NCLC REPORTS

Consumer Credit and Usury / Deceptive Practices and Warranties Editions

Volume 29
July/August 2010

Special Double Issue on the Dodd-Frank Financial Reform Bill

President Signs Financial Reform Bill

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank),[1] the most important change in consumer-protection law since the late 1960s, was signed into law on July 21, 2010. Most readers by now are familiar that it will create a new Consumer Financial Protection Bureau (CFPB) which will issue extensive new regulations and otherwise dramatically change lending practices for years to come.

Perhaps less well known is that Dodd-Frank makes scores of important changes to TILA, RESPA, HAMP, EFTA, HMDA, CLA, FCRA, and other consumer laws, particularly changes related to mortgage originations and servicing. Federal preemption of state consumer law is also restricted.

This double issue examines all aspects of Dodd-Frank relevant to a consumer law practice. NCLC is also presenting a webinar on the subject on Sept. 15 at 2 p.m. EST.[2]

Effective Dates Vary

The most immediate question for practitioners is when these dramatic changes go into effect. The answer varies by provision and in some cases is unclear.

The Designated Transfer Date

The CFPB assumes full authority and takes over any authority transferred from other federal agencies on the "Designated Transfer Date." Virtually all other provisions of Title X of Dodd-Frank also either go into effect on that date or that date is key in computing the effective date.

The designated transfer date is an unspecified date to be determined (by Sept. 19, 2010) by the Secretary of the Treasury in consultation with other agencies. The date must be between January 21, 2011 and July 21, 2011, though it can be as late as January 21, 2012 if the Secretary justifies a later date in a report to Congress.[3]

Effective Dates for Title XIV: Mortgage-Related Provisions

Dodd-Frank Title XIV enacts a large number of significant mortgage provisions. The effective dates for these provisions depend on whether and when regulations are written to implement them. If regulations are enacted to implement a section or provision, then the section or provision takes effect on the date that the final regulations take effect.[4] A rule required by the mortgage title must be prescribed in final form within 18 months of the transfer date and must take effect within 12 months of the rule's promulgation. If regulations have not been issued for a section by 18 months after the transfer date, then that section becomes effective at that point (sometime between July 21, 2012 and July 21, 2013).[5]

It is unclear if these dates apply to provisions for which no regulations are needed or expected.[6] If they do not, then Dodd-Frank's default effective date—July 22, 2010—applies.[7]

For example, no regulations are needed for Dodd-Frank's HAMP changes, and delaying their implementation until 2012 or 2013 would defeat their goal of reducing foreclosures, especially in light of HAMP's sunset date. Regardless of the technical effective date, in the case of HAMP, the Treasury Department, which controls HAMP, could adopt the new measures immediately as supplemental directives. But for other provisions, where Dodd-Frank does not require regulations and no regulations are issued, the provision's effective date may only be settled by litigation.

TILA Coverage, Damages, and Class Action Limit Increased

Dodd-Frank raises from $25,000 to $50,000 the amount over which leases and non-mortgage, non-student loan credit are exempt from TILA and the Consumer Leasing Act.[8] This change is effective on the transfer date.[9] The CFPB also must adjust the limit in the future for inflation.[10]

The range of TILA statutory damages for closed-end, non-mortgage transactions, currently $100 to $1000, is raised to $200 to $2000.[11] TILA's class action cap is raised from $500,000 to $1 million.[12] See the Title XIV effective date discussion on page 1 for when these changes take place.

---

1 Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010) [hereinafter Dodd-Frank].

2 Contact jhiemenz@nclc.org to join the webinar. Also go to www.nclc.org for the 2010 schedule and downloads of past webinars.

3 Dodd-Frank § 1062.

4 *Id.* § 1400(c)(2).

5 *Id.* § 1400(c)(3).

6 Dodd-Frank § 1400(c)(3) states "A section of this title for which regulations have not been issued on the date that is 18 months after the designated transfer date shall take effect on such date." The confusion is whether the term "regulations" refers to the regulations mentioned in § 1400(c)(1), which are "the regulations required to be prescribed under this title...." If so, § 1400(c)(3) does not apply to sections where no regulations are required and the Act's default effective date applies. If § 1400(c)(3) is referring to all sections in the title, even sections for which regulations are not required, then the effective date will be 18 months after the transfer date.

7 Dodd-Frank § 4.

8 *Id.* § 1100E, *to be codified at* 15 U.S.C. §§ 1603(3), 1667(1). Student loan limits were eliminated in 2009 and there is no limit for mortgage credit.

9 Dodd-Frank § 1100H.

10 *Id.* § 1100E(b), to be codified at 15 U.S.C. § 1603

11 *Id.* § 1416, *to be codified at* 15 U.S.C. § 1640(a)(2)(A)(ii).

12 *Id.* § 1416, *to be codified at* 15 U.S.C. § 1640(a)(2)(B).

TILA Amendments re Mortgage Loans

Dodd-Frank includes extensive TILA changes concerning mortgage origination and servicing and strengthens TILA remedies. All of these changes are found in Title XIV of the new Act, so the Title XIV effective date discussion on page 1 should be referred to for all of these provisions.

TILA Remedies for Mortgage Violations

Dodd-Frank imposes many new prohibitions and requirements regarding mortgage lending, by adding new subsections to TILA immediately after § 1639, which are thus within TILA Part B.[13] Part B violations lead to TILA private remedies of actual and statutory damages and attorney fees, in both individual and class actions.[14] (While TILA lists certain TILA violations for which statutory damages are not available, Congress did not add any of the new mortgage requirements to this list.)

For purposes of the new TILA yield spread premium (YSP) and steering requirements, Dodd-Frank also expands the definition of "creditor" to include mortgage originators,[15] so that there is no question that TILA's private remedies apply to such originators. (Without such an amendment, a mortgage originator might not meet the definition of either creditor or assignee, and thus not be subject to TILA remedies.[16]) Dodd-Frank, though, offers no new clarification as whether servicers are creditors for purposes of TILA's remedy provisions, or whether servicers are liable for their TILA violations even if they are not creditors.

Dodd-Frank also sets additional damages recoveries for violations of certain new TILA requirements. Most strikingly, it provides for enhanced damages of the sum of all finance charges and fees paid by the consumer if a *creditor* violates the new ability-to-repay or YSP provisions.[17] If a *mortgage originator* violates the steering or YSP provisions, statutory damages are the greater of actual damages or three times originator compensation.[18] Statutory damages of $2000 are available if a creditor fails to obtain an appraisal that meets Dodd-Frank's new requirements.[19]

The statute of limitations for all violations of HOEPA and for the new steering and ability to pay rules is extended to three years.[20] The Act explicitly provides for an action in recoupment for claims involving YSPs or violation of the ability-to-pay requirements where the homeowner is in foreclosure, although damages are capped at the amount that would be available at the time the general statute of limitations expired.[21] It also empowers state attorneys general to enforce new provisions regarding ability to repay, steering, prepayment penalties, escrows, appraisals, prompt crediting of payments, and payoff amount requests.[22]

Dodd-Frank eliminates TILA liability where an obligor or co-obligor has been convicted of obtaining the mortgage by actual fraud.[23] It also adds a correction-of-error defense for creditors or assignees who, in good faith, fail to comply with HOEPA requirements.[24]

Yield Spread Premiums Banned

In a major change, Dodd-Frank bans yield spread premiums (YSPs) and other broker compensation that is based on the terms of a consumer's loan, except for the amount borrowed.[25] This eliminates a major incentive for steering borrowers into loans with high rates or other terms lucrative for mortgage companies but harmful to consumers. Mortgagees will need to remain alert for tactics that inflate the loan principal, such as unnecessary fees, fraudulent appraisals, and inappropriate debt consolidation. The Act also directs the CFPB to write additional rules restricting loan steering, applicable to both loan brokers and the lender's in-house loan officers.[26]

Mortgage Arbitration Clauses, Single-Premium Credit Insurance Banned; Prepayment Penalties Limited

Dodd-Frank bans forced arbitration and single premium credit insurance[27] in mortgages. Prepayment penalties are prohibited for subprime loans (determined by the rate spread), adjustable-rate loans, and all loans that do not fit the safe harbor described below.[28]

The Ability-to-Repay Requirement and the Safe Harbor

For all mortgage loans, the creditor must determine and document that the homeowner can afford the loan.[29] A "safe harbor" gives rise to a rebuttable presumption of compliance with this requirement.[30] To qualify for the safe harbor, creditors must verify and document income and conduct an ability-to-pay analysis that considers taxes, insurance, and—for adjustable rate mortgages—the highest possible mortgage payment that could be required during the first five years of the loan.

Loans eligible for the safe harbor generally cannot exceed thirty years and may not include negative amortization, a balloon payment, or points and fees exceeding 3%. Not counted in the 3% are up to 2.25% in fees for Federal Housing Administration or private mortgage insurance. Also not counted in the 3% are up to two bona fide discount points, a significant loophole unless the CFPB restricts what can be counted as a discount point.

Government agencies that insure loans are not covered by the safe harbor law but must create their own equivalent. Securitizers are also required to retain on their own books at least 5% of the risk for new loans unless the loans satisfy a safe harbor at least as restrictive as the one applicable to the affordability analysis.[31]

HOEPA Expanded

The Act expands the range of loans subject to HOEPA by lowering the triggers and expanding the definition of points and fees to include payments to creditors in table funded loans, YSPs, and prepayment penalties.[32] The Act

---

13 TILA Part B encompasses 15 U.S.C. §§ 1631 through 1649.
14 15 U.S.C. § 1640(a).
15 Dodd-Frank § 1404, to be codified at 15 U.S.C. § 1639B(d).
16 15 U.S.C. § 1641(a), (d).
17 Dodd-Frank § 1416, to be codified at 15 U.S.C. § 1640(a)(4).
18 *Id.* § 1404, to be codified at 15 U.S.C. § 1639B(d).
19 *Id.* § 1471, to be codified at 15 U.S.C. § 1639H(e).
20 *Id.* § 1416, to be codified at 15 U.S.C. § 1640(e).
21 *Id.* § 1413, to be codified at 15 U.S.C. § 1640(k).
22 *Id.* § 1422, to be codified at 15 U.S.C. § 1640(e).
23 *Id.* § 1417, to be codified at 15 U.S.C. § 1640(l).
24 *Id.* § 1433, *to be codified at* 15 U.S.C. § 1639(v).
25 *Id.* § 1403, to be codified at 15 U.S.C. § 1639B.
26 *Id.*
27 *Id.* § 1414, to be codified at 15 U.S.C. § 1639C.
28 *Id.*
29 *Id.* § 1411, to be codified at 15 U.S.C. § 1639C.
30 *Id.* § 1412, to be codified at 15 U.S.C. § 1639C.
31 *Id.* § 941.
32 *Id.* § 1431, amending 15 U.S.C. § 1602(aa).

also creates a new trigger based solely on the timing or amount of prepayment penalties. There are also new substantive provisions for HOEPA loans that:

- Require pre-loan counseling;
- Limit the cost of prepayment penalties, late fees, and fees related to payoff statements;
- Ban balloon payments altogether, not just for loans less than five years;
- Prohibit modification and deferral fees; and
- Ban creditors from recommending default, financing prepayment penalties in a same-creditor refinancing, or financing points or fees.[33]

Appraisal Reform

Dodd-Frank amends TILA to impose new restrictions on appraisals, including standards for appraisal independence and a prohibition on creditors extending mortgages if the creditor knows of a violation of these standards.[34] However, the Act also creates a huge loophole, allowing the creditor to go forward with the transaction if it determines that the corrupt appraisal does not materially misstate the dwelling's value.[35] For certain "higher-risk" mortgage loans, the creditor also must give the consumer a free copy of each appraisal report at least three days prior to closing.[36]

TILA Mortgage Servicing Amendments

Dodd-Frank includes several servicer-related TILA amendments. Servicers must promptly credit payments,[37] provide periodic statements for residential mortgage loans,[38] and provide payoff balances within seven days after receipt of a written request.[39] Subprime and certain jumbo loans must include an escrow account for the first five years, or until the loan no longer includes private mortgage insurance.[40]

RESPA Mortgage Servicing Changes

Dodd-Frank Title XIV amends the Real Estate Settlement Procedures Act (RESPA) to increase consumer rights related to mortgage servicing. See the Title XIV effective date discussion on page 1 for when these changes take place.

Statutory Damages Increased

RESPA statutory damages are increased from $1000 to $2000 for violations involving a pattern and practice of noncompliance, and by increasing the cap on class action statutory penalties from $500,000 to $1 million.[41] Damages remain difficult to obtain, however, because of RESPA's pattern and practice requirement.

Faster Responses to Qualified Written Requests

Dodd-Frank requires servicers to respond faster to qualified written requests. Servicers must acknowledge requests within five days, rather than 20, and respond within 30 days instead of 60.[42] The 30-day period can be extended for up to 15 days only if the servicer notifies the borrower, within the 30-day period, of the extension and the reasons for the delay. Dodd-Frank also bans fees for responding to valid qualified written requests, and clarifies that a borrower's request may seek "to correct errors relating to allocation of payments, final balances for purposes of paying off the loan, or avoiding foreclosure, or other standard servicer's duties."[43]

Force Placed Insurance and Other Servicing Requirements

Any funds remaining in escrow accounts when the loan is paid off must be promptly refunded.[44] New limits are created as to when insurance can be force-placed and the force placed insurance charges, other than those subject to state insurance regulations, must be bona fide and reasonable.[45]

Dodd-Frank requires servicers to correct errors in a timely manner, and meet a new timeline for identifying loan holders.[46] The latter requirement fills a gap in TILA, which requires servicers to identify holders upon request, but does not impose a deadline for doing so. RESPA also provides statutory damages for violation of this requirement (if a pattern and practice is shown), while TILA's remedy is unclear for the same violation.

A Single, Integrated Disclosure

Dodd Frank requires the CFPB to create "a single, integrated disclosure" for mortgage transactions that combines the HUD-1 settlement statement and the mandatory TILA disclosures for mortgages.[47] Treasury Secretary Geithner included this streamlined form in a list of actions regulators may take soon, rather than waiting for the transfer date.[48]

New Foreclosure Prevention Measures

Dodd-Frank makes the Home Affordable Modification Program (HAMP) more transparent. It mandates creation of a new web portal for homeowners to determine whether their loan modification meets HAMP's Net Present Value test, requires servicers to turn over NPV inputs and outputs at the time of denial, and mandates public release of the NPV model itself and certain data.[49]

The Act also sets up a bridge loan program for unemployed homeowners,[50] modeled on the Pennsylvania Homeowners' Emergency Mortgage Assistance Program. The funds, while permitted to be used in a federally administered program, may be provided to state-tailored programs as well.

The Act authorizes $35 million for legal services programs to defend foreclosures and evictions,[51] but these funds must be appropriated in other legislation. Other changes include creating a new national database of information regarding loans in default and foreclosure[52] and requiring lend-

[33] *Id.* § 1433, amending 15 U.S.C. § 1639.
[34] *Id.* § 1472, *to be codified at* 15 U.S.C. § 1639e.
[35] *Id.*
[36] *Id.* § 1471, *to be codified at* 15 U.S.C. § 1639h.
[37] *Id.* § 1464, *to be codified at* 15 U.S.C. § 1639f.
[38] *Id.* § 1420, *to be codified at* 15 U.S.C. § 1638(f). This obligation is imposed on the creditor, assignee, or servicer.
[39] *Id.* § 1464, *to be codified at* 15 U.S.C. § 1639g.
[40] *Id.* §§ 1461–1462, *to be codified at* 15 U.S.C. § 1639d.
[41] *Id.* § 1463, *to be codified at* 12 U.S.C. § 2605(f)(1)(B), (f)(2)(B), (f)(2)(B)(i).
[42] *Id.* § 1463, *to be codified at* 12 U.S.C. § 2605(e)(1)(A), (e)(2), (e)(4).
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.* (correction of account errors, provision of identity of holder).
[47] *Id.* § 1098.
[48] Bill Swindell, *Treasury Officials Go Forth to Spread Word on Overhaul*, CongressDaily, Aug. 3, 2010 (a.m. ed.), at 3.
[49] Dodd-Frank §§ 1482–1483.
[50] *Id.* § 1496.
[51] *Id.* § 1498
[52] *Id.* § 1447. Section 1446 also requires a study of the causes of default and foreclosure.

ers to report substantially more data, including credit scores, under the Home Mortgage Data Act (HMDA).[53] The Act also gives the CFPB authority to require additional information under HMDA.[54] HMDA changes are effective on the transfer date. The Title XIV effective date discussion on page 1 should be referred to for the other provisions.

Preemption Reined In

Preemption by Bank Regulators Restricted

Dodd-Frank alters the circumstances under which the National Bank Act (NBA), the Home Owners Loan Act (HOLA), and their regulations can preempt state law for national banks and federal savings associations. Previously, bank regulators had issued broad regulations preempting all state laws in a variety of areas, including lending, deposit taking, and the business of banking.[55] (Dodd-Frank does not change the standard of preemption for federal credit unions, but the National Credit Union Administration has been less aggressive in this area, and will likely be influenced by these changes.)

The new standards apply to "state consumer financial law," defined as any law that "directly and specifically regulates the manner, content, or terms and conditions of any financial transaction … or any account related thereto, with respect to a consumer."[56] While the new preemption standard thus does not address laws governing contracts generally, statutes prohibiting unfair or deceptive acts or practices, or similar state laws, the implication should be that they are not preempted.

Broad Preemption Regulations Reversed; Precise Impact Unclear

Dodd-Frank amends the NBA and HOLA to provide that "state consumer financial laws" are preempted "only if, … in accordance with the legal standard for preemption in ... *Barnett Bank of Marion County, N. A. v. Nelson, Florida Insurance Commissioner et al.*, 517 U.S. 25 (1996), the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers."[57]

The Act permits the Office of the Comptroller of the Currency (OCC)[58] to issue regulations preempting state consumer financial laws only if the OCC determines, on a case-by-case basis, that a particular state law, or one with substantially equivalent terms, meets the *Barnett* standard.[59] This effectively reverses broad regulations that preempt all state predatory lending laws and a variety of other state laws addressing abuses in the consumer arena.

Precisely which state laws are preempted under the *Barnett* standard is unclear. In 1996, at the time of the *Barnett* case, few state laws were preempted. The state law at issue in the *Barnett* case itself (which the Supreme Court found preempted) presented a clear case of conflict preemption: state law prohibited national banks from engaging in an activity—acting as an insurance agent in towns of less than 5,000—that federal law specifically authorized them to do. State laws that do not interfere so significantly with authorized powers, such as laws they merely regulate abusive bank conduct and do not outright prohibit activities explicitly permitted under federal law, should survive under the *Barnett* standard.

But the OCC has claimed that its broad preemption regulations follow the *Barnett* standard, and lower courts have varied in their interpretations of *Barnett*. The Supreme Court has not expounded on the standard since 1996, so its application will remain unsettled for some period of time.

Notably, Comptroller John Dugan, who presided over the OCC's broad preemption regulation, has resigned effective August 14, 2010. President Obama will name the new Comptroller to a five-year term, and that person will have a big impact on the initial interpretation of the preemption provision.

The NBA and HOLA amendments go into effect on the transfer date. Contracts entered into on or before July 21, 2010 are grandfathered and continue to enjoy preemption.[60]

Standard for Judicial Review of Preemption Regulations Clarified

The Act, effective with the transfer date, includes provisions that subject OCC preemption regulations to somewhat rigorous judicial review. Substantial evidence must support the OCC's finding that a state law is preempted.[61] Courts must review the validity of OCC preemption regulations under the less deferential *Skidmore*[62] deference standard: "depending upon the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant."[63] Previously, the judicial review standard for preemption regulations was unsettled at the Supreme Court level. Some lower courts applied the more deferential *Chevron* standard, under which courts uphold agency regulations unless they are an impermissible construction of the statute, even if the court would arrive at a different result.[64]

CFPB Rules Generally Do Not Preempt State Law

CFPB rules will not preempt state laws unless the state laws conflict with CFPB rules.[65] This is the same preemption standard applicable to TILA and other federal consumer protections statutes.

AMTPA Mortgage Preemption Largely Repealed

Effective for contracts entered into after the transfer date, Dodd-Frank all but repeals the Alternative Mortgage Transactions Parity Act, which currently preempts many state laws that would otherwise regulate terms such as negative amortization, balloon payments, and other terms of adjustable rate mortgages (ARMs). AMTPA applies to any mortgage lender, including nonbank state mortgage lenders.[66] Even after the

[53] Dodd-Frank § 1094.
[54] *Id.*
[55] *See generally* NCLC, The Cost of Credit §§ 3.4.6, 3.5.3, 3.5.4 (4th ed. 2009 and Supp.).
[56] Dodd-Frank § 1044.
[57] Dodd-Frank §§ 1044 (NBA) 1046, to be codified at 12 U.S.C. § 1465 (HOLA, incorporating NBA standard). In addition, state laws are preempted if they have a discriminatory effect on national banks or federal thrifts compared to state-chartered banks, or if another provision of federal law preempts the state law.
[58] Dodd-Frank eliminates the Office of Thrift Supervision. The OCC will regulate both national banks and federal savings associations and will administer both the NBA and HOLA.
[59] Dodd-Frank, § 1044.
[60] Dodd-Frank, § 1043.
[61] *Id.* § 1044.
[62] Skidmore v. Swift & Co., 323 U.S. 134 (1944).
[63] Dodd-Frank § 1044.
[64] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).
[65] Dodd-Frank § 1041(a).
[66] 12 U.S.C. § 3802.

transfer date, though, laws and regulations besides AMTPA, discussed above, will still preempt some state mortgage laws as to *federally* chartered banks, thrifts and credit unions.

The only surviving part of AMTPA is a ban on state laws that *prohibit* adjustable rate mortgages. AMTPA no longer preempts state laws regulating mortgages generally, such as restrictions on prepayment penalties or late charges.[67]

No Preemption for Bank Subsidiaries

Dodd-Frank ends preemption for bank operating subsidiaries by reversing *Watters v. Wachovia Bank*[68] and the regulation *Watters* upheld. Effective on the transfer date, mortgage subsidiaries and other subsidiaries of national banks and federal thrifts will no longer be able to ignore state law.[69] Current preemption regulations will continue to apply to contracts entered into on or before July 21, 2010.[70] It is possible, however, that banks will minimize the effect of this amendment by absorbing some subsidiaries.

State Enforcement against Banks

The Act codifies *Cuomo v. Clearing House Ass'n*,[71] which holds that states can enforce non-preempted state laws (like fair lending laws) against national banks and federal thrifts, but cannot issue pre-litigation subpoenas to those banks or thrifts in order to investigate potential violations.[72] The Act also clarifies that state attorneys general (AGs) can enforce other federal statutes against national banks and federal thrifts if the statute gives AGs enforcement rights.[73] For example, AGs have the authority to enforce HOEPA's high-cost mortgage provisions[74] and the Fair Credit Reporting Act's furnisher provisions.[75] AGs can enforce most of the Act's new mortgage rules.[76] The Dodd-Frank Act also gives AGs the right to enforce CFPB rules, even against federally chartered institutions in their states, with no limitations on that power.[77]

Interest Rate Exportation Codified

The Act does not change interest rate exportation and effectively codifies the *Marquette*[78] and *Smiley*[79] decisions.[80] Federally chartered banks, thrifts, and credit unions may continue to charge interest rates and fees authorized by their home states. Banks that locate in states without usury caps are still immune from other states' usury caps even when lending to consumers in those other states.

Credit Reporting Provisions

Dodd-Frank amends the FCRA to require, effective on the transfer date, that creditors, insurers, and other users of consumer reports provide in an adverse action[81] or risk-based pricing notice[82] the actual credit score used in making the decision.[83] However, the definition of credit score is limited to scores for "predicting credit behaviors,"[84] making it unclear whether the specialized scores used by insurers and others must be disclosed. This new credit score provision is codified at FCRA § 1681m, which many courts have found to lack a private right of action due to a "scrivener's error."[85]

New Protections for Remittances

American residents every year send tens of billions of dollars to overseas relatives—at least three times official development assistance and the largest source of external financing in many developing countries.[86] Abuses related to remittances include the remittance not reaching its intended recipient, excessive fees, and changing exchange rates.

Dodd-Frank amends the Electronic Fund Transfer Act (EFTA) to create a new set of protections for all "senders" of remittances originated in the U.S.[87] Effective on the transfer date, remittances will be subject to new disclosures, error resolution procedures, and—particularly important—protections against loss through error or theft.

Written disclosures must now be provided both before and after money is paid, and must show the amount transferred, the amount the recipient will receive in foreign currency,[88] the total fees, the exchange rate, the promised delivery date, contact information for the designated recipient and remittance transfer provider, the provider's state and federal regulator, and a description of the consumer's rights under the new law.[89] The CFPB may allow some of these disclosures to be made over the telephone, or, if the sender initiates the transaction in that manner, on the Internet.[90] The disclosures must be in English and in the language used by the provider to advertise and market.[91]

---

[67] Dodd-Frank § 1083, *to be codified at* 12 U.S.C. §§ 3802, 3803. Under current law, state laws regulating prepayment penalties and late charges are not preempted in regard to non-depository state housing creditors, 12 C.F.R. §§ 560.210, 560.220, but the Dodd-Frank provision is much broader. *See* NCLC, The Cost of Credit § 3.11.2 (4th ed. 2009 and Supp.).

[68] 550 U.S. 1 (2007).

[69] Dodd-Frank §§ 1044, 1046. Preemption never applied to federal credit union subsidiaries.

[70] *Id.* § 1043.

[71] 129 S. Ct. 2710 (2009).

[72] Dodd-Frank § 1047, *to be codified at* 12 U.S.C. § 1465(c).

[73] *Id.* § 1042.

[74] 15 U.S.C. §§ 1639, 1640(e).

[75] 15 U.S.C. §§ 1681s-2, 1682s-2(d).

[76] Dodd-Frank § 1422. Though the Act does not address AG enforcement of state or federal laws against federal credit unions, *Cuomo* itself and the general AG enforcement power should apply in that context as well.

[77] Dodd-Frank § 1042.

[78] Marquette Nat'l Bank v. First of Omaha Serv. Corp., 439 U.S. 299 (1978) (banks may lend at the interest rate permitted by their home state).

[79] Smiley v. Citibank, N.A., 517 U.S. 735 (1996) (upholding regulation defining long list of fees as "interest" subject to interest rate exportation).

[80] Dodd-Frank § 1044(a).

[81] 15 U.S.C. § 1681m(a). The notice is required whenever a user of a consumer report takes an "adverse action" based on that report, such as denial of credit. *See* NCLC, Fair Credit Reporting § 8.2.6 (6th ed. 2006 and Supp.).

[82] 15 U.S.C. § 1681m(h). The notice is required whenever a creditor offers or grants lass favorable terms of credit based on a consumer report. *See* NCLC, Fair Credit Reporting § 8.2.8 (6th ed. 2006 and Supp.).

[83] Dodd-Frank § 1100F, *to be codified at* 15 U.S.C. § 1681m(a)(2) and 1681m(h)(5)(E)

[84] 15 U.S.C. § 1681g(f)(2)(A).

[85] *See* NCLC, Fair Credit Reporting § 8.2.6.5 (6th ed. 2006 and Supp.).

[86] In 2008, officially recorded remittances to developing countries reached $330 billion. Dilip Ratha, *Remittances in Development–A Lifeline to Poor Countries,* International Monetary Fund, vol. 46, no. 4, (Dec. 2009), *available at* www.imf.org/external/pubs/ft/fandd/2009/12/ratha.htm.

[87] Dodd-Frank § 1073(a)(3) creates a new 15 U.S.C § 1693p, renumbering existing § 1693p, as well as subsequent current sections.

[88] Disclosures for remittances to certain (unnamed) nations, in which the recipient nation does not allow a provider to know the amount of currency that will be received, are permitted to be based on "reasonably accurate estimate of the foreign currency to be received." Dodd-Frank § 1073, *to be codified at* 15 U.S.C. § 1693p(c).

[89] Dodd-Frank § 1073, *to be codified at* 15 U.S.C. § 1693p(a).

[90] *Id.*, *to be codified at* 15 U.S.C. § 1693p(a)(5).

[91] *Id.*, *to be codified at* 15 U.S.C. § 1693p(b).

If the sender provides oral or written notice to the provider within 180 days of the promised date of delivery that an error has occurred, including that the amount of currency to be received was not given to the recipient, the provider is required to try to resolve the error, and either make a refund to the sender or make available to the recipient the missing funds within 90 days, or provide an explanation in writing to the sender of why there was no error.[92] The Act also clarifies that remittance providers are responsible for their agents' actions.[93] Enforcement is through EFTA's pre-existing provisions providing for actual damages, statutory damages of $100 to $1000, plus costs and attorney fees.[94]

Changes to Bank Funds Availability Rules

Effective on the transfer date, the Expedited Funds Availability Act (EFAA) is amended to increase the amount of a deposited check that is available the first day and also the next business day from $100 to $200.[95] Both amounts, as well as other dollar figures in the EFAA, are to be adjusted every five years for inflation.[96]

Interchange and Prepaid Debit Card Fees

Dodd-Frank adds new provisions to the Electronic Funds Transfer Act (EFTA) aimed at lowering fees that merchants pay to card networks (i.e., Visa or MasterCard) for credit or debit card transactions. The changes will have both good and bad effects on consumers. The FRB must issue a rule limiting these "interchange" fees to an amount that is reasonable and proportional to the card issuer's costs.[97] Prepaid debit cards are exempt, including cards issued for payment of public benefits and general reloadable prepaid cards.[98] The interchange provision is effective on July 21, 2011. The exemption for prepaid cards, however, expires as of July 21, 2012 for any card that permits overdraft or shortage fees or a fee for the first in-network ATM withdrawal per month. Thus, prepaid card issuers have an incentive to eliminate such fees by that date.

The EFTA interchange amendments also permit merchants to offer discounts or other incentives for payments in cash, by check, or other methods as long as the merchant does not differentiate on the basis of card issuer or payment card network. Merchants will also be able to set a minimum transaction amount, not to exceed $10, for accepting credit cards (but not for other types of cards if prohibited by the agreement with the card network).

Limits on interchange fees could induce credit and debit card issuers to increase fees on consumers, but merchants could pass savings from interchange fees onto all customers. The ability to offer discounts for non-card based payments could help lower-income consumers who pay by cash or check, though it could hurt consumers who receive their public benefits by prepaid card.

[92] *Id.*, *to be codified at* 15 U.S.C. § 1693p(d)(1). The Board has 18 months from enactment of the Act to establish standards for error resolution. *Id.* § 1073, *to be codified at* 15 U.S.C. § 1693p(d)(2).
[93] *Id.*, *to be codified at* 15 U.S.C. § 1693p(f).
[94] 15 U.S.C. § 1693*l*.
[95] Dodd-Frank § 1086, *to be codified at* 12 U.S.C. § 4002(a)(2)(D), (b)(3)(C).
[96] *Id.* § 1086, *to be codified at* 12 U.S.C. § 4006(f).
[97] *Id.* § 1075, *to be codified at* 15 U.S.C. § 1693r(a).
[98] *Id.* § 1075, *to be codified at* 15 U.S.C. § 1693r(a).

The Consumer Financial Protection Bureau

Dodd-Frank creates a Consumer Financial Protection Bureau (CFPB) charged with protecting consumers across the board in the financial arena. It takes over rule writing authority currently held, largely, by the Federal Reserve Board (FRB) as well as enforcement and supervisory authority currently held by several federal agencies.

Bureau Structure, Independence, and Funding

The CFPB will be part of the FRB, but the Act guarantees the CFPB's independence and the Director is appointed by the President. A new Financial Stability Oversight Council (with representatives from eight federal agencies and one state appointee) will have authority to veto CFPB rules by a two-thirds vote. To veto a rule, the Council must find that the rule "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"[99]—a fairly high standard.

The FRB will fund the CFPB, but the FRB has no control over the amount or allocation of the budget. The CFPB's budget will be set by the CFPB's Director, up to a cap of about $485 million in 2013, adjusted for inflation thereafter. By comparison, the Federal Trade Commission's 2009 budget was $281 million and the Securities and Exchange Commission's was $961 million.

Rule Writing Authority

The CFPB takes over rule writing authority for all the major consumer financial protection statutes—called the "enumerated statutes"—including TILA and FCRA.[100] Dodd-Frank creates new rule writing authority for the Fair Debt Collection Practices Act and gives it to the CFPB.[101] The CFPB also has authority to write rules to prevent unfair, deceptive, or abusive acts or practices (UDAAP authority) in connection with a broad array of consumer financial products and services.[102]

Until the transfer date, the Secretary of the Treasury can exercise some of the authority given to the CFPB that takes effect immediately, including the ability to write the rule defining the "larger" nonbanks that will be subject to CFPB enforcement and supervision. It is possible that some procedural rulemakings will begin before a Director is appointed or the CFPB is fully operational.

The CFPB has an unparalleled opportunity to correct the decades of credit deregulation that led to the current economic crisis and caused untold injury to consumers. For example, in addition to the rules the Act mandates, consumer advocates intend to press the CFPB to:

- Require mortgage servicers to consider loan modification where appropriate prior to foreclosure;
- Ban excessive overdraft fees and unfair tactics to increase those fees; and
- Ban dangerous forms of security, including check holding, mandatory electronic access to the consumer's account, and holding car titles.

[99] *Id.* § 1023. A decision by the Council to veto a rule—but not a decision to refrain from a veto—is reviewable by the courts.
[100] Dodd-Frank §§ 1022, 1002(12). The FTC retains FCRA rule writing and enforcement over the Red Flag Rules for identity theft prevention and the Disposal of Consumer Information Rule.
[101] Dodd-Frank § 1089.
[102] *Id.* § 1031. Products and services covered by the Act are generally set forth in § 1002(15).

New Authority to Ban Abusive Practices

The authority over unfair or deceptive conduct tracks the FTC's current authority, but authority over "abusive" conduct is new. To ban an act as abusive, the CFPB must find that the act or practice:

(1) materially interferes with a consumer's ability to understand a term or condition of a consumer financial product or service; or

(2) takes unreasonable advantage of—

(A) a consumer's lack of understanding of the material risks, costs, or conditions of the product or service;

(B) a consumer's inability to protect his or her own interests when selecting or using a product or service; or

(C) the consumer's reliance on a covered person.[103]

Scope of the CFPB's Rule-Writing Authority

The CFPB has rule writing authority over virtually everyone in the financial services area, including banks, credit unions, mortgage lenders, credit bureaus, auto finance companies, debt collectors, student lenders, and payday lenders. Most dealers of autos, motorcycles, boats, recreational vehicles and motor homes are exempt and stay under FTC authority.[104]

Effective on the designated transfer date, the FTC gains streamlined authority to write rules preventing unfair or deceptive practices by dealers exempted from the CFPB's jurisdiction,[105] and retains enforcement power over these dealers. Both the FRB and the FTC must coordinate with the newly created Office of Service Member Affairs to monitor and respond to problems faced by service members and their families with respect to auto dealers.

Certain credit from "merchants, retailers or sellers" is also exempt from the CFPB's UDAAP jurisdiction (but not from its authority under the enumerated statutes such as TILA). To be exempt, the credit: must be offered by the merchant directly, for its own non-financial good or service; must not be assigned or conveyed; cannot exceed the market value of the good or service or be used as an evasion; and must be offered by a merchant who does not regularly extend credit subject to a finance charge, unless the merchant is a small business or does not significantly engage in offering consumer financial products or services.[106]

The CFPB lacks UDAAP authority over insurers, including credit insurers, but has authority over lenders who offer or sell such insurance. Less clear is whether it has UDAAP rulemaking authority over rent-to-own transactions.[107]

The CFPB has the authority to issue UDAAP rules applicable to attorneys who offer or provide "consumer financial products or services."[108] This term is defined to include not just extensions of credit, but also credit counseling, debt management, debt settlement, loan modification, foreclosure avoidance, and debt collection.[109] Nonetheless, the CFPB cannot enforce UDAAP rules against attorneys for conduct that constitutes the practice of law and occurs exclusively within the scope of the attorney-client relationship with a consumer.[110] It can enforce UDAAP rules against attorneys if the consumer is not the attorney's client.

Authority to Ban Arbitration; No Usury Cap Allowed

The CFPB is given authority to prohibit or impose conditions on forced arbitration involving consumer financial products or services after the CFPB conducts a study of the issue.[111] Any rule banning arbitration will apply only to new contracts entered into 180 days after the rule is effective. In light of the time to do the study, any rule would likely affect contracts entered into in 2013 or later.

The CFPB has no authority to enact a usury cap,[112] but can impose tougher rules on high-rate loans, as the Home Owner's Equity Protection Act does.[113]

No Private Enforcement Except Under Current Statutes; State Claims Possible

Dodd-Frank does not provide an private cause of action for violations of CFPB UDAAP rules.[114] But the CFPB has rulemaking authority under existing statutes that do carry a private right of action—most notably TILA and FDCPA – and some of the substantive changes in Dodd-Frank are within such statutes. These existing private causes of action generally are available to enforce amendments to these statutes and their implementing regulations. Moreover, UDAP or other state causes of action may be available for violations of the CFPB's UDAAP rules.[115]

Dodd-Frank also makes it unlawful "to offer or provide to a consumer any financial product or service not in conformity with Federal consumer financial law" (including CFPB rules).[116] Illegality is generally a defense to a contract,[117] and consumers may be able to assert this defense to void or enjoin enforcement of non-conforming agreements.

Government Enforcement

The CFPB will have full enforcement authority under the enumerated statutes and UDAAP rules over banks and credit

---

[103] Dodd-Frank § 1031(d).

[104] *Id.* § 1029. The exemption for motor vehicle dealers does not extend to dealers that retain financing or sell or assign financing to a related entity, such as many buy-here, pay-here dealers. *See id.* § 1029(b)(2). However, such dealers are likely exempt through the merchant exception, discussed below., if they are a small business.

[105] The FTC generally must follow the lengthy and cumbersome "Magnuson-Moss" procedures when writing rules, but for motor vehicle dealers it now can use the more streamlined Administrative Procedure Act process. For rules affecting dealers under TILA and other enumerated statutes, authority is retained at the FRB.

[106] Dodd-Frank § 1027(a).

[107] Rent-to-own transactions likely do not fall within the definition of leases subject to the CFPB's jurisdiction, Dodd-Frank § 1002(15)(A)(2), though the CFPB does have jurisdiction if rent-to-own is considered credit. Notably, Dodd-Frank defines the term "credit" more broadly than the TIL definition at 15 U.S.C. § 1602(e). In addition, TILA's restrictive definition of "creditor" (15 U.S.C. § 1602(f)) is not carried over into Dodd-Frank.

[108] Dodd-Frank §§ 1002(6) (definition of "covered person"), 1002(15) (definition of "financial product or service"), 1027(e) (exception for practice of law), 1031 (general authority to adopt UDAAP rules for "covered persons").

[109] *Id.* § 1002(15)(A)(viii), (x).

[110] *Id.* § 1027(e)(2).

[111] *Id.* § 1028.

[112] *Id.* § 1027(o).

[113] *See* 15 U.S.C. § 1639. Certain Dodd-Frank provisions in fact restrict credit where the APR or finance charges exceed a benchmark. *See* Dodd-Frank §§ 1414, 1471.

[114] *See* NCLC's Consumer Banking and Payments Law § 8.2.5 (4th ed. 2009 and Supp.) (discussion of difficulties of implying private cause of action to enforce federal statutes and rules).

[115] *See* In re TJX Companies Retail Sec. Breach Litigation, 564 F.3d 489 (1st Cir. 2009) (finding FTC guidelines and consent decrees instructive as to whether conduct is unfair under Massachusetts law); *see generally* NCLC, Unfair and Deceptive Acts and Practices 3.4.5 (7th ed. 2008 and Supp.).

[116] Dodd-Frank § 1036(a)(1)(A).

[117] *See*, *e.g.*, Rugemer v. Rhea, 957 P.2d 184, 187 n.1 (Or. Ct. App. 1998) ("Illegal contracts may be rescinded by the party not at fault.").

NCLC REPORTS

Developments and Ideas for the Practice of Consumer Law

The National Consumer Law Center, Inc. (NCLC), a non-profit legal organization which represents the interests of low-income consumers, publishes NCLC REPORTS 24 times a year. NCLC REPORTS consists of four separate editions: *Bankruptcy & Foreclosures* (ISSN 1054-3775); *Consumer Credit & Usury* (ISSN 0890-2615), *Debt Collection & Repossessions* (ISSN 0890-2607); and *Deceptive Practices & Warranties* (ISSN 0890-0973). Each edition is published six times a year.

NCLC REPORTS is sent free to every neighborhood legal services office funded by the Legal Services Corp. Other individuals and institutions may purchase subscriptions for the entire NCLC REPORTS at a price of $175 (which includes a three ring binder to file NCLC REPORTS) or for each edition at a price of $60 per edition/year, plus $10 for the three ring binder.

For subscription orders or more information, write or call:

National Consumer Law Center, Inc.

NCLC REPORTS
7 Winthrop Sq., 4th Floor, Boston, MA 02110-1245
Phone: 617-542-9595, Fax: 617-542-8028
E-Mail: publications@nclc.org
Visit our website: www.consumerlaw.org

NCLC REPORTS
National Consumer Law Center, Inc.
7 Winthrop Sq., 4th Floor
Boston, MA 02110-1245

NONPROFIT ORG.
U.S. POSTAGE
PAID
BOSTON, MA
PERMIT NO. 54162

unions with $10 billion or more in assets (and all of their subsidiaries). Banking regulators have enforcement power over smaller institutions.[118]

Subject to the exemptions for vehicle dealers and some merchant credit, discussed above, the CFPB has enforcement authority over the following nonbanks:

- The mortgage industry (including brokers, lenders, and servicers);
- Private student lenders;
- Payday lenders;
- The "larger participants in a market for other consumer financial products or services";
- Any other person the CFPB determines to "be engaging, or have engaged, in conduct that poses risks to consumers."[119]

A CFPB rule violation is treated as a violation of the FTC Act.[120] The FTC retains its full FTC Act authority, including enforcement power over auto dealers, attorneys and merchants,that are exempt from the CFPB's authority.

State attorneys general may enforce CFPB rules against any actor in their state, including national banks and federal savings associations.[121] State regulators may enforce the CFPB rules against entities chartered, incorporated, or licensed in the state.[122]

Supervision

The CFPB takes over responsibility to require reports from and conduct periodic examinations of banks and credit unions with $10 billion or more in assets.[123] For other banks and credit unions, federal bank regulators retain supervision responsibility, but the CFPB can participate in examinations and seek information on a sampling basis.[124]

The statute also creates new federal supervision authority over nonbank institutions, allowing a useful compliance tool that can be used against nonbank predatory lenders. Examiners have access to more information, with fewer restraints, than officials acting in a law enforcement posture, and they can also pressure or cajole changes without the need to prove legal violations. The CFPB has supervision authority over the same nonbanks over which it has enforcement authority: the mortgage industry, private education and payday lenders, the larger participants in other markets, and those shown to pose risks to consumers.[125] The FTC has no parallel supervision authority for those outside the CFPB's authority.

NCLC Releases 10 Manual Updates

NCLC has just released three important revised editions to our consumer law treatise series:

- Foreclosures (3d ed. 2010) (1130 pp.)
- Consumer Class Actions (7th ed. 2010) (1026 pp.)
- Consumer Warranty Law (4th ed. 2010) (1136 pp.)

NCLC has also released seven new 2010 supplements to:

- Cost of Credit,
- Credit Discrimination,
- Fair Debt Collection,
- Collection Actions,
- Consumer Banking and Payments Law,
- Automobile Fraud, and
- Access to Utility Service.

All updates come with another year of our updated companion websites.

Subscribers should be receiving their updates in August, and others can order them at www.consumerlaw.org/updates or by calling NCLC Publications at 617-542-9595.

Please file this special double issue in the NCLC REPORTS 3-ring binder under *Consumer Credit & Usury Edition*.

118 Dodd-Frank § 1026.
119 *Id.* § 1024(a)(1). The CFPB must issue a rule within one year of the designated transfer date to define the "larger participants."
120 Dodd-Frank § 1061(b)(5)(C).
121 *Id.* § 1042(a).
122 *Id.*
123 *Id.* § 1025.
124 *Id.* § 1026.
125 *Id.* § 1024.