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## The Consumer Financial Protection Bureau Is Radically Changing The Playing Field For Financial Institutions.

In just over one year, the government's beat cop, the United States Consumer Financial Protection Bureau (also known as the CFPB) is already starting to have an impact on financial institutions. In fact, on July 18, 2012 in its first enforcement action, the CFPB ordered Capital One to pay \$210 million for deceptive marketing tactics. This is just the beginning.

Between July 21, 2011, and June 1, 2012, the CFPB received approximately 45,630 consumer complaints, including approximately 16,840 credit card complaints, 19,250 mortgage complaints, 6,490 bank products and services complaints, and 1,270 private student loan complaints. The CFPB has implemented a whistleblower hotline for employees, contractors, vendors and competing companies to confidentially report suspected violations of federal consumer financial laws. The CFPB is also beginning to implement a mandate covering government agencies within its jurisdiction to establish an Office of Minority and Women Inclusion (OMWI) to oversee diversity efforts of the agencies, regulated entities and agency contractors. If you haven't heard of the CFPB, you will soon. Capital One is a \$210 million dollar warning that the CFPB cannot be ignored.

Many blame a lack of regulation and systematic greed for the recent recession. Regardless of whether the blame is properly assessed, the government's one year old beat cop, the CFPB, is charged with monitoring our financial systems so that the public will not be in the same position again. The CFPB was established through Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), which established the CFPB as an independent bureau within the Federal Reserve System and made it responsible for protecting consumers from abusive financial services practices. The overarching purpose of the CFPB is to implement and enforce federal consumer financial law so that "markets for consumer financial products and services are fair, transparent, and competitive." The jurisdiction of the CFPB includes banks, credit unions, security firms, payday lenders, mortgage-servicing operations, foreclosure relief services, debt collectors, mortgage companies, and private educational lenders and other financial companies. The Dodd-Frank Act grants the CFPB broad powers to assume regulatory and rulemaking authority under numerous existing federal consumer laws. It also vests the CFPB with the power to enact new regulations and to take enforcement and supervisory actions with respect to consumer financial products and the entities that deal with them. The CFPB is authorized to:

- Conduct rule-making, supervision, and enforcement for Federal consumer financial laws;
- Restrict unfair, deceptive, or abusive acts or practices by financial institutions;
- Create an intake center for consumer complaints;
- Promote financial education;
- Research consumer behavior;
- Monitor financial markets for new risks to consumers; and
- Enforce laws that outlaw discrimination and other unfair treatment in consumer finance.

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The potential penalties that the CFPB can impose on financial institutions are significant. They are also designed to encourage companies to monitor the CFPB's regulation carefully. For example, Section 1055 of the Dodd-Frank Act grants courts or the CFPB the jurisdiction to award any appropriate legal or equitable relief, including rescission or reformation of contracts, refund of monies, return of real property, restitution, disgorgement, compensation for unjust enrichment, payment of damages or other monetary relief, public notification regarding the violation and costs of notification, limits on activities or function of the person, and civil money penalties. While the Dodd-Frank Act does not authorize exemplary or punitive damages, it does authorize civil penalties: up to \$5,000 per day for the violation of a rule imposed by the CFPB, up to \$25,000 per day for the reckless violation of a federal consumer protection law, and up to \$1,000,000 per day for a knowing violation of a federal consumer financial law.

In just over one year, the CFPB's impact is already widely felt, and it is already impacting how lenders and consumers interact. Seeking to continue its initial momentum, the CFPB intends to take an even more active role in shaping the evolving laws with respect to consumers. If the last year is any indication, the CFPB is just getting warmed up and all financial systems and lawyers who work with financial and real estate related companies must pay close attention to the rules the CFPB is promulgating.

For example, since December 2011, the CFPB has filed six amicus briefs in different circuits of the U.S. Court of Appeals. Two of the amicus briefs were filed regarding the Fair Debt Collection Practices Act (FDCPA) and four briefs were filed regarding the Truth In Lending Act. In one FDCPA amicus brief, the CFPB advocated for a broad definition of a "debt collector." In another FDCPA amicus brief, the CFPB argued against several lower courts' rulings on the FDCPA's general ban on contacting third parties in connection with debt collections and contends that the FDCPA supplants F.R.C.P. 54(d)'s default rule that prevailing parties may recover costs. In amicus briefs addressing the Truth In Lending Act, the CFPB takes on the issues of whether a consumer is required to sue a lender in addition to providing written notice of rescission of the loan.

What is remarkable about the amicus briefs is the CFPB's willingness to dispute established court precedent. As noted in one of the amicus briefs, most lower courts have concluded that consumers must, within three years of obtaining the loan, (i) exercise their right of decision – by providing notice to the lenders – and (ii) sue their lenders to resolve any disputes that arise regarding the rescission before the right to rescind expires. The CFPB, which is now charged with interpreting the Truth In Lending Act delegated by the Executive Branch, instead maintains that a lawsuit is not required.

While it would appear on the surface that the amicus briefs are limited to finite issues, their significance is broader. The CFPB is exercising its prerogative to interpret and influence the rules and regulations being applied to financial institutions. In many ways, the CFPB is suggesting that it can replace the judiciary for interpreting rules and regulations. The CFPB makes no qualms about its perceived role. It clearly claims to be the ultimate interpreter and even contradicts the precedents established by some trial courts.

In that regard, in February 2012, the CFPB issued draft rules that would allow it to regulate debt collectors with more than \$10 million in annual receipts for the first time. Under this proposal,

the CFPB would regulate approximately two-thirds of business in the debt collection market. The CFPB's proposal also targets consumer reporting agencies with more than \$7 million in annual receipts, and would result in the CFPB regulating the approximately 30 companies that make up more than 90 percent of the annual receipts from the business. Just this month, in conjunction with the CFPB's first anniversary, Richard Cordray, the director of the CFPB, said that the agency intended to overhaul the home mortgage market as a first step toward improving its fairness and clarity, with the ultimate goal of making it easier for borrowers to understand the kind of loan they are getting and its cost.

Finally, the CFPB has also gone to great lengths to make the consumer complaint process as user friendly as possible and will be maintaining a searchable database of consumer complaints. It is critical to know and understand how the CFPB's database works. As explained by the CFPB:

Screened complaints are sent via a secure web portal to the appropriate company. The company reviews the information, communicates with the consumer as needed, and determines what action to take in response. The company reports back to the consumer and the CFPB via the secure "web portal." The CFPB then invites the consumer to review the response. Consumer Response prioritizes for review and investigation complaints in which the consumer disputes the response or where companies fail to provide a timely response. Consumers can log onto the secure "web portal", available on the CFPB's website or call the toll-free number to receive status updates, provide additional information, and review responses provided to the consumer by the company. Once the company responds, the CFPB provides this response to the consumer for review. Consumers are given the option to dispute responses indicating a resolution has been provided or that the company has closed the complaint with or without relief. Consumers are asked to notify the CFPB within 30 days if they want to dispute a company's response.

Regulated companies must take care to monitor the database. Like the Consumer Products Safety Commission's database, the CFPB database is generally regarded unfavorably by industry organizations as a likely mass of unreliable information that may be confusing to consumers—and that may be misused by plaintiffs' attorneys and experts in legal proceedings. In order to benefit from information that is posted to the database, and to reduce the risk of inaccurate or confidential information being published in the database, we recommend that companies should consider taking the following actions:

- Appoint one or more employee who have responsibility to act for the company relative to the database;
- Review the database online, and become familiar with its operation and features;
- Develop procedures for investigating and responding promptly to all reports;
- Act promptly upon receipt of all reports and submit timely comments, claims of material inaccuracy or claims of confidential information as appropriate;
- Monitor the database for potential reports regarding the company's products that were not attributed to the company, and submit comments or objections as appropriate; and
- Coordinate these efforts with counsel and prepare to defend against misuse of the database by competitors, litigants or others.

Neither financial institutions nor law firms will be able to rely exclusively upon precedent in order to advise their clients. Law firms must carefully follow the statements of the CFPB in order to properly evaluate cases and determine how best to advise their clients. We believe, however, that the CFPB will reward responsive practices. Even though the CFPB is in the position of the financial industry's beat cop, it can also be used as a standard bearer for how to practice correctly. Banks, lenders, and mortgage companies can protect themselves through self-action. The best advice is to prepare now. Be proactive, and make sure you are in compliance with the current interpretations by CFPB before the beat cop arrives at your company's door step.

This document is intended to provide you with general information about issues related to new federal renewable energy project funding opportunities. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorney listed below or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.

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