

ClientAlert

Financial Markets Developments

July 2010

Dodd-Frank Wall Street Reform and Consumer Protection Act

Consumer Financial Protection Bureau

Consumer protection was one of the most contentious topics during the long legislative process that resulted in the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act"). In particular, the idea of having an independent consumer financial protection agency was strongly favored by those who claimed that existing federal regulatory agencies had failed in their mandate to protect consumers. Not surprisingly, it also was strongly opposed by those who claimed the agency would be a utility-like bureaucracy that would stifle competition and creativity while creating an imprudent separation of safety and soundness regulation from consumer protection regulation.

In the early stages of the debate about an independent agency, a few of the features that opponents of such an agency found most objectionable were discarded, including the authority of the agency to require that "plain vanilla" versions of financial instruments be offered alongside more complicated versions and its authority to examine depository institutions with assets of US\$10 billion or less. In the later stages, car dealers succeeded after a protracted battle in being generally exempted from coverage.

The Bureau of Consumer Financial Protection (the "Bureau") established by the Act in Title X (Consumer Financial Protection Act of 2010 (the "CFPA")) is the result of these and other compromises reached by multiple constituencies affected by the CFPA. Despite these compromises, the Bureau will have extensive and pervasive rulemaking, supervisory and enforcement authority over a broad range of consumer financial products and services.

1. How will the Bureau be organized?

The Bureau will be an independent bureau of the Federal Reserve System. Its Director will be appointed by the President with the advice and consent of the Senate for a five-year term.¹

The Director has broad authority to appoint and hire all employees of the Bureau², and the employees of the Board of Governors of the Federal Reserve System (the "Board"), the Federal Deposit Insurance Corporation (the "FDIC"), the Office of the Comptroller of the Currency (the "OCC") and other agencies who are currently supporting the consumer financial protection functions of these agencies will be transferred to the Bureau.³



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The Director is required to establish a research unit, a community affairs unit to focus on financial products and services to traditionally underserved consumers and communities, and a unit to collect (including the establishment of a simple, toll-free telephone number), react and respond to consumer complaints.⁴

The Director is required to establish an Office of Fair Lending and Equal Opportunity, an Office of Financial Education, an Office of Service Member Affairs, and an Office of Financial Protection for Older Americans.⁵

2. How is the independence of the Bureau assured?

No rule or order of the Bureau is subject to approval or review by the Board, and the Board may not intervene in any matter or proceeding before the Director, may not appoint, direct or remove any officer or employee of the Bureau, and may not merge or consolidate any of the Bureau's functions into the Federal Reserve System.⁶

The Financial Stability Oversight Council ("FSOC") established by the Act has the authority to "set aside" regulations of the Bureau, but the process involved and the criteria required to be applied to justify the setting aside make it unlikely that the FSOC will ever exercise this authority.⁷

The Act requires the Board to fund the Bureau under a stipulated formula, and the Bureau may request additional appropriations as set forth in the Act.⁸ It is expected that these sources of funds will provide adequate financial resources for the operations of the Bureau.

3. What is the scope of the Bureau's rulemaking authority?

The Bureau has broad authority to administer, enforce and implement the provisions of "Federal consumer financial law,"⁹ including broad rulemaking authority.¹⁰

"Federal financial consumer law" is defined to include the Act, any rule or order of the Bureau, and most federal laws relating to consumer protection (except the Federal Trade Commission Act and the Consumer Reinvestment Act), including the Alternative Mortgage Transaction Parity Act of 1982, the Consumer Leasing Act of 1976, the Electronic Fund Transfer Act, the Equal Credit Opportunity Act, the Fair Credit Billing Act, relevant sections of the Fair Credit Reporting Act, the Home Owners Protection Act of 1998, the Fair Debt Collection Practices Act, relevant sections of the Federal Deposit Insurance Act, relevant sections of the Gramm-Leach-Bliley Act, the Home Mortgage Disclosure Act of 1975, the Home Ownership and Equity Protection Act of 1994,

the Real Estate Settlement Procedures Act of 1974, the S.A.F.E. Mortgage Licensing Act of 2008, the Truth in Lending Act, the Truth in Savings Act, section 626 of the Omnibus Appropriations Act, 2009, and the Interstate Land Sales Full Disclosure Act.¹¹

Except for the Federal Trade Commission (the "FTC"), the Bureau has the "exclusive authority" to prescribe rules pursuant to Federal consumer financial law.¹²

4. Who is covered by the Bureau's supervisory authority?

The Act defines "covered person" as any person engaged in offering or providing a "consumer financial product or service" and any affiliate of such a person that acts as a service provider to such person.¹³

"Financial product or service" is defined to include generally (excluding the business of insurance and electronic conduit services): extending credit and servicing loans; extending or brokering leases that are the functional equivalent of extending credit; providing real estate settlement services or performing appraisals; engaging in deposit-taking activity, transmitting or exchanging funds, or acting as a custodian of funds or financial instruments; providing check cashing, check collection or check guaranty services; providing payments or other financial data processing services; providing financial advisory services; collecting, analyzing, maintaining or providing consumer report information; and debt collection.¹⁴ A "consumer financial product or service" is any of these products or services if "offered or provided for use by consumers primarily for personal, family or household purposes."¹⁵

The Act identifies three separate categories of covered persons over which the Bureau has differing degrees of supervisory authority.

- **Nondepository covered persons.** A nondepository covered person is any person that originates, brokers or services secured consumer real estate loans, offers or provides consumer loan modification services, foreclosure relief services, private education loans or payday loans, or who is "a larger participant of a market for other consumer financial products or services" as defined by the Bureau in a rulemaking mandated by the Act.¹⁶ The Bureau may extend the definition of covered persons to any person that the Bureau determines by order to be engaging in conduct that "poses risks to consumers with regard to the offering or provision of consumer financial products and services."¹⁷ The Bureau generally has exclusive authority to enforce Federal consumer financial law against nondepository covered persons¹⁸ and, as to these persons, to "prescribe rules, issue guidance, conduct examinations, require reports or issue exemptions."¹⁹

■ **Insured depository institutions and credit unions with assets of more than US\$10 billion.** The Bureau has exclusive authority to require reports and conduct examinations of these large institutions with regard to compliance with Federal consumer financial law.²⁰ The Bureau has “primary authority” for the enforcement of such law against these large institutions, with other federal agencies having “backup” enforcement authority.²¹

■ **Insured depository institutions and credit unions with assets of US\$10 billion or less.** The Bureau may require reports from and examine on a “sampling basis” these institutions with regard to Federal consumer financial law, but the Federal bank regulatory agencies will retain their examination and enforcement authority over these institutions with regard to such law.²²

5. What persons are excluded from the authority of the Bureau?

- Merchants, retailers and sellers of any “nonfinancial good or service” except to the extent they are offering or providing any consumer financial product or service or are subject to any consumer protection law for which the Bureau is given responsibility by the CFPA.²³
 - Persons entitled to this exclusion may offer credit to a consumer to purchase the nonfinancial good or service directly from such excluded persons, collect the debt resulting from the credit and sell such debt that is delinquent or in default, provided such persons do not regularly extend credit and the credit is not subject to a finance charge.²⁴
- Real estate agents and brokers, manufactured and modular home retailers, accountants and tax preparers, attorneys, persons regulated by State insurance regulators, employee benefit and compensation plans and persons regulated by a State securities commission are generally exempt from the authority of the Bureau subject to the limitations set forth in the CFPA.²⁵
- Persons regulated by the Securities and Exchange Commission (the “SEC”) (including broker-dealers and investment advisers) and the Commodities Futures Trading Commission (the “CFTC”) are generally exempt from the Bureau’s authority to the extent they are acting in their registered capacities.²⁶
- Car dealers are generally exempt from the Bureau’s authority subject to the limitations set forth in the CFPA.²⁷

6. What authority does the Bureau have to prevent unfair, deceptive or abusive acts or practices?

The Bureau has broad rulemaking and enforcement authority to prevent covered persons from engaging in unfair, deceptive or abusive acts or practices and, for purposes of rulemaking, the CFPA contains guidance on what acts and practices may be considered “unfair” or “abusive.”²⁸

The Bureau may prescribe rules regarding disclosures required in respect of consumer financial products and services, including the adoption of optional model forms that provide “safe harbor” protection regarding required disclosures.²⁹ It may also prohibit the use of agreements that include mandatory arbitration clauses,³⁰ although the Bureau has no authority to prevent consumers from entering into arbitration once a dispute has arisen.

7. What acts are prohibited by the CFPA?

The CFPA makes it unlawful for any covered person or service provider to:

- Offer or provide to a consumer any financial product or service not in conformity with Federal consumer financial law, or otherwise commit any act or omission in violation of a Federal consumer financial law.
- Engage in any unfair, deceptive or abusive act or practice.
- Fail or refuse to permit access to or copying of records, to establish or maintain records, or to make reports or provide information to the Bureau.
- Knowingly or recklessly provide substantial assistance to a covered person or service provider in violation of the provisions described in the response to the preceding question, and the provider of such substantial assistance shall be deemed to be in violation of those provisions to the same extent as the person to whom such assistance is provided.³¹

8. What relationship does the CFPA have to state laws?

State laws are generally not affected by the CFPA except to the extent they are inconsistent with the CFPA, and the provision of greater protection under state laws is not deemed to be inconsistent with the CFPA.³²

The Attorney General or equivalent of any state may bring a civil action to enforce the CFPA and regulations issued by the Bureau thereunder, except that such official may only bring against national banks and federal savings associations civil actions to enforce regulations issued by the Bureau under the CFPA and not to enforce the CFPA.³³

As to the contentious issue of preemption of state law by Federal law in respect of national banks, the CFPA provides for preemption in favor of national banks (but not for their subsidiaries or affiliates that are not national banks) only if:

- Application of a state consumer financial law would have a discriminatory effect on national banks in comparison with the effect of the law on a bank chartered by that state.
- In accordance with the legal standard for preemption in the decision of the US Supreme Court in *Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al.*, 517 US 25 (1996), the state consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers, with any preemption determination under this subparagraph to be made by a court, or by regulation or order of the OCC on a case-by-case basis, in accordance with applicable law.
- The state consumer financial law is preempted by a provision of Federal law other than the CFPA.³⁴

The CFPA contains various provisions about how preemption determinations are to be made and the deference to be given to the views of the OCC.³⁵

In addition, in accordance with the decision of the *US Supreme Court in Cuomo v. Clearing House Assn., L.L.C.* (129 S. Ct. 2710 (2009)), no provision of the CFPA which relates to visitorial powers or otherwise limits or restricts the visitorial authority to which any national bank is subject shall be construed as limiting or restricting the authority of any Attorney General or equivalent of any state to bring an action against a national bank in a court of appropriate jurisdiction to enforce an applicable law and to seek relief as authorized by such law.³⁶

9. Does the Bureau have the authority to grant exemptions from the CFPA?

Yes. The Bureau, by rule, may conditionally or unconditionally exempt any class of covered persons, service providers, or consumer financial products or services, from any provision of the CFPA, or from any rule issued by the Bureau, as the Bureau determines necessary or appropriate to carry out the purposes and objectives of the CFPA, taking into account various factors listed in the CFPA.³⁷

10. When does the CFPA become effective?

The majority of the provisions in the CFPA become effective on or before the "designated transfer date," defined as one year after the enactment of the Act with the possibility of an extension to a date not later than 18 months after the date of enactment of the Act.³⁸ Certain provisions become effective on the date of enactment of the Act, including: the Bureau's authority to issue rules and regulations to administer and enforce consumer financial laws under Section 1022; the Bureau's supervision authority over nondepository covered persons under Section 1024, including the authority to require registration and reporting; and Section 1025(e), which requires coordinated supervision with respect to insured depository institutions and credit unions with assets over US\$10 billion.³⁹

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1. CFPB §1011(b) – (c).
2. CFPB §1013(a)(1).
3. CFPB §1064.
4. CFPB §1013(b).
5. CFPB §1013(c).
6. CFPB §1012(c).
7. CFPB §1023.
8. CFPB §1017.
9. CFPB §1022(a).
10. CFPB §1022(b). The Bureau does not, however, have the authority to establish a usury limit. CFPB §1027(o).
11. CFPB §1002(14).
12. CFPB §1022(b)(4)(A). For a description of the continuing authority of the FTC, *see* CFPB §1061(b)(5).
13. CFPB §1002(6).
14. CFPB §1002(15).
15. CFPB §1002(5).
16. CFPB §1024(a)(1)(A), (a)(2).
17. CFPB §1024(a)(1)(C).
18. CFPB §1024(c)(1).
19. CFPB §1024(d).
20. CFPB §1025(b).
21. CFPB §1025(c).
22. CFPB §1026.
23. CFPB §1027(a)(1).
24. CFPB §1027(a)(2).
25. CFPB §1027(b) – (h).
26. CFPB §1027(i), (j). Persons regulated by the CFTC and the SEC are identified in the Act §1002 (20) and (21), respectively.
27. CFPB §1029.
28. CFPB §1031(a), (b).
29. CFPB §1032(a), (b), (d).
30. CFPB §1028.
31. CFPB §1036.
32. CFPB §1041(a)(1), (2).
33. CFPB §1042(a).
34. CFPB §1044. Similar preemption standards apply to federal savings associations. CFPB §1046.
35. *Id.*
36. CFPB §1047. A similar approach applies to federal savings associations. *Id.*
37. CFPB §1022(b)(3).
38. Act §2 (17).
39. CFPB §1029A.

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