

# Alert: The Bureau of Consumer Financial Services Begins Civil Investigative Demand Process

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**September 7, 2011**

- Do you offer or provide a consumer financial service or product?
- Are you a bank, thrift or credit union with assets greater than \$10 billion?
- Do you provide material services to a bank, thrift or credit union?
- Do you provide material services to a company/person who offers or provides a consumer financial service or product?
- Do you qualify for one of the statutory exclusions from the Consumer Financial Services Bureau's (the Bureau) authority?

These are important questions to answer, as the Bureau has now launched its authority under the Consumer Financial Protection Act of 2010 (the Act) to issue Civil Investigative Demands (CID's). Banks, thrifts and credit unions with assets less than or equal to \$10 billion are not subject to enforcement by the Bureau, but depositories with assets over that amount, and anyone else who offers or provides a consumer financial service or product; as well as service providers to banks, thrifts, and credit unions of whatever size and to anyone offering or providing a consumer financial service or product, are all subject to the Bureau's enforcement. Anyone who knowingly or recklessly provides substantial assistance to someone in connection with a violation of the Act's prohibition against unfair, deceptive, or abusive acts or practices also is brought within the Bureau's net.

And in a real sleeper provision of the Act, the following are defined as "related persons": (1) directors, officers, and managerial employees of the persons/entities providing or offering a consumer financial service or product, and (2) shareholders, consultants, joint venture partners and any other persons who materially participate in the conduct of the affairs of the person/entity providing or offering a consumer financial product or service, and (3) independent contractors (including attorneys, appraisers and accountants) who knowingly or recklessly participate in any violation of law or regulation or breach of a fiduciary duty. All of these persons are "related persons" under the Act. A related person is, in turn, "deemed to mean a covered person for all purposes of any provision of federal consumer financial law." This last dragnet for "related persons" does not apply in the case of bank holding companies, credit unions or depository institutions.

## **Practice Areas**

Asset-Based Lending

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All of the entities drawn into the orbit of the Bureau's enforcement authority may be the subject of an investigation and enforcement proceeding. The Bureau issued a rule on July 28, 2011 which provides for the issuance of a CID to any person in connection with an investigation of a consumer law violation within its jurisdiction. We have provided an in-depth look at the scope of the Bureau's jurisdiction in the context of this CID authority, which can be found [here](#).

Companies and other persons who come under the enforcement jurisdiction of the Bureau need to take account of the Bureau's authority to (1) impose Civil Money Penalties, and (2) provide other relief including rescission, reformation, refunds, restructure, disgorgement, damages, and imposition of limits on activities.

1. All clients should determine their status and the extent of the Bureau's authority over them. We recommend that you take a good hard look at your business, your products, and your services and analyze the following (either myself or your Briggs and Morgan attorney would be happy to assist you):

- Depository institution? - easy answer
- Covered person? Do you offer or provide a consumer financial product or service? There are "internal" definitional exclusions (with conditions) from some of the categories. Do you qualify?
- If you are a covered person, are you nonetheless excluded under Section 1027? Do you meet all the criteria required for the exclusion?
- If your product or service is specifically excluded under Section 1027 from the definition of a consumer financial product or service, do you meet the criteria for the exclusion? Are you sure?
- Are you one of the five "singled out" covered persons (e.g., payday lender)?
- Are you a service provider?
- Are you a related person?
- Do you do business with a covered person – could you be a "knowing or reckless" "assistor"?

2. All clients should re-examine their record retention policies. They should be well-reasoned, well-documented and supported by written advice of counsel. When the Bureau seeks records, they should be in appropriate shape and supported by a thorough and defensible record retention protocol.

3. All consumer financial products should be subjected to a rigorous overhaul, from the first-touch marketing to the promotion, sale, contracting, servicing and collection. Every aspect of customer interaction should be reviewed under the touchstones of unfair, deceptive or abusive (Section 1031 of the Act).

4. Checklists should be used for all Consumer Financial Laws under the Bureau's jurisdiction. Procedures for compliance should be enhanced.

5. Customer complaints to the client and to regulators should be rigorously examined. Written procedures should be enhanced. Documentation of resolutions should be enhanced.

Obviously, enforcement by the Bureau is best avoided, and it is best avoided by reducing the possibility of violations of federal consumer financial laws.

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For more information please contact your Briggs and Morgan attorney.