

Mortgage Lending Developments: A New Federal Regulator and Mortgage Reform Under the Dodd-Frank Act

By Julie R. Caggiano, Jennifer L. Dozier, Richard P. Hackett,
and Arthur B. Axelson*

INTRODUCTION

On July 21, 2010, President Barack Obama signed into law landmark financial reform legislation, the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”).¹ The Dodd-Frank Act, which was passed in response to the financial meltdown of 2008–2009,² is the culmination of recent efforts to overhaul the United States financial regulatory system, and it represents a paradigm shift in the regulation of financial services. This survey discusses the new consumer protection agency (Title X) and mortgage reforms (Title XIV) contained in the Dodd-Frank Act.

TITLE X—CONSUMER FINANCIAL PROTECTION ACT

Title X of the Dodd-Frank Act, the Consumer Financial Protection Act of 2010 (“CFPA”),³ creates the Bureau of Consumer Financial Protection (the “CFPB”) and empowers it to enforce existing and new federal consumer financial laws.⁴ The discussion immediately below reviews the creation, scope, management, funding, powers, and activities of the CFPB. The CFPA also materially changes the standards and procedures that federal regulators and courts apply when determining

* Julie R. Caggiano is General Counsel of Envoy Mortgage, headquartered in Houston, Texas, and is Chair of the Membership Committee of the American Bar Association Section of Business Law. Jennifer L. Dozier is an associate at Franzén and Salzano in Atlanta, Georgia. Richard P. Hackett is a partner with the firm of Pierce Atwood LLP in Portland, Maine, and is Vice Chair of the Committee on Consumer Financial Services of the American Bar Association Section of Business Law. Arthur B. Axelson is head of the Financial Services Regulatory and Compliance Practice at the Dykema firm in Washington, D.C.

1. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) [hereinafter Dodd-Frank Act].

2. See generally Julie R. Caggiano, Therese G. Franzén & Jennifer L. Dozier, *Developments in State and Federal Mortgage Lending Laws: Predatory Lending and Beyond*, 65 BUS. LAW. 583 (2010) (in the 2010 Annual Survey).

3. Dodd-Frank Act, *supra* note 1, tit. X, §§ 1001–1100H, 124 Stat. at 1955–2113.

4. *Id.* § 1022, 124 Stat. at 1980 (to be codified at 12 U.S.C. § 5512).

whether a state consumer financial law⁵ applies to a national bank or a federally chartered thrift. Those new rules are discussed separately in this *Annual Survey*.⁶

The CFPB has broad powers over “covered persons,”⁷ a term that includes those who offer or provide a “financial product or service,”⁸ and may also reach, under certain circumstances, their “service providers”⁹ and “related persons.”¹⁰ The definition of each of these terms subsumes a complex set of covered financial activities and actors, together with partial or complete exemptions for certain industry segments and activities. In addition, section 1027 of the CFPA enumerates additional complete or partial exemptions for certain financial service providers, as noted below.

A “financial product or service” includes consumer credit (extending, servicing, acquiring, purchasing, selling, or brokering);¹¹ consumer leasing;¹² real estate settlement services and appraisals of real and personal property;¹³ deposit taking and money transmitting;¹⁴ stored value (selling, providing, and issuing, with exceptions);¹⁵ checks (cashing, collecting, guaranteeing);¹⁶ financial data processing;¹⁷ financial advisory services, including credit counseling, debt man-

5. See *id.* § 1044(a), 124 Stat. at 2014–15 (to be codified at 12 U.S.C. § 25b) (defining “state consumer financial laws”).

6. See Ralph T. Wutscher & David L. Beam, *The Dodd-Frank Act’s New Federalism*, 66 *BUS. LAW.* 519 (2011) (in this *Annual Survey*); see also Matthew Dyckman, Matthew S. Yoon & John P. Holahan, *Financial Regulatory Reform—The Dodd-Frank Act Rolls Back Federal Preemption*, 64 *CONSUMER FIN. L.Q. REP.* 129 (2010).

7. Dodd-Frank Act, *supra* note 1, § 1002(6), 124 Stat. at 1956 (to be codified at 12 U.S.C. § 5481(6)).

8. *Id.*; see also *id.* § 1002(15)(A), 124 Stat. at 1957–58 (to be codified at 12 U.S.C. § 5481(15)(A)) (defining “financial product or service”).

9. *Id.* § 1002(26), 124 Stat. at 1962–63 (to be codified at 12 U.S.C. § 5481(26)).

10. *Id.* § 1002(25), 124 Stat. at 1962 (to be codified at 12 U.S.C. § 5481(25)).

11. *Id.* § 1002(15)(A)(i), 124 Stat. at 1957–58 (to be codified at 12 U.S.C. § 5481(15)(A)(i)) (the definition excludes “solely extending commercial credit to a person who originates consumer credit transactions”).

12. *Id.* § 1002(15)(A)(ii), 124 Stat. at 1958 (to be codified at 12 U.S.C. § 5481(15)(A)(ii)). This includes

extending or brokering leases of personal or real property that are the functional equivalent of purchase finance arrangements, if—(I) the lease is on a non-operating basis; (II) the initial term of the lease is at least 90 days; and (III) . . . [with regard to real property], at the inception of the initial lease, the transaction is intended to result in ownership of the leased property to be transferred to the lessee.

Id.

13. *Id.* § 1002(15)(A)(iii), 124 Stat. at 1958 (to be codified at 12 U.S.C. § 5481(15)(A)(iii)).

14. *Id.* § 1002(15)(A)(iv), 124 Stat. at 1958 (to be codified at 12 U.S.C. § 5481(15)(A)(iv)). This section includes “otherwise acting as a custodian of funds or any financial instrument for use by or on behalf of a consumer.” *Id.* “Transmitting or exchanging funds” is further defined very broadly in section 1002(29), 124 Stat. at 1964 (to be codified at 12 U.S.C. § 5481(29)).

15. *Id.* § 1002(15)(A)(v), 124 Stat. at 1958 (to be codified at 12 U.S.C. § 5481(15)(A)(v)). The exceptions are for (i) “a seller [that] is not a party to the contract with the consumer for the stored value product, [if] another person is principally responsible for establishing the terms and conditions”; and (ii) “advertising the nonfinancial goods and services of the seller on the stored value card or device.” *Id.* “Stored value” is further defined in the Dodd-Frank Act in section 1002(28), again in a very broad fashion. *Id.* § 1002(28), 124 Stat. at 1963–64 (to be codified at 12 U.S.C. § 5481(28)).

16. *Id.* § 1002(15)(A)(vi), 124 Stat. at 1958 (to be codified at 12 U.S.C. § 5481(15)(A)(vi)).

17. *Id.* § 1002(15)(A)(vii), 124 Stat. at 1958–59 (to be codified at 12 U.S.C. § 5481(15)(A)(vii)). This excludes retail transaction data capture and persons who “provide[] access to a host server to a person for purposes of enabling that person to establish and maintain a website.” *Id.*

agement, and debt settlement;¹⁸ consumer reporting (“collecting, analyzing, maintaining, or providing,” with exceptions);¹⁹ debt collection (if related to a consumer financial product);²⁰ and any other financial product or service defined by rule issued by the CFPB.²¹

To be covered, the financial product or service must be offered or provided for use by consumers primarily for personal, family, or household use, except that the offering of credit-related services, settlement services, consumer reporting, or debt collection between businesses is covered, if the underlying product is offered to consumers.²²

In addition to the limitations and exclusions noted above, the term “financial product or service” expressly excludes the business of insurance and electronic conduit services.²³

Offering or providing any of the foregoing financial products or services will make the person a “covered person” subject to CFPB jurisdiction. Under some circumstances, that jurisdiction also reaches a vendor to or a related person of a “covered person.” Vendors are subject to CFPB examination and enforcement powers as “service providers” if they provide a “material service,” including participating in the design, operation, or maintenance of a consumer financial product or service or processing transactions relating to the product or service.²⁴

Given the very broad reach of the CFPB described above, some industries and professions that interact with consumers or support the financial services industry obtained exclusions of varying degrees and scope, which are collected in section

18. *Id.* § 1002(15)(A)(viii), 124 Stat. at 1959 (to be codified at 12 U.S.C. § 5481(15)(A)(viii)). This excludes SEC-regulated persons or persons regulated by a state securities commission. *Id.*

19. *Id.* § 1002(15)(A)(ix), 124 Stat. at 1959–60 (to be codified at 12 U.S.C. § 5481(15)(A)(ix)). There are exceptions for persons who: (i) use information that relates solely to the transaction between a consumer and such person; (ii) provide such information to an affiliate; or (iii) provide such information for non-consumer financial products and services such as employment, residential leases, etc. *Id.*

20. *Id.* § 1002(15)(A)(x), 124 Stat. at 1960 (to be codified at 12 U.S.C. § 5481(15)(A)(x)). *Id.*

21. Dodd-Frank Act, *supra* note 1, § 1002(15)(A)(xi), 124 Stat. at 1960 (to be codified at 12 U.S.C. § 5481(15)(A)(xi)). The CFPB must find that such a product or service is “(I) entered into . . . to evade any Federal consumer financial law; or (II) permissible for a bank or for a financial holding company to offer . . . and has, or is likely to have, a material impact on consumers.” *Id.* The following activities are excluded from this “catch-all” provision: (i) identity authentication; (ii) fraud or identity theft detection, prevention, and investigation; (iii) document retrieval and delivery; (iv) public information records information retrieval; and (v) anti-money laundering products or services. *Id.* § 1002(15)(B)(i), 124 Stat. at 1960 (to be codified at 12 U.S.C. § 5481(15)(B)).

22. *Id.* § 1002(5)(B), 124 Stat. at 1956 (to be codified at 12 U.S.C. § 5481(5)(B)).

23. *Id.* § 1002(15)(C), 124 Stat. at 1960 (to be codified at 12 U.S.C. § 5481(15)(C)). These terms are in turn defined in the Dodd-Frank Act in section 1002(3), 124 Stat. at 1955 (to be codified at 12 U.S.C. § 5481(3)) (“business of insurance”), and 1002(11), 124 Stat. at 1956–57 (to be codified at 12 U.S.C. § 5481(11)) (“electronic conduit services”). The latter is intended to exclude those who provide data transmission and storage generally, without modifying the content and without differentiating between financial data and other data (i.e., content-neutral data systems). *Id.* § 1002(11).

24. *Id.* § 1002(26), 124 Stat. at 1963 (to be codified at 12 U.S.C. § 5481(26)). But the term excludes (i) support services generally provided to businesses or of a ministerial nature; and (ii) advertisers of consumer financial products or services. *Id.*

1027 of the CFPB. With the notable exception of automobile dealers,²⁵ the exclusions do not apply to CFPB rulemaking under the “enumerated consumer laws” nor to the enforcement of those rules by either the Federal Trade Commission (“FTC”) or the CFPB.²⁶ The following persons are generally excluded from the enforcement, examination, supervision, and rulemaking authority of the CFPB: (i) merchants, retailers, or sellers of any non-financial good or services who do not offer financial products or services,²⁷ together with credit-sellers who: (a) extend credit directly to a consumer in order to enable the consumer to purchase a non-financial good or service; (b) directly, or through an agreement with a third party, collect debt arising from credit extended as indicated above; or (c) sell or convey debt described above that is delinquent or otherwise in default;²⁸ (ii) licensed real estate brokers;²⁹ (iii) manufactured home retailers and modular home retailers;³⁰ (iv) accountants and tax preparers;³¹ (v) lawyers;³² (vi) persons subject to regulation by a state insurance regulator;³³ (vii) employee benefit and compensation plans;³⁴ (viii) persons regulated by a state securities commission;³⁵ (ix) persons

25. *Id.* § 1029, 124 Stat. at 2004–05 (to be codified at 12 U.S.C. § 5519). This section excludes those engaged in the sale, servicing, and leasing of motor vehicles from any CFPB jurisdiction. *Id.*

26. *Id.* § 1027(a)(1), 124 Stat. at 1995 (to be codified at 12 U.S.C. § 5517(a)(1)).

27. *Id.*

28. *Id.* § 1027(a)(2)(A), 124 Stat. at 1995 (to be codified at 12 U.S.C. § 5517(a)(2)(A)). This exclusion does not apply if: (i) “the person assigns, sells, or otherwise conveys” non-delinquent debt; (ii) “the credit extended significantly exceeds the market value of the nonfinancial good or service provided”; or (iii) the person “regularly extends [such] credit and the credit is subject to a finance charge.” *Id.* § 1027(a)(2)(B), 124 Stat. at 1995–96 (to be codified at 12 U.S.C. § 5517(a)(2)(B)). Notwithstanding the foregoing, the exclusion does apply to a person described in clause (iii) above, unless the person is engaged “significantly” in offering or providing consumer financial products or services. *Id.* § 1027(a)(2)(C), 124 Stat. at 1996 (to be codified at 12 U.S.C. § 5517(a)(2)(C)). Last, notwithstanding all of the above, a merchant, retailer, or seller who meets the small business threshold defined in section 3 of the Small Business Act is excluded from coverage under the CFPB, as long as that merchant, retailer, or seller extends credit only for the sale of non-financial goods and services and retains such credit on its own accounts (except to sell or convey delinquent debt). *Id.* § 1027(a)(2)(D)(ii), 124 Stat. at 1996 (to be codified at 12 U.S.C. § 5517(a)(2)(D)(ii)). None of the exclusions apply to the CFPB’s role in enforcement of and rulemaking under the enumerated consumer laws (such as the Truth in Lending Act). *See supra* note 26.

29. Dodd-Frank Act, *supra* note 1, § 1027(b), 124 Stat. at 1997 (to be codified at 12 U.S.C. § 5517(b)). This is limited to brokerage of real property and negotiating any portion of a real estate contract (sale, purchase, lease, rental, or exchange). *Id.*

30. *Id.* § 1027(c), 124 Stat. at 1997–98 (to be codified at 12 U.S.C. § 5517(c)). This is similar to the limitation for real estate brokers.

31. *Id.* § 1027(d), 124 Stat. at 1998–99 (to be codified at 12 U.S.C. § 5517(d)). This is limited to “customary and usual” accounting activity. *Id.*

32. *Id.* § 1027(e), 124 Stat. at 1999 (to be codified at 12 U.S.C. § 5517(e)) (for services “offered, or provided as part of, or incidental to, the practice of law, occurring exclusively within the scope of the attorney-client relationship”).

33. *Id.* § 1027(f), 124 Stat. at 2000 (to be codified at 12 U.S.C. § 5517(f)). This excludes people who offer or provide consumer financial products or services. *Id.*

34. *Id.* § 1027(g), 124 Stat. at 2000–01 (to be codified at 12 U.S.C. § 5517(g)). This includes plans described in sections 220, 223, 401(a), 403(a), 403(b), 408, 408A, 529, or 530 of the Internal Revenue Code, or any employee benefit or compensation plan, including any plan subject to Title I of the Employee Retirement Income Security Act or any prepaid tuition program offered by a state. *Id.*

35. *Id.* § 1027(h), 124 Stat. at 2001–02 (to be codified at 12 U.S.C. § 5517(h)). This excludes people who offer or provide consumer financial products or services. *Id.*

regulated by the U.S. Securities and Exchange Commission (“SEC”) and Commodities Futures Trading Commission (“CFTC”),³⁶ (x) persons regulated by the Farm Credit Administration,³⁷ and (xi) charitable fundraising.³⁸

A final, critical definition in describing the scope of CFPB authority is the “enumerated consumer laws” or “ECLs.”³⁹ The CFPB receives exclusive rulemaking authority under these laws⁴⁰ and has exclusive⁴¹ or shared⁴² enforcement authority under them. The ECLs essentially include every federal consumer financial protection law enacted since the Truth in Lending Act in 1968,⁴³ with the notable exception of the Community Reinvestment Act (“CRA”).⁴⁴

POWERS, RESPONSIBILITIES, AND FUNCTIONS OF THE CFPB: REGULATION, SUPERVISION, AND ENFORCEMENT

PURPOSES

The primary purpose of the CFPB is to ensure that all consumers have access to consumer financial products and services that are “fair, transparent, and competitive.”⁴⁵ This objective is to be carried out through the promulgation of

36. *Id.* § 1027(i), (j), 124 Stat. at 2002 (to be codified at 12 U.S.C. § 5517(i), (j)). The SEC and CFTC are directed to consult and coordinate with the CFPB with respect to any product or service that competes with a consumer financial product or service. *Id.*

37. *Id.* § 1027(k), 124 Stat. at 2002 (to be codified at 12 U.S.C. § 5517(k)).

38. *Id.* § 1027(l), 124 Stat. at 2002–03 (to be codified at 12 U.S.C. § 5517(l)). This excludes people who offer or provide consumer financial products or services. *Id.*

39. “Enumerated consumer laws” include the following: Alternative Mortgage Transaction Parity Act; Consumer Leasing Act; Electronic Fund Transfer Act (except § 920, which stays with the Federal Reserve Board); Equal Credit Opportunity Act; Fair Credit Billing Act; Fair Credit Reporting Act (except §§ 615(a) and 628); Home Owners Protection Act; Fair Debt Collection Practices Act; Federal Deposit Insurance Act (§ 43(b)–43(f) only); Gramm-Leach-Bliley Act (§§ 502–509 only, except § 505 as it applies to § 501(b)); Home Mortgage Disclosure Act; Home Ownership and Equity Protection Act; Real Estate Settlement Procedures Act; SAFE Mortgage Licensing Act; Truth in Lending Act; Truth in Savings Act; Omnibus Appropriations Act (§ 626 only); and Interstate Land Sales Full Disclosure Act. *Id.* § 1002(12), 124 Stat. at 1957 (to be codified at 12 U.S.C. § 5481(12)).

40. *Id.* § 1022(b)(4), 124 Stat. at 1981 (to be codified at 12 U.S.C. § 5512(b)(4)).

41. With respect to “large” depository institutions, the CFPB has exclusive examination and enforcement authority for the ECLs; with respect to smaller institutions, the CFPB has limited examination authority and no enforcement authority for the ECLs. *Id.* §§ 1025, 1026, 124 Stat. at 1990–95, 1993 (to be codified at 12 U.S.C. §§ 5515, 5516).

42. With respect to nonbanks (except auto dealers), the CFPB has exclusive rulemaking authority, and it also has examination, supervision, and licensing authority over specified nonbanks. *Id.* § 1024, 124 Stat. at 1987 (to be codified at 12 U.S.C. § 5514); *see also infra* notes 65–70 and accompanying text. The CFPB shares enforcement over nonbanks with the FTC. *See Dodd-Frank Act, supra* note 1, § 1024(c)(3), 124 Stat. at 1989 (to be codified at 12 U.S.C. § 5514(c)(3)); *see also infra* note 81 and accompanying text.

43. Truth in Lending Act, Pub. L. No. 90-321, 82 Stat. 146 (codified as amended at 15 U.S.C.A. §§ 1601–1667f (West 2009 & Supp. 2010)) [hereinafter TILA].

44. 12 U.S.C. §§ 2901–2908 (2006). Arguably, the CRA does not protect individual consumers but rather improves the access of entire segments of society to financial services.

45. Dodd-Frank Act, *supra* note 1, § 1021(a), 124 Stat. at 1979–80 (to be codified at 12 U.S.C. § 5511(a)). The CFPB is authorized to exercise its authority under ECLs for the purposes of ensuring that, with respect to consumer financial products and services:

- (1) consumers are provided with timely and understandable information to make responsible decisions about financial transactions;
- (2) consumers are protected from unfair, deceptive, or

rules and regulations, compliance supervision, and oversight of the entities under its jurisdiction (as described above), as well as education, market analysis, assessment of market risks, and enforcement.

RULEMAKING AUTHORITY

The CFPB is authorized to prescribe rules and issue guidance necessary to implement and further the purposes and objectives of the ECLs.⁴⁶ The CFPB provides the CFPB with broad and powerful authority, in that it is given exclusive rulemaking authority to implement these federal laws, and its interpretations are to be given deference by the courts as the ECLs' exclusive interpreter.⁴⁷

The CFPB's rulemaking authority is not unfettered, however, and must be exercised in accordance with certain standards, and in collaboration with certain other agencies. In prescribing regulations, the CFPB must consider "the potential benefits and costs to[, and other impact on,] consumers and covered persons,"⁴⁸ including the potential reduction of access by consumers to consumer financial products or services resulting from" the regulation.⁴⁹ In addition, the CFPB must consult with the appropriate prudential regulators⁵⁰ or other federal agencies prior to proposing a rule and during the comment process regarding consistency with prudential, market, and systemic objectives of such agencies.⁵¹ If any of these other agencies provides the CFPB with a written objection to the proposed rule, the CFPB must include in the adopting release a description of the objection and the basis for the CFPB decision, if any, regarding such objection.⁵²

A member of the Financial Stability Oversight Council ("Council")⁵³ may petition the Council, and the Council may set aside all or a part of a regulation issued

abusive acts and practices and from discrimination; (3) outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens; (4) 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; and (5) markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.

Id. § 1021(b), 124 Stat. at 1980 (to be codified at 12 U.S.C. § 5511(b)).

46. See *supra* note 39 for a list of these ECLs.

47. Dodd-Frank Act, *supra* note 1, § 1022(b)(4), 124 Stat. at 1981 (to be codified at 12 U.S.C. § 5512(b)(4)).

48. "Covered person" is defined as "(A) any person that engages in offering or providing a consumer financial product or service; and (B) any affiliate of a person described in subparagraph (A) if such affiliate acts as a service provider to such person." *Id.* § 1002(6), 124 Stat. at 1956 (to be codified at 12 U.S.C. § 5481(6)).

49. *Id.* § 1022(b)(2)(A), 124 Stat. at 1980–81 (to be codified at 12 U.S.C. § 5512(b)(2)(A)).

50. Prudential regulators include the Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, Office of Thrift Supervision, Federal Reserve Board ("FRB"), and National Credit Union Administration. *Id.* § 1002(24), 124 Stat. at 1962 (to be codified at 12 U.S.C. § 5481(24)); see also *infra* note 67 and accompanying text.

51. Dodd-Frank Act, *supra* note 1, § 1022(b)(2)(B), 124 Stat. at 1981 (to be codified at 12 U.S.C. § 5512(b)(2)(B)).

52. *Id.* § 1022(b)(2)(C), 124 Stat. at 1981 (to be codified at 12 U.S.C. § 5512(b)(2)(C)).

53. The Financial Stability Oversight Council is created by Title III of the Dodd-Frank Act, *supra* note 1, 124 Stat. at 1520–70.

by the CFPB if the Council decides that the provision or regulation would jeopardize the safety and soundness of the U.S. banking system or the stability of the financial system.⁵⁴

In promulgating rules and regulations, the CFPB is also authorized to “conditionally or unconditionally exempt any class of covered persons, service providers, or consumer financial products or services, from any provision of this title, or from any rule issued under this title, as the CFPB determines necessary or appropriate to carry out the purposes and objectives of this title.”⁵⁵

In connection with its rulemaking authority, the CFPB is charged with monitoring the risks associated with the offering and provision of consumer products and services in the financial market.⁵⁶ It is required to evaluate the risks and costs to consumers, the consumers’ understanding of the product risks, available legal protections, the prevalence and growth rate of various consumer products, and any disproportionate effects on underserved communities.⁵⁷ The CFPB’s monitoring and data collection are limited by rules regarding business confidentiality and consumer privacy.⁵⁸

The CFPB may prescribe rules setting forth disclosure requirements to ensure that the features of any consumer financial product or service are “fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service.”⁵⁹ In connection with this disclosure rulemaking authority, the CFPB may issue sample disclosure forms that have been validated through consumer testing.⁶⁰ The use of such model forms creates a safe harbor for the entity using such disclosures.⁶¹

SUPERVISION

Scope

The CFPB has been granted supervisory authority over both nondepository entities and large depository institutions with assets exceeding \$10 million.⁶² Nondepository entities include covered persons that originate, broker, or service real estate-secured consumer loans, as well as larger market participants and those

54. *Id.* § 1023, 124 Stat. at 1985–86 (to be codified at 12 U.S.C. § 5513).

55. *Id.* § 1022(b)(3), 124 Stat. at 1981 (to be codified at 12 U.S.C. § 5512(b)(3)). The CFPB’s decision to exempt entities or products must take into account:

(i) the total assets of the class of covered persons; (ii) the volume of transactions involving consumer financial products or services in which the class of covered persons engages; and (iii) existing provisions of law which are applicable to the consumer financial product or service and the extent to which such provisions provide consumers with adequate protections.

Id.

56. *Id.* § 1022(c), 124 Stat. at 1981–83 (to be codified at 12 U.S.C. § 5512(c)).

57. *Id.*

58. *Id.*

59. *Id.* § 1032(a), 124 Stat. at 2006–07 (to be codified at 12 U.S.C. § 5532(a)).

60. *Id.* § 1032(b), 124 Stat. at 2007 (to be codified at 12 U.S.C. § 5532(b)).

61. *Id.* § 1032(d), 124 Stat. at 2007 (to be codified at 12 U.S.C. § 5532(d)).

62. *Id.* §§ 1024, 1025, 124 Stat. at 1987–93, 1990 (to be codified at 12 U.S.C. §§ 5514, 5515).

persons who, in offering or providing consumer financial products or services, are engaging in, or have engaged in, conduct that poses risks to consumers.⁶³ It also is to supervise any persons offering private education loans or payday loans to consumers.⁶⁴

Nondepository Entities

In supervising nondepository institutions, the CFPB must require reports from, and conduct examinations of, its supervisees for the purposes of: “(A) assessing compliance with the requirements of Federal consumer financial laws; (B) obtaining information about the activities and compliance systems or procedures [of such entities]; and (C) detecting and assessing any risks to consumers and to markets for consumer financial products and services.”⁶⁵ The CFPB also directs the CFPB to develop a risk-based supervisory program, determined by:

(A) asset size of the [entity]; (B) the volume of the transactions involving consumer financial products or services in which the [entity] engages; (C) the risks to consumers created by the provision of such consumer financial products or services; (D) the extent to which institutions are subject to oversight by State authorities for consumer protection; and (E) any other factors that the [CFPB] determines to be relevant to a class of covered persons.⁶⁶

In an effort to reduce the regulatory burden, duplication of effort, and undue burden on the supervisees, the CFPB is required to coordinate its supervisory activities with the supervisory activities conducted by prudential banking regulators and the state bank regulatory authorities; this coordination must include establishing schedules for examination and requirements regarding reports to be submitted by its supervisees.⁶⁷ In addition, the CFPB is, to the fullest extent possible, required to use reports submitted to either state or federal agencies, as well as publicly reported information.⁶⁸ Nonetheless, the CFPB’s authority to require the reporting of information is not limited to reports made to other regulators. The CFPB may also prescribe rules regarding record retention and requirements for nondepository entities and their principals, officers, and directors to ensure that the entities are legitimate and are able to perform their obligations to consumers.⁶⁹ The CFPB must consult with state agencies in an effort to coordinate registration, bonding, and other requirements that the state may have previously established.⁷⁰

63. *Id.* § 1024(a)(1), 124 Stat. at 1987 (to be codified at 12 U.S.C. § 5514(a)(1)).

64. *Id.*

65. *Id.* § 1024(b)(1), 124 Stat. at 1987 (to be codified at 12 U.S.C. § 5514(b)(1)).

66. *Id.* § 1024(b)(2), 124 Stat. at 1987–88 (to be codified at 12 U.S.C. § 5514(b)(2)).

67. *Id.* § 1024(b)(3), 124 Stat. at 1988 (to be codified at 12 U.S.C. § 5514(b)(3)); *see also supra* note 50.

68. Dodd-Frank Act, *supra* note 1, § 1024(b)(4), 124 Stat. at 1988 (to be codified at 12 U.S.C. § 5514(b)(4)).

69. *Id.* § 1024(b)(7), 124 Stat. at 1988–89 (to be codified at 12 U.S.C. § 5514(b)(7)).

70. *Id.* § 1024(b)(7)(D), 124 Stat. at 1989 (to be codified at 12 U.S.C. § 5514(b)(7)(D)).

Large Depository Institutions

While the CFPB has been given supervisory powers over depository institutions with total assets exceeding \$10 million, these powers are more limited than those in regard to nondepository institutions, in that greater coordination with the institution's prudential regulator or state bank regulator is required.⁷¹ The CFPB is also given exclusive supervisory authority over these large financial institutions in regard to compliance with the requirements of the ECLs and assessing market and consumer risks.⁷² Similarly, the CFPB also must consult with the institution's regulators, in this instance the institution's prudential regulator, or the state bank regulator in an effort to coordinate examination and reporting requirements.⁷³

In connection with these large depository institutions, the CFPB must coordinate and conduct simultaneous examinations of each of these institutions and share its draft report with the institution's other supervisory agency.⁷⁴ Prior to issuing a final examination report, the CFPB is also required to take into consideration the concerns and comments of the other agency.⁷⁵ If the supervisory determinations of the CFPB and the other supervisory agency are in conflict, the depository institution may request that the agencies coordinate and present "a joint statement of coordinated action," in which case the two agencies must provide such a statement within thirty days of the request.⁷⁶

Smaller Depository Institutions

While the CFPB does not have supervisory or enforcement power over depository institutions with assets of less than \$10 million, it may require reports from such institutions in connection with its duty to implement the ECLs and to assess and detect risks to consumers and consumer financial markets.⁷⁷ In addition, the CFPB may include an examiner on a sampling basis in examinations conducted by the smaller institution's prudential regulator to assess compliance with the ECLs.⁷⁸ The prudential regulator must cooperate with the CFPB and share examination information and reports.⁷⁹

71. *Id.* § 1025(b)(2), 124 Stat. at 1990 (to be codified at 12 U.S.C. § 5515(b)(2)).

72. *Id.* § 1025(b)(1), 124 Stat. at 1990 (to be codified at 12 U.S.C. § 5515(b)(1)).

73. *Id.* § 1025(e)(1), 124 Stat. at 1991–92 (to be codified at 12 U.S.C. § 5515(e)(1)).

74. *Id.*

75. *Id.*

76. *Id.* § 1025(e)(3), 124 Stat. at 1992 (to be codified at 12 U.S.C. § 5515(e)(3)). If the agencies cannot agree or if one agency takes action without the other, the depository institution may institute an appeal to a governing panel, composed of a representative from the CFPB and the other agency, both of whom cannot have been involved in the supervisory determinations in conflict, as well as a representative from one of the other banking regulators, selected on a rotating basis. *Id.* § 1025(e)(4), 124 Stat. at 1992 (to be codified at 12 U.S.C. § 5515(e)(4)).

77. *Id.* § 1026(b), 124 Stat. at 1993–94 (to be codified at 12 U.S.C. § 5516(b)).

78. *Id.* § 1026(c), 124 Stat. at 1994 (to be codified at 12 U.S.C. § 5516(c)).

79. *Id.* § 1026(d), 124 Stat. at 1994 (to be codified at 12 U.S.C. § 5516(d)).

ENFORCEMENT

As is more fully discussed elsewhere,⁸⁰ the CFPB has also been granted enforcement authority in connection with the ECLs. To the extent that federal law authorizes the CFPB and another federal agency to have enforcement authority in connection with an ECL, the CFPB is granted exclusive enforcement authority over that law in connection with nondepository entities and large depository institutions.⁸¹ The prudential regulators of smaller depository institutions have exclusive enforcement authority over those institutions in connection with compliance with the ECLs.⁸²

MISCELLANEOUS CFPB AUTHORITY

The CFPB has been granted authority in a number of additional areas. It has power to study and possibly ban the inclusion of arbitration clauses in connection with consumer financial products.⁸³ The CFPB may also prescribe rules prohibiting “unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service.”⁸⁴

The CFPB must also establish, in consultation with other federal regulators, reasonable procedures that will provide a timely response to consumer complaints against, or inquiries concerning, covered persons.⁸⁵ In turn, covered persons subject to supervision and enforcement by the CFPB must provide a timely response to a CFPB inquiry into an alleged complaint and must comply with a consumer request for information within the covered person’s control.⁸⁶

TITLE XIV—MORTGAGE REFORM AND ANTI-PREDATORY LENDING ACT

INTRODUCTION

Title XIV of the Dodd-Frank Act enacts the Mortgage Reform and Anti-Predatory Lending Act (“Mortgage Reform Act”).⁸⁷ The Mortgage Reform Act is intended

80. See *supra* notes 39–44 and accompanying text; see also John L. Ropiequet, Christopher S. Najeva & L. Jean Noonan, *Fair Lending Developments: Enforcement Comes to the Fore*, 66 *BUS. LAW.* 447 (2011) (in this *Annual Survey*).

81. Dodd-Frank Act, *supra* note 1, §§ 1024(c), 1025(c), 124 Stat. at 1989, 1991 (to be codified at 12 U.S.C. §§ 5514(c), 5515(c)). The FTC retains some enforcement authority over nonbanks, and the CFPB must coordinate an enforcement regulation agreement with the FTC. *Id.* § 1024(c)(3), 124 Stat. at 1989 (to be codified at 12 U.S.C. § 5515(c)(3)); see also *supra* note 42.

82. Dodd-Frank Act, *supra* note 1, § 1026(c), 124 Stat. at 1994 (to be codified at 12 U.S.C. § 5516(c)).

83. *Id.* § 1028(a), 124 Stat. at 2003–04 (to be codified at 12 U.S.C. § 5518(a)); see also Alan S. Kaplinsky, Mark J. Levin & Martin C. Bryce, Jr., *Arbitration Developments: Has the Supreme Court Finally Stepped In?*, 66 *BUS. LAW.* 529, 537–38 (2011) (in this *Annual Survey*).

84. Dodd-Frank Act, *supra* note 1, § 1031(b), 124 Stat. at 2005–06 (to be codified at 12 U.S.C. § 5531(b)).

85. *Id.* § 1034(a), 124 Stat. at 2008 (to be codified at 12 U.S.C. § 5534(a)).

86. *Id.* § 1034(b), (c), 124 Stat. at 2009 (to be codified at 12 U.S.C. § 5534(b), (c)). Responses to such requests are limited by business confidentiality and consumer privacy requirements. *Id.*

87. *Id.* §§ 1400–1498, 124 Stat. at 2136–2212; see also Robert A. Cook & Meghan Musselman, *Summary of the Mortgage Lending Provisions in the Dodd-Frank Wall Street Reform and Consumer Protection Act*, 64 *CONSUMER FIN. L.Q. REP.* 231 (2010).

to address perceived abuses related to subprime mortgages and amends TILA in an effort to ensure that consumers “receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans and that are understandable and not unfair, deceptive, or abusive.”⁸⁸ Most of the substantive provisions of the Mortgage Reform Act are designated as consumer protection laws under the jurisdiction of the CFPB.⁸⁹

RESIDENTIAL MORTGAGE LOAN ORIGATION STANDARDS

The Mortgage Reform Act imposes a number of new requirements and restrictions on “mortgage originators.”⁹⁰

Mortgage originators are required to be qualified and registered or licensed in accordance with applicable state or federal law, including the SAFE Act,⁹¹ and must include on all loan documents their unique identifier assigned by the Nationwide Mortgage Licensing System and Registry.⁹²

The Mortgage Reform Act also bans “steering” incentives, by prohibiting mortgage originators from receiving yield spread premiums or any other compensation that varies based on the terms of the loan other than the amount of the principal.⁹³ Mortgage originators cannot receive any compensation from any person other than the consumer except if the consumer has not paid any compensation directly to the mortgage originator and has not paid any upfront discount points, origination points, or fees other than bona fide third party charges.⁹⁴

88. Dodd-Frank Act, *supra* note 1, § 1402, 124 Stat. at 2138 (to be codified at 15 U.S.C. § 1639b(a)(2)).

89. *Id.* § 1400, 124 Stat. at 2136 (to be codified at 15 U.S.C. § 1601 note).

90. *Id.* §§ 1401–1405, 124 Stat. at 2137–42 (to be codified at 15 U.S.C. §§ 1602, 1639b). A “mortgage originator” is any person who, for direct or indirect compensation or gain: “(i) takes a residential mortgage loan application; (ii) assists a consumer in obtaining or applying to obtain a residential mortgage loan; or (iii) offers or negotiates terms of a residential mortgage loan.” *Id.* § 1401, 124 Stat. at 2137 (to be codified at 15 U.S.C. § 1602(cc)(2)(A)). A person “assists a consumer in obtaining or applying to obtain a residential mortgage loan” by, among other things, “advising on residential mortgage loan terms (including rates, fees, and other costs), preparing residential mortgage loan packages, or collecting information on behalf of the consumer with regard to a residential mortgage loan.” *Id.*, 124 Stat. at 2138 (to be codified at 15 U.S.C. § 1602(cc)(4)). Any person who holds himself out to the public as being able to provide mortgage origination services is also considered a mortgage originator. *Id.*, 124 Stat. at 2137 (to be codified at 15 U.S.C. § 1602(cc)(2)(B)). The term does not include persons who perform purely administrative or clerical tasks relating to a residential mortgage loan application. *Id.*, 124 Stat. at 2137 (to be codified at 15 U.S.C. § 1602(cc)(2)(C)). And, unlike the Secure and Fair Enforcement for Mortgage Licensing Act of 2008, the Mortgage Reform Act expressly excludes servicers and their employees, agents, and contractors from the definition of “mortgage originator.” *Id.* § 1401, 124 Stat. at 2138 (to be codified at 15 U.S.C. § 1602(cc)(2)(G)).

91. On the SAFE Act, see Julie R. Caggiano, Therese G. Franzén & Jennifer L. Dozier, *Developments in State and Federal Mortgage Lending Laws: Predatory Lending and Beyond*, 65 Bus. Law. 583, 584–86 (2010) (in the 2010 Annual Survey); Julie R. Caggiano, Therese G. Franzén & Jennifer L. Dozier, *Mortgage and Predatory Lending Law Developments*, 64 Bus. Law. 517, 518–21 (2009) (in the 2009 Annual Survey).

92. Dodd-Frank Act, *supra* note 1, § 1402, 124 Stat. at 2139 (to be codified at 15 U.S.C. § 1639b(b)(1)).

93. *Id.* § 1403, 124 Stat. at 2139 (to be codified at 15 U.S.C. § 1639b(c)(1)).

94. *Id.*, 124 Stat. at 2139–40 (to be codified at 15 U.S.C. § 1639b(c)(2)).

The Mortgage Reform Act directs the FRB⁹⁵ to prescribe regulations that prohibit mortgage originators from engaging in certain mortgage origination practices that constitute improper steering,⁹⁶ and grants broad discretionary authority to the CFPB to issue regulations prohibiting any terms or practices that it finds to be abusive, unfair, deceptive, or predatory.⁹⁷

MINIMUM UNDERWRITING STANDARDS FOR MORTGAGES

A creditor is prohibited from making a residential mortgage loan “unless [it] makes a reasonable and good faith determination based on verified and documented information that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan, according to its terms, and all applicable taxes, insurance . . . , and assessments.”⁹⁸ This determination is to be made by examining the consumer’s credit history, current and expected income, current obligations, debt-to-income ratio, employment status, and other financial resources.⁹⁹ The determination cannot be based on the consumer’s equity in the property securing the loan.¹⁰⁰

The creditor must verify the consumer’s income and assets “by reviewing the consumer’s Internal Revenue Service Form W-2, tax returns, payroll receipts, [bank] records, or other third-party documents that provide reasonably reliable evidence of the consumer’s income or assets.”¹⁰¹

The creditor must use a fully amortizing repayment schedule for determining the consumer’s ability to repay the loan.¹⁰² The Mortgage Reform Act provides guidance for determining the ability to repay for nonstandard loans, such as negative amortization and interest-only loans, calculating the monthly payment amount for loans

95. Final regulations required by the Mortgage Reform Act are to be issued within eighteen months after the designated transfer date and must take effect no later than twelve months after issuance. *Id.* § 1400(c), 124 Stat. at 2136 (to be codified at 15 U.S.C. § 1602 note). The regulations will be issued by the CFPB when authority over the Mortgage Reform Act transfers to the CFPB on the designated transfer date. *Id.* §§ 1061(b), 1062, 124 Stat. at 2036, 2039–40 (to be codified at 12 U.S.C. §§ 5581(b), 5582). On September 20, 2010, United States Treasury Secretary Timothy Geithner announced that the designated transfer date is July 21, 2011. See Designated Transfer Date, 75 Fed. Reg. 57252, 57252 (Sept. 20, 2010).

96. Prohibited practices include (i) steering a consumer to a residential mortgage loan that the consumer lacks a reasonable ability to repay (in accordance with regulations under TILA) or that has predatory characteristics, such as equity-stripping, excessive fees, or abusive terms; (ii) steering a consumer from a “qualified mortgage” to a mortgage loan that is not a “qualified mortgage”; (iii) “abusive or unfair lending practices that promote disparities among consumers of equal credit worthiness but of different race, ethnicity, gender, or age”; (iv) “mischaracterizing the credit history of a consumer or the mortgage loans available to a consumer”; (v) mischaracterizing the appraised value of the property securing the residential mortgage loan; or (vi) discouraging a consumer from seeking a residential mortgage loan from another mortgage originator if a creditor is unable to suggest, offer, or recommend a loan that is less expensive than a loan for which the consumer qualifies. Dodd-Frank Act, *supra* note 1, § 1403, 124 Stat. at 2140 (to be codified at 15 U.S.C. § 1639b(c)(3)).

97. *Id.* § 1405, 124 Stat. at 2141–42 (to be codified at 15 U.S.C. § 1639b(e)).

98. *Id.* § 1411, 124 Stat. at 2142 (to be codified at 15 U.S.C. § 1639c(a)(1)).

99. *Id.*, 124 Stat. at 2143 (to be codified at 15 U.S.C. § 1639c(a)(3)).

100. *Id.*

101. *Id.* (to be codified at 15 U.S.C. § 1639c(a)(4)).

102. *Id.* (to be codified at 15 U.S.C. § 1639c(a)(3)).

that do not have substantially equal monthly payments, and refinancing hybrid loans with the current lender.¹⁰³ There is a rebuttable presumption that if a loan is a “qualified mortgage,”¹⁰⁴ then the consumer has the ability to repay the loan.¹⁰⁵

The Mortgage Reform Act eliminates prepayment penalties on residential mortgage loans that do not qualify as lower-priced, fixed-rate “qualified mortgages.”¹⁰⁶ Lower priced, fixed-rate “qualified mortgages” may contain prepayment penalties provided the penalties are phased out from a maximum of 3 percent in the first year, 2 percent in the second year, 1 percent in the third year, and no prepayment penalty thereafter.¹⁰⁷ Further, a creditor may not offer a residential mortgage loan with a prepayment penalty unless it also offers a loan without a prepayment penalty.¹⁰⁸

NEW DISCLOSURES FOR MORTGAGE LOANS

The Mortgage Reform Act imposes several new disclosure requirements in connection with residential mortgage loans. These disclosure requirements include the following:

- pre-consummation disclosure and counseling for negative amortization loans;¹⁰⁹
- pre-consummation disclosure of state anti-deficiency protection;¹¹⁰
- disclosure of the creditor’s partial payment acceptance policy;¹¹¹
- disclosure of the initial and fully indexed monthly principal and interest payment amounts and total payment amounts for variable rate loans with escrow accounts;¹¹²

103. *Id.*, 124 Stat. at 2143–45 (to be codified at 15 U.S.C. § 1639c(a)(6)).

104. A “qualified mortgage” is any residential mortgage loan that meets all of the following requirements: (i) regular loan payments do not result in an increase in the principal balance or allow the consumer to defer repayment of principal; (ii) except as permitted by regulation, it does not have a balloon payment “that is more than twice as large as the average of earlier scheduled payments”; (iii) the consumer’s income and financial resources are verified and documented; (iv) for a fixed rate loan, “the underwriting process is based on a payment schedule that fully amortizes the loan over the loan term and takes into account all applicable taxes, insurance, and assessments”; (v) for an adjustable rate loan, “the underwriting is based on the maximum rate permitted under the loan during the first 5 years, and a payment schedule that fully amortizes the loan over the loan term and takes into account all applicable taxes, insurance, and assessments”; (vi) the loan complies with any guidelines or regulations established by the CFPB regarding ratios of total monthly debt-to-income or any alternative measure determined by the CFPB; (vii) the total points and fees do not exceed 3 percent of the total loan amount; (viii) the loan term does not exceed thirty years, with limited exceptions; and (ix) in the case of a reverse mortgage, one that meets the standards for a qualified mortgage, as set by the CFPB. *Id.* § 1412, 124 Stat. at 2145–46 (to be codified at 15 U.S.C. § 1639c(b)(2)(A)).

105. *Id.* § 1412, 124 Stat. at 2145 (to be codified at 15 U.S.C. § 1639c(b)(1)).

106. *Id.* § 1414(a), 124 Stat. at 2149 (to be codified at 15 U.S.C. § 1639c(c)(1)(A)).

107. *Id.*, 124 Stat. at 2150 (to be codified at 15 U.S.C. § 1639c(c)(3)).

108. *Id.* (to be codified at 15 U.S.C. § 1639c(c)(4)).

109. *Id.* § 1414(b), 124 Stat. at 2151–52 (to be codified at 15 U.S.C. § 1639c(f)).

110. *Id.* § 1414(c), 124 Stat. at 2152 (to be codified at 15 U.S.C. § 1639c(g)).

111. *Id.* § 1414(d), 124 Stat. at 2152–53 (to be codified at 15 U.S.C. § 1639c(h)).

112. *Id.* § 1419, 124 Stat. at 2154–55 (to be codified at 15 U.S.C. § 1638(a)(16)).

- disclosure of the aggregate amount of settlement charges, fees, and interest and the wholesale rate of the creditor's cost of funds for all residential mortgage loans;¹¹³
- six-month advance notice before a hybrid adjustable rate mortgage with an introductory fixed rate is reset;¹¹⁴
- monthly statement disclosures on a form to be developed by the CFPB;¹¹⁵
- pre-closing disclosure regarding escrow payments for certain first lien mortgages;¹¹⁶ and
- disclosure for non-escrowed loans.¹¹⁷

LIABILITY AND ENFORCEMENT

Mortgage originators that fail to comply with the new qualification requirements, anti-steering prohibitions, and restrictions on compensation are subject to civil liability for the greater of the actual damages suffered by the consumer or three times the total amount of compensation to the mortgage originator in connection with the residential mortgage loan involved in the violation, plus costs, including reasonable attorney's fees.¹¹⁸ A consumer may assert violations of the mortgage originator compensation restrictions or the ability to repay standard as a partial defense in a foreclosure action by the creditor or assignee without regard to the statute of limitations.¹¹⁹ Enhanced damages under TILA equal to the sum of all finance charges and fees paid by the consumer are also available for violations of the restrictions on mortgage originator compensation and the ability to repay standard.¹²⁰ In addition, the Mortgage Reform Act raises the limits on TILA class action damages to the lesser of \$1,000,000 or 1 percent of the creditor's or mortgage originator's net worth and extends the limitations period for civil actions under TILA to three years.¹²¹ State attorneys general are given expanded authority to enforce the requirements under the Mortgage Reform Act.¹²²

HOEPA REVISIONS

The Mortgage Reform Act also amended the federal high-cost loan provisions of the Home Ownership and Equity Protection Act ("HOEPA").¹²³ First, the Mortgage

113. *Id.*, 124 Stat. at 2155 (to be codified at 15 U.S.C. § 1638(a)(17)).

114. *Id.* § 1418, 124 Stat. at 2153–54 (to be codified at 15 U.S.C. § 1638a).

115. *Id.* § 1420, 124 Stat. at 2155–56 (to be codified at 15 U.S.C. § 1638(f)).

116. *Id.* § 1461, 124 Stat. at 2178–81 (to be codified at 15 U.S.C. § 1639d(a)–(i)).

117. *Id.* § 1462, 124 Stat. at 2181–82 (to be codified at 15 U.S.C. § 1639d(j)).

118. *Id.* § 1404, 124 Stat. at 2141 (to be codified at 15 U.S.C. § 1639b(d)).

119. *Id.* § 1413, 124 Stat. at 2148–49 (to be codified at 15 U.S.C. § 1640(k)).

120. *Id.* § 1416, 124 Stat. at 2153 (to be codified at 15 U.S.C. § 1640(a)).

121. *Id.* § 1422, 124 Stat. at 2157 (to be codified at 15 U.S.C. § 1640(e)).

122. *Id.*

123. Pub. L. No. 103-325, 108 Stat. 2191 (1994) (codified in scattered sections of 5, 12, 15, 18, 31 & 42 U.S.C.).

Reform Act expanded the scope of HOEPA to include purchase-money loans and open-end credit plans.¹²⁴ Second, the Mortgage Reform Act lowered the annual percentage rate (“APR”) threshold and ties it to the average prime offer rate (“APOR”) rather than the yield on U.S. Treasury Securities.¹²⁵ The APR thresholds are lowered to 6.5 percent above the APOR for a first lien transaction and 8.5 percent above the APOR for a subordinate lien transaction.¹²⁶ A separate APR threshold of 8.5 percent above the APOR is applicable if the dwelling securing a first lien loan is personal property (e.g., a manufactured home) and the transaction is for an amount less than \$50,000.¹²⁷ Third, the Mortgage Reform Act lowers the points and fees threshold from 8 percent of the total loan amount to: (i) 5 percent of the total transaction amount for transactions of \$20,000 or more; and (ii) the lesser of 8 percent of the total transaction amount or \$1,000 for transactions of less than \$20,000.¹²⁸

In addition to lowering the points and fees threshold, the Mortgage Reform Act also modified the definition of points and fees.¹²⁹ As amended, points and fees includes (i) all compensation paid to a mortgage originator by a consumer or creditor (directly or indirectly); (ii) premiums and charges payable at closing for credit insurance (e.g., accident, loss-of-income, life, or health insurance); (iii) the maximum prepayment penalties that may be charged under the terms of the loan; (iv) all prepayment penalties incurred by the consumer for a refinance of a loan made or currently held by the same creditor or an affiliate; and (v) for open-end loans, the minimum additional fees required to draw down the total credit line.¹³⁰ Up to two bona fide discount points may be excluded from the points and fees threshold (subject to certain conditions) as well as government agency insurance premiums.¹³¹ Private mortgage insurance premiums up to a certain amount may also be excluded, provided that requirements regarding refunds are met.¹³²

The Mortgage Reform Act also added a third high-cost loan threshold relative to prepayment penalties.¹³³ Specifically, a loan is automatically a high-cost loan (irrespective of the APR and points and fees thresholds) if the loan documents permit a prepayment penalty to be charged more than thirty-six months after closing or if the prepayment penalty exceeds 2 percent of the amount prepaid.¹³⁴ The substantive restrictions applicable to high-cost loans were also amended and expanded.¹³⁵

Significantly, the Mortgage Reform Act also added a cure provision for high-cost mortgage loans.¹³⁶

124. Dodd-Frank Act, *supra* note 1, § 1431, 124 Stat. at 2157–60 (to be codified at 15 U.S.C. § 1602(aa)).

125. *Id.*

126. *Id.*, 124 Stat. at 2157 (to be codified at 15 U.S.C. § 1602(aa)(1)(A)(i)).

127. *Id.*

128. *Id.*, 124 Stat. at 2157–58 (to be codified at 15 U.S.C. § 1602(aa)(1)(A)(ii)).

129. *Id.*, 124 Stat. at 2159 (to be codified at 15 U.S.C. § 1602(aa)(4)).

130. *Id.*

131. *Id.*, 124 Stat. at 2159–60 (to be codified at 15 U.S.C. § 1602(dd)).

132. *Id.*, 124 Stat. at 2159 (to be codified at 15 U.S.C. § 1602(aa)(4)(D)).

133. *Id.*, 124 Stat. at 2158 (to be codified at 15 U.S.C. § 1602(aa)(1)(A)(iii)).

134. *Id.*

135. *Id.*, §§ 1432, 1433, 124 Stat. at 2160–63 (to be codified at 15 U.S.C. § 1639).

136. *Id.* § 1433(f), 124 Stat. at 2163 (to be codified at 15 U.S.C. § 1639(v)).

MORTGAGE SERVICING PRACTICES

The Mortgage Reform Act also created new requirements regarding mortgage servicing practices by amending TILA. The Mortgage Reform Act requires establishment of a mandatory escrow account for first lien loans secured by the consumer's principal dwelling in certain instances.¹³⁷ Mandatory escrow accounts generally must remain in existence for at least five years from consummation.¹³⁸ New disclosures are required both in connection with mandatory escrow accounts¹³⁹ and if accounts are not mandatory or the consumer elects to close an existing account.¹⁴⁰

The Mortgage Reform Act also amended section 6 of the Real Estate Settlement Procedures Act ("RESPA") relative to servicing practices.¹⁴¹ Under the Mortgage Reform Act, a servicer is prohibited from: (i) force-placing hazard insurance (except under certain circumstances); (ii) charging fees for responding to valid qualified written requests; (iii) failing to respond timely to a borrower's request to correct certain errors; (iv) failing to respond to a borrower's request for information regarding the owner/assignee of the loan within ten business days; and (v) failing to comply with any other obligation as established by rule.¹⁴² The response times relative to qualified written requests are reduced to five days (in which to acknowledge receipt of a request) and thirty days (in which to take action upon the request).¹⁴³

CONCLUSION

As the most sweeping financial reform legislation since the 1930s, the Dodd-Frank Act is guaranteed to change significantly the financial landscape of the United States. With the creation of the CFPB, many industries will find themselves subject to significant federal regulation for the first time. Others will find their regulatory and legal environments (including their potential liabilities) significantly changed and perhaps heavily increased. What remains unclear is precisely how most of the provisions will be implemented and whether the reforms will serve to stabilize the industry and benefit consumers. As rulemaking gets underway, those directly impacted by the reforms can only wait for a clearer picture of the legal and regulatory environment going forward.

137. *Id.* § 1461, 124 Stat. at 2178–81 (to be codified at 15 U.S.C. § 1639d).

138. *Id.*, 124 Stat. at 2179 (to be codified at 15 U.S.C. § 1639d(d)).

139. *Id.*, 124 Stat. at 2180–81 (to be codified at 15 U.S.C. § 1639d(h)).

140. *Id.* § 1462, 124 Stat. at 2181–82 (to be codified at 15 U.S.C. § 1639d(j)).

141. *Id.* § 1463, 124 Stat. at 2182–84 (to be codified at 12 U.S.C. § 2605); *see also* John P. Kromer, Sanford Shatz & Jonathan W. Cannon, 2010 *Survey of RESPA Developments*, 66 *Bus. Law.* 435, 438–39 (2011) (in this *Annual Survey*).

142. Dodd-Frank Act, *supra* note 1, § 1463, 124 Stat. at 2182 (to be codified at 12 U.S.C. § 2605(k)(1)).

143. *Id.*, 124 Stat. at 2184 (to be codified at 12 U.S.C. § 2605(m)).