

The New Consumer Financial Protection Bureau Will Impact Community and Regional Banks

August 9, 2010

[Susan B. Zaunbrecher](#), [Tammy Imhoff](#), [Nathan E. Hagler](#)

Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act") creates a new, independent bureau housed within the Federal Reserve System, the Consumer Financial Protection Bureau (the "Bureau"). The Bureau is tasked with enforcing new and existing federal consumer financial protection laws and rules to ensure that the markets for consumer financial products and services are fair, transparent and competitive. The Bureau is to be formed and take control of the federal consumer financial protection laws upon the designated transfer date, which is to take place within 6-18 months of enactment of the Act.

Although Title X expressly exempts depository institutions and credit unions with total assets of \$10 billion or less (the "Community Financial Institutions") from enforcement actions by the Bureau, these Community Financial Institutions, through their prudential regulators, are nonetheless subject to the regulations and rules promulgated by the Bureau. Enforcement of the Bureau's regulations and the consumer financial protection laws is vested in the prudential regulators that already have oversight capacity for these Community Financial Institutions. Additionally, the Bureau has enforcement authority over service providers that may have relationships with Community Financial Institutions, and the institutions may therefore be required to respond to investigatory demands in relation to investigations of a service provider. The following is a non-exhaustive overview of Title X, focusing on the areas that are of particular interest to community and regional banks and other financial institutions that fall within the exemption, having less than \$10 billion in total assets.

The Basics of the Bureau

- **Independent Agency.** The Bureau will be an independent executive agency housed within the Fed. The Bureau director will be appointed by the President, confirmed by the Senate, to serve a five year term.
- **Units and Offices.** The Act provides for several units and offices within the Bureau, including functional units tasked with research, community affairs, and collecting and tracking complaints. The Act also requires creation of the following offices within the first year of the Bureau's existence:
 - Office of Fair Lending & Equal Opportunity. This office will oversee and enforce federal fair lending laws, including the Equal Credit Opportunity Act and the Home Mortgage Disclosure Act.
 - Office of Financial Education. This office is tasked with researching, developing and implementing educational initiatives to improve the financial literacy of consumers.
 - Office of Service Member Affairs. This office is responsible for education initiatives for military and armed forces members and their families and to monitor and coordinate responses to complaints from service members and their families.
 - Office of Financial Protection for Older Americans. This office is responsible for educational efforts and monitoring and coordinating response efforts for complaints from individuals over the age of 62.

- **Consumer Advisory Board.** The Act requires the Bureau Director to establish a Consumer Advisory Board (the "Board") to advise and consult with the Bureau in the exercise of its functions and to provide information on emerging trends in the consumer financial products and services industries. The Act states that the Board should be comprised of experts in consumer protection, financial services, community development, fair lending and civil rights, and consumer financial products and services, as well as representatives of communities that have been significantly impacted by higher-priced mortgage loans.
- **Victims Relief Fund.** Any penalties collected by the Bureau are to be placed in a Consumer Financial Civil Penalty Fund for distribution to victims of activities for which the penalty was assessed. If the victims cannot be identified, the Bureau may use these funds to support educational programs.
- **Consumer Complaint Hotline.** The Bureau is tasked with creating and monitoring a toll-free consumer complaint hotline, website, and database to centralize the collection, monitoring and response to consumer complaints. Bureau staff will monitor this complaint line and route complaints to other prudential regulators and federal and state agencies as appropriate.

The Bureau's Rulemaking Authority

- **Agency Powers Combined Under the Bureau.** Upon the designated transfer date, the Bureau will take over authority for enforcement of consumer financial protection laws from a host of federal agencies, including the Board of Governors and the Federal Reserve Banks, the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Department of Housing and Urban Development, and the Federal Trade Commission.
 - However, these regulators specifically retain enforcement powers for consumer financial protection laws as applicable to financial institutions having less than \$10 billion in total assets. These prudential regulators may enforce any rules issued under the Act or by the Bureau pursuant to the Act, and any rule or order of the Bureau under the following laws:
 - Federal Credit Union Act (12 U.S.C. 1751 *et seq.*)
 - § 8 of the FDIC Act (12 U.S.C. 1818)
 - Bank Service Company Act (12 U.S.C. 1861 *et seq.*)
- **Rulemaking Authority.** The Bureau has significant rulemaking authority, including the ability to exempt any class of covered persons, service providers, or products or services from any rule. The Bureau must provide an assessment of any "significant" rule it enacts within five (5) years of its effective date, included in this assessment is a public comment period to allow for suggestions for modifying, expanding, or eliminating the rule.
 - The Act sets out the following standards for the Bureau when prescribing a rule:
 - The Bureau should consider (1) the potential benefits and costs of the rule to the consumers and the covered persons subject to the rule and (2) the impact of the proposed rule on covered persons and the impact on consumers in rural areas;
 - The Bureau shall consult, as appropriate, with prudential regulators and/or other Federal Agencies prior to proposing a rule and during the comment process for the rule. The prudential regulators can provide written objections to any proposed rule; and
 - If the Bureau receives a written objection from a prudential regulator, the Bureau must describe the objection and the Bureau's response to the objection in the adopting release of the rule.
- **Review of Bureau Regulations.** The Financial Stability Oversight Council (the "FSOC"), created by the Act, has the authority to set aside any regulation put forth by the Bureau if the FSOC decides it puts the safety or soundness of the U.S. banking or financial system at risk.

- Any agency member of the FSOC may request a stay of a regulation within ten (10) days of its publication. If granted by the Chair of the FSOC, the stay will last for a period of up to ninety (90) days to allow the FSOC to decide whether the regulation should be set aside.

The Bureau's Authority over Financial Institutions with less than \$10 billion in assets.

- **Enforcement Authority.** Although the current prudential regulators for Community Financial Institutions retain enforcement authority under the Act, the Bureau will enjoy certain authority over these institutions. The Bureau may require reports from these institutions "as necessary" to support its role of implementing federal consumer financial protection laws, to support the Bureau's examination activities, and to assess and detect risks to consumers and financial markets. The Act requires that the Bureau use publicly available information and pre-existing reports provided to federal and state agencies to the largest extent possible. Although the Bureau may not examine Community Financial Institutions on its own, it can send examiners on a "sampling basis" to examinations performed by other prudential regulators and request any reports that result from those examinations from the prudential regulators. If the Bureau takes part in an examination on a sampling basis, the prudential regulator must involve the bureau agent in all aspects of the examination and consider the input of the agent in the scope, conduct and contents of the examination and any reports issued as a result of the examination.
- **Referrals From the Bureau and Sharing Information Among Regulators.** If the Bureau believes that a Community Financial Institution has materially violated a federal consumer financial protection law, it can notify the appropriate prudential regulator in writing and recommend an investigation. The prudential regulator is required by the Act to provide a written response to the Bureau within sixty (60) days of receipt of the Bureau's referral. Additionally, the Act allows for significant sharing of information among prudential regulators and the Bureau. The Bureau is also required to share its reports of examination with state prudential regulators but the Act does not require state prudential regulators to share information with the Bureau.
- **Subpoena and Civil Investigative Demand Authority.** The Act provides authority to the Bureau to issue subpoenas for documents and testimony. The Bureau may also issue civil investigative demands ("CIDs") compelling the production of documents, responses to interrogatories, or testimony of witnesses prior to instituting any legal proceedings. The Act does not limit who the Bureau may issue CIDs to, and because the Bureau has enforcement authority over service providers that may serve Community Financial Institutions, these institutions may find themselves subject to these CIDs in the course of a Bureau investigation. The Bureau is required to describe the nature of the conduct constituting an alleged violation and the provision(s) of law applicable to such violations.

Law and Rule Changes under Title X

- **Tracking Provisions for Small Business Loans.** The Act amends the Equal Credit Opportunity Act (15 U.S.C. 1691 *et seq.*) Effective as of the designated transfer date, financial institutions will be required to inquire whether a business applying for credit is a small business or a women or minority owned business, and will need to maintain a record of responses to those inquiries. The applicant can refuse to respond, and where feasible, the responses are to be kept from loan underwriters and all others involved in the decision to extend credit. Financial institutions will need to submit reports of this data to the Bureau annually and maintain records of the data for three years. The Bureau is required to issue guidance to facilitate compliance with this requirement.
- **Limitations on Arbitration Agreements.** The Bureau is given authority under the Act to study and report on the use of pre-dispute arbitration agreements, and may impose conditions or limitations on the use of such agreements if the Bureau finds such a regulation to be in the public interest and for the protection of consumers. Any such rule must have a six month grace period

after enactment. The Act also states that no such rule should prohibit a financial institution and a consumer from entering into an arbitration agreement after a dispute arises.

- **Limitations on debit card transaction fees.** The Act amends the Electronic Funds Transfer Act (15 U.S.C. 1693 *et seq.*) to add the Reasonable Interchange Transaction Fees for Electronic Debit Transactions section; requiring that fees charged by the issuers of debit cards be reasonable and proportional to the costs incurred by the issuer and the card network's expenses with respect to those transactions. The Act requires enactment of a final rule establishing standards for assessing fees within nine (9) months of the date of enactment of the Act. The rule must consider the functional similarity between debit transactions and checks, which are required by the Fed to clear at par, but may also consider costs such as the reasonable costs for fraud detection and prevention in debit card transactions. Card issuers with assets under \$10 billion (including the assets of affiliates) are exempt from this regulation, as are transactions involving debit or prepaid cards issued by the government.
- **Model Disclosures.** The Bureau has the authority to issue rules regarding information that must be conveyed in disclosures for consumer financial products or services. As part of this rulemaking authority, the Bureau may promulgate model disclosures for financial institutions to use. The Act provides for a safe harbor for any covered person using such a model disclosure. However, the Act does not require that other prudential regulators accept the model disclosures; therefore, it remains to be seen whether Community Financial Institutions that are subject to other prudential regulators, and not the Bureau, may avail themselves of these safe harbors by using a model disclosure. The Act also requires that the Bureau propose a combined mortgage loan disclosure that combined the disclosures required under the Truth in Lending Act and sections 4 and 5 of the Real Estate Settlement Procedures Act of 1974 into one integrated disclosure. This must be promulgated within the Bureau's first year of operation.
- **Consumer Rights to Accessing Information.** The Act requires covered persons to provide consumers with information concerning any financial product or service that the consumer has obtained from the covered person. This information must be made available electronically to the consumer and must include information such as costs, charges, and usage data. The covered person is not required to provide:
 - confidential commercial information, including algorithms used to derive credit scores or other risk scores or predictors;
 - information collected to prevent or detect unlawful conduct including fraud or money laundering;
 - information that any other provision of law requires be kept confidential; and
 - information that the covered person cannot retrieve in the ordinary course of business.
- **Remittance Transfer Rules.** The Act amends the Electronic Funds Transfer Act (15 U.S.C. 1693 *et seq.*) by adding a new section on disclosures required for remittance transfers. The section applies to transfers of currency where the designated recipient is in a foreign country. The new rule requires disclosures about the amount of currency to be transferred, all fees charged for the transfer, and the exchange rate used to the nearest 1/100th of a point. The rule also requires that the transferor receive a receipt at the time of transfer listing basic information about the transfer, including the intended recipient, the promised date of delivery, and contact information if there is a problem with the transfer. Finally, the rule sets up a dispute resolution system if the transferor contacts the financial institution within 180 days of the transfer and claims an error was made. The financial institution has 90 days to investigate and, if warranted, remedy the alleged error. The Act also requires the Bureau to establish a rule regarding records keeping standards and cancellation and refund policies. This rule must be promulgated within 18 months of Act's passage.
- **Truth in Lending Act.** The Act amends the Truth in Lending Act to apply to credit transactions and consumer leases below \$50,000 instead of the current \$25,000.