

A New Congress, a New Chance to Rein In the CFPB

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Consumer Financial Protection Bureau head Richard Cordray is building an empire. Given the vast unchecked power the Dodd-Frank Act gave the agency, why wouldn't he? The CFPB is insulated from congressional and executive oversight and has near-plenary authority. This is at odds with America's tripartite constitutional system of government and traditional institutional checks and balances.

The CFPB's expansive view of its authority should remind the incoming Republican Congress that it's high time to rein it in, if not eliminate it.

There is evidence aplenty that the CFPB has overstepped its bounds. It recently made a grab to regulate [telecommunications companies](#), contending they are subject to its authority since they process payments and extend credit on behalf of third-party payment schemes and merchants. It also obtained a \$2.6 million settlement from the [furniture retailer](#) Freedom Stores in December over its collection practices. And the agency has even circumvented Dodd-Frank's prohibition on regulating auto-dealer finance by going after wholesale suppliers such as [Ally Financial](#).

These moves indicate that the CFPB is starting to see itself as a central planner rather than just an enforcer for consumer finance law and industry watchdog. At the [Clearing House's annual conference](#) on Nov. 20th, Cordray [half a dozen times told the audience](#) what the industry "must" or "should" build into its proposed faster payment system. He repeatedly cautioned the audience to ensure adequate consumer protections.

The industry is hardly against consumer protection. But without guidance from regulators, payment systems such as MasterCard and Visa have built in robust consumer protections and chargeback rights. They do this because it is in their best interests, and the interests of their licensees, to do so.

In sum, the CFPB is administrative law on steroids. Support for this argument can be drawn from [Is Administrative Law Unlawful?](#), a book by Columbia Law School professor Philip Hamburger. As his book explains, the system is supposed to work this way: legislatures make laws, executive agencies implement and enforce the laws, and an independent judiciary adjudicates. Notwithstanding the deference that courts have given agencies, only Congress can make binding law. The reigning standard gives regulators latitude to implement rules when the statute's text is unclear. But this is not license to create laws.

The CFPB's 253-page [proposed rule](#) for prepaid cards, published in December, exemplifies many of the problems with the agency. The proposal mandates the number of characters that banks can use in disclosure URLs—an absurd level of specificity reminiscent of the European Union's aborted attempt to define [the correct curvature and size of bananas](#). More troublingly, prepaid companies would be required to wait 30 days after issuing cards to begin offering their customers credit. That's making, not implementing law. And the CFPB's prerogative to unconditionally exempt parties from its rules is absolutism.

There are a number of other issues with the CFPB. The agency's director can write and approve his or her own budget of [up to 12%](#) of the Federal Reserve's annual operating expenses. Kings are supposed to approve their own budgets, not regulators in constitutional republics.

The CFPB risks suppressing innovation and choice in the financial services industry. But what is to be done about it?

Congress should act to curb the CFPB. For one thing, Congress should ensure that it, rather than the Fed, funds the agency. This would make the agency directly accountable to Congress, which is in turn politically accountable to voters. It should also eliminate the CFPB's authority to deem products "abusive" and consequently ban them, and restrict the agency's authority to traditional standards of policing unfair and deceptive practices. If all the material facts of products are fully disclosed, adults who are competent to vote, serve on juries and join the army should be free to decide whether or not to use them.

Moreover, Congress should ensure that the CFPB is supervised by a bipartisan board like other administrative agencies, rather than headed by an unaccountable director who is only removable for cause.

This can be a bipartisan effort. Some on the left, including George Washington law professor Jonathan Turley, profoundly believe in constitutional separation of powers. Some congressional Democrats still do too. They have an interest in defending Congresses' institutional authority over administrative agencies.

No matter how enlightened regulators are, it's not their job to make policy or to make consumers' choices for them. It's their job to implement and enforce the law. The CFPB should therefore have a more circumscribed role subject to rigorous, politically accountable congressional oversight.

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