Venable CFPB Watch

VENABLE LLP

DEVELOPMENTS AND UPDATES ON THE CONSUMER FINANCIAL PROTECTION BUREAU

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Please contact our attorneys in our CFPB Task Force if you have any questions regarding this update.

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Recent Developments

Launch of the CFPB

Today marks the one-year anniversary of when President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), Pub. L. No. 111-203, 124 Stat. 1376, Title X of which constitutes the Consumer Financial Protection Act ("CFPA"). The CFPA established the new Consumer Financial Protection Bureau ("CFPB") within the Federal Reserve System to regulate the offering and provision of consumer financial products or services. Rather than create the new consumer bureau overnight, the CFPA directed the Secretary of the Treasury to designate a transfer date upon which the CFPB would assume authority for existing enumerated federal consumer protection laws and for consumer compliance supervision over large depository institutions. In September 2010, the Treasury Secretary announced July 21, 2011 as the designated transfer date. The designated transfer date has now arrived. This issue of the *Venable CFPB Watch* describes several of the first formal efforts of the new bureau.

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Request for Comment on Defining Larger Participants Subject to CFPB Supervisory Authority

In one of its first notices, the CFPB has published a request for comments to inform its forthcoming proposed rule that will define “larger participants” in certain consumer financial products or services markets that will be subject to the CFPB’s supervisory authority (“Notice”).[1] Pursuant to the CFPA, the CFPB has direct supervisory authority over depository institutions with more than $10 billion in assets, as well as such authority over certain enumerated nondepository entities (i.e. mortgage originators, brokers and servicers, providers of mortgage modification and foreclosure relief services, payday lenders, and private education lenders). The law further permits the CFPB to extend its supervisory authority over “larger participants” in other non-enumerated consumer financial products or services by rulemaking. The CFPB’s Notice identifies potential areas that may warrant CFPB supervision. Comments are due by August 15, 2011. The CFPB must issue its final rule by July 12, 2012. Highlights from the Notice follow below.

Nondepository Supervisory Authority

While entities subject to federal consumer protection laws must comply with those laws regardless of the CFPB’s rulemaking, this rulemaking would also subject them to CFPB *supervision*. Section 1024 of the CFPA requires the CFPB to implement a risk-based supervisory program over the enumerated nondepository institutions (i.e. mortgage originators, brokers, and servicers, providers of mortgage modification and foreclosure relief services, payday lenders, and private education lenders) as well as over those “larger participants” that it identifies through rulemaking. Through this program, the CFPB may subject these entities to a range of requirements, including among others:

- federal registration (which would be established by a separate rulemaking);
- the submission of reports; and
- onsite examinations to assess compliance with federal consumer financial law.

The exact scope of the program would vary by consumer financial product or service market.

Identifying Larger Participants

Section 1024(b)(2) of the CFPA directs the CFPB to identify larger participants based on the risks they pose to consumers in relevant product and geographic markets and to consider: (1) asset size; (2) volume of transactions; (3) risks to consumers; (4) extent of state supervision; and (5) any other relevant factors determined by the CFPB.

<u>Initial Markets Under Consideration</u>

In its Notice, the CFPB has identified the following markets for potential inclusion in its proposed rulemaking on “larger participants”:

- consumer credit and related activities;
- consumer reporting;
- debt collection;
- debt relief services;
- money transmitting, check cashing and related activities; and
- prepaid cards.

Even if the CFPB limits its initial rulemaking to identifying the above areas, the CFPB has indicated that it may expand the list of “larger participants” through subsequent rulemakings.

To help it determine the appropriate markets, the CFPB has asked for comments on:

- what consumer financial products or service markets should be included;
- how financial product or service markets covered by the rule should be defined; and
- what criteria should be measured and threshold levels set to define larger participants.

Factors in Determining Size of Larger Participants

To assist it determining the appropriate size for larger participants, the CFPB has asked:

- whether a larger participant should be defined based on relative size within a market or on an absolute threshold;
- whether more than one criteria should determine size (*e.g.*, number of annual transactions, number of states where business is conducted); and
- whether the same criteria should be used to define larger participants for every market.

The Notice also requests comments on how the CFPB should measure the criteria as they relate to market participants and how time frames should factor into size measurements.

1. Bureau of Consumer Financial Protection, Notice and Request for Comment, Defining Larger Participants in Certain Consumer Financial Products and Services Markets, 76 Fed. Reg. 38059 (June 29, 2011).

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CFPB Begins Supervision of Large Banks and Affiliates

July 21, 2011 marks the day the CFPB begins its supervision of very large banks with more than $10 billion in assets as well as any subsidiary and affiliate of such depository institutions to ensure compliance with federal consumer financial protection laws. Presently, there are 111 depository institutions that meet the $10 billion threshold level. The CFPB announced its bank supervision approach on July 12th and indicated that the process would initially begin remotely and would be followed by on-site reviews by CFPB examiners. The bureau will also place the initial phase of its Examination Manual on its website at www.ConsumerFinance.gov.

Examiners

The CFPB has stated that its examiners will work out of satellite offices in Chicago, New York, San Francisco, and Washington, DC, and will focus on their specific regions of the country. These examiners—which currently include staff transferred from the Federal Deposit Insurance Corporation, Federal Reserve System, Office of the Comptroller of the Currency, and Office of Thrift Supervision, and are expected to expand to include examiners with state regulatory and industry experience—will undergo further training and are anticipated to spend most of their time on-site at these large banks and at other consumer financial service companies.

Supervisory Process

Section 1025(b) of the CFPA provides the CFPB with authority to require reports and conduct examinations of these large depository institutions. The CFPB has interpreted this provision to permit on-going supervision that will take the form of:

- pre-examination scoping;
- information review;
- data analysis;
- on-site exams;
- regular communication with covered entities and prudential regulators; and
- follow-up monitoring.

While most banks subject to the CFPB will undergo periodic examinations with advance notice, the CFPB has said that the largest and most complex banks will be subject to year-round supervision.

The CFPB has stated that the supervision process will be "constructive" to help ensure that risks posed to consumers are addressed. As outlined by the CFPB, these entities will undergo:

- assessments of internal procedures to determine their ability to detect, prevent, and remedy harm to consumers;
- reviews of compliance requirements during the life cycle of a consumer product or service;
- fair lending reviews; and
- policy and practice reviews for compliance with consumer financial protection laws.

If entities are found not to be compliant, the CFPB will seek corrective actions.

Members of Venable's CFPB Task Force are experienced in helping clients to address all stages of regulatory examinations and are ready to provide assistance.

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CFPB Releases Report on Credit Scores

The CFPB on July 19, 2011 released a report on the variations among credit scores sold to consumers and those used by lenders when making credit decisions. Section 1078 of the Dodd-Frank Act required the CFPB to conduct a study on any differences between these credit scores and to determine whether such variations disadvantage consumers. The Dodd-Frank Act gave the CFPB until July 21, 2011 to deliver the report to Congress. The report notes that many consumers lack an understanding about credit scoring. Additionally, the CFPB indicates that it will conduct a subsequent analysis of data from the nationwide consumer reporting agencies and Fair Isaac Corporation to compare the variations between these credit scores. The report is available online.

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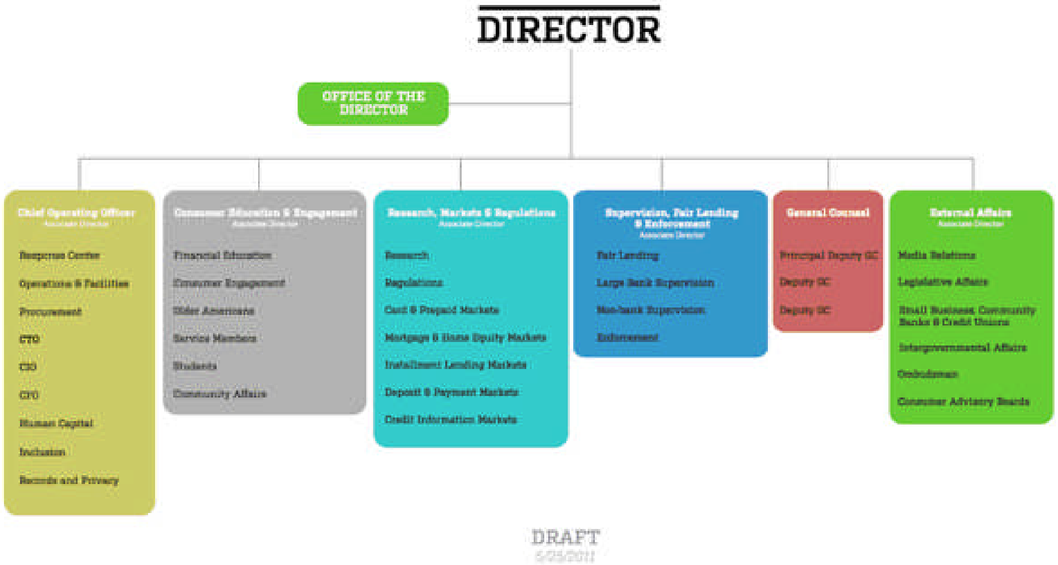
CFPB Structure Chart

The website of the new CFPB may now be viewed at www.ConsumerFinance.gov, and includes helpful information on the new entity, including a chart of the CFPB's structure:



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President Obama Nominates Richard Cordray as CFPB Director

On July 18, 2011, three days before the designated transfer date, President Obama announced his nomination of Richard Cordray to serve as the first Director of the CFPB. Cordray is the former Attorney General of Ohio and previously served as Ohio Treasurer.

Over the last year, Elizabeth Warren, Assistant to the President and Special Advisor to the Secretary of the Treasury on the CFPB, has been leading the CFPB implementation team. In December 2010, Warren selected Cordray to establish the CFPB's Enforcement Division and to serve as the CFPB's Assistant Director for Enforcement.

Cordray's nomination will now be forwarded to Congress, where it must gain Senate approval before Cordray may assume the position of CFPB Director.

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Venable's CFPB Task Force

The Dodd-Frank Act ushered in the most sweeping financial legislation in decades, signaling a new era of tighter regulation and heightened enforcement. The CFPB, a central element of the new law, takes on powers formerly exercised by various regulatory agencies. The central mission of the CFPB, as it is articulated on the bureau's new website, is "to make markets for consumer financial products and services work for Americans—whether they are applying for a mortgage, choosing among credits cards, or using any number of other consumer financial products."[1]

The CFPB is authorized to write and enforce consumer protection regulations targeting a broad range of financial services and products. Other provisions of the law set new requirements for:

- banks, thrifts and credit unions;
- consumer finance lenders;
- mortgage loan originators, loan servicers and brokers;
- currency exchanges;
- real estate settlement companies, appraisers, appraisal companies and appraisal management companies;
- consumer credit reporting agencies;
- debt collectors;
- debt settlement and management services;
- check cashing, collection or guaranty services;
- lenders and brokers in certain lease-to-own arrangements;
- financial and investment advisors (not registered with the SEC);
- payday lenders;
- credit counselors;
- broker-dealers, non-depository trust companies and deposit intermediation services;
- service providers and related persons of covered persons;
- some sellers or issuers of stored value cards and instruments;
- money services businesses, money transmitters and wire transmitters;
- in limited cases, tax preparers, accountants, merchants or retailers and attorneys; and
- financial data processors, including data storage providers, transmission services, and software and hardware providers.

These regulations will indelibly alter the consumer financial landscape.

For businesses that fall under the consumer financial protection legislation, uncertainty lies ahead in the form of the new regulations and enforcement powers. While the route is new, the skills needed to navigate it are not. Venable has the experience to guide businesses through what lies ahead in financial and consumer regulation.

The *Venable CFPB Monitor* is an online tool designed to offer a comprehensive summary of current developments related to the primary provisions of the Consumer Protection Act and the enforcement activity of the CFPB.

The *Monitor* provides links to regulatory initiatives by the CFPB with their corresponding statutory provisions. In addition, the *Monitor* includes other publically available reports and analysis to assist in examination of the CFPB's activities in a particular industry segment.

Venable's CFPB Task Force is uniquely prepared to guide companies through this evolving regulatory environment. We have multiple, long-established practices focused on the intersection of consumer protection and government regulation in financial and commerce. Our decades of experience span advertising and marketing, banking and financial services regulation, corporate and consumer finance, nonprofit and trade association law, and legislative and government affairs.

While the CFPB is new, it takes over responsibilities from agencies we know intimately – such as the Federal Trade Commission, the Treasury Department, the Department of Housing and Urban Development, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Federal Reserve System – and in areas of law that we know inside and out. Members of Venable's CFPB Task Force are ready to guide you in this new era of the CFPB.

1. Learn About the Bureau, Consumer Financial Protection Bureau, http://ww.consumerfinance.gov/the-bureau/.

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