

Consumer Financial Protection Bureau: The First Year

Andrew Smith* and James Nguyen**

Table of Contents

ESTABLISHMENT OF THE CONSUMER FINANCIAL PROTECTION BUREAU (CFPB)	
<i>Designated Transfer Date</i>	
<i>Key Definitions</i>	
Covered Persons	
Consumer Financial Protection Functions	
Federal Consumer Financial Law and Enumer- ated Consumer Laws	
<i>Unfair, Deceptive and Abusive</i>	
<i>Transfer of Functions</i>	
Federal Banking Agencies and National Credit Union Administration (“NCUA”)	
Federal Trade Commission (“FTC”)	
Department of Housing and Urban Development (“HUD”)	
<i>Recess Appointment of Richard Cordray</i>	
RULEMAKING AND POLICY DEVELOPMENT INITIA- TIVES	
<i>Consumer Complaint System</i>	
<i>Deposit Accounts and Overdraft Protection</i>	
<i>Prototype Credit Card Agreement</i>	
<i>General-Purpose Reloadable Prepaid Cards</i>	
<i>Request for Comment on Payday Loan Practices</i>	
<i>Revised Mortgage Disclosures</i>	
<i>New Remittance Transfer Requirements</i>	
<i>Amending Account-Opening Fee Limits</i>	
SUPERVISORY INITIATIVES	

*Partner, Morrison & Foerster LLP, Washington, DC.

**J.D., University of California, Berkeley School of Law, 2013; Summer Associate, Morrison & Foerster LLP, Washington, DC.

<i>Examination Procedures Released</i>	
<i>Production of Privileged Information in Examinations</i>	
<i>"Larger Participant" Rulemaking</i>	
<i>Procedures for Designating Nonbanks Posing Risks to Consumers</i>	
ENFORCEMENT INITIATIVES	
<i>"Early Warning Notice" Procedure</i>	
<i>Bulletin on Fair Lending Enforcement</i>	
<i>Procedural Rules Issued</i>	
<i>First Enforcement Action</i>	
CONCLUSION	

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act" or "Act")¹ established an independent bureau in the Federal Reserve System, named the "Bureau of Consumer Financial Protection" ("Bureau" or "CFPB").²

The CFPB has independent power to make rules under the Federal Consumer Financial Laws, to examine and supervise "Covered Persons" for compliance with Federal Consumer Financial Laws, and to enforce compliance with Federal Consumer Financial Laws. In addition, the Bureau has newly established powers to broadly regulate the market for consumer financial products and services, including the authority to supervise non-depository institutions and to prohibit products or services that the agency deems to be unfair, deceptive or abusive.

In this Article, we will describe the establishment of the CFPB, roughly one year ago, and will provide an update regarding major initiatives of the CFPB over the last year, in the areas of rulemaking and policy development, supervision and law enforcement. This Article is not intended to provide an exhaustive discussion of the Bureau's activities; instead, it discusses the key initiatives that the Bureau has either chosen or is mandated by statute to implement.

¹Pub. L. No. 111-203, 124 Stat. 1376 [hereinafter DFA].

²DFA § 1011.

ESTABLISHMENT OF THE CFPB

Congress established the Bureau to “regulate the offering and provision of consumer financial products and services under the Federal consumer financial laws.”³ The Act permits the Bureau to implement and enforce Federal consumer financial law for “the purpose of ensuring that all consumers have access to markets for consumer financial products and services” and that these markets are “fair, transparent, and competitive.”⁴ The Act outlines five primary objectives through which the Bureau may advance its purpose:

- Providing consumers timely and understandable information to make responsible decisions about financial decisions;
- Reducing unwarranted regulatory burdens;
- Protecting consumers from unfair, deceptive and abusive practices and from discrimination;
- Enforcing Federal consumer financial law to promote fair competition; and
- Facilitating access and innovation in markets for consumer financial products and services so that these markets operate transparently and efficiently.⁵

Designated Transfer Date

The Act provided that the Bureau would officially come into existence on the “Designated Transfer Date,” at which time it also would receive certain rulemaking, supervision and enforcement power from several existing federal agencies: the Board of Governors of the Federal Reserve System (“FRB”), the Federal Deposit Insurance Corporation (“FDIC”), the Federal Trade Commission (“FTC”), the National Credit Union Administration (“NCUA”), the Office of the Comptroller of the Currency (“OCC”), the Office of Thrift Supervision (“OTS”), and the Department of Housing and Urban Development (“HUD”).⁶

The Act required the Treasury Secretary to establish the Designated Transfer Date within 60 days following

³DFA § 1011(a).

⁴DFA § 1021(a).

⁵DFA § 1021(b).

⁶DFA § 1061.

enactment.⁷ The Treasury Secretary established July 21, 2011, or one year after the Dodd-Frank Act's enactment, as the Designated Transfer Date.⁸

Key Definitions

Covered Persons

The Dodd-Frank Act provides the CFPB with certain supervisory and enforcement jurisdiction over "Covered Persons." A "Covered Person" is defined to mean a "person that engages in offering or providing a consumer financial product or service; and . . . any affiliate of [such] a person . . . if such affiliate acts as a service provider to such person."⁹

Consumer Financial Protection Functions

The Dodd-Frank Act also transfers "Consumer Financial Protection Functions" to the Bureau from the existing federal agencies. The Act defines "Consumer Financial Protection Functions" to mean (a) all authority to prescribe rules or issue orders or guidelines pursuant to any "Federal Consumer Financial Law," including performing appropriate functions to promulgate and review such rules, orders, and guidelines; and (b) the authority to examine depository institutions with more than \$10 billion in assets ("Very Large Institutions") for compliance with Federal Consumer Financial Law.¹⁰

Federal Consumer Financial Law and Enumerated Consumer Laws

The term "Federal Consumer Financial Law"¹¹ is defined as the Dodd-Frank Act itself, as well as the "Enumerated Consumer Laws,"¹² which are comprised of several previously existing federal consumer protection laws, as follows:

⁷DFA § 1062.

⁸75 Fed. Reg. 57,252 (Sept. 20, 2010).

⁹DFA § 1002(6).

¹⁰DFA §§ 1002, 1025.

¹¹DFA § 1002(14).

¹²DFA § 1002(12).

CONSUMER FINANCIAL PROTECTION BUREAU: THE FIRST YEAR

- The Alternative Mortgage Transaction Parity Act of 1982;¹³
- The Consumer Leasing Act of 1976;¹⁴
- The Electronic Fund Transfer Act (“EFTA”),¹⁵ except with respect to section 920 of the EFTA, relating to restrictions on interchange fees for debit cards;
- The Equal Credit Opportunity Act (“ECOA”);¹⁶
- The Fair Credit Billing Act;¹⁷
- The Fair Credit Reporting Act (“FCRA”),¹⁸ except with respect to sections 615(e) and 628 of the FCRA,¹⁹ relating to the establishment of identity theft prevention programs and the secure disposal of consumer report information;
- The Home Owners Protection Act of 1998;²⁰
- The Fair Debt Collection Practices Act;²¹
- Subsections (b) through (f) of section 43 of the Federal Deposit Insurance Act,²² relating to the advertising of federal deposit insurance and depository institutions without federal deposit insurance;
- Sections 502 through 509 of the Gramm-Leach-Bliley Act,²³ relating to the privacy of personally identifiable consumer financial information, except for section 505,²⁴ as it relates to section 501(b),²⁵ concerning the safeguarding of consumer financial data;
- The Home Mortgage Disclosure Act of 1975;²⁶

¹³12 U.S.C.A. §§ 3801 et seq.

¹⁴15 U.S.C.A. §§ 1667 et seq.

¹⁵15 U.S.C.A. §§ 1693 et seq.

¹⁶15 U.S.C.A. §§ 1691 et seq.

¹⁷15 U.S.C.A. §§ 1666 et seq.

¹⁸15 U.S.C.A. §§ 1681 et seq.

¹⁹15 U.S.C.A. §§ 1681m(e), 1681w.

²⁰12 U.S.C.A. §§ 4901 et seq.

²¹15 U.S.C.A. §§ 1692 et seq.

²²12 U.S.C.A. §§ 1831t(c) to (f).

²³15 U.S.C.A §§ 6802 to 6809.

²⁴15 U.S.C.A. § 6805.

²⁵15 U.S.C.A. § 6801(b).

²⁶12 U.S.C.A. §§ 2801 et seq.

- The Home Ownership and Equity Protection Act of 1994;²⁷
- The Real Estate Settlement Procedures Act of 1974 (“RESPA”);²⁸
- The Secure and Fair Enforcement for Mortgage Licensing Act of 2008;²⁹
- The Truth in Lending Act (“TILA”);³⁰
- The Truth in Savings Act;³¹
- Section 626 of the Omnibus Appropriations Act, 2009,³² relating to “unfair or deceptive acts or practices regarding mortgage loans, which may include unfair or deceptive acts or practices involving loan modification and foreclosure rescue services”; and
- The Interstate Land Sales Full Disclosure Act.³³

Unfair, Deceptive and Abusive

Because the term “Federal Consumer Financial Law” includes the provisions of the Dodd-Frank Act, it includes the Bureau’s authority to prohibit “unfair,” “deceptive” and “abusive” practices.³⁴ Although this authority has yet to be exercised by the CFPB,³⁵ it is nonetheless controversial,³⁶ in large part because of the use of ill-defined terms and the broad discretion provided to the CFPB to determine established practices to be illegal:

- To declare an act or practice to be “unfair,” the Bureau must have a reasonable basis to conclude that (a) the act or practice causes or is likely to cause substantial

²⁷15 U.S.C.A. § 1601 note.

²⁸12 U.S.C.A. §§ 2601 et seq.

²⁹12 U.S.C.A. §§ 5101 et seq.

³⁰15 U.S.C.A. §§ 1601 et seq.

³¹12 U.S.C.A. §§ 4301 et seq.

³²Pub. L. No. 111-8, 123 Stat. 524.

³³15 U.S.C.A. § 1701.

³⁴DFA § 1031.

³⁵But see the CFPB’s first enforcement action against Capital One, alleging deceptive practices in connection with the sale of “ancillary” products, such as credit protection. See *infra*, note 190 and accompanying text.

³⁶See generally Wright, John D., Dodd-Frank’s “Abusive” Standard: A Call for Certainty, 8 Berkeley Bus. L.J. 164 (2011).

injury to consumers which is not reasonably avoidable by consumers; and (b) such substantial injury is not outweighed by countervailing benefits to consumers or to competition.³⁷ In determining whether an act or practice is unfair, the Bureau may consider established public policies as evidence to be considered with all other evidence, but such public policy considerations may not serve as a primary basis for such determination.³⁸ This is substantially similar to the current unfairness test used by the FTC.³⁹

- Although the Act does not explain what “deceptive” means, or provide any additional information regarding deceptive acts or practices, under established FTC precedent a representation, omission or practice is deceptive if it is likely to mislead a consumer “acting reasonably in the circumstances,” and the representation, omission, or practice is “material,” such that it is “likely to affect the consumer’s conduct or decision with regard to a product or service.”⁴⁰
- The “abusive” standard is entirely new. The Bureau will have the authority to declare an act or practice in connection with the provision of a consumer financial product or service to be “abusive” if the act or practice “materially interferes” with the ability of a consumer to understand a term or condition of a consumer financial product or service, or “takes unreasonable advantage” of (a) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service; (b) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or (c) the reasonable reliance by the consumer on a Covered Person to act in the interests of the consumer.⁴¹

³⁷DFA § 1031.

³⁸DFA § 1031.

³⁹See 15 U.S.C.A. § 45(n).

⁴⁰FTC, Policy Statement on Deception (Oct. 14, 1983), appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984), and available at <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>.

⁴¹DFA § 1031.

Transfer of Functions**Federal Banking Agencies and NCUA**

On July 21, 2011—the Designated Transfer Date—the Bureau assumed all “Consumer Financial Protection Functions” of the FRB, the OCC, the OTS, the FDIC and the NCUA, as well as all powers and duties that had been vested in such agencies relating to Consumer Financial Protection Functions on the day before the Designated Transfer Date.⁴²

The Bureau now has primary jurisdiction over a Very Large Institution with respect to supervision and enforcement of compliance with Federal Consumer Financial Laws, but the transferring prudential regulator continues to have “backup” enforcement authority, meaning that the prudential regulator may recommend to the CFPB that it take an enforcement action against a Very Large Institution, and if the CFPB fails to act within 120 days, the prudential regulator may bring an enforcement action in its own right.⁴³ The prudential regulator also may require reports from and conduct examinations of a Very Large Institution incidental to that backup authority.

The transferring prudential regulators, however, have exclusive authority to examine banks and credit unions with less than \$10 billion in assets (“Smaller Institutions”),⁴⁴ but the Bureau may “ride along” on an examination of a Smaller Institution—the Act permits the Bureau “to include examiners on a sampling basis of the examinations performed by the prudential regulator.”⁴⁵ The Bureau also may require reports from a smaller institution, as necessary to assess and detect risks to consumers and consumer financial markets, but is required, “to the fullest extent possible,” to use reports pertaining to a smaller institution that have been provided or required to have been provided to a Federal or State agency and information that has been reported publicly.

The Act authorizes the prudential regulator, not the Bureau, to enforce the requirements of Federal Consumer

⁴²DFA § 1061.

⁴³DFA § 1025(c).

⁴⁴DFA § 1026.

⁴⁵DFA § 1026(c)(1).

Financial Laws with respect to these Smaller Institutions. When the Bureau has reason to believe that a Smaller Institution has engaged in a material violation of a Federal Consumer Financial Law, the Bureau is authorized to notify the prudential regulator in writing and recommend appropriate action to respond. Upon receiving such a recommendation, the prudential regulator is required to provide a written response to the Bureau within 60 days of receipt of such recommendation, but the Bureau does not have any authority to pursue an enforcement action in its own right.⁴⁶

FTC

The authority of the FTC under an Enumerated Consumer Law to prescribe rules, issue guidelines, or conduct a study or issue a report mandated under such law transferred to the Bureau on the Designated Transfer Date, and the Bureau was given all powers and duties under the Enumerated Consumer Laws to prescribe rules, issue guidelines, or conduct studies or issue reports mandated by such laws, that had been vested in the FTC on the day before the Designated Transfer Date.⁴⁷

The Bureau may enforce a rule prescribed by the FTC under the Federal Trade Commission Act prohibiting any unfair or deceptive act or practice,⁴⁸ to the extent that such rule applies to a Covered Person, or service provider to a Covered Person, with respect to the offering or provision of a consumer financial product or service. The Bureau may enforce such an FTC requirement as if it were a CFPB rule prohibiting “unfair, deceptive or abusive” acts or practices.

The FTC continues to have the same enforcement authority with respect to the Enumerated Consumer Laws that it had before the Designated Transfer Date.⁴⁹ In addition, the FTC now has authority to enforce under the Federal Trade Commission Act any rule prescribed by the Bureau under the Dodd-Frank Act—such as a rule prohibiting “unfair,

⁴⁶DFA § 1026(d).

⁴⁷DFA § 1061.

⁴⁸See, e.g., 16 C.F.R. pt. 444 (credit Practices Rule, prohibiting certain practices in connection with the offering of consumer credit accounts).

⁴⁹See, e.g., DFA §§ 1084, 1085, 1088, 1089, 1093, 1100A, 1100C.

deceptive or abusive” acts or practices—with respect to a Covered Person subject to the FTC’s jurisdiction.⁵⁰

As required by the Dodd-Frank Act,⁵¹ in January 2012, the FTC and the Bureau negotiated a Memorandum of Understanding (“MOU”) with respect to coordinating enforcement actions by each agency against non-depository Covered Persons (including service providers).⁵² The MOU also addresses rulemaking by each agency, including consultation with the other agency prior to proposing a rule and during the comment period, and coordination and cooperation with respect to the collection of consumer complaints and consumer education.⁵³

The MOU establishes procedural requirements, rather than jurisdictional limitations, and requires the two agencies to consult with one another before opening investigations or bringing enforcement actions; it does not limit either agency’s enforcement jurisdiction or authority.⁵⁴ The MOU also calls for the establishment of a “secure computerized system” that each agency can “independently search” to determine whether a company is under investigation, in litigation, or under Order with the other agency.⁵⁵ The MOU specifically allows for the sharing of confidential examination information and examination results with the FTC,⁵⁶ which presents particularly challenging questions for

⁵⁰DFA § 1061(b)(5)(C)(ii).

⁵¹DFA §§ 1024(c)(3), 1061.

⁵²See Memorandum of Understanding Between the CFPB and the Federal Trade Commission (Jan. 20, 2012), available at <http://www.ftc.gov/os/2012/01/120123ftc-cfpb-mou.pdf>.

⁵³Memorandum of Understanding Between the CFPB and the Federal Trade Commission (Jan. 20, 2012), available at <http://www.ftc.gov/os/2012/01/120123ftc-cfpb-mou.pdf>.

⁵⁴Memorandum of Understanding Between the CFPB and the Federal Trade Commission (Jan. 20, 2012), available at <http://www.ftc.gov/os/2012/01/120123ftc-cfpb-mou.pdf>.

⁵⁵Memorandum of Understanding Between the CFPB and the Federal Trade Commission (Jan. 20, 2012), available at <http://www.ftc.gov/os/2012/01/120123ftc-cfpb-mou.pdf>.

⁵⁶See MOU § VI.B.2 (“Upon written request by the FTC to the CFPB’s General Counsel, and pursuant to CFPB regulation 12 C.F.R. § 1070.43(b) and the CFPB’s other policies and procedures, the CFPB will provide the FTC with Confidential Supervisory Information pertaining to any MOU Covered Person subject to the FTC’s jurisdiction unless it has good cause

financial institutions, given the CFPB's position that Covered Persons must produce attorney-client privileged information in response to an examination request.⁵⁷

HUD

All consumer protection functions of HUD relating to the Real Estate Settlement Procedures Act of 1974, the Secure and Fair Enforcement for Mortgage Licensing Act of 2008, and the Interstate Land Sales Full Disclosure Act are transferred to the Bureau.⁵⁸ The Bureau has all powers and duties that were vested in HUD relating to such acts on the day before the Designated Transfer Date.

Recess Appointment of Richard Cordray

On January 4, 2012, the President named Richard T. Cordray as Director of the Bureau through a recess appointment, a post Mr. Cordray will hold until the Senate adjourns at the end of 2013.⁵⁹ The appointment recently was challenged in a lawsuit filed in the U.S. District Court for the District of Columbia.⁶⁰ The petitioners allege that the CFPB's "formation and operation violates the Constitution's separation of powers," because the Dodd-Frank Act "delegates effectively unbounded power to the CFPB, and couples that power with provisions insulating CFPB against meaningful checks by the Legislative, Executive, and Judicial Branches."⁶¹ In addition, the petitioners allege that the recess appointment of Mr. Cordray was unconstitutional

not to do so and explains to FTC staff why it will not provide the information.").

⁵⁷See *infra*, note 149 and accompanying text.

⁵⁸DFA § 1061(b)(7)(A).

⁵⁹The White House, Office of the Press Secretary, President Obama Announces Recess Appointments to Key Administration Posts, Press Release, Jan. 4, 2012, available at <http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts>.

⁶⁰*State National Bank of Big Spring, Texas v. Geithner*, No. 1:12-cv-01032-esh.

⁶¹*State National Bank of Big Spring, Texas v. Geithner*, No. 1:12-cv-01032-esh at para. 5.

because the Senate had not actually recessed and was still in session.⁶²

RULEMAKING AND POLICY DEVELOPMENT INITIATIVES

As noted above, the Bureau has authority to make rules to implement the Federal Consumer Financial Laws, and also has substantial responsibility for making Federal policy with respect to the regulation of consumer financial services.

Consumer Complaint System

The Dodd-Frank Act requires the Bureau to collect, investigate, and respond to consumer complaints.⁶³ The Act also specifies how the Bureau—and the Covered Persons to which consumers are directing their complaints—must respond to consumers following a filed complaint.⁶⁴

On the Designated Transfer Date, the agency launched its Consumer Response function, an online intake system to accept, monitor, and report about consumer complaints related to consumer financial products and services.⁶⁵ The system serves three primary purposes: providing an online intake system for consumer complaints, routing complaints to the proper institution, and monitoring the complaints to ensure that complaints are properly responded to by institutions. The system initially accepted only complaints for credit cards, but the Bureau has since expanded the list of financial products or services the system accepts to include consumer

⁶²State National Bank of Big Spring, Texas v. Geithner, No. 1:12-cv-01032-esh at para. 6 (“[T]he President unconstitutionally appointed Richard Cordray to be CFPB Director by refusing to secure the Senate’s advice and consent while the Senate was in session, one of the few constitutional checks and balances on the CFPB left in place by the Dodd-Frank Act.”).

⁶³DFA § 1021(c)(2).

⁶⁴DFA §§ 1034(a) and 1034(b).

⁶⁵See CFPB, Consumer Response Annual Report, March 31, 2012, available at http://files.consumerfinance.gov/f/201204_cfpb_ConsumerResponseAnnualReport.pdf; (findings from the first six months also were reported in an interim report, which contains aggregate data on the types of complaints received, the percentage of resolved and unresolved cases, and the consumers’ response to an issuer’s reported resolution of the complaint. Nov. 30, 2011, available at <http://www.consumerfinance.gov/blog/credit-card-complaints-by-the-numbers/>).

complaints about checking and deposit accounts,⁶⁶ student loans,⁶⁷ auto loans,⁶⁸ and mortgages.⁶⁹ To assist covered institutions with managing responses to complaints under the new system, the Bureau released a “Company Portal Manual.”⁷⁰ The manual details the mechanics of the newly launched system and explains how firms can begin processing complaints being routed to them through the Bureau’s online portal.⁷¹

While the Bureau has not started accepting complaints about all financial products or services, such as complaints about payday loans or credit reports, consumers seeking to file complaints not presently served by the complaint system can submit their issue through the Bureau’s “Tell Your Story” application, which allows consumers to submit complaint-like information in narrative form but does not trigger the requirements of a response or resolution from the

⁶⁶See CFPB, Consumer Financial Protection Bureau now taking complaints on checking accounts, Press Release, March 1, 2012, available at <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-now-taking-complaints-on-checking-accounts/>.

⁶⁷See Chopra, Rohit, Student Loan Ombudsman, CFPB, Our student loan complaint system is open for business, March 5, 2012, available at <http://www.consumerfinance.gov/blog/our-student-loan-complaint-system-is-open-for-business/>.

⁶⁸See Alag, Sartaj, Assistant Director for Consumer Response, CFPB, Who is going to help with your complaint about an auto or installment loan?, March 12, 2012, available at <http://www.consumerfinance.gov/blog/who-is-going-to-help-with-your-complaint-about-an-auto-or-installment-loan/>.

⁶⁹See Alag, Sartaj, CFPB mortgage complaint system is up and running, Jan. 5, 2012, available at <http://www.consumerfinance.gov/blog/cfpb-mortgage-complaint-system-is-up-and-running/>.

⁷⁰The Bureau has not publicly posted the Company Portal Manual online. However, an electronic copy provided to the American Bankers Association is posted on its Web site, available at <http://www.aba.com/Solutions/Compliance/Documents/1a4d6f63fa7940c3b1f8699829db145fCFPBCompanyPortalManualv2.pdf>.

⁷¹The Bureau has not publicly posted the Company Portal Manual online. However, an electronic copy provided to the American Bankers Association is posted on its Web site, available at <http://www.aba.com/Solutions/Compliance/Documents/1a4d6f63fa7940c3b1f8699829db145fCFPBCompanyPortalManualv2.pdf>.

Bureau or a covered institution.⁷² The Bureau anticipates fully implementing its consumer response intake system to accept most complaints by the end of 2012.⁷³

Deposit Accounts and Overdraft Protection

The Bureau received transferred authority from the FRB for administration of the Truth in Savings Act and the EFTA.⁷⁴ Under this authority, the Bureau initiated efforts to review regulations affecting deposit accounts, such as checking and savings accounts, with a particular focus on reviewing checking account disclosures⁷⁵ and overdraft practices.⁷⁶

Legislators and consumer groups have raised concerns about the effectiveness of current disclosure rules.⁷⁷ Partially

⁷²See CFPB, Tell Your Story, Web site, available at <https://help.consumerfinance.gov/app/tellyourstory> (last visited July 20, 2012).

⁷³See CFPB, Consumer Response Annual Report, *supra* note 67.

⁷⁴See DFA § 1002(12), *supra* note 14.

⁷⁵See CFPB, Consumer Financial Protection Bureau launches inquiry into overdraft practices, Press Release, Feb. 22, 2012 (Responding, in part, to Senators Richard Durbin and Jack Reed's letter requesting that the Bureau consider implementing a rule to require financial institutions to "post on their websites a standardized, concise and consumer-friendly disclosure form that lists the fees and key terms associated with checking accounts."), available at <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-launches-inquiry-into-overdraft-practices/>. See also Letter from Richard Durbin and Jack Reed, Members of Congress, to Raj Date, Acting Director, CFPB, Nov. 3, 2011, available at <http://durbin.senate.gov/public/index.cfm/statementscommentary?ID=690fc5d1-f6ac-49bc-ba75-46a6aa1b512a>.

⁷⁶CFPB, Consumer Financial Protection Bureau launches inquiry into overdraft practices, Press Release, Feb. 22, 2012 (Responding, in part, to Senators Richard Durbin and Jack Reed's letter requesting that the Bureau consider implementing a rule to require financial institutions to "post on their websites a standardized, concise and consumer-friendly disclosure form that lists the fees and key terms associated with checking accounts."), available at <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-launches-inquiry-into-overdraft-practices/>. See also Letter from Richard Durbin and Jack Reed, Members of Congress, to Raj Date, Acting Director, CFPB, Nov. 3, 2011, available at <http://durbin.senate.gov/public/index.cfm/statementscommentary?ID=690fc5d1-f6ac-49bc-ba75-46a6aa1b512a>.

⁷⁷CFPB, Consumer Financial Protection Bureau launches inquiry into overdraft practices, Press Release, Feb. 22, 2012 (Responding, in part, to Senators Richard Durbin and Jack Reed's letter requesting that the Bureau consider implementing a rule to require financial institutions to

in response to these concerns, the Bureau issued a notice and request for information seeking public input “regarding overdraft programs and their costs, benefits, and risks to consumers,”⁷⁸ and is collecting data from the largest banks in the country to “evaluate how those institutions’ overdraft policies affect consumers.”⁷⁹

Concurrently, the Bureau developed and launched a prototype “penalty fee box” that it is suggesting could be placed on a consumer’s checking account statement to “highlight the amount overdrawn and total overdraft fees charged” to a consumer during the prior billing month.⁸⁰ The prototype penalty fee box provides disclosures that draw attention to overdraft fees paid during the monthly period covered in the statement by highlighting the total fees paid by the consumer and the amount overdrawn that triggered the fees.⁸¹

Prototype Credit Card Agreement

In December 2011, the Bureau developed and launched a prototype of a simplified credit card agreement.⁸² Designed to shorten credit card agreements, which the Bureau says are typically from 10 to 12 pages in length, the Bureau’s prototype condensed the length of a credit card agreement by removing standard, boiler-plate definitions of terms and

“post on their websites a standardized, concise and consumer-friendly disclosure form that lists the fees and key terms associated with checking accounts.”), available at <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-launches-inquiry-into-overdraft-practices/>. See also Letter from Richard Durbin and Jack Reed, Members of Congress, to Raj Date, Acting Director, CFPB, Nov. 3, 2011, available at <http://durbin.senate.gov/public/index.cfm/statementscommentary?ID=690fc5d1-f6ac-49bc-ba75-46a6aa1b512a>.

⁷⁸CFPB, Impacts of Overdraft Programs on Consumers, 77 Fed. Reg. 12,031 (Feb. 28, 2012).

⁷⁹See Consumer Financial Protection Bureau launches inquiry into overdraft practices, *supra* note 75.

⁸⁰Consumer Financial Protection Bureau launches inquiry into overdraft practices, *supra* note 75.

⁸¹Consumer Financial Protection Bureau launches inquiry into overdraft practices, *supra* note 75.

⁸²CFPB, Consumer Financial Protection Bureau aims to simplify credit card agreements, Press Release, Dec. 7, 2012, available at <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-aims-to-simplify-credit-card-agreements/>.

incorporating such definitions by reference to a separate glossary on the Bureau's or the credit card issuer's Web site.⁸³

Concurrent with the prototype's release, the Bureau also announced that it will be partnering with a credit card issuer to pilot and test the new agreement prototype.⁸⁴ Under the pilot, the Bureau will focus on whether the new agreement improves consumer understanding of credit card terms and encourages more consumers to compare and shop across different credit card products.⁸⁵

Currently, adoption of the prototype is optional for credit card issuers. The Bureau has broad authority to "prescribe rules to ensure that the features of any consumer financial product or service, both initially and over the term of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service,"⁸⁶ and could, for example, issue regulations designating a federal safe harbor for card issuers adopting the prototype credit card agreement to ensure compliance with appropriate federal consumer laws.

General-Purpose Reloadable Prepaid Cards

A policy priority for the Bureau is the regulation of general-purpose reloadable prepaid cards ("GPR cards"), which are prepaid cards that a consumer can use anywhere that accepts payment from a retail electronic payments network, such as Visa, MasterCard, American Express, or Discover, and can be "reloaded," meaning that the consumer, or other authorized party, can add money to the card after the card is issued.

⁸³CFPB, Consumer Financial Protection Bureau aims to simplify credit card agreements, Press Release, Dec. 7, 2012, available at <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-aims-to-simplify-credit-card-agreements/>.

⁸⁴CFPB, Consumer Financial Protection Bureau aims to simplify credit card agreements, Press Release, Dec. 7, 2012, available at <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-aims-to-simplify-credit-card-agreements/>.

⁸⁵CFPB, Consumer Financial Protection Bureau aims to simplify credit card agreements, Press Release, Dec. 7, 2012, available at <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-aims-to-simplify-credit-card-agreements/>.

⁸⁶DFA § 1032.

On May 23, 2012, the Bureau issued an Advance Notice of Proposed Rulemaking (“ANPR”) to collect information to learn more about the cost, benefits, and potential risk of GPR cards.⁸⁷ The ANPR notes the lack of uniform federal regulation applying to GPR cards and seeks public comments on whether the Bureau should extend certain consumer protections of the EFTA to cover the products.⁸⁸ The Bureau is considering whether to develop and implement regulations to “ensure that consumers’ funds on prepaid cards are safe and that card terms and fees are transparent.”⁸⁹

The Bureau announced the release of the ANPR at a field hearing it held on GPR cards.⁹⁰ The town-hall style event included a speech from Bureau Director Cordray, an expert panelist discussion, and public comments directly from members of the public.⁹¹

Town hall meetings and field hearings are one of the tools used by the Bureau to raise important policy issues. Past town halls and field hearings held by the Bureau have focused on initiatives such as regulatory actions to address overdraft fees and disclosures,⁹² student loans,⁹³ payday lending,⁹⁴ and credit cards.⁹⁵

⁸⁷77 Fed. Reg. 30,923 (May 24, 2012).

⁸⁸77 Fed. Reg. at 30,925.

⁸⁹See CFPB, Consumer Financial Protection Bureau considers rules on prepaid cards, May 23, 2012, available at <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-considers-rules-on-prepaid-cards/>.

⁹⁰See CFPB Web Team, CFPB, Live From Durham, NC!, Web site and Video, May 23, 2012, available at <http://www.consumerfinance.gov/blog/live-from-durham-nc/>.

⁹¹CFPB Web Team, CFPB, Live From Durham, NC!, Web site and Video, May 23, 2012, available at <http://www.consumerfinance.gov/blog/live-from-durham-nc/>.

⁹²See CFPB Web Team, CFPB, Live from New York City!, Feb. 22, 2012, available at <http://www.consumerfinance.gov/blog/live-from-new-york-city/>.

⁹³See Chopra, Rohit, Student Loan Ombudsman, CFPB, Thousands of voices on private student loans, June 13, 2012, available at <http://www.consumerfinance.gov/blog/thousands-of-voices-on-private-student-loans/>.

⁹⁴See CFPB Web Team, CFPB, Hearing your stories on payday lending, Jan. 19, 2012, available at <http://www.consumerfinance.gov/blog/hearing-your-stories-on-payday-lending/>.

Request for Comment on Payday Loan Practices

The Dodd-Frank Act subjects payday lenders, for the first time, to full federal regulatory supervision and enforcement.⁹⁶ In January 2012, the Bureau published guidance that it will use to conduct compliance examinations of payday lenders.⁹⁷ The publication of the field guide was announced at a Bureau field hearing in Birmingham, Alabama,⁹⁸ which examined, among other things, the impact of payday loans and deposit advance products on different types of consumers, payday lender marketing practices, and how these issues may differ based on whether the lending occurs online or at storefronts.⁹⁹

Subsequently, the Bureau published a notice to invite public comment on issues related to payday lending.¹⁰⁰ More than 500 comments were submitted and were posted to the public record.¹⁰¹ While the Bureau has not announced any enforcement actions related to payday lending, examinations of payday lenders are reportedly underway.¹⁰²

Revised Mortgage Disclosures

The Dodd-Frank Act requires the Bureau to combine the mortgage disclosures required by TILA and those required

⁹⁵See CFPB Web Team, CFPB, Live from Cleveland, Dec. 7, 2011, available at <http://www.consumerfinance.gov/blog/live-from-cleveland/>.

⁹⁶DFA § 1024(a)(1)(E).

⁹⁷CFPB Examination Manual, Examination Procedures, Short-Term, Small-Dollar Lending; retrieved at <http://files.consumerfinance.gov/f/2012/01/Short-Term-Small-Dollar-Lending-Examination-Manual.pdf>.

⁹⁸<http://www.consumerfinance.gov/blog/category/payday-loans/> (January 19, 2012).

⁹⁹The transcript of the hearing can be found on the Bureau's Web site, available at http://files.consumerfinance.gov/f/201201_cfpb_transcript_payday-lending-field-hearing-alabama.pdf (last visited July 20, 2012).

¹⁰⁰Request for Comment on Payday Lending Hearing Transcript, 77 Fed. Reg. 16,817 (March 22, 2012).

¹⁰¹The comments submitted to the public record can be found on the Federal & Rulemaking Program Web site, available at <http://www.regulations.gov/#!docketDetail;dt=PS;rpp=25;so=ASC;sb=organization;po=100;D=CFPB-2012-0009> (last visited July 20, 2012).

¹⁰²See Twohig, Peggy and Antonakes, Steve, CFPB, The CFPB launches its nonbank supervision program, Jan. 5, 2012, available at <http://www.consumerfinance.gov/blog/the-cfpb-launches-its-nonbank-supervision-program/>.

RESPA into a single document.¹⁰³ The project was officially launched on May 9, 2011,¹⁰⁴ prior to the Designated Transfer Date, and follows an unconventional rulemaking process that proceeds through an iterative research and testing agenda utilizing public feedback collected directly online.¹⁰⁵

During the testing phase, the Bureau posted on its Web site designs and mock-ups of prototype mortgage disclosure forms in order to receive direct feedback from the public.¹⁰⁶ Concurrently, the Bureau held focus groups in locations across the country to gather additional feedback.¹⁰⁷ New versions incorporating feedback and research were developed and subjected to the same feedback process.¹⁰⁸

In July 2012, the Bureau issued a proposed rule to integrate mortgage disclosures under TILA and RESPA,¹⁰⁹ and also released a report summarizing the results of the testing

¹⁰³DFA § 1032(f).

¹⁰⁴See McCoy, Patricia, Assistant Director for Mortgage Markets, CFPB, Know Before You Owe: Help Us Make Your Mortgage Forms Better, May 9, 2011, available at <http://www.consumerfinance.gov/blog/know-before-you-owe-help-us-make-your-mortgage-forms-better/>.

¹⁰⁵See CFPB Web Team, CFPB, Know Before You Owe: Where Did the Online Participants Come From?, June 8, 2011, available at <http://www.consumerfinance.gov/blog/know-before-you-owe-where-did-the-online-participants-come-from/>.

¹⁰⁶See CFPB Web Team, CFPB, Mortgage Disclosure Is Heating Up, June 24, 2011, available at <http://www.consumerfinance.gov/blog/mortgage-disclosure-is-heating-up/>.

¹⁰⁷Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z), Proposed Rule with Request for Public Comment, [Docket No. CFPB-2012-0028], July 9, 2012, available at http://files.consumerfinance.gov/f/201207_cfpb_proposed-rule-integrated-mortgage-disclosures.pdf. [The citation to the Federal Register Notice was not yet published at the time of submission of this article for publication.].

¹⁰⁸See CFPB Web Team, CFPB, Know Before You Owe: We're Back!, June 27, 2011, available at <http://www.consumerfinance.gov/blog/know-before-you-owe-were-back/>; see also CFPB Web Team, CFPB, Know Before You Owe: What's next, Oct. 17, 2011, available at <http://www.consumerfinance.gov/blog/know-before-you-owe-whats-next/>.

¹⁰⁹See Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z), *supra* note 109.

process.¹¹⁰ The Bureau's proposed rule covers five aspects of mortgage lending disclosures and practices: how loan estimates are disclosed, mortgage closing disclosures, limitations on closing cost increases, annual percentage rate ("APR") definition changes, and lender recordkeeping requirements.¹¹¹ The proposed cost estimate and mortgage closing disclosures would replace the separate TILA and RESPA disclosures that lenders are now required to provide, while the changes to APR calculations and recordkeeping requirements are new, substantive regulatory requirements.¹¹²

New Remittance Transfer Requirements

The Dodd-Frank Act amended the EFTA to require certain disclosures and to impose new error resolution provisions with respect to "remittance transfers"—i.e., electronic transfers of money sent by consumers in the United States to individuals or businesses in other countries.¹¹³ These provisions were implemented by the very first rule published by the CFPB in February 2012, barely a month after the appointment of Director Cordray.¹¹⁴

The CFPB's final rule requires a remittance transfer provider to provide to each "sender" of a remittance transfer a disclosure describing the amount of currency that will be received by the "designated recipient" of the transfer, the fees that will be charged by the remittance transfer provider,

¹¹⁰Kleimann Communications Group, Inc., Know Before You Owe: Evolution of the Integrated TILA-RESPA Disclosures, July 9, 2012, available at http://files.consumerfinance.gov/f/201207_cfpb_report_tila-respa-testing.pdf.

¹¹¹See Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z), *supra* note 109.

¹¹²Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z), *supra* note 109.

¹¹³DFA § 1073 (adding EFTA § 919).

¹¹⁴77 Fed. Reg. 6,194 (Feb. 7, 2012). In conjunction with this final rule, the Bureau also proposed a rule that would create a safe-harbor exception for entities that do not effect remittance transfers in the ordinary course of business and would establish new provisions regarding remittance transfers scheduled in advance. 77 Fed. Reg. 6,310 (Feb. 7, 2012).

and the exchange rate. This disclosure must be expressed in the currency into which the funds will be exchanged. This disclosure would be provided when the sender requests a remittance transfer and before the sender makes any payment.¹¹⁵

The remittance transfer provider also must provide the sender with a receipt showing all of the information above, as well as the promised date of delivery, the name and telephone number or address of the designated recipient, a statement about the sender's error resolution rights (see below), contact information for the remittance transfer provider, and contact information for the remittance transfer provider's primary state regulator (in the case of a state-chartered bank or credit union or state-licensed money services business) or federal regulator (in the case of a federally chartered bank or credit union) and the CFPB, as well as a toll-free number established by the CFPB.¹¹⁶

Under the CFPB's rule, banks and credit unions are only required to provide a "reasonably accurate estimate of the foreign currency to be received" if the transfer is conducted through a deposit account that the sender holds with the bank or credit union and the bank or credit union is unable to know the exact amount of foreign currency that will be received. This safe harbor sunsets on July 20, 2015.¹¹⁷ In addition, all remittance transfer providers, bank and non-bank, may provide estimates for those countries where local law or other circumstances do not permit the provider to determine a precise exchange rate.¹¹⁸

The CFPB's rule sets forth error resolution procedures that take the place of the EFTA's existing error resolution procedures for electronic funds transfers.¹¹⁹ If a remittance transfer provider receives notice that an error occurred from a sender within 180 days of the promised delivery of the remittance transfer, the provider must, within 90 days, conduct an investigation and report the results of the investigation to the sender within three days of completion.

¹¹⁵77 Fed. Reg. 6,194 (Feb. 7, 2012).

¹¹⁶77 Fed. Reg. 6,194 (Feb. 7, 2012).

¹¹⁷77 Fed. Reg. 6,194 (Feb. 7, 2012).

¹¹⁸77 Fed. Reg. 6,194 (Feb. 7, 2012).

¹¹⁹See EFTA §§ 908 and 909 (EFTA error resolution and unauthorized transaction provisions).

Where the provider determines that an error has occurred, the provider would be required to offer the sender the option of obtaining a refund or making available to the designated recipient the funds necessary to resolve the error. The provider is only required to refund fees where the provider failed to make funds available to the designated recipient by the date of availability specified in the receipt or combined disclosure. In other words, a refund of fees is not required for errors where the recipient still receives the transferred money on or before the availability date.¹²⁰

The CFPB's rule also allows senders a 30-minute cancellation period for all remittance transfers, except those that are scheduled at least three business days prior to the date of transfer.¹²¹

The CFPB's rule presents several compliance challenges to banks and others that provide remittance transfers. For example, remittance transfer providers are required to provide a receipt listing a specific amount that will be received by a recipient in a foreign country—not only is it difficult to predict the exchange rate in advance, but this requirement requires remittance transfer providers to estimate the taxes that will be assessed by every jurisdiction through which the money passes, as well as the “lifting fees” that might be exacted by any correspondent financial institution.¹²² Although banks are permitted to estimate these taxes and fees, that exception will expire in three years, in July 2015.

Another challenge is perhaps an unintended consequence of the Dodd-Frank Act inclusion of the remittance transfer provisions in the EFTA. Wire transfers generally are covered by Article 4A of the Uniform Commercial Code and are exempt from regulation under the EFTA.¹²³ Uniform Commercial Code Article 4A, however, does not apply “to a funds

¹²⁰77 Fed. Reg. 6,194 (Feb. 7, 2012).

¹²¹77 Fed. Reg. 6,194 (Feb. 7, 2012).

¹²²See Joint Association Comment Letter on the Proposed Remittance Transfer Rule, at 6–7 (July 22, 2011) (discussing challenges of providing remittance transfers through an “open network” of correspondent institutions, with no way to determine the intermediaries or the fees they will exact), available at <http://www.theclearinghouse.org/index.html?f=072552>.

¹²³EFTA § 903(7) (definition of “electronic fund transfer”); 12 C.F.R. § 1005.3(c)(3) (implementing EFTA and excluding wire transfers from coverage).

transfer, any part of which is governed by the [EFTA].”¹²⁴ Although the EFTA generally governs “electronic fund transfers” and excludes wire transfers from the definition of “electronic fund transfer,” the CFPB’s new rule covers all remittance transfers, even those that do not meet the definition of “electronic funds transfer.”¹²⁵ That is, a remittance transfer that is a wire transfer is now governed in part by EFTA and is, therefore, specifically excluded from UCC Article 4A. This creates uncertainty with respect to allocation of rights and responsibilities with respect to the senders and receivers of international wire transfers.¹²⁶

The American Law Institute and Uniform Law Commission have approved an amendment to Article 4A that addresses this issue, by adding language providing that “[t]his Article applies to a funds transfer that is a ‘remittance transfer’ as defined in the [EFTA] . . . , unless the remittance transfer is an ‘electronic fund transfer’ as defined in the [EFTA].”¹²⁷ As of this writing, we understand that this amendment is being considered by a number of state legislatures.

Amending Account-Opening Fee Limits

In April 2012, the Bureau issued a proposed rule¹²⁸ to implement the high-fee credit card provisions the Credit Card Accountability Responsibility and Disclosure Act of

¹²⁴U.C.C. § 4-108.

¹²⁵See EFTA § 919(e)(1) (explicitly applying the EFTA to remittance transfers that are not electronic fund transfers).

¹²⁶See 77 Fed. Reg. 6,194, 6,211 (“Many commenters, including the Office of the Comptroller of the Currency (OCC), argued that this outcome creates legal uncertainty that will disrupt the long-standing legal framework governing the allocation of risks among financial institutions of wire transfers.”).

¹²⁷Uniform Law Commission. (June 5, 2012) Meeting of the Uniform Law Commission on Proposed Revisions to UCC Section 4A-108 and its Comments, for Approval under Section 4.3(b)(3) of the ULC Constitution at http://www.uniformlaws.org/shared/docs/executive/2012_06_05_Min_EC_ConfCall.pdf.

¹²⁸Truth in Lending, 77 Fed. Reg. 21,875 (Apr. 12, 2012).

2009 (“CARD Act”).¹²⁹ The CARD Act limits the amount of up-front fees that issuers of credit cards can charge to consumers to 25% of the total credit limit: “[i]f the terms of a credit card account . . . require the payment of any [account opening] fees . . . by the consumer *in the first year during which the account is opened* . . . in excess of 25 percent of the total amount of credit authorized under the account . . . [then] no payment of any fees may be made from the credit made available under the terms of the account.”¹³⁰

In 2011, the FRB made a rule implementing the CARD Act, which provided that fees could not exceed 25% of the credit limit, even if those fees are paid by the consumer out-of-pocket, prior to account opening.¹³¹ This rule was subsequently transferred to the CFPB on the Designated Transfer Date.

A credit card issuer filed a lawsuit challenging the FRB’s rule and alleging that by limiting fees charged prior to account opening, the FRB did not give effect to the language in the law stating that only fees charged “in the first year during which the account is opened” are limited. The credit card issuer succeeded in obtaining a district court decision¹³² to block implementation of the rule, and the Bureau’s proposed rule is in response to the court’s preliminary injunction order. Under the Bureau’s proposed rule, fees charged prior to account opening would be excluded from the calculation to determine whether account-opening fees exceed 25% of an account’s credit limit.¹³³

SUPERVISORY INITIATIVES

The CFPB is charged by the Dodd-Frank Act with supervising and examining certain financial institutions and Covered Persons:

- Very Large Institutions, i.e., those depository institu-

¹²⁹Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (codified in scattered sections of 15 U.S.C.).

¹³⁰15 U.S.C.A. § 1637(n)(1) (emphasis added).

¹³¹76 Fed. Reg. 22,948 (Apr. 25, 2011) (codified at 12 C.F.R. § 226.52(a)).

¹³²*First Premier Bank v. U.S. Consumer Financial Protection Bureau*, 819 F. Supp. 2d 906 (D.S.D. 2011).

¹³³77 Fed. Reg. 21,875 (Apr. 12, 2012).

- tions and credit unions with over \$10 billion in assets, and any affiliate of a Very Large Institution;¹³⁴
- Any Covered Person who offers or provides origination, brokerage, or servicing of consumer mortgage loans, or loan modification or foreclosure relief services in connection with consumer mortgage loans;¹³⁵
 - Any Covered Person who offers or provides to a consumer a private student loan;¹³⁶
 - Any Covered Person who offers or provides to a consumer a “payday loan”;¹³⁷
 - Any Covered Person who “is a larger participant of a market for other consumer financial products or services,” as defined by rule to be made by the Bureau;¹³⁸
 - Any Covered Person whom “the Bureau has reasonable cause to determine . . . 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.”¹³⁹

The Bureau is directed by the Dodd-Frank Act to examine these financial institutions “for purposes of—(A) assessing compliance with the requirements of Federal consumer financial law; (B) obtaining information about [their] activities and compliance systems or procedures . . .; and (C) detecting and assessing risks to consumers and to markets for consumer financial products and services.”¹⁴⁰

On the Designated Transfer Date, July 21, 2011, the CFPB formally began its program to supervise Very Large Institutions, which amounted to a total of 111 banks and credit unions.¹⁴¹ Following the appointment of Richard Cordray as CFPB Director in January 2012, the CFPB began its

¹³⁴DFA § 1025(a).

¹³⁵DFA § 1024(a)(1)(A).

¹³⁶DFA § 1024(a)(1)(D).

¹³⁷DFA § 1024(a)(1)(E).

¹³⁸DFA § 1024(a)(1)(B).

¹³⁹DFA § 1024(a)(1)(C).

¹⁴⁰DFA §§ 1024(b)(1), 1025(b)(1).

¹⁴¹See CFPB, Consumer Financial Protection Bureau Outlines Bank Supervision Approach: CFPB Will Begin Its Examination Program for Large Banks on July 21, Press Release, (July 12, 2012), available at <http://www.consumerfinance.gov>

program of non-bank supervision.¹⁴² As explained in greater detail below, the CFPB also began the process of designating “larger participants” to be supervised, and proposed a rule for identifying Covered Persons who engage in conduct that presents risks to consumers.

Examination Procedures Released

In October 2011, the Bureau issued its Supervision and Examination Manual (“Manual”), as a guide to how it will supervise and examine consumer financial service providers under its jurisdiction for compliance with Federal Consumer Financial Law.¹⁴³ This initial manual was based largely on existing examination procedures developed under the auspices of the Federal Financial Institutions Examination Council (“FFIEC”) for the Enumerated Consumer Laws, such as the Truth in Lending Act, Real Estate Settlement Procedures Act, and Fair Credit Reporting Act.¹⁴⁴

The Manual is divided into three parts. The first part describes the supervision and examination process. The second part contains examination procedures, including both general instructions and procedures for determining compliance with specific regulations. The third part presents templates for documenting information about supervised entities and the examination process, including examination reports.

Although the Manual is based largely on existing FFIEC materials, the CFPB also has included examination procedures organized by product and line of business. The initial

www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-outlines-bank-supervision-approach/.

¹⁴²See CFPB, Consumer Financial Protection Bureau launches nonbank supervision program, Press Release, (Jan. 5, 2012), available at <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-launches-nonbank-supervision-program/>.

¹⁴³CFPB, Supervision and Examination Manual (Oct. 13, 2011), available at http://www.consumerfinance.gov/wp-content/themes/cfpb_theme/images/supervision_examination_manual_11211.pdf.

¹⁴⁴The FFIEC is a formal interagency body empowered to prescribe uniform principles, standards, and report forms for the federal examination of financial institutions by the FRB, the FDIC, the NCUA, the OCC, and the CFPB, and to make recommendations to promote uniformity in the supervision of financial institutions. See 12 U.S.C.A. § 3303 (establishing FFIEC).

release in October 2011 included procedures for reviewing mortgage servicing. Subsequent supplements to the Manual have addressed mortgage origination examination procedures,¹⁴⁵ and short-term, small-dollar lending (e.g., payday lending) examination procedures.¹⁴⁶ Also, in conjunction with the other FFIEC agencies, the CFPB issued examination procedures for federally regulated depository institutions under the Secure and Fair Enforcement for Mortgage Licensing Act of 2008.¹⁴⁷

Production of Privileged Information in Examinations

In early January 2012, the CFPB announced that supervised entities cannot refuse to produce documents to a CFPB examiner and cannot assert attorney-client privilege in response to a request for documents from a CFPB examiner.¹⁴⁸ In this same Bulletin, the CFPB claimed that any privilege attached to a document produced to the CFPB in response to an examination request would not be waived.¹⁴⁹ In support of this argument, however, the CFPB relied on a federal statute that specifically provides that attorney-client privilege would not be waived with respect to documents produced to the FDIC, OCC or FRB, without mentioning the CFPB.¹⁵⁰

¹⁴⁵See CFPB, Examination Procedures: Mortgage Origination (Jan. 11, 2012), available at <http://files.consumerfinance.gov/f/2012/01/Mortgage-Origination-Examination-Procedures.pdf>.

¹⁴⁶See CFPB, Short-Term, Small-Dollar Lending Examination Procedures (Jan. 19, 2012), available at <http://files.consumerfinance.gov/f/2012/01/Short-Term-Small-Dollar-Lending-Examination-Manual.pdf>.

¹⁴⁷See CFPB, Consumer Laws and Regulations: SAFE Act (Mar. 7, 2012), available at http://files.consumerfinance.gov/f/201203_cfpb_update_SAFE_Act_Exam_Procedures.pdf.

¹⁴⁸See CFPB Bulletin 12-01 (Jan. 4, 2012) ("Supervised institutions may not selectively withhold responsive documents . . . Failure to provide information required by the Bureau is a violation of law."), available at http://files.consumerfinance.gov/f/2012/01/GC_bulletin_12-01.pdf.

¹⁴⁹CFPB Bulletin 12-01 (Jan. 4, 2012) ("Supervised institutions may not selectively withhold responsive documents . . . Failure to provide information required by the Bureau is a violation of law."), available at http://files.consumerfinance.gov/f/2012/01/GC_bulletin_12-01.pdf.

¹⁵⁰See 12 U.S.C.A. § 1828(x) ("The submission by any person of any information to any Federal banking agency . . . for any purpose in the course of any supervisory or regulatory process of such agency . . . shall

To remedy this uncertainty, in March 2012 the CFPB proposed a rule to facilitate the production of privileged information to the CFPB, and the re-disclosure of that data by the CFPB to other federal and state agencies.¹⁵¹ This rule was made final without any alteration in July 2012.¹⁵²

The rule added two provisions to the CFPB Rules of Practice. The first provision provides that the “submission by any person of any information to the CFPB for any purpose in the course of any supervisory or regulatory process of the Bureau shall not be construed as waiving, destroying, or otherwise affecting any privilege” with respect to the information.¹⁵³ The second provision provides that the CFPB “shall not be deemed to have waived any privilege applicable to any information by transferring that information to, or permitting that information to be used by, any Federal or State agency.”¹⁵⁴

This latter provision, permitting the CFPB to disclose to other agencies without waiving privileges is much broader than similar authority to the Federal banking agencies. Specifically, the banking agencies may share privileged information with other Federal agencies, and the statute specifically contemplates other Federal banking agencies and financial regulators such as the Farm Credit Administration, Federal Housing Finance Agency and NCUA, as well as the Government Accountability Office.¹⁵⁵ The CFPB’s rule, on the other hand, would permit sharing with “any Federal or State agency,” including a law enforcement agency such as the FTC or a State Attorney General.

“Larger Participant” Rulemaking

As noted above, the CFPB has special authority to examine Covered Persons that it designates as “larger participants” of consumer financial markets.

not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information.”); 12 U.S.C.A. § 1813 (defining “Federal banking agency” to include only the OCC, FRB, FDIC and the now-defunct Office of Thrift Supervision).

¹⁵¹See 77 Fed. Reg. 15,286 (Mar. 15, 2012).

¹⁵²77 Fed. Reg. 39,617 (July 5, 2012).

¹⁵³12 C.F.R. § 1070.48.

¹⁵⁴12 C.F.R. § 1070.47(c).

¹⁵⁵12 U.S.C.A. § 1821(t).

In February 2012, the CFPB proposed its initial Larger Participant Rule. The proposed rule only applied to “debt collection” and “consumer reporting” markets.¹⁵⁶ In selecting these two markets for its initial rulemaking, the CFPB noted the considerable impact that debt collectors and consumer reporting agencies have on American consumers.¹⁵⁷ The proposed rule would have defined “larger participants” of the covered markets in terms of the annual receipts of the participant for the covered activities, “because [revenue] approximates market participation in these two markets.”¹⁵⁸

With regard to debt collectors, a collector with annual receipts of more than \$10 million would be subject to supervision. The threshold triggering supervision for consumer reporting agencies would be \$7 million under the proposed rule.

According to the CFPB, this proposal was the “first in a series” of Larger Participant Rule proposals. The CFPB plans to follow up on this initial proposal with subsequent proposals to supervise other types of financial institutions, such as finance companies, prepaid card issuers, money transmitters and check cashers. The CFPB further noted that subsequent rulemakings covering additional markets may use different criteria as appropriate for each market.

In July 2012, the CFPB issued a final rule regarding the supervision of larger participants in consumer reporting markets.¹⁵⁹ The final rule was substantially the same as the proposal, including the \$7 million revenue threshold.

At the same time as it issued its final “consumer reporting” rule, the CFPB stated that it plans to issue a final “larger participant” rule regarding “debt collection” markets

¹⁵⁶77 Fed. Reg. 9,592 (Feb. 17, 2012).

¹⁵⁷77 Fed. Reg. at 9,597, 9,602.

¹⁵⁸See CFPB, Consumer Financial Protection Bureau proposes rule to supervise larger participants in consumer debt collection and consumer reporting markets, Press Release, February 16, 2012, available at <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-proposes-rule-to-supervise-larger-participants-in-consumer-debt-collection-and-consumer-reporting-markets/>.

¹⁵⁹77 Fed. Reg. 42,874 (July 20, 2012).

“this fall,” and “plans to propose additional ‘larger participant’ rules in the future.”¹⁶⁰

Procedures for Designating Nonbanks Posing Risks to Consumers

As noted, the Dodd-Frank Act provides the CFPB with the authority to supervise “any Covered Person who . . . the Bureau has reasonable cause to determine, by order, after notice to the person and a reasonable opportunity to respond, that such person 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.”¹⁶¹

In May 2012, the CFPB proposed procedural rules governing the Bureau’s ability to subject a non-depository Covered Person to its supervisory authority because it is engaging in conduct that presents risks to consumers.¹⁶² Under the proposal, Covered Persons that the CFPB determines are engaging in risky conduct would be subject to direct examination by the CFPB for at least two years.

The proposed rule would prescribe procedures to notify a non-bank that it is being considered for supervision. The proposal would permit the Bureau staff to issue a notice to a Covered Person when the “Bureau *may have* reasonable cause to determine that the nonbank Covered Person is engaging, or has engaged, in conduct that poses risks to consumers.”¹⁶³ The person would then be permitted to respond within 20 days, and also could request to make an oral presentation. The proposed rule would set out what the CFPB requires in the response.¹⁶⁴

The proposal does not define what would constitute reasonable cause, nor does it specify the “risks to consumers” that would justify an order subjecting a Covered Person to CFPB supervision.

¹⁶⁰See CFPB, Consumer Financial Protection Bureau to supervise credit reporting, Press Release, July 16, 2012, available at <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-to-supervise-credit-reporting/>.

¹⁶¹DFA § 1024(a)(1)(C).

¹⁶²77 Fed. Reg. 31,226 (May 25, 2012).

¹⁶³Proposed § 1091.102(a) (emphasis added).

¹⁶⁴77 Fed. Reg. 31,226 (May 25, 2012).

The proposal also would include a mechanism for non-banks to file a petition to terminate supervision authority after two years.¹⁶⁵

ENFORCEMENT INITIATIVES

The Bureau has established its enforcement function within its Division of Supervision, Enforcement, Fair Lending and Equal Opportunity. This is the largest section of the Bureau, accounting for more than half of Bureau employees. By Fiscal 2013, beginning September 2012, the Division of Supervision, Enforcement, Fair Lending and Equal Opportunity will have 873 full-time employees, representing 64% of the Bureau's total of 1,359 employees.¹⁶⁶

Although the CFPB enforcement staff is reportedly conducting a number of confidential law enforcement investigations, as of this writing, the Bureau has brought only one enforcement action (described below). In addition, the Bureau has outlined several enforcement policies and procedures, discussed here.

“Early Warning Notice” Procedure

In November 2011, the Bureau issued a Bulletin announcing its policy to notify the subject of an investigation before bringing an enforcement action.¹⁶⁷ The policy was initially referred to as the “Early Warning Notice,” and was subsequently renamed the Notice and Opportunity to Respond and Advise.¹⁶⁸ Then-Enforcement Director Richard Cordray stated that the new policy is intended alert the CFPB to possible “unintended consequences” of enforcement actions, and to ensure that any actions brought by the CFPB are consistent with its broader consumer protection agenda.

¹⁶⁵77 Fed. Reg. 31,226 (May 25, 2012).

¹⁶⁶See CFPB, Program Summary by Budget Activity, CFPB FY 2013 Budget Estimates, available at <http://files.consumerfinance.gov/f/2012/02/budget-in-brief.pdf>.

¹⁶⁷See CFPB, Consumer Financial Protection Bureau plans to provide early warning of possible enforcement actions, Press Release, Nov. 7, 2011, available at <http://www.consumerfinance.gov/pressrelease/consumer-financial-protection-bureau-plans-to-provide-early-warning-of-possible-enforcement-actions/>.

¹⁶⁸See CFPB Bulletin 2011-04 (Enforcement) (issued Nov. 7, 2011; updated Jan. 18, 2012), available at <http://files.consumerfinance.gov/f/2012/01/Bulletin10.pdf>.

The policy is completely discretionary, and the Bureau staff is not required to give notice where notice would not be “appropriate,” such as in cases of ongoing fraud or where the CFPB “needs to act quickly.”¹⁶⁹ In addition, the policy requires a very fast turnaround by targets of investigations: any response to the notice is due within 14 calendar days, and the policy does not address whether extensions of that time period may be requested or granted.¹⁷⁰

The Early Warning Notice procedure appears to be modeled on the “Wells Letter” procedure at the Securities and Exchange Commission (“SEC”).¹⁷¹ The SEC’s Wells submission procedures were instituted nearly 40 years ago, and their goal was to ensure that the SEC uses its limited enforcement resources wisely and in the public interest. To that end, one of the purposes of the SEC’s Wells process is to encourage give-and-take between regulators and respondents, including the SEC opening its investigation files, as appropriate, so that a respondent can assess the strength of the government’s case.¹⁷² There is no mention in the CFPB’s announcement of a similar open file policy.

Bulletin on Fair Lending Enforcement

In April 2012, the CFPB released a Bulletin confirming that the doctrine of “disparate impact” applies under the ECOA.¹⁷³ “Disparate impact” discrimination, also known as “effects test” discrimination, occurs when a lender employs a

¹⁶⁹CFPB Bulletin 2011-04 (Enforcement) (issued Nov. 7, 2011; updated Jan. 18, 2012), available at <http://files.consumerfinance.gov/f/2012/01/Bulletin10.pdf>.

¹⁷⁰CFPB Bulletin 2011-04 (Enforcement) (issued Nov. 7, 2011; updated Jan. 18, 2012), available at <http://files.consumerfinance.gov/f/2012/01/Bulletin10.pdf>.

¹⁷¹See generally, Charles R. Mills and Benjamin J. Oxley, Comparing the “Wells Processes” of the SEC, CFTC, and FERC: Is There Room for Improvement? (2008).

¹⁷²See Charles R. Mills and Benjamin J. Oxley, Comparing the “Wells Processes” of the SEC, CFTC, and FERC: Is There Room for Improvement? (2008). at 7 (“The exchange of information in a Wells meeting is critical to the success of the SEC’s process because it is the receipt of the staff’s evidentiary and legal analysis that allows defense counsel to prepare an informative and responsive Wells submission that can specifically expose any evidentiary flaws or legal infirmities within the staff’s proposed case, if they exist.”).

¹⁷³See CFPB Bulletin 2012-04 (Fair Lending) (Apr. 18, 2012).

facially neutral policy or practice, but the policy or practice has a disproportionate adverse impact on applicants from a group protected against discrimination (such as, women, people with disabilities, or the elderly).¹⁷⁴

The CFPB's Bulletin is consistent with a 1994 policy statement on fair lending enforcement published by the federal banking agencies, FTC, HUD, and the Department of Justice, among others.¹⁷⁵ Nonetheless, the CFPB Bulletin is controversial, and the American Bankers Association has petitioned the FRB to reconsider the application of disparate impact theory to enforcement under the ECOA and Fair Housing Act,¹⁷⁶ arguing that the use of disparate impact analysis under the ECOA is based on a line of employment discrimination cases that have since been reversed by the Supreme Court.¹⁷⁷ Earlier this year, the Supreme Court was set to decide whether "disparate impact" doctrine applied under the Fair Housing Act,¹⁷⁸ but the appellant in that case dismissed its appeal before the Supreme Court could hear the case.¹⁷⁹

Procedural Rules Issued

In June 2012, the CFPB announced three Final Rules and

¹⁷⁴See CFPB Bulletin 2012-04 (Fair Lending) (Apr. 18, 2012).

¹⁷⁵See <http://www.fdic.gov/regulations/laws/rules/5000-3860.html>. (The 1994 interagency policy statement also explains discrimination theory and provides examples. It is a helpful document in understanding the agencies' views on what can be a very complicated subject.).

¹⁷⁶42 U.S.C.A. §§ 3601 et seq.

¹⁷⁷See letter to Ben Bernanke, Chairman, Federal Reserve Board of Governors, from Frank Keating, President and CEO, American Bankers Association, ABA Fair Lending Concerns, July 28, 2012, available at <http://www.aba.com/Issues/LetterstoCongress/Documents/CoverLettertoFairLendingWhitePaper.pdf>; see also Buckley Sandler, LLP, Disparate Impact Under FHA and ECOA: A Theory Without a Statutory Basis, July 13, 2012, available at <http://www.aba.com/Solutions/Compliance/Documents/DisparateImpactWhitePaper.pdf>.

¹⁷⁸We note that the Fair Housing Act ("FHA"), prohibiting discrimination in any aspect of a housing transaction (including lending), is not one of the Enumerated Consumer Laws or Federal Consumer Financial Laws, and therefore is not within the CFPB's enforcement jurisdiction. The CFPB, however, has authority to enforce the ECOA, and the basis for disparate impact liability under the ECOA is the same as under FHA. A decision on one issue would inform the result on the other.

¹⁷⁹*Magner v. Gallagher*, 132 S. Ct. 1306, 181 L. Ed. 2d 1035 (2012).

one Interim Final Rule regarding its enforcement proceedings.¹⁸⁰ The three Final Rules—regarding investigative procedures, administrative adjudications, and notifications from State officials—were originally published as Interim Final Rules in July 2011, shortly after the Designated Transfer Date.¹⁸¹ The Interim Final Rule sets forth procedures for Covered Persons to recover legal fees under the Equal Access to Justice Act (“EAJA”).¹⁸²

(An “interim final rule,” is a rule which takes effect immediately, but on which the agency is nonetheless requesting public comment. Agencies are generally required to first propose rules for public comment, rather than issue them immediately in final form, but agencies are permitted under the Administrative Procedure Act to issue an interim final rule, where the rule concerns internal agency procedures, such as the enforcement procedure rules here.¹⁸³ Although interim final rules are frequently revised by the agency at a later date in response to the comments received, there is no requirement that an agency revise an interim final rule or republish an interim final rule in final form.)

The four CFPB rules relating to enforcement procedures are as follows:

- **Rules Relating to Investigations:** This rule describes the CFPB’s procedures for investigating whether persons have engaged in conduct that violates Federal Consumer Financial Law. The Rule establishes the CFPB’s authority to conduct investigations, including the procedures for issuing subpoenas and other compul-

¹⁸⁰ 77 Fed. Reg. 39,101 (June 29, 2012) (Rules Relating to Investigations); 77 Fed. Reg. 39,058 (June 29, 2012) (Rules of Practice for Adjudication Proceedings); 77 Fed. Reg. 39,112 (June 29, 2012) (State Official Notification Rule); 77 Fed. Reg. 39,117 (June 29, 2012) (Equal Access to Justice Act Implementation Rule).

¹⁸¹ 76 Fed. Reg. 45,168 (July 28, 2011) (Rules Relating to Investigations); 76 Fed. Reg. 45,338 (July 28, 2011) (Rules of Practice Governing Adjudication Proceedings); 76 Fed. Reg. 45,174 (July 28, 2011) (State Official Notification Rule).

¹⁸² 5 U.S.C.A. § 504; 28 U.S.C.A. 2412.

¹⁸³ 5 U.S.C.A. § 553(b) (requiring that rules should generally be proposed for comment, before being made final, but including an exception for “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice”).

sory process and the procedures for objecting to or quashing such process.¹⁸⁴

- Rules of Practice for Adjudication Proceedings: The CFPB can conduct administrative adjudications (hearings) before its own Administrative Law Judges to enforce compliance with federal laws and regulations. This Rule sets out the procedures and rules to be followed in those proceedings.¹⁸⁵
- State Official Notification Rule: The Dodd-Frank Act requires State officials to notify the CFPB of legal actions that the State officials bring to enforce compliance with certain provisions of the Dodd-Frank Act and CFPB regulations.¹⁸⁶ This Rule sets out the procedure by which those notifications shall be made.¹⁸⁷
- EAJA Implementation Rule: The EAJA allows certain prevailing parties in administrative proceedings to recover attorney fees and expenses. This Interim Final Rule establishes who can seek to recover these costs and how to do so.¹⁸⁸

First Enforcement Action

On July 18, 2012, the OCC and CFPB announced a \$210 million settlement with Capital One Bank for deceptive practices relating to the sale of “payment protection” and “credit monitoring.”¹⁸⁹ This is the CFPB’s first formal enforcement action.

“Payment protection” is a debt cancellation product, which allows consumers to request that the bank cancel up to 12 months of minimum payments if they encounter certain life events like unemployment or temporary disability. “Credit monitoring” provides consumers with identity-theft protection and daily monitoring of a consumer’s credit report—for example, to determine if someone is applying for credit in

¹⁸⁴77 Fed. Reg. 39,101 (June 29, 2012).

¹⁸⁵77 Fed. Reg. 39,057 (June 29, 2012).

¹⁸⁶DFA § 1042(b).

¹⁸⁷77 Fed. Reg. 39,117 (June 29, 2012).

¹⁸⁸77 Fed. Reg. 39,112 (June 29, 2012).

¹⁸⁹See *In re Capital One Bank, (USA) N.A., Admin. Proc.* File No. 2012-CFPB-01 (July 16, 2012) http://files.consumerfinance.gov/f/201207_cfpb_consent_order_0001.pdf.

the consumer's name without authorization. The CFPB and OCC alleged that Capital One Bank—through third-party service providers that operated call centers for the sale and marketing of these products—misled consumers about the benefits of the products, failed to notify consumers that buying the products was optional, misrepresented the cost of the products, and made it difficult for consumers to cancel the product.¹⁹⁰

The settlement consisted of \$140 million in redress to consumers, which constituted the entire amount paid for these products by consumers who enrolled on or after August 1, 2010, or unsuccessfully sought to cancel these products on or after August 1, 2010.¹⁹¹ In addition, Capital One Bank paid \$25 million in civil penalties to the CFPB,¹⁹² and \$35 million in civil penalties to the OCC.¹⁹³

The penalties paid to the OCC were deposited in the U.S. Treasury, while the penalties paid to the CFPB were contributed to the CFPB's "Civil Penalty Fund," which was established by the Dodd-Frank Act.¹⁹⁴ When the Bureau obtains a civil penalty in any judicial or administrative action, the Bureau may deposit into the Civil Penalty Fund the amount of the penalty collected.¹⁹⁵ Amounts in the Civil Penalty Fund are available to the Bureau, without fiscal year limitation, for payments to the victims, but to the extent that such victims cannot be located or such payments are otherwise not practicable, the Bureau may use such funds

¹⁹⁰*In re Capital One Bank, (USA) N.A., Admin. Proc. File No. 2012-CFPB-01* (July 16, 2012), available at http://files.consumerfinance.gov/f/201207_cfpb_consent_order_0001.pdf; see also *In re Capital One Bank (USA), N.A., OCC File No. AA-EC-2012-63*, at Article II, available at <http://www.occ.gov/static/enforcement-actions/ea2012-153.pdf>.

¹⁹¹*In re Capital One Bank, (USA) N.A., Admin. Proc. File No. 2012-CFPB-01* (July 16, 2012) at paras. 15–17.

¹⁹²*In re Capital One Bank, (USA) N.A., Admin. Proc. File No. 2012-CFPB-01* (July 16, 2012) at para. 30.

¹⁹³*In re Capital One Bank (USA), N.A., OCC File No. AA-EC-2012-63*, at Article II, available at <http://www.occ.gov/static/enforcement-actions/ea2012-153.pdf>.

¹⁹⁴DFA § 1017(d).

¹⁹⁵DFA § 1017(d).

for the purpose of consumer education and financial literacy programs.¹⁹⁶

As a result, the Bureau can use the Civil Penalty Fund to defray expenditures related to consumer education, and thereby free up resources for other purposes. For example, in this case, all consumers who were arguably injured by Capital One's conduct will be made whole, and thus the full \$25 million penalty will be available to the CFPB for other purposes. We are not aware of any other federal agency that is permitted to use civil penalties to fund its own expenses—all other federal agencies are required to contribute civil penalties to the general public fund in the U.S. Treasury, where they are counted with other federal revenues.

CONCLUSION

The CFPB's first year was largely devoted to establishing policies and procedures for running the agency and examining financial companies for compliance with federal laws. The Bureau also undertook several important policy initiatives concerning specific financial products that will set the stage for rulemaking, guidance and enforcement actions in the coming years. The Bureau also made one substantive rule, concerning remittance transfers, proposed another rule, regarding credit card fees, and closed the year with its first enforcement action. In Year Two, we can expect that the CFPB will build upon the foundation from this first year, with more rules, more examination, and more law enforcement, as the CFPB establishes itself as the primary consumer protection regulator for the financial services industry.

¹⁹⁶DFA § 1017(d).