

IV. *First Actions of the Consumer Financial Protection Bureau*

A. Introduction

The Consumer Financial Protection Bureau (“CFPB”) was formed in 2011, pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank”).¹ The CFPB is a federal agency tasked with “rulemaking, supervision, and enforcement” of consumer financial protection regulation.² It was originally developed to further an idea put forward by then-Harvard Law School professor Elizabeth Warren, in an article she wrote for *Democracy*.³ Professor Warren suggested the creation of a “Financial Product Safety Commission,” similar to the Consumer Product Safety Commission, to supervise and enforce consumer protection laws with respect to financial products.⁴ She suggested that such an agency could, for example, examine whether new financial products were safe for consumers and require that they be modified if they were not.⁵

The mandate of the CFPB is similar to that of the proposed Financial Product Safety Commission and requires, among other things, that the CFPB ensure the protection of consumers from “unfair, deceptive, or abusive acts and practices”⁶ and that “markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.”⁷ The CFPB was initially subject to legal challenges that ultimately proved unsuccessful but that nevertheless called into question its authority and consequently hampered its original efforts at meeting its mandate.⁸ As a result, the CFPB is only now starting to be able to

¹ Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 322 (2013).

² *Id.*

³ *Id.* at 334–35 & n.70.

⁴ *Id.* at 334–35.

⁵ Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY, Summer 2007, at 8, 17.

⁶ Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5511 (b)(2) (2012).

⁷ *Id.* § 5511(b)(5).

⁸ See Barbara S. Mishkin, BALLARD SPAHR LLP, *D.C. Federal Court Dismisses Morgan Drexen Lawsuit against CFPB*, CFPB MONITOR (Oct. 21, 2013), <http://cfpbmonitor.com/2013/10/21/d-c-federal-court-dismisses->

move toward effectively implementing its mandate as a financial services consumer protection regulator.⁹ This article examines the CFPB's actions to date. Part B focuses on high-profile actions of the CFPB. Part C outlines the CFPB's actions to date relating to the mortgage industry. Part D describes the CFPB's actions in relation to payday loans and deposit advance products. Finally, Part E focuses on the CFPB's regulation of new products and its expanded regulatory authority.

B. High-Profile Actions

The CFPB has already been successful in a number of high-profile enforcement actions against various financial institutions resulting in very large awards or fines.¹⁰ For example, in December 2013, the CFPB, together with the Department of Justice, entered into the "largest auto loan discrimination settlement in history" with indirect auto lenders Ally Financial Inc. and Ally Bank (collectively, "Ally").¹¹ This settlement required payment by Ally of \$80 million in damages and an additional \$18 million fine, based on the finding

morgan-drexen-lawsuit-against-cfpb; Barbara S. Mishkin, BALLARD SPAHR LLP, *D.C. Federal Court Grants CFPB's Motion to Dismiss in State National Bank of Big Spring*, CFPB MONITOR (Aug. 2, 2013), <http://cfpbmonitor.com/2013/08/02/d-c-federal-court-grants-cfpbs-motion-to-dismiss-in-state-national-bank-of-big-spring>.

⁹ Alan Zibel, *Consumer Regulator Starts to Flex Its Muscles*, WALL ST. J. (Dec. 27, 2013, 3:31 PM), <http://blogs.wsj.com/washwire/2013/12/27/consumer-regulator-starts-to-flex-its-muscles>.

¹⁰ See, e.g., *CFPB and DOJ Order Ally to Pay \$80 Million to Consumers Harmed by Discriminatory Auto Loan Pricing*, CFPB (Dec. 20, 2013), <http://consumerfinance.gov/newsroom/cfpb-and-doj-order-ally-to-pay-80-million-to-consumers-harmed-by-discriminatory-auto-loan-pricing> [hereinafter *Ally Ordered to Pay \$80 Million*]; *CFPB Orders Chase and JPMorgan Chase to Pay \$309 Million Refund for Illegal Credit Card Practices*, CFPB (Sept. 19, 2013), <http://consumerfinance.gov/newsroom/cfpb-orders-chase-and-jpmorgan-chase-to-pay-309-million-refund-for-illegal-credit-card-practices> [hereinafter *JPMorgan Chase Ordered to Pay \$309 Million Refund*]; *CFPB Orders American Express to Pay \$85 Million Refund to Consumers Harmed by Illegal Credit Card Practices*, CFPB (Oct. 1, 2012), <http://consumerfinance.gov/newsroom/cfpb-orders-american-express-to-pay-85-million-refund-to-consumers-harmed-by-illegal-credit-card-practices> [hereinafter *American Express Ordered to Pay \$85 Million Refund*].

¹¹ *Ally Ordered to Pay \$80 Million*, *supra* note 10.

that Ally discriminated against “African-American, Hispanic, and Asian Pacific Islander borrowers” in the pricing of auto loans.¹²

The CFPB has also been successful in multiple enforcement actions targeting practices relating to credit card products, resulting in large awards.¹³ In October 2012, the CFPB ordered three American Express subsidiaries to pay refunds of approximately \$85 million, together with a fine of \$27.5 million, in a case involving deceptive marketing, discrimination, and illegal fees on credit card products over a period spanning from 2003 to Spring 2012.¹⁴ In December 2013, the CFPB again found against three American Express subsidiaries in an action involving refunds of \$59.5 million and fines of \$9.6 million for misleading and deceptive tactics for credit card “add-on products” from 2000 to 2012.¹⁵ In another action relating to credit card practices, the CFPB entered into an order with JPMorgan Chase Bank, N.A. and Chase Bank USA, N.A. in September 2013.¹⁶ The order required the payment of \$309 million in refunds and a \$20 million fine for “unfair billing practices” relating to credit card “add-on” products that were charged to consumers but not received.¹⁷

Through actions such as the Ally, American Express, and JPMorgan matters, the CFPB has demonstrated its willingness and ability to take on large financial institutions and seek and obtain large fines in connection with consumer protection.¹⁸ Thus, the

¹² *Id.*

¹³ See, e.g., *CFPB Orders American Express to Pay \$59.5 Million for Illegal Credit Card Practices*, CFPB (Dec. 23, 2013), <http://consumerfinance.gov/newsroom/cfpb-orders-american-express-to-pay-59-5-million-for-illegal-credit-card-practices> [hereinafter *American Express Ordered to Pay \$59.5 Million for Illegal Credit Card Practices*]; *JPMorgan Chase Ordered to Pay \$309 Million Refund*, *supra* note 10; *American Express Ordered to Pay \$85 Million Refund*, *supra* note 10.

¹⁴ *American Express Ordered to Pay \$85 Million Refund*, *supra* note 10.

¹⁵ *American Express Ordered to Pay \$59.5 Million for Illegal Credit Card Practices*, *supra* note 13. This action was in conjunction with the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency (“OCC”). *Id.*

¹⁶ *JPMorgan Chase Ordered to Pay \$309 Million Refund*, *supra* note 10. This was a joint action with the OCC.

¹⁷ *Id.*

¹⁸ Lydia DePillis, *A Watchdog Grows Up: The Inside Story of the Consumer Financial Protection Bureau*, WASH. POST WONKBLOG (Jan. 11, 2014, 9:28 AM), <http://washingtonpost.com/blogs/wonkblog/wp/2014/01/11/a-watch>

CFPB has sent a clear message to the financial services industry: it is not afraid to impose large fines or pursue high-profile targets.¹⁹

C. Mortgage Industry

In addition to the high-profile CFPB enforcement actions described in Part B, the CFPB has actively regulated the mortgage industry through the exercise of its rulemaking and enforcement powers.²⁰ The CFPB has passed a large number of new mortgage-related rules, most notably the Ability-to-Repay and Qualified Mortgage Rule, which became effective on January 10, 2014.²¹ This rule was passed as a Dodd-Frank requirement and requires a mortgage lender to make a “reasonable, good-faith determination” that its borrowers have the ability to repay their mortgage, with a presumption of compliance for certain lower risk mortgages known as “Qualified Mortgages.”²² Mortgage lenders must consider certain specific factors in determining a borrower’s ability to repay under this rule, with the aim of preventing the issuance of mortgage loans to borrowers who are unable to repay, as occurred prior to the 2008 financial crisis.²³

dog-grows-up-the-inside-story-of-the-consumer-financial-protection-bureau.

¹⁹ *Id.*

²⁰ *See, e.g.*, CFPB, REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU PURSUANT TO SECTION 1017(E)(4) OF THE DODD FRANK ACT 73–78 (2013), *available at* http://files.consumerfinance.gov/f/201312_cfpb_report_section-1017e4-appropriations.pdf [hereinafter SECTION 1017(E)(4) REPORT]; CFPB, ABILITY-TO-REPAY AND QUALIFIED MORTGAGE RULE: SMALL ENTITY COMPLIANCE GUIDE 1 (2013), *available at* http://files.consumerfinance.gov/f/201308_cfpb_atr-qm-implementation-guide_final.pdf [hereinafter ABILITY-TO-REPAY AND QUALIFIED MORTGAGE RULE]; CFPB, *State Authorities Order Ocwen to Provide \$2 Billion in Relief to Homeowners for Servicing Wrongs*, CFPB (Dec. 19, 2013), <http://consumerfinance.gov/newsroom/cfpb-state-authorities-order-ocwen-to-provide-2-billion-in-relief-to-homeowners-for-servicing-wrongs> [hereinafter CFPB, *State Authorities Order Ocwen to Provide \$2 Billion in Relief*].

²¹ ABILITY-TO-REPAY AND QUALIFIED MORTGAGE RULE, *supra* note 20, at 7.

²² *Id.* at 11, 28.

²³ *Id.* at 14–15. These factors include (1) “income or assets”; (2) “employment status”; (3) “[m]onthly mortgage payment for this loan”; (4) “[m]onthly payment on any simultaneous loans secured by the same

The CFPB has also passed a number of other mortgage lending-related rules on a variety of matters including appraisal requirements, loan originator compensation, escrow account requirements, and mortgage-servicing procedures.²⁴ As a result, the mortgage industry is much more regulated than it was previously.²⁵ While the CFPB has been prolific and active in its rulemaking, there remains concern that some of these new rules, in particular the Ability-to-Repay and Qualified Mortgage Rule, may have unintended consequences on the mortgage market.²⁶

Moreover, the CFPB has actively sought enforcement actions against various participants in the mortgage industry.²⁷ In particular, in December 2013, the CFPB entered into a consent order with Ocwen Financial Corporation (“Ocwen”) in connection with a complex enforcement action coordinated with state authorities.²⁸ Ocwen “is the largest nonbank mortgage servicer and the fourth-largest servicer overall in the United States.”²⁹ Ocwen was ordered to provide \$2 billion in loan modification relief and \$125 million in refunds to approximately 185,000 customers as a result of engaging in systemic misconduct in the mortgage servicing process.³⁰ The proposed order also requires Ocwen to follow certain servicing standards and protections mandated in the proposed consent order, in addition to the requirement of compliance with the Ability-to-Repay and Qualified Mortgage Rule.³¹ In addition to the Ocwen action, the CFPB has also imposed orders on other mortgage-related activities in

property”; (5) monthly costs associated with the property, such as taxes and other fees; (6) other debts and obligations; (7) “[m]onthly debt-to-income ratio or residual income”; and (8) “[c]redit history.” *Id.*

²⁴ See CFPB, 2013 CFPB DODD-FRANK MORTGAGE RULES READINESS GUIDE 2–6 (2013), available at http://in.gov/dfi/files/2013_CFPB_Dodd-Frank_Mortgage_Rules_Readiness_Guide.pdf.

²⁵ See *id.*

²⁶ See Ilyce Glink, *Will New Rules Make It Harder to Get a Mortgage?*, CBS MONEYWATCH (Dec. 17, 2013, 6:45 AM), <http://cbsnews.com/news/will-new-rules-make-it-harder-to-get-a-mortgage> (contending that the CFPB’s rules relating to lending may make obtaining a mortgage more difficult).

²⁷ See SECTION 1017(E)(4) REPORT, *supra* note 20.

²⁸ CFPB, *State Authorities Order Ocwen to Provide \$2 Billion in Relief*, *supra* note 20.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

actions targeting mortgage relief schemes affecting distressed borrowers, mortgage industry kickback schemes, and the steering of borrowers to mortgages with higher rates.³²

D. Payday Loans and Deposit Advance Products

Furthermore, the CFPB has increasingly shifted its attention to the regulation of payday loans and deposit advance products.³³ Payday loans and deposit advance products are both products consisting of “short-term small dollar loans” that “are generally marketed as a way to bridge unexpected financial short-falls between paychecks, receipt of benefits, or other sources of income.”³⁴ Payday loans are repayable on the “borrower’s next payday or other receipt of income,” while “deposit advances do not have a predetermined repayment date.”³⁵ “Instead, deposit advance agreements typically stipulate that repayment will automatically be taken out of the borrower’s next qualifying electronic deposit.”³⁶

The CFPB issued a report in April 2013 on payday loans and deposit advance products, which examined the use and risks of these products and concluded that they “raise substantial consumer protection concerns.”³⁷ In particular, the CFPB found that some users of these products “find themselves caught in a cycle of high-cost borrowing over an extended period of time.”³⁸ These products raise consumer protection concerns as “consumers are not fully aware of the cost” and “use those products instead of less-expensive

³² SECTION 1017(E)(4) REPORT, *supra* note 20 at 74–78 (collecting cases).

³³ *See id.* at 8–9; CFPB, PAYDAY LOANS AND DEPOSIT ADVANCE PRODUCTS: A WHITE PAPER OF INITIAL DATA FINDINGS 44 (2013), available at http://files.consumerfinance.gov/f/201304_cfpb_payday-dap-whitepaper.pdf [hereinafter PAYDAY LOANS AND DEPOSIT ADVANCE PRODUCTS]; *Consumer Financial Protection Bureau Takes Action Against Payday Lender for Robo-Signing*, CFPB (Nov. 20, 2013), <http://consumerfinance.gov/newsroom/consumer-financial-protection-bureau-takes-action-against-payday-lender-for-robo-signing> [hereinafter *Robo-Signing*]; *CFPB Begins Accepting Payday Loan Complaints*, CFPB (Nov. 6, 2013), <http://consumerfinance.gov/newsroom/cfpb-begins-accepting-payday-loan-complaints> [hereinafter *Payday Loan Complaints*].

³⁴ PAYDAY LOANS AND DEPOSIT ADVANCE PRODUCTS, *supra* note 33 at 3, 6.

³⁵ *Id.* at 6–7.

³⁶ *Id.* at 7.

³⁷ *Id.* at 44.

³⁸ *Id.*

alternatives.”³⁹ The CFPB has now indicated that it may introduce additional rules in the future providing for additional oversight of these products.⁴⁰ In November 2013, the CFPB announced that it would begin accepting complaints regarding payday loans.⁴¹ It also recently pursued its first enforcement action against a payday lender, Cash America International, Inc.⁴² It obtained a consent order against this payday lender for “robo-signing court documents in debt collection lawsuits,” resulting in “\$14 million in refunds to consumers and . . . a \$5 million fine.”⁴³ Based on the CFPB’s announcements, additional action can be expected in the future from the CFPB with respect to the payday loan industry.⁴⁴

E. Regulation of New Products and Expanded Regulatory Authority

Since its inception, the CFPB has demonstrated a willingness to regulate new or innovative financial products.⁴⁵ In December 2013, the CFPB filed “its first action against an online loan servicer, CashCall Inc.” for “unfair, deceptive and abusive practices” relating to CashCall Inc.’s collection of money from its customers.⁴⁶ In connection with the filing of this action, Richard Cordray, director of the CFPB, specifically stated that online lending was a growing sector worthy of regulatory scrutiny and that the CFPB would take action against online lenders where warranted.⁴⁷ Regulation by the CFPB of financial product innovations, such as online lending, is consistent with Elizabeth Warren’s perspective that a financial services consumer protection agency should be active in reviewing

³⁹ Robert L. Clarke & Todd J. Zywicki, *Payday Lending, Bank Overdraft Protection, and Fair Competition at the Consumer Financial Protection Bureau*, 33 REV. BANKING & FIN. L. 235, 279 (2013).

⁴⁰ See SECTION 1017(E)(4) REPORT, *supra* note 20, at 8–9.

⁴¹ *Payday Loan Complaints*, *supra* note 33.

⁴² See *Robo-Signing*, *supra* note 33.

⁴³ *Id.*

⁴⁴ See SECTION 1017(E)(4) REPORT, *supra* note 20, at 8–9.

⁴⁵ *CFPB Sues CashCall for Illegal Online Loan Servicing*, CFPB (Dec. 16, 2013), <http://consumerfinance.gov/newsroom/cfpb-sues-cashcall-for-illegal-online-loan-servicing>.

⁴⁶ *Id.*

⁴⁷ *Id.*

and regulating new products.⁴⁸ It also reflects an agency wishing to be seen as proactive and up to date with industry developments.

Furthermore, the CFPB has been willing to go beyond the requirements of Dodd-Frank and impose additional regulations on products or parties where it finds that additional regulation is warranted, beyond the large number of rules already imposed by Dodd-Frank.⁴⁹ For example, in December 2013, the CFPB issued a rule expanding its oversight authority to “nonbank student loan servicers” with more than one million accounts, in response to concerns raised by consumer complaints.⁵⁰ It has also announced a proposal to regulate and examine debt collection practices, prepaid cards, and information sharing practices in the future.⁵¹

F. Conclusion

In both its enforcement actions and its rulemaking, the CFPB has emerged as an active regulator, capable of implementing a large number of rules within an aggressive timeline,⁵² as well as pursuing complex and high profile enforcement actions.⁵³ The CFPB’s actions to date have been most intensely focused on the mortgage lending industry (both in terms of enforcement actions and new rules), which is not surprising given the origins of the credit crisis and the obligations of the CFPB under Dodd-Frank.⁵⁴ However, the CFPB has also demonstrated its willingness to pursue actions relating to financial product innovations, such as online lending.⁵⁵ In addition, the CFPB has shown willingness to expand its oversight to additional

⁴⁸ Warren, *supra* note 5.

⁴⁹ See Kelly Thompson Cochran, *Fall 2013 Rulemaking Agenda*, CFPB (Dec. 3, 2013), <http://consumerfinance.gov/blog/fall-2013-rulemaking-agenda> (discussing CFPB’s proposal for a rule relating to “prepaid card products,” “debt collection practices,” and “information sharing practices”); see, e.g., *CFPB to Oversee Nonbank Student Loan Servicers*, CFPB (Dec. 3, 2013), <http://consumerfinance.gov/newsroom/cfpb-to-oversee-nonbank-student-loan-servicers> [hereinafter *CFPB to Oversee Nonbank Student Loan Servicers*].

⁵⁰ *CFPB to Oversee Nonbank Student Loan Servicers*, *supra* note 49.

⁵¹ Cochran, *supra* note 49.

⁵² See *supra* Part C.

⁵³ See *supra* Part B.

⁵⁴ See *supra* Part C.

⁵⁵ See *supra* notes 49–51 and accompanying text.

financial parties to respond to consumer complaints.⁵⁶ Furthermore, it has indicated that it intends to continue to expand its rulemaking authority based on the information it gathers from or about consumers.⁵⁷ Notwithstanding a difficult start in having to overcome various challenges,⁵⁸ the CFPB's first actions signal its promise as an active and motivated regulator. What remains to be seen, however, is the efficacy of its regulations, particularly on the mortgage industry, and the degree to which it will ensure consumer protection within transparent and efficient markets for consumer financial products.

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⁵⁶ *See supra* note 50 and accompanying text.

⁵⁷ *See supra* Part E.

⁵⁸ *See supra* Part A.

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