

Developments at the Bureau of Consumer Financial Protection in the Mulvaney Era

Acting Director Mick Mulvaney is making significant changes at the Bureau of Consumer Financial Protection. The authors describe these changes, beginning with the pending litigation over his appointment and President Trump's nomination of a new permanent Director. They then turn to Mulvaney's statements detailing his vision and themes for the Bureau, and developments in regulations and rule-making. They conclude with a description of recent enforcement actions and Mulvaney's informal guidance on future supervisory activities.

By Gerald S. Sachs and Joseph L. Robbins*

Since Richard Cordray's resignation as the first Director of the Bureau of Consumer Financial Protection (the "Bureau")¹ in November of 2017, the Bureau's mission statement and strategic plan or priorities have been revised to come more in-line with President Trump's deregulatory agenda. While a determination as to whom the rightful Acting Director succeeding Former Director Cordray is still playing out in federal court, President Trump's appointed Acting Director has been steadily in command of the Bureau with no sign of his tenure there ending anytime soon, except for the appointment of a permanent director, which is discussed below. This article summarizes the issue relating to the Director's succession and some of the significant changes currently taking place at the Bureau—from requests to information to rewrite regulations to enforcement and supervisory actions.

THE BUREAU'S ACTING DIRECTOR

On Friday, November 24, 2017, Former Director Cordray resigned and appointed then-Bureau Chief of Staff, Leandra English, to serve as Deputy Director.² This position had been vacant or filled on an acting basis for the approximately previous 18 months. Later the same day, the President appointed Mick Mulvaney, the Director of the Office of Management and Budget (OMB) and a former U.S. Congressman from South Carolina, to serve as Acting Director of the Bureau (he still serves in dual roles).³ The weekend after these appointments, the Bureau's General Counsel, Mary McLeod, issued a legal memorandum "advis[ing] all Bureau personnel to act consistently with the

* GERALD S. SACHS is a partner and JOSEPH L. ROBBINS is an associate in Venable LLP's Consumer Financial Services practice group and Washington, D.C. office. Their email addresses are gsachs@venable.com and jlrobbins@venable.com. These views are their own and do not necessarily represent those of Venable LLP or its clients.

¹ The Bureau now sometimes uses the acronym "BCFP" to refer to itself, instead of "CFPB." For simplicity, we use "the Bureau."

² Letter from Richard Cordray, CFPB Director (Nov. 24, 2017), available at <https://www.politico.com/f/?id=0000015f-efff-d90d-a37f-ffff72670000>.

³ White House, Statement on President Donald J. Trump's Designation of OMB Director Mick Mulvaney as Acting Director of the CFPB (Nov. 24, 2017), <https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trumps-designation-omb-director-mick-mulvaney-acting-director-consumer-financial-protection-bureau/>.

understanding that Director Mulvaney is the Acting Director of the [Bureau]."⁴ The following Sunday evening, Ms. English filed a lawsuit in D.C. federal district court seeking to stop Mr. Mulvaney's appointment and a declaration that she is the proper Acting Director.⁵

Ms. English's lawsuit mainly asserts that the later-enacted and more specific Dodd-Frank Act, which states that the "Deputy Director . . . shall serve as acting Director in the absence of or unavailability of the Director," conflicts with and, therefore, displaces the Federal Vacancies Reform Act of 1998 (FVRA). The FVRA allows the President to "direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity"⁶

United States District Court Judge Timothy Kelly denied the request for injunctive relief and has found that there is no conflict between the Dodd-Frank Act and the FVRA. He held that the FVRA merely provides an alternative procedure for temporarily filling the office that the President may use and can be read compatibly with the Dodd-Frank Act.⁷

Ms. English appealed this ruling to the United States Court of Appeals for the District of Columbia Circuit, which granted expedited review of the matter.⁸ A panel of three judges heard oral argument on April 12, 2018.⁹ Proceedings in the lower court have been stayed pending the appeal. There is very little doubt that after the D.C. Circuit rules, one of the parties will file a petition for rehearing *en banc* and/or an appeal to the United States Supreme Court. That said, the need for this litigation would become moot if the U.S. Senate confirms a new permanent Director nominated by the President.

On June 18, 2018, President Trump announced his intent to nominate Kathleen Kraninger to be the Bureau's next permanent Director with a five-year term.¹⁰ Ms. Kraninger currently works with Acting Director Mulvaney as OMB's Associate Director for General Government.¹¹ Previously, she worked for the Department of Homeland Security and the U.S. House and Senate appropriations committees.¹² If nominated, while the Senate considers her nomination,

⁴ Memorandum from CFPB General Counsel Mary E. McLeod (Nov. 25, 2017), *available at* <https://www.politico.com/f/?id=0000015f-fbe7-d90d-a37f-fff74f280000>.

⁵ *English v. Trump*, Case No. 1:17-cv-02534-TJK (D.D.C.) (filed Nov. 26, 2017).

⁶ 12 U.S.C. § 5491(b)(5)(B); 5 U.S.C. §§ 3345(a), 3347.

⁷ *English v. Trump*, 279 F. Supp. 3d 307, 311-312, 314, 335, Case No. 17-2534 (D.D.C. 2018).

⁸ Order, *English v. Trump*, Case No. 18-5007, Dkt. No. 1714212 (D.C. Cir. Jan. 23, 2018).

⁹ The argument was heard by Judges Judith Rogers, Thomas Griffith, and Patricia Millet.

¹⁰ White House, President Donald J. Trump Announces Intent to Nominate and Appoint Personnel to Key Administration Posts (June 18, 2018), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-appoint-personnel-key-administration-posts-11/>.

¹¹ *Id.*

¹² *Id.*

the FVRA allows Acting Director Mulvaney to remain as the Bureau's Acting Director.¹³ If Ms. Kraninger is not confirmed, the FVRA 210-day limit on Mulvaney's tenure as Acting Director would start anew.¹⁴ Further, Mulvaney can remain Acting Director while the Senate considers a second nomination, and then for 210 more days thereafter if the second nominee is not confirmed.¹⁵ Thus, Acting Director Mulvaney, potentially, can remain as the Acting Director of the Bureau into mid-2020.¹⁶

NEW DIRECTION OF THE BUREAU

Shortly after Mulvaney's appointment as Bureau Acting Director, he issued an email to staff detailing his vision and themes for how the Bureau should be led.¹⁷ He also took one additional step to be transparent about his views toward the direction of the Bureau and released an updated strategic plan.

First, Mulvaney declared in the email that the Bureau will exercise its statutory authority, but "go no further" and will not "'push the envelope' in pursuit of the 'mission.'" Mulvaney urged that, as government employees, the Bureau works for "everyone" including consumer finance businesses and their employees, not just consumers. He added that "bringing the full weight of the federal government down on the necks of the people we serve should be something that we do only reluctantly, and only when all other attempts at resolution have failed. It should be the most final of last resorts."

Second, he stated that "the people we regulate should have the right to know what the rules are before being charged with breaking them. This means more formal rulemaking on which financial institutions can rely, and less regulation by enforcement."

Third, Mulvaney indicated that the Bureau would be guided more heavily by quantitative data in the Bureau's prioritizing and decision-making (compared to qualitative factors). In apparent reference to the prepaid card and payday lending rulemakings, he noted that "[i]n 2016, almost a third of the complaints into this office related to debt collection," whereas "[o]nly 0.9% related to prepaid cards and 2% to payday lending." He also pointed to the Bureau's statutory duty to "consider the potential costs and benefits to consumers and covered persons." Mulvaney

¹³ 5 U.S.C. § 3346(a)(2).

¹⁴ *Id.* § 3346(b)(1).

¹⁵ *Id.* §§ 3346(b)(2)(A)-(B).

¹⁶ The Bureau's constitutionality as an independent agency is somewhat settled and unsettled. On January 31, 2018, the D.C. Circuit sitting *en banc* upheld the constitutionality of the Bureau's structure with a single Director who can only be fired for cause, and the deadline to appeal that decision in the U.S. Supreme Court passed without any appeal being filed. *PHH Corp. v. CFPB*, 881 F.3d 75, 76-77 (D.C. Cir. 2018). Despite that, a New York federal judge ruled the Bureau entirely unconstitutional on June 21, 2018. *CFPB v. RD Legal Funding LLC, et al.*, Case No. 17-0890, Dkt. No. 80 at 99-104 (S.D.N.Y. June 21, 2018). There is, also, another case challenging the Bureau's constitutionality pending before the Ninth Circuit, for which oral argument may occur in late 2018. See, e.g., *CFPB v. D and D Marketing, Inc., d/b/a T3Leads, et al.*, Case No. 17-55709, Dkt. No. 38 at 16-39 (9th Cir. Feb. 7, 2018) (defendants-appellants' consolidated opening brief); *id.*, Dkt. Nos. 46, 52, 56-59.

¹⁷ E-Mail from Mick Mulvaney (Jan. 23, 2018), available at <https://bankingjournal.aba.com/wp-content/uploads/2018/01/Mulvaney-Memo.pdf>. The email was also published as an Op-Ed in the Wall Street Journal, Mulvaney, Op-Ed., *The CFPB Has Pushed Its Last Envelope*, WALL ST. J., Jan. 23, 2018.

concluded the email by inviting everyone at the Bureau to join his effort to "redefine the way we serve the American people at the Bureau."

About three weeks after releasing his email to staff, Mulvaney released the Bureau's Strategic Plan for FY 2018 – 2022 incorporating these principles and outlining further objectives and goals.¹⁸ It differs from the prior Strategic Plan issued by Former Director Cordray in various respects. Whereas Mr. Cordray's "Vision" statement included a focus on stopping "unfair, deceptive, or abusive practices" or UDAAP,¹⁹ the current "Vision" statement does not include that language and reads as follows:

Free, innovative, competitive, and transparent consumer finance markets where the rights of all parties are protected by the rule of law and where consumers are free to choose the products and services that best fit their individual needs.²⁰

The Strategic Plan's section titled "How we will do our work" states that "[t]he Bureau will achieve its mission and vision through:

- seeking the counsel of others and making decisions after carefully considering the evidence;
- equally protecting the legal rights of all;
- confidently doing what is right; and
- acting with humility and moderation."²¹

Using these principles, the Bureau intends to pursue three "strategic goals" over the next five years.²²

Goal 1: "Ensure that all consumers have access to markets for consumer financial products and services."

This goal focuses on consumer education, a streamlined regulatory environment, and a transparent and efficient financial marketplace. A key element of the goal emphasizes the cost-benefit balance of regulations, as well as efforts to ensure that industry participants are adequately equipped with resources for implementing and complying with applicable laws and regulations. The Bureau will also "[e]ngage in rulemaking where appropriate to address unwarranted regulatory burdens."²³

Goal 2: "Implement and enforce the law consistently to ensure that markets for consumer financial products and services are fair, transparent, and competitive." While not in the "Vision" statement, the Bureau includes as

¹⁸ CFPB, BUREAU OF CONSUMER FINANCIAL PROTECTION STRATEGIC PLAN FY 2018 – 2022 (2018) (issued on February 12, 2018) [hereinafter 2018 STRATEGIC PLAN].

¹⁹ CFPB, BUREAU OF CONSUMER FINANCIAL PROTECTION STRATEGIC PLAN FY 2013 – 2017, at 5 (2013).

²⁰ 2018 STRATEGIC PLAN, *supra* note 18, at 4.

²¹ *Id.* at 4.

²² *Id.* at 5-13.

²³ *Id.* at 7-9.

one of its goals, "[p]rotect[ing] consumers from unfair, deceptive, or abusive acts and practices and from discrimination." The Strategic Plan also indicates that the Bureau will endeavor to "promote fair competition" "without regard for whether a financial service provider is a bank or nonbank," and focus enforcement and supervisory efforts on "institutions and their product lines that pose the greatest risk to consumers based on the nature of the product, field and market intelligence, and the size of the institution and product line."²⁴

Goal 3: "Foster operational excellence through efficient and effective processes, governance, and security of resources and information." This goal focuses on improving the Bureau's internal infrastructure and procedures by safeguarding its information and systems; maintaining a talented, diverse, inclusive and engaged workforce; and managing risk and promoting accountability within the Bureau. Finally, the Strategic Plan emphasizes mission and budget "discipline," and "identification of budget savings."²⁵ Indeed, on June 12, 2018, Mulvaney told reporters he asked Bureau staff to devise plans that would cut the Bureau's budget by 20%, though he insisted cuts would focus "almost exclusively on non-personnel spending."²⁶

To achieve these new goals and objectives, Mulvaney has brought in a number of political appointees known as "Policy Associate Director[s]," who assist with day-to-day management of the Bureau.²⁷

While Mulvaney has taken a different approach to setting the Bureau's priorities and how it will be managed, it is still too early to predict exactly how these changes will impact the financial services market and its consumers. The next two sections discuss how the new direction of the Bureau has impacted its regulatory, enforcement, and supervisory activities in practice so far.

REGULATIONS AND RULE-MAKING

Consistent with the new Strategic Plan's commitment to "seek[] the counsel of others," the Bureau launched a "Call for Evidence" initiative under which the Bureau has issued 12 requests for information (RFIs) seeking public comment on how to improve the Bureau's:

- 1) Civil Investigative Demands and Associated Processes (comment period closed April 26, 2018);
- 2) Rules of Practice for Adjudication Proceedings (comment period closed May 7, 2018);
- 3) Enforcement Processes (comment period closed May 14, 2018);

²⁴ *Id.* at 10-11.

²⁵ *Id.* at 12-13.

²⁶ Lalita Clozel, *CFPB Acting Chief Asks Staff to Cut Budget by 20%*, Wall Street Journal (June 12, 2018), <https://www.wsj.com/articles/cfpb-acting-chief-asks-staff-to-cut-budget-by-20-1528842446?ns=prod/accounts-wsj>.

²⁷ See CFPB, BUREAU STRUCTURE, <https://www.consumerfinance.gov/about-us/the-bureau/bureau-structure/> (last updated May 11, 2018) (Sheila Greenwood for Consumer Education & Engagement; Anthony Welcher for External Affairs; Tom Pahl for Research, Markets & Regulations; and Eric Blankenstein for Supervision, Enforcement & Fair Lending).

- 4) Supervision Program (comment period closed May 21, 2018);
- 5) External Engagements (comment period closed May 29, 2018);
- 6) Public Reporting Practices of Consumer Complaint Information (comment period closed June 4, 2018);
- 7) Rulemaking Processes (comment period closed June 7, 2018);
- 8) Adopted Regulations and New Rulemaking Authorities (comment period closed June 19, 2018);
- 9) Inherited Regulations and Inherited Rulemaking Authorities (comment period closed June 25, 2018);
- 10) Guidance and Implementation Support (comment period closed July 2, 2018);
- 11) Financial Education Programs (comment period closed July 9, 2018); and
- 12) Consumer Complaint and Inquiry Handling Process (comment period closed July 16, 2018).²⁸

This Call for Evidence initiative provides a unique opportunity for industry participants to help reshape the Bureau's policies, procedures, and rules. To do so, individuals and entities must submit comments to each pertinent request for information.

On April 2, 2018, the Bureau released its Semi-Annual Report to Congress, which mainly discussed the pre-Mulvaney April 1, 2017 – September 30, 2017 period, but also included a section titled "Plan for upcoming rules."²⁹ Notably, among the four upcoming "proposed" rules previewed were two that "reconsider" existing rules—the 2017 payday lending rule and the 2015 amendments to Home Mortgage Disclosure Act (HMDA) Regulation C. On January 16, 2018—the original effective date of the final "Payday, Vehicle Title, and Certain High-Cost Loans" rule—the Bureau announced that it "intends to engage in a rulemaking process so that the Bureau may reconsider the Payday Rule."³⁰ The Bureau made a similar announcement relating to the HMDA rulemaking.³¹ In prepared written

²⁸ CALL FOR EVIDENCE, <https://www.consumerfinance.gov/policy-compliance/notice-opportunities-comment/open-notices/call-for-evidence/> (last updated Apr. 17, 2018).

²⁹ CFPB, SEMI-ANNUAL REPORT OF THE BUREAU OF CONSUMER PROTECTION 19 (2018), https://files.consumerfinance.gov/f/documents/cfpb_semi-annual-report_spring-2018.pdf [hereinafter SEMI-ANNUAL REPORT].

³⁰ CFPB, Statement on Payday Rule (January 16, 2018), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-statement-payday-rule/>. The Bureau recently filed a joint motion with two trade associations seeking to stay the Payday Rule's compliance date and stay the case pending the Bureau's "rulemaking process [which] may result in repeal or revision of the Payday Rule." See *Community Financial Servs. Assoc. of America, et al. v. CFPB*, Case No. 18-295, Dkt. No. 16 at 3-4 (W.D. Tex. May 31, 2018). It remains unclear how the Bureau will treat all such regulatory challenges though. Here, the court ultimately granted the case stay, but denied a stay of the Payday Rule's compliance date. *Id.*, Dkt. No. 29 at 2 (June 12, 2018).

³¹ CFPB, Public Statement on Home Mortgage Disclosure Act Compliance (Dec. 21, 2017), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-public-statement-home-mortgage-disclosure-act-compliance/> [hereinafter CFPB HMDA Statement].

testimony to Congress, Mulvaney stated that these efforts "demonstrate that under new leadership the Bureau is willing to revisit existing rules to find ways to ease undue burdens and protect consumer choice."³²

The third upcoming proposed rule previewed in the Semi-Annual Report was the debt collection rulemaking where the Bureau will work towards releasing a proposed rule concerning collectors' communications practices and consumer disclosures under the Fair Debt Collection Practices Act (FDCPA).³³ This proposed rulemaking is significant because, since the FDCPA's enactment in 1978, there have never been any implementing regulations to amend or clarify the statutory requirements. The fourth and final upcoming proposed rule mentioned by the Bureau related to expedited funds availability (Regulation CC). By statute, the Bureau will have to work with the Board of Governors of the Federal Reserve System to issue jointly a rule that includes provisions within the Bureau's authority.

The Semi-Annual Report also previewed three upcoming "final" rules regarding (i) annual notice requirements under the Gramm-Leach-Bliley Act (Regulation P); (ii) "the protection and disclosure of confidential information that the Bureau obtains" with respect to the Freedom of Information Act, the Privacy Act of 1974, and legal proceedings; and (iii) an amendment to the federal mortgage disclosure requirements under the Truth in Lending Act (Regulation Z) concerning the "use of Closing Disclosures to determine good faith disclosure of estimated closing cost."

On May 10, 2018, the Bureau announced its "Spring 2018 rulemaking agenda" largely confirming what had been previewed in the Semi-Annual Report.³⁴ One new item, in the pre-rule stage until March 2019, is "Business Lending Data (Regulation B)" concerning the information that must be collected, maintained, and reported under the Equal Credit Opportunity Act (ECOA) with respect to credit applications made by women-owned, minority-owned, and small businesses.³⁵ Also of note, the agenda provides anticipated dates for Notices of Proposed Rulemaking (NPRM) and Final Rules, including that the HMDA NPRM is expected by January 2019, the Payday Rule NPRM is expected by February 2019, and the FDCPA NPRM is expected by March 2019.³⁶

³² Written Testimony of Mulvaney, Acting Director, CFPB, Before the House Committee on Financial Services at 8 (Apr. 10, 2018), available at <https://www.consumerfinance.gov/about-us/newsroom/written-testimony-mick-mulvaney-acting-director-before-house-committee-financial-services/> [hereinafter Mulvaney Written Testimony]. These efforts are not to be confused with the 5-year lookback required by the Dodd-Frank Act with respect to mortgage rules, which has been underway and is expected to conclude in January 2019. *CFPB to Reexamine Payday Rule, CID Process, and Mortgage Rules*, VENABLE LLP'S CONSUMER FINANCIAL SERVICES DIGEST (Jan. 18, 2018), <https://www.venable.com/cfpb-to-reexamine-payday-rule-cid-process-and-mortgage-rules-01-18-2018/>.

³³ SEMI-ANNUAL REPORT, *supra* note 29, at 19.

³⁴ CFPB, Spring 2018 Rulemaking Agenda (May 10, 2019), <https://www.consumerfinance.gov/about-us/blog/spring-2018-rulemaking-agenda/>.

³⁵ Office of Information and Regulatory Affairs, AGENCY RULE LIST – SPRING 2018, https://www.reginfo.gov/public/do/eAgencyMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=3170&Image58.x=36&Image58.y=25&Image58=Submit (last visited June 20, 2018).

³⁶ *Id.*

Lastly, it is worth noting that in the Semi-Annual Report, Acting Director Mulvaney urged Congress to make four legislative changes to establish meaningful accountability for the Bureau:

1. fund the Bureau through congressional appropriations;
2. require legislative approval of major Bureau rules;
3. ensure that the Director answers to the President in the exercise of executive authority; and
4. create an independent Inspector General for the Bureau.³⁷

Mulvaney stated these changes are necessary, because "the Bureau is far too powerful, and with precious little oversight of its activities."³⁸ Currently, the Bureau is accountable to the federal judiciary, but it is largely independent from the political process once a Director is in place. First, the Bureau is principally funded by transfers from the Federal Reserve System up to the limits set forth in the Dodd-Frank Act, so Congress has little ability to impact the Bureau through its funding.³⁹ Second, although majorities of both houses of Congress and the President can together *invalidate* a Bureau rule using the Congressional Review Act (as they did, for example, with the Bureau's arbitration rule),⁴⁰ Bureau rules otherwise go into effect without any approval needed from Congress or the President. Third, the Dodd-Frank Act provides that the Bureau's Director cannot be removed by the President at will, and can only be fired for cause.⁴¹ And fourth, the Bureau's current Inspector General is shared with the Federal Reserve, and is hired by the Federal Reserve's Chairman rather than appointed by the President and approved by the Senate.⁴²

ENFORCEMENT AND SUPERVISION

After Mulvaney submitted the Bureau's written Semi-Annual Report for April to September 2017 to Congress, he testified in-person about the Report before the House Financial Services Committee⁴³ and the Senate Banking,

³⁷ *Id.* at 1-2.

³⁸ *Id.* at 1.

³⁹ *Id.* at 8.

⁴⁰ *Impact of Arbitration Rule CRA Vote on CFPB Regulations*, VENABLE LLP'S CONSUMER FINANCIAL SERVICES DIGEST (Oct. 26, 2017), <https://www.venable.com/impact-of-arbitration-rule-cra-vote-on-cfpb-regulations-10-26-2017/>.

⁴¹ This has been and continues to be a subject of constitutional challenge in the courts. *Supra* note 16. Also, Mulvaney subsequently clarified in testimony to the U.S. Senate that his first choice would actually be for the single Director position to be replaced altogether with a five-member Commission. *Senate Banking, Housing and Urban Affairs Committee, Hearing on the Consumer Financial Protection Bureau's Semiannual Report to Congress*, 115th Cong. 20 (Apr. 12, 2018) ("*Mulvaney Senate Testimony*").

⁴² See, e.g., Press Release, U.S. Senator Rob Portman (R-OH), Portman Introduces Bill Creating Inspector General for the CFPB, Says It Will Improve Transparency & Accountability (Mar. 15, 2017), <https://www.portman.senate.gov/public/index.cfm/2017/3/portman-introduces-bill-creating-inspector-general-for-the-cfpb-says-it-will-improve-transparency-accountability>.

⁴³ *House Financial Services Committee Hearing on the Consumer Financial Protection Bureau's Semi-Annual Report to Congress*, 115th Cong. 21 (Apr. 11, 2018) [hereinafter *Mulvaney House Testimony*].

Housing and Urban Affairs Committee on April 11 and 12, 2018.⁴⁴ Although under Former Director Cordray the Enforcement Office had filed approximately four lawsuits or enforcement actions per month, Mulvaney testified in April that "[w]e've initiated none since I've been there."⁴⁵ This statement was consistent with Mulvaney's remarks to the National Association of Attorneys General on February 28, 2018, where he stated that he is looking for states to lead on consumer financial services enforcement.⁴⁶

Mulvaney did note, however, that there were approximately 100 investigations currently ongoing, and about 12 of them "have gone into the sue or settlement" phase.⁴⁷ Sure enough, about a week later on April 20, 2018, the Bureau and the Office of the Comptroller of the Currency announced a \$1 billion settlement with a major depository financial institution concerning alleged "(1) charging fees for rate-lock extensions in connection with residential-mortgage lending; and (2) force-placing collateral-protection insurance...on consumers' vehicles for auto loans that it originated or acquired."⁴⁸ The OCC stated further that it "has identified deficiencies in the Bank's enterprise-wide compliance risk management program."⁴⁹ In the Bureau's press release, Mulvaney commented that he was pleased "we were able to work closely and effectively with our colleagues at the OCC...we have said all along that we will enforce the law. That is what we did here."⁵⁰ This marked the Bureau's first public enforcement action under Mulvaney.

As of this writing, another relevant consent order issued during Mulvaney's tenure occurred on June 13, 2018, and assessed a \$5 million civil penalty for allegedly improper debt collection and credit reporting practices.⁵¹ Additionally, in May 2018 the Bureau sought and obtained a default judgment awarding almost \$5 million for consumer redress, a \$16 million civil penalty, and injunctive relief for violations of the Telemarketing Sales Rule and the Consumer Financial Protection Act related to debt relief practices.⁵²

Asked during his congressional testimony whether any of the 100 investigations were initiated under his watch, Mulvaney said he imagines some were, but that he would not know because the decision to start or stop an

⁴⁴ See *Mulvaney Senate Testimony*, *supra* note 41.

⁴⁵ *Mulvaney House Testimony*, *supra* note 43, at 13.

⁴⁶ *CFPB Calls on States to Lead Consumer Finance Enforcement*, VENABLE LLP'S CONSUMER FINANCIAL SERVICES DIGEST (Mar. 30, 2018), <https://www.venable.com/cfpb-calls-on-states-to-lead-consumer-finance-enforcement-03-30-2018/>.

⁴⁷ *Mulvaney Senate Testimony*, *supra* note 41, at 29.

⁴⁸ *In the Matter of Wells Fargo Bank, N.A.*, File No. 2018-BCFP-0001, Consent Order at 1 (Apr. 20, 2018), *available at* https://files.consumerfinance.gov/f/documents/cfpb_wells-fargo-bank-na_consent-order_2018-04.pdf.

⁴⁹ *In the Matter of Wells Fargo Bank, N.A.*, Case No. AA-EC-2018-16, #2018-026, Consent Order For A Civil Money Penalty at 1 (Apr. 20, 2018), *available at* <https://www.occ.gov/static/enforcement-actions/ea2018-026.pdf>.

⁵⁰ CFPB, Bureau of Consumer Financial Protection Announces Settlement with Wells Fargo for Auto-Loan Administration and Mortgage Practices (Apr. 20, 2018), <https://www.consumerfinance.gov/about-us/newsroom/bureau-consumer-financial-protection-announces-settlement-wells-fargo-auto-loan-administration-and-mortgage-practices/>.

⁵¹ CFPB, Bureau of Consumer Financial Protection Settles With Security Group, Inc. (June 13, 2018), <https://www.consumerfinance.gov/about-us/newsroom/bureau-consumer-financial-protection-settles-security-group-inc/>.

⁵² *CFPB v. Federal Debt Assistance Assoc., LLC, et al.*, Case No. 17-2997, Dkt. Nos. 21-22 (May 7 and 22, 2018).

investigation is actually made by career personnel in the field without his involvement.⁵³ Mulvaney also testified that he had approved the return of \$92.6 million to consumers, likely from actions that were initiated by Former Director Cordray.⁵⁴

In addition, Mulvaney testified that the Bureau was actively litigating around 25 cases, 10 of which are against "short-term, small-dollar or payday lenders."⁵⁵ He acknowledged that none of those lawsuits were initiated during his tenure at the Bureau. He also pointed out that he had voluntarily dismissed one lawsuit while he stressed that the dismissal was without prejudice to bring the action again, and that there is a "current ongoing investigation against the same entity."⁵⁶

The dismissed lawsuit involved four online payday lenders that allegedly deceived consumers by collecting debts the consumers did not owe in light of state interest rate caps and licensing requirements.⁵⁷ Defendants asserted *inter alia* that Indian sovereign immunity bars the Bureau's suit, because the defendants are wholly-owned companies, which are incorporated pursuant to the laws of a federally-recognized Indian tribe.⁵⁸ Although the Bureau did not give a reason for the dismissal, Mulvaney has stated that "[p]ushing the envelope" risks "interfering with the sovereignty or autonomy of the states or Indian tribes. [He has] resolved that this will not happen at the Bureau."⁵⁹

Subsequent to Mulvaney's congressional testimony, the Bureau issued another voluntary dismissal on June 7, 2018 releasing PHH Corp. from charges that it had violated the Real Estate Settlement Procedures Act (RESPA).⁶⁰ The Bureau's dismissal order noted that the D.C. Circuit's appellate ruling – "that PHH did not violate RESPA if it charged no more than the reasonable market value for the reinsurance it required the mortgage insurers to purchase, even if the reinsurance was a *quid pro quo* for referrals" – was "now the law of this case."⁶¹

⁵³ *Mulvaney Senate Testimony*, *supra* note 41, at 33-34; *Mulvaney House Testimony*, *supra* note 43, at 13-14.

⁵⁴ *Mulvaney House Testimony*, *supra* note 43, at 14.

⁵⁵ *Mulvaney Senate Testimony*, *supra* note 41, at 6. The Bureau's 2018 Semi-Annual report includes a list of over 50 public CFPB enforcement actions that were in litigation during October 1, 2016 to September 30, 2017, which includes a synopsis of each lawsuit and notes which ones remain pending. SEMI-ANNUAL REPORT, *supra* note 29, at 23-43. Subsequent to that reporting period but prior to Former Director Cordray's resignation, the Bureau also filed suit against two companies operating under the name "FDAA" and filed suit against Freedom Debt Relief. CFPB Sues Debt-Relief Companies Illegally Posing as Federal Government (Oct. 12, 2017), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-debt-relief-companies-illegally-posing-federal-government/>; CFPB Sues Freedom Debt Relief for Misleading Consumers about Its Debt-Settlement Services (Nov. 8, 2017), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-freedom-debt-relief-misleading-consumers-about-its-debt-settlement-services/>.

⁵⁶ *Mulvaney Senate Testimony*, *supra* note 41, at 6, 34.

⁵⁷ See SEMI-ANNUAL REPORT, *supra* note 29, at 24.

⁵⁸ *CFPB v. Golden Valley Lending, Inc. et al.*, Civil Case No. 17-2521, Dkt. No. 62 at 5-15 (D. Kan. Oct. 10, 2017) (defendants' motion to dismiss).

⁵⁹ 2018 STRATEGIC PLAN, *supra* note 18, at 2.

⁶⁰ *In the Matter of PHH Corp.*, File No. 2014-CFPB-0002, Dkt. No. 236, Order Dismissing the Notice of Charges (June 7, 2018).

⁶¹ *Id.*

Of the cases the Bureau is currently litigating, a handful are in the appeal phase.⁶² One case that is being followed closely in the small-dollar lending markets is *CFPB v. CashCall, Inc., et al.* in the Ninth Circuit. This case relates to tribal sovereign immunity and state law violations.⁶³ The U.S. District Court for the Central District of California rejected defendants' tribal-related defenses and declined to enforce a tribal choice-of-law provision upon concluding that CashCall (a California corporation) was the "true lender" and the subject borrowers' home states were in the United States.⁶⁴ Although the Bureau prevailed on its substantive legal theories, the court denied much of the restitution and other relief sought by the Bureau, awarding \$10.3 million in civil money penalties and no injunctive relief.⁶⁵ Both sides have now filed a notice of appeal.⁶⁶

The Bureau's supervisory activities are non-public, which limits detailed ascertainable information that is publicly available. Informal guidance issued by the Bureau indicates that (i) the Bureau's Office of Supervision will likely continue examinations, but (ii) it will likely take into account the burden on the supervised entities, and (iii) it will be less likely to push the envelope over to Enforcement and more likely to resolve matters confidentially. For example, the Bureau's announcement that it would be reconsidering the 2015 HMDA rule states that due to the systems and operational challenges of complying with that new rule, the Bureau "does not intend to require data resubmission unless data errors are material or assess penalties with respect to errors for data collected in 2018 and reported in 2019," and "any supervisory examinations of 2018 HMDA data will be diagnostic, to help institutions identify compliance weaknesses, and [the Bureau] will credit good-faith compliance efforts."⁶⁷ Similarly, Mulvaney's

⁶² *In the Matter of Integrity Advance, LLC and James R. Carnes* is a CFPB administrative proceeding in which the Administrative Law Judge's (ALJ) decision has been appealed by both sides to the Bureau's Director for final Bureau decision pursuant to 12 C.F.R. §§ 1081.402, 1081.405. File No. 2015-CFPB-0029, Dkt. Nos. 177-78. On March 15, 2018, Mulvaney issued an order holding the matter in abeyance until after the U.S. Supreme Court issues its decision in *Lucia v. SEC*. *Integrity Advance*, Dkt. No. 210 at 2 (citing *Lucia v. SEC*, 86 U.S.L.W. 3356, Case No. 17-130 (2018) (on appeal from *Lucia v. SEC*, 832 F.3d 277, (D.C. Cir. 2016))). On June 21, 2018, the Supreme Court issued its decision in *Lucia*, holding that SEC ALJs are subject to the U.S. Constitution's appointments clause, which has potentially broad implications for how the Bureau's ALJs are lawfully appointed and removed. See *Lucia v. SEC*, 2018 WL 3057893 (U.S. June 21, 2018); *Constitutional Issues with Administrative Adjudication*, VENABLE LLP'S CONSUMER FINANCIAL SERVICES DIGEST (May 17, 2018), <https://www.venable.com/constitutional-issues-with-administrative-adjudication-05-17-2018/>.

⁶³ Civil Case No. 15-7522, Dkt. Nos. 325, 327 (C.D. Cal.) (Ninth Circuit Appeal Nos. 18-55407, 18-55479).

⁶⁴ *CFPB v. CashCall, Inc.*, 2016 WL 4820635, at *9 (C.D. Cal. Aug. 31, 2016).

⁶⁵ *CFPB v. CashCall, Inc.*, 2018 WL 485963, at *11, 16 (C.D. Cal. Jan. 19, 2018).

⁶⁶ *Supra* note 63. It is also worth noting that Mulvaney has moved the Office of Fair Lending and Equal Opportunity out from under the "soon-to-be-renamed" Division of Supervision, Enforcement, and Fair Lending, and put it under the Director's Office. Mulvaney Written Testimony, *supra* note 32, at 8-9. He asserts that the "bureau will continue to enforce fair lending laws" and the move was just to "reduce redundancy." *Id.* at 8. On May 21, 2018 after the Congressional Review Act was used to nullify the Bureau's prior guidance about indirect auto lender compliance with the Equal Credit Opportunity Act (ECOA) and disparate impact unintentional discrimination, Mulvaney noted that the Bureau "will be reexamining the requirements of the ECOA." CFPB, Statement of the Bureau of Consumer Financial Protection on enactment of S.J. Res. 57 (May 21, 2018), <https://www.consumerfinance.gov/about-us/newsroom/statement-bureau-consumer-financial-protection-enactment-sj-res-57/>.

⁶⁷ See CFPB HMDA Statement, *supra* note 31. Other federal regulators also announced that they will take this approach to compliance. *FFIEC Releases New HMDA Guide*, VENABLE LLP'S CONSUMER FINANCIAL SERVICES DIGEST (Mar. 1, 2018), <https://www.venable.com/ffiec-releases-new-hmda-guide-03-01-2018/>.

announcement about reconsidering the payday rule states that the Bureau may waive the "deadline to submit an application for preliminary approval to become a registered information system ('RIS') under the Payday Rule."⁶⁸

CONCLUSION

Congress created the Bureau after the worst mortgage market failure of this century. The Bureau's first Director, Richard Cordray, helped build it into a more than 1,400 person agency with a budget of more than \$600 million. He undertook a significant number of enforcement actions, rulemakings, and supervisory activity, as well as promoting financial education. Acting Director Mulvaney has stated that he has no intention of dismantling the Bureau, but also has noted that elections have consequences. While Mulvaney has already started making changes at the Bureau to adhere to the President's deregulatory agenda, only time will tell how much change comes to the Bureau.

This article was originally published in *The Review of Banking & Financial Services'* July 2018 edition.

⁶⁸ CFPB Statement on Payday Rule, *supra* note 30.