

Leaked Hensarling Memo Outlines Proposed Changes to the CFPB

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Media organizations have obtained a leaked memo originating from Representative Jeb Hensarling, Chairman of the House Financial Services Committee, that outlines planned changes to the version of the CHOICE Act [introduced in the last Congress](#). According to the memo, which we read as commenting upon an interim nonpublic draft of the CHOICE Act, CHOICE Act 2.0, which is expected to be introduced in Congress soon, would retain and restructure the CFPB.

Under CHOICE Act 2.0, the CFPB would be headed by a single director who would be removable by the President at will. This structure stands in contrast to CHOICE Act 1.0, which would have turned the CFPB into a five-member bipartisan commission. CHOICE Act 2.0's proposed CFPB structure, however, would be in line with the remedy prescribed by [PHH v. CFPB](#), the holding of which has been stayed pending a [petition for en banc review](#). The proposed revisions in the leaked memo neatly side step the brewing fight with Senate Democrats [who are against a multi-member bipartisan commission](#). An executive director, removable at will by the President might, indeed, be the preferred option of a President of either party.

CHOICE Act 2.0 would outright repeal a number of Dodd-Frank provisions relating to the CFPB, including the CFPB's UDAAP, supervisory, and market monitoring authorities; the CFPB's consumer education function; and the CFPB's research function. The CFPB consumer complaint database would be eliminated. CHOICE Act 2.0 would also strengthen existing statutory language to make clear that the CFPB's jurisdiction does not include entities regulated by either the CFTC or SEC. Rulemaking authority would be limited to the 18 enumerated statutes listed in Title X of Dodd-Frank.

Many of these changes go further than those in CHOICE Act 1.0. For example, CHOICE Act 1.0 would have retained the CFPB's supervisory authority (while raising the benchmark from \$10 million to \$50 million) and would have retained the consumer complaint database (while requiring verification of complaints before publication). We expect that the provisions of CHOICE Act 1.0 that would have subjected the CFPB to Congressional appropriations, and which are a core part of the policy changes sought by Congressional Republicans, will be retained in CHOICE Act 2.0 even though the leaked memo is silent on this point.

The memo also refers to making the CFPB a "civil enforcement agency" similar to the FTC. We believe that the memo's reference to the CFPB being "restructured" as a civil enforcement agency is not meant to refer to the civil/criminal jurisdictional divide. The current CFPB, like the FTC and the federal financial regulatory agencies, does not have criminal enforcement powers and instead makes criminal referrals to the DOJ.

Instead, we suspect that the comparison to the FTC is intended to refer to the more general notion that the restructured CFPB would function more like the FTC whose scope of rulemaking authority is narrowly prescribed, particularly given the proposed elimination of the CFPB's broad UDAAP authority. Given that the CFPB has rulemaking authority under 18 "enumerated consumer laws," it is not clear this is a real limit. It may well be that the reference is meant to reflect a desire that the CFPB act, as a policy matter, more like the FTC.

The leaked memo discusses many more changes to the forthcoming version of the CHOICE Act beyond those relating to the CFPB; stay tuned to Davis Polk's FinRegReform blog for our continued analysis and commentary.

Law Clerk Ryan Johansen contributed to this post.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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