

The First Year of the Consumer Financial Protection Bureau: An Overview

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The longest lasting legacy of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”)¹ may be the creation of the Bureau of Consumer Financial Protection (“CFPB”). First proposed in 2007 by Professor Elizabeth Warren,² the agency materialized remarkably quickly, being enacted into law in 2010.³ Although it came together quickly, the CFPB was built to last. The Dodd-Frank Act provides it with broad authority, secure funding, and a powerful, independent director.⁴

The CFPB’s authority, which commenced when it opened its doors on July 21, 2011,⁵ begins with the ability to issue regulations under a host of consumer protection laws.⁶ It also exercises supervisory and enforcement authority over banks, savings associations, and credit unions with assets of over \$10 billion;⁷ has authority over all consumer mortgage companies, payday lenders, and private education lenders;⁸ has authority over any “larger participant” in a market for consumer financial products or services;⁹ and has authority over anyone who

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1. Pub. L. No. 111-203, 124 Stat. 1376 (2010).

2. See Elizabeth Warren, *Unsafe at Any Rate: If It’s Good Enough for Microwaves, It’s Good Enough for Mortgages: Why We Need a Consumer Financial Product Safety Commission*, DEMOCRACY, Summer 2007, at 8, 8–9 [hereinafter *Unsafe at Any Rate*].

3. See *supra* note 1.

4. The CFPB is not subject to annual appropriations from Congress but may simply access up to 12 percent of the total operating budget of the Federal Reserve Board (“FRB”). 12 U.S.C. § 5497(a) (Supp. IV 2010). Its regulations may be overturned only if two-thirds of the members of the Financial Stability Oversight Council believe that they “would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk.” *Id.* § 5513(a), (c). The director is appointed for a five-year term and is removable only for cause. *Id.* § 5491(c)(1), (3).

5. See *id.* § 5511 note.

6. The enumerated federal consumer financial laws are listed at *id.* § 5481; see also Michael A. Benoit & Jeffrey P. Taft, *CFPB Developments: Coordinating the Supervision of Depository and Non-Depository Institutions*, 68 BUS. LAW. 619 n.6 (2013) (in this *Annual Survey*).

7. See 12 U.S.C. § 5515 (Supp. IV 2010).

8. See *id.* § 5514(a)(1)(A), (D).

9. *Id.* § 5514(a)(1)(B).

engages in “conduct that poses risks to consumers with regard to the offering or provision of consumer financial products and services.”¹⁰ However, the CFPB did not launch its supervision of nonbanks until President Obama made a recess appointment of former Ohio Attorney General Richard Cordray as its first director.¹¹ The CFPB had maintained that the Dodd-Frank Act did not authorize it to exercise any examination or enforcement authority over nonbanks in the absence of a director.¹²

The Dodd-Frank Act provided the CFPB with a series of tasks to perform in its first year, and it followed through with thirteen final rules,¹³ a study on private student lending,¹⁴ a report on the three largest credit reporting agencies,¹⁵ and countless examinations of banks. At the same time, the CFPB launched a series of its own initiatives, including filing amicus briefs on issues of interest to it¹⁶

10. *Id.* § 5514(a).

11. See Press Release, Consumer Fin. Prot. Bureau, Consumer Financial Protection Bureau Launches Nonbank Supervision Program (Jan. 5, 2012), available at <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-launches-nonbank-supervision-program/>. A legal challenge to the appointment is pending. See *infra* notes 91–92 and accompanying text.

12. See Eric M. Thorson & Elizabeth A. Coleman, Joint Response by the Inspectors General of the Department of the Treasury and Board of Governors of the Federal Reserve System: Request for Information Regarding the Bureau of Consumer Financial Protection 4–7 (Jan. 10, 2011) (No. OIG-CA-11-004), available at http://www.federalreserve.gov/oig/files/Treasury_OIG_Posted_PDF_-_Response_CFPB.pdf.

13. See Truth in Lending Act (Regulation Z), 77 Fed. Reg. 69738 (Nov. 21, 2012) (to be codified at 12 C.F.R. pt. 1026); Truth in Lending Act (Regulation Z), 77 Fed. Reg. 69736 (Nov. 21, 2012) (to be codified at 12 C.F.R. pt. 1026); Delayed Implementation of Certain New Mortgage Disclosures, 77 Fed. Reg. 70105 (Nov. 23, 2012) (to be codified at 12 C.F.R. pt. 1026); Defining Larger Participants of the Consumer Debt Collection Market; Correction, 77 Fed. Reg. 72913 (Dec. 7, 2012) (to be codified at 12 C.F.R. pt. 1090); Confidential Treatment of Privileged Information, 77 Fed. Reg. 39617 (July 5, 2012) (to be codified at 12 C.F.R. pt. 1070); Rules Relating to Investigations, 77 Fed. Reg. 39101 (June 29, 2012) (to be codified at 12 C.F.R. pt. 1080); Rules of Practice for Adjudication Proceedings, 77 Fed. Reg. 39057 (June 29, 2012) (to be codified at 12 C.F.R. pt. 1081); State Official Notification Rule, 77 Fed. Reg. 39112 (June 29, 2012) (to be codified at 12 C.F.R. pt. 1082); Electronic Fund Transfers (Regulation E), 77 Fed. Reg. 6194 (Feb. 7, 2012) (to be codified at 12 C.F.R. pt. 1005); Electronic Fund Transfers (Regulation E); Correction, 77 Fed. Reg. 40459 (July 10, 2012) (to be codified at 12 C.F.R. pt. 1005); Electronic Fund Transfers (Regulation E), 77 Fed. Reg. 50244 (Aug. 20, 2012) (to be codified at 12 C.F.R. pt. 1005); Home Mortgage Disclosure (Regulation C), 77 Fed. Reg. 8721 (Feb. 15, 2012) (to be codified at 12 C.F.R. pt. 1003); Fair Credit Reporting (Regulation V); Correction, 77 Fed. Reg. 67744 (Nov. 14, 2012) (to be codified at 12 C.F.R. pt. 1022); Consumer Leasing (Regulation M), 77 Fed. Reg. 69735 (Nov. 21, 2012) (to be codified at 12 C.F.R. pts. 213, 1013).

14. See CONSUMER FIN. PROT. BUREAU, PRIVATE STUDENT LOANS, REPORT TO THE SENATE COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS, SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS, HOUSE COMMITTEE ON FINANCIAL SERVICES, AND HOUSE COMMITTEE ON EDUCATION AND WORKFORCE (Aug. 29, 2012), available at http://files.consumerfinance.gov/f/201207_cfpb_reports_Private-Student-Loans.pdf. The study found that the market for private student loans shared similarities with the mortgage market bubble. *Id.* at 3.

15. See *Key Dimensions and Processes in the U.S. Credit Reporting System: A Review of How the Nation's Largest Credit Bureaus Manage Consumer Data*, CONSUMER FIN. PROT. BUREAU (Dec. 2012), http://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf.

16. See *Amicus Program*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/amicus/> (last visited Dec. 18, 2012).

and seeking consumer input through field hearings, town halls, and complaint portals on its website.¹⁷

Looking back on the CFPB's first year, several themes emerge. First, the CFPB has succeeded in intensifying the focus on consumer protection in the market for financial products and services. Not only has it taken action, but the CFPB's mere presence has prompted financial institutions to review and enhance their own policies and procedures in anticipation of its scrutiny. At the same time, the CFPB's presence seems to have moved the traditional banking regulators to focus on consumer issues so as not to cede ground, or headlines, to the new agency.

Second, the CFPB has worked to find the right balance between educating consumers about their choices and limiting those choices. Its "Know Before You Owe" campaign has helped customers for mortgages, student loans, and credit cards make educated choices before borrowing.¹⁸ At the same time, some of its statements and actions have suggested that some forms of products should not be offered to any consumer, even one who would be making a knowing, informed choice.¹⁹ One early test of the CFPB's regulatory philosophy will come when it completes its ongoing study to determine "how effective arbitration is in resolving consumers' issues"²⁰ pursuant to a requirement of the Dodd-Frank Act.²¹

Third, the CFPB has begun the process of reinventing bank regulation. For example, it has flipped the safety and soundness paradigm on its head, often placing its most intense scrutiny on the financial services and products that are the most profitable for banks. Similarly, the CFPB has integrated functions that traditional banking regulators took pains to segregate by including enforcement attorneys in routine bank examinations and having its examination and enforcement units both report to the same associate director.²²

17. See CONSUMER FIN. PROT. BUREAU, SEMI-ANNUAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU 5 (July 2012), available at http://files.consumerfinance.gov/f/201207_cfpb_Semi-Annual_Report.pdf ("In the past year, the CFPB has heard from consumers about their positive and negative experiences with financial products and services, including through the 'Tell Your Story' feature of the CFPB's website, roundtables, town halls, and field hearings. In addition, the Bureau has launched a first-rate infrastructure to receive, process, and facilitate responses to consumer complaints.").

18. See *Know Before You Owe*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/knowbeforeyouowe> (last visited Dec. 18, 2012) (mortgages); *Know Before You Owe*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/students/knowbeforeyouowe> (last visited Dec. 18, 2012) (student loans); *Know Before You Owe*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/credit-cards/knowbeforeyouowe> (last visited Dec. 18, 2012) (credit cards).

19. See, e.g., *infra* notes 74–83 and accompanying text (payment protection products); *infra* note 85 and accompanying text (payday lending).

20. See Press Release, Consumer Fin. Prot. Bureau, Consumer Financial Protection Bureau Launches Public Inquiry into Arbitration Clauses (Apr. 24, 2012), available at <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-launches-public-inquiry-into-arbitration-clauses/>; see also Alan S. Kaplinsky, Mark J. Levin & Martin C. Bryce, Jr., *Arbitration Developments: Post-Conception—The Debate Continues*, 68 BUS. LAW. 649, 658 (2013) (in this *Annual Survey*).

21. 12 U.S.C. § 5518(a) (Supp. IV 2010).

22. Compare *The Bureau's Structure*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/the-bureau/> (last visited Dec. 18, 2012), with OFFICE OF THE COMPTROLLER OF THE CURRENCY, ANNUAL REPORT: FISCAL YEAR 2010, at 33–35 (undated), available at <http://www.occ.gov/publications/publications-by->

These themes have emerged during a year when the CFPB was still growing into the powers provided by Congress. In describing those powers, Director Cordray has repeatedly referred to them as a toolkit, with the right tool for any job:

There's three core tools for us, all of which can matter. Our core tools are regulation, where we write rules, [and] supervision, where we go in and examine institutions. For me, I have learned here that's a very powerful tool. And it's often a very fast tool for getting something resolved. And there's enforcement, and that's a tool too.²³

In keeping with the Director's approach, this survey reviews each tool in the CFPB's toolkit, and describes a fourth tool that the CFPB already has used extensively this first year: the ability to engage the public.

REGULATION

The Dodd-Frank Act set ambitious regulatory objectives for the CFPB, and the new agency has spent much of its first year executing on that agenda. Below is a summary of the significant regulatory measures it has taken.

RESIDENTIAL MORTGAGE LENDING

With respect to residential mortgage lending, the CFPB has proposed and issued numerous regulations governing the mortgage origination and servicing process. The CFPB draws its authority in this context from several statutes, including the Truth in Lending Act ("TILA"),²⁴ the Real Estate Settlement Procedures Act ("RESPA"),²⁵ and the Home Ownership and Equity Protection Act ("HOEPA").²⁶

The CFPB has used its TILA and RESPA authority to propose combined TILA and RESPA disclosures, along with proposed new Regulation Z (implementing the TILA) and Regulation X (implementing the RESPA) provisions and commentary that explain how to complete the new forms.²⁷ The proposed rule is designed to reduce consumer confusion resulting from inconsistent and overlapping disclosures.²⁸

type/annual-reports/annual-report-2010.pdf, and *2010 Annual Report Highlights*, FDIC Organization Chart/Officials, FED. DEPOSIT INS. CORP. (Dec. 31, 2010), <http://www.fdic.gov/about/strategic/report/2010highlight/chpt4-01.html>.

23. See Rob Blackwell, *Cordray Defends Complaint Database, Talks Qualified Mortgage Plan*, AM. BANKER, July 10, 2012, at 1, 3 [hereinafter *Qualified Mortgage Plan*].

24. Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C.A. §§ 1601–1667f (West, Westlaw through Pub. L. No. 112-173)).

25. Pub. L. No. 93-533, 88 Stat. 1724 (1974) (codified as amended at 12 U.S.C.A. §§ 2601–2617 (West, Westlaw through Pub. L. No. 112-173)).

26. Pub. L. No. 103-325, 108 Stat. 2190 (1994) (codified as amended at 15 U.S.C.A. §§ 1602(aa)–(bb), 1639) (West, Westlaw through Pub. L. No. 112-173)).

27. See Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 77 Fed. Reg. 51115 (proposed Aug. 23, 2012) (to be codified at 12 C.F.R. pts. 1024, 1026) [hereinafter *Integrated Regulation X Disclosures*]; see also Sanford Shatz & Jonathan Cannon, *2012 Survey of RESPA and TILA Regulatory Developments*, 68 BUS. LAW. 583, 583–88 (2013) (in this *Annual Survey*).

28. See *Integrated Regulation X Disclosures*, *supra* note 27, 77 Fed. Reg. at 51116.

The CFPB is also considering regulations to implement the new “ability to repay” and “qualified mortgage” (“QM”) standards established under the Dodd-Frank Act.²⁹ It expects to finalize this rule by January 2013.³⁰ One critical issue will be whether compliance with these QM standards creates a legal safe harbor or merely a “presumption of compliance.”³¹ Commentary on the rules has followed a predictable pattern, with the industry insisting that compliance with legal standards should seal off their liability, and consumer advocates arguing for a more flexible standard.³² While there has been some delay by the CFPB in announcing the final QM rule, Director Cordray has explained that the CFPB will “get it right” by striking an appropriate balance between ensuring that consumers are not sold mortgages they cannot afford and making mortgages accessible.³³

The CFPB also has proposed rules implementing the Dodd-Frank Act’s provisions expanding the types of “high cost” mortgage loans that are subject to HOEPA.³⁴ The proposed rules revise and expand the triggers for coverage under HOEPA, and they impose additional restrictions on HOEPA mortgage loans, including a pre-loan counseling requirement.³⁵

The CFPB’s proposed rules governing mortgage servicing are due to be finalized by January 2013.³⁶ The rules under consideration require clear monthly mortgage statements, warnings before interest rates adjust, options for avoiding

29. See 15 U.S.C. § 1639c(a), (b)(2)(A) (Supp. IV 2010).

30. See *id.* § 1601 note; see also Press Release, Consumer Fin. Prot. Bureau, Consumer Financial Protection Bureau Seeks Further Comment on Ability-to-Pay Mortgage Rule (May 31, 2012), available at <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-seeks-further-comment-on-ability-to-repay-mortgage-rule/>.

31. See Regulation Z; Truth in Lending, 76 Fed. Reg. 27390, 27391 (proposed May 11, 2011) (to be codified at 12 C.F.R. pt. 226).

32. Compare, e.g., American Banker’s Association Comment Letter re: No. CFPB-2012-0022—Notice of Reopening of Proposed Amendments to Regulation Z (July 9, 2012), available at <http://www.aba.com/Issues/commentletters/Documents/ABACommentsonCFPBReopeningofProposedAmendmentsToRegZJuly092012.pdf>, with Comments of the National Consumer Law Center and the National Association of Consumer Advocates on Truth in Lending (Regulation Z): Supplemental Comments on Ability-to-Pay and Qualified Mortgages, 77 Fed. Reg. 331200 (June 5, 2012) and 76 Fed. Reg. 27390 (May 11, 2011) (July 9, 2012), available at http://www.nclc.org/images/pdf/foreclosure_mortgage/predatory_mortgage_lending/comments-ability-to-pay-2012.pdf.

33. See *Qualified Mortgage Plan*, *supra* note 23, at 4; see also Consumer Fin. Prot. Bureau, Written Testimony of Richard Cordray Before the House Oversight and Government Reform Subcommittee on TARP, Financial Services, and Bailouts of Public and Private Programs (July 24, 2012), available at <http://www.consumerfinance.gov/speeches/written-testimony-of-richard-cordray-before-the-house-oversight-and-government-reform-subcommittee-on-tarp-financial-services-and-bailouts-of-public-and-private-programs/>.

34. See High-Cost Mortgage and Homeownership Counseling Amendments to the Truth in Lending Act (Regulation Z) and Homeownership Counseling Amendments to the Real Estate Settlement Procedures Act (Regulation X), 77 Fed. Reg. 49089 (proposed Aug. 15, 2012) (to be codified at 12 C.F.R. pt. 1026).

35. *Id.* at 49096.

36. See 2012 Truth in Lending Act (Regulation Z) Mortgage Servicing Proposal, 77 Fed. Reg. 57318 (proposed Sept. 17, 2012) (to be codified at 12 C.F.R. pt. 1026); 2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal, 77 Fed. Reg. 57200 (proposed Sept. 17, 2012) (to be codified at 12 C.F.R. pt. 1024).

“force-placed” insurance, early information and options for avoiding foreclosure, immediate crediting of payments, up-to-date and accessible records, quick correction of errors, and borrowers’ ongoing access to a servicer foreclosure prevention team.³⁷

ELECTRONIC FUND TRANSFERS

In February 2012, pursuant to the requirements of the Dodd-Frank Act, the CFPB issued a final rule to protect consumers who send remittance transfers electronically to foreign countries.³⁸ Under the new rule, remittance transfers will receive the same protection as other electronic fund transfers that authorize a financial institution to debit or credit a consumer’s account.³⁹ The new rule also requires institutions to provide customers with significant upfront disclosures at the time the request for a remittance transfer is made, both in English and in the foreign language principally used by the remittance transfer provider to market its services.⁴⁰

PREPAID CARDS

The CFPB has also considered extending Regulation E protections to general purpose reloadable cards, or “prepaid cards.” While it has not yet proposed a rule as of this writing, the CFPB has issued an advance notice of proposed rule-making that requests information on general purpose reloadable cards.⁴¹ The CFPB has asserted that prepaid cards provide weaker consumer protection than debit or credit cards, and so it is likely that it will seek to extend some of the protections of Regulation E, such as upfront disclosures, to prepaid cards.⁴² The CFPB’s notice also seeks input on whether other protections of Regulation E, such as the periodic statement requirement, should be applied to prepaid cards.⁴³

37. *Id.* at 57319–20; see also Arthur B. Axelson & Heather C. Hutchings, *Mortgage Servicing Developments*, 68 *BUS. LAW.* 571, 575–78 (2013) (in this *Annual Survey*).

38. See Electronic Fund Transfers (Regulation E), 77 *Fed. Reg.* 6194 (Feb. 7, 2012) (to be codified at 12 C.F.R. pt. 1005) [hereinafter EFT Rule]; see also Laura Hobson Brown, Candace Modlin Davis, Lois S. Woodward & Ryan S. Stinneford, *Current Developments in Deposit Products and Payment Systems*, 68 *BUS. LAW.* 603, 605–11 (2013) (in this *Annual Survey*) [hereinafter *Deposit Products*].

39. See EFT Rule, *supra* note 38, 77 *Fed. Reg.* at 6194; see also *Deposit Products*, *supra* note 38, at 605–11.

40. See EFT Rule, *supra* note 38, 77 *Fed. Reg.* at 6218, 6230; see also *Deposit Products*, *supra* note 38, at 607.

41. See Electronic Fund Transfers (Regulation E), 77 *Fed. Reg.* 30923 (proposed May 24, 2012) (to be codified at 12 C.F.R. pt. 1005) [hereinafter Advance Notice]; see also *Deposit Products*, *supra* note 38, at 611.

42. See Advance Notice, *supra* note 41, 77 *Fed. Reg.* at 30925; see also Press Release, Consumer Fin. Prot. Bureau, Consumer Financial Protection Bureau Considers Rules on Prepaid Cards (May 23, 2012), available at <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-considers-rules-on-prepaid-cards/>.

43. See Advance Notice, *supra* note 41, at 77 *Fed. Reg.* 30924–25.

SUPERVISION AND EXAMINATION

The CFPB has the authority to “require reports and conduct examinations” of supervised entities.⁴⁴ These examinations assess compliance with federal consumer financial law, obtain information about the entity’s activities and compliance systems, and assist the CFPB in “detecting and assessing risks to consumers and to markets for consumer financial products and services.”⁴⁵ While examinations have long been a staple of bank regulation, the CFPB has taken them in a new direction. As Director Cordray explained: “It’s almost as though if you take your traditional examination model and you take that examiner and turn them around 180 degrees to look back at the public and how they’re affected rather than solely at the potential impact to the institution.”⁴⁶ The CFPB’s approach constitutes a conscious effort to avoid the traditional focus on safety and soundness, where “certain consumer harms and impacts were not highlighted because . . . they weren’t at a high level of dollars” and “didn’t affect the safety and soundness of the institution.”⁴⁷

This singular focus on the consumer is apparent even before the CFPB visits a financial institution for a routine examination. A key component of its Supervision and Examination Manual is the Consumer Risk Assessment, a pre-examination process in which the CFPB evaluates a supervised entity to determine the amount of risk it poses to consumers.⁴⁸ Because this assessment occurs before the examination begins, the CFPB relies upon information from complaints, public sources, and other regulators to tailor the examination process to the particular institution.⁴⁹ A “high” rating of overall risk to consumers in this pre-examination process may lead to a more searching examination.⁵⁰

The CFPB typically will issue a sixty-day pre-examination notice to the supervised entity, along with a detailed information request.⁵¹ After an onsite examination, the CFPB issues an examination report accompanied by a compliance rating from one (highest) to five (lowest), the same scale used by other federal

44. 12 U.S.C. §§ 5514(b)(1), 5515(b)(1) (Supp. IV 2010).

45. *Id.* §§ 5514(b)(1)(C), 5515(b)(1)(C).

46. See *Qualified Mortgage Plan*, *supra* note 23, at 2.

47. *Id.* By way of contrast, the OCC states: “From a supervisory perspective, risk is the potential that events, expected or unanticipated, may have an adverse effect on the bank’s earnings, capital, or franchise/enterprise value. The OCC has defined eight categories of risk for bank supervision purposes. These risks are: *credit, interest rate, liquidity, price, operations, compliance, strategic, and reputation.*” OFFICE OF THE COMPTROLLER OF THE CURRENCY, LARGE BANK SUPERVISION: COMPTROLLER’S HANDBOOK 4 (Jan. 2010), available at <http://www.occ.gov/publications/publications-by-type/comptrollers-handbook/lbs.pdf>.

48. See CONSUMER FIN. PROT. BUREAU, SUPERVISION AND EXAMINATION MANUAL 2.0, at 21 (Oct. 31, 2012), available at http://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf (“risk to consumers” is “the potential for consumers to suffer economic loss or other legally [re]cognizable injury as a result of a violation of Federal financial consumer law”).

49. See *id.* at 15. In addition, for depository institutions, the lead examiner assigned to the institution “will, either individually or with a team, monitor information about the entity and its affiliates.” *Id.* at 16.

50. *Id.* at 855 (noting that “[t]he factor ratings and comments should be used to inform the Examination Scope”).

51. *Id.* at 24.

banking agencies.⁵² The CFPB's early examination reports have been similar to banking agency reports and contain findings and recommendations for corrective action and set forth any violations of law.⁵³ As with banking agency examinations, CFPB examination findings may form the basis for enforcement action.⁵⁴

One difficult issue raised by the CFPB's examination program has been its position that it can compel institutions to produce attorney-client privileged material.⁵⁵ The CFPB compares itself to traditional banking regulators that have long claimed⁵⁶ such authority. Under section 1828(x) of the Federal Deposit Insurance Act ("FDI Act"), production of privileged materials to enumerated federal banking regulators does not waive the privilege.⁵⁷ However, the CFPB's position was undermined by the fact that the Dodd-Frank Act did not explicitly provide it with the authority to require the production of privileged material nor did it include the CFPB within the coverage of section 1828(x). Similarly, the CFPB was not explicitly covered by section 1821(t), which protects the privileged status of such information in the event that a banking regulatory agency subsequently provides the information to another covered federal agency.⁵⁸ Since the CFPB was not an enumerated agency under sections 1821 and 1828, third parties may claim that a financial institution that provides privileged information to it waives the attorney-client privilege. By the same token, a third party could claim a waiver if the CFPB provided a financial institution's privileged information to any other agency.⁵⁹

In an effort to resolve the issue, the CFPB issued a final rule asserting that the production of attorney-client privileged material to it in the course of its supervisory or regulatory processes does not waive the privilege.⁶⁰ The rule also provided that any sharing of information between the CFPB and another federal or state agency does not waive any applicable privilege.⁶¹ The rule relied upon the Dodd-Frank Act's transfer of "all powers and duties" relating to examination

52. *Id.* at 26–28.

53. *See id.* at 29 (describing the content of examination reports).

54. *Id.* at 27, 30.

55. *See* CFPB Bull. 12-01, The Bureau's Supervision Authority and Treatment of Confidential Supervisory Information (Jan. 4, 2012), available at http://files.consumerfinance.gov/f/2012/01/GC_bulletin_12-01.pdf.

56. *See, e.g.*, OCC Interpretive Letter, 1991 WL 338409 (Dec. 3, 1991) (unpublished); Statement of Scott Alvarez, Gen. Counsel of the Bd. of Governors of the Fed. Reserve Sys., Before the Committee on Financial Services, U.S. House of Representatives 2 (May 17, 2012), available at <http://financialservices.house.gov/UploadedFiles/HHRG-112-BA00-WState-SAlvarez-20120517.pdf>.

57. 12 U.S.C. § 1828(x) (2006).

58. *Id.* § 1828(t).

59. *See generally* American Bar Association Comment Letter re: Bureau of Consumer Financial Protection Proposed Rule on Confidential Treatment of Privileged Information; Docket No. CFPB-2012-0010; RIN 3170-AA20, 77 Fed. Reg. 15286 (Apr. 12, 2012), available at http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2012apr13_attorneyclientprivileges_1.authcheckdam.pdf.

60. *See* Confidential Treatment of Privileged Information, 77 Fed. Reg. 39617 (July 5, 2012) (to be codified at 12 C.F.R. pt. 1070).

61. *Id.* at 39621.

authority from the banking regulators to the CFPB.⁶² Despite the new rule, concerns remained that attorney-client privileged information turned over to the CFPB would lose its privileged status. The risk was even higher for nonbank financial institutions, since the transfer of traditional bank examination authority to the CFPB has limited relevance to nonbanks. On December 20, 2012, the President signed a bill to amend the FDI Act to include the CFPB as an enumerated agency under sections 1821(t) and 1828(x), which marks a significant step toward resolving these issues.⁶³

Finally, the CFPB's examinations have also sharply diverged from traditional bank examinations by including enforcement attorneys. Director Cordray has stated that the reason for this coordination is merely to help "the supervision teams to understand where enforcement works," and, conversely, to help "the enforcement team to understand how supervision and examinations work."⁶⁴ This rationale suggests the possibility that as the CFPB's teams are trained, the presence of enforcement attorneys at routine examinations may dwindle. In addition, the first annual report of the CFPB Ombudsman on November 15, 2012,⁶⁵ called for the Bureau to review its policy of including enforcement attorneys at supervisory examinations, and to clarify the policy to the public until that review is complete.

ENFORCEMENT

The CFPB has the power to conduct investigations, issue subpoenas and civil investigative demands, bring cease-and-desist proceedings, and conduct hearings.⁶⁶ As might be expected, its rules are generally focused on expediting its investigations. For example, petitions for modifying or setting aside a civil investigative demand must be filed within twenty days, and then are considered by the CFPB itself.⁶⁷ Despite this short timeline, requests for extensions of time for such a petition "are disfavored,"⁶⁸ though they have been granted in some cases.

At the same time, the CFPB has signaled its willingness to provide appropriate due process to financial institutions on the brink of an enforcement action. The need for such a process was noted as soon as the CFPB opened its doors.⁶⁹

62. *Id.* at 39619.

63. H.R. 4014, 112th Cong. (2012).

64. See Dave Clarke, *U.S. Consumer Cop Says Not Bullying Banks*, REUTERS (Mar. 29, 2012, 4:49 PM EST), <http://www.reuters.com/article/2012/03/29/financial-regulation-cfpb-idUSL2E8ET7XL20120329>.

65. CFPB OMBUDSMAN'S OFFICE, FY 2012 ANNUAL REPORT TO THE DIRECTOR (Nov. 15, 2012), available at http://files.consumerfinance.gov/f/201211_Ombuds_Office_Annual_Report.pdf.

66. See 12 U.S.C. §§ 5562, 5563 (Supp. IV 2010). The CFPB has implemented final rules governing its procedures for investigations, for adjudication proceedings, and for state notification of enforcement actions. See Rules Relating to Investigations, 77 Fed. Reg. 39101 (June 29, 2012) (to be codified at 12 C.F.R. pt. 1080) [hereinafter Investigation Rules]; Rules of Practice Relating to Adjudication Proceedings, 77 Fed. Reg. 39058 (June 29, 2012) (to be codified at 12 C.F.R. pt. 1081); State Official Notification Rule, 77 Fed. Reg. 39112 (June 29, 2012).

67. See 12 U.S.C. § 5562(f) (Supp. IV 2010).

68. See Investigation Rules, *supra* note 66, 77 Fed. Reg. at 39104-05.

69. See Eric J. Mogilnicki & William McLucas, SEC Provides an Enforcement Roadmap for the CFPB, AM. BANKER, July 20, 2011, at 1, available at <http://www.americanbanker.com/bankthink/>

In November 2011, it announced procedures that would provide advance notice and an opportunity to be heard to financial institutions facing potential legal action, noting that the procedures were modeled on other agencies' procedures.⁷⁰ The procedures should provide due process that benefits both financial institutions and the CFPB by preventing flawed enforcement actions from going forward.

In July 2012, the CFPB announced its first public enforcement action against Capital One Bank, (USA) N.A. ("Capital One").⁷¹ The CFPB found that Capital One failed to monitor third-party vendors that marketed products, such as payment protection and credit monitoring, that could be added to a Capital One credit card.⁷² Notably, the consent order does not find any improper marketing by Capital One itself. The CFPB required Capital One to refund approximately \$140 million to two million customers⁷³ and pay \$25 million in penalties.⁷⁴ Acting concurrently, the OCC imposed a \$35 million fine and \$150 million in restitution against Capital One, which included the same \$140 million ordered by the Bureau.⁷⁵

In September 2012, the CFPB issued its second public enforcement action, jointly with the FDIC, against Discover Bank.⁷⁶ The CFPB and FDIC jointly assessed a \$14 million civil money penalty and ordered no less than \$200 million in restitution to at least 3.5 million customers. Like the *Capital One* order, the order against Discover Bank concerns ancillary credit card products such as debt suspension and credit monitoring, as well as identity theft monitoring, lost wallet assistance, and credit score monitoring.⁷⁷ Unlike *Capital One*, Discover Bank was allegedly directly involved in the drafting of the telemarketing scripts found to be deficient by the Bureau. The CFPB required that Discover implement numerous compliance and audit improvements, including enhance-

consumer-financial-protection-bureau-wells-process-1040383-1.html; Eric J. Mogilnicki & Timothy J. Perla, Due Process, Transparency and the Consumer Financial Protection Bureau, 43 SEC. REG. & L. REP. (BNA) 1532, 1533 (July 29, 2011).

70. See CFPB Bull. 2011-14 (Enforcement) (Nov. 7, 2011), available at <http://files.consumerfinance.gov/f/2012/01/Bulletin10.pdf>.

71. See *In re Capital One Bank, (USA) N.A.*, No. 2012-CFPB-0001 (CFPB July 18, 2012) (stipulation and consent order) [hereinafter *Capital One Consent Order*], available at http://files.consumerfinance.gov/f/201207_cfpb_consent_order_0001.pdf.

72. *Id.* at 4. Accordingly, the consent order requires Capital One to establish clear standards in its contracts with service providers and to perform onsite reviews. *Id.* at 22-23.

73. See Press Release, Consumer Fin. Prot. Bureau, CFPB Probe into Capital One Credit Card Marketing Results in \$140 Million Consumer Refund (July 18, 2012) [hereinafter *Capital One Press Release*], available at <http://www.consumerfinance.gov/pressreleases/cfpb-capital-one-probe/>.

74. *Capital One Consent Order*, *supra* note 71, at 20.

75. See *In re Capital One Bank, (USA) N.A.*, No. 2012-152 (OCC July 17, 2012), available at <http://www.occ.gov/news-issuances/news-releases/2012/2012-110a.pdf> (cease-and-desist consent order); *In re Capital One Bank, (USA) N.A.*, No. 2012-153 (OCC July 17, 2012), available at <http://www.occ.gov/news-issuances/news-releases/2012/2012-110b.pdf> (civil money penalty consent order).

76. See *In re Discover Bank*, Nos. FDIC-11-548b, FDIC-11-551k, 2012-CFPB-0005 (Sept. 24, 2012) (joint consent order), available at http://files.consumerfinance.gov/f/201209_cfpb_consent_order_0005.pdf.

77. *Id.* at 2.

ments to training, vendor management, compliance staffing, and a prior review of all product-related marketing materials.⁷⁸

While *Capital One* and *Discover Bank* focused only on the marketing of the ancillary credit card products, the CFPB's public statements suggest that the agency has doubts about the value of payment protection and other ancillary credit card products. In the *Capital One* press release, the CFPB took pains to note that the relevant "payment protection" product would cancel only "roughly one percent of their credit card balance" if the customer encountered certain life events like unemployment and temporary disability.⁷⁹ The CFPB also issued a bulletin discussing the marketing of these add-on products and to warn that it would closely review such products "to assess whether additional supervisory, enforcement, or other actions may be necessary to ensure that the market for add-on products functions in a fair, transparent, and competitive manner."⁸⁰ This warning may lead financial institutions to change the pricing of these products, or to abandon them altogether.

Subsequently, in October 2012, the CFPB issued its third public enforcement action against American Express Centurion Bank, American Express Bank, FSB, and American Express Travel Related Services ("*American Express*").⁸¹ The consent orders focused on the following alleged practices: deceptive marketing practices, age discrimination, unlawful fees on existing accounts, consumer disputes, and deceptive debt collection.⁸² The CFPB orders required that the American Express entities strengthen oversight over service providers and pay approximately \$85 million in restitution to an estimated 250,000 customers.⁸³ The CFPB also assessed penalties of \$14.1 million.⁸⁴

In *American Express*, the CFPB coordinated its efforts with the Federal Deposit Insurance Corporation ("FDIC"), the OCC, and the FRB, each of which imposed

78. *Id.* at 15–16.

79. *See supra* note 73.

80. *See* CFPB Bull. 2012-06, Marketing of Credit Card Add-on Products (July 18, 2012), available at http://files.consumerfinance.gov/f/201207_cfpb_bulletin_marketing_of_credit_card_addon_products.pdf.

81. *See In re* Am. Express Centurion Bank, Nos. FDIC-12-315b, FDIC-12-316k, 201-CFPB-0002 (Oct. 1, 2012) (joint consent order) [hereinafter Amex Centurion Consent Order], available at <http://files.consumerfinance.gov/f/2012-CFPB-0002-American-Express-Centurion-Consent-Order.pdf>; *In re* Am. Express Bank, No. 2012-CFPB-0003 (Oct. 1, 2012) (consent order) [hereinafter Amex Bank Consent Order], available at <http://files.consumerfinance.gov/f/2012-CFPB-0003-American-Express-Bank-FSB-Consent-Order.pdf>; *In re* Am. Express Travel Related Servs. Co., No. 2012-CFPB-0004 (Oct. 1, 2012) (consent order) [hereinafter Amex TRS Consent Order], available at <http://files.consumerfinance.gov/f/2012-CFPB-0004-American-Express-Travel-Related-Services-Company-Inc.-Stipulation-with-e-signatures.pdf>.

82. *See, e.g.,* Amex Centurion Consent Order, *supra* note 81, at 3–4.

83. *See* Press Release, Consumer Fin. Prot. Bureau, CFPB Orders American Express to Pay \$85 Million Refund to Consumers Harmed by Illegal Credit Card Practices (Oct. 1, 2012), available at <http://www.consumerfinance.gov/pressreleases/cfpb-orders-american-express-to-pay-85-million-refund-to-consumers-harmed-by-illegal-credit-card-practices/>; *see also* Amex Centurion Consent Order, *supra* note 81, at 21; Amex Bank Consent Order, *supra* note 81, at 16–17.

84. *See* Amex Centurion Consent Order, *supra* note 81, at 32; Amex Bank Consent Order, *supra* note 81, at 26; Amex TRS Consent Order, *supra* note 81, at 2.

additional civil money penalties.⁸⁵ Taken together, the *Capital One*, *Discover Bank* and *American Express* orders demonstrate that large banks now face overlapping enforcement actions and penalties that involve both the new agency and the traditional banking regulators.

PUBLIC ADVOCACY AND ENGAGEMENT

While Director Cordray has not always included a fourth tool in his description of the CFPB's powers, there can be no doubt that the new agency has used public advocacy and engagement to identify and pursue its goals to an extent unprecedented for a bank regulator and unusual for any agency. For example, the CFPB has used its website to solicit comments from consumers on possible new regulations or initiatives, and even suggestions for its amicus program.⁸⁶ It has also held field hearings and roundtables across the country on a range of issues. In 2012, the CFPB's outreach efforts focused on payday lending,⁸⁷ overdrafts,⁸⁸ and private student lending.⁸⁹ In addition, the CFPB stated that it "uses consumer complaints to inform its work in making prices and risks clearer, protecting consumers of financial products and services, and encouraging financial markets to operate fairly and competitively."⁹⁰ The complaint database has also informed its thinking on credit cards, mortgages, bank products and services, vehicle and consumer loans, and private student loans.⁹¹

The CFPB's reliance on complaints has been a source of concern to the financial services industry, which has argued that the release of unverified, potentially inaccurate allegations could mislead consumers and unnecessarily tarnish the reputation of the publicly identified company.⁹² In response, the CFPB has agreed that "its complaint process does not provide for across the board verifi-

85. See *Ending Illegal Credit Card Practices*, CONSUMER FIN. PROT. BUREAU, 3, http://files.consumerfinance.gov/f/201210_cfpb_AmEx_Enforcement_Factsheet.pdf (last visited Dec. 20, 2012).

86. See *supra* note 16.

87. The CFPB expressed concerns with "the inherent risks associated with payday products" and doubts that "these products actually help consumers and not harm them." See *In re A Field Hearing on Payday Lending* 19 (CFPB Jan. 19, 2012) [hereinafter *Payday Lending Hearing*], available at http://files.consumerfinance.gov/f/201201_cfpb_transcript_payday-lending-field-hearing-alabama.pdf.

88. The CFPB emphasized that, while "[o]verdrafts can provide consumers with needed access to funds . . . the growing costs of overdraft practices have the capacity to inflict serious economic harm." See Prepared Remarks by Richard Cordray at the CFPB Roundtable on Overdraft Practices (Feb. 22, 2012), available at <http://www.consumerfinance.gov/speeches/prepared-remarks-by-richard-cordray-at-the-cfpb-roundtable-on-overdraft-practices/>.

89. In late 2011, the CFPB launched a public inquiry regarding private student loans. See Request for Information Regarding Private Education Loans and Private Educational Lenders, Notice and Request for Information, 76 Fed. Reg. 71329 (Nov. 17, 2011).

90. See CONSUMER FIN. PROT. BUREAU, CONSUMER RESPONSE: A SNAPSHOT OF COMPLAINTS RECEIVED 7 (June 19, 2012), available at http://files.consumerfinance.gov/f/201206_cfpb_snapshot_complaints-received.pdf.

91. See Press Release, Consumer Fin. Prot. Bureau, Consumer Financial Protection Bureau Launches Consumer Complaint Database (June 19, 2012), available at <http://www.consumerfinance.gov/press-releases/consumer-financial-protection-bureau-launches-consumer-complaint-database/>.

92. See Press Release, Am. Bankers Ass'n, ABA Statement on CFPB Credit Card Complaint Database (June 19, 2012), available at <http://www.aba.com/Press/Pages/061912StatementCFPBCreditCardComplaint.aspx>.

cation of claims made in complaints,” and it expressed its hope that publicizing these complaints will “allow the marketplace of ideas to determine what the data show.”⁹³

THE YEAR AHEAD

The coming year may see a resolution of a legal challenge to the President’s recess appointment of Director Cordray and the creation of the CFPB itself. In June 2012, a small Texas bank and two conservative advocacy organizations sued to challenge the constitutionality of the appointment, the creation of the CFPB, and the creation of the Financial Stability Oversight Council, the inter-agency body charged with identifying systemically important financial institutions.⁹⁴ It is too early to tell whether the suit will survive motion practice or whether any of the relief sought will be granted. However, even if the lawsuit successfully challenges the Director’s appointment, it might not succeed in reversing the CFPB’s actions.⁹⁵

The year ahead also will find the CFPB continuing to seek an appropriate balance between arming consumers with information and simply prohibiting certain financial products and services. The tension between these approaches has been around since the very origins of the CFPB. Professor Warren’s *Unsafe at Any Rate* compared certain financial products to toasters that blow up (and so were banned), but generally described the proposed new federal agency as one that would focus on improving disclosures and consumer education.⁹⁶ In 2013, the CFPB’s approach to consumer arbitration clauses and overdraft protection products may provide further clues as to how the new agency will choose between disclosure and prohibition.

Similarly, the CFPB can be expected to continue to seek to find the appropriate balance between reducing the risks of financial products and services and maximizing the availability of credit. The CFPB field hearing on payday lending illustrated this problem, as witnesses differed on whether payday lending should be eliminated even if doing so left some borrowers with no legal way to obtain short-term cash.⁹⁷ The proposed QM rule presents the same challenge to the CFPB. While a mortgage with very stringent underwriting standards will expose both the industry and the borrower to less risk, such standards may place homeownership out of reach for many consumers.⁹⁸

93. See Disclosure of Certain Credit Card Complaint Data, Notice of Final Policy Statement, 77 Fed. Reg. 37558, 37561 (June 22, 2012).

94. Complaint, *State Nat’l Bank of Big Spring v. Geithner*, No. 1:12-cv-1032-ESH (D.D.C. June 20, 2012). The attorneys general of Michigan, Oklahoma, and South Carolina subsequently joined the case as plaintiffs. See Amended Complaint, *State Nat’l Bank of Big Spring v. Geithner*, No. 1:12-cv-1032-ESH (D.D.C. Sept. 20, 2012). A motion to dismiss was filed by the government on November 20, 2012.

95. See *Ryder v. United States*, 515 U.S. 177, 180 (1995) (recognizing the de facto officer doctrine, which protects the acts of the officer even in cases where the appointment was invalid).

96. See *Unsafe at Any Rate*, *supra* note 2, at 8–9, 17–18.

97. See Payday Lending Hearing, *supra* note 87, at 39–41.

98. See *supra* notes 29–33 and accompanying text.

Finally, the CFPB will embed itself further in the bank regulatory landscape. Banks will continue to experience the CFPB's examination process and become more accustomed to its new approach. At the same time, the new agency should grow more comfortable during examinations, as its knowledge base grows. With more examinations under their belts, both the CFPB and its supervised entities should find themselves in a more predictable and structured regime. In this new regime, the CFPB will have laid down markers on issues of concern, but also will have deemed certain practices unobjectionable, either explicitly or implicitly. Likewise, each public enforcement action will make the CFPB's expectations and approach to enforcement clearer to the regulated, and each civil money penalty it imposes will add to the predictability of penalty amounts in future cases.