

Resources

Consumer Financial Protection Bureau Alert—Vol. 1, No. 6

By the Authors of PLI's Consumer Financial Services Answer Book 2011

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Edited by Arthur B. Axelson

News and Views: Consumer Financial Protection Bureau

Regulations and Guidance Update

CFPB Moves to Phase Two of “Know Before You Owe:” Two Model Loan Closing Disclosures Posted for Comment

In its continued effort to streamline mortgage disclosures, the CFPB posted two model loan closing prototypes that combine the Truth in Lending Disclosure with the HUD-1 Settlement Statement. The five-page “Hornbeam” and six-page “Ironwood” models simplify the presentation of the disclosures required at closing in order to provide more clarity to borrowers. Each form adds a front sheet that spotlights the loan terms and a chart that allows borrowers to compare loan estimate charges with final costs. The Bureau indicated that its goal is to harmonize the front-end loan application process with the back-end loan closing. The models are part of the Bureau’s “Know Before You Owe” program designed to ensure that borrowers understand their loan terms over the life of the loan before they execute the loan documents.

According to the Bureau, these mortgage closing disclosure prototypes build upon the feedback received during the first phase of its “Know Before You Owe” initiative, which focused on early loan application disclosures. During five rounds of testing different early disclosure prototypes, the Bureau received more than 24,000 comments.

The Bureau sought comments on the loan closing prototypes from consumers and the industry online through November 16, 2011. Additionally, the prototypes are being tested in markets across the country beginning in Des Moines, Iowa. The market testing will target consumers, lenders, brokers and other industry professionals. In a recent press statement, the Bureau indicated that it intends to run four rounds of testing through February 2012. Draft forms are expected to be issued for notice and comment in July 2012.

Agencies Issue Statement Regarding the Calculation of Asset Size for Purposes of Determining Institution’s Regulator

A statement that explains how the total assets of an insured bank, thrift or credit union will be measured for purposes of determining supervisory and enforcement responsibilities under the Dodd-Frank Wall Street Reform and Consumer Protection Act was issued yesterday by the FRB, OCC, FDIC, NCUA and the Bureau.

Under section 1025 of the Dodd-Frank Act, the Bureau has exclusive authority with regard to institutions with total assets exceeding \$10 billion and their affiliates to examine for compliance with federal consumer financial laws and to enforce those laws. Section 1026 confirms that the four prudential regulators—the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration and the Office of the Comptroller of the Currency—will retain supervisory and enforcement authority for other institutions. The policy statement clarifies the application of sections 1025 and 1026 by addressing the measure to be used to determine asset size and the schedule for making such determinations.

In regard to asset size, the statement indicates that the regulators will use the total assets reported in the quarterly Reports of Condition and Income (“Call Reports”), which banks, thrifts and insured credit unions are required to file.

The statement also explains the need to establish a schedule for determining the size of an institution that avoids unwarranted uncertainty or volatility regarding the identity of an institution's primary supervisor for federal consumer financial laws. Such conditions could both impose increased burden on institutions and interfere with the orderly implementation of the agencies' responsibilities with respect to the federal consumer financial laws. In order to avoid these adverse consequences, after an initial asset size determination based on data from June 30, 2011, an institution generally will not be reclassified unless four consecutive quarterly reports indicate that a change in supervisor is warranted.

Examinations/Enforcement Here and Now

CFPB to Provide Early Warning Notice of Enforcement Actions

The Consumer Financial Protection Bureau ("CFPB") recently announced that it may provide lenders with notice of the nature of the subject's potential violation(s) before proceeding with enforcement actions. CFPB Bulletin 2011-04 states that its Office of Enforcement has discretion to provide notice and an opportunity to respond to the subject of an investigation. The CFPB may choose not to provide notice in certain circumstances, however, such as when time is of the essence or there are allegations of continuing fraud. A responding party's submission cannot exceed 40 pages and must focus on legal and policy issues. Further, any factual assertion in the response must come from an individual with personal knowledge and be made under oath. Responding parties have 14 days to respond following receipt of the notice.

Raj Date, Special Advisor to the Secretary of the Treasury for the CFPB, stated, "The Early Warning Notice announced today strikes a balance between the goal of fairness to those being investigated and our mission to protect consumers." The notice system is based on similar procedures used at other federal agencies, including the Security and Exchange Commission's "Wells process." This process will provide subjects with an opportunity to present their position before an enforcement action is recommended. The CFPB has not yet announced whether it will permit responding parties the opportunity to review evidence from the investigation or meet in-person with CFPB staff.

According to Mr. Date, the notice system "will help us fulfill our commitment to transparency in enforcing the law."

News from the Bureau

Raj Date Assesses Bureau's First 100 Days and Forecasts Future Bureau Activity

Despite continued Republican opposition to the current Bureau structure (see article below), Raj Date, Special Advisor to the Secretary of the Treasury for the Bureau, recently testified before the House Financial Service Subcommittee and outlined what the Bureau has already accomplished, and what we can expect to see in the coming months and after the Bureau has a confirmed Director in place.

With the Bureau now 700 employees strong, Mr. Date extolled the virtue of having an agency exclusively focused on consumer protection, as opposed to the past regulatory scheme, under which consumer protection was but one of the regulators' concerns. He also emphasized the Bureau's mission to level the playing field among financial institutions and non-bank financial service providers. Although the Bureau cannot implement all its authority until it has a confirmed Director, it has been actively engaged in community outreach, education programs and bank examinations in the few months it has been in existence.

According to Mr. Date, the Bureau is aiming for transparency and participation in everything it does. Its goal is to be an open agency that shares with the public not only what it is doing, but how it is doing it. It is also committed to basing its judgments on research and data analysis, and will not be swayed by ideology or a political agenda. The Bureau is also pushing for transparency in consumer products and clarity in the marketplace so consumers understand the products and services being offered. To this end, Mr. Date discussed the Bureau's "Know Before You Owe" disclosure initiative, under which it has reached out to the public, industry participants and market experts for guidance on shorter and more useful mortgage disclosures. It has used the feedback received to continually modify the posted disclosure prototypes. The Bureau is also embarking on a "Know Before You Owe" initiative in connection with student loans. Mr. Date also noted the Bureau's outreach to the public and the industry on its development of the "larger participant" rule that will define the scope of the agency's non-bank supervision authority.

The Bureau's supervisory jurisdiction extends over the 100 or so largest banks, thrifts and credit unions, and the Bureau has started on-site inspections of these institutions, which hold a majority of bank assets and serve a majority of the nation's consumers. Once a Director is heading the agency, the Bureau will also supervise key non-bank providers of consumer financial services and products. In connection with the Bureau's supervisory role, Mr. Date emphasized the benefits of having a federal regulator monitoring the activities of all players in the mortgage market, including brokers, originators and servicers. According to Mr. Date, previously the supervision of these entities was fragmented, created an un-level playing field, and enabled industry players to shop for the least-regulated regime. Once a Director is in place, Mr. Date emphasized, all industry participants will have to play by the same rules, regardless of their charter.

In connection with the Bureau's supervisory powers, Mr. Date also discussed the recently published Supervision and Examination Manual, the guide for examiners to use in overseeing companies that provide financial services and products, as well as the Bureau's examination procedures for mortgage servicing. Notably, he indicated that these are evolving documents and the Bureau welcomes feedback from all affected. He also stated that additional examination guides for particular products and lines of business will be forthcoming. While the Bureau is focusing on the examination of large banks and their affiliates first, once it has a Director, Mr. Date indicated, the examination guides will be used across all markets within its authority.

On the regulatory front, Mr. Date said that "one of the Bureau's central responsibilities" is to identify and streamline outdated, unnecessary or unduly burdensome regulations. Noting that many of the regulations the Bureau inherited from other agencies have become outdated or redundant due to changes in technology, market practices and the legal landscape, Mr. Date believes that the Bureau has a unique opportunity to streamline and simplify rules affecting the financial services industry. Beginning later this month, the Bureau will initiate a targeted review of these rules and ways to update and streamline the regulations. He also indicated that the public and the industry will be able to participate in this activity as well.

Finally, Mr. Date emphasized the Bureau's role in empowering consumers through education and the protection of vulnerable segments of the population such as the nation's elderly, servicemembers and students. By educating these groups, addressing problems and unfair, deceptive and abusive practices specific to these groups, the Bureau hopes to assist and protect the more vulnerable users of financial services and products.

Skip Humphrey Testifies Before Congress on the Office of Older Americans

On November 15, Hubert H. "Skip" Humphrey III, head of the Bureau's Office for Older Americans, testified before the Senate Subcommittee on Financial Institutions and Consumer Protection about plans to help the nation's senior consumers in the financial marketplace. According to Mr. Humphrey, many of those in the 62-plus population are not financially prepared for retirement, and financial exploitation of older Americans is on the rise. Mr. Humphrey pointed to a study by the MetLife Mature Market Institute, which disclosed that Americans over the age of 65 lost more than \$2.9 billion to financial abuse and exploitation in 2010, a 12% increase from the \$2.6 billion estimated in 2008.

When the Dodd-Frank Act created the CFPB, it specified certain populations that Congress felt needed focused attention, including older Americans. Mr. Humphrey testified that the CFPB launched its efforts to help older American consumers by creating the Office for Older Americans well before the statutory deadline of January 21, 2012. He further testified that the Office for Older Americans currently is hiring highly experienced staff, and its work and planning are well under way. As an example, Mr. Humphrey noted the activation of an Older Americans home page on the CFPB website, which provides access to financial information and protection tactics for older Americans. Additionally, Mr. Humphrey highlighted the fact that the Division is engaging with older consumers and already helping them. He pointed to one success story involving "Suzanne," an 81-year-old Kentucky woman, who became unemployed and was unable to keep up minimum payments on her longstanding credit card debts. Only one credit card issuer agreed to offer a modest reduction in her monthly payments after repeated appeals; the other refused and started charging late fees coupled with a spiked interest rate. Suzanne eventually wrote to a local Congressman who advised her to contact the CFPB. Ten days after the CFPB contacted the credit card issuer, the company credited all of the extra interest charges and late fees, bringing the balance to zero. Mr. Humphrey emphasized that Suzanne is only one example of the CFPB's success in helping older Americans during its first several months of operation.

Under the Dodd-Frank Act, the CFPB's Office for Older Americans is specifically tasked with several functions, including addressing the concerns of seniors being misled by deceptive certifications or designations of financial advisors. Mr. Humphrey testified that the CFPB will fulfill this mandate by monitoring certifications and designations and alerting federal and state regulators about those that are unfair, deceptive or abusive. The Dodd-Frank Act also mandates that the CFPB

promote sound financial management and decision making by seniors, with a particular focus on the areas of long-term savings and planning for retirement and long-term care. To this end, Mr. Humphrey indicated the Office for Older Americans will work with other divisions of the CFPB to conduct research and identify best practices and effective methods to educate and counsel seniors. Because women live longer and are more likely than men to be victims of financial abuse and exploitation, special attention will be paid to the problems facing older women.

Mr. Humphrey concluded by saying the best defense against deceptive practices and elder financial abuse and exploitation is “not only tough enforcement, but also effective prevention through good education and training of all our consumers, not just older Americans.”

Miscellany

Republicans Continue to Push for Changes to Consumer Financial Protection Bureau

Republican members of the House Financial Services Committee continued to urge the Senate to adopt structural changes to the CFPB at a recent hearing on the CFPB’s activities. Republicans are calling for more accountability at the Bureau, including replacing the single Director with a bipartisan five-person committee and making it easier for federal banking regulators to overrule the Bureau’s decisions. House Financial Services Committee Chairman Spencer Bachus (R-AL) explained that the CFPB “could easily become a loose cannon” under the current leadership structure.

CFPB Special Advisor Raj Date defended the single Director structure, asserting that “if you want something hard done, you really should have someone singularly accountable for it.” Date further defended the CFPB, saying “[a]t some level, if you don’t believe what we say, look at what we do,” pointing to the Bureau’s early initiatives, which include working directly with members of the military and older Americans, and streamlining disclosure forms for mortgages and student loans.

Despite Date’s assurances regarding the structure of the CFPB, Senate Republicans continue to block Richard Cordray’s confirmation as Director of the Bureau. Because it lacks a Director, the CFPB finds its powers significantly limited. The Bureau is not yet allowed by law to supervise payday lenders, private student loan companies and other non-bank companies that can take advantage of consumers.

The White House has ratcheted up pressure to confirm Cordray, charging that Americans will be denied full safeguards against abusive business practices until Cordray is in place. Stephanie Cutter, presidential advisor, called on Republicans to “do the right thing by consumers,” but offered no new path to confirmation for Cordray. She also said President Obama would oppose any efforts to change the structure of the CFPB. Cutter declined to comment on the possibility of a recess appointment of Cordray to bypass Republicans while Congress is not in session, and said that the Senate still has an opportunity to confirm Cordray before going into recess at Christmas.

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 November 18, 2011

**NOTE: [Click here](#) to access a printable version of the Scorecard.

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, higher priced 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)

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

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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)

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)

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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

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

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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.

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

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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

Proposed Information Collection; Comment Requests; Generic Clearance for Research in Development of Disclosure Forms September 26, 2011

(76 FR 59379) Generic Clearance Request regarding information collection to OMB in connection with research in the development of disclosure forms and request for comments on the collection of information and the estimated burden on respondents. Written comments due to OMB reviewer and to Treasury Department Clearance Officer on or before October 26, 2011.

FRB Final Rule Amending Regulation B to Postpone Auto Dealer Collection of Information on Minority and Women Owned Businesses and Small Businesses

September 20, 2011

Provides that motor vehicle dealers are not required to comply with Dodd-Frank's data collection requirements on credit applications by women- and minority-owned businesses until the FRB issues final regulations to implement the statutory requirement. Effective upon publication in the *Federal Register*

Proposed Collection;

Comment Request October 31, 2011

(76 FR 67128) CFPB is soliciting comment for a proposed generic information collection that will help the CFPB satisfy responsibilities under the Dodd-Frank Act—the collection and monitoring of and response to consumer complaints about certain financial products and services.
Written comments due on or before December 30, 2011.

Proposed Collection;

Comment Request November 2, 2011

(76 FR 67668) CFPB is soliciting comment for a proposed generic information collection for development and/or testing of model forms, tools, and similar related materials.

Written comments due on or before January 3, 2012.

Notice of Proposed Privacy Act System of Records November 4, 2011

(76 FR 68395) CFPB is soliciting comments on its new system of records regarding its employees' Transit Subsidy Program. Written comments due on or before December 5, 2011.

Contacts and Caveats

For more information about Dykema's Financial Services Regulatory and Compliance Team, please contact group leader, **Don Lampe** at 704-335-2736, or any of the listed attorneys.

As part of our service to you, we regularly compile short reports on new and interesting developments regarding the Consumer Financial Protection Bureau. Please use our website to stay current on these subjects. If you have any questions or comments, please contact us at 704-335-2736. Your comments on this Alert, or any Dykema publication, are always welcome. ©2011 Dykema Gossett PLLC. We advise you of such designation.

Attorneys

Joseph H. Hickey

Theodore W. Seitz

Practice Areas

Litigation

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