

## Articles

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### Six Things to Know about the CFPB

*The Independent Counselor*

Since opening for business in July 2011, the Consumer Financial Protection Bureau (“CFPB” or the “Bureau”) has focused on regulating consumer financial markets and protecting consumers through studying markets, educating consumers, and enforcement. While still in its infancy, it would be an understatement to say that the CFPB has been busy, as it’s been downright transformational.

Here are five things to know about the CFPB:

#### **1. The name says it all. Consumers rule.**

Unlike other government agencies that regulate financial institutions, the CFPB takes a consumer-centered approach in everything that it does. The CFPB structure and operations are designed so that the focus is on ensuring that banks and nonbanks comply with federal consumer financial laws and to detect and assess the risks to consumers that arise from these businesses.

As a result, the CFPB’s regulatory, supervisory, and investigatory powers have been used most frequently where there is a perception of greatest risk to consumers. CFPB Director Richard Cordray has summed up the Bureau’s focus as: “As the economy recovers, we want people to know they now have a new agency standing on their side, looking out for their interests, to help restore their confidence in the consumer financial marketplace.”

#### **2. The CFPB will use every tool at its disposal.**

The CFPB has promoted the use of mortgage and student loan shopping sheets; brought enforcement actions against credit card companies, mortgage foreclosure assistance providers, and debt settlement companies; has adopted sweeping new rules for the mortgage market; and signaled policy positions on what constitutes fair auto lending despite not having clear authority over auto dealers. Also, it is now supervising banks and larger credit bureaus and debt buyers and collectors, and, soon will be supervising student loan servicers and potentially other nonbank financial services makers. On top of all this, the CFPB actively solicits and processes consumer complaints and, on the consumer advocacy front it has been a fierce advocate for servicemembers, veterans, older Americans, and their families.

The lesson here is a simple one: The CFPB will tackle perceived issues in consumer financial markets using any or all of the tools at its disposal. That may mean traditional notice and comment rulemaking, but it might just mean enforcement, issuing a bulletin, writing a blog post, or using the power of the bully pulpit.

#### **3. The CFPB is focused on the full product and service; not just advertising and marketing.**

The CFPB’s general authority to regulate unfair, deceptive, or abusive acts and practices is very similar to the long-held authority granted to the Federal Trade Commission (“FTC”), and federal banking agencies under Section 5 of the FTC Act. Indeed, the CFPB’s first round of enforcement actions resulting in consent orders against three credit card companies in 2012 were aggressive displays of enforcement power based on alleged unfair, deceptive, or abusive advertising and marketing and debt collection practices. They were high profile and headline grabbing. Also, the actions were focused on settled areas of the law, the advertising and marketing of add-on products to consumer transactions, and disclosures in communications to consumers. Both of these areas are the bread and butter of the FTC. But advertising and marketing, including disclosures, are not the only focus of the CFPB in either its investigations or supervisory examinations. Rather the CFPB scrutinizes the entire consumer experience: initial advertising, enrollment, fulfillment, complaint handling, and more. The Bureau also has authority to enforce over a dozen additional statutes, some general to particular products and services, but others are broad, including the privacy provisions of the Gramm-Leach-Bliley Act and laws and regulations covering electronic transactions.

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#### **4. The CFPB is controversial.**

The CFPB is controversial, but that does not mean it can be ignored. Even before its creation the CFPB was a lightning rod for criticism because of its organizational structure and power. Many of the concerns raised about the CFPB have been based on its single director structure and virtually bottomless access to financial resources because it is part of the Federal Reserve System and not directly subject to Congressional appropriations.

All of this came to a head in January when the U.S. Court of Appeals for the District of Columbia Circuit issued a decision holding that President Obama had violated the Appointments Clause of the U.S. Constitution in purporting to make “intrasession” recess appointments of three persons to the National Labor Relations Board at a time when Congress was in session. *Noel Canning v. National Labor Relations Board*, No. 12-1115 (Jan. 25, 2013).

The *Noel Canning* decision has substantial implications for the authority of the CFPB to conduct investigations and bring enforcement actions under various statutes it implements. Indeed, Richard Cordray currently is serving as Director of the CFPB pursuant to a recess appointment that the President made on the same day, and during the same purported intrasession recess of the Senate, as the NLRB appointments. As a result, if the *Canning* decision is upheld by the Supreme Court, Cordray’s appointment would be extremely vulnerable to a successful constitutional challenge on the same theory. This means that many final actions already taken or to be taken in the future by the CFPB technically may be subject to a threshold legal challenge that they are invalid because Director Cordray was not lawfully appointed at the time he purported to make these decisions.

Despite or, possibly, in spite of all this, the CFPB is not backing down. By all outward appearances the Bureau is moving forward full steam with its agenda. And, not everything the CFPB has accomplished to date required a director or even regulatory power. So stay tuned.

#### **5. The CFPB believes that it “Gets It.”**

Regulated companies and those that are the focus of its scrutiny may disagree, but the CFPB believes that it “gets it.” Despite being a new agency, the CFPB staff is following through on unfinished business, consumer protection issues long simmering, or ones viewed as too complex by others to tackle. By attacking credit card add on products, mortgage lending and servicing, student lenders and services, auto lending, and other consumer focused hot button issues, the CFPB is signaling that it means business.

The CFPB has teams of staff working on gathering information from voluntary meet and greets with members of the public and industry, formal requests for information, nonpublic investigations, confidential examinations of supervised banks and nonbanks, and consumer complaints. It also has scores of enthusiastic employees – around 1,200 to be exact. This means that when the CFPB “floats” a policy position or issues a bulletin on service provider liability, fair lending, or any one about a half dozen other significant substantive areas of potential sources liability, the CFPB is not merely asking, or suggesting, it is expecting to see its positions followed. For times when its expectations are not followed, the CFPB has invited company employees to act as whistleblowers and is even able to provide them with financial incentives to cooperate.

#### **6. The CFPB is working with other Federal and State Agencies, and State Attorneys General.**

Director Cordray says that collaborative partnerships are built into the DNA of the CFPB. Already the CFPB has taken an enforcement action against a debt settlement company joined by the states of Hawaii, New Mexico, North Carolina, North Dakota, and Wisconsin. Also, the CFPB, FTC, and state attorneys general all share consumer complaints with each other through the Consumer Sentinel database. And, federal and state regulators are part of a consumer financial protection working group to coordinate on big issues, and on individual matters, where the CFPB can share information to further its own investigations of potential violations of consumer financial law.

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All financial products and services providers, and their third-party service providers, should give careful consideration to the CFPB’s focus on studying markets, education, and enforcement, and thoroughly assess whether any of their ongoing activities, and new products and services before they are launched, are in compliance with the law in light of the CFPB’s expectations.

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