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HEADNOTE: REFORM! Steven A. Meyerowitz	675
THE DODD-FRANK ACT'S BANKING AND FINANCIAL COMPANY ENFORCEMENT PROVISIONS Richard M. Alexander, Robert M. Clark, and Jeremy W. Hochberg	677
NEW "VOLCKER RULE" TO IMPOSE SIGNIFICANT RESTRICTIONS ON BANKING ENTITIES, OTHER SIGNIFICANT FINANCIAL SERVICE COMPANIES A. Patrick Doyle, David F. Freeman, Jr., Alan W. Avery, and Andrew J. Shipe	686
TIGHTENING THE REGULATION OF AFFILIATE TRANSACTIONS AND EXTENSIONS OF CREDIT TO INSIDERS Robert E. Mannion, Beth S. DeSimone, and Tengfei (Harry) Wu	695
NEW LAW'S MORTGAGE PROVISIONS AFFECT LENDERS, MORTGAGE BROKERS, APPRAISERS, SETTLEMENT SERVICE PROVIDERS, AND OTHERS Michael B. Mierzewski, Beth S. DeSimone, and Tengfei (Harry) Wu	702
DERIVATIVES TRADING OF BANKS: SIGNIFICANTLY IMPACTED BY NEW REFORM LAW Daniel Waldman and Ahmad Hajj	717
THE DODD-FRANK ACT ESTABLISHES THE BUREAU OF CONSUMER FINANCIAL PROTECTION AS THE PRIMARY REGULATOR OF CONSUMER FINANCIAL PRODUCTS AND SERVICES Michael B. Mierzewski, Beth S. DeSimone, Jeremy W. Hochberg, and Brian P. Larkin	722
THE DODD-FRANK ACT GRANTS EXPANSIVE FAIR LENDING ENFORCEMENT AND RULEMAKING AUTHORITY TO THE BUREAU OF CONSUMER FINANCIAL PROTECTION Michael B. Mierzewski, Beth S. DeSimone, Jeremy W. Hochberg, and Wasim W. Quadir	737
STRICTER CAPITAL REQUIREMENTS MANDATED FOR FINANCIAL INSTITUTIONS Michael B. Mierzewski, Howard L. Hyde, Beth S. DeSimone, and Wasim W. Quadir	742
SAVINGS AND LOAN HOLDING COMPANIES AND THEIR SUBSIDIARIES TO BE SUBJECT TO NEW REGULATORY REGIMES A. Patrick Doyle, Beth S. DeSimone, and Kathleen A. Scott	750
HAS FINANCIAL REGULATORY REFORM MATERIALLY ALTERED THE PREEMPTION LANDSCAPE FOR FEDERALLY CHARTERED INSTITUTIONS? Nancy L. Perkins and Beth S. DeSimone	759
DODD-FRANK ACT ATTEMPTS TO CURTAIL SYSTEMIC RISK Alan W. Avery, Kathleen A. Scott, and Lindsey Carson	766
WHISTLEBLOWER INCENTIVES AND PROTECTIONS IN THE FINANCIAL REFORM ACT Drew A. Harker, Matthew D. Keiser, and Sionne C. Rosenfeld	779
NEW RESOLUTION PROCESS CREATED FOR SYSTEMICALLY SIGNIFICANT INSTITUTIONS Alan Avery, Christopher L. Allen, and Rosa J. Evergreen	784
THE CORPORATE GOVERNANCE AND EXECUTIVE COMPENSATION PROVISIONS — WHAT TO DO NOW Richard E. Baltz and Laura Badian	795

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THE DODD-FRANK ACT ESTABLISHES THE BUREAU OF CONSUMER FINANCIAL PROTECTION AS THE PRIMARY REGULATOR OF CONSUMER FINANCIAL PRODUCTS AND SERVICES

MICHAEL B. MIERZEWSKI, BETH S. DESIMONE, JEREMY W. HOCHBERG, AND
BRIAN P. LARKIN

The authors expect that the creation of the Bureau of Consumer Financial Protection almost certainly will result in an increased focus on consumer protection in the financial services industry and likely will create some uniformity in supervision and enforcement between depository and nondepository participants.

The passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Act”) will touch off a major reorganization in the federal regulation of consumer financial products and services. The Act establishes the Bureau of Consumer Financial Protection (“CFPB”) to serve as the primary regulatory authority over consumer financial products, and nearly every federal consumer financial protection statute. The CFPB will police activities relating to financial products and services for unfair, deceptive, and abusive acts or practices, and routinely examine large depository institutions, and nondepository entities for compliance with federal consumer financial laws. Although the impact of the CFPB is not completely clear, its existence almost certainly will result in an increased focus on consumer protection in the financial services industry and likely will create some unifor-

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imity in supervision and enforcement between depository and nondepository participants. The identity of the first Director of the CFPB (“Director”) will help to define the direction and tone of the CFPB’s expressed powers.

CREATION OF THE CFPB

The CFPB will be established and housed within the Federal Reserve System, but operate as an autonomous agency. The Board of Governors of the Federal Reserve System (“Federal Reserve”) will fund the CFPB from the earnings of the Federal Reserve System. The Federal Reserve, however, will have no authority over officers of the CFPB, and will be unable to approve or reject the CFPB’s rules or orders.

Director

The CFPB will be headed by a single director appointed for a five-year term by the President of the United States, with the consent of the U.S. Senate. The Director will have a large concentration of regulatory power. For example, he or she will be able to annually determine the amount of Federal Reserve funding that will be “reasonably necessary” in a given year, limited only by an annual funding cap.¹ The Director will be responsible for executing the CFPB’s purpose of implementing and enforcing consumer financial laws on behalf of consumers, and according to the Act, on behalf of “fair, transparent, and competitive” markets. The Director will also serve as a voting member of the Financial Stability Oversight Council (“FSOC”), the umbrella authority created by the Act to monitor the systemic health of the U.S. financial markets. Until the Director is formally appointed, the Secretary of the Department of the Treasury will serve as the interim head of the CFPB.

Designated Transfer Date

The Treasury Secretary also will determine, no later than 60 days after the enactment of the Act, the date upon which the CFPB will be transferred authority from other regulators. This “designated transfer date” must be between six months and one year from the enactment of the Act.² Although the CFPB

will be a new agency, it will be created through the merging of several existing consumer financial regulatory departments. The Federal Reserve, the Office of Thrift Supervision (“OTS”), the Federal Deposit Insurance Corporation (“FDIC”), the Office of the Comptroller of the Currency (“OCC”), the National Credit Union Administration (“NCUA”), and the U.S. Department of Housing and Urban Development (“HUD”) will all transfer consumer financial protection powers, and employees, from their agencies to the CFPB.

SCOPE OF THE CFPB’S AUTHORITY

The CFPB will become the administrator for the “federal consumer financial laws,” which include nearly every existing federal consumer financial statute, as well as new consumer financial protection mandates prescribed by the Act, such as the new mortgage loan standards set forth in Title XIV. The “enumerated consumer laws” transferred to the CFPB’s authority include:

- The Alternative Mortgage Transaction Parity Act of 1982;
- The Consumer Leasing Act of 1976;
- The Electronic Fund Transfer Act;
- The Equal Credit Opportunity Act (“ECOA”);
- The Fair Credit Billing Act;
- The Fair Credit Reporting Act;
- The Home Owners Protection Act of 1998;
- The Fair Debt Collection Practices Act;
- Subsections (b) through (f) of Section 43 of the Federal Deposit Insurance Act, requiring disclosure when a depository institution lacks federal deposit insurance;
- Sections 502 through 509 of the Gramm-Leach-Bliley Act, protecting the disclosure of nonpublic personal information;
- The Home Mortgage Disclosure Act of 1975;
- The Home Ownership and Equity Protection Act of 1994;
- The Real Estate Settlement Procedures Act of 1974 (“RESPA”);

- The S.A.F.E. Mortgage Licensing Act of 2008;
- The Truth-in-Lending Act (“TILA”);
- The Truth-in-Savings Act;
- Section 626 of the Omnibus Appropriations Act, 2009, mandating a rulemaking on unfair and deceptive mortgage lending practices; and
- The Interstate Land Sales Full Disclosure Act.

CFPB’s Relationship with the Federal Trade Commission

Notably, the Act preserves the authority of the Federal Trade Commission (“FTC”) to enforce the Federal Trade Commission Act (“FTC Act”) against nondepository entities engaged in financial activities. The FTC will transfer the authorities to prescribe rules, issue guidelines, conduct studies, and issue reports under any enumerated consumer law to the CFPB, while retaining all of its remaining consumer protection authorities. The CFPB and the FTC must negotiate an agreement for coordinating enforcement actions against nondepository entities, which must include procedures for notice between the agencies prior to the initiation of a civil action against such entities. The CFPB and the FTC also must negotiate an agreement to coordinate FTC rulemakings on unfair and deceptive acts or practices, with CFPB rulemakings on unfair, deceptive, and abusive acts or practices (discussed below), to the extent both rulemakings apply to nondepository entities. The rulemaking agreement must include consultation between the agencies prior to a rulemaking, in order to avoid duplication of or conflict between the agencies’ rules. Thus it is expected that the FTC will continue its historic role of enforcement against false and misleading marketing practices of nondepository entities, in coordination with the CFPB.

Fair Lending Limitations

The CFPB will have no authority to administer the Fair Housing Act, which will remain under the jurisdiction of HUD. Despite the fair lending and antidiscrimination similarities between ECOA and the Fair Housing Act, the two statutes will be administered by different agencies.

Covered Persons

The CFPB will regulate, as covered persons, anyone who engages in offering or providing a consumer financial product or service. Service providers to covered persons, and affiliates of a covered person acting as a service provider, are also under the regulatory authority of the CFPB. A covered person broadly includes those engaged in the following consumer financial activities:

- Extending consumer credit and servicing loans;
- Extending or brokering leases of property that are the functional equivalent of purchase finance arrangements;³
- Providing real estate settlement services (other than appraisal of real or personal property);
- Engaging in deposit-taking activities, transmitting or exchanging funds, or acting as a custodian of consumer funds;
- Selling, providing, or issuing stored value or payment instruments, unless the seller does not exercise substantial control over the terms and conditions of the stored value;
- Providing check cashing, check collection, or check guaranty services;
- Providing payments or other financial data processing products or services to a consumer by any technological means;
- Providing individual financial advisory services to consumers, including credit counseling or debt management;⁴
- Maintaining or providing consumer credit information to make a decision regarding the offering of a consumer financial product or service;
- Collecting debt related to any consumer financial product or service; and
- Offering any other financial product that is permissible for a bank or financial holding company to offer where the CFPB determines such activity will likely have a material impact on consumers.

Exclusions

While the scope of the CFPB's authority is very broad, there are numerous parties who are specifically excluded from coverage. Most of these exclusions only apply to the extent that the parties are not engaged in offering a consumer financial product or service, or are not separately subject to an enumerated consumer law. Excluded parties include:

- Merchants, retailers, and sellers of nonfinancial goods or services;
- Motor vehicle dealers⁵ (except for motor vehicle dealers who provide mortgages, or who extend retail credit directly to consumers without assigning that credit to a third party);
- Persons regulated by the Securities and Exchange Commission, Commodity Futures Trading Commission, or state securities commissions;
- Persons regulated by a state insurance regulator;
- Persons regulated by the Farm Credit Administration;
- Real estate agents, brokers, and appraisers;
- Manufactured home retailers;
- Accountants;
- Tax preparers (when not extending credit such as through a refund anticipation loan);
- Attorneys;
- Employee benefit and compensation plans; and
- Tax exempt organizations.

The CFPB also may exempt any covered person or financial product from regulatory coverage based on the size of that person and the extent to which existing law provides adequate protections.

For merchants and retailers, the applicability of their exclusion may be conditioned upon the size of the merchant's or retailer's business. Merchants and retailers are excluded from the CFPB's regulatory coverage if they offer credit solely for the purpose of enabling a consumer to purchase a nonfinan-

cial good or service. If this extension of credit (or collection of debt) contains any of the following characteristics, however, the merchant or retailer will be subject to the CFPB's coverage:

- The extension of credit (or collection of debt) is sold or conveyed to another person (except for delinquent debt);
- The extension of credit (or collection of debt) significantly exceeds the market value of the good or service provided; or
- The extension of credit (or collection of debt) is subject to a finance charge.

If a merchant or retailer extends credit that only contains the third characteristic, a finance charge, then that merchant will remain excluded from the CFPB's coverage only if that merchant or retailer is "not engaged significantly in offering consumer financial products or services." The Act does not define the scope of those who are "not engaged significantly in offering consumer financial products or services," but this designation does explicitly include "small businesses" as defined in Section 3 of the Small Business Act. However, larger merchants and retailers will need to determine whether they are exempt from CFPB regulation, as the CFPB provides rulemakings on the matter. Regardless, all merchants and retailers that offer credit would still be subject to the enumerated consumer laws under the CFPB's purview.

REGULATORY POWERS OF THE CFPB

The CFPB is granted *exclusive* authority to promulgate regulations, issue orders, and provide guidance to administer the federal consumer financial laws.

Rulemaking Authority

When promulgating a regulation, the CFPB must consider the potential costs and benefits to both consumers and covered persons, including the reduction of access by consumers to consumer financial products. The CFPB must particularly consider the impact of a proposed rule on consumers in

rural areas and depository institutions with less than \$10 billion in total assets. The CFPB may not establish an interest rate limit (a usury prohibition) for extensions of credit.

While broad, the CFPB's rulemaking authority is subject to some consultation and review by other federal agencies. The CFPB must consult with federal banking regulators or other appropriate federal agencies prior to proposing a rule, in order to confirm the consistency of the rule with the objectives of those agencies. The consulted regulator or agency may provide a written objection to a proposed rule of the CFPB, and the CFPB must address this objection in the adopting release of the disputed final rule. Additionally, the FSOC may set aside a final regulation of the CFPB if the FSOC decides, by two-thirds vote, that the regulation would put the safety and soundness of the financial system of the United States at risk.

Despite these limits, the CFPB is granted several powers to support its rulemaking and regulatory functions. For example, the CFPB has general authority to monitor for risks to consumers in the offering of consumer financial products or services. As part of this monitoring function, the CFPB may require covered persons to file reports, and participate in interviews and surveys.

Assessment of Existing Regulations

The CFPB will also have five years to conduct a complete assessment of each significant regulation or order transferred to the authority of the CFPB under an enumerated consumer law. This assessment must provide a public comment period, in which recommendations can be made to modify, expand, or eliminate any significant regulation implementing an enumerated consumer law.

Among the significant rules that must explicitly be modified by the CFPB are disclosure regulations implementing TILA and RESPA. The CFPB must propose a single integrated disclosure that will satisfy both TILA requirements, and RESPA good faith estimate and settlement statement requirements no later than one year after the designated transfer date. The single disclosure should partially alleviate a disclosure process that was often criticized in the mortgage industry as duplicative. However, other major regulations also may be revamped under the CFPB's review power.

Unfair, Deceptive, and Abusive Acts or Practices

Another power granted to the CFPB is the authority to prohibit the commission of a particular act or practice on the grounds that it is unfair, deceptive, or abusive. This authority expands the unfair and deceptive acts or practices (“UDAP”) doctrine, initially grounded in Section 5 of the FTC Act. The Act adds the term “abusive” to the UDAP doctrine, and defines the term as an act or practice that:

- Materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
- Takes unreasonable advantage of:
 - A lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
 - The inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or
 - The reasonable reliance by the consumer on a covered person to act in the interests of the consumer.

It appears from the definition of “abusive” that the term is aimed at situations in which a consumer lacks understanding of a consumer financial product, and a covered person was the cause of this lack of understanding. On its face, the definition could apply to the provision of complicated disclosure terms, the provision of terms that are not translated to the native language of a consumer, or even an agreement that the consumer fully understands, but that the CFPB feels is not reasonably in the consumer’s interest. Depending on how the CFPB interprets this definition of abusive, certain consumer financial products could be curtailed.

Consumer Education

The CFPB will also focus its resources on educating and empowering consumers to make better informed financial decisions. The CFPB will es-

establish an Office of Financial Education that will seek to provide opportunities for consumers to have access to financial counseling, information on understanding credit histories and scores, mainstream banking services, and strategies for debt reduction. In addition, the CFPB will establish separate offices to address the particular consumer financial education needs of service members and older Americans.

EXAMINATION AUTHORITY OF THE CFPB

The CFPB has primary examination authority over certain nondepository entities, and certain depository institutions.

Nondepository Entities

The CFPB will conduct periodic examinations for consumer financial law compliance of the following nondepository entities:

- Mortgage originators, mortgage brokers, and servicers;
- Larger participants of a market for “other” consumer financial products;
- Private education loan providers;
- Payday lenders; and
- Covered persons whom the CFPB determined have engaged in conduct that poses risk to consumers.

It is unclear which entities would be covered by the term “larger participants of a market for other consumer financial products.” This term will be spelled out further in regulations. However, almost certainly it will include large nondepository entities, such as large captive finance companies or larger players in the prepaid market. The CFPB may require any nondepository entity to file reports to determine whether the entity is a covered person subject to examination. The CFPB may (but is not required to) also prescribe registration requirements for all nondepository covered persons in consultation with state agencies.

Large Depository Institutions

For depository institutions, examination authority for compliance with consumer financial laws will be divided between the primary federal banking regulators, and the CFPB on the basis of the institution's total asset size. Depository institutions with total assets greater than \$10 billion (Large Depository Institutions), will be subject to consumer financial compliance examination by the CFPB. The CFPB must coordinate its examination of a Large Depository Institution with examinations conducted by the institution's federal and state banking regulators. If the supervisory determinations of the CFPB and a federal banking regulator are in conflict, then the Large Depository Institution may request a joint statement from the conflicting regulators. If the regulators are unable to resolve the conflict, then the institution may file an appeal with a governing panel consisting of representatives from the CFPB, the conflicting regulator, and a federal banking regulator not involved in the dispute. Through majority vote, the governing panel will provide a final determination to the supervisory conflict.

Smaller Depository Institutions

A depository institution with total assets of \$10 billion or less (Smaller Depository Institution) will continue to be exclusively examined for compliance with federal consumer financial laws by the institution's primary federal banking regulator. The examinations must include the CFPB's input concerning the scope, conduct, and contents of the examination and its resulting report.

ENFORCEMENT AUTHORITY OF THE CFPB

The CFPB's enforcement authority over covered persons is delegated as follows:

Covered Person	Primary Enforcement Authority	Secondary Enforcement Authority
Nondepository Entities	<ul style="list-style-type: none"> • CFPB has exclusive authority to enforce federal consumer financial laws, except where the FTC continues to have enforcement authority. • CFPB and the FTC will coordinate enforcement actions through a negotiated agreement. 	<ul style="list-style-type: none"> • Any federal agency authorized to enforce a federal consumer financial law may recommend in writing that the CFPB initiate an enforcement proceeding.
Large Depository Institutions (Total Assets Greater than \$10 Billion)	<ul style="list-style-type: none"> • CFPB has primary authority to enforce federal consumer financial laws. 	<ul style="list-style-type: none"> • Any federal agency (other than the FTC) that is authorized to enforce a federal consumer financial law may recommend in writing that the CFPB initiate an enforcement proceeding. • If the CFPB does not initiate an enforcement proceeding within 120 days, then that agency may initiate an enforcement proceeding.
Smaller Depository Institutions (Total Assets of \$10 Billion or Less)	<ul style="list-style-type: none"> • Federal banking regulator of the depository institution shall have exclusive authority to enforce federal consumer financial laws. 	<ul style="list-style-type: none"> • CFPB shall notify the federal banking regulator in writing when there is reason to believe that a material violation of a federal consumer financial law has occurred.

Through its enforcement authority, the CFPB may conduct hearings and adjudication proceedings, issue subpoenas, issue civil investigative demands, and issue cease and desist orders. The CFPB may also commence civil actions to impose a civil penalty for violations of a federal consumer financial law. If the civil action is based upon an alleged violation of Title X of the Act, then the statute of limitations for such an action is three years after the date of the discovery of the violation. State attorneys general or state regulators may bring a civil action to enforce Title X with respect to any entity that is state-chartered, incorporated, licensed, or otherwise authorized to do business under state law. A state attorney general may also bring a civil action against a national bank or federal savings association to enforce a regulation promulgated under Title X, but not to enforce a provision of Title X.

Consumers do not have a private right of action under Title X, but they may send their complaints to the CFPB. Indeed, the Act requires that the CFPB facilitate the centralized collection of consumer complaints, instead of being disbursed among the various regulatory agencies. The CFPB must provide a timely response to consumer complaints, detailing the steps that have been taken in response to the complaint. Large Depository Institutions are required to provide timely responses to the CFPB, or any federal banking regulator that inquires about a consumer complaint. It is likely that consumer complaints will drive the focus of the CFPB's enforcement efforts, as well as perhaps its future rulemakings.

Damages and Penalties

Relief arising from an administrative proceeding or court action may include:

- Rescission or reformation of contracts;
- Refund of moneys or return of real property;
- Restitution;
- Disgorgement or compensation for unjust enrichment;
- Payment of damages;
- Public notification of the violation;

- Limits on the covered person's activities or functions; and
- Civil money penalties, as follows:
 - First Tier: Up to \$5,000 per day for any violation of a law rule, final order, or condition imposed in writing by the CFPB;
 - Second Tier: Up to \$25,000 per day for *recklessly* engaging in a violation of a federal consumer financial law; and
 - Third Tier: Up to \$1,000,000 per day for *knowingly* violating a federal consumer financial law.

The CFPB, state attorney general, or state regulator may pursue the costs of prosecuting an action from a defendant, but they may not pursue punitive damages. For alleged criminal violations, the CFPB will refer the matter to the U.S. Attorney General.

IMPACT OF THE CFPB

Given the broad reach of the language creating the CFPB, the impact of the CFPB will be significant. However, the parameters and degrees of that significance are difficult to measure at this time. It is clear that nondepository providers of consumer financial products will, for the first time, be systematically supervised in a manner more similar to that of financial institutions. Complaints likely will be dealt with more systematically and disclosures will be revamped. However, the CFPB, through the Director, has broad powers to dictate its concentrated consumer financial protection authority beyond these areas. One issue of particular concern is Congress' removal of language contained in the House version of the Act that would have prohibited the CFPB from requiring the offering of a standard consumer financial product. As a result, the CFPB could use its broad powers to impose mandates relating to "plain vanilla" financial products.

It is true that Title X of the Act contains several potential checks against the CFPB that could limit its authority. First, the mandated assessment of all significant federal consumer financial regulations could allow industry commenters to encourage the CFPB to identify and address outdated, unnecessary, or unduly burdensome regulations, which is a stated objective of the

agency. Second, in any rulemaking, the CFPB must conduct a cost-benefit analysis of the effects of a rule on both consumers and covered persons, with particular consideration to the reduction of access to consumer financial products. Third, although less likely to be used, the FSOC can set aside a regulation if it places safety and soundness at risk, and federal banking agencies may formally object to CFPB rulemakings that are inconsistent with the agencies' objectives. Finally, each of the dozens of rulemakings that the CFPB must conduct will allow for public comment periods, where industry stakeholders may express their concerns.

The initial direction and tone of the CFPB undoubtedly will be established by the forthcoming Director. Presently, the appointment of the CFPB's first director is the most influential indicator of the CFPB's ultimate regulatory impact. The Director will set the culture and policies for how the CFPB's authorities will be applied. Therefore, concerned industry stakeholders may wish to consider expressing their views early during the period that the CFPB is being organized and the Director is being appointed and confirmed, as well as during later rulemaking public comment periods.

NOTES

¹ This funding cap escalates from 10 percent of the Federal Reserve's operating expenses to 12 percent by 2012.

² The Treasury Secretary is authorized to request an extension which may not exceed 18 months after the enactment of the Act.

³ Covered leasing activities must be on a non-operating basis, with an initial term of at least 90 days, and for leases involving real property, the transaction must be intended to result in the ownership of the real property.

⁴ This covered activity does not include newspaper and magazine publications when they publish general market information.

⁵ Motor vehicle dealers will remain under the regulatory authority of the FTC.