

Recent Developments: Consumer Financial Protection Bureau

The Banking Institute

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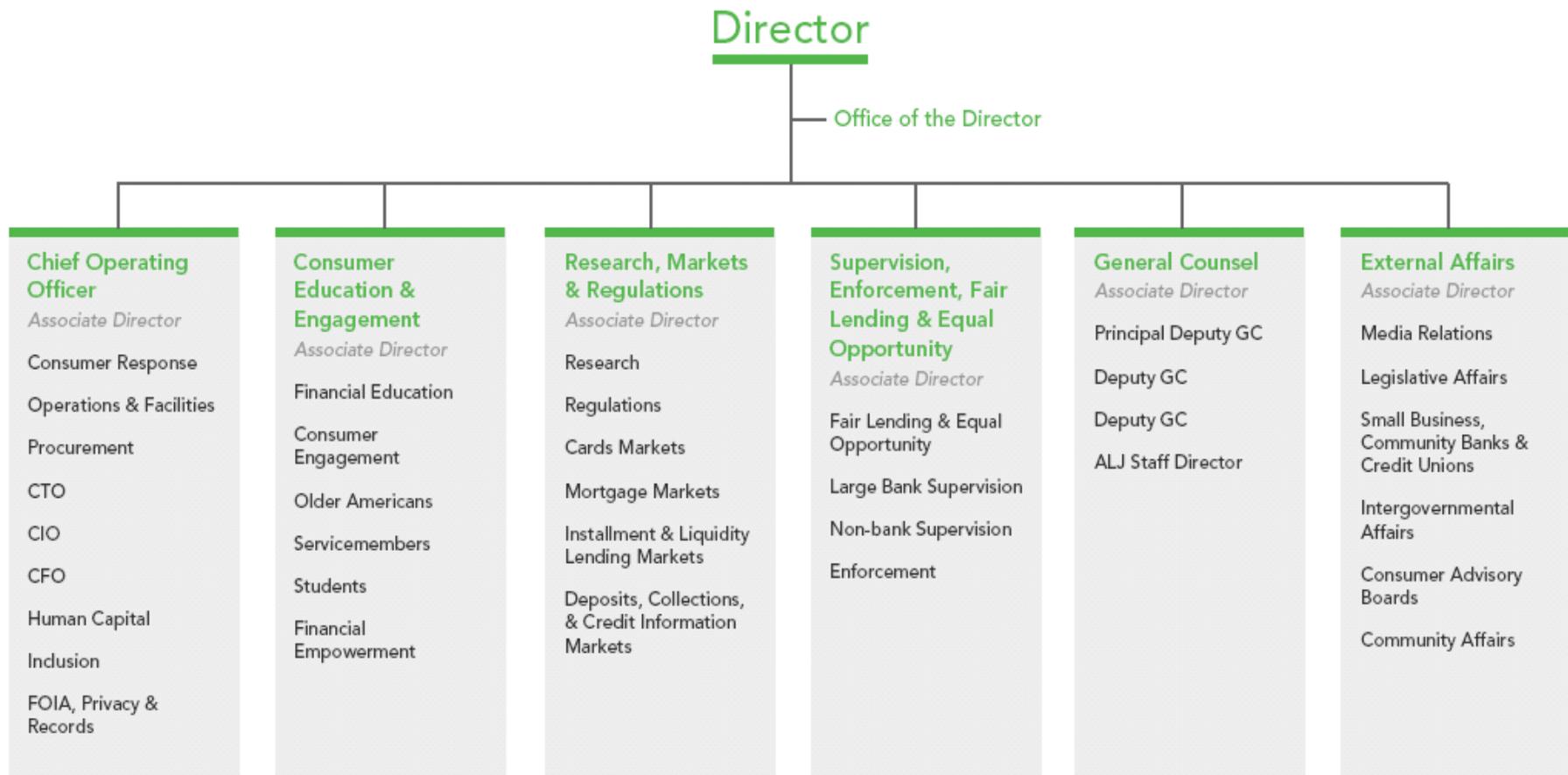


CFPB Recent Developments

- Background on CFPB
- Cordray Appointment
- Office of Fair Lending
- Attorney Client Privilege Rule and Legislation
- Enforcement Process: The NORA
- Other Areas of Focus



Organizational Chart





Dodd-Frank Title X: Consumer Financial Protection Bureau

- **The Bureau's objectives include:**
 - Rulemaking, supervising and examining “covered persons”
 - Enforcing rules related to consumer financial products and services
 - Promoting financial education
 - Investigating consumer complaints
 - Conducting market research
- **Effective Date:** Bureau opened its doors on July 21, 2011



General Powers of the Bureau

- **Rulemaking:** Exclusive authority under existing laws – e.g., TILA, ECOA, FCRA. May make additional rules “as necessary to carry out the purposes of the Federal Consumer Financial Laws”
- **Supervisory / Enforcement:** More limited than rulemaking authority and (in some cases) concurrent supervisory and enforcement authority with respect to the so-called “enumerated consumer laws” as applied to “covered persons” offering “consumer financial product[s] or service[s]”
- **Exemption:** Authority to exempt covered persons, service providers, or consumer financial products or services from Title X’s provisions and rules issued under the title



Supervisory and Examination Activity

- Bureau issued supervision and examination manual on October 13, 2011
 - Lists three principles: risk to consumers, data driven analysis, and consistent standards in supervision of depositories and non-depositories.
 - Notes that every exam must review compliance management and potential UDAAP.
 - Contemplates assigning a Compliance Rating.
- Bureau has been examining large banks and affiliates, and has expanded focus to non-banks since Cordray appointment.



Cordray Appointment

- President Obama named Richard Cordray CFPB Director Cordray through a recess appointment on January 4, 2012.
- Office of Legal Counsel released opinion stating that pro forma sessions do not preclude President from making recess appointments.
- Legal challenge may focus on recess appointments of NLRB members.
- Corday and Bureau are working cooperatively with Congress. CFPB has testified before Congress 15 times.



Issues If Legal Challenge Succeeds

- Cordray argues Director is needed for full supervision over nonbanks.
 - Section 1066 of Dodd-Frank gives the Secretary of the Treasury the authority “to perform the functions of the Bureau *under this subtitle* [Subtitle F] until the Director of the Bureau is confirmed by the Senate.”
- In absence of Director, Bureau had not performed functions most plainly outside of Subtitle F, including the supervision of non-bank institutions.
- If recess appointment is invalid, Bureau will likely retreat to its prior position – and cannot then argue it has inherent authority over nonbanks.
- De Facto Officer Doctrine may be asserted to protect acts by Cordray even if appointment is invalid. *See Ryder v. United States*, 515 U.S. 177, 180 (1995).
- A court might take a still stricter view of the CFPB’s authority without a Director.
- Certain Bureau offices and initiatives are at risk:
 - For example, Dodd-Frank states in Subtitle A that “the Director” must establish the Office of Fair Lending. 12 U.S.C § 1013



Attorney Client Privilege and Legislation

- Congress gave the Bureau examination powers similar to those held by the banking agencies, but did not include the Bureau in the statutory privilege waiver protections granted to those agencies. *See* 12 U.S.C. 1821(t), 1828(x).
- Bureau has said it will demand privileged materials. Lack of statutory protection creates risk providing these materials will waive privileges.
- Bureau will share information and coordinate investigations with State Attorneys General. Could include sharing of privileged information.
- Bureau asserts that statutory protection is not necessary. Released Guidance Bulletin (January 2012) then Proposed Rulemaking (March 2012).
 - States production of privileged documents is non-voluntary, and therefore not a waiver.
 - States that Congress intended Bureau's examination powers to be equivalent to, and have same protections as, prudential regulators.
- House passed bill (by voice vote) HR 4104, extending banking agency privilege protections to Bureau on March 27. Protections would also apply to non-banks.



Attorney Client Privilege and Legislation

- Bureau has yet to declare whether bank examination privilege applies to documents shared between the Bureau and a bank. Complicated by relationship with non-banks.
- Until statutory privilege fix becomes law, substantial risk for financial institutions, which must either:
 - Withhold privileged materials and defy Bureau requests risking enforcement action; or
 - Produce privileged materials and risk waiving the privilege. Not certain that courts will accept Bureau's reasoning, which goes against some court precedent.
- In the meantime, financial institutions can:
 - Develop protocols for memorializing privilege claims (as the Bureau has invited institutions to do)
 - Build internal escalation procedures – and seek the same from the Bureau
 - Carefully consider the Bureau's privilege position: any challenge should occur before privileged information is shared



Title X Places CFPB at the Center of Fair Lending

- Establishes an Office of Fair Lending and Equal Opportunity
- Broadly defines Fair Lending
 - “fair, equitable, and nondiscriminatory access to credit for consumers” 12 U.S.C. § 1002(13)
 - CFPB will flesh out that definition over time.
- Provides Bureau with rulemaking authority over ECOA and HMDA, and examination and enforcement authority for large banks (and certain non-banks):
- CFPB and FTC have agreement to coordinate enforcement and information sharing with regard to non-banks.



Enforcement Process: The NORA

- Notice and Opportunity to Respond and Advise
- Bureau's answer to banking agency 15-day letters or SEC Wells process
- Provides due process to potential subject of enforcement action
- Provides CFPB with opportunity to test its case before taking action
- Demonstrates Bureau's willingness to listen to the regulated



Enforcement Process: The NORA

NORA policy leaves some open questions, including the extent to which the Bureau will:

- Provide a notice that is sufficiently detailed to allow for a full response
- Provide access to the factual basis for an enforcement action
- Extend the 14 day period for a response in appropriate cases



How Will the CFPB Exercise its Fair Lending Authority: Some First Impressions

- Bureau will have an expansive view of fair lending
 - “Fair, equitable and nondiscriminatory access to credit”
 - Bureau will not only look backwards to see if individuals faced discrimination, but look prospectively at whole communities’ current access to credit.
 - ECOA and HMDA have not changed but will be interpreted from this new perspective.
- Appointment of Patrice Ficklin as Assistant Director
- Focus on Fair Lending during examinations and in CFPB complaint portals

Mortgage and credit card questionnaires ask if complainant believes discrimination was involved.



How Will the CFPB Exercise its Fair Lending Authority: Some First Impressions

- Bureau will place new emphasis on fair lending in areas other than mortgages
- Assistant Director Ficklin has made clear that the Office of Fair Lending will focus on the full range of consumer financial transactions.
- Example: Student loans
 - Congress requires a Bureau report on private education loans by July 21
 - Fair Lending is co-leading the study because Congress specifically asked about:
 - The racial and socioeconomic status of private education loan borrowers
 - Whether regulators have access to enough information to determine lender compliance with fair lending laws
 - Whether federal regulators need better tools to enforce fair lending with regard to student loans



Other Areas of CFPB Focus

- **Disclosures – “Know Before You Owe” Project**
 - Testing disclosures relating to mortgages and student loans
- **Student lending**
 - Created position of Private Education Loan Ombudsman
 - Published Notice and Request for Information regarding Private Education Loans and Lenders
 - Released student debt repayment assistant tool
- **Servicemembers and Veterans**
 - Established Office of Servicemember Affairs led by Holly Petraeus
- **Older Americans**
 - Established Office of Older Americans led by Hubert “Skip” Humphrey III



Closing

“The man who wears the shoe knows best that it pinches and where it pinches.”

Richard Cordray, quoting John Dewey (Jan. 5, 2012, The Brookings Institution)



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