With Richard Cordray leaving, chance for new start at CFPB

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November 15, 2017

Richard Cordray has announced that he will resign as director of the Consumer Financial Protection Bureau by the end of the month. This is good news because Cordray's tenure as the inaugural director of this new agency has been terrible. It has been terrible for Americans who rely on financial products to manage their households, terrible for the financial services industry. It has been terrible for rule of law and constitutional principles. We need a new director at the head of this agency.

The agency's purpose is to "ensur[e] that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive." The CFPB, however, strays well beyond this purpose and, in many cases, frustrates its own mission by limiting consumer access to needed products.

Most recently, it issued a rule that will all but eviscerate the payday lending sector. These loans, while expensive, often fill a gap and can be lifelines for vulnerable people. This fact seems to have been lost on Director Cordray, who pushed forward with the final rule despite widespread agreement that it would result in a significant decrease in the availability of these loans. The agency has also tried to expand its reach beyond its actual jurisdiction, applied new interpretations of regulations retroactively and without notice, and ignored basic principles of due process.

Here are a few guiding principles for the new director. First, focus on deterring and punishing fraud. A recent poll conducted by the Cato Institute, in collaboration with YouGov, found that Americans overwhelmingly support protecting consumers from fraud as a top priority for financial regulators. Down at the bottom of the list were "ban risky financial products" and "prevent consumers from making bad decisions." People want protection from fraudsters, not from their own bad decisions.

Second, opt for the policy that results in more choices for consumers, not fewer. In modern society, access to a variety of products is crucial for effective financial management. Different consumers have different financial needs. A single parent working unpredictable shifts and saving for a child's college education will have different needs than a retired couple trying to stretch their savings while preparing for surprise medical expenses. The more products available to consumers, the more likely they will find the product that suits their particular needs.

Third, respect due process. By all means, punish fraudsters, but justice requires that everyone have notice of what activities are not permitted and what the likely punishment will be. The Administrative Procedure Act requires agencies to engage in considerable conversation with the public before issuing regulations. This process, known as notice and comment, allows the agency to improve its understanding of how proposed rules might actually function on the ground before the rules are made final. It also gives the public a helpful heads up about what changes might be coming, and allows anyone affected to change their practices before the rule is final. But when an agency instead decides to change policy by reinterpreting long-standing guidance, and then applying that interpretation retroactively, as it did to PHH Mortgage, it not only unfairly penalizes a company that could not have known it was breaking the law, but also deprives itself of the insight notice and comment can provide.

Finally, stay in your lane. The CFPB has wide-ranging jurisdiction over consumer finance. But under Director Cordray, the CFPB went further, trying to assert authority over areas well out of its range. For example, it attempted to investigate the accreditation process for for-profit colleges, issuing a subpoena for documents. As the appeals court noted in striking down the agency's request, "there are real limits on any agency's subpoena power" and the CFPB's vague hand waving toward student loans was insufficient to show how its investigation into accreditation was relevant to its jurisdiction over consumer finance. The CFPB's attempt to regulate auto dealers, a group explicitly exempted from the agency's purview, has also been rightly criticized. Consumer finance is a big enough field for one agency. Root out the fraud here. There's no need to go roaming around the economy, looking for more things to "fix."

Installing a new director is not a fix for all that ails this agency. There are constitutional problems with its structure that cannot be remedied by the appointment of a new director. A better solution would be to reform the agency as a bipartisan commission, similar to many other federal financial regulators. But within existing parameters, a new director can infuse the agency with a commitment to its actual mission of promoting a robust consumer financial sector.

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