

Resources

Consumer Financial Protection Bureau Alert—Vol. 1, No. 2

September 16, 2011

Regulations and Guidance Update

Bureau Requests Information on Financial Products and Services for Servicemembers

The CFPB's Office of Service Member Affairs was established under Section 1013(e) of the Dodd-Frank Act to develop and implement initiatives for servicemembers and their families to "educate and empower servicemembers and their families to make better informed decisions regarding consumer financial products and services" and to coordinate with the CFPB and federal and state agencies regarding consumer protection measures relating to consumer financial products and services offered to and used by servicemembers and their families. On Tuesday, September 6, 2011, the Office of Servicemember Affairs issued a Request for Information regarding appropriate financial products and services aimed at servicemembers (76 FR 54998). Stating that military families face unique financial challenges, Holly Petraeus, Assistant Director of the Office of Servicemember Affairs, believes the office needs to identify those products and services that can assist the servicemembers' particular needs.

Specifically, the Request for Information "seeks information on consumer financial products and services that are currently being offered to or used by servicemembers and their families." According to the Request for Information, the information provided will be used to create a knowledge base of consumer financial products used by servicemembers and their families in order to monitor consumer complaints and develop education and outreach initiatives and other consumer protection measures. Specifically, the Request for Information seeks comments on the following questions:

1. What consumer financial products and services are currently offered to or utilized by servicemembers and their families?
2. What consumer financial products and services are tailored to the unique financial needs of servicemembers and their families or are marketed specifically to servicemembers and their families? This includes (a) information on products and services designed to address deployments, permanent change-of-station moves, overseas assignments, relocations and similar circumstances; (b) short-term lending products tailored to servicemembers and their families; and (c) products and services that are comparable to the Department of Defense Savings Deposit Program.
3. What financial education opportunities are offered to servicemembers and their families, both in person and online?
4. What programs, policies, accommodations or benefits to financial service providers currently are currently provided that exceed those required by the Servicemembers Civil Relief Act or comparable state law?
5. What unique assistance is currently provided by financial service providers to servicemembers and their families who are distressed homeowners, including specific mortgage modifications; accommodations for servicemembers with permanent change-of-station orders; and assistance for wounded, ill or injured servicemembers, or surviving spouses of deceased servicemembers?
6. What marketing and communication strategies are currently used to inform servicemembers and their families of the specific products and services, accommodations, and educational opportunities, and which tend to be most effective?

Written comments to the Request for Information are due by September 20, 2011.

Round 4—CFPB Continues Gathering Input on Model Disclosure Forms

As we have previously advised, the CFPB is required by the Dodd-Frank Act to combine the Truth in Lending and RESPA up front mortgage disclosures. In an effort to involve the public and the finance industry, the CFPB, over the past few months, has been asking for comments on different versions of simplified mortgage disclosure forms. In round one, the Bureau asked for comments on the front page—or "shopping sheet"—of the disclosure. Round two requested input on the second

page of the disclosure which set out closing costs. The request for comment on the third round offered different ways to highlight and clarify some of the more confusing sections of the disclosure.

On September 12, 2011, the Bureau took a different approach by posting the disclosure of different loans using the same form of disclosure. The two forms—Jasmine and Nandina—each reflect a different loan product and consumers are being asked whether the disclosure form actually helps compare competing loan products and facilitates a consumer's decision making. The Bureau is asking consumers whether the form enabled them to understand different features of the competing loan products and whether additional information or other means of comparison would be helpful.

In an attempt to determine whether the industry understands the disclosure forms and can explain the disclosures to their clients, separate industry forms are also posted on the Bureau's website. Mortgage brokers are being asked to indicate which loan they would recommend to their clients.

CFPB Issues Warning Against Loan Scams After Natural Disasters

Given the high number of natural disasters that has affected the country in recent months and the financial pressures that often accompany such devastation, the CFPB issued a warning on its website to consumers against contractor and lender financial scams and set out some helpful guidance. Believing that consumers who need to make immediate repairs to their homes are more susceptible to deceptive practices, the Bureau emphasized protection against home improvement loan scams and offered both warning signs to watch out for and tactics to avoid a loan scam. The Bureau listed the following:

Warning signs:

- The contractor demands full payment up front or in cash only.
- The contractor has no physical address or refuses to show ID.
- You have to disclose personal financial information (perhaps to “speed up payment”) to start the repair or lending process.
- If you have to borrow to pay for the repairs, the contractor steers you toward a particular lender or tries to act as an intermediary between you and a lender.
- You are asked to sign something without enough time to review it.

Avoiding the scam:

- Carefully question strangers who show up and knock on your door, offering repairs.
- Never give any personal financial information, such as an insurance number or Social Security number.
- Never sign any document without fully reading and understanding it. If you don't understand something, ask for an explanation.
- Do your own research before borrowing any money to pay for repairs.
- Get a loan quote from someone who is not recommended by your contractor and compare their amounts, repayment schedules and rates. If they differ significantly, ask both parties why.

The Bureau also referred consumers to other agencies, such as HUD, the FTC, and state AGs and other authorities for assistance.

Problems with CFPB Consumer Credit Hotline

Being Addressed

Pursuant to the Dodd-Frank Act, on July 21, 2011, the CFPB established a credit card complaint hotline on its website to allow consumers to register complaints about problems they are having with card issuers or servicers regarding their credit cards. The hotline, which was designed to alert banks as to the consumer complaints and require a response within 10 days after receipt, experienced some technical glitches that either caused a delay in the delivery of, or failed to deliver, the

complaints to some banks. Without notification from the Bureau, the banks are not aware a complaint has been filed.

The Bureau became aware of these system glitches and has indicated that most of the problems have now been resolved, with any remaining problems to be corrected within the next few weeks. On a call with industry participants held on August 31, 2011, the CFPB indicated that, given the system issues, it will be flexible on the 10-day bank response time for the time being. The CFPB also appears to be performing some validation of the consumer complaints, so it might take up to 48 hours before the complaint is accessible to the bank. The Bureau's goal is to shorten this time to 24 hours.

Note that the Bureau will be rolling out a similar complaint process for financial products other than credit cards over the next several months.

Unlikely Partners: Banks Agree with Consumers and the CFPB over Regulation and Supervision of Nonbanks

Responding to a request for comments on the scope of the CFPB's supervision of nonbank financial companies, the banking community and its trade groups, while still concerned about the existence of the Bureau itself, have pressed for a very broad definition of "larger participants" in six credit-related nonbank sectors. These comments mirrored those of consumer groups that are advocating for an expansive definition to include a wide-ranging array of financial-related companies, from companies doing background checks to manufactured housing lenders and debt relief agencies.

The banks' goal is to level the playing field so their nonbank competitors are equally regulated and supervised by the Bureau. Arguing that any nondepository entity materially engaged in the business of consumer financial products and services should be deemed a "larger participant" subject to Bureau supervision, the banking and consumer communities are seeking vigorous supervision and regulation of these entities.

Other groups representing nonbank entities called for a more limited definition of nonbanks that will be subject to CFPB supervision. Some commenters expressed their belief that without having a director in place, the Bureau overstepped its authority by requesting comment on this nonbank issue, because they believe that the director should oversee all phases of the rulemaking process in connection with nonbanks. Without an approved director in place, the Bureau may not prescribe rules (1) defining the scope of nondepository institutions subject to the Bureau's supervision, (2) prescribe recordkeeping requirements for such institutions, or (3) supervise nonbank entities.

News from the Bureau

Hearing Held on Richard Cordray's Nomination as Director of the CFPB

On July 17, 2011, President Barack Obama chose Richard Cordray, a former Attorney General of Ohio and the current Bureau Director of Enforcement, as his nominee to be the first Director of the Consumer Financial Protection Bureau. Despite recent discontent over the directorship, including the introduction of HR 1315, which seeks to replace the director's role with a committee, the Senate Banking Committee held a confirmation hearing on Tuesday September 6, 2011, for Richard Cordray's appointment as the Director of the CFPB. Unfortunately for Mr. Cordray, his confirmation hearing morphed into an opportunity for Republicans to again voice their opposition to a single-director structure with little supervision or check on authority. (See article below.)

In his opening statement, Cordray gave a brief summary of his background and how it prepared him for the position of Director of the CFPB and sought to reassure the Senate Banking Committee that as Director of the CFPB, he would adopt a reasonable approach to regulation and enforcement and be accountable to Congress. His background includes appointment as Franklin County Treasurer, State Treasurer of Ohio and Ohio Attorney General, all of which helped him "develop managerial skills and the knowledge needed to run a financial office and safeguard public funds." He noted that his experiences also showed him that "there is no such thing as a one-size-fits-all solution" when it comes to solving financial issues. Instead, he has experimented with a variety of different approaches, including new laws requiring financial education for high school students; the creation of the "Save Our Homes" program, which brought businesses and banks together with the community to assist those in financial trouble; court-ordered foreclosure mediation; and a "low-interest loan program to help small businesses create jobs and to help farmers obtain needed funds on an affordable basis." As Ohio attorney general he also utilized the legal system to protect consumers. Specifically, he took on fraud and other scams that targeted the elderly, pursued foreclosure rescue scammers and enforced consumer protection laws against servicers

who repeatedly violated the law.

Downplaying enforcement actions the Bureau is expected to initiate, Cordray emphasized that litigation is not always the preferred method of protecting consumers in the financial industry. In particular, Cordray pointed to his early-warning policy, which gave parties a chance to tell their story and resulted in resolving issues without further legal action. Further, Cordray noted that litigation is “very slow, wasteful and needlessly acrimonious” and that he intends to use the entire toolbox of solutions, including “research reports, rulemaking, market guidance, consumer education and empowerment, and the ability to supervise and examine both large banks and many nonbank institutions” in performing his duties as Director of the CFPB. Despite the assortment of tools available, Cordray also made it clear that enforcement will have an important role at the CFPB “[i]f people are ignoring or evading consumer protection laws—and seeking to gain an unfair advantage over their law-abiding competitors.” He also emphasized that he will make it a priority to streamline and decrease the number of regulations under the Bureau’s authority.

It is likely Mr. Cordray’s nomination will be approved by the Democrats on the Senate Banking Committee but will be filibustered by Republicans on the Senate floor.

Miscellany

Cordray Hearing Used as Opportunity to Press for Overhaul of CFPB Structure and Greater Accountability

The Senate Banking Committee hearing on September 6, ostensibly scheduled to address the nomination of Richard Cordray as Bureau Director, quickly became a hearing on and an indictment of the structure of the Bureau and its lack of accountability. Digging in their heels, Republican senators expressed their intention to not approve any nominee for the Bureau’s director position until changes were made to the Bureau structure. Putting the approval of a Bureau director in limbo further delays implementation of many Bureau powers tied to the approval of a CFPB director (see CFPB Alert dated September 1, 2011), an additional benefit to the Republicans’ intransigence.

Chief among the Republican-desired changes are (1) the conversion of the CFPB’s leadership from a single powerful director to a five-member bipartisan commission; (2) subjecting the Bureau to the Congressional appropriations process rather than permitting the automatic funding based on a set percentage of the Federal Reserve Board’s income, and (3) easing the ability of the Financial Stability Oversight Council (FSOC) to override Bureau activity and decisions. Concerns about a super-bureaucracy with an independent director and no checks and balances were voiced by a very vocal minority of Republican senators who attended the hearing. This Republican position is no surprise to Democrats who supported Cordray’s nomination and the current structure of the Bureau. In May of this year, 44 Republican senators issued a letter demanding that these Bureau changes be made before a director was nominated and approved, in effect threatening a filibuster on the nomination of a director.

While Cordray was greeted cordially and informed that the opposition was not personal, he attempted to defend the current CFPB structure and assure the Republican opposition that he would be accountable to Congress and would try to work collaboratively with the other banking regulators. Nonetheless, Cordray seemed to be a pawn in the battle over the agency he had hoped to manage and was not even asked any questions by Republicans regarding his suitability for the position.

The Democrats, to date refusing to agree to any of the Republican-demanded changes, accused the Republicans of misusing the hearing process to affect legislative change in regard to a battle that was played out last year where the Democrats prevailed in the passage of the Dodd-Frank Act. Believing that the Bureau is a much needed check on lending abuses, the Democrats resented the use of what they considered blackmail to weaken the agency. They contended that the longer the delay in approving a director, the longer nonbank financial companies would continue virtually unregulated and at a competitive advantage to banks and credit unions.

While Cordray’s nomination will likely clear the Democratic-controlled Senate Banking Committee, he is likely to face a Republican filibuster when his nomination reaches the Senate floor. In the meantime, House Republicans have started moving on legislation to amend the Bureau’s structure and oversight. HR 1315, which has not yet been taken up by the Senate, would (1) establish a bipartisan, five-member Commission to head the CFPB; (2) lower the threshold required to set aside proposed Bureau regulations from a two-thirds vote of the FSOC to a simple majority; (3) clarify that the FSOC must set aside any CFPB regulation that is inconsistent with the safe and sound operations of U.S. financial institutions; (4)

eliminate the 45-day time limit for the FSOC review and vote on Bureau regulations; and (5) require that all FSOC meetings be open to the public whenever the FSOC decides to overturn a Bureau regulation.

Regulatory Scorecard

Below is Dykema's up-to-date chart of pending and final regulatory activities and proceedings at the CFPB.

Consumer Financial Protection Bureau Pending Rulemakings, Final Rulemakings and Other Initiatives under Dodd-Frank Act (DFA) as of September 16, 2011

Description

Date of Proposal/ Final or Interim Rule

Summary of Contents

Key Dates

Proposed Federal Reserve Board Comprehensive Regulation Z Proposals August 26, 2009
(74 FR 43428)

August 26, 2009

(74 FR 43232) Two proposals issued in August of 2009 contained revisions to disclosures for closed-end mortgage loans and HELOCs. On February 1, 2011, Fed elected not to finalize proposals, recognizing CFPB's impending authority

Proposed Federal Reserve Board Comprehensive Regulation Z Proposal September 24, 2010

(75 FR 58539) Proposed rule to: (1) expand the right to rescind to additional loan types, (2) amend disclosures to explain the right to rescind, (3) clarify lender's responsibilities upon rescission, (4) mandate disclosures for loan modifications, (5) change reserve mortgage disclosures, and (6) place restrictions on certain advertising and sales practices for reverse mortgages. On February 1, 2011, Fed elected not to finalize proposals, recognizing CFPB's impending authority

Department of Treasury Privacy Act System of Records January 10, 2011
(76 FR 1507)

June 15, 2011

(76 FR 35071) In accordance with the Privacy Act of 1974, as amended, Department of Treasury provided notice of the establishment of a Privacy Act System of Records. Written comments due on or before February 9, 2011

Effective Date: July 15, 2011

Proposed Federal Reserve Board Regulation Z: Escrow Requirements March 2, 2011

(76 FR 11598) Proposed rule to: (1) extend the minimum period an escrow account must be maintained for first lien, higherpriced mortgage loans from one to five years, (2) provide an exemption from the mandatory escrow for certain loans, (3) exempt from the mandatory escrow requirement creditors that operate primarily in "rural or "undeserved" counties, and (4) require new disclosure explaining how the escrow account works or what the effects would be of not having an escrow account at all. Written comments due on or before May 2, 2011

CFPB and JAGs Partnership July 6, 2011

The CFPB and JAGS: partnering to protect servicemembers CFPB and Judge Advocate Generals will work together to identify potential violations of consumer law involving service members and their families.

OCC, FED, FDIC, SEC, FHFA, and HUD Risk Retention/Qualified Residential Mortgage (QRM) April 29, 2011
(76 FR 24090)

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June 10, 2011

(76 FR 34010) DFA §941 requires sponsors of assetbacked securities (ABSs) to retain at least 5% of the credit risk of assets underlying the securities; proposal includes loan-level requirements such as minimum down payment. Written comments due on or before August 1, 2011

Federal Reserve Board Increase in Regulations Z & M Coverage Thresholds April 4, 2011

(76 FR 11598) Consumer credit transactions and consumer leases with transaction amounts up to \$50,000 will be covered by Regulation Z and Regulation M. Beginning the end of this year (December 31, 2011), the threshold will be adjusted annually based upon the Consumer Price Index (CPI) for Urban Wage Earners and Clerical Workers. Effective July 21, 2011

CFPB Data Collection under ECOA April 11, 2011

Section 1701 of the Dodd-Frank Act DFA §1071 amended ECOA to require financial institutions to collect and report credit application information for women- or minority-owned businesses and small businesses. CFPB issued guidance to financial institutions clarifying that DFA §1071 does not take effect until the CFPB issues necessary implementing regulations.

Federal Reserve Board Ability to Repay/Qualified Mortgage (QM) April 19, 2011

(76 FR 27390) DFA §1411 requires creditors, when making loans covered by TILA, to determine the consumer's ability to repay before making a loan and also to establish minimum mortgage underwriting standards; proposal includes alternatives for final regulation. Written comments due on or before July 22, 2011

Federal Reserve Board Foreign Remittance Transfers under Regulation. E May 23, 2011

(76 FR 29902) DFA §1073 amended the EFT Act, adding a new section to require providers of "remittance transfers" to provide disclosures about such transfers, including exchange rate, applicable fees and taxes, and the amount to be received by the "designated recipient." Written comments due on or before July 22, 2011

Federal Reserve Board Collection Data at Motor Vehicle Dealers under Regulation. B June 20, 2011

(76 FR 36885) Proposed rule to clarify that motor vehicle dealers temporarily are not required to comply with certain data collection requirements in the DFA until the board issues final regulations to implement the statutory requirements. Written comments due on or before July 29, 2011

CFPB "Single Integrated Disclosure" Proposal (in advance of proposed rule) under DFA §1032 May – June, 2011
(www.consumerfinance.gov)

July 20, 2011

(76 FR 43374)

September 12, 2011 CFPB posted "sample" forms on its website and sought public feedback; U.S. Treasury has solicited comments "concerning a proposed generic information collection for development and evaluation of integrated loan disclosures" (combining Regulation. Z mortgage disclosure and the RESPA Good Faith Estimate (GFE) into a single, integrated disclosure form). Treasury requests comments on or before September 19, 2011; DFA requires final rule no later than July 21, 2012

CFPB "Larger Participant" Definition June 29, 2011

(76 FR 38059) DFA §1024 provides that CFPB may supervise covered persons in the residential mortgage, private education lending and payday lending markets. For other markets for consumer financial products or services, CFPB's supervision program will apply only to a "larger participant" of these markets, as defined by rule. Written comments due on or before August 15, 2011

CFPB Identification of Enforceable Rules and Orders

July 21, 2011

(76 FR 43569)

CFPB published consumer financial protection authorities that would be transferred from seven federal agencies and that it would enforce after the Transfer Date. Effective Date: July 21, 2011

CFPB Alternative Mortgage Transaction Parity (Regulation D)

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July 22, 2011
(76 FR 44226)

CFPB published interim final rule establishing Regulation D pursuant to the Alternative Mortgage Transaction Parity Act and the Truth in Lending Act.

Effective for state housing creditors July 22, 2011

Written comments due on or before September 22, 2011

FTC Statement of General Policy or Interpretation; Commentary on the Fair

Credit Reporting Act

July 26, 2011
(76 FR 44462)

FTC is rescinding its Statements of General Policy or Interpretations under the FCRA. Effective Date: July 26, 2011

Disclosure of Records and Information

July 28, 2011
(76 FR 45372)

Interim Final Rule establishes procedures for the public to obtain information from the CFPB under the Freedom of Information Act (FOIA). CFPB also established its rules regarding the confidential treatment of information it obtains in connection with the exercise of its authority.

Effective Date: July 28, 2011

Written comments due on or before September 26, 2011

Rules of Practice of Adjudication Proceedings

July 28, 2011
(76 FR 45338)

Interim Final Rule establishes procedures regarding the conduct of adjudication proceedings under §1053 of the Dodd-Frank Act, used to enforce compliance with the Dodd-Frank Act or any laws for which it has enforcement authority.

Effective Date: July 28, 2011

Written comments due on or before September 26, 2011

State Official Notification Rules

July 28, 2011
(76 FR 45174)

Interim Final Rule establishes procedures to be used by state officials to notify the CFPB of their actions or proceedings in enforcing the Dodd-Frank Act or its regulations.

Effective Date: July 28, 2011

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Written comments due on or before September 26, 2011

Rules Relating to Investigations

July 28, 2011
(76 FR 45168)

Interim Final Rule describing the CFPB's procedures for investigations regarding compliance with the federal consumer financial laws.

Effective Date: July 28, 2011

Written comments due on or before September 26, 2011

Notice of Proposed Privacy Act System of Records

August 1, 2011
(76 FR 45767)

(76 FR 45765)

(76 FR 45761)

(76 FR 45757)

(76 FR 45759)

(76 FR 45763)

Notice of new records system to collect process, log, track and respond to all FOIA- and Privacy Act-related requests.

Notice of new records system used to enable the CFPB to carry out its responsibilities with respect to certain banks, savings associations, credit unions, and their affiliates and service providers, including coordination and conduct of examinations, supervisory evaluations and enforcement actions.

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Notice of a new records system used to enable the CFPB to carry out its responsibilities with respect to individuals related to non-depository covered persons, including the coordination of examinations, supervision evaluations and enforcement actions.

Notice of a new records system used to enable the CFPB to carry out its responsibilities with respect to the enforcement of federal consumer financial protection laws.

Notice of a new records system used to assist the CFPB by providing effective, social media-based ways to share information and interact with the public.

Notice of a new records system that will provide the CFPB with a single, agency-wide repository of identifying and registration information concerning entities offering or providing, or materially assisting in the offering or provision of, consumer financial products or services.

Effective Date: September 12, 2011

Written comments due on or before August 31, 2011

Policy on Ex Parte Presentations in Rulemaking Proceedings
August 16, 2011

Policy on Ex Parte Presentations in Rulemaking Proceedings Policy requiring public disclosure of ex parte presentations made to the CFPB staff concerning a pending rulemaking.
August 16, 2011

Notice and Request for Information on Consumer Financial Products and Services for Servicemembers
September 6, 2011

(76 FR 54998)

Request for input regarding consumer financial products and services tailored to servicemembers and their families.
Written comments due on or before September 20, 2011

Contacts and Caveats

For more information, please contact one of the listed attorneys, or your Dykema relationship attorney.

As part of our service to you, we regularly compile short reports on new and interesting developments regarding the Consumer Financial Protection Bureau. Please recognize that these reports do not constitute legal advice and that we do not attempt to cover all such developments. Readers should seek specific legal advice before acting with regard to the subjects mentioned here. Rules of certain state supreme courts may consider this advertising and require us to advise you of such designation. Your comments on this Alert or any Dykema publication are always welcome. ©2011 Dykema Gossett PLLC.

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Practice Areas

Financial Services Litigation – Consumer

Litigation

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