
House GOP Report Says CFPB May Have Violated Law

BNA Snapshot By Jeff Bater – January 19, 2017

House Republicans are contending the Consumer Financial Protection Bureau might have violated a federal law that governs agency rulemaking procedures.

The Jan. 18 report is the third issued by House Financial Services Committee Republicans in the last 14 months highlighting the CFPB's "troubled efforts" to regulate auto lenders.

The latest report comes amid uncertainty over the fate of the agency's leader, Richard Cordray, and efforts by GOP lawmakers to build the case for President-elect Donald Trump to fire him "for cause," Joann Needleman, a Philadelphia-based lawyer at Clark Hill PLC, told Bloomberg BNA in an e-mail.

A committee news release said the report, based on internal CFPB documents, uncovers "several potential legal problems" with the bureau's 2015 rule authorizing it to regulate the auto-lending market.

Administrative Procedure Act

The report said the bureau "failed to take steps that its attorneys advised the director to undertake to comply with the Administrative Procedure Act (APA) when issuing a major rulemaking governing the larger participants in the auto-lending market." The APA governs the procedures for rulemaking by federal agencies

Disregarding clear advice from agency lawyers to reopen the record in order to comply with the APA was highly problematic, Jane Luxton, who chairs Clark Hill's administrative law practice group, told Bloomberg BNA in an e-mail.

"Any competent administrative law practitioner would welcome the chance to challenge that decision as arbitrary and capricious and not in accordance with the law," said Luxton, who is based in Washington.

Cordray's five-year term expires in 2018, and under Dodd-Frank he can be removed only for cause. A group of Democratic senators said Jan. 17 they would rally public opinion against Trump if he tries to dismiss Cordray and that an attempt by Trump to fire him would be hard-pressed to withstand a legal challenge.

"There is no conceivable way that Cordray can be fired for cause," Sen. Chuck Schumer (D-N.Y.) said in a telephone news conference with Sens. Sherrod Brown (D-Ohio) and Elizabeth Warren (D-Mass.). "There would be a long fight if they try to remove him. We think the odds are high a legal challenge would work."

Democrats to the Defense

Brown and Warren, along with some other Democrats on the Senate Banking Committee, praised Cordray in a Jan. 17 letter that took note of the bureau's big fine in 2016 against Wells Fargo over a sales tactics scandal and implored him to "continue to lead the charge against companies that take advantage of hardworking Americans."

Cordray is also facing uncertainty because of a ruling by a panel of federal appeals court judges that said the head of the CFPB can be dismissed at the pleasure of the president. The U.S. Court of Appeals for the District of Columbia Circuit hasn't yet acted on the CFPB's request that the full court review the judicial panel's October PHH ruling.

House GOP Report

In its news release, the committee said that one potential legal problem with the bureau's 2015 rule is Cordray's failure to heed CFPB attorneys who advised him to publish a list of institutions the bureau believed would be subject to the proposed rule and to reopen the public comment period after it had closed.

"Despite the recommendations of CFPB attorneys who warned him of the legal implications of failing to reopen the comment period, Director Cordray approved issuing the final rule without disclosure and public comment on the data underlying the rulemaking," the news release said.

The committee said its new report demonstrates that under recent Supreme Court precedent, the CFPB's use of the disparate impact legal theory in enforcement actions against providers of auto financing wouldn't survive judicial scrutiny.

"Fuzzy logic and false comparisons are unfortunately prevalent in the CFPB's auto-lending actions," the report states. "In every aspect of the CFPB's auto-lending actions, the CFPB's lack of rigor leads to unsupported and unreliable conclusions."

Clark Hill's Needleman said the committee's report may lay the groundwork for the next financial institution that might be the target of the CFPB on disparate impact and said the arguments presented are good.

"But it really does nothing more than 'Monday morning quarterback' the CFPB's claims," said Needleman, who leads Clark Hill's consumer financial services regulatory and compliance practice group. "It's not news that the industry sees the CFPB's legal theories as tenuous at best, but that is the reason there is a court system. Those theories need to be tested and Congress is not the final arbiter on whether those theories have merit."

'Regulatory State Run Amok.'

Rep. Jeb Hensarling (R-Texas), the committee's chairman and a longtime CFPB critic, said in the news release the agency routinely abuses and exceeds its authority.

"Once again we see the CFPB is a dangerously out-of-control, unconstitutional and unaccountable bureaucracy," Hensarling said. "It is a case study in the overreach and pathologies of the regulatory state run amok."

To contact the reporter on this story: Jeff Bater in Washington at jbater@bna.com