

The CFPB and the Rule of Law

January 27, 2018 | Client Update | 4-minute read

The Mulvaney Memo on the CFPB and the rule of law is one of the most remarkable documents to be published by an agency head in many years. It signals a deep commitment to the rule of law as a philosophical concept and as an important brake on agency discretion in the administrative state. The [full memo](#) is well worth a read. A shorter version appeared in the [Wall Street Journal](#).

Acting Director Mulvaney framed his view of the CFPB's mission in comparison to that of former Director Cordray. As Acting Director Mulvaney characterized it, the CFPB in the past viewed its mission as one of a new sheriff in town who would "push[] the envelope." To Acting Director Mulvaney, this sort of philosophy is misguided and even a little frightening. After quoting the famous defense of the rule of law from the play *A Man for All Seasons*, later made into [a film](#) in 1966, Acting Director Mulvaney asked rhetorically, "If you push the envelope now in pursuit of your mission, what's to stop someone else—with a different mission, perhaps—from pushing that envelope against you tomorrow?"

We believe that the memo is intended to signal a shift in thinking far beyond the CFPB and the financial sector as the Trump Administration brings a new attitude to the regulatory state. For example, Associate Attorney General Rachel Brand announced Thursday a [new Department of Justice policy](#) that will prohibit the DOJ from using guidance documents—or noncompliance with guidance documents—to establish violations of law in civil enforcement actions. In the words of the announcement, to do otherwise would be a use of "civil enforcement authority to convert agency guidance documents into binding rules."

Acting Director Mulvaney closed his memo by announcing a new mission of enforcing the law "with humility and prudence." What does that mean in practice? Acting Director Mulvaney offered a few ideas.

Regulation. In an interview with Greg Baer of the Clearing House, Federal Reserve Vice Chair for Supervision Randal Quarles made the fundamental observation that "[i]f there are going to be rules, we should probably let people know what they are." Consistent with his focus on the rule of law, Acting Director Mulvaney struck a similar tone in his memo, saying that "the people we regulate should have the right to know what the rules are before being charged with breaking them." As a result, financial institutions should expect rulemaking to occur through formal processes while the CFPB backs away from the idea of retroactive regulation through enforcement.

Data-Driven Cost-Benefit Analysis. Under the Dodd-Frank Act, the CFPB is required to consider the potential costs and benefits of its rules and, for Acting Director Mulvaney, this obligation necessitates not only a qualitative analysis but also an analysis of measurable and quantifiable costs and benefits. In addition to driving the CFPB's cost-benefit analyses, Acting Director Mulvaney suggests that an increased use of quantitative data will also help to shape the CFPB's priorities. Here, Acting Director Mulvaney implied that the CFPB's rulemakings related to prepaid cards and payday lending may have been misguided—at least in terms of prioritizing those products over other areas—as these products garner a very small share of total consumer complaints received by the CFPB. The numbers cited by Acting Director Mulvaney are striking. Prepaid cards and payday lending products made up just 0.9% and 2% of total complaints received by the CFPB in 2016, respectively, while "almost a third" of total complaints related to debt collection.

Enforcement. The CFPB intends to focus on "quantifiable and unavoidable harm" to consumers. Gone are the days, according to Acting Director Mulvaney, of the CFPB "looking for excuses to bring lawsuits" in cases where such quantifiable, unavoidable harm does not exist. One of the costs the CFPB must consider when engaging in rulemaking is "the potential reduction of access by consumers to consumer financial products."

As Acting Director Mulvaney noted in his memo, the CFPB is in the process of "reviewing everything" that it does, a reference to the CFPB's [call for evidence](#) announced last week. On Wednesday, the CFPB published the first of the

Requests for Information (RFIs) that it previewed in the call for evidence. This [first RFI](#) focuses on Civil Investigative Demands (CIDs). Given that the CFPB notes that it is “especially interested” in aligning its CID processes with those of “other agencies with similar authorities,” responses to this RFI bear watching.

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