

# A Crash Course on the Consumer Financial Protection Bureau

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*An Overview of the Consumer Financial  
Protection Bureau  
Who, What, When, and How*

A Crash Course on the Consumer Financial Protection Bureau  
July 28, 2011

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## **I. OVERVIEW OF THE CFPB**

### **A. Background**

1. Center piece of Dodd-Frank Act
2. Uber-agency
3. Transfer of agency personnel and 18 separate consumer protection laws
4. Nuclear penalties

## **I. OVERVIEW OF THE CFPB (cont.)**

### **B. What is the Bureau?**

1. Executive Agency within Federal Reserve System
2. Director appointed by President
3. Extensive budget
4. Consumer Advisory Board to advise Bureau
5. Financial Oversight Council

## **I. OVERVIEW OF THE CFPB (cont.)**

### **C. Objectives**

1. Timely, understandable information
2. Eliminate deceptive practices
3. Protection against discrimination
4. Eliminate outdated regulations
5. Enforce consumer protection laws

## II. COVERED PERSONS

### A. What's Covered (Financial Activities)

- Extension of Credit
- Acquiring, Selling, Brokering or Servicing Mortgage Loans
- Real Estate Settlement (not defined but clearly covers closing/escrow services—less clear about things like home warranties not regulated by insurance)
- Appraisals
- Financial Advice
- Credit Counseling, Debt Management, Debt Collection

## II. COVERED PERSONS (cont.)

### B. Who's Covered

- Banks, Lenders
- Mortgage Brokers
- Mortgage Servicers
- Financial Advisers
- Appraisers
- Credit Counselors

## **II. COVERED PERSONS (cont.)**

### **C. Who Dodged a Bullet (Exemptions)**

- Business of Insurance
- Real Estate Brokers/Agents
- Accountants
- Attorneys
- Persons Regulated by State Insurance Regulators (Title Companies)
- Automobile dealers

## III. POWERS AND PENALTIES

### A. Enormous Powers

#### 1. Consumer functions and personnel transferred from:

- FRB
- OCC
- OTS
- FDIC
- NCUA
- HUD

### III. POWERS AND PENALTIES (cont.)

#### A. Enormous Powers (cont.)

##### 2. Transfer for Existing Consumer Laws

- EFTA
- ECOA
- FCRA
- GLB
- FDCPA
- HOEPA
- HMDA
- TIL
- RESPA
- SAFE Act
- FDIC
- Interstate Land Sales

### **III. POWERS AND PENALTIES (cont.)**

#### **A. Enormous Powers (cont.)**

3. Fair Housing Act/FTC Act Stay in Place
4. Power to Write Rules
  - a. “Carry out purposes and objectives” of federal consumer financial laws and “prevent evasions thereof”
  - b. Mandate form/content of disclosures
  - c. Identify unfair and deceptive practices
  - d. Restrict pre-dispute arbitration
  - e. Impose registration requirements

### III. POWERS AND PENALTIES (cont.)

#### B. Penalties

1. Nuclear arsenal of weaponry
2. Including:
  - Rescission
  - Refunds
  - Restitution
  - Damages
  - Unjust Enrichment
  - Public Notification
3. Enforcement authority beyond original statutes
  1. Can launch investigations (C&D power)
  2. Can bring litigation
  3. Can conduct studies, collect information and make reports

### **III. POWERS AND PENALTIES (cont.)**

#### **B. Penalties (cont.)**

##### 4. Civil Money Penalties

- up to \$5,000 per day
- \$25,000 per day for reckless violation
- up to \$1.0 million for knowing violation

## **IV. THE STRUCTURE OF THE CFPB**

### **A. Director / Office of Director**

- On July 18, 2011 the President nominated Richard Cordray to be the CFPB director.
- Mr. Cordray is a former Attorney General of Ohio and currently serves as the CFPB's Assistant Director for Enforcement.

## **IV. THE STRUCTURE OF THE CFPB (cont.)**

### **B. Divisions**

- Consumer Education & Engagement
- Research, Markets & Regulations
- Supervision, Fair Lending & Enforcement
- General Counsel
- External Affairs

### **C. Research, Markets & Regulations**

- Led by Associate Director Raj Date, previously a Managing Director at Deutsche Bank Securities.
- As Raj Date is taking over Elizabeth Warren's position as Special Advisor to the Bureau on August 1, it is unclear whether he will continue as Associate Director.

## **IV. THE STRUCTURE OF THE CFPB (cont.)**

### **D. Supervision, Fair Lending & Enforcement**

- Large Bank Supervision: Steve Antonakes, former Commissioner of Banks in Massachusetts.
- Non-Bank Supervision: Peggy Twohig, former Associate Director of the Division of Financial Practices at the Federal Trade Commission.
- Fair Lending: Patrice Ficklin, formerly at Fannie Mae and at law firm Relman, Dane & Colfax.
- Enforcement: Until his nomination for director, Richard Cordray, former Attorney General of Ohio. It is unclear who will be tapped to head enforcement within the Bureau now.

# *Panel on CFPB Rulemaking*

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*Overview of the Bureau's Regulatory and  
Supervisory Authority*

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## **Regulatory Authority**

- Whom and what is covered
- What are obligations of covered persons
- Information gathering

## **Supervisory Authority**

- All persons and products are not equal
- Examination authority does not apply to all covered persons
- Bureau issues notice regarding covered markets and participants

## Regulatory Authority: Whom and What Does the CFPA Cover?

- **Covered person**
  - Any person or entity that engages in offering or providing a consumer financial product or service, and their affiliates that act as “service providers” for them
  - The Act defines “service provider” as a person that provides a material service to a covered person in connection with the offering or provision by the covered person of a consumer financial product or service.

## Whom and What Does the CFPA Cover? (cont.)

- **Consumer financial product or service**
  - Any financial product for use by consumers primarily for personal, family, or household purposes

## **Whom and What Does the CFPA Cover? (cont.)**

- Extending credit
- Acquiring, purchasing, selling, brokering, or servicing loans or other extensions of credit (but not solely extending commercial credit to an originator of consumer credit)
- Leasing or brokering leases equivalent to purchase finance arrangements
- Providing real estate settlement services
- Performing appraisals of real estate or personal property
- Deposit-taking, money transmitting, or money services
- Selling, providing, or issuing stored value
- Check cashing, check collection, and check guaranty services
- Financial data processing and transmission services
- Providing financial advisory services, including credit counseling
- Providing services to assist a consumer with debt management or debt settlement, with modifying loans, or with avoiding foreclosure
- Collecting, analyzing, maintaining, and providing consumer report information
- Debt collection
- Other as defined by Bureau regulation under certain conditions

## Whom and What Does the CFPA Cover? (cont.)

- Related persons also are covered persons
- The term applies only with respect to a covered person that is not a bank holding company, credit union, or depository institution

## Whom and What Does the CFPA Cover? (cont.)

- Related persons are:
  - Directors, officers, employees with managerial responsibility, controlling shareholders of, or agents for, the covered person
  - Shareholders, consultants, joint venture partners, and any other person as determined by the Bureau who materially participates in the conduct of the affairs of the covered person
  - Independent contractors (including attorneys, appraisers, or accountants) who knowingly or recklessly participate in any violation of law or regulation, or breach of a fiduciary duty

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## What Persons or Activities are Expressly Excluded?

To the extent they are not offering or providing consumer financial products or services, the following are not covered by CFPA:

- Business of insurance
- Providers of electronic conduit services
- Merchants, retailers, and sellers of non-financial goods or services
- Real estate licensees
- Manufactured home retailers and modular home retailers
- Accountants and tax preparers
- Attorneys
- Persons regulated by a state insurance regulator
- Employee benefit and compensation plans
- Persons regulated by the SEC or a state securities commission
- Persons regulated by the CFTC
- Persons regulated by Farm Credit Administration
- Solicitation or making of charitable contributions
- Auto dealers

But they may be subject to information requests by the Bureau.

## **What Rulemaking Authority Will the Bureau Have?**

The Bureau will have exclusive authority to prescribe rules under the federal consumer financial laws.

The Act authorizes—and in some cases requires—the Bureau to make rules or guidelines regarding such areas as:

- identifying prohibited unfair, deceptive, or abusive acts or practices, including with respect to mortgage loan modification and foreclosure rescue services;
- mandating the form and content of disclosures to consumers, with a safe harbor for a covered person that uses a model form;
- conditions or limitations on reverse mortgages; and
- the accuracy and integrity of information furnished to consumer reporting agencies, and regulations requiring persons that furnish information to credit reporting agencies to establish reasonable policies and procedures for implementing those guidelines.

## Information Gathering

To support its rulemaking functions, the Bureau must monitor for risks to consumers in the offering or providing of consumer financial products or services.

As part of this monitoring, the Bureau:

- Must publish at least one report per year of significant findings.
- May gather information from time to time regarding the organization, business conduct, markets, and activities of covered persons and service providers. The Bureau may gather this information from:
  - Exam reports, consumer complaints, voluntary surveys and interviews of consumers, surveys and interviews with covered persons and service providers, and review of available databases.
  - *And the Bureau may require covered persons and service providers to file annual or special reports (under oath or otherwise), or written answers to specific questions.*

## **What Authorities Will Be Transferred to the Bureau?**

Most consumer financial protection functions of the Board of Governors, FDIC, NCUA, OCC, and OTS will be transferred to the Bureau. All consumer protection functions of HUD relating to RESPA and the S.A.F.E. Act are transferred to the Bureau.

“Consumer financial protection functions” means the authority to prescribe rules or issue orders or guidelines pursuant to any federal consumer financial law, as well as the authority to examine large banks.

## Supervisory Authority

- The Act requires the Bureau to examine large banks, thrifts, credit unions, and their affiliates.
- The Act also allows the Bureau to conduct routine examinations of *nonbank* covered persons in the residential mortgage lending, private education lending, and payday lending markets, among others.

## Supervisory Authority (cont.)

- For other markets of consumer financial products or services, the Bureau's supervision program will generally apply only to a "larger participant" of those markets.
- Congress left it up to the Bureau to decide which markets to target, and how to define who qualifies as a "larger participant".

## Supervisory Authority (cont.)

- In its notice and request for comment, the Bureau has proposed six markets for possible inclusion in an initial rule:
  - Debt collection
  - Consumer reporting
  - Consumer credit and related activities
  - Money transmitting, check cashing and related activities
  - Prepaid cards
  - Debt relief services.

## Supervisory Authority (cont.)

- The Bureau could have included other markets on this list, but seems to have singled out these particular markets generally because of the volume of consumer transactions that they involve.
- 14% of consumers have debt that is subject to the collections process.
- Over 11 million households have used prepaid card products.

## **Risk-Based Supervision Program**

Under the CFPA, the Bureau must set up a Risk Based Supervision Program, requiring reports from and conducting examinations of nondepository covered persons, to:

- Assess compliance with the requirements of Federal consumer financial law;
- Obtain information about the activities and compliance systems or procedures of such person; and
- Detect and assess risks to consumers and to markets for consumer financial products and services.

## **Risk-Based Supervision Program (cont.)**

Under the Program, in supervising nondepository covered persons, the Bureau must assess the risks posed to consumers in the relevant product markets and geographic markets by taking into consideration:

- The asset size of the covered person;
- The volume of transactions involving consumer financial products or services in which the covered person engages;
- The risks to consumers created by the provision of such consumer financial products or services;
- The extent to which such institutions are subject to oversight by State authorities for consumer protection; and
- Any other factors that the Bureau determines to be relevant to a class of covered persons.

## Rulemaking Powers

While coordination with state and federal regulatory agencies is meant to lessen the regulatory burden on industries, the Bureau has broad rulemaking powers under the CFPA to require nondepository covered persons to:

- Generate, provide, or retain records for the purposes of facilitating supervision of such persons and assessing and detecting risks to consumers.
- Require covered persons to meet certain bonding or other financial requirements, to ensure that such persons are legitimate entities and are able to perform their obligations to consumers.
- Require background checks for principals, officers, directors, or key personnel.
- Develop and implement a registration system. The Bureau must consult with state agencies to coordinate or combine systems for registrations.

## *The CFPB's New UDAAP Standard*

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## The Context

The Consumer Financial Protection Act identified as one of the primary objectives of the CFPB:

- To protect consumers from **unfair, deceptive, or abusive acts or practices**

In her first round of testimony before Congress, Elizabeth Warren stated that: “[t]o **address a root cause of the financial crisis of 2008**, Congress established the CFPB: .... 2) to protect consumers from unfair, deceptive, or abusive acts or practices, and from discrimination ...”

## Summary

- Background development of federal and state UDAP laws
- Federal UDAP rulemaking authority prior to Dodd-Frank
- The CFPB's UDAAP mandate
- Rulemaking authority under the CFPA and "new" UDAAP standards

## Rulemaking vs. Enforcement

- “Substantive rulemaking is non-adjudicatory and nonspecific in that it does not single out individuals or entities as targets, but deals rather with the practices of an entire industry.” FTC OM, Ch. 7.
- By contrast, enforcement activities include issuance and litigation of administrative complaints, issuance of orders to cease and desist, acceptance of consent agreements, compliance/civil penalty proceedings, and various other techniques.
- In the absence of rulemaking, enforcement activities have been used to create new UDAP standards.

## Development of UDAP Law and Standards

- Federal Law
  - Statutes (*e.g.*, FTCA, HOEPA)
  - Federal regulations (*e.g.*, Reg. AA, Reg. Z)
  - Supervisory guidance
  - Enforcement (*e.g.*, OCC, DOJ)
  
- State Law
  - Statute (mini-FTC Acts)
  - State AGs
  - Private actions

## Guideposts: FTC's Original UDAP Authority

- Section 5 of the FTCA grants authority to the FTC to enjoin unfair and deceptive acts and practices.

“The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in [section 57a\(f\)\(3\)](#) of this title, Federal credit unions described in [section 57a\(f\)\(4\)](#) of this title ... from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.”

- FTC has substantive rulemaking authority.
- FTC rulemaking is restricted by Magnuson Moss, which requires, among other things, that the FTC issue rules only after it makes determinations as to the **prevalence** of the acts or practices under investigation.

## Agency Advantages of Rulemaking

According to the FTC, rulemaking can:

- save the agency resources compared with proceeding on a case-by-case basis to terminate industry-wide practices;
- it can provide businesses greater certainty as to what business practices are not permissible;
- it allows the agency to solicit and consider a wide range of data and viewpoints from various interested persons to formulate a rule that is sound and fair to those who will be affected by it; and
- it avoids singling out one respondent for initial imposition of a new and perhaps costly legal obligation. (FTC Operating Manual, ch. 7).

## Growing Federal Authority to Write UDAP Rules

- Authority to write UDAP rules under FTCA expanded to the OCC, OTS, FDIC, and NCUA (FTCA, Section 57a, 1975).
- Prudential regulators gradually began issuing UDAP guidance.
- Due to lack of guidance and amorphous nature of UDAP concepts, however, there have not been rules that have enabled financial services providers to understand comprehensively what constituted UDAP.

## **FRB's Rulemaking Authority Under HOEPA**

- Congress provided the FRB with broad, substantive rulemaking authority under HOEPA in connection with mortgage loans it deemed “unfair” or “deceptive” or designed to evade HOEPA’s requirements and to address refinance mortgage loans the Board deemed “abusive.” 15 U.S.C. 1639(l)(2)(A) and (B) (1994).
- Rules apply to all mortgage loans made by both depository institutions and non-bank companies.
- Legislative history of HOEPA pointed the FRB to state UDAP acts and the FTCA for determining standards for “unfair” and “deceptive.”
- FRB required to follow notice-and-comment rulemaking procedure, and required by Congress to hold hearings.

## UDAP Rules Issued by FRB Under HOEPA

- In 2008, under HOEPA, the FRB invoked its authority to prohibit certain “stated income” or “no doc” loans as UDAP. 73 Fed. Reg. 44522.
- FRB used more UDAP authority in 2009 to prohibit unfair longstanding and widespread credit card products (like teaser rates). 74 Fed. Reg. 5498.
- In 2010, FRB issued mortgage loan originator compensation rules. 75 Fed. Reg. 58509.
- Specific rules apply uniformly to all creditors and are enforceable by federal and state supervisory and enforcement agencies and, in many cases, private individuals.

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## FRB's 2008 Final Rule: The Melding of Unfair, Deceptive, and Abusive Standards

In its 2008 final rule, the FRB stated that the “goals of the amendments are to protect consumers from *unfair, abusive, or deceptive* lending and servicing practices while preserving responsible lending and sustainable homeownership....” 73 FR 44522.

In issuing the final rule, the FRB referenced its authority “to prohibit unfair or deceptive practices in connection with mortgage loans, as well as to prohibit abusive practices or practices **not in the interest of the borrower** in connection with refinancings.” See *also* 75 Fed. Reg. 58509.

## The “Unfairness” Standard

- HOEPA does not define what is “unfair” or “deceptive.”
- The Conference Report for HOEPA indicates that the FRB should look to standards used by state UDAP laws and the FTCA.
- Under FTCA, “an act or practice is unfair when
  - it causes or is likely to cause substantial injury to consumers
  - which is not reasonably avoidable by consumer themselves and
  - not outweighed by countervailing benefits to consumers or to competition.” 15 USC 45(a).
- The FTC is also permitted to consider established public policies, but such considerations may not serve as the primary basis for an unfairness determination.”

## The “Unfairness” Standard (cont.)

- The FTC’s interpretation of “unfairness:”
  - Consumer injury is the central focus of any inquiry regarding unfairness.
  - Consumer injury may be substantial if it imposes a small harm on a large number of consumers, or
  - If it raises a significant risk of concrete harm.
- The FTC looks to whether an act or practice is injurious in “**its net effects.**”
- The FTC also looks at whether consumers’ free market decisions are unjustifiably hindered. 42 FR 7740 (Credit Practices Rule.)

## The “Deceptive” Standard

- Not defined in FTCA (*but see* FTC Letter (“Dingell Letter”), 12/17/80). Three factors:
  - There must be a representation, omission, or practice that is likely to mislead the consumer.
  - The act or practice is examined from the perspective of a consumer acting reasonably in the circumstances.
  - The representation, omission, or practice must be material. It must be likely to affect the consumer’s conduct or decision with regard to a product or service.

## **FRB's Application of the "Deceptive or Misleading" Standard (2008)**

- Disclosures/advertisements must provide
  - "Accurate and balanced" information;
  - In a "clear and conspicuous" manner
  
- Examples of deceptive/misleading advertisements:
  - Failure to disclose that "fixed" rates are temporary;
  - Advertising a loan as "government-sponsored" when it is not;
  - Creating a false impression that mortgage broker is a "counselor;"
  - Making claims of "debt elimination" when one obligation is replacing another.

## Clues to the “Abusive” Standard

- “Abusive” not defined by FTCA, HOEPA, or Reg. Z.
- FRB 2008 Final Rule focused on four areas in connection with higher-priced mortgage loans:
  - Extending credit without regard to ability to repay (affordability/equity stripping);
  - Requiring verification of income and assets re: ability to repay;
  - Prohibiting prepayment penalties under certain circumstances; and
  - Requiring escrow accounts for taxes and insurance.

## Clues to the “Abusive” Standard (cont.)

- HOEPA/FRB rulemakings: “abusive” correlates to conduct not in the consumer’s interest; hints of a new, broad “duty of care.”
- OCC Advisory Letter AL 2003-2 (equating “abusive lending” with “predatory lending” and stating that abusive lending “can involve unfair or deceptive practices” in violation of Section 5 of the FTCA).
- Massachusetts v. Fremont (addressing “presumptively unfair” loans, court looked to OCC AL 2003-2 re: abusive lending).
- State UDAP statutes (incl. debt collection) suggest that whether conduct is “abusive” is determined based on the perception of a “reasonable” person.

## The Development Of State UDAP Standards

- Each state has its own unique UDAP law derived from the FTCA.
- Pleading burdens vary by state and in actions brought by AG versus private plaintiff.
- Broad state UDAP laws give state AGs powerful remedies including preliminary and permanent injunctive relief, restitution, civil penalties, attorney's fees, and power to have receiver appointed.
- Example: Massachusetts Chapter 93A, § 2 makes unlawful any “unfair or deceptive acts or practices in the conduct of any trade or commerce.” No definition of “unfairness; drawing on the FTCA, “there is no limit to human inventiveness in this field.” (Mass. Supreme Judicial Court).

## The Development of State UDAP Standards (cont.)

- Large, organized, multi-state enforcement actions by consortia of AGs (examples, foreclosure/modification settlement discussions, Ameritrust settlement, Countrywide settlement, Dell Financial Services)
- Examples of influential individual state AG actions:
  - *Massachusetts v. Fremont Investment & Loan* (“presumptively unfair loan” standard developed from broad application of Massachusetts’ “unfair” standard in Chapter 93A)
  - *New York v. Greenpoint*
  - *Ohio v. New Century Financial Corp.*
  - Minnesota/NAF settlement
- Relaxed burdens of proof

## The New CFPB UDAAP Standard

Under the CFPA, it is unlawful for any covered person or service provider to engage in “unfair, deceptive, or abusive acts or practices.” See § § 1031, 1036.

## The CFPB's UDAAP Rulemaking Authority

- One of the primary functions of the CFPB is to “issu[e] rules, orders, and guidance implementing Federal consumer financial law ...” and its authority is exclusive. § § 1021(c)(5), 1022(4)(A).
- The CFPA gives the Bureau the authority to issue rules identifying and preventing UDAAP with respect to consumer financial products or services. Specifically:
  - Section 1031(b) states that the CFPB “*may prescribe rules applicable to a covered person or service provider **identifying as unlawful, unfair, deceptive, or abusive** acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.*”
  - Section 1097 amends the Omnibus Appropriations Act of 2009 and gives the CFPB authority prescribe UDAP rules in connection with loan modification and foreclosure rescue services.

## “Unfair”

- Standard is consistent with FTC and FRB standard
- To declare a practice unlawful because it is **unfair**, the Bureau must have “a reasonable basis to conclude that
  - (A) the act or practices causes or is likely to cause **substantial injury to consumers**, which is **not reasonably avoidable by consumers**; and
  - (B) such substantial injury is **not outweighed by countervailing benefits** to consumers or competition.”

Section 1031(c)(1).

- Although the Bureau may consider established public policies as evidence, such considerations cannot serve as the primary basis for such a determination. § 1031(c)(2).
- See OCC Advisory Letter 2002-3 (stating standard derived from FTCA); FRB/FDIC March 11, 2004 letter.

## “Deceptive”

- The Act is silent on the definition of “deceptive,” providing the CFPB with discretion in developing a definition. Until it does so, the FTC’s standard will apply.
- Established tests for “deceptive” include the following factors:
  - Representation, omission, act or practice that is likely to mislead.
  - Act or practice would be deceptive from the perspective of a reasonable consumer.
  - Representation, omission, act or practice is material.
- See OCC Advisory Letter 2002-3 (stating standard derived from FTCA); FRB/FDIC March 11, 2004 letter.

## “Abusive” – The “New” Factor

- An **abusive** practice may only be deemed unlawful by the CFPB if it “**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) 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. § 1031(d).

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## Notice-and-Comment Rulemaking Procedure and Judicial Review Applicable to UDAAP

- The CFPB must follow the APA's minimum procedures for adjudication and rule making, as well as meet additional requirements set forth in the CFPA.
- There is a “strong presumption that Congress intends judicial review’ of administrative action.” This presumption is embodied in the APA, which provides that “final agency action for which there is no other adequate remedy in a court [is] subject to judicial review.”
- Under the APA, a rule promulgated informally can be challenged on the ground that it is:
  - arbitrary, capricious, abuse of discretion, or illegal;
  - unconstitutional;
  - *in excess of statutory authority*; or
  - due to failure to follow legal procedure.
- Informal, notice-and-comment rulemakings are generally not reviewed under **the substantial evidence** test.

## CFPB UDAAP Rulemaking – Less is More

- The CFPB authorizes the CFPB to engage in UDAAP rulemaking under the APA, a process that is less restrictive than the authority the FTC has had under Magnuson-Moss provisions of the FTCA.
- There are no requirements that
  - the CFPB show a pattern or practice of certain UDAP conduct prior to proposing a new rule; or
  - that the rule is supported by substantial evidence.
- UDAP is generally comprised of highly elusive and amorphous concepts; Congress put important limitations on the rulemaking powers of the FTC through Magnuson-Moss.
- Those limits do not apply to the CFPB, which will have significant discretion to issue broad rules regulating financial products and services. While “unfairness” and “abusive” are defined, deceptive is not defined and all three concepts are subjective.

## The CFPB's UDAAP Rulemaking Authority: Checks and Balances?

### Consultation with prudential regulators:

- The CFPB must consult with the appropriate prudential regulators prior to proposing a rule and during the comment process regarding consistency with prudential, market, or systemic objectives administered by such agencies. § 1022(2)(B).
- If the CFPB receives a written objection by a prudential regulator, it must include the objection in the adopting release and explain the basis for the CFPB's decision regarding the objection. § 1022(2)(C).

## Checks and balances (cont.)

### Council review of CFPB regulations (the “veto”):

- On a 2/3 vote, the Financial Stability Oversight Council can set aside a Bureau rule, but under only circumscribed conditions relating to “the safety and soundness of the United States banking system” or “the stability of the financial system.” § 1023.
- A petition to set aside a CFPB rule must be published in the Federal Register.
- Effectiveness of a rule may be stayed by action of the Council.
- Decision to set aside subject to judicial review.

## Procedural Requirements

- Cost/benefit analysis: In prescribing rules under the Federal consumer financial laws, the Bureau shall consider “the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule.” Section 1022(d)(A).
- Monitoring (Section 1022(4)(C))
- Assessments (Section 1022(d))
- CFPB and FTC must avoid conflict between rules prescribed by the CFPB under Section 1031 and rules prescribed by the FTC under the FTC Act (Section 1061(a)(5)(D)).

## **Areas Where the CFPB Will Likely Exercise its Rulemaking Authority under UDAAP**

- Mortgage loan products and pricing
- Credit card pricing and programs
- Debit card programs
- Overdraft protection programs
- Information reporting and sharing

## “Rulemaking” Through Enforcement Activity

- The CFPA does not restrict the CFPB’s ability to bring enforcement actions under the broad UDAP standards contained in the statute or other Federal consumer financial laws, including HOEPA.
- Section 1031(a) authorizes the CFPB to take “any action under subtitle E [Enforcement Powers] **to prevent** a covered person or service provider from committing or engaging in an **unfair, deceptive or abusive** act or practice **under Federal law** in connection with any transaction by a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.”
- Section 1024 provides exclusive enforcement authority to the CFPB as to any Federal consumer financial law that authorizes enforcement by another federal agency.
- The CFPA authorizes state AGs to continue enforcement activity with light limitations.

## Conclusion – Buckle Your Seatbelts

- New federal UDAP authority under the CFPA is equally broad, if not broader, than existing state standards. The scope of the CFPB's authority is equally as broad as the FRB's authority under HOEPA.
- However, unlike the FRB, CFPA will pursue UDAP violations from the perspective of the consumer, not as a prudential regulator.
- While “unfair” and “deceptive” are expressly defined by statute, the definitions leave room for subjective interpretation and “deceptive” is undefined altogether.
- There are some checks and balances in connection with the CFPB's UDAP rulemaking authority, but formal rulemaking based on “substantial evidence” is not required.

## Conclusion (cont.)

- Following notice and comment, the CFPB may promulgate UDAAP regulations that set out objective standards regarding products and services. But, it is difficult to define *per se* UDAAP conduct, and any rules promulgated by the CFPB would be prospective.
- The CFPB need not exercise its UDAAP rulemaking authority to develop UDAAP standards on a case-by-case basis through enforcement activity.

*Regulatory Burdens and Considerations for  
Providers of Consumer Financial Products and  
Services*

A Crash Course on the Consumer Financial Protection Bureau  
July 28, 2011

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## The Bureau's Authority Over Providers of Consumer Financial Products and Services

The Bureau has extremely broad authority over companies that offer consumer financial products and services.

A consumer financial product or service includes any financial product for use by consumers primarily for personal, family, or household purposes

## Examples of Affected Industries

The Bureau's general regulatory authority reaches much further and has the potential to impact a very broad assortment of industries.

- Retailers
- Prepaid Card Issuers
- Mobile Payments Providers

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## Consumer Groups Take Up the Fight

Various consumer watchdogs have already started to lobby for stricter consumer protections in industries subject to regulation by the Bureau.

For example, the Center for Financial Services Innovation has recommended the following consumer protections be applied to the prepaid card industry:

- Mandate FDIC pass-through insurance.
- Extend Regulation E as it is applied to payroll cards and enhance the protections by:
  - Lengthening the period for which transaction history is available;
  - Enabling consumers to make a single request for ongoing paper statements; and
  - Studying and leveraging advances in technology and insights in financial capability to improve the delivery of account information.
- Require a standardized fee-disclosure box and encourage additional disclosure tools for consumers, based on advances in technology and insights in financial capability.

*The Rulemaking Process and Challenging the  
Bureau's Rules*

A Crash Course on the Consumer Financial Protection Bureau  
July 28, 2011

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## **Brief Overview of Rulemaking Requirements Under the Administrative Procedure Act**

- Authority
- Procedure
- Review

## Authority

- Bureau 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.”
- Bureau’s authority exclusive as to all agencies other than the Federal Trade Commission. Bureau’s authority exclusive as to all agencies other than the Federal Trade Commission’s separate authority to address unfair or deceptive practices under the FTC Act. The Bureau must coordinate with the FTC in this area.
- Authority in absence of a Director
  - If the Bureau does not have a Senate-confirmed Director by the designated transfer date, the Bureau may continue to operate under the Secretary’s “Section 1066(a) authority,” which continues until a Director is confirmed by the Senate.
  - Until a Director is confirmed, the Secretary has the authority to carry out certain functions of the Bureau including the authority to prescribe rules, issue orders, and produce guidance related to the federal consumer financial laws *that were, prior to the designated transfer date, within the authority of the transferor agencies*. This does *not* extend to rules under newly-created authorities such as UDAP, model disclosure forms, and nondepository supervision.

## Procedure: “Notice and Comment”

- Legislative Rules vs. Interpretive Rules/Guidance
- Notice and Comment Procedures for Legislative Rules
- Procedures Specially Applicable to the Bureau

## Rule vs. Interpretation / Guidance

- Notice and comment procedures not required for guidance or “interpretive” rules, only for “legislative” rules. The line can be fuzzy.
- Legislative rules grant rights, impose obligations, or effect a change in existing policy. By contrast, interpretive rules are those that merely clarify or explain existing laws or regulations.
- Key issue is whether the agency statement has the “force of law.” The agency’s pronouncement is considered binding as a practical matter if it either appears on its face to be binding or is applied by the agency in a way that indicates it is binding.
- By contract, an agency policy statement issued without the signature of any Agency official, applied on a purely *ad hoc* basis, and that in no way binds the agency or regulated entities is not a legislative rule.
- For legislative rules, notice and comment procedures can be waived if they would be “impracticable, unnecessary, or contrary to the public interest.” This exception is narrowly construed.

## Notice and Comment Procedures

- Notice of Proposed Rulemaking
- Consideration of Proposed Rule
- Notice of Final Rule

## Notice of Proposed Rulemaking

- Sets out the proposed rule or alternatives.
- Includes a statement of basis and purpose and an initial regulatory flexibility analysis.
- Agency must identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules.
- Requests comments by a date certain.
- Agency can, but is not required to, accept late comments.

## Consideration of Proposed Rule

- No ex parte limitation during consideration because proceeding is not “on the record,” but agencies usually document significant contacts
- OMB review of “significant regulatory actions” under Executive Order 12866. \$100 million threshold for significance, unless proposed rule meets certain other criteria

## Notice of Final Rule

- Must address significant comments (tolerably terse vs. intolerably mute) *and* make a rational connection between the facts found and the choice made.
- Must provide a reasoned explanation for changes in policy or to a prior statutory interpretation, in order to show that “prior policies and standards are being deliberately changed, not casually ignored”.
- Must be a “logical outgrowth” of the proposed rule, which can include refraining from adopting a proposal altogether.
- Must be issued 30 days before rule is effective unless good cause.

## Notice of Final Rule

- Under the Regulatory Flexibility Act (RFA), must
  - Consider the effects of the regulation on “small entities” directly affected and therefore regulated by the challenged regulations.
  - Provide a regulatory flexibility analysis that explains why “each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.”
  - Executive Order 12866 analysis can substitute for RFA.

## **Procedures Specially Applicable to the Bureau**

- Matters the Bureau Must Consider
- Consultation Requirements
- Committee Review of Rules

## The Bureau Must Consider

- The potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule
  - EO 12866 requires consideration of costs and benefits of proposed rules, but courts do not review compliance
  - Inclusion in the statute allows judicial review of compliance
- The impact of the proposed rule on insured depository institutions and credit unions with assets under \$10 billion, and on consumers in rural areas

## The Bureau Must Consider (cont.)

- The impact of the proposed rule on the cost of credit for small entities.
  - Initial RFA must identify any significant alternatives to the proposed rule that would minimize any increase in credit costs for small entities.
  - Bureau must seek advice and recommendations from representatives of small entities, identified in consultation with the SBA.
  - Final RFA must describe steps the agency has taken to minimize any increase in credit costs for small entities.

## Requirement "To Consider," Though Procedural, Is Not Meaningless

- Agency's failure properly to consider factors as required by statute would make promulgation of the rule arbitrary and capricious.
- DC Circuit last week vacated an SEC rule for failing to comply with a statutory requirement to consider certain economic effects, holding that the agency “inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters.”

## Consultation Requirements

- Bureau must consult with the appropriate prudential regulators or other Federal agencies prior to proposing a rule, and during the comment process, regarding consistency with prudential, market, or systemic objectives administered by such agencies.
- If during that consultation process a prudential regulator provides a written objection to the proposed rule, the Bureau shall include in the notice of final rule a description of the objection and the basis for the Bureau decision, if any, regarding such objection.
- Consultation is without prejudice to authority of the Financial Stability Oversight Council to reject rules (see below).

## Broad Exemption Authority

- Bureau can exempt any class of covered person, service provider, or product or service from any rule or any provision of the Act as “necessary or appropriate.”
- Bureau shall consider, as appropriate:
  - the total assets of the class
  - the volume of transactions involved
  - existing provisions of law that adequately protect consumers

## Council Review and Opportunity to Reject Any Rule

- Process begins on petition by any member agency within 10 days of publication of the final rule. Council may stay the rule for up to 90 days and Council must act within 45 days or the period of any stay.
- APA notice and comment procedures do not apply to this process.
- Standard is whether the rule “would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk.”
  - House bill would change standard to “is inconsistent with the safe and sound operations of United States financial institutions.”
  - House bill would also eliminate the time limits within which the Council must act, change the required vote for stay or disapproval from 2/3 to a majority (excluding the Director), and require Council meetings considering stay or disapproval be open to the public.
- Judicial ability to meaningfully supervise is unclear.
  - No procedural standards
  - Standard hard to apply judicially

## Judicial Review of Rules

- General Standards
- Deference

## General APA Standards of Judicial Review

The reviewing court shall –

- hold unlawful and set aside agency action, findings, and conclusions found to be –
  - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
  - (B) contrary to constitutional right, power, privilege, or immunity;
  - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
  - (D) without observance of procedure required by law.

5 USC § 706(2)(A)

## General APA Standards of Judicial Review (cont.)

- Court must examine "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."
- An agency decision is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."
- Agency cannot look only to evidence that supports its conclusion without considering evidence contrary to its result. Likewise, review must be based on the "whole record" before the agency; the agency cannot merely provide those portions of the record that support it.
- Courts have concluded that a private party has no right to seek judicial review as to an agency's compliance with EO 12866. Courts will review RFA compliance, but will not necessarily vacate the rule for noncompliance.

## Deference to the Agency

- *Chevron* deference applies to agency interpretations reached after notice and comment rulemaking.
- Bureau afforded deference as to its interpretations of federal consumer financial laws as if it were the only agency authorized to apply, enforce, interpret, or administer such provision.

## Chevron Step 1 – No Deference at This Step

- The court employs “traditional tools of statutory construction,” to determine whether Congress has “directly spoken to the precise question at issue,” or left a gap for the agency to fill with its own interpretation.
- The question is whether Congress has “unambiguously foreclosed the agency’s statutory interpretation. . . . if we determine that statutory ambiguity has left the agency with a range of possibilities and that the agency’s interpretation falls *within* that range, then the agency will have survived *Chevron* step one.”
- To prevail under *Chevron* step one, a challenger “must do more than offer a reasonable or, even the best, interpretation; it must show that the statute *unambiguously* forecloses the [agency’s] interpretation.” A court will uphold an agency’s reasonable construction even if the court might have interpreted the statute differently if the question initially had arisen in a judicial proceeding.

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## **Chevron Step 2 – Considerable Deference at This Step**

- When an agency fills a ‘gap’ left by Congress reasonably, and in accordance with other applicable (e.g., procedural) requirements, the courts accept the result as legally binding.
- Court defers to the agency’s permissible interpretation if the agency has offered a reasoned explanation for why it chose that interpretation.
- Court asks whether the Board has reasonably explained how the permissible interpretation it chose is “rationally related to the goals of” the statute.

## **No Standards Are Specially Applicable to the Review of a Bureau Rule**

- The Act expressly provides that the Council review process does not affect any judicial review of a rule, which would proceed under the normal course.
- An injunction could be sought in court as to a rule the Council refused to stay
- Absent a request for preliminary or extraordinary judicial relief, the Council review process would be completed before a court was ready to act
- Special deference provision applicable to Comptroller determinations as to preemption of state laws does not apply outside that context

*The Combined GFE/TIL and the Bureau's  
Progress*

A Crash Course on the Consumer Financial Protection Bureau  
July 28, 2011

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## Background

- March 2008 - HUD proposed rules for a new Good Faith Estimate (GFE) and HUD-1 Settlement Statement (HUD-1)
  - GFE required the disclosure of loan terms and the bundled disclosure of certain settlement costs
- Public pleaded for coordination between HUD and the Federal Reserve Board to no avail
- Nov. 2008 - HUD finalized rules for GFE and HUD-1, which took effect Jan 1, 2010

## Section 1032(f) of Dodd Frank Act

### Combined Mortgage Loan Disclosure:

- “Not later than 1 year after the designated transfer date, the Bureau shall propose for public comment rules and model disclosures that combine the disclosures required under the Truth in Lending Act and sections 4 and 5 of the Real Estate Settlement Procedures Act of 1974, into a single, integrated disclosure for mortgage loan transactions covered by those laws, unless the Bureau determines that any proposal issued by the Board of Governors and the Secretary of Housing and Urban Development carries out the same purpose.”

## Combined Disclosure as a CFPB Priority

- Combined disclosure identified as regulatory priority for the CFPB
  - Seeks to combine two-page TIL disclosure and three-page GFE required within 3 business days of loan application
- Stated goals of CFPB:
  - Shorter, clearer forms to make it easier for consumers to understand key loan terms and compare offers
  - Make disclosure easier for industry to complete and use and address implementation burdens

## CFPB Progress to Date

- Fall 2010 – Roundtable discussion at Treasury Department with lenders and consumer groups
- Winter/Spring 2010-2011 – Research, outreach, analysis and initial form design
- May 2011 – first two drafts of form released for testing and public feedback with focus on disclosure of loan terms
- June 2011 – second two drafts of form released for testing and public feedback with focus on disclosure of closing costs
- Summer/Fall 2011 – three additional rounds of revision and testing

## CFPB Progress to Date (cont.)

### 2 Simultaneous Methods for Disclosure Development:

- Public testing
  - May 18, 2011 – first two drafts of form tested through consumer, lender, and broker interviews in Baltimore, MD
  - June 27, 2011 – second two drafts of form tested through interviews in Los Angeles, CA
  - Additional rounds of testing expected in Springfield, MA; Albuquerque, NM; Chicago, IL; and Birmingham, AL
- “Know Before You Owe” website
  - May 18, 2011 – first two drafts of form posted online
  - 13,096 comments received through website
  - June 27, 2011 – second two drafts of form posted online
  - Nearly 4,000 comments received through website

## Initial Issues Raised by Draft Forms

- Only one week allowed for public input on second round of draft forms
- Difference between “Monthly Loan Payment” and “Projected Payment” on page 1 not clear
- Operational and technology concerns
  - Producing double-sided disclosure
  - Different fonts, shading, dots, circles, arrows
- Disclosure of different loan products – temporary buy downs, construction-to-permanent loans, second-lien loans

## **Initial Issues Raised by Draft Forms (cont.)**

- Apparent retention of “tolerances” and changes to tolerance categories applied to closing costs
- Detailed itemization of title fees vs. bundled disclosure of origination fees
- Separately disclose fees according to TILA limitations on points and fees
- Challenge of anticipating implementation issues without underlying regulations

## What's Next

- 3 More rounds of draft forms
  - Initial testing and “Know Before You Owe” initiative expected to end in September
- “CFPB plans to issue a regulatory proposal on mortgage disclosure for public comment in the future”
  - Expected after initial testing ends in September
  - Forms will be tested again after receiving public comments through formal rulemaking process
- Development of integrated closing-stage disclosure
- No current indication that other TIL disclosures will be targeted for change

## What's Next (cont.)

- Possible timeline of events:
  - Proposed regulations with formal comment period - Not likely before the end of 2011
  - Final regulations issued – Late Summer/Fall 2012
  - Six-month to one-year implementation period
  - Effective date for combined form – Spring/Summer 2013



Attachments:

Round 1 forms – “Ficus” and  
“Pecan”

Round 2 forms – “Redbud”  
and “Dogwood”

# *Panel on CFPB Enforcement*

A Crash Course on the Consumer Financial  
Protection Bureau  
July 28, 2011

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## *Enforcement Coverage and Powers*

A Crash Course on the Consumer Financial Protection Bureau  
July 28, 2011

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## The Bureau's Enforcement Authority

One of the Bureau's stated main objectives is to enforce federal consumer financial law consistently and without regard to the status of a person as a depository institution. Consumer financial laws under the Board's authority include:

- CFPA;
- Certain "enumerated consumer laws" encompassing almost all federal laws that regulate the activities of consumer financial product and service providers, including the new mortgage reform provisions in Title XIV of the Dodd-Frank Act, but excluding the FTC Act and the Fair Housing Act;
- The laws for which authorities are transferred under subtitles F (transferring consumer financial protection functions and personnel) and H of the CFPA (making conforming amendments to 25 federal laws); and
- Any rule or order that the Bureau issues under any of the foregoing.

## What Acts Are Prohibited under the CFPA?

The CFPA expressly prohibits a covered person or service provider from:

- Engaging in unfair, deceptive, or abusive acts or practices, or knowingly or recklessly providing substantial assistance to a covered person or service provider in violation of the CFPA's UDAP provisions or rules;
- Offering or providing to a consumer a financial product or service not in conformity with federal consumer financial law; or
- Failing to permit access to or copying of records, establishing or maintaining records, or making reports or providing information to the Bureau.

## **Could You Be the Subject of an Enforcement Action by the CFPB?**

Yes, if you are a:

- Covered person
  - Including a related person
- Service provider
  - Provides a material service to a covered person in connection with the offering or provision by the covered person of a consumer financial product or service

## Aiding and Abetting

- Another way to be pulled into enforcement coverage is under the aiding and abetting provisions.
- Effective July 21, 2011, it is unlawful for any person to knowingly or recklessly provide “substantial assistance” to a covered person or service provider in violation of Dodd-Frank’s UDAP provisions or any UDAP rule or order the Bureau issues.

## Primary Enforcement Authority Over Very Large Banks

With respect to a federal consumer financial law, the Bureau has primary enforcement authority over:

- Covered persons that are insured depository institutions or credit unions with assets > \$10 billion; and
- Their affiliates.
- Any federal agency other than the FTC that is authorized to enforce a federal consumer financial law may make a referral to the Bureau.
- If the Bureau does not initiate an enforcement proceeding within 120 days of the referral, the other agency may initiate an enforcement proceeding.

## **Backup Enforcement Authority Over Smaller Banks, Savings Associations, and Credit Unions**

The prudential regulators retain exclusive enforcement authority (relative to the Bureau) over other banks and credit unions, but the Bureau could make a referral to the regulator to recommend action if the Bureau has reason to believe that the bank has engaged in a material violation of federal consumer financial law.

## **Exclusive Enforcement Authority Over Non-Depository Covered Persons**

If a federal law authorizes the Bureau and another federal agency to enforce federal consumer financial law against a non-depository covered person, the Bureau has exclusive authority to enforce that law.

But:

- Other federal agencies may make a referral to the Bureau by recommending that the Bureau initiate an enforcement proceeding.
- By 1/21/12, the Bureau and the FTC must negotiate an agreement to coordinate their enforcement actions regarding the offering or provision of consumer financial products or services by non-depository covered persons or their service providers.

## CFPB's Enforcement Powers

The Bureau has the power to:

- Issue civil investigative demands and file a petition to a court for their enforcement;
- Conduct joint investigations, including joint fair lending investigations with HUD and/or DOJ;
- Issue subpoenas;
- Conduct hearings and adjudication proceedings and issue cease-and-desist orders; and
- Commence civil actions.

## Statute of Limitations

- 3 years from the date of discovery of the violation to which the action relates.
- Actions arising under the enumerated consumer laws or laws for which authorities are transferred under the Act may be brought in accordance with the statute of limitations requirements of those laws, as applicable.

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## The Bureau's Enforcement Authority: The ECOA Example

- **Bureau:** has (1) primary authority to enforce ECOA against insured depository institutions and insured credit unions with total assets of more than \$10 billion and their affiliates; (2) exclusive authority (relative to all federal agencies other than the FTC) with respect to nondepository covered persons; and (3) may make referrals of insured depository institutions and insured credit unions with total assets of \$10 billion or less to the prudential regulators.
- **FTC:** retains its currently existing level of authority to enforce ECOA against nondepository institutions, including affiliates of insured depository institutions and insured credit unions with total assets of more than \$10 billion. Must coordinate its enforcement actions with the Bureau.

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## The Bureau's Enforcement Authority: The ECOA Example (cont.)

- **FRB, OCC, OTS, FDIC and NCUA**: have (1) exclusive authority (relative to Bureau) to enforce ECOA for smaller depository institutions; (2) backup authority to enforce ECOA for very large depository institutions and their affiliates if the Bureau does not act on a referral from the banking agency within 120 days.
- **DOJ**: authority to enforce ECOA is unchanged (*i.e.*, when a matter is referred to DOJ or whenever the Attorney General has reason to believe a creditor has engaged in a pattern or practice in violation of ECOA, the Attorney General may bring a civil action). Bureau may conduct joint fair lending investigations with DOJ.

*Remedies and Anticipated Enforcement Priorities*

A Crash Course on the Consumer Financial Protection Bureau  
July 28, 2011

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## The Bureau's Remedies

Penalties for violations of federal consumer financial laws, including rule or order violations, include:

- Rescission or reformation of contracts;
- Refunds of money or return of real property;
- Restitution;
- Disgorgement of compensation for unjust enrichment;
- Monetary damages;
- Limits on activities or functions of the person;
- Public notification of the violation, including costs for notification; and
- Civil money penalties of up to \$5,000 per day, up to \$25,000 per day for a reckless violation, or up to \$1 million per day for a knowing violation. Mitigating factors are to be considered, and the Bureau could reduce the penalty accordingly.

---

## Remedies for a Knowing Violation: The Million Dollar Question

The Bureau's remedies are in large measure patterned after the rights afforded to federal banking agencies under section 8 of the Federal Deposit Insurance Act. Most notably, section 8 penalties also include civil money penalties of up to \$5,000 per day, up to \$25,000 per day for a reckless violation, or up to \$1 million per day for a knowing violation.

However, the Bureau has fewer statutory hurdles it must scale before it can invoke these remedies.

Therefore, while section 8 penalties are available to federal banking regulators at the \$1 million level, there is no guarantee the Bureau will pursue such penalties in the same manner.

## The Million Dollar Question (cont.)

	<u>FDIA § 8</u>	<u>CFPA § 1055</u>
Scope of Enforcement Authority	Federal banking agencies may exercise their authority when an institution has engaged in an “unsafe or unsound practice” or has violated or the agency has reason to believe is about to violate “a law, rule, or regulation...”	The Bureau may initiate administrative enforcement actions with respect to any violation of a Federal consumer financial law.
Public Notification	Once a banking agency has obtained an order, whether as a result of an adjudicative administrative proceeding or because the party or institution consents to the order, the agency generally publicizes the order on its web site and through the issuance of a press release.	Public notification of the violation, including the costs of notification, is expressly available.

## The Million Dollar Question (cont.)

	<u>FDIA § 8</u>	<u>CFPA § 1055</u>
Restitution or Indemnification Against Loss	Federal banking agencies may impose a requirement that the person “make restitution or provide reimbursement, indemnification, or guarantee against loss if the person was unjustly enriched or the violation or practice involved a reckless disregard for the law or any applicable regulations or prior order of the appropriate federal banking agency. 12 USC § 1818(b)(6)(A).	The Bureau has the authority to require <i>rescission or reformation of contracts</i> ; refund of moneys or return of real property; restitution; and money damages, <i>without any explicit requirement that there first be a finding that the party or institution engaged in a “reckless disregard”</i> for the law, regulations or order at issue.
Limits on Activities or Functions	Permits limitations to be imposed on the activities of an institution in connection with enforcement proceedings.	Permits limitations to be imposed on the activities of an institution in connection with enforcement proceedings.

## The Million Dollar Question (cont.)

	<u>FDIA § 8</u>	<u>CFPA § 1055</u>
Civil Money Penalty	Provides for: (1) up to \$5,000 per day for any violation, even an unknowing violation, of any law, regulation, order or written agreement; (2) up to \$25,000 for each day during which a party engages in such a violation, breaches a fiduciary duty or recklessly engages in an unsafe or unsound practice, <i>where any of the foregoing is part of a pattern of misconduct; causes or is likely to cause more than a minimal loss to the institution or results in pecuniary gain or other benefit to the party</i> ; and (3) in the case of any insured depository institution, for each day that the violation, practice or breach continues, an amount not to exceed <i>the lesser of \$1,000,000 or 1 percent of the total assets of such institution</i> , with respect to any <i>knowing violation</i> of any law, regulation, condition, order or written agreement, unsafe or unsound practice or breach of fiduciary duty <i>which knowingly or recklessly causes a substantial loss to such depository institution or a substantial pecuniary gain or other benefit to such party</i> by reason of such violation, practice, or breach.	Provides for up to \$5,000 a day for any violation; up to \$25,000 a day for reckless violations (whether or not the violation is part of a pattern or misconduct or causes more than a minimal loss or results in pecuniary gain or other benefit); and \$1 million a day if the violation is knowing, <i>whether or not it causes a substantial loss or gain</i> .

## The Bureau's Remedies

- In an administrative proceeding or court action brought under federal consumer financial law, the court or Bureau may grant any of this relief without limitation.
- Litigation costs also may be recovered in actions brought by the Bureau, a state attorney general, or a state regulator to enforce any federal consumer financial law.
- The CFPB does not authorize the imposition of exemplary or punitive damages.

## The Bureau's Remedies (cont.)

- The CFPA says that it is unlawful for a covered person or service provider to violate a federal consumer financial law.
- Thus, the CFPA's penalty provisions effectively amend each federal consumer financial law by providing an entirely new set of remedies.

## **The Bureau's Anticipated Enforcement Priorities**

- Mortgages
- Credit Cards
- Financial Education
- Consumer Complaints
- Supervision, Enforcement, and Fair Lending
- Information Technology

## *Retroactive Enforcement*

A Crash Course on the Consumer Financial Protection Bureau  
July 28, 2011

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## **Application of the CFPA's Relief Provisions to Conduct that Occurred Prior to July 21, 2011**

Do the new remedial provisions in the CFPA apply only to a claim alleging a violation of a federal consumer financial law that occurs:

- On or after the effective date of the CFPA  
(or)
- Prior to the effective date and claim is pending on the effective date, or that is filed thereafter

Statutes that implicate past conduct raise both constitutional and basic fairness concerns.

## Supreme Court's Retroactivity Doctrine

Landmark case: *Landgraf v. USI Film Products*, 511 U.S. 244 (1994)

Two-Step Inquiry:

- (1) Did Congress clearly express retroactive intent? If yes, statute is applied to past conduct.
- (2) If no express statement, does applying statute to past conduct have genuinely “retroactive effects”? If yes, statute cannot be applied to past conduct.

## Step One: Congressional Intent

Determine whether Congress “expressly prescribed the statute’s proper reach” to ensure that “Congress has itself determined that the benefits of retroactivity outweigh the potential for disruption or unfairness” – *Landgraf*, 511 U.S. at 268 and 280.

- To determine whether a new civil law may be applied to claims *pending* before its effective date:
  - Clear statement in law itself of retroactive intent
  - Legislative history to explore congressional intent
  - Normal rules of construction (e.g., review other sections of the law to determine temporal reach)

## Step Two: Retroactive Effects

If no clear statement by Congress, determine whether “the new law attaches new legal consequences to events completed before its enactment date” – *Landgraf*, 511 U.S. at 269-70.

- To determine whether a law affects substantive rights, ask if it:
  - Impairs rights a party possessed when he acted;
  - Increases a party’s liability for past conduct; or
  - Imposes new duties with respect to transactions already completed.

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## Recent Decisions Applying Retroactivity Doctrine to Dodd-Frank Act

- Retroactivity Permissible:
  - *Pezza*, 2011 WL 767982 (D. Mass. March 1, 2011)
  - *Johnson*, U.S. Dept. of Labor, ARB Case No. 08-032 (March 31, 2011)
  - *Saunders*, 2011 WL 2176900 (D.D.C. June 6, 2011)
- Retroactivity Impermissible:
  - *Citgo*, 2010 WL 3212751 (N.D. Okla. August 12, 2010)
  - *Megino*, 2011 WL 53086 (D. Nev. January 6, 2011)
  - *Riddle*, 733 F.Supp.2d 743 (N.D. Tex. 2010)
  - *Morgan*, Admin. Proc. Rulings Release No. 659 (August 3, 2010)
  - *SEC v. Daifotis*, 2011 WL 2183314 (N.D. Cal. June 6, 2011)
  - *Lawton*, Admin. Proc. Initial Decision Release No. 419 (April 29, 2011)
- *Gupta v. SEC*: TBD (July 11, 2011 decision denying SEC motion to dismiss allows case to move forward)

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## Recent Decisions Applying Retroactivity Doctrine to Dodd-Frank Act (cont.)

Of the 10 cases to date that address the retroactive application of a Dodd-Frank Act provision:

- One remains undecided (*Gupta*)
- Three found retroactivity permissible:
  - Suggested such result without deciding the issue on the merits (*Saunders*)
  - Two found that while Congress's retroactive intent is unclear, there are no retroactive effects (*Pezza* and *Johnson*)
- Six reject retroactivity for a variety of reasons:
  - In absence of clear intent, presumption against retroactivity (*Citgo* and *Megino*)
  - Clear intent under Section 4 to apply prospectively (*Riddle* and *Morgan*)
  - No clear intent but retroactive effects (*Daifotis* and *Lawton*)

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## Remedial Provisions of CFPB - Application of *Landgraf*

- CFPB itself is silent as to whether it applies to claims under federal consumer financial laws *pending* before July 21, 2011.
- Courts have looked to Section 4 of the Dodd-Frank Act to determine temporal reach of other provisions of the law.
  - Section 4 states that “[e]xcept as otherwise specifically provided in this Act or the amendments made by this Act, this Act and such amendments shall take effect 1 day after the date of enactment of this Act.”
  - Courts split on whether this provides clear congressional statement of retroactive or prospective intent.

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## Remedial Provisions of CFPA - Application of *Landgraf* (cont.)

With no clear retroactive statement by Congress, the next step is determining retroactive effects.

- Do the remedial provisions of the CFPA affect procedural or substantive rights?
  - Procedural rights (e.g., law simply changes the forum in which a matter must be brought) – do not raise retroactivity concerns
  - Substantive rights (e.g., law increases relief available to a party) – problematic if applied to past conduct because it increases the liability of defendant and attaches new legal burden

## Remedial Provisions of CFPA - Application of *Landgraf* (cont.)

New remedial provisions of CFPA differ from relief previously available to a federal banking agency under Section 8 of the FDIA:

### (1) Civil Money Penalties:

- Bureau may obtain \$25,000 a day for a reckless violation *whether or not* the violation is a part of a pattern of misconduct or caused more than a minimal loss or resulted in pecuniary gain or other benefit
- Bureau may obtain \$1 million a day for a knowing violation *whether or not* the violation causes a substantial loss or gain

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## Remedial Provisions of CFPA - Application of *Landgraf* (cont.)

### (2) Restitution or Indemnification Against Loss:

- Bureau has authority to require rescission or reformation of contracts, refunds of money or return of real property, restitution, and money damages, *without* any explicit requirement that there first be a finding that the party engaged in a “reckless disregard” for the law, regulations, or order at issue.
- Prior to effective date of CFPA, a party possessed a right to be free from such punishment absent a showing of “reckless disregard”
- Bureau no longer needs to meet this evidentiary threshold

## **Remedial Provisions of CFPA - Application of *Landgraf* (cont.)**

- If Bureau seeks to impose these new standards based on alleged conduct that occurred prior to July 21, 2011, there is a strong argument that such retroactive application would have unlawful retroactive effects
- Arguably, these new remedial provisions impair the rights of a party by altering the legal standard for liability
- By affecting a party's substantive rights, retroactive application raises serious unfairness concerns

*Bureau's Relationship to State Attorneys General  
and Other Federal Agencies*

A Crash Course on the Consumer Financial Protection Bureau  
July 28, 2011

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## **New Enforcement Powers for State Attorneys General**

Under the CFPA, state attorneys general:

- Retain the enforcement powers they had under consumer financial protection laws prior to the Act
- Gain new authority to bring civil actions to enforce violations of the CFPA
- Have access to increased CFPA remedies

Any notice of civil actions previously required to be served on the primary federal regulator must now also be served on the Bureau.

## **New Enforcement Powers for State Attorneys General (cont.)**

State attorneys general are explicitly authorized to bring civil actions to enforce the CFPA and its implementing regulations.

- But with respect to national banks and federal thrifts, they may only enforce rules prescribed by the Bureau under the CFPA.

To enforce the Bureau's regulations against national banks or federal thrifts, a state attorney general must first notify the Bureau and applicable prudential regulator of the violation. The Bureau may intervene in the action as a party.

## **New Enforcement Powers for State Attorneys General (cont.)**

The Bureau must:

- prescribe regulations to implement these requirements
- provide guidance from time to time to coordinate actions with the state AGs and other regulators

## **New Enforcement Powers for State Attorneys General (cont.)**

The CFPA expressly does not alter the authority of state attorneys general to enforce federal consumer financial laws besides the CFPA. State AGs have enforcement power under:

- FCRA
- RESPA
- TILA
- Section 626 of the Omnibus Appropriations Act of 2009 (which directed the FTC to promulgate mortgage loan rules and treated violation of such rules as a violation of section 18 of the FTC Act regarding unfair or deceptive acts or practices)

## Response from the States

On July 8, Connecticut passed H.B. 6350, the first state law specifically permitting the state attorney general to:

- Enforce any provision of the Dodd-Frank Act that a state attorney general is authorized to enforce.
- Seek any relief that a state attorney general is authorized to seek under the Dodd-Frank Act.

## Federal and State Coordination

The CFPA requires the State AGs to coordinate their enforcement efforts with the Bureau by providing the Bureau with a copy of the complaint and a written notice describing the action, prior to initiation of a civil action against a covered person.

The Bureau may respond by:

- Intervening in the action as a party,
- Removing the action to federal district court,
- Requiring that it be heard on all matters arising in the action, and
- Appealing any order or judgment in the proceeding.

The Bureau and the National Association of Attorneys General released a joint statement on cooperation and have agreed to:

- Develop joint training programs
- Share information, data, and analysis
- Engage in regular consultation to identify mutual enforcement priorities

## The Bureau and Other Federal Agencies: Transferred Authority

Powers transferred to the Bureau:

- The consumer financial protection functions of the Board of Governors, FDIC, NCUA, OCC, and OTS are transferred to the Bureau.
- All consumer protection functions of HUD relating to RESPA and the S.A.F.E. Act are transferred to the Bureau.

In addition to consumer financial protection functions, personnel will be transferred from these agencies to the Bureau.

## The Bureau and Other Federal Agencies: Referrals and Joint Investigations

The Bureau must refer any person to the Attorney General of the United States if the Bureau obtains evidence that the person has engaged in criminal conduct.

Conforming amendments to the Federal Deposit Insurance Act require federal banking agencies to make referrals to the Bureau when the agency “has a reasonable belief that a violation of an enumerated consumer law...has been committed.”

The Bureau may engage in joint fair lending investigations with:

- DOJ
- HUD
- Both DOJ and HUD

## The Bureau and the FTC

The FTC retains its enforcement authority over non-depository covered persons or their service providers.

The CFPA directs the FTC and Bureau to negotiate an agreement that includes procedures for notice to the other agency prior to initiating a civil action to enforce consumer financial laws.

Whenever one agency files a civil action against a covered person, the other agency may not file its own action against the person, but may intervene as a party.

## UDAP Enforcement

The Bureau can enforce an FTC UDAP rule against a covered person or service provider in connection with the offering or provision of a consumer financial product or service as if it were a rule prescribed by the Bureau under its own authority.

Likewise, the FTC can enforce under the FTC Act a Bureau UDAAP rule with respect to a covered person who is subject to FTC jurisdiction.

State AGs can also enforce the CFPA UDAAP provision and the Bureau's implementing regulations.

## Looking Forward

Consumer financial service providers are sure to have many compliance questions in the future, as their industries become more heavily regulated and the enforcement of laws is handled by so many different authorities, with perhaps different standards and different agendas.

## *Whistleblower Protection*

A Crash Course on the Consumer Financial Protection Bureau  
July 28, 2011

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## Brief History of False Claims Act and *Qui Tam*

- 1863 – False Claims Act or “Lincoln’s Law” - 31 U.S.C. 3729-3733
  - Allows private citizens (“relators”) with knowledge of government contractor fraud on the government to file a *qui tam* suit against the contractor and share in the proceeds of the recovery.
- 1943 Amendments: Eviscerate the FCA.
- 1986 Amendments: Revive the FCA and added anti-retaliation provisions to protect whistleblowers.
- 2009 Amendments: Expand anti-retaliation provisions.
- 2010 Amendments: Broaden ability of relators to bring claims without being the “original source.”

## The Expansion of False Claims Act Cases

- There is real money at stake – over \$3 billion in False Claims Act recoveries in FY 2010. More than 80% of those cases were brought by whistleblowers and their attorneys.
- Approximately **\$24 billion in recoveries** since the 1986 amendments.
- Traditionally, the health care industry has been the most active sector for False Claims Act cases, approximately 80%
- Also used in the government procurement and contract fraud sector. It has been used more recently in connection with Department of Defense contractors in connection with wartime spending.

## The Expansion of False Claims Act Cases: Use in Criminal Cases

- Used not only in civil cases, but can be used to proceed *criminally* for significant penalties:
- Approximately **20%** of the top 100 False Claims Act cases contained a criminal fine. Some examples include:
  - 2009 case against Pfizer—**\$1.3 billion** in criminal fines in addition to a \$1 billion under the FCA.
  - 2009 case against Eli Lilly – **\$615 million** in criminal fines and forfeiture and \$800 million under the FCA
  - 2010 case against GlaxoSmithKline –**\$150 million** in criminal fines and forfeiture and \$600 million under the FCA.

## The Expansion of False Claims Act Cases: State False Claims Act Cases

- Finally, approximately 30 states and D.C. have some version of a False Claims Act with *qui tam* enforcement regimes.
  - Potential impact is significant – a State may decide to intervene and prosecute a case for a relator when the federal government will not.

## The Evolution of Whistleblower Protection

- Government employee whistleblowers got protection from:
  - Civil Service Reform Act of 1978
  - Whistleblower Protection Act of 1989
  - False Claims Act whistleblower protection (1986 amendments) in the rare cases in which the government employee is a relator in a *qui tam* case.

## The Evolution of Whistleblower Protection (cont.)

- Until 2002, private employees got protection from various State employment laws, and from federal law in very discrete areas (public health and safety, civil rights).
- **Sarbanes-Oxley Corporate Reform Act of 2002**
- With SOX, internal and external whistleblower protection was expanded significantly to officers and employees of a publicly traded company, its contractors, subcontractors, or agents in an effort to promote the disclosure of financial frauds.

## The Evolution of Whistleblower Protection (cont.)

- SOX's main components regarding whistleblowers:
  - **Made it illegal to "discharge, demote, suspend, threaten, harass, or in any manner discriminate against" whistleblowers**
  - **Established criminal penalties of up to 10 years for executives who retaliate against whistleblowers**
  - **Required Board Audit Committees to establish procedures for hearing whistleblower complaints**
  - **Allowed the Secretary of Labor to order a company to rehire a terminated employee with no court hearing**
  - **Gave a whistleblower the right to a jury trial, bypassing months or years of administrative hearings.**

\* From "Encouraging Internal Whistle blowing in Organizations," by Lilanthi Ravishankar, Markkula Center for Applied Ethics, Santa Clara University

## Whistleblower Protections for Financial Services Employees in Dodd-Frank

### Overview and Highlights

- Section 1057 of Dodd-Frank Act, to be codified at 12 U.S.C. Sec. 5567, provides whistleblower protections to financial services employees.
- **Not a “bounty” program like the new SEC/CFTC programs**, it is a more traditional employment protection program that provides financial services employees with significant protections.

## Whistleblower Protections for Financial Services Employees in Dodd-Frank (cont.)

### Overview and Highlights (cont):

- **Scope of Section 1057 is broad** and applies to many organizations and multiple business lines that provide a wide range of financial products and services, from those that extend credit to prepaid cards to credit counseling and performing real estate appraisals.
- Applies to traditional whistleblowing activity (reporting to a law enforcement activity), but also to objecting, or refusing to participate in a company policy, practice, or assigned task that the employee reasonably believed was in violation of law subject to CFPB jurisdiction.

## Whistleblower Protections for Financial Services Employees in Dodd-Frank (cont.)

### Overview and Highlights (cont):

- **Burden shifting provision** favorable to employees requires only a *prima facie* case by the employee that whistleblowing was a “contributing factor” to the unfavorable employment action, and the employer must show by *clear and convincing evidence* that it would have taken the same action in the absence of the employee’s protected conduct.
- **Removal to federal court** an option if DOL does not issue a final order within 210 days of complaint being filed.
- **Not subject to arbitration:** The protections cannot be contractually resolved by arbitration.

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## Whistleblower Protections for Financial Services Employees in Dodd-Frank (cont.)

### Who Can Seek the Protections?

- A “covered employee,” or a person who performs tasks related to the offering or provision of a consumer financial product or service, may not be terminated or discriminated against, if the employee:
  - (1) Provides information to the employer, to the CFPB, or any Federal, State, or local law enforcement agency relating to any:
    - “violation, or any act or omission that the employee reasonably believes to be a violation of:
      - Title 12
      - Any other provision of law that is subject to the CFPB’s jurisdiction, or
      - Any rule, order, standard, or prohibition prescribed by the CFPB.

## Whistleblower Protections for Financial Services Employees in Dodd-Frank (cont.)

### Who Can Seek the Protections (cont.)?

- (2) Testifies or will testify in any proceeding resulting from the administration or enforcement of the laws noted above;
- (3) Filed, instituted, or caused to be filed any proceeding under any Federal consumer financial law, and

### A critical final category of protected activity:

- (4) *Objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee reasonably believed to be in violation of any law, rule, order, standard, prohibition, subject to the CFPB's jurisdiction.*

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## Whistleblower Protections for Financial Services Employees in Dodd-Frank (cont.)

### How is “Financial Product or Service” Defined?

In a word, ***broadly***. The services listed in the statute, some with specific carve-outs for certain specified activity, include:

- Extending credit and servicing loans, including acquiring, purchasing, selling, brokering, or other extensions of credit;
- Extending or brokering leases or personal or real property that are the functional equivalent of purchase finance agreements;
- Real estate settlement services;
- Appraisals of real estate or personal property;

## Whistleblower Protections for Financial Services Employees in Dodd-Frank (cont.)

### How is “Financial Product or Service” Defined (cont.)?

- Deposit-taking activities;
- Transmitting or exchanging funds;
- Acting as a custodian of funds or any financial instrument for use by a consumer;
- Selling or issuing stored value or payment instruments;
- Check cashing, collection, or guaranty services;
- Providing payments or other financial data processing products or services “by any technological means” (any payments made through on-line banking system or mobile telecommunications network).
  - This section explicitly excludes the merchant or retailer engaging in an on-line sale for a non-financial good or service.

## **Whistleblower Protections for Financial Services Employees in Dodd-Frank (cont.)**

### **How is “Financial Product or Service” Defined (cont.)?**

And More....

- Providing financial advisory services (other than services relating to securities provided by a regulated person) on individual financial matters or relating to proprietary financial products;
  - Newspapers, news magazines, financial publications of general circulation, or investment information that is not tailored to the individual needs of a consumer are excluded
- Credit counseling and debt management services;
- Debt modification services, including foreclosure avoidance services;

## Whistleblower Protections for Financial Services Employees in Dodd-Frank (cont.)

### How is “Financial Product or Service” Defined (cont.)?

And still more...

- Collecting or providing consumer credit report information;
- Collecting debt related to any consumer financial product;
- And, finally, a catch-all:
  - “Such other financial product or service that may be defined by the Bureau,” if the Bureau finds that the product was:
    - sold with the purpose to evade any Federal consumer financial law, or
    - A product that is permissible for a bank or financial holding company to offer that “has, or likely will have, a material impact on consumers.”

## **Whistleblower Protections for Financial Services Employees in Dodd-Frank (cont.)**

### **What are the Procedures for an Employee to File a Whistleblower Complaint?**

- The employee has 180 days from the date of the alleged violation to file a complaint with the Secretary of Labor.
- The Secretary of Labor will notify the employer upon receipt of the complaint.
- Within 60 days after receipt of the complaint, the DOL will permit the employer the opportunity to present a response, meet with the DOL, and present witnesses.

## Whistleblower Protections for Financial Services Employees in Dodd-Frank (cont.)

### Procedures (cont.):

- DOL will then decide whether to initiate an investigation to determine whether there is “reasonable cause to believe that the complaint has merit.”
- **Burden-shifting provision** which is favorable to employee:
  - Complainant must make a *prima facie showing* that the alleged conduct was a contributing factor to the unfavorable personnel action;
  - Employer can show rebuttal evidence, but the standard is by be *clear and convincing evidence*.

## Whistleblower Protections for Financial Services Employees in Dodd-Frank (cont.)

### Procedures (cont.):

- If the complaint is determined to have merit, the DOL will issue a preliminary order.
- 30 days after the issuance of the preliminary order, the employer can file objections and request a hearing.
- 120 days after a hearing, the Final Order is issued.
  - Provision for *de novo* review in US District Court if the DOL fails to act within 210 days of complaint.

## **Whistleblower Protections for Financial Services Employees in Dodd-Frank (cont.)**

### **What Relief Can a Whistleblower Receive?**

- No “bounty” awards like in the SEC/CFTC whistleblower programs (10 to 30% of awards of \$1 million or more).
- The DOL can order:
  - Affirmative action to abate the violation;
  - To reinstate the complainant to his or her former position;
  - Compensation and back pay;
  - Compensatory damages to the complainant.
  - All costs and expenses, including attorneys fees and expert witness fees.

## **Whistleblower Protections for Financial Services Employees in Dodd-Frank (cont.)**

### **Can a Company Arbitrate or Release from Section 1057?**

- No – No predispute arbitration agreement is valid or enforceable if it requires arbitration of a dispute arising under Section 1057.

## Whistleblower Protections for Financial Services Employees in Dodd-Frank (cont.)

### What Other Considerations are Important?

- 12 U.S.C. Section 5566 requires that if the CFPB obtains evidence that any person has engaged in conduct that may constitute a violation of Federal criminal law, the Bureau shall transmit the evidence to the Attorney General.
- Potential for parallel proceedings with the CFPB and the DOJ, civil and criminal divisions, for alleged fraud, false claims, and related offenses.
- Potential for additional *qui tam* cases to arise if government funds are involved.
- Potential for other federal agencies to “piggyback” on the allegations.

## **Whistleblower Protections for Financial Services Employees in Dodd-Frank (cont.)**

### **What Other Considerations are Important (cont.)?**

- Potential for abuse – employees facing imminent termination may seek to use whistleblowing rules to “lock-in” employment status.
- How to encourage internal reporting within company before going to CFPB.
- Increased focus on compliance efforts and employee “hot lines” to provide assurance that the issues can be addressed internally.

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**Guest Speaker - Len Kennedy,  
General Counsel of the CFPB**