

New Agency, New Authority: An Update on the Consumer Financial Protection Bureau

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The fact is the financial crisis and the recession were not the result of normal economic cycles or just a run of bad luck. They were abuses and there was a lack of smart regulations. So we're not just going to shrug our shoulders and hope it doesn't happen again. We're not going to go back to the status quo where consumers couldn't count on getting protections that they deserved. We're not going to go back to a time when our whole economy was vulnerable to a massive financial crisis. That's why reform matters. That's why this bureau matters. I will fight any efforts to repeal or undermine the important changes that we passed. And we are going to stand up this bureau and make sure it is doing the right thing for middle-class families all across the country.

—President Obama, July 18, 2011¹

The passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act² in July 2010 created a single new agency, the Consumer Financial Protection Bureau (CFPB), responsible for the regulation of consumer financial products.³ President Obama, in signing the Act into law, described the CFPB as “a new consumer watchdog with just one job: looking out for people—not big banks, not lenders, not investment houses—looking out for people . . . as they interact with the financial system.”⁴ Under the Act, the CFPB is vested with broad authority to implement and enforce most existing federal consumer financial laws,⁵ including the Truth in Lending Act, the Fair Credit Reporting Act, and the Federal Debt Collection Practices Act.⁶ Additionally, the CFPB has

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¹ Nikki Sutton, *President Obama Nominates Richard Cordray to Lead Consumer Financial Protection Bureau*, WHITE HOUSE BLOG (July 18, 2011, 3:55 PM), <http://www.whitehouse.gov/blog/2011/07/18/president-obama-nominates-richard-cordray-lead-consumer-financial-protection-bureau>.

² Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, tit. X, 124 Stat. 1376, 1955 (2010) [hereinafter *Dodd-Frank Act*], available at <http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf>.

³ See generally John E. Villafranco & Kristin A. McPartland, *New Agency, New Authority: What You Need to Know About the Consumer Financial Protection Bureau*, ANTITRUST SOURCE, Dec. 2010, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Dec10_Villafranco12_21f.authcheckdam.pdf.

⁴ President Barack Obama, Remarks by the President at Signing of Dodd-Frank Wall Street Reform and Consumer Protection Act, White House Office of the Press Secretary (July 21, 2010), <http://www.whitehouse.gov/the-press-office/remarks-president-signing-dodd-frank-wall-street-reform-and-consumer-protection-act>.

⁵ The complete list of laws now under the CFPB's authority is as follows: Alternative Mortgage Transaction Parity Act of 1982; Consumer Leasing Act of 1976; Electronic Fund Transfer Act, with the exception of section 920; Equal Credit Opportunity Act; Fair Credit Billing Act; Fair Credit Reporting Act, with the exception of sections 615(e) and 628; Home Owners Protection Act of 1998; Fair Debt Collection Practices Act; subsections (b) through (f) of section 43 of the Federal Deposit Insurance Act; Sections 502 through 509 of the Gramm-Leach-Bliley Act, with the exception of section 505 as it applies to section 501(b); Home Mortgage Disclosure Act of 1975; Home Ownership and Equity Protection Act of 1994; Real Estate Settlement Procedures Act of 1974; S.A.F.E. Mortgage Licensing Act of 2008; Truth in Lending Act; Truth in Savings Act; section 626 of the Omnibus Appropriations Act; and Interstate Land Sales Full Disclosure Act. See *Dodd-Frank Act*, tit. X, § 1002 (12), 124 Stat. at 1957.

⁶ *Id.*

specific authority to prevent unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service.⁷ “Consumer financial product or service” is broadly defined and includes (with some exceptions) extending credit or servicing loans, real estate settlement services, deposit-taking activities, stored payment card systems, check-cashing, collection or guaranty services, financial advisory services, consumer report information, and debt collection.⁸

Since the signing of the Act, the CFPB has come under increasing political fire, and operated without a Director until one was installed in January 2012 through a controversial recess appointment. Throughout 2011, however, the agency staffed up, with approximately 750 employees as of the end of 2011,⁹ and in July 2011 began to oversee banks that have over \$10 billion in assets. At the same time, the agency has been rolling out new initiatives focused on mortgage and credit card products and increasing its consumer outreach efforts. And last month, with a Director in place, the agency also launched its non-bank supervision program.

This article will look back on what the CFPB accomplished in various areas during its first year in business and for each of those areas discuss what may lie ahead in 2012.

[A] May 2011 letter

to President Obama

signed by forty-four

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Staffing the Agency

President Obama’s nominee for Director, former Ohio Attorney General Richard Cordray, received high profile attention due to the political fight over his nomination. Many had expected President Obama to nominate Elizabeth Warren, his original choice to “stand up” the agency,¹⁰ and the former Assistant to the President and Special Advisor to the Secretary of the Treasury on the Consumer Financial Protection Bureau. However, the President ultimately chose Cordray, then-current Director of Enforcement, as the nominee on July 18, 2011. The Senate Committee on Banking, Housing, and Urban Affairs held a September confirmation hearing and in October voted on party lines to send Cordray’s nomination to the full Senate. On December 8, 2011, Senate Republicans blocked an up-or-down vote on Cordray’s nomination, leaving the CFPB without a Director in place going into the new year.

The December vote was not surprising, particularly in light of a May 2011 letter to President Obama signed by forty-four Republican Senators opposing the nomination of any CFPB Director “absent structural changes that will make the Bureau accountable to the American people.”¹¹ Specifically, the letter called for three major reforms: (1) replacing the single Director position with a Board of Directors; (2) changing agency funding to be subject to the annual congressional appropriations process rather than funded through the independent Federal Reserve; and (3) establishing more oversight tools for federal bank regulators to ensure that CFPB regulations “strike the right balance between consumer protection and safety and soundness.”¹² In a state-

⁷ *Id.* tit. X, § 1031(a), 124 Stat. at 2005.

⁸ *Id.* tit. X, §§ 1002(5) & 1002(15), 124 Stat. at 1956, 1957–60.

⁹ *How Will the CFPB Function Under Richard Cordray?: Hearing Before the Committee on Oversight & Government Reform*, 112th Cong. (Jan. 24, 2012), available at <http://www.youtube.com/watch?v=M5u9s9Go-t8>.

¹⁰ Press Release, White House Office of the Press Secretary, Statement by the President to the Press (Sept. 17, 2010), <http://www.whitehouse.gov/the-press-office/2010/09/17/statement-president-press>.

¹¹ Mary Lu Carnevale, *McConnell Slams Obama Plan to Appoint Consumer Bureau Chief*, WALL ST. J. ELECTION 2012 BLOG (Jan. 4, 2012, 11:04 AM), <http://blogs.wsj.com/washwire/2012/01/04/mcconnell-slams-obama-plan-to-appoint-consumer-bureau-chief/>.

¹² Press Release, Senator Richard Shelby, 44 U.S. Sens. to Obama: No Accountability, No Confirmation (May 5, 2011), http://shelby.senate.gov/public/index.cfm/newsreleases?ContentRecord_id=893bc8b0-2e73-4555-8441-d51e0ccd1d17.

ment accompanying the May letter, Senate Minority Leader Mitch McConnell (R-KY) called the letter “a commitment by 44 Republican Senators to fix the poorly-thought structure of this agency that will have unprecedented reach and control over individual consumer decisions—but an unprecedented lack of oversight and accountability.” Republicans in both chambers of Congress have proposed legislation that would include these structural reforms, and in July 2011, the Republican-controlled House of Representatives passed H.R. 1315, the Consumer Financial Protection Safety and Soundness Improvements Act, although prospects for enactment this year remain slim with a Democrat-controlled Senate.

With no resolution in sight on the Senate Republicans’ objections, President Obama moved forward with a controversial recess appointment on January 4, 2012, installing Cordray as Director. While the Constitution grants the President the power to make appointments whenever the Senate is in recess,¹³ Republicans contend that a resolution to formally adjourn was never adopted and the Senate had been meeting every three days in pro forma sessions. They argue that, based on precedent, recess appointments cannot be made during a recess of less than ten days. Consequently, the move has generated criticism of executive overreach and court challenges are eventually expected, with Senator McConnell calling the move “uncertain legal territory.”¹⁴

The recess appointment will last until the end of the next session of Congress (i.e., the end of 2013) unless an individual (either Cordray or someone else) is nominated, confirmed, and permanently appointed to the Director position prior to the end of that congressional session. Either way, with the appointment of a Director, the CFPB is moving forward in regulating non-bank lenders. Due to the language of the Act, the CFPB had been unable to begin regulating non-bank lenders until a Director was in place, leaving payday lenders and mortgage brokers among those that had not yet been brought under the CFPB’s regulatory authority. Some lawmakers, however, including Ohio Republican Senator Rob Portman, argue that the recess appointment is irrelevant and that the CFPB is still without its full authority. As Portman said in a release issued following the appointment:

The irony is that while this recess appointment may advance the White House’s political goals, it does nothing to advance the work of the CFPB. The statute creating the CFPB makes clear that only Senate confirmation of a Director—not a recess appointment—can activate the new powers of this agency to regulate consumer transactions with Main Street businesses.¹⁵

The Obama administration stresses that it does not see a distinction between a recess-appointed Director and a Senate-confirmed Director. In prepared remarks to the Brookings Institute on January 5, 2012, Cordray brushed aside these objections, stating, “Now, for the first time, we can exercise the full authorities granted to us under the new law. That is the specific difference that having a director makes.”¹⁶

Garnering less media attention but key to future agency action, the CFPB announced eight new hires in November 2011, including several personnel with previous experience in the White House.

¹³ U.S. CONST. art. II, § 2, cl. 3.

¹⁴ David Nakamura & Felicia Sonmez, *Obama Appoints Richard Cordray to Head Consumer Watchdog Bureau*, WASH. POST, Jan. 4, 2011, http://www.washingtonpost.com/politics/richard-cordray-appointed-by-obama-to-head-consumer-watchdog-bureau/2012/01/04/gIQAgyqraP_story_1.html.

¹⁵ Press Release, Senator Rob Portman, Portman Statement on President Obama’s Decision to Appoint Director of Unaccountable New Agency (Jan. 4, 2012), <http://portman.senate.gov/public/index.cfm/press-releases?ID=baf7bd21-d863-431c-91f9-fd6e37633d5f>.

¹⁶ Richard Cordray, Director, CFPB, A Discussion with Richard Cordray, Brookings Inst. (Jan. 5, 2012), http://www.brookings.edu/~media/Files/events/2012/0105_cordray/0105_cordray_remarks.pdf.

In October 2011, the

CFPB made available

online its Supervision

and Examination

Manual, outlining

how the agency will

supervise and examine

consumer financial

service providers for

compliance with federal

consumer financial law.

Roberto Gonzalez, a former Associate Counsel to the President and Special Assistant to the President, was named Principal Deputy General Counsel after serving as Deputy General Counsel. Rohit Chopra was named Private Education Loan Ombudsman, a position created to assist private student loan borrowers. Nicholas Rathod was hired as the Assistant Director for Intergovernmental and International Matters from his prior position as Deputy Director for Intergovernmental Affairs at the White House, and Lisa Konwinski, a former Deputy Assistant to President Obama and Deputy Director of the White House Office of Legislative Affairs, was named as the CFPB's Assistant Director for Legislative Affairs. The CFPB's website was also updated in December 2011 to include an infrastructure chart showing its six divisions.¹⁷

With these hires and a new Director, followers of the CFPB's activities can expect a full agenda for 2012. Also of note, the Federal Trade Commission announced in December 2011 that Jessica Rich, previously a Deputy Director of the FTC's Bureau of Consumer Protection, would take over as head of the Bureau's Division of Financial Practices as of January 9, 2012, following the retirement of Joel Winston. The Division of Financial Practices is likely to have an influential role in determining how the FTC shares jurisdiction of consumer financial protection enforcement actions with the CFPB.

CFPB Supervision and Guidance

In July 2011, the CFPB began to oversee the 111 depository institutions (along with their affiliates and subsidiaries) with over \$10 billion in assets. Collectively these institutions account for more than 80 percent of industry assets.¹⁸ The CFPB's examination staff is deployed throughout satellite offices in Chicago, New York, San Francisco, and Washington, D.C., and examiners are expected to spend much of their time on site at depository institutions and other consumer financial services companies, in addition to consulting internally within the CFPB and drafting reports. While many examiners have been transferred to the CFPB from other supervisory agencies, the CFPB has also been recruiting examination staff from outside sources. Examiners are expected to review available information from other agencies and public sources; develop a preliminary risk focus and scope for the onsite portion of the exam; spend time on site to observe, conduct interviews, and review documents and information; and draft examination reports.¹⁹ In addition to conducting regular examinations of entities, the CFPB will also have the ability to conduct reviews that focus on a particular situation or issue of concern (e.g., particular customer complaints or particular products or practices) that has arisen and affects either a single entity (a "target review") or multiple entities (a "horizontal review").²⁰

In October 2011, the CFPB made available online its Supervision and Examination Manual, outlining how the agency will supervise and examine consumer financial service providers for compli-

¹⁷ The CFPB's infrastructure chart is available at <http://www.consumerfinance.gov/the-bureau/>. A modified version of the chart showing the names of key agency leadership is available at http://www.americanbar.org/publications/the_antitrust_source.html [References tab].

¹⁸ Press Release, U.S. Dep't of the Treasury, Consumer Financial Protection Bureau Outlines Bank Supervision Approach (July 12, 2011), <http://www.treasury.gov/press-center/press-releases/Pages/tg1236.aspx>.

¹⁹ CONSUMER FIN. PROT. BUREAU, CFPB SUPERVISION AND EXAMINATION MANUAL, Examinations 1–11 (Oct. 2011, as amended) [hereinafter EXAMINATION MANUAL], available at http://www.consumerfinance.gov/wp-content/themes/cfpb_theme/images/supervision_examination_manual_11211.pdf.

²⁰ *Id.* Overview 6.

ance with federal consumer financial law.²¹ Labeled “Version 1.0,” the Manual is being continually updated as compliance requirements evolve. The Manual is divided into three parts, (1) Compliance Supervision and Examination, (2) Examination Procedures, and (3) Examination Process Templates. Perhaps most helpfully, the second section, Examination Procedures, is divided into subject headings entitled Unfair, Deceptive or Abusive Acts or Practices, the Equal Credit Opportunity Act, the Truth in Lending Act, the Fair Credit Reporting Act, and the Fair Debt Collection Practices Act, among others, with each heading describing the principles of enforcement for the respective body of law.

The Manual’s guidance on unfair and deceptive acts and practices will be familiar to FTC practitioners. An unfair act or practice is defined in the Manual as one that: (1) causes or is likely to cause substantial injury to consumers, (2) is not reasonably avoidable by consumers, and (3) is not outweighed by countervailing benefits to consumers or to competition. For the first prong, an act or practice that causes a small amount of harm to a large number of people may be deemed to be a substantial injury. Moreover, actual injury is not required in every case, and a significant risk of concrete harm may be sufficient. For the second prong, the inquiry will turn on whether an act or practice hinders a consumer’s decision-making, by, for example, withholding information until the consumer has committed to purchasing the product. For the third prong, the act or practice must be injurious in its net effect, an analysis that may include offsetting consumer or competitive benefits as well as costs that would be incurred to prevent the injury. As with the FTC’s jurisprudence, the Manual states that “public policy considerations by themselves may not serve as the primary basis for determining that an act or practice is unfair.”²²

A representation, omission, act or practice is deceptive when (1) it misleads or is likely to mislead the consumer, (2) the consumer’s interpretation of the representation, omission, act, or practice is reasonable under the circumstances, and (3) the misleading representation, omission, act, or practice is material. For the first prong, the Manual emphasizes that a consumer need not already have been misled; rather, an act or practice may be deceptive if it is likely to mislead consumers. Moreover, statements, representations, and omissions will be evaluated in the context of the entire advertisement, transaction, or course of dealing, such that written disclosures may be insufficient to correct a misleading statement or representation. Here, the Manual specifically cites the FTC’s test for evaluating whether a representation, omission, act, or practice is likely to mislead. For the second prong, the representation is evaluated from the perspective of a reasonable member of the target audience. Additionally, it is not required that a majority of consumers in the target class share the consumer’s interpretation; if a significant minority of consumers are misled, the act or practice may be considered misleading. For the third prong, an act or practice is considered material if it is likely to affect a consumer’s choice or conduct, with certain categories of information presumed to be material, including information about the central characteristics of a product like costs, benefits, or restrictions on the use or availability of the product or service. Express claims with respect to a financial product or service are presumed material. Even if a representation or claim is not presumed to be material, it may be material if there is evidence that it is likely to be considered important by consumers.²³

²¹ See generally *Supervision and Examination Manual—Version 1.0*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/guidance/supervision/manual/> (last visited Feb. 7, 2012).

²² EXAMINATION MANUAL, *supra* note 19, UDAAP 3. See generally *id.*, UDAAP 2–3.

²³ See generally *id.*, UDAAP 5–7.

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Thus, initial guidance from the CFPB indicates that companies should expect the CFPB to follow the FTC’s existing jurisprudence on unfair and deceptive acts and practices in its examinations and, accordingly, in its enforcement actions.²⁴ As to the abusive practices²⁵ prong, Director Cordray said during a January 24, 2012 Congressional hearing that while the term was something of a “puzzle” to the agency, he did not see it as a weapon that would be frequently wielded.²⁶ Instead, “[f]or something to be an abusive practice it would have to be a pretty outrageous practice.”²⁷ Given this perspective, it is unlikely that the CFPB will be pushing the reach of “abusive” practices in the near future.

The CFPB also published its Mortgage Origination Examination Procedures, a field guide for CFPB examiners tasked with evaluating mortgage originators in both the bank and non-bank sectors of the industry, on January 11, 2012.²⁸ Although these procedures focus on a particular product—namely, mortgages—they are an extension of the more general Supervisory and Examination Manual, and they similarly describe the types of information to be reviewed as part of the assessment process. On January 19, 2012, the CFPB published a similar update for short-term, small-dollar lending, commonly known as payday lending, which likewise identified examination procedures and priorities for those specific products.²⁹

The examinations, for both banks and non-banks, may involve a combination of tools, including requiring businesses to file reports, reviewing the materials used by companies to offer products and services, reviewing corporate compliance systems and procedures, and reviewing promises made to consumers. The CFPB has indicated that it will generally notify non-banks of an upcoming examination.³⁰

CFPB Memorandum of Understanding with the FTC

On January 20, 2012, the FTC and the CFPB signed a memorandum of understanding (MOU) to coordinate enforcement efforts and promote consistent regulatory treatment of “consumer financial products or services.”³¹ Director Cordray described the agreement as “important to making sure markets for consumer financial products are getting efficient and effective federal govern-

²⁴ The CFPB Supervision and Examination Manual is replete with examples of unfair and deceptive acts and practices taken from past FTC enforcement actions. *See id.*, UDAAP 3–5 & 7–8.

²⁵ “Abusive” is defined in Dodd-Frank as an act or practice that (1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or (2) takes unreasonable advantage of (A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service; (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer. Dodd-Frank Act, tit. X, § 1031(d), 124 Stat. at 2006.

²⁶ Dave Clarke, *U.S. Abusive Lending Bar Likely Set High—Cordray*, THOMSON REUTERS NEWS & INSIGHT, Jan. 24, 2012, http://newsandinsight.thomsonreuters.com/Securities/News/2012/01_-_January/US_abusive_lending_bar_likely_set_high-Cordray/.

²⁷ *Id.*

²⁸ CONSUMER FIN. PROT. BUREAU, THE EXAMINATION PROCEDURES, MORTGAGE ORIGATION (Jan. 2012), available at <http://www.consumerfinance.gov/wp-content/uploads/2012/01/Mortgage-Origination-Examination-Procedures.pdf>.

²⁹ CONSUMER FIN. PROT. BUREAU, THE EXAMINATION PROCEDURES, SHORT-TERM, SMALL-DOLLAR LENDING (Jan. 2012), available at <http://www.consumerfinance.gov/wp-content/uploads/2012/01/Short-Term-Small-Dollar-Lending-Examination-Manual.pdf>.

³⁰ Peggy Twohig & Steve Antonakes, *The CFPB Launches Its Nonbank Supervision Program*, CONSUMER FIN. PROT. BUREAU (Jan. 5, 2012), <http://www.consumerfinance.gov/the-cfpb-launches-its-nonbank-supervision-program/>.

³¹ CONSUMER FIN. PROT. BUREAU & FED. TRADE COMM’N, MEMORANDUM OF UNDERSTANDING (2012) [hereinafter MOU], available at <http://www.ftc.gov/os/2012/01/120123ftc-cfpb-mou.pdf>. Under the MOU, the term “consumer financial product or service” has the same meaning as under Section 1002(5) of the Dodd-Frank Act. *Id.* at 1, § II.B. This includes, but is not limited to, the following: extending, servicing, acquiring, purchasing, selling and brokering loans or other extensions of credit; extending or brokering certain leases of personal or real property that are the functional equivalent of purchase finance arrangements; providing certain real estate settlement services; engaging in deposit-taking activities, transmitting or exchanging funds, or otherwise acting as a custodian of funds; selling, providing or issuing

ment oversight. We are both motivated by the same thing: To do right by consumers. We look forward to this partnership.”³²

The agencies agree to coordinate law enforcement activities and investigations, and in particular, to notify each other as to all stages of an enforcement action against a “covered person”³³ under “consumer financial laws”³⁴ in connection with offering or providing “consumer financial products or services.” Specifically, the agencies will work together prior to commencing an investigation, will provide ten days notice, if practicable, to each other before filing a complaint or similar initiation of agency action, will provide ten days notice prior to filing a settlement, if practicable, and will permit each other to intervene in any covered court action upon prior notice.³⁵

For rulemaking, the agencies agree to consult each other regarding any rulemaking activity related to consumer financial products or laws. Additionally, the agencies agree to meet periodically to discuss and coordinate initiatives regarding advisory opinions and comprehensive guidance that interpret or apply the applicable laws. The MOU also sets out consultation and notification requirements, including that either agency notify the other of its intention to issue proposed or final rules prohibiting unfair, deceptive, and abusive acts or practices by “covered persons” in the offering of “consumer financial products and services” and that the agencies consult on formal comprehensive agency guidance documents written by either party that address unfair, deceptive, or abusive acts or practices.³⁶

The MOU requires that the agencies meet quarterly to discuss and coordinate the CFPB’s examinations of “covered persons.”³⁷ To facilitate coordination, the FTC may request to review any planned examinations of “covered persons” by the CFPB. In addition, the CFPB will turn over to the FTC specific examination reports, such as reports pertaining to any “covered person” subject to the FTC’s jurisdiction. The CFPB must also notify the FTC of any modifications made to a previously produced examination report. Upon written request by the FTC,³⁸ the CFPB agrees to provide the FTC with any information the CFPB collects through its supervision of a “covered person” subject to the FTC’s jurisdiction unless good cause is shown to preclude disclosure.

stored value or payment instruments and selling such instruments in certain circumstances; providing check cashing, check collection, or check guaranty services; providing certain payments or other financial data processing products or services; providing certain financial advisory services other than those regulated by the SEC or state securities regulators; providing credit counseling or debt management services; collecting, analyzing, maintaining, or providing consumer report information or other account information subject to certain exceptions; collecting debts related to any consumer financial product or service; and other financial products or services as may be defined by the Bureau, including a service permissible for a bank or financial holding company.

³² Press Release, Consumer Fin. Prot. Bureau, Consumer Financial Protection Bureau, Federal Trade Commission Pledge to Work Together to Protect Consumers (Jan. 23, 2012), <http://www.consumerfinance.gov/pressrelease/consumer-financial-protection-bureau-federal-trade-commission-pledge-to-work-together-to-protect-consumers/>.

³³ The term “covered person” means any person (including an individual, partnership, corporation, trust, estate, cooperative, association, or other entity) who offers or provides “consumer financial products or services” other than a bank, thrift, federal credit union, or other person excluded from the FTC’s jurisdiction under the FTC Act. MOU, *supra* note 31, at 2, § II.F.

³⁴ The term “consumer financial laws” includes, but is not limited to, the Dodd-Frank Act, 12 U.S.C. §§ 5301 et seq.; the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101–08; and the Federal Trade Commission Act (FTC Act), 15 U.S.C. §§ 41–58. *Id.* at 2, § II.E.

³⁵ See generally *id.* at 3–7, § IV.

³⁶ See generally *id.* at 7–9, § V. Such consultation would be made pursuant to Section 1031 of the Dodd-Frank Act, Sections 5 and 18 of the FTC Act, the Omnibus Appropriations Act of 2009, the Fair Debt Collection Practices Act, and the Fair Credit Reporting Act.

³⁷ See generally *id.* at 9, § VI.

³⁸ Such a request would be made pursuant to CFPB regulation, 12 C.F.R. § 1070.43(b), and the CFPB’s other policies and procedures.

In the first three months, CFPB received more than 5000 credit card complaints and forwarded them to credit card companies for handling. Companies reported resolving more than 3100 complaints, with consumers disputing the responses less than 13 percent of the time.

The MOU further addresses consumer complaints, and outlines shared responsibility between the agencies, including consumer education responsibilities.³⁹ One issue of note is that the MOU states that all information provided or received under the terms of the MOU is to be used only for official regulatory, supervisory, or law enforcement purposes.⁴⁰ The MOU provides that all non-public information shared under its terms will remain the property of the providing agency unless otherwise authorized in writing. The agencies agree to take all actions reasonably necessary to preserve, protect, and maintain all privileges and claims of confidentiality related to nonpublic information provided pursuant to the MOU, including any information the CFPB collects through its supervision of “covered persons.” No further disclosure of nonpublic information may be made by the receiving party without the written permission of the disclosing agency.⁴¹

CFPB Consumer Outreach and Complaint Handling

In addition to its guidance to industry, the CFPB has been setting up a forum for submission of consumer complaints regarding mortgage and credit card issues. First, the CFPB began taking consumer complaints relating to credit cards on July 21, 2011 and released an interim report on November 30, 2011. In the first three months, CFPB received more than 5000 credit card complaints and forwarded them to credit card companies for handling. Companies reported resolving more than 3100 complaints, with consumers disputing the responses less than 13 percent of the time.⁴² Second, the CFPB began taking consumer complaints about mortgages through its website in December 2011. A consumer may choose a complaint category from a drop-down menu, describe his or her problem, and ask for a resolution. The CFPB will forward a complaint to the relevant lender and provide the consumer with a tracking number to monitor the progress of his or her filing.⁴³ Finally, the CFPB expects to be ready to handle complaints for all other financial products and services by the end of 2012.

The CFPB is in the process of refining its complaint collection and handling process and has proposed the creation of a searchable public database of complaint information, meaning personally identifiable information would be expunged.⁴⁴ Certain credit card complaint data would be publicly available for research and analysis and published in periodic reports issued by the CFPB, so as to give consumers meaningful information about credit card use. This furthers the CFPB’s statutory purpose to help consumers “make responsible decisions about financial transactions” and to ensure that markets for consumer financial products “operate transparently and efficiently.” Information to be disclosed includes the name of the card issuer, the complainant’s zip code, the date of the complaint, the subject area at issue, and whether and how the issuer responded.

The extent to which this complaint data will be reliable or probative remains an open question. In a similar situation, the Consumer Product Safety Commission (CPSC) began making public dis-

³⁹ See generally MOU, *supra* note 31, at 10–11, §§ VIII & IX.

⁴⁰ *Id.* at 12, § XI.A.

⁴¹ See generally *id.* at 12, § XI.

⁴² Sartaj Alag, *Credit Card Complaints, by the Numbers*, CONSUMER FIN. PROT. BUREAU (Nov. 30, 2011), <http://www.consumerfinance.gov/credit-card-complaints-by-the-numbers/>.

⁴³ Ann Carrns, *Consumer Bureau Is Taking Your Mortgage Complaints*, N.Y. TIMES (Dec. 8, 2011, 11:17 AM), <http://bucks.blogs.nytimes.com/2011/12/08/consumer-bureau-is-taking-your-mortgage-complaints/>.

⁴⁴ Disclosure of Certain Credit Card Complaint Data, 76 Fed. Reg. 76,628 (proposed Dec. 8, 2011) (to be codified at 12 C.F.R. ch. X), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-12-08/pdf/2011-31153.pdf>.

closures of consumer complaints earlier in 2011, and this move raised concerns about the misidentification of companies or false reporting by consumers.⁴⁵ The CFPB has claimed in its Notice of Proposed Policy that its database will differ from the CPSC's because the issuer can be reliably identified from the submitted credit card number.⁴⁶ In the event that a credit card company represents to the CFPB that it has been wrongly identified, the CFPB has proposed that it will keep the company's name confidential pending a determination of the correct issuer,⁴⁷ although the procedure for removing the company's name is unclear. The comment period for the CFPB's proposal closed on January 30, 2012, and it remains to be seen whether changes will be made to the proposed form of the database and potential public access. Regardless of the concerns that have been raised, it is likely, as those familiar with the FTC's Sentinel system⁴⁸ know, that the CFPB will use the complaint information to support its oversight and supervision activities as well as its regulatory policy and rulemaking functions.

CFPB Rulemaking

One of the most important pieces of CFPB rulemaking in 2012 will be the "larger participant" rule. This rule will establish the parameters of the CFPB's supervision over nonbank companies, which have historically been subject to FTC oversight through enforcement actions. Under the nonbank supervision program, the CFPB will supervise companies of all sizes in the mortgage, payday lending, and private student lending markets but other businesses, such as those involved in consumer installment loans and debt collection, will be subject to CFPB supervision only for "larger participants." As a result, the "larger participant" rule, which will be issued by July 21, 2012, will have great impact on participants in those latter industries.

The CFPB published a Notice and Request for comment on issues presented in drafting a proposed rule on June 29, 2011, and comments were due by August 15, 2011.⁴⁹ The rulemaking sought public input on six markets for potential inclusion in an initial rule—debt collection; consumer reporting; consumer credit and related activities; money transmitting, check cashing and related activities; prepaid cards; and debt relief services. The CFPB sought feedback, among other issues, on criteria and relevant time periods to measure the size of a market participant, thresholds for inclusion, and whether to adopt a single test or use specific tests for different markets. An initial proposed rule directed at the markets for debt collection and consumer reporting was published for comment on February 16, 2012, and it set thresholds of \$10 million and \$7 million in annual receipts, respectively, above which entities in these markets would be considered "larger participants" subject to CFPB regulation.⁵⁰ A series of rulemakings covering larger participants in other consumer financial markets will follow.

⁴⁵ See *Business—Frequently Asked Questions (FAQs)* (subtopic "Accuracy"), U.S. CONSUMER PROD. SAFETY COMM'N, <http://www.cpsc.gov/safer/faqs-business.html#accuracy> (last visited Feb. 24, 2012).

⁴⁶ Disclosure of Certain Credit Card Complaint Data, 76 Fed. Reg. 76,628, 76,631 (proposed Dec. 8, 2011).

⁴⁷ *Id.* at 76,632.

⁴⁸ See *Consumer Sentinel Network*, FED. TRADE COMM'N, <http://www.ftc.gov/sentinel/> (last visited Feb. 24, 2012).

⁴⁹ Defining Larger Participants in Certain Consumer Financial Products and Services Markets, 76 Fed. Reg. 38,059 (June 29, 2011) (notice and request for comment), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-06-29/pdf/2011-15984.pdf>.

⁵⁰ Defining Larger Participants in Certain Consumer Financial Product and Service Markets, 77 Fed. Reg. 9,592 (proposed Feb. 17, 2012) (to be codified at 12 C.F.R. ch. X), available at <http://www.gpo.gov/fdsys/pkg/FR-2012-02-17/pdf/2012-3775.pdf>.

In December 2011, the CFPB issued waves of regulation in an exercise of its inherent rule-making authority under the Dodd-Frank Act.⁵¹ The interim final rules transfer the rulemaking authority originally vested in seven other Federal agencies to the CFPB and duplicate the existing regulations, making only technical, formatting, and stylistic changes. None of the proposed regulations imposed new substantive obligations on already regulated entities. For example, three interim final rules divest the FTC of rulemaking authority for consumer protection provisions involving the Fair Debt Collection Practices Act, the Federal Deposit Insurance Act, and the Mortgage Acts and Practices and the Mortgage Assistance Relief Services Rule.⁵² All interim final rules transferring rulemaking authority to the CFPB had an effective date of December 30, 2011, with comments due in February 2012.

Looking Ahead in 2012

The past year saw the official opening of the CFPB's doors on July 21, 2011, the beginning of the agency's bank supervision program, and official transfer of authority to the agency for several consumer protection regulations. With the recess appointment of a Director, the CFPB started 2012 by rolling out its non-bank supervision program and continuing its consumer outreach efforts to collect and analyze consumer complaints. Proposed new forms for mortgages and credit card disclosures continue to undergo testing and are likely to be finalized and introduced this year. At the same time, the agency will continue to roll out new proposed rules. In the year-and-a-half since its creation by the Dodd-Frank Act, the agency has already staffed up and begun to make its imprint on the consumer finance industry.

With the ongoing political controversy regarding the CFPB's structure, financing, and authority, and its own increasingly high profile as it moves forward with regulations, supervision, and enforcement actions, we expect that the agency will stay in the headlines throughout the coming year. Industry participants should therefore pay close attention to the news in the coming months. ●

⁵¹ See, e.g., Interstate Land Sales Registration Program (Regulations J, K, and L), 76 Fed. Reg. 79,486 (Dec. 21, 2011) (to be codified at 12 C.F.R. pts. 1010, 1011 & 1012), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-12-21/pdf/2011-31713.pdf>; Equal Credit Opportunity (Regulation B), 76 Fed. Reg. 79,442 (Dec. 21, 2011) (to be codified at 12 C.F.R. pt. 1002), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-12-21/pdf/2011-31714.pdf>; Privacy of Consumer Financial Information (Regulation P), 76 Fed. Reg. 79,025 (Dec. 21, 2011) (to be codified at 12 C.F.R. pt. 1016), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-12-21/pdf/2011-31729.pdf>; Consumer Leasing (Regulation M), 76 Fed. Reg. 78,500 (Dec. 19, 2011) (to be codified at 12 C.F.R. pt. 1013), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-12-19/pdf/2011-31723.pdf>; Disclosure Requirements for Depository Institutions Lacking Federal Deposit Insurance (Regulation I), 76 Fed. Reg. 78,126 (Dec. 16, 2011) (to be codified at 12 C.F.R. pt. 1009), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-12-16/pdf/2011-31732.pdf>.

⁵² Other transferred provisions relate to the Home Mortgage Disclosure Act, the S.A.F.E. Mortgage Licensing Act, the Consumer Leasing Act, the Equal Credit Opportunity Act, the Fair Credit Reporting Act, the Interstate Land Sales Registration Program within the Interstate Land Sales Full Disclosure Act, the Gramm-Leach-Bliley Act's provision titled "Disclosure of Nonpublic Personal Information," and the Truth in Savings Act.