

# What You Need to Know About the CFPB and Why You Should Care

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This information is not intended to be legal advice and may not be used as legal advice. Legal advice must be tailored to the specific circumstances of each case. Every effort has been made to assure this information is up-to-date. It is not intended to be a full and exhaustive explanation of the law in any area. It should not be used to replace the advice of your own legal counsel.

# REGULATORY HISTORY & BACKGROUND

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# REGULATORY HISTORY & BACKGROUND

## Federal Trade Commission (FTC)

- Primary agency in charge of consumer protection for financial services
- Limited authority – no rulemaking for FDCPA or Mortgage Servicing

## Consumer Financial Protection Bureau (CFPB)

- Authorized by Dodd-Frank Wall Street Reform and Consumer Protection Act (12 USC § 5481 *et seq.*)

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# AUTHORITY OF THE BUREAU

- Mission – make rules more effective, consistently and fairly enforcing rules, and empower consumers to take more control over their financial lives
- Supervise, examine and enforce covered persons – banks and non-banks
- Issue regulations under the enumerated consumer protection laws including UDAAP, FCRA, FDCPA, RESPA & TILA, CLA, EFTA, ECOA, FCBA, HOPA, HMDA
- 12 USC § 5481(15) – Entities Covered
- 12 USC § 5481(26) – Service Provider Rule

# STRUCTURE OF THE CFPB

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# IMPORTANT DIVISIONS OF THE CFPB

- Consumer response team (complaint portal)
- Consumer Education and Engagement
- Supervision, Enforcement and Fair Lending
- Research, Markets and Regulation



# HOW THE CFPB DISCHARGES ITS AUTHORITY

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# COVERED PERSONS & “LARGER MARKET PARTICIPANTS”

## 12 USC 5514(a)(1) – Supervision over Non Banks

- Originates, brokers or services real estate loans (consumer) including loan modifications and foreclosure relief
- A larger participant of a market for other consumer financial products or services, as defined by rule
- From complaints received, after reasonable notice, that covered person is engaging in conduct that poses risk to consumers (use AGs)
- Student loans
- Payday loans

## 12 USC 5511(b)(4) – Depository Institutions (Banks)

- Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition

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# CFPB TOOLS

- Power to investigate
  - i. Civil Investigation Demand (Supervise)
  - ii. Examination (either on-site or by deposition)
  - iii. Enforcement (bring law suit and enter into consent orders)
- Bulletins, white papers or research – policy making without formal rule making
- Examination Manuals
- Regulation

# OVERSIGHT OF PARTICULAR MARKETS

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# OVERSIGHT OF PARTICULAR MARKETS

## Current Priorities

- Mortgage Origination & Servicing
- Student Loan Origination & Servicing
- Debt Collection
- Credit Reporting
- Medical Debt
- Payday/Small Dollar Lending
- Auto Lending & Financing
- Arbitrations Clauses
- Pre-Paid Cards

## Possible Future Priorities

- Payment Systems (Apply Pay & Pay Pal)

# THIRD PARTY OVERSIGHT

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# THE ELIMINATION OF INDEPENDENT CONTRACTORS

12 USC 5481(26)

- “Service provider” means any person that provides a material service to a covered person

CFPB Bulletin 2012-03 – Service Provider Bulletin - expects supervised banks and non banks to oversee business relationships with service providers

- Conduct due diligence to determine that service providers understands and is capable of complying with federal consumer protections laws
- Review of service providers policies and procedures and ensure training of its employees
- Contracts must reflect these expectations and expressly provide for termination if not followed
- Covered persons must have on-going monitoring of service provider
- Take quick action if monitoring reveals issue including termination

# HOW THE CFPB DIFFERS FROM PRUDENTIAL REGULATORS

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# PRUDENTIAL SUPERVISION OF DEPOSITORY INSTITUTIONS

Core Mission: ensure that banks are safe and sound

- Risk management and compliance examinations: traditional processes and bank specific
  - Off-site review of information
  - Advance notice of examination date
  - Familiarity with EIC
  - Standard review of files, documents, policies, procedures, interviews, etc.
  - Special emphasis, i.e., flood insurance, cyber security
  - Constant communication with bank officers during the examination
  - Exit interview with Board of Directors

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# PRUDENTIAL SUPERVISION OF DEPOSITORY INSTITUTIONS

Core Mission: cont'd

- Guidance and policy publications
  - Interagency effort to achieve uniform direction to examiners
  - Consistent application of procedures
  - Banks know what to expect
- Industry communications
  - Listen to industry concerns

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# PRUDENTIAL REGULATORS: PROTECTION OF CONSUMER RIGHTS AND BANK INVESTMENT IN COMMUNITIES

- Consumer protection is only one of many responsibilities
- Compliance with consumer protection laws, Community Reinvestment Act and fair lending laws and do not engage in unfair or deceptive practices
- Achieved through compliance with CRA examinations
  - Most are rated Satisfactory or Outstanding
  - Statutory timelines for exams
  - Examines consumer protection, privacy, and fair lending
  - As with risk management examinations, failure can result in enforcement actions

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# CFPB SUPERVISION

Core Mission: enforce consumer laws to ensure that consumer products and services are fair, transparent and competitive

- Sole focus is consumer financial protection. CFPB does not have a safety and soundness mandate
- Unlike prudential regulators, CFPB does not focus on specific institutions or entities
- Focus is on risk to the consumer versus risk to the institution: **opposite** of prudential regulator
- Examinations are conducted by product-line rather than institution centric approach: **opposite** of prudential regulator
- CFPB has jurisdiction over about 150 depository institutions, but about 15,000 unique institutions in non-bank markets (auto lending, credit cards, money transfers, mortgage servicing, student loans, credit reporting, etc). Impossible to have an institution-specific examination for all entities — lack of CFPB resources

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# CFPB EXAMINATION SUPERVISION AND EXAMINATION MANUAL VERSION 2.0, OCTOBER 1, 2012

- Examination Manual is updated with new or revised chapters with the examination of each product line
- 18 examination updates since 2012 to reflect prioritization of risk assessment of product lines, including:
  - Auto lending
  - Mortgage origination
  - TILA
  - RESPA
  - Education lending
  - Remittance transfers

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# SUPERVISION AND EXAMINATION ISSUES

- Will examiners have sufficient training and expertise to properly examine new product lines? [GAO recently criticized prudential regulators for lack of training of examiners in cyber compliance]
- Controversial enforcement attorney presence during examinations is reversed after FRB OIG investigation
- Examination of an institution can reflect a review of several product lines, i.e., credit cards, auto lending
- An examination of one product line can include multiple participants, i.e., debt collectors, money transferors

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## CFPB DOES NOT ACT ALONE

- Coordinates with and exchanges information with prudential regulators
- Informal understanding with state Attorneys-General regarding investigations and enforcement actions
  - Recent JPMorgan Chase case regarding bad debt sales and abusive collection efforts for 528,000 customers
  - CFPB and 47 state AG's brought claim resulting in multi-million settlement for consumers, CFPB, states and the OCC
  - Supplies extra resources that CFPB lacks in investigations and enforcement
  - Complaint portal used by state and federal prudential regulators as well as state attorneys-general

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# SUMMARY

- Almost anything is fair game for CFPB if it impacts a consumer product or service
- For CFPB and the prudential regulator, the examination procedure is similar
- Globally, the examination approach is different
  - For the prudential regulator: look at the institution's safety and soundness
  - For the CFPB, look at the consumer and are products and services fair, transparent and competitive



# CFPB'S RULEMAKING AUTHORITY AND HOW IT HAS EXERCISED THIS RESPONSIBILITY

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# CFPB RULEMAKING AUTHORITY

- The CFPB has the authority to “prescribe rules and issue orders and guidance, as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasion thereof.” Dodd-Frank Act, § 1022(b)(1)
- In prescribing rules, the CFPB must consider:
  - Potential costs and benefits to consumers and “covered persons,” including the potential reduction of access by consumers to consumer financial products/services
  - Impacts on covered persons and consumers in rural areas
  - (“Covered persons” are insured depository institutions and credit unions with total assets of \$10 billion or less. Dodd-Frank Act § 1026)

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## LIMITS ON THE CFPB'S RULEMAKING AUTHORITY

- Under the Dodd-Frank Act, the CFPB must consult with appropriate prudential regulators or other federal agencies before proposing a rule and during the comment process “regarding consistency with prudential, market, or systemic objectives administered by such agencies” ( § 1022(b)(2)(B))
- If properly petitioned, the Financial Stability Oversight Council may set aside a final CFPB regulation if the Council decides that the regulation or a provision of it would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk ( § 1023)
- CFPB rules are subject to the requirements of the Administrative Procedure Act, applicable to all federal rulemaking (5 U.S.C. § 551 et seq.)
- The CFPB must adhere to special requirements for rules that are likely to have a significant impact on a substantial number of small entities, triggering the Small Business Regulatory Enforcement Fairness Act (SBREFA) (12 U.S.C. § 5532(a))

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# ADMINISTRATIVE PROCEDURE ACT BASICS

The Administrative Procedure Act (APA) requires federal agencies, in adopting a binding rule, to do the following:

- Publish a notice of proposed rulemaking in the Federal Register
- Provide an opportunity for public comment
- Adopt a final rule based on the administrative record and publish it in the Federal Register
- Establish an effective date, typically no less than 30 days after the final rule is published (5 U.S.C. § 553)

Final rules may be successfully challenged in federal court, if they are:

- Arbitrary and capricious
- An abuse of agency discretion
- Otherwise not in accordance with law
- Contrary to constitutional right, power, privilege, or immunity
- In excess of statutory jurisdiction, authority, or limitations, or short of statutory right. (5 U.S.C. § 706)

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## SBREFA BASICS

- Only three agencies are subject to SBREFA: EPA, OSHA, CFPB
- If a proposed rule is likely to have a significant impact on a substantial number of small entities, the CFPB must – *before* it can propose a rule:
  - Convene a SBREFA or Small Business Advocacy Review (SBAR) panel, made up of representatives of the CFPB, Office of Management and Budget (OMB), and Small Business Administration Office of Advocacy
  - Provide an analysis of the impacts of the rule on small businesses that will be regulated, consider input and recommendations from small business representatives, and respond in a report that becomes part of the administrative record, reviewable by the courts.
- In an extra requirement for the CFPB alone, it must also analyze any projected increase resulting from the rule in the cost of credit for small businesses and must seek to minimize that impact. (Dodd-Frank Act § 1100G(b))

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## WHY DOES THIS MATTER?

- Courts have struck down final agency rules, including those implementing the Dodd-Frank Act, that are arbitrary and capricious, e.g., for failure to assess adequately the costs and benefits of a rule, see *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011)
- Courts have enjoined enforcement of final rules that fail to analyze and address adverse impacts on small business, see *Southern Offshore Fishing Ass'n v. Daley*, 55 F.Supp.2d 1336 (M.D. FL 1999)
- Agency attempts to regulate beyond delegated statutory authority have also been rejected by the courts, see *American Bar Association v. Federal Trade Commission*, 403 F.3d 457 (D.C. Cir. 2005) (overturning the FTC's plan to regulate attorneys engaged in the practice of law as "financial institutions" subject to the Gramm-Leach-Bliley Act)
- Courts have halted agency efforts to circumvent rulemaking, by issuing binding guidance documents instead, as contrary to the requirements of the APA, see *Appalachian Power v. Environmental Protection Agency*, 208 F.3d 1015 (D.C. Cir. 2000)

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## MAJOR CFPB FINAL RULES TO DATE

- Home mortgage disclosure (Regulation C), Dec. 2012\*
- Ability to repay and qualified mortgage standards under TILA, Jan. 2013
- Mortgage servicing under RESPA/TILA, Jan. 2013\*
- Loan originator compensation requirements under TILA, Jan. 2013\*
- Integrated mortgage disclosures under RESPA/TILA, Nov. 2013
- Larger participant rule for student loan servicing, Dec. 2013
- Larger participant rule for international money transfer, Sept. 2014
- Larger participant rule for auto financing, June 2015

\* *Rule proposed after SBREFA panel review.*

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# CFPB'S REGULATORY AGENDA

- Updates to the Home Mortgage Disclosure Act (HMDA) rule – finalizing proposed rule (late summer 2015)
- Follow up on Jan. 2013 mortgage rules (fall 2015) and mortgage servicing rule (spring 2016)
- Finalizing a December 2014 proposed rule on prepaid financial products (early 2016)
- Issuing a notice of proposed rulemaking on payday, auto title, and installment loans (end of year 2015) (SBREFA panel 2015)
- Overdraft services on checking accounts (conducting research to determine if a rule is needed)
- Working on larger participants rules (finalizing auto rule in summer 2015)
- Developing a proposed rule on debt collection (no date specified) (SBREFA panel planned)
- Arbitration agreements (analyzing data to determine if a rule is needed) (SBREFA panel planned)



# UNDERSTANDING HOW THE CFPB IMPACTS YOUR BUSINESS

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# UNDERSTANDING HOW THE CFPB IMPACTS YOUR BUSINESS

- CFPB Engagement – different from other regulators
- What should a client do if it gets an inquiry from the CFPB?
- What are the current and immediate concerns – what is industry telling us?
- How do you prepare for the CFPB?

# QUESTIONS?

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# THANK YOU



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