



Consumer Financial Protection Act: *What Lenders Need to Know*

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Today's Speakers



Martin J. Bishop
Chicago
mbishop@foley.com



Michael C. Lueder
Milwaukee
mlueder@foley.com



Thomas I. Elkind
Boston
telkind@foley.com



Christi Adams
Orlando
cadams@foley.com

Meet The New Boss: The Bureau of Consumer Financial Protection



Martin J. Bishop

Important Dates

- Effective Date: July 21, 2010
- Designated Transfer Date: Between January 17, 2011 and January 21, 2012
- Selection of Designated Transfer Date: By September 19, 2010

Bureau Limitations

- Exclusions
- No Power to Impose Usury Limitations
- Bureau Can Exempt Any Class of Persons Covered by CFPA

Bureau's Structure

- Independent Bureau
- Executive Agency
- Headed by Director
- Funding: \$500MM + \$200MM

Important Definitions

- Consumer
- Covered Person
- Service Provider
- Consumer Financial Product or Service

Three Key Areas of Rulemaking Authority

1. The Federal consumer financial laws
2. Unfair, deceptive, or abusive acts or practices
3. Restrictions on pre-dispute arbitration clauses

Enumerated Consumer Laws

- Alternative Mortgage Transaction Parity Act
- Consumer Leasing Act
- Electronic Fund Transfer Act
- Equal Credit Opportunity Act
- Fair Credit Billing Act
- Fair Credit Reporting Act
- Home Owners Protection Act
- Fair Debt Collection Practices Act
- Federal Deposit Insurance Act
- Gramm-Leach-Bliley Act
- Home Mortgage Disclosure Act
- Home Ownership and Equity Protection Act
- Real Estate Settlement Procedures Act
- S.A.F.E. Mortgage Licensing Act of 2008
- Truth in Lending Act
- Truth in Savings Act
- Omnibus Appropriations Act of 2009
- Interstate Land Sales Full Disclosure Act

Unfair, Deceptive, or Abusive Acts or Practices

Unfair: (a) likely to cause or causes substantial injury which is not reasonably avoidable by consumers, and (b) “countervailing benefits to consumer or to competition” do not outweigh the substantial injury.

Deceptive: ????

Abusive: (a) materially interferes with a consumer's ability to understand a term or condition of a consumer financial product or service, or (b) takes "unreasonable advantage" of a consumer's lack of understanding, inability to protect herself, or reasonable reliance on a covered person to act in the consumer's interests.

Bureau Has Supervisory Authority Over:

- Non-depository institutions
- Large depository institutions
- Smaller depository institutions

Preemption and State Enforcement



Michael C. Lueder

Subtitle D

Preservation of State Law

- The Consumer Financial Protection Act does not exempt any person from complying with State consumer financial law except to the extent that State law is inconsistent with the CFPA and then only to the extent of the inconsistency.

§ 1041(a)(1).

Subtitle D

Preservation of State Law

- State law is not inconsistent with the CFPA if the protection afforded to consumers is greater than the protection provided under the CFPA.

§ 1041(a)(2).

Subtitle D

Preservation of State Law

- The Consumer Financial Protection Bureau determines whether such protection is inconsistent with the CFPB either on its own initiative or in response to a request for review.

§ 1041(a)(2).

Preemption Standards for National Banks

- State consumer financial laws are preempted only if:
 - a) 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 State chartered bank;
 - b) *the state consumer financial law prevents or significantly interferes with the exercise of national bank powers;*
 - c) the state consumer financial law is preempted by another federal law.
 - The *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25(1996) is codified.
- § 1044. (Amending the National Bank Act)

Preemption Standards for National Banks

- The OCC is stripped of its ability to make sweeping preemption announcements. Now the Comptroller must make preemption decisions on a case-by-case basis. Any such OCC decision must be reviewed and justified every five years.

§ 1044(b)(3).

Preemption Standards for National Banks

- OCC determinations on preemption are not entitled to *Chevron* deference. Instead reviewing courts must assess the validity of the determination. They will examine the thoroughness of the OCC's consideration, the validity of its reasoning, its consistency with other determinations and any other factor the court finds persuasive and relevant. *Chevron* deference still applies to OCC's determinations interpreting the National Bank Act which do not impact a State consumer financial law.

§ 1044(b)(5).

Preemption Standards for National Banks

- *Watters v. Wachovia* is overturned. The CFPB does not preempt, annul or affect the applicability of State law as applied to any subsidiary or affiliate of a national bank.

§ 1044(b)(2).

Preservation of Enforcement Powers of States

- The attorney general of any State may bring a civil action in the name of the State to enforce provisions of the CFPA or the regulations issued thereunder and to secure remedies under the provisions of the CFPA or remedies otherwise provided under the law.

§ 1042(a)(1).

Actions Against National Banks or Thrifts

- A State attorney general may not bring a civil action in the name of the State against a national bank or federal thrift to enforce the CFPA, but may bring such action to enforce a Bureau regulation prescribed under a provision of CFPA and to secure CFPA remedies or remedies otherwise provided under other law.

§ 1042(a)(2)(A) and (B)

Preservation of Existing Contracts

- The CFPA and the Bureau's regulations, orders, guidance and interpretations, do not alter or affect the applicability of any OCC or OTS regulations, orders guidance or interpretation regarding the applicability of State law under federal banking law to any contract entered into on or before the date of the enactment of the act.

§ 1043.

Effective Date

- This subtitle is effective on the transfer date.
§ 1048.

Enforcement



Thomas I. Elkind

Investigation Powers

- The Bureau can investigate all matters relating to “fair lending”
- The Bureau can do joint investigations with HUD and/or Attorney General
- The Bureau can issue subpoenas
 - Enforceable by district courts

Investigation Powers

■ Civil Investigative Demands

- Before litigation is commenced Bureau can issue a notice stating nature of alleged violations and serve:
 - Document requests
 - Requests for tangible things
 - Interrogatories
 - Notices of depositions

Hearings and Adjudication Proceedings

- The Bureau has broad powers to conduct hearings and proceedings against anyone
 - To enforce compliance with the Act
 - To enforce any other Federal law regarding consumer finance

Hearings and Adjudication Proceedings

■ Cease and Desist Proceedings

- May be brought against any “covered person” or “service provider”
- After a hearing or default, the Bureau may order the defendant to:
 - Cease and desist, and/or
 - Take affirmative action to correct conditions

Hearings and Adjudication Proceedings

■ Incomplete or Inaccurate Records

- If Bureau charges that books and records of a covered person or service provider are so incomplete and inaccurate that it cannot determine the financial condition or the details of any transaction that may affect the financial condition of that person, the Bureau may issue a temporary order requiring:

Hearings and Adjudication Proceedings

- Incomplete or Inaccurate Records (cont.)
 - Cessation of certain activities, and/or
 - affirmative action to restore books and records to an accurate state.

Litigation

- There is no private right of action – all claims must be made through the Bureau
- The Bureau can institute a civil action against anyone for any violation of any Federal consumer financial law in state or federal court
 - Three-year statute of limitations from discovery date
- The Bureau is required to coordinate with the Attorney General to avoid conflicts in parallel investigations so as not to impede prosecution of criminal violations
- The Bureau cannot conduct criminal prosecutions – it must transmit evidence of criminal activity to the Attorney General

Litigation

■ Remedies include:

- Rescission or reformation of contracts
- Refund of money or return of real estate
- Restitution
- Disgorgement for unjust enrichment
- Damages
- Public notification of violations
- Proscribing certain activities of the defendant
- Civil money penalties
- Costs to the Bureau
 - No punitive damages may be awarded

Litigation

■ Civil money penalties

- Assessed in court and administrative proceedings
- For violation of any Federal consumer financial law
- Three tiers of penalties
 - Up to \$5,000/day for any violation;
 - Up to \$25,000/day for a reckless violation;
 - Up to \$1,000,000/day for a knowing violation

Employee Protection

- “Covered employees” of covered persons and service providers are protected from retaliation for whistle-blowing
 - A “covered employee” is someone involved in offering a consumer financial service or product
 - If an employee is discharged or discriminated against he/she must file a complaint with the Secretary of Labor

Transfer of Consumer Financial Protection Functions and Amendments to Consumer Laws



Christi Adams

Transfer of Consumer Financial Protection Functions

- All authority to prescribe rules or issue orders or guidelines pursuant to any Federal consumer financial law are transferred to the Bureau
- The examination authority described in the CFPA is transferred to the Bureau
- Transfers the Employees Needed to Implement - provides that the employees transferred may not be involuntarily separated or involuntarily reassigned outside his or her locality pay area for two years. The Bureau cannot reorganize for three years.
- The Board of Governors (and any Federal reserve bank); FDIC; FTC; National Credit Union Administration (“NCUA”); OCC; Office of Thrift Supervision; HUD.

Amends the Equal Credit Opportunity Act

(15 U.S.C. 1691 et seq.)

Adds Sec. 704B-Small Business Loan Data Collection:

(a) Purpose is to facilitate enforcement of fair lending laws and to identify business and community development needs and opportunities of women-owned (WO), minority-owned (MO), and small businesses (SB).

(b) Information Gathering - any application to a financial institution for credit for WO, MO, or SB, the financial institution shall

- (1) inquire whether the business is a WO, MO, or SB;
- (2) maintain a record of the responses to such inquiry, separate from the application and accompanying information.

Amends the Equal Credit Opportunity Act

(15 U.S.C. 1691 et seq.)

Applicant for credit may refuse to provide any information requested.

No loan underwriter or other officer or employee of a financial institution involved in making any determination concerning an application for credit shall have access to any information provided pursuant to this section, or if the underwriter has access to such information the financial institution must notify the applicant, along with a notice that the financial institution may not discriminate on the basis of such information.

Each financial institution shall compile and maintain a record of the information provided by any loan applicant pursuant to this section.

Data must be retained for three years and made available for public inspection.

Remittance Transfers

- Amends the EFTA and FCUA to regulate remittance transfers, along with electronic funds.
- Requires certain written disclosures for remittance transfers in a form the sender may keep. The disclosure must be made at the time the sender requests a remittance transfer, and prior to the sender making any payment in connection with the remittance transfer. Certain disclosures must be displayed in store windows and on internet sites.

Freddie and Fannie

- Dept. of Treasury is tasked with conducting a study on ending the conservatorship of Fannie Mae, Freddie Mac, and reforming the Housing Finance System. The task force is instructed to study options such as
 - Gradual wind-down and liquidation;
 - Privatization;
 - Incorporation of the functions of such entities into a federal agency;
 - The dissolution of Fannie Mae and Freddie Mac into smaller companies; or
 - Any other measures the Secretary determines appropriate.

EFTA Amendments

- The EFTA is amended to provide the Board with authority to promulgate regulations regarding interchange transaction fees for electronic debit transactions.
- The statute now provides that the amount of any interchange transaction fee that an issuer may receive or charge with respect to an electronic debit transaction (defined to mean a transaction in which a person uses a debit card) shall be reasonable and proportional to the cost incurred by the issuer (defined as the person holding the asset account that is debited through an electronic debit transaction) with respect to the transaction.
- The Board may require an issuer or payment card network to provide it with such information as may be necessary to carry out the provisions of the subsection, on at least a bi-annual basis. The issuer or card networks must provide information concerning the cost incurred, and interchange transaction fees charged or received, by issuers or payment card networks in connection with the authorization, clearance or settlement of electronic debt transactions.

EFTA Amendments

- The Board may allow for an adjustment to the fee amount received or charged by an issuer if such adjustment is reasonably necessary to make allowance for costs incurred by the issuer in preventing fraud in relation to electronic debit transactions; and the issuer complies with fraud-related standards established by the Board.
- These provisions do not apply to any “small issuers,” defined as, together with its affiliates, having assets of less than \$10 billion.
- Government-administered payment programs and reloadable prepaid cards are also exempted from these provisions.

Network Fees

- Provides regulatory authority for the Board to prescribe regulations regarding network fees. A network fee may not be used to directly or indirectly compensate an issuer with respect to an electronic debit transaction.
- This provision takes effect one year after enactment of the CFPA.
- No Exclusive Network: an issuer or payment card network shall not, by contract, requirement, condition, penalty, or otherwise, restrict the number of payment card networks on which an electronic debit transaction may be processed.
- No Routing Restrictions: issuer or card network may not inhibit the ability of any person who accepts debit cards for payments to direct the routing of electronic debit transactions for processing over any payment card network that may process such transactions. A payment card network shall not inhibit the ability of any person to provide a discount or in-kind incentive for payment by the use of cash, checks, debit cards, or credit cards to the extent that the discount or incentive does not differentiate on the basis of the issuer or the payment card network.

Network Fees

- A payment card network shall not by contract, requirement, condition, penalty, or otherwise, inhibit the ability of any person to set a minimum dollar value for the acceptance by that person of credit cards, to the extent that such minimum dollar value does not differentiate between issuers or card networks, and such minimum dollar value does not exceed \$10. (The Board may increase this amount by regulation).
- A Federal agency or institution of higher education may set a maximum dollar value for the acceptance of credit cards, to the extent that such maximum dollar value does not differentiate between issues or payment card networks.

Reports, Reports, Reports

- Requires the Bureau to conduct a study, not later than one year after the designated transfer date, to identify any practices as unfair, deceptive, or abusive in connection with a reverse mortgage transaction and provide for an integrated disclosure standard and model disclosures for reverse mortgages transactions.
- Requires that the Director and the Secretary of Education, in consultation with the Comm. of the FTC, and the Atty. General, submit a report to select Congressional and Senatorial committees on private education loans and private educational lenders.
- Requires the Bureau to conduct a study on the nature, range, and size of variations between the credit scores sold to creditors and those sold to consumers by consumer reporting agencies.
- Requires the Director to review all federal laws and regulations relating to the protection of consumers who use exchange facilitators (a person who, for a fee, facilitates an exchange of like kind property) for consumer transactions, and submit a report to Congress describing recommendations for legislation to ensure the appropriate protection of consumers who use exchange facilitators.

Financial Fraud Provisions

- Requires the U.S. Sentencing Comm. to review and, if appropriate, amend the Federal Sentencing Guidelines and policy statements applicable to persons convicted of offenses relating to securities fraud and financial institution fraud.
- Increases the statute of limitations for securities fraud offenses to six years after the commission of the offense.
- Increases the statute of limitations to bring claims under the False Claims Act to three years.

Housekeeping

Subtitle H contains amendments to include the appropriate references to the Bureau in the following acts:

- Inspector General Act of 1978
- The Privacy Act of 1974;
- The Alternative Mortgage Transaction Parity Act of 1982;
- The Electronic Fund Transfer Act;
- The Equal Credit Opportunity Act
- The Expedited Funds Availability Act;
- The Fair Credit Billing Act;
- The Fair Credit Reporting Act and the Fair and Accurate Credit Transactions Act of 2003;
- The Fair Debt Collection Practices Act;
- The Federal Deposit Insurance Act;
- The Federal Financial Institutions Examination Council Act of 1978;
- The Federal Trade Commission Act;
- The Gramm-Leach-Bliley Act;
- The Home Mortgage Disclosure Act of 1975;
- The Homeowners Protection Act of 1998;
- The Home Ownership and Equity Protection Act of 1994;
- The Omnibus Appropriations Act, 2009;
- The Real Estate Settlement Procedures Act of 1974;
- The Interstate Land Sales Full Disclosure Act;
- The Right to Financial Privacy Act of 1978;
- The Secure and Fair Enforcement For Mortgage Licensing Act of 2008;
- The Truth in Lending Act;
- The Trust in Savings Act;
- The Telemarketing and Consumer Fraud and Abuse Prevention Act; and
- The Paperwork Reduction Act.

Inflating TILA

- TILA has been amended to provide adjustments for inflation. Previously, for an extension of credit to be governed by TILA, it had to be a consumer transaction less than \$25,000. TILA now applies to all consumer credit transactions and consumer leases less than \$50,000.
- On and after Dec. 31, 2010, the Bureau shall adjust annually the dollar amounts by the annual percentage increase in the Consumer Price Index, rounded to the nearest multiple of \$100, or \$1,000, as applicable.

Mortgage Loan Disclosures

- Amends TILA and RESPA to require that the Bureau publish a single, integrated disclosure for mortgage loan transactions (including real estate settlement cost statements) which includes the disclosure requirements of RESPA and TILA that, taken together, may apply to a transaction that is subject to both or either provisions of law.

Amendments to the FCRA

- Amends the FCRA to address the release of medical information.
- Provides that any violation of the FCRA (as well as the FDCPA) shall constitute an unfair or deceptive act or practice in commerce in violation of the Federal Trade Commission Act. Any person violating any provision of the FCRA shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act as though the applicable terms and provisions of such Act are a part of the FCRA.
- Section 615 of the FCRA (15 USC 1681m) is amended to require that if any person takes an adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall provide to the consumer written or electronic disclosure of a numerical credit score used by such person in taking any adverse action based in whole or in part on any information in a consumer report.

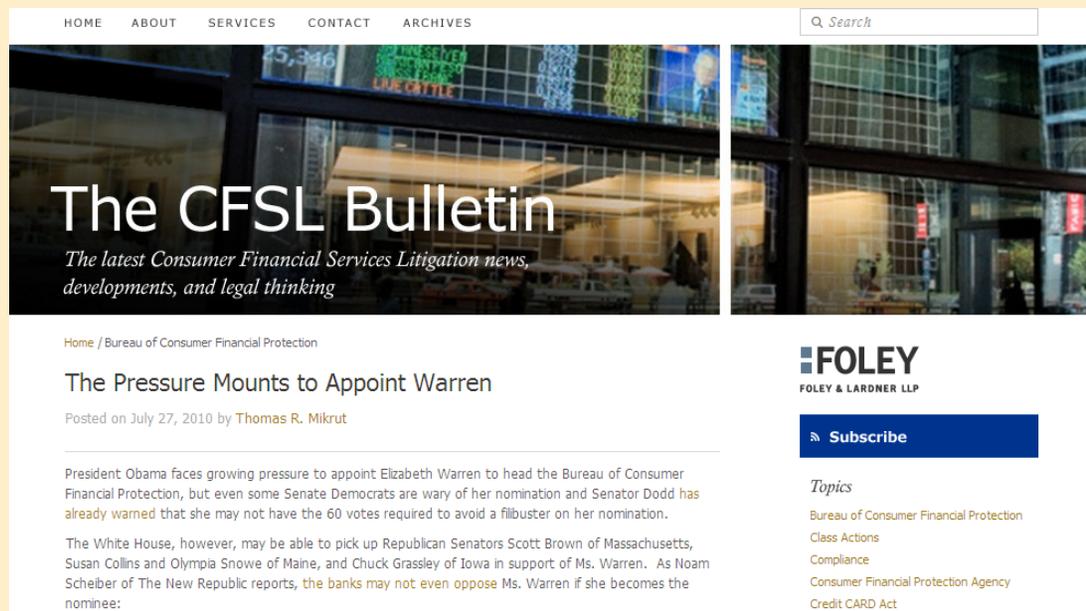
Amendments to the FCRA

- For knowing violations of the FCRA, the FTC may commence a civil action to recover a civil penalty in a district court. Such person shall be liable for a civil penalty of not more than \$2,500 per violation. In determining the amount of the civil penalty, the court shall take into account the degree of culpability, any history of such prior conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require. The court may not impose any civil penalty on a person for a violation of section 623(a)(1) (15 U.S.C. 1681s), unless the person has been enjoined from committing the violation, or ordered not to commit the violation, in an action or proceeding brought by or on behalf of the FTC, and has violated the injunction or order, and the court may not impose any civil penalty for any violation occurring before the date of the violation of the injunction or order.
- Inserts a new provision to 15 U.S.C. 1681s-2, requiring the Bureau to prescribe a brief model disclosure that financial institutions may use to comply with subparagraph (A), which shall not exceed 30 words. Subparagraph A requires that a financial institution provide a notice to the consumer that it has reported negative information to a credit reporting agency. The use of the model form is not required, but will provide a safe harbor for the financial institution.

FCRA-Accuracy Guidelines

- Requires the Bureau to establish and maintain guidelines for use by each person that furnishes information to a consumer reporting agency regarding the accuracy and integrity of the information relating to consumers that such entities furnish to consumer reporting agencies, and update such guidelines as often as necessary; and prescribe regulations requiring each person that furnishes information to a consumer reporting agency to establish reasonable policies and procedures for implementing the guidelines.
- Except as otherwise provided in the Act, all sections amended pursuant to subtitle H become effective on the designated transfer date.

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The Pressure Mounts to Appoint Warren

Posted on July 27, 2010 by Thomas R. Mikrut

President Obama faces growing pressure to appoint Elizabeth Warren to head the Bureau of Consumer Financial Protection, but even some Senate Democrats are wary of her nomination and Senator Dodd has already warned that she may not have the 60 votes required to avoid a filibuster on her nomination.

The White House, however, may be able to pick up Republican Senators Scott Brown of Massachusetts, Susan Collins and Olympia Snowe of Maine, and Chuck Grassley of Iowa in support of Ms. Warren. As Noam Scheiber of The New Republic reports, the banks may not even oppose Ms. Warren if she becomes the nominee:

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