Client Update - Thursday, December 6, 2018

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KATHY KRANINGER CONFIRMED BY 50-49 VOTE IN SENATE AS NEW CFPB DIRECTOR

As predicted in our post-election Client Update, the retention of control by the Republicans as majority party in the United States Senate has resulted in the confirmation of Kathy Kraninger as the next Director of the Consumer Financial Protection Bureau (CFPB). The confirmation is effective immediately, and Ms. Kraninger will be moving into her new office at the CFPB within the next few days.

Mick Mulvaney's controversial acting directorship at CFPB will be coming to a close, although it is noteworthy that Ms. Kraninger was Mr. Mulvaney's deputy at the Office of Management and Budget (OMB). Mulvaney, who kept his directorship at OMB as he was dually serving as Acting Director at CFPB, will now return full-time to his very influential position at OMB.

In fact, there is some insider buzz that Mulvaney might well be on the short list to take over as President Trump's Chief of Staff if - as expected - John Kelley, the current White House Chief of Staff, departs over the coming weeks. There is no doubt but that Mulvaney is a Trump-type fighter pilot who will take on any mission with gusto.

Mulvaney has dramatically influenced the CFPB over the past year he has served as Acting Director. He has rescinded some regulations, revised others and pulled back on the enforcement approach on many. In fact, he has even required the agency to begin using its name as specified in statute - the Bureau of Consumer Financial Protection (BCFP) - rather than the more catchy name of Consumer Financial Protection Bureau (CFPB) that previous Director Richard Cordray had christened the agency for widespread public usage and identity.

Whether the name changes officially or not, Mulvaney has clearly established that the CFPB (or BCFP) under the Trump administration will be less activist in both regulation and enforcement for at least the remainder of the President's first term. Ms. Kraninger, while perhaps lacking the gusto and combativeness with which Mulvaney took on the task, will almost certainly continue in the same less activist approach at CFPB.

Rules on automobile indirect lending arrangements, international remittance transfers and payday lending are among the regulatory actions affecting credit unions that were promulgated during the Cordray years at CFPB and could likely receive a revision or outright repeal.

The most interesting matter with credit union implications, because of the spillover effect at NCUA and the states when the CFPB is prioritizing the issue and the primary compliance regulators must take note and follow suit, is whether there will be a focus on more and expanded fair lending examinations for all financial institutions - including credit unions.

Because credit unions can only lend to their members that come from an established field of membership that can be employer, associational or restricted community based, fair lending exams can be problematic because they tend to be somewhat quota based with a "disparate impact" approach. Disparate impact focuses on the results of a lending program on loan approvals as they relate to protected classes, rather than the non-discriminatory nature of the lending policies and underwriting standards themselves.

While credit unions eventually are able to meet the standards and comply with the expectations of most fair lending exams, every credit union that has faced one can relate that they are burdensome and demanding. The challenge is particularly difficult for credit unions because of the field of membership factor that overrides to whom a credit union loan can be made - regardless of the race, gender, national original or socio-economic status of the borrower.

If Kraninger reduces the emphasis at CFPB somewhat on the demands of fair lending exams to the financial institutions with assets in excess of $10 billion that CFPB examines, the spillover effect will be less emphasis on such exams at the NCUA and state levels as well. Naturally, if the emphasis goes toward more and increased scrutiny through fair lending exams at CFPB, that will also be contagious with more NCUA and state fair lending exams on credit unions with less than $10 billion in assets.

There is much to watch at CFPB over the next few months. The confirmation of Ms. Kraninger tells us that the clock is now ticking on the approach CFPB will take over the final two years of the Trump administration before the voters speak again in 2020.

What will be of particular interest will be whether there is a wholesale turnover of CFPB staff with the Kraninger assumption of the directorship. Almost the entire professional staff and leadership at CFPB were recruited and came on board under the Cordray administration at the Bureau. How many of them will stay in place through at least the next two years - and perhaps longer depending upon the outcome of the 2020 elections - of less activist regulation and enforcement at CFPB? The next few months will tell that story.

Then, whoever wins the 2020 election will determine the next four years of CFPB direction. Some staff may stay at the Bureau awaiting the next election before they abandon ship. Others may move on now that Kraninger is official and her authority as a Senate-confirmed Director is not subject to question as was Mulvaney's as Acting Director. This should become evident shortly after the first of the new year.

Because there has been no structural change at the CFPB by congressional action revising the Dodd-Frank Act, the directorship will remain a presidential prerogative. Even though the CFPB Director has a fixed term, any president can make life so miserable for a carryover CFPB head that a change in leadership at the Bureau is likely to happen anytime there is a change in the occupant of the White House.

So, while the CFPB is almost certain to be one of the agencies of government whose direction is determined at each presidential election cycle, it is also important to note that fundamental reform to the CFPB (such as creating a multi-member rulemaking commission or bringing its budget under greater congressional control) is almost a certainty not to occur with the Democrats controlling one house of Congress and the Republicans controlling the other.

The Kraninger era is about to begin as CFPB Director. The 50-49 vote for her confirmation is an indication that control of the CFPB and its direction is about as divided in approach as everything else in Washington these days.

We will keep our eyes and ears open as the second directorship of this crucial agency settles in over the next two years. As always, we will keep you up to date on what we learn and how the future actions of the CFPB may affect you and your credit union.

Until next time.

Dennis Dollar