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The Dodd-Frank Consumer Finance Act: What You Need to Know

On July 15, the Senate passed a comprehensive financial reform bill that touches every aspect of financial services, from derivatives to mortgages to consumer finance. The Dodd-Frank Wall Street Reform and Consumer Protection Act will now go to the White House for President Barack Obama's signature.

Of particular interest to lenders and others involved in consumer finance is Title 10 of the Act, which is also known as the Consumer Financial Protection Act of 2010 (the CFPA). Among other things, the CFPA creates a Bureau of Consumer Protection and vests it with broad regulatory and rulemaking authority, backed up by strong enforcement powers.

Notable Provisions

While important details remain to be worked out in the rulemaking process, certain provisions of the CFPA will be of interest to those in the consumer finance arena:

- **Creation of the Bureau of Consumer Financial Protection:** The CFPA creates a new federal regulator, housed within the Federal Reserve. The Bureau of Consumer Protection (the Bureau) will have oversight over essentially every entity involved in consumer finance.
- **No Usury Limit:** The CFPA specifically provides that, "No provision of this title shall be construed as conferring authority on the Bureau to establish a usury limit applicable to an extension of credit offered or made by a covered person to a consumer, unless explicitly authorized by law."
- **Otherwise Broad Rulemaking Authority:** Notwithstanding the lack of authority to establish a usury limit, as discussed below the Bureau is vested with broad rulemaking authority.
- **Registration and Supervision:** Section 1024 requires the Bureau to prescribe rules regarding registration requirements for consumer mortgage lenders and anyone who "is a larger participant of a market for other consumer financial products or services." With respect to the latter, the Bureau shall consult with the FTC and then conduct a rulemaking in order to determine what specific entities are subject to registration. The Bureau may also impose requirements to facilitate supervision, including requirements concerning recordkeeping and background checks.
- **Uncertainty Regarding Consumer Arbitration Agreements:** The CFPA charges the Bureau with conducting a study of, and reporting to Congress on, the use of agreements to arbitrate in connection with the provision of consumer financial products and services. The Bureau may prohibit, or impose limitations on, the use of arbitration agreements if the Bureau finds it to be in the public interest and for the

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protection of consumers. As these findings must be consistent with the Bureau's study, presumably the Bureau could not impose any restrictions prior to reporting to Congress. And importantly, any limitations or restrictions on the use of arbitration agreements may not be applied retroactively to contracts entered into prior to enactment of the regulation.

- **Consumer Right to Information:** The CFPA provides consumers with a broad right to access information pertaining to their accounts. Upon request of the consumer, an entity subject to the jurisdiction of the CFPA must provide the consumer with information concerning the product or service that the consumer obtained from that entity, "including costs, charges and usage data." The information "shall be made available in an electronic form usable by consumers." The pertinent provision contains a carve-out for trade secrets and other information required to be confidential by law, and "shall not be construed" so as to impose a duty to maintain records. The Bureau may, after consulting with the federal banking agencies and the FTC, promulgate appropriate rules in furtherance of this directive.
- **Duties Regarding Consumer Complaints:** The CFPA charges the Bureau with implementing reasonable procedures to respond to consumer complaints or inquiries regarding entities regulated by the Bureau. Among other things, the CFPA contemplates a toll-free telephone number, a website and a database of complaints. The Bureau is to coordinate with the FTC and other agencies regarding the collection of complaints, and may refer complaints to individual states for action. When responding to a complaint, the Bureau must identify steps that have been taken by the Bureau, any responses by the regulated entity, and any planned follow-up actions. While banks with assets in excess of $10 billion must provide the Bureau with a response to any consumer complaint or inquiry, there does not appear to be a similar requirement for other entities. However, presumably nothing precludes the Bureau from imposing such a requirement during the rulemaking process.
- **Disclosure Requirements:** The Bureau is authorized to prescribe rules governing and/or requiring the use of disclosures with respect to consumer financial products and services, both initially and over the term of the product or service.
- **Private Right of Action:** The CFPA is silent as to whether it allows for a private right of action. Although an earlier version of the legislation in the House of Representatives had included language stating that the statute did not create a private right of action, this language does not appear in the compromise version passed by the Senate. (However, the earlier House version had left in place private rights of action arising under the rules and authorities transferred to the Bureau from other regulatory agencies.) Regardless, nothing in the law precludes an aggrieved consumer from using a violation of the law as a predicate to a claim under a state unfair and deceptive trade practices act. And the CFPA specifically provides that marketing, offering, selling any product or attempting to enforce any agreement that fails to comply with the statute, or any rule promulgated thereunder, is unlawful—powerful fodder for a deceptive trade practices claim.
- **Timing:** The CFPA has several different effective dates. Subtitle A, which consists of sections 1011-1018 of the CFPA and establishes the Bureau, is effective immediately. Most of the remaining provisions are effective on the "Designated Transfer Date"—that is, a date selected by the Secretary of the Treasury that is between 180 days and 18 months after enactment of the CFPA. No later than 60 days after enactment of the CFPA, the Secretary of the Treasury is charged with publishing a notice of the Designated Transfer Date in the Federal Register. Subtitle F (sections 1061-1067) contains provisions governing the transition of power to the Bureau prior to the Designated Transfer Date. Certain other subsections, particularly those imposing a requirement on the Bureau to report to Congress, have separate effective dates specified in those subsections. Notably, Section 1024 requires the Bureau to issue its rule identifying entities subject to registration within one year of the Designated Transfer Date.

Analysis: The Bureau Of Consumer Financial Protection

Composition and Jurisdiction

The CFPA creates a new federal regulator, the Bureau of Consumer Financial Protection. The Bureau will be part of the Federal Reserve, and will be headed by a Director appointed by the President and confirmed by the Senate. The Bureau will be divided into several functional units and offices, including a Research Unit, a Community Affairs Unit, a unit dedicated to collecting and tracking consumer complaints, an Office of Fair Lending and Equal Opportunity, an Office of Financial Literacy and an

Office of Service Member Affairs. Although the statute sets forth the goals for each unit and office, the precise scope of each of their respective powers will be determined during the rulemaking process.

The Bureau is vested with broad regulatory and rulemaking powers over not just consumer lenders, but also over essentially every entity involved in consumer financial services. While the CFPA provides that the universe of entities subject to the Bureau's authority will be determined during the rulemaking process, entities specifically identified in the CFPA as subject to the Bureau's jurisdiction include lenders and servicers; those who acquire, purchase, sell or broker loans; those who sell, provide or issue stored value instruments; those engaged in check cashing, check collection or check guaranty services; payment processors; those who provide credit counseling, debt management or debt settlement services; and debt collectors.

The CFPA consolidates certain regulatory powers previously held by several other agencies, including the Federal Reserve, the Comptroller of Currency, the Office of Thrift Supervision (which is abolished by the CFPA) and others, and vests them in the Bureau. While "all powers and duties arising under enumerated consumer laws" previously vested in the Federal Trade Commission will also be transferred to the Bureau (presumably including the Truth In Lending Act, the Gramm Leach Bliley Act, the Fair Debt Collection Practices Act, the Fair Credit Reporting Act and others), the Bureau will share concurrent jurisdiction with the Federal Trade Commission over unfair and deceptive acts and practices where the FTC has asserted its authority pursuant to the Federal Trade Commission Act. Recognizing the potential for conflicting rules and competing enforcement actions, the CFPA requires the Bureau and the FTC to negotiate an agreement with respect to rulemaking by each agency, and to consult with each other during the rulemaking process. They are also required to negotiate an agreement for coordinating with each other regarding enforcement actions undertaken by each agency. And where one agency has initiated a civil enforcement action, the other agency may not bring a civil action under the same provision of law against the same defendants during the pendency of the initial action. (However, an agency may intervene in an action brought by the other agency.) The devil is in the details, and it remains to be seen whether this will be a sufficient preventative against competing and conflicting regulatory and enforcement activity.

Enforcement Powers

The Bureau has the power to conduct investigations, hold hearings and initiate litigation. Its investigative powers are similar to those of the FTC, and include the power to issue subpoenas and civil investigative demands calling for the production of documents, things, written reports or answers, and deposition testimony. Service may be effected by an investigator anywhere in the United States, and entities located overseas may be effected in the manner prescribed by the Federal Rules of Civil Procedure. A party required to provide deposition testimony may be accompanied by an attorney.

The Bureau may also initiate a "cease-and-desist" proceeding, whereby between 30 to 60 days after service of written notice by the Bureau, a regulated entity shall appear at a hearing to determine whether a cease-and-desist order should issue. Failure by a regulated entity to attend the hearing shall be deemed consent to issuance of the cease-and-desist order.

Finally, the Bureau may also initiate litigation in any United States District Court or other court of competent jurisdiction. The CFPA imposes a three-year statute of limitations on actions, and the statute begins running upon discovery of the violation. A panoply of relief is available to the Bureau, including rescission or reformation of contracts, refunds or return of property, restitution, disgorgement, damages or other monetary relief, public notification regarding the violation, injunctive relief, statutory damages, and recovery of attorneys' fees and costs. (However, "nothing in this subsection shall be construed as authorizing the imposition of exemplary or punitive damages.") Statutory damages are severe: up to $5,000 for each day during which a violation of a law, rule or final order occurred; up to $25,000 for each day during which a person "recklessly" violates such a law; or up to $1,000,000 per day for each day during which a person "knowingly" violates such a law. "Mitigating factors" to be considered in assessing statutory damages include the size, financial resources and good faith of the alleged violator; the gravity of the violation or failure to pay; the severity of the risks to or losses of the consumer, which "may take into account the number of products or services sold or provided"; the history of previous violations; and, "such other matters as justice may require."

Where the Bureau determines that a criminal violation has occurred, it may provide pertinent evidence in its possession to the United States Attorney General. Also of note, the CFPA provides protection for employee whistle-blowers who provide evidence to the Bureau or other regulators of violations of the CFPA, or otherwise cooperate in any proceedings brought thereunder. While a whistle-blower must first file a complaint with the Secretary of Labor, he or she may seek redress in court if the Secretary fails to act on the complaint. (Significantly, the subsection governing whistle-blowers expressly prohibits pre-dispute arbitration agreements with respect to disputes arising under that subsection.)

Concurrent State Jurisdiction

The CFPA not only largely leaves existing state law intact, but also provides the states with a significant role in shaping the consumer protections afforded by the statute. So while the statute does expressly preempt "inconsistent" state law, it also expressly stipulates that a state law is not "inconsistent" where the protection provided by the state law is "greater than the protection provided under this title." The statute also provides that the Bureau shall issue a notice of proposed rulemaking whenever a majority of the states enacts a resolution in support of the rulemaking, giving the states a direct hand in regulation. The CFPA expressly preserves the enforcement powers of the states, and notably allows a state attorney general to bring a civil action in the name of the state to enforce provisions of the CFPA. Where the attorney general does so, and when practicable, he or she must provide written notice and a copy of the complaint to be filed to the Bureau.

Conclusion

The CFPA—to say nothing of the larger Dodd-Frank Wall Street Reform and Consumer Protection Act within which it is contained—was a monumental undertaking and represents a sea change in the way consumer finance will be transacted. The practical implications of the CFPA will be revealed after the conclusion of the rulemaking process.