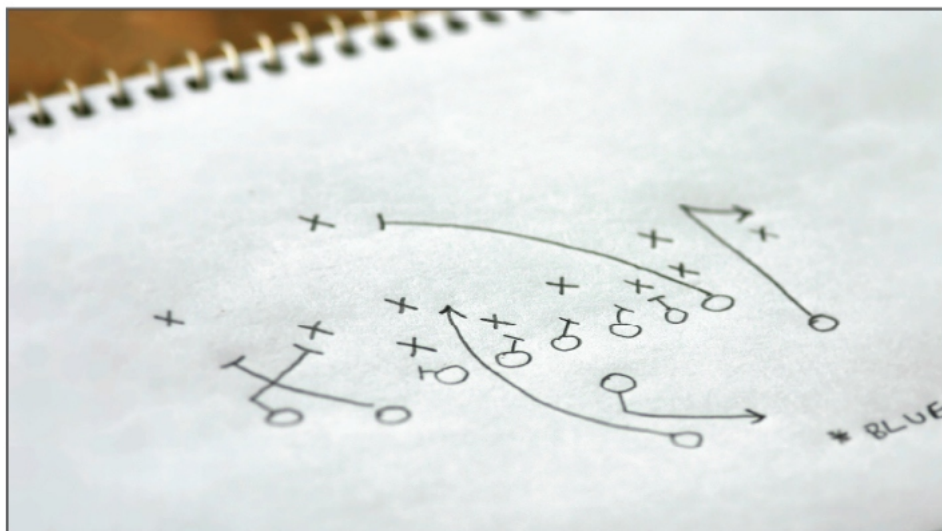


# Dodd-Frank Wall Street Reform and Consumer Protection Act

## Consumer Financial Protection User Guide



This is the fourth in a series of user guides that will be published by Morrison & Foerster. The user guides provide an in depth discussion on specific topics raised by the Dodd-Frank Act. For our Dodd-Frank overview and brief alerts, please see our dedicated website at:

<http://www.mofo.com/resources/regulatory-reform/>.

This User Guide addresses various provisions of the Consumer Financial Protection Act (“CFPA” or “Act”), Pub. L. No. 111-203, Title X, 124 Stat. 1955 (2010), that may have immediate impact on lenders and other financial institutions. The Act is one title of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), which was signed by President Obama on July 21, 2010.

Earlier User Guides discussed the provisions of the CFPA that apply to residential mortgage origination, <http://www.mofo.com/files/Uploads/Images/ResidentialMortgage.pdf>, residential mortgage servicing, [http://www.mofo.com/files/Uploads/Images/100830User\\_Guide\\_Mortgage\\_Servicing.pdf](http://www.mofo.com/files/Uploads/Images/100830User_Guide_Mortgage_Servicing.pdf), and federal preemption, <http://www.mofo.com/files/Uploads/Images/100723UserGuide.pdf>.

A future User Guide will analyze the CFPA provisions regarding the organization, jurisdiction, and authority of the Consumer Financial Protection Bureau.

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## 1. OVERVIEW

### 1.1 Summary of this User Guide

The CFPA amends a variety of the existing consumer financial protection laws. The authority to issue regulations under most of the existing consumer financial protection laws will be transferred to the new Bureau of Consumer Financial Protection. The CFPA also adds new obligations with respect to:

- Privacy, including credit reporting and telemarketing;
- Fair lending, student lending, and the Truth-in-Lending Act;
- Deposit accounts, electronic fund transfers, and expedited funds availability;
- Remittance transfers;
- Arbitration clauses;
- Exchange facilitators; and
- Debt collection.

This User Guide will discuss the foregoing provisions to the extent that they are not discussed in our other User Guides.

### 1.2 Key Terms

We will use some key terms throughout this User Guide, as follows:

- “Bureau” refers to the new Bureau of Consumer Financial Protection that will be established under the CFPA.
- “Covered Person.” Under section 1002(6) of the Act, the term “Covered Person” is defined as any person that offers or provides a “Consumer Financial Product or Service” and any affiliate of such a person if the affiliate acts as a service provider to such person. The definition includes banks as well as non-banks.
- The term “Consumer Financial Product or Service” is defined expansively to cover a wide range of financial services for use by consumers primarily for personal, family, or household purposes. The term includes, among other things, the extension of credit, servicing loans, or brokering loans; deposit-taking activity; issuing stored value cards; payment processing; check cashing; credit reporting; and debt collection. The term does not include insurance, securities, and commodities trading, real estate brokerage, tax preparation, practicing law, and certain other activities. See Act § 1002; see also Act § 1027.

**Comment:** *The term “primarily for personal, family, or household purposes” is frequently used to define the scope of various consumer credit protection laws. See, e.g., 15 U.S.C. § 1602(h) [Truth-in-Lending Act’s definition of “consumer,” when used in reference to a credit transaction] and 12 C.F.R. § 226.2(a)(12) [Regulation Z’s definition of “consumer credit”]. There is a considerable body of case law regarding this term, and that case law likely will be referenced in defining a “Consumer Financial Product or Service” for purposes of the CFPA.*

- **“Designated Transfer Date.”** Many of the provisions discussed in this User Guide will be effective on the Designated Transfer Date, which will be July 21, 2011. On this date, many functions relating to the existing consumer financial protection laws will be transferred to the Bureau. See Act § 1062 (explaining the Designated Transfer Date); § 1061 (explaining the transfer of functions to the Bureau).
- **“Enumerated Consumer Laws.”** The Act transfers to the Bureau the authority to administer certain consumer financial protection laws and the rules implemented thereunder. These so-called “Enumerated Consumer Laws” are
  - the Electronic Fund Transfer Act (“EFTA”) (except for the new interchange provisions in EFTA section 920);
  - the Equal Credit Opportunity Act (“ECOA”);
  - the Fair Credit Reporting Act (“FCRA”) (except for the identity theft red flags and data disposal requirement in FCRA sections 615(e) and 628);
  - the Fair Debt Collection Practices Act (“FDCPA”);
  - Title V of the Gramm-Leach-Bliley Act (“GLBA”) (except for the data safeguards provisions of GLBA section 501(b));
  - the Truth-in-Lending Act (“TILA”);
  - the Fair Credit Billing Act;
  - the Consumer Leasing Act of 1976;
  - the Truth in Savings Act;
  - subsections (b) through (f) of section 43 of the Federal Deposit Insurance Act (“FDI Act”) (relating to privately-insured credit unions);
  - the Home Owners Protection Act of 1998 (“HPA”);
  - the Home Mortgage Disclosure Act of 1975 (“HMDA”);
  - the Home Ownership and Equity Protection Act of 1994 (“HOEPA”);
  - the Real Estate Settlement Procedures Act of 1974 (“RESPA”);
  - the S.A.F.E. Mortgage Licensing Act of 2008;
  - the Interstate Land Sales Full Disclosure Act;
  - the Alternative Mortgage Transaction Parity Act of 1982;

- section 626 of the Omnibus Appropriations Act, 2009 (Public Law 111-8) (relating to unfair or deceptive acts and practices that may occur with regard to mortgage advertising); and
- Certain provisions of the Mortgage Reform and Anti-Predatory Lending Act,<sup>1</sup> as follows:
  - Subtitle A (Residential Mortgage Loan Origination Standards),
  - Subtitle B (Minimum Standards for Mortgages),
  - Subtitle C (High-Cost Mortgages),
  - Subtitle E (Mortgage Servicing),
  - Section 1471 (property appraisal requirements),
  - Section 1472 (appraiser independence requirements),
  - Section 1475 (RESPA provisions relating to appraisal fees), and
  - Section 1476 (Government Accountability Office study regarding effectiveness of various appraisal methods).

The Enumerated Consumer Laws do not include the Fair Housing Act, the Community Reinvestment Act, or the Federal Trade Commission Act (“FTC Act”) (although, as discussed below, the Bureau will be authorized to enforce rules made under the FTC Act).

- The term “Federal Consumer Financial Law” means the provisions of the CFPA (such as the prohibition on unfair, deceptive, and abusive practices in CFPA section 1031), the Enumerated Consumer Laws, and any rule or order prescribed by the Bureau. The term expressly does not include the FTC Act.

### 1.3 Highlights of this User Guide

#### 1.3.1 *Transfer of Enumerated Consumer Laws*

One of the primary objectives of the CFPA is to transfer the authority to administer the Enumerated Consumer Laws to the Bureau.

For the laws transferred, the Act establishes a standard examination and enforcement scheme. Specifically, the existing federal regulators retain their authority to enforce these laws (together with the other laws that comprise the Federal Consumer Financial Law) against depository institutions and their affiliates,<sup>2</sup> but the Bureau has primary enforcement authority against banks and credit unions with assets in excess of ten billion dollars (as well as against their affiliates). The other federal regulator can make a written recommendation that the Bureau take enforcement action and, if the Bureau does not do so within 120 days, the other federal regulator can initiate the enforcement

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<sup>1</sup> The Mortgage Reform and Anti-Predatory Lending Act is Title XIV of the Dodd-Frank Act and the CFPA is Title X of the Dodd-Frank Act. We discuss the Mortgage Reform and Anti-Predatory Lending Act in more detail in our residential mortgage origination and servicing user guides. See <http://www.mofo.com/files/Uploads/Images/ResidentialMortgage.pdf> (origination user guide); [http://www.mofo.com/files/Uploads/Images/100830User\\_Guide\\_Mortgage\\_Servicing.pdf](http://www.mofo.com/files/Uploads/Images/100830User_Guide_Mortgage_Servicing.pdf) (servicing user guide).

<sup>2</sup> In most instances, the existing federal regulators include the Federal Deposit Insurance Corporation, Federal Reserve Board (“FRB”), and Office of the Comptroller of the Currency (“Banking Agencies”); National Credit Union Administration (“NCUA”); Secretary of Transportation; Secretary of Agriculture; Farm Credit Administration; Securities and Exchange Commission (“SEC”); and Small Business Administration. On July 21, 2011, the Office of Thrift Supervision will be disbanded and its functions and rulemaking authority generally will be transferred to the Office of the Comptroller of the Currency. The supervision of savings and loan holding companies and certain related rulemaking authority will be transferred to the FRB. See Dodd-Frank Act §§ 311, 312.

action. See Act § 1025(c). The Bureau has exclusive authority to require reports and conduct examinations of those large institutions (and their affiliates) with respect to compliance with these laws. See Act § 1025(b)(1).

In contrast, the existing federal agencies have exclusive enforcement authority over depository institutions with assets of ten billion dollars or less, but the Bureau can make enforcement recommendations. See Act § 1026(d).

The Bureau will have supervisory authority over those non-bank Covered Persons that are engaged in the origination, brokerage, or servicing of real estate loans to consumers primarily for personal, family, or household purposes; loan modification or foreclosure relief services for those loans; larger participants in a market for other consumer financial products or services; those non-bank Covered Persons whose consumer financial products or services are deemed to pose risks to consumers; offerors or providers of private education loans; and offerors or providers of payday loans. For these non-bank Covered Persons, the Bureau will share enforcement authority with the Federal Trade Commission (“FTC”), subject to a memorandum of understanding to be negotiated between the two agencies by January 21, 2012. In addition, the Bureau will have the authority to require reports and conduct examinations for those persons, and to impose registration, recordkeeping, and other requirements. See Act § 1024.

The Bureau and the FTC will share residual enforcement authority with respect to other Covered Persons and persons subject to the specific Enumerated Consumer Law, but the CFPA does not specifically require the Bureau and FTC to negotiate a memorandum of understanding or other enforcement agreement with respect to these other persons. The Bureau alone will have authority to issue regulations under the Enumerated Consumer Laws, except as noted. See Act § 1024, § 1061.

For example, as discussed in more detail below, the ECOA is amended to permit the Bureau to enforce the ECOA “with respect to any person subject to [the ECOA],” and to permit the FTC to enforce the ECOA “[e]xcept to the extent the enforcement . . . is specifically committed to” the Banking Agencies, NCUA, SEC, Secretary of Transportation, Secretary of Agriculture, Farm Credit Administration, or Small Business Administration. That is, the enforcement jurisdiction of the Bureau and FTC overlap with respect to those persons not committed to a specific federal regulator.

Until the memorandum of understanding is negotiated between the two agencies, and perhaps even for some time afterwards, it appears as though non-depository entities, the jurisdiction of which is not specifically committed to a specific federal regulator, will be subject to an uncertain enforcement scheme involving both the FTC and the Bureau.

Throughout this Guide, we will refer to this general enforcement scheme, or will note exceptions, as appropriate.

**Comment:** *The transfer of rulemaking and enforcement powers to the Bureau as summarized above likely will result in significant changes to the framework for consumer financial services in the United States. The Bureau is an independent governmental body whose sole purpose is the regulation of the offering and provision of consumer financial services under the federal consumer financial laws. In contrast with the Banking Agencies, the Bureau has no other function. Its primary purpose is the protection of consumers, and, given its current leadership, the Bureau is likely to implement its charter with focused determination.*

### **1.3.2 Privacy and Credit Reporting**

The CFPA imposes new obligations on financial institutions to provide consumers with electronic access to their account information, subject to the rules of the Bureau. See Act § 1033.

The Fair Credit Reporting Act (“FCRA”) is amended to require the disclosure of credit scores, as well as certain related information, in adverse action notices. See Act § 1100F. The Bureau also is required to conduct a study on the efficacy of “educational” credit scores sometimes provided to consumers by credit bureaus.

The CFPA transfers rulemaking authority under Title V of GLBA and the FCRA to the Bureau, with the exception of the data security, red flags, and data disposal rules, which remain with the FTC and prudential regulators. See Act § 1093, § 1088.

The FCRA also is amended to add enforcement and rulemaking authority for the Commodity Futures Trading Commission (“CFTC”) and the Securities and Exchange Commission (“SEC”). The SEC and CFTC also are directed to make rules under the Identity Theft Red Flags Rule provisions, and the CFTC is directed to make an Affiliate Marketing Rule. See Act § 1088. The CFTC already has begun to implement these new requirements. See 75 Fed. Reg. 66,018 (Oct. 27, 2010).

The CFPA adds enforcement authority for the Bureau under the FCRA, but the FTC maintains its enforcement power as well, consistent with the general enforcement scheme established by the CFPA. In 2009, the FTC increased its civil penalty authority to \$3,500 to adjust for inflation, but by restating the administrative enforcement provisions of the FCRA, the CFPA has effectively reduced the FTC’s civil penalty authority back to \$2,500. See Act § 1088.

The Telemarketing and Consumer Fraud and Abuse Prevention Act (“TCFAPA”), under which the FTC has made its Telemarketing Sales Rule (“TSR”), is amended to add rulemaking and enforcement power for the Bureau, but banks remain exempt from the TSR’s terms. See Act § 1100C.

### **1.3.3 Lending**

The CFPA amends the ECOA to require lenders to request and collect data about applicants for business credit—specifically whether they are small businesses or woman- or minority-owned businesses. The Bureau is authorized to issue regulations to carry out and create exceptions to the new requirements. These amendments to ECOA become effective on July 21, 2011. See Act § 1071.

The ECOA also is amended to add general rulemaking authority for the Bureau, except that the FRB will continue to exercise rulemaking authority in the case of motor vehicle dealers. In addition, the statute of limitations has been increased from two years to five years. See Act § 1085.

### **1.3.4 Remittance Transfers**

This is an especially important provision of the CFPA that establishes an entirely new regulatory scheme for persons that provide remittance transfers, including banks. A “remittance transfer” is an electronic transfer of funds by a consumer located in any state to a recipient in a foreign country. This provision adds a new section 919 to the Electronic Fund Transfer Act (“EFTA”) to require certain disclosures and to impose new error resolution provisions with respect to remittance transfers. These provisions are to be implemented by rules to be made initially by the FRB. Rulemaking authority will transfer to the Bureau on the Designated Transfer Date. See Act § 1073.

### **1.3.5 Pre-Dispute Arbitration Clauses**

Numerous sections of the Dodd-Frank Act (of which the CFPA is just one title) address pre-dispute arbitration. For example, section 1414 amends the Truth-in-Lending Act to prohibit pre-dispute arbitration clauses with respect to residential mortgage loans and open-end consumer credit plans secured by principal dwellings. See <http://www.mofo.com/files/Uploads/Images/ResidentialMortgage.pdf>. In addition, section 1057(d), concerning the transfer of federal agency employees to the Bureau, prohibits the use of pre-dispute arbitration in certain agreements or in certain circumstances involving employment agreements. The CFPA directs the Bureau to conduct a study of the use of agreements providing for arbitration of future disputes between consumers and Covered Persons in connection with the offering or providing of consumer financial products or services, and permits the Bureau to prohibit or impose conditions or limitations on the use of any such agreements. See Act § 1028.

### **1.3.6 Exchange Facilitators**

The term “exchange facilitators” refers to persons who facilitate like-kind exchanges of property for tax purposes. Exchange facilitators are not currently regulated as such under federal law, but some states impose licensing requirements. The Bureau is required to conduct a study of consumers who use exchange facilitators for transactions that are primarily for personal, family, or household purposes; prepare a report; and issue regulations to protect consumers. See Act § 1079.

### **1.3.7 Debt Collection**

The CFPA adds rulewriting authority for the Bureau under the Fair Debt Collection Practices Act (“FDCPA”), except with respect to motor vehicle dealers. Prior to the passage of the CFPA, no agency was permitted to write rules under the FDCPA. See Act § 1089.

### **1.3.8 Other Amendments to Existing Law**

The CFPA amends other federal banking laws, including the FDI Act, the FTC Act, HPA, and HOEPA, to transfer the appropriate authority provided under those acts to the Bureau. Some noteworthy provisions: the Bureau can enforce FTC trade regulation rules and the HPA, subject to the limitations discussed above. Previously, enforcement powers under the HPA were limited to the federal banking agencies. See Act § 1095.

## **2. PRIVACY, CREDIT REPORTING, AND TELEMARKETING**

### **2.1 Consumer Rights to Access Information (§ 1033)**

#### **SEC. 1033. CONSUMER RIGHTS TO ACCESS INFORMATION.**

- (a) **In General-** Subject to rules prescribed by the Bureau, a covered person shall make available to a consumer, upon request, information in the control or possession of the covered person concerning the consumer financial product or service that the consumer obtained from such covered person, including information relating to any transaction, series of transactions, or to the account including costs, charges and usage data. The information shall be made available in an electronic form usable by consumers.
- (b) **Exceptions-** A covered person may not be required by this section to make available to the consumer—
- (1) any confidential commercial information, including an algorithm used to derive credit scores or other risk scores or predictors;
  - (2) any information collected by the covered person for the purpose of preventing fraud or money laundering, or detecting, or making any report regarding other unlawful or potentially unlawful conduct;
  - (3) any information required to be kept confidential by any other provision of law; or
  - (4) any information that the covered person cannot retrieve in the ordinary course of its business with respect to that information.
- (c) **No Duty To Maintain Records-** Nothing in this section shall be construed to impose any duty on a covered person to maintain or keep any information about a consumer.
- (d) **Standardized Formats for Data-** The Bureau, by rule, shall prescribe standards applicable to covered persons to promote the development and use of standardized formats for information, including through the use of machine readable files, to be made available to consumers under this section.
- (e) **Consultation-** The Bureau shall, when prescribing any rule under this section, consult with the Federal banking agencies and the Federal Trade Commission to ensure, to the extent appropriate, that the rules—
- (1) impose substantively similar requirements on covered persons;

- (2) take into account conditions under which covered persons do business both in the United States and in other countries; and
- (3) do not require or promote the use of any particular technology in order to develop systems for compliance.

## Analysis

- This provision will add potentially substantial new obligations for Covered Persons to provide customers with electronic access to their account and transaction information. As written, the new law appears to apply to both existing customers and previous customers. Section 1033 will impose operational burdens on Covered Persons, increase the risk of unlawful access to confidential information, and facilitate information access by consumers who wish to assert legal challenges against Covered Persons.
- Covered Person to Provide Information to Consumers. Subject to rules to be prescribed by the Bureau, Section 1033 requires a Covered Person to make available to a consumer “information in the control or possession of the covered person concerning the consumer financial product or service that the consumer obtained from such covered person,” including, but not presumably not limited to, information relating to any transaction, series of transactions, or the account, including costs, charges, and usage data.

Section 1033 further requires Covered Persons to make this information available in an electronic form that is usable by consumers. Section 1033 is silent regarding the right of Covered Persons to impose fees on consumers who access this information. Presumably, this is an issue that the Bureau will address in its rulemaking.

- Information Excluded from this Requirement. A Covered Person is not required to make available to the consumer (1) any confidential commercial information, including an algorithm used to derive credit scores or other risk scores or predictors; (2) any information collected by the Covered Person for the purpose of preventing fraud or money laundering, or detecting, or making any report regarding other unlawful or potentially unlawful conduct; (3) any information required to be kept confidential by any other provision of law; or (4) any information that the Covered Person cannot retrieve in the ordinary course of its business with respect to that information.
- No Duty to Maintain Records. Section 1033 expressly states that it does not impose any duty on a Covered Person to “maintain or keep any information about a consumer.” However, other laws often require Covered Persons to maintain records. For instance, Covered Persons that are regulated—including banks—are obligated to maintain records as a matter of safety and soundness. Moreover, many of the Enumerated Consumer Laws impose record retention requirements of their own. For example, ECOA generally imposes a 25-month record retention requirement after the date that a creditor takes action on an application, and that 25-month period is extended if there is a pending governmental investigation or enforcement proceeding. See 12 C.F.R. §202.12. In short, Covered Persons may have an independent duty to maintain records, and certain information in these records will be accessible by consumers under Section 1033.
- Standardized Forms. The Bureau is required to prescribe standards applicable to Covered Persons to promote the development and use of standardized formats for information to be made available to consumers.
- Consultation with Banking Agencies and FTC. When prescribing any rule under this section, the Bureau is required to consult with the Federal banking agencies and the FTC to ensure, to the extent appropriate, that the rules (1) impose substantively similar requirements on Covered Persons; (2) take into account conditions under which Covered Persons do business both in the United States and in other countries; and (3) do not require or promote the use of any particular technology in order to develop systems for compliance.
- Effective Date. These provisions are effective as of the Designated Transfer Date, July 21, 2011.

## 2.2 Gramm-Leach-Bliley Act (§ 1093)

### SEC. 1093. AMENDMENTS TO THE GRAMM-LEACH-BLILEY ACT.

Title V of the Gramm-Leach-Bliley Act (15 U.S.C. 6801 et seq.) is amended—

(1) in section 501(b) (15 U.S.C. 6801(b)), by inserting ‘, other than the Bureau of Consumer Financial Protection,’ after ‘505(a)’;

(2) in section 502(e)(5) (15 U.S.C. 6802(e)(5)), by inserting ‘the Bureau of Consumer Financial Protection’ after ‘(including)’;

(3) in section 504(a) (15 U.S.C. 6804(a))—

(A) by striking paragraphs (1) and (2) and inserting the following:

‘(1) RULEMAKING-

‘(A) IN GENERAL- Except as provided in subparagraph (C), the Bureau of Consumer Financial Protection and the Securities and Exchange Commission shall have authority to prescribe such regulations as may be necessary to carry out the purposes of this subtitle with respect to financial institutions and other persons subject to their respective jurisdiction under section 505 (and notwithstanding subtitle B of the Consumer Financial Protection Act of 2010), except that the Bureau of Consumer Financial Protection shall not have authority to prescribe regulations with respect to the standards under section 501.

‘(B) CFTC- The Commodity Futures Trading Commission shall have authority to prescribe such regulations as may be necessary to carry out the purposes of this subtitle with respect to financial institutions and other persons subject to the jurisdiction of the Commodity Futures Trading Commission under section 5g of the Commodity Exchange Act.

‘(C) FEDERAL TRADE COMMISSION AUTHORITY- Notwithstanding the authority of the Bureau of Consumer Financial Protection under subparagraph (A), the Federal Trade Commission shall have authority to prescribe such regulations as may be necessary to carry out the purposes of this subtitle with respect to any financial institution that is a person described in section 1029(a) of the Consumer Financial Protection Act of 2010.

‘(D) RULE OF CONSTRUCTION- Nothing in this paragraph shall be construed to alter, affect, or otherwise limit the authority of a State insurance authority to adopt regulations to carry out this subtitle.

‘(2) COORDINATION, CONSISTENCY, AND COMPARABILITY- Each of the agencies authorized under paragraph (1) to prescribe regulations shall consult and coordinate with the other such agencies and, as appropriate, and with representatives of State insurance authorities designated by the National Association of Insurance Commissioners, for the purpose of assuring, to the extent possible, that the regulations prescribed by each such agency are consistent and comparable with the regulations prescribed by the other such agencies.’; and

(B) in paragraph (3), by striking ‘, and shall be issued in final form not later than 6 months after the date of enactment of this Act’;

(4) in section 505(a) (15 U.S.C. 6805(a))—

(A) by striking ‘This subtitle’ and all that follows through ‘as follows:’ and inserting ‘Subject to subtitle B of the Consumer Financial Protection Act of 2010, this subtitle and the regulations prescribed thereunder shall be enforced by the Bureau of Consumer Financial Protection, the Federal functional regulators, the State insurance authorities, and the Federal Trade Commission with respect to financial institutions and other persons subject to their jurisdiction under applicable law, as follows:’;

(B) in paragraph (1)—

- (i) in the matter preceding subparagraph (A), by inserting ‘by the appropriate Federal banking agency, as defined in section 3(q) of the Federal Deposit Insurance Act,’ after ‘Act.’;
  - (ii) in subparagraph (A), by striking ‘, by the Office of the Comptroller of the Currency’;
  - (iii) in subparagraph (B), by striking ‘, by the Board of Governors of the Federal Reserve System’;
  - (iv) in subparagraph (C), by striking ‘, by the Board of Directors of the Federal Deposit Insurance Corporation’; and
  - (v) in subparagraph (D), by striking ‘, by the Director of the Office of Thrift Supervision’; and
- (C) by adding at the end the following:
- ‘(8) Under subtitle E of the Consumer Financial Protection Act of 2010, by the Bureau of Consumer Financial Protection, in the case of any financial institution and other covered person or service provider that is subject to the jurisdiction of the Bureau and any person subject to this subtitle, but not with respect to the standards under section 501.’;
- (5) in section 505(b)(1) (15 U.S.C. 6805(b)(1)), by inserting ‘, other than the Bureau of Consumer Financial Protection,’ after ‘subsection (a)’; and
- (6) in section 507(b) (15 U.S.C. 6807), by striking ‘Federal Trade Commission’ and inserting ‘Bureau of Consumer Financial Protection’.

## Analysis

- Limited Authority of the Bureau Under the GLBA. Title V of GLBA generally regulates the disclosure of customer financial information to third parties; requires banks, lenders and other financial institutions to provide customers with annual privacy notices; and requires financial institutions to establish procedures for the safekeeping of customer financial information. Section 1093 amends Title V of GLBA to transfer to the Bureau the regulatory authority to “prescribe such regulations as may be necessary to carry out the purposes” of the GLBA. Nevertheless, revision of the existing privacy regulations may not be a high priority for the Bureau. Following the enactment of the Financial Services Regulatory Relief Act of 2006, the federal agencies issued new model privacy forms. These forms, which were the result of extensive consumer research and testing, reflect the type of disclosure style that is likely to be acceptable to the new Bureau. See 74 Fed. Reg. 62,890 (Dec. 1, 2009). The federal regulators released a model consumer privacy notice online form builder on April 15, 2010.  
  
Importantly, the Bureau will not have authority to establish financial institution data safeguards. Specifically, under the GLBA, certain agencies are authorized to establish standards for financial institutions relating to administrative, technical and physical safeguards to (i) ensure the security and confidentiality of customer records and information; (ii) to protect against any anticipated threats or hazards to the security or integrity of such records; and (iii) to protect against unauthorized access to or use of such records or information which could result in substantial harm or inconvenience to any customer. Section 1093 expressly excludes the Bureau from having this authority.
- Coordination with the SEC, CFTC, and FTC. The Bureau is not granted the sole authority to prescribe regulations under the GLBA; this section also authorizes the SEC and the CFTC to prescribe regulations for persons subject to their respective jurisdictions. The FTC is charged with writing rules for persons that are excluded from Bureau jurisdiction under CFPB section 1029(a)—that is, motor vehicle dealers that are predominantly engaged in the sale and servicing of motor vehicles, the leasing of motor vehicles, or both. All of these agencies, the Bureau, SEC, CFTC, and the FTC, are required to “consult and coordinate” with the other agencies and, as appropriate with state insurance authorities designated by the National Association of Insurance Commissioners.

- **Enforcement.** Enforcement of the privacy provisions of GLBA Title V follows the general CFPB model: the Bureau will enforce these provisions against banks with more than \$10 billion in assets; functional regulators will enforce these provisions against other regulated entities; state insurance regulators will enforce these provisions against insurance companies; and the Bureau and FTC will share residual jurisdiction. The GLBA Title V has never provided a civil cause of action for any violation, and the CFPB does not change this.

The data security provisions of GLBA Title V will not, however, be enforced by the Bureau, but only by the functional regulators and FTC.

- **Effective Date.** These provisions are effective on the Designated Transfer Date, July 21, 2011.

## 2.3 Credit Reporting

### 2.3.1 Amendments to the FCRA and FACTA (§ 1088)

#### SEC. 1088. AMENDMENTS TO THE FAIR CREDIT REPORTING ACT AND THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT OF 2003.

(a) Fair Credit Reporting Act- The Fair Credit Reporting Act (15 U.S.C. 1681 et seq.) is amended—

(1) in section 603 (15 U.S.C. 1681a)—

(A) by redesignating subsections (w) and (x) as subsections (x) and (y), respectively; and

(B) by inserting after subsection (v) the following:

‘(w) The term ‘Bureau’ means the Bureau of Consumer Financial Protection.’; and

(2) except as otherwise specifically provided in this subsection—

(A) by striking ‘Federal Trade Commission’ each place that term appears and inserting ‘Bureau’;

(B) by striking ‘FTC’ each place that term appears and inserting ‘Bureau’;

(C) by striking ‘the Commission’ each place that term appears, other than sections 615(e) (15 U.S.C. 1681m(e)) and 628(a)(1) (15 U.S.C. 1681w(a)(1)), and inserting ‘the Bureau’; and

(D) by striking ‘The Federal banking agencies, the National Credit Union Administration, and the Commission shall jointly’ each place that term appears, other than section 615(e)(1) (15 U.S.C. 1681m(e)) and section 628(a)(1) (15 U.S.C. 1681w(a)(1)), and inserting ‘The Bureau shall’;

(3) in section 603(k)(2) (15 U.S.C. 1681a(k)(2)), by striking ‘Board of Governors of the Federal Reserve System’ and inserting ‘Bureau’;

(4) in section 604(g) (15 U.S.C. 1681b(g))—

(A) in paragraph (3), by striking subparagraph (C) and inserting the following:

‘(C) as otherwise determined to be necessary and appropriate, by regulation or order, by the Bureau or the applicable State insurance authority (with respect to any person engaged in providing insurance or annuities).’; and

(B) by striking paragraph (5) and inserting the following:

‘(5) REGULATIONS AND EFFECTIVE DATE FOR PARAGRAPH (2)-

‘(A) REGULATIONS REQUIRED- The Bureau may, after notice and opportunity for comment, prescribe regulations that permit transactions under paragraph (2) that are determined to be necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs (and which shall include permitting actions necessary for administrative verification purposes), consistent with the intent of paragraph (2) to restrict the use of medical information for inappropriate purposes.’;

- (5) in section 605(h)(2)(A) (15 U.S.C. 1681c(h)(2)(A)), by striking ‘with respect to the entities that are subject to their respective enforcement authority under section 621’ and inserting ‘, in consultation with the Federal banking agencies, the National Credit Union Administration, and the Federal Trade Commission,’.
- (6) in section 611(e)(2) (15 U.S.C. 1681i(e)), by striking paragraph (2) and inserting the following:  
‘(2) EXCLUSION- Complaints received or obtained by the Bureau pursuant to its investigative authority under the Consumer Financial Protection Act of 2010 shall not be subject to paragraph (1).’;
- (7) in section 615(d)(2)(B) (15 U.S.C. 1681m(d)(2)(B)), by striking ‘the Federal banking agencies’ and inserting ‘the Federal Trade Commission, the Federal banking agencies,’;
- (8) in section 615(e)(1) (15 U.S.C. 1681m(e)(1)), by striking ‘and the Commission’ and inserting ‘the Federal Trade Commission, the Commodity Futures Trading Commission, and the Securities and Exchange Commission’;
- (9) in section 615(h)(6) (15 U.S.C. 1681m(h)(6)), by striking subparagraph (A) and inserting the following:  
‘(A) RULES REQUIRED- The Bureau shall prescribe rules to carry out this subsection.’;
- (10) in section 621 (15 U.S.C. 1681s)—
- (A) by striking subsection (a) and inserting the following:  
‘(a) Enforcement by Federal Trade Commission-
- ‘(1) IN GENERAL- The Federal Trade Commission shall be authorized to enforce compliance with the requirements imposed by this title under the Federal Trade Commission Act (15 U.S.C. 41 et seq.), with respect to consumer reporting agencies and all other persons subject thereto, except to the extent that enforcement of the requirements imposed under this title is specifically committed to some other Government agency under any of subparagraphs (A) through (G) of subsection (b)(1), and subject to subtitle B of the Consumer Financial Protection Act of 2010, subsection (b). For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement or prohibition imposed under this title shall constitute an unfair or deceptive act or practice in commerce, in violation of section 5(a) of the Federal Trade Commission Act (15 U.S.C. 45(a)), and shall be subject to enforcement by the Federal Trade Commission under section 5(b) of that Act with respect to any consumer reporting agency or person that is subject to enforcement by the Federal Trade Commission pursuant to this subsection, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests under the Federal Trade Commission Act. The Federal Trade Commission shall have such procedural, investigative, and enforcement powers, including the power to issue procedural rules in enforcing compliance with the requirements imposed under this title and to require the filing of reports, the production of documents, and the appearance of witnesses, as though the applicable terms and conditions of the Federal Trade Commission Act were part of this title. Any person violating any of the provisions of this title shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act as though the applicable terms and provisions of such Act are part of this title.
- ‘(2) PENALTIES-
- ‘(A) KNOWING VIOLATIONS- Except as otherwise provided by subtitle B of the Consumer Financial Protection Act of 2010, in the event of a knowing violation, which constitutes a pattern or practice of violations of this title, the Federal Trade Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person that violates this title. In such action, such person shall be liable for a civil penalty of not more than \$2,500 per violation.

‘(B) DETERMINING PENALTY AMOUNT- In determining the amount of a civil penalty under subparagraph (A), the court shall take into account the degree of culpability, any history of such prior conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

‘(C) LIMITATION- Notwithstanding paragraph (2), a court may not impose any civil penalty on a person for a violation of section 623(a)(1), unless the person has been enjoined from committing the violation, or ordered not to commit the violation, in an action or proceeding brought by or on behalf of the Federal Trade Commission, and has violated the injunction or order, and the court may not impose any civil penalty for any violation occurring before the date of the violation of the injunction or order.’;

(B) by striking subsection (b) and inserting the following:

‘(b) Enforcement by Other Agencies-

‘(1) IN GENERAL- Subject to subtitle B of the Consumer Financial Protection Act of 2010, compliance with the requirements imposed under this title with respect to consumer reporting agencies, persons who use consumer reports from such agencies, persons who furnish information to such agencies, and users of information that are subject to section 615(d) shall be enforced under—

‘(A) section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818), by the appropriate Federal banking agency, as defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), with respect to—

‘(i) any national bank or State savings association, and any Federal branch or Federal agency of a foreign bank;

‘(ii) any member bank of the Federal Reserve System (other than a national bank), a branch or agency of a foreign bank (other than a Federal branch, Federal agency, or insured State branch of a foreign bank), a commercial lending company owned or controlled by a foreign bank, and any organization operating under section 25 or 25A of the Federal Reserve Act; and

‘(iii) any bank or Federal savings association insured by the Federal Deposit Insurance Corporation (other than a member of the Federal Reserve System) and any insured State branch of a foreign bank;

‘(B) the Federal Credit Union Act (12 U.S.C. 1751 et seq.), by the Administrator of the National Credit Union Administration with respect to any Federal credit union;

‘(C) subtitle IV of title 49, United States Code, by the Secretary of Transportation, with respect to all carriers subject to the jurisdiction of the Surface Transportation Board;

‘(D) the Federal Aviation Act of 1958 (49 U.S.C. App. 1301 et seq.), by the Secretary of Transportation, with respect to any air carrier or foreign air carrier subject to that Act;

‘(E) the Packers and Stockyards Act, 1921 (7 U.S.C. 181 et seq.) (except as provided in section 406 of that Act), by the Secretary of Agriculture, with respect to any activities subject to that Act;

‘(F) the Commodity Exchange Act, with respect to a person subject to the jurisdiction of the Commodity Futures Trading Commission;

‘(G) the Federal securities laws, and any other laws that are subject to the jurisdiction of the Securities and Exchange Commission, with respect to a person that is subject to the jurisdiction of the Securities and Exchange Commission; and

‘(H) subtitle E of the Consumer Financial Protection Act of 2010, by the Bureau, with respect to any person subject to this title.

‘(2) INCORPORATED DEFINITIONS- The terms used in paragraph (1) that are not defined in this title or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) have the same meanings as in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).’;

(C) in subsection (c)(2)—

(i) by inserting ‘and the Federal Trade Commission’ before ‘or the appropriate’; and

(ii) by inserting ‘and the Federal Trade Commission’ before ‘or appropriate’ each place that term appears;

(D) in subsection (c)(4), by inserting before ‘or the appropriate’ each place that term appears the following: ‘, the Federal Trade Commission,’;

(E) by striking subsection (e) and inserting the following:

‘(e) Regulatory Authority-

‘(1) IN GENERAL- The Bureau shall prescribe such regulations as are necessary to carry out the purposes of this title, except with respect to sections 615(e) and 628. The Bureau may prescribe regulations as may be necessary or appropriate to administer and carry out the purposes and objectives of this title, and to prevent evasions thereof or to facilitate compliance therewith. Except as provided in section 1029(a) of the Consumer Financial Protection Act of 2010, the regulations prescribed by the Bureau under this title shall apply to any person that is subject to this title, notwithstanding the enforcement authorities granted to other agencies under this section.

‘(2) DEFERENCE- Notwithstanding any power granted to any Federal agency under this title, the deference that a court affords to a Federal agency with respect to a determination made by such agency relating to the meaning or interpretation of any provision of this title that is subject to the jurisdiction of such agency shall be applied as if that agency were the only agency authorized to apply, enforce, interpret, or administer the provisions of this title. The regulations prescribed by the Bureau under this title shall apply to any person that is subject to this title, notwithstanding the enforcement authorities granted to other agencies under this section.’; and

(F) in subsection (f)(2), by striking ‘the Federal banking agencies’ and insert ‘the Federal Trade Commission, the Federal banking agencies,’;

(11) in section 623 (15 U.S.C. 1681s-2)—

(A) in subsection (a)(7), by striking subparagraph (D) and inserting the following:

‘(D) MODEL DISCLOSURE-

‘(i) DUTY OF BUREAU- The Bureau shall prescribe a brief model disclosure that a financial institution may use to comply with subparagraph (A), which shall not exceed 30 words.

‘(ii) USE OF MODEL NOT REQUIRED- No provision of this paragraph may be construed to require a financial institution to use any such model form prescribed by the Bureau.

‘(iii) COMPLIANCE USING MODEL- A financial institution shall be deemed to be in compliance with subparagraph (A) if the financial institution uses any model form prescribed by the Bureau under this subparagraph, or the financial institution uses any such model form and rearranges its format.’;

(B) in subsection (a)(8), by inserting ‘, in consultation with the Federal Trade Commission, the Federal banking agencies, and the National Credit Union Administration,’ before ‘shall jointly’; and

(C) by striking subsection (e) and inserting the following:

‘(e) Accuracy Guidelines and Regulations Required-

‘(1) GUIDELINES- The Bureau shall, with respect to persons or entities that are subject to the enforcement authority of the Bureau under section 621—

‘(A) establish and maintain guidelines for use by each person that furnishes information to a consumer reporting agency regarding the accuracy and integrity of the information relating to consumers that such entities furnish to consumer reporting agencies, and update such guidelines as often as necessary; and

‘(B) prescribe regulations requiring each person that furnishes information to a consumer reporting agency to establish reasonable policies and procedures for implementing the guidelines established pursuant to subparagraph (A).

‘(2) CRITERIA- In developing the guidelines required by paragraph (1)(A), the Bureau shall—

‘(A) identify patterns, practices, and specific forms of activity that can compromise the accuracy and integrity of information furnished to consumer reporting agencies;

‘(B) review the methods (including technological means) used to furnish information relating to consumers to consumer reporting agencies;

‘(C) determine whether persons that furnish information to consumer reporting agencies maintain and enforce policies to ensure the accuracy and integrity of information furnished to consumer reporting agencies; and

‘(D) examine the policies and processes that persons that furnish information to consumer reporting agencies employ to conduct reinvestigations and correct inaccurate information relating to consumers that has been furnished to consumer reporting agencies’;

(12) in section 628(a)(1) (15 U.S.C. 1681w(a)(1)), by striking ‘Not later than’ and all that follows through ‘Exchange Commission,’ and inserting ‘The Federal Trade Commission, the Securities and Exchange Commission, the Commodity Futures Trading Commission, the Federal banking agencies, and the National Credit Union Administration, with respect to the entities that are subject to their respective enforcement authority under section 621,’; and

(13) in section 628(a)(3) (15 U.S.C. 1681w(a)(3)), by striking ‘the Federal banking agencies, the National Credit Union Administration, the Commission, and the Securities and Exchange Commission’ and inserting ‘the agencies identified in paragraph (1)’.

(b) Fair and Accurate Credit Transactions Act of 2003- The Fair and Accurate Credit Transactions Act of 2003 (Public Law 108-159) is amended—

(1) in section 112(b) (15 U.S.C. 1681c-1 note), by striking ‘Commission’ and inserting ‘Bureau’;

(2) in section 211(d) (15 U.S.C. 1681j note), by striking ‘Commission’ each place that term appears and inserting ‘Bureau’;

(3) in section 214(b) (15 U.S.C. 1681s-3 note), by striking paragraph (1) and inserting the following:

‘(1) IN GENERAL- Regulations to carry out section 624 of the Fair Credit Reporting Act (15 U.S.C. 1681s-3), shall be prescribed, as described in paragraph (2), by—

‘(A) the Commodity Futures Trading Commission, with respect to entities subject to its enforcement authorities;

'(B) the Securities and Exchange Commission, with respect to entities subject to its enforcement authorities; and

'(C) the Bureau, with respect to other entities subject to this Act.>'; and

(4) in section 214(e)(1) (15 U.S.C. 1681s-3 note), by striking 'Commission' and inserting 'Bureau'.

## Analysis

- **Enforcement Overview.** The Act adds enforcement authority for the CFTC and SEC. Otherwise, enforcement of FCRA follows the general CFPA model: the Bureau will enforce FCRA and its implementing rules against banks with more than \$10 billion in assets; functional regulators will enforce these provisions against other regulated entities; and the Bureau and FTC will share residual jurisdiction. The Act amends FCRA to provide the Bureau with general enforcement power "with respect to any person subject to this title," but the FTC continues to maintain its general enforcement jurisdiction under the FCRA. Thus, as a practical matter, the Bureau and the FTC appear to share residual enforcement jurisdiction under the FCRA.

In addition, consumer reports that are not used in connection with offering Consumer Financial Products or Services are excluded from the Bureau's jurisdiction, meaning that the Bureau appears to have no authority over consumer reporting agencies that do not provide consumer reports in connection with consumer credit or deposit transactions, for example, consumer reporting agencies that provide employment background reports, insurance underwriting reports, tenant screening reports, and reports used in connection with government licensing or benefits decisions. Nor does the Bureau have enforcement authority over persons, such as landlords and insurance companies, that use consumer reports in connection with non-credit or deposit-related transactions. See, e.g., CFPA § 1027(f) ("the Bureau shall have no authority to exercise any power to enforce this title with respect to a person regulated by a State insurance regulator").

In addition to rearranging the enforcement authority of federal agencies under the FCRA, the Act also restated the FTC's authority to obtain civil penalties in the amount of \$2,500 "in the event of a knowing violation, which constitutes a pattern or practice of violations of this title." The FTC had recently increased this amount to \$3,500 per violation, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990. 28 U.S.C. § 2461 note; see also 74 Fed. Reg. 857, 858 (Jan. 9, 2009) (codified at 16 C.F.R. § 1.98(m)). The effect of the CFPA amendment will be to reduce this amount back to \$2,500.

- **Rulemaking Overview.** Existing rulemaking power, which is currently diffused among the Banking Agencies and FTC, will for the most part transfer to the Bureau on the Designated Transfer Date of July 21, 2011. The Bureau will have general rulemaking authority under the FCRA, which rules will apply to all persons subject to the FCRA, "notwithstanding the enforcement authorities granted to other agencies under" the FCRA. This general authority is now held jointly by the Banking Agencies.

The SEC and CFTC also are directed to make rules under the Identity Theft Red Flags Rule provisions, and the CFTC is directed to make an Affiliate Marketing Rule and a rule requiring the secure disposal of consumer report information. See Act §§ 1088(a)(12) and (b)(3). The CFTC has issued notices of proposed rulemakings to implement these new requirements. See 74 Fed. Reg. 66,018 (Oct. 27, 2010).

In addition, the Bureau will be solely responsible for prescribing many of the specific rules required by the Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (2003), including rules regarding the provision of free credit reports to consumers; the use of medical information by lenders and the sharing of medical information among affiliated companies; the receipt of address discrepancy notices by users of consumer reports; prescreen opt-out notifications; the provision of risk-based pricing notices to consumers; the establishment of procedures regarding the furnishing of accurate information to consumer reporting agencies; the receipt of disputes directly from consumers; the provision of negative information to consumer reporting agencies; and certain definitions relating to the rights of identity theft victims. Rules regarding the receipt and use of information for marketing purposes by affiliated companies will be made by the Bureau in

conjunction with the SEC and CFTC. Importantly, however, the authority to make regulations to prevent and mitigate identity theft (the so-called "Identity Theft Red Flags Rule") under FCRA section 615(e) and to require the proper disposal of consumer report information under FCRA section 628 will remain with the FTC, SEC, CFTC, and the Banking Agencies.

- **Deference.** Notwithstanding any power granted to any Federal agency under the FCRA, the deference that a court affords to a Federal agency with respect to a determination made by such agency relating to the meaning or interpretation of any provision of the FCRA that is subject to the jurisdiction of such agency will be applied as if that agency were the only agency authorized to apply, enforce, interpret, or administer the provisions of the FCRA. The regulations prescribed by the Bureau under the FCRA will apply to any person that is subject to the FCRA, notwithstanding the enforcement authorities granted to other agencies. This deference provision is consistent with provisions added to other Enumerated Consumer Laws by the CFPB.
- **Effective Date.** These provisions are effective on the Designated Transfer Date, July 21, 2011.

### 2.3.2 Required Disclosure of Credit Scores (§ 1100F)

#### SEC. 1100F. USE OF CONSUMER REPORTS.

Section 615 of the Fair Credit Reporting Act (15 U.S.C. 1681m) is amended—

(1) in subsection (a)—

(A) by redesignating paragraphs (2) and (3) as paragraphs (3) and (4), respectively;

(B) by inserting after paragraph (1) the following:

‘(2) provide to the consumer written or electronic disclosure—

‘(A) of a numerical credit score as defined in section 609(f)(2)(A) used by such person in taking any adverse action based in whole or in part on any information in a consumer report; and

‘(B) of the information set forth in subparagraphs (B) through (E) of section 609(f)(1);’; and

(C) in paragraph (4) (as so redesignated), by striking ‘paragraph (2)’ and inserting ‘paragraph (3)’; and

(2) in subsection (h)(5)—

(A) in subparagraph (C), by striking ‘; and’ and inserting a semicolon;

(B) in subparagraph (D), by striking the period and inserting ‘; and’; and

(C) by inserting at the end the following:

‘(E) include a statement informing the consumer of—

‘(i) a numerical credit score as defined in section 609(f)(2)(A), used by such person in making the credit decision described in paragraph (1) based in whole or in part on any information in a consumer report; and

‘(ii) the information set forth in subparagraphs (B) through (E) of section 609(f)(1).’.

#### Analysis

Section 1100F amends Section 615 of the Fair Credit Reporting Act to add credit score disclosure obligations in connection with adverse action and risk-based pricing notices.

- **New Disclosure Requirements for Users Taking Adverse Actions on the Basis of Information Contained in Consumer Reports.** The FCRA requires a person who, with respect to any consumer, takes any adverse action

that is based in whole or in part on any information contained in a consumer report to provide certain information to the consumer.

Section 1100F amends this section of the FCRA to add a new requirement that the person “provide to the consumer written or electronic disclosure (A) of a numerical credit score as defined in section 609(f)(2)(A) [of the FCRA] used by such person in taking any adverse action based in whole or in part on any information in a consumer report; and (B) of the information set forth in subparagraphs (B) through (E) of section 609(f)(1).” Consequently, the Act amends the FCRA to require new disclosures by users of a consumer report:

(A) A user must provide the actual “numerical credit score” to a consumer when a user takes any adverse action based in whole or in part on information contained in a consumer report; and

(B) The user must provide certain disclosures that a consumer reporting agency is presently required to provide upon the request of a consumer for a credit score, specifically, (i) the range of possible credit scores under the model used; (ii) all of the key factors that adversely affected the credit score of the consumer in the model used; (iii) the date on which the credit score was created; and (iv) the name of the person or entity that provided the credit score or credit file upon which the credit score was created.

This information is similar to what is currently required in connection with certain mortgage loan applications. See FCRA § 609(g) (requiring mortgage lenders to provide borrowers with a “Notice to Home Loan Applicants,” including a credit score and the key factors contributing that score). As a result, it should not be difficult for credit bureaus to generate the required information, but creditors will need to modify their adverse action notice forms to accommodate the new disclosures.

The term “credit score,” as defined in FCRA section 609(f)(2)(A), means a value derived from a modeling system used to predict certain credit behaviors, and does not include a rating of an automated underwriting system that considers factors in addition to consumer report information such as loan-to-value ratio, the amount of down payment, or the financial assets of a consumer. Thus, for example, a consumer report user would not be required to disclose a score developed for use by insurers, and would not be required to disclose a proprietary score that includes factors, such as loan-to-value ratio, that are not derived from a consumer report.

- **Risk-Based Pricing Notices.** The so-called “Risk-Based Pricing” provisions in FCRA Section 615(h) require users who, based on a consumer report, grant, extend, or provide credit on material terms that are materially less favorable than the most favorable terms available to a substantial portion of consumers from or through that person to provide certain disclosures to consumers. Under the Act, such users will be required, in addition to other notice requirements required by FCRA section 615(h)(5), to include a statement in the notice informing the consumer of “(i) a numerical credit score as defined in section 609(f)(2)(A), used by such person in making the credit decision described in paragraph (1) based in whole or in part on any information in a consumer report; and (ii) the information set forth in subparagraphs (B) through (E) of section 609(f)(1).”
- The FRB and FTC have recently made a rule implementing the Risk-Based Pricing provisions of FCRA § 615(h). See 75 Fed. Reg. 2,724 (Jan. 15, 2010) (final rulemaking notice). This rule is effective January 1, 2011, and requires lenders to provide Risk-Based Pricing Notices to certain borrowers. The rule requires specific content to be provided in these notices and also provides model forms that lenders can use as a “safe harbor.” See 16 C.F.R. § 640.4 (content of notices); 16 C.F.R. pt. 640, App. (model forms). These provisions will need to be amended to allow the additional content required by the amendments made by CFPB section 1100F.
- **Effective Date.** These provisions are effective on the Designated Transfer Date, July 21, 2011.

### 2.3.3 Study and Report on Credit Scores (§ 1078)

#### SEC. 1078. STUDY AND REPORT ON CREDIT SCORES.

(a) Study- The Bureau shall conduct a study on the nature, range, and size of variations between the credit scores sold to creditors and those sold to consumers by consumer reporting agencies that compile and maintain files on consumers on a nationwide basis (as defined in section 603(p) of the Fair Credit Reporting Act; 15 U.S.C. 1681a(p)), and whether such variations disadvantage consumers.

(b) Report to Congress- The Bureau shall submit a report to Congress on the results of the study conducted under subsection (a) not later than 1 year after the date of enactment of this Act.

#### Analysis

- Study and Report on Credit Scores. Section 1078 requires the Bureau to conduct a study on the “nature, range, and size of variations between the credit scores sold to creditors and those sold to consumers” by nationwide consumer reporting agencies as well as “whether such variations disadvantage consumers.” The Bureau is to submit a report to Congress regarding the results of this study.

There currently are three nationwide consumer reporting agencies: Equifax Inc., Experian Information Solutions, Inc., and TransUnion LLC. See 75 Fed. Reg. 9,726, 9,726 at n. 2 (Mar. 3, 2010). Under existing law, the nationwide consumer reporting agencies are required to disclose to a consumer a credit score upon the consumer’s request, but are permitted to disclose an “educational” score, rather than a score actually used by lenders to make decisions about consumers. FCRA § 609(f)(7)(A) (permitting a consumer reporting agency to disclose “a credit score that assists the consumer in understanding the credit scoring assessment of the credit behavior of the consumer”). This study is motivated by the apparent belief of some members of Congress that educational credit scores may be less valuable for consumers. See House Serial No. 110-133 at 24 (2008) (comments of Rep. Jackie Speier (D-Cal.) regarding “FAKO” scores). This provision was enacted in lieu of a competing provision that sought to prohibit the sale of educational scores.

- Report on Remittance Transfers. As discussed in section 6.1 of this User Guide, CFPB section 1073 requires the Bureau to submit a report to the President, the House Financial Services Committee, and the Senate Banking Committee on the manner in which a consumer’s history of sending remittance transfers could be used to enhance the consumer’s credit score.
- Effective Date. The reports required by section 1078 and section 1073 are due on or before July 21, 2011.

### 2.3.4 Telemarketing and Consumer Fraud and Abuse Prevention Act (§ 1100C)

#### SEC. 1100C. AMENDMENTS TO THE TELEMARKETING AND CONSUMER FRAUD AND ABUSE PREVENTION ACT.

(a) Amendments to Section 3- Section 3 of the Telemarketing and Consumer Fraud and Abuse Prevention Act (15 U.S.C. 6102) is amended by striking subsections (b) and (c) and inserting the following:

‘(b) Rulemaking Authority- The Commission shall have authority to prescribe rules under subsection (a), in accordance with section 553 of title 5, United States Code. In prescribing a rule under this section that relates to the provision of a consumer financial product or service that is subject to the Consumer Financial Protection Act of 2010, including any enumerated consumer law thereunder, the Commission shall consult with the Bureau of Consumer Financial Protection regarding the consistency of a proposed rule with standards, purposes, or objectives administered by the Bureau of Consumer Financial Protection.

‘(c) Violations- Any violation of any rule prescribed under subsection (a)—

‘(1) shall be treated as a violation of a rule under section 18 of the Federal Trade Commission Act regarding unfair or deceptive acts or practices; and

‘(2) that is committed by a person subject to the Consumer Financial Protection Act of 2010 shall be treated as a violation of a rule under section 1031 of that Act regarding unfair, deceptive, or abusive acts or practices.’.

(b) Amendments to Section 4- Section 4(d) of the Telemarketing and Consumer Fraud and Abuse Prevention Act (15 U.S.C. 6103(d)) is amended by inserting after ‘Commission’ each place that term appears the following:

‘or the Bureau of Consumer Financial Protection’.

(c) Amendments to Section 5- Section 5(c) of the Telemarketing and Consumer Fraud and Abuse Prevention Act (15 U.S.C. 6104(c)) is amended by inserting after ‘Commission’ each place that term appears the following: ‘or the Bureau of Consumer Financial Protection’.

(d) Amendment to Section 6- Section 6 of the Telemarketing and Consumer Fraud and Abuse Prevention Act (15 U.S.C. 6105) is amended by adding at the end the following:

‘(d) Enforcement by Bureau of Consumer Financial Protection- Except as otherwise provided in sections 3(d), 3(e), 4, and 5, and subject to subtitle B of the Consumer Financial Protection Act of 2010, this Act shall be enforced by the Bureau of Consumer Financial Protection under subtitle E of the Consumer Financial Protection Act of 2010, with respect to the offering or provision of a consumer financial product or service subject to that Act.’.

## Analysis

Section 1100C amends the TCFAPA, which is especially notable because the FTC has used authority provided in the TCFAPA to issue its Telemarketing Sales Rule (“TSR”), including the Do-Not-Call provisions of the TSR. The TSR does not currently apply to banks, and these amendments do not change that.

- **Rulemaking.** Section 1100C amends TCFAPA Section 6102(b) (Rulemaking) and (c) (Enforcement) by replacing these sections with new text. The CFPA preserves the authority of the FTC to prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices. In the event the rule “relates to the provision of a consumer financial product or service that is subject to the Consumer Financial Protection Act of 2010, including any enumerated consumer law thereunder,” the FTC is required to consult with the Bureau “regarding the consistency of a proposed rule with standards, purposes, or objectives administered” by the Bureau.
- **Violations.** Section 1100C provides that any violation of the TSR will be treated as a violation of a rule under section 18 of the FTC Act regarding unfair or deceptive acts or practices. This means the FTC can obtain civil penalties for violations of the TSR in the same amount as the civil penalties that it obtains for violations of a trade regulation rule—currently, \$16,000 per violation. See FTC Act § 5(m); 16 C.F.R. § 1.98. Additionally, if the violation is committed by a person subject to the CFPA, the violation will be treated as a violation of a rule under Section 1031 of the Act. Section 1031 of the CFPA prohibits unfair, deceptive, or abusive acts or practices.
- **Application to Banks.** Section 1100C amends Section 6105 of the TCFAPA to provide that the TCFAPA will be enforced by the Bureau with respect to the offering or provision of a consumer financial product or service. Because the Bureau has enforcement jurisdiction over large banks, this provision could be read to mean that the TCFAPA and the TSR will now apply to banks. Section 1100C, however, does not amend existing TCFAPA section 6105(a), which states that “Except as otherwise provided in ... this title, this chapter shall be enforced by the Commission under the FTC Act (15 U.S.C. 41 et seq.). Consequently, no activity which is outside the jurisdiction of that Act shall be affected by this chapter.” To read these provisions consistently with one another, the better interpretation is that activities that are exempt from the FTC Act, such as banking, are not now subject

to TCFAPA, but enforcement of the TCFAPA with respect to non-bank consumer financial products and services will be committed to the Bureau.

- **Effective Date.** These provisions are effective on the Designated Transfer Date, July 21, 2011.

### 3. FAIR LENDING

#### 3.1 Definition of Fair Lending (§ 1002(13))

(13) FAIR LENDING- The term ‘fair lending’ means fair, equitable, and nondiscriminatory access to credit for consumers.

#### Analysis

The Act creates a potentially significant new definition for a fairly old concept, “fair lending.” While the Fair Housing Act (“FHA”) and the ECOA are known as fair lending laws, neither the FHA nor the ECOA specifically define that term. Rather, the FHA and ECOA outlaw discrimination on any prohibited basis (*e.g.*, race, color, religion, national origin, etc.) with respect to a credit transaction. The Banking Agencies use the term “fair lending” to refer to this type of discrimination, and recognize three forms of lending discrimination: overt discrimination, disparate treatment, and disparate impact. See, *e.g.*, the Policy Statement on Discrimination in Lending jointly issued by HUD, the U.S. Department of Justice, FRB, OCC, OTS, FDIC, FTC, NCUA, and other federal agencies, at 59 Fed. Reg. 18266 (April 15, 1994).

This new definition for “fair lending” could broaden the term beyond the current model of discrimination on a prohibited basis. An expansion of the “fair lending” concept to general—and highly subjective—principles of fairness and equity could subject Covered Persons to significant liability. Moreover, a broad interpretation of fairness and equity could include unpalatable principles such as mandatory credit allocation without regard to credit worthiness.

Various other provisions of the CFPA touch on fair lending. For example, section 1052 authorizes the Bureau to engage in joint investigations and requests for information with HUD and the U.S. Attorney General with respect to fair lending matters.

#### 3.2 Office of Fair Lending and Equal Opportunity (§ 1013(c))

##### (c) Office of Fair Lending and Equal Opportunity.—

(1) ESTABLISHMENT.—The Director shall establish within the Bureau the Office of Fair Lending and Equal Opportunity.

(2) FUNCTIONS.—The Office of Fair Lending and Equal Opportunity shall have such powers and duties as the Director may delegate to the Office, including—

(A) providing oversight and enforcement of Federal laws intended to ensure the fair, equitable, and nondiscriminatory access to credit for both individuals and communities that are enforced by the Bureau, including the Equal Credit Opportunity Act and the Home Mortgage Disclosure Act;

(B) coordinating fair lending efforts of the Bureau with other Federal agencies and State regulators, as appropriate, to promote consistent, efficient, and effective enforcement of Federal fair lending laws;

(C) working with private industry, fair lending, civil rights, consumer and community advocates on the promotion of fair lending compliance and education; and

(D) providing annual reports to Congress on the efforts of the Bureau to fulfill its fair lending mandate.

(3) ADMINISTRATION OF OFFICE.—There is established the position of Assistant Director of the Bureau for Fair Lending and Equal Opportunity, who—

- (A) shall be appointed by the Director; and
- (B) shall carry out such duties as the Director may delegate to such Assistant Director.

## Analysis

- **Establishment.** The Bureau will establish an Office of Fair Lending and Equal Opportunity that will (1) provide oversight and enforcement of Federal laws intended to ensure the fair, equitable, and nondiscriminatory access to credit for both individuals and communities that are enforced by the Bureau; (2) coordinate fair lending efforts of the Bureau with other Federal agencies and State regulators, as appropriate, to promote consistent, efficient, and effective enforcement of Federal fair lending laws; (3) work with private industry, fair lending, civil rights, consumer, and community advocates on the promotion of fair lending compliance and education; and (4) providing annual reports to Congress on the efforts of the Bureau to fulfill its fair lending mandate. The new Office will be led by an Assistant Director of the Bureau.
- **Effective Date.** These provisions were effective on July 21, 2010. The Office of Fair Lending and Equal Opportunity must be established within 1 year after the Designated Transfer Date, that is, by July 21, 2012.

### 3.3 Financial Institutions to Collect Data Regarding Certain Applicants (§ 1071)

#### SEC. 1071. SMALL BUSINESS DATA COLLECTION.

(a) In General- The Equal Credit Opportunity Act (15 U.S.C. 1691 et seq.) is amended by inserting after section 704A the following:

#### 'SEC. 704B. SMALL BUSINESS LOAN DATA COLLECTION.

'(a) Purpose- The purpose of this section is to facilitate enforcement of fair lending laws and enable communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses.

'(b) Information Gathering- Subject to the requirements of this section, in the case of any application to a financial institution for credit for women-owned, minority-owned, or small business, the financial institution shall—

'(1) inquire whether the business is a women-owned, minority-owned, or small business, without regard to whether such application is received in person, by mail, by telephone, by electronic mail or other form of electronic transmission, or by any other means, and whether or not such application is in response to a solicitation by the financial institution; and

'(2) maintain a record of the responses to such inquiry, separate from the application and accompanying information.

'(c) Right To Refuse- Any applicant for credit may refuse to provide any information requested pursuant to subsection (b) in connection with any application for credit.

'(d) No Access by Underwriters—

'(1) LIMITATION- Where feasible, no loan underwriter or other officer or employee of a financial institution, or any affiliate of a financial institution, involved in making any determination concerning an application for credit shall have access to any information provided by the applicant pursuant to a request under subsection (b) in connection with such application.

'(2) LIMITED ACCESS- If a financial institution determines that a loan underwriter or other officer or employee of a financial institution, or any affiliate of a financial institution, involved in making any determination concerning an application for credit should have access to any information provided by the applicant pursuant to a request under subsection (b), the financial institution shall provide notice to the applicant of the access of the underwriter to such information, along with notice that the financial institution may not discriminate on the basis of such information.

'(e) Form and Manner of Information—

'(1) IN GENERAL- Each financial institution shall compile and maintain, in accordance with regulations of the Bureau, a record of the information provided by any loan applicant pursuant to a request under subsection (b).

'(2) ITEMIZATION- Information compiled and maintained under paragraph (1) shall be itemized in order to clearly and conspicuously disclose—

'(A) the number of the application and the date on which the application was received;

'(B) the type and purpose of the loan or other credit being applied for;

'(C) the amount of the credit or credit limit applied for, and the amount of the credit transaction or the credit limit approved for such applicant;

'(D) the type of action taken with respect to such application, and the date of such action;

'(E) the census tract in which is located the principal place of business of the women-owned, minority-owned, or small business loan applicant;

'(F) the gross annual revenue of the business in the last fiscal year of the women-owned, minority-owned, or small business loan applicant preceding the date of the application;

'(G) the race, sex, and ethnicity of the principal owners of the business; and

'(H) any additional data that the Bureau determines would aid in fulfilling the purposes of this section.

'(3) NO PERSONALLY IDENTIFIABLE INFORMATION- In compiling and maintaining any record of information under this section, a financial institution may not include in such record the name, specific address (other than the census tract required under paragraph (1)(E)), telephone number, electronic mail address, or any other personally identifiable information concerning any individual who is, or is connected with, the women-owned, minority-owned, or small business loan applicant.

'(4) DISCRETION TO DELETE OR MODIFY PUBLICLY AVAILABLE DATA- The Bureau may, at its discretion, delete or modify data collected under this section which is or will be available to the public, if the Bureau determines that the deletion or modification of the data would advance a privacy interest.

'(f) Availability of Information—

'(1) SUBMISSION TO BUREAU- The data required to be compiled and maintained under this section by any financial institution shall be submitted annually to the Bureau.

'(2) AVAILABILITY OF INFORMATION- Information compiled and maintained under this section shall be—

'(A) retained for not less than 3 years after the date of preparation;

'(B) made available to any member of the public, upon request, in the form required under regulations prescribed by the Bureau;

'(C) annually made available to the public generally by the Bureau, in such form and in such manner as is determined by the Bureau, by regulation.

'(3) COMPILATION OF AGGREGATE DATA- The Bureau may, at its discretion—

'(A) compile and aggregate data collected under this section for its own use; and

'(B) make public such compilations of aggregate data.

'(g) Bureau Action—

'(1) IN GENERAL- The Bureau shall prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to this section.

'(2) EXCEPTIONS- The Bureau, by rule or order, may adopt exceptions to any requirement of this section and may, conditionally or unconditionally, exempt any financial institution or class of financial

institutions from the requirements of this section, as the Bureau deems necessary or appropriate to carry out the purposes of this section.

‘(3) GUIDANCE- The Bureau shall issue guidance designed to facilitate compliance with the requirements of this section, including assisting financial institutions in working with applicants to determine whether the applicants are women-owned, minority-owned, or small businesses for purposes of this section.

‘(h) Definitions- For purposes of this section, the following definitions shall apply:

‘(1) FINANCIAL INSTITUTION- The term ‘financial institution’ means any partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity that engages in any financial activity.

‘(2) SMALL BUSINESS- The term ‘small business’ has the same meaning as the term ‘small business concern’ in section 3 of the Small Business Act (15 U.S.C. 632).

‘(3) SMALL BUSINESS LOAN- The term ‘small business loan’ means a loan made to a small business.

‘(4) MINORITY- The term ‘minority’ has the same meaning as in section 1204(c)(3) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.

‘(5) MINORITY-OWNED BUSINESS- The term ‘minority-owned business’ means a business—

‘(A) more than 50 percent of the ownership or control of which is held by 1 or more minority individuals; and

‘(B) more than 50 percent of the net profit or loss of which accrues to 1 or more minority individuals.

‘(6) WOMEN-OWNED BUSINESS- The term ‘women-owned business’ means a business—

‘(A) more than 50 percent of the ownership or control of which is held by 1 or more women; and

‘(B) more than 50 percent of the net profit or loss of which accrues to 1 or more women.’.

(b) Technical and Conforming Amendments- Section 701(b) of the Equal Credit Opportunity Act (15 U.S.C. 1691(b)) is amended—

(1) in paragraph (3), by striking ‘or’ at the end;

(2) in paragraph (4), by striking the period at the end and inserting ‘; or’; and

(3) by inserting after paragraph (4), the following:

‘(5) to make an inquiry under section 704B, in accordance with the requirements of that section.’.

(c) Clerical Amendment- The table of sections for title VII of the Consumer Credit Protection Act is amended by inserting after the item relating to section 704A the following new item:

‘704B. Small business loan data collection.’.

(d) Effective Date- This section shall become effective on the designated transfer date.

## Analysis

- Financial Institutions Required to Collect Information. Section 1071 amends the ECOA by requiring a “financial institution” to collect certain information about certain business applicants for credit.
- “Financial Institution.” Section 1071 defines the term “financial institution” as any partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity that engages in any financial activity. This is in contrast with the remainder of ECOA and Regulation B, which principally imposes duties on “creditors.” In general, a “creditor” is defined to mean any person—including an individual—who, in the ordinary course of business, regularly participates in a credit decision, including the

setting of the terms of the credit. See 12 C.F.R. §202.2(l). Thus, while an individual can be a “creditor,” it appears that he/she cannot be a “financial institution” for purposes of the new data gathering provisions of section 1071.

The term “financial activity” is not defined in section 1071 or elsewhere in the ECOA. It would be logical to interpret the term as it is used in Title V of GLBA—that is, any activity permitted under section 4(k) of the Bank Holding Company Act. It is also possible that the term will be interpreted more expansively. In any event, it is likely that the term will be defined broadly. For example, the term may very well be defined in a manner such that a “financial institution” will include loan brokers and assignees that participate in underwriting decisions. As noted below, the Bureau is authorized to prescribe rules, including having the authority to “conditionally or unconditionally, exempt any financial institution or class of financial institutions from the requirements” of Section 1071.

- **Data Collection Required.** In the case of any application to a financial institution for credit for a women-owned, minority-owned, or small business, a financial institution is required to (i) inquire (a “Request”) whether the business is a women-owned, minority-owned, or small business, without regard to the manner in which such application is received; and (ii) maintain a record of the responses to such Requests, separate from the application and accompanying information. As literally worded, the data gathering requirement only is imposed where the application itself is for women-owned, minority-owned, or small business credit, suggesting that an application that is not so defined will not be covered (and thereby facilitating a possible circumvention of section 1071). In practice, the Bureau is likely to identify classes of applications for which Requests must be made.

The Act provides that an applicant for credit “may refuse to provide any information requested.”

- **No Access by Underwriters to Information Submitted Pursuant to a “Request.”** Section 1071 requires institutions to wall-off certain employees from information submitted by applicants in response to a Request. Specifically, the Act requires a financial institution, “where feasible,” to prevent a loan underwriter or other officer or employee of a financial institution, or any affiliate of a financial institution, “involved in making any determination concerning an application for credit” from having access to any information provided by the applicant pursuant to the Request.
  - **Exception to Prohibition.** The Act provides a limited exception to this prohibition. If a financial institution determines that a loan underwriter or other officer or employee of a financial institution, or any affiliate of a financial institution, involved in making any determination concerning an application for credit should have access to any information provided by the applicant pursuant to the Request, the financial institution must provide a notice to the applicant of the underwriter’s access to such information and the fact that the financial institution may not discriminate on the basis of such information. In practice, many elements of information that will be provided in response to a Request will be necessary to underwrite the application, such as the amount of credit applied for and the gross annual revenues of the business. Therefore, it is likely that the notice will be required in connection with all Requests.
- **Form and Manner of Information Collection.** Section 1071 requires financial institutions to compile and maintain, in accordance with regulations of the Bureau, a record of the information provided by any loan applicant pursuant to a Request.

The information compiled and maintained must be itemized in order to clearly and conspicuously disclose (i) the number of the application and the date on which the application was received; (ii) the type and purpose of the loan or other credit being applied for; (iii) the amount of the credit or credit limit applied for, and the amount of the credit transaction or the credit limit approved for such applicant; (iv) the type of action taken with respect to such application, and the date of such action; (v) the census tract in which is located the principal place of business of the women-owned, minority-owned, or small business loan applicant; (vi) the gross annual revenue of the business in the last fiscal year of the women-owned, minority-owned, or small business loan applicant

preceding the date of the application; (vii) the race, sex, and ethnicity of the principal owners of the business; and (viii) any additional data that the Bureau determines would aid in fulfilling the purposes of this section.

In compiling and maintaining any record of information provided pursuant to a Request, a financial institution may not include in such record the name, specific address (other than the census tract), telephone number, electronic mail address, or any other personally identifiable information concerning any individual who is, or is connected with, the women-owned, minority-owned, or small business loan applicant.

The Bureau is permitted, at its discretion, to delete or modify data collected which is or will be available to the public, if the Bureau determines that the deletion or modification of the data would advance a privacy interest.

**Comment:** *In general, Regulation B prohibits a creditor from inquiring regarding an applicant's race, national origin, or sex. See 12 C.F.R. § 202.5. Regulation B provides several narrow exceptions to this prohibition, none of which will apply to section 1071's requirement that the creditor inquire regarding the applicant's race, national origin, or sex. It will be necessary to revise Regulation B to remove this impediment.*

- **Submission and Availability of Information.** A financial institution must annually submit this data to the Bureau. Additionally, a financial institution must (i) retain the data for not less than three years after the date of preparation; and (ii) make such data available to any member of the public, upon request, in the form required under regulations prescribed by the Bureau. Also, the data must be annually made available to the public generally by the Bureau, in such form and in such manner as is determined by the Bureau, by regulation.

The Bureau may, at its discretion, compile and aggregate the data collected for its own use; and make public such compilations of aggregate data.

**Comment:** *In essence, section 1071 requires the collection of HMDA-like information by financial institutions, requires the submission of that data to the Bureau, and requires that this data be made available to the public. As in the case of HMDA information, this new data will be heavily scrutinized by regulators, Congress, community groups, and other organizations. The new data likely will be used to pressure financial institutions to provide more loans to small businesses, particularly those that are woman- or minority-owned. For example, the new data will likely be used in determining whether banks have met their obligations under the Community Reinvestment Act.*

- **Bureau Action.** The Bureau is authorized to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile such data.

The Bureau is also authorized, by rule or order, to adopt exceptions to any requirement of this section and may, conditionally or unconditionally, exempt any financial institution or class of financial institutions from the requirements of section 1071, as the Bureau deems necessary or appropriate to carry out the purposes of section 1071. There will be pressure on the Bureau to adopt few, if any, exemptions. One possibility is an exemption for financial institutions that are very small or that make very few business loans each year, given that, for such institutions, the benefits of data gathering will be overwhelmed by the burdens. A somewhat comparable exemption is provided with respect to HMDA. See 12 C.F.R. § 203.2(e).

Regulation B currently exempts certain classes of transactions—public utilities credit, securities credit, incidental credit, and government credit—from specific sections of that regulation. It remains to be seen whether these classes of transactions also will be exempted from the data gathering provisions of section 1071. Given the stated purposes of section 1071, it is quite possible that some of these classes of transactions will not be exempted.

The Bureau is required to issue guidance designed to facilitate compliance with the requirements of this section, including assisting financial institutions in working with applicants to determine whether the applicants are women-owned, minority-owned, or small businesses for purposes of this section.

- **Effective Date.** These provisions are effective on the Designated Transfer Date, July 21, 2011, whether or not the Bureau makes an implementing rule.

### 3.4 Equal Credit Opportunity Act (Regulation B) (§ 1085)

#### SEC. 1085. AMENDMENTS TO THE EQUAL CREDIT OPPORTUNITY ACT.

The Equal Credit Opportunity Act (15 U.S.C. 1691 et seq.) is amended—

(1) by striking ‘Board’ each place that term appears, other than in section 703(f) (as added by this section) and section 704(a)(4) (15 U.S.C. 1691c(a)(4)), and inserting ‘Bureau’;

(2) in section 702 (15 U.S.C. 1691a), by striking subsection (c) and inserting the following:

‘(c) The term ‘Bureau’ means the Bureau of Consumer Financial Protection.’;

(3) in section 703 (15 U.S.C. 1691b)—

(A) by striking the section heading and inserting the following:

‘SEC. 703. PROMULGATION OF REGULATIONS BY THE BUREAU.’;

(B) by striking ‘(a) Regulations- ‘;

(C) by striking subsection (b);

(D) by redesignating paragraphs (1) through (5) as subsections (a) through (e), respectively;

(E) in subsection (c), as so redesignated, by striking ‘paragraph (2)’ and inserting ‘subsection (b)’; and

(F) by adding at the end the following:

‘(f) Board Authority- Notwithstanding subsection (a), the Board shall prescribe regulations to carry out the purposes of this title with respect to a person described in section 1029(a) of the Consumer Financial Protection Act of 2010. These regulations may contain but are not limited to such classifications, differentiation, or other provision, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this title, to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith.

‘(g) Deference- Notwithstanding any power granted to any Federal agency under this title, the deference that a court affords to a Federal agency with respect to a determination made by such agency relating to the meaning or interpretation of any provision of this title that is subject to the jurisdiction of such agency shall be applied as if that agency were the only agency authorized to apply, enforce, interpret, or administer the provisions of this title’;

(4) in section 704 (15 U.S.C. 1691c)—

(A) in subsection (a)—

(i) by striking ‘Compliance’ and inserting ‘Subject to subtitle B of the Consumer Protection Financial Protection Act of 2010’;

(ii) by striking paragraphs (1) and (2) and inserting the following:

‘(1) section 8 of the Federal Deposit Insurance Act, by the appropriate Federal banking agency, as defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), with respect to—

‘(A) national banks, Federal savings associations, and Federal branches and Federal agencies of foreign banks;

‘(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act; and

‘(C) banks and State savings associations insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), and insured State branches of foreign banks.’;

(iii) by redesignating paragraphs (3) through (9) as paragraphs (2) through (8), respectively;

(iv) in paragraph (7) (as so redesignated), by striking ‘and’ at the end;

(v) in paragraph (8) (as so redesignated), by striking the period at the end, and inserting ‘; and’; and

(vi) by adding at the end the following:

‘(9) Subtitle E of the Consumer Financial Protection Act of 2010, by the Bureau, with respect to any person subject to this title.’;

(B) by striking subsection (c) and inserting the following:

‘(c) Overall Enforcement Authority of Federal Trade Commission- Except to the extent that enforcement of the requirements imposed under this title is specifically committed to some other Government agency under any of paragraphs (1) through (8) of subsection (a), and subject to subtitle B of the Consumer Financial Protection Act of 2010, the Federal Trade Commission shall be authorized to enforce such requirements. For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act (15 U.S.C. 41 et seq.), a violation of any requirement imposed under this subchapter shall be deemed a violation of a requirement imposed under that Act. All of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Federal Trade Commission to enforce compliance by any person with the requirements imposed under this title, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests under the Federal Trade Commission Act, including the power to enforce any rule prescribed by the Bureau under this title in the same manner as if the violation had been a violation of a Federal Trade Commission trade regulation rule.’; and

(C) in subsection (d), by striking ‘Board’ and inserting ‘Bureau’;

(5) in section 706(e) (15 U.S.C. 1691e(e))—

(A) in the subsection heading—

(i) by striking ‘Board’ each place that term appears and inserting ‘Bureau’; and

(ii) by striking ‘Federal Reserve System’ and inserting ‘Bureau of Consumer Financial Protection’; and

(B) by striking ‘Federal Reserve System’ and inserting ‘Bureau of Consumer Financial Protection’;

(6) in section 706(g) (15 U.S.C. 1691e(g)), by striking ‘(3)’ and inserting ‘(9)’; and

(7) in section 706(f) (15 U.S.C. 1691e(f)), by striking ‘two years from’ each place that term appears and inserting ‘5 years after’.

## Analysis

- Transfer of Authority to the Bureau. Except as noted below, Section 1085 amends the ECOA by transferring the rulemaking and interpretive authority granted to the FRB to the Bureau.
- Consumer Advisory Council. Section 1085 removes the Consumer Advisory Council from the ECOA. Specifically, Section 1085(3)(C) strikes “subsection (b)” of ECOA section 703. Section 703(b) of the ECOA had previously provided that the FRB would establish a Consumer Advisory Council to advise and consult with it in the exercise of its functions under the ECOA. This council is replaced by the Consumer Advisory Board to be established by the Bureau under section 1014 of the CFPA.
- FRB Authority Over Excluded Motor Vehicle Dealers. Section 1085 authorizes the FRB to prescribe regulations to carry out the purposes of the ECOA with respect to motor vehicle dealers that are predominantly engaged in the sale and servicing of motor vehicles, the leasing of motor vehicles, or both. This authority mimics the general authority of the Bureau to make rules under the ECOA. Presumably, the Board and Bureau will issue regulations that are consistent with one another.

- **Deference.** Section 1085 also adds a provision to Section 703 of the ECOA stating that a court should defer to any agency's interpretation of the ECOA, as though that agency were the only agency authorized to enforce and administer the ECOA. That is, even though numerous agencies have authority to enforce and administer the ECOA, "the deference that a court affords to a Federal agency with respect to a determination made by such agency relating to the meaning or interpretation of any provision of [the ECOA] that is subject to the jurisdiction of such agency shall be applied as if that agency were the only agency authorized to apply, enforce, interpret, or administer the provisions of [the ECOA]."
- **Enforcement Generally.** Section 1085 amends the ECOA to establish an enforcement scheme that follows the general CFPB model: the Bureau will enforce ECOA and its implementing rules against banks with more than \$10 billion in assets; functional regulators will enforce these provisions against other regulated entities; and the Bureau and FTC will share residual jurisdiction.
- **Authority of the FTC.** The FTC's enforcement power under the ECOA is unchanged. As before, a violation of the ECOA shall be deemed an unfair or deceptive act or practice in violation of FTC Act, and all of the functions and powers of the FTC under the FTC Act are available to the FTC to enforce compliance by any person with the ECOA, including the power to enforce the ECOA, in the same manner as if the violation had been a violation of an FTC trade regulation rule. This means that the FTC can obtain civil penalties for violations of the ECOA in the same amount as the civil penalties that it obtains for violations of a trade regulation rule; currently that amount is \$16,000 per violation. See FTC Act § 5(m); 16 C.F.R. § 1.98.
- **Statute of Limitations.** Section 1085 amends the ECOA civil liability section to extend the length of time an action under the ECOA may be brought to five years from the date of the occurrence of the violation. The previous statute of limitations was two years. If the responsible enforcement agency brings an administrative enforcement action, or the U.S. Attorney General brings a civil action, within five years, the applicant who is the alleged victim of the discrimination may bring a civil action within one year following the initiation of the governmental action.
- **Effective Date.** These provisions are effective on the Designated Transfer Date, July 21, 2011.

## 4. STUDENT LENDING

### 4.1 Private Education Loan Ombudsman (§ 1035)

#### SEC. 1035. PRIVATE EDUCATION LOAN OMBUDSMAN.

(a) **Establishment-** The Secretary, in consultation with the Director, shall designate a Private Education Loan Ombudsman (in this section referred to as the 'Ombudsman') within the Bureau, to provide timely assistance to borrowers of private education loans.

(b) **Public Information-** The Secretary and the Director shall disseminate information about the availability and functions of the Ombudsman to borrowers and potential borrowers, as well as institutions of higher education, lenders, guaranty agencies, loan servicers, and other participants in private education student loan programs.

(c) **Functions of Ombudsman-** The Ombudsman designated under this subsection shall—

(1) in accordance with regulations of the Director, receive, review, and attempt to resolve informally complaints from borrowers of loans described in subsection (a), including, as appropriate, attempts to resolve such complaints in collaboration with the Department of Education and with institutions of higher education, lenders, guaranty agencies, loan servicers, and other participants in private education loan programs;

(2) not later than 90 days after the designated transfer date, establish a memorandum of understanding with the student loan ombudsman established under section 141(f) of the Higher Education Act of 1965

(20 U.S.C. 1018(f)), to ensure coordination in providing assistance to and serving borrowers seeking to resolve complaints related to their private education or Federal student loans;

(3) compile and analyze data on borrower complaints regarding private education loans; and

(4) make appropriate recommendations to the Director, the Secretary, the Secretary of Education, the Committee on Banking, Housing, and Urban Affairs and the Committee on Health, Education, Labor, and Pensions of the Senate and the Committee on Financial Services and the Committee on Education and Labor of the House of Representatives.

(d) Annual Reports-

(1) **IN GENERAL-** The Ombudsman shall prepare an annual report that describes the activities, and evaluates the effectiveness of the Ombudsman during the preceding year.

(2) **SUBMISSION-** The report required by paragraph (1) shall be submitted on the same date annually to the Secretary, the Secretary of Education, the Committee on Banking, Housing, and Urban Affairs and the Committee on Health, Education, Labor, and Pensions of the Senate and the Committee on Financial Services and the Committee on Education and Labor of the House of Representatives.

(e) **Definitions-** For purposes of this section, the terms ‘private education loan’ and ‘institution of higher education’ have the same meanings as in section 140 of the Truth-in-Lending Act (15 U.S.C. 1650).

## Analysis

- **Establishment.** The Secretary of the Treasury, in consultation with the Director of the Bureau, will designate a Private Education Loan Ombudsman (the “Ombudsman”) within the Bureau to provide timely assistance to borrowers of private education loans. A “private education loan” means credit that (i) is *not* made under Title IV of the Higher Education Act of 1965; (ii) is made to a consumer expressly, in whole or in part, for postsecondary educational expenses, whether provided by the student’s educational institution or as a direct loan; (iii) does not include open-end credit or any loan that is secured by real property or a dwelling; and (iv) does not include an extension of credit in which the educational institution is the creditor if (a) the term of the credit is 90 days or less, or (b) an interest rate will not be applied against the loan balance and the term of the credit is one year or less. See 15 U.S.C. § 1650(a)(7); 12 C.F.R. § 226.46(b)(5).
- **Public Information.** The Act also requires the Secretary of the Treasury and the Director of the Bureau to disseminate information about the availability and functions of the Ombudsman to borrowers and potential borrowers, as well as institutions of higher education, lenders, guaranty agencies, loan servicers, and other participants in private education student loan programs.
- **Functions.** The Ombudsman will (1) receive, review, and attempt to resolve informally complaints from borrowers of loans, including, as appropriate, attempts to resolve such complaints in collaboration with the Department of Education and with institutions of higher education, lenders, guaranty agencies, loan servicers, and other participants in private education loan programs; (2) compile and analyze data on borrower complaints regarding private education loans; and (3) make appropriate recommendations to the Director of the Bureau; the Secretary of the Treasury; the Secretary of Education; the Committee on Banking, Housing, and Urban Affairs and the Committee on Health, Education, Labor, and Pensions of the Senate; and the Committee on Financial Services and the Committee on Education and Labor of the House of Representatives.
- **Coordination Required.** Within 90 days after the designated transfer date (*i.e.*, by October 19, 2011), the Ombudsman is required to establish a memorandum of understanding with the Department of Education’s Federal Student Aid Ombudsman established under section 141(f) of the Higher Education Act of 1965 (20 U.S.C. 1018(f)), see also <http://www.ombudsman.ed.gov/index.html>, to ensure coordination in providing assistance to and serving borrowers seeking to resolve complaints related to their private education or federal student loans.

- **Rule Required.** The Director of the Bureau is required to issue regulations regarding the Ombudsman's receipt, review, and informal resolution of complaints from borrowers of private education loans.
- **Report Required.** The Ombudsman is required to prepare an annual report that describes the activities, and evaluates the effectiveness of the Ombudsman during the preceding year. The report will be submitted on the same date annually to the Treasury Secretary; the Secretary of Education; the Committee on Banking, Housing, and Urban Affairs and the Committee on Health, Education, Labor, and Pensions of the Senate; and the Committee on Financial Services and the Committee on Education and Labor of the House of Representatives.
- **Effective Date.** These provisions are effective as of the Designated Transfer Date, July 21, 2011.

## 4.2 Private Education Loans and Private Education Lenders

### SEC. 1077. REPORT ON PRIVATE EDUCATION LOANS AND PRIVATE EDUCATIONAL LENDERS.

(a) Report- Not later than 2 years after the date of enactment of this Act, the Director of the Bureau and the Secretary of Education, in consultation with the Commissioners of the Federal Trade Commission, and the Attorney General of the United States, shall submit a report to the Committee on Banking, Housing, and Urban Affairs and the Committee on Health, Education, Labor, and Pensions of the Senate and the Committee on Financial Services and the Committee on Education and Labor of the House of Representatives, on private education loans (as that term is defined in section 140 of the Truth-in-Lending Act (15 U.S.C. 1650)) and private educational lenders (as that term is defined in such section).

(b) Content- The report required by this section shall examine, at a minimum—

- (1) the growth and changes of the private education loan market in the United States;
- (2) factors influencing such growth and changes;
- (3) the extent to which students and parents of students rely on private education loans to finance postsecondary education and the private education loan indebtedness of borrowers;
- (4) the characteristics of private education loan borrowers, including—
  - (A) the types of institutions of higher education that they attend;
  - (B) socioeconomic characteristics (including income and education levels, racial characteristics, geographical background, age, and gender);
  - (C) what other forms of financing borrowers use to pay for education;
  - (D) whether they exhaust their Federal loan options before taking out a private loan;
  - (E) whether such borrowers are dependent or independent students (as determined under part F of title IV of the Higher Education Act of 1965) or parents of such students;
  - (F) whether such borrowers are students enrolled in a program leading to a certificate, license, or credential other than a degree, an associates degree, a baccalaureate degree, or a graduate or professional degree; and
  - (G) if practicable, employment and repayment behaviors;
- (5) the characteristics of private educational lenders, including whether such creditors are for-profit, non-profit, or institutions of higher education;
- (6) the underwriting criteria used by private educational lenders, including the use of cohort default rate (as such term is defined in section 435(m) of the Higher Education Act of 1965);
- (7) the terms, conditions, and pricing of private education loans;
- (8) the consumer protections available to private education loan borrowers, including the effectiveness of existing disclosures and requirements and borrowers' awareness and understanding about terms and conditions of various financial products;

(9) whether Federal regulators and the public have access to information sufficient to provide them with assurances that private education loans are provided in accord with the Nation's fair lending laws and that allows public officials to determine lender compliance with fair lending laws; and

(10) any statutory or legislative recommendations necessary to improve consumer protections for private education loan borrowers and to better enable Federal regulators and the public to ascertain private educational lender compliance with fair lending laws.

## Analysis

- Report on Private Education Loans and Lenders. Section 1077 requires the Bureau and Department of Education, in consultation with the FTC and Department of Justice, to submit a report to the Senate and House committees overseeing banking and education on private education loans and private educational lenders.
- The report must examine, at a minimum:
  - the growth and changes of the private education loan market in the United States;
  - factors influencing such growth and changes;
  - the extent to which students and parents of students rely on private education loans to finance postsecondary education and the private education loan indebtedness of borrowers;
  - the characteristics of private education loan borrowers, including:
    - the types of institutions of higher education that they attend;
    - socioeconomic characteristics (including income and education levels, racial characteristics, geographical background, age, and gender);
    - what other forms of financing borrowers use to pay for education;
    - whether they exhaust their Federal loan options before taking out a private loan;
    - whether such borrowers are dependent or independent students (as defined in section 480 of the Higher Education Act of 1965, 20 U.S.C. § 1087vv) or parents of such students;
    - whether such borrowers are students enrolled in a program leading to a certificate, license, or credential other than a degree, an associates degree, a baccalaureate degree, or a graduate or professional degree; and
    - if practicable, employment and repayment behaviors;
  - the characteristics of private educational lenders, including whether such creditors are for-profit, non-profit, or institutions of higher education;
  - the underwriting criteria used by private educational lenders, including the use of cohort default rate (as such term is defined in section 435(m) of the Higher Education Act of 1965, 20 U.S.C. § 1085(m));
  - the terms, conditions, and pricing of private education loans;
  - the consumer protections available to private education loan borrowers, including the effectiveness of existing disclosures and requirements and borrowers' awareness and understanding about terms and

conditions of various financial products. In this regard, note that Section 1011(a) of the Higher Education Opportunity Act, Pub. L. 110-315, added a new Section 140 to TILA. This section, together with 12 C.F.R. §§ 226.46 to 226.48, imposes new disclosure requirements for private education loans, prohibits certain co-branding practices, prohibits payments to certain advisory board members, and prohibits prepayment fees with respect to private education loans;

- whether federal regulators and the public have access to information sufficient to determine lender compliance with fair lending laws; and
  - any statutory or legislative recommendations necessary to improve consumer protections or compliance with fair lending laws.
- **Effective Date.** The required report must be completed not later than 2 years after the date of enactment of the Act—*i.e.*, by July 21, 2012.

## 5. TRUTH-IN-LENDING ACT

### 5.1 Amendments to the Truth-in-Lending Act (§ 1100A)

#### SEC. 1100A. AMENDMENTS TO THE TRUTH-IN-LENDING ACT.

The Truth-in-Lending Act (15 U.S.C. 1601 et seq.) is amended—

(1) in section 103 (15 U.S.C. 1602)—

(A) by redesignating subsections (b) through (bb) as subsections (c) through (cc), respectively; and

(B) by inserting after subsection (a) the following:

‘(b) Bureau- The term ‘Bureau’ means the Bureau of Consumer Financial Protection.’;

(2) by striking ‘Board’ each place that term appears, other than in section 140(d) and sections 105(i) and 108(a), as amended by this section, and inserting ‘Bureau’;

(3) by striking ‘Federal Trade Commission’ each place that term appears, other than in section 108(c) and section 129(m), as amended by this Act, and other than in the context of a reference to the Federal Trade Commission Act, and inserting ‘Bureau’;

(4) in section 105(a) (15 U.S.C. 1604(a)), in the second sentence—

(A) by striking ‘Except in the case of a mortgage referred to in section 103(aa), these regulations may contain such’ and inserting ‘Except with respect to the provisions of section 129 that apply to a mortgage referred to in section 103(aa), such regulations may contain such additional requirements,’; and

(B) by inserting ‘all or’ after ‘exceptions for’;

(5) in section 105(b) (15 U.S.C. 1604(b)), by striking the first sentence and inserting the following: ‘The Bureau shall publish a single, integrated disclosure for mortgage loan transactions (including real estate settlement cost statements) which includes the disclosure requirements of this title in conjunction with the disclosure requirements of the Real Estate Settlement Procedures Act of 1974 that, taken together, may apply to a transaction that is subject to both or either provisions of law. The purpose of such model disclosure shall be to facilitate compliance with the disclosure requirements of this title and the Real Estate Settlement Procedures Act of 1974, and to aid the borrower or lessee in understanding the transaction by utilizing readily understandable language to simplify the technical nature of the disclosures.’;

(6) in section 105(f)(1) (15 U.S.C. 1604(f)(1)), by inserting ‘all or’ after ‘from all or part of this title’;

(7) in section 105 (15 U.S.C. 1604), by adding at the end the following:

‘(i) **AUTHORITY OF THE BOARD TO PRESCRIBE RULES-** Notwithstanding subsection (a), the Board shall have authority to prescribe rules under this title with respect to a person described in section 1029(a) of the Consumer Financial Protection Act of 2010. Regulations prescribed under this subsection may contain such classifications, differentiations, or other provisions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this title, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.’;

(8) in section 108 (15 U.S.C. [1607]), by adding at the end the following:

(A) by striking subsection (a) and inserting the following:

‘(a) **Enforcing Agencies-** Subject to subtitle B of the Consumer Financial Protection Act of 2010, compliance with the requirements imposed under this title shall be enforced under—

‘(1) section 8 of the Federal Deposit Insurance Act, by the appropriate Federal banking agency, as defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), with respect to—

‘(A) national banks, Federal savings associations, and Federal branches and Federal agencies of foreign banks;

‘(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act; and

‘(C) banks and State savings associations insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), and insured State branches of foreign banks;

‘(2) the Federal Credit Union Act, by the Director of the National Credit Union Administration, with respect to any Federal credit union;

‘(3) the Federal Aviation Act of 1958, by the Secretary of Transportation, with respect to any air carrier or foreign air carrier subject to that Act;

‘(4) the Packers and Stockyards Act, 1921 (except as provided in section 406 of that Act), by the Secretary of Agriculture, with respect to any activities subject to that Act;

‘(5) the Farm Credit Act of 1971, by the Farm Credit Administration with respect to any Federal land bank, Federal land bank association, Federal intermediate credit bank, or production credit association; and

‘(6) subtitle E of the Consumer Financial Protection Act of 2010, by the Bureau, with respect to any person subject to this title.’;

and

(B) by striking subsection (c) and inserting the following:

‘(c) **Overall Enforcement Authority of the Federal Trade Commission-** Except to the extent that enforcement of the requirements imposed under this title is specifically committed to some other Government agency under any of paragraphs (1) through (5) of subsection (a), and subject to subtitle B of the Consumer Financial Protection Act of 2010, the Federal Trade Commission shall be authorized to enforce such requirements. For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement imposed under this title shall be deemed a violation of a requirement imposed under that Act. All of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Federal Trade Commission to enforce compliance by any person with the requirements under this title, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests under the Federal Trade Commission Act.’; and

(9) in section 129 (15 U.S.C. 1639), by striking subsection (m) and inserting the following:

‘(m) Civil Penalties in Federal Trade Commission Enforcement Actions- For purposes of enforcement by the Federal Trade Commission, any violation of a regulation issued by the Bureau pursuant to subsection (l)(2) shall be treated as a violation of a rule promulgated under section 18 of the Federal Trade Commission Act (15 U.S.C. 57a) regarding unfair or deceptive acts or practices.’; and

(10) in chapter 5 (15 U.S.C. 1667 et seq.)—

(A) by striking ‘the Board’ each place that term appears and inserting ‘the Bureau’; and

(B) by striking ‘The Board’ each place that term appears and inserting ‘The Bureau’.

## Analysis

- Transfer of Authority to the Bureau. Section 1100A amends the Truth-in-Lending Act (“TILA”) by transferring virtually all of the FRB’s rulemaking authority to the Bureau. The FRB, however, retains authority to make rules under TILA with respect to motor vehicle dealers that are predominantly engaged in the sale and servicing of motor vehicles, the leasing of motor vehicles, or both.<sup>3</sup>
- Combined Mortgage Disclosure. Section 1100A requires the Bureau to produce a single integrated disclosure for mortgage transactions that includes both TILA and RESPA-mandated disclosures. Section 1098 amends RESPA to impose the same requirement. Section 1032(f) imposes a similar requirement on the Bureau: “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 [FRB] and the [Department of] Housing and Urban Development carries out the same purpose.” The combined mortgage disclosure is discussed in more detail in the User Guide addressing mortgage origination issues. See <http://www.mofo.com/files/Uploads/Images/ResidentialMortgage.pdf>.
- Administrative Enforcement. Enforcement of TILA follows the general CFPA model: the Bureau will enforce TILA and its implementing rules against banks with more than \$10 billion in assets; functional regulators will enforce these provisions against other regulated entities; and the Bureau and FTC will share residual jurisdiction.
- Authority of the FTC. Although the FTC enforcement provisions are entirely rewritten by the CFPA, the FTC’s power to enforce TILA and its implementing rules is virtually unchanged; the FTC will continue to enforce the statute generally under the authority granted it in its organic statute, the FTC Act. In addition, the FTC has been given authority to enforce rules issued by the Bureau under TILA section 129(l)(2) (prohibiting acts and practices in connection with (i) mortgages that the Bureau finds to be unfair, deceptive, or designed to evade section 129, and (ii) refinancings of mortgages that the Bureau finds to be associated with abusive lending practices, or that otherwise are not in the interest of the borrower) as though they are FTC Act “trade regulation rules,” which permits the FTC to assess civil penalties of \$16,000 per violation. See FTC Act § 5(m); 16 C.F.R. § 1.98.
- Effective Date. These provisions are effective on the Designated Transfer Date, July 21, 2011.

<sup>3</sup> The CFPA does not replace the term “Board” with “Bureau” in TILA section 140(d). This omission, however, does not preserve any specific authority of the FRB under TILA. Section 140(d) refers to certain student lending “advisory boards,” and understandably Congress did not want to replace the term “Board” with the term “Bureau” in this context.

## 5.2 Adjustments for Inflation in the Truth-in-Lending Act (§ 1100E)

### SEC. 1100E. ADJUSTMENTS FOR INFLATION IN THE TRUTH-IN-LENDING ACT.

#### (a) Caps-

(1) CREDIT TRANSACTIONS- Section 104(3) of the Truth-in-Lending Act (15 U.S.C. 1603(3)) is amended by striking '\$25,000' and inserting '\$50,000'.

(2) CONSUMER LEASES- Section 181(1) of the Truth-in-Lending Act (15 U.S.C. 1667(1)) is amended by striking '\$25,000' and inserting '\$50,000'.

(b) Adjustments for Inflation- On and after December 31, 2011, the Bureau shall adjust annually the dollar amounts described in sections 104(3) and 181(1) of the Truth-in-Lending Act (as amended by this section), by the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers, as published by the Bureau of Labor Statistics, rounded to the nearest multiple of \$100, or \$1,000, as applicable.

#### Analysis

- Section 1100E amends one of the Truth-in-Lending Act's exemptions of certain consumer credit transactions and consumer leases. Specifically, Section 1100E exempts consumer credit transactions from the Truth-in-Lending Act in which the total amount financed exceeds \$50,000. As before, transactions secured by real estate or a principal dwelling, and private education loans, are not subject to this exemption. Previously, the exemption amount was \$25,000. Section 1100E also exempts consumer leases from the Truth-in-Lending Act where the total contractual obligation exceeds \$50,000. Previously, the exemption amount was \$25,000.

Additionally, Section 1100E directs the Bureau to annually adjust these dollar amounts for changes in the Consumer Price Index. Currently, TILA does not provide for adjustments to the \$25,000 threshold.

The current \$25,000 threshold is implemented by Section 226.3(b) of Regulation Z and the related provisions of the Federal Reserve Staff Commentary to Regulation Z (consumer loans) and Section 213.2(e) of Regulation M (consumer leases). These provisions will need to be amended to reflect the changes made by section 1100E.

The changes made by section 1100E are significant. Currently, many consumer credit and consumer lease transactions—including many auto loans and leases—are in excess of the \$25,000 threshold and therefore are not subject to Regulations Z or M. As a result of this amendment, a large number of these previously exempt transactions will become subject to one or the other of those regulations.

- Effective Date. These provisions are effective on the Designated Transfer Date, July 21, 2011.

## 5.3 Fair Credit Billing Act (§ 1087)

### SEC. 1087. AMENDMENTS TO THE FAIR CREDIT BILLING ACT.

The Fair Credit Billing Act (15 U.S.C. 1666-1666j) is amended by striking 'Board' each place that term appears, other than in section 105(i) (as added by this subtitle) and inserting 'Bureau'.

#### Analysis

- Transfer of Authority to the Bureau. Section 1087 amends the Fair Credit Billing Act by transferring the authority granted to the FRB to the Bureau.
- Effective Date. These provisions are effective on the Designated Transfer Date, July 21, 2011.

## 6. DEPOSIT ACCOUNTS AND FUNDS TRANSFERS

### 6.1 Remittance Transfers (§ 1073)

#### SEC. 1073. REMITTANCE TRANSFERS.

(a) Treatment of Remittance Transfers- The Electronic Fund Transfer Act (15 U.S.C. 1693 et seq.) is amended—

- (1) in section 902(b) (15 U.S.C. 1693(b)), by inserting ‘and remittance’ after ‘electronic fund’;
- (2) in section 904(c) (15 U.S.C. 1693b(c)), in the first sentence, by inserting ‘or remittance transfers’ after ‘electronic fund transfers’;
- (3) by redesignating sections 919, 920, 921, and 922 as sections 920, 921, 922, and 923, respectively; and
- (4) by inserting after section 918 the following:

#### ‘SEC. 919. REMITTANCE TRANSFERS.

‘(a) Disclosures Required for Remittance Transfers-

‘(1) IN GENERAL- Each remittance transfer provider shall make disclosures as required under this section and in accordance with rules prescribed by the Board. Disclosures required under this section shall be in addition to any other disclosures applicable under this title.

‘(2) DISCLOSURES- Subject to rules prescribed by the Board, a remittance transfer provider shall provide, in writing and in a form that the sender may keep, to each sender requesting a remittance transfer, as applicable to the transaction—

‘(A) at the time at which the sender requests a remittance transfer to be initiated, and prior to the sender making any payment in connection with the remittance transfer, a disclosure describing—

‘(i) the amount of currency that will be received by the designated recipient, using the values of the currency into which the funds will be exchanged;

‘(ii) the amount of transfer and any other fees charged by the remittance transfer provider for the remittance transfer; and

‘(iii) any exchange rate to be used by the remittance transfer provider for the remittance transfer, to the nearest 1/100th of a point; and

‘(B) at the time at which the sender makes payment in connection with the remittance transfer—

‘(i) a receipt showing—

‘(I) the information described in subparagraph (A);

‘(II) the promised date of delivery to the designated recipient; and

‘(III) the name and either the telephone number or the address of the designated recipient, if either the telephone number or the address of the designated recipient is provided by the sender; and

‘(ii) a statement containing—

‘(I) information about the rights of the sender under this section regarding the resolution of errors; and

‘(II) appropriate contact information for—

‘(aa) the remittance transfer provider; and

‘(bb) the State agency that regulates the remittance transfer provider and the Board, including the toll-free telephone number established under section 1013 of the Consumer Financial Protection Act of 2010.

'(3) REQUIREMENTS RELATING TO DISCLOSURES- With respect to each disclosure required to be provided under paragraph (2) a remittance transfer provider shall—

'(A) provide an initial notice and receipt, as required by subparagraphs (A) and (B) of paragraph (2), and an error resolution statement, as required by subsection (d), that clearly and conspicuously describe the information required to be disclosed therein; and

'(B) with respect to any transaction that a sender conducts electronically, comply with the Electronic Signatures in Global and National Commerce Act (15 U.S.C. 7001 et seq.).

'(4) EXCEPTION FOR DISCLOSURES OF AMOUNT RECEIVED-

'(A) IN GENERAL- Subject to the rules prescribed by the Board, and except as provided under subparagraph (B), the disclosures required regarding the amount of currency that will be received by the designated recipient shall be deemed to be accurate, so long as the disclosures provide a reasonably accurate estimate of the foreign currency to be received. This paragraph shall apply only to a remittance transfer provider who is an insured depository institution, as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813), or an insured credit union, as defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752), and if—

'(i) a remittance transfer is conducted through a demand deposit, savings deposit, or other asset account that the sender holds with such remittance transfer provider; and

'(ii) at the time at which the sender requests the transaction, the remittance transfer provider is unable to know, for reasons beyond its control, the amount of currency that will be made available to the designated recipient.

'(B) DEADLINE- The application of subparagraph (A) shall terminate 5 years after the date of enactment of the Consumer Financial Protection Act of 2010, unless the Board determines that termination of such provision would negatively affect the ability of remittance transfer providers described in subparagraph (A) to send remittances to locations in foreign countries, in which case, the Board may, by rule, extend the application of subparagraph (A) to not longer than 10 years after the date of enactment of the Consumer Financial Protection Act of 2010.

'(5) EXEMPTION AUTHORITY- The Board may, by rule, permit a remittance transfer provider to satisfy the requirements of—

'(A) paragraph (2)(A) orally, if the transaction is conducted entirely by telephone;

'(B) paragraph (2)(B), in the case of a transaction conducted entirely by telephone, by mailing the disclosures required under such subparagraph to the sender, not later than 1 business day after the date on which the transaction is conducted, or by including such documents in the next periodic statement, if the telephone transaction is conducted through a demand deposit, savings deposit, or other asset account that the sender holds with the remittance transfer provider;

'(C) subparagraphs (A) and (B) of paragraph (2) together in one written disclosure, but only to the extent that the information provided in accordance with paragraph (3)(A) is accurate at the time at which payment is made in connection with the subject remittance transfer; and

'(D) paragraph (2)(A), without compliance with section 101(c) of the Electronic Signatures in Global Commerce Act, if a sender initiates the transaction electronically and the information is displayed electronically in a manner that the sender can keep.

'(6) STOREFRONT AND INTERNET NOTICES-

'(A) IN GENERAL-

'(i) PROMINENT POSTING- Subject to subparagraph (B), the Board may prescribe rules to require a remittance transfer provider to prominently post, and timely update, a notice describing a model remittance transfer for one or more amounts, as the Board may determine, which notice shall show the amount of currency that will be received by the designated recipient, using the values of the currency into which the funds will be exchanged.

'(ii) ONSITE DISPLAYS- The Board may require the notice prescribed under this subparagraph to be displayed in every physical storefront location owned or controlled by the remittance transfer provider.

'(iii) INTERNET NOTICES- Subject to paragraph (3), the Board shall prescribe rules to require a remittance transfer provider that provides remittance transfers via the Internet to provide a notice, comparable to a storefront notice described in this subparagraph, located on the home page or landing page (with respect to such remittance transfer services) owned or controlled by the remittance transfer provider.

'(iv) RULEMAKING AUTHORITY- In prescribing rules under this subparagraph, the Board may impose standards or requirements regarding the provision of the storefront and Internet notices required under this subparagraph and the provision of the disclosures required under paragraphs (2) and (3).

'(B) STUDY AND ANALYSIS- Prior to proposing rules under subparagraph (A), the Board shall undertake appropriate studies and analyses, which shall be consistent with section 904(a)(2), and may include an advanced notice of proposed rulemaking, to determine whether a storefront notice or Internet notice facilitates the ability of a consumer—

'(i) to compare prices for remittance transfers; and

'(ii) to understand the types and amounts of any fees or costs imposed on remittance transfers.

'(b) Foreign Language Disclosures- The disclosures required under this section shall be made in English and in each of the foreign languages principally used by the remittance transfer provider, or any of its agents, to advertise, solicit, or market, either orally or in writing, at that office.

'(c) Regulations Regarding Transfers to Certain Nations- If the Board determines that a recipient nation does not legally allow, or the method by which transactions are made in the recipient country do not allow, a remittance transfer provider to know the amount of currency that will be received by the designated recipient, the Board may prescribe rules (not later than 18 months after the date of enactment of the Consumer Financial Protection Act of 2010) addressing the issue, which rules shall include standards for a remittance transfer provider to provide—

'(1) a receipt that is consistent with subsections (a) and (b); and

'(2) a reasonably accurate estimate of the foreign currency to be received, based on the rate provided to the sender by the remittance transfer provider at the time at which the transaction was initiated by the sender.

'(d) Remittance Transfer Errors-

'(1) ERROR RESOLUTION-

'(A) IN GENERAL- If a remittance transfer provider receives oral or written notice from the sender within 180 days of the promised date of delivery that an error occurred with respect to a remittance transfer, including the amount of currency designated in subsection (a)(3)(A) that was to be sent to the designated recipient of the remittance transfer, using the values of the currency into which the funds should have been exchanged, but was not made available to the designated recipient in the foreign country, the remittance transfer provider shall resolve the error pursuant to this subsection and investigate the reason for the error.

'(B) REMEDIES- Not later than 90 days after the date of receipt of a notice from the sender pursuant to subparagraph (A), the remittance transfer provider shall, as applicable to the error and as designated by the sender—

'(i) refund to the sender the total amount of funds tendered by the sender in connection with the remittance transfer which was not properly transmitted;

'(ii) make available to the designated recipient, without additional cost to the designated recipient or to the sender, the amount appropriate to resolve the error;

'(iii) provide such other remedy, as determined appropriate by rule of the Board for the protection of senders; or

'(iv) provide written notice to the sender that there was no error with an explanation responding to the specific complaint of the sender.

'(2) RULES- The Board shall establish, by rule issued not later than 18 months after the date of enactment of the Consumer Financial Protection Act of 2010, clear and appropriate standards for remittance transfer providers with respect to error resolution relating to remittance transfers, to protect senders from such errors. Standards prescribed under this paragraph shall include appropriate standards regarding record keeping, as required, including documentation—

'(A) of the complaint of the sender;

'(B) that the sender provides the remittance transfer provider with respect to the alleged error; and

'(C) of the findings of the remittance transfer provider regarding the investigation of the alleged error that the sender brought to their attention.

'(3) CANCELLATION AND REFUND POLICY RULES- Not later than 18 months after the date of enactment of the Consumer Financial Protection Act of 2010, the Board shall issue final rules regarding appropriate remittance transfer cancellation and refund policies for consumers.

'(e) Applicability of This Title-

'(1) IN GENERAL- A remittance transfer that is not an electronic fund transfer, as defined in section 903, shall not be subject to any of the provisions of sections 905 through 913. A remittance transfer that is an electronic fund transfer, as defined in section 903, shall be subject to all provisions of this title, except for section 908, that are otherwise applicable to electronic fund transfers under this title.

'(2) RULE OF CONSTRUCTION- Nothing in this section shall be construed—

'(A) to affect the application to any transaction, to any remittance provider, or to any other person of any of the provisions of subchapter II of chapter 53 of title 31, United States Code, section 21 of the Federal Deposit Insurance Act (12 U.S.C. 1829b), or chapter 2 of title I of Public Law 91-508 (12 U.S.C. 1951-1959), or any regulations promulgated thereunder; or

'(B) to cause any fund transfer that would not otherwise be treated as such under paragraph (1) to be treated as an electronic fund transfer, or as otherwise subject to this title, for the purposes of any of the provisions referred to in subparagraph (A) or any regulations promulgated thereunder.

'(f) Acts of Agents-

'(1) IN GENERAL- A remittance transfer provider shall be liable for any violation of this section by any agent, authorized delegate, or person affiliated with such provider, when such agent, authorized delegate, or affiliate acts for that remittance transfer provider.

'(2) OBLIGATIONS OF REMITTANCE TRANSFER PROVIDERS- The Board shall prescribe rules to implement appropriate standards or conditions of, liability of a remittance transfer provider, including a provider who acts through an agent or authorized delegate. An agency charged with enforcing the requirements of this section, or rules prescribed by the Board under this section, may consider, in any action or other proceeding against a remittance transfer provider, the extent to which the provider had established and maintained policies or procedures for compliance, including policies, procedures, or other appropriate oversight measures designed to assure compliance by an agent or authorized delegate acting for such provider.

'(g) Definitions- As used in this section—

'(1) the term 'designated recipient' means any person located in a foreign country and identified by the sender as the authorized recipient of a remittance transfer to be made by a remittance transfer provider, except that a designated recipient shall not be deemed to be a consumer for purposes of this Act;

'(2) the term 'remittance transfer'—

'(A) means the electronic (as defined in section 106(2) of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. 7006(2))) transfer of funds requested by a sender located in any State to a designated recipient that is initiated by a remittance transfer provider, whether or not the sender holds an account with the remittance transfer provider or whether or not the remittance transfer is also an electronic fund transfer, as defined in section 903; and

'(B) does not include a transfer described in subparagraph (A) in an amount that is equal to or lesser than the amount of a small-value transaction determined, by rule, to be excluded from the requirements under section 906(a);

'(3) the term 'remittance transfer provider' means any person or financial institution that provides remittance transfers for a consumer in the normal course of its business, whether or not the consumer holds an account with such person or financial institution; and

'(4) the term 'sender' means a consumer who requests a remittance provider to send a remittance transfer for the consumer to a designated recipient.'

**(b) Automated Clearinghouse System-**

**(1) EXPANSION OF SYSTEM-** The Board of Governors shall work with the Federal reserve banks and the Department of the Treasury to expand the use of the automated clearinghouse system and other payment mechanisms for remittance transfers to foreign countries, with a focus on countries that receive significant remittance transfers from the United States, based on—

(A) the number, volume, and size of such transfers;

(B) the significance of the volume of such transfers relative to the external financial flows of the receiving country, including—

(i) the total amount transferred; and

(ii) the total volume of payments made by United States Government agencies to beneficiaries and retirees living abroad;

(C) the feasibility of such an expansion; and

(D) the ability of the Federal Reserve System to establish payment gateways in different geographic regions and currency zones to receive remittance transfers and route them through the payments systems in the destination countries.

**(2) REPORT TO CONGRESS-** Not later than one calendar year after the date of enactment of this Act, and on April 30 biennially thereafter during the 10-year period beginning on that date of enactment, the Board of Governors shall submit a report to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives on the status of the automated clearinghouse system and its progress in complying with the requirements of this subsection. The report shall include an analysis of adoption rates of International ACH Transactions rules and formats, the efficacy of increasing adoption rates, and potential recommendations to increase adoption.

**(c) Expansion of Financial Institution Provision of Remittance Transfers-**

**(1) PROVISION OF GUIDELINES TO INSTITUTIONS-** Each of the Federal banking agencies and the National Credit Union Administration shall provide guidelines to financial institutions under the jurisdiction of the agency regarding the offering of low-cost remittance transfers and no-cost or low-cost basic consumer accounts, as well as agency services to remittance transfer providers.

**(2) ASSISTANCE TO FINANCIAL LITERACY COMMISSION-** As part of its duties as members of the Financial Literacy and Education Commission, the Bureau, the Federal banking agencies, and the National Credit Union Administration shall assist the Financial Literacy and Education Commission in executing the Strategy for Assuring Financial Empowerment (or the 'SAFE Strategy'), as it relates to remittances.

**(d) Federal Credit Union Act Conforming Amendment-** Paragraph (12) of section 107 of the Federal Credit Union Act (12 U.S.C. 1757) is amended to read as follows:

‘(12) in accordance with regulations prescribed by the Board—

‘(A) to sell, to persons in the field of membership, negotiable checks (including travelers checks), money orders, and other similar money transfer instruments (including international and domestic electronic fund transfers and remittance transfers, as defined in section 919 of the Electronic Fund Transfer Act); and

‘(B) to cash checks and money orders for persons in the field of membership for a fee;’.

(e) Report on Feasibility of and Impediments to Use of Remittance History in Calculation of Credit Score— Before the end of the 365-day period beginning on the date of enactment of this Act, the Director of the Bureau shall submit a report to the President, the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives regarding—

(1) the manner in which the remittance history of a consumer could be used to enhance the credit score of the consumer;

(2) the current legal and business model barriers and impediments that impede the use of the remittance history of the consumer to enhance the credit score of the consumer; and

(3) recommendations on the manner in which maximum transparency and disclosure to consumers of exchange rates for remittance transfers subject to this title and the amendments made by this title may be accomplished, whether or not such exchange rates are known at the time of origination or payment by the consumer for the remittance transfer, including disclosure to the sender of the actual exchange rate used and the amount of currency that the recipient of the remittance transfer received, using the values of the currency into which the funds were exchanged, as contained in sections 919(a)(2)(D) and 919(a)(3) of the Electronic Fund Transfer Act (as amended by this section).

## Analysis

**Overview.** This is an especially important provision of the CFPA that sets forth an entirely new regulatory scheme for persons that provide remittance transfers, including banks. Remittance transfers are electronic transfers of money from U.S. consumers in any state to recipients in foreign countries. Section 1073 adds a new section 919 to the Electronic Fund Transfer Act (“EFTA”) to require certain disclosures and to impose new error resolution provisions with respect to remittance transfers. These provisions are to be implemented by rules to be made initially by the FRB, but rulemaking authority will transfer to the Bureau on the Designated Transfer Date. See Act § 1084 (amending EFTA by “striking ‘Board’ each place that term appears and inserting ‘Bureau’”). As a practical matter, this means that the FRB will begin the rulemaking process, but the rules, unless they are issued in final form by the Designated Transfer Date, will in all likelihood be completed by the Bureau. Because of this midstream shift of authority, we will refer to these rules as being made by the “FRB/Bureau.”

**Required Disclosures.** A remittance transfer provider must provide to each “sender” of a remittance transfer a disclosure describing the amount of currency that will be received by the “designated recipient” of the transfer, the fees that will be charged by the remittance transfer provider, and the exchange rate. This disclosure must be expressed in the currency into which the funds will be exchanged. This disclosure must be provided when the sender requests a remittance transfer and before the sender makes any payment.

Subject to the rules to be made by the FRB/Bureau, banks and credit unions are only required to provide a “reasonably accurate estimate of the foreign currency to be received” if the transfer is conducted through a deposit account that the sender holds with the bank or credit union and the bank or credit union is unable to know at the time of the transaction the amount of foreign currency that will be received. This safe harbor sunsets five years after the date of enactment of the Act, but the Bureau is authorized to extend the safe harbor for an additional five years under certain circumstances. (Although the Act provides the FRB with the authority to extend the safe harbor, by the Act’s fifth anniversary—July 2015—rulemaking authority will have transferred from the FRB to the Bureau.)

The remittance transfer provider also must provide the sender with a receipt showing all of the information above, as well as the promised date of delivery, the name and telephone number or address of the designated recipient, a

statement about the sender's error resolution rights (see below), contact information for the remittance transfer provider, and contact information for the remittance transfer provider's primary regulator and the Bureau, as well as the toll-free number established by the Bureau. (Although the law currently reads that the notice shall include contact information for the FRB, upon the Designated Transfer Date, this will be amended to require contact information for the Bureau, rather than the FRB.)

These disclosures must be provided to the sender clearly and conspicuously, in writing and in a form that the sender can keep. They must be provided in English and "in each of the foreign languages principally used by the remittance transfer provider or any of its agents, to advertise, solicit, or market, either orally or in writing, at that office." If the sender initiates the transaction electronically, disclosures must be made in accordance with the Electronic Signatures in Global and National Commerce Act ("E-SIGN"). The FRB/Bureau may make rules allowing for (i) verbal, mailed, or periodic statement disclosures in telephone transactions, (ii) a disclosure that combines the initial disclosure, receipt, and error resolution information, and (iii) for electronic disclosures without complying with E-SIGN, where the sender initiates the transaction electronically and the information is displayed electronically in a manner that the sender can keep.

After conducting a study, the FRB/Bureau may also make rules requiring that remittance transfer providers post storefront and Internet notices showing examples of model remittance transfers and the amount of currency that would be received by the designated recipient of the transfer.

**Error Resolution Procedures.** If a remittance transfer provider receives notice from a sender within 180 days of the promised delivery of the remittance transfer that an error occurred, the remittance transfer provider must, within 90 days, (1) refund to the sender any funds not properly transmitted, (2) make available to the designated recipient the funds necessary to resolve the error, (3) provide a written notice explaining that there was no error, or (4) provide a remedy as determined to be appropriate by a rule of the FRB/Bureau. The remedy to be provided must be applicable to the error and will be designated by the sender, *not* the remittance transfer provider.

**Must Be Implemented by Rulemaking.** The remittance transfer provisions must be implemented by a series of rules to be made by the FRB, generally within 18 months of the CFPA's effective date (*i.e.*, January 21, 2012). This rulemaking authority will transfer to the Bureau on the Designated Transfer Date.

**Transfers to Certain Nations.** If the FRB/Bureau determines that a recipient nation does not allow the remittance transfer provider to know the amount of currency that will be received by a recipient in that nation, the FRB/Bureau may issue a rule to provide standards for a compliant receipt and a reasonably accurate estimate of the foreign currency to be received.

**Agents and Authorized Delegates.** The FRB/Bureau is to issue rules relating to the liability of a remittance transfer provider, including liability for the activities of the provider's agents or authorized delegates. The applicable enforcement agency may consider the extent of the provider's policies and procedures for compliance, including those relating to the compliance of its agents or authorized delegates, when taking enforcement action.

**Coverage.** Where the remittance transfer is electronic, the EFTA generally will apply to the transaction. However, the section 919 error resolution procedures take the place of the EFTA's existing error resolution procedures in EFTA section 908. That is, section 908 does not apply to electronic remittance transfers. A remittance transfer that is not electronic (which, technically, should not meet the definition of a remittance transfer in the first instance) is not subject to sections 905-913 of the EFTA, but it appears that these are intended to be subject to new section 919 of the EFTA, including section 919's error resolution procedures. Remittance transfers of less than \$15 are not subject to section 919. See EFTA § 919(g)(2)(B) (excluding from the remittance transfer provisions "small-value" transactions determined by rule to be excluded from the receipt requirements of EFTA § 906(a)); 12 C.F.R. § 205.10(e) (excluding transfers of "\$15 or less" from the receipt requirements of EFTA § 906(a)).

**Facilitation of Remittance Transfers.** The FRB, Federal Reserve banks, and Treasury Department are to work together to expand the availability of the automated clearinghouse system, and other payment mechanisms, for

remittance transfers. The FRB is to report to the Senate Banking Committee and House Financial Services Committee by July 21, 2011, and biennially thereafter each April 30<sup>th</sup> for 10 years after enactment of the Act, on the status of the automated clearinghouse system and its progress on meeting this goal.

**Expansion of Guidelines to Financial Institutions.** Section 1073 requires the federal banking agencies to provide guidelines regarding the offering of low-cost remittance transfers by banks as well as agency services to remittance transfer providers.

**Comment:** *In a potentially significant “sleeper” provision, the banking agencies also are directed to provide guidelines relating to “no-cost or low-cost basic consumer accounts.” The offering of no- or low-cost basic checking accounts has been an issue of controversy for many years, and it is possible that this provision of section 1073 will lead the banking agencies to press the banking industry to offer such accounts. In this regard, note that on August 10, 2010, the FDIC Board of Directors approved a pilot program to evaluate the feasibility of insured depository institutions offering safe, low-cost transactional and savings accounts. For banks, a further risk derives from the fact that section 1073 does not define “consumer account.” As a result, the banking agencies conceivably could construe the term “consumer account” aggressively to cover a wider range of consumer financial products. For example, the banking agencies could try to use section 1073 as a basis for issuing guidelines on the offering of low-cost small consumer loans by banks. Any such guidelines could expand on the FDIC’s Affordable Small-Dollar Loan Products Guidelines. See FDIC FIL-50-2007, June 19, 2007.*

**Bureau Report.** Section 1073 requires the Bureau, within 365 days of the CFPA’s enactment, or July 21, 2011, to report on (i) the manner in which the remittance history of a consumer could be used to enhance the credit score of the consumer; (ii) the current legal and business model barriers and impediments that impede the use of the remittance history of the consumer to enhance the credit score of the consumer; and (iii) recommendations on the manner in which maximum transparency and disclosure to consumers of exchange rates for remittance transfers may be accomplished. The report is to be made to the President, Senate Banking Committee, and House Financial Services Committee.

**Comment:** *If the report were to indicate that remittance histories may be used to enhance credit scores, the banking agencies may see this as an opportunity to raise the credit scores of low- and moderate-income individuals who frequently transmit funds to relatives abroad. If so, the banking agencies may pressure banks to use credit scores that take remittance histories into account. Lenders have found that the relationship between creditworthiness and other types of “non-traditional” payment data, such as utilities or rent payments, is complex and not susceptible to easy analysis or characterization. See, e.g., Federal Trade Commission, Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003 (December 2004) (“In order for data to be a useful supplement or substitute for traditional credit history information, the data must be predictive of credit behavior.”). The same may be true of remittance transfer data.*

## 6.2 Electronic Fund Transfer Act (Regulation E) (§ 1084)

### SEC. 1084. AMENDMENTS TO THE ELECTRONIC FUND TRANSFER ACT.

The Electronic Fund Transfer Act (15 U.S.C. 1693 et seq.) is amended—

(1) by striking ‘Board’ each place that term appears and inserting ‘Bureau’, except in subsections (a) and (e) of section 904 (as amended in paragraph (3) of this section) and in 918 (15 U.S.C. 1693o) (as so designated by the Credit Card Act of 2009) and section 920 (as added by section 1076);

(2) in section 903 (15 U.S.C. 1693a)—

(A) by redesignating paragraphs (3) through (11) as paragraphs (4) through (12), respectively; and

(B) by inserting after paragraph (3) the following:

‘(4) the term ‘Bureau’ means the Bureau of Consumer Financial Protection;’;

(3) in section 904 (15 U.S.C. 1693b)—

(A) in subsection (a), by striking ‘(a) Prescription by Board- The Board shall prescribe regulations to carry out the purposes of this title.’ and inserting the following:

‘(a) Prescription by the Bureau and the Board-

‘(1) IN GENERAL- Except as provided in paragraph (2), the Bureau shall prescribe rules to carry out the purposes of this title.

‘(2) AUTHORITY OF THE BOARD- The Board shall have sole authority to prescribe rules—

‘(A) to carry out the purposes of this title with respect to a person described in section 1029(a) of the Consumer Financial Protection Act of 2010; and

‘(B) to carry out the purposes of section 920.’; and

(C) by adding at the end the following new subsection:

‘(e) Deference- No provision of this title may be construed as altering, limiting, or otherwise affecting the deference that a court affords to—

‘(1) the Bureau in making determinations regarding the meaning or interpretation of any provision of this title for which the Bureau has authority to prescribe regulations; or

‘(2) the Board in making determinations regarding the meaning or interpretation of section 920.’.

(4) in section 916(d) (15 U.S.C. 1693m) (as so designated by the Credit CARD Act of 2009)—

(A) in the subsection heading, by striking ‘of Board or Approval of Duly Authorized Official or Employee of Federal Reserve System’;

(B) by inserting ‘Bureau or the’ before ‘Board’ each place that term appears; and

(C) by inserting ‘Bureau of Consumer Financial Protection or the’ before ‘Federal Reserve System’; and

(5) in section 918 (15 U.S.C. 1693o) (as so designated by the Credit CARD Act of 2009)—

(A) in subsection (a)—

(i) by striking ‘Compliance’ and inserting ‘Subject to subtitle B of the Consumer Financial Protection Act of 2010, compliance’;

(ii) by striking paragraphs (1) and (2), and inserting the following:

‘(1) section 8 of the Federal Deposit Insurance Act, by the appropriate Federal banking agency, as defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), with respect to—

‘(A) national banks, Federal savings associations, and Federal branches and Federal agencies of foreign banks;

‘(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act; and

‘(C) banks and State savings associations insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), and insured State branches of foreign banks;’;

(iii) by redesignating paragraphs (3) through (5) as paragraphs (2) through (4), respectively;

(iv) in paragraph (2) (as so redesignated), by striking the period at the end and inserting a semicolon;

(v) in paragraph (3) (as so redesignated), by striking ‘and’ at the end;

(vi) in paragraph (4) (as so redesignated), by striking the period at the end and inserting ‘and’;  
and

(vii) by adding at the end the following:

‘(5) subtitle E of the Consumer Financial Protection Act of 2010, by the Bureau, with respect to any person subject to this title, except that the Bureau shall not have authority to enforce the requirements of section 920 or any regulations prescribed by the Board under section 920.’;

(B) in subsection (b), by inserting ‘any of paragraphs (1) through (4) of’ before ‘subsection (a)’ each place that term appears; and

(C) by striking subsection (c) and inserting the following:

‘(c) Overall Enforcement Authority of the Federal Trade Commission- Except to the extent that enforcement of the requirements imposed under this title is specifically committed to some other Government agency under any of paragraphs (1) through (4) of subsection (a), and subject to subtitle B of the Consumer Financial Protection Act of 2010, the Federal Trade Commission shall be authorized to enforce such requirements. For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement imposed under this title shall be deemed a violation of a requirement imposed under that Act. All of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Federal Trade Commission to enforce compliance by any person subject to the jurisdiction of the Federal Trade Commission with the requirements imposed under this title, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests under the Federal Trade Commission Act.’

## Analysis

- **Transfer of Authority to the Bureau.** Section 1084 amends the EFTA by transferring the rulemaking authority granted to the FRB to the Bureau, except for the authority provided to the FRB to make rules imposing “reasonable fees” for payment card transactions under EFTA section 920 (added by CFPA section 1075). The FRB also retains authority to make rules under the EFTA for persons who are excluded from Bureau jurisdiction under CFPA section 1029(a)—that is, motor vehicle dealers that are predominantly engaged in the sale and servicing of motor vehicles, the leasing of motor vehicles, or both. Notably, this section does not preserve the FRB’s authority to make rules under new EFTA section 919, added by the CFPA and regarding remittance transfers. See discussion of section 1073, *supra*.

This section of the Act also adds a “deference” provision, amending the EFTA to state that “no provision of this title may be construed as altering, limiting, or otherwise affecting the deference that a court affords to (1) the Bureau in making determinations regarding the meaning or interpretation of any provision of this title for which the Bureau has authority to prescribe regulations; or (2) the FRB in making determinations regarding the meaning or interpretation of section 920.” As stated, section 920 of the EFTA is added by CFPA section 1075 and addresses, among other things, the interchange transaction fees than can be charged by banks.

- **Enforcement by Bureau.** Section 1084 amends the EFTA to establish an enforcement scheme that follows the general CFPA model: the Bureau will enforce EFTA and its implementing rules against banks with more than \$10 billion in assets; functional regulators will enforce these provisions against other regulated entities; and the Bureau and FTC will share residual jurisdiction. However, the Bureau does not have the authority to enforce the interchange requirements (Section 920 of the Act) or any regulations prescribed by the FRB under that section.
- **Authority of the FTC.** The Act amends EFTA Section 918 to provide that the FTC and Bureau will both have enforcement jurisdiction over persons not committed to the jurisdiction of another agency. This is consistent

with the general enforcement scheme under the CFPB, and is consistent with amendments made to other statutes, including FCRA, ECOA, and FDCPA. The FTC's authority to enforce the EFTA is otherwise unchanged.

- **Effective Date.** These provisions are effective on the Designated Transfer Date, July 21, 2011.

### 6.3 Expedited Funds Availability Act (Regulation CC) (§ 1086)

#### SEC. 1086. AMENDMENTS TO THE EXPEDITED FUNDS AVAILABILITY ACT.

(a) Amendment to Section 603- Section 603(d)(1) of the Expedited Funds Availability Act (12 U.S.C. 4002) is amended by inserting after 'Board' the following ' , jointly with the Director of the Bureau of the Bureau of Consumer Financial Protection, '.

(b) Amendments to Section 604- Section 604 of the Expedited Funds Availability Act (12 U.S.C. 4003) is amended—

(1) by inserting after 'Board' each place that term appears, other than in subsection (f), the following: ' , jointly with the Director of the Bureau of the Bureau of Consumer Financial Protection, ' ; and

(2) in subsection (f), by striking 'Board.' each place that term appears and inserting the following: 'Board, jointly with the Director of the Bureau of the Bureau of Consumer Financial Protection.'.

(c) Amendments to Section 605- Section 605 of the Expedited Funds Availability Act (12 U.S.C. 4004) is amended—

(1) by inserting after 'Board' each place that term appears, other than in the heading for section 605(f)(1), the following: ' , jointly with the Director of the Bureau of the Bureau of Consumer Financial Protection, ' ; and

(2) in subsection (f)(1), in the paragraph heading, by inserting 'AND BUREAU' after 'BOARD'.

(d) Amendments to Section 609- Section 609 of the Expedited Funds Availability Act (12 U.S.C. 4008) is amended:

(1) in subsection (a), by inserting after 'Board' the following ' , jointly with the Director of the Bureau of the Bureau of Consumer Financial Protection, ' ; and

(2) by striking subsection (e) and inserting the following:

'(e) Consultations- In prescribing regulations under subsections (a) and (b), the Board and the Director of the Bureau of the Bureau of Consumer Financial Protection, in the case of subsection (a), and the Board, in the case of subsection (b), shall consult with the Comptroller of the Currency, the Board of Director of the Bureaus of the Federal Deposit Insurance Corporation, and the National Credit Union Administration Board.'

(e) Expedited Funds Availability Improvements- Section 603 of the Expedited Funds Availability Act (12 U.S.C. 4002) is amended—

(1) in subsection (a)(2)(D), by striking '\$100' and inserting '\$200'; and

(2) in subsection (b)(3)(C), in the subparagraph heading, by striking '\$100' and inserting '\$200'; and

(3) in subsection (c)(1)(B)(iii), in the clause heading, by striking '\$100' and inserting '\$200'.

(f) Regular Adjustments for Inflation- Section 607 of the Expedited Funds Availability Act (12 U.S.C. 4006) is amended by adding at the end the following:

'(f) Adjustments to Dollar Amounts for Inflation- The dollar amounts under this title shall be adjusted every 5 years after December 31, 2011, by the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers, as published by the Bureau of Labor Statistics, rounded to the nearest multiple of \$25.'

## Analysis

- Transfer of Authority to the Bureau. Section 1086 amends the Expedited Funds Availability Act (“EFAA”) to add rulemaking authority for the Bureau. Rules under the EFAA will now be made jointly by the FRB and Bureau.
- Expedited Funds Availability Schedules. The Act increases next-day availability from \$100 and \$200, and provides for future adjustments of this amount (and other dollar amounts stated in the EFAA) based on increases in the CPI. For example, the adjustment will also apply to the large dollar amount exception (currently, \$5,000) in section 604(b)(1) of the EFAA. The adjustments will be made every five years after December 31, 2011 and will be rounded to the nearest multiple of \$25.
- Effective Date. These provisions are effective on the Designated Transfer Date, July 21, 2011.

## 6.4 Truth in Savings (§ 1100B)

### SEC. 1100B. AMENDMENTS TO THE TRUTH IN SAVINGS ACT.

The Truth in Savings Act (12 U.S.C. 4301 et seq.) is amended—

(1) by striking ‘Board’ each place that term appears, other than in section 272(b) (12 U.S.C. 4311), and inserting ‘Bureau’;

(2) in section 270(a) (12 U.S.C. 4309)—

(A) by striking ‘Compliance’ and all that follows through the end of paragraph (1) and inserting:

‘Subject to subtitle B of the Consumer Financial Protection Act of 2010, compliance with the requirements imposed under this subtitle shall be enforced under—

‘(1) section 8 of the Federal Deposit Insurance Act by the appropriate Federal banking agency (as defined in section 3(q) of that Act), with respect to—

‘(A) insured depository institutions (as defined in section 3(c)(2) of that Act);

‘(B) depository institutions described in clause (i), (ii), or (iii) of section 19(b)(1)(A) of the Federal Reserve Act which are not insured depository institutions (as defined in section 3(c)(2) of the Federal Deposit Insurance Act); and

‘(C) depository institutions described in clause (v) or (vi) of section 19(b)(1)(A) of the Federal Reserve Act which are not insured depository institutions (as defined in section 3(c)(2) of the Federal Deposit Insurance Act);’;

(B) in paragraph (2), by striking the period at the end and inserting ‘; and’; and

(C) by adding at the end the following:

‘(3) subtitle E of the Consumer Financial Protection Act of 2010, by the Bureau, with respect to any person subject to this subtitle.’;

(3) in section 272(b) (12 U.S.C. 4311(b)), by striking ‘regulation prescribed by the Board’ each place that term appears and inserting ‘regulation prescribed by the Bureau’; and

(4) in section 274 (12 U.S.C. 4313), by striking paragraph (4) and inserting the following:

‘(4) BUREAU- The term ‘Bureau’ means the Bureau of Consumer Financial Protection.’.

## Analysis

- Transfer of Authority to the Bureau. Section 1100B amends the Truth in Savings Act (“TISA”) (12 U.S.C. 4301 et seq.) by replacing the FRB with the Bureau. The Bureau will enforce TISA against banks with more than \$10 billion in assets; functional regulators will enforce these provisions against other regulated entities; and the

Bureau will have residual jurisdiction. (The FTC does not enforce TISA, and TISA does not provide a private cause of action for violations.)

- Effective Date. These provisions are effective on the Designated Transfer Date, July 21, 2011.

## 7. ARBITRATION

### 7.1 Authority to Restrict Mandatory Pre-Dispute Arbitration (§ 1028)

#### SEC. 1028. AUTHORITY TO RESTRICT MANDATORY PRE-DISPUTE ARBITRATION.

(a) Study and Report- The Bureau shall conduct a study of, and shall provide a report to Congress concerning, the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services.

(b) Further Authority- The Bureau, by regulation, may prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers. The findings in such rule shall be consistent with the study conducted under subsection (a).

(c) Limitation- The authority described in subsection (b) may not be construed to prohibit or restrict a consumer from entering into a voluntary arbitration agreement with a covered person after a dispute has arisen.

(d) Effective Date- Notwithstanding any other provision of law, any regulation prescribed by the Bureau under subsection (b) shall apply, consistent with the terms of the regulation, to any agreement between a consumer and a covered person entered into after the end of the 180-day period beginning on the effective date of the regulation, as established by the Bureau.

#### Analysis

- General. This is one of several sections of the Dodd-Frank Act (of which the CFPB is just one title) addressing arbitration. For example, section 1414 amends the Truth-in-Lending Act to prohibit pre-dispute arbitration clauses with respect to residential mortgage loans and open-end consumer credit plans secured by principal dwellings. See <http://www.mofo.com/files/Uploads/Images/ResidentialMortgage.pdf>. In addition, section 1057(d), concerning the transfer of federal agency employees to the Bureau, prohibits the use of pre-dispute arbitration in certain agreements or in certain circumstances involving employment agreements.
- Study and Report. The Bureau is required to conduct a study of, and provide a report to Congress concerning, the use of agreements with pre-dispute arbitration clauses by Covered Persons in connection with the offering or providing of consumer financial products or services. Section 1028 does not set a specific date by which the Bureau is to submit its report to Congress and does not identify the required contents of the report.
- Rulemaking Authority. Section 1028 authorizes the Bureau to issue a regulation that prohibits or imposes conditions or limitations on the use of agreements with pre-dispute arbitration clauses by Covered Persons in connection with the offering or providing of consumer financial products or services.

To prohibit, or impose such conditions on, the use of an agreement containing a pre-dispute arbitration clause, the Bureau must find that such a prohibition or imposition of conditions or limitations (a) is “in the public interest,” and (b) would “protect” consumers. The Act does not provide any further guidance on either condition; however, the findings in the rule must be consistent with the Bureau’s arbitration study.

Any such regulation of the Bureau may not prohibit or restrict a consumer from entering into a voluntary arbitration agreement with a Covered Person after a dispute has arisen.

- **Effective Date.** If the Bureau issues a regulation prohibiting or imposing conditions or limitations on pre-dispute arbitration clauses, that rule will apply to any agreement between a consumer and a Covered Person entered into after the end of the 180-day period beginning on the effective date of the regulation. As a result, agreements entered into before that date will be grandfathered. Moreover, with nearly six months warning before the new regulation takes hold, Covered Persons will have sufficient time to revise their agreements and adjust their pricing to reflect the impact of the new regulation.
- **Comment:** *For many years, consumer groups have been highly critical of the inclusion of pre-dispute arbitration clauses in consumer financial services agreements. There has been considerable litigation regarding the legality of these clauses, particularly where the clauses are unilaterally added by banks to existing agreements or where banks seek to preclude the exercise of the arbitration remedy on behalf of an entire class of consumers. In response to this litigation, as well as scrutiny by state attorneys general, some large banks have decided to eliminate pre-dispute arbitration clauses from consumer contracts. See, e.g., American Banker, "Issuers Back Away from Arbitration," July 23, 2009. In addition, some of the largest arbitrators have stopped handling consumer credit arbitrations. See id. The Bureau's study and report are likely to pave the way for the issuance of limitations on the use of pre-dispute arbitration clauses or, quite possibly, an outright prohibition on the use of those clauses.*
- **Effective Date.** These provisions are effective as of the Designated Transfer Date, July 21, 2011.

## 8. EXCHANGE FACILITATORS

### 8.1 Review, Report and Program with Respect to Exchange Facilitators (§ 1079)

#### SEC. 1079. REVIEW, REPORT, AND PROGRAM WITH RESPECT TO EXCHANGE FACILITATORS.

(a) Review- The Director of the Bureau shall review all Federal laws and regulations relating to the protection of consumers who use exchange facilitators for transactions primarily for personal, family, or household purposes.

(b) Report- Not later than 1 year after the designated transfer date, the Director of the Bureau shall submit to Congress a report describing—

(1) recommendations for legislation to ensure the appropriate protection of consumers who use exchange facilitators for transactions primarily for personal, family, or household purposes;

(2) recommendations for updating the regulations of Federal departments and agencies to ensure the appropriate protection of such consumers; and

(3) recommendations for regulations to ensure the appropriate protection of such consumers.

(c) Program- Not later than 2 years after the date of the submission of the report under subsection (b), the Bureau shall, consistent with subtitle B, propose regulations or otherwise establish a program to protect consumers who use exchange facilitators.

(d) Exchange Facilitator Defined- In this section, the term 'exchange facilitator' means a person that—

(1) facilitates, for a fee, an exchange of like kind property by entering into an agreement with a taxpayer by which the exchange facilitator acquires from the taxpayer the contractual rights to sell the taxpayer's relinquished property and transfers a replacement property to the taxpayer as a qualified intermediary (within the meaning of Treasury Regulations section 1.1031(k)-1(g)(4)) or enters into an agreement with the taxpayer to take title to a property as an exchange accommodation titleholder (within the meaning of

Revenue Procedure 2000-37) or enters into an agreement with a taxpayer to act as a qualified trustee or qualified escrow holder (within the meaning of Treasury Regulations section 1.1031(k)-1(g)(3));

(2) maintains an office for the purpose of soliciting business to perform the services described in paragraph (1); or

(3) advertises any of the services described in paragraph (1) or solicits clients in printed publications, direct mail, television or radio advertisements, telephone calls, facsimile transmissions, or other electronic communications directed to the general public for purposes of providing any such services.

## Analysis

- **Definition of Exchange Facilitator.** The term “exchange facilitator” is defined to mean a person that “(1) facilitates, for a fee, an exchange of like kind property by entering into an agreement with a taxpayer by which the exchange facilitator acquires from the taxpayer the contractual rights to sell the taxpayer’s relinquished property and transfers a replacement property to the taxpayer as a qualified intermediary (within the meaning of Treasury Regulations section 1.1031(k)-1(g)(4)) or enters into an agreement with the taxpayer to take title to a property as an exchange accommodation titleholder (within the meaning of Revenue Procedure 2000-37) or enters into an agreement with a taxpayer to act as a qualified trustee or qualified escrow holder (within the meaning of Treasury Regulations section 1.1031(k)-1(g)(3)); (2) maintains an office for the purpose of soliciting business to perform the services described in paragraph (1); or (3) advertises any of the services described in paragraph (1) or solicits clients in printed publications, direct mail, television or radio advertisements, telephone calls, facsimile transmissions, or other electronic communications directed to the general public for purposes of providing any such services.”
- **Review and Report on Exchange Facilitators.** There is currently no comprehensive scheme of federal regulation of “exchange facilitators”—persons who work with consumers to arrange like-kind exchanges of property for the purpose of deferring taxes on the sale of property. The Director of the Bureau is required to review all federal laws and regulations relating to the protection of consumers who use exchange facilitators for transactions primarily for personal, family, or household purposes.

Within one year after the Designated Transfer Date (*i.e.*, by July 21, 2012), the Director of the Bureau is required to submit to Congress a report describing (i) recommendations for legislation to ensure the appropriate protection of consumers who use exchange facilitators for personal, family, or household transactions; (ii) recommendations for updating the regulations of federal departments and agencies to ensure the appropriate protection of such consumers; and (iii) recommendations for regulations to ensure the appropriate protection of such consumers.

- **Program.** Within two years after the date of the submission of the report, the Bureau is required, consistent with subtitle B of the Act (the general powers of the Bureau), to propose regulations or otherwise establish a program to protect consumers who use exchange facilitators.
- **Effective Date.** No effective date is provided for Section 1079, but the report is due to Congress by July 21, 2011, and rules or a “program” to regulate exchange facilitators must be proposed within two years of the report.
- **Comment.** *In discussions relating to the causes of the recent financial crises, there has been little mention of exchange facilitators. Nevertheless, Congress has directed the Bureau to prepare a report regarding exchange facilitators, and this is likely to lead to a new regulatory regime. An important question is whether the Bureau will exempt banks from that new regulatory regime.*

## 9. DEBT COLLECTION

### 9.1 Fair Debt Collection Practices Act (§ 1089)

#### SEC. 1089. AMENDMENTS TO THE FAIR DEBT COLLECTION PRACTICES ACT.

The Fair Debt Collection Practices Act (15 U.S.C. 1692 et seq.) is amended—

(1) by striking ‘Commission’ each place that term appears and inserting ‘Bureau’;

(2) in section 803 (15 U.S.C. 1692a)—

(A) by striking paragraph (1) and inserting the following:

‘(1) The term ‘Bureau’ means the Bureau of Consumer Financial Protection.’;

(3) in section 814 (15 U.S.C. 1692l)—

(A) by striking subsection (a) and inserting the following:

‘(a) Federal Trade Commission- The Federal Trade Commission shall be authorized to enforce compliance with this title, except to the extent that enforcement of the requirements imposed under this title is specifically committed to another Government agency under any of paragraphs (1) through (5) of subsection (b), subject to subtitle B of the Consumer Financial Protection Act of 2010. For purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act (15 U.S.C. 41 et seq.), a violation of this title shall be deemed an unfair or deceptive act or practice in violation of that Act. All of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Federal Trade Commission to enforce compliance by any person with this title, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests under the Federal Trade Commission Act, including the power to enforce the provisions of this title, in the same manner as if the violation had been a violation of a Federal Trade Commission trade regulation rule.’;

and

(B) in subsection (b)—

(i) by striking ‘Compliance’ and inserting ‘Subject to subtitle B of the Consumer Financial Protection Act of 2010, compliance’;

(ii) by striking paragraphs (1) and (2) and inserting the following:

‘(1) section 8 of the Federal Deposit Insurance Act, by the appropriate Federal banking agency, as defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), with respect to—

‘(A) national banks, Federal savings associations, and Federal branches and Federal agencies of foreign banks;

‘(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act; and

‘(C) banks and State savings associations insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), and insured State branches of foreign banks.’;

(iii) by redesignating paragraphs (3) through (6), as paragraphs (2) through (5), respectively;

(iv) in paragraph (4) (as so redesignated), by striking ‘and’ at the end;

(v) in paragraph (5) (as so redesignated), by striking the period at the end and inserting ‘; and’; and

(vi) by inserting before the undesignated matter at the end the following:

‘(6) subtitle E of the Consumer Financial Protection Act of 2010, by the Bureau, with respect to any person subject to this title.’

(4) in subsection (d), by striking ‘Neither the Commission’ and all that follows through the end of the subsection and inserting the following: ‘Except as provided in section 1029(a) of the Consumer Financial Protection Act of 2010, the Bureau may prescribe rules with respect to the collection of debts by debt collectors, as defined in this title.’

## Analysis

- **Transfer of Authority to the Bureau.** Section 1089 amends the Fair Debt Collection Practices Act (“FDCPA”) by transferring the authority granted to the FTC to the Bureau. The FTC, however, retains its enforcement authority. Thus, as a practical matter, the duties and authority that will transfer from the FTC to the Bureau are (1) the FTC’s duty to provide annual FDCPA reports to Congress (FDCPA § 815); (2) the FTC’s duty to issue exemptions under state law (FDCPA § 815); and (3) the “safe harbor” under FDCPA § 813(d) for acts or omissions “in conformity with any advisory opinion of the Commission,” which will now apply to acts or omissions based on Bureau advisory opinions.
- **Rulewriting.** There currently is no rulewriting authority provided to any agency under the FDCPA. The CFPA amends the FDCPA to authorize the Bureau to prescribe rules with respect to the collection of debts by debt collectors, except as provided in section 1029(a) of the Act (exempting from Bureau jurisdiction motor vehicle dealers that are predominantly engaged in the sale and servicing of motor vehicles, the leasing of motor vehicles, or both). It appears, therefore, that any FDCPA rules that might be made by the Bureau will not apply to such motor vehicle dealers. In contrast with other consumer financial protection laws, the FDCPA does not authorize another federal agency to issue regulations for such motor vehicle dealers.
- **Authority of the FTC.** The FTC’s enforcement power under the FDCPA is unchanged. As before, a violation of the FDCPA shall be deemed an unfair or deceptive act or practice in violation of FTC Act, and all of the functions and powers of the FTC under the FTC Act are available to the FTC to enforce compliance by any person with the FDCPA, in the same manner as if the violation had been a violation of an FTC trade regulation rule. This means that the FTC can obtain civil penalties for violations of the FDCPA in the same amount as the civil penalties that it obtains for violations of a trade regulation rule—currently, \$16,000 per violation. See FTC Act § 5(m); 16 C.F.R. § 1.98.
- **Enforcement by Bureau.** Section 1089 amends the FDCPA to establish an enforcement scheme that is consistent with the overall CFPA; the Bureau will enforce FDCPA against banks with more than \$10 billion in assets, functional regulators will enforce these provisions against other regulated entities, and the Bureau and FTC will share residual jurisdiction.
- **Effective Date.** These provisions are effective on the Designated Transfer Date, July 21, 2011.

## 10. OTHER CONFORMING AMENDMENTS TO EXISTING LAWS

### 10.1 Federal Deposit Insurance Act (§ 1090)

#### SEC. 1090. AMENDMENTS TO THE FEDERAL DEPOSIT INSURANCE ACT.

The Federal Deposit Insurance Act (12 U.S.C. 1811 et seq.) is amended—

(1) in section 8(t) (12 U.S.C. 1818(t)), by adding at the end the following:

‘(6) REFERRAL TO BUREAU OF CONSUMER FINANCIAL PROTECTION- Subject to subtitle B of the Consumer Financial Protection Act of 2010, each appropriate Federal banking agency shall make a referral to the Bureau of Consumer Financial Protection when the Federal banking agency has a reasonable belief that a violation of an enumerated consumer law, as defined in the Consumer Financial Protection Act of 2010, has been committed by any insured depository institution or institution-affiliated party within the jurisdiction of that appropriate Federal banking agency.’; and

(2) in section 43 (12 U.S.C. 1831t)—

(A) in subsection (c), by striking ‘Federal Trade Commission’ and inserting ‘Bureau’;

(B) in subsection (d), by striking ‘Federal Trade Commission’ and inserting ‘Bureau’;

(C) in subsection (e)—

(i) in paragraph (2), by striking ‘Federal Trade Commission’ and inserting ‘Bureau’; and

(ii) by adding at the end the following new paragraph:

‘(5) BUREAU- The term ‘Bureau’ means the Bureau of Consumer Financial Protection.’; and

(D) in subsection (f)—

(i) by striking paragraph (1) and inserting the following:

‘(1) LIMITED ENFORCEMENT AUTHORITY- Compliance with the requirements of subsections (b), (c), and (e), and any regulation prescribed or order issued under such subsection, shall be enforced under the Consumer Financial Protection Act of 2010, by the Bureau, subject to subtitle B of the Consumer Financial Protection Act of 2010, and under the Federal Trade Commission Act (15 U.S.C. 41 et seq.) by the Federal Trade Commission.’;

and

(ii) in paragraph (2), by striking subparagraph (C) and inserting the following:

‘(C) LIMITATION ON STATE ACTION WHILE FEDERAL ACTION PENDING- If the Bureau or Federal Trade Commission has instituted an enforcement action for a violation of this section, no appropriate State supervisory agency may, during the pendency of such action, bring an action under this section against any defendant named in the complaint of the Bureau or Federal Trade Commission for any violation of this section that is alleged in that complaint.’.

## Analysis

- **Referral.** Section 1090 of the Act amends the FDI Act to require each appropriate Federal Banking Agency, subject to Subtitle B of the CFPA, to make a referral to the Bureau when the federal banking agency has a “reasonable belief” that a violation of an Enumerated Consumer Law has been committed by any insured depository institution or institution-affiliated party within the jurisdiction of that appropriate federal banking agency. The “subject to Subtitle B” language is critical here; Subtitle B provides that the Bureau has primary enforcement authority against banks and credit unions with assets in excess of \$10 billion, see Act § 1025(c), but the Banking Agencies have enforcement authority over depository institutions with assets of \$10 billion or less, see Act § 1026(d).

While it appears to require the Banking Agencies to make referrals to the Bureau for banks with more than \$10 billion in assets, this provision also may impact smaller institutions. For banks with less than \$10 billion in assets, the Bureau can require reports, send its own examiners on a “sampling” basis along with the prudential

regulator's examiners, and recommend enforcement action. See Act § 1026. Consequently, there would be a substantive justification for the prudential regulator to provide information under section 1090 to the Bureau even for these smaller banks. As a result, and given the literal wording of section 1090 ("any insured depository institution"), which does not limit the reporting obligation to the larger banks, the prudential regulator has a duty to report for all banks and institution-affiliated parties, regardless of size.

- **Transfer to Bureau.** The Act also transfers from the FTC to the Bureau the responsibility, under FDI Act section 43, to prescribe the manner and content of disclosure required to inform depositors of depository institutions lacking federal deposit insurance. This provision, added by the FDIC Improvements Act in 1991, requires the agency to prescribe a disclosure to depositors in depository institutions that are not federally insured. The FTC promulgated such a disclosure in 2010. See 16 C.F.R. pt. 320.
- **Effective Date.** These provisions are effective on the Designated Transfer Date, July 21, 2011.

## 10.2 Federal Trade Commission Act (§ 1092)

### SEC. 1092. AMENDMENTS TO THE FEDERAL TRADE COMMISSION ACT.

Section 18(f) of the Federal Trade Commission Act (15 U.S.C. 57a(f)) is amended—

(1) by striking the subsection heading and inserting the following:

'(f) Definitions of Banks, Savings and Loan Institutions, and Federal Credit Unions-'

(2) by striking paragraph (1) and inserting the following:

'(1) [Repealed.]';

(3) by striking paragraphs (5) through (7);

(4) in paragraph (2)—

(A) by striking '(2) ENFORCEMENT' and all that follows through 'in the case of' and inserting the following:

'(2) DEFINITION- For purposes of this Act, the term 'bank' means';

(B) in subparagraph (A), by striking ', by the division' and all that follows through 'Currency';

(C) in subparagraph (B)—

(i) by striking ', by the division' and all that follows through 'System'; and

(ii) by striking '25(a)' and inserting '25A'; and

(D) in subparagraph (C)—

(i) by striking '(other' and inserting '(other than'; and

(ii) by striking ', by the division' and all that follows through 'Corporation';

(5) in paragraph (3), by striking 'Compliance' and all that follows through 'as defined in' and inserting the following: 'For purposes of this Act, the term 'savings and loan institution' has the same meaning as in'; and

(6) in paragraph (4), by striking 'Compliance' and all that follows through 'credit unions under' and inserting the following: 'For purposes of this Act, the term 'Federal credit union' has the same meaning as in'.

## Analysis

- **Removal of Authority.** Section 1092 of the Act amends Section 18(f) of the Federal Trade Commission Act to remove rulemaking authority for the Banking Agencies. This provision was initially added in 1975 to require the Banking Agencies to make rules that dovetail with the so-called "Trade Regulation Rules" made by the FTC—

*i.e.*, rules prohibiting unfair or deceptive acts or practices under section 5 of the FTC Act. See Pub. L. No. 93-637, 88 Stat. 2193, at § 202(a). Because banks are specifically excluded from the FTC's jurisdiction under FTC Act section 5(a)(2), Congress added this provision to ensure that banks and non-banks were subject to the same requirements. (The Banking Agencies initially used their authority under section 18(f) in 1985, to promulgate Regulation AA, 12 C.F.R. pt. 227, which mimicked the FTC's Credit Practices Rule, 16 C.F.R. pt. 444.)

The authority to make trade practice rules for banks, however, is not obsolete, given the authority of the Bureau to make rules prohibiting unfair, deceptive, or abusive acts or practices under section 1031 of the CFPA. In addition, section 1061(b)(5)(D) requires the Bureau and FTC to coordinate their trade practices rules: "To avoid duplication of or conflict between rules prescribed by the Bureau under section 1031 of this title and the [FTC] under [the FTC Act] that apply to a covered person or service provider with respect to the offering or provision of consumer financial products or services, the agencies shall negotiate an agreement with respect to rulemaking by each agency, including consultation with the other agency prior to proposing a rule and during the comment period."

In addition, under section 1061 of the CFPA, the Bureau can enforce FTC Trade Regulation Rules—such as, the Holder in Due Course Rule, 16 C.F.R. pt. 433, and the Credit Practices Rule, 16 C.F.R. pt. 444—as though they are prohibitions against unfair, deceptive, or abusive acts or practices under section 1031 of the CFPA. See Act § 1061(b)(5)(B)(ii). The FTC, in turn, can enforce any rules made by the Bureau prohibiting unfair, deceptive, or abusive acts or practices as though they are Trade Regulation Rules under the FTC Act. See Act § 1061(b)(5)(C)(ii).

**Comment:** *As stated, the FTC can enforce its Trade Regulation Rules against non-banks, and the Bureau can enforce those rules against Covered Persons within its enforcement jurisdiction, including banks with assets in excess of \$10 billion. The banking agencies, which have exclusive authority to enforce the Federal Consumer Financial Laws with respect to banks with assets of \$10 billion or less, do not have any specific authority to enforce FTC Trade Regulation Rules, and, due to the repeal of FTC Act § 18(f), no longer have authority to make such rules on their own. Furthermore, the FTC Act is specifically excluded from the enumerated Federal Consumer Financial Laws. But, the banking agencies may have authority to enforce FTC rules against banks under FDI Act § 8, 12 U.S.C. § 1818, which permits "the appropriate Federal banking agency" to bring an enforcement action against a bank that "is violating or has violated, or ... is about to violate, a law, rule, or regulation." In the past, the banking agencies have taken the position that this provision permits the agencies to bring actions against banks for violations of FTC Act Section 5, prohibiting unfair and deceptive acts or practices. See, e.g., Letter from Alan Greenspan, Chairman, Federal Reserve Board, to John J. LaFalce, Ranking Member, House Committee on Financial Services (May 30, 2002), available at <http://www.federalreserve.gov/boarddocs/press/bcreg/2002/20020530/attachment.pdf> (stating that the banking agencies intend to use their authority under 12 U.S.C. § 1818 to enforce banks' compliance with the FTC Act). In addition, the Bureau could ensure that the requirements and prohibitions of the FTC Trade Regulation Rules would be incorporated into the Federal Consumer Financial Laws by including any FTC Trade Regulation Rules in its own body of regulations under CFPA Section 1031 (regarding unfair, deceptive and abusive practices).*

- The FTC also retains all enforcement power under all laws, including Enumerated Consumer Laws: "No provision of this title shall be construed as modifying, limiting, or otherwise affecting the authority of the [FTC] (including its authority with respect to affiliates [of banks]) under the [FTC] Act or any other law, other than the authority under an enumerated consumer law to prescribe rules, issue official guidelines, or conduct a study or issue a report mandated under such law."
- Effective Date. These provisions are effective on the Designated Transfer Date, July 21, 2011.

### 10.3 Homeowners Protection Act of 1998 (§ 1095)

#### SEC. 1095. AMENDMENTS TO THE HOMEOWNERS PROTECTION ACT OF 1998.

Section 10 of the Homeowners Protection Act of 1998 (12 U.S.C. 4909) is amended—

(1) in subsection (a)—

(A) by striking ‘Compliance’ and all that follows through the end of paragraph (1) and inserting the following:

‘Subject to subtitle B of the Consumer Financial Protection Act of 2010, compliance with the requirements imposed under this Act shall be enforced under—

‘(1) section 8 of the Federal Deposit Insurance Act, by the appropriate Federal banking agency (as defined in section 3(q) of that Act), with respect to—

‘(A) insured depository institutions (as defined in section 3(c)(2) of that Act);

‘(B) depository institutions described in clause (i), (ii), or (iii) of section 19(b)(1)(A) of the Federal Reserve Act which are not insured depository institutions (as defined in section 3(c)(2) of the Federal Deposit Insurance Act); and

‘(C) depository institutions described in clause (v) or (vi) of section 19(b)(1)(A) of the Federal Reserve Act which are not insured depository institutions (as defined in section 3(c)(2) of the Federal Deposit Insurance Act);’;

(B) in paragraph (2), by striking ‘and’ at the end;

(C) in paragraph (3), by striking the period at the end and inserting ‘; and’;

and

(D) by adding at the end the following:

‘(4) subtitle E of the Consumer Financial Protection Act of 2010, by the Bureau of Consumer Financial Protection, with respect to any person subject to this Act.’;

and

(2) in subsection (b)(2), by inserting before the period at the end the following: ‘, subject to subtitle B of the Consumer Financial Protection Act of 2010’.

#### Analysis

- **Enforcement by Bureau.** The HPA was enacted in 1998 to provide consumers with certain rights and to require certain disclosures with respect to private mortgage insurance. Currently, the HPA is enforced only by the Banking Agencies, NCUA, and Farm Credit Administration. See 12 U.S.C. 4909(a). CFPA section 1095 amends the HPA to provide that the requirements of the HPA will, after section 1095 becomes effective, be enforced by the Bureau, and as a result non-depository institutions will for the first time be subject to administrative enforcement under the HPA. The federal banking agencies will continue to have enforcement authority for banks with \$10 billion or less of assets. The HPA continues to provide a private right of action against “[a]ny servicer, mortgagee, or mortgage insurer” that violates the HPA. See 12 U.S.C. 4907.
- **Effective Date.** These provisions are effective on the Designated Transfer Date, July 21, 2011.

## 10.4 HOEPA (§ 1096)

### SEC. 1096. AMENDMENTS TO THE HOME OWNERSHIP AND EQUITY PROTECTION ACT OF 1994.

The Home Ownership and Equity Protection Act of 1994 (15 U.S.C. 1601 note) is amended—

(1) in section 158(a), by striking ‘Board of Governors of the Federal Reserve System, in consultation with the Consumer Advisory Council of the Board’ and inserting ‘Bureau, in consultation with the Advisory Board to the Bureau’; and

(2) in section 158(b), by striking ‘Board of Governors of the Federal Reserve System’ and inserting ‘Bureau’.

### Analysis

- Transfer of Authority to the Bureau. Section 1086 amends the Home Ownership and Equity Protection Act of 1994 (“HOEPA”) by transferring the authority granted to the FRB to the Bureau.

Subtitle C of Title XIV of the Dodd-Frank Act makes significant substantive changes to HOEPA. See <http://www.mofo.com/files/Uploads/Images/ResidentialMortgage.pdf>.

- Effective Date. These provisions are effective on the Designated Transfer Date, July 21, 2011.

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