

The logo for Investor's Business Daily, featuring the text "INVESTOR'S BUSINESS DAILY" in white, all-caps, sans-serif font, centered within a dark blue rectangular background.

# INVESTOR'S BUSINESS DAILY®

## **A First Step To Draining The D.C. Swamp**

Thaya Brook Knight

November 14, 2016

I have a must-do item for President Trump's first days in office: Replace Richard Cordray as director of the Consumer Financial Protection Bureau.

Replace him with someone who respects not only due process and basic fairness, but who also respects the vital role that financial products play in Americans' daily lives. The financial sector is not the enemy, and it is stunningly inappropriate for any government agency to treat an entire industry with the contempt that the CFPB has shown for those in consumer finance under Director Cordray.

Chief among the Bureau's troubling practices has been regulation by enforcement.

For example, in a recent case before a federal appeals court it was revealed that the CFPB had reinterpreted a rule and enforced its new interpretation against a mortgage company, without providing any notice to the company. The company in question had relied on a long-settled practice laid out in an official interpretation of the regulation issued by the Department of Housing and Urban Development years ago.

The CFPB had the authority to reinterpret the rule, but instead of issuing new guidance, it opted to bring an enforcement action, declaring its new interpretation for the first time as it pursued a company that had had every reason to believe it was in compliance with the law.

The Constitution prohibits *ex post facto* laws that criminalize behavior that happened before the law was enacted. This is because it is fundamentally unfair to hold a person accountable for conduct that was not prohibited at the time it occurred. Luckily the federal court of appeals agreed with the mortgage company and ruled against the CFPB on these and other grounds.

Beyond such explicit examples, other broad policies at the agency suggest a cavalier approach to the harm the CFPB can inflict. Many agencies have a hotline for receiving complaints against companies from the public. Such a system is appropriate and ensures that the agency is responsive to the people.

What is not appropriate is the CFPB's decision to publish what it calls "narratives," copies of complaints it has received from the public published anonymously. The financial companies have the option of submitting a public response, but given the forum it is unsurprising that the vast majority of institutions demur.

Director Cordray has defended the program, asserting that "every complaint tells us what people are facing in the financial marketplace." But this assertion does not explain why these complaints must be posted publicly and anonymously. The only logical reason for publishing them is to, as one industry insider put it, "name and shame" the banks. Remember that these are only complaints. Not the outcomes of trials or even enforcement actions.

Our justice system includes two bedrock principles: that an accused person is innocent until proven guilty, and that an accused person must be given the opportunity to confront the accusing witnesses. Releasing nameless complaints on the internet — although with the name of the financial institution prominently displayed — long before any investigation has even begun violates both principles, and tacitly places the CFPB in opposition to the banks from the beginning.

But the CFPB has not even been successful in promoting the interests of the consumers it claims to protect. Earlier this year it proposed rules restricting the short-term low-value loans known as "payday" loans. These rules would make it infeasible for many lenders to continue operations, not only because the rules themselves are onerous and therefore costly, but because in some instances it is unclear whether compliance would even be possible.

In response to the proposed rule, the agency received an estimated 1.5 million comment letters. Although there is no publicly available information about the breakdown of these letters, previous surveys have shown that customers are satisfied with the services they receive from these lenders.

Additionally, even though much of the rhetoric surrounding the proposed rules has focused on so-called "debt traps," a recent study shows that borrowers do repay the loans in a few months and that the majority are fully aware of how long it will take to repay the loans.

This example highlights a fundamental fact that Director Cordray has missed: People need financial products. They need a range of products to meet their range of needs. The ability to obtain credit, ensure cash flow, save and meet financial goals is the foundation for individual and household prosperity and financial security. The proposed payday rules ignore this fact and jeopardize the ability of lower-income Americans to meet their financial needs.

The best solution, if the CFPB continues to exist, would be to change it from a bureau into a multiseat commission, with commissioners drawn from both major parties. Such a change would require an act of Congress, however, and is not within the president's power to enact.

In the meantime, President Trump, it's time to say "you're fired" to Mr. Cordray and to replace him with someone who will lead the agency with the respect for rule of law, procedure, due process, and fairness that all Americans have a right to expect from their government officials. Even the Americans who work in finance.

*Knight is associate director of financial regulation studies at the Cato Institute.*