



Small Business Financial Protection Bureau?*

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Recently, the Consumer Financial Protection Bureau (CFPB) announced plans to increase its role in supervising small business lending. This article reviews those plans and analyzes the CFPB's authority, or lack thereof, to take such actions.

CFPB Plans

As part of CFPB's policy priorities for the next two years, the agency outlined its vision for small business lending and action plans to achieve that vision.¹ "The CFPB envisions a small business lending market where fair lending laws are enforced and where communities, governmental entities, and creditors have access to the data needed to identify the business and community development needs and opportunities of women-owned, minority-owned, and small businesses." To effectuate this goal, CFPB plans to do the following:

1. The Bureau will build a small business lending team and begin market research and outreach for a rulemaking on business lending data collection.
2. Subject to an assessment of feasibility, the Bureau's consumer response team will build the infrastructure to intake and analyze small business lending complaints.
3. As part of its supervisory work, the Bureau will continue to examine small business lenders for compliance with fair lending laws.

*The information contained in this newsletter does not constitute legal advice. This newsletter is intended for educational and informational purposes only.

¹*Policy priorities over the next two years*

The first and third item would be achieved through CFPB's authority under the Equal Credit Opportunity Act (ECOA), which applies to consumer and commercial credit. The Dodd-Frank Act amended ECOA to require companies to gather and CFPB to collect certain data related to small business lending. The second item is part of CFPB's authority to collect consumer complaints.

ECOA

ECOA prohibits discrimination in every step of a credit transaction on the basis of race, color, religion, national origin, sex, marital status, age, income derived from a public assistance program, and good faith exercise of rights under the Consumer Credit Protection Act. ECOA applies to consumer and business credit transactions. The CFPB has the authority to enforce and supervise lenders for compliance with ECOA. This speaks to the third item listed above — that CFPB will continue to examine lenders for compliance with fair lending laws.

As to the first action listed, the Dodd-Frank Act amended ECOA to require creditors extending commercial loans to inquire whether an applicant business is a women-owned, minority-owned, or small business. It also requires the creditor to collect certain information including: (1) information on the number of applications; (2) the type and purpose of the loan; (3) the credit limit on the loan; (4) the action taken on the application; (5) the census tract in which the business is located; (6) the annual gross revenue of the small business; and (7) the race, sex and ethnicity of the principal owners of the business.

The CFPB is not enforcing these new provisions until it issues a rulemaking, and it is in the beginning stages of the rulemaking process. CFPB officials have stated that they plan to use the Home Mortgage Disclosure Act (HMDA) data collection as a model for this rulemaking and data collection. The HMDA rule was finalized in late 2015 and mortgage companies are working to implement the changes with the new data collection set to begin in 2018, with reporting in 2019. As a model for CFPB's future ECOA data collection, commercial lenders should pay attention to CFPB's implementation of the HMDA rule, the specifics on reporting the data, and the details of CFPB publicizing the data. The CFPB has not stated publicly what it intends to do with the data it collects under ECOA, but it is reasonable to expect that this data may lead to reports, investigations, enforcement actions and rulemakings.

Dodd-Frank Act: Consumer Financial Products and Services and Consumer Complaints

Under the Dodd-Frank Act, CFPB is tasked with implementing federal consumer financial laws to ensure “that all consumers have access to markets for **consumer financial products and services** and that markets for consumer financial products and services are fair, transparent, and

competitive.”² A “consumer financial product or service” includes a variety of products and services, such as extending and servicing loans, deposit taking, providing stored value cards, check cashing, and collecting consumer report information, “offered or provided for use by consumers primarily for personal, family, or household purposes.”³ While the CFPB has the authority to expand the definition of what is considered a financial product or service, the requirement that the product be for consumers “primarily for personal, family, or household purposes” must be met. One of the six primary functions of the CFPB is “collecting, investigating, and responding to consumer complaints.”⁴

The Dodd-Frank Act requires CFPB to establish a unit within the agency “to facilitate the centralized collection of, monitoring of, and response to consumer complaints regarding **consumer financial products or services.**”⁵ It also must establish procedures to provide a timely response to consumers to complaints against, or inquiries concerning, a **covered person.**⁶ A “covered person” is any person or their affiliate “that engages in offering or providing a consumer financial product or service.”⁷

The CFPB plans to collect small business loan complaints, subject to an assessment of feasibility, does not seem to be in line with its statutory authority to collect consumer complaints. Assuming the CFPB would rely on section 1013(b)(3) of the Dodd-Frank Act, which establishes the consumer complaint unit, that statutory language states that the CFPB can collect complaints about consumer financial products or services, not commercial products.⁸ The CFPB has not addressed this issue publicly to date, but perhaps the agency will provide an explanation as the agency’s plans develop. It is unclear whether the CFPB would rely on other authority to collect complaints about small business lending. Whether this authority to collect such complaints is challenged by the industry or Congress remains to be seen, however commercial lenders should pay close attention as the CFPB puts this plan into action.

If the CFPB proceeds with collecting consumer complaints regarding small business lending, the question then becomes what the CFPB will do with that data. The CFPB has limited regulatory authority over small business loans. If a complaint alleges discrimination, the CFPB may investigate that under its ECOA authority. Or, as explained below, if the complaint touches on TILA provisions related to commercial credit cards, the CFPB may investigate it. However, beyond those issues, it is not clear what, if anything, the CFPB can do with complaints it gathers on small business lending, beyond referring them to another regulatory agency, either at the federal or state level.

²12 U.S.C. §5511(a) (emphasis added).

³12 U.S.C. §5481(5).

⁴12 U.S.C. §5511(c)(2) (emphasis added).

⁵12 U.S.C. §5493(b)(3) (emphasis added).

⁶12 U.S.C. §5534 (emphasis added). The CFPB also must require certain covered persons (large financial institutions) to respond to the CFPB and to the consumer about the complaint.

⁷12 U.S.C. §5481(6).

⁸Section 1013(b)(3) of the Dodd-Frank Act (12 U.S.C. §5493(b)(3)) is cited by the CFPB as authority to collect complaints and publish complaint data, as is Section (12 U.S.C. §5534), see, e.g., *Disclosure of Certain Credit Card Complaint Data*, 76 Fed. Reg. 76628, 76629 (Dec. 8, 2011). Note that it remains unclear whether CFPB would argue that its general supervisory authority over certain banks and non-banks provides the agency with authority to collect complaints.

TILA

While not mentioned in CFPB's action plans, CFPB has some limited authority over commercial credit cards under TILA. TILA generally applies only to consumer credit products made to consumers (meaning products extended to natural persons primarily for personal, family or household purposes). However, there are two provisions of TILA that apply to business-purpose credit cards issued to a person. First, the restrictions on unsolicited issuances of credit cards apply regardless of the purpose of the credit card. Second, the limitations on the liability of a cardholder for unauthorized use of a credit card apply to business-purpose credit cards. CFPB has authority to write rules, enforce and supervise entities for compliance with TILA.

Next Steps

Recently, the CFPB announced that Grady Hedgespeth has joined the agency as the Assistant Director for the Office of Small Business Lending Markets. Prior to joining the CFPB, Mr. Hedgespeth was Director of the Office of Economic Opportunity for the U.S. Small Business Administration.

The CFPB's intentions to step into the small business lending space have gained much attention in the industry and the press. There are many questions regarding how the CFPB will proceed, including what the agency will do with the data it gathers under ECOA, whether the agency can collect consumer complaints on small business lending, and if so, what it will do with the information it gathers from those complaints.

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