

The Consumer Financial Protection Bureau: first year

The Consumer Financial Protection Bureau has been in force for a year in the US, supervising banks, issuing regulations and investigating financial services practices. John K. Van De Weert, a Partner at Sidley Austin in Washington D.C., analyses the first year of enforcement and discusses the updates expected for the upcoming second year.

In 2010, Congress created the new Consumer Financial Protection Bureau ('CFPB') as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the 'Dodd-Frank Act')¹. The CFPB was designed to be the central federal consumer protection authority for financial products and services, consolidating existing rulemaking, supervisory and enforcement functions from at least six other federal agencies. In its first year of action, the CFPB has been active - and remains controversial. This note reviews major actions taken by the CFPB in this first year.

A Brief History

About one year ago, on 21 July 2011, the CFPB assumed most of its transferred powers from the other federal agencies². At that time, the CFPB began to supervise the largest banks for consumer protection issues, and assumed the authority to issue regulations and take enforcement actions under existing federal consumer protection statutes - such as the Truth-in-Lending Act and the Equal Credit Opportunity Act. President Obama had not, however, appointed a Director for the CFPB, and the Bureau therefore could not exercise most of the new authorities created by the Dodd-Frank Act: for example, the CFPB could not supervise non-bank financial service providers

such as mortgage companies, and could not make rules under the broad, new Dodd-Frank authority relating to unfair, deceptive, or abusive acts or practices and new consumer disclosures³.

Political differences between the President and congressional Republicans delayed the appointment of the CFPB's first Director. President Obama finally nominated Richard Cordray to the position in July 2011⁴, but Congress declined to consider the nomination. On 4 January 2012, President Obama installed Mr. Cordray through a recess appointment⁵. The appointment remains controversial, however, as Congress had not formally declared itself in recess, and the Senate was meeting in pro forma sessions. To date, no formal challenge has been made to the appointment, although the Justice Department has issued an opinion concluding that the appointment was valid⁶.

Process and Structure

The CFPB's ability to require document production, and the effect of document production on privileged documents, has been of significant controversy in the first year. Some supervised institutions have taken the position that they should be permitted to withhold or redact documents that are outside of the CFPB's consumer protection mission. The CFPB has asserted its right to demand documents from supervised institutions without limitation, however, and to determine for itself what information is relevant to its functions⁷. To date, no public controversies have arisen over an institution's refusal to provide documents requested by the agency.

Supervised institutions have also been very concerned that producing documents to the CFPB

could result in a waiver of the attorney-client privilege (or other privileges) that would otherwise apply to the documents. If the privilege is waived, then institutions might have to produce the same document in private litigation. In 2006, Congress amended the Federal Deposit Insurance Act to provide that institutions did not waive privileges by providing documents to a 'Federal banking agency'⁸. The CFPB, however, was not included within the definition of 'Federal banking agency'⁹. There has been concern, therefore, that any production to the CFPB could result in a waiver of privilege - as some courts had held with respect to other agencies prior to the enactment of the 2006 statute¹⁰.

In January 2012, the CFPB issued a memorandum taking the position that institutions would not waive privilege by producing documents to the CFPB, and in March the CFPB issued a proposed regulation to the same effect¹¹. Congress has proposed legislation to extend 12 U.S.C. § 1828(x) to include the CFPB. Supervised institutions have strongly supported this legislation, which has passed the House but has been stalled in the Senate¹².

Another structural issue that remains unresolved is the question of how the CFPB will coordinate its activities with other agencies at both the federal and state level. There is, for example, significant overlap in the investigation and enforcement authority of the CFPB and the Federal Trade Commission (FTC) over non-bank entities. The two agencies have reached a memorandum about their intent to cooperate, but the memorandum does not address a number of very significant issues, including whether the agencies will have different priorities in how they exercise their authority, and

how divergences of opinion between the agencies will be reconciled¹³. The same is true of the CFPB and state agencies, which have overlapping jurisdiction and have reached a similar memorandum of understanding¹⁴. And potential regulatory conflicts may be the greatest risk for large banks, which are examined by both the CFPB and another regulator. The Dodd-Frank Act created a formal mechanism for resolving conflicts among supervisory agencies¹⁵. However, many conflicts or tensions between the agencies will not rise to that level, but may still put banks in an uncertain position. The agencies have also signed a formal Memorandum of Understanding, which while providing some details on information sharing and coordination in connection with examinations, does not answer all concerns¹⁶.

Consumer Protection Rulemaking

The CFPB's most significant new final rulemaking to date - the finalisation of a remittance rule under the Electronic Fund Transfer Act in Regulation E - promises to have a significant effect on the payments industry in the US when it becomes effective on 7 February 2013¹⁷. The rule implements a provision in the Dodd-Frank, and was proposed by the Federal Reserve before the rulemaking functions passed over to the CFPB¹⁸.

The new rule applies broadly to 'remittance transfers' defined as the electronic transfer of funds requested by a sender to a designated recipient that is sent by a remittance transfer provider¹⁹. The rule requires pre-transaction disclosures, post-transfer receipts, and specific error resolution procedures and timeframes²⁰. It also imposes a minimum 30-

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minute cancellation period, during which the sender can cancel and obtain a refund²¹.

One challenge under the new rule is the requirement to disclose to the sender the amount of foreign currency that will be delivered to the recipient. This is a particular challenge for 'open' systems, where the remittance provider may not know exactly what fees or exchange rate will be charged by the dispersing entity. Although there is a temporary exemption that allows for estimates (which itself poses challenges), that applies only to insured depository institutions and expires in 2015²². Another challenge is that the specification by the sender of the wrong account number of the recipient is considered an error that must be corrected by the remittance provider. This is unusual because providers typically rely on the recipients' account numbers provided by consumers and do not have a way of verifying that names and account numbers of recipients are accurate. This raises the possibility that the remittance provider may have to pay for the sender's own error.

The CFPB is expected to issue new rules governing mortgage loans in the summer, to implement provisions of the Dodd-Frank Act. Those rules are likely to have a significant effect on the mortgage industry, and will need to be carefully studied.

In addition to its formal rulemaking, the CFPB has also engaged in more informal efforts, particular in the area of disclosures. The CFPB has issued a proposed two-page credit card agreement for comment and testing²³. The idea of short-form agreement, long championed by Elizabeth Warren, would create many challenges for card issuers because of the complexity, and many variations, in the agreements

used today. The CFPB has also issued various mortgage disclosure proposals in this informal manner, and proposed disclosures for prepaid cards²⁴. This type of informal rulemaking creates challenges for interested parties because it is not subject to the formal comment process of the Administrative Procedures Act, and yet these efforts could result in the development of agency positions that are then difficult to challenge.

The CFPB has also issued a formal request for information about consumer arbitration provisions, as it seeks to conduct a study on that topic mandated by the Dodd-Frank Act²⁵. The study, and rulemaking that could follow, could result in a prohibition or restriction on the use of such provisions, which have been an important way that companies have sought to control exposure to meritless litigation.

Supervision

Since July 2011, the CFPB has been exercising supervisory authority over large banks' consumer products and services - examiners have been actively overseeing these banks using this authority²⁶. The CFPB has also been planning its supervision of non-bank entities, which is a power it assumed with the appointment of a Director²⁷.

Under the Dodd-Frank Act, the CFPB currently has authority to supervise mortgage lenders, brokers, and servicers; mortgage loan modification and foreclosure relief providers; payday lenders, and private education lenders²⁸. It also has authority to extend this supervision, by regulation, to 'larger participants' in other consumer finance areas and to institutions posing 'risks' to consumers²⁹. The CFPB has proposed to extend its supervision to cover larger participants in debt collection and consumer reporting,

and has proposed a regulation to determine which institutions pose 'risks' that warrant supervision³⁰. It is anticipated that the CFPB will seek to extend its supervision further, including prepaid cards and other areas.

The CFPB has released a comprehensive supervision and examination manual to guide its examiners³¹. The manual also provides important guidance for supervised institutions, including guidance on how the agency will exercise its authority to examine institutions for unfair, deceptive, or abusive acts or practices.

Investigation & Enforcement

Under the Dodd-Frank Act, the CFPB is charged with collecting and processing consumer complaints. The CFPB has rolled out a complaint gathering system by industry - starting with credit cards and mortgages, and now including bank accounts/bank services, auto loans and general consumer loans, and student loans³². In addition to resolving individual complaints, the CFPB intends to use complaints to identify problematic practices. In-depth analysis of complaints is a key item in the CFPB's agenda³³. The CFPB also views an institutions' own complaint-handling processes to be very important - again, not only to resolve individual disputes but also to identify practices in need of adjustment.

The CFPB is also exercising its authority to investigate and enforce consumer financial protection laws. Some of these activities have been publicised, including an investigation of mortgage reinsurance arrangements under the Real Estate Settlement Procedures Act³⁴. To date, there have not been any public enforcement actions by the CFPB.

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enforcement authority as well as authority to pursue enforcement actions in the courts. The rules governing administrative enforcement proceedings were recently finalised³⁵. The agency has not, however, provided guidance on when it is likely to use administrative as opposed to judicial enforcement mechanisms.

Conclusion

The CFPB has actively exercised its authority in the first year - issuing rules, examining banks, and investigating practices in consumer financial services. An active agenda is also expected for the upcoming second year, as the agency issues a number of rules to implement provisions in the Dodd-Frank Act. Careful attention to the CFPB's actions - formal and informal - is essential as the agency further defines its role and puts its imprint on the financial services industry.

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1. Pub. L. 111-201, 124 Stat. 1376.
2. Dodd-Frank Act § 1061, codified at 12 U.S.C. § 5581.
3. See Joint Response by the Inspectors General of the Department of the Treasury and Board of Governors of the Federal Reserve System, at pp. 4-7, attached to letter dated January 10, 2011 from the Inspectors General to Reps. Spencer Bachus and Judy Biggert
4. Appelbaum, Binyamin, "Former Ohio Attorney General Picked to Lead Consumer Agency," *The New York Times*.
5. Wong, Scott, "Richard Cordray nomination blocked by Senate GOP," <http://www.politico.com/news/stories/12/11/70091.html>.
6. Lawfulness of Recess Appointments during a recess of the Senate Notwithstanding Periodic Pro Forma Sessions, January 6, 2012.
7. CFPB Bulletin 12-01 (Jan. 4, 2012), at pp. 1-2 (available at http://files.consumerfinance.gov/f/2012/01/GC_bulletin_12-01.pdf).
8. 18 U.S.C. § 1828(x).
9. See 12 U.S.C. § 1813(z)
10. See, e.g., *In re Bank One Secs. Litig.*, 209 F.R.D. 418, 424 (N.D. Ill. 2002).

11. CFPB Bulletin 12-01 (Jan. 4, 2012), at pp. 2-3; 77 Fed. Reg. 15286 (Mar. 15, 2012).
12. Legislation is pending as H.R. 4014.
13. Memorandum of Understanding Between the Consumer Financial Protection Bureau and the Federal Trade Commission, Jan. 20, 2012.
14. Memorandum of Understanding Between the Consumer Financial Protection Bureau, the Conference of State Bank Supervisors, and the Other Signatories Hereto Regarding the Sharing of Information for Consumer Protection Purposes, Jan. 4, 2011
15. Dodd-Frank Act § 1025(e), codified at 12 U.S.C. § 5515(e).
16. Memorandum of Understanding on Supervisory Coordination, May 16, 2012
17. 77 Fed. Reg. 6194 (Feb. 7, 2012). The CFPB has also adopted a number of procedural rules and has re-issued existing regulations that have been transferred to it from other agencies.
18. Dodd-Frank Act § 1073, codified as Section 919 of the Electronic Fund Transfer Act, 15 U.S.C. § 1693o-1; proposed rule was published by the Federal Reserve at 76 Fed. Reg. 29902 (May 23, 2011).
19. 12 C.F.R. § 1005.30(e).
20. 12 C.F.R. §§ 1005.31(b)(1), (3); .33.
21. 12 C.F.R. § 1005.34.
22. 12 C.F.R. § 1005.32(e).
23. Available at <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-aims-to-simplify-credit-card-agreements/> (Dec. 7, 2011).
24. See, e.g., <http://www.consumerfinance.gov/knowbeforeyouowe/>.
25. 77 Fed. Reg. 25148 (Apr. 27, 2012); Dodd-Frank Act § 1028, codified at 12 U.S.C. § 5518.
26. Dodd-Frank Act §§ 1025 & 1061, codified at 12 U.S.C. §§ 5515, 5581.
27. On January 11, 2012, the CFPB issued its examination procedures for mortgage origination
28. Dodd-Frank Act § 1024(a)(1)(A), (D), codified at 12 U.S.C. § 5514.
29. Dodd-Frank Act § 1024 (a)(1)(B), (C).
30. 77 Fed. Reg. 9592 (Feb. 17, 2012); 77 Fed. Reg. 31226 (May 25, 2012).
31. Available at <http://www.consumerfinance.gov/guidance/supervision/manual/>.
32. See <http://www.consumerfinance.gov/complaint/>.
33. John Adams, "CFPB's Complaint Box-It's All Over Except for the Shouting," *American Banker* January 2011.
34. Jeff Horwitz, "PHH Targeted by CFPB in Reinsurance Kickback Probe," *American Banker*, Jan. 10, 2012.
35. 12 C.F.R. pt. 1081.