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Consumer Financial Protection Bureau in jeopardy under Donald Trump

Some say president-elect could remove director regardless of pending legal action

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The Consumer Financial Protection Bureau, the powerful five-year-old agency that President Obama hopes will be regulating businesses on behalf of consumers long after he leaves office, could be gutted and its director removed soon after President-elect Donald Trump is inaugurated in January.

Despite a federal-court case over the independence of the CFPB director that could take more than a year to resolve, some legal and financial analysts believe Mr. Trump doesn't need to wait that long to rein in the fledgling bureaucracy opposed by many conservatives.

Mr. Trump and his advisers could decide to withdraw an Obama administration appeal of the ruling by a panel of the Circuit Court of Appeals for the District of Columbia, which last month declared unconstitutional the statute limiting a president's authority to remove the CFPB's director, Richard Cordray. That would leave in place the court's decision, which said the president should have the ability to fire Mr. Cordray at will.

Mr. Obama wants to ensure that the unelected, high-level bureaucrat at CFPB has a five-year term that isn't subject to the whims of any president. The judges said it could be "the most important separation of powers case in a decade."

There's also a view emerging that Mr. Trump could remove Mr. Cordray regardless of any pending legal action, simply by asserting his administration's own view that the statute restricting the removal of the CFPB director is unconstitutional.

Aditya Bamzai, an associate law professor at the University of Virginia Law School who has argued prominent national security cases for the Obama Justice Department, said the president has the authority to remove the CFPB director absent a court decision.

"This authority follows logically from the principle that the executive branch may assess the constitutionality of a statute, and then act on its assessment without preexisting judicial imprimatur," he said in a posting on the Notice and Comment blog managed by the Yale Journal on Regulation and the American Bar Association's section of administrative law and regulatory practice.

Mr. Bamzai pointed to the example of President Thomas Jefferson refusing to enforce the Alien and Sedition Acts because he believed the law to be unconstitutional. The law, signed by his predecessor John Adams in 1789, gave the president new powers to deport foreigners and make it harder for new immigrants to vote.

More recently, Mr. Bamzai said, the federal Office of Legal Counsel issued a memo in 1994 endorsing the view that "there are circumstances in which the president may appropriately decline to enforce a statute that he views as unconstitutional," particularly "to resist unconstitutional provisions that encroach upon the constitutional powers of the presidency."

Citing other examples of presidents removing people from government posts, Mr. Bamzai wrote, "The removal may occur before, and in the absence of, a court order sanctioning it, because the president has the authority to independently construe the Constitution and the CFPB director cannot insist that he be allowed to stay in his office following a presidential order to vacate it."

Mr. Cordray could then sue in an attempt to get his job back.

Mark Calabria, director of financial regulation studies at the libertarian Cato Institute, agreed that Mr. Trump should be allowed to remove the CFPB director regardless of a pending court case. Formerly a senior Republican staffer on the Senate Banking Committee, Mr. Calabria said he believes the Dodd-Frank law that created the agency allows for such a removal, even before last month's Circuit Court ruling.

"Under the current Dodd-Frank removal language, Trump could make a strong case for removing Cordray based upon a number of Cordray's actions," Mr. Calabria said. "Not a slam dunk case, but certainly a strong one. If I were Trump, I'd fire Cordray on Day One."

The CFPB didn't respond to a request for comment Tuesday.

Mr. Trump hasn't said what he intends to do with CFPB, but Republicans in Congress have been eager to curtail the agency's power ever since it was created as the brainchild of liberal Sen. Elizabeth Warren, Massachusetts Democrat.

Formed as a response to Wall Street abuses, the CFPB has a budget fixed as a percentage of the Federal Reserve's appropriations, to be less vulnerable to congressional oversight. It has the power to regulate mortgages, credit cards and other products directed at consumers such as payday loans and private student loans.

In September, CFPB was among the regulators that fined Wells Fargo $185 million for opening more than 2 million accounts without customer authorization.

The Circuit Court said the agency has authority that is "massive in scope, concentrated in a single person, and unaccountable to the president."

Ms. Warren recently put Mr. Trump on notice not to mess with the CFPB.

“Americans want to hold the big banks accountable,” she wrote in a blog post. “That will not happen if we gut Dodd-Frank and fire the cops responsible for watching over those banks.”

Some in the banking industry want to keep the CFPB, with certain modifications. Richard Hunt, president and CEO of the Consumer Bankers Association, said a five-person, bipartisan board “would preserve the bureau as a strong, stable and effective regulator that would give the banking system certainty and consistency,” regardless of the president’s party.

CBA spokeswoman Jacqueline Ortiz Ramsay said such a leadership structure would “discourage a potential abuse of power.”

“The CFPB is unlike any other agency in D.C., as it is the only one led by a sole director,” she said, adding that her association believes the Senate will have a big role to play with the agency next year.

“Moderate Senate Democrats will have a choice to make — either go along with Sen. Warren or choose to work with Republicans in Congress who could make the commission a reality, thereby protecting the longevity of the CFPB and keeping it from being subject to political winds every two to four years,” she said.

At issue in the court case was an enforcement action that CFPB started in 2014 against PHH, a New Jersey-based mortgage lender. Eventually the agency ordered PHH to pay $109 million for allegedly accepting kickbacks from mortgage insurers.

At first, an administrative judge ordered the company to pay $6.4 million. Mr. Cordray essentially overruled that decision and imposed a penalty of $109 million.

The appeals court panel said Mr. Cordray’s interpretation of real-estate law in the case was incorrect. The judges said the CFPB also “violated bedrock due process principles” by applying its new interpretation of the law retroactively.