

## Consumer Financial Protection Bureau— On the Horizon for Federal and State Watchdogs

To discuss the implications of the new CFPB on your business, please contact the following or your Vorys relationship attorney:

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The state Attorneys General met April 10-12, 2011 in Charlotte, North Carolina to discuss their new role in enforcement coordination with the still-to-be formed federal Consumer Financial Protection Bureau (CFPB). Once the CFPB becomes official on or about July 21, 2011, there will be rules to write and staff to organize before it can begin its work. In the meantime, the state Attorneys General will be in a position to begin enforcement of its consumer provisions.

Elizabeth Warren, Assistant to President Obama and Special Advisor to the Secretary of the Treasury on the CFPB, noted in her remarks that the goals of the CFPB would be (1) to ensure transparency for consumers as to the costs and risks of a financial product, and (2) enforcement of the law.

Prior to Warren's remarks in the plenary session, the National Association of Attorneys General and staff of the CFPB reached an agreement on Joint Principles for mutual enforcement to carry out these goals. These principles provided that the parties will:

- Develop joint training programs and share information about developments in state and federal laws that apply to consumer financial products or services;
- Share information about conduct and practices in the markets for consumer financial products or services to inform enforcement policies and priorities;
- Engage in regular consultation to identify mutual enforcement priorities that will ensure effective and consistent enforcement of the consumer protection laws;

- Support each other in the enforcement of the laws that protect consumers of financial products or services, including joint or coordinated investigations of wrongdoing and coordinated enforcement actions;
- Pursue legal remedies to foster transparency, competition, and fairness in the markets for consumer financial products or services across state lines and without regard to corporate forms or charter choice for those providers who compete directly with one another in the same markets;
- Develop a consistent and enduring framework to share investigatory information and to coordinate enforcement activities to the extent practicable and consistent with governing law;
- Share, refer, and route complaints and information between the CFPB and the state Attorney General;
- Analyze and leverage input from consumers and the public in order to advance their mutual goal of protecting consumers; and,
- Create and support technologies to enable data sharing and procedures that will support complaint cooperation.

**Who Should Be Concerned and Why?**  
Financial institutions and more generally, those providing “substantial assistance to another person” in violating §1031 need to be concerned with enforcement actions by the CFPB. Additionally, the Attorneys General in each state where the alleged violator is doing business or its products reach the financial consumer have enforcement authority and may be more activist at the beginning than their federal

counterpart. Further, some entities, will still need to be concerned about regulation by the FTC (Commissioner Julie Brill also attended and spoke at this conference) and other federal entities.

The Dodd-Frank Act appears to favor state law enforcement and regulation of national banks by the states. It arguably allows states to enact and enforce tougher banking standards, as long as they are not inconsistent with federal law. Therefore, it is a protective floor and not a ceiling which has been created at the federal level. This would appear to be an opportunity for aggressive and activist Attorneys General – perhaps to be tempered by a local state’s view that it needs to be encouraging of economic development and to “foster competition.”

**Some Obvious Unknowns:** Generally, the CFPB will have authority under §1031 of the Consumer Financial Protection Act to prevent acts or practices by financial institutions and others which are unfair, deceptive, and abusive. “Unfair” and “abusive” are defined by the Act; “deceptive” is not. “Deceptive” may be defined in the regulations to be promulgated. In prescribing its rules the CFPB is required to consult with other federal agencies, including banking agencies, which will include the FTC.

Importantly, while there may have been some attempts at defining the CFPB’s

authority in §1031, there are a number of obvious unknowns, such as the definition of “deceptive,” what is “unreasonable advantage of consumers’...reasonable reliance,” what is the standard for measurement of material interference with a consumer’s ability to understand a term, and the broad scope of “covered persons” which appears to include all those who “knowingly or recklessly provide substantial assistance to another person in violating §1031 or any rule prescribed under §1031.”

**Coordinated Defense:** There is little doubt that there is plenty of room for aggressive enforcement, particularly against those entities who previously may have escaped regulation. It is doubtful, however, that major financial players will have difficulty in complying with the early mandates that the CFPB plans to implement, involving credit card and mortgage term transparency. But after this first public activity and over time, the CFPB and the States will have the opportunity for heightened enforcement. As a practical matter, if one investigation is opened by one state, the alleged violator will want to consider going to the CFPB, the FTC, and other affected States to have them join in on any resolution in order to avoid litigating on multiple fronts at multiple times.

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