

“Leveling the Playing Field”: Implications of CFPB Authority over Non-Depository Financial Institutions

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IN CREATING THE CONSUMER FINANCIAL Protection Bureau (CFPB), the Dodd-Frank Act¹ combined elements from the Federal Trade Commission, which is primarily an enforcement agency, with elements from the bank regulatory agencies, which are primarily supervision and rulemaking agencies. The new bureau’s “hybrid” powers will create challenges for all financial institutions, but non-depository institutions—such as mortgage companies, debt collection companies, and payday lenders—may face particular challenges as historically they have not been subject to significant regulatory oversight.

These non-depository institutions provide consumer financial products and services, but they are not banks, savings associations, or credit unions, and therefore these institutions are not subject to the authority of the prudential bank regulators, such as the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), and the Board of Governors of the Federal Reserve System (FRB). Instead, these non-depository institutions were traditionally subject to FTC oversight, which lacks supervision and examination authority and regulated these institutions primarily through its enforcement authority.

Now, the CFPB hopes to level the playing field for depository and non-depository institutions to ensure that con-

sumers receive consistent protection.² Part of this strategy will involve many non-depository institutions facing new reporting requirements and on-site compliance examinations, a significant investment of time and energy that these institutions have never experienced before. Non-depository institutions should also expect more aggressive enforcement actions and Bureau coordination with federal and state regulators, as evidenced by recent CFPB enforcement actions against credit card issuers that resulted in high restitution amounts and civil penalties. Additionally, consumer complaint data is expected to drive the CFPB’s enforcement actions and rulemaking; this data is now available in a public, searchable database, increasing both the regulatory and reputational costs for institutions that fail to maintain a comprehensive complaint resolution system. Compared to the FTC, the Bureau also has a more streamlined rulemaking process, and non-depository institutions should therefore expect the CFPB to issue new consumer protection rules more efficiently and at a faster pace.

Nevertheless, even though the Dodd-Frank Act granted the CFPB broad regulatory powers over non-depository institutions, the FTC will continue to both influence consumer protection standards and play an important enforcement role for those institutions. In this respect, non-depository institutions should anticipate that overlapping CFPB and FTC jurisdiction may create some uncertainties regarding consumer protection standards.

FTC and CFPB Authority over Non-Depository Financial Institutions

Federal Trade Commission. The FTC’s Bureau of Consumer Protection has long had broad consumer protection authority over both financial and non-financial companies. Its financial institutions authority governs debt collection; mortgage, credit card, and other debt relief services; payday lending; motor vehicle sales, financing, and leasing; and credit repair and mortgage lending and servicing. However, this expansive jurisdiction over financial institutions is generally limited to non-depository institutions; the FTC does not have jurisdiction over banks, savings and loan institutions, and federal credit unions.³

The FTC primarily regulates non-depository institutions using its enforcement authority under Section 5 of the Federal Trade Commission Act, which prohibits “unfair or deceptive acts or practices in or affecting commerce.”⁴ The agency can also enforce specific consumer protection statutes, such as the Equal Credit Opportunity Act (ECOA), Fair Credit Reporting Act (FCRA), and Truth in Lending Act (TILA). Additionally, although lacking supervision and examination powers, the Commission can issue trade regulation rules “which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce.”⁵

Consumer Financial Protection Bureau. In contrast to the FTC’s broad consumer protection mandate across

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financial and non-financial industries, the CFPB's jurisdiction is generally limited to a "covered person," which is any entity that "engages in offering or providing a consumer financial product or service."⁶ The definition of "covered person" also covers any affiliate of a covered person that acts as a "service provider" to such entity.⁷ The Dodd-Frank Act defines "financial product or service" to include such activities as extending credit and servicing loans, providing real estate settlement services, and engaging in deposit-taking activities.⁸

The CFPB's mission is to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws."⁹ The federal consumer financial laws include Title X of the Dodd-Frank Act, which, among other things, prohibits unfair, deceptive, or abusive acts or practices (UDAAP) in connection with consumer financial products and services.¹⁰ Such laws also include eighteen enumerated statutes that were transferred to the CFPB, as well as their implementing regulations.¹¹

Many non-depository financial institutions that are subject to the eighteen enumerated statutes or are now "covered persons" under the Dodd-Frank Act are generally subject to the Bureau's rulemaking, supervision, and enforcement powers, with certain qualifications.

Rulemaking. The CFPB has rulemaking authority over the enumerated statutes, and any entity subject to these statutes, with certain exceptions, is also subject to Bureau rulemaking. Also, a "covered person" or a "service provider" to such person is subject to the general UDAAP prohibition and any CFPB UDAAP rules.

Supervision. The CFPB has supervisory authority over certain non-bank "covered persons" of any size in the mortgage, payday lending, and private student lending markets, and non-bank "covered persons" that are "larger participants" as the CFPB defines by rule in markets for other consumer financial products or services, including debt collection and consumer reporting.¹² This authority also covers certain other non-bank "covered persons" that the Bureau determines pose risks to consumers in connection with consumer financial products and services.¹³

Enforcement. If a financial institution is a "covered person" or a "service provider" to a covered person, then it is subject to CFPB enforcement, including the UDAAP prohibition.¹⁴ Additionally, an institution generally is subject to CFPB enforcement with respect to the eighteen enumerated statutes regardless of whether the institution is deemed a "covered person" or a "service provider" to a covered person.

As part of the Bureau's enforcement authority, the CFPB is authorized to conduct investigations to determine whether any person is engaging, or has engaged in conduct that violates federal consumer financial law. Investigations may include subpoenas or civil investigative demands. The CFPB may initiate administrative enforcement proceedings or civil actions in federal district court to enforce its rules and enumerated statutes, as well as the UDAAP prohibition, among

other things. The Bureau may obtain "any appropriate legal or equitable relief with respect to a violation of Federal consumer financial law," which may include restitution and civil penalties.¹⁵

Implications of CFPB Authority over Non-Depository Institutions

Many non-depository institutions traditionally subject to FTC enforcement authority and now subject to the CFPB's hybrid powers should expect:

- (i) new reporting requirements and compliance examinations;
- (ii) more aggressive enforcement actions;
- (iii) an investigative methodology that focuses on consumer complaint data to drive enforcement actions and rule-making;
- (iv) increased rulemaking; and
- (v) overlapping CFPB and FTC jurisdiction and influence, which may create inconsistencies and confusion regarding consumer protection standards.

1. New Compliance Examinations. Non-depository financial institution "covered persons" of all sizes engaged in mortgage lending, payday lending, and private student lending activities are subject to CFPB supervisory and examination oversight.¹⁶ In addition, non-depository covered person "larger participants" in other markets for consumer financial products or services are also subject to this oversight; the CFPB is required to define such larger participants by rule. The CFPB has issued final larger participant rules for the consumer reporting and debt collection markets.¹⁷ The CFPB has stated that this supervisory and examination oversight could also extend to larger participants in markets for consumer credit and related activities, money transmitting, check cashing and related activities, prepaid cards, and debt relief services.¹⁸

Non-depository institutions in these other markets should pay close attention to the CFPB's annual receipts thresholds in its larger participant rules, as such thresholds will likely be an important factor for determining which institutions the Bureau will supervise.¹⁹ For example, in the consumer reporting market, the CFPB intends to supervise certain entities with more than seven million dollars in annual receipts resulting from relevant consumer reporting activities. Approximately thirty companies out of 400 consumer reporting agencies meet this threshold, and they represent about 94 percent of the market's annual receipts.²⁰ In the debt collection market, the CFPB determined that larger participants would consist of entities with more than ten million dollars in annual receipts resulting from relevant debt collection activities. An estimated 175 debt collectors meet this threshold and will be subject to the CFPB's supervisory authority, and these companies represent over sixty percent of that market's annual receipts.²¹

The CFPB may also supervise a "covered person" if it has "reasonable cause to determine" that it "is engaging, or has engaged, in conduct that poses risks to consumers with regard

to the offering or provision of consumer financial products or services.”²² The CFPB must make this determination based on consumer complaints that it receives or “information from other sources.”²³

Not all non-bank entities subject to the CFPB’s supervisory and examination authority will actually be examined, due to logistical constraints and because the Dodd-Frank Act mandates that the CFPB take supervisory action only when the Bureau determines that the entity poses sufficient risk to consumers. Non-depository institutions should expect the CFPB to rely on three guiding principles for its “risk-based supervision” function. First, the CFPB has noted that it will “focus on consumers” in its reviews, including how well financial institutions “detect, prevent, and correct practices that present a significant risk of violating law and causing consumer harm.”²⁴ The examinations will “emphasize areas that pose the greatest risk for consumers to potentially suffer economic loss or other legally-cognizable injury from a violation of Federal consumer financial law.”²⁵ As part of this analysis, the Dodd-Frank Act requires that the CFPB’s risk-based supervision program of non-depository institutions assess “the risks posed to consumers in the relevant product markets and geographic markets” and consider the institution’s asset size, volume of transactions involving consumer financial products or services, the risks to consumers from the provision of the consumer financial products or services, the extent of state oversight for consumer protection, and any other relevant factors.²⁶

Second, the CFPB has stated that its examination function will be “data driven” and “rest[] firmly on analysis of available data about the activities of entities it supervises, the markets in which they operate, and risks to consumers posed by activities in these markets.”²⁷

Third, the CFPB has emphasized that it will “apply consistent standards” to its supervision, including using the “same procedures to examine all supervised entities that offer the same types of consumer financial products or services, or conduct similar activities.”²⁸

Non-bank entities subject to examination will find that the examination procedures are detailed and comprehensive and that the process can be expensive and last several months. The examinations are designed to:

- (i) assess compliance with the requirements of federal consumer financial law;
- (ii) obtain information about the entity’s activities and compliance systems or procedures; and
- (iii) detect and assess risks to consumers and to markets for consumer financial products and services.²⁹

According to the Bureau, the examination procedures include a “pre-examination” or “scoping” phase in which the CFPB may request information or records from the institution to identify risks and determine the scope of any on-site examination.³⁰ The next phase may include on-site examinations, where several Bureau examiners visit the institution and conduct formal or informal interviews of all levels of

personnel, including both management and staff. Interviews may test the individual’s knowledge of the institution’s policies and procedures or any relevant regulatory requirements. The CFPB examiners may also observe operations and review sample transactions.³¹ After this examination, the CFPB has stated that it will communicate its findings and any desired corrective actions to the Board of Directors or management in the form of a confidential examination report. Depending on the findings, the Bureau may initiate a supervisory action³² or public enforcement action against the institution. Indeed, it has been widely reported that CFPB enforcement attorneys have been present in on-site supervisory examinations as a matter of course, although this practice has generated some controversy.³³

2. More Aggressive Enforcement Actions. Financial institutions may be subject to CFPB enforcement in two ways. First, any institution that is considered a “covered person” or a “service provider” to a covered person generally will be subject to CFPB enforcement and the prohibition against committing unfair, deceptive, and abusive acts or practices. Additionally, an institution generally will be subject to CFPB enforcement with respect to the eighteen enumerated statutes regardless of whether the institution is deemed a “covered person” or a “service provider” to a covered person.

The CFPB has coordinated with other regulators in four public enforcement actions, three of them against credit card issuers Capital One, Discover, and American Express. The actions against the issuers resulted in approximately \$435 million in restitution for about 5.75 million consumers, over \$101.5 million in civil penalties, and involved the following practices:

- **Capital One (July 18, 2012).** The CFPB alleged that Capital One engaged in deceptive marketing and sales practices in connection with credit monitoring and payment protection products offered to its credit card customers. Among the allegations, the consent order stated that the company’s call center vendors deviated from sales scripts and misled consumers about the optional nature of the product and whether consumers had agreed to purchase the service. The consent order required restitution of \$140 million to be paid to an estimated two million customers, as well as payment of a \$25 million civil penalty. The OCC also issued its own enforcement action for certain marketing and billing practices that it publicized on the same day.³⁴
- **Discover Bank (Sept. 24, 2012).** As with the Capital One order, the CFPB alleged that Discover engaged in deceptive marketing and sales practices in connection with the offering of credit monitoring, identity theft protection, and payment protection products. However, with Discover, the CFPB also alleged that the customer service scripts themselves misled consumers about whether they were purchasing a product and whether the product had a separate fee, as well as the product’s terms and pricing. The consent order, a joint action with the FDIC, required

Discover to pay restitution of \$200 million to over 3.5 million consumers and a \$14 million civil penalty.³⁵

- **American Express (Oct. 1, 2012).** The CFPB alleged that American Express engaged in: (1) deceptive debt collection practices regarding waiving or forgiving debt in exchange for settlement; (2) deceptive marketing of a rewards program; (3) charging of impermissible late fees; (4) failing to report accurate credit history information; and (5) improperly considering the age of applicants in certain scorecards. The consent orders, which were against several American Express entities, required the payment of \$85 million in restitution and a \$27.5 million civil penalty to several coordinating regulatory agencies, including the FDIC, Utah Department of Financial Institutions, the OCC, and the FRB.³⁶

Although these three enforcement actions involved credit card issuers, non-depository financial institutions should expect that future enforcement actions in their sectors will possess similar characteristics to the actions listed above, including a high degree of coordination with state and federal regulators, large restitution amounts, imposition of civil penalties, and detailed public findings. This close coordination is particularly visible in the CFPB's most recent public enforcement action, against a debt-relief service provider, Payday Loan Debt Solution, Inc., that charged certain illegal advance fees in violation of federal consumer financial law. According to the CFPB, the state attorneys general of New Mexico, North Carolina, North Dakota, and Wisconsin, and Hawaii's Office of Consumer Protection, all participated in the CFPB's investigation and lawsuit to enforce their respective state laws.³⁷ In December 2012, the CFPB announced that a federal district court ordered the provider to pay \$100,000 in restitution and a \$5,000 civil penalty for such unlawful practices.³⁸

The Bureau has indicated that enforcement actions will focus on deficiencies in three primary areas: (i) compliance management systems; (ii) third-party oversight; and (iii) sales and marketing practices. In particular, the CFPB intends to evaluate the effectiveness of compliance management systems in detecting and preventing violations of Federal consumer financial law, including through "internal controls and oversight, training, internal monitoring, consumer complaint response, independent testing and audit, third-party service provider oversight, recordkeeping, product development and business acquisition, and marketing practices."³⁹ The Bureau also plans to focus on deficiencies in oversight of third-party and affiliate service providers and the ability of financial institutions to "manag[e] the risks of those relationships to ensure compliance with applicable Federal consumer financial law."⁴⁰ Additionally, the CFPB will likely target deficiencies in sales and marketing practices, particularly in connection with credit card ancillary products, as seen in recent consent orders.⁴¹

3. Investigative Methodology That Uses Complaint Data. Non-depository financial institutions may wish to

review and consider enhancing their complaint systems in light of the CFPB's stated reliance on consumer complaint data to guide the Bureau's regulatory activities. As the Bureau notes on its website, complaints "help with our work to supervise companies, enforce federal consumer financial laws, and write better rules and regulations."⁴² In particular, the Bureau has stated that it will consider the volume and nature of such complaints to help the agency identify areas for review. Although the Bureau can receive complaints from numerous sources, including other regulators, the CFPB's online complaint process constitutes a significant source of consumer complaints. The CFPB's website allows consumers to submit complaints directly regarding several consumer financial products or services, including: bank accounts or services, credit cards, credit reporting, money transfers, mortgages, student loans, and vehicle or consumer loans.

The CFPB's online complaint process is more interactive than the FTC's Consumer Sentinel system.⁴³ In particular, the FTC primarily uses its complaint system to collect and share complaints and identify patterns of illegal behavior; the Sentinel system is not designed to resolve individual consumer complaints. In contrast, the CFPB facilitates complaint resolution between the consumer and the financial institution. As part of this process, the consumer must first submit a complaint through the online system. For example, if a consumer states that he or she has a credit reporting complaint, the consumer must answer a series of questions by choosing one of several preselected answers. In response to the question, "Which of these best describes your issue?," the consumer can choose from one of five answers: "Incorrect information on my credit report"; "Credit Reporting company's investigation"; "Improper use of my credit report"; "Unable to get my credit report or credit score"; or "Credit monitoring or identity protection services." The questions may also allow the consumer to provide narrative data to describe the issue and upload supporting documents. The consumer must also provide product information, such as the relevant credit reporting company, and indicate his or her desired "fair" resolution to the issue. Additionally, the consumer must provide his or her personal contact information, including name, mailing address, and email address.

Once the consumer submits the complaint, he or she can receive email updates and track the complaint status. The CFPB typically sends the complaint to the company, and the company reviews the complaint and contacts the consumer, where appropriate. The company then reports to the CFPB regarding the resolution of the issue. The consumer can assess this response and provide the CFPB with feedback. The CFPB shares this complaint data with other state and federal law enforcement agencies, including the FTC, and analyzes and compiles the data in regular reports.⁴⁴

Non-depository institutions should also note that the CFPB's new credit card complaint database, launched in June 2012, is accessible to a broader audience than the FTC's Consumer Sentinel system.⁴⁵ While the FTC's consumer

complaint database is an important tool for law enforcement agencies, the CFPB's database is designed for public users. Accordingly, the database may create certain reputational risks for companies apart from the Bureau's use of such data in its regulatory activities. Public users can download and search complaints by issue (billing disputes, late fee, etc.), company name, company response, and whether the consumer disputed the response. Users can also view charts that "visualize" or summarize complaint data by complaint issue or zip code, among other things. Currently, only the CFPB's credit card complaint database is available to the public, but the CFPB has stated that it intends to make complaints for other products available to the public in the future.⁴⁶

4. Broader Rulemaking Authority. The CFPB has a more streamlined rulemaking power compared to the FTC, which will likely lead to the issuance of more rules, more efficiently, and more quickly than non-depository institutions are accustomed. The FTC can issue trade regulation rules "which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce."⁴⁷ However, the Magnuson-Moss amendment to the FTC Act imposes many time-consuming and burdensome steps on the FTC's general rulemaking power with respect to unfair or deceptive practices, including requiring publication of two notices of proposed rulemaking, findings that the illegal practices are prevalent, and an opportunity for informal hearings.⁴⁸ Accordingly, it is generally thought that Magnuson-Moss has significantly constrained the FTC's general rulemaking power.⁴⁹

The FTC has mainly issued rules pursuant to specific congressional grants of rulemaking authority under certain statutes, such as the Telemarketing and Consumer Fraud and Abuse Prevention Act, which generally provide for expedited rulemaking procedures pursuant to the Administrative Procedure Act (APA). The limitations on FTC rulemaking have pushed the FTC into regulating primarily by enforcement, an expensive process that can be narrow in scope and therefore ineffective in leading to widespread change in industry behavior compared to rulemaking.

In contrast, the Dodd-Frank Act grants the CFPB broad authority to issue rules "as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof."⁵⁰ As previously described, the Bureau has wide rulemaking authority. Furthermore, in exercising this power the Bureau is not subject to the Magnuson-Moss restrictions, and instead can engage in the notice-and-comment rulemaking procedures under the APA. The CFPB has already issued regulations under the enumerated consumer protection statutes that were transferred to the agency from other regulators. The CFPB has also engaged in rulemaking mandated by the Dodd-Frank Act, such as certain mortgage-related rules and rules defining larger participants in non-depository institution markets. In January 2013, the CFPB finalized certain mortgage origination rules, address-

ing, most significantly, the "ability to repay" and "qualified mortgage" safe harbor. Looking ahead, the CFPB is likely to turn to other important rulemakings, including implementing the new mortgage and small business data reporting requirements.

5. Overlapping CFPB and FTC Jurisdiction and Influence. Although the CFPB has significant rulemaking, supervision, and enforcement powers, non-depository institutions should expect the FTC to continue to play an important role in consumer financial protection. For example, the Dodd-Frank Act explicitly requires the CFPB to consult with the FTC before issuing a rule defining which covered non-depository institutions are subject to supervision.⁵¹ Additionally, the FTC generally retains its enforcement authority over various consumer protection statutes, although in certain cases the agency may share this authority with the CFPB.⁵²

Because of this concurrent authority, the Dodd-Frank Act requires the CFPB and FTC to negotiate an agreement to coordinate their enforcement actions in connection with consumer financial products or services.⁵³ The agencies finalized this agreement in January 2012, when they signed a Memorandum of Understanding (MOU) to coordinate their rulemaking and enforcement activities, ensure consistency, and avoid duplication.⁵⁴ Among other things, the MOU states that each agency must provide notice to the other agency, where possible, before it initiates a court action or an administrative proceeding. The MOU also states that one agency cannot institute a civil action or administrative proceeding against an entity when the other agency has a pending case against the same entity for the same violations. However, the agencies are allowed to pursue joint or coordinated actions, or intervene in such actions as warranted.

The FTC's practice and precedent will also continue to influence CFPB activities regarding non-depository institutions. The Bureau employs many former FTC employees, and this is one way the FTC's institutional influence will be felt at the CFPB. For example, Peggy Twohig, who was a former Associate Director of the FTC's Division of Financial Practices, is now an Assistant Director in the CFPB's Office of Supervision Policy. Additionally, the CFPB, in its UDAAP guidance, largely adopted the FTC interpretations of the unfair and deceptive standards,⁵⁵ although the CFPB has yet to define the new "abusive" standard outlined in the Dodd-Frank Act. Furthermore, just before the transfer date in July 2011, the FTC summarized its FCRA interpretations over the past forty years.⁵⁶ As a practical matter, this guidance has become the definitive body of interpretations for the industry, even though the Dodd-Frank Act transferred primary regulatory and interpretative authority over FCRA from the FTC to the CFPB.

Despite this influence, the CFPB and FTC will likely face challenges in coordinating their activities, implementing consistent methodologies, and creating consistent consumer protection standards. However, in some areas, such as over non-

bank mortgage advertisers pursuant to the 2011 Mortgage Acts and Practices Advertising Rule, the CFPB and FTC seem to have closely coordinated their shared enforcement authority. In November 2012, the agencies conducted a joint review of about 800 mortgage-related advertisements, including advertisements for refinancings, mortgage loans, and reverse mortgages. The CFPB sent warning letters to approximately twelve mortgage lenders and brokers regarding misleading advertisements, particularly advertisements targeting older individuals and veterans. The CFPB has also initiated formal investigations of six companies that may have “committed more serious violations of the law.”⁵⁷ The FTC sent letters to about twenty real estate agents, home builders, and lead generators regarding similar practices, and the agency may also pursue non-public investigations of additional companies.⁵⁸

Nevertheless, other areas, such as auto lending, may prove more difficult for the agencies to coordinate and may result in confusing consumer protection standards. The CFPB has enforcement authority over non-bank indirect auto lenders under ECOA and UDAAP, inasmuch as indirect auto lenders are subject to those laws. The CFPB also has this authority with respect to auto dealers to the extent they normally sell to captive indirect lenders or retain the contracts themselves. The FTC otherwise has exclusive ECOA enforcement authority over most auto dealers, mainly those that regularly sell the loans to unaffiliated indirect lenders, and the FTC has concurrent ECOA enforcement authority with the CFPB over non-bank indirect auto lenders.

Further complicating matters is that the FRB, not the CFPB, has ECOA rulemaking authority with respect to auto dealers who sell the contracts to independent third-party lenders. Additionally, a significant auto lending issue—dealer “markup” on retail installment contracts—arguably involves the policies and procedures of both the dealer and the indirect lender, which means that the CFPB and FTC may be able to regulate certain aspects of this practice through enforcement and rulemaking. Also, the Dodd-Frank Act provides the FTC with more streamlined rulemaking with respect to auto dealers pursuant to the APA rather than the Magnuson-Moss rulemaking.⁵⁹

Conclusion

In response to the financial crisis, the Dodd-Frank Act created a new consumer protection agency with hybrid supervisory, rulemaking, and enforcement powers. In doing so, the Act helped to level the playing field for depository and non-depository institutions with respect to regulation. As a result, many non-depository institutions will be subject to supervision and thus new reporting requirements and on-site and off-site compliance examinations. Smaller institutions will not escape scrutiny. Consumer complaints will drive investigations and rulemaking. The CFPB will continue to promulgate rules and regulations pursuant to its enumerated statutes and as mandated by the Dodd-Frank Act, and the process will be much faster. Non-depository institutions will

also face the risk of enforcement actions from two federal agencies, the CFPB and the FTC, and the actions will likely result in higher restitution and civil penalties. The overlapping jurisdiction of these agencies in the area of consumer financial protection may also create inconsistent consumer protection standards. It remains to be seen if this hybrid approach to consumer protection will be successful. ■

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of U.S.C.).

² Peggy Twohig & Steve Antonakes, *The CFPB Launches Its Nonbank Supervision Program*, CFPB (Jan. 5, 2012), <http://www.consumerfinance.gov/blog/the-cfpb-launches-its-nonbank-supervision-program/>.

³ Federal Trade Commission Act, 15 U.S.C. § 45(a)(2).

⁴ Section 5 of the FTC Act, 15 U.S.C. § 45(a)(1), states: “Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”

⁵ Section 18 of the FTC Act, 15 U.S.C. § 57a(a)(1)(B).

⁶ Dodd-Frank Act, Title X, Section 1002(6) (codified at 12 U.S.C. § 5481(6)). However, there are certain exemptions from the CFPB’s authority, including merchants, retailers, and other sellers of non-financial goods or services that provide credit for the sale of retail products; real estate brokers; manufactured home and modular home retailers; accountants and tax preparers; attorneys; persons regulated by a state insurance regulator; persons regulated by a state securities commission; and certain auto dealers, among other entities. See Section 1027 (codified at 12 U.S.C. § 5517).

⁷ Dodd-Frank Act, Title X, Section 1002(6) (codified at 12 U.S.C. § 5481(6)). A service provider offers a “material service” to a covered person in connection with the consumer financial product or service, including “designing, operating, or maintaining” the product or service and processing certain transactions related to the product or service. See Section 1002(26)(A) (codified at 12 U.S.C. § 5481(26)(A)).

⁸ Dodd-Frank Act, Title X, Section 1002(15)(A) (codified at 12 U.S.C. § 5481(15)(A)).

⁹ Dodd-Frank Act, Title X, Section 1011(a) (codified at 12 U.S.C. § 5491(a)).

¹⁰ Dodd-Frank Act, Title X, Sections 1031 and 1036 (codified at 12 U.S.C. §§ 5531 and 5536, respectively).

¹¹ The CFPB has authority to interpret and enforce the following enumerated consumer laws that were transferred to the CFPB and are identified at Dodd-Frank Act, Title X, Section 1002(12) (codified at 12 U.S.C. § 5481(12)): The Alternative Mortgage Transaction Parity Act of 1982 (12 U.S.C. § 3801 et seq.); Consumer Leasing Act of 1976 (15 U.S.C. § 1667 et seq.); Electronic Fund Transfer Act (15 U.S.C. § 1693 et seq.), except with respect to section 920 of that Act; Equal Credit Opportunity Act (15 U.S.C. § 1691 et seq.); Fair Credit Billing Act (15 U.S.C. § 1666 et seq.); Fair Credit Reporting Act (15 U.S.C. § 1681 et seq.), except with respect to sections 615(e) and 628 of that Act (15 U.S.C. §§ 1681m(e), 1681w); Home Owners Protection Act of 1998 (12 U.S.C. § 4901 et seq.); Fair Debt Collection Practices Act (15 U.S.C. § 1692 et seq.); subsections (b) through (f) of section 43 of the Federal Deposit Insurance Act (12 U.S.C. § 1831t(c)–(f)); sections 502 through 509 of the Gramm-Leach-Bliley Act (15 U.S.C. §§ 6802–6809) except for section 505 as it applies to section 501(b); Home Mortgage Disclosure Act of 1975 (12 U.S.C. § 2801 et seq.); Home Ownership and Equity Protection Act of 1994 (15 U.S.C. § 1601 note); Real Estate Settlement Procedures Act of 1974 (12 U.S.C. § 2601 et seq.); S.A.F.E. Mortgage Licensing Act of 2008 (12 U.S.C. § 5101 et seq.); Truth in Lending Act (15 U.S.C. § 1601 et seq.); Truth in Savings Act (12 U.S.C. § 4301 et seq.); section 626 of the Omnibus Appropriations Act, 2009 (Public Law 111–8); and Interstate Land Sales Full Disclosure Act (15 U.S.C. § 1701).

- ¹² The CFPB also has supervisory authority over insured depository institutions and credit unions with total assets of more than \$10 billion and any affiliated covered persons. See Dodd-Frank Act, Title X, Section 1025(a) (codified at 12 U.S.C. § 5515(a)).
- ¹³ Dodd-Frank Act, Title X, Section 1024(a)(1)(C) (codified at 12 U.S.C. § 5514 (a)(1)(C)). Non-depository institutions that are not “covered persons” may still be subject to supervision if they are deemed to be service providers to a CFPB-supervised bank or non-bank. See CFPB, Bulletin No. 2012-03, Service Providers (Apr. 13, 2012), available at http://files.consumerfinance.gov/f/201204_cfpb_bulletin_service-providers.pdf.
- ¹⁴ Note, however, that Section 1026 of the Dodd-Frank Act provides that enforcement authority against depository institutions with less than \$10 billion in assets remains with the prudential bank regulators, although the Bureau has authority to recommend enforcement action against such a bank.
- ¹⁵ Dodd-Frank Act, Title X, Section 1055(a)(1) (codified at 12 U.S.C. § 5565(a)(1)).
- ¹⁶ In 2012, the Bureau commenced on-site examinations of certain non-depository financial institutions, including mortgage lenders.
- ¹⁷ Defining Larger Participants of the Consumer Reporting Market, 77 Fed. Reg. 42,874 (July 20, 2012); Defining Larger Participants of the Consumer Debt Collection Market, 77 Fed. Reg. 65,775 (Oct. 31, 2012) (both to be codified at 12 C.F.R. § 1090).
- ¹⁸ Defining Larger Participants in Certain Consumer Financial Products and Services Markets, 76 Fed. Reg. 38,059, 38,060 (June 29, 2011).
- ¹⁹ Even if a non-depository institution meets this threshold, the institution can still challenge its designation as a larger participant by submitting an affidavit within forty-five days of CFPB notification that the Bureau intends to conduct certain supervisory activities. 12 C.F.R. § 1090.103. One potential basis for challenge is the methodology for calculating annual receipts. The Bureau calculates annual receipts “resulting from” certain activities in covered markets, such as consumer reporting or debt collection. The CFPB has stated that it will permit apportionment of such receipts as a basis for challenging larger participant designations, but the Bureau has declined to define “apportionment.” See, e.g., Defining Larger Participants of the Consumer Debt Collection Market, 77 Fed. Reg. 65,775 (Oct. 31, 2012). Thus, non-depository institutions, particularly those with multiple lines of business, may face difficulties in differentiating income streams from covered and non-covered activities and therefore experience some uncertainty as to whether they qualify as larger participants. For example, the CFPB has excluded revenues from collecting medical debt from the annual receipts calculation; debt collectors that collect several debt types will need to apportion such receipts when challenging any larger participant designation. Likewise, the Bureau has excluded revenues from employment background screening activities from the annual receipts calculation for determining larger participants in the consumer reporting market, thereby impacting certain consumer reporting agencies.
- ²⁰ Press Release, CFPB, Consumer Financial Protection Bureau to Supervise Credit Reporting (July 16, 2012), available at <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-to-supervise-credit-reporting/>.
- ²¹ Press Release, CFPB, Consumer Financial Protection Bureau to Oversee Debt Collectors (Oct. 24, 2012), available at <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-to-oversee-debt-collectors/>.
- ²² Dodd-Frank Act, Title X, Section 1024(a)(1)(C) (codified at 12 U.S.C. § 5514(a)(1)(C)).
- ²³ *Id.* The CFPB must make this determination in an “order,” and it must give the covered person notice and a reasonable opportunity to respond before the order is finalized.
- ²⁴ CFPB, Supervisory Highlights: Fall 2012 (Oct. 31, 2012), available at http://files.consumerfinance.gov/f/201210_cfpb_supervisory-highlights-fall-2012.pdf.
- ²⁵ *Id.*
- ²⁶ Dodd-Frank Act, Title X, Section 1024(b)(2) (codified at 12 U.S.C. § 5514(b)(2)).
- ²⁷ CFPB Supervisory Highlights, *supra* note 24.
- ²⁸ *Id.*
- ²⁹ Dodd-Frank Act, Title X, Section 1024(b)(1) (codified at 12 U.S.C. § 5514(b)(1)).
- ³⁰ CFPB, Supervision and Examination Manual (Oct. 2012), available at http://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf.
- ³¹ *Id.*
- ³² Based on its supervisory examinations, the CFPB has initiated several non-public supervisory actions against financial institutions engaged in credit card, credit reporting, and mortgage origination activities. These actions have required relevant institutions to take certain corrective actions, enhance their compliance systems, and provide remedial relief to 1.4 million consumers. CFPB Supervisory Highlights, *supra* note 24.
- ³³ The CFPB Ombudsman noted in her 2012 report that the CFPB “decided to make supervision and enforcement an integrated process within one CFPB division, and to involve enforcement attorneys at the beginning, middle, and end of the supervision examination.” The Ombudsman acknowledged widespread industry criticism that the policy could create “a barrier to a free exchange during the examination.” As a result, the Ombudsman recommended that the CFPB review its “implementation” of the policy and “establish ways to clarify the Enforcement Attorney role in practice at the supervisory examination.” CFPB Ombudsman’s Office, FY2012 Annual Report to the Director (Nov. 15, 2012), available at http://files.consumerfinance.gov/f/201211_Ombuds_Office_Annual_Report.pdf.
- ³⁴ Press Release, CFPB, CFPB Probe into Capital One Credit Card Marketing Results in \$140 Million Consumer Refund (July 18, 2012), available at <http://www.consumerfinance.gov/pressreleases/cfpb-capital-one-probe/>; see also Press Release, OCC, OCC Assesses Civil Money Penalty Against Capital One, Orders Restitution to 2.5 Million Customers (July 18, 2012), available at <http://www.occ.gov/news-issuances/news-releases/2012/nr-occ-2012-110.html>.
- ³⁵ Press Release, CFPB, Federal Deposit Insurance Corporation and Consumer Financial Protection Bureau Order Discover to Pay \$200 Million Consumer Refund for Deceptive Marketing (Sept. 24, 2012), available at <http://www.consumerfinance.gov/pressreleases/discover-consent-order/>.
- ³⁶ Press Release, CFPB, 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/>.
- ³⁷ Press Release, CFPB, Consumer Financial Protection Bureau and State Partners Obtain Refunds for Consumers Charged Illegal Debt-Relief Fees (Dec. 21, 2012), available at <http://www.consumerfinance.gov/press-releases/consumer-financial-protection-bureau-and-state-partners-obtain-refunds-for-consumers-charged-illegal-debt-relief-fees/>.
- ³⁸ *Id.* Non-depository financial institutions should also expect the CFPB to coordinate closely with other agencies and regulators on a variety of issues outside of the enforcement context. For example, the CFPB and the U.S. Department of Education issued a joint report on the private student loan market. See CFPB & U.S. Dep’t of Educ., Private Student Loans (Aug. 29, 2012), available at http://files.consumerfinance.gov/f/201207_cfpb_Reports_Private-Student-Loans.pdf.
- ³⁹ CFPB Supervisory Highlights, *supra* note 24.
- ⁴⁰ *Id.* The CFPB also issued a bulletin discussing the supervisory expectations for these providers. See CFPB Bulletin No. 2012-03, *supra* note 13.
- ⁴¹ The CFPB issued a bulletin discussing the supervisory expectations for these products. See CFPB, Bulletin No. 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.
- ⁴² CFPB, Submit a Complaint, <http://www.consumerfinance.gov/complaint/>.
- ⁴³ Consumers can submit complaints using the FTC’s Complaint Assistant, available at <https://www.ftccomplaintassistant.gov/>. Consumers can submit complaints on a variety of topics, including financial issues relating to

- credit reports, debt collection, financial institutions, and lending. The FTC then adds these complaints to its online database, the Consumer Sentinel network, which is used by law enforcement agencies.
- ⁴⁴ See, e.g., CFPB, *Consumer Response: A Snapshot of Complaints Received* (Oct. 10, 2012), available at http://files.consumerfinance.gov/f/201210_cfpb_consumer_response_september-30-snapshot.pdf.
- ⁴⁵ CFPB, *Consumer Complaint Database*, <http://www.consumerfinance.gov/complaintdatabase/>.
- ⁴⁶ *Disclosure of Consumer Complaint Data*, 77 Fed. Reg. 37,616 (June 22, 2012).
- ⁴⁷ Section 18 of the FTC Act, 15 U.S.C. § 57a(a)(1)(B).
- ⁴⁸ *Id.* § 57a(b).
- ⁴⁹ See, e.g., R. Christian Bruce, *FTC Eyeing Broad New Powers to Tighten Screws on Auto Dealers*, Bloomberg BNA (Aug. 10, 2010) (stating that Joel Winston, director of the FTC's Division of Financial Practices, discussed in an American Bar Association meeting how prior to the Dodd-Frank Act, "the FTC could only write rules under procedures that could take as long as 10 years to complete, effectively keeping the FTC from targeting an array of practices in the industry.").
- ⁵⁰ Dodd-Frank Act, Title X, Section 1022(b)(1) (codified at 12 U.S.C. § 5512(b)(1)).
- ⁵¹ Dodd-Frank Act, Title X, Section 1024(a)(2) (codified at 12 U.S.C. § 5514(a)(2)).
- ⁵² Dodd-Frank Act, Title X, Section 1061(b)(5)(C)(i) (codified at 12 U.S.C. § 5581(b)(5)(C)(i)). "No provision of this title shall be construed as modifying, limiting, or otherwise affecting the authority of the Federal Trade Commission (including its authority with respect to affiliates described in section 1025(a)(1)) under the Federal Trade Commission Act or any other law, other than the authority under an enumerated consumer law to prescribe rules, issue official guidelines, or conduct a study or issue a report mandated under such law."
- ⁵³ Dodd-Frank Act, Title X, Section 1024(c)(3) (codified at 12 U.S.C. § 5514(c)(3)).
- ⁵⁴ Memorandum of Understanding Between the Consumer Financial Protection Bureau and the Federal Trade Commission (Jan. 20, 2012), available at <http://www.ftc.gov/os/2012/01/120123ftc-cfpb-mou.pdf>.
- ⁵⁵ See CFPB, SUPERVISION & EXAMINATION MANUAL (Oct. 2012), available at http://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf. The CFPB states that the Dodd-Frank Act's unfair and deceptive standards are "similar" to the standards under Section 5 of the FTC Act. The CFPB also notes that the FTC and "federal banking regulators have applied these standards through case law, official policy statements, guidance, examination procedures, and enforcement actions that may inform CFPB."
- ⁵⁶ FED. TRADE COMM'N, 40 YEARS OF EXPERIENCE WITH THE FAIR CREDIT REPORTING ACT (July 2011), available at <http://www.ftc.gov/os/2011/07/110720fcrareport.pdf>.
- ⁵⁷ Press Release, CFPB, *Consumer Financial Protection Bureau Warns Companies Against Misleading Consumers with False Mortgage Advertisements* (Nov. 19, 2012), available at <http://www.consumerfinance.gov/press-releases/consumer-financial-protection-bureau-warns-companies-against-misleading-consumers-with-false-mortgage-advertisements/>.
- ⁵⁸ Press Release, Fed. Trade Comm'n, *FTC Warns Mortgage Advertisers that Their Ads May Violate Federal Law* (Nov. 19, 2012), available at <http://www.ftc.gov/opa/2012/11/mortgageadvertise.shtm>.
- ⁵⁹ See Dodd-Frank Act, Title X, Section 1029(d) (codified at 12 U.S.C. § 5519(d)). See also Bruce, *supra* note 49 (quoting the FTC's director for the Division of Financial Practices as stating that the Dodd-Frank Act "allows the FTC to conduct rulemaking in connection with motor vehicle dealers under the Administrative Procedures Act, making the regulatory process much faster and easier.").