

Choice 2.0

April 19, 2017 | [Michael A. Benoit](#)

The House Financial Services Committee ("HFSC") is working on the Financial Choice Act ("Choice Act 2.0") based on an earlier version from the last Congress ("Choice Act 1.0"). While the HFSC has not authenticated it, a February 6 memo from Chair Jeb Hensarling (R-TX) to the HFSC leadership team lays out the new provisions under consideration that would impact the Consumer Financial Protection Bureau ("CFPB").

According to the memo, the overall approach will seek to recast the CFPB as a civil law enforcement agency, similar to the Federal Trade Commission ("FTC"). The proposed changes to the CFPB that may appear in Choice Act 2.0 include:

- Retaining its sole director structure, but making the director removable at will by the President;
- Eliminating its consumer education functions;
- Limiting its rulemaking authority to the statutes enumerated in Title 10 of the Dodd Frank Act (e.g., Truth in Lending Act, Consumer Leasing Act, etc.);
- Repealing its UDAAP authority entirely;
- Eliminating its supervisory authority;
- Repealing the consumer complaint database provisions;
- Repealing its market monitoring authority;
- Limiting its enforcement powers to cease and desist, civil investigative demand, and subpoena authority;
- Eliminating mandatory advisory boards;
- Eliminating its research function;
- Making clear it has no jurisdiction over entities regulated by the Securities and Exchange Commission or the Commodity Futures Trading Commission.

I think most agree this wish list is of the "throw everything against the wall and see what sticks" variety. That said, let's break it down a bit.

Much of the talk has been about eliminating the single director in favor of a politically balanced five-member commission, so why the focus on keeping the single director? Probably because the next director will be appointed by a Republican president with a palpable dislike of regulation. If you're a Democrat in Congress, a commission structure looks pretty attractive right now. But, proposing to keep the single director may be nothing more than a bargaining chip, since both sides know the problems with the structure, even if it *is* constitutional. I predict we'll ultimately see a commission structure.

Eliminating consumer education, the complaint database, market monitoring, mandatory advisory boards, and research functions make sense if you're recasting the CFPB as a civil law enforcement agency. Its mission will be to enforce the laws, not train consumers, or engage in unfettered policymaking. It also eliminates a number of positions - and full time employees -- allowing Congress to reduce its budget. Choice Act 1.0 proposed to eliminate the CFPB's entitlement funding from the Federal Reserve Board's ("FRB") operating budget, and replace it with appropriated funds; that provision will likely remain in Choice Act 2.0 as it allows Congress more control over the agency.

Eliminating the CFPB's UDAAP and supervisory authority are a big deal, but necessary if the intent is to be left with a law enforcement agency. This will be a tough sell, particularly in the Senate, as it eliminates half of CFPB's function and authority. If the Republicans are serious about reforming the CFPB, we're more likely to see a final bill that retains the supervisory authority and pares back "UDAAP" authority to "UDAP" authority (i.e., eliminating its authority to declare acts and practices "abusive"). The supervisory function needs to stay with the CFPB unless Congress is willing to send that authority back to the prudential regulators -- a costly and messy process. Plus, the prudential regulators alleged failure to adequately supervise consumer protection compliance is why we have the CFPB to begin with.

Limiting the CFPB to UDAP authority brings it in line with FTC authority and the significant body of case law defining what is unfair and deceptive -- I'm still not sure anyone can articulate what behavior might be abusive that is not also unfair or deceptive. Eliminating the CFPB's ability to prohibit unfair and deceptive practices leave it with little to do in the way of enforcement, and seems at odds with the stated purpose of converting it to a pure law enforcement agency.

Limiting rulemaking authority to the enumerated statutes means that even the CFPB retains either UDAP or UDAAP authority, it can't do any rulemaking on that basis. In other words, it will not be able to write any rule it wants in the name of consumer protection. It can only write rules implementing the enumerated statutes, and only to the extent of the authority provided in those statutes. So, rulemakings based on the CFPB's UDAAP authority, e.g., its small dollar rule aimed at eliminating payday lending, would no longer be authorized.

Finally, limiting the CFPB's enforcement powers as described above eliminates its ability to levy civil money penalties. It would only be able to issue a cease and desist order, then go to federal court in the event the order is subsequently violated. Even then, recourse would be limited to what is available under the underlying statute unless Congress gives the CFPB authority to request civil money penalties. In any event, those decisions would be made by a federal judge, not the director as is currently the case.

It remains to be seen what Congress will actually do and what Choice Act 2.0 will ultimately look like. It will most assuredly see action - and perhaps, final action -- before the 2018 midterm elections, but in the meantime health care and tax reform seem to be the priorities. Ironically - given the challenges Congress is experiencing with health care reform and will likely experience with tax reform - a modified

Choice Act 2.0 may be easier to pass than anyone thinks.

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