

Former CFPB attorney on the agency's flaws, future

By Kiah Lau Haslett

May 10, 2017

→ The Consumer Financial Protection Bureau's mission has broadened to include "advocacy"

→ Banks under CFPB purview should hope they are lucky



*Ronald Rubin,
attorney and author*

Ronald Rubin was the 13th enforcement attorney to join the Consumer Financial Protection Bureau following its formation as a result of the Dodd-Frank Act. He joined Hunton & Williams as a partner in 2013 and later served as chief adviser on regulatory policy for the House Financial Services Committee. Since leaving the CFPB, he has authored a number of articles that outline his criticism of the agency and where he has seen it going in recent years. S&P Global Market Intelligence spoke with Rubin at Commerce Street Capital's bank conference in late April. Below is

an edited transcript of that conversation.

S&P Global Market Intelligence:

How did you come to work for the CFPB?

Ronald Rubin: I started following the Dodd-Frank Act's legislative process because of Elizabeth Warren, whom I remembered as a University of Pennsylvania Law School professor. I thought the CFPB would be the consumer financial version of the SEC, where I'd worked for seven years, and that I could help them avoid the SEC's organizational flaws, especially the ones that made it miss the Madoff fraud. I had no idea the CFPB would be as political as it turned out to be.

I'm a University of Chicago guy — I believe free markets provide the best results for consumers, but only if they have correct information. Markets aren't really free or efficient if consumers are being lied to. When I interviewed with Rich [CFPB Director Richard Cordray], he asked me what the bureau should tackle first. I said credit card contracts with fine

print that nobody can read, because consumers have no idea what they're agreeing to.

Preventing financial industry fraud was supposed to be the agency's mission, and sometimes it still is. Where the CFPB went wrong was becoming a consumer advocate, which usually involves substituting somebody's judgment about what's best for consumers for the market's judgment. A good example is attempting to put legal, honest payday lenders out of business. Honest means borrowers understand the terms of their loans; it doesn't mean charging whatever fees or interest rates the CFPB thinks is fair.

What role do you play in the CFPB debate?

The CFPB debate the public gets through the media is oversimplified. One side inflates the agency's accomplishments, says its current structure is the only way to protect consumers, and labels any criticism insincere; the other is reluctant to give the bureau credit for anything it does or acknowledge its legitimate purpose. The truth is somewhere in-between, and it's complicated. While I sometimes point out the CFPB's mistakes, propaganda, or dishonesty, I never question its core mission or call for its elimination. I usually focus on specific policies and actions that harm or fail to protect consumers.

Do you think the CFPB is unconstitutionally structured?

The Constitution protects us from the government by dividing it into three branches that individually write, interpret and enforce our laws. The Dodd-Frank Act took advantage of a few unwise Supreme Court decisions' exceptions to the three-branch structure to create a CFPB director who could write regulations that operate like laws, determine facts and interpret laws instead of judges, and enforce laws without worrying about being fired by the president. So I agree with the PHH Corp. decision that the CFPB's structure is unconstitutional because, for consumer financial laws, it recombines the three functions into one unelected official. Even if the full D.C. Circuit Court of Appeals reverses its three-judge panel's decision, I think the Supreme Court will rule the way the panel did.

What are the benefits of a bipartisan commission leadership structure, and how could one be implemented?

A commission structure offers several important benefits. The most obvious is intellectual diversity. Like most of the CFPB's mistakes, Rich's PHH ruling was the product of groupthink — it never would have happened if he'd had a few moderate or conservative advisers who weren't afraid to disagree with him. Probably the most important benefit is transparency. With two minority-party commissioners, you wouldn't be able to hide things the way the CFPB does now. If the leaders of an agency can't honestly explain and defend the reasons for their policies or actions, then they probably shouldn't be doing whatever they're doing.

A law that immediately changed from single director to bipartisan commission was always unlikely because one party would be giving up power. A bill might pass if the change became effective five years out, because neither side would

know whether the change helped or hurt them. At this point, the agency wouldn't be bipartisan without five years under a Republican director to balance out the last six years of Democratic staffing.

Can you give any advice for banks that are preparing to or recently moved into CFPB supervision purview?

The truth is that the CFPB usually targets companies because they're the biggest in their industry, not because they're the worst. So "don't be successful" is the correct answer, but it's not very good advice. Also, there's a certain amount of luck involved. Either the CFPB's supervision unit or its enforcement unit handles any particular company, but not both at the same time. If you draw supervision, your odds of avoiding an enforcement action are much better.