AMERICAN BANKER

The Myth of the All Powerful CFPB

By: Victoria Finkle – June 7, 2013

To hear critics of the Consumer Financial Protection Bureau describe the new agency conjures up images of an old horror flick: there's a monster on the loose, with the power to damage financial markets and bankers with the swing of its tail.

But it's been almost two years since the regulator opened its doors and the evidence so far suggests a rather different picture.

Opponents often point to the fact that the agency runs under a director, not a commission, and that its budget is not subject to congressional appropriations as evidence that it is able to act as it pleases, unbeholden to lawmakers, taxpayers or anyone else. Yet time and again the CFPB acts much like other regulators, including listening to Congressional and industry concerns and compromising on key issues.

"It's a debate that has been curiously immune to facts," said Raj Date, the former deputy director of the CFPB and founder of consultancy Fenway Summer, of the ongoing political divide over the extent of the agency's powers.

While the debate has lost some of the fervor generated during the writing of the Dodd-Frank Act, the familiar rhetoric about the agency still gets trotted out regularly in Washington, despite the CFPB's actions so far and the considerable constraints it faces.

It is also the primary rationale many Republicans use for opposing Richard Cordray's nomination as the agency's director. They say they will not approve any nominee because the structure of the CFPB makes it all powerful and unaccountable to anyone else.

So far, however, the agency has made deliberate efforts to incorporate multiple points of view into its rules. For example, the CFPB announced several amendments to its controversial qualified mortgage rule last week, winning praise from industry officials and consumer advocates alike. The revisions also reflected feedback from lawmakers, who had raised concerns the qualified mortgage rule was too narrowly defined and would stifle access to credit.

"In my view, it is more difficult to make an argument against the CFPB based on the manner in which the agency has conducted itself in mortgage-related rulemaking," said Isaac Boltansky, a policy analyst at Compass Point Research & Trading. "If you use that as the base case for how the agency will conduct itself, I don't think the agency will have that many true opponents in DC."

Even lawmakers and industry officials who are critical of the bureau have been quick to concede that Cordray has been a fair and thoughtful leader and that the agency has been open to hearing concerns from banks and others. In addition to its mortgage rules, the agency recently made several revisions to its remittance provisions for wiring money overseas.

"I do praise them for being a two-way street with us," said Richard Hunt, president and chief executive of the Consumer Bankers Association. "We bring our bankers in all the time, and we go to the CFPB monthly and sit down with them for hours. We'll even tell them our vulnerabilities and our concerns working with consumers. "\xA6 It's been a good give and take."

The agency has also made a special effort to ensure its new rules, some of which will have a significant impact on the marketplace, can be implemented swiftly and without unnecessary difficulty. For example, earlier this year it hired Lisa Applegate, a former Fannie Mae executive, as its implementation lead for its mortgage rules to help collect and clarify questions about specific provisions.

"They're trying to be innovative in helping the industry implement a complicated, major set of rules," said Jo Ann Barefoot, an industry consultant with Treliant Risk Advisors.

Date argues the idea that the agency is somehow all-powerful is deeply misguided, noting it has to follow the same administrative procedures as other regulators - and that those procedures have a large impact.

"It's not as though the CFPB or any regulatory body can just willy-nilly promulgate a rule. There are pretty elaborate constraints under the Administrative Procedure Act. The machinations to get any rule in place are actually astonishing," he said. "The CFPB does empirical research, issues a proposal, does outreach with various constituents, there's a required consultation with small businesses - there's all manner of procedural and substantive checks on a federal agency. The notion that it's possible for the bureau to just run off the rails is a notion fueled mostly by the imagination."

He added the agency's mission is to make the markets work better for consumers, not steamroll businesses.

"Part of the explicit statutory mandate is to ensure ready access to the financial system for consumers broadly speaking - it's not just to iron out the marketplace in the name of consumer protection," said Date. "If an agency is doing its job right it's attentive to the impact of any new or existing safeguards" on the way a business functions, including factors like return on equity and operating complexity.

Despite its efforts, the CFPB still has detractors, much like any other regulator. And the industry is not exactly comfortable with its newest supervisor.

"I don't care if it's the CFPB, the OCC, the FDIC or the Fed. You never relax. You're always on guard as a willing partner with all of them," said Hunt, who said he has ongoing concerns about the agency's examination process and data collection efforts.

Others argue that while the agency has been good on rulemaking, it has fallen short with its enforcement actions. The CFPB issued its first action citing "abusive" practices, a new legal standard laid out in the Dodd-Frank law, against a Florida debt collector late last month. Some say the term should have first been defined in a rule or guidance before an enforcement action was handed down.

"If the bureau wants to use the concept of abusive, they ought to write a rule on it or at least guidance on abusive practices that comes out in a proposed form so that there's opportunity for comment, so there's the same form of clarity and thoughtfulness on an issue that people are very concerned about," said Richard Fischer, a partner with Morrison Foerster. "I recognize that they're challenged, but when they take the time to do a final rule, they're getting high marks in my judgment. When they shortcut it through enforcement actions, they're not."

But others said that the agency's decision in that case aligns with what any of the other banking regulators might do.

"I clearly think that some of the enforcement actions are intended to send a signal. That's how all the agencies use enforcement actions, including the Justice Department," said Barefoot. "So they are sending signals and people are trying to figure out what they need to do to meet these new standards laid out in the enforcement action, and that's always a challenge because there's not clear guidance."

She added: "There's definitely a concern, particularly on UDAAP and fair lending - what are the expectations, what are the emerging standards? And I think there's a lack of clarity that has the industry concerned, but I think that's just the process."

Others warned that the consumer bureau's past actions may not fully reflect its future efforts, particularly as it moves away from working on statutorily mandated provisions into new fields like payday lending and overdraft practices. They also suggest the agency might be especially attentive to listening to Congress and the industry while it is under such intense scrutiny.

"The first few years were always going to be a question about their long-term viability," said Mark Calabria, director of financial regulation studies at the Cato Institute. "They always wanted to get themselves to a spot where they weren't a target anymore. How they have behaved so far is not in my opinion the best indicator of how they will behave in the future."

The target on the agency's back isn't likely to be removed anytime soon. A federal appeals court earlier this year invalidated several recess appointments President Obama made the same day he appointed Cordray as director of the CFPB. While Cordray is not involved in the lawsuit, the case does raise questions about his appointment and has already given detractors fresh ammunition against the agency. All eyes are now on the Supreme Court, which is expected to decide whether it will take up the case in the coming weeks.

In the meantime, however, many in Washington are likely to keep arguing that the CFPB is out-of-control, despite its behavior to date.

"It truly feels to me that the concerns on Capitol Hill have their own life force beyond the concerns of financial lobbyists," said Boltansky. "Once the talking points are learned and are committed to memory, then it's easier to retrieve them. This fight has been going on for so long that it's very easy for lawmakers to continue it without any catalysts in the covered financial sectors."