

Banking Agencies

Federal Banking Agencies

The Consumer Financial Protection Bureau and the State Attorneys General: A Force Multiplier in Consumer Protection Matters

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Introduction

On July 21, 2011 the Consumer Financial Protection Bureau (CFPB) will open its doors. The CFPB was created by Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act¹ (Dodd-Frank or the Act), and will be an independent bureau within the Federal Reserve System. In addition to consumer protections created by Dodd-Frank, the CFPB will have primary rulemaking and enforcement authority for eighteen federal consumer protection statutes.

A discussion is currently ongoing as to how the CFPB will be structured and how these laws will be enforced, particularly with regard to its cooperation with state Attorneys General and other state regulators. This article will highlight and discuss some sections of importance regarding enforcement coordination between the CFPB and the states, who will partner with this new federal bureau in protecting consumers. In other words, in addition to the CFPB's own enforcement staff, this new federal bureau will use state Attorneys General and other state regulators as force multipliers to enforce federal consumer financial laws. For a general overview of the CFPB, see Bloomberg LawNotes[®], [Dodd-Frank Wall Street Reform and Consumer Protection Act: Bureau of Consumer Financial Protection](#), and for a discussion of the CFPB organization and structure, see Bloomberg LawNotes[®], [Bureau of Consumer Financial Protection: Organization and Structure](#).

Title X — Bureau of Consumer Financial Protection

Title X of the Act, also known as the Consumer Financial Protection Act of 2010, created the CFPB and granted it rulemaking, supervisory, and enforcement authority over consumer financial products or services under certain federal consumer financial laws. Even though located within the Federal Reserve Board (FRB), the CFPB is not under FRB's jurisdiction and is independently funded by a percentage of the total operating expenses of the Federal Reserve System.²

While the Act grants the CFPB very broad powers, it also provides for coordination between the CFPB and other federal agencies and state regulators.³ In essence, the CFPB consolidates the consumer protection responsibilities of many federal agencies, including among others, the Commodity Futures Trading Commission (CFTC), Federal Deposit Insurance Corporation (FDIC), Federal Trade Commission (FTC), Housing and Urban Development (HUD), National Credit Union Administration (NCUA), Office of Thrift Supervision (OTS), and the Securities and Exchange Commission (SEC).⁴

Purpose and Objectives

The overarching purpose of the CFPB is to implement and enforce federal consumer financial law consistently so that "markets for consumer financial products and services are fair, transparent, and competitive."⁵ More specifically, CFPB's objectives are to ensure that consumers are provided timely and understandable information in order to make responsible decisions about financial transactions thereby protecting consumers from unfair, deceptive, or abusive acts.⁶

Organization

The Act requires certain offices to be established within the CFPB. Those offices are organized around discreet issues or populations,⁷ and include the following:

- Office of Fair Lending and Equal Opportunity;
- Office of Financial Education;
- Office of Service Member Affairs; and

- Office of Financial Protection for Older Americans.

Each of these offices will coordinate efforts with other federal agencies and state regulators, as appropriate.⁸

A CFPB Implementation Team was created as an initial workforce, drawn from a number of positions currently scattered across other agencies, including among others, the Federal Reserve, FTC, FDIC, HUD, OCC, OTS, and the Treasury.⁹ The statute defines an 18-month transitional period, by the end of which this initial workforce and others will be brought inside the CFPB. As of the date of this article, some notable CFPB appointments have included former Ohio Attorney General Richard Cordray, Gail Hillebrand, and Holly Petraeus. Mr. Cordray serves as Associate Director for Regulations, and in that position will lead the enforcement arm of the CFPB.¹⁰ Ms. Hillebrand, who formerly worked with the consumer protection group Consumers Union, will serve as Associate Director of Consumer Education and Engagement, overseeing the offices established within the Bureau.¹¹ Ms. Petraeus, who formerly served as Director of the Better Business Bureau Military Line and is the spouse of United States Forces Afghanistan Commander General David Petraeus, will lead the Office of Servicemember Affairs.¹²

Under the Act, the CFPB also must create a Consumer Advisory Board to advise and consult with the CFPB and provide information on emerging practices and trends.¹³ The CFPB is mandated to coordinate with other federal and state regulators in order to "promote consistent regulatory treatment of consumer financial and investment products and services."¹⁴ As the primary, and sometimes exclusive, enforcement agency for consumer financial laws, substantially all consumer protection functions of FDIC, FTC, HUD, OCC, OTS, and NCUA are transferred under subtitles F and H of Title X to the CFPB.¹⁵

Rulemaking

The CFPB is granted exclusive rulemaking authority for consumer protection under the standards enumerated, including the requirement to consider, along with the potential benefits and costs to consumers and covered persons, the potential reduction of access to consumer financial products or services.¹⁶ The CFPB's rulemaking authority is extensive and limitations are few. CFPB has certain obligations to consult with the appropriate prudential regulators or other federal agencies prior to proposing a rule, during the comment process, and when publishing resulting objections. The Financial Stability Oversight Council is empowered to set aside a final regulation upon a determination that it "would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk."¹⁷

Coordinated State Enforcement of Title X and Preemption of State Law

While Title X of Dodd-Frank grants the CFPB very broad powers, it includes a federalism balance, providing for coordination between the CFPB and the state regulators.¹⁸ The Act also empowers state Attorneys General and other relevant state regulators to serve as force multipliers, enforcing the Act's provisions. As the chief law enforcement officers of the states, Attorneys General and other regulators have long played a critical role in protecting consumers in matters ranging from individual consumer scams to complex predatory lending, and have a role advocating for legislative changes. The Act and the structure of the CFPB preserve that role, while expanding the tools available to enforce certain provisions of the law and related regulations.¹⁹

Enforcement by State Attorneys General and State Regulators

Except with respect to a national bank or federal savings association, the state Attorneys General or appropriate state regulator may bring a civil action, in the name of the state, in a federal or state court to enforce provisions of Title X or regulations promulgated under that Title.²⁰ With respect to a national bank or federal savings association, state Attorneys General may bring a civil action in the name of the state in a federal or state court to enforce only regulations promulgated under Title X.²¹

Relief/Penalties

Section 1055 of the Act grants courts or the CFPB the jurisdiction to award any appropriate legal or equitable relief, including rescission or reformation of contracts, refund of moneys, return of real property, restitution, disgorgement, compensation for unjust enrichment, payment of damages or other monetary relief, public notification regarding the violation and costs of notification, limits on activities or function of the person, and civil money penalties.²² While the Act authorizes the payment of damages, it does not authorize exemplary or punitive damages.²³ Provisions for penalties are included.²⁴

Notice to CFPB Prior to Suit

Before initiating civil actions, the state Attorneys General or state regulators must provide the CFPB and prudential regulators, if any, with a copy of the complaint to be filed and a notice containing certain facts and information. CFPB may intervene and remove the action to federal court if it was not initiated there.²⁵ From a practical perspective, the issue currently being debated is how the CFPB and the states will work together and how enforcement targets will be identified.

CFPB and NAAG Joint Statement of Principles

As the first step in forging a new partnership between federal and state officials to protect consumers of financial products and services, according to the Joint Statement of Principles on Consumer Financial Protection (Joint Statement) released on April 11, 2011, certain principles were developed to advance the goals shared by the CFPB and the Presidential Initiative Working Group of the National Association of Attorneys General (NAAG). These principles will protect consumers of financial products and services by: (1) protecting consumers of financial products or services from unlawful acts or practices; (2) providing clear rules that will improve the marketplace for consumers; (3) eliminating unfair competition to help law-abiding businesses; and (4) identifying ways to promote understanding and address complaints and concerns raised by consumers about financial products or services in the most efficient and effective manner possible.²⁶

In the Joint Statement, the parties agree to:

- Coordinate training programs and share information about developments in federal consumer financial laws and state consumer protection laws that apply to consumer financial products or services;
- Share information, data, and analysis about conduct and practices in the markets for consumer financial products or services to inform enforcement policies and priorities;
- Engage in regular consultation to identify mutual enforcement priorities that will ensure effective and consistent enforcement of the laws that protect consumers of financial products or services;
- Support each other, to the fullest extent permitted by law as warranted by the circumstances, in the enforcement of the laws that protect consumers of financial products or services, including by joint or coordinated investigations of wrongdoing and coordinated enforcement actions;
- Pursue legal remedies to foster transparency, competition, and fairness in the markets for consumer financial products or services across state lines and without regard to corporate forms or charter choice for those providers who compete directly with one another in the same markets;
- Develop consistent and enduring framework to share investigatory information and to coordinate enforcement activities to the extent practicable and consistent with governing law;
- Share, refer, and route complaints and consumer complaint information between the CFBP and the state Attorneys General;
- Analyze and leverage the input they receive from consumers and the public in order to advance their mutual goal of protecting consumers of financial products or services; and
- Create and support technologies to enable data sharing and procedures that will support complaint tracking and cooperation.²⁷

Information Sharing with States

The Act contemplates coordination between the CFPB and other federal and state regulators.²⁸ The Act also expressly provides for information sharing of consumer complaints and examination reports; provided that states can give reasonable assurances of maintaining the confidentiality of such information.²⁹ It is unclear whether information received as a result of civil investigative demands will be similarly subject to sharing.³⁰ The details of the confidentiality will be the subject of rulemaking.

Another portion of information sharing involves how information will be shared with the public at large, which is where an awareness of public access laws like the Freedom of Information Act (FOIA) becomes critical. As information sharing issues evolve, we anticipate the real concern will relate to striking the proper balance between governments' interests in transparency, individual consumers' interests in their personal privacy, financial institutions' interests in safeguarding their confidential proprietary business information and intellectual property once shared with regulators, and overall fairness to all involved parties.

The goal of transparency reflected in public access laws is important. The CFPB has made this a foremost goal, stating: "Transparency is at the core of our agenda, and it is a key part of how we operate."³¹ All states also have similar public disclosures laws, premised on the idea that transparency gives rise to accountability, which is essential in government. However, that goal must

be balanced against protecting the privacy interests of businesses and individuals. In stark contrast to the noble goal of transparency in the operations of government, there is no public interest in matters of private commerce solely in the possession of governmental bodies.

Transparency Tempered by Confidentiality Concerns

Businesses must be aware that competitors and others may use public disclosure laws in order to gain access to confidential and proprietary business information. Likewise, individuals must be aware that disclosure of private financial information could result in identity theft. Additionally, governments must be aware that they can be exposed to liability for improper disclosures of information. With regard to individuals, disclosure of personal and financial information may give rise to claims under laws like the Privacy Act.³² With regard to businesses, disclosure of confidential and proprietary business information may give rise to claims based on the taking of private property without just compensation.³³

The CFPB will establish a unit to facilitate the centralized collection of consumer complaints, which may then be routed to the states provided they meet certain criteria, including the operational capacity to receive such consumer complaints.³⁴ These criteria will be established through CFPB rulemaking.³⁵ These criteria will likely include certifications regarding ability to maintain confidentiality over shared information, particularly personal information such as credit card and bank account numbers.

More importantly, the Act provides that "the **Bureau shall share consumer complaint information** with prudential regulators, the Federal Trade Commission, other Federal agencies, and State agencies, subject to the standards applicable to Federal agencies for protection of the confidentiality of personally identifiable information and for data security and integrity."³⁶ In Section 1022, the rulemaking provisions, the Act discusses confidentiality of information, and how such information may be shared with other regulators.³⁷ The details of confidentiality will be established through CFPB rulemaking.³⁸ Specifically regarding information sharing, the Act provides:

(C) ACCESS BY OTHER REGULATORS TO REPORTS OF THE BUREAU.—

(i) EXAMINATION REPORTS.—**Upon providing reasonable assurances of confidentiality**, a prudential regulator, a State regulator, or any other Federal agency having jurisdiction over a covered person or service provider shall have access to any report of examination made by the Bureau with respect to such person, and to all revisions made to any such report.

(ii) PROVISION OF OTHER REPORTS TO OTHER REGULATORS.—In addition to the reports described in clause (i), the Bureau may, in its discretion, furnish to a prudential regulator or other agency having jurisdiction over a covered person or service provider any other report or other confidential supervisory information concerning such person examined by the Bureau under the authority of any other provision of Federal law.³⁹

The "reasonable assurances" language of Section 1022(c)(6)(C) is substantially similar to language used in other federal laws that allow sharing of information with states provided that the states can maintain the same level of protection for such information as afforded by federal agencies under federal law.⁴⁰ It is uncertain whether the Act's confidentiality requirement will create conflict with the various states' public records disclosure laws.

It is unclear whether information received as a result of civil investigative demands will be similarly subject to sharing.⁴¹ The Act simply provides that "[d]ocumentary materials and tangible things received as a result of a civil investigative demand shall be subject to requirements and procedures regarding confidentiality, in accordance with rules established by the [CFPB]."⁴²

Conclusion

The Act has made and will continue to make sweeping changes to the financial system in the United States. When the CFPB officially begins operations on July 21, 2011, a number of questions will begin to be answered through rulemaking and regulatory enforcement. Coordinated regulatory enforcement among federal and State governments is not a new phenomenon; however, coordination has not been previously contemplated on such grand a scale as anticipated under Dodd-Frank. While the debate continues over the CFPB's structure and enforcement, the real issue to observe will be the level of cooperation with state Attorneys General and other state regulators. Only history will reveal whether this effort will result in the agency using the states as force multipliers to enforce federal consumer financial laws or prove to be an unworkable model.

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¹ Pub. L. [111-203](#), [124 Stat. 1376](#) (July 21, 2010).

² Sections 1011 and 1017, [12 U.S.C. § 5491](#) and [12 U.S.C. § 5497](#).

³ Section 1015, [12 U.S.C. § 5495](#).

⁴ Section 1061(b), [12 U.S.C. § 5581](#)(b).

⁵ Section 1021(a), [12 U.S.C. § 5511](#)(a).

⁶ Section 1021(b), [12 U.S.C. § 5511](#)(b).

⁷ Sections 1013(c), (d), (e), (g); [12 U.S.C. § 5493](#)(c), (d), (e), (g).

⁸ Section 1015, 12 U.S.C. § 5495.

⁹ See generally CFPB's website available at <http://www.consumerfinance.gov/the-bureau/>.

¹⁰ U.S. Department of the Treasury, Press Release, [Treasury Department Announces Senior Leadership Hires for CFPB Implementation Team](#) (Dec. 15, 2010).

¹¹ U.S. Department of the Treasury, Press Release, [Treasury Department Announces Senior Hires for Consumer Financial Protection Bureau](#) (Mar. 31, 2011).

¹² U.S. Department of the Treasury, Press Release, [Treasury Department Announces Holly Petraeus to Establish Office of Servicemember Affairs for Consumer Financial Protection Bureau](#) (Jan. 6, 2011).

¹³ Section 1014, [12 U.S.C. § 5494](#).

¹⁴ Section 1015, 12 U.S.C. § 5495.

¹⁵ Section 1061(b), [12 U.S.C. § 5581](#)(b).

¹⁶ Section 1022, [12 U.S.C. § 5512](#).

¹⁷ Section 1023(a), [12 U.S.C. § 5513](#)(a).

¹⁸ Section 1015, 12 U.S.C. § 5495.

¹⁹ Dodd-Frank also addresses the important issue of federal preemption of state consumer protection laws and regulations. Section 1041 of the Act provides that a state statute, regulation, order or interpretation of law is preempted by the Act "to the extent that any such provision of law is inconsistent with the provisions of this title, and then only to the extent of the inconsistency." Section 1041 also creates a mechanism by which determinations can be made as to whether a state law or regulation is inconsistent with the Act.

²⁰ Section 1042(a)(1), [12 U.S.C. § 5552](#)(a)(1).

²¹ Section 1042(a)(2), [12 U.S.C. § 5552](#)(a)(2).

²² Section 1055, [12 U.S.C. § 5565](#).

²³ Section 1055(a)(3), [12 U.S.C. § 5565](#)(a)(3).

²⁴ Section 1055(c), [12 U.S.C. § 5565](#)(c).

²⁵ Section 1042(b), [12 U.S.C. § 5552](#)(b).

²⁶ CFPB, Presidential Initiative Working Group of the National Association of Attorneys General, *Joint Statement of Principles on Consumer Financial Protection* (April 11, 2011) available at http://www.naag.org/assets/files/pdf/meetings/2011_summit/2011_Final_Joint_Statement_of_Principles_on_Consumer_Financial_Protection.pdf.

²⁷ *Id.*

²⁸ Section 1015, 12 U.S.C. § 5495.

²⁹ See Section 1013(b)(3)(B), [12 U.S.C. § 5493](#)(b)(3)(B); Section 1022(c)(6)(C), [12 U.S.C. § 5512](#)(c)(6)(C).

³⁰ Section 1052(d), [12 U.S.C. § 5562](#)(d).

³¹ See <http://www.consumerfinance.gov/open/>.

32 See, e.g., *Doe v. Chao*, [540 U.S. 614](#) (2004).

33 See, e.g., *Ruckelshaus v. Monsanto Co.*, [467 U.S. 986](#) (1984).

34 Section 1013(b)(3)(B), [12 U.S.C. § 5493](#)(b)(3)(B).

35 Section 1013(b)(3)(B), 12 U.S.C. § 5493(b)(3)(B).

36 Section 1013(b)(3)(D)(emphasis added), [12 U.S.C. § 5493](#)(b)(3)(D).

37 Section 1022(c)(6), [12 U.S.C. § 5512](#)(c)(6).

38 Section 1022(c)(6)(A), [12 U.S.C. § 5512](#)(c)(6)(A).

39 Section 1022(c)(6)(C)(emphasis added), [12 U.S.C. § 5512](#)(c)(6)(C).

40 See, e.g., Consumer Product Safety Act, [15 U.S.C. § 2078](#)(f)(1); Federal Trade Commission Act, [15 U.S.C. § 57b-2](#).

41 Section 1052(d), [12 U.S.C. § 5562](#)(d).

42 Section 1052(d), 12 U.S.C. § 5562(d).

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