

Anticipating Potential CFPB Enforcement Priorities as Agency Marks 10-Year Anniversary

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In the 10 years since the Consumer Financial Protection Bureau (CFPB) opened its doors on July 21, 2011, the agency has in many ways upheld its mandate to look out for the public interest. Created by the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) one year earlier, the CFPB is tasked with protecting consumers from unfair, deceptive, or abusive practices, while also arming the public with the information, steps, and tools that consumers need to make smart financial decisions. The agency has made ample use of its enforcement authority; in a blog post celebrating the agency's 10-year anniversary, Acting Director Dave Uejio noted that the CFPB had recovered approximately \$14.4 billion in relief for consumers and imposed \$1.7 billion in civil penalties to date.^[1] In addition, the agency continues its mission to educate the public by issuing regular reports and resources on various topics, such as consumer credit, auto loans, debt collection, and potential scams and frauds.

Senator Elizabeth Warren, however, thinks there is plenty more ground to cover. In recent remarks at an event cohosted by various leading consumer advocacy groups, Warren highlighted several areas that may garner additional attention from the CFPB in the near future, especially if the Senate confirms Rohit Chopra, President Biden's nominee for director. In particular, Warren mentioned cryptocurrency, predatory auto lending, and bank overdraft fees as practices ripe for CFPB enforcement. This article delves into the agency's enforcement record on each of these issues to assess what increased CFPB oversight might mean for lenders and other businesses engaging in these and similar practices.

Cryptocurrency

Companies dealing with cryptocurrency, including companies that offer cryptocurrency products and services to consumers, are still breaking new ground in terms of the regulatory landscape. For now, cryptocurrency remains a largely unregulated market, although both federal and state regulators are taking increasing interest. In addition to the surge of complaints the CFPB received following bitcoin's then-record high and subsequent crash in early 2018, the Federal Trade Commission recently reported that it had received over 7,000 complaints in the last 10 months from consumers claiming to have lost over \$80 million in cryptocurrency investment scams.^[2] And in July, Warren wrote a letter to Securities and Exchange Commission Chairman Gary Gensler requesting information about the agency's authority to properly regulate cryptocurrency exchanges, noting that the existing regulatory gaps leave investors and consumers vulnerable to scams and other fraudulent behavior.^[3] In recent comments at the Aspen Security Forum, Gensler noted that the SEC will continue to protect investors against fraud, including by establishing safeguards for cryptocurrency investors through a regulatory oversight regime. The timeline for establishing cohesive regulation from any of these regulatory bodies, however, remains unclear.

The CFPB currently accepts complaints on virtual currency products and services, including exchange services and online digital wallets, and has been alerting consumers to the potential risks of cryptocurrency since the early days of the bureau's existence. In particular, the CFPB has repeatedly warned consumers that cryptocurrency exchange rates are volatile, that transaction costs (including markups and fees) are unclear, that hackers and scammers pose significant threats, and that many companies dealing in cryptocurrency do not provide any customer support resources should issues arise.

As consumer interest and investment in cryptocurrencies continues to rise, however, the agency may seek to stake out its ground and establish itself as the primary regulator for companies operating in the cryptocurrency space. Recent market instability will require the agency to assess how its regulatory and enforcement authority interacts with the existing financial regulatory framework sooner rather than later.

Predatory Auto Lending

Turning to a more traditional area of enforcement, the CFPB may well take up Warren's challenge to refocus the spotlight on predatory auto lending. The agency currently maintains a series of resources on its website for consumers seeking assistance in navigating auto finance, and it has issued a series of consent orders in recent years against auto loan servicers. However, the last CFPB director to focus the bureau's enforcement priorities on fraudulent auto lending practices was Richard Cordray, who served as the agency's first director from 2012 to 2017. Under Cordray, the CFPB acted against several "buy-here, pay-here" auto dealerships for unlawful lending practices, including promulgating abusive financing schemes, hiding auto finance charges, misleading consumers, and providing damaging, inaccurate consumer information to credit reporting companies.

These early investigations led to significant enforcement action. Under the terms of one consent order, the CFPB collected \$700,000 in restitution to harmed consumers, in addition to imposing a \$100,000 civil penalty that was suspended as long as the consumer redress was paid. In other orders, the CFPB imposed penalties of \$6.5 million and \$8 million to be paid into the agency's Civil Penalty Fund, as well as ordered several conduct provisions stipulating ongoing compliance and additional affirmative actions on the part of the lenders. For example, in addition to penalizing the lenders for deceptive practices, the CFPB ordered one lender to implement reasonable policies and procedures appropriate to the nature, size, complexity, and scope of the company's activities, and required that another implement an audit program in its credit reporting practices.

If the CFPB takes up Warren's challenge, we should expect to see the CFPB revive its interest in predatory auto lending and pursue investigatory and enforcement actions similar to those occurring in the agency's early years.

Bank Overdraft Fees

Historically, the CFPB has not taken much interest in penalizing entities for bank overdraft fees, tending instead to focus on consumer education and best practices for banks. For example, as part of a 2017 initiative looking into overdraft practices and outcomes at financial institutions, the agency created several model overdraft disclosures designed to educate consumers by making the costs and risks of opting into overdraft coverage easier to understand and evaluate. As with predatory auto lending, however, the agency took some action under former Director Cordray that may preview its priorities moving forward, should the agency delve into enforcement with renewed vigor.

While some recent actions have targeted the deceptive sales and marketing of overdraft services, the agency still has plenty of room to expand its efforts, with overdraft fees remaining a major pain point for consumers, especially those struggling financially during the COVID-19 pandemic. By some estimates, banks and credit unions obtain over \$34 billion in overdraft fees every year, with smaller banks earning much of their profit from overdraft revenues. The CFPB may well choose to investigate the overdraft practices of these banks to ensure proper compliance with the existing regulatory scheme.

Best Practices

As the CFPB revisits these and other enforcement priorities, any entity subject to CFPB enforcement should keep a close watch on the agency's current enforcement actions and consent orders, as well as any research reports issued by the agency, to identify any particular areas of interest. This holds particularly true for entities dealing with cryptocurrency as the regulatory landscape morphs to fit the increasingly popular medium of exchange. Moreover, entities should prepare to respond quickly and comprehensively to civil investigative demands, as well as demonstrate a strong system of compliance policies and procedures should the agency issue a demand.

In particular, auto lenders should beware of any potentially deceptive practices, including advertising misleading annual percentage rates, other material misrepresentations concerning auto financing, or other potential violations of the Truth in Lending Act, Dodd-Frank, the Fair Credit Reporting Act, or the Consumer Financial Protection Act. Lenders should ensure that policies and procedures are in place to maintain records of customer acknowledgement of loan conditions and fees and to provide accurate credit information to credit reporting companies.

Meanwhile, banks should review their practices to ensure that consumers affirmatively opt into overdraft protection, as well as review procedures to ensure overdraft practices are not misrepresented or misleading consumers who choose to opt in. As always, unexpectedly costly fees — including overdraft fees — will likely spur additional consumer complaints and draw the attention of the agency.

In addition to maintaining a robust compliance regime, covered entities should be prepared and able to affirmatively remediate any violations discovered through internal reviews or audits.

While the specific focus of the CFPB under Chopra is not yet known, it is clear that the CFPB will continue to provide relief for consumers facing economic hardships following the COVID-19 pandemic, while also addressing ongoing racial injustices in the area of lending — two priorities highlighted by Uejio in a post earlier this summer.^[4] In these and the more traditional arenas, the CFPB has an opportunity to further solidify its role as protector of the public interest. With the agency poised to flex its enforcement muscle under Chopra, the next 10 years will likely bring even more prominence to this relatively young agency than its first decade in existence.

[1] See <https://www.consumerfinance.gov/about-us/blog/celebrating-10-years-consumer-protection/>.

[2] See <https://www.ftc.gov/news-events/press-releases/2021/05/ftc-data-shows-huge-spike-cryptocurrency-investment-scams>.

[3] See <https://www.warren.senate.gov/imo/media/doc/Draft%20SEC%20Crypto%20Exchange%20Letter%2007.7.2021%20clean.pdf>.

[4] See <https://www.consumerfinance.gov/about-us/blog/addressing-racial-inequities-consumer-finance-markets/>.

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