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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

The authors examine the fair lending provisions contained in the new federal financial regulatory reform law.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Act”) expands upon and complicates the applicable regulatory and enforcement framework in the fair lending area. The Act charges the newly created Bureau of Consumer Financial Protection (“CFPB”) with carrying out, coordinating, and enforcing the requirements of most but not all of the existing fair lending laws as well as with promulgating regulations to implement new federal requirements. Not only that, it also creates a special Office of Fair Lending and Equal Opportunity to coordinate all these efforts. Nevertheless, the Act allows the Fair Housing Act — one of the primary federal fair lending laws — to remain within the purview of the Department of Housing and Urban Development (“HUD”), thus maintaining a complicated parallel fair lending enforcement scheme.

Most of these statutory reforms will become effective on the “designated transfer date,” which can be no earlier than 180 days nor later than 12 months after the Act’s enactment (extendable up to 18 months after the Act’s enact-

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ment by the Secretary of the Treasury). However, regulations necessary for the implementation of many of the new requirements may not ultimately be issued until well after that time. Lenders that have fair lending responsibilities would be advised to carefully review these provisions and, if appropriate, anticipate changes that may need to be made to their fair lending programs to comply with these reforms.

DEFINITION OF FAIR LENDING

The Act provides a definition for “fair lending.” This definition states that “fair lending” consists of “fair, equitable, and nondiscriminatory access to credit for consumers.” Furthermore, the Act grants broad general oversight of the “fair lending” area to the CFPB. Existing federal fair lending laws do not appear to contain a particular definition of the term, and thus this definition provides the CFPB with a broadly worded mandate that may be adapted to encompass a variety of activities related to fair lending that may not have been previously considered as covered, including suitability standards. By themselves, the Act’s definition of “fair lending” and consolidation of most fair lending regulation within the CFPB may focus attention on this area.

OFFICE OF FAIR LENDING AND EQUAL OPPORTUNITY

The Act not only gives the CFPB the general authority to oversee the fair lending area, it establishes an Office of Fair Lending and Equal Opportunity (“Office”) within the CFPB to be responsible for that area. The Office must be established within one year of the designated transfer date, as described above. The duties of the Office include:

- Providing oversight and enforcement of federal laws, including the Equal Credit Opportunity Act (“ECOA”) and the Home Mortgage Disclosure Act (“HMDA”), to ensure fair, equitable, and nondiscriminatory access to credit;
- Coordinating the fair lending efforts of the CFPB with other federal and state regulators;

- Working with private industry and fair lending advocates to promote fair lending compliance and education; and
- Providing annual reports to the U.S. Congress on the efforts of the CFPB to fulfill its fair lending mandate.

The Act also requires the CFPB to publish a report within two years of the Act's enactment that examines, among other things, whether federal regulators have access to information sufficient to provide them with assurances that private education loans are provided in accordance with fair lending laws.

AMENDMENTS TO THE EQUAL CREDIT OPPORTUNITY ACT

The Act also introduces a number of significant amendments to ECOA, which prohibit discrimination in credit transactions on the basis of a number of protected grounds (e.g., race, color, religion, national origin, gender, marital status, or age). While ECOA in its current form grants rulemaking authority to the Board of Governors of the Federal Reserve System, the Act amends ECOA to grant primary rulemaking authority to the CFPB. The Federal Reserve is also required to issue rulemakings to implement ECOA with respect to motor vehicle dealers, who are exempted from regulation by the CFPB.

The Act further amends ECOA to create a new section on small business loan data collection in order to facilitate the identification of the “business and community development needs...of women-owned, minority-owned, and small businesses” and to enforce fair lending laws with respect to these businesses. This section imposes information-gathering requirements on financial institutions (broadly defined under this section as any entity that engages in any financial activity) with respect to credit applications made by women- or minority-owned businesses and other small businesses (as defined by the Small Business Act). A financial institution must annually submit to the CFPB data on each such application's loan size and purpose, the action taken with respect to the application, the gross annual revenue of the business applying for the loan, and the race, sex, and ethnicity of the principal business owners, among other details. The Act requires the CFPB to make such data publicly available on an annual basis. Since financial institutions must

compile and maintain this data in accordance with regulations issued by the CFPB, the new data collection requirements will not become effective until after the designated transfer date.

AMENDMENTS TO THE HOME MORTGAGE DISCLOSURE ACT

The Act also amends HMDA, which requires covered depository institutions to maintain and disclose certain data on home mortgage applications. The Act transfers overall responsibility for HMDA's implementation from the Federal Reserve to the CFPB. The amendments also create additional data collection and reporting requirements for depository institutions to include for each loan purchased or originated (including loans for which the institution received completed applications):

- The age of the borrower or applicant;
- The credit score of the borrower or applicant;
- The total points and fees payable at origination of the mortgage;
- The difference between the annual percentage rate associated with the loan and a benchmark rate for all loans;
- The value of the collateral pledged for the loan;
- The presence of contractual terms that would allow payments that are not fully amortizing; and
- The number of months after which an introductory rate may change.

With the exception of data on an applicant's or borrower's age, the newly required data would not need to be disclosed to the CFBP until the first January after the nine-month period that begins when the CFPB first issues final regulations on the required disclosures (for which regulations the Act does not provide a deadline).

The CFPB, in consultation with the Bureau of the Census and certain other agencies, also is directed to develop methods to facilitate the matching of addresses with census tracts to facilitate compliance with HMDA requirements (and presumably with Community Reinvestment Act requirements).

ENFORCEMENT OF FAIR LENDING LAWS

As before, enforcement duties under the amended ECOA are shared among the federal banking agencies with respect to financial institutions within their regulatory jurisdictions. The CFPB is granted concurrent authority to enforce compliance with ECOA with respect to consumer transactions. The Federal Trade Commission is also permitted to enforce ECOA, including any related rules prescribed by the CFPB, with respect to institutions, such as retailers and other nonbank lenders, for which enforcement is not specifically committed to another federal agency.

Enforcement of HMDA, as amended, remains with the federal banking agencies for depository institutions, along with the National Credit Union Administration for credit unions and HUD for other nonbank lenders. The CFPB is also granted the ability to discretionarily exercise “principal authority to examine and enforce compliance by any person with the requirements” of HMDA.

The federal banking agencies may also elect to refer violations of ECOA and HMDA (along with other “enumerated consumer laws”) by financial institutions to the CFPB, in addition to HUD (and it appears they will still be required to make referrals to the Department of Justice). Note that the Act does not amend the Fair Housing Act, so enforcement of and referrals for violations of that law will continue to be handled by HUD. Finally, the Act provides the CFPB with the authority to conduct joint investigations with HUD and the Justice Department with respect to fair lending matters.

CONCLUSION

As this article highlights, the Act ushers in a number of significant reforms to fair lending compliance. Lenders with fair lending responsibilities should review these reforms carefully and, if appropriate, contemplate changes that may need to be made to fair lending programs in order to comply with the Act’s new fair lending requirements.