The CFPB Supervision Problem

CFPB director Richard Cordray (Reuters photo: Yuri Gripas)

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by RONALD L. RUBIN *June 23, 2017 4:00 AM*

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NATIONAL REVIEW

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By Ronald L. Rubin — June 23, 2017

On June 12, 2017, the Treasury Department issued a 149-page report proposing reforms to the Dodd-Frank Act of 2010, many of which were in the Financial CHOICE Act that House Republicans had passed a week earlier. Most of the proposed revisions to the 2010 law, enacted while Democrats controlled Congress and the White House, concern technical measures designed to prevent a repetition of the 2008 financial meltdown.

The most controversial proposals involve the Consumer Financial Protection Bureau. While the CFPB was not essential to the goal of preventing economic crises, a modest federal agency dedicated to curbing financial-industry fraud, like the one Senator Elizabeth Warren first advocated as a law professor in a 2007 article, might have provided welcome enforcement of consumer financial laws that had been neglected by state agencies and solvency-focused bank regulators.

Instead, the unchecked Democrats, arguing that only a regulator independent from politicians could protect consumers, created a huge agency with guaranteed funding through Federal Reserve Bank profits, led by a single director who could be fired only for cause during a five-year term. The CFPB was given jurisdiction over 18 laws and authorized to assess massive fines for subjectively determined “unfair, deceptive, and abusive acts and practices.” What followed has been Washington’s version of the famous *Twilight Zone* episode in which a telekinetic child terrorizes adults.

The latest Republican proposals would eliminate the CFPB’s supervisory authority, which allows it to conduct examinations of financial businesses. Supervision is different from investigation, in which the government subpoenas documents and interviews witnesses based on suspected wrongdoing. With supervisory authority, examinations are conducted

on-site at the regulator's discretion. Supervisory authority is very intrusive — basically a permanent search warrant — and typically limited to industries where malfeasance can cause catastrophic harm. The only activity with such risk overseen by the bureau is mortgage lending, which is already supervised by bank regulators. Much of the territory the CFPB now covers was previously handled by the Federal Trade Commission, which lacks supervisory authority.

The CFPB expends more financial and human resources on supervision than on any other agency function. Conducting on-site examinations requires expensive regional offices and travel costs. The Supervision and Consumer Response offices are the bureau's most poorly managed, generating the majority of its labor disputes and internal-discrimination claims.

Bureaucratic competition between the CFPB's Supervision and Enforcement offices has led to significant, sometimes spectacular, dysfunction. Either Supervision or Enforcement covers any particular company, but not both at once. This territorialism was a significant factor in the CFPB's inability for five years to stop Wells Fargo from fraudulently opening millions of unauthorized customer accounts.

Supervision "claimed" Wells Fargo in 2011 and failed to uncover the widespread fraud before the *Los Angeles Times* exposed it in December 2013. Worse yet, Supervision did not conduct on-site examinations of Wells Fargo's sales practices and discouraged Enforcement from commencing a full investigation until the Los Angeles city attorney sued Wells Fargo on May 4, 2015. Enforcement had to scramble to review evidence from the Los Angeles city attorney's and comptroller of the currency's investigations, collect data to support a headline-driven $100 million fine, and draft documents in time to announce its settlement together with the other agencies on September 8, 2016.

The CFPB's failure to protect consumers for five years did not stop its shameless press office from capitalizing on the case by cleverly misrepresenting the agency's tagalong participation as leadership. The deception backfired and the truth emerged, however, when Wells Fargo's chastened new management and the comptroller's office cooperated with congressional inquiries. As might be expected, the bureau did not.

Ironically, Congress needs supervisory authority over the CFPB much more than the CFPB needs supervisory authority over businesses. For years, the House Financial Services Committee has requested and subpoenaed internal documents in a futile attempt

at oversight. Without the threat of budget cuts, the CFPB has been free to withhold embarrassing evidence and operate in secrecy.

On June 6, 2017, the House committee published a staff report describing obstruction of its Wells Fargo investigation and threatening to charge CFPB director Richard Cordray with contempt of Congress. Cordray used to ignore such threats, but since the election he must avoid giving President Trump obvious cause to fire him.

Cordray's June 14, 2017, rebuttal letter to committee chairman Jeb Hensarling demonstrated the CFPB's favorite stonewalling tactic. Cordray's narrative leaves little doubt that the bureau responded to the committee's document requests and subpoenas by sending hundreds of pages of irrelevant documents and then offering to schedule a bipartisan briefing for committee staffers. The Republicans replied that a briefing would be welcome once the CFPB produced the requested documents. A few cat-and-mouse e-mail exchanges went nowhere. Cordray concludes the letter by proclaiming that the always-cooperative bureau provided thousands of documents and offered bipartisan briefings, but was snubbed.

Much debate has been wasted over whether the CFPB's employee-discrimination problems justify Cordray's removal for cause, but the agency's blatant contempt of Congress is far more serious and easier to prove. In 2014, CFPB managers were forced to withdraw their reprimand of a whistleblowing employee after the bureau's inspector general informed Cordray that the managers, not the employee, had been improperly obstructing oversight. Cordray did not punish the managers, who continued their illegal practices. Hensarling questioned Cordray about the incident during the director's semiannual testimony on April 5, 2017. The video of that exchange speaks for itself, and the underlying facts made public after the hearing are disturbing.

Transparency would not weaken the CFPB's independence, but that independence makes traditional legislative oversight ineffective. The Republicans' reforms should include giving Congress supervisory authority over the CFPB.

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— Ronald L. Rubin was an enforcement attorney at the Consumer Financial Protection Bureau and chief adviser on regulatory policy at the House Financial Services Committee.