U.S. House of Representatives

Committee on Oversight and Government Reform

Darrell Issa (CA-49), Chairman

Patrick McHenry (NC-10), Chairman, Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs

THE CONSUMER FINANCIAL PROTECTION BUREAU'S THREAT TO CREDIT ACCESS IN THE UNITED STATES

Staff Report
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TABLE OF CONTENTS

EXECUTIVE SUMMARY

The Consumer Financial Protection Bureau exercises tremendous and unmatched authority over American financial products and services. Created by the Dodd-Frank Wall Street Reform and Consumer Protection Act and given virtually limitless power, the CFPB has the real potential to severely reduce credit access for American consumers. Its unique structure, vague mandate, and lack of accountability position the Bureau to be an aggressive and heavy-handed financial regulator. The controversial and legally questionable selection of its first director – former Ohio Attorney General Richard Cordray – adds unneeded uncertainty to financial markets. The CFPB's apparently close relationship with the Obama Administration has allowed the White House to attempt to use the Bureau to further its partisan agenda. These circumstances, and the manner in which the Bureau has begun to exercise its authority, suggest that the CFPB will become a run-away regulator unlike any other in American history.

At a time of prolonged economic strain, American consumers can ill-afford such an unaccountable, unresponsive, and all-powerful financial regulator. The Federal Deposit Insurance Corporation estimates that almost 30 percent of all Americans do not have adequate access to traditional financial services.[1] Another study finds that half of all Americans could not produce $2,000 within 30 days in response to a financial emergency.[2] Under the regulatory burden of the Dodd-Frank Act, financial products and services are costing more and small community banks are closing up shop at a pace of hundreds per year. Credit access has shrunk as lenders have raised lending standards and stopped offering some products and services. These effects have been felt most keenly by those borrowers at the margins, creating an economic divide in the United States between those with access to credit and those without.

Yet the CFPB's unprecedented structure and vague mandate threatens to restrict credit access even further. The regulator has refused to add certainty to its nebulous and overly burdensome regulatory authority, causing banks and credit unions to restrict certain credit products and services for fear of litigation and enforcement actions. The heavy-handed regulations proposed by the CFPB have proven costly for financial institutions, making borrowing more expensive and credit less available. In exercising its vast regulatory powers, the Bureau has not implemented adequate measures to fully assess and address the impact of its actions on credit access.

Already, according to estimates, the CFPB has increased the cost of consumer credit by a total of $17 billion and depressed job creation by about 150,000 jobs.[3] By all indications, the CFPB shows no signs of letting up. If the Bureau is not careful to add clarity and much-needed certainty to the financial sector, the CFPB may continue to drastically affect credit access for millions of American families and small businesses.

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[1] Fed. Deposit Insurance Corp., 2011 FDIC National Survey of Unbanked and Underbanked Households (Sept. 2012).

[2] Annamaria Lusardi et al., *Financially Fragile Households: Evidence and Implications*, Nat'l Bureau of Econ. Research (May 2011).

[3] *See "Credit Crunch: Is the CFPB Restricting Consumer Access to Credit?": Hearing before the Subcomm. on TARP, Financial Servs., and Bailouts of Public and Private Programs of the H. Comm. on Oversight and Gov't Reform*, 112th Cong. (2012) (testimony of Mark Calabria, Cato Institute); *infra* note 62.

INTRODUCTION

Credit plays an integral role in the daily lives of millions of Americans. Sufficient access to credit has helped to spur consumer demand, promote homeownership, and provide borrowers with flexibility in their financial decisions. Traditional credit sources have also aided job creation and productivity in the economy by allowing entrepreneurs to take advantage of financial instruments to launch and grow their businesses. When the economy began to weaken in 2007, however, credit access shrunk for consumers and small businesses alike. Lenders tightened credit standards, requiring higher credit scores and limiting the products and services they offered.[4] As a result, more and more eligible Americans found themselves priced out of the consumer credit markets. Now the Consumer Financial Protection Bureau (CFPB), created by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),[5] threatens to restrict credit access even further.

The CFPB, an unelected and unaccountable bureaucracy unlike any other government agency, has been given vast and vague regulatory authority over virtually the entire financial services industry. With its broad and sweeping power to regulate consumer financial products and services, the CFPB has been called the "most powerful agency in American history."[6] Despite its immense authority, the Bureau lacks the vital external and internal controls that ordinarily govern federal agencies.[7] Even the most basic of constitutional safeguards – the Senate's advice and consent power – was violated when President Obama installed Richard Cordray as CFPB director during a self-proclaimed "recess" of the Senate in January 2012. These circumstances have created the conditions for the CFPB to become a run-away financial regulator that is poised to add uncertainty and illiquidity to domestic credit markets.

At a time of prolonged strain in the economy, creditworthy consumers and small-business owners deserve certainty that they can easily and affordably access credit in U.S. markets. If not, many potential borrowers will take their business, their products, and their services overseas, and others may disappear completely. The ability of deserving entrepreneurs and job-creators to borrow money in order to start new companies, to open new factories, or to generate new sources of economic growth is crucial to getting the U.S. economy back on track and getting more Americans back to work. If the CFPB does not carefully exercise its broad authority, its actions could have devastating consequences on the ability of eligible American families and small business to access credit safely and efficiently.

The Committee on Oversight and Government Reform and the Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs have closely monitored the

[4] *See* Cong. Budget Office, Small Firms, Employment, and Federal Policy 9 (Mar. 2012) ("The recent financial crisis disproportionately affected small businesses' access to capital . . . ."); Joint Economic Committee Republicans, Not "Doing Fine": The Persistent Failure of Obamanomics and the Worst Recovery Since World War II, at 7 (June 19, 2012).
[5] Pub. L. 111-203, 124 Stat. 1376 (2010).
[6] Mary Kissel, *Cordray's Charm Offensive*, Wall. St. J., Jan. 13, 2012.
[7] *See* Todd J. Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, Mercatus Center Working Paper No. 12-25 (Oct. 2012).

CFPB in the months after its creation.[8] In this time, the Committee and Subcommittee have become increasingly concerned that the CFPB, through its rulemakings and enforcement actions, could have a chilling effect on lending and thereby diminish credit access for eligible consumers. This staff report details how the CFPB could adversely affect access to credit in the United States. It begins with an outline of the already tight lending environment in the United States, follows with an analysis of the CFPB's structural and organizational deficiencies that could predispose it toward restrictive regulations, and concludes with an explanation of why the CFPB must take access to credit into account when rolling out its policy and regulatory regimes.

CREDIT IS ALREADY OUT OF REACH FOR MANY AMERICAN FAMILIES AND SMALL BUSINESSES

In the wake of the residential housing market collapse and subsequent economic recession, Democratic majorities in Congress passed the Dodd-Frank Act to "bring transparency to our financial markets" and to "bring[] consumer protection to Main Street and to the American people."[9] Despite these lofty promises, the U.S. economy remains fragile as financial institutions struggle to withstand the onslaught of newly imposed regulations. The result has been an economy where access to credit is currently out of reach for many American consumers and small businesses. In the coming months, the cost and availability of credit is only likely to worsen as financial institutions prepare for the full implementation of the Dodd-Frank Act. In the words of one lender, "the bucket of acceptable loans is shrinking" as the regulatory environment "is becoming dangerously unhealthy."[10]

Many Americans already do not have sufficient access to financial products and services or to consumer credit. According to a September 2012 study by the Federal Deposit Insurance Corporation (FDIC), 8.2 percent of U.S. households are "unbanked" – meaning no individual in the household has a checking or savings account – and 20.1 percent of U.S. households are "underbanked" – meaning an individual in the household has a checking or savings account but also relies on alternative financial services.[11] A similar 2011 report found that one half of all Americans could not produce $2,000 within thirty days in response to a financial emergency.[12] Meanwhile, for those consumers with access, financial products and services are becoming increasingly more expensive. Consumers are facing more fees and more restrictions on so-called

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[8] *See "Who's Watching the Watchmen? Oversight of the Consumer Financial Protection Bureau": Hearing before the Subcomm. on TARP, Financial Servs. and Bailouts of Public and Private Programs of the H. Comm. on Oversight and Gov't Reform*, 112th Cong. (2011); *"Consumer Financial Protection Efforts: Answers Needed": Hearing before the H. Comm. on Oversight and Gov't Reform*, 112th Cong. (2011); *"How Will the CFPB Function Under Richard Cordray?": Hearing before the Subcomm. on TARP, Financial Servs. and Bailouts of Public and Private Programs of the H. Comm. on Oversight and Gov't Reform*, 112th Cong. (2012*); "Credit Crunch: Is the CFPB Restricting Consumer Access to Credit?": Hearing before the Subcomm. on TARP, Financial Servs., and Bailouts of Public and Private Programs of the H. Comm. on Oversight and Gov't Reform*, 112th Cong. (2012).

[9] 156 Cong. Rec. H5252 (June 30, 2010) (statement of Rep. Nancy Pelosi, Speaker of the House of Representatives).

[10] Lorraine Woellert, *Home Lenders Demand Best Credit Scores in Decades: BGOV Barometer*, Bloomberg, June 22, 2012.

[11] Fed. Deposit Insurance Corp., 2011 FDIC National Survey of Unbanked and Underbanked Households (Sept. 2012).

[12] Annamaria Lusardi et al., *Financially Fragile Households: Evidence and Implications*, Nat'l Bureau of Econ. Research (May 2011).

"free" checking accounts as banks seek to recoup the costs of new regulations.[13] These increased costs are also hurting consumer lending, as explained by one recent study: "Consumer loans under $5,000 are unprofitable under the traditional banking model and as a result, the credit needs of low-to-moderate-income individuals and small businesses are no longer filled by most community banks and credit unions."[14]

Access to traditional credit sources has become increasingly strained for many small businesses owners. Small businesses account for the majority of net new job creation in the country and rely heavily on initial financing through traditional financial products like bank loans and credit cards.[15] However, as reported by the *New York Times*, these businesses have been forced to get "a little creative" with financing, often securing start-up financing through nonbank loans, cash advances, and other nontraditional lending sources.[16] Any further strain on American entrepreneurs could not only have a dramatic effect on these businesses in isolation, but it could also have a significant drag on economic recovery as a whole, given the nation's current unemployment rate of 7.7 percent.[17]

In this climate of financial fragility, credit access has declined as banks have tightened lending standards in response to burdensome Dodd-Frank regulations and an uncertain business environment. According to the Federal Reserve Board, two thirds of credit expansion in the first half of 2012 was the result of auto and student loans alone.[18] In other words, "other than student loans, which are almost completely now backed by the government, and auto loans, our credit markets remain constrained."[19] Furthermore, as a result of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (the Card Act),[20] which the CFPB is in charge of implementing, interest rate spreads for credit card loans have increased, making it more difficult for eligible borrowers to access the capital they need for their businesses.[21]

Perhaps most noticeable, however, is the effect on mortgage lending. Lenders are reportedly requiring the highest credit scores in a decade to approve home mortgages, with an average credit score of 737 for borrowers approved for a home loan in 2011.[22] The international capital guidelines outlined in the Basel III capital accords have also made mortgage loans less

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[13] *See* Robin Sidel, *'Free' Checking Costs More*, Wall St. J., Sept. 24, 2012.
[14] Bretton Woods, Inc., Serving Consumers' Needs for Loans in the 21st Century (June 2012).
[15] Small Business Admin. Office of Advocacy, Frequently Asked Questions (Sept. 2012); Small Business Admin. Office of Advocacy, Frequently Asked Questions about Small Business Finance (Sept. 2011).
[16] Ian Mount, *When Banks Won't Lend, There Are Alternatives*, N.Y Times, Aug. 2, 2012.
[17] *See* Bureau of Labor Statistics, U.S. Department of Labor, *The Employment Situation – November 2012*, Dec. 7, 2012.
[18] Board of Governors of the Federal Reserve System, *Monetary Policy Report to the Congress*, July 17, 2012.
[19] *See "Credit Crunch: Is the CFPB Restricting Consumer Access to Credit?": Hearing before the Subcomm. on TARP, Financial Servs., and Bailouts of Public and Private Programs of the H. Comm. on Oversight and Gov't Reform*, 112th Cong. (2012) (testimony of Mark Calabria, Cato Institute).
[20] Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. 111-24, 123 Stat. 1734 (2009).
[21] *See "Credit Crunch: Is the CFPB Restricting Consumer Access to Credit?": Hearing before the Subcomm. on TARP, Financial Servs., and Bailouts of Public and Private Programs of the H. Comm. on Oversight and Gov't Reform*, 112th Cong. (2012) (testimony of Mark Calabria, Cato Institute).
[22] Lorraine Woellert, *Home Lenders Demand Best Credit Scores in Decades: BGOV Barometer*, Bloomberg, June 22, 2012.

worthwhile for banks.[23] An April 2012 Federal Reserve survey found that 83 percent of banks were less likely to originate a GSE-eligible 30-year fixed-rate mortgage for a borrower with a credit score of 620 and a 10 percent down payment than they were in 2006.[24] Roughly 70 percent of those banks surveyed blamed regulatory and legislative changes for restricting lending.[25]

In addition, small lenders and community bankers are especially overwhelmed by the onslaught of "red tape." As the regulatory requirements of the Dodd-Frank Act continue to be implemented, more and more small banks are closing or being sold to large competitors. In 1997, there were 9,143 small banks in the United States; today, there are only 6,263 small banks, and the country is on pace to lose an additional 418 small banks this year.[26] More alarmingly, because only 33 percent of the 400 rulemakings required by the Dodd-Frank Act have been implemented fully,[27] the total extent of the Act's effect on credit cannot yet be accurately measured. As the President and CEO of the Credit Union National Association explained:

> [A]s the Bureau of Consumer Financial Protection (CFPB) continues to promulgate and review the regulations under its jurisdiction as required by the Dodd-Frank Act and other statutes now subject to its jurisdiction, there will likely be hundreds of additional changes credit unions will be required to make.[28]

Likewise, as Steven Zeisel, the Executive Vice President and General Counsel of the Consumer Bankers Association, told the Subcommittee, "[t]he Bureau must always recognize the potential impact [that] its actions can have on access to credit for consumers, and how over-burdensome regulations will only increase compliance costs and stifle product innovation."[29]

As lenders continue to increase lending standards on creditworthy borrowers and as community banks close up shop in increasing numbers, it will be the American consumers – and primarily middle-class families and small businesses – who will bear the brunt of the pain. According to the *Wall Street Journal*, there is increasingly "an economic divide that separates Americans not by income or wealth but by their access to credit."[30] Thus, while 90 percent of all new mortgages originated went to households with high credit scores, lenders are often "reluctant to extend credit to households with even a hint of financial problems."[31] The CFPB is in danger of exacerbating this disparity and further restricting credit for millions of creditworthy American consumers.

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[23] *Id.*
[24] Board of Governors of the Fed. Reserve System, The April 2012 Senior Loan Officer Opinion Survey on Bank Lending Practices (Apr. 2012).
[25] *Id.*
[26] David Weidner, *Who Wants to Start a Bank? No One*, Wall St. J., July 5, 2012.
[27] Davis Polk, *Dodd-Frank Progress Report* 2 (Dec. 2012).
[28] Letter from Bill Cheney, Credit Union Nat'l Ass'n, to Darrell Issa & Jim Jordan, H. Comm. on Oversight & Gov't Reform (June 1, 2012).
[29] *"Credit Crunch: Is the CFPB Restricting Consumer Access to Credit": Hearing before the Subcomm. on TARP, Financial Servs., and Bailouts of Public and Private Programs of the H. Comm. on Oversight & Gov't Reform*, 112th Con. (2012) (written testimony of Steven I. Zeisel, Consumer Bankers Ass'n).
[30] Jon Hilsenrath, *Fed Wrestles With How Best to Bridge U.S. Credit Divide*, Wall St. J., June 18, 2012.
[31] *Id.*

THE CFPB IS A POWERFUL AND UNACCOUNTABLE FINANCIAL REGULATOR

Title X of the Dodd-Frank Act created the CFPB "to regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws."[32] Under the Dodd-Frank Act, the CFPB has wide-ranging supervisory, enforcement, and rulemaking authority over banks and non-depository institutions.[33] Yet today, over two years after the Dodd-Frank Act was passed and over a year after the CFPB began operations, the promise that the Bureau would bring enhanced transparency and consumer protection to financial markets remains unfulfilled. In its place stands a powerful and virtually unchecked financial sector regulator with the potential to create tremendous uncertainty for middle-class families and small businesses.

The CFPB began formal operations on July 21, 2011,[34] and on January 4, 2012, the CFPB began to exercise the full scope of its authority under the Dodd-Frank Act.[35] These powers include authority over deposit taking, mortgages, credit cards, loan servicing, debt collection, real estate settlement, and financial data processing, among other things.[36] The Dodd-Frank Act also gives the CFPB vague rulemaking authority to prevent "an unfair, deceptive, or abusive act or practice . . . in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service."[37] Additionally, the CFPB has rulemaking authority to ensure that the terms of a product or service are "fully, accurately, and effectively disclosed."[38]

With these vast powers, the CFPB lacks some of the most basic institutional and external controls that would provide much needed oversight to the agency. Unlike other independent financial regulators – including the Federal Reserve Board, the Securities and Exchange Commission (SEC), and the Federal Deposit Insurance Corporation – the CFPB is run by a single director instead of a bipartisan or nonpartisan commission.[39] The CFPB director serves a five-year term and can only be removed for "inefficiency, neglect of duty, or malfeasance in office."[40] Unlike some other agencies, the CFPB is not subject to annual congressional appropriations,[41] and its regulations are not subject to stringent interagency review by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB).[42] These structural deficiencies allow the CFPB to be a rogue financial regulator with the unmatched potential to create uncertainty for providers of consumer financial products and services.

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[32] Pub. L. 111-203 § 1011(a), 124 Stat. 1376, 1964 (2010).
[33] *Id.* §§ 1022, 1024, 1025, 1026, 124 Stat. 1955, 1980-95 (2010) (codified at 12 U.S.C. §§ 5512, 5514, 5515, 5516).
[34] Carter Dougherty, *CFPB Bank Supervisor Says Oversight Set to Start July 21*, Bloomberg, Jun. 15, 2011.
[35] Consumer Financial Protection Bureau, Consumer Financial Protection Bureau Launches Nonbank Supervision Program, Jan. 5, 2012.
[36] David H. Carpenter, Cong. Research Serv., *The Dodd-Frank Wall Street Reform and Consumer Protection Act: Title X, The Consumer Financial Protection Bureau* (July 21, 2010).
[37] Pub. L. 111-203 § 1031(a), 124 Stat. at 2005 (codified at 12 U.S.C. § 5531).
[38] *Id.* § 1032(a), 124 Stat. at 2006-07.
[39] *See id.* § 1011(b), 124 Stat. at 1964 (codified at 12 U.S.C. § 5491); Zywicki, *supra* note 7, at 39-45.
[40] *Id.* § 1011(c)(2), 124 Stat. at 1964 (codified at 12 U.S.C. § 5491).
[41] *Id.* § 1017, 124 Stat. at 1975 (codified at 12 U.S.C. § 5497).
[42] *See* Curtis W. Copeland, Cong. Research Serv., *The Dodd-Frank Wall Street Reform and Consumer Protection Act: Regulations to be Issued by the Consumer Financial Protection Bureau* 15 (Aug. 25, 2010).

Richard Cordray's constitutionally questionable appointment generates even more uncertainty for financial service providers and, ultimately, for American consumers. Because President Obama bypassed Senate consent and installed Mr. Cordray as CFPB Director during a self-designated "recess," a court could invalidate Mr. Cordray's appointment, leaving the CFPB's regulatory actions vulnerable to legal challenge. In fact, a community bank filed a lawsuit in June 2012 asking a federal court to declare Mr. Cordray's appointment to be unconstitutional and asking it to stop the Bureau from exercising its improper authority.[43] Despite this risk, the CFPB has taken no steps to provide certainty to the industry. Mr. Cordray told the Subcommittee that the CFPB had no "Plan B" if a court found that he was appointed illegally.[44] The potential threat of litigation risk surrounding Mr. Cordray's unprecedented appointment and the CFPB's failure to address the deficiency will only further harm consumers and discourage lending.[45]

In addition to concerns over the Bureau's powers and uncertainty about the validity of Mr. Cordray's appointment, questions exist about the CFPB's development as an independent regulatory agency.[46] On January 6, 2012, two days after Mr. Cordray's controversial "recess" appointment, President Obama visited the CFPB headquarters in what was described as a "victory lap" to celebrate the appointment.[47] Later that month, Mr. Cordray attended the President's State of the Union address as the guest of First Lady Michelle Obama.[48] Since his appointment, Mr. Cordray has also met regularly with senior Administration officials, including White House Deputy Chief of Staff Nancy Ann DeParle, and he attended an event in April 2012 called the "White House Cabinet Affairs Chief of Staff Lunch."[49]

Other CFPB employees have enjoyed similar access to White House officials. Meredith Fuchs, the then-CFPB Chief of Staff, and Lisa Konwinski, the CFPB's Assistant Director of Legislative Affairs, met with Gene Sperling, the Director of the National Economic Council, in February 2012.[50] Although these meetings are not inappropriate *per se*, the appearance of a close and coordinated relationship between CFPB officials and political elements of the executive branch undermines the Bureau's authority as a neutral and independent regulator. The Committee is concerned that this appearance of impropriety could jeopardize the CFPB's ability to act effectively and independently.

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[43] *See* Complaint, *State Nat'l Bank v. Geithner*, No. 1:12-CV-1032 (D.D.C. 2012).
[44] *"How Will the CFPB Function Under Richard Cordray?": Hearing before the Subcomm. on TARP, Financial Servs., and Bailouts of Public and Private Programs of the H. Comm. on Oversight & Gov't Reform*, 112th Con. (2012).
[45] *See* Mark Calabria, *Obama's Constitutional Gamble on Consumer Finance Nomination*, Cato Instit., Jan. 4, 2012.
[46] *See* Mary Kissel, *Consumer Financial Political Bureau*, Wall St. J., July 5, 2012; Zywicki, *supra* note 7, at 36.
[47] Joseph Williams, *Consumer Financial Protection Bureau Gets a Visit from Obama*, Politico, Jan. 6, 2012.
[48] *See* Julie Pace, *Obama Guests Add Celebrity to State of the Union*, Wash. Times, Jan. 24, 2012.
[49] *See* Consumer Financial Prot. Bureau, Leadership Calendar, http://www.consumerfinance.gov/leadership-calendar/ (last visited Dec. 7, 2012).
[50] *See* The White House, Visitor Access Records, http://www.whitehouse.gov/briefing-room/disclosures/visitor-records.

With these concerns in mind, Chairman McHenry wrote to Mr. Cordray in July 2012 with questions about the CFPB's commitment to regulatory independence.[51] In response to this oversight, the CFPB produced to the Subcommittee an email in which the White House overtly sought to use the CFPB to further the Obama Administration's policy objectives. In January 2012 – shortly after Mr. Cordray's appointment – White House official Sarah Apsel wrote to two CFPB employees asking for a brief call "to get an update on CFPB's work in [regulating credit bureaus] and brainstorm re: how it might dovetail with other Administration housing efforts."[52] It is unclear whether this conversation occurred and, if so, what was discussed; however, this email demonstrates that the Obama Administration viewed the CFPB as a potential ally in implementing its policy agenda.

> -----Original Message-----
> From: Apsel, Sarah [redacted]
> Sent: Friday, January 20, 2012 12:32 PM
> To: Brown, Allison (CFPB); marcel_bryar@Fannie Mae [redacted]; Haspel, Christopher (CFPB)
> Cc: Thompson, Ann (CFPB); Casper-Futterman, Evan (Intern)
> Subject: RE: Introduction
>
> Hi All,
>
> Congratulations on your new director! Now that your director is in place, I was hoping to catch up with you on regulation of credit bureaus. Assuming that falls in your area, would you be available for a short call next week? I'm hoping to get an update on CFPB's work in that area and brainstorm re: how it might dovetail with other Administration housing efforts. Marcel, would be great if you can join as well.
>
> Best,
> Sarah

Given its broad mandate and lack of institutional or external controls, the CFPB is uniquely poised to affect consumer credit in the United States. The questionable and unsettled appointment of Richard Cordray – along with the apparently close relationship with the Obama Administration – only adds greater uncertainty for credit markets. Because financial institutions must now comply with new rules being issued by the CFPB, the costs of which will likely be passed on to consumers, the CFPB's actions could increase the costs of financial products and services. Further, because compliance costs are also disproportionally higher for small businesses, the CFPB's actions could lead to less competitive markets dominated by bigger entities, such as large banks, with higher prices for consumers.[53] In short, as law professor Todd Zywicki argues, the CFPB could actually "harm[] the very consumers it was founded to protect."[54]

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[51] *See* Letter from Patrick McHenry, H. Comm. on Oversight & Gov't Reform, to Richard Cordray, Consumer Financial Prot. Bureau (July 2, 2012).
[52] Email from Sarah Apsel, Exec. Office of Pres., to Allison Brown, Con. Financial Prot. Bureau, Marcel Bryar, Fannie Mae, & Christopher Haspel, Con. Financial Prot. Bureau (Jan. 20, 2012).
[53] *See, e.g.*, Bank Lawyer's Blog, MetLife Home Loans Sells Out, Oct. 16, 2011 ("The lovers of the idea that United States needs just a few humongous banks that dominate our financial products must take hope from another unintended consequence of the wonderful world unleashed by Dodd-Frank, the CFPB, and the Federal Reserve Board.").
[54] Zywicki, *supra* note 7, at 1.

THE CFPB COULD FURTHER REDUCE ACCESS TO CREDIT FOR AMERICAN CONSUMERS AND SMALL BUSINESSES

An all-powerful financial regulator unlike any other, the CFPB has the potential to restrict credit access at a time when sufficient credit already eludes many otherwise eligible American consumers and businesses. The Bureau's mandate and structure predispose the Bureau to limit credit access by tightening restrictions on financial products and services without considering how its actions affect consumer lending. The Bureau's actions could therefore decrease credit availability, make available credit more expensive, hurt small businesses, stunt job creation, and jeopardize a full economic recovery.[55] As described in more detail below, the Bureau's actions have already proven to restrict the provision of credit instruments in certain markets.

Even before the CFPB was created, there were concerns that it would decrease credit availability. The CFPB is the "brainchild" of Harvard law professor Elizabeth Warren, who co-authored a law review article in 2008, entitled "Making Credit Safer," with a thesis arguing that consumers do not know what is best for them.[56] The article first proposed the creation of a "single regulatory body that [would] be responsible for evaluating the safety of consumer credit products and policing any features that are designed to trick, trap, or otherwise fool the consumers who use them."[57] With a paternalistic approach to consumer regulation, the proposed regulatory body would decide what financial products were best for consumers and restrict access to other products accordingly.

An early analysis of Title X of the Dodd-Frank Act, the section of the law that created the CFPB, found that the newly created CFPB would "[m]ake it harder and more expensive for consumers to borrow" and would "[j]eopardize financial recovery by reducing credit during a severe economic recession."[58] The analysis suggested that the CFPB's actions would increase interest rates by 160 basis points (1.6 percent), reduce consumer borrowing by 2.1 percent, and reduce net new jobs created by 4.3 percent.[59] The analysis forecasted that the CFPB's actions would decrease availability and democratization of credit and result in a credit crunch for many Americans.[60] This "credit squeeze," the analysis concluded, "is likely to negatively impact small businesses and job creation."[61] Notably, since the Bureau has assumed rulemaking authority, predictions have worsened, with estimates now indicating that the CFPB's actions have raised the cost of consumer credit by at least two full percentage points, which equals a total of about $17 billion,[62] and have reduced job creation by five percent, or approximately 150,000 jobs.[63]

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[55] David S. Evans & Joshua D. Wright, *The Effect of the Consumer Financial Protection Agency Act of 2009 on Consumer Credit*, 22 Loyola Consumer L. Rev. 277, 280, 327 (2010).
[56] Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. Penn. L. Rev. 1 (2008).
[57] *Id.* at 8.
[58] Evans & Wright, *supra* note 55, at 280.
[59] *Id.* at 316.
[60] *Id.* at 327.
[61] *Id.* at 331.
[62] This estimate is calculated from the total amount of outstanding revolving consumer credit as of September 2012, $852 billion. *See* Board of Governors of the Fed. Reserve System, Consumer Credit – G.19 (Sept. 2012).
[63] *See "Credit Crunch: Is the CFPB Restricting Consumer Access to Credit?": Hearing before the Subcomm. on TARP, Financial Servs., and Bailouts of Public and Private Programs of the H. Comm. on Oversight and Gov't Reform*, 112th Cong. (2012) (testimony of Mark Calabria, Cato Institute).

The CFPB Is Predisposed to Limit Access to Credit

The CFPB's vague statutory mandate increases uncertainty and discourages lending. The Dodd-Frank Act empowers the CFPB to prevent "unfair, deceptive, or abusive" financial services or products.[64] Although the terms "unfair" and "deceptive" have established meanings in case law and regulation, the term "abusive" has no well-established definition and the CFPB has shown no willingness to define the term.[65] In fact, the CFPB Examination Manual – used by CFPB employees to supervise financial institutions – includes seven full pages of definitions, explanation, and examples for the terms "unfair" and "deceptive." But the manual only spends a half-page defining "abusive" – without any examples or explanation.[66] During his testimony before the Subcommittee in January 2012, Mr. Cordray refused to offer a clear definition of "abusive":

> [W]e have determined that that is going to have to be a fact and circumstances issue; it is not something we are likely to be able to define in the abstract. Probably not useful to try to define a term like that in the abstract; we are going to have to see what kind of situations may arise where that would seem to fit the bill under the prongs.[67]

When asked in July 2012 whether the Bureau intended to define "abusive" in a public notice-and-comment rulemaking, Cordray again declined to offer a clear definition of "abusive" or any particular practices that would fit the definition.[68]

Because the statutory definition in the Dodd-Frank Act is ambiguous and the CFPB has repeatedly declined to interpret it, there is tremendous uncertainty about how the CFPB will apply the "abusive" standard in practice.[69] This uncertainty creates a chilling effect on financial institutions that are reluctant to lend due to the litigation risk that could follow from the amorphous definition of "abusive." In October 2010, State National Bank, a community bank in Texas, stopped its mortgage lending business due to uncertainty over whether its lending practices would be deemed "unfair, deceptive, or abusive" by the CFPB. The bank, which is now suing the CFPB, noted that reliance on "an *ex post facto* CFPB interpretation of the law" would be a costly legal risk that the small bank could simply not afford.[70] State National Bank's concern is not isolated. As the Consumer Bankers Association's Steven Zeisel informed the

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[64] Pub. L. 111-203 § 1031(a), 124 Stat. at 2005 (codified at 12 U.S.C. § 5531).

[65] Kate Davidson, *New "Abusive" Standard Stokes Fear from Bankers*, Am. Bankers, Sept. 6, 2011.

[66] Consumer Financial Prot. Bureau, Supervision and Examination Manual (Oct. 2012).

[67] *"How Will the CFPB Function Under Richard Cordray?": Hearing before the Subcomm. on TARP, Financial Servs., and Bailouts of Public and Private Programs of the H. Comm. on Oversight & Gov't Reform*, 112th Con. (2012).

[68] *See "Credit Crunch: Is the CFPB Restricting Consumer Access to Credit": Hearing before the Subcomm. on TARP, Financial Servs., and Bailouts of Public and Private Programs of the H. Comm. on Oversight & Gov't Reform*, 112th Con. (2012) (question and answer with Chairman McHenry).

[69] *See* Zywicki, *supra* note 7, at 65-72.

[70] Complaint, *State Nat'l Bank v. Geithner*, No. 1:12-CV-1032 (D.D.C. 2012). Three state attorneys general – from Oklahoma, South Carolina, and Michigan – joined the lawsuit to challenge the overall constitutionality of the Dodd-Frank Act. *See* First Amended Complaint for Declaratory and Injunctive Relief, *State Nat'l Bank v. Geithner*, No. 1:12-CV-1032 (D.D.C. filed Sept. 20, 2012).

Subcommittee, the CFPB's outright refusal to define the term "abusive" "raises a lot of doubt and uncertainties in the minds of financial institutions," causing lenders to restrict certain credit products and services.[71]

The CFPB's Proposals and Practices Will Increase Regulatory Burden and Reduce Credit Availability

Based on recent policy measures, the CFPB appears poised to enact overly burdensome regulations that will drastically restrict consumer credit access. Its rulemakings and other regulatory actions will increase the burden on financial institutions and correspondingly reduce the credit available to small businesses and consumers. As economist David Evans told the Subcommittee at a May 2011 hearing: "[H]istory teaches us that heavy-handed credit regulation ultimately makes consumers worse off by reducing the availability of credit to them and increasing the costs of obtaining that credit."[72]

In February 2012, the CFPB finalized a rule to regulate international remittance transfers sent by individuals in the United States to consumers overseas.[73] As a result of this rule, which "impos[ed] burdensome requirements on financial institutions and other providers of those services," State National Bank in Big Spring, Texas, stopped offering remittance services to its customers altogether.[74] State National Bank has sued the CFPB to stop the implementation of this regulation and it is estimated that 3,000 to 4,000 other community banks, and possibly an equal number of credit unions, will exit the remittance transfer business due to the onerous requirements of the rule.[75] Likewise, according to Douglas A. Fecher, President and CEO of Wright-Patt Credit Union in Fairborn, Ohio, "it is quite likely" that his credit union will discontinue its international remittance services due to the burdensome cost of the CFPB's regulation.[76]

Recently proposed and forthcoming mortgage regulations have also received significant negative feedback. In July 2012, the CFPB issued a proposed rule to integrate mortgage disclosure forms required under the Truth in Lending Act and the Real Estate Settlement Procedures Act.[77] Mr. Fecher told the Subcommittee that the size of this "massive" proposal – totaling almost 1,100 pages – will be difficult for some credit unions to thoroughly review and therefore "may make many smaller credit unions simply throw up their hands and quit making

[71] *"Credit Crunch: Is the CFPB Restricting Consumer Access to Credit": Hearing before the Subcomm. on TARP, Financial Servs., and Bailouts of Public and Private Programs of the H. Comm. on Oversight & Gov't Reform*, 112th Con. (2012) (question and answer between Steven Zeisel and Chairman McHenry).
[72] *"Who's Watching the Watchmen? Oversight of the Consumer Financial Protection Bureau": Hearing before the Subcomm. on TARP, Financial Servs., and Bailouts of Public and Private Programs of the H. Comm. on Oversight & Gov't Reform*, 112th Con. (2011).
[73] Electronic Fund Transfers (Regulation E), 77 Fed. Reg. 6194 (Feb. 7, 2012).
[74] Complaint at ¶ 12, *State Nat'l Bank v. Geithner*, No. 1:12-CV-1032 (D.D.C. 2012).
[75] Letter from Camden Fine, Independent Community Bankers of America, to Darrell Issa & Jim Jordan, H. Comm. on Oversight & Gov't Reform (June 1, 2012).
[76] *See "Credit Crunch: Is the CFPB Restricting Consumer Access to Credit": Hearing before the Subcomm. on TARP, Financial Servs., and Bailouts of Public and Private Programs of the H. Comm. on Oversight & Gov't Reform*, 112th Con. (2012) (question and answer between Douglas A. Fecher and Chairman McHenry).
[77] Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulations Z), 77 Fed. Reg. 51,116 (Aug. 23, 2012).

mortgage loans."[78] Responding to Mr. Cordray's comment that small financial institutions do not have to be "conversant" with every aspect of the rulemaking, Mr. Fecher said that credit unions ignore any part of the rule "at [their] own peril":

> We have to read the whole thing. There are parts of that thing that we just can't take the risk of not understanding what is in it. So while the comment and point was made earlier that these regulations, very few of them have been put out yet, the amount of uncertainty and, frankly, fear among small credit unions that this thing will roll up on them is real.[79]

In addition, the CFPB is currently considering a mortgage rule that would require a lender to verify a borrower's ability to repay a mortgage unless the loan satisfies the definition of a "qualified mortgage."[80] According to Frank Keating, CEO of the American Bankers Association, the rule could "make borrowing more expensive and credit less available. Some lenders may leave the market altogether."[81] The rule could also increase the cost of mortgage lending, reduce consumer choice, and make it harder for consumers to compare mortgage options.[82] If the CFPB is not careful, these rules could make it more difficult – if not impossible – for millions of Americans to purchase homes.

Additionally, the CFPB has finalized a rule to supervise larger participants in the debt collection industry, which affects roughly 30 million Americans who owe debt subject to the collection process.[83] The rule stated that "consumers' access to credit may decrease" as a result of the new regulation; however, it did not specifically estimate the actual impact or calculate the additional costs generated by the rule.[84] Regardless, if it is more difficult and more costly for lenders to collect debts owed by consumers, lenders will become more hesitant to extend credit in the first place.

The CFPB has also taken steps to regulate the use of short-term, small-dollar lending. In May 2012, it issued an Advance Notice of Proposed Rulemaking to regulate the prepaid card market.[85] The CFPB has also begun its regulation of payday lending and overdraft services.[86] Regulatory overreach on these short-term, small-dollar loans threatens to diminish the availability of these products and discourages innovation that would provide better functions to underserved consumers. Overzealous actions by the CFPB – in the name of consumer protection

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[78] *See "Credit Crunch: Is the CFPB Restricting Consumer Access to Credit": Hearing before the Subcomm. on TARP, Financial Servs., and Bailouts of Public and Private Programs of the H. Comm. on Oversight & Gov't Reform*, 112th Con. (2012) (testimony of Douglas A. Fecher).

[79] *Id.* (question and answer between Douglas A. Fecher and Chairman McHenry); *see* Zywicki, *supra* note 7, at 55-56 ("[T]he proposed regulation . . . does little to help consumers by simplifying mortgage disclosures but imposes new substantive limits on loan terms, such as late fees, balloon payments, and loan-modification fees . . . .").

[80] Regulation Z; Truth in Lending, 76 Fed. Reg. 27390 (May 11, 2011).

[81] Carter Dougherty & Clea Benson, *Ability-to-Repay Rule for Mortgages Nears CFPB Approval*, Bloomberg, May 1, 2012.

[82] Jonathan Macey, *The Feds' New Mortgage Disclosures Are a Bust*, Wall St. J., July 18, 2012.

[83] Defining Larger Participants of the Consumer Debt Collection Market, 77 Fed. Reg. 65,775 (Oct. 31, 2012).

[84] *Id.*

[85] Electronic Fund Transfers (Regulation E), 77 Fed. Reg. 30,923 (May 24, 2012).

[86] *See* Press Release, Consumer Financial Prot. Bureau, Consumer Financial Protection Bureau Examines Payday Lending (Jan. 19, 2012); Maya Jackson Randall, *Watchdog Targets Overdraft Charges*, Wall St. J., Feb. 22, 2012.

– could actually result in these consumers having no access to funds that otherwise would be available for emergencies or other important needs.

In addition to its regulatory actions, the manner by which the CFPB has compiled consumer complaint data could adversely affect credit access. The CFPB has established a Consumer Response Office to receive consumer complaints, including credit card complaints,[87] and has proposed a rule to make some of this complaint data public.[88] This public display of consumer complaints – without context or explanation – could have a discernible chilling effect on lending, discouraging some lenders from extending credit for fear of consumer complaints. Many small businesses and entrepreneurs rely on consumer credit cards to finance their businesses, with small firms more likely to use credit card financing during tight credit conditions.[89] Thus, if the CFPB's actions reduce credit access or increase the cost of consumer credit, it could create an entry barrier for small businesses and entrepreneurs.

Moreover, the CFPB's uncertain enforcement of fair lending laws could discourage lenders from extending credit. The CFPB has announced that it will utilize a controversial legal theory known as "disparate impact" to pursue discriminatory lending practices.[90] Showing discriminatory lending using disparate impact does not require the CFPB to prove any intent to discriminate; instead, discrimination can be shown merely by using controversial statistical analyses. Despite serious legal uncertainty about the disparate impact doctrine, the Department of Justice has used disparate impact to extract settlements from several banks, most notably Wells Fargo.[91] The CFPB recently signed a memorandum of understanding with the Department of Justice to collaborate on fair lending enforcement, presumably including the use of disparate impact.[92] The CFPB's use of disparate impact analyses could restrict credit access as lenders avoid loaning funds – especially to those borrowers at the margins who need credit the most – for fear of prosecution.

The CFPB's Regulatory Review Is Inadequate to Detect Access to Credit Impediments

The CFPB's weak reliance on economics prevents an evenhanded examination of its regulatory actions. For instance, unlike the SEC, which has a full-time chief economist and Division of Risk, Strategy, and Financial Innovation with the mission of "providing detailed, high-quality economic and statistical analyses,"[93] the CFPB only maintains a small Office of Research within the same division that is responsible for promulgating regulations.[94] The head of this office, Sendhil Mullainathan, is an economist whose research centers on how an

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[87] *See* Consumer Financial Prot. Bureau, Consumer Response: Interim Report on CFPB's Credit Card Complaint Data 2 (Nov. 30, 2011).
[88] Disclosure of Certain Credit Card Complaint Data, 76 Fed. Reg. 76,628 (Dec. 8, 2011).
[89] Small Business Admin., Credit Card Financing and Small Businesses (Jun. 2012).
[90] Consumer Financial Prot. Bureau, Consumer Financial Protection Bureau to Pursue Discriminatory Lenders, Apr. 18, 2012.
[91] Mary Ellen Podmolik, *Justice Department Settles Fair-Lending Claims with Wells Fargo*, Chi. Tribune, July 12, 2012.
[92] *See* Rachel Witkowski, *CFPB and DOJ Sign Memorandum of Understanding*, Am. Banker, Dec. 6, 2012.
[93] Sec. & Exch. Comm'n, Division of Risk, Strategy, and Financial Innovation Overview, http://www.sec.gov/divisions/riskfin.shtml.
[94] *See* Consumer Financial Prot. Bureau, Learn About the Bureau, http://www.consumerfinance.gov/the-bureau/.

individual's biases and weaknesses lead to him making bad economic decisions.[95] Moreover, according to an article in *Washington Monthly*, Mr. Mullainathan is only a "part-time" assistant director of research at the CFPB.[96] Thus, whereas other independent agencies like the SEC have an independent division dedicated to methodical and unbiased economic analyses, the CFPB relies on a tiny office led by a part-time director with an apparent predilection toward restrictive regulations. Within this arrangement, it is likely that the CFPB would be completely unaware if its regulatory actions harm access to credit among some segments of the population.

Unsurprising for an agency with a weak reliance on economics, the CFPB does not perform adequate cost-benefit analyses in its rulemakings. Pursuant to the Dodd-Frank Act, the CFPB is legally required to consider the costs and benefits in its rulemakings, including "the potential reduction of access by consumers to consumer financial products or services."[97] However, as economist Mark Calabria has argued, the CFPB has failed to adequately assess reduced credit access as a cost to its regulations.[98] If the CFPB does not adopt a more robust process, Dr. Calabria fears its cost-benefit analysis will become an "after-the-fact box checking exercise, rather than a serious attempt to inform the rule-making process."[99]

Fortunately, other independent financial regulators have relevant experience in improving their cost-benefit analyses. The Commodity Futures Trading Commission (CFTC), for instance, signed a memorandum of understanding with OIRA to review its cost-benefit analyses.[100] The SEC likewise recently implemented improved cost-benefit analysis practices after receiving criticism about its approach to rulemaking from many observers, including the Committee.[101] The SEC's new guidance "ensures that decisions . . . are informed by the best available information about a rule's likely economic consequences"; involves economists at the earliest stages of developing rules; and requires economists to concur in the economic analyses.[102] The CFPB, however, remains unconvinced. Despite calls for action "to ensure the Bureau's cost benefit analyses are rigorous and complete,"[103] the CFPB has given no indication that it would consider enhancing its own cost-benefit procedures.

The CFPB's unnecessarily aggressive processes also prevent the Bureau from adequately considering how its enforcement and regulatory actions could restrict access to and increase the cost of credit. Unlike other prudential regulators, the CFPB has assigned lawyers to its examination teams, which in turn has caused financial institutions to retain additional lawyers as well.[104] As a result, the CFPB examination process is more contentious and more expensive than

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[95] *See* Maya Jackson Randall & Justin Lahart, *Harvard Economist to Join Consumer Bureau*, Wall St. J., May 11, 2011.
[96] John Gravois, *Too Important to Fail*, Wash. Monthly (July/Aug. 2012).
[97] Pub. L. 111-203 § 1022(b)(2)(A)(i), 124 Stat. at 1980.
[98] *See* Mark A. Calabria, *The CFPB: Problem or Solution?*, Cato Inst., Aug. 17, 2012.
[99] *Id.*
[100] Jamila Trindle, *CFTC Taps Help for Cost Analysis on New Rules*, Wall St. J., May 10, 2012.
[101] *See, e.g.*, Letter from Darrell Issa, H. Comm. on Oversight & Gov't Reform, to Mary L. Schapiro, Sec. & Exch. Comm'n (Sept. 20, 2011).
[102] Sec. & Exch. Comm'n, Current Guidance on Economic Analysis in SEC Rulemakings (Mar. 16, 2012).
[103] Letter from David Hirschmann, U.S. Chamber of Commerce, to Richard Cordray, Consumer Financial Prot. Bureau (July 2, 2012).
[104] *See* Barbara S. Mishkin, *CFPB Enforcement Lawyers Attending Exams: The Latest Twist*, CFPB Monitor, Apr. 3, 2012.

necessary.[105] Similarly, there is concern that the Bureau could regulate informally – bypassing traditional notice-and-comment requirements – by coercing financial institutions to act "voluntarily."[106] Without the certainty of thorough notice-and-comment rulemaking, lenders will be less likely to extend credit. Likewise, because the CFPB does not conduct retrospective reviews of its regulations,[107] the Bureau has no mechanism to adequately address the consequences of its regulations on consumer credit access.

CONCLUSION

The Consumer Financial Protection Bureau has been given *carte blanche* authority to regulate the offering of consumer financial products and services in the United States. Charged by the Dodd-Frank Act with a vast mandate and vague authority, the agency also lacks the necessary institutional and external controls typically found in an independent agency. As a result, the CFPB is uniquely positioned to drastically – and perhaps unalterably – affect the consumer credit market for American families and small businesses. By its very structure and operations, the Bureau is predisposed toward heavy-handed regulations that will increase costs for lenders and correspondingly restrict credit for consumers. With a growing divide between American consumers and businesses with and without adequate access to credit, the CFPB must be mindful to ensure that the United States retains a vibrant, robust, and fully accessible credit market.

[105] Mark W. Olson, *CFPB Stepping into Vigilante Territory*, Am. Banker, Apr. 20, 2012.
[106] *See, e.g.*, Thomas P. Vartanian, *Will CFPB Make Policy Via Rules – or Enforcement?*, Am. Banker, Nov. 14, 2011.
[107] Letter from David Hirschmann, U.S. Chamber of Commerce, to Richard Cordray, Consumer Financial Prot. Bureau (July 2, 2012).