenders. (See my Feb. 2, 2018, Law360 column, CFPB's Payday Loan Protections Protect Big Business Too.) This rule was designed to ensure that borrowers could actually afford the high-interest loans that often bury them beneath mounds of unexpected and unaffordable debt.

Since January, the bureau has been issuing requests for information to evaluate various bureau functions. Recent requests concern assessing the bureau's judicial process — including examining how the bureau demands information from companies it's investigating — and its enforcement process. The goal, claims the bureau, is "to improve outcomes for both consumers and covered entities."

In February, the bureau moved the Office of Fair Lending and Equal Opportunity — the group tasked with pursuing cases against financial institutions accused of discrimination — out of its supervision and enforcement division to the director's office. There, the bureau will shift this group's focus from enforcement to education, coordination and advocacy — whatever that means.

But the hazard doesn't stop with the CFPB. Trump's directive to delay key regulations and to impose fewer penalties against wrongdoers — thus victimizing consumers, compromising well-behaving companies and enabling cheaters — infects his regime more broadly.

For instance, the U.S. Department of Labor has backed off enforcing an Obama-era rule intended to protect retirement savers. The rule would require investment advisers and brokers to put their clients' interests before their own when advising them on retirement accounts such as 401(k)s and IRAs. According to a 2015 study from former President Barack Obama's Council of Economic Advisers, conflicted investment advisers' advice costs consumers about $17 billion in retirement earnings each year. For the Labor Department's part, a spokesperson simply remarked, "Pending further review, the [Labor Department] will not be enforcing the 2016 fiduciary rule."

And the U.S. Department of Education has walked back Obama-era regulations intended to strengthen protections for student borrowers. Along with curtailing over 600 policy documents, this rollback includes eliminating guidance directing schools to allow transgender children to use bathrooms that align with their gender identity and 72 policy documents outlining the rights of students with disabilities. The department has also delayed forgiving loans to students victimized by crooked not-for-profit colleges.

Even the U.S. Consumer Product Safety Commission is getting in on the act. Its new acting chairperson Ann Marie Buerkle routinely votes against civil penalties for companies that fail to report product safety problems promptly. According to the Washington Post, of the 21 settlement votes during her five years as a CPSC commissioner, she rejected 16. "We

should not be hoping for multimillion-dollar penalties," Buerkle wrote before assuming control, "[w]e should be hoping for zero penalties." Lost on her is that enforcement leads to compliance.

As expected, the administration has extolled its efforts. "For too long, the guise of consumer protection has been used to benefit trial lawyers, government bureaucracies and ambitious politicians looking for the next job," proclaimed Lindsay Walters, deputy White House press secretary. "The Trump administration has put the focus of consumer protection back where it belongs: on protecting consumers and enabling them to make better decisions for themselves."

As another pat on his back, Trump declared March 4 National Consumer Protection Week, claiming it as "an opportunity for Americans to learn about their consumer rights." Seriously? I hadn't heard about this faux-occasion till I researched and wrote this essay — and I do consumer-protection work.

So what does all this mean for consumers and well-behaving companies who respect enforcement and appreciate efforts to maintain a level playing field? Who's there to fill this enforcement void — a void that encourages mischief and cheating by companies bent on taking advantage of Trump's unpoliced wasteland?

Enforcement mechanisms that had formerly existed in the federal realm need now shift to the state domain, meaning state attorneys general. Ironically, even a CFPB spokesperson said that the bureau was looking "for a lot more leadership when it comes to enforcement."

States whose attorneys general have long and active reputations for financial enforcement, including California, Colorado, Illinois, Massachusetts, New Jersey, New York, Pennsylvania, Virginia and Washington, have responded to the bureau's challenge. For instance, Massachusetts Attorney General Maura Healey has headed up states' efforts to investigate Equifax Inc.'s data breach.

Virginia Attorney General Mark Herring has created a team to focus on predatory lending and has filed several cases against payday lenders. "We have worked cooperatively with the CFPB in the past," Herring said, "but, unfortunately, [Mulvaney] is going in the opposite direction and even dropping cases that we previously approved. We will be filling the void if the CFPB continues to abdicate its responsibility."

Pennsylvania Attorney General Josh Shapiro even established a consumer financial protection bureau within his office and sued Navient Corp. for widespread abuses and deceptive acts involving its student loans. He is also investigating several Philadelphia financial institutions for racial discrimination related to mortgage lending.

Four states and the District of Columbia have passed legislation establishing requirements and standards on servicing and collecting student loans, while a dozen other states have proposed similar legislation. In the face of all this, and despite the Department of Education's rollbacks, DOE has issued a statement insisting that the department — not the states — has jurisdiction over student-loan servicing. Sheesh!

But states are strapped. They have only so many resources. And with competing priorities, such as the opioid crisis, consumers and well-behaving companies can't and shouldn't need to count exclusively on their states' attorneys general to reign in cheaters. The private bar — plaintiffs and defense attorneys together — suitably fills the gap.

No reason exists to malign the plaintiffs bar for committing its time and resources — at serious personal risk — to enforce the law for victimized consumers and to promote marketplace fairness and integrity for well-behaving companies. And defense lawyers have an ongoing duty to counsel their clients against overreaching and cheating their customers.

Attorneys general and the private bar are a natural combination for righting wrongs, helping people and protecting businesses. Though these days their work is certainly cut out, they've always come through for their clients and for victims. And despite the capricious season, I'm confident that they will continue to do so.

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