



3-1-2017

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Recommended Citation

Donald C. Lampe & Ryan J. Richardson, *The Consumer Financial Protection Bureau at Five: A Survey of the Bureau's Activities*, 21 N.C. BANKING INST. 85 (2017).

Available at: <http://scholarship.law.unc.edu/ncki/vol21/iss1/9>

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THE CONSUMER FINANCIAL PROTECTION BUREAU AT FIVE: A SURVEY OF THE BUREAU'S ACTIVITIES

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I. INTRODUCTION

In 2008 and 2009, the United States experienced its most dramatic and debilitating economic downturn since the Great Depression.¹ Congress and the President responded to these events with the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Dodd-Frank Act”),² a sweeping financial services reform package designed to remedy the shortcomings of federal regulation and oversight that preceded the financial crisis. For consumer financial services, the centerpiece of the Dodd-Frank Act was the creation of the Consumer Financial Protection Bureau (the “CFPB” or the “Bureau”).³ Congress consolidated in the CFPB the consumer financial protection functions of multiple federal agencies and vested with the new agency broad authority over segments of the consumer financial services market that were previously not subject to federal regulation.⁴

The Dodd-Frank Act became effective upon President Obama’s

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1. See generally FIN. CRISIS INQUIRY COMM’N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES, 389–410 (2011) (describing the effects of the financial crisis on the economy in the United States).

2. Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) § 1(a), 12 U.S.C. § 5301 (2015).

3. See Ben Protess, *On Its First Day, Consumer Bureau Finds Support*, N.Y. TIMES: DEALBOOK (July 21, 2011), <http://dealbook.nytimes.com/2011/07/21/on-its-first-day-consumer-bureau-finds-support/> (“The Consumer Financial Protection Bureau was a chief component of the Dodd-Frank financial regulatory law.”).

4. See Dodd-Frank § 1002, 12 U.S.C. § 5481 (“Title X, referred to in par. (4), is title X of Pub. L. 111–203, July 21, 2010, 124 Stat. 1955, known as the Consumer Financial Protection Act of 2010, which enacted subchapter V (§5481 et seq.) of this chapter . . .”).

signature on July 21, 2010, but the Bureau was not immediately empowered. Rather, Congress established in the Dodd-Frank Act a mechanism for the Secretary of the Treasury, in consultation with the heads of the federal financial regulators and the Office of Management and Budget, to designate a “transfer date,”⁵ upon which the “consumer financial protection functions” of the constituent federal financial, trade protection, and housing finance agencies would shift to the newly minted Bureau.⁶ The Secretary designated the transfer date of July 21, 2011, one year to the day after President Obama signed the Dodd-Frank Act into law.⁷

Thus, on July 21, 2011, the Bureau became fully empowered under Title X of the Dodd-Frank Act,⁸ and July 21, 2016, marked the agency’s fifth anniversary. This Article surveys the CFPB’s activities over its first five years, with an emphasis on publicly available empirical data. Part II provides an overview of the CFPB’s creation and operations, including discussion of its structure and powers.⁹ Part III provides data and analysis on the CFPB’s activities across its three primary functional areas—rulemaking, supervision, and enforcement—for the five-year period from July 21, 2011, to July 21, 2016.¹⁰ Part IV summarizes major developments in the CFPB’s sixth year and the agency’s stated policy priorities through 2017.¹¹ Finally, Part V concludes the Article with a discussion of potential CFPB reforms in 2017 and the possible impact of a court opinion holding the Bureau Director’s tenure is not protected.¹²

5. Dodd-Frank § 1062, 12 U.S.C. § 5582.

6. Dodd-Frank § 1064, 12 U.S.C. § 5584.

7. See Designated Transfer Date, 75 Fed. Reg. 57252 (Sep. 20, 2010) (“Pursuant to the Consumer Financial Protection Act of 2010, . . . the Secretary of the Treasury designates July 21, 2011, as the date for the transfer of functions”). In the time between the enactment of the Dodd-Frank Act and the appointment and confirmation of the Bureau’s Director, the Secretary of the Treasury was authorized to perform the functions of the Bureau, including providing administrative support to the Bureau until the designated transfer date. Dodd-Frank § 1066, 12 U.S.C. § 5586. In fact, senior staffers at the Treasury became involved in planning for the new agency even before the Dodd-Frank Act was enacted. Charles S. Clark, *Starting from Square One*, GOVERNMENT EXECUTIVE (Dec. 1, 2012), <http://www.govexec.com/magazine/features/2012/12/starting-square-one/59853/>.

8. Proress, *supra* note 3.

9. See *infra* Part II.

10. See *infra* Part III.

11. See *infra* Part IV.

12. See *infra* Part V.

II. CREATION, STRUCTURE, AND POWERS OF THE CFPB

A. *Regulation of Consumer Financial Protection Before the CFPB*

Federal laws to protect consumers in credit and other retail financial transactions are relatively new. Until the New Deal, consumer financial protection was entirely a matter of state law, and industry practices generally relied on a combination of bank activities laws, usury laws, and common law principles against fraud, misrepresentation, and unfair dealing.¹³ The federal interest in consumer financial protection began in 1938 with the Wheeler-Lea Act, which authorized the Federal Trade Commission (“FTC”) to enjoin “unfair or deceptive acts or practices.”¹⁴ The pace of federal regulation of consumer financial products and services accelerated in the second half of the 20th century beginning with the 1968 enactment of the seminal Consumer Credit Protection Act.¹⁵ The central feature of this Act was the Truth-in-Lending Act, which created a disclosure-based regime of consumer credit protection that remains in place today.¹⁶

In the roughly seventy years between the Wheeler-Lea Act and the Dodd-Frank Act, with each new federal banking or financial services law, the web of federal jurisdiction and responsibility for consumer protection functions became increasingly complex. The reach of federal agency authority granted by the various federal financial services laws varied significantly. Certain federal statutes vested one or more agencies with authority over an entire class of entities or institutions.¹⁷ Other federal statutes vested agencies with authority over a particular product or service.¹⁸ Just as the reach of authority varied by statute, so, too, did the specific consumer protection functions granted to federal agencies. Certain federal agencies were authorized to

13. Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction* 32 REVIEW OF BANKING AND FIN. LAW 321, 323 (2013).

14. Wheeler-Lea Act of 1938 § 2, 15 U.S.C. § 45 (2015).

15. Consumer Credit Protection Act § 1, 15 U.S.C. § 1601 (2015).

16. *Id.* at tit. II.

17. *See, e.g.*, Federal Deposit Insurance Corporation Improvement Act of 1991 (“FDICIA”) § 1, 12 U.S.C. § 1811 (2015) (vesting the Federal Deposit Insurance Corporation with enhanced authority over all state, non-member banks).

18. *See, e.g.*, Consumer Leasing Act § 3, 15 U.S.C. § 1667 (2015) (vesting the Board of Governors of the Federal Reserve with authority over certain aspects of consumer leases of personal property).

promulgate consumer financial protection rules,¹⁹ while others were authorized only to enforce certain rules promulgated by others.²⁰ The federal banking agencies, in particular, were authorized to examine and supervise institutions within their jurisdiction,²¹ but the federal regulators of nonbank financial services companies generally did not enjoy this power.

Before creation of the CFPB, federal responsibility for consumer financial protection functions was divided among no less than twelve federal agencies, each with its own particular niche of authority. The five federal prudential regulators—the Office of the Comptroller of the Currency (“OCC”), the Board of Governors of the Federal Reserve System (“Board”), the Federal Deposit Insurance Corporation (“FDIC”), the Office of Thrift Supervision (“OTS”), and the National Credit Union Administration (“NCUA”)—each maintained supervisory and enforcement authority over a class of chartered financial institutions. Namely, the OCC maintained supervisory and enforcement jurisdiction over national banks;²² the Board, over state-chartered banks that are members of the Federal Reserve, bank holding companies, and nonbank subsidiaries of bank holding companies, among others;²³ the FDIC, over state-chartered banks that are not members of the Federal Reserve;²⁴ the OTS, over federal thrifts and savings associations;²⁵ and

19. *See, e.g.*, Equal Credit Opportunity Act (“ECOA”) § 703, 15 U.S.C. § 1691b (2015) (directing the Board of Governors of the Federal Reserve to promulgate regulations to implement ECOA).

20. *See id.* § 1691c (2015) (vesting various agencies with authority only to enforce ECOA and regulations promulgated thereunder by the Board).

21. *See, e.g.*, FDICIA § 2, 12 U.S.C. § 1820 (directing the federal banking agencies to examine institutions annually).

22. The OCC’s supervisory authority is conferred by 12 U.S.C. § 481 and 12 U.S.C. § 1820(d). The OCC’s enforcement authority is conferred generally by 12 U.S.C. §§ 1818, 1829, 1831*o*, and 1831*p*.

23. The Board’s supervisory authority is conferred by 12 U.S.C. § 248, 12 U.S.C. § 1820(d) (state member banks), and 12 U.S.C. § 1844 (bank holding companies, nonbank subsidiaries of bank holding companies). The Board’s enforcement authority is conferred generally by 12 U.S.C. §§ 1818, 1829, 1831*o*, and 1831*p*. The Board also maintains supervisory and enforcement authority over branches and agencies of foreign banks and Edge and Agreement corporations; however, these powers are beyond the scope of this Article.

24. The FDIC’s supervisory authority is conferred by 12 U.S.C. § 1820. The FDIC’s enforcement authority is conferred generally by 12 U.S.C. §§ 1818, 1829, 1831*o*, and 1831*p*.

25. The OTS’s supervisory authority was conferred by 12 U.S.C. § 1463 and 12 U.S.C. § 1820(d). The OTS’s enforcement authority was conferred generally by 12 U.S.C. §§ 1818, 1829, 1831*o*, and 1831*p*.

the NCUA, over federal credit unions.²⁶

The supervisory and enforcement powers granted to these agencies included authority under both safety and soundness²⁷ and consumer financial protection laws and regulations.²⁸ In the safety and soundness context, each agency generally maintained independent authority to promulgate rules governing the group of institutions it supervised. In the consumer financial protection context, however, only one of these agencies—the Board—was vested with significant consumer financial protection rulemaking authority. Unlike its peers, the Board possessed rulemaking authority under several core federal consumer financial statutes, including the Truth-in-Lending Act,²⁹ the Equal Credit Opportunity Act,³⁰ the Home Mortgage Disclosure Act,³¹ and the Electronic Fund Transfer Act.³² These statutes granted the Board the authority to promulgate regulations governing many common consumer financial products and services (e.g., credit cards),³³ but the authority to supervise institutions for, and to enforce, compliance with the Board's rules was divided among the various prudential regulators.³⁴

Apart from the federal prudential regulators, the Federal Trade Commission (“FTC”) possessed enforcement authority under the FTC Act with respect to nonbank providers of consumer financial products and services,³⁵ as well as both rulemaking and enforcement authority under the Fair Credit Reporting Act.³⁶ The U.S. Department of Housing and Urban Development had rulemaking and limited enforcement authority with respect to certain aspects of the residential mortgage market under the Real Estate Settlement Procedures Act and the

26. The NCUA's supervisory authority is conferred by 12 U.S.C. § 1756. The NCUA's enforcement authority is conferred generally by 12 U.S.C. § 1786.

27. *See supra* notes 18–22.

28. *See, e.g.*, Truth in Lending Act §108, 15 U.S.C. § 1607 (2015) (conferring authority to enforce the Truth-in-Lending Act to the prudential regulators). The version of this statute currently in effect includes the same conferral of authority, subject to the provisions of Title X of the Dodd-Frank Act.

29. Truth in Lending Act 15 U.S.C. § 1604.

30. Equal Credit Opportunity Act § 1691b.

31. Home Mortgage Disclosure Act 12 U.S.C. § 2803.

32. Electronic Fund Transfer Act 15 U.S.C. § 1693b.

33. *See, e.g.*, Truth in Lending Act § 1604.

34. *See supra* notes 18–24.

35. 15 U.S.C. § 45.

36. *Id.* § 1681.

National Housing Act of 1934,³⁷ and the U.S. Department of Justice was vested with authority to enforce the Fair Housing Act³⁸ and the Equal Credit Opportunity Act.³⁹ Other federal agencies with an interest in consumer financial protection included: the Federal Housing Finance Agency (“FHFA”) (successor to the Federal Housing Finance Board and the Office of Federal Housing Enterprise Oversight), as supervisor of the Federal Home Loan Banks⁴⁰ and supervisor (and later, conservator) of Fannie Mae and Freddie Mac;⁴¹ the U.S. Department of Defense, with rulemaking authority over higher-priced personal loans to active duty military and their dependents;⁴² and the U.S. Department of Veterans Affairs (“VA”), which had rulemaking authority with respect to VA residential mortgage insurance for veterans.⁴³

In short, in the period of time leading up to the financial crisis, the federal scheme for consumer financial protection across the wide range of entities offering consumer financial products and services was decentralized and largely uncoordinated.⁴⁴ In the wake of the crisis, Congress established a single, powerful consumer financial protection regulator and facilitated the transfer of most federal consumer financial protection functions to a new, central federal agency—the CFPB.⁴⁵

B. *Creation of the CFPB*

Significantly, calls to consolidate federal consumer financial protection functions in a single federal agency predated the financial crisis.⁴⁶ As early as 2005, Heidi Mandanis Schooner, a law professor at

37. 12 U.S.C. § 2617.

38. 42 U.S.C. § 3614.

39. 15 U.S.C. § 1691.

40. 12 U.S.C. § 1440.

41. *See* Housing and Economic Recovery Act of 2008 § 1102(a), 12 U.S.C. § 4513 (2015) (creating the FHFA and authorizing it to place Fannie Mae and Freddie Mac in conservatorship); *see also* Conservatorship, FEDERAL HOUSING FINANCE AGENCY, fhfa.gov, <http://www.fhfa.gov/Conservatorship> (noting that the FHFA placed Fannie Mae and Freddie Mac in conservatorship on September 6, 2008).

42. Talent Amendment, 10 U.S.C. § 987 (2006).

43. Veterans Benefits, 38 U.S.C. § 3703.

44. Analysis of how and to what extent this structure contributed to or failed to stop the crisis is beyond the scope of this Article.

45. *See* Dodd-Frank Wall Street Reform and Consumer Financial Protection Act (“Dodd-Frank”) § 1001, 12 U.S.C. § 5301 (2015).

46. *See, e.g.,* Heidi Mandanis Schooner, *Consuming Debt: Structuring the Federal Response to Abuses in Consumer Credit*, 18 LOY. CONSUMER L. REV. 43, 67–77 (2005).

The Catholic University of America, argued that the banking agencies' safety and soundness obligations, which aim to protect solvency and capital, created inevitable and irreconcilable conflicts with the agencies' concurrent consumer protection obligations, which aim to protect consumers.⁴⁷ Professor Schooner advocated that, in order to resolve these conflicts, the banking agencies' consumer protection responsibilities should be reassigned to a single consumer protection agency.⁴⁸

Two years later, in 2007, Elizabeth Warren, then a law professor at Harvard University, penned her influential article, *Unsafe at Any Rate*.⁴⁹ This article opened with the memorable toaster meme: "It is impossible to buy a toaster that has a one-in-five chance of bursting into flames and burning down your house. But it is possible to refinance an existing home with a mortgage that has the same one-in-five chance of putting the family out on the street."⁵⁰ Warren argued that streamlined federal consumer protections in the market for tangible goods (like toasters) had successfully balanced the twin goals of protecting consumers and promoting innovation.⁵¹ The hodgepodge of federal and state consumer protections in the financial products market, she argued, had done the exact opposite, effectively failing to protect consumers and stifling innovation.⁵² Warren called for the creation of a Financial Product Safety Commission, which would "establish guidelines for consumer disclosure, collect and report data about the uses of different financial products, review new financial products for safety, and require modification of dangerous products before they can be marketed to the public."⁵³

On October 3, 2008—the same day that Congress passed and President Bush signed the bill⁵⁴ to establish the \$700 billion Troubled

47. See *id.* at 67 ("The disadvantages of such a combination of regulatory responsibilities are found in the differences between the two regulatory goals.").

48. *Id.* at 82. Professor Schooner recommended that the consumer protection functions of the federal banking agencies be transferred to the FTC, which she argued was the best equipped existing federal agency to take on the role. *Id.*

49. Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY J. (Summer 2007), <http://democracyjournal.org/magazine/5/unsafe-at-any-rate/>.

50. *Id.*

51. *Id.*

52. See *id.* ("Credit products, by comparison, are regulated by a tattered patchwork of federal and state laws that have failed to adapt to changing markets.").

53. *Id.*

54. Emergency Economic Stabilization Act of 2008 § 1(a), 12 U.S.C. § 5201 (2015).

Asset Relief Program—Rep. William Delahunt and Sen. Richard Durbin introduced identical bills in the House and Senate, respectively, to establish a Consumer Credit Safety Commission based largely on Warren’s proposal.⁵⁵ The bills were not taken up by the Congress. In June of 2009, however, when Treasury Secretary Timothy Geithner published the Obama Administration’s outline for the policy and legislative reforms that would eventually undergird the Dodd-Frank Act,⁵⁶ the proposal to establish a single consumer financial protection agency resurfaced. As lawmakers and the White House negotiated the financial reform package through late 2009 and early 2010, two central issues with respect to the new agency were its structure and powers.⁵⁷ Each is discussed in turn below.

C. *Structure of the CFPB*

The Bureau’s structure is unusual among federal agencies.⁵⁸ It is an independent bureau within the Federal Reserve System.⁵⁹ By virtue of its independence, the Bureau is not subject to congressional appropriations,⁶⁰ is empowered to establish its own pay scale for employees,⁶¹ and is subject to a less stringent standard than is imposed on the prudential regulators for cost-benefit analyses in connection with rulemakings.⁶² By virtue of its position within the Federal Reserve System, the Bureau is guaranteed an operating budget.⁶³ Specifically, the Dodd-Frank Act requires that the Federal Reserve System fund the Bureau with an amount equal to 12% of the Federal Reserve’s 2009 operating expenses, adjusted each year for inflation according to the

55. Consumer Credit Safety Commission Act of 2008, H.R. 7258, S. 3629, 110th Congress (2008) (“To provide individual consumers of credit with better information and stronger protections, and to provide sellers of consumer credit with more regulatory certainty.”).

56. DEP’T OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION 55–70 (June 2009), https://www.treasury.gov/initiatives/wsr/Documents/FinalReport_web.pdf.

57. Levitin, *supra* note 13, at 334–39.

58. Levitin, *supra* note 13, at 339.

59. Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd Frank”) § 1011, 12 U.S.C. § 5491 (2015).

60. Dodd-Frank § 1017, 12 U.S.C. § 5497(a)(2)(A).

61. Dodd-Frank § 1013, 12 U.S.C. 5493(a)(2).

62. Dodd-Frank § 1022, 12 U.S.C. § 5512.

63. Dodd-Frank § 1017, 12 U.S.C. § 5491.

Bureau of Labor Statistics' employment cost index for total compensation for state and local government works. As adjusted, the Bureau's funding from the Federal Reserve for Fiscal Year 2016 is \$631.7 million.⁶⁴ For Fiscal Year 2017, it is \$646.2 million.⁶⁵ The Federal Reserve invests any of the CFPB's unused funds, and the CFPB may draw on such funds in any future year.⁶⁶

Despite its position within the Federal Reserve System, the CFPB is completely independent of the Board of Governors.⁶⁷ Congressional oversight is limited; the Bureau is required under the Dodd-Frank Act to make periodic reports to, and appearances before, Congress.⁶⁸ Moreover, the CFPB's budget is not subject to congressional appropriations, but it is subject to a statutory maximum⁶⁹ and to an annual audit by the Government Accounting Office.⁷⁰

Per Title X of the Dodd-Frank Act,⁷¹ the CFPB is led by a single director, who is appointed by the President with the advice and consent of the Senate.⁷² The Director serves a five-year term.⁷³ The Dodd-Frank Act provides that the President may remove the Director only for cause, i.e., "for inefficiency, neglect of duty, or malfeasance in office."⁷⁴ However, in a recent decision, the U.S. Court of Appeals for the District of Columbia Circuit declared this limitation on executive power unconstitutional.⁷⁵

64. CONSUMER FIN. PROT. BUREAU, CFPB STRATEGIC PLAN, BUDGET, AND PERFORMANCE PLAN AND REPORT 9 (Feb. 2016), http://files.consumerfinance.gov/f/201602_cfpb_report_strategic-plan-budget-and-performance-plan_FY2016.pdf.

65. *Id.*

66. Dodd-Frank § 1017, 12 U.S.C. § 5497(b)(3), (c)(2).

67. Dodd-Frank § 1017, 12 U.S.C. § 5491(a).

68. Dodd-Frank § 1016, 12 U.S.C. § 5496(a)–(b).

69. Dodd-Frank § 1017, 12 U.S.C. § 5497(a)(2).

70. Dodd-Frank § 1017, 12 U.S.C. § 5497(a)(5)(A).

71. Title X of the Dodd-Frank Act is separately titled the Consumer Financial Protection Act. In this Article, it is simply referred to as "Title X."

72. Dodd-Frank § 1017, 12 U.S.C. § 5491(b)(2). Congress in Title X provided for only one Presidential appointee, the Director. From the outset, this created questions about the authority of the Bureau to conduct business in the event the Director position is vacant.

73. Dodd-Frank § 1017, 12 U.S.C. § 5491(c)(1).

74. Dodd-Frank § 1017, 12 U.S.C. § 5491(c)(3).

75. *See PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 36 (D.C. Cir. 2016) ("[W]e therefore conclude that the CFPB is unconstitutionally structured because it is an independent agency headed by a single director."). The CFPB filed a petition for rehearing en banc. *See* Respondent Consumer Financial Protection Bureau's Petition for Rehearing En Banc (Doc. 1646917), No. 15-1177 (D.C. Cir., Nov. 18, 2016). The Court in turn ordered PHH to respond and invited the Solicitor General to file a response expressing the views of the United States. *See* Order (Doc. 1647585), No. 15-1177 (D.C. Cir., Nov. 23,

More than six years ago, the Bureau began with support from a small staff within the Department of the Treasury. In the time since, the Bureau has grown to more than 1,500 employees. Table 1 shows the growth of the agency's total staff headcount, as reported semi-annually to Congress.

Table 1
Total CFPB Staff

Semi-Annual Report Date	Headcount
January 2012	More than 750 ⁷⁶
July 2012	889 ⁷⁷
December 2012	1,073 ⁷⁸
September 2013	1,355 ⁷⁹
March 2014	1,362 ⁸⁰
September 2014	1,443 ⁸¹
March 2015	1,459 ⁸²
September 2015	1,486 ⁸³
March 2016	1,519 ⁸⁴

2016). The latter is unusual in cases where a federal agency with independent litigating authority is already a party. *See* Joseph R. Palmore, Donald C. Lampe, & Bryan J. Leitch, *PHH and the Future of CFPB: Ten Questions and Nine Answers*, LAW360 (Dec. 8, 2016), <https://media2.mofo.com/documents/161209-ten-questions-phh-cfpb-director.pdf>. PHH and the Solicitor General have filed their responses. *See infra* Part V. On February 16, 2017, the court granted the CFPB's rehearing en banc. *See* Order (Doc. 1661681), No. 15-1177 (D.C. Cir., Feb. 16, 2017).

76. CONSUMER FIN. PROT. BUREAU, SEMI-ANNUAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU 6 (Jan. 2012), http://files.consumerfinance.gov/f/2012/01/Congressional_Report_Jan2012.pdf (July 21, 2011–December 31, 2011).

77. CONSUMER FIN. PROT. BUREAU, SEMI-ANNUAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU 6 (July 2012), http://files.consumerfinance.gov/f/201207_cfpb_Semi-Annual_Report.pdf (Jan. 1, 2012–June 30, 2012).

78. CONSUMER FIN. PROT. BUREAU, SEMI-ANNUAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU 10 (Mar. 2013), http://files.consumerfinance.gov/f/201303_CFPB_SemiAnnualReport_March2013.pdf (July 1, 2012–Dec. 31, 2012).

79. CONSUMER FIN. PROT. BUREAU, SEMI-ANNUAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU 11 (Nov. 2013), http://files.consumerfinance.gov/f/201311_cfpb_semi-annual-report.pdf (April 1, 2013–Sept. 30, 2013).

80. CONSUMER FIN. PROT. BUREAU, SEMI-ANNUAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU 12 (May 2014), http://files.consumerfinance.gov/f/201405_cfpb_semi-annual-report.pdf (Oct. 1, 2013–March 31, 2013).

81. CONSUMER FIN. PROT. BUREAU, SEMI-ANNUAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU 13 (Dec. 2014), http://files.consumerfinance.gov/f/201501_cfpb_semi-annual-report-fall-2014.pdf (April 1, 2014–Sept. 2014).

82. CONSUMER FIN. PROT. BUREAU, SEMI-ANNUAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU 15 (June 2015), http://files.consumerfinance.gov/f/201506_cfpb_semi-annual-report-spring-2015.pdf (October 1, 2014–March 31, 2015).

83. CONSUMER FIN. PROT. BUREAU, SEMI-ANNUAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU 14 (Nov. 2015), http://files.consumerfinance.gov/f/201511_cfpb_semi-annual-report-fall-2015.pdf (April 1, 2015–Sept. 30, 2015).

D. Statutory Powers of the CFPB

The Dodd-Frank Act vests the CFPB, a single entity, with broad rulemaking, supervision, and enforcement powers over significant segments of the consumer financial services market.⁸⁵ Congress established the framework for Bureau's basic powers through a series of interlocking definitions in Title X. As a threshold matter, Congress vested the Bureau with authority over "covered persons." Per the following definitions in Title X:

- A "covered person" is "any person that engages in offering or providing a consumer financial product or service" and "any affiliate of [such a person if the] affiliate acts as a service provider to the covered person."⁸⁶
- A "consumer financial product or service" is "any financial product or service" (as separately defined) that is "offered or provided for use by consumers primarily for personal, family, or household purposes."⁸⁷ The term also includes certain products or services that are "delivered, offered, or provided in connection with a consumer financial product or service."⁸⁸

Title X defines the term "financial product or service"⁸⁹ in detail. The term includes:

- loans and credit, including making, brokering, servicing, and purchasing loans loan and

84. CONSUMER FIN. PROT. BUREAU, SEMI-ANNUAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU 14 (June 2016), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/Report.Spring_2016_SAR.06.28.16.Final.pdf (Oct. 1, 2015–March 31, 2016).

85. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd Frank") § 1012, 12 U.S.C. § 5492 (2015).

86. Dodd-Frank § 1002, 12 U.S.C. § 5481(6).

87. Dodd-Frank § 1002, 12 U.S.C. § 5481(5).

88. *Id.*

89. Dodd-Frank § 1002, 12 U.S.C. § 5481(15).

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- credit;⁹⁰
- certain leases, including making or brokering such leases;⁹¹
 - real estate settlement services, excluding appraisals and insurance;⁹²
 - deposits and deposit-taking;⁹³
 - money transmission;⁹⁴
 - stored-value payment instruments, including issuing such instruments;⁹⁵
 - check cashing, check collection, and check guaranty services;⁹⁶
 - mobile payments and digital banking, or otherwise providing payments or other financial data processing products or services by technological means;⁹⁷
 - financial advisory services;⁹⁸
 - consumer reports, including collecting, analyzing, maintaining, or providing consumer report or account information for use in offering or providing other consumer financial products or services, except to the extent such information is to be used in-house or by an affiliate;⁹⁹ and
 - debt collection.¹⁰⁰

The term does not include:

- insurance; or

90. Dodd-Frank § 1002, 12 U.S.C. § 5481(15)(A)(i).

91. Dodd-Frank § 1002, 12 U.S.C. § 5481(15)(A)(ii).

92. Dodd-Frank § 1002, 12 U.S.C. § 5481(15)(A)(iii).

93. Dodd-Frank § 1002, 12 U.S.C. § 5481(15)(A)(iv).

94. *Id.*

95. Dodd-Frank § 1002, 12 U.S.C. § 5481(15)(A)(v).

96. Dodd-Frank § 1002, 12 U.S.C. § 5481(15)(A)(vi).

97. Dodd-Frank § 1002, 12 U.S.C. § 5481(15)(A)(vii).

98. Dodd-Frank § 1002, 12 U.S.C. § 5481(15)(A)(viii).

99. Dodd-Frank § 1002, 12 U.S.C. § 5481(15)(A)(ix).

100. Dodd-Frank § 1002, 12 U.S.C. § 5481(15)(A)(xi).

- telecommunications.¹⁰¹

The Bureau's supervisory authority expressly extends to "service providers" to covered persons.¹⁰² Under these provisions of Title X, service providers in effect are subject to CFPB examination authority to the same extent as provided to the federal banking regulators under the Bank Service Company Act.¹⁰³ It is difficult to generalize about the rulemaking authority and enforcement power of the Bureau over service providers. For example, Title X's general rulemaking authority does not expressly extend to service providers (except within the limitations on Bureau access to identifiable consumer personal financial information),¹⁰⁴ while a specific Title X provision grants the agency the power to prescribe rules applicable to covered persons and service providers preventing unfair, deceptive, or abusive acts or practices.¹⁰⁵ In general, the Bureau's enforcement powers are not limited to covered persons.¹⁰⁶

A "service provider" is "any person that provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service."¹⁰⁷ The term also includes any person who "participates in designing, operating, or maintaining the consumer financial product or service," or who "processes transactions relating to the consumer financial product or service (other than unknowingly or incidentally transmitting or processing financial data in a manner that such data is undifferentiated from other types of data in the same form as the person transmits or processes)."¹⁰⁸ The term does not include a person solely by virtue of such person providing support or ministerial services or providing time

101. Dodd-Frank § 1002, 12 U.S.C. § 5481(15)(C).

102. Dodd-Frank § 1024, 12 U.S.C. § 5514(e) (supervisory authority over non-depository covered persons); Dodd-Frank § 1025, 12 U.S.C. § 5515(d) (supervisory authority over depository covered persons with assets of \$10 billion or greater).

103. Dodd-Frank § 357(3), 12 U.S.C. 1867(c).

104. Dodd-Frank § 1022, 12 U.S.C. § 5512(c)(9)(B).

105. Dodd-Frank § 1031, 12 U.S.C. § 5531(b).

106. For example, the Bureau's investigative authority is not limited to covered persons, see Dodd-Frank § 1052, 12 U.S.C. § 5562, nor is the agency's power to bring administrative actions, see Dodd-Frank § 1054, 12 U.S.C. § 5564(a). The Bureau's litigation authority arises if "any *person* violates a [f]ederal consumer financial law." Dodd-Frank § 1054, 12 U.S.C. § 5564(a) (emphasis added).

107. Dodd-Frank § 1002, 12 U.S.C. § 5481(26).

108. *Id.*

or space for advertising.¹⁰⁹

The specific coverage of each basic power of the agency—rulemaking, supervision, and enforcement—is discussed in turn below. Congress circumscribed the Bureau’s authority by excluding certain persons engaged in specified professions or businesses, except to the extent they are offering or providing consumer financial products and services. These specified persons include:

- Licensed real estate agents and brokers;
- Retailers of manufactured homes and mobile homes;
- Tax preparers;
- Certified public accountants;
- Attorneys licensed to practice law under applicable state laws;
- Auto and boat dealers;¹¹⁰
- Merchants, retailers, or other sellers of nonfinancial goods or services, to the extent such person extends purchase money credit directly to consumers, collects the debt created by the extension of credit directly or through a debt collector, or sells delinquent debt;¹¹¹ and
- Entities regulated by certain other federal and state regulators, such as state insurance regulators, state securities regulators, the Securities Exchange Commission and the Commodity Futures Trading Commission.¹¹²

^{109.} *Id.*

^{110.} Dodd-Frank § 1029, 12 U.S.C. § 5519. Auto and boat dealers are excluded, except to the extent they offer financing, including leases, directly to consumers and do not routinely assign the loan or lease to an unaffiliated third party; provide services related to real property transactions; or offer any other consumer financial product or service not related to the sale or servicing of vehicles or boats, as applicable. *Id.*

^{111.} Dodd-Frank § 1027, 12 U.S.C. § 5517(b)–(e). Merchants, retailers, or other sellers of nonfinancial goods or services are within the Bureau’s jurisdiction to the extent such person is engaged in offering any consumer financial product or service other than purchase money credit or is otherwise subject to any enumerated consumer law.

^{112.} Dodd-Frank § 1027, 12 U.S.C. § 5517(f)–(l). The other regulators are the Securities and Exchange Commission, Commodities Futures Trading Commission, Internal Revenue Service, Farm Credit Administration, State securities regulators, and State insurance regulators.

These exclusions, however, are not blanket and are conditioned upon circumstances described in each applicable provision of the statute.

1. Rulemaking

The CFPB has the power to promulgate rules to administer, enforce, and implement “federal consumer financial law.”¹¹³ As defined in Title X, the term “federal consumer financial law” encompasses two categories of laws:

The “enumerated consumer laws,” for which rulemaking authority was previously divided among multiple federal agencies. The eighteen enumerated consumer laws are as follows:

- the Alternative Mortgage Transaction Parity Act of 1982;¹¹⁴
- the Consumer Leasing Act of 1976;¹¹⁵
- the Electronic Fund Transfer Act,¹¹⁶ with the exception of Section 920 (Reasonable Fees and Rules for Payment Card Transactions), which remains with the Board;
- the Equal Credit Opportunity Act;¹¹⁷
- the Fair Credit Billing Act;¹¹⁸
- the Fair Credit Reporting Act,¹¹⁹ with the exception of Section 615(e) (Red Flag Guidelines), and Section 628 (Disposal of Records), both which remain jointly assigned to multiple agencies;
- the Home Owners Protection Act of 1998;¹²⁰
- the Fair Debt Collection Practices Act;¹²¹

113. Dodd-Frank § 1022, 12 U.S.C. § 5512.

114. Alternative Mortgage Transaction Parity Act of 1982 § 804, 12 U.S.C. § 3803 (2015).

115. Consumer Leasing Act of 1976 § 3, 15 U.S.C. § 1667 (2015).

116. Electronic Fund Transfer Act § 902, 15 U.S.C. § 1693 (2015).

117. Equal Credit Opportunity Act § 701, 15 U.S.C. § 1691 (2015).

118. Fair Credit Billing Act § 306, 15 U.S.C. § 1666 (2015).

119. Fair Credit Reporting Act § 602, 15 U.S.C. § 1681 (2015).

120. Home Owners Protection Act of 1998 § 1(a), 12 U.S.C. § 4901 (2015).

- Section 43 of the Federal Deposit Insurance Act;¹²²
- Sections 502 through 509 of the Gramm-Leach-Bliley Act;¹²³
- the Home Mortgage Disclosure Act of 1975;¹²⁴
- the Home Ownership and Equity Protection Act of 1994;¹²⁵
- the Real Estate Settlement Procedures Act of 1974;¹²⁶
- the S.A.F.E. Mortgage Licensing Act of 2008;¹²⁷
- the Truth in Lending Act;¹²⁸
- the Truth in Savings Act;¹²⁹
- Section 626 of the Omnibus Appropriations Act, 2009;¹³⁰ and
- the Interstate Land Sales Full Disclosure Act.¹³¹

Title X, proper, which creates in the CFPB’s “organic” authority to promulgate regulations under various provisions in the statute. Specifically, Title X authorizes the Bureau to prescribe regulations that:

- identify certain unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service;¹³²
- require federal registration of certain entities and

121. Fair Debt Collection Practices Act § 802, 15 U.S.C. § 1692 (2015).

122. Federal Deposit Insurance Act § 2[43], 12 U.S.C. § 1831t(c)–(f) (2015).

123. Gramm-Leach-Bliley Act § 502, 15 U.S.C. §§ 6802–6809 (2015).

124. Home Mortgage Disclosure Act of 1975 § 302, 12 U.S.C. § 2801 (2015).

125. Home Ownership and Equity Protection Act of 1994 § 151, 15 U.S.C. § 1601 (2015).

126. Real Estate Settlement Procedures Act of 1974 § 1, 12 U.S.C. § 2601 (2015).

127. S.A.F.E. Mortgage Licensing Act of 2008 § 1501, 12 U.S.C. § 5101 (2015).

128. Truth in Lending Act § 101, 15 U.S.C. § 1601 (2015).

129. Truth in Savings Act § 261, 12 U.S.C. § 4301 (2015).

130. Omnibus Appropriations Act of 2009 § 626(a), 12 U.S.C. § 5538 (2015) (authorizing the FTC to write UDAP rules for residential mortgages).

131. Interstate Land Sales Full Disclosure Act § 1, 15 U.S.C. § 1701 (2015).

132. See Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd Frank”) § 1022, 12 U.S.C. § 5511 (2015).

individuals;¹³³

- require disclosures in connection with certain consumer financial products or services;¹³⁴
- require covered persons to make available to consumers, upon request, information about products or services obtained from such covered persons;¹³⁵
- prohibit or limit the use of arbitration clauses in contracts for consumer financial products or services.¹³⁶

Notably, under its rulemaking authority, the Bureau may promulgate rules that conditionally or unconditionally exempt any class of covered persons, service providers or consumer financial products or services from any provision of Title X or from any rule issued under Title X, “as the Bureau deems necessary to or appropriate to carry out the purposes and objectives of [Title X].”¹³⁷ This authority is subject to the requirement that the Bureau take into consideration certain factors enumerated in the statute, such as the total assets of the class of covered persons, the volume of consumer financial transactions that the covered person conducts and existing provisions of applicable law.¹³⁸

With respect to the enumerated consumer laws, the reach of the Bureau’s rulemaking power is set forth within the enumerated statutes. In effect, the terms of the enumerated laws circumscribe the CFPB’s rulemaking authority.¹³⁹ On the other hand, the terms of Title X control the reach of the CFPB’s organic rulemaking authority.¹⁴⁰ Generally, the jurisdiction of the CFPB’s organic rulemaking authority in Title X includes “covered persons” and “service providers,”¹⁴¹ as defined in

133. See Dodd-Frank § 1022, 12 U.S.C. § 5512(c)(7).

134. Dodd-Frank § 1032, 12 U.S.C. § 5532.

135. Dodd-Frank § 1033, 12 U.S.C. § 5533(a).

136. Dodd-Frank § 1028, 12 U.S.C. § 5518(b).

137. Dodd-Frank § 1022, 12 U.S.C. § 5512 (b)(3)(A).

138. Dodd-Frank § 1022, 12 U.S.C. § 5512 (b)(3)(B).

139. For example, the Truth in Lending Act authorizes the Bureau to prescribe rules governing creditors and extensions of consumer credit, as those terms are defined in the TILA. See 15 U.S.C. 1604(a) (2015) (“The Bureau shall prescribe regulations to carry out the purposes of this subchapter.”).

140. See *id.*

141. See, e.g., Dodd-Frank § 1022, 12 U.S.C. § 5512(b). Note that the disclosure rule writing authority is not by its own terms limited to covered persons, but instead is keyed to

Title X.¹⁴² The agency’s organic rulemaking powers enable the CFPB to prescribe rules, for purposes set forth in Title X, that govern the nearly all segments of the consumer financial services market—credit (including lending and brokering), leases, deposits, payments, debt collection, and financial advisory services.¹⁴³ The notable exclusions from the Bureau’s reach are insurance, which is expressly excluded,¹⁴⁴ and non-deposit investment products, which are impliedly excluded.¹⁴⁵

Procedural limitations apply to the CFPB’s rulemaking authority. First, the CFPB, like all federal agencies, is subject to the Administrative Procedure Act.¹⁴⁶ Thus, before issuing a final rule, the CFPB generally must publish notice of a proposed rulemaking and solicit and consider public comments.¹⁴⁷ Likewise, the CFPB’s final rules are subject to judicial review under the standards of scrutiny that commonly apply.¹⁴⁸

Second, unlike most federal agencies, the CFPB is subject to the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”),¹⁴⁹ which requires the CFPB to take certain steps to evaluate and minimize the cost of significant rules on small businesses. Specifically, in advance of publishing notice of a proposed rulemaking, the CFPB is required to convene a review panel comprised of representatives from the CFPB, the Small Business Administration (“SBA”), and the White House Office of Information and Regulatory Affairs (a “SBREFA Panel”).¹⁵⁰ A SBREFA Panel must take testimony from small business representatives, identified in advance by the SBA, about the potential costs of the proposed rule, and deliver a report of its findings to the CFPB.¹⁵¹ In turn, the CFPB must review and consider

communications about consumer financial products or services. *See* Dodd-Frank § 1022, 12 U.S.C. § 5532. Though not likely, it is conceivable that a person could communicate about a consumer financial product or service and not fall within the definition of a covered person or service provider.

142. Dodd-Frank § 1002, 12 U.S.C. § 5481(6) (26).

143. Levitin, *supra* note 13, at 346.

144. Dodd-Frank § 1002, 12 U.S.C. § 5481(15)(C).

145. Levitin, *supra* note 13, at 346.

146. Administrative Procedure Act, Pub. L. no. 79-404 (1946).

147. Administrative Procedure Act, 5 U.S.C. § 553 (2015).

148. *See, e.g.,* Chevron U.S.A., Inc., v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

149. Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801–808, 15 U.S.C. § 657 (2015).

150. Regulatory Flexibility Act, 5 U.S.C. § 609(b) (2015).

151. *Id.*

the SBREFA panel report and discuss its response, if any, to the panel's findings in the regulatory flexibility analysis that must accompany the notice of proposed rulemaking.¹⁵²

Third, Congress established the Bureau as an independent agency to, among other things, exempt the agency from the Office of Management and Budget ("OMB") requirement to perform a cost-benefit analysis of rulemakings.¹⁵³ The Dodd-Frank Act nevertheless requires the CFPB to undertake such an analysis, albeit under a less stringent standard than applied to other federal regulators.¹⁵⁴ Specifically, the Dodd-Frank Act compels the CFPB, when proposing a rule, to "consider the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule."¹⁵⁵

Finally, CFPB rulemakings are subject to review and veto by the Financial Stability Oversight Council ("FSOC").¹⁵⁶ Also a product of the Dodd-Frank Act, the FSOC is chaired by the Secretary of the Treasury and in addition is comprised of the Comptroller of the Currency; the Chairs of the Federal Reserve, the FDIC, the NCUA, the CFTC, and the SEC; the Directors of the CFPB and the FHFA; and an independent insurance expert appointed by the president.¹⁵⁷ The FSOC is charged with identifying and mitigating systemic risk in the U.S. and global economies. Thus, upon petition by any member, the FSOC is authorized to veto, by vote of a two-thirds majority (which must include the Secretary of the Treasury), any rulemaking that would "put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk."¹⁵⁸ To date, the FSOC has not vetoed any regulation of the CFPB.

Congress charged the Bureau with promulgating mandatory

152. *Id.*

153. See Exec. Order 12866 (Sep. 30, 1993), 58 Fed. Reg. 51735 (1993); *but see* Letter from Rep. J. Hensarling (R-TX) to Hon. R. Cordray (Oct. 19, 2016) (stating that per the holding of the federal circuit court in *PHH Corp. v. CFPB*, the CFPB is an executive agency).

154. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd Frank") § 1022, 12 U.S.C. § 5512(b)(2) (2015).

155. Dodd-Frank § 1022, 12 U.S.C. § 5512(b)(2).

156. Dodd-Frank § 1022, 12 U.S.C. § 5513.

157. *Id.*

158. Dodd-Frank § 1022, 12 U.S.C. § 5513(a).

regulations, often within specific deadlines, as well as discretionary rules with no specific deadlines. Examples of mandatory rules are found in the Mortgage Reform and Anti-Predatory Lending Act, Title XIV of the Dodd-Frank Act.¹⁵⁹ Per Dodd-Frank Act Section 1400(c)(1), for consumer mortgage-related regulations required to be promulgated under Title XIV, Congress directed the Bureau to promulgate final rules within eighteen months of the designated transfer date and to become effective not more than six months thereafter.¹⁶⁰ As further described in Part II(A), the Bureau met the Congressional deadline for the mandatory mortgage rules, all of which became effective prior to February 15, 2013.¹⁶¹ The Director of the Bureau noted that unlike some of the other federal regulators charged with promulgating federal rules pursuant to the Dodd-Frank Act, the CFPB adhered to its Congressional rulemaking mandate.¹⁶²

2. Supervision

Like the federal banking agencies, the CFPB has the power to supervise and examine certain “covered persons” and “service providers” for compliance with the laws and regulations the agency administers.¹⁶³ Specifically, the Dodd-Frank Act directs the CFPB to require reports and periodic examinations for purposes of assessing the examination target’s compliance with the law, obtaining information about the person’s activities and compliance systems, and detecting and assessing risks to consumers and markets for consumer financial products and services.¹⁶⁴ As mentioned above, the CFPB’s supervisory jurisdiction is limited to certain types of covered persons, namely:

- banks and credit unions with total assets in

159. See Dodd-Frank §§ 1432, 1433, 15 U.S.C. § 1639 (implementing various mortgage origination regulations designed to root out deceptive and predatory lending practices).

160. Dodd-Frank § 1400(c)(1), 15 U.S.C. § 1601 note.

161. These regulations included the qualified mortgage rule, 12 CFR § 1026.43, amendments to the loan originator compensation rule, 12 CFR § 1026.36.

162. CFPB, CFPB LAYS OUT IMPLEMENTATION PLAN FOR NEW MORTGAGE RULES, (Feb. 13, 2013), <http://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-lays-out-implementation-plan-for-new-mortgage-rules/>.

163. See Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd Frank”) § 1025, 12 U.S.C. § 5515(b)(1) (2015).

164. Dodd-Frank §§ 1024, 1025, 12 U.S.C. §§ 5514(b)(1), 5515(b)(1).

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- excess of \$10 billion;¹⁶⁵
- residential mortgage lenders, brokers, and servicers;¹⁶⁶
 - persons offering loan modification and foreclosure relief services;¹⁶⁷
 - payday lenders;¹⁶⁸
 - private student lenders;¹⁶⁹
 - “larger participants” in a market for other consumer financial products or services, as designated by the CFPB and proscribed by rule;¹⁷⁰ and
 - any party the CFPB has reasonable cause to determine is engaged in conduct that poses risks to consumers with regard to the offering or provisions of consumer financial products or services.¹⁷¹

Supervisory authority over banks and credit unions with total assets less than \$10 billion remains vested with the prudential regulators.¹⁷²

The Dodd-Frank Act imposes no substantive requirements on the CFPB's designation of “larger participants” in a market for purposes of supervision and examination. The CFPB must engage in rulemaking in order to designate “larger participants” in markets for consumer financial services not expressly listed in the Dodd-Frank Act.¹⁷³ In this regard, the Dodd-Frank Act requires that, as a matter of procedure, the CFPB must consult with the FTC before issuing a rule defining the larger participant criteria.¹⁷⁴ In 2012, the CFPB issued a regulation setting forth its procedures for designating “larger participants.”¹⁷⁵ To

165. Dodd-Frank § 1025, 12 U.S.C. § 5515.

166. Dodd-Frank § 1024, 12 U.S.C. § 5514(a)(1).

167. *Id.*

168. Dodd-Frank § 1024, 12 U.S.C. § 5514(a)(1)(E).

169. Dodd-Frank § 1024, 12 U.S.C. § 5514(a)(1)(D).

170. Dodd-Frank § 1024, 12 U.S.C. § 5514(a)(1)(B).

171. Dodd-Frank § 1024, 12 U.S.C. § 5514(a)(1).

172. Dodd-Frank § 1025, 12 U.S.C. § 5515.

173. Dodd-Frank § 1024, 12 U.S.C. § 5514(a)(2).

174. Dodd-Frank § 1024, 12 U.S.C. § 5514(a)(1)(B).

175. Defining Larger Participants of the Consumer Reporting Market, 77 Fed. Reg.

date, the CFPB has issued final rules defining larger participants in the markets for credit reporting,¹⁷⁶ debt collection,¹⁷⁷ student loan servicing,¹⁷⁸ money transmission,¹⁷⁹ and nonbank auto finance.¹⁸⁰ The statute also contains a special, open-ended authority for the CFPB, on a case-by-case basis, to exercise supervisory jurisdiction over any covered person.¹⁸¹ The statute here provides due-process protections to such parties.¹⁸² To date, the CFPB has not initiated such a “reasonable cause” proceeding to subject a party not otherwise subject to the CFPB’s supervision to the agency’s supervisory jurisdiction.

Consistent with federal banking law, examination schedules and reports of examination are not made available to the public.¹⁸³ However, negative exam findings may lead to CFPB enforcement actions, which may be public.

3. Enforcement

The CFPB has the authority to enforce “federal consumer financial law.”¹⁸⁴ This term includes Title X of the Dodd-Frank Act and any rules promulgated thereunder, as well as the enumerated consumer laws and the rules promulgated thereunder.¹⁸⁵ The Dodd-Frank Act vests the CFPB with three main tools to carry out its enforcement

42873 (Jul. 20, 2012) (codified at 12 C.F.R. pt. 1090).

176. *id.*

177. Defining Larger Participants of the Consumer Debt Collection Market, 77 Fed. Reg. 65775 (Oct. 31, 2012) (codified at 12 C.F.R. pt. 1090).

178. Defining Larger Participants of the Student Loan Servicing Market, 78 Fed. Reg. 73383 (Dec. 6, 2013) (codified at 12 C.F.R. pt. 1090).

179. Defining Larger Participants of the International Money Transfer Market, 79 Fed. Reg. 56631 (Sep. 23, 2014) (codified at 12 C.F.R. pt. 1090).

180. Defining Larger Participants of the Automobile Financing Market and Defining Certain Automobile Leasing Activity as a Financial Product or Service, 80 Fed. Reg. 37495 (Jun. 30, 2015) (codified at 12 C.F.R. pts. 1001, 1090).

181. Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd Frank”) §§ 2, 1024, 12 U.S.C. § 5514(a)(1)(C) (2015).

182. Dodd-Frank § 2, 1024, 12 U.S.C. § 5514(a)(1)(C). (“[The Bureau must have] reasonable cause to determine, by order, after notice to the covered person and a reasonable opportunity for such covered person to respond, based on complaints collected . . . or information from other sources, that such covered person is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services.”).

183. Confidential Information, 81 Fed. Reg. 58309 (Aug. 24, 2016) (codified at 12 C.F.R. pts. 1070.40–48).

184. Dodd-Frank § 1054, 12 U.S.C. § 5564(a).

185. Dodd-Frank § 1002, 12 U.S.C. § 5481(14).

authority. Namely, the Bureau is empowered to (1) investigate potential violations of federal consumer financial law, (2) bring public legal actions, either in an administrative forum or in federal court, for violations of federal consumer financial law, and (3) in the context of an administrative or federal court action, seek injunctive and pecuniary relief for violations of federal consumer law. Each of these tools is addressed in turn below.

As a preliminary matter, the reach of the Bureau's enforcement authority generally is broader than its rulemaking and supervisory authorities. Specifically, unlike the rulemaking and supervisory authorities, which are limited in scope to "covered persons" and "service providers," the agency's enforcement powers apply to any "person." Title X defines "person" as any "individual, partnership, company, corporation, association (incorporated or unincorporated), trust estate, cooperative organization, or other entity."¹⁸⁶ Thus, the Bureau's authority to enforce a federal consumer financial law against any "person," as broadly defined by Title X, is a sweeping, plenary power.¹⁸⁷

The Bureau's enforcement authority is subject to several limitations. With respect to banks and credit unions, the CFPB's enforcement authority tracks its supervisory authority; that is, the Bureau may only bring enforcement actions against banks and credit unions with total assets in excess of \$10 billion.¹⁸⁸ With respect to such "very large banks," the Bureau shares concurrent federal enforcement jurisdiction with the prudential regulators.¹⁸⁹ However, federal enforcement authority over banks with total assets of less than \$10 billion remains entirely vested with the prudential regulators.¹⁹⁰

Additionally, the CFPB and the FTC share concurrent federal enforcement jurisdiction over nonbank covered persons under the Dodd-Frank Act and the FTC Act, respectively.¹⁹¹ This concurrent jurisdiction has been memorialized by the two agencies in a

186. Dodd-Frank § 1002, 12 U.S.C. § 5481(19).

187. *Id.*

188. Dodd-Frank § 1026, 12 U.S.C. § 5516(d).

189. *Id.*

190. *Id.*

191. FEDERAL TRADE COMM'N., *Memorandum of Understanding Between the Consumer Financial Protection Bureau and the Federal Trade Commission* (January 20, 2012), <https://www.ftc.gov/system/files/120123ftc-cfpb-mou.pdf>.

memorandum of understanding.¹⁹² State attorneys general and state financial services regulators also may bring civil actions against covered persons within their jurisdictions for violations of Title X of the Dodd-Frank Act or regulations promulgated thereunder, though authority to enforce an enumerated consumer law depends on the terms of the specific law.¹⁹³ State attorneys general to date have brought a number of these actions, including actions by the New York attorney general alleging that certain auto dealers engaged in deceptive practices¹⁹⁴ and an action by the Mississippi attorney general alleging that a consumer reporting agency knowingly included erroneous data in credit files.¹⁹⁵

The first of the Bureau's enforcement tools under Title X of the Dodd-Frank Act is a broad investigatory power. The primary fact-gathering mechanism is the civil investigative demand ("CID"), which the CFPB may issue if it "has reason to believe that any person may be in possession, custody, or control of any documentary material or tangible things, or may have any information, relevant to a violation."¹⁹⁶ A CID permits the Bureau to demand production of documents, written responses, and oral testimony, among other things. Apart from a CID, the CFPB also may issue a Notice and Opportunity to Respond and Advise ("NORA") letter, which notifies a recipient of potential violations that the CFPB has identified and offers the recipient an opportunity to respond in writing.¹⁹⁷

The Bureau's investigative processes generally are not public.¹⁹⁸ If an investigation reveals evidence of a potential violation, the Bureau may advance beyond the confidential investigation phase to a second tool—a public enforcement action. The Dodd-Frank Act provides the

192. *Id.*

193. Dodd-Frank § 1042, 12 U.S.C. § 5552(a).

194. Press Release, Eric T. Schneiderman, Att'y Gen., N.Y. Office of the Att'y Gen., A.G. Schneiderman Announces Nearly \$14 Million Settlement With NYC And Westchester Auto Dealerships For Deceptive Practices That Resulted In Inflated Car Prices (June 17, 2015), <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-nearly-14-million-settlement-nyc-and-westchester-auto>.

195. Press Release, Jim Hood, Att'y Gen., Att'y Gen., Miss. Office, AG Jim Hood announces that Experian, Transunion, and Equifax will overhaul credit reporting practices, and end deceptive marketing in Mississippi (Oct. 29, 2016), <http://www.ago.state.ms.us/ag-jim-hood-announces-that-experian-transunion-and-equifax-will-overhaul-credit-reporting-practices-and-end-deceptive-marketing-in-mississippi/>.

196. Dodd-Frank § 1052, 12 U.S.C. § 5562(c)(1).

197. CONSUMER FIN. PRO. BUREAU, BULLETIN 2011-04, NOTICE AND OPPORTUNITY TO RESPOND AND ADVISE (2011).

198. *See id.*; Dodd-Frank § 1052, 12 U.S.C. § 5562.

CFPB with two available forums for filing enforcement actions. First, like many federal agencies, the CFPB has the right to file an administrative enforcement action pursuant to the Administrative Procedure Act.¹⁹⁹ Second, the CFPB has independent litigating authority, which gives the agency the right to file suit in its own name in both state and federal courts (as opposed to filing through the Department of Justice, which most federal agencies are required to do).²⁰⁰ The Dodd-Frank Act includes no personal subject matter jurisdictional criteria for choosing either forum.

The Bureau, in any action it commences, is granted broad remedial tools, including the power to seek injunctive and financial relief for a violation. The Dodd-Frank Act permits the Bureau to seek “any appropriate legal or equitable relief with respect to violation of a [f]ederal consumer financial law, including a violation of a rule or order prescribed under a [f]ederal consumer financial law.”²⁰¹ The Dodd-Frank Act sets forth available relief to include, without limitation:

- rescission or reformation of contracts;
- refund of moneys or return of real property;
- restitution;
- disgorgement or compensation for unjust enrichment;
- payment of damages or other monetary relief;
- public notification regarding the violation, including the costs of notification;
- limits on the activities of functions of the person; and
- civil money penalties against any person.²⁰²

The Dodd-Frank Act sets forth a three-tiered civil money penalty scheme. On the first tier, for violation of a law, rule, or final order or condition imposed in writing, the Bureau may impose a civil penalty of up to \$5,000 for each day during which the violation of failure to pay continues.²⁰³ On the second tier, for a reckless violation

199. Dodd-Frank, § 1053, 12 U.S.C. § 5563.

200. Dodd-Frank § 1054, 12 U.S.C. § 5564(a), (f).

201. Dodd-Frank § 1054, 12 U.S.C. § 5565(a)(1).

202. Dodd-Frank § 1054, 12 U.S.C. § 5565(a)(2).

203. Dodd-Frank § 1054, 12 U.S.C. § 5565(c)(2)(A).

of a federal consumer financial law, the Bureau may impose a civil penalty of up to \$25,000 for each day during which the violation continues.²⁰⁴ On the third tier, for a knowing violation of a federal consumer financial law, the Bureau may impose a civil penalty of up to \$1 million for each day during which the violation continues.²⁰⁵

III. THE FIRST FIVE YEARS, BY THE NUMBERS

A. *Rulemaking*

An examination of the CFPB's Federal Register docket shows that, in the period between July 21, 2011, and July 21, 2016, the agency promulgated 124 final rules.²⁰⁶ These 124 final rules fall roughly into nine categories, based on their content and effect: (1) substantive rules, which established or amended certain rights or obligations of market participants under one or more federal consumer financial regulations; (2) administrative and procedural rules, which established or amended certain Bureau operations and certain mechanics of communicating with and practicing before the Bureau; (3) threshold adjustments, which periodically amend dollar or other numerical values, typically (but not always) according to an inflation index; (4) transfer rules, which reprinted existing rules previously administered by another agency; (5) technical corrections, which fix typographical and other non-substantive errors; (6) larger participant rules, which define larger participants in a given market for purposes of supervision by the Bureau; (7) policy statements, which provide guidance about the Bureau's position on certain issues; (8) delays of effective dates; and (9) interpretive rules, which clarify certain ambiguities in existing regulations.²⁰⁷ Of these

204. Dodd-Frank § 1054, 12 U.S.C. § 5565(c)(2)(B).

205. Dodd-Frank § 1054, 12 U.S.C. § 5565(c)(2)(C).

206. Consumer Financial Protection Bureau, OFFICE OF THE FED. REG., <https://www.federalregister.gov/agencies/consumer-financial-protection-bureau> (using the Advanced Search function with the following criteria: (1) Agency: Consumer Financial Protection Bureau; (2) Publication Date: Range: 07/21/2011 to 07/21/2016; (3) Document Type: Rule). Rules are counted based on promulgation date and not on effective date.

207. The authors relied on the Bureau's own categorizations, typically in the rule title or Federal Register abstract, to identify rules in categories (3) through (9). The authors reviewed the balance of the rules to determine whether a rule was "substantive" (i.e., it affected an amendment or addition to a federal consumer financial protection regulation) or "administrative and procedural" (i.e., it set forth a process or procedure for interfacing with the Bureau or for internal Bureau operations).

124 final rules, we identified thirty-four that affected substantive amendments or additions to one or more federal consumer financial regulations. Table 2 shows the composition of the remaining categories.

Table 2
Final Rules by Content Category, July 21, 2011, to July 21, 2016

Content Category	Number
Substantive Rules	34
Administrative & Procedural Rules	25
Threshold Adjustment	24
Transfer Rules	15
Technical Corrections	9
Larger Participant Rules	5
Policy Statements	5
Delays of Effective Date	4
Interpretive Rule	3
TOTAL	124

We further categorized the thirty-four substantive rules according to the consumer financial product or service they cover. Table 3 shows the breakdown of substantive rulemakings by product or service, by year.

Table 3
Substantive Final Rules by Product/Service and Year

Product/Service	Year						Total
	2011	2012	2013	2014	2015	2016	
Mortgage (Origination, Servicing)	1	0	16	1	5	1	24
Remittance Transfers	0	2	2	1	0	0	5
Consumer Credit (Credit Cards)	0	0	2	0	0	0	2
EFT (Non-Remittance)	0	0	1	0	0	0	1
Interstate Land Sales	0	0	0	0	0	1	1
Privacy (No Product)	0	0	0	1	0	0	1
Total	1	2	21	4	5	2	34

The data reflects that, in its first five years, the Bureau focused its rulemaking activities on the residential mortgage market, with mortgage-related rules comprising more than 70% of the Bureau's total substantive rulemaking activity. This focus stems from the mandatory deadlines for mortgage rulemakings set forth in the Dodd-Frank Act. As noted above, Congress directed the Bureau to promulgate certain final mortgage rules within eighteen months of the designated transfer date and to make such rules effective not more than six months thereafter. The Bureau satisfied this mandate through serious and sustained efforts at the agency.

Specifically, in its first five years, the Bureau issued numerous major mortgage rules under a combination of mandatory and discretionary authorities in the Dodd-Frank Act. First, pursuant to the Truth-in-Lending Act (as amended by the Dodd-Frank Act), the Bureau issued the final loan originator compensation and anti-steering rule in January 2013.²⁰⁸ Among other things, this rule prohibits compensating mortgage loan originators based on the terms of a transaction. This rule became effective on January 10, 2014.²⁰⁹

Second, pursuant to the Truth-in-Lending Act (as amended by the Dodd-Frank Act), the Bureau issued the final Escrow Requirements rule in January 2013.²¹⁰ Among other things, this rule lengthens the time for which a mandatory escrow account established for a higher-priced mortgage loan must be maintained. The rule also exempts certain transactions from the escrow requirement for higher-priced mortgage loans. This rule also became effective on January 10, 2014.

Third, pursuant to the Truth-in-Lending Act and the Real Estate Settlement Procedures Act (each, as amended by the Dodd-Frank Act),

²⁰⁸ Loan Originator Compensation Requirements Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 11279 (Feb. 15, 2013) (codified at 12 C.F.R. pts. 1026.25 and 1026.36).

²⁰⁹ The Bureau issued a final rule amending the loan originator compensation rule (and the integrated disclosures rule) on January 20, 2015. *See* Amendments to the 2013 Integrated Mortgage Disclosures Rule Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) and the 2013 Loan Originator Rule Under the Truth in Lending Act (Regulation Z), 80 Fed. Reg. 8767 (Feb. 19, 2015) (codified at 12 C.F.R. pts. 1024.5, 1026.19, 1026.36–38). Among other things, the amendments provide for placement of the Nationwide Mortgage Licensing System and Registry ID (NMLSR ID) on the integrated disclosure. *Id.* The amendments became effective on August 1, 2015. *Id.*

²¹⁰ Escrow Requirements Under the Truth-in-Lending Act (Regulation Z), 78 Fed. Reg. 4725 (Jan. 22, 2013) (codified at 12 C.F.R. pt. 1026.35).

the Bureau issued final Mortgage Servicing rules in February 2013.²¹¹ Among other things, these rules impose revised or additional obligations on mortgage servicers related to error resolution, policies and procedures, loss mitigation, and force-placed insurance. This rule also became effective on January 10, 2014.

Fourth, pursuant to the Truth-in-Lending Act (as amended by the Dodd-Frank Act), the Bureau issued the final Ability-to-Repay/Qualified Mortgage (“ATR/QM”) rule in June 2013.²¹² The ATR/QM rule generally requires creditors to make a reasonable, good faith determination of a consumer’s ability to repay any consumer credit transaction secured by a dwelling and establishes certain protections from liability under this requirement for “qualified mortgages.” This rule also became effective on January 10, 2014.

Fifth, pursuant to the Truth-in-Lending Act and the Real Estate Settlement Procedures Act (each, as amended by the Dodd-Frank Act), the Bureau issued the final integrated disclosures rule for residential mortgage loans on December 31, 2013.²¹³ This rule, which became effective in October of 2015,²¹⁴ combines mandated pre-closing and closing disclosures for consumers in connection with applying for and closing on a mortgage loan.²¹⁵

Sixth, pursuant to the Home Mortgage Disclosure Act (as amended by the Dodd-Frank Act), the Bureau issued a final rule amending the Home Mortgage Disclosure Rule in October of 2015.²¹⁶ Among other things, this final rule modifies the institutional and transactional coverage of HMDA and adds new, expanded reporting requirements. The bulk of this rule will become effective January 1,

211. Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10695 (Feb. 14, 2013) (codified at 12 C.F.R. pts. 1024.6, 1024.9, 1024.17, 1024.30–41.); Mortgage Servicing Rules Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 10902 (codified at 12 C.F.R. pts. 1026.17, 1026.20, 1026.36, 1026.41).

212. Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 35429 (June 12, 2013) (codified at 12 C.F.R. pt. 1026.43).

213. Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z), 78 Fed. Reg. 80225 (Dec. 31, 2013) (codified at 12 C.F.R. pts. 1024.5, 1024.30, 1024.33, 1026.1–3, 1026.17–20, 1026.22, 1026.25, 1026.28, 1026.37–39).

214. *Id.*

215. The Bureau issued a final rule amending the integrated disclosures rule on January 20, 2015. *See supra* note 209.

216. Home Mortgage Disclosure (Regulation C), 80 Fed. Reg. 66127 (Oct. 28, 2015) (codified at 12 C.F.R. pt. 1003).

2018.

Outside of the mortgage market, the Bureau has issued other consumer financial protection final rules. For example, in February 2012, the Bureau issued a final rule covering money transmitters.²¹⁷ This rule established new protections, including disclosures and error resolution and cancellation rights, for consumers who send remittance transfers to other consumers or businesses in a foreign country.²¹⁸ This rule became effective in February 2013. Three months later, in May 2013, the Bureau issued another final rule amending certain major disclosure requirements and error resolution procedures for money transmitters.²¹⁹ This rule became effective in October 2013. The Bureau also promulgated two final rules amending minor provisions of the credit card regulations in Regulation Z.²²⁰

Though they are not “substantive” in content, the Bureau’s five larger participant rules expanded the reach of its supervisory authority, as provided in Title X.²²¹ As noted above, the Bureau in these rulemakings defined criteria for larger participants in the markets for debt collection, consumer reporting, student loan servicing, remittance transfers, and auto lending.²²² Entities that satisfy the criteria set forth in these rules are subject to supervision and periodic examination by the Bureau under Section 1024 of the Dodd-Frank Act.²²³

In addition to the final rules discussed above, the CPFEB proposed two significant rulemakings in the summer of 2016 that remain under consideration. In May 2016, the CPFEB issued a notice of proposed rulemaking that, if made final, would prohibit certain providers of consumer financial products and services from using an arbitration agreement to bar a consumer from filing or participating in a

217. Electronic Fund Transfers (Regulation E), 77 Fed. Reg. 6193 (Feb. 2, 2012) (codified at 12 C.F.R. pt. 1005).

218. *Id.*

219. Electronic Fund Transfers (Regulation E), 78 Fed. Reg. 30661 (May 22, 2013) (codified at 12 C.F.R. pt. 1005).

220. Amendment relating to consumer ability to repay; Truth in Lending Act (Regulation Z), 78 Fed. Reg. 25818 (May 3, 2013) (codified at 12 C.F.R. pt. 1026); Amendment relating to credit limits; Truth in Lending (Regulation Z) 78 Fed. Reg. 18795 (March 28, 2013) (codified at 12 C.F.R. pt. 1026).

221. Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) § 1024, 12 U.S.C. §§ 5514(a)(1)(B) (2015); *see also supra* notes 174–179.

222. *See supra* notes 174–179.

223. Dodd-Frank § 1024, 12 U.S.C. 5514.

class action.²²⁴ In June 2016, the CFPB issued a notice of proposed rulemaking that, if made final, would require payday, vehicle title, and high-cost installment loan lenders to determine a borrower's ability to repay before making a covered loan. The proposed rule would also enhance disclosures for covered loans and impose restrictions on making covered loans to repeat customers in certain circumstances.²²⁵

B. Supervision & Examinations

The pendency, progress, and results of CFPB examinations and investigations are confidential. As a result, public knowledge about the CFPB's examination and supervisory activities is limited. The Office of Supervision's thrice-yearly publication *Supervisory Highlights* describes common examination findings and touches on the Bureau's examination priorities and sensitivities.

The Bureau published eleven issues of *Supervisory Highlights* between July 21, 2011, and July 21, 2016. Of those eleven issues, nine focused at least in part on fair lending; seven focused at least in part on debt collection; and six focused at least in part on consumer reporting. Table 4 summarizes the focus areas of all eleven issues.

²²⁴ Arbitration Agreements, 81 Fed. Reg. 32829, Arbitration Agreements 32829 (May 24, 2016) (to be codified at 12 C.F.R. pt. 1040).

²²⁵ Payday, Vehicle Title, and Certain High-Cost Installment Loans, 81 Fed. Reg. 47864 (July 22, 2016) (to be codified at 12 C.F.R. pt. 1041).

Table 4
Focus Areas of Supervisory Highlights, July 21, 2011, to July 21, 2016

Focus	2012 (One Issue) ²²⁶	2013 (Two Issues) ²²⁷	2014 (Three Issues) ²²⁸	2015 (Three Issues) ²²⁹	2016 (Two Issues) ²³⁰
Fair Lending	Issue 1		Issues 1, 2, 3	Issues 1, 2, 3	Issues 1, 2
Consumer Reporting			Issues 1, 3	Issues 1, 2, 3	Issue 1
Debt Collection			Issue 1	Issues 1, 2, 3	Issues 1, 2
Mortgage Origination				Issues 1, 2, 3	Issues 1, 2
Mortgage Servicing		Issues 1, 2	Issue 3	Issues 2, 3	
Student Loan Servicing			Issue 3	Issues 2, 3	
Short-term, Small dollar			Issue 1		Issue 2
Deposits			Issue 2		Issue 2
Remittance Transfers					Issue 1
Vendor Management	Issue 1				

226. CONSUMER FIN. PROT. BUREAU, SUPERVISORY HIGHLIGHTS (Fall 2012), http://files.consumerfinance.gov/f/201210_cfpb_supervisory-highlights-fall-2012.pdf.

227. CONSUMER FIN. PROT. BUREAU, SUPERVISORY HIGHLIGHTS (Winter 2013), http://files.consumerfinance.gov/f/201401_cfpb_supervisory-highlights-winter-2013.pdf; CONSUMER FIN. PROT. BUREAU, SUPERVISORY HIGHLIGHTS (Summer 2013), http://files.consumerfinance.gov/f/201308_cfpb_supervisory-highlights-august.pdf.

228. CONSUMER FIN. PROT. BUREAU, SUPERVISORY HIGHLIGHTS (Spring 2014), http://files.consumerfinance.gov/f/201405_cfpb_supervisory-highlights-spring-2014.pdf; CONSUMER FIN. PROT. BUREAU, SUPERVISORY HIGHLIGHTS (Summer 2014), http://files.consumerfinance.gov/f/201409_cfpb_supervisory-highlights_auto-lending_summer-2014.pdf; CONSUMER FIN. PROT. BUREAU, SUPERVISORY HIGHLIGHTS (Fall 2014), http://files.consumerfinance.gov/f/201410_cfpb_supervisory-highlights_fall-2014.pdf.

229. CONSUMER FIN. PROT. BUREAU, SUPERVISORY HIGHLIGHTS (Winter 2015), http://files.consumerfinance.gov/f/201503_cfpb_supervisory-highlights-winter-2015.pdf; CONSUMER FIN. PROT. BUREAU, SUPERVISORY HIGHLIGHTS (Summer 2015), http://files.consumerfinance.gov/f/201506_cfpb_supervisory-highlights.pdf; CONSUMER FIN. PROT. BUREAU, SUPERVISORY HIGHLIGHTS (Fall 2015), http://files.consumerfinance.gov/f/201510_cfpb_supervisory-highlights.pdf.

230. CONSUMER FIN. PROT. BUREAU, SUPERVISORY HIGHLIGHTS (Winter 2016), http://files.consumerfinance.gov/f/201603_cfpb_supervisory-highlights.pdf; CONSUMER FIN. PROT. BUREAU, SUPERVISORY HIGHLIGHTS (Summer 2016), http://files.consumerfinance.gov/f/documents/Supervisory_Highlights_Issue_12.pdf.

The data indicate that the Bureau's interest in fair lending, consumer reporting, debt collection, and mortgage servicing, respectively, is high and remains steady. Issues related to compliance with mortgage rules, including mortgage origination and mortgage servicing issues, also remain top priorities.

C. Enforcement

In the period between July 21, 2011, and July 21, 2016, the Bureau according to its website reached a public disposition on 115 individual enforcement actions.²³¹ The majority of the Bureau's public enforcement activity has been resolved with consent orders, which are filed in the administrative forum, and stipulated judgments, which are filed in federal district court. These public documents commonly memorialize the terms of settlement as agreed between the Bureau and the target entity or individual prior to the commencement of full-blown legal or administrative proceedings. Terms of these resolutions typically are negotiated confidentially before being made public. Of the 115 actions on which the Bureau has reached a final disposition, only nine were contested (that is, they involved actual litigation proceedings, rather than early-stage consent orders or stipulated judgments, as applicable). Of these nine contested actions, eight were filed and later resolved in federal court, and only one was filed and later resolved in the Bureau's administrative forum.

In addition to the 115 public actions on which the Bureau reached a final disposition between July 21, 2011, and July 21, 2016, the Bureau in that same period filed an additional twenty-two actions that remained pending and in contest. Of these twenty-two actions, two were pending in the administrative forum and twenty were pending in federal court.²³²

It appears that targets of CFPB administrative actions and litigation are incentivized to seek settlement terms with the agency. For

231. CONSUMER FIN. PROT. BUREAU, ENFORCEMENT ACTIONS, <http://www.consumerfinance.gov/policy-compliance/enforcement/actions/> (last visited January 10, 2017).

232. CONSUMER FIN. PROT. BUREAU, ENFORCEMENT ACTIONS, http://www.consumerfinance.gov/policy-compliance/enforcement/actions/?form-id=0&filter0_title=&filter0_categories=admin-filing&filter0_from_date=&filter0_to_date (last visited January 10, 2017); *see also infra* Table 6.

example, financial institutions and other respondents or defendants may be hesitant to run the risk of adverse final decisions that could result in substantial, transaction-multiplied money remedies such as restitution, disgorgement, and civil money penalties.²³³ Financial risk may be compounded by reputational risk, if the financial institution or other respondent or defendant is alleged in a public forum to have violated consumer financial protection laws, such as anti-discrimination laws. Finally, CFPB consent orders and stipulated judgments typically do not contain admissions of liability by the respondents or defendants.

Only one contested administrative action commenced by the Bureau has resulted in a nonconsensual order.²³⁴ This matter starkly demonstrates the risk of opposing the CFPB in a particular action, since the Director imposed a money penalty on the respondent which represented a multiple of approximately eighteen times the penalty imposed by the Administrative Law Judge earlier in the action.²³⁵ Following the Director's entry of a final public Order in this case, the respondent appealed to the U.S. Court of Appeals for the District of Columbia Circuit, as permitted pursuant to federal administrative law.²³⁶ The circuit court reversed the Director's rulings, vacated the Order and remanded the case to the Bureau for consideration of one relatively narrow factual issue under the Real Estate Settlement Procedures Act.²³⁷ The CFPB filed a petition for rehearing en banc, which the circuit court granted in February of 2017.²³⁸ Because the dispute remains in contest, this case is categorized as pending for purposes of this Article.

Occasionally, material agency investigations have come to light through securities filings made by target companies that are publicly traded.²³⁹ In cases involving non-public companies, the commencement or, in most cases, the resolution of a CFPB enforcement action becomes public when filings are made in a federal district court or in the CFPB's

233. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 1055, 12 U.S.C. § 5565(a)(2) (2015).

234. In re PHH Corporation et al., No. 2014-CFPB-002 (June 4, 2015).

235. *Id.*

236. PHH Corp. v. Consumer Fin. Pro. Bureau, 839 F.3d 1 (D.C. Cir. 2016).

237. *PHH*, 839 F.3d at 54.

238. See Order (Doc. 1661681), No. 15-1177 (D.C. Cir., Feb. 16, 2017). For more information on the posture and current state of the PHH case see *supra* note 75 and *infra* Part V.

239. See, e.g., Ben Lane, *CFPB launches investigation into Bankrate mortgage rate tracker*, HOUSINGWIRE (June 19, 2015).

administrative forum. Generally, though, investigations under the Bureau's enforcement authority, including CIDs and NORA letters, are confidential.²⁴⁰ Thus, the available data on CFPB enforcement actions is limited to those actions that have been made public by federal court or administrative filings.

We reviewed the public filings relating to each of the Bureau's 115 resolved public enforcement actions and twenty-two pending public enforcement actions, all of which are available on the Bureau's website.²⁴¹ Table 5 shows the breakdown of resolved and pending public enforcement actions by year during the first five years of the Bureau's full empowerment.

Table 5
CFPB Publicly Announced Enforcement Actions by Year, as of July 21, 2016

Year	Number of Resolved Public Actions	Number of Pending Public Actions	Total Public Actions
2012	5	2	7
2013	22	3	25
2014	28	5	33
2015	48	8	57
2016	12	4	16
TOTAL	115	22	137

Table 6 further shows the breakdown of resolved and pending public enforcement actions by year and forum during the first five years of the Bureau's full empowerment.

240. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 1052, 12 U.S.C. § 5562(d) (2015).

241. CONSUMER FIN. PROT. BUREAU, ENFORCEMENT ACTIONS, http://www.consumerfinance.gov/policy-compliance/enforcement/actions/?form-id=0&filter0_title=&filter0_categories=admin-filing&filter0_from_date=&filter0_to_date (last visited January 10, 2017).

Table 6
CFPB Publicly Announced Enforcement Actions by Year and
Forum, as of July 31, 2016

Year	Forum	Number of Resolved Public Actions	Number of Pending Public Actions	Total Public Actions
2012	Administrative	4	0	4
	Federal Court	1	2	3
2013	Administrative	14	0	14
	Federal Court	8	3	11
2014	Administrative	16	1	17
	Federal Court	12	4	16
2015	Administrative	30	1	31
	Federal Court	18	7	25
2016	Administrative	11	0	11
	Federal Court	1	4	5
TOTAL		115	22	137

On its website, the CFPB has identified the consumer financial product or service at the core of each enforcement action.²⁴² According to these identifiers, the CFPB has resolved more public enforcement actions related to mortgages than any other product—thirty-nine in total over five years. Other high frequency targets were credit cards (twenty-six), debt collection (twenty-six), and auto loans (thirteen). Table 7 shows the breakdown by product type and year. Note that the sum total of actions is slightly higher, accounting for actions that the Bureau’s website identifies as relating to multiple products.

^{242.} *Id.*

Table 7
CFPB Resolved Public Enforcement Actions by Product Type and
Year, as of July 21, 2016

Products	Years					Total
	2012	2013	2014	2015	2016	
Mortgage	0	9	10	18	2	39
Credit Cards	4	5	8	8	1	26
Collection	0	3	5	12	6	26
Auto Loans	0	3	2	6	2	13
Credit Reporting	0	0	2	5	0	7
Student Loans	0	0	3	2	1	6
Debt Relief	1	3	1	0	0	5
Deposits	0	0	1	3	0	4
Cellular Service	0	0	2	1	0	3
Payday	0	1	1	1	0	3
Land Sales	0	1	0	1	0	2
Tax Loans	0	0	0	1	0	1
Total	5	25	35	58	12	135

Accounting for both resolved and pending public enforcement actions, the balance shifts slightly, but not by much. Per the CFPB website data, the CFPB pursued (i.e., resolved or filed with resolution pending) more public enforcement actions related to mortgages than any other products—forty-six in total over five years. Other high frequency targets include debt collection (twenty-eight), credit cards (twenty-six), auto loans (thirteen), and payday loans (eleven). Notably, the CFPB has resolved only three public enforcement actions related to payday loans in its first five years, but another eight actions remain pending. Table 8 shows the breakdown by product type, year, and status (i.e., resolved or pending).

Table 8
CFPB Resolved and Pending Public Enforcement Actions by
Product Type, Year, and Status as of July 21, 2016

Products	Status*	Years					Total	
		2012	2013	2014	2015	2016		
Mortgage	R	0	9	10	18	2	39	46
	P	2	1	3	1	0	7	
Credit Cards	R	4	5	8	8	1	26	26
	P	0	0	0	0	0	0	
Collection	R	0	3	5	12	6	26	28
	P	0	1	0	1	0	2	
Auto Loans	R	0	3	2	6	2	13	13
	P	0	0	0	0	0	0	
Credit Reporting	R	0	0	2	5	0	7	7
	P	0	0	0	0	0	0	
Student Loans	R	0	0	3	2	1	6	8
	P	0	0	1	1	0	2	
Debt Relief	R	1	3	1	0	0	5	8
	P	0	1	1	1	0	3	
Deposits	R	0	0	1	3	0	4	4
	P	0	0	0	0	0	0	
Cellular Service	R	0	0	2	1	0	3	3
	P	0	0	0	0	0	0	
Payday	R	0	1	1	1	0	3	11
	P	0	1	1	3	3	8	
Land Sales	R	0	1	0	1	0	2	2
	P	0	0	0	0	0	0	
Tax Loans	R	0	0	0	1	0	1	1
	P	0	0	0	0	0	0	
Electronic Payments	R	0	0	0	0	0	0	1
	P	0	0	0	0	1	1	
Installment Loans	R	0	0	0	0	0	0	1
	P	0	0	0	1	0	1	
Total		7	29	41	66	16	159	

*Status: R – Resolved, P- Pending

The data indicate that, until 2016, the CFPB's enforcement activity focused heavily on the mortgage market, with a secondary emphasis on credit cards. In 2015 and 2016, enforcement activity surged in the debt collection and payday loan markets.

The financial settlements reached through public CFPB enforcement actions have varied widely in both size and composition. The largest total settlement through the first five years of the CFPB's enforcement activity, entered against a mortgage servicer in December 2013, required the servicer to provide \$2 billion in relief to consumers (in the form of principal reduction to underwater borrowers) and an additional \$125 million in direct refunds to foreclosed borrowers.²⁴³ This settlement did not include a civil money penalty ("CMP"), however. During this time period, a string of actions against large national banks relating to credit card add-on products produced three of the six largest total settlements to date, and each involved a CMP. In September 2013, the Bureau ordered a national bank to pay \$309 million in consumer relief plus a \$20 million CMP to the Bureau.²⁴⁴ Then, in April 2014, the Bureau ordered another national bank to pay \$727 million in consumer relief plus a \$20 million CMP to the Bureau.²⁴⁵ Finally, in July 2015, the Bureau ordered another national bank to pay \$700 million in consumer relief plus a \$25 million CMP to the Bureau.²⁴⁶

In the Bureau's first five years, the six largest total settlements ranged in aggregate value from \$228.5 million to \$2 billion.²⁴⁷ Among

243. CONSUMER FIN. PROT. BUREAU, CFPB, STATE AUTHORITIES ORDER OWEN TO PROVIDE \$2 BILLION IN RELIEF TO HOMEOWNERS FOR SERVICING WRONGS (Dec. 19, 2013), <http://www.consumerfinance.gov/about-us/newsroom/cfpb-state-authorities-order-ocwen-to-provide-2-billion-in-relief-to-homeowners-for-servicing-wrongs/>.

244. *In re JPMorgan Chase Bank, N.A.*, No. 2013-CFPB-0007 (2013).

245. CONSUMER FIN. PROT. BUREAU, CFPB ORDERS BANK OF AMERICA TO PAY \$727 MILLION IN CONSUMER RELIEF FOR ILLEGAL CREDIT CARD PRACTICES (Apr. 9, 2014), <http://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-bank-of-america-to-pay-727-million-in-consumer-relief-for-illegal-credit-card-practices/>.

246. CONSUMER FIN. PROT. BUREAU, CITIBANK TO PAY \$700 MILLION IN CONSUMER RELIEF FOR ILLEGAL CREDIT CARD PRACTICES (July 15, 2015), <http://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-citibank-to-pay-700-million-in-consumer-relief-for-illegal-credit-card-practices/>.

247. *See supra* notes 228–231. *See also* CONSUMER FIN. PROT. BUREAU, CFPB, FEDERAL PARTNERS, AND STATE ATTORNEYS GENERAL FILE ORDER REQUIRING SUNTRUST TO PROVIDE \$540 MILLION IN RELIEF TO HOMEOWNERS FOR SERVICING WRONGS (Jun. 17, 2014), <http://www.consumerfinance.gov/about-us/newsroom/cfpb-federal-partners-and-state-attorneys-general-file-order-requiring-suntrust-to-provide-540-million-in-relief-to-homeowners-for-servicing-wrongs/> (\$540 million in refunds and consumer relief, plus \$10

these six settlements, the amount of the CMP, if any, ranged from \$3.5 million to \$35 million, with the balance of the settlement value typically going to consumer relief or disgorgement. In its sixth year, however, the CFPB ordered a large national bank to pay \$2.5 million in consumer relief plus a \$100 million CMP in connection with certain account marketing and promotion activities.²⁴⁸

IV. THE AGENCY'S AGENDA GOING FORWARD

Semiannually, the CFPB publishes a rulemaking agenda.²⁴⁹ Typically, each semiannual agenda groups rulemaking initiatives into three categories based on the initiatives' respective stage in the rulemaking process—the pre-rule stage, the proposed rule stage, and the final rule stage. At the time this Article went to press, the CFPB most recently published its semiannual rulemaking agenda on December 2, 2016 (the “Fall 2016 Agenda”),²⁵⁰ On the Fall 2016 Agenda, the Bureau listed eleven rulemaking initiatives in the final rule stage:

- Prepaid Accounts (Regulations E and Z);
- Expedited Funds Availability Act (Regulation CC);
- Consumer Financial Civil Penalty Fund;
- Arbitration;
- Gramm-Leach-Bliley Act (Regulation P);
- Amendments to the Federal Mortgage Disclosure Rules (Regulation and Z);
- Civil Penalty Inflation Adjustment Rule;
- Amendments Relating to Disclosure of Records and Information under the Freedom of Information Act;
- Consumer Leasing (Regulation M);

million in penalties to various federal agencies).

248. CONSUMER FIN. PROT. BUREAU, CITIBANK TO PAY \$700 MILLION IN CONSUMER RELIEF FOR ILLEGAL CREDIT CARD PRACTICES (July 15, 2015), <http://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-citibank-to-pay-700-million-in-consumer-relief-for-illegal-credit-card-practices/>.

249. Kelly Cochran, *Fall 2016 Rulemaking Agenda*, CONSUMER FIN. PROT. BUREAU (Dec. 2, 2016), <http://www.consumerfinance.gov/about-us/blog/fall-2016-rulemaking-agenda/>.

250. *Id.*

- Exemption Thresholds for Consumer Credit Transactions under TILA (Regulation Z); and
- Exemption Thresholds for Higher-Priced Mortgage Loans under TILA (Regulation Z).²⁵¹

Of the eleven rulemaking initiatives listed on the Fall 2016 Agenda in the final rule stage, three are complete: (1) Prepaid Accounts (Regulations E and Z) (final rule issued October 5, 2016);²⁵² (2) Exemption Thresholds for Consumer Credit Transactions under TILA (final rule issued November 30, 2016); and (3) Exemption Thresholds for Higher-Priced Mortgage Loans under TILA (final rule issued November 30, 2016). Additionally, the Bureau issued an interim final rule in the Civil Penalty Inflation Adjustment rulemaking on June 14, 2016.²⁵³ A final rule remains forthcoming. The Fall 2016 Agenda indicates that the Bureau plans to issue final rules in the remaining seven initiatives in 2017.

The Bureau listed four rulemakings in the proposed rule stage on the Fall 2016 Agenda:

- Payday Loans and Deposit Advance Products;
- Amendments to FIRREA Concerning Appraisals;
- Technical Corrections and Clarifying Amendments to Home Mortgage Disclosure (Regulation C); and
- Reconciling Equal Credit Opportunity (Regulation B) and Home Mortgage Disclosure (Regulation C) Ethnicity and Race Information Collection.²⁵⁴

251. OFFICE OF INFORMATION AND REGULATORY AFFAIRS, CFPB: AGENCY RULE LIST, https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=3170.

252. *Id.*; CONSUMER FIN. PROT. BUREAU, CFPB FINALIZES STRONG FEDERAL PROTECTIONS FOR PREPAID ACCOUNT CONSUMERS (Oct. 5, 2016), <http://www.consumerfinance.gov/about-us/newsroom/cfpb-finalizes-strong-federal-protections-prepaid-account-consumers/>.

253. Civil Penalty Inflation Adjustment, 81 Fed. Reg. 38569 (June 14, 2016) (codified at 12 C.F.R. pt. 1083).

254. OFFICE OF INFORMATION AND REGULATORY AFFAIRS, CFPB: AGENCY RULE LIST, <https://www.reginfo.gov/public/do/>

- The Bureau issued a notice of proposed rulemaking on payday, vehicle title, and certain high-cost installment loans on June 2, 2016.²⁵⁵ The Fall 2016 Agenda indicates that the Bureau intends to issue notices of proposed rulemaking in March 2017 for the following initiatives: (1) Technical Corrections and Clarifying Amendments to Home Mortgage Disclosure (Regulation C); and (2) Reconciling Equal Credit Opportunity (Regulation B) and Home Mortgage Disclosure (Regulation C) Ethnicity and Race Information Collection.²⁵⁶
- On the Fall 2016 Agenda, the Bureau listed four rulemaking initiatives in the pre-rule stage:
- Supervision of Larger Participants in the Installment Loan and Vehicle Title Loan Markets;
- Business Lending Data (Regulation B);
- Debt Collection;
- Overdrafts.²⁵⁷

The Bureau did not take public action on these four rulemaking initiatives before its fifth anniversary, but it has since taken public steps on the debt collection rulemaking. Specifically, the Bureau published an outline of proposals under consideration for regulation of the third-party debt collection market on July 28, 2016,²⁵⁸ and it convened a

eAgencyMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=3170 (last visited Feb. 9 2017).

255. *Id.*

255. CONSUMER FIN. PROT. BUREAU, *supra* note 251.

255. Payday, Vehicle Title, and Certain High-Cost Installment Loans, 81 Fed. Reg. 47864 (July 22, 2016) (to be codified at 12 C.F.R. pt. 1041).

256. OFFICE OF INFORMATION AND REGULATORY AFFAIRS, CFPB: AGENCY RULE LIST, https://www.reginfo.gov/public/do/eAgencyMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=3170 (last visited Feb. 9 2017).

257. *Id.*

258. CONSUMER FIN. PROT. BUREAU, CONSUMER FINANCIAL PROTECTION BUREAU CONSIDERS PROPOSAL TO OVERHAUL DEBT COLLECTION MARKET (July 28, 2016), <http://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-considers-proposal-overhaul-debt-collection-market/>.

SBREFA panel to hear testimony on the proposals on August 25, 2016.²⁵⁹ The Bureau has announced it plans to address regulation of the first-party debt collection market on a separate rulemaking track.²⁶⁰

In February 2016, the Bureau published a document summarizing its policy priorities through 2017.²⁶¹ This document included policy priorities that have been included in some form on the Spring 2016 Agenda and several others not necessarily tied to specific rulemakings. For this latter category, the Bureau intends to continue examinations and investigations of consumer reporting companies under its supervisory and enforcement authorities, respectively, with an eye toward a possible rulemaking to govern furnisher and consumer reporting accuracy, dispute resolution, and related issues.²⁶² The Bureau's consumer education unit intends to harness research on consumer demands to create user-friendly tools to help consumers make important financial decisions.²⁶³ The CFPB's research arm intends to focus efforts on understanding the composition of household balance sheets.²⁶⁴ Finally, the CFPB intends to continue examinations and investigations of student loan servicers to identify any potential need for a future rulemaking.²⁶⁵

V. CONCLUSION

As this Article demonstrates, the CFPB, a new federal agency in Washington, D.C., generated a staggering volume of output in its first five years of full empowerment. According to issuances by the agency, the Bureau has facilitated approximately \$11.7 billion in consumer redress and \$440 million in penalties during this time period,²⁶⁶ while

259. Kelly Knepper-Stephens, *Small Business Representative Shares Her Thoughts About Yesterday's Debt Collection SBREFA Hearing*, INSIDEARM, (Aug. 26, 2016), <https://www.insidearm.com/news/00041691-small-business-representative-shares-her-/>.

260. See CONSUMER FIN. PROT. BUREAU, SMALL BUSINESS REVIEW PANEL FOR DEBT COLLECTION AND DEBT BUYER RULEMAKING: OUTLINE OF PROPOSALS UNDER CONSIDERATION AND ALTERNATIVES CONSIDERED (July 28, 2016), http://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf.

261. See CONSUMER FIN. PROT. BUREAU, POLICY PRIORITIES OVER THE NEXT TWO YEARS (2016) http://files.consumerfinance.gov/f/201602_cfpb_policy-priorities-over-the-next-two-years.pdf.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. CONSUMER FIN. PROT. BUREAU, CONSUMER FINANCIAL PROTECTION BUREAU:

promulgating thousands of pages of complex, wide-ranging regulations mandated or contemplated by the Dodd-Frank Act. Data on the agency's supervisory activities are not readily available, due to required confidentiality. Sources show that the number of examinations has exceeded well over 100 during these early years of the Bureau's existence, and anecdotal evidence indicates that the total number of Bureau examinations is much greater than this. The agency's examinations have covered compliance with consumer financial services laws and regulations, as well as specialized areas of emphasis, such as fair lending.²⁶⁷

Just as the Bureau's activities have garnered praise from members of Congress, consumer and community advocates and others, they have attracted the attention of policymakers intent on modifying the agency's structure and slimming down its powers. It is nearly a universally held belief that the new Administration of President Donald J. Trump will support changes to the Dodd-Frank Act.²⁶⁸ The extent of Dodd-Frank reform touching the Bureau is not yet known. An outline of possible CFPB reforms is provided in the Financial CHOICE Act of 2016, introduced in the House of Representatives in August of 2016.²⁶⁹ Title III of the CHOICE Act sets out a number of reforms to the structure of the Bureau, to be renamed the Consumer Financial Opportunity Commission, including creation of a five-member commission and aligning the agency's funding with Congressional appropriations. The CHOICE Act also contains a smorgasbord of limitations on the Bureau's powers, including conditions on the exercise of rulemaking and enforcement actions. If nothing else, the CHOICE Act very well could serve as a checklist for the new Administration to discern parts of Title X and identify Bureau actions to date which could be amended or rescinded to satisfy the Bureau's critics.

Finally, the ultimate disposition of *PHH Corp. v. CFPB*²⁷⁰ could

ENFORCING FEDERAL CONSUMER PROTECTION LAWS 1 (July 13, 2016), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/07132016_cfpb_SEFL_anniversary_factsheet.pdf.

267. CONSUMER FIN. PROT. BUREAU, *Fair Lending Report of the Consumer Financial Protection Bureau* (April, 2016), http://files.consumerfinance.gov/f/documents/201604_cfpb_Fair_Lending_Report_Final.pdf (hereinafter "CFPB Fair Lending Report").

268. Ian McKendry, *Trump Gives Banks Their Best Shot at Rolling Bank Dodd Frank*, AM. BANKER (Nov. 14, 2016).

269. Financial Choice Act of 2016, H.R. 5983, 114th Congress (2016).

270. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016).

significantly impact the Director's prospects going forward. As noted above, the D.C. Circuit (the "Court") has agreed to rehear *PHH* en banc.²⁷¹ The petition follows the October 11, 2016, decision by a three-judge panel of the Court, which held, in part, that the CFPB's structure contravenes long-standing separation of powers precedent because it is headed by a single director who may be removed by the President only for cause, instead of at will.²⁷² According to the Court, such precedents support the conclusion that leaders of federal agencies with quasi-legislative and quasi-investigative powers akin to the CFPB's (e.g., the SEC, the NLRB) should be checked by the president (via at will removal authority), a multi-member body, or both.²⁷³ The CFPB's leadership structure, with no check by the president (via at-will removal authority) or a multi-member body, concentrates an undue volume of power with a single individual, the Court reasoned.²⁷⁴ Thus, in its decision, the Court severed the "for cause" removal provision of the statute establishing the office of the Director.²⁷⁵ Post-severance, the Director would serve at will, subject to "the ultimate supervision and direction of the president."²⁷⁶

If the Court sitting en banc confirms the panel's decision, the CFPB may appeal the decision to the United States Supreme Court.²⁷⁷ The appeal would be heard at the earliest in the Supreme Court's 2017–2018 term.²⁷⁸

Notably, even though Title X grants the CFPB independent litigating authority, the agency would need the approval of President Trump's Solicitor General in order to appeal the decision to the high court.²⁷⁹ It is conceivable that the new Solicitor General might withhold such approval, such that the decision of the lower court would stand. It is likewise conceivable that the new Congress could render the issue moot by enacting structural reforms before the appeals process is fully exhausted. All told, depending on the resolution of many variables,

271. Order (Doc. 1661681), No. 15-1177 (D.C. Cir., Feb. 16, 2017).

272. *PHH*, 839 F.3d at 30; see also CFPB Fair Lending Report *supra*, note 267.

273. *Id.* at 25; see also CFPB Fair Lending Report *supra*, note 267 at 44–49.

274. *Id.* at 21; see also CFPB Fair Lending Report *supra*, note 267 at 44–49.

275. *Id.* at 39; see also CFPB Fair Lending Report *supra*, note 267 at 65–69.

276. *Id.* at 10; see also CFPB Fair Lending Report *supra*, note 267 at 13.

277. *Id.*

278. *Id.*

279. *Id.*

PHH feasibly could be resolved in 2017, or it could stretch into the years ahead.