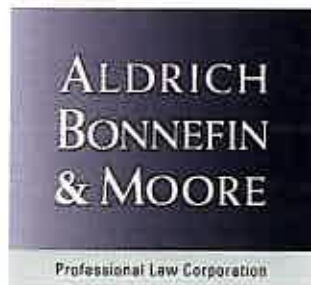


Mark E. Aldrich
Janet M. Bonnefin
Mark A. Moore
Robert K. Olsen
Eric C. Baron
Keith R. Forrester
Anne M. McEvelly



Ill C. Kovar
Michael N. Delune
Tricia E. Engelhardt

Our File Number
2600.00055
207752.1

ONE YEAR ANNIVERSARY OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT

August 2011

Although it may only seem like yesterday, a whole year has passed since the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Reform Act”) was signed into law. However, many of the key changes discussed in our summary last year still have yet to be or have only been partially implemented through final regulation. This summary will discuss what progress has been made, if any, on these key provisions of the Reform Act.

The Consumer Financial Protection Bureau

Director Wanted

Initially, the buzz surrounding the Consumer Financial Protection Bureau (the “Bureau”) centered on one person—Elizabeth Warren. Under Warren, an entity that existed only on paper grew into a significant agency with a staff of more than 400, a number which is expected to be over a 1,000 by the end of 2011. On July 21, 2011, the bank regulators’ consumer protection powers were transferred to the Bureau and the Bureau opened its doors, began to take consumer credit card complaints and counsel distressed homeowners.

Despite the growth and grand opening of the Bureau, its ability to perform some of its newly established functions—such as supervise non-banks and prohibit unfair, deceptive and abusive practices in connection with consumer financial products and services—is hampered. As stated in the Offices of Inspector General of the Federal Reserve System and the Department of the Treasury’s jointly issued “Review of CFPB Implementation Planning Activities” (July 15, 2011), the Bureau is not authorized to perform such functions until a director is confirmed. Just three days before the official start date of the Bureau, President Obama nominated former Ohio Attorney General Richard Cordray to be the Bureau’s first director. Because of expected

This document and any information contained herein are intended for informational purposes only and should not be construed as legal advice. Seek competent legal counsel for advice on any legal matter.

resistance of Cordray's nomination in the Senate, it is not clear as to when Cordray will be confirmed, if ever (see below).

Coincidentally, on July 21, 2011, the House voted 241-173 on a measure that would modify the structure and weaken the authority of the Bureau. Among other changes, the House voted to replace the Bureau's single director with a five-member board. In regards to weakening the Bureau, the measure would enhance the ability of the Financial Stability Oversight Council to overrule the Bureau by merely a majority vote, rather than a two-thirds vote as is currently required. Further, the measure would suspend some of the Bureau's operations until a director is in place. Although this measure appears "dead on arrival" to the Democratic majority in the Senate, more than 44 Republican senators have conditioned the nomination of a director upon the restructuring of the Bureau. Because the ability of the Bureau to exercise some of its regulatory powers depends upon the confirmation of a director (as discussed above), it is uncertain as to when such regulatory authority will be unleashed.

What Rules Are Now Under the Bureau's Authority?

As mandated by the Reform Act, on July 21, 2011, the Bureau issued a final list of regulations that it will have authority to enforce. The list essentially follows those regulations set out in the Reform Act, and includes (among others) Regulation B (ECOA), Regulation C (HMDA), Regulation E (EFTA), Regulation M (Consumer Leasing), Regulation P (Privacy), Regulation Z (TILA), Regulation DD (TISA) and the NCUA's regulations implementing TISA, as well as HUD's Regulation X (RESPA) and the banking agencies' rules implementing the registration of mortgage loan originators under the SAFE Act.

While the Bureau will have jurisdiction over Regulation V (FCRA), there are three FCRA provisions that it will not have authority to enforce: Section 222.83 (disposal of consumer information), Section 226.90 (identify theft and red flag guidelines), and Section 222.91 (change of address rules applicable to card issuers). The Reform Act granted exclusivity authority for these FCRA provisions to the Federal Trade Commission. Note, however, that the banking agencies' rules implementing these provisions still remain in place and, thus, would be enforced by the banking agencies.

So what is the impact of all of this? While the transfer itself of the enforcement authority should not have an immediate effect on the rules, it will be interesting to see what, if anything, the new Bureau does with its new rulemaking authority in the future.

Progress on a Single Integrated TILA/GFE Model Disclosure

A provision of the Reform Act requires the Bureau to come up with a single integrated model disclosure that combines the disclosures required by the federal TILA with the good faith estimate (GFE). While the Bureau has up to July 21, 2012 to devise such a model, it is not wasting any time.

On May 18, 2011, the Bureau released two alternative prototype forms designed to provide consumers with easy to understand information about their mortgage loan-related costs and terms. Each form, while differing in style and format, would provide information about the interest rate, monthly payment, monthly taxes and insurance and cautionary information about

rate increases, balloon payments and prepayment penalties. The forms also would provide a more succinct itemization of closing costs, somewhat reminiscent of the pre-2010 GFE days.

The Bureau is now in the process of testing the forms, soliciting feedback not only from consumers, but also lenders and brokers. The testing includes one-on-one interviews as well as gathering public input through its website. Dubbed the “Know Before You Owe” project, over the summer months of 2011 the Bureau conducted interviews in six cities across the nation hoping to gain greater insight particularly with respect to the use and implementation of a final form. In early August, the Bureau asked for commentary on the third round of such forms in order for them to “start thinking about how to improve on these forms for the next round.” The cut-off date for such feedback was August 8th.

Cost of the Reform Act

The Republicans of the House Financial Services Committee issued a report in July 2011 which concluded that the burdens of the Reform Act were substantially outweighed by the uncertain benefits. One key failure of the Reform Act, pursuant to this report, was that the largest financial institutions in the United States not only continue to be “too big to fail,” but have grown since the signing of the Reform Act. The report anticipated that by the end of the fiscal year of 2012, the budgetary cost of the Reform Act will reach over \$1.25 billion and will have created 2,849 government jobs. Further, the report stated that over 2.2 million labor hours are required annually in order to comply with the then-issued rules under the Reform Act, which constituted only 10 percent of the total rules to be enacted.

Goodbye OTS; Hello OCC

As mandated by the Reform Act, on July 21, 2011, the powers, authorities, rights and duties of the Office of Thrift Supervision (OTS) were completely transferred to other banking agencies, including the Office of the Comptroller of the Currency (OCC). Thereafter, the OCC has the authority to examine, regulate and supervise federal savings associations. Accordingly, the OCC issued final rules to revise particular banking legislation pursuant to the Reform Act. Within such final rules, it appears as if the OCC shortened the range of state law preemption by replacing the provision that state laws would be preempted if they “obstruct, impair, or condition” the business of banking with if it “prevents or significantly interferes with” the functions of a national bank. In addition, the final rules altered its visitorial powers rules to allow state attorney generals to bring enforcement lawsuits against national banks. These changes are in accordance with other provisions of the Reform Act.

The Office of Financial Research

In order to facilitate regulators’ access to certain data that was previously kept secret—such as credit default swaps records—the Reform Act created the Office of Financial Research (OFR). The OFR has the power—more specifically, it has subpoena power—to collect certain information that had historically kept undisclosed by financial institutions. Similar to the Bureau, the OFR requires the confirmation of a director. Over a year after the OFR’s creation, a director has yet to be nominated by President Obama’s administration.

“Too Big to Fail” Institutions

Identification of “Too Big To Fail” Institutions

The Reform Act created the Financial Stability Oversight Council (the “Council”) in which regulators were to identify “too big to fail” financial institutions. “Too big to fail” institutions are financial institutions that are so large and interconnected that their failure would threaten the financial stability of the country (i.e., they pose a systemic risk). Once identified, heightened supervision would be imposed upon such institutions.

A whole year after its creation, the Council has begun the groundwork for such identification, but that is about all that it has accomplished. The Council has yet to espouse criteria that includes any details or specificity that would allow financial institutions to take action to prevent being identified as a systemic risk, let alone actually identify an institution as posing a systemic risk. Instead, the Council has merely reiterated the vague threshold by which financial institutions were deemed to be a financial institution under the Reform Act.

Resolution of “Too Big to Fail” Institutions

In an attempt to avoid having to have to bail out institutions that were “too big to fail” (does AIG ring a bell?) the Reform Act gave banking regulators the tools necessary to resolve such institutions. With such power, the FDIC issued an interim final rule in January 2011 that covered: (1) the authority of failing banks to continue operations by paying for services provided by employees and others; (2) the treatment of creditors; and (3) the application of proceeds from the liquidation of subsidiaries. 76 FR 4207.

In March 2011, the FDIC proposed a rule that addressed additional resolution powers granted in the Reform Act. In this proposed rule, the FDIC set forth, among other things, a definition of a “financial company” that would be subject to such resolution power and rules regarding recouping compensation from senior executives and directors, the application of the authority to avoid fraudulent or preferential transfers, and the priorities of expenses and unsecured claims. As of publication of this summary, final rules had yet to be issued.

In addition to providing regulators with the tools to resolve “too big to fail” banks, the Reform Act also required certain financial institutions that were deemed systemically important to submit resolution plans (a.k.a. “living wills”) in order to prevent their resolution from having serious adverse effects to American financial stability. Final rules regarding living wills are due in January 2012.

Volcker Rule

The Volcker Rule prohibits banking entities from doing two things. First, it prohibits banking entities from engaging in proprietary securities trading. Second, it restricts banking entities from owning or sponsoring a hedge fund or private equity fund. Essentially, the Volcker Rule was intended to rebuild some of the walls between banking and investment activities that were last seen in the Glass-Steagall Act. Since enactment, the only progress with regards to the Volcker Rule has been the Council’s 79-page study on the rule in January 2011. As of the publication of this summary, regulators have yet to propose rules, let alone adopt rules, which are

supposed to be adopted by October 18, 2011. Regardless of whether or not a final rule is finalized, the Volcker Rule becomes effective July 21, 2012.

Derivatives Reform

In response to the potential threat over-the-counter trading of derivatives has on the financial system, the Reform Act instigated, among other things, registration and clearing requirements, and prohibited federal assistance to swap entities with respect to swap, security-based swap, or other activity of a swaps entity. The daunting task of reforming the trading of commodity-based derivatives fell squarely on the shoulders of the Commodity Futures Trading Commission (CFTC). Meanwhile, the CFTC has about 700 employees, is being threatened with a 15 percent budget cut and is being bombarded by lobbyists. Not to much surprise, the CFTC announced that it would delay the implementation of some of these rules until December 2011.

Title VII of the Reform Act granted the Securities and Exchange Commission (SEC) authority to regulate the over-the-counter swap market. The effective date of Title VII was July 16, 2011. Accordingly, the SEC has issued numerous proposed rules since the adoption of the Reform Act, such as rules on beneficial ownership, definitions of “swap,” “security-based swap,” and a “security-based swap agreement,” and registration and regulation of security-based swap execution facilities. In a guidance issued by the SEC on June 15, 2011, the SEC stated that after all proposed rulemakings have been released, it will thereafter seek public comment regarding a comprehensive implementation plan of such rules. However, the guidance also stated which of the proposed rules would become effective on July 16, 2011, which was a minority of the proposed regulations. For a detailed list of what action the SEC has taken regarding security-based swap reform under the Reform Act, visit <http://www.sec.gov/spotlight/dodd-frank/accomplishments.shtml#derivatives>.

Risk Retention

As a disincentive to reckless lending that helped spawn the 2008 financial meltdown, the Reform Act required mortgage lenders to retain at least 5 percent of each borrower’s credit risk—i.e., keep some skin in the game. An exemption to this requirement would be provided for asset-backed securities that are collateralized by qualified residential mortgages and other types of qualified assets. Thus, financial institutions are on the edge of their seats awaiting the definition of a “qualified residential mortgage.” In April 2011, the banking agencies issued a proposed rule in which the definition of a “qualified residential mortgage” included, among other criteria, debt-to-income restrictions and a mortgage with a minimum of a 20 percent down payment. 76 FR 24089. Naturally, the 20 percent threshold has caused an uproar in the banking industry and in Congress, both of whom have sent letters to lawmakers urging them to reduce such threshold. The due date for comments was originally June 10, 2011, but was extended to August 1, 2011. Look for a final rule in the coming months. The effective date will be one year after publication of the final rule on qualified residential mortgages, and two years after the publication of the final rule on other types of qualified assets.

The Collins Amendment

The Collins Amendment of the Reform Act imposed risk-based and leverage capital standards on U.S. bank holding companies and established the minimum capital requirements for all insured institutions regardless of their size. Most of the Collins Amendment was implemented in June 2011 by final rule. 76 FR 37620.

Little of the Reform Act was dedicated to capital and leverage standards because lawmakers knew that the Basel Committee on Banking Supervision was addressing the issue. Accordingly, international committee issued a package of reforms in September 2010 that would require banks to maintain 4.5 percent in common equity, which will be phased in by January 1, 2015, and by 2019, banks would be required to hold an additional 2.5 percent as a conservation buffer. In July 2011, such international regulators proposed requiring the largest banks to hold an additional 1 to 2.5 percent of capital. Although the end result in the U.S. is uncertain, there has been much more progress in the Basel III process than expected.

The Durbin Amendment

Section 1075 of the Reform Act, which is commonly referred to as the “Durbin Amendment,” mandated regulation of prepaid card processing and limitations upon interchange fees on debit cards so that the fee is based on the actual costs of transaction authorization, processing and settlement. Thus, the Durbin Amendment empowered the Federal Reserve Board (FRB) to place a cap on interchange fees on electronic debit transactions that was “reasonable and proportional to the cost incurred by the issuer.”

Back in December 2010, the FRB issued proposed rules that would cap debit transaction interchange fees to 12 cents per transaction. The banking industry was outraged and their lobbyists fought emphatically against the proposal. Some benefit was gained from the lobbyist assault because the new Regulation II (“Debit Card Interchange Fees and Routing”), which was issued on July 20, 2011, did contain a cap on debit interchange fees at a higher rate of 21 cents per transaction plus 5 basis points of the transaction’s value. 76 FR 43394. Regulation II becomes effective October 1, 2011. In conjunction with the issuance of new Regulation II, the FRB also adopted a separate interim final rule that allows an additional one cent to be charged if financial institutions are in compliance with the established fraud prevention standards. 76 FR 43478. Comments on this interim final rule, which is effective October 1, 2011, are being accepted until September 30, 2011.

Also within this interim final rule were clarifications as to whom or what type of transactions are exempt from such fee restrictions. There are three exemptions: (1) if the issuer (and its affiliates) have assets of less than \$10 billion; (2) if it is a debit or prepaid card provided to a person pursuant to a federal, state or local government administered payment program; and (3) if it is a reloadable general use prepaid card. In order for a card to be a reloadable general use prepaid card, the interim final rule requires the card to not be issued or approved for use to access or debit any account held by or for the benefit of the cardholder, it must be reloadable and not marketed or labeled as a gift card or gift certificate, and the card is the only means of access to the underlying funds except when all remaining funds are provided to the cardholder in a single transaction.

Data Collection Rules

Section 1071 of the Reform Act amended the Equal Credit Opportunity Act to mandate that financial institutions collect and report certain information pertaining to credit application requests received from three types of businesses: women-owned, minority-owned and small businesses. The Bureau is charged with the responsibility of issuing regulations to implement the data collection requirement for the majority of financial institutions. The Bureau received numerous inquiries as to when such collection and reporting requirements will take effect. On April 11, 2011, the Bureau issued guidance-like document to calm the waters. This guidance essentially advised financial institutions that the data collection requirements will not become effective until the Bureau issues appropriate implementing regulations, regardless of the then-looming effective date of July 21, 2011.

Motor Vehicle Dealers Temporarily Exempted

Although the Bureau has the authority to issue data collection requirements for most financial institutions, the FRB has the rulemaking authority for certain motor vehicle dealers under the Reform Act. The motor vehicle dealers subject to this rulemaking authority are entities who are predominantly engaged in the sale, servicing or leasing of motor vehicles. On June 20, 2011, the FRB issued a proposed rule that announced that such dealers do not need to comply with the data collection requirements discussed above until the FRB adopts final implementing regulations.

Regulation Z Dollar Threshold Exemption Increased

As mandated by the Reform Act, on June 13, 2011, the FRB published amendments to Regulation Z to raise the dollar threshold for excluding certain consumer credit transactions from coverage under the TILA and Regulation Z, effective January 1, 2012. 76 FR 35722.

Recall that the Reform Act increased the dollar threshold for exempt consumer-purpose credit transactions from \$25,000 to \$50,000. As required under the Reform Act, in April of this year the FRB adopted final amendments to Regulation Z to implement the Reform Act provisions by increasing the exemption threshold amount to \$50,000, effective July 21, 2011. 76 FR 18354. The Reform Act also requires that the \$50,000 threshold be adjusted annually, effective January 1 of each year, based on annual percentage increases in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI). As a consequence, on June 20, 2011, the FRB published final amendments to Regulation Z adjusting the exemption threshold amount to \$51,800. This adjustment is effective January 1, 2012. Thus, consumer-purpose transactions that are extended in 2012 (that is, from January 1, 2012 and December 31, 2012), which are above the \$51,800 threshold, will not be subject to Regulation Z coverage. Note that this includes both closed-end loans as well as open-end credit plans where the written commitment to lend is more than \$51,800. However, private education loans and consumer-purpose loans secured by a dwelling or any form of real property are subject to TILA and Regulation Z regardless of the amount of the loan.

In the final rule, the FRB clarified the application of the threshold exemption as follows:

- Prior to July 21, 2011, the threshold amount remained at \$25,000.
- Beginning July 21, 2011, the threshold amount is \$50,000, and thus new loans and lines of credit established on or after that date must be more than \$50,000 to be exempt.
- Beginning January 1, 2012, new loans and lines of credit must exceed the new \$51,8000 threshold to be exempt.
- Each January 1 thereafter, the threshold amount may be increased based upon changes in the CPI.

In conjunction with the final Regulation Z changes, the FRB also has adjusted the dollar threshold for exempt consumer leases under the Consumer Leasing Act and Regulation M to \$51,800. This change also is effective January 1, 2012.

Foreign Remittances

The FRB published a proposal on May 23, 2011 (76 FR 29902) that would provide protections to consumers who send money to areas such as the Caribbean, Latin America, Mexico and elsewhere. According to the FRB, the majority of remittances from the U.S. are sent to these areas as well as Asia and the Philippines.

The proposed regulations would implement provisions of the Reform Act that require remittance transfer providers to disclose information about fees, the applicable exchange rate and the amount of currency to be received by the recipient. In addition, the Reform Act provides error resolution rights for consumers sending remittance transfers. The proposed rules are expected to be finalized by the Bureau.

Repeal of Regulation Q

As mandated under the Reform Act, on April 14, 2011, the FRB published a proposal that would repeal Regulation Q. 76 FR 20892. Since 1933, with the enactment of Section 19(i) of the Banking Act, financial institutions have been prohibited from directly or indirectly, by any device, whatsoever, paying interest on demand deposits. "Demand deposit" means any deposit that is payable on demand and is typically in the form of a checking account. The FRB originally adopted Regulation Q to implement Section 19(i). Over the years, financial institutions, pressed by the need to accommodate their customers, have attempted to avoid this prohibition in many creative ways while still remaining in compliance with the regulation. Through interpretations, the FRB deemed some actions as the indirect payment of interest and therefore prohibited the payment, while other actions were not considered the indirect payment of interest and therefore permitted. Section 627 of the Reform Act has brought an end to this by repealing Regulation Q effective July 21, 2011 and thereby eliminating the prohibition on the payment of interest on demand deposits.

Amending Regulation Z Regarding Ability to Repay Provisions

Pursuant to the Reform Act, on April 19, 2011, the FRB released a proposal to amend Regulation Z that would require creditors to determine a consumer's ability to repay a mortgage before making the loan and to establish minimum mortgage underwriting standards. Comments on the proposal were due July 22, 2011. However, the FRB notes that because general rulemaking authority for TILA was transferred to the Bureau on July 21, 2011, this proposed rule will not be finalized by the FRB. As of the date this summary was published, final rules had yet to be issued.

Changes to Risk-Based Pricing and Adverse Action Notices

Under the Fair Credit Reporting Act (FCRA), a risk-based pricing notice must be sent to the consumer if a credit report was used and, based on any information in the credit report (not just the credit score), the lender extends credit on material terms that are materially less favorable than those provided to a substantial portion of consumers. The FCRA also requires an adverse action notice to be sent to a consumer if a credit score (or a credit report) was used in taking adverse credit action. The Reform Act requires the disclosure of the credit score and other related information to consumers in both risk-based pricing notices and adverse action notices. In order to conform with the Reform Act's requirements, the FRB and Federal Trade Commission issued a final rule on July 15, 2011. 76 FR 41602. The final rule becomes effective August 15, 2011.

Regulation of Executive Compensation

As required by the Reform Act, the federal financial regulatory agencies issued a proposed rule in April 2011 to ensure that regulated financial institutions' incentive compensation agreements do not encourage inappropriate risks. Financial institutions subject to the proposed rule would be required to establish policies and procedures that ensure compliance with the proposed rule. Further, covered institutions would be required to provide certain information about their incentive compensation arrangements, which would have to be submitted to the institution's federal regulator. Final rules are expected to be issued by the end of 2011.

Stay Tuned!

As always, Aldrich, Bonnefin & Moore, PLC, will continue to post updates on the progress of the regulations under the Reform Act. So, stay tuned to remain informed.