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The Consumer Financial Protection Bureau Completes Its First Six Months — But Questions About Its Future Remain

By Stephen A. Fogdall

On January 31, 2012, the Consumer Financial Protection Bureau ("CFPB") released its first Semi-Annual Report, marking the completion of its first six months of existence. The release of the report coincided with the appearance of the CFPB Director, Richard Cordray, before the Senate Committee on Banking, Housing and Urban Affairs. Despite the optimistic tone of both the CFPB's Semi-Annual Report and Mr. Cordray's remarks before the Committee, there are a number of questions about the CFPB's future that have yet to be answered.

First, there is uncertainty about how long Mr. Cordray's tenure as the CFPB's Director will last. Mr. Cordray was appointed by President Obama in a controversial recess appointment on January 4, 2012. Some commentators have argued that the appointment was invalid because the Senate was in a "pro forma" session and not truly in recess. Some commentators have also argued that the Consumer Financial Protection Act ("CFPA"), the statute that created the CFPB, was specifically drafted to prohibit a recess appointment of the Director. They point to a provision stating that the Secretary of the Treasury "shall perform the functions of the Bureau" until "the Director of the Bureau is confirmed by the Senate." CFPA § 1066, 12 U.S.C. § 5586. Mr. Cordray's appointment has been so controversial that some Republicans on the Senate Banking Committee boycotted his appearance. And Republicans who attended the meeting told Mr. Cordray they felt his appointment should be short-lived. The Associated Press reported that Senator Mike Johanns of Nebraska stated to Mr. Cordray, "I can't imagine how anybody could maintain, under the circumstances, that your appointment and your service is valid." The Senator also predicted that Mr. Cordray's appointment would be challenged in court and that "the Supreme Court will ultimately decide the constitutionality of the President's action."

Second, there is still uncertainty about who precisely the CFPB will regulate. The CFPA grants the CFPB authority of varying degrees over three broad classes of entities: (1) depository institutions with $10 billion or more in assets; (2) depository institutions with less than $10 billion in assets; and (3) certain non-depository institutions. The allocation of authority between the CFPB and other federal agencies with respect to these three categories of institutions is far from clear. The CFPA gives the CFPB rulemaking authority over all of these entities, but allocates examination and enforcement authority very differently. The CFPB will have exclusive examination authority with respect to consumer financial laws only over large depository institutions (the first of the three categories). Other banking agencies will retain examination authority over smaller institutions. As to enforcement authority, the CFPB will have to coordinate, and potentially compete, with other federal agencies. While the CFPA gives the CFPB "primary" enforcement authority over large depository institutions and certain non-depository institutions, other agencies may exercise enforcement authority as well, if they recommend an enforcement action to the CFPB and the CFPB fails to proceed. Moreover, the precise contours of these three categories of entities are still being defined. Only in November 2011 did the CFPB settle on the measure it would use to determine the asset size of depository institutions. And the range of non-depository institutions that will fall within the CFPB's authority has yet to be determined. The extent of that category will not be fully known until the CFPB decides which entities it deems to be "pos[ing] risks to consumers with regard to the offering or provision of consumer financial products or services," and which entities it deems to be "larger participant[s]" of a "market for consumer financial products or services," making these entities subject to its regulations. CFPA § 1024(a)(1)(B)&(C), 12 U.S.C. § 5514(a)(1)(B)&(C).

Third, there is also uncertainty about the scope of conduct the CFPB is authorized to target. The CFPA authorizes the

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CFPB to define and prohibit "unfair, deceptive or abusive acts or practices in connection with" consumer financial products or services. CFPA § 1031(b), 12 U.S.C. § 5531(b). This language is noticeably broader than the powers granted to the Federal Trade Commission ("FTC"), which is authorized to define and prohibit "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a). The authority given to the CFPB incorporates a new component of impropriety — namely, acts or practices that are "abusive." What precisely these are, however, is undetermined. Moreover, the broader authority granted to the CFPB does not displace the narrower authority already granted to the FTC. Under the CFPA, the FTC retains the authority it has always had to target "unfair or deceptive" acts or practices. Thus, financial services companies subject to the CFPB's and FTC's enforcement powers will have to adhere to two standards of conduct simultaneously — the FTC's "unfair or deceptive" standard and the CFPB's new "unfair, deceptive or abusive" standard that has yet to be defined.

Institutions that will or may be affected by these new regulations would be well advised to keep close watch on the continued work of the CFPB and Director Cordray. ◆

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