



January 6, 2012

## AND THEY'RE OFF!: President Obama Appoints Cordray as Director of CFPB

On January 4<sup>th</sup>, 2012, President Obama appointed Richard Cordray as the first Director of the federal Consumer Financial Protection Bureau ("CFPB"), using his executive authority after the Senate rejected the nomination last month. Senate Republicans generally objected to the nomination, maintaining that they did not want a director to be confirmed until changes were made to the Bureau's structure. Senate Republicans had tried to keep the Senate technically in session until they return in January to prevent a recess nomination. The President's action is likely to invite legal challenge, but that is likely only to slow, not stop, the CFPB juggernaut. By waiting to appoint Cordray until after the Senate's commencement of its Second Session of the 112th Congress, President Obama appears to have extended Cordray's potential period of service to December 2013. On January 5<sup>th</sup>, Cordray designated Raj Date as the CFPB's first Deputy Director, ensuring continuity of leadership beyond Cordray's tenure.

### Impact of Appointment on CFPB

The appointment of a Director allows the CFPB to dramatically expand the scope of authority and accelerate potential new initiatives. Without a Director, the CFPB's examination authority (for federal consumer law compliance purposes) was limited to banks, savings associations and credit unions with total assets in excess of \$10 billion and their affiliates and to enforcing 14 enumerated laws and their preexisting accompanying regulations. *See, e.g.*, our ALERT dated December 19, 2011 (republished rules); *see also* our ALERT dated December 2, 2011 (regarding the Bureau's request for input on streamlining existing regulations). With a Director, the CFPB's supervision and examination authority expands to include nonbanks and the Bureau is now allowed to (i) begin rulemaking processes to define and prohibit unfair, deceptive or abusive acts or practices in connection with consumer financial products and services and (ii) prescribe rules and develop model disclosure forms to ensure fair, accurate and effective disclosures for covered products and services. President Obama highlighted these expanded powers in his remarks in which he named "dishonest

mortgage brokers, payday lenders and debt collectors" as targets.

### Nonbank Supervision

The Dodd-Frank Act authorizes the CFPB to supervise "covered persons" in the residential mortgage, private education lending, and payday lending markets. For other markets, supervision generally will extend only to "large participants" to be defined by rule of the CFPB (very shortly per CFPB representatives). Six markets were identified by the CFPB last June for possible inclusion in an initial rule: debt collection; consumer reporting; consumer credit and related activities; money transmitting, check cashing and related activities; prepaid cards; and debt relief services.

Importantly, covered persons include not only persons actively engaged in offering or providing a consumer financial product or service directly to consumers, but also to their affiliates who act as service providers. A "service provider" is a person that provides a material service to a covered person in connection with the offering or providing of a consumer financial product or service. The term includes a person that (i) participates in designing, operating or maintaining the consumer financial product or service or (ii) processes related transactions, with exceptions for certain general business support services. Unaffiliated service providers also may be made subject to direct CFPB supervision. Further, the CFPB may, in addition, supervise covered persons that the CFPB has reasonable cause to determine, by order, after notice to the covered person and a reasonable opportunity to respond, based on complaints collected or information from other sources, that the person is engaging, or has engaged, in conduct that poses "risks" to consumers with regard to the offering or provision of consumer financial services. This authority underscores the importance of the CFPB's consumer complaint and state and federal regulatory outreach initiatives. Thus, the CFPB is capable of casting (and now apparently quite ready to cast) a significantly wide supervisory net.

### Rulemaking

The CFPB will likely proceed as swiftly as possible with various initiatives to introduce new model disclosure forms and practices. While the CFPB is not authorized to establish usury limits and representatives have repeatedly asserted that the Bureau has no

Darrell L. Dreher  
[ddreher@dltlaw.com](mailto:ddreher@dltlaw.com)

Judith M. Scheiderer  
[jscheiderer@dltlaw.com](mailto:jscheiderer@dltlaw.com)

Elizabeth L. Anstaett  
[eanstaett@dltlaw.com](mailto:eanstaett@dltlaw.com)

Charles V. Gall  
[cgall@dltlaw.com](mailto:cgall@dltlaw.com)

Susan L. Ostrander  
[sostrander@dltlaw.com](mailto:sostrander@dltlaw.com)

### DREHER TOMKIES SCHEIDERER LLP

2750 Huntington Center

41 S. High Street

Columbus, Ohio 43215

Telephone: (614) 628-8000 Facsimile: (614) 628-1600

[WWW.DTLAW.COM](http://WWW.DTLAW.COM)

*To see all previously sent ALERTS, visit our website at [www.dtlaw.com](http://www.dtlaw.com)*

*To decline future ALERTS, please contact us at [ALERTS@DLTLAW.COM](mailto:ALERTS@DLTLAW.COM). This ALERT has been prepared for informational purposes only. It does not constitute legal advice and does not create an attorney-client relationship.*

Michael C. Tomkies  
[mtomkies@dltlaw.com](mailto:mtomkies@dltlaw.com)

Margaret M. Stolar  
[mstolar@dltlaw.com](mailto:mstolar@dltlaw.com)

Robin R. De Leo  
[robin@dreher-la.com](mailto:robin@dreher-la.com)

Vanessa A. Nelson  
[vnelson@dltlaw.com](mailto:vnelson@dltlaw.com)

Kathleen L. Caress  
[kcaress@dltlaw.com](mailto:kcaress@dltlaw.com)



plans to ban products outright, the CFPB can potentially introduce regulations and model disclosures that reshape, restrict or otherwise adversely impact the nature, variety or profitability of consumer financial products and services. Standard rulemaking procedures requiring notice, comment and final publication may provide opportunity for industry input and comment, but many initiatives are already in the works and the rules and principles developed by the CFPB for one market (like credit cards) may simply be carried over to other markets. This "cross-pollination" of concepts and ideas means that everything the CFPB does warrants review and comment by all sectors of consumer financial services. One size does not fit all, and the CFPB needs to be properly educated early in the process.

**Prepare for Action**

The CFPB is not making a cold start. Many of the persons hired to date have extensive backgrounds with other regulatory agencies, private industry or enforcement. The CFPB has already established ties with state regulators and state attorneys general through a variety of channels and memoranda of understanding. Funding for the CFPB's activities is readily available. Previous initiatives of the federal banking agencies and Federal Trade Commission, many of which were placed on hold just prior to finalization in anticipation of the CFPB, provide ample starting material. Cordray himself has been a part of the CFPB nearly from its inception and can be expected to act aggressively. The CFPB's consumer complaint process begun with credit cards has already been expanded to mortgages and was designed with the expectation of eventual expansion into other areas. See, e.g. our ALERT of October 21, 2011. The Bureau's ability to seek and process information, and its apparent willingness to share with state and federal regulators, is unprecedented and raises myriad concerns. See the following ALERT article. CFPB representatives' insist that they will seek to implement "data-driven" regulation, but such data clearly will be reviewed from a consumer-centric perspective. Cordray and other representatives have repeatedly emphasized individual stories, which may or may not be typical or representative, and the CFPB has asked for whistleblower input. Cordray made a direct appeal for more consumer stories by email in his first few hours as Director.

In short, the CFPB's engine is warm, the gas tank is full and the driver has finally been named — *the race is on!* □

- Mike Tomkies and Kathleen Caress

**CFPB ISSUES LETTER ON TREATMENT OF CONFIDENTIAL SUPERVISORY INFORMATION**

On January 4, 2012, the CFPB issued a letter discussing its treatment of confidential information it collects through the supervisory process. This letter, according to the CFPB, is in response to certain supervised institutions expressing concern that providing privileged information to the CFPB might result in a waiver of the privilege with respect to third parties.

The CFPB's letter explains that the provision of information to the CFPB pursuant to a supervisory request would not waive any privilege that may attach to such information, as the provision of such information is not voluntary. Further, the CFPB noted that its examination authority is equivalent to that of prudential regulators, which regulators have the power to receive privileged information

from supervised entities without resulting in a waiver of privilege. The CFPB concluded in its letter that it will not consider waiver concerns to be a valid basis for the withholding of privileged information responsive to a supervisory request. However, the CFPB will consider requests to limit the form and scope of requests for privileged information, and will provide confirmation that materials will be treated confidentially. The CFPB's policy is to treat all information as exempt from disclosure under the Freedom of Information Act.

The CFPB did, however, state that it might be appropriate, or required, to share information with other government agencies that also have supervisory jurisdiction over institutions supervised by the CFPB. With regard to law enforcement agencies that do not have supervisory authority, the CFPB plans to share information only in very limited circumstances and upon review of the relevant facts and considerations. □

◇ - Mike Tomkies and Kathleen Caress

*From the CFPB --*

**Our Tools – Some of the Nitty Gritty**

The purpose of the CFPB's nonbank supervision is to prevent harm to consumers and promote the development of markets for consumer financial products and services that are fair, transparent, and competitive. To accomplish these goals, the CFPB will assess whether nonbanks are conducting their businesses in compliance with federal consumer financial laws, such as the Truth in Lending Act and the Equal Credit Opportunity Act.

What will we do? The CFPB's approach to nonbank examination will be the same as its approach to bank examination. It may include a combination of any of the following tools: requiring nonbanks to file certain reports, reviewing the materials the companies actually use to offer those products and services, reviewing their compliance systems and procedures, and reviewing what they promised consumers. In general, we will notify a nonbank in advance of an upcoming examination.

Consistent with the Dodd-Frank Act, the CFPB is implementing a risk-based nonbank supervision program. On an ongoing basis, we will be assessing the risks posed to consumers in the relevant product markets. When considering whether and how to supervise particular nonbanks, we will consider several relevant factors, including the nonbank's volume of business, types of products or services, and the extent of state oversight.

The CFPB will coordinate with other federal and state regulators. This coordination will help us allocate resources where they are most needed and minimize burdens on the nonbanks.

We have built – and continue to build – a highly qualified supervision and examination staff to execute on all of these important goals. Many examiners have come to the CFPB from state and federal bank and financial services regulatory agencies and they bring extensive experience in conducting examinations. We are training all of our examiners in CFPB supervision policies and procedures and integrating them into a coherent team. Our supervision staff will cover the nation, reporting to regional offices in San Francisco, Chicago, Washington, D.C., and New York.

--Excerpted from *The CFPB Launches its Nonbank Supervision Program*, by Peggy Twohig and Steve Antonakes, CFPB blog post (1/5/12). <http://www.consumerfinance.gov/the-cfpb-launches-its-nonbank-supervision-program/>