

The Consumer Financial Protection Bureau: An Update on Selected Initiatives

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Andrew J. Lorentz
Partner, Washington, DC



- Selected CFPB Initiatives
 - “Larger Participant” Proposed Rule
 - CFPB/FTC Memorandum of Understanding
 - Confidentiality and Privilege
 - Supervision and Examination Manual
- More CFPB
 - What about that recess appointment?
 - Streamlining
 - Prototype Credit Card Agreement
 - Consumer Complaints

“Larger Participant” Proposed Rule

“Larger Participant” Proposed Rule

- “Under the new law, our nonbank supervision program will be able to look at companies of all sizes in the mortgage, payday lending, and private student lending markets. But for all other markets—like consumer installment loans, money transmitting, and debt collection—the CFPB generally can supervise only larger participants.” CFPB

“Larger Participant” Proposed Rule

- Section 1024 of the CFP Act
 - In addition to covered persons in the residential, mortgage, private education lending, and payday lending markets, the CFPB may supervise any covered person who is a “**larger participant**” of a market for other consumer financial products or services, as defined by a rulemaking.
 - CFPB may also supervise covered persons who pose risks to consumers, but only “by order, after notice”
- CFPB must issue “its initial rule” defining “larger participants” no later than **July 12, 2012**.

“Larger Participant” Proposed Rule

- June 2011: CFPB sought public comment about possible markets to include in the initial rule and available data sources the CFPB could use to define larger participants in nonbank markets.
- February 2012: CFPB issued a proposed rule defining “larger participants” and requested public comment on or before April 17, 2012.

“Larger Participant” Proposed Rule

- First in a series of rules to define “larger participants” in specific markets
- Proposed Rule covers two markets
 - Consumer debt collection
 - Consumer reporting

“Larger Participant” Proposed Rule

- Proposed definition of “consumer debt collection”
 - Similar to the terms of the Fair Debt Collection Practices Act (FDCPA)
 - Does not expressly cross-reference the definitions and interpretations under the FDCPA
 - Potential for divergence between CFPB’s treatment under the CFP Act and interpretations under the FDCPA may create uncertainty as to coverage under both sets of rules

“Larger Participant” Proposed Rule

- Proposed definition of “consumer reporting”
 - Derived from Fair Credit Reporting Act (FCRA)
 - Potential for confusion in interpretation of similar terms
 - “consumer report” under the FCRA involves the communication of certain information used as a factor in establishing a consumer’s eligibility
 - “consumer reporting” under the Proposed Rule includes providing certain information used in any decision regarding the provision of a consumer financial product or service

“Larger Participant” Proposed Rule

- Proposed tests for these markets
 - “Annual receipts” definition adapted from the Small Business Administration
 - Thresholds
 - Consumer debt collection: more than \$10 million
 - Consumer reporting: more than \$7 million

“Larger Participant” Proposed Rule

- Flat “annual receipts” figure
 - Creates an ongoing need for the CFPB to update amounts as the markets evolve
 - Without any reference to overall market size or share, what is “larger”?
 - Low thresholds present business planning challenges for new entrants

“Larger Participant” Proposed Rule

- If annual receipts drop
 - Covered person would still be subject to regulation as a larger participant “for not less than 2 years from the first day of the tax year in which the person last met the applicable test”
- A covered person may challenge its designation as a “larger participant”

“Larger Participant” Proposed Rule

- The CFPB has not determined whether the “annual receipts” test would be appropriate for any other market
- The CFPB intends to “tailor each test to the market to which it will be applied”

CFPB/FTC Memorandum of Understanding

MOU Between FTC and CFPB

- Signed January 20, 2012; in effect for three years
- The CFP Act mandates coordination between the agencies – examples reflected in MOU:
 - The CFPB has exclusive enforcement authority over “covered persons” to extent federal law gives concurrent authority to CFPB and another federal agency, except as set forth in 1024(c)(3) and 1061
 - the CFPB and the FTC must enter into an agreement for coordinating enforcement activities **(1024(c)(3))**
 - the FTC may enforce CFPB rules against covered persons subject to FTC jurisdiction under the FTC Act **(1061(b)(5)(C)(ii))**

MOU Between FTC and CFPB

- CFPB must consult with “appropriate prudential regulators or other Federal agencies” before *and during* general rulemaking **(1022(b)(2)(B), (C))**
- CFPB must consult with the FTC *before* issuing a rule defining “larger participants” **(1024(a)(2))**
- FTC must consult with CFPB “in prescribing a rule” under the Telemarketing and Consumer Fraud and Abuse Prevention Act **(1100C)**
- Parties must consult on rulemakings regarding unfair, deceptive and abusive acts or practices “prior to proposing a rule and during the comment period” **(1061(B)(5(D))**

MOU Between FTC and CFPB

- Other FTC/CFPB MOU highlights
 - Law enforcement generally to be coordinated; each party to notify other before commencing investigations or actions or settling proceedings or actions
 - Either party may intervene “in any court action in which it shares jurisdiction under an MOU Consumer Financial Law”

MOU Between FTC and CFPB

- Even More (!) FTC/CFPB MOU highlights
 - The CFPB *shall* provide the FTC with examination reports upon reasonable assurances of confidentiality
 - The CFPB *will* provide other confidential supervisory information to FTC “unless good cause not to do so”
 - CFP Act, 1022(c)(6)(C)(ii), gives CFPB discretion
 - CFPB Confidentiality Rule at 12 C.F.R. Sect. 1070.43((a) and (b) gives CFPB “sole discretion” as to sharing supervisory information – **so why is this in the MOU?**

MOU Between FTC and CFPB

- Last of the MOU highlights - really
 - Requires parties to exchange consumer complaint information – reflects CFP Act
 - CFPB shall share “consumer complaint information with prudential regulators, the Federal Trade Commission, other Federal agencies, and State agencies”
(1013(b)(3)(D))
 - FTC has reciprocal obligation **(1013(b)(3)(D))**
 - Many other provisions for notices, consultation, and coordination

Confidentiality & Privilege

Confidentiality and Privilege

- Controversy as to scope of CFPB information sharing, sufficiency of controls, and potential for waiver of privilege
- CFPB issued interim final rule on “Disclosure of Records and Information.” 76 Fed. Reg. 45372 (July 28, 2011)
 - Criticized for breadth of information sharing commitments, lack of controls, and inadequate assurances as to maintenance of legal privilege
 - Industry concerns regarding disclosure of supervisory information to State AGs and others evident in comments
 - Safety and soundness, visitorial powers concerns

Confidentiality and Privilege

- CFPB not listed in 12 U.S.C. Section 1828(x) as a “Federal banking agency”
- CFPB issued CFPB Bulletin 12-01 to clarify reasoning that privilege is not waived by disclosure to CFPB (Jan. 4, 2012)
- CFPB proposed amendment to 12 C.F.R. part 1070, subpart D to further support claim that privilege is not waived. 77 Fed. Reg. 15286, (Mar. 15, 2012)

Confidentiality and Privilege

- Proposed Amendment to Subpart D:
 - “[S]ubmission ... to the CFPB ... shall not be construed as waiving, destroying, or otherwise affecting any privilege”
 - Similarly, CFPB’s provision to another federal or state agency of privileged material received pursuant to this rule does not waive the privilege

Confidentiality and Privilege

- Does the CFPB have the authority to issue the proposed amendment?
 - In support for its proposed rule, the CFPB has stated that it relied on:
 - Authority to “prescribe rules regarding the confidential treatment of information obtained from persons in connection with the exercise of its authorities under Federal consumer financial law”
 - General rulemaking authority
 - Authority to “prescribe rules to facilitate the supervision of [nondepository institutions]”
- Open question whether CFPB’s interpretation would withstand judicial scrutiny

Confidentiality and Privilege

- H.R. 4014 & S. 2099
 - Amends 12 U.S.C. sections 1821(t)(2)(A) and 1828(x) to add the CFPB to the statutory definition of “Federal Banking Agency”
 - Applies to all entities subject to CFPB’s supervisory and regulatory authority, not just depository institutions
 - House passed by voice vote on Mar. 26, 2012
 - Bipartisan support, but two Republican senators have blocked the legislation because they want to be able to offer amendments to Dodd-Frank. – Victoria McGrane, “Two GOP Senators Block Bank-Confidentiality Bill,” *Wall Street Journal*, Mar. 29, 2012.

Supervision and Examination Manual

Supervision and Examination Manual

- First issued Oct. 13, 2011
- Guide to how the CFPB staff will supervise and examine covered persons for compliance with Federal consumer financial laws
- In practice, expect examiners will use Manual to guide examinations - not the underlying laws and regulations

Supervision and Examination Manual

- Three main principles guide the supervision process
 - Risk to consumers
 - Driven by analysis of data on activities, markets, and consumer risks
 - Consistency in standards applied to depository and non-depository institutions

Supervision and Examination Manual

- CFPB says two things distinguish its manual from other agency exam manuals
 - A “Risk assessment” to identify potential risks in consumer financial products and services; and
 - UDAAP procedures to identify “unfair, deceptive and abusive acts or practices”

<http://www.consumerfinance.gov/guidance/supervision/manual/supervision-manual-qa>

Supervision and Examination Manual

- “Inherent Risk” includes
 - Factors that increase the potential for
 - Unfair, deceptive or abuse acts or practices
 - Discrimination
 - Violations of other Federal consumer financial laws
 - Factors that increase the compliance management challenges of a business

Supervision and Examination Manual

- Manual template for assessing risk

| Overall Risk to Consumers | | | | |
|---------------------------|----------|--------------------------|----------|----------|
| | | Quality of Risk Controls | | |
| | | Strong | Adequate | Weak |
| Inherent Risk | High | Moderate | High | High |
| | Moderate | Low | Moderate | High |
| | Low | Low | Low | Moderate |

- The greater the “inherent risk,” the stronger the covered person’s risk controls must be in order to avoid a problematic evaluation

Supervision and Examination Manual

- Key factors relevant to assessing “inherent risk” for markets involving the sale of financial services products or services to consumers
 - Nature and structure of products offered
 - Consumer segments to which the products are offered
 - Methods of selling the products
 - Methods of managing delivery of the products and services and ongoing relationship with the consumer

Supervision and Examination Manual

- The manual examination procedures are organized by product and line of business
- Currently only includes examination procedures for
 - Mortgage Origination
 - Payday Lending
 - SAFE Act mortgage licensing

More CFPB

Recess Appointment

- DOJ Office of Legal Counsel's January 6, 2012 "Memorandum Opinion for the Counsel to the President"
 - DOJ asserts recess appointment of Richard Cordray as Director of the CFPB was lawful
- Q&A #5, January 10, 2011 Joint Letter from the Inspector Generals of the Federal Reserve and Treasury Department
 - Without a duly-appointed Director, the CFPB cannot exercise many of its newly created powers under Title X of the Dodd-Frank Act, e.g., oversight of nondepository entities

Streamlining

- CFPB requests suggestions to streamline regulations inherited from other Federal agencies under CFP Act. 76 Fed. Reg. 75825 (Dec. 5, 2011)
- Specific items for potential streamlining include
 - Defining terms consistently across regulations
 - Whether to permit electronic disclosures now required to be in writing to be delivered in electronic form
 - Whether certain disclosures should be permitted to be provided by text messaging

Prototype Credit Card Agreement

Welcome to ABC Bank.

You'll find the terms of your credit card here.
It's a contract that starts as soon as you sign or use the card.

For each underlined word or phrase, the definition in the Consumer Financial Protection Bureau Definition of Credit Card Terms is part of your contract.

These definitions are available at www.cfpb.gov or www.abcbank.com. Or call 1-800-xxx-xxxx for a free printed copy.

1. Costs

You may use your card for purchases, cash advances, or balance transfers. Each type of charge will have its own balance. Each balance may have a separate interest rate.

What are the charges?

| | | | |
|---|-----------------|---|---------------|
| Interest rate for [period] on purchases | X% <u>APR</u> → | Interest rate after [period] on purchases | X% <u>APR</u> |
| Interest rate on <u>balance transfers</u> | X% <u>APR</u> + | Balance transfer fee (per transaction) | X% |
| Interest rate on <u>cash advances</u> | X% <u>APR</u> + | Cash advance fee (per transaction) | X% |
| Penalty interest rate | X% <u>APR</u> | Late payment fee | \$X/\$Y |
| Returned payment fee | \$X | Rush card fee | \$X |
| Replacement card fee | \$X | Foreign currency transaction fee | X% |

Your APRs are variable, except [excluded rates]. They increase or decrease with the prime rate. From the [day] of each billing period, we apply APRs based on the prime rate published x business days before the end of that period. To determine your APRs we add to the prime rate: x percentage points for purchases after [period], x percentage points for balance transfers, x percentage points for cash advances, and x percentage points for the penalty interest rate.

What do I have to pay and when?

We will send your bill to the address on file. You agree to pay all authorized charges on the bill, including interest and fees. You agree to pay us for charges that we allow over your credit limits. You must pay at least the minimum payment by the due date stated on each bill. Your minimum payment will be [insert formula].

We choose which balances to pay with the minimum payment. We apply payments above the minimum to balances with the highest APRs first.

You must pay in U.S. dollars, without restrictive terms, and according to all the other standard payment instructions. Mailed payments should be sent to [payment address].

What if I pay late?

If you don't pay at least the minimum payment by the due date, you'll be charged a late payment fee of \$X.

In addition, if you make a late payment, you will be in default and you may be subject to interest rate increases.

If you are late more than once in a six month period, the late payment fee will go up to \$Y. If you make on time payments for six months, it will return to \$X.

Special Promotions

How is interest calculated?

We calculate interest using the daily balance method with compounding. This means that interest compounds daily.

We will not charge you interest on purchases if you pay your full account balance by the due date each month. This is called a grace period. If you do not take advantage of the grace period, we will charge interest starting the day you make a purchase. If you do not pay your full account balance on time in any month you will lose your grace period until you pay your full account balance on time x months in a row. You pay interest on cash advances or balance transfers from [date].

Consumer Complaint Data

- CFPB accepts consumer complaints about credit cards, mortgages, bank accounts, and private student loans (as of Mar. 5, 2011)
- CFPB proposes to release credit card complaint information. 76 Fed. Reg. 76628 (Dec. 8, 2011)
 - CFPB would release at least the following information: subject area of the complaint, name of the card issuer, the consumer's zip code, date of the complaint, and whether and how the issuer responded
 - Industry concerns: veracity, safety and soundness, and selection bias

Questions?

Andrew Lorentz, Partner, 202.973.4232
andrewlorentz@dwt.com

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