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The Bureau Without A Director

Law360, New York (December 14, 2011, 12:27 PM ET) -- On Dec. 8, nearly all Senate Republicans joined together to defeat a cloture motion on the nomination of former Ohio Attorney General Richard Cordray to lead the Consumer Financial Protection Bureau as its first director. Only one Republican voted in favor of the cloture motion: Sen. Scott Brown, R-Mass., who may have to defend his Senate seat next November against a vigorous challenge by Elizabeth Warren, the bureau's chief architect. (Another moderate Republican, Sen. Olympia Snowe, R-Maine, voted present.)

A vote on a cloture motion is a key procedural step to limit further debate to 30 hours and to move the nomination to an up-or-down vote. A cloture motion fails unless at least 60 senators vote to pass it, and in this case the motion failed on a 53-45 vote. By defeating the cloture motion, Senate Republicans have effectively filibustered Cordray's nomination, preventing a vote on the nomination itself, as they have promised to do since May 2011.

Ironically, President Obama nominated Cordray — rather than his controversial first choice, Warren — to be the bureau's first director in an attempt to avoid a filibuster and to secure a quick confirmation. While some Senate Republicans have praised Cordray's qualifications for the position, the Republican caucus vows to block the confirmation of any nominee as director of the bureau until Congress enacts significant structural changes to the bureau. Democrats, in turn, promise to derail any structural changes to the bureau.

The Larger Controversy

The CFPB was created by the Dodd-Frank legislation, which passed during the previous session of Congress (when Democrats had 59 votes in the Senate). The bureau has always been one of the most controversial aspects of a very controversial law. Only four Republican senators — Brown, Snowe, Susan Collins, R-Maine, and Chuck Grassley, R-Iowa — voted to pass Dodd-Frank, in large part because of the bureau.

Historically, compliance with federal consumer financial protection laws has been the jurisdiction of prudential regulators: the Federal Reserve Board, the Federal Deposit Insurance Company, the Office of the Comptroller of the Currency, the now-defunct Office of Thrift Supervision, the National Credit Union Administration, the Federal Trade Commission, and the Department of Housing and Urban Development.

In the immediate aftermath of a financial crisis largely attributed to subprime and predatory lending, Congress was skeptical of these prudential regulators' ability to adequately enforce those laws and protect consumers, inferring, in some cases, that those regulators' statutory duties to promote financial industry profitability (safety and soundness) created an inherent conflict with their consumer protection obligations and led to lax enforcement.

In Dodd-Frank, Congress transferred rulemaking and, in many cases, supervision and enforcement of consumer financial protection laws from the prudential regulators to the bureau. As envisioned by the act's primary authors, Congressman Barney Frank, D-Mass., and former Sen. Christopher Dodd, D-Conn., who then chaired the responsible House and Senate committees, the bureau would be a strong agency with a clear, unconflicted mission to enforce consumer financial protection laws.

Not surprisingly, the finance industry and its allies in Congress fought these changes, fearing a powerful and adversarial new regulator, but they largely lost the war in the then Democrat-controlled Congress. The bureau was established and ultimately commenced most of its responsibilities on July 21, 2011, the "designated transfer date."

An Incomplete Transfer of Powers

On the designated transfer date, the bureau assumed rulemaking authority over consumer financial protection laws and supervisory and enforcement authority over those laws only for large banks, savings associations and credit unions and their affiliates (i.e., those with over $10 billion in total assets). However, to ensure passage of Dodd-Frank, Congress made an unusual compromise: supervisory and enforcement powers for nondepository institutions were transferred to the director, not to the bureau itself.

In a joint legal opinion issued on Jan. 10, 2011, to the chairman of the House Committee on Financial Services, the inspectors general of the Department of the Treasury and the Federal Reserve Board concluded that such powers over nondepository institutions would not transfer to the bureau until the initial director is installed.

Consequently, the bureau is unable to exercise such powers over many of the primary targets of Dodd-Frank, such as payday and title lenders, consumer finance companies, debt collection agencies, debt adjustment companies, and mortgage originators, mortgage brokers and nondepository mortgage lenders.

Until a director is in place, supervisory and enforcement authorities over such entities remain with the applicable prudential regulator — in many cases, the Federal Trade Commission. However, many of these agencies have already transferred key consumer finance examiners to the bureau, leaving them ill-equipped, and perhaps uninspired, to continue enforcing laws that Congress sought to transfer to the bureau.

Efforts to Modify the Bureau's Structure

With the bureau already "open for business" and largely staffed, and with Democrats continuing to control the executive branch and the Senate, most Republicans recognize that they cannot currently eliminate the bureau. Consequently, they have focused their efforts on "reforming" or "improving" the bureau.

Republicans currently express two primary complaints about the bureau's structure, namely (1) the tremendous power of a director, without accountability to Congress, checks or balances, and (2) the bureau's ability to obtain funding, subject to a cap, by submitting requests to the Federal Reserve, rather than through congressional budgeting.

Congressional Republicans are now pushing to "fix" these perceived faults in the bureau's structure, and their senators are holding the director position hostage until structural changes are made.

In the current session of Congress, House and Senate Republicans have introduced a number of bills to modify, or in some cases repeal, the Dodd-Frank Act. The House of Representatives has only passed one such bill, H.R. 1315, which is currently pending in the Senate.

H.R. 1315 would eliminate the positions of director and deputy director entirely. In their place, the legislation would establish a new five-member commission to lead the bureau, with each member having a staggered five-year term. The commission would consist of the Federal Reserve Board's vice chairman for supervision and four additional members appointed by the president, subject to advice and consent of the Senate. In addition, H.R. 1315 would enhance the ability of the federal Financial Stability Oversight Council (FSOC) to stall or set aside regulations of the bureau.

If enacted, H.R. 1315 would increase prudential regulators' influence in the bureau's rulemaking, supervisory and enforcement activities, whether through the Federal Reserve Board's seat or through the FSOC's greater ability to stall or set aside bureau rulemaking. In addition, with commission seats subject to the Senate's confirmation (or filibuster), any group of 40 senators would retain the ability to manipulate the commission's composition, including maintaining vacancies on the commission. This would certainly lead to a less activist leadership of the bureau.

President Obama and Senate Democrats vow to oppose H.R. 1315 and any effort to modify the bureau's structure. They maintain that the bureau's existing budget limitations and FSOC checks on the bureau's rulemaking are adequate, and contend that a commission would be less effective than a director.

Current Impasse and Possible Routes Forward

For the moment, neither side appears willing to concede or compromise its position, so it is unlikely that Congress will give the bureau a leader, whether a director or a commission, anytime soon. As we enter a presidential election cycle, each party believes that its position will be supported by its base and contributors and will ultimately reap political rewards in the next election.

We can expect that Democrats will label Republicans as anti-consumer obstructionists, and that Republicans will decry the excesses of an unchecked dictatorial bureau. Unless unfavorable opinion polling leads incumbent senators to rethink their position, these positions may only harden as the election approaches.

In the meantime, President Obama is said to be considering appointing Cordray as director when and if the Senate adjourns, through a so-called “recess appointment.” Such an appointment would not avoid Senate the necessity of confirmation, but would only be effective until the next session of Congress begins in January 2013. At that point, the president would again have to nominate a director subject to the Senate’s confirmation.

Republicans could thwart a recess appointment by failing to adjourn. This tactic has been effectively used in the past, with the Republican-controlled House of Representatives continuing in session by holding short pro forma sessions every three days. With the House remaining in session, the Senate is constitutionally prohibited from adjourning without the House’s consent.

As the election season approaches, however, the pressure on congressional leaders to adjourn may become unbearable, as members of Congress will undoubtedly be eager to go to their home state or district to campaign for reelection. The pressure will be most acute for endangered members of Congress in closely contested races. At some point, the political calculus may change, and the risk of a recess appointment may appear small compared with the potential loss of partisan colleagues in electoral defeat.

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