

## Primer on the Consumer Financial Protection Bureau

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On July 21, 2011, the Consumer Financial Protection Bureau (the Bureau or CFPB) will open its doors for business. The CFPB is a new, broadly empowered regulator that is charged with regulating the consumer financial products and services industry. The CFPB will have a significant impact on a broad range of companies, including participants in banking, mortgage, credit card, payday and student lending, and other consumer financial services industries, as well as their affiliates and service providers. Specifically, as of this week, the Bureau will have the authority to issue new rules and regulations for certain statutes and to start examinations of very large depository institutions. Its authority to examine non-depository institutions and exercise certain other powers given to it by the Dodd-Frank Act will commence with the confirmation of a Bureau Director. This article provides an overview of the Bureau and its activities to date.

### Organization and Staffing of the Bureau

The Bureau was established by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). The Bureau is housed within the Federal Reserve System, but it is essentially independent of the board of governors, with its own budget mandated by statute and little oversight or review by the board. Although the Bureau was created with the passage of the Dodd-Frank Act on July 21, 2010, most of its authority to enforce the law, issue new rules and regulations, and examine companies for compliance does not become effective until one year after passage of the Act. In preparation for the July 21, 2011, “transfer date,” the Bureau has spent the last year staffing up and preparing to exercise its new authority.

Over much of that time, attention has been focused on the question of whom President Obama would nominate as the Director of the Bureau. Elizabeth Warren, a Harvard University Law School professor widely credited as the person who came up with the idea of a federal agency focused solely on financial consumer protection, was appointed by President Obama last year as a “special assistant” charged with getting the Bureau up and running. Although Professor Warren was initially considered the likely nominee for Bureau Director, congressional Republicans opposed her nomination. Earlier this week, President Obama sought to end the controversy over the directorship by nominating Richard Cordray as CFPB Director. Although not as well known as Professor Warren, who has served as the public face of the Bureau, Mr. Cordray built a reputation for aggressive consumer financial services enforcement during his tenure as the Attorney General of Ohio. He currently serves as the Director of Enforcement at the Bureau, and if he is confirmed by the Senate as Bureau Director, he likely will act quickly to put his own stamp on the Bureau.

If confirmed, Mr. Cordray will oversee a large staff of lawyers, examiners and economists. A number of key CFPB staff hires have been made, including:

- Raj Date, Associate Director for Research, Markets, and Regulation;
- Steven Antonakes, Assistant Director for Large Bank Supervision;

- Patrice Ficklin, Assistant Director for Fair Lending;
- Holly Petraeus, Assistant Director for Servicemember Affairs; and
- Leonard Kennedy, General Counsel.

The Bureau's website, [www.consumerfinance.gov](http://www.consumerfinance.gov), further describes its functions, organization and senior staff hires.

### **Covered Financial Products and Services**

The Bureau regulates the provision of “consumer financial products and services,” meaning, generally, certain defined “financial products and services” that are offered or provided for use by “consumers” (*i.e.*, individuals) primarily for personal, family or household purposes. The Dodd-Frank Act defines the following 10 categories of activities as “financial products or services”:

- Originating, brokering or servicing loans or other credit;
- Extending or brokering leases of personal or real property;
- Real estate settlement and appraisal services;
- Deposit taking and transmitting/exchanging funds;
- Stored value cards or payment instruments;
- Check cashing, collection or guaranty;
- Providing payments or financial-data-processing products or services to consumers;
- Financial advisory services and credit and debt modification counseling to consumers;
- Consumer credit reports; and
- Consumer debt collection.

Additionally, the Bureau is authorized to expand the definition of financial product or service by regulation in certain circumstances, including for any product or service that it finds is a “subterfuge or with a purpose to evade any Federal consumer financial law.”

There are a number of important carve-outs from the Bureau's rulemaking, examination and enforcement authority with respect to certain categories of persons and products, including insurance, merchants who finance their own products, auto dealers, attorneys, accountants, real estate brokers, tax preparers and SEC-regulated entities.

Any person who offers or provides a consumer financial product or service is considered a “covered person,” which subjects that person to various Bureau authorities. However, in certain circumstances, the CFPB's authorities extend beyond those persons who themselves offer financial products and services to consumers. For example, “affiliates” of covered persons are, in some circumstances, considered covered persons, and service providers to covered persons are subject to many of the Bureau's enforcement authorities. Thus, companies that do not themselves offer financial products and services to consumers should nonetheless carefully analyze the Dodd-Frank Act and, in the future, Bureau regulations and guidance, to assess how the CFPB may impact them or related entities.

## The Bureau's Main Functions

The CFPB will have broad powers in three main areas: (1) rulemaking, (2) enforcement and (3) supervision.

**Rulemaking.** Rulemaking authority for certain enumerated federal consumer statutes previously exercised by banking and other enforcement agencies is transferred to the Bureau effective on the designated “transfer date,” July 21, 2011. The transferred statutes include the Truth in Lending Act (TILA), the Real Estate Settlement Procedures Act (RESPA), the Home Mortgage Disclosure Act (HMDA), the Equal Credit Opportunity Act (ECOA) and other statutes. Furthermore, the Bureau is authorized to engage in rulemaking to prohibit unfair, deceptive, and “abusive” acts and practices. The Bureau also has specific authority to prohibit or condition pre-dispute mandatory arbitration provisions in contracts for consumer financial products and services and to require enhanced disclosures relating to features of consumer financial products and services. The Bureau has indicated that rulemaking with respect to disclosures — including simplifying and enhancing disclosures for mortgage loans and credit cards in particular — will be a top priority. As part of its “Know Before You Owe” initiative, the Bureau already has released proposed combined TILA and RESPA disclosures.

**Enforcement.** The CFPB has the authority to enforce 18 enumerated federal consumer laws transferred to the CFPB, as well as Title X of the Dodd-Frank Act and Bureau rules. The Bureau can bring civil actions in its own name to enforce violations of federal consumer financial protection laws and administrative proceedings, including enforcement actions against covered persons and their service providers, in order to obtain cease-and-desist orders and civil penalties. Additionally, if the Bureau obtains evidence that any person has engaged in conduct that may constitute a violation of federal criminal law, the Bureau is required to transmit that evidence to the Attorney General.

**Supervision.** The Bureau will have supervision and examination authority over some depository and non-depository institutions. Consumer compliance examination authority for banks with assets over \$10 billion and any “affiliate” of such an institution that is also a covered person is transferred from the federal banking regulators to the CFPB effective July 21, 2011. Also, the Bureau will have examination authority over the following five categories of non-depository covered persons: (1) mortgage industry participants (originators, brokers, servicers and loan modification/foreclosure relief services); (2) private education lenders; (3) “payday” lenders; (4) “larger participants” in markets for other consumer financial products or services, as defined by rule<sup>1</sup>; and (5) covered persons that the Bureau determines have engaged in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services. This authority will subject a large segment of the consumer financial services industry to regular federal supervision for the first time, and was intended to “level the playing field” for bank and non-bank lenders.

## Immediate Short-Term and Long-Term Consequences of the Transfer Date

A number of questions have been raised as to whether the Bureau has legal authority to exercise its various powers starting on the transfer date in the absence of a confirmed Director. The inspectors general of Treasury and the Federal Reserve have issued reports addressing these and other questions. Generally, the inspectors general determined that certain existing powers that other regulators are transferring to the Bureau (*e.g.*, rulemaking for TILA, RESPA, HMDA and ECOA, as well as large bank supervision) can be exercised by the Bureau in the absence of a confirmed Director, but

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<sup>1</sup> On June 23, 2011, the Bureau issued a request for comments with respect to identifying such “larger participants” in markets for other consumer financial products or services.

that certain new authorities (such as non-depository supervision and unfair, deceptive, and abusive acts or practices rulemaking) cannot. It will be some time before the impact of all of the Bureau's authorities is fully felt by the industry. However, even prior to the transfer date, and in the absence of a confirmed Director, the Bureau has been active and influential, as exemplified by the Bureau's much-discussed analysis and advice regarding possible settlement terms in the ongoing mortgage foreclosure negotiations involving the state Attorneys General and the largest mortgage servicers.

### **Oversight and Potential Reforms**

Given the breadth of the Bureau's authority and its unique structure, a number of legislators have expressed concern about the Bureau's impact and have introduced reform proposals. For instance, some members of Congress have suggested that heightened regulation of the financial services industry by the Bureau will increase the cost and decrease the availability of credit in the market. House members have introduced a number of bills to subject the CFPB's funding to the appropriations process, change the Bureau's leadership to a commission rather than a single Director, and make it easier for the Financial Stability Oversight Council to overrule Bureau regulations. Additionally, Senate Republicans have vowed to block the confirmation of any nominated Director until certain Bureau reforms are implemented. Whether any of these proposals make it into law or exert indirect impact on the Bureau's exercise of its authority will largely depend upon political developments.

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Exactly how the Bureau will exercise its broad authorities is far from clear. Much will depend upon future rulemaking and leadership initiatives, as well as the outcome of efforts to limit the CFPB's authority or modify its structure. What is clear, however, is that few large companies — whether they think of themselves as providers of “consumer financial products and services” or not — will remain unaffected by the Bureau's exercise of its broad mandate. As the Bureau opens its doors for business on July 21, companies would be well advised to consider how the Bureau might affect their business before they hear a knock on their own door when the Bureau comes calling.