What Is the CFPB, and Why Do I Care?

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American Bankruptcy Institute
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Agenda

- CFPB overview
- CFPB enforcement activity
- Mortgage origination rules
- Consent Orders generally
- Practice of law exclusion
- The "new normal" culture
- Current Regulatory Agenda: periodic statements in bankruptcy, arbitration and debt collection
- CFPB resources

CFPB Overview

- 2010: Dodd-Frank Act created the Bureau of Consumer Financial Protection (CFPB)
  - to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services
  - to ensure consumer financial products and services are fair, transparent, and competitive
  - ensures that consumer "are provided with timely and understandable information to make responsible decisions about financial transactions" and "are protected from unfair, deceptive, or abusive acts and practices and from discrimination."

Mandates

- Conduct financial education programs;
- Collect, investigate and respond to consumer complaints;
- Collect, research, monitor and publish information that is relevant to the functioning of markets for consumer financial products and services in order to identify risks to consumers, and to the proper functioning of those markets;
- Supervise covered persons within the CFPB's authority for compliance with federal consumer financial laws;
- Take appropriate enforcement action to address violations of federal consumer financial law

Rulemaking

- The CFPB's director "may prescribe rules and issue orders and guidance as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof."
- Issue regulations under Federal consumer protection statutes, including the Fair Debt Collection Practices Act (FDCPA), Fair Credit Reporting Act, Equal Credit Opportunity Act, Home Ownership and Equity Protection Act, Real Estate Settlement Procedures Act (RESPA) and Truth in Lending Act (TILA), among others

UDAAP Protection

- The CFPB: May take any action ... to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or *abusive* act or practice [UDAAP] 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 service

Implementation of Authority

- Issuing civil investigation demands when it suspects that a violation has occurred;
- Directing examinations of supervised entities, either on site or by deposition; or
- Enforcement actions and consent orders
- Bulletins, white papers, research and examination manuals

Abusive

- “Abusive”
  - Materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
  - Takes unreasonable advantage of —
    - a lack of understanding on the part of the consumer of the 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 financial product or service; or
    - the reasonable reliance by the consumer on a covered person

CFPB Supervisory Authority

- Authority over nonbanks:
  - Mortgage industry, including brokers and servicers
  - Private student loan lenders
  - Payday lenders
  - "Larger participants" in other markets (by reg.)
- *Supervisory Highlights* reports on practices and alleged violations uncovered by CFPB's examiners:
  - student loan debt collection practices, overdraft practices, mortgage origination, fair lending, remittances, handling of disputes by consumer reporting agencies, etc.

Supervisory Authority Example – Student Loan "Auto-Default" Clauses

- CFPB report – 90% of private student loans were co-signed in 2011
- Contracts typically provide that bankruptcy filing or death of co-borrower is event of default that triggers loan acceleration
- Enforced by lenders even though non-filing borrower is current, intends to continue paying, and co-borrower is not seeking discharge of loan in bankruptcy
- CFPB **"Supervisory Highlights"** (March, 2016):
  - "Examiners determined that one or more servicers engaged in an unfair practice in violation of the Dodd-Frank Act relating to auto-default."

Conduct addressed

- Collection practices
- Credit card add on fees
- Lending discrimination
- TILA violations
- EFT violations
- FCRA violations
- Military collection violations
- Background check requirements
- Deposit account violations

Conduct addressed

- Mortgage servicing
- Student loan servicing
- Mortgage origination
- Land development
- Violations in connection with ID Theft Services
- Mortgage insurance kickbacks

PHH Mortgage vs. CFPB

- Administrative Law Judge recommended $6.5 million in disgorgement.
- Director Cordray expanded upon a the ALJ ruling, directing the company to disgorge $109 million
- Ruling appealed (hearing 4-12-16)
  - Also challenges single director structure

TILA-RESPA IntegratedDisclosure Rule (TRID)

- Prior forms were developed by two different agencies under two different statutes (TILA and RESPA)
  - information on forms was overlapping and inconsistent
- Dodd-Frank Act required CFPB to integrate the mortgage loan disclosures
- Final rule became effective Oct. 3, 2015
- Industry compliance concerns
- CFPB: "Resources To Help You Comply"

TILA-RESPA Integrated Disclosure Rule (TRID)

- Good Faith Estimate and initial TIL disclosure have been combined into new form, the **Loan Estimate**
  - must be provided to consumers no later than third business day after loan application
- HUD-1 and final TIL disclosure have been combined into new form, the **Closing Disclosure**
  - must be provided to consumers at least three business days before loan consummation
- Applies to most closed-end consumer mortgages
  - does not apply to home equity lines of credit (HELOCs) and reverse mortgages

Recent Consent Orders

- Debt purchasers
  - Procedural changes
  - Monetary penalties
  - Ongoing business and compliance reporting requirements

- Collection Law Firms
  - Procedural changes
  - Monetary penalties
  - Ongoing business and compliance reporting requirements

Debt Purchasers

- "The [consumer debt purchasers] bought debts that were potentially inaccurate, lacking documentation, or unenforceable. Without verifying the debt, the companies collected payments by pressuring consumers with false statements and churning out lawsuits using robo-signed court documents."
- Penalty:
  - ordered the companies to overhaul their debt collection and litigation practices and to stop reselling debts to third parties
  - Refunds, penalties and cessation of collection

Debt Purchasers

- Knowingly purchasing unverified, OOS or disputed debt
- Purchasing undocumented debt
- Improper dispute handling
- Referral of disputed debt to law firms
- Engaging in “scattershot litigation”
- Using false affidavits
- Threats to sue on OOS debt
- Harassing collection calls

Debt Purchaser Consent Order

- For questionable portfolios: prohibited from making any representation, expressly or by implication, that a Consumer owes a debt without review of account level documentation
- Prohibition of resale of debt to any unrelated entity
- Suing or threatening to sue on any unsubstantiated debt
- Using false or inaccurate affidavits

Debt Purchaser Consent Order

- Suing on OOS debt
- Collecting on OOS debt without disclosure
- Compliance, redress and reporting plan
- Contract with law firms must state:
  - Performance responsibilities and internal controls
  - Outlines duties on training on consumer protection laws
  - Outlines duties for firm to report any dispute verbally or written and reporting of disputes relating to accuracy and validity or time barred
  - Client shall conduct periodic audit
  - Client shall terminate for failure to comply

Monetary Penalty

- [] must pay up to $42 million in consumer refunds and a $10 million penalty, and stop collection on over $125 million worth of debts.

- [] must pay $19 million in consumer refunds and an $8 million penalty, and stop collecting on over $3 million worth of debts.

Debt Collection Law Firms

- [] *and all other persons in active concert or participation with any of them who receive actual notice of this Order, whether acting directly or indirectly through Outside Counsel* are permanently restrained and enjoined from initiating or threatening to initiate a Collection Suit where the do not have
  - Original account level documentation
  - copy of each bill of sale and
  - A document signed by or evidencing charges made by the consumer

Collection Law Suits

- Attorney of record must show by electronic record that attorney has accessed consumer’s account
- Attorney of record must review account level documentation
- Attorney of record must review to ensure SOL has not run
- Attorney of record has confirmed consumer not in bankruptcy
- Attorney of record must certify that the suit complies with the Consent Order

Affidavits in Collection Law Suits

- Attorney must ensure
  - That any affidavit used in a suit is based on personal knowledge
  - That any affidavit was signed in the presence of a notary
  - That the consumer sued is the liable consumer
  - That the affiant has reviewed account level documentation
  - The attorney's system of records shows that an affidavit has been reviewed for compliance with the Consent Order
- On an annual basis, the Defendants must review and analyze the processes and procedures employed by any entity that employs affiants executing and submitting affidavits for use in Collection Suits initiated by Defendants (including Outside Counsel) to reasonably ensure compliance with … the Order.

Debt Collection Law Firms

Law Firm Required:

- Policies & procedures
- When using outside counsel: Defendants must deliver a copy of this Order to Outside Counsel. Within 30 days of any such engagement of new Outside Counsel, Defendants must submit to the Enforcement Director an acknowledgment of receipt of this Order from the new Outside Counsel.

Other penalties

- Ongoing financial disclosure
- Ongoing self-reporting on business
- Compliance reporting
- Recordkeeping
- Ongoing cooperation
- Applicability to downstream service providers
- Compliance system monitoring

Practice of Law Exclusion

- CFPB v. Frederick Hanna & Assocs. PC
  - Lack of meaningful involvement in suit
  - Improper client affidavits

- CFPB v. The Mortgage Law Group, et al.
  - Charging illegal up front fees for mortgage modifications
  - Deceptive marketing of services

12 U.S. Code § 5517 – Limitations on authorities of the Bureau

- (e) EXCLUSION FOR PRACTICE OF LAW
  - (1) IN GENERAL. Except as provided under paragraph (2), the Bureau may not exercise any supervisory or enforcement authority with respect to an activity engaged in by an attorney as part of the practice of law under the laws of a State in which the attorney is licensed to practice law.

12 U.S. Code § 5517 – Limitations on authorities of the Bureau

- (2)RULE OF CONSTRUCTION
  - Paragraph (1) shall not be construed so as to limit the exercise by the Bureau of any supervisory, enforcement, or other authority …
  - (A)that is not offered or provided as part of, or incidental to, the practice of law, occurring exclusively within the scope of the attorney-client relationship; or
  - (B)that is otherwise offered or provided by the attorney in question with respect to any consumer who is not receiving legal advice or services from the attorney in connection with such financial product or service.

12 U.S. Code § 5517 – Limitations on authorities of the Bureau

- (3)EXISTING AUTHORITY
  - Paragraph (1) shall not be construed so as to limit the authority of the Bureau with respect to any attorney, to the extent that such attorney is otherwise subject to any of the enumerated consumer laws or the authorities transferred under subtitle F or H.

The New Normal

- Consent orders also bind providers
- Consent orders signal questionable conduct
- Regulation by enforcement?

- Consumer financial service providers are responsible for activities of their vendors

CFPB Regulatory Agenda

- Amendments to 2013 mortgage servicing rules
  - successors in interest
  - borrowers in bankruptcy
- Debt collection rules under FDCPA
- Payday loans
- Arbitration
- Bank overdraft fees

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The Consumer Financial Protection Bureau's Regulatory Agenda

"TRID" Mortgage Transaction Disclosures
Periodic Mortgage Statements for Borrowers in Bankruptcy

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The Consumer Financial Protection Bureau (CFPB) was created by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. It officially opened its doors in the summer of 2011, and 2012 was its first full year.

For consumer and bankruptcy attorneys, the most concrete power that the CFPB has is the power to write rules to implement a broad range of federal consumer protection statutes. The Bureau has rule writing power (transferred primarily from the Federal Reserve Board and also from the U.S. Department of Housing and Urban Development) under a number of statutes, including the Fair Credit Reporting Act, the Truth in Lending Act, the Real Estate Settlement Procedures Act and, with new authority added by the Dodd-Frank Act, the Fair Debt Collection Practices Act.

The CFPB has the power to write rules to ban or prevent unfair, deceptive, or abusive practices. It also has authority to regulate or ban forced arbitration clauses in consumer contracts. It is not permitted to impose or set usury caps.

1. Overview of CFPB Structure

The CFPB is structured as a bureau within the Federal Reserve Board, though it is effectively independent. It is an Executive agency as defined in Section 105 of Title 5, United States Code. The CFPB is headed by presidentially-appointed Director, confirmed by the Senate. The Financial Stability Council can veto rules promulgated by the CFPB, but only if they pose a risk to the financial system.

The CFPB has authority to promulgate rules, conduct examinations, engage in enforcement actions, receive complaints, conduct research, and provide financial education. Consistent with these tasks, the CFPB has the following divisions: Consumer Education and Engagement; Supervision, Enforcement and Fair Lending; Research, Markets and Regulations; Legal Division; External Affair; Operations, and specialized units such as Servicemember Affairs, Older Americans and Students. It has authority over a wide range of entities: bank and nonbank lenders (including providers of prepaid credit cards, remittances, check cashing), credit reporting bureaus, debt collectors, debt settlement companies, credit counseling agencies, and others involved in financial products or services (but not credit insurance).

2. The CFPB's Rulemaking Agenda for 2016

The CFPB's regulatory agenda includes rulemaking actions in a variety of stages: pre-rule, proposed rule, final rule, long term actions, and completed actions. The following are topics that were either finalized in 2015 or will likely be considered in 2016:

a. Mortgages

- A proposal issued in July 2014 to amend Regulation C, which implements the Home Mortgage Disclosure Act (HMDA), was finalized in 2015;
- The rulemaking (TRID Final Rule) to implement a Dodd-Frank Act directive to consolidate and streamline federal mortgage disclosures required under the Truth in Lending Act (TILA) and Real Estate Settlement Procedures Act was finalized in 2015m though implementation issues will continue into 2016;
- Proposal issued in November 2014 that would amend the 2013 mortgage servicing rules, including disclosures, early intervention, and loss mitigation, compliance when a consumer is a potential or confirmed successor in interest, is in bankruptcy, or sends a cease communication request under the Fair Debt Collection Practices Act (FDCPA) will likely be issued as a final regulation in 2016.

b. Debt collection

- The CFPB received more than 23,000 comments in 2014 in response to an advanced notice of proposed rulemaking released in November 2013. The CFPB is considering whether debt collection rules should be promulgated under the Fair Debt Collection Practices Act or other authority.
- Rulemaking might include disclosures or address acts or practices in connection with debt collection activities. Possible topics might include:

applying federal rules limiting debt collection abuses to creditors; requiring substantially more information before collection attempts can be initiated and pursued; including information about prior collection attempts and ownership of the loan; applying hard stops on collection of debts barred by the statute of limitations; mandating strict limits on abusive contacts; providing substantive limits on collection of medical debt.

- A 2014 Report on the FDCPA stated that more than 30,000 consumer complaints were submitted to the CFPB on debt collection from July 2013 through December 2013. From January to November 2014, they received more than 79,000 consumer complaints.

c. Prepaid cards

- A proposal to create consumer protections for prepaid financial products such as general purpose reloadable prepaid cards (GPR cards) and certain digital and mobile wallets, though amendments to Regulation E. Prepaid products that access overdraft services or credit features for a fee would generally be credit cards subject to TILA and Regulation Z, including Regulation Z's credit card rules.

d. Payday loans

- The CFPB is considering what rules may be appropriate for addressing payday loans and other short-term, high-cost credit products. The CFPB published research on payday lending and so-called deposit advance products in an April 2013 white paper and a March 2014 data point. Rulemaking might include disclosures or possibly prohibited acts and practices related to these products.

e. Bank overdraft fees

- The CFPB is continuing research on bank overdraft related fees and services and considering whether rules should adopted. Rulemaking might include disclosures or possibly prohibited acts and practices related to these products.

f. Arbitration

- The Dodd-Frank Act required the CFPB to study arbitration agreements and provide a report to Congress. That report was completed in 2015. In October, 2015, the CFPB published an outline of the proposals under consideration in preparation for convening a Small Business Review Panel to gather feedback from small industry stakeholders. This is the first step in the process of a potential rulemaking on the issue. The proposals being considered by the CFPB would ban companies from including in consumer contracts arbitration clauses that prevent class action lawsuits.

3. CFPB Mortgage Servicing Proposed Regulations for Periodic Statements Sent to Borrowers in Bankruptcy

Rulemaking authority over the two key federal statutes that apply to mortgage servicing, the Real Estate Settlement Procedures Act (RESPA) and the Truth in Lending Act (TILA), was transferred to the CFPB. Following an extensive notice and comment period, the CFPB issued new mortgage servicing regulations under these statutes affecting a wide variety of servicer duties.[1] These regulations, added to Regulation Z for TILA and Regulation X for RESPA, became effective on January 10, 2014.

One of the regulations adopted by the CFPB, implementing an amendment to the Truth in Lending Act, requires that periodic statements be sent to borrowers on most residential mortgage loans.[2] The regulation requires that the statements contain information in the following categories: amount due for the billing period, explanation of amount due on the account including fees imposed, past payment breakdown, transaction activity, partial payment information, contact and account information, and delinquency information if applicable. Several of these categories include disclosure of a partial payment that is sent to a suspense or unapplied funds account. Additional information, including an account history, must be provided if the consumer is more than forty-five days delinquent.

The CFPB initially stated that is the "complexities" of the bankruptcy scenario "necessitate" the periodic statement information be provided to consumers,[3] and the final rule as originally promulgated did not contain a bankruptcy exemption. However, the CFPB subsequently issued an Interim Final Rule, effective January 10, 2014, that created a broad exemption for consumers who are debtors in a bankruptcy proceeding or for any portion of a mortgage debt that is discharged in bankruptcy.[4] This exemption was intended as an interim rule and the CFPB has proposed a final rule that would significantly change the exemption.

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[1] 78 Federal Register 10902 (Feb. 14, 2013)(TILA) and 78 Federal Register 10696 (Feb. 14, 2013)(RESPA).
[2] 15 U.S.C. § 1638(f); Reg. Z, 12 C.F.R. § 1026.41.
[3] *See* Section-by-Section Analysis, § 1026.41(d)(2), 78 Fed. Reg. 10966 (Feb. 14, 2013).
[4] Reg. Z, 12 C.F.R. § 1026.41(e)(5).

The Interim Final Rule in section 1026.41(e)(5) currently provides that a servicer is exempt from the periodic statement requirements for a mortgage loan while the borrower is a debtor in a bankruptcy case.[5] The CFPB's Official Interpretations for this section provide that the exemption applies for any portion of the mortgage debt that is discharged in bankruptcy.[6] The exemption does not address the fact that many consumers file under chapter 7 for non-mortgage related reasons and continue to maintain payments on their mortgage after receiving a discharge. For a variety of reasons, these consumers often do not enter into a reaffirmation agreement with the mortgage holder. Section 524(j) of the Bankruptcy Code provides an exception to the discharge injunction in this situation, permitting the mortgage holder to accept payments and service the loan in the ordinary course.[7]

The CFPB has proposed a final rule that would revise the exemption.[8] If the consumer is a debtor in a bankruptcy case, the consumer is a primary obligor on a mortgage for which another primary obligor is a debtor in a chapter 12 or 13 case, or the consumer has discharged personal liability for the mortgage loan, periodic statements must be provided unless one of the following conditions applies:

- The consumer requests in writing that the servicer cease providing periodic statements or coupon books;
- The consumer's confirmed plan provides that the consumer will surrender the dwelling, provides for the avoidance of the lien securing the mortgage, or otherwise does not provide for payment of prepetition arrearage or maintenance of payments due under the mortgage loan;
- The bankruptcy court enters an order providing for the avoidance of the lien securing the mortgage loan, lifting the automatic stay with respect to the mortgage, or requiring the servicer to cease providing periodic statements or coupon books; or
- The consumer files with the bankruptcy court a Statement of Intention identifying an intent to surrender the dwelling securing the mortgage loan.

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[5] 12 C.F.R. § 1026.41(e)(5).
[6] *See* Official Interpretations, Supplement 1 to Part 1026, ¶ 41(e)(5) - 2(ii).
[7] 11 U.S.C. § 524(j).
[8] *See* Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), Docket No. CFPB-2014-0033, 79 Fed. Reg. 74176 (Dec. 15, 2014).

4. TILA/RESPA Integrated Disclosures ("TRID") Mortgage Transaction Disclosures Introduction[9]

Closed-end mortgage transactions that are also subject to the Truth in Lending Act (TILA) and Real Estate Settlement Procedures Act (RESPA)[10] are subject to special timing rules. Effective October 3, 2015, the CFPB combined the TILA and RESPA early and the origination disclosures and included timing rules for delivery of these new forms.[11]

In 2010, Congress directed the CFPB to create "a single integrated disclosure" form combining the existing HUD-1 settlement statement and TILA disclosure form.[12] The CFPB finalized the forms and the accompanying regulations on December 31, 2013.[13] The new regime commenced on October 3, 2015 and covers closed-end consumer credit transactions secured by real property.[14] Home equity lines of credit are excluded. In addition, the rules do not govern reverse mortgages, which are addressed in Regulation Z §§ 1026.19(a) and 1026.33, and mortgages secured by a dwelling that is not attached to real property.[15]

A. Early Disclosures

Effective October 3, 2015, for loans to which the TILA/RESPA integrated disclosure rules apply, the early disclosure ("Loan Estimate") requirements generally track those applicable to loans applied for on or after July 30, 2009, with some exceptions.[16] Like the good faith estimate, the creditor must deliver (in person or electronically) or place the loan estimate form in the mail not later than the third business

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9 Portions of this section are derived from the the National Consumer Law Center's Truth in Lending (9th ed. 2015), updated at www.nclc.org/library, and reprinted here with the permission of NCLC.

10 12 U.S.C. §§ 2601–2617. *See also* Regulation X, 12 C.F.R. pt. 1024.

11 78 Fed. Reg. 79,730 (Dec. 31, 2013); 80 Fed. Reg. 43,911 (July 24, 2015) (extending the effective date to October 3, 2015).

12 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1098, 124 Stat. 1376 (July 21, 2010).

13 78 Fed. Reg. 79,730 (Dec. 31, 2013).

14 Reg. Z § 1026.19(e) (eff. Oct. 3, 2015); 78 Fed. Reg. 79,730, 79,730 (Dec. 31. 2013); 80 Fed. Reg. 43,911 (July 24, 2015) (extending the effective date to October 3, 2015).

15 78 Fed. Reg. 79,730, 79,730 (Dec. 31, 2013).

16 Reg. Z § 1026.19(e)(1)(iii), (iv) (eff. Oct. 3, 2015); 78 Fed. Reg. 79,730, 79,730 (Dec. 31, 2013); 80 Fed. Reg. 43,911 (July 24, 2015) (extending the effective date to October 3, 2015).

day after the creditor receives the consumer's application.[17] One exception arises where a mortgage broker receives the application. In that case, the broker may provide the loan estimate and, if so, it must comply with the TILA rules. The creditor is responsible for compliance.[18] If there are multiple applicants, the creditor may deliver the disclosures to any consumer who is primarily liable on the obligation.[19]

"Application" is defined to mean "the submission of a consumer's financial information for the purposes of obtaining an extension of credit" and consists of the consumer's name, income, social security number, the property address, an estimate of the value of the property, and mortgage amount.[20] The creditor can collect any other information it deems necessary but once it has received these six pieces of information, it has an application for purposes of triggering required disclosures.[21] If a consumer starts to fill out an application online, enters the six pieces of information and saves the application, rather than submits it to the creditor, the creditor need not provide a loan estimate within the requisite time period.[22]

The loan estimate must contain good faith estimates of the disclosures listed in Regulation Z § 1026.37.[23] At the same time, the creditor must provide a special information booklet titled "Shopping for your home loan: Settlement cost booklet"[24] and a written list of settlement service providers.[25] The creditor need not provide the booklet if it denies the consumer's application before the end of the three business day period.[26] If the consumer uses a mortgage broker, the broker must give the consumer the booklet, not

[17] Reg. Z § 1026.19(e)(1)(iii) (eff. Oct. 3, 2015); 78 Fed. Reg. 79,730, 79,730 (Dec. 31, 2013). At the same time, the creditor must provide the special information booklet. Reg. Z § 1026.19(g); Official Interpretations § 1026.19(g) (eff. Oct. 3, 2015); 78 Fed. Reg. 79,730, 79,730 (Dec. 31, 2013).
[18] Reg. Z § 1026.19(e)(1)(ii); Official Interpretations § 1026.19(e)(1)(ii). *See also* 78 Fed. Reg. 79,730, 79,799–79,802 Dec. 31, 2013) (CFPB discussion of the mortgage broker's and creditor's respective duties).
[19] Reg. Z § 1026.17(d).
[20] Reg. Z § 1026.2(a)(3). *See also* 78 Fed. Reg. 79,730, 79,762–79,768 (Dec. 31, 2013) (CFPB discussion of the definition of application).
[21] Official Interpretations § 1026.2(a)(3)-1.
[22] 78 Fed. Reg. 79,730, 79,768 (Dec. 31, 2013) (CFPB discussion of this issue).
[23] Reg. Z § 1026.19(e)(1)(i).
[24] Reg. Z § 1026.19(g); Official Interpretations § 1026.19(g) (eff. Oct. 3, 2015); 78 Fed. Reg. 79,730, 79,730 (Dec. 31, 2013); 80 Fed. Reg. 43,911 (July 24, 2015) (extending the effective date to October 3, 2015). The booklet is *available at* www.consumerfinance.gov.
[25] Reg. Z § 1026.19(e)(1)(vi).
[26] Reg. Z § 1026.19(g)(1)(i).

the creditor.[27] The booklet need not be given if the transaction does not involve the purchase of a one-to-four family residential property. Examples of non-purchase transactions include refinancings, closed-end transactions secured by a subordinate lien, and reverse mortgages.[28]

If the creditor provides the loan estimate form electronically, the assumption that the consumer received the estimate within three business days applies in the same fashion as when the creditor mails it, that is, three business days after they are delivered or placed in the mail.[29] "Business days" in the loan estimate context means each day on which the creditor's offices are open to the public for carrying on substantially all of its business functions.[30]

If the creditor determines within the three-day period that the consumer's application will not be approved on the terms requested, or if the consumer withdraws the application within that period, then the creditor need not give the TILA/RESPA integrated early disclosures.[31]

B. Format of early disclosures

Effective October 3, 2015, for mortgage loan transactions to which the CFPB regulations combining the TILA and RESPA disclosures apply, the good faith estimate is replaced by the "loan estimate."[32] The "closing disclosure" replaces the settlement statement.[33] The the loan estimate and closing disclosure forms are readily comparable by the consumer and practitioners to assess bait-and-switch concerns.

C. Fees

In an effort to promote shopping, the statute and regulation limit the fees that a consumer may be charged, by any party, before the early disclosures are received by the

[27] *Id.*
[28] Reg. Z § 1026.19(g)(1)(i), (iii).
[29] Reg. Z § 1026.19(e)(1)(iv); Official Interpretations § 1026.19(e)(1)(iv)-2.
[30] Reg. Z § 1026.2(a)(6); Official Interpretations § 1026.19(e)(1)(iii)-1 (eff. Oct. 3, 2015); 78 Fed. Reg. 79,730, 79,730 (Dec. 31, 2013); 80 Fed. Reg. 43,911 (July 24, 2015) (extending the effective date to October 3, 2015).
[31] Official Interpretations § 1026.19(e)(1)(iii)-3.
[32] Reg. Z app. H-24(B) (Mortgage Loan Transaction Loan Estimate—Fixed Rate Loan Sample).
[33] Reg. Z app. H-25(B) (Mortgage Loan Transaction Closing Disclosure—Fixed Rate Loan Sample).

consumer to a credit report fee.[34] The regulations further require that the credit report fee be bona fide and reasonable.[35] Other fees, whether charged by the creditor or a third party, may only be charged after the consumer receives the early disclosures.[36] Creditors may, for the purpose of charging fees, presume receipt of the early disclosures three days after mailing.[37]

The TILA/RESPA integrated disclosure rules that become effective October 3, 2015, fairly track the fee restrictions in the previous version of Regulation Z, with one major exception.[38] The only fee that a creditor may impose on the consumer before the creditor has provided the loan estimate form *and* the consumer has "indicated" an intent to proceed with the transaction is a bona fide and reasonable credit report fee.[39] A consumer may indicate an intent to proceed in any manner the consumer chooses, unless the creditor specifies a particular method of communication.[40] The official interpretations state that in-person, oral communication immediately upon delivery of the loan estimate form, oral communications over the phone, written communication via e-mail, or signing a preprinted form are sufficient to indicate intent to proceed as long as the actions occur after receipt of the loan estimate form and the creditor documents the consumer's communication.[41] Mere silence on the part of the consumer does not suffice, however.[42] Once the creditor provides the loan estimate form and the consumer has indicated an intent to proceed, the creditor is free to impose additional fees.[43]

D. Redisclosure Before Closing

In some cases, by the time of closing, the disclosed early APR no longer matches the actual projected APR. If the inaccuracy reaches certain thresholds, redisclosure is

[34] 15 U.S.C. § 1638(b)(2)(E); Reg. Z § 1026.19(a)(1)(iii).
[35] Reg. Z § 1026.19(a)(1)(iii).
[36] 15 U.S.C. § 1638(b)(2)(E); Reg. Z § 1026.19(a)(1)(ii).
[37] Reg. Z § 1026.19(a)(2)(ii).
[38] *See also* Official Interpretations § 1026.19(e)(1)(iv)-1, -2; 78 Fed. Reg. 79,730, 79,811–79,815 (Dec. 31, 2013) (CFPB discussion of fee restrictions).
[39] Reg. Z § 1026.19(e)(2)(i)(A); Official Interpretations § 1026.19(e)(2)(i)(A)-1 (eff. Oct. 3, 2015); 78 Fed. Reg. 79,730, 79,730 (Dec. 31, 2013); 80 Fed. Reg. 43,911 (July 24, 2015) (extending the effective date to October 3, 2015).
[40] Reg. Z § 1026.19(e)(2)(i)(A); Official Interpretations § 1026.19(e)(2)(i)(A)-2.
[41] Official Interpretations § 1026.19(e)(2)(i)(A)-2.
[42] Official Interpretations § 1026.19(e)(2)(i)(A)-2.
[43] Official Interpretations § 1026.19(e)(2)(i)(A)-2.

required. Effective October 3, 2015, the redisclosure rules for early disclosures given in transactions to which the TILA/RESPA integrated disclosure rules apply are more extensive than the previous rules. The loan estimate is binding and redisclosure is allowed only in the event of a limited universe of changed circumstances.

Redisclosure is allowed in the following specific circumstances:

- Changed circumstances, including: an extraordinary event beyond the control of any interested party; other unexpected event specific to the consumer or transaction; information specific to the consumer or transaction that the creditor relies upon when providing the disclosures that is inaccurate or changes after the loan estimate disclosure is provided; new information specific to the consumer or transaction that the creditor did not rely upon when providing the original disclosure. [44]

- Changed circumstances affecting the consumer's eligibility, including the consumer's creditworthiness or the value of the security for the loan.[45]

- Revisions to the credit terms or the settlement requested by the consumer that cause an estimated charge to increase.[46]

- Interest rate dependent charges that change, such as points or lender credits, because the interest rate is not locked when the loan estimate form is originally provided.[47]

- An indication by the consumer of an intent to proceed with the transaction more than ten business days after the creditor originally provided the loan estimate form.[48]

- A reasonable expectation by the creditor that the settlement will occur more than sixty days after the original loan estimate form was provided in transactions involving new construction loans, as long as the creditor clearly and conspicuously stated on the original loan estimate form that the it may issue a revised loan estimate form at any time prior to sixty days before consummation.[49]

When the creditor provides a revised loan estimate form to the consumer, it must

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[44] Reg. Z § 1026.19(e)(3)(iv)(A); Official Interpretations § 1026.19(e)(3)(iv)(A)-1–(A)-3 (providing examples). *See also* 78 Fed. Reg. 79,730, 79,829–79,834 (Dec. 31, 2013) (CFPB discussion of inaccuracies caused by these circumstances and revised loan estimates).

[45] Reg. Z § 1026.19(e)(3)(iv)(B); Official Interpretations § 1026.19(e)(3)(iv)(B)-1 (providing an example).

[46] Reg. Z § 1026.19(e)(3)(iv)(C); Official Interpretations § 1026.19(e)(3)(iv)(C)-1 (providing an example).

[47] Reg. Z § 1026.19(e)(3)(iv)(D); Official Interpretations § 1026.19(e)(3)(iv)(D)-1 (providing an example), as amended by, 80 Fed. Reg. 8767 (Feb. 19, 2015).

[48] Reg. Z § 1026.19(e)(3)(iv)(E); Official Interpretations § 1026.19(e)(3)(iv)(E)-1 (providing an example).

[49] Reg. Z § 1026.19(e)(3)(iv)(F); Official Interpretations § 1026.19(e)(3)(iv)(F)-1.

do so within three business days of receiving information sufficient to establish that one of the reasons for revision applies.[50] Moreover, the consumer also must receive the revised loan estimate form no later than four business days before consummation.[51] The official interpretations relax this rule where there are less than four business days between the time the revised disclosure must be provided and the closing. In this situation, the final closing cost disclosure must include the necessary changes.[52] Finally, Regulation Z expressly forbids the creditor from giving the revised loan estimate form to the consumer after the creditor provides the final closing cost disclosure.[53]

E. TILA/RESPA Integrated Closing Disclosure

Effective October 3, 2015, the creditor must ensure that the consumer receives the closing disclosures no later than three business days before consummation for mortgage loans to which the TILA/RESPA integrated disclosure rules apply.[54] In the context of the closing disclosure, "business day" is defined to mean all calendar days except Sundays and the legal public holidays.[55] In a rescindable transaction, each consumer who has a right to rescind must be given a copy of the closing disclosure.[56] If the disclosures are not given to the consumer in person, the consumer's receipt of the closing disclosure form is deemed to have occurred within three business days after the creditor delivers it or places it in the mail.[57] This rule expressly applies to the use of electronic mail, so long as the consumer consented to proceed with the transaction electronically.[58]

The final closing disclosure form must include the actual terms of the credit transaction unless an estimate is permitted.[59] The charges imposed on the consumer must be the actual charges, that is, the amount actually received by the settlement service

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[50] Reg. Z § 1026.19(e)(4)(i); Official Interpretations § 1026.19(e)(4)(i)-1 (providing three examples).
[51] Reg. Z § 1026.19(e)(4)(ii); Official Interpretations § 1026.19(e)(4)(ii)-1.
[52] Official Interpretations § 1026.19(e)(4)(ii)-1.
[53] Reg. Z § 1026.19(e)(4)(ii); Official Interpretations § 1026.19(e)(4)(ii)-1.
[54] Reg. Z § 1026.19(f)(1)(ii); Official Interpretations § 1026.19(f)(1)(ii). *See also* 78 Fed. Reg. 79,730, 79,842–79,852 (Dec. 31, 2013) (CFPB discussion of the timing rules).
[55] Official Interpretations § 1026.19(f)(1)(ii)-1.
[56] Reg. Z § 1026.23(a); Official Interpretations § 1026.23(b(1)-1. *See also* Official Interpretations § 1026.17(d)-2.
[57] Reg. Z § 1026.19(f)(1)(iii); Official Interpretations § 1026.19(f)(1)(iii)-1. *See also* 78 Fed. Reg. 79,730, 79,853–79,856 (Dec. 31, 2013) (CFPB discussion of the receipt rules).
[58] Official Interpretations § 1026.19(f)(1)(iii)-2.
[59] Official Interpretations § 1026.19(f)(1)(i)-2.

provider.[60] One exception to the actual charge rule occurs when the creditor charges the consumer an "average" charge.[61] The creditor may charge an average charge if *all* of the following conditions are met:

- The average charge does not exceed the average amount paid for that service by or on behalf of consumers and sellers for a class of transactions;
- The creditor or settlement service provider defines the class of applicable transactions based on an appropriate period of time, geographic area, and type of loan;
- The creditor or settlement service provider uses the same average charge for every transaction within the defined class; and
- The creditor or settlement service provider does not use an average charge for any type of insurance, for any charge based on the loan amount or property value, or if doing so is otherwise prohibited by law.[62]

Estimates may be used even though the creditor knows that more precise information will be available at or before consummation.[63] To use an estimate instead of the actual fee or term, the creditor must base the estimate on the best information reasonably available because the actual term is unknown at the time the closing disclosure form is provided.[64] However, the creditor must use due diligence to obtain the actual term before resorting to an estimate.[65]

If any one of three changes in the disclosures occur before consummation, the need for corrected information triggers redisclosure and a new waiting period.[66] These changes are:

- The APR becomes inaccurate beyond the applicable tolerances as defined in Regulation Z § 1026.22;

[60] Reg. Z § 1026.19(f)(3)(i); Official Interpretations § 1026.19(f)(3)(i).
[61] Reg. Z § 1026.19(f)(3)(ii); Official Interpretations § 1026.19(f)(3)(ii).
[62] Reg. Z § 1026.19(f)(3)(ii); Official Interpretations § 1026.19(f)(3)(ii).
[63] Official Interpretations § 1026.19(f)(1)(i)-2-ii.
[64] Official Interpretations § 1026.19(f)(1)(i)-2-i.
[65] Official Interpretations § 1026.19(f)(1)(i)-2-ii.
[66] Reg. Z § 1026.19(f)(2)(i); Official Interpretations § 1026.19(f)(2)(i).

- The loan product is changed, causing the information required under Regulation Z § 1026.38(o)(4) (loan terms) to become inaccurate; or

- A prepayment penalty is added, causing the disclosure required by Regulation Z § 1026.38(b) to become inaccurate.[67]

If the change does not trigger a new waiting period, meaning it is not one of the three listed above, the creditor must correct the closing disclosure and provide it to the consumer at or before consummation.[68] The consumer has the right to inspect the closing disclosure during the business day before consummation.[69]

Post-consummation, the creditor must deliver corrected disclosures if the event that causes the disclosure to become inaccurate occurs during the thirty-day period following consummation and the inaccuracy results in a change to an amount actually paid by the consumer.[70] In this situation, the creditor must deliver or mail the corrected disclosures no later than thirty days after receiving information that the event occurred.[71] If the closing disclosure form contains non-numeric clerical errors, the creditor must deliver or mail corrected disclosures no later than sixty days after consummation.[72] Finally, if the consumer is entitled to a refund of any amounts that changed beyond the permissible limits, the creditor must refund the excess to the consumer and deliver or mail corrected disclosures that reflect the refund within sixty days after consummation.[73]

F. Waiver

Consumers can, in some circumstances, waive receipt of the early disclosures.[74] Consumers may also waive the timing of the early disclosures. Thus, a consumer could choose to get the disclosures more than three days after application or less than seven days before closing. Although the statute does not provide for waiver of redisclosure,

[67] Reg. Z § 1026.19(f)(2)(ii); Official Interpretations § 1026.19(f)(2)(ii).
[68] Reg. Z § 1026.19(f)(2)(i); Official Interpretations § 1026.19(f)(2)(i) (providing examples).
[69] Reg. Z § 1026.19(f)(2)(i); Official Interpretations § 1026.19(f)(2)(i) (providing examples). The creditor may omit the seller's information for the inspection.
[70] Reg. Z § 1026.19(f)(2)(iii); Official Interpretations § 1026.19(f)(2)(iii).
[71] Reg. Z § 1026.19(f)(2)(iii); Official Interpretations § 1026.19(f)(2)(iii). *See also* 78 Fed. Reg. 79,730, 79,878–79,881 (Dec. 31, 2013) (CFPB discussion of changes in the disclosed information occurring after settlement).
[72] Reg. Z § 1026.19(f)(2)(iv); Official Interpretations § 1026.19(f)(2)(iv).
[73] Reg. Z § 1026.19(f)(2)(v); Official Interpretations § 1026.19(f)(2)(v). *See also* Reg. Z § 1026.38(h)(3); Official Interpretations § 1026.38(h)(3)-2.
[74] 15 U.S.C. § 1638(b)(2)(F); Reg. Z § 1026.19(a)(3).

Regulation Z permits waiver of the three-day waiting period following redisclosure.[75] Consumers may only exercise this right of waiver or modification in the event of a "bona fide personal emergency." [76] In order to support waiver, the bona fide personal emergency must require the consummation of the loan transaction before the expiration of the waiting period. Thus, in the only example provided by Regulation Z of when a bona fide personal emergency exists—a pending foreclosure sale—that sale must be scheduled to proceed before the expiration of the waiting period.[77]

Congress imposed four procedural limitations on waiver:

- The consumer, not the creditor, must determine the existence of the emergency;
- The consumer must provide a written, dated request for waiver, describing the emergency;
- The existence of the emergency must be documented by a written, dated description of the emergency; and
- All the consumers with a right to receive the disclosures must sign the waiver.[78]

The CFPB extended these protections by forbidding the use of a preprinted form to exercise waiver of the early disclosures.[79] Congress put one additional limitation on the exercise of the waiver right: the consumer must receive the final disclosures no later than the waiver.[80]

[75] Reg. Z § 1026.19(a)(3); 74 Fed. Reg. 23,289, 23,296 (May 19, 2009).
[76] 15 U.S.C. § 1638(b)(2)(F); Reg. Z § 1026.19(a)(3).
[77] Official Interpretations § 1026.19(a)(3)-1.
[78] 15 U.S.C. § 1638(b)(2)(F).
[79] Reg. Z § 1026.19(a)(3).
[80] 15 U.S.C. § 1638(b)(2)(F)(iii).

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Feature

By Alane A. Becket and William A. McNeal[1]

What Is the CFPB, and Why Should You Care?

The Bureau's Reach Extends Beyond Consumer Advocacy

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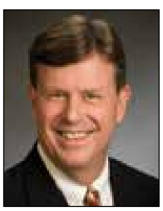

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Authors' Note: *This is the first in a series of articles on the CFPB, its current activities and its potential impact on bankruptcy practice.*

As most practitioners are likely aware, on July 21, 2010, President Barack Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act[2] (the "Dodd-Frank Act"). The Dodd-Frank Act was conceived "to promote the financial stability of the U.S. by improving accountability and transparency in the financial system, to end 'too big to fail,' to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes."[3]

According to President Obama, the Dodd-Frank Act is intended to "rein ... in the abuse and excess that nearly brought down our financial system ... [and] bring transparency to the kinds of complex and risky transactions that helped trigger the financial crisis." It also aimed to end "tax-funded bailouts ... for Wall Street's mistakes" and provide "the ability to wind ... down [a failed large financial institution] without endangering the broader economy ... [a]nd ... make [it] clear that no firm is somehow protected because it is 'too big to fail.'"[4] The Dodd-Frank Act further authorizes the Secretary of the Treasury to implement programs and provide funding to enhance access to mainstream financial institutions for lower- and middle-income consumers.[5] These provisions are designed, in part, to provide alternatives to higher-cost products, which are often a consumer's only option.

Most relevant to the average American, the Dodd-Frank Act also authorized the formation of the Bureau of Consumer Financial Protection (CFPB),[6] whose mission is several-fold: "to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services, and that markets for consumer financial products and services are fair, transparent, and competitive."[7] Notably and ironically, an often-overlooked objective of the CFPB is "to reduce unwarranted regulatory burdens."[8] For consumers, the CFPB ensures that they "are provided with timely and understandable information to make responsible decisions about financial transactions" and "are protected from unfair, deceptive, **or abusive** acts and practices and from discrimination."[9]

The CFPB's Broad Powers Defined

To accomplish its assigned purposes and goals, the CFPB conducts financial education programs; collects, investigates and responds to consumer complaints; collects, researches, monitors and publishes information that is relevant to the functioning of markets for consumer financial products and services in order to identify risks to consumers, and to the proper functioning of those markets; supervises covered persons within the CFPB's statutory ambit for compliance with

1 The authors thank Joann Needleman of Clark Hill PLC for her assistance and advice in the preparation of this article.
2 Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203, 124 Stat. 1376 (codified in scattered sections of 12 U.S.C., 15 U.S.C., 31 U.S.C., 7 U.S.C., 18 U.S.C., 42 U.S.C., 22 U.S.C. (as amended by Pub. L. 113-235, Pub. L. 113-250, Pub. L. 113-279)).
3 *Id.*
4 Statement by President Obama upon signing H.R. 4173, White House Press Release, July 21, 2010.

5 *See supra* n.2.
6 More commonly known as the Consumer Financial Protection Bureau.
7 12 U.S.C. § 5511(a).
8 12 U.S.C. § 5511(b)(3).
9 12 U.S.C. § 5511(b)(1), (2) (emphasis added).

federal consumer financial law; and takes appropriate enforcement action to address violations of federal consumer financial law.[10]

The CFPB's director "may prescribe rules and issue orders and guidance as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof."[11] This empowers the CFPB to issue regulations under a host of Federal consumer protection statutes, including the Fair Debt Collection Practices Act (FDCPA), Fair Credit Reporting Act, Equal Credit Opportunity Act, Home Ownership and Equity Protection Act, Real Estate Settlement Procedures Act (RESPA) and Truth in Lending Act (TILA), among others.[12]

More generally, the CFPB "may take any action ... to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice [UDAAP] 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."[13] The term "abusive" was added to the traditional concept of UDAP (unfair or deceptive act or practice) and is defined as an act or practice that:

(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) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;

(B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or

(C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.[14]

What is unfair or deceptive has traditionally been subject to interpretation by courts; however, the Dodd-Frank Act provides the CFPB with the power to apply its determination of the more muscular standard to the acts of supervised entities. The CFPB's oversight of UDAAP is a significant tool and extends potential liability to persons who might be exempt from traditional consumer-protection laws, such as original creditors from the FDCPA.

The CFPB discharges its express supervisory authority in several ways: by (1) issuing civil investigation demands when it suspects that a violation has occurred; (2) directing examinations of supervised entities, either on site or by deposition; or (3) enforcement actions and consent orders. Consent orders, which outline that a supervised entity has agreed to, among other things, a course of future conduct, signal the CFPB's expectations for other supervised entities. In addition, the CFPB has forecasted its expectations and issued warnings, through dozens of bulletins, white papers, research and examination manuals that enable it, in part, to instigate policy without formal rule-making or legislation. It is under this circumstance that the CFPB has dictated numerous guidelines in advance of issuing formal rules.[15]

The CFPB has also been very active and aggressive in carrying out its duties. For example, it announced in 2014 its well-publicized Mortgage Servicing Rules, which were subsequently amended later that year. The Mortgage Servicing Rules amended Regulations B, X and Z to require, among other things, that a lender perform a good-faith ability-to-pay analysis; provide certain information requested by such borrowers; and afford protections to such borrowers in connection with force-placed insurance and impose obligations on servicers to correct errors asserted by mortgage loan borrowers.

The Mortgage Servicing Rules further required servicers to establish certain policies, procedures and requirements — including the designation of personnel to assist consumers who fall behind in their mortgage payments — and contact consumers soon after delinquency and work with them for consideration for applicable loss-mitigation options. They also impose restrictions on loan originators, specifically regarding registration and licensing, compliance procedures, compensation and record-keeping.

The CFPB's rule-making power generally supersedes that of other agencies and courts,[16] and for the most part, they must defer to the CFPB exclusively.[17] However, the authorities of the CFPB and Federal Trade Commission are co-existent and equivalent, if not coequal,[18] and they are required to coordinate their rule-making activities.[19]

Whom Does the CFPB Supervise?

The CFPB is specifically charged with supervising any residential mortgage originator, broker or servicer; private student lender; and payday lender, as well as "larger market participants" (as defined by the CFPB).[20] It is further authorized to supervise, examine and take enforcement action against other "covered persons," generally defined as any entity providing consumer financial products or services, and their affiliated service providers.[21]

In addition, the CFPB has authority over "very large banks, savings associations, and credit unions," which are defined as those with assets exceeding $10 billion.[22] In regard to smaller banks and credit unions, the CFPB may require their cooperation and information in order to assess and detect risks to consumer financial markets, although enforcement authority against these entities remains with the prudential regulator.[23]

Importantly for consumer finance professionals, the CFPB's authority extends to "service providers," defined as "any person that provides a material service to a covered

10 12 U.S.C. § 5511(c).
11 12 U.S.C. § 5512(b)(1).
12 12 U.S.C. § 5481(12).
13 12 U.S.C. § 5531.
14 12 U.S.C. § 5531(d).

15 For a list of guidance documents, *see* www.consumerfinance.gov/guidance/ (unless otherwise indicated, all links in this article were last visited on Nov. 3, 2015).
16 12 U.S.C. § 5512(b)(4)(A).
17 12 U.S.C. § 5512(b)(4)(B).
18 12 U.S.C. § 5581(b)(5). "Coequal" is a legal term coined, most relevantly, by the Supreme Court in describing the constitutional stature and powers of the three branches of the federal government. It denotes a degree of similarity or correspondence that exceeds mere "equivalent" but does not extend to the literal, quantitative "equal."
19 12 U.S.C. § 5581(b)(5)(D).
20 12 U.S.C. § 5514. For example, in the consumer debt-collection market, a nonbank entity is considered a larger-market participant if its annual receipts from consumer debt collection are more than $10 million. *See* 12 C.F.R. 1090.105.
21 12 U.S.C. § 5481(6).
22 12 U.S.C. § 5515. For a current list of depository institutions under CFPB supervision, *see* files.consumerfinance.gov/f/201509_cfpb_depository-institutions-list.pdf.
23 12 U.S.C. § 5515.

person in connection with the offering or provision by such covered person of a consumer financial product or service."[24] Any "service provider" representing a "substantial number" of smaller entities is also subject to supervision.[25] This power extends the reach of the CFPB's supervision and enforcement powers far beyond traditional consumer financial service providers.

In support of its power to issue rules and other forms of guidance to implement, administer and enforce consumer financial law,[26] the CFPB has the right and duty to monitor covered persons by occasionally "gather[ing] information ... regarding the organization, business conduct ... and activities of covered persons and service providers,"[27] a function that consumes much of the CFPB's energies, and it may require covered persons to furnish such information. In addition to informal or administrative requests, the CFPB has the right to subpoena witnesses and things for hearings, and, if a violation of any consumer law is suspected, a civil investigative demand may be issued requiring the entity to produce documents, file reports, answer questions, give testimony or any combination thereof.[28] If warranted, the CFPB may litigate violations of federal consumer financial law.[29]

If found to be in violation of any federal consumer financial statute or rule, the CFPB has a host of available remedies, many of which it has vigorously applied in the five years since its inception. Remedies include — but are not limited to — rescission or reformation of contracts, refunds, restitution, monetary damages, limits on the activities of the violator and civil penalties.[30]

What Should One Expect When Being Monitored by the CFPB?

In 2012, the CFPB issued its *Supervision and Examination Manual*[31] to assist its investigators in examining entities when performing its routine monitoring functions, or when an entity is suspected of violating consumer finance laws. The *Manual*, at almost 1,000 pages, is exceedingly thorough and addresses examinations based on type of entity, financial product or consumer financial regulatory statute. Since its release, the *Manual* has been supplemented to update examination procedures and add procedures related to specific activities, such as debt collection, auto finance and education lending. It not only assists examiners in planning for and conducting exams, but is a road map for supervised entities preparing to meet the CFPB's expectations.

Supervision is consumer-focused and data-driven. An examination begins with a review of publicly available information about the entity in order to assess risk and set the scope and parameters of the examination. Each depository institution is assigned a lead examiner, who performs continuous monitoring (*i.e.*, at least quarterly) after the initial examination. An assessment is made based on the inherent risks posed by the products and services provided by the institution and the controls that it employs to manage those risks. A nonbank supervised entity is selected for examination based on its size, assessed risk, volume of consumer transactions and oversight by other regulators. A directional risk is assigned to the institution, *viz*. increasing, decreasing or stable.

After the level of risk has been assessed, the entity is then scheduled for an on-site review. Guided by the risk assessment, every examination will include a review of compliance management and practices to identify any that are potentially unfair, deceptive or abusive. For entities engaged in lending activities, a review for discrimination is also performed.

Examinations focus on an entity's (1) compliance management; (2) product-based procedures (consumer-reporting larger participants, mortgage origination, mortgage servicing, and short-term, small-dollar lending); and (3) statutory and regulatory procedures (including UDAAP, Equal Credit Opportunity Act, Home Mortgage Disclosure Act, TILA, RESPA, Homeowners Protection Act, Consumer Leasing Act, Secure and Fair Enforcement for Mortgage Licensing Act, Fair Credit Reporting Act, FDCPA, Electronic Fund Transfer Act, Truth in Savings Act, and Privacy of Consumer Financial Information (also known as the "Gramm-Leach-Bliley Act")). Examiners are thorough and expect prompt, written, clear, comprehensive and continuously updated policies and procedures, as well as demonstrable evidence of an entity's understanding and communication of, and monitoring for compliance with, articulated policies.

After the examination is complete, a compliance rating on a scale of one (strong compliance position) to five (in need of strongest supervision) is assigned. Ratings are based on the entity's compliance system, management's ability to monitor for compliance, policies and procedures that are in place, the identification and communication of changes in the law and resultant changes in the compliance program, staff training, an identification of internal compliance violations and remediations, and evidence of any discriminatory practices. A report is prepared, including the rating, a discussion of major strengths and weaknesses, and any required corrective actions. The final report is shared with any governing prudential regulator. If an entity receives an unsatisfactory rating or an enforcement action is recommended, the CFPB will meet with an entity's directors or principals and perform follow-up assessments to gauge remediation and ongoing compliance.

Why Should You Care?

Lest there be any doubt about the CFPB's institutional fervor, consider its own words as emblematic of its intentions, activism, diligence and even (according to a few) regulatory ferocity:

> Since 2011, we have secured over $10.8 billion ... in relief for more than 25 million consumers harmed by illegal practices.
>
> We've taken several actions against mortgage-servicing companies for failing to tell borrowers when their loan-modification applications were incomplete, denying loan modifications to qualified borrowers,

24 12 U.S.C. § 5481(26).
25 *Id.*
26 12 U.S.C. § 5515.
27 12 U.S.C. § 5512.
28 12 U.S.C. § 5562.
29 12 U.S.C. § 5564.
30 *Id.*
31 A digital copy is available at files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf.

> failing to honor modifications for loans transferred from other servicers, and illegal foreclosure practices. We have also taken action against companies in the mortgage industry for steering consumers into costlier loans, for paying illegal kickbacks in exchange for business, and for making inadequate disclosures or using deceptive ads. We've secured billions of dollars of relief for millions of consumers harmed by deceptive marketing and enrollment of credit card add-on products, unfair billing, and illegal debt-collection practices.
> We have taken action against payday lenders and installment lenders for unlawful lending and collections practices that include using false threats of lawsuits or criminal prosecution to collect debts, charging undisclosed fees to servicemembers, and robo-signing court documents related to debt-collection lawsuits.[32]

For the individual consumer heretofore victimized by unscrupulous financial services providers, the CFPB's activism is a welcome respite from feelings of oppression and helplessness. For the young and very modestly paid soldier, sailor, airman or marine taken in by dishonest auto finance or payday lenders, and harassed by high-pressure collection tactics laced with threats of exposure to the chain of command, the CFPB's powers are a salvatory port in the financial storm.[33]

However, for a service provider or smaller entity, the CFPB's overzealous and heavy-handed regulatory tactics, arising out of near limitless and sweeping powers conferred by broad enabling statutory language, could result in financial ruin. For low-income consumers, the CFPB's policies may hamper their ability to obtain products and services that are needed but might not be available through traditional financing sources. Future installments will discuss these and other reasons why you should care. abi

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32 *See* Anthony Alexis, "You Have the Right to a Fair Financial Marketplace," CFPB, July 21, 2015, *available at* www.consumerfinance.gov/blog/you-have-the-right-to-a-fair-financial-marketplace/.

33 *See* "CFPB Orders Servicemember Auto Loan Company to Pay $3.28 Million for Illegal Debt Collection Tactics," CFPB, Oct. 28, 2015, *available at* www.consumerfinance.gov/newsroom/cfpb-orders-servicemember-auto-loan-company-to-pay-3-28-million-for-illegal-debt-collection-tactics/.

Ramifications of the Consents Orders Against the Nation's Two Largest Debt Buyers

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In the wake of the financial crisis, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act).[1] Title X of the Dodd-Frank Act established the Consumer Financial Protection Bureau (CFPB), and authorizes the CFPB to supervise certain consumer financial services companies and large depository institutions and their affiliates for consumer protection purposes. The CFPB's stated purpose is set forth by Section 1021 of the Dodd-Frank Act: "[t]he [CFPB] shall seek to implement and, where applicable, enforce federal consumer financial laws consistently for the purpose of ensuring that all consumers have access to markets for consumer financial produces and services and that markets for consumer financial products and services are fair, transparent, and competitive."[2]

Subject to the provisions of the Dodd-Frank Act, the CFPB has responsibility to implement, examine for compliance with, and enforce "Federal consumer financial law," including, among other things, Title X itself—which includes a prohibition against unfair, deceptive or abusive acts or practices (UDAAP) in connection with transactions for consumer financial products; the Telemarketing and Consumer Fraud and Abuse Prevention Act; several rules issued by the Federal Trade Commission (FTC);[3] and 18 other pre-existing consumer financial protection laws.

The authority of the CFPB falls into three broad categories: supervisory, which includes the power to examine and to impose reporting requirements on financial institutions; enforcement of various consumer protection laws and regulations; and rulemaking. Some of these powers are newly established by the CFPA, such as the authority to supervise certain nondepository financial institutions. A significant portion of the CFPB's powers, however, was transferred from other regulators to the CFPB, including the authority to prescribe regulations under the enumerated consumer laws. The focus of this paper is to provide a brief overview of the CFPB's enforcement authority, and the recent consent orders by the CFPB against the nation's two largest debt-buying companies.

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[1] Dodd-Frank Act § 1011(a) (codified at 12 U.S.C. § 5491); CFPB, Supervision and Examination Manual —Version 2, Overview 1 (Oct. 31, 2012) (CFPB Supervision and Examination Manual), *available at* http://www.consumerfinance.gov/guidance/supervision/manual/.

[2] Dodd-Frank Act § 1021, 12 U.S.C. § 5511.

[3] *Supra* note 1.

CFPB's Enforcement Powers

The CFPB has essentially adopted an enforcement program modeled after those developed by other agencies, such as the U.S. Securities and Exchange Commission (SEC) and FTC, that have only civil or administrative, and not criminal, enforcement powers. Under the Dodd-Frank Act, the CFPB's investigations are designed to determine whether any person is, or has, engaged in conduct that violates federal consumer financial law.[4]

If it is determined that a federal consumer financial law has been violated, the CFPB may then bring administrative proceedings or civil actions in federal district court or state court. The CFPB can conduct hearings and adjudication proceedings, including cease-and-desist proceedings, to enforce compliance with the CFPA, regulations the CFPB issues, and the other federal laws the CFPB is authorized to enforce.[5] In an administrative proceeding or in a civil action brought under federal consumer financial law, the court or the CFPB "shall have jurisdiction to grant any appropriate legal or equitable relief," including, but not limited to the following:[6]

- Rescission or reformation of contracts
- Refund of money or return of real property
- Restitution
- Disgorgement or compensation for unjust enrichment
- Payment of damages or other monetary relief
- Public notification regarding the violation
- Limits on the activities or functions of the person against whom the action is brought
- Civil monetary penalties (which can go either to victims or to financial education)

The provisions that allow the CFPB to seek restitution and damages are significant because other regulators, such as the SEC, currently lack such powers. The Dodd-Frank Act, however, does not authorize the imposition of exemplary or punitive damages, but it does allow state or federal regulators to recover their costs if they prevail in the action.[7]

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[4] *See* 77 Fed. Reg. 39101, 39102 (June 29, 2012).

[5] Dodd-Frank Act §§ 1053, 1055(a) (codified at 12 U.S.C. § 5563).

[6] 12 U.S.C. § 5565.

[7] Dodd-Frank Act § 1055(a)(3), (b).

The Dodd-Frank Act also provides that "[a]ny person that violates, through any act or omission, any provision of Federal consumer financial law shall forfeit and pay a civil penalty." The statute provides for three tiers of penalties.[8] The first tier applies to "any violation of a law, rule, or final order or condition imposed in writing by the [CFPB]," and sets a penalty of not more than $5,000 per day that the violation occurred or the party continues to fail to pay the penalty. The second tier provides that "for any person that recklessly engages in a violation of a Federal consumer financial law, a civil penalty may not exceed $25,000 for each day during which such violation continues." And the third tier provides that "for any person that knowingly violates a Federal consumer financial law, a civil penalty may not exceed $1,000,000 for each day during which such violation continues."[9] The statute requires, however, that the CFPB or court consider "the appropriateness of the penalty" in light of mitigating factors, including "the size of financial resources and good faith of the person charged;" "the gravity of the violation or failure to pay;" "the severity of the risks to or losses of the consumer, which may take into account the number of products or services sold or provided;" "the history of previous violations;" and "such other matters as justice may require." The funds collected by the CFPB may be used either for consumer victims or for financial education.[10]

Last year, the CFPB initiated more than 50 enforcement actions, reaching settlements in most of those cases for a total of more than $1.6 billion in compensation to consumers (more than $30 million per settlement, on average) as well as approximately $190 million in civil penalties.[11] While mortgage origination, servicing, and other mortgage related issues are a perennial focus of the CFPB, a number of other consumer financial products and services garnered enforcement attention this past year, including matters related to:

- Small dollar lending practices[12]
- Debt buying and collection[13]
- Auto finance[14]

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[8] Dodd-Frank Act § 1055.

[9] Dodd-Frank Act § 1055(c)(1)–(2).

[10] *Supra* note 1, CFPB Supervision and Examination Manual, Overview 7.

[11] *See* Semi-Annual Report of the Consumer Financial Bureau (April 1, 2015 – September 30, 2015), *available at* http://files.consumerfinance.gov/f/201511_cfpb_semi-annual-report-fall-2015.pdf.

[12] *See, e.g.,* http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-military-allotment-processor-for-charging-servicemembers-hidden-fees/.

[13] *See, e.g.,* http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-bad-check-debt-collector/.

[14] *See, e.g.,* http://www.consumerfinance.gov/newsroom/cfpb-and-doj-reach-resolution-with-honda-to-address-discriminatory-auto-loan-pricing/.

- Billing practices (mobile phones and online)[15]

Although the Dodd-Frank Act gives the bureau the authority to enforce numerous financial services statutes, the CFPB almost always cited companies for UDAAP violations, and sought some type of civil money penalty—whether millions of dollars or a single dollar. The CFPB has relied upon UDAAP as its primary enforcement tool for a number of reasons.

First, penalties for violating the UDAAP provision can be drastic—up to $1 million per day for a knowing violation of the law. Perhaps more importantly though, the language of the UDAAP provision is broad and vague, allowing the CFPB to rely on its UDAAP authority to challenge conduct it finds troubling, even if not in violation of any express legal requirement. Indeed, although some precedent exists regarding the interpretation of "unfair" or "deceptive," those terms remain elastic. As to "abusive," there is no prior precedent, and the statute provides little guidance as to what constitutes an abusive act or practice. While both Congress and industry groups have called upon the CFPB to clarify the scope and meaning of UDAAP through its rulemaking authority, the CFPB has declined to do so, choosing instead to rely upon its enforcement authority and develop its UDAAP doctrine on a case-by-case basis.

Encore and PRA Consent Orders

The CFPB announced consent orders were entered into separately with Encore Capital Group (Encore)[16] and Portfolio Recovery Associates (PRA)[17], the nation's largest debt-buying firms, for deceptive collection practices, on September 9, 2015. The CFPB cited both debt-buyers for what it termed illegal debt collection activities, including purchasing debts they should have known were inaccurate and/or not legally enforceable and attempting to collect on that debt through unlawful means. Encore was ordered to pay up to $42 million in refunds to consumers while PRA was ordered to pay up to $19 million in refunds. Each was assessed civil penalties as well.

As stated in the consent orders, the CFPB found that both Encore and PRA engaged in the following:

- **Improper Debt Buying Practices**. Both companies purchased debt that they knew or should have known was inaccurate, was missing information to substantiate the debt, or where in some instances, the seller had disclaimed its accuracy and enforceability. Both companies stated incorrect balances, interest rates, and payment due dates in attempting to collect debts from consumers.

[15] *See, e.g.,* http://www.consumerfinance.gov/newsroom/cfpb-takes-action-to-obtain-120-million-in-redress-from-sprint-and-verizon-for-illegal-mobile-cramming/.

[16] Copy of the Encore Consent Order *available at* http://files.consumerfinance.gov/f/201509_cfpb_consent-order-encore-capital-group.pdf.

[17] Copy of the PRA Consent Order *available at* http://files.consumerfinance.gov/f/201509_cfpb_consent-order-portfolio-recovery-associates-llc.pdf.

- **Improper Handling of Consumer Disputes**. Both companies relied upon the consumer to advise as to the accuracy of the debt and failed to provide "account level documentation" after the validation period, failed to investigate oral disputes and referred matters to law firms knowing the accounts had been disputed.

- **Illegal Litigation Practices**. The CFPB also found that the companies engaged in unlawful litigation practices both internally and with outside law firms. Notably, the companies sued consumers in state courts across the country with no intention of ever proving the debts. The companies made no effort to obtain the documents to back up their claims, relying instead on consumers not to file a defense and winning the lawsuits by default. The companies also filed affidavits that contained misleading statements as well as sent thousands of letters to consumers offering to settle, without revealing that the debt was time-barred and too old for litigation.

In some instances, PRA and Encore were found to have violated the Fair Debt Collection Practices Act (FDCPA) even though they complied with the plain meaning of the FDCPA. For example, pursuant to 15 U.S.C. § 1692g(a)(3), if a consumer fails to dispute the debt, or any portion thereof within 30 days from the date they receive the initial notice, the debt will be assumed to be valid by the debt collector. The CFPB, however, found that both PRA and Encore failed to investigate the accuracy of the debts they were collecting, even in instances where there was no evidence of a dispute or any communication by the consumer. The CFPB also found that PRA and Encore failed to investigate oral disputes outside the 30-day validation period, even though the FDCPA does not require a debt collector to do so.

Moreover, the CFPB took issue with the law firms hired by both PRA and Encore suggesting that the number of attorneys in the respective law firms was extraordinarily small compared to the volume of the cases being sued upon. Neither consent order found that any of these law firms had violated any Rules of Professional Conduct or that any attorney in any of these firms was not otherwise qualified to represent PRA or Encore.

Both PRA and Encore were ordered to cease collections on millions of dollars of debt, and move to vacate all judgments and dismiss all lawsuits where it misrepresented that a debt was assumed valid or where a lawsuit was filed past the statute of limitations. That amount could reach in excess of $125 million. Both companies are also prohibited from making any representation regarding any debt unless it can be substantiated including a review of all "original account level documentation" reflecting the consumer's name and claimed amount before filing collection lawsuits and, in most circumstances, before attempting to collect debt. This original account-level documentation includes any document that a creditor provided to a consumer about a debt, a complete transactional history of that debt, and a copy of any judgment on that debt. Further, before initiating any collection lawsuit, Encore and PRA are required to be in possession of a list of all prior owners of the debt and a certified copy of documents evidencing the transfer of ownership of the debt.

Conclusion

The effect of these consent orders will be far-reaching. For one, the reputations of both PRA and Encore have been severely compromised such that any evidence to substantiate a debt will be met with suspicion both by the consumer and the courts. Look for increased litigation against PRA, Encore and their law firms for no other reason than that they do business together. The consent orders have also created an environment of mistrust resulting in a law firm being unable to rely on the information provided to it by its client. Law firms will be required to adopt enhanced policies and procedures to ensure that not only is the information provided to it by its client accurate, but that the debt has not otherwise been disputed and that evidence exists to substantiate the debt. Finally, although the CFPB has yet to release its proposed regulations on debt collection, these enforcement actions reveal that the CFPB is likely to require third-party debt collectors to possess certain information about a debt before contacting a consumer, including the original, account-level documents.