
Consumer Financial Protection Bureau Rulemaking and Enforcement Authority Powers Take Effect in Five Months; Affected Organizations Should Prepare for Heightened Enforcement of Financial Consumer Protection Laws

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In the seven months since the President signed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("the Act"), information about the structure and focus of the Consumer Financial Protection Bureau ("Bureau" or "CFPB") has emerged. In five months (on July 21, 2011), the rulemaking and enforcement authority of the Bureau will take effect. This alert focuses on the Bureau's enforcement powers, the areas it is likely to target, and how affected organizations can begin to prepare for the new regime.¹

Assistant to the President Elizabeth Warren, charged with setting up the Bureau, has characterized the establishment of the Bureau as an example of "David beat[ing] Goliath," and a "victory for consumers and anyone who believes that well-informed consumers make markets work."² The Bureau's website (www.consumerfinance.gov), launched February 3, promises that the Bureau will be a "cop on the beat" patrolling the practices of financial companies. The Bureau will consolidate consumer protection powers from a variety of agencies. This will increase the likelihood and range of potential regulatory enforcement actions related to covered persons offering consumer financial products or services, which include, among other things,

mortgages, credit cards and other retail financial products.

Warren has already identified credit cards and mortgages as the Bureau's initial priorities, including the identification and remediation of any deceptive practices. Consistent with this focus, the Bureau's recently launched website features a collection of videos by consumers describing their experiences with "unfair practices" such as "aggressive mortgage lending that the homeowner cannot repay," "unexpected overdraft fees," and "arbitrary rate increases on credit cards." The Bureau also appears poised to concentrate on the protection of particular consumer constituencies, as it is opening offices for Service Member Affairs and Financial Protection for Older Americans.

The Bureau will have a budget of up to \$500 million independently funded through fees collected by the Federal Reserve in which it is housed, and it will pursue its objectives against the backdrop of a broad grant of jurisdiction.³ The Bureau has primary enforcement authority with regard to consumer financial protection laws over depository institutions (including credit unions) with more than \$10 billion in assets and their affiliates. These entities' primary regulators have back-up enforcement authority. Primary regulators also retain jurisdiction over banks with \$10 billion or less in assets, but the Bureau has authority to require reports from and conduct limited examinations of these smaller banks. The Bureau has exclusive enforcement jurisdiction over non-bank providers of consumer financial products and services; mortgage-related lenders; loan modification, providers of debt reduction and foreclosure relief services; private student loan providers; payday lenders; and any entity the Bureau believes is engaging in conduct that poses risk to consumers with regard to financial products or services, but in general, it must coordinate enforcement with the Federal Trade Commission ("FTC").

The Bureau will enforce numerous existing consumer statutes, including The Electronic Funds Transfer Act, The Equal Credit Opportunity Act, The Fair Credit Reporting Act, The Fair Debt Collection Practices Act, The Home Mortgage Disclosure Act, The Real Estate Settlement Procedures Act, The Secure and Fair Enforcement for Mortgage Licensing Act, The Truth in Lending Act, and The Truth in Savings Act. The Bureau will also enforce its own yet-to-be-enacted regulations. Of particular relevance to enforcement will be the Act's broad prohibition on engaging in any unfair, deceptive or abusive act or practice in connection with the provision of consumer financial products and services. Forthcoming Bureau regulations are expected to add specificity to the meaning of unfair, deceptive or abusive acts or practices, which are defined under the Act in exceedingly broad terms. The Bureau also has authority to prosecute persons for aiding and abetting a violation, which, under the Act, is "knowingly or recklessly" providing "substantial assistance to a covered person" in connection with violative conduct. Notably, however, the Bureau will not have jurisdiction over the federal securities or commodities laws and persons regulated by those laws. Persons regulated by state insurance agencies also will not be subject to the Bureau's jurisdiction.

The Act grants the Bureau broad enforcement powers to investigate, conduct administrative proceedings, and initiate litigation. In conducting investigations of whether there has been a violation of a federal consumer financial law, the Bureau has the authority to issue subpoenas, demand documents, and conduct other administrative discovery. To remediate alleged violations, the Bureau may conduct hearings and adjudicatory proceedings, appeals from which are made directly to the US Court of Appeals. The Bureau may also commence civil actions in its own name to seek monetary or equitable relief, subject to a three-year statute of

limitations running from the date of discovery. Together with other relief (such as rescission or reformation of contracts, refunds, disgorgement and restitution), the Act authorizes the Bureau to impose three tiers of civil monetary penalties, ranging from \$5,000 to \$1 million per day for each violation.

The Act also increases the probability of heightened state-level regulatory enforcement activity. A provision of the Act with potentially significant consequences grants concurrent enforcement authority to state regulatory authorities. State attorneys general, after notifying the Bureau and any prudential regulator, may bring civil actions or other proceedings under the Act or regulations against state-chartered or state-licensed institutions. State attorneys general cannot bring such civil actions against national banks or federal savings banks, but may bring actions to enforce Bureau regulations issued under the title. The Bureau may intervene in any such action against either state or federally chartered institutions. The extent to which the Bureau and state regulators will work together to bring enforcement actions, or pursue their own priorities, will remain an important developing issue for covered organizations.

In December, the Bureau, which has yet to staff the majority of the 700-1,000 positions it aims to fill by July, appointed outgoing Ohio Attorney General Richard Cordray to head its enforcement division. As the Ohio AG, Cordray made a name as a consumer advocate, including via high-profile litigation against financial institutions based on mortgage and foreclosure practices. In recent months, Cordray has expressed his view that banks' foreclosure practices reflected "a business model built on fraud," and stated that, as chief of enforcement, his "focus will be big banks." Cordray also said mortgages, credit cards and student loans are high on his enforcement agenda. Asked in a recent interview republished on his Facebook page last

week how soon the Bureau would start bringing enforcement actions, Cordray said, "I will be seeing to it that we will be ready with some of our priorities immediately."

Bureau enforcement actions are likely to arise from numerous sources. The Act creates a periodic examination regime for covered organizations. In addition, the Bureau has announced the establishment of a toll-free hotline and a website to receive consumer complaints, and has proposed the creation of a searchable Consumer Inquiry and Complaint Database, which will serve as a repository of complaints made to federal and state agencies regarding consumer financial products and services, and will be potentially available to a variety of persons and entities. The Bureau has proposed to make information stored in the database available to complainants, victims, entities that are the subjects of complaints, a variety of governmental bodies, and courts. *See* Federal Register/Vol. 76, No. 6 (Jan. 10, 2011 notice). To the extent such proposals would result in access to such records by civil litigants and their counsel, that could be expected to aid the plaintiffs' bar in locating potential plaintiffs and bolstering existing claims.

Cooperative efforts will likely also generate enforcement actions. Warren has suggested that the Bureau will work closely with state attorneys general—which is borne out by the numerous meetings with such regulators included in the calendar of Warren's daily meetings posted on the Bureau's website.⁴ Similarly, Cordray appears in a short video posted on the Bureau's website pledging to work "very closely" with state attorneys general as "part of the same team." The Act also expressly calls for the Bureau to negotiate an agreement with the FTC to coordinate enforcement actions in areas of concurrent authority, and to notify the US Attorney General of enforcement litigation. Finally, the private plaintiffs' bar will undoubtedly seek to benefit from increased regulation, potentially both as a source of

information to the Bureau, and through private litigation seeking to utilize Bureau enforcement activities to support private causes of action.

Organizations regulated by the Bureau should take action to avoid, and prepare for, heightened enforcement actions and collateral litigation. Such action may include:

- Conducting periodic reviews of internal compliance functions to ensure they meet evolving regulatory requirements, particularly in areas that have been identified as potential priorities.
- Staying abreast of new rulemaking. In the coming months, the Bureau will likely issue a range of new rules that will require active changes to internal compliance and lending programs. The rulemaking process provides an organization with the opportunity to help shape the regulatory regime (through the notice and comment process) as well as to ensure early notice of new regulatory requirements.
- Preparing for Bureau examinations, which will likely target consumer issues and disclosure, and give rise to enforcement inquiries and actions.
- Paying close attention to developments that may increase the leverage and resources of the plaintiffs' bar, which will surely exploit any new opportunities to bring private actions against financial institutions.

¹ Additional information about the Act is available at www.wilmerhale.com/publications/whPubsDetail.aspx?publication=9561.

² See Elizabeth Warren, *Remarks at Consumers' Union 75th Anniversary Celebration*, Feb. 15, 2011, at www.consumerfinance.gov/speech/remarks-at-consumers-unions-75th-anniversary-celebration. Warren was the prior Chairperson of the Congressional Oversight Panel overseeing implementation by the Treasury Department of the Troubled Asset Relief Program. She is credited with being the first person to propose creation of an independent entity to write and enforce rules relating to federal financial consumer protection laws.

³ The Bureau estimates its 2011 cost of operations at just under \$143 million, and its 2012 cost at slightly over \$329 million. Lawmakers are still finalizing the Bureau's budget, with certain lawmakers proposing changes to the budget size and sources, including a proposal to house the Bureau within the Treasury (which would subject the Bureau's budget to the Congressional appropriations process).

⁴ The Bureau has already entered into a Memorandum of Understanding with the Conference of State Bank Supervisors to establish a framework for cooperation and information sharing. Regulatory authorities of individual states are invited to sign as well. See <http://www.dllr.state.md.us/finance/csbsmou.pdf>.

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