VII. New Regulation Under the Consumer Financial Protection Bureau

A. Introduction

One of the chief contributory factors that led to the 2007-2010 economic downturn in the United States was the large number of speculative and risky loans made to consumers in the years prior to the housing bubble's burst. While some consumers undoubtedly took on more debt than they could handle, others fell prey to confusing agreements and misleading provisions that masked the true cost of borrowing. One of the cornerstones of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") is the congressional mandate to establish the new Consumer Financial Protection Bureau ("CFPB").[1] The CFPB's statutory objectives are:

1. To ensure that consumers have timely and understandable information to make responsible decisions about financial transactions;
2. To protect consumers from unfair, deceptive, or abusive acts or practices, and from discrimination;
3. To reduce outdated, unnecessary, or overly burdensome regulations;
4. To promote fair competition by enforcing the Federal consumer financial laws consistently; and
5. To advance markets for consumer financial products and services that operate transparently and efficiently to facilitate access and innovation.[2]

The CFPB will impact the financial regulatory environment by both consolidating current rules into one agency and creating new regulations in order to advance its statutory objectives. Although Elizabeth Warren developed the idea of the CFPB, President Obama chose to nominate Richard Cordray as the first head of the CFPB, due to opposition from congressional Republicans pressured by

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[1] Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, §1011, 124 Stat. 1376, 1964 (2010) (to be codified at 12 U.S.C. § 5491).

[2] CONSUMER FIN. PROT. BUREAU, BUILDING THE CFPB 2 (2011), *available at* http://www.consumerfinance.gov/wp-content/uploads/2011/07/Report_BuildingTheCfpb1.pdf [hereinafter BUILDING THE CFPB].

business interests who refused to support her appointment.[3] In an effort to stop Republicans from blocking his second choice to lead the CFPB, President Obama used a controversial recess appointment for Richard Cordray. Republicans deny that Congress was in recess.[4]

B. CFPB Accomplishments since the passage of Dodd-Frank

Although the CFPB is a new agency, it is already beginning to leave its mark on the financial sector. The CFPB has already begun or plans to begin programs to find and address problems with mortgage disclosure, transparency in credit cards, credit scores, remittance exchange rates, and "larger" participants in nonbank financial services. The CFPB also launched several public relations and consumer outreach programs. These efforts are only the beginning of what could be a large role for the new agency to play in the post-2007 financial regulatory environment.

C. "Know Before You Owe" Initiative

On September 21, 2010, Timothy Geithner and Elizabeth Warren sponsored a mortgage disclosure forum at the Department of the Treasury.[5] The forum brought together consumer groups, industry representatives, and other interested parties to discuss ways in which the CFPB could use its power to simplify the mortgage disclosure process. Currently, two federal disclosure forms are required when closing on a mortgage: the Truth in Lending Disclosure Statement and the HUD-1 Settlement Statement.[6] Section 1032(f) of the Dodd-

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[3] Binyamin Appelbaum, *Former Ohio Attorney General to Head New Consumer Agency*, N.Y. TIMES, July 17, 2011, http://www.nytimes.com/2011/07/18/business/former-ohio-attorney-general- picked-to-lead-consumer-agency.html.

[4] Jim Puzzanghera, *Consumer Agency Chief's Appointment is Invalid, GOP Senators Say,* L.A. TIMES, Jan. 31, 2012, http://www.latimes.com/business/la-fi-senate-cordray-20120201,0,3626321.story.

[5] U.S. DEP'T OF THE TREASURY, DEPARTMENT OF THE TREASURY'S OPEN GOVERNMENT HIGHLIGHTS FROM FIRST YEAR 3-4 (2011), http://www.treasury.gov/open/Documents/OpenGovernment2010.pdf.

[6] *Know Before You Owe*, CONSUMER FIN. PROT. BUREAU, http://www.consumerfinance.gov/KnowBeforeYouOwe/.

Frank requires the CFPB to combine these two forms.[7] Consumer representatives at the forum also criticized current disclosures because the format confuses consumers, making it hard for them to easily compare mortgages from different institutions.[8] Industry representatives added that the current forms increased costs and paperwork for little or no benefit to consumers.[9]

In conjunction with their mandate and in response to these criticisms, in May of 2011 the CFPB created the "Know Before You Owe" initiative to combine the two existing forms into a single, easy-to-read form.[10] The CFPB is currently in the final stages of testing both a proposed loan estimate form and a loan settlement form.[11] Extensive public feedback, disclosure, and testing contributed to preparing the new proposed mortgage disclosure forms. While the proposed forms appear significantly more organized, it remains to be seen if the CFPB will ultimately achieve its goal of increasing consumer awareness about the costs and risks of borrowing. The two current forms are two and three pages long. Because the proposed combined CFPB closing form is five pages long, it is unlikely that consumer awareness will increase as a result of a combined CFPB form unless consumer confusion resulted entirely from the layout and vocabulary of each section of the previous disclosure forms. Similarly, using a combined five-page form may not bring significant time and cost savings to institutions.

In addition to mortgages, the CFPB launched a parallel initiative of the "Know Before You Owe" program for student loans. On July 29, 2011, the Department of Education ("DOE") announced it would hold a public meeting to discuss improving student financial aid forms.[12] In conjunction with the DOE, the CFPB now "gather[s] feedback to improve the way schools communicate financial aid

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[7] Dodd-Frank Act, Pub. L. No. 111-203, §1032(f), 124 Stat. 1376, 2007 (2010) (to be codified at 12 U.S.C. § 5532).
[8] BUILDING THE CFPB, *supra* note 2, at 10.
[9] *Id.*
[10] *Id.*
[11] The CFPB Mortgage Disclosure Team, *Know Before You Owe: The last dance...or is it?*, CONSUMER FIN. PROT. BUREAU, http://www.consumerfinance.gov/know-before-you-owe-the-last-dance-or-is-it/.
[12] Public Meeting on Recommendations for Improvement of Student Financial Aid Offer Forms, Development of Model Financial Aid Forms, 76 Fed. Reg. 45,546, 45,546-47 (July 29, 2011).

offers to students."[13] Although the DOE is responsible for creating a model financial aid offer form,[14] the CFPB has already released an example of what the form could look like.[15] The CFPB also created an online tool, the "Student Debt Repayment Assistant," to help consumers who have already taken on student debt create a plan for repayment, along with suggestions and "information on deferments, income-based repayment, and much more."[16] Dodd-Frank also mandated the creation of a student loan Ombudsman within the CFPB to direct the agency's handling and response to private student loan complaints.[17] The position went to Rohit Chopra, who on March 5, 2012, announced that the CFPB is now accepting consumer complaints regarding federal and private student loans.[18] Federal student loan complaints will be conveyed to the DOE, while private companies "are expected to respond to consumer complaints within 15 days and resolve them within 60 days."[19]

D. Credit Card Accountability Responsibility and Disclosure Act

Congress passed the Credit Card Accountability Responsibility and Disclosure Act ("CARD Act") in May 2009 after concluding that industry practices were unclear and unfair.[20] The CFPB held a conference in February 2011 to review studies on the impact of the CARD Act on the credit card industry and consumers.

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[13] *Know Before You Owe Student Loans*, CONSUMER FIN. PROT. BUREAU, http://www.consumerfinance.gov/students/knowbeforeyouowe/about/.
[14] *Id.*
[15] *Id.* (clarifying that the form is a "thought starter" and not a formal proposal).
[16] Raj Date, *Student Loans: Know Before You Owe,* HUFFINGTON POST, Oct. 28, 2011, http://www.huffingtonpost.com/raj-date/student-loans-know-before_b_1062611.html; *Student Debt Repayment Assistant*, CONSUMER FIN. PROT. BUREAU, http://www.consumerfinance.gov/students/repay/.
[17] Dodd-Frank Act, Pub. L. No. 111-203, §1035, 124 Stat. 1376, 2009-10 (2010) (to be codified at 12 U.S.C. § 5535).
[18] *Government's Consumer Watchdog Agency Begins Accepting Complaints About Private Student Loans,* WASH. POST, Mar. 5, 2012, http://www.washingtonpost.com/business/governments-consumer-watchdog-agency-begins-accepting-complaints-about-private-student-loans/2012/03/05/gIQAnsd0sR_story.html.
[19] *Id.*
[20] BUILDING THE CFPB, *supra* note 2, at 12.

The CFPB conducted a voluntary survey of the nine largest credit card issuers (comprising ninety percent of the market share) and found that "late fees, interest rate hikes, and over-limit fees had been significantly curtailed since the CARD Act took effect."[21] Nonetheless, the data also revealed that the total amount that consumers pay for their credit cards has remained the same over the last three years.[22] The CFPB also reports that according to their consumer survey, sixty percent of consumers feel their monthly billing statements and credit card terms are more coherent and straightforward than they were prior to the CARD Act taking effect.[23]

E. Defining "Larger Participants" of Unregulated Consumer Financial Industries

Section 1024 of Dodd-Frank requires the CFPB to supervise any non-depository covered institutions in the mortgage, payday, and private education lending markets.[24] The purpose of this supervision program is to "[assess] compliance with the requirements of federal consumer financial law; [obtain] information about the activities and compliance systems or procedures of such person[s]; and [detect and assess] risks to consumers and to markets for consumer financial products and services."[25] Supervision extends to include institutions that are "larger participant[s] of a market for other consumer financial products or services."[26] Congress requires the CFPB to define "larger participants" by rule no later than July 21, 2012.[27] As part of this process, the CFPB issued a notice and request for comment on June 29, 2011.[28] The notice contained several potential targets for regulation, including debt collection, consumer reporting,

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[21] *Id.*
[22] *Id.*
[23] CONSUMER FIN. PROT. BUREAU, THE CARD ACT: ONE YEAR LATER, 4 (2011) *available at* http://www.consumerfinance.gov/wp-content/uploads/2011/02/CARD-Act-Conference-Factsheet-Feb-2011.pdf.
[24] Dodd-Frank Act, Pub. L. No. 111-203, §1024(a), 124 Stat. 1376, 1987 (2010) (to be codified at 12 U.S.C. § 5514).
[25] *Id.* §1024(b).
[26] *Id.* §1024(a)(1)(B).
[27] BUILDING THE CFPB, *supra* note 2, at 12; Dodd-Frank Act §1024(a)(2).
[28] Defining Larger Participants in Certain Consumer Financial Products and Service Markets, 76 Fed. Reg. 38,059, 38,059-62 (proposed June 29, 2011) (to be codified at 12 C.F.R. Ch. X).

consumer credit, money transmitting and check cashing, prepaid card, and debt relief providers.[29]

On February 16, 2012, the CFPB released a proposed rule to define larger participants in the consumer debt collection and consumer reporting markets.[30] The CFPB chose to focus its limited resources on these two industries first because of their perceived size and importance in the financial services industry. With respect to the debt collection industry, in 2011 about thirty million individuals "had debt that was subject to the collections process (averaging approximately $1,400)."[31] The consumer reporting market touches every consumer who uses a credit card or tries to obtain a loan. The Consumer Data Industry Association estimates that the three largest consumer reporting agencies (Experian, Equifax, and TransUnion) hold data for more than 200 million consumers.[32] The proposed rule will subject debt collectors with more than $10 million in annual receipts and credit reporting agencies with more than $7 million in annual receipts to CFPB supervision.[33] According to the CFPB, the proposed rule would subject about 175 consumer debt collectors and thirty[34] consumer reporting agencies to the new supervisory

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[29] *Id.*at 38,060.

[30] Defining Larger Participants in Certain Consumer Financial Products and Service Markets, 77 Fed. Reg. 9592, 9606-08 (proposed Feb. 16, 2012) (to be codified at 12 C.F.R. pt. 1090).

[31] *Id.* at 9597 (citing Federal Reserve Bank of New York Quarterly Report on Household Debt and Credit (Nov. 2011), *available at* http://www.newyorkfed.org/research/national_economy/householdcredit/DistrictReport_Q32011.pdf).

[32] Larger Participants in Certain Consumer Financial Products and Service Markets, 77 Fed. Reg. at 9600 (citing Letter from Stuart Pratt, President & CEO Consumer Data Indus. Ass'n, to Nat'l Telecomm. & Info. Admin., 2 (June 13, 2010), *available at* http://ntia.doc.gov/files/ntia/comments/100402174-0175-01/attachments/Consumer%20Data%20Industry%20Association%20Comments.pdf).

[33] Larger Participants in Certain Consumer Financial Products and Service Markets, 77 Fed. Reg. at 9603. Annual receipts will be calculated based on the method adopted by the Small Business Administration when determining if a business is a "small business concern." 77 Fed. Reg. at 9,595.

[34] In reality, this threshold would cover thirty-nine credit reporting agencies. However, some of these firms are highly specialized, and only provide reports for employment screening or rental purposes. Under the Dodd-Frank Act, such agencies are not engaged in offering consumer financial products

program.[35] These numbers reflect four percent of all debt collection firms, covering sixty-three percent of all collections receipts, and seven percent of all credit reporting agencies, representing ninety-four percent of all receipts.[36]

The CFPB has identified several potential costs and benefits of adopting the proposed rule as it stands today. It is likely that supervised consumer debt collectors and consumer reporting agencies will increase their compliance with applicable federal consumer protection laws, such as the Fair Debt Collection Practices Act and the Fair Credit Reporting Act.[37] Increased compliance may also lead to increased costs, which will most likely be passed on to institutions that use debt collectors and credit reports.[38] These institutions will then pass those costs on to their customers, resulting in an indirect increase in the cost of many financial products that rely on debt collection or credit reporting agencies.[39] Finally, if the CFPB actually conducts an inspection of one of these "larger participants," its costs could further increase as a result of document requests or on-site inspections.

F. Remittances

Consumers use remittance transfers to electronically send billions of dollars to foreign countries each year.[40] Prior to the passage of Dodd-Frank, consumer protection laws did not extend to remittances.[41] Dodd-Frank required the CFPB to conduct a study on remittances in order to find ways to achieve greater transparency in the exchange rates used in each transaction, and to see if remittances could be used to supplement and enhance a consumer's credit score.[42] The CFPB released its final rules on February 7, 2012.[43] The

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or services and would therefore not be subject to CFPB supervision. *See id.* at 9601-02.

[35] *Id.* at 9603-04.

[36] *Id.* at 9599-602.

[37] *Id.* at 9604.

[38] *Id.*

[39] *Id.*at 9,605.

[40] Electronic Fund Transfers (Regulation E), 77 Fed. Reg. 6194, 6194 (Feb. 7, 2012) (to be codified at 12 C.F.R. pt. 1005).

[41] *Id.*

[42] Dodd-Frank Act, Pub. L. No. 111-203, §1073(e), 124 Stat. 1376, 2066-67 (2010) (to be codified at 12 U.S.C. § 5601).

[43] Electronic Fund Transfers (Regulation E), 77 Fed. Reg. at 6194.

rules will apply to remittance transfers if they are more than fifteen dollars, made by a consumer in the United States, and sent to a person or company in a foreign country.[44] The CFPB expects these rules to apply to many different institutions that provide remittance transfers, including banks, thrifts, credit unions, and money transmitters.[45]

The new rules require companies to provide a disclosure statement listing the exchange rate, fees, the amount of money to be delivered in a given transaction, and when funds will be available to the recipient of a particular remittance.[46] The final rules require this information to be presented in both English and in each of the foreign languages principally used by the remittance transfer provider to advertise, solicit, or market remittance transfers at a particular office.[47] The new rules also provide additional protection to consumers, including a rule requiring companies to investigate complaints and issue refunds in cases where money has not arrived as promised, as well as holding companies liable for mistakes made by employees in certain circumstances. Furthermore, the rules contain two proposals open for public comment. The first concerns the addition and parameters of a possible safe harbor provision in the definition of "remittance transfer provider" to make it clear when certain entities are excluded from the statutory scheme. The proposed rules adopt the definition of "remittance transfer provider" used in the Electronic Funds Transfer Act (amended under Dodd-Frank), which covers "any person . . . that provides remittance transfers for a consumer in the normal course of its business, whether or not the consumer holds an account with such person."[48]

The CFPB previously solicited comments to determine which factors should be used to determine whether a company engages in remittance transfers as part of its "normal course of business." Many commentators suggested a safe harbor for any institution providing fewer than a set number of remittances annually, with suggested limits ranging from 1,200 to 2,400 per

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[44] *Final Remittance Rule*, CONSUMER FIN. PROT. BUREAU, http://www.consumerfinance.gov/regulations/final-remittance-rule-amendment-regulation-e/#summary.
[45] *Id.*
[46] Electronic Fund Transfers (Regulation E), 77 Fed. Reg. at 6203.
[47] *Id.*
[48] Dodd-Frank Act, Pub. L. No. 111-203, sec. 1073, § 919(g)(3), 124 Stat. 1376, 2060-67 (2010).

method of transfer.[49] The proposed rule as currently written does not provide a bright-line numerical threshold, but rather states that the CFPB will consider "the facts and circumstances" of each provider.[50] Because a numerical threshold is easier to understand and enforce than a "facts and circumstances" test, the CFPB proposal requests further comment on a potential threshold. Because the CFPB believes "normal course of business" is meant to cover providers with a lower number of transactions per year than the ranges suggested by earlier commentators, any safe harbor adopted will likely be less than the 1,200-2,400 transactions per year that industry commentators hoped for.[51]

The second proposal is a possible safe harbor for remittances scheduled to occur several days in advance since some information will not be available until the transfer actually occurs.[52] The CFPB is soliciting comments regarding whether estimates can be used to satisfy disclosure requirements for elements such as the exchange rate used. The CFPB is also adopting different cancellation rules for remittance transfers scheduled to occur many days in advance.[53]

The new rules ensure that consumers receive both disclosure and protection when dealing with providers of remittances. The CFPB will regulate a higher proportion of the remittance market than industry representatives had hoped, since it appears any safe harbor provision for those who do not provide remittances in the normal course of business will be significantly lower than the threshold suggested by the industry. One possible adverse effect of these new rules is that increased costs will drive out smaller remittance providers from the marketplace, leaving consumers to deal with only larger institutions who can shoulder new compliance costs.

G. Overdraft Fees

On February 22, 2012, the CFPB launched an investigation into checking account overdraft fees to determine their impact on

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[49] Electronic Fund Transfers (Regulation E), 77 Fed. Reg. at 6,213 (explaining that several methods exist for providing remittances, including international wire transfers, Automated Clearing House transactions, or soliciting the services of a "money transmitter").
[50] *Id.*
[51] *Id.*
[52] *Id.* at 6,203-04.
[53] *Id.*

consumers.[54] The study focuses on learning more about potentially abusive practices associated with overdrafts, including re-ordering of transactions to process larger payments first (increasing the likelihood and number of transactions that will cause overdraft fees). Furthermore, the CFPB is examining potentially deceptive marketing materials and account statements that do not disclose potential fees or policies of overdraft programs. The CFPB is also concerned with a 2008 FDIC study that found overdraft fees affect a disproportionate amount of young and low-income consumers, and will reexamine the issue with this inquiry.[55] The CFPB is also creating a "what's your overdraft status?" initiative to educate consumers about newly adopted Regulation E, which forces consumers to opt into checking account overdraft programs before institutions can authorize overdrawn transactions.[56] Lastly, the CFPB is requesting public comment on a prototype "penalty fee box" on checking account statements to noticeably and clearly state "how much [is] overdrawn and what fees [are] incurred so that consumers can clearly see how much overdraft fees are costing them."[57]

H. Conclusion

The CFPB is successfully implementing its mandate under Dodd-Frank to centralize and evenly enforce consumer protection laws and bring new industries under regulatory schemes designed to further protect consumers. Based on the CFPB's early actions, the Bureau appears to favor clear disclosure as a means to protect consumers so that they are able to compare services and rates easily and uniformly. While new CFPB rules are aimed at protecting consumers, it remains to be seen if the benefits of increased

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[54] *Consumer Financial Protection Bureau Launches Inquiry into Overdraft Practices*, CONSUMER FIN. PROT. BUREAU, (Feb. 22, 2012) http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-launches-inquiry-into-overdraft-practices/; Impacts of Overdraft Programs on Consumers, 77 Fed. Reg. 12,031, 12,031-34 (Feb. 28, 2012) .

[55] Impacts of Overdraft Programs on Consumers, 77 Fed. Reg. at 12,031 (citing FED. DEPOSIT INS. CORP., FDIC STUDY OF BANK OVERDRAFT PROGRAMS, (2008) *available at* http://www.fdic.gov/bank/analytical/overdraft/FDIC138_Report_Final_v508.pdf).

[56] *See* Impacts of Overdraft Programs on Consumers, 77 Fed. Reg. at 12,032.

[57] *Consumer Financial Protection Bureau Launches Inquiry into Overdraft Practices*, *supra* note 54.

regulation will outweigh the increased costs to consumers in the long run. Several industries that previously had little to no regulation now face increased regulatory costs, which will, at least in part, pass onto consumers. Furthermore, many smaller businesses now falling under CFPB regulation have warned that increased costs may squeeze them out of the market altogether, giving consumers fewer choices and competitors for their business. If successful, the consumer education programs certainly can increase financial literacy and help consumers make better financial decisions, which in turn can create a better base of financial stability for the country as a whole.

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