

# **12<sup>th</sup> Annual AFSA State Government Affairs and Legal Issues Forum**

The Dodd-Frank Wall Street Reform and  
Consumer Protection Act.

Issues Facing Industry at the State Level in  
the Wake of Creation of the Bureau of  
Consumer Financial Protection

# Title X – Bureau of Consumer Financial Protection

- **Title X consists of several subtitles:**
  - **Bureau of Consumer Financial Protection**
  - **General Powers of the Bureau**
  - **Specific Bureau Authorities**
  - **Preservation of State Law**
  - **Enforcement Powers**
  - **Transfer of Functions and Personnel; Transitional Provisions**
  - **Regulatory Improvements**
  - **Conforming Amendments**

- The nine most terrifying words in the English language are, 'I'm from the government and I'm here to help.'
  - Ronald Reagan  
*40th president of US (1911 - 2004)*

## **The Bureau will have the following functional units:**

- **Research**
  - Responsible for the creation of research and reporting on:
    - developments in markets for consumer financial products or services
    - access to fair and affordable credit for traditionally underserved communities
    - consumer awareness, understanding, and use of disclosures and communications regarding consumer financial products or services
    - consumer behavior with respect to consumer financial products and services, including mortgages.
    - experiences of traditionally underserved consumers, including un-banked and under-banked consumers
- **Community Affairs**
  - This unit is responsible for providing information, guidance, and technical assistance regarding the offering and provision of financial products or services to traditionally underserved consumers and communities
- **Complaint Collection and Tracking**
  - This unit will establish a single toll free number, a web site and a database to facilitate the centralized collection of, monitoring of, and response to consumer complaints about consumer financial products or services. The Director shall coordinate with the FTC and other federal agencies to route complaints to the appropriate agencies when necessary. The system will also be authorized to share information with the States
  - The Director of the Bureau will provide a report to Congress annually providing information regarding complaints received

**The bill also creates the following offices within the Bureau tasked with addressing specific areas of enforcement:**

- **Office of Fair Lending and Equal Opportunity**
  - Possesses such powers as the Director may delegate to it, including power to provide oversight and enforcement of federal laws intended to ensure the fair, equitable and nondiscriminatory access to credit for both individuals and communities that are enforced by the Bureau, including ECOA and HMDA;
- **Office of Financial Education**
  - Responsible for developing and implementing initiatives to better educate and empower consumers to make better informed financial decisions
- **Office of Service Member Affairs**
  - Responsible for developing and implementing initiatives for service members and their families intended to educate them to make better informed decisions about financial products and services
  - Required to coordinate with the Bureau to monitor complaints by service members, and to coordinate efforts among Federal and State agencies as appropriate regarding consumer protection issues
- **Office of Financial Protection for Older Americans**
  - Designed to facilitate the financial literacy of individuals 62 years or older on protection from unfair, deceptive and abusive practices, and on current and future financial choices

## FUNDING

- Each year the Board of Governor's shall transfer to the Bureau from the combined earnings of the Federal Reserve System, an amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau under Federal consumer financial law. There is to be a funding cap on this transfer of 10% of the total operating expenses of the Federal Reserve System in 2011, 11% in 2012, and 12% in 2013
- Consumer Financial Protection Fund – is created within the Federal Reserve into which funds may be requested to be provided from the Board of Governor's
- Consumer Financial Civil Penalty Fund is established within the Federal Reserve to accept any civil penalties levied against any person in a judicial or administrative action under Federal consumer financial laws
  - Amounts in this fund may be used to reimburse victims of activities for which the civil penalties have been imposed

## **Subtitle B - General Powers of the Bureau**

- The Bureau shall seek to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that markets for consumer financial products and services are fair, transparent and competitive
  - Federal consumer financial law is defined to include:
    - The Alternative Mortgage Transaction Parity Act
    - The Consumer Leasing Act
    - The Electronic Fund Transfer Act
    - The Equal Credit Opportunity Act
    - The Fair Credit Billing Act
    - The Fair Credit Reporting Act
    - The Home Owners Protection Act
    - The Fair Debt Collection Practices Act
    - Portions of Section 43 of the Federal Deposit Insurance Act

- Sections 502 through 509 of the Gramm-Leach-Bliley Act
  - The Home Mortgage Disclosure Act
  - The Home Ownership and Equity Protection Act
  - The Real Estate Settlement Procedures Act
  - The S.A.F.E. Mortgage Licensing Act
  - The Truth in Lending Act
  - The Truth in Savings Act
  - Section 626 of the Omnibus Appropriations Act, 2009
  - The Interstate Land Sales Full Disclosure Act
  - Any rule prescribed by the Bureau
- Notably Federal consumer financial law is defined NOT to include the Federal Trade Commission Act

The Bureau is authorized to exercise its authorities under Federal consumer financial law for the purposes of ensuring that, with respect to consumer financial products and services:

- Consumers are provided with timely and understandable information to make responsible decisions about financial transactions
- Consumers are protected from unfair, deceptive or abusive acts and practices and from discrimination
- Outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens
- Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition
- Markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation

## The primary functions of the Bureau are:

- Conducting financial education programs
- Collecting, investigating and responding to consumer complaints
- Collecting, researching, monitoring, and publishing information relevant to the functioning of markets for consumer financial products and services to identify risks to consumers and the proper functioning of such markets
- Supervising covered persons for compliance with Federal consumer financial law, and taking appropriate enforcement action to address violations of Federal consumer financial law
- Issuing rules, order and guidance implementing Federal consumer financial law
- Providing such support functions as may be necessary or useful to facilitate the other functions of the Bureau

- **Sec. 1024 - Supervision of Non Depository Covered Persons**
- The Bureau is provided authority to supervise any covered person who:
  - Offers or originates, brokers or services loans secured by real estate, or loan modification or foreclosure relief services in connection with these loans
  - Is a larger participant of a market for other consumer financial products or services as defined by rule
  - The Bureau has a reasonable cause to determine by order that the person has engaged, or is engaging, in conduct that poses a risk to consumers with regard to the offering of provision of consumer financial products or services
  - Offers or provides any private education loan
  - Offers or provides a payday loan

- The Bureau shall require reports and conduct examinations on a periodic basis for purposes of: (A) assessing compliance with the requirements of the federal consumer financial law; (B) obtaining information about the activities and compliance systems and procedures of such person, and (C) detecting and assessing risks to consumers and to markets for consumer financial products and services
  - This is to be a “Risk Based” Supervision Program, based on the asset size of the covered person, the volume of transactions involving consumer financial products or services in which the covered person engages, risks to the consumer created by the provision of such consumer financial products or services, and the extent to which such institutions are subject to oversight by State authorities for consumer protection, and any other factors the Bureau determines to be relevant

- The Bureau is supposed to coordinate its supervisory activities with prudential regulators and state banking authorities, in addition to using where possible existing reports and information on the institution. The Bureau does still however retain the right to request whatever reports they wish
- Interestingly, subsection (a)(7) provides that the Bureau shall prescribe rules to facilitate supervision of persons described in (a)(1) and assessment and detection of risks to consumers. The same subsection also provides that the Bureau shall consult with State Agencies regarding requirements or systems (including coordinated or combined systems for registration), where appropriate

## Sec. 1025 – Supervision of Very Large Banks, Savings Associations and Credit Unions

- The Bureau shall have exclusive authority to require reports and conduct examinations on a periodic basis to assess compliance with the requirements of Federal consumer financial laws, to obtain information about the activities subject to such laws and the associated compliance systems and procedures of such persons, and detecting and assessing associated risks to consumers and to markets for consumer financial products and services of:
  - An insured depository institution with total assets of more than \$10 Billion and any affiliate thereof
  - An insured credit union with total assets of more than \$10 Billion, and any affiliate thereof
  - The Bureau is to have primary enforcement authority over any other Federal agency authorized to enforce a Federal consumer financial law

## Sec. 1026 – Supervision of Other Banks, Savings Associations and Credit Unions

- The Bureau may require reports as necessary to support their role in implementing Federal consumer financial law, to support its examination activities, and to assess and detect risks to consumer and consumer financial markets of:
  - An insured depository institution with total assets of less than \$10 Billion;
  - An insured credit union with total assets of less than \$10 Billion
- The Bureau may at its discretion, include examiners on a sampling basis of the examinations performed by the prudential regulator to assess compliance with the requirements of Federal consumer financial law of:
  - An insured depository institution with total assets of less than \$10 Billion;
  - An insured credit union with total assets of less than \$10 Billion

- **Sec. 1028 – Authority to Restrict Mandatory Pre-Dispute Arbitration**
  - Requires the Bureau to conduct a study of the use of arbitration clauses associated with offering or providing of consumer financial products or services. **Further provides that the Bureau may by regulation prohibit or impose conditions or limitations on the use of arbitration clauses**

## **Subtitle C – Specific Bureau Authorities**

- **Sec. 1031 – Prohibiting Unfair, Deceptive, or Abusive Acts or Practices**
  - The Bureau may take any action to prevent a covered person or a service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service
  - The Bureau may prescribe rules identifying as unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service

- This same section identifies the circumstances under which the Bureau may declare an act Unfair or Abusive
  - The Bureau shall have no authority to declare an act or practice Unfair unless they have a reasonable basis to conclude that: A) the act or practice causes or is likely to cause substantial injury to consumers, which is not reasonably avoidable by consumers; B) such substantial injury is not outweighed by countervailing benefits to consumers or to competition. The Bureau may also consider established public policies as evidence to be considered with all other evidence when making their determination

- The Bureau shall have no authority to declare an act or practice abusive in connection with the provision of a consumer financial product or service, unless the act or practice: 1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or 2) takes unreasonable advantage of a lack of understanding on the part of the consumer of material risks, costs, or conditions of the product or service; the inability of the consumer to protect the interests of the consumer in selecting or using a consumer of financial service or product; or the reasonable reliance by the consumer on a covered person to act in the interests of the consumer

- **Sec. 1041 – Relation to State Law.**
  - Provides that this title shall not be construed as annulling, altering or affecting or exempting any person subject to the provisions of this title from complying with the statutes, regulations, orders, or interpretations in effect in any State, except to the extent that any such provision of law is inconsistent with the provisions of this title, and then only to the extent of that inconsistency
  - **A statute, regulation, order or interpretation in effect in any state is not inconsistent with the provisions of this title if the protection it affords is greater than the protection provided under this title.**

- A determination regarding whether a statute, regulation, order or interpretation in effect in any State is inconsistent with the provisions of this title may be made by the Bureau on its own motion, or in response to a non-frivolous petition initiated by any interested person.
- Requires the Bureau to issue a notice of proposed rulemaking if a majority of the States enact a resolution in support of the establishment or modification of a consumer protection regulation by the Bureau

- **Sec. 1042 – Preservation of Enforcement Powers of the States**
  - The Attorney General of any state may bring an action to enforce the provisions of this title or regulations issued by the Bureau. This provision authorizes actions against a national bank or federal savings association
  - A State regulator may also bring a civil action or other appropriate proceeding against any state licensed or chartered institution

- **Sec. 1044 - State Law Preemption for National Banks and their Subsidiaries**
  - State consumer financial laws are preempted only if:
    - Application of a state consumer financial law would have a discriminatory effect on national banks, in comparison with the effect of the law on a bank chartered by that State
    - The State consumer financial law prevents or significantly interferes with the exercise by a national bank of its powers, in accordance with the legal standard in *Barnett Bank v. Nelson* 517 U.S. 25 (1996)
    - The State consumer financial law is preempted by a provision of federal law other than this title
  - Any preemption determination shall be made either by a court, or by the Comptroller of the Currency by regulation or order on a case by case basis
    - The Comptroller of the Currency shall periodically conduct a review, through notice and public comment, of each determination that a provision of federal law preempts a state consumer financial law

- A court reviewing any determinations made by the Comptroller regarding preemption shall assess the validity of such determinations, depending on the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and other factors the court finds persuasive and relevant to its decision.
- No regulation or order of the Comptroller of the Currency shall be interpreted is applied so as to invalidate, or otherwise declare inapplicable to a national bank the provision of a State consumer financial law **unless substantial evidence, made on the record of the proceeding, supports the specific finding regarding preemption of such provision in accordance with the legal standard in *Barnett, Id.***

- **A State consumer financial law shall apply to a subsidiary or affiliate of a national bank to the same extent that the state consumer financial law applies to any person, corporation, or other entity subject to the State law**
- Nothing in this title is to be construed to affect the ability of a national bank to export interest rates in accordance with 12 U.S.C. 85.
- Codifies the holding in *Cuomo v. Clearinghouse Assn., L.L.C.* (129 S.Ct. 2710 (2009)) authorizing any attorney general or law enforcement officer in any state to bring an action against a national bank to enforce visitorial powers

- **Sec. 1075 – Reasonable Fees and Rules for Payment Card Systems**
  - Creates a new Section 920 of the Electronic Fund Transfer Act that will provide the Board of Governor’s authority to prescribe regulations regarding any interchange transaction fee that an issuer may receive or charge with respect to an electronic debit transaction
    - Requires the Board to prescribe rules not later than 9 months after the enactment of the Consumer Financial Protection Act of 2010
  - Requires the amount of any interchange transaction fee to be reasonable and proportional to the cost incurred by the issuer with respect to the transaction
  - Authorizes the Board to require any issuer, it’s agent, or a payment card network to provide information as necessary. Further allows the Board as they deem appropriate and in the public interest, to then disclose in the aggregate information collected
  - Exempts from the scope of the section any issuer that, together with its affiliates, has assets of less than \$10 Billion
  - Exempts government administered payment programs and reloadable pre-paid cards

## Subtitle H – Conforming Amendments

- As you will see not all of these amendments are merely “conforming”
- The Secure and Fair Enforcement for Mortgage Licensing Act (“SAFE”) is amended to now place the Bureau in the position of oversight and backup authority over the NMLSR, replacing HUD.
- The Home Mortgage Disclosure Act (“HMDA”) is amended to now require the submission of the following additional data fields:
  - The number and dollar amount of mortgages grouped according to:
    - The total points and fees payable at origination in connection with the mortgage as determined by the Bureau
    - The difference between the APR associated with the loan and the benchmark rate or rates for all loans
    - The term in months of any prepayment penalty or other fee or charge payable
    - **Any other information the Bureau may require**

- The number and dollar amount of mortgage loans and completed applications grouped according to:
  - The value of the property pledged as collateral
  - The actual or proposed term in months of an introductory period after which the rate may change
  - Any presence of loan terms that may allow the borrower to make payments that result in the loan not being fully amortizing
  - The actual or proposed term of the loan in months
  - The channel through which the application was made, including retail, broker, or other categories
  - The unique identifier that identifies the loan originator associated with the loan in accordance with the SAFE Act
  - A universal loan identifier to be determined by the Bureau
  - The parcel number associated with the property to be used as collateral for the loan
  - The credit score of the applicants
  - **Any other information the Bureau may require**