

Consumer Financial Protection Bureau: Evolution of a New Agency with Emerging Regulatory Framework

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INTRODUCTION

The Consumer Financial Protection Bureau is the first federal agency tasked solely with the responsibility for regulating consumer financial protection in the United States. Created under the Dodd-Frank Wall Street Reform and Consumer Protection Act, the bureau puts forth its mission as follows:

The central mission of the CFPB is to make markets for consumer financial products and services work for Americans—whether they are applying for a mortgage, choosing among credit cards, or using any number of other consumer financial products.

The CFPB is charged with supervising bank and non-bank financial entities, greatly broadening the scope of federal regulation. In addition to supervising big banks (with limited supervisory authority for banks under \$10 billion), the CFPB is responsible for regulating non-bank mortgage lenders and servicers, payday lenders, private student lenders, debt collectors and debt relief services, credit bureaus and other financial service providers.

Pursuant to the provisions of the Dodd-Frank Act, the main functions of the CFPB are to:

- Conduct rulemaking, supervision, and enforcement for federal consumer financial protection laws;
- Restrict unfair, deceptive, or abusive acts or practices;
- Create a center to take consumer complaints;
- Promote financial education;
- Research consumer behavior;
- Monitor financial markets for new risks to consumers; and
- Enforce laws that outlaw discrimination and other unfair treatment in consumer finance.

BACKGROUND

In the wake of the financial crisis of 2007-2008, it became apparent that many consumers utilized financial products that had risks and costs that they did not completely understand. Some financial services firms were thought to engage in misleading and/or deceptive practices. To remedy this situation, Title X of the Dodd-Frank Act provided for the creation of the CFPB to educate and protect consumers in their dealings with financial service providers.

Not only did the Dodd-Frank Act provide the CFPB with broad supervision over the financial services industries, it endowed the bureau with sweeping enforcement powers. The bureau has the power to conduct investigations, hold hearings and initiate litigation.

The CFPB assumed oversight of consumer compliance rules from seven agencies, namely the:

- Federal Reserve Board;
- Office of the Comptroller of the Currency;
- Federal Deposit Insurance Corp.;
- Office of Thrift Supervision;
- National Credit Union Administration;
- Federal Trade Commission; and
- Department of Housing and Urban Development.

CFPB DIRECTOR

One of the provisions of the Dodd-Frank Act requires that a director of the CFPB be in place before the bureau can initiate rulemaking. The CFPB began operations, per the legislation, on July 21, 2011. President Barack Obama nominated Richard Cordray on July 18, 2011. It was announced at that time that CFPB Special Advisor Elizabeth Warren, pivotal in getting the bureau up and running, would return to Harvard Law School and be replaced by Raj Date, CFPB Associate Director of Research, Markets and Regulations. Date would be in charge of the CFPB's day-to-day operations in the period until a new director was confirmed.

Cordray Nomination

President Obama nominated Richard Cordray as the director of the CFPB at a July 18, 2011, White House event. In a statement, the president said, "American families and consumers bore the brunt of the financial crisis and are still struggling in its aftermath to find jobs, stay in their homes, and make ends meet. That is why I fought so hard to pass reforms to fix the financial system and put in place the strongest consumer protections in our nation's history. Richard Cordray has spent his career advocating for middle class families, from his tenure as Ohio's Attorney General, to his most recent role as heading up the enforcement division at the CFPB and looking out for ordinary people in our financial system."

Mixed Reaction to Nomination

Senate Banking Committee Chairman Tim Johnson, D-S.D., expressed his confidence that Cordray "will help ensure the CFPB provides consumers the tools that they need to make the best possible financial decisions for themselves and their families." He added that, "Until a Director is in place, the CFPB will not be able to level the playing field for responsible community banks and credit unions. That is why I will move Mr. Cordray's nomination forward in the Banking Committee as quickly as possible."

Sen. Richard Shelby, R-Ala., Ranking Member of the Senate Banking Committee, criticized Obama for waiting until what he termed "the last possible moment" to nominate a director. Shelby opined that for months Obama has ignored Republican concerns about the lack of accountability at the CFPB and its potential adverse effects on the economy. "Until President Obama addresses our concerns by supporting a few reasonable structural changes, we will not confirm anyone to lead it. No accountability, no confirmation," Shelby said.

Sen. Jerry Moran, R-Kan., a member of the Senate Banking Committee and Ranking Member of the Senate Subcommittee on Financial Services and General Government, stated the "announcement, nearly 12 months after the President created this new agency, does nothing to increase transparency or accountability. I along with 43 of my Senate colleagues have made our intentions quite clear, but the Administration has yet to respond to our May 5th letter calling for the Bureau's leadership structure to be strengthened."

Senate Republicans continued to hold out for changes at the CFPB following the Cordray nomination. Earlier in the year, 44 Republican senators outlined their concerns in a letter to President Obama. The senators called for replacing the single director structure with a committee to oversee the bureau. Other requests included subjecting the CFPB to the annual appropriations process along with safety and soundness checks for the prudential financial regulators.

EARLY ACTIVITIES

While CFPB rulemaking powers may have been restricted until a director was appointed, the bureau was not idle in the interim. During this period, the CFPB promoted a series of initiatives directed at educating consumers in their dealings with financial service entities.

One such initiative is the “Know Before You Owe” program. Under “Know Before You Owe,” the CFPB developed draft mortgage disclosure forms, a prototype for a more consumer-friendly credit card application, guidance on student loans, provided advice to senior Americans about avoiding financial fraud and protecting retirement funds and information targeted to servicemembers intended to help them with financial planning.

The CFPB also issued a number of reports addressing consumer needs. The bureau reported that consumers were unaware of the variety of credit scores available and targeted international money transfers.

During this period, the CFPB was involved in a number of activities intended to advance its mission. More specifically, the bureau:

- Issued a Joint Statement of Principles in conjunction with the Judge Advocate Generals of all five uniformed military services. The statement is intended to provide stronger consumer protection for servicemembers and their families.
- Provided guidance on credit card applications for college students and published a student loan guide.
- Participated in a joint task force intended to combat scams targeting homeowners seeking to apply for the Home Affordable Mortgage Program, a foreclosure prevention program funded by the Troubled Asset Relief Program.
- Entered into an agreement with the Federal Trade Commission allowing the CFPB access to consumer complaints within the FTC’s Consumer Sentinel.
- Addressed credit discrimination via its Office of Fair Lending & Equal Opportunity.
- Created the Ombudsman’s Office to assist in the resolution of individual and systemic issues that a depository entity, non-depository entity or consumer has with the CFPB.
- Created the Office of Older Americans which targets elder financial abuse.

The bureau also unveiled its mortgage supervision approach in its *Mortgage Servicing Examination Procedures* as part of the more comprehensive *CFPB Supervision and Examination Manual* and detailed its large bank supervision program for banks with assets over \$10 billion.

In addition, the CFPB outlined the ways that whistleblowers now can begin to report violations of the federal consumer financial protection laws. The bureau established an email address and toll-free telephone number for whistleblowers to contact the CFPB. The bureau also announced plans to create a portal on its website to be used by whistleblowers.

Transfer of Consumer Compliance Regulations

In December 2011, the CFPB moved to transfer or republish a number of consumer financial protection regulations from other federal agencies. The rules include technical and conforming changes made by the Dodd-Frank Act but do not impose any substantive obligations.

The transferred regulations are as follows:

- Regulation F—Fair Debt Collection Practices Act, *76 Federal Register* 78121, Dec. 16, 2011.
- Regulation I—Disclosure Requirements for Depository Institutions Lacking Federal Deposit Insurance, *76 Federal Register* 78126, Dec. 16, 2011.
- Regulation N—Mortgage Acts and Practices-Advertising, and Regulation O—Mortgage Assistance Relief Services, *76 Federal Register* 78130, Dec. 16, 2011.
- Regulation X—Real Estate Settlement Procedures Act, *76 Federal Register* 78978, Dec. 20, 2011.
- Regulation E—Electronic Fund Transfers, *76 Federal Register* 81020, Dec. 27, 2011.
- Reg. B—Equal Credit Opportunity, *76 Federal Register* 79442, Dec. 19, 2011.
- Reg. V—Fair Credit Reporting, *76 Federal Register* 79308, Dec. 21, 2011.
- Reg. J, K, L—Interstate Land Sales Full Disclosure, *76 Federal Register* 79486, Dec. 21, 2011.
- Reg. P—Privacy of Consumer Financial Information, *76 Federal Register* 79025, Dec. 21, 2011.
- Reg. DD—Truth in Savings, *76 Federal Register* 79276, Dec. 21, 2011.
- Reg. Z—Truth in Lending, *76 Federal Register* 79768, Dec. 22, 2011.
- Reg. M—Consumer Leasing, *76 Federal Register* 78500, Dec. 19, 2011.
- Reg. C—Home Mortgage Disclosure, *76 Federal Register* 78465, Dec. 19, 2011.
- Reg. G, H—S.A.F.E. Mortgage Licensing Act, *76 Federal Register* 78483, Dec. 19, 2011.

The interim final rules became effective on Dec. 30, 2011.

Further, the CFPB released a series of interim final rules establishing procedures for various parts of the agency's operations. The bureau established the process for notification when a state official takes an action to enforce the Consumer Financial Protection Act. An interim final rule describing the agency's procedures for investigations set forth the CFPB's authority to conduct investigations and the rights of persons from whom the agency seeks to compel information in investigations. Procedures for the conduct of adjudication proceedings were established enabling the CFPB to use administrative adjudications enforce compliance. Procedures for the public to obtain information from the agency under the Freedom of Information Act, the Privacy Act of 1974 and in legal proceedings established the CFPB's rules regarding the confidential treatment of information obtained from persons in connection with the exercise of its authorities under federal consumer financial law.

CORDRAY APPOINTMENT

President Obama on Jan. 4, 2012, announced his appointment of former Ohio Attorney General Richard Cordray as director of the CFPB, sidestepping protracted Republican efforts to block the nomination in the Senate. The GOP, however, has questioned the legality of the recess appointment and indicated that it could be legally challenged.

Obama, speaking at an event in Cleveland, stated, "when Congress refuses to act and as a result hurts our economy and puts people at risk, I have an obligation as President to do what I can without them." He added, "I will not stand by while a minority in the Senate puts party ideology ahead of the people they were elected to serve. Not when so much is at stake." If Republicans were to continue to hold Cordray's nomination "hostage," according to Obama, then "more dishonest

lenders could take advantage of the most vulnerable among us," while "the vast majority of financial firms who do the right thing could be undercut by those who don't."

Prior to the announcement, Cordray said he would begin work immediately, including expanding the CFPB's supervision program to non-banks, "which is an area we haven't been able to touch up until now."

Reactions to Cordray Appointment

House Speaker John Boehner, R-Ohio, called Obama's decision an "extraordinary and entirely unprecedented power grab...that defies centuries of practice and the legal advice of his own Justice Department." He added that the move "goes beyond the President's authority, and I expect the courts will find the appointment to be illegitimate."

Senate Minority Leader Mitch McConnell, R-Ky., said the recess appointment "represents a sharp departure from a long-standing precedent that has limited the President to recess appointments only when the Senate is in a recess of 10 days or longer. Breaking from this precedent lands this appointee in uncertain legal territory, threatens the confirmation process and fundamentally endangers the Congress's role in providing a check on the excesses of the executive branch."

Senate Banking Committee Ranking Member Richard Shelby, R-Ala., said that the president did an end run around Congress, the elected representatives of the American people, in order to avoid accountability to them. Shelby said that he has led the fight for accountability at the consumer bureau. Joined by 44 Republican Senators, Shelby sent a letter last year to Obama urging amendments to the Dodd-Frank Act that would change the bureau's governance, replacing the single director with a board to oversee the CFPB. On Dec. 8, 2011, Shelby said on the Senate floor that in order to make the bureau more accountable, it should be led by a board of directors rather than a single director.

White House Press Secretary Jay Carney said the White House counsel considers that Senate pro forma sessions, which have been used to prevent the President from exercising his constitutional authority, "do not interrupt the recess." Asked if the White House was prepared for a legal challenge, Carney said he would not speculate on the matter, noting that "the constitutional authority the President has is very clear."

Challenge to Appointment

After the appointment, 39 Republican senators signed a letter indicating their intent to file an amicus brief and join a court challenge to Cordray's recess appointment. In the letter, the lawmakers, including Senate Minority Leader Mitch McConnell, R-Ky., said that the recess appointment was unprecedented and unconstitutional. A number of ranking members also signed the letter, including Sen. Orrin Hatch, R-Utah, of the Finance Committee, Sen. Charles Grassley, R-Iowa, of the Judiciary Committee, Sen. Susan Collins, R-Maine, of the Homeland Security and Governmental Affairs Committee, Sen. John McCain, R-Ariz., of the Armed Services Committee and Sen. Richard Lugar, R-Ind., of the Foreign Relations Committee.

Cordray Defense

Cordray, appearing before the Senate Banking Committee on Jan. 31, 2012, assured members that his recess appointment will have no negative impact on his work at the new bureau. Cordray

stressed that "my legal responsibility is to do the best job I can...that's what I'm totally focused on doing."

Asked by Sen. Mike Johanns, R-Neb., whether his actions at the CFPB would be considered invalid if his appointment was successfully challenged, Cordray replied, "I don't know that I believe that's clear-cut one way or the other." He continued, "It is also not clear-cut, by any means, that this is not a valid appointment. I believe it is."

Johanns responded, "I can't imagine how anybody could maintain, under the circumstances, that your appointment and your service is valid. And I can't imagine...how the actions you're taking will be upheld. And I think that's a very, very serious consequence for our nation."

Sen. Sherrod Brown, D-Ohio, responded to Johanns' argument by stating, "I just simply can't believe we're still having this debate...Richard Cordray's job is so important." Sen. Chuck Schumer, D-N.Y., added, "let's move on. Mr. Johanns is right. The courts will decide this. I believe they will decide that the agency is...constituted properly."

Committee Chairman Tim Johnson, D-S.D., remarked that regardless of whether or not one agrees with the decision to recess appoint Cordray, "it is time for us all to put politics aside and work together to protect the American consumers and foster a strong and fair consumer financial marketplace."

White House Blog

A statement on the White House blog set out the legal and factual background of the appointment. The statement noted that the U.S. Constitution gives the president the authority to make temporary recess appointments to fill vacant positions when the Senate is in recess, a power all recent Presidents have exercised. The Senate had effectively been in recess for weeks, it said, and was expected to remain in recess for weeks. The statement posited that in an "overt attempt to prevent the President from exercising his authority during this period, Republican Senators insisted on using a gimmick" called pro forma sessions, which are sessions during which no Senate business is conducted and instead one or two Senators simply gavel in and out of session in a matter of seconds. The statement asserted that "gimmicks do not override the President's constitutional authority to make appointments to keep the government running." In fact, continued the statement, the lawyers who advised President Bush on recess appointments wrote that the Senate cannot use sham "pro forma" sessions to prevent the president from exercising a constitutional power.

Committee Hearing

On Feb. 1, 2012, the House Committee on Oversight & Government Reform held a hearing on Obama's recess appointments, including the appointment of Cordray as director of the CFPB. On January 4, Obama also appointed Richard Griffin, Jr., Sharon Block and Terence F. Flynn as members of the National Labor Relations Board.

Opponents of the appointments testified that they were unconstitutional. Committee Chairman Darrell E. Issa, R-Calif., argued that the appointments "place Congress and the Executive Branch in uncharted territory" because at the time of the appointments, the Senate was holding a series of 'pro forma' sessions. This action has already triggered lawsuits challenging the validity of the appointments and is sure to bring further suits challenging the validity of rules and regulations passed by these federal agencies."

"This is not a recipe for good government and effective rulemaking—it's a recipe for Constitutional crisis," the chairman said.

Oversight Panel

A House panel invited the recess-appointed CFPB director to testify on Jan. 24, 2012, on policy concerns about the structure of the bureau and how the concerns of the oversight panel can be reconciled. In a letter to Cordray, Rep. Patrick McHenry, R-N.C., Chair of the Oversight Subcommittee on the Troubled Asset Relief Program and Financial Services, noted that the CFPB director has enormous authority to invalidate any consumer financial product in the United States and broadly regulate financial products and services with minimal oversight. The letter emphasized that the subcommittee is deeply interested on how the director will implement and enforce the unparalleled powers of his new office.

In a separate statement, Chairman McHenry said that this unprecedented appointment runs counter to the constitutional requirements for a recess appointment and President Obama's own campaign pledge to run the most transparent administration in history. He posited that the enormous authority put in the hands of a single director for the CFPB must be accompanied by appropriate congressional oversight and transparency. Meanwhile, Rep. Jeff Landry, R-La., said that he would introduce legislation to prevent Cordray's appointment from going forward because of its unconstitutionality. The Constitution is clear, said Landry. The president can appoint officials with the advice and consent of the Senate. Because the Senate has advised the president against making Cordray's nomination and has not given its consent on his appointment and with the House meeting to keep Congress in session, reasoned Landry, the appointment of Cordray only can be considered an abuse of the recess appointment process.

Separately, Financial Services Committee Chairman Spencer Bachus, R-Ala., said that the president's unprecedented attempt to circumvent the Constitution and ignore the law indicates that he has abandoned any effort to work in a bipartisan manner to strengthen accountability and oversight of the CFPB. In the chairman's view, the recess appointment of Cordray has delegitimized the CFPB and has opened the agency up to legitimate legal challenges that will cripple it for years.¹

CFPB ACTIVITIES POST-APPOINTMENT

One of the first issues to arise after the Cordray appointment was concern over information protection. The CFPB has assured the financial institutions it regulates that if they comply with a request for information they will not have waived any privilege that applies to that information, including the attorney-client privilege. The bureau has pledged that it will take "all reasonable and appropriate actions" to help an institution defeat any claim that it has waived a privilege. However, this means that institutions cannot invoke waiver concerns as a reason to withhold information they otherwise are required to produce, the bureau said.

If the bureau requests an institution to produce information that is within the scope of its supervisory authority, the institution must provide all of the relevant documents and information, regardless of whether the institution believes some of that information may be unnecessary.

¹ *Jim Hamilton's World of Securities Regulation* at <http://jimhamiltonblog.blogspot.com/2012/01/house-panel-has-invited-recess.html#links>

Because the institution is required to provide the information, it is not acting voluntarily and therefore will not waive any privilege it can claim, the CFPB said. The bureau also noted that its examination authority is intended to be equal to that of the other financial institution regulatory agencies. Since providing information to the Federal Reserve Board, Office of the Comptroller of the Currency or Federal Deposit Insurance Corp. does not waive any privilege, no privilege will be waived if information is provided to the bureau.

The CFPB also said that it intends to ask for privileged information only when that information is material and cannot be obtained from non-privileged sources. It also is willing to work with institutions to limit its requests when doing so is appropriate.

Confidential Information

Information obtained during the supervisory process will be treated as privileged and confidential, the bureau said. Such information will be considered to be exempt from disclosure under the Freedom of Information Act and will not be routinely shared with other agencies that are not engaged in the supervision of financial institutions. "[E]ven a significant law enforcement interest" may not be sufficient to justify the disclosure of supervisory information, the CFPB said, although such an interest would be a factor to be considered. Confidential information will be shared with law enforcement agencies "only in very limited circumstances and upon review of all the relevant facts and considerations," the bureau said.

Legislation Preserving Confidentiality of Privileged Information

The House Financial Services Committee unanimously approved bi-partisan legislation to fix an omission in the Dodd-Frank Act that might open the door for third parties to obtain privileged information provided by financial institutions to the CFPB. The legislation, H.R. 4014, would require the CFPB to preserve the confidentiality of privileged information it receives from financial institutions, as other banking regulators do. Cordray testified that this was an oversight and that he supports a legislative solution to ensure that privileged information is not leaked to third parties through the CFPB.

Committee Chairman Spencer Bachus, R-Ala., noted that the legislation protects both attorney-client and work product privilege. Rep. Bill Huizenga, R-Mich., the author of the legislation, noted that the Dodd-Frank Act specifically failed to safeguard the proprietary information that H.R. 4014 protects. Currently, the bureau could have access to confidential information and the legislation would close this loophole and protect data provided during an examination. He described the legislation as a common sense measure that applies to both depository and non-depository institutions.

A companion bill in the Senate, S.B. 2099, was introduced by Senate Banking Committee Chair Tim Johnson, D-S.D., and Committee Ranking Member Richard Shelby, R-Ala.²

Regulatory Initiatives Launched

Shortly after Cordray's controversial appointment, the CFPB began its rulemaking activities. On Jan. 20, 2012, the bureau announced that it had amended Reg. E—Electronic Fund Transfers (12

² *Jim Hamilton's World of Securities Regulation* at <http://jimhamiltonblog.blogspot.com/2012/02/house-panel-approves-legislation.html#links>

CFR 1005) to establish federal regulatory protections for consumers who are making international fund transfers.

The rules, which are required by the Dodd-Frank Act, constitute the first time that federal laws have provided consumer protections for international remittance transfers, the CFPB said. They require specified disclosures, create cancellation rights and impose a duty to investigate claimed errors. The rules will apply to transfers of more than \$15.

The rules require a remittance transfer service provider to tell the consumer, before the consumer pays for a transfer:

- the exchange rate that will apply;
- the fees that will be charged; and
- the amount of money that will be delivered to the recipient.

When payment is made, the consumer must be given a receipt that repeats the disclosures. The receipt also must tell the consumer the date the transferred funds will arrive.

A consumer who initiates a remittance transfer must be given at least 30 minutes to cancel it and, if the transaction is cancelled, must be given a refund. If a consumer reports a problem with a transfer, the service provider must investigate. Depending on the result of that investigation, the consumer may be entitled to a refund or to a free transfer of funds that did not arrive.

The final rule is effective on Feb. 7, 2013.

Proposed Reg. E Rule

The CFPB also issued a proposed rule regarding Reg. E remittance transfers. The proposal requests comment on whether a safe harbor should be adopted with respect to the phrase “normal course of business” in the definition of “remittance transfer provider.” This definition determines whether a person is covered by the rule. The proposal also requests comment on several aspects of the final rule regarding remittance transfers that are scheduled in advance, including preauthorized remittance transfers. In developing the final rule, the bureau believes that these issues would benefit from further public comment.

Comments are due by April 9, 2012.

Supervision for Debt Collectors and Credit Agencies

The CFPB proposed a regulation (12 CFR 1090) that would define which debt collectors and consumer reporting agencies would be deemed "larger participants" in their markets and thus subject to the bureau's authority under its nonbank supervision program. According to the bureau, this would be the first time participants in these businesses have been subject to federal supervision. However, credit reporting has been covered by regulations issued by other financial services regulators, and the Fair Debt Collection Practices Act has been enforced by the Federal Trade Commission under its authority to address unfair or deceptive acts and practices.

The Dodd-Frank Act empowered the CFPB to supervise nonbanks that are engaged in residential mortgage lending, payday lending and private education lending. It also said the bureau was to supervise larger participants in other markets for consumer financial products and services and instructed the bureau to establish the criteria for what was a larger participant. It is this authority the bureau now is exercising.

HMDA Rule

In addition to amending Reg. E, the CFPB adopted a final rule amending the official commentary to Reg. C—Home Mortgage Disclosure (12 CFR 1003). The amendments reflect a change in the asset-size exemption threshold for depository institutions based on the annual percentage change in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI–W).

The rule was effective on Feb. 15, 2012.

Initiatives Continue

The CFPB, in addition to rulemaking, has moved forward on a number of initiatives intended to further its goals of educating and protecting consumers in dealings with the financial services industry.

Nonbank Supervision Program

In the wake of the Cordray appointment, the bureau has said it will begin to phase in the supervision of nonbank financial services providers. The CFPB said it now has the authority to supervise mortgage companies, private education lenders and payday lenders. Also, the bureau soon will propose a rule defining "larger participants" in all other markets and begin to supervise these companies when a final rule is adopted.

The CFPB also said it intends to examine nonbanks in the same way it examines banks, using a combination of required reports, document reviews and on-site examinations. Companies generally will be given advance notice of examinations. The CFPB said it will coordinate its examinations with those of other regulatory agencies at both the state and federal levels.

In a Jan. 5, 2012, speech at the Brookings Institution, Cordray said that nonbank activities are important markets, providing valuable services to customers who lack access to other forms of credit. He noted that nearly 20 million U.S. households use payday lenders, paying about \$7.4 billion in annual fees.

Cordray said that since most of these nonbank businesses are not used to any federal oversight, the new supervision program may be a challenge for them, "but we must establish clear standards of conduct so that all financial providers play by the rules."

Mortgage Originator Examination Procedures

In a "key step" to implementation of its Nonbank Supervision Program, the CFPB published its examination procedures for mortgage loan originators. The procedures will be used by examiners dealing with both banks and nonbank mortgage originators.

"The mortgage market cannot work well for consumers if the spotlight shines only on one part of it, while the rest is left in darkness," said Cordray. "Our supervision program will illuminate the entire marketplace by making nonbanks play by the same rules as the banks."

According to the CFPB, a large part of the mortgage origination market, including many of the largest subprime lenders, has been exempt from federal supervision. However, the bureau now has the authority to supervise these companies under changes made by the Dodd-Frank Act. The bureau issued examination procedures for mortgage servicers in September 2011.

The CFPB will be implementing its nonbank mortgage supervision program based on its assessment of risk to consumers, including consideration of factors such as the volume of business, types of products or services and the extent of state oversight. The CFPB also will be coordinating with federal and state regulators in order to maximize overall supervisory capability and minimize regulatory burden, the bureau said.

Payday Lending Examination Procedures

The CFPB on Jan. 19, 2012, released guidance on examination procedures related to the short-term, small-dollar credit market known as payday lending. The bureau noted that prior to using the exam procedures, examiners should complete a risk assessment and examination scope memorandum.

The procedures are composed of modules covering a payday loan's lifecycle. Each module identifies relevant matters for review. Each examination will cover one or more of the modules, depending on the scope of the examination and in conjunction with the compliance management system and consumer complaint response review procedures. The modules are:

- (1) Marketing;
- (2) Application and Origination;
- (3) Payment Processing and Sustained Use;
- (4) Collections, Accounts in Default, and Consumer Reporting; and
- (5) Third-Party Relationships.

CFPB/FTC MOU

The CFPB and the Federal Trade Commission entered into a memorandum of understanding that is intended to enhance consumer protections while avoiding burdening businesses with duplicate enforcement authorities. The MOU calls for the two agencies to:

- create a secure computerized system each agency can use to keep track of the other's activities;
- inform each other before beginning an investigation or an enforcement action and refrain from duplicative actions;
- have meetings at least quarterly to coordinate their activities;
- consult on guidance and regulatory proposals, such as those addressing unfair, deceptive or abusive acts or practices;
- cooperate on consumer education initiatives; and
- share consumer complaints.

The CFPB also has agreed to provide the FTC with the report of examination of any company under the FTC's jurisdiction.

Monthly Mortgage Statement/Mortgage Cost Disclosure Prototypes

Furthering its goal to simplify mortgage forms and educate consumers on mortgage processes, the CFPB offered a draft monthly mortgage statement that lenders could use to provide consumers with information about their mortgages. According to the bureau, the Dodd-Frank Act requires either the lender or loan servicer to provide information to borrowers on a monthly basis, and the proposed form is a prototype of what could be included in a CFPB regulation later this year.

The CFPB also has continued working on improvements to mortgage loan disclosures by asking for comments on revised prototypes for loan estimate and settlement disclosure forms. According to the bureau, the two forms use a similar arrangement and similar terms in order to make it easier for consumers to compare one to the other at closing.

Check Overdraft Fees

The bureau has begun looking into checking account overdraft fees, starting with a request for information from a number of banks and a separate request for information from the public. The bureau also has provided a prototype of a disclosure—referred to as a "penalty box"—that financial institutions would include on a consumer's monthly statement to explain the overdrafts and how the resulting fees were calculated.

The CFPB said that, according to industry sources, the average overdraft fee ranged from \$30 to \$35 in 2011 and has increased by 17 percent over the previous five years. Consumers with 20 or more overdrafts per year paid an average of more than \$1,600 in annual fees, according to a 2008 Federal Deposit Insurance Corp. study cited by the bureau. The CFPB also noted that rules adopted by the Federal Reserve Board requiring a financial institution to secure a consumer's affirmative consent before charging fees due to an overdraft from a point-of-sale or automated teller machine transaction do not apply to overdrafts from checks or online bill payments.

Checking Account Complaints

In addition to studying checking account overdraft fees, the CFPB also has begun accepting consumer complaints about bank accounts, including checking accounts, savings accounts, certificates of deposit and related services. According to the bureau, consumers can file complaints using its website, as well as by mail, fax or telephone.

"Deposit accounts play a critical role in the lives of most Americans, but these products and the laws governing them are complicated," said Cordray. "Consumers need someone on their side to keep banks and credit unions accountable—that is our job."

The CFPB said that it expects banks to respond to complaints within 15 days and that it wants to close all complaints within 60 days. Consumers will be given tracking numbers after submitting a complaint. They are then able to log in to the CFPB website at any time and check the status of their case. Each complaint will be processed individually and consumers will have the option to dispute a bank's resolution.

Additional Activities

In addition to the initiatives discussed above, the CFPB's post-appointment activities include:

- Establishing a Consumer Advisory Board;
- Launching the Office of Minority and Women Inclusion;

- Issuing a series of information collections intended to gather information on various consumer-oriented topics as well as the streamlining of regulations the CFPB inherited from other federal agencies; and
- Blogging on consumer issues such as the need for setting financial goals.

MOVING FORWARD

Cordray's vision is that the new CFPB will make consumer financial markets operate fairly in order to protect consumers, support honest businesses, and play a crucial role in helping to safeguard the overall economy. In testimony before a House oversight panel chaired by Rep. Patrick McHenry, R-N.C., he said that the bureau will benefit consumers by clarifying the prices and risks of consumer financial products and services.

When consumers know the true costs, benefits and risks of competing products, Cordray reasoned, they will be able to better make informed decisions. Greater knowledge also helps people avoid being ambushed by costly surprises buried in the fine print, he continued, so that they can have proper confidence that the terms of the deal stated today are the terms they will actually be living with down the road. The CFPB will benefit honest businesses by leveling the playing field and ensuring that financial institutions play by the same set of rules.

Cordray also noted that the CFPB has launched the first federal nonbank supervision program, one of the central new authorities provided by the Dodd-Frank Act. There are thousands of nonbank providers of financial products and services that make up a significant portion of the consumer financial marketplace, including mortgage lenders, mortgage servicers, mortgage brokers, payday lenders, consumer reporting agencies, debt collectors and money services corporations.

The director said that the nonbank supervision program will include conducting individual examinations and may also include requiring reports from businesses to determine what areas need greater focus. The bureau will determine what degree of supervision to perform based on an analysis of the risks posed to consumers, including factors such as the nonbank's volume of business, types of products or services and the extent of state oversight for consumer financial protection.

Now that the CFPB has a director, the CFPB is exercising its authority to fulfill its mandate to investigate and bring enforcement actions to ensure that financial providers are held accountable if they violate the law, and that the rules of the road governing banks and nonbanks are applied evenhandedly to all participants. In this area, observed Cordray, the bureau also is cooperating closely with other law enforcement agencies to avoid any duplication of work and to coordinate limited resources. The CFPB has many tools to address problems in the financial markets, he said, including supervision, rulemaking and enforcement. Cordray emphasized that filing lawsuits or administrative actions will be necessary at times to ensure that the law is followed and respected and that harm to consumers from unlawful conduct is remedied.³

³ Jim Hamilton's World of Securities Regulation at <http://jimhamiltonblog.blogspot.com/2012/01/cordray-outlines-to-house-panel-his.html#links>

CONCLUSION

The CFPB is in a position unique amongst federal financial regulatory agencies. Created as a result of the recent financial crisis, the CFPB has broad powers to promote its sole mission of educating and protecting consumers as they navigate their way through financial services transactions.

For the first six months after its July 21, 2011, launch date, the CFPB was hampered by a provision in the Dodd-Frank Act indicating that the bureau could not exercise full rulemaking powers until a director was in place. That director was not appointed until January 2012. However, the CFPB worked during those months to promote its mission by instituting and moving forward on a number of consumer protection initiatives.

With the appointment of Cordray in place, the CFPB rapidly instituted consumer protection rulemaking while continuing to move forward with the initiatives it developed in the months before a director was put into place.

As it moves forward, the direction and vision of the CFPB is clearly stated. The CFPB intends to use the authority granted by the Dodd-Frank Act to ensure that financial markets operate fairly, make certain that consumers are aware of the true costs, benefits and risks of competing products and hold financial providers accountable for violations of consumer financial protections.

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Katalina M. Bianco — *Senior Attorney-Editor*

Bianco contributes her editorial expertise to the [Consumer Financial Protection Bureau Reporter](#), [Federal Banking Law Reporter](#) and [Mortgage Compliance Guide](#) and [Bank Digest](#). She co-authored the [Dodd-Frank Wall Street Reform and Consumer Protection Act Law, Explanation and Analysis](#) book. She authored the well-received white papers, *Financial Regulatory Reform: An Overview of the Administration's Draft Legislation*, *A Retrospective of the Troubled Asset Relief Program*, *The Subprime Lending Crisis: Causes and Effects of the Mortgage Meltdown* and *Money Laundering and Mortgage Fraud: The Growth of a Merging Industry* as well as articles on bank fraud and identity theft. Bianco's white paper on the subprime mortgage crisis has been used as guidance material by law firms, Continuing Legal Education courses and bank industry groups. Bianco offers expert insight on a variety of issues affecting the banking industry.

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