

FROM THE EDITOR

What Does Wall Street Reform Have To Do with Electric Cooperatives? Part 2

This month's editorial, part 2 in a 2-part series, was written by Tracey Steiner, NRECA Deputy Chief Member Counsel.

Title X: New Consumer Financial Protection Regulator

Title X, the Consumer Financial Protection Act (CFPA) of The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank or Act),¹ establishes the Bureau of Consumer Financial Protection (Bureau). The Bureau will be an independent bureau within the Federal Reserve System authorized to regulate the offering and provision of consumer financial products or services (collectively, Products) under federal consumer financial law.

The Bureau's purpose is to ensure "that all consumers have access to markets for [Products] and that markets for [Products] are fair, transparent, and competitive." The Bureau will seek to ensure, among other things, that:

- Consumers receive timely and understandable information about Products;
- Consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination;
- Outdated, unnecessary, or unduly burdensome regulations are addressed to reduce unwarranted regulatory burdens;
- Federal consumer financial law is consistently enforced to promote fair competition; and
- Markets for Products operate transparently and efficiently to facilitate access and innovation.

Section 1022 provides the new Bureau with exclusive rulemaking authority for the "enumerated consumer laws" (Enumerated Laws), which include, among others, the Equal Credit Opportunity Act;² the Fair Credit Billing Act;³ the Fair Credit Reporting Act⁴ (except §§ 615(e) and 628); the Fair Debt Collection Practices Act;⁵ the Gramm-Leach-Bliley Act⁶ (§§ 502-509 only, except § 505 as it applies to § 501(b));⁷ and the Truth In Lending Act.⁸

As required in CFPA section 1061, the Secretary of the Treasury established a date to transfer "consumer financial protection functions"⁹ currently exercised by other federal agencies, including the Federal Trade Commission (FTC), under the Enumerated Laws to the Bureau. On September 20, 2010, Treasury Secretary Timothy Geithner designated July 21, 2011 as the transfer date,¹⁰ which is also the date upon which the other provisions in this subtitle are effective.¹¹

What Are Consumer Financial Products or Services? Under the Act, a "consumer financial product or service,"¹² or Product, means: (1) any financial product or service provided for use by consumers primarily for personal, family, or household purposes, or (2) certain business-to-business services provided in connection with the former, such as credit servicing, settlement services, consumer reporting, and debt

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collection. Generally speaking, the latter services are those provided to creditors to support the creditors' consumer lending programs.

What Specific Authority Does the Bureau Have? In addition to the "consumer financial protection functions" being transferred to the new Bureau, Subtitle C of the CFPA¹³ provides the Bureau with other, specific powers.

Section 1031 empowers the Bureau to prevent a covered person – which includes a "related person" or "service provider"¹⁴ – from "committing or

engaging in an unfair, deceptive or abusive act or practice" in connection with a consumer transaction for a Product or the offering of such Product. It is generally unlawful for a covered person or service provider to provide a Product that does not conform to federal consumer financial law, to otherwise violate such law, or to engage in unfair, deceptive or abusive practices.¹⁵ Section 1036(a)(2) makes it unlawful for a "covered person" to not allow access to records or fail to establish or maintain such records or for any person to "knowingly or recklessly provide substantial assistance to a covered person" with regard to the acts and practices prohibited in section 1031.

The Bureau is authorized by section 1032 to issue rules regarding the disclosure of costs, benefits, and risks of Products, including issuing model disclosures. A safe harbor is included for any covered person that uses the model disclosures.

CFPA Subtitle C also provides new consumer rights to be enforced by the Bureau, namely, the right of consumers to obtain information concerning Products from covered persons¹⁶ and to receive a timely response from the Bureau regarding a complaint about a covered person.¹⁷

The Bureau is further authorized to conduct investigations, issue subpoenas, demand documents and other things,¹⁸ conduct hearings and adjudications (decisions of which are appealable to the federal courts),¹⁹ initiate a civil action to impose a civil penalty or seek other relief, including injunctions,²⁰ and refer evidence to the U.S. Attorney General for possible criminal proceedings.²¹ Section 1057 provides whistleblower protections for employees providing information to the Bureau.

Are Cooperatives Covered Persons under the CFPA? Under section 1002(6),

a covered person is: (1) any "person" that offers or provides a Product and (2) any affiliate that acts as "service provider"²² to such a person. The definition of "person" in section 1002(19) includes a "cooperative organization." However, section 1027 excludes numerous persons from the coverage of the CFPA, and thus the supervisory and enforcement authority of the new Bureau. These excluded persons would continue to be subject to the supervisory and enforcement authority of other prudential regulators, such as the FTC, Federal Reserve, National Credit Union Administration, among others. Exclusions include:

- Merchants, retailers, or sellers of any non-financial goods or services (Non-Products) unless also offering Products.²³
- Merchants, retailers, or sellers of Non-Products who: (i) extend credit directly to a consumer in order to enable the consumer to purchase a Non-Product; (ii) directly, or through an agreement with a third party, collect debt arising from credit extended as indicated in (i); or (iii) sell or convey debt described in (i) that is delinquent or otherwise in default.²⁴
- Merchants, retailers, or sellers of Non-Products that are not engaged "significantly" in offering or providing Products.²⁵
- Merchants, retailers, or sellers of Non-Products that would otherwise be subject to the Bureau's jurisdiction because they regularly extend credit that is subject to a finance charge provided that they satisfy three criteria: (1) only extend credit for the sale of Non-Products, (2) retain such credit on their own accounts, and (3) meet the small business size threshold for relevant industry pursuant to section 3 of the Small Business Act.²⁶

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An electric cooperative that is not otherwise significantly engaged in the provision of Products likely satisfies one of these exclusions. Further, the Bureau is authorized to exempt any class of covered persons, service providers, or category of Products from any provision of the CFPA or any Bureau rule.²⁷

Two to Tango? The Complicated Division of Labor Between the Bureau and FTC. Generally, the Bureau will have supervisory authority over certain non-bank “covered persons,”²⁸ but share enforcement authority with the FTC over such persons, subject to a memorandum of understanding to be negotiated between them within six months of enactment (or January 21, 2012).²⁹ The Bureau and the FTC will share residual enforcement authority with respect to other “covered persons” and persons subject to the specific Enumerated Laws, but the CFPA does not direct the Bureau and FTC to negotiate a memorandum of understanding regarding these other persons. Again, the Bureau alone will have rule-making authority under the Enumerated Laws, except as noted above. Therefore, electric cooperatives (even those satisfying any of the exemptions from being a “covered person”) will be subject to Bureau regulations issued pursuant to the Enumerated Laws, but it is not clear yet whether the FTC or Bureau will take full or lead enforcement responsibility against cooperatives for the implementing regulations under those laws.

Regarding specific enforcement actions, the Bureau and FTC must notify the other before filing a lawsuit against a person within both agencies’ jurisdiction, and each agency can intervene in actions brought by the other agency. If one agency already has initiated an action against a person, the other agency is precluded

from bringing its own action for the same violation.³⁰

The FTC retains rulemaking and guidance authority under the Federal Trade Commission Act (FTC Act)³¹ and enforcement authority over its rules related to unfair and deceptive acts or practices that violate the FTC Act.³² The Bureau can enforce an FTC rule regarding an unfair or deceptive act or practice to the extent that such a rule applies to “covered persons” offering a Product – just as if it were a rule prescribed by the Bureau under its section 1031 authority over unfair, deceptive, and abusive acts or practices.³³

Under section 1088, rulemaking and enforcement authority under Fair Credit Reporting Act (FCRA) – an Enumerated Law – is divided between the Bureau and the FTC. The FTC retains rulemaking authority with respect to so-called “red flags” identity theft prevention under FCRA § 615(e) and data disposal requirements under FCRA § 628.³⁴ The FTC also keeps its FCRA enforcement authority with respect to Non-Products.³⁵

Conclusion

While most if not all electric cooperatives should escape much of the new Bureau’s CFPA supervisory and enforcement authority, cooperatives are subject to regulations issued by the Bureau under the Enumerated Laws. Further, cooperatives face the possibility of Bureau enforcement in areas where the Bureau has concurrent authority with the FTC. Once the Bureau is fully operational, there should be more clarity on the division of labor between the two agencies. NRECA will continue to monitor developments and report on them as needed.

If you have questions or comments, please contact me at 703-907-5847 or tracey.steiner@nreca.coop.

¹ 124 Stat. 1376, Pub. Law 111–203 (July 21, 2010).

² 15 U.S.C. §§ 1691 – 1691f.

³ 15 U.S.C. § 1601 note.

⁴ 15 U.S.C. §§ 1681 – 1681x.

⁵ 15 U.S.C. §§ 1692 – 1692p.

⁶ Pub. Law No. 106-102. Codified in relevant part at 15 U.S.C. §§ 6801-6809 (GLB Act).

⁷ GLB Act sections 502 – 509 are the financial privacy provisions. Section 501(b) refers to financial institutions.

⁸ 15 U.S.C. §§ 1601- 1665.

⁹ Dodd-Frank section 1061 defines “consumer financial protection functions” as “all authority to prescribe rules or issue orders or guidelines” under the consumer financial laws and “examination authority,” as the power to require reports and conduct compliance examinations.

¹⁰ 75 Fed. Reg. 57,252 (Sept. 20, 2010). The Secretary is authorized to extend the transfer date for six months.

¹¹ Dodd-Frank section 1037.

¹² Dodd-Frank section 1002(5).

¹³ Dodd-Frank sections 1031 – 1037.

¹⁴ Dodd-Frank section 1002.

¹⁵ Dodd-Frank section 1036(a)(1).

¹⁶ Dodd-Frank section 1033.

¹⁷ Dodd-Frank section 1034.

¹⁸ Dodd-Frank section 1052.

¹⁹ Dodd-Frank section 1053.

²⁰ Dodd-Frank sections 1054 & 1055.

²¹ Dodd-Frank section 1056.

²² Dodd-Frank section 1002(26) defines “service provider” as any person that “provides a material service to a covered person in connection with the offering or provision . . . of a consumer financial product or service,” which includes (i) participating in designing, operating, or maintaining the consumer financial product or service; or (ii) processing transactions relating to the product or service (with some exception), but which excludes: (i) support services generally provided to businesses or of a ministerial nature, and (ii) media for advertising of consumer financial products or services.

²³ Dodd-Frank section 1027(a)(1).

²⁴ Dodd-Frank section 1027(a)(2)(A) and (B).

²⁵ Dodd-Frank section 1027(a)(2)(C)(i).

²⁶ Dodd-Frank section 1027(a)(2)(B)(iii) and (D)(ii).

²⁷ Dodd-Frank section 1022(b)(3).

²⁸ Namely, those engaged in the origination, brokerage, or servicing of real estate loans to consumers primarily for personal, family, or household purposes; loan modification or foreclosure relief services for those loans; larger participants in a market for other Products; those non-bank covered persons whose Products are deemed to pose risks to consumers; offerors or providers of private education loans; and offerors or providers of payday loans. See, Dodd Frank section 1024(a).

²⁹ Dodd-Frank section 1024(c)(3)(A) & (D).

³⁰ Dodd-Frank section 1024(c)(3)(B).

³¹ 15 U.S.C. § 41 et seq.

³² Dodd-Frank section 1061(a)(5)(C).

³³ Dodd-Frank section 1061(a)(5)(B)(ii).

³⁴ Dodd-Frank section 1088(e).

³⁵ Dodd-Frank section 1088(a)(2)(D).