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Mulvaney Can Undo Cordray's Legacy

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When Richard Cordray attempted to install his chief of staff as acting director of the Consumer Financial Protection Bureau, his evident aim was to buy enough time to cement his legacy—particularly a just-finalized rule that the agency expects will wipe out half or more of the short-term lending industry. On Tuesday a federal judge thwarted Mr. Cordray, holding that President Trump acted within his authority by appointing Mick Mulvaney to moonlight as acting CFPB director while continuing to lead the Office of Management and Budget.

On his first day at the bureau, Mr. Mulvaney put a freeze on new rules and guidance. But that doesn't solve the problem of the payday-lender rule. Mr. Mulvaney acknowledged that he cannot simply recall rules that have already gone out the door. Repealing a final rule typically requires restarting the rule-making process, which can take years to complete.

But Mr. Mulvaney can stop the payday-lender rule by putting on his OMB hat and invoking the Paperwork Reduction Act of 1980. That law is generally thought of as—actually, strike that. Nobody ever thinks about the Paperwork Reduction Act. It has about as much currency in Washington as the Filled Cheese Act of 1896.

The PRA, which was purportedly strengthened in 1995, was an effort to address a real problem. Federal agencies are eager to impose paperwork burdens on citizens and businesses. It costs an agency almost nothing to impose a new record-keeping requirement or reporting mandate. The expense falls on those required to carry it out.

The obvious solution was to put agencies on a paperwork budget and force them to internalize the costs they foist on the public. To ensure that agencies don't evade that responsibility, the PRA established robust centralized oversight in the Office of Management and Budget, which is part of the White House. Every "information collection request" issued or imposed by a federal agency must be approved by OMB. That includes government forms as well as requirements that private parties collect information. If OMB disapproves a request, the agency cannot enforce it.

In practice, however, the PRA doesn't have much effect. Disapprovals from OMB are exceedingly rare. In part, that's because most agencies are subject to presidential control, rendering the act superfluous—if the White House opposes a regulatory proposal, it can simply instruct the agency to drop or amend it. By the time PRA review rolls around, the White House has already had its say.

Then there are the independent agencies insulated from presidential control, such as the Federal Communications Commission, the Securities and Exchange Commission and most other financial regulators. The PRA empowers them to overrule a disapproval by majority vote. The CFPB was designed to be an independent agency, but unlike the others it has a single director. The PRA limits the ability to overrule to “an independent regulatory agency which is administered by two or more members.” So OMB can disapprove any action by the bureau that imposes unnecessary or excessive paperwork burdens, without fear of being overruled.

Mr. Mulvaney should exercise that power. Every single provision of the short-term lending rule is structured around information collection requests subject to the PRA. The rule’s central requirement is that lenders determine a borrower’s ability to repay by demanding financial information from the borrower, verifying it, and then recording the result of various calculations. Each step is its own paperwork burden.

Whether or not the agency can ultimately justify its regulatory approach—and we have our doubts—it has to do its homework under the PRA. That includes accurately assessing costs, considering the need for and utility of each individual paperwork requirement, balancing the costs and benefits, and minimizing collection burdens. The bureau’s final rule differs substantially from its initial proposal, but the agency made little attempt to account for changes in paperwork burden, as the PRA requires it to do. Nor did it engage with the detailed criticisms of its analysis of the proposal’s costs. The three-page analysis published with the final rule can only be described as Mr. Cordray—perhaps unaware of the bureau’s unique status under the PRA—thumbing his nose at OMB and the White House.

That is reason enough to disapprove the rule and send the CFPB back to the drawing board. It would also signal that the Trump administration actually intends to enforce the PRA—to the point that it will halt a major regulation to ensure compliance. That should prompt other agencies to pay attention to paperwork burdens.

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