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Newly Established Consumer Financial Protection Bureau Nets First Enforcement Action

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NEWLY ESTABLISHED CONSUMER FINANCIAL PROTECTION BUREAU NETS FIRST ENFORCEMENT ACTION

by Agostino S. Filippone

I. INTRODUCTION

In addition to depleting the retirement accounts of citizens across the United States, the 2008 financial crisis also depleted the patience those on Main Street had with Wall Street. The containment efforts taken by Congress and spearheaded by former President Bush as well as President Obama lead to increased discourse among those on Capitol Hill regarding financial regulation. The once lauded deregulated market economy and high-powered financial institutions were now the poster children for unbridled greed and corrupt practices. From the wreckage arose new calls for governmental regulation of the financial marketplace, including "too big to fail" banks, and a refocusing of values.

The Consumer Financial Protection Bureau (CFPB) was formed in July 2011 as a new federal agency tasked with the responsibility of protecting U.S. consumers against financial institutions and the products and services they offer. The CFPB acts as the country's consumer watchdog, and this past summer it took its first bite: a $165 million public enforcement action against Capital One, one of the largest credit card companies in the United States. The action accused Capital One of deceptive marketing practices and called for $140 million in refunds to approximately 200 million consumers and an additional $25 million penalty to be paid into the Civil Penalty Fund. With this enforcement action under its belt, the CFPB will go on to flex its muscle against institutions that target consumers through convoluted language and shadowed rates in their various financial products, including mortgages and credit cards.

II. THE BIRTH OF THE CFPB

In a speech made on the South Lawn of the White House, President Obama commented on Wall Street reform, noting, "[o]ur economic growth and prosperity depend on a strong, robust financial sector. . . [b]ut we've all seen what happens when there's inadequate oversight and insufficient transparency on Wall Street."[1] Referring to the CFPB, the President stressed,

> [w]e'll put in place the toughest consumer financial protections in our history, while creating an independent agency to enforce them. Through this agency, we'll combine under one roof the consumer protection functions that currently are divided among half a dozen different agencies. Now there will be one agency whose sole job will be to look out for you.[2]

What followed was a 2,000-page piece of signature legislation, known as the Dodd-Frank Act Wall Street Reform and Consumer Protection Act, which was signed into law on July 21, 2010 following contentious debates in both the House and Senate.[3]

The idea for a government agency created to protect consumers from misrepresentations and misdeeds perpetrated by financial institutions was advanced by Elizabeth Warren, a former Harvard Law School professor and now Democratic candidate for U.S. Senate in Massachusetts.[4] Warren envisioned a

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[1] President Barack Obama, Remarks by the President on Wall Street Reform (June 25, 2010) (transcript available at http://www.whitehouse.gov/photos-and-video/video/president-obama-wall-street-reform#transcript).

[2] *Id.*

[3] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010) [hereinafter Dodd-Frank Act]; *see also* Jim Puzzanghera, *House, Senate Lawmakers Reach a Deal on Financial Reform*, L.A. TIMES, June 26, 2010, http://articles.latimes.com/2010/jun/26/nation/la-na-financial-reform-20100626 (noting that negotiations between leaders of the House and Senate took place over two weeks. In addition to creating the CFPB, the law sets out "new regulations to reduce risk-taking by large banks and limit their trading of complex derivatives").

[4] *See* David Corn, *Elizabeth Warren: Passed Over for CFPB Post, But . . .*, MOTHER JONES, July 17, 2011, http://www.motherjones.com/mojo/2011/07/obama-elizabeth-warren-cfpb-cordray-senate. On the one-year anniversary of the CFPB, Warren continued

"government agency that would protect consumers from tricks and traps perpetrated by banks, mortgage firms, and credit card companies . . ."[5] However, given mounting pressure by Republican party leaders, President Obama instead chose former Ohio Attorney General Richard Cordray to head the CFPB as its first director.[6] Opposition from opponents toward any director turned out to be so strong in the months following that President Obama bypassed the Senate entirely and appointed Cordray using his recess appointment powers on January 4, 2012 during a congressional recess.[7] In the President's remarks to a crowd

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to advocate for the agency's mandate to "level the playing field for small players—families, students, seniors, community banks, credit unions, small businesses." *See also* Elizabeth Warren, *Tricks, Traps, and Accountability*, HUFF. POST, July 23, 2012, http://www.huffingtonpost.com/elizabeth-warren/cfpb-anniversary-consumer-protection_b_1695547.html.

[5] Corn, *supra* note 4.

[6] *Id.* It is important to note that President Obama announced his nomination of Richard Cordray on July 17, 2011 despite a May 2, 2011 letter sent to the President that was signed by forty-four Republican Senators telling him that they would block any nominee to the CFPB unless Democrats agreed to changes in the CFPB's structure and funding. Among the suggested changes: replacing the agency director position with a board of directors, bringing funding decisions under congressional control, and allowing for greater oversight by other bank regulators of CFPB operations. At the time, Democrats controlled fifty-three seats in the Senate, which meant the forty-four Republican threatened hold-outs would ensure that the sixty vote majority needed to overcome objections would not be met. *See* Letter from Republic Senators to President Obama Regarding Dodd-Frank Act (May 2, 2011), *available at* http://www.aba.com/aba/documents/blogs/doddfrank/SenateToObamaCFPBApril2011.pdf; *see also* Phil Mattingly, *Senate Republicans Plan to Block Consumer Bureau While Seeking Changes*, BLOOMBERG, May 6, 2011, http://www.bloomberg.com/news/2011-05-05/republican-senators-to-block-consumer-nominee-absent-changes-1-.html.

[7] *See* Tamara Keith, *Obama Appoints Cordray to Head Watchdog Agency*, Jan. 4, 2012, *available at* http://www.npr.org/2012/01/04/144694066/obama-appoints-cordray-to-head-watchdog-agency. President Obama appointed Richard Cordray under his constitutional powers to make appointments while lawmakers are in recess. Article 2 of the Constitution provides, "[t]he President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session." U.S. CONST. art. 2, sec 2, clause 2. In addition to the appointment of Mr. Cordray to the CFPB, President Obama also filled three labor board positions during the recess. *See also* Helene Cooper & Jennifer Steinhauer, *Bucking Senate, Obama Appoints Consumer Chief*, N.Y. TIMES, Jan. 4, 2012, at A1, *available at* http://www.nytimes.com/2012/01/05/us/politics/richard-cordray-named-consumer-chief-in-recess-

gathered at an Ohio high school announcing the appointment of "America's consumer watchdog," President Obama said of the position,

> [Cordray's] job will be to protect families like yours from the abuses of the financial industry. His job will be to make sure that you've got all the information you need to make important financial decisions. Right away, he'll start working to make sure millions of Americans are treated fairly by mortgage brokers and payday lenders and debt collectors.[8]

The "stealth" appointment set off a firestorm of criticism by opponents.[9] Nonetheless, Richard Cordray retained his position.[10]

The CFPB was touted as a key piece of the Dodd-Frank Act,[12] and was created with the charge to "make markets for

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appointment.html?pagewanted=all&_moc.semityn.www.

[8] President Barack Obama, Remarks by the President on the Economy, (June 4, 2012), (transcript available at http://www.whitehouse.gov/photos-and-video/video/2012/01/04/president-obama-speaks-appointing-richard-cordray#transcript).

[9] U.S. Chamber of Commerce President and CEO Thomas Donahue called the recess appointment of Richard Cordray ". . . unprecedented, constitutionally questionable, and puts the authority of the director and the validity of the bureau's work in legal jeopardy." Press Release, U.S. Chamber of Commerce, U.S. Chamber Condemns Unprecedented Recess Appointment of CFPB Director (Jan. 4, 2012), http://www.uschamber.com/press/releases/2012/january/us-chamber-condemns-unprecedented-recess-appointment-cfpb-director. Following the appointment, House Speaker John Boehner stated, "It's clear the president would rather trample our system of separation of powers than work with Republicans to move the country forward . . . This action goes beyond the president's authority, and I expect the courts will find the appointment to be illegitimate." Alex M. Parker, *Richard Cordray Recess Appointment Sparks More Bickering*, U.S. NEWS, Jan. 4, 2012, http://www.usnews.com/news/articles/2012/01/04/richard-cordray-recess-appointment-sparks-more-bickering.

[10] Laura Meckler, *Cordray to Head Consumer Bureau Despite Opposition*, FINS FINANCE, Jan. 4, 2012, http://www.fins.com/Finance/Articles/SBB0001424052970203471004577140552133809784/Cordray-to-Head-Consumer-Bureau-Despite-Opposition.

[12] Puzzanghera, *supra* note 3. *See generally* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010).

consumer financial products and services work for Americans."[13] The Bureau aims to meet this continuing goal through increased consumer education, enforcing federal consumer finance laws against banks, credit unions and other financial institutions, as well as performing research and other studies concerning the consumer financial market.[14]

III. THE CFPB'S FIRST ACTION: CAPITAL ONE

The Consumer Financial Protection Bureau announced its first enforcement action on July 18, 2012.[15] The agency rendered a $165 million enforcement action, calling for Capital One to refund approximately $140 million to customers.[16] An additional $25 million penalty was imposed and will be paid to the Civil Penalty Fund.[17] The CFPB reported the bank used deceptive marketing tactics in misleading and pressuring two million customers into purchasing additional financial products, such as payment protection and credit monitoring, when opening credit card accounts.[18] Further, Capital One also agreed to pay the Office of the Comptroller of the Currency (OCC) $35 million in penalties and refund another $10 million due to the bank's failure to create programs that were designed to protect against unfair practices.[19] In sum, the total cost to Capital One amounted to

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[13] *Learn About the Bureau*, CONSUMER FINANCIAL PROTECTION BUREAU, http://www.consumerfinance.gov/the-bureau/.

[14] *Id.*

[15] Press Release, Consumer Financial Protection Bureau, CFPB Probe Into Capital One Credit Card Marketing Results in $140 Million Consumer Refund (July 18, 2012), http://www.consumerfinance.gov/pressreleases/cfpb-capital-one-probe/; *see also* Emily Jane Fox, *Capital One to Pay $210 Million in Fines, Consumer Refunds*, CNN MONEY, July 18, 2012, http://money.cnn.com/2012/07/18/pf/capital-one-refund/index.htm.

[16] CONSUMER FINANCIAL PROTECTION BUREAU, CFPB BULLETIN 2012-06, MARKETING OF CREDIT CARD ADD-ON PRODUCTS (July 18, 2012), http://files.consumerfinance.gov/f/201207_cfpb_marketing_of_credit_card_addon_products.pdf.

[17] *Id.* The Civil Penalty Fund was established under the Dodd-Frank Act, operating from the Federal Reserve Bank of New York, providing an official account from which to pay victims as well as funding consumer education and financial literacy programs. *See Civil Penalty Fund*, http://files.consumerfinance.gov/f/201207_cfpb_civil_penalty_fund_factsheet.pdf.

[18] Fox, *supra* note 15.

[19] *Id.* The Dodd-Frank Act outlined what behavior constitutes unfair or deceptive practices. "The standard for unfairness in the Dodd-Frank Act is

$210 million.[20]

Concerning the Capital One settlement, Director Cordray announced "[w]e are putting companies on notice that these deceptive practices are against the law and will not be tolerated."[21] Bureau investigators determined that third-party call-center vendors working on behalf of Capital One were pressuring or misleading consumers into purchasing add-ons like payment protection or credit monitoring when consumers opened a Capital One credit card.[22] Those with lower credit scores or credit limits were found to have been disproportionately targeted.[23] CFPB reported that customers were often misled to believe that the add-ons would somehow improve credit scores or help increase credit limits.[24] Vendors were also accused of lying about whether the add-ons were free, whether they were optional, and telling customers that they had to buy the add-on before the customer could receive full details on how it worked.[25] In other cases, consumers reported being automatically enrolled in the add-on programs and subsequently having trouble cancelling the

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that an act or practice is unfair when: (1) It causes or is likely to cause substantial injury to consumers, (2) The injury is not reasonably avoidable by consumers, and (3) The injury is not outweighed by countervailing benefits to consumers or to competition." Consumer Financial Protection Bureau, *Consumer Laws and Regulations: Unfair, Deceptive, or Abusive Acts or Practices (UDAAP)*, *available at* http://www.consumerfinance.gov/guidance/supervision/manual/udaap-narrative/#fnref:15; *see also* Dodd-Frank Act, 12 U.S.C. § 5531 (2010). The CFPB has provided a summation of key portions of the Dodd-Frank Act that relate to unfair and deceptive practices and provide examples to illustrate to prohibited behaviors. Consumer Financial Protection Bureau, *Consumer Laws and Regulations: Unfair, Deceptive, or Abusive Acts or Practices (UDAAP)*, *available at* http://www.consumerfinance.gov/guidance/supervision/manual/udaap-narrative/#fnref:15.

[20] Fox, *supra* note 15.

[21] Consumer Financial Protection Bureau Press Release, *supra* note 15.

[22] Mickey Meece, *What's in Your Wallet? If It's a Capital One Card, You May Be Due a Refund*, FORBES, July 18, 2012, http://www.forbes.com/sites/mickeymeece/2012/07/18/whats-in-your-wallet-if-its-a-capital-one-card-you-may-be-due-a-refund/.

[23] *Id.*

[24] Jim Puzzanghera, *Capital One to Refund $150 Million to Credit Card Customers*, L.A. TIMES, July 18, 2012, http://articles.latimes.com/2012/jul/18/business/la-fi-mo-capital-one-refunds-fine-consumer-financial-protection-bureau-20120718.

[25] *Id.*

services after they were already charged.[26] In a news release, Ryan Schneider, the President of the Card division for Capital One Corporation, admitted, "Capital One's third party vendors did not always adhere to company sales scripts and sales policies for "Payment Protection" and "Credit Monitoring" products, and the bank did not adequately monitor their activities."[27] In addition to the payment agreements reached with the OCC and CFPB, Capital One noted corrective measures they would take in order to limit any similar future issues, including strengthening internal quality controls and increasing vendor monitoring.[28]

IV. "NO SURPRISES AND NO RUNAROUNDS"[29]

What's next on CFPB's plate? The agency is proposing legislation that will simplify the application process and allow potential borrowers to receive concise, plain-language details on rates and terms for several financial instruments.[30] The project, dubbed "Know Before You Owe," proposes the substitution of new rate disclosure sheets to be provided to applicants for

[26] Eileen Ambrose, *CFPB Orders Capital One Bank to Refund $140 Million to Consumers*, BALT. SUN, July 18, 2012, http://articles.baltimoresun.com/2012-07-18/business/bal-consuming-interests-cfpb-orders-capital-one-bank-to-refund-140-million-to-consumers-20120718_1_capital-one-refund-consumers.

[27] News Release, Capital One, Capital One Announces Settlement with Bank Regulators Related to Oversight of Vendor Sales Practices of Payment Protection and Credit Monitoring Products (July 18, 2012), http://phx.corporate-ir.net/phoenix.zhtml?c=70667&p=irol-newsArticle&ID=1715896&highlight=.

[28] *Id.*

[29] In response to the CFPB's next directive to provide clearer guidelines for home mortgage loans, Director Cordray stated that homeowners should expect "no surprises and no runarounds" when it comes to their home mortgages. Martha C. White, '*No Runaround' Mortgage Rules Proposed by CFPB*, TIME, Apr. 10, 2012, *available at* http://business.time.com/2012/04/10/no-runaround-mortgage-rules-proposed-by-cfpb/.

[30] Alan Zibel, *Consumer Bureau Proposes Mortgage Disclosure Form*, WALL. ST. J., July 9, 2012, http://online.wsj.com/article/SB10001424052702304022004577517150187365204.html ("The Consumer Financial Protection Bureau proposed [a] three-page mortgage disclosure to replace two overlapping forms that consumers currently receive under federal rules. The proposal, itself 1,099 pages long, is set for public comment until Nov. 6, [2012,] but lenders may start distributing the forms to consumers only in 2014. . . ").

mortgage, student loan, and credit card products.[31] The Bureau is drafting the changes under two separate proposed amendments: one to the Truth in Lending Act and one to the Real Estate Settlement Procedures Act.[32] Proposed changes include adding rules concerning monthly mortgage statements, warnings before interest rate adjustments, and early outreach for delinquent borrowers, among others.[33]

V. CONCLUSION

With its first win under its belt, the CFPB continues on its quest to make the U.S. financial landscape a safer and fairer place for U.S. consumers. By creating a new bureau, Congress has taken a positive step toward combating the gluttony of conflicts and deceptive practices simmering in the U.S. economy even before the 2008 financial crisis hit and caused everything to boil over. The CFPB's signature first success against Capital One highlights not only the continued efforts of the bureau's members in faithfully executing their duties, but also ensures the forward

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[31] CFPB Mortgage Disclosure Team, *Preparing for New Mortgage Disclosures: A Look Back at Know Before You Owe*, CONSUMER FIN. PROTECTION BUREAU, July 5, 2012, http://www.consumerfinance.gov/blog/preparing-for-new-mortgage-disclosures-a-look-back-at-know-before-you-owe/.

[32] David Silberman, *Putting the 'Service' Back in 'Mortgage Servicing'*, CONSUMER FIN. PROTECTION BUREAU, Aug. 10, 2012, http://www.consumerfinance.gov/blog/putting-the-serviceback-in-mortgage-servicing/. The Truth in Lending Act was issued by the Federal Reserve Board of Governors to ". . . promote the informed use of consumer credit by requiring disclosures about its terms and cost. The regulation also includes substantive protections. It gives consumers the right to cancel certain credit transactions that involve a lien on a consumer's principal dwelling, regulates certain credit card practices, and provides a means for fair and timely resolution of credit billing disputes." Truth in Lending (Regulation Z), 12 C.F.R. § 226.1 (2011), *available at* http://www.fdic.gov/regulations/laws/rules/6500-1400.html#fdic6500226.1. The Real Estate Settlement Procedures Act (RESPA) was effectuated July 11, 2011, being administered and enforced by the CFPB. RESPA ". . . ensures that consumers throughout the nation are provided with more helpful information about the cost of the mortgage settlement and protected from unnecessarily high settlement charges caused by certain abusive practices." *See RESPA—Real Estate Settlement Procedures Act*, U.S. Dept. of Housing & Urb. Dev., July 21, 2012, *available at* http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/rmra/res/respa_hm.

[33] Silberman, *supra* note 32.

movement of liberty and justice for all.