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## MEMORANDUM

**TO:** Clients and Friends of the Firm

**FROM:** J. Alton Alsup

**DATE:** July 21, 2010

**SUBJECT:** Congress Establishes a New “Bureau of Consumer Financial Protection” with Independent Rulemaking Authority and Enforcement Powers Over the Offering and Provision of Consumer Financial Products and Services under Federal Consumer Financial Laws.

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A new order of federal regulation over consumer financial products and services has been established with the recent passage of the “Dodd-Frank Wall Street Reform & Consumer Protection Act of 2010.” H. R. 4173 (Pub. L. 111-203) Supporters of the Act believe that such an overhaul of the federal regulatory scheme was necessary to prevent a repeat of the financial crisis that hit the U.S. economy starting in 2007, which Congress believes was caused in part by abusive or imprudent consumer lending practices. This memorandum sets out a brief overview of the new Act

Under the new federal regulatory scheme, set out in Title X of the Act and known as the Consumer Financial Protection Act of 2010, the exclusive authority to implement, interpret and enforce the Real Estate Settlement Procedures Act (RESPA), Truth in Lending Act, Equal Credit Opportunity Act (ECOA), Secure and Fair Enforcement for Mortgage Licensing Act (SAFE Act), Fair Credit Reporting Act (FCRA), Fair and Accurate Credit Transactions Act (FACT Act), Fair Debt Collections Practices Act (FDCPA), Home Mortgage Disclosure Act (HMDA), and ten other federal statutes that currently regulate some aspect of consumer loan origination and servicing activities would for the first time be consolidated within a single autonomous federal agency to be known as the Bureau of Consumer Financial Protection (“BCFP” or the Bureau), which is mandated to enhance and harmonize the requirements of the various federal statutes and regulations.

The new Bureau has been delegated what appears to be unprecedented powers to write and enforce its regulations. The Director of the Bureau, who will be appointed by the President of the United States with the advise and consent of the Senate, is authorized to prescribe rules and issue orders and guidance as may be “necessary or appropriate” to enable the Bureau to administer and carry out the “purposes and objectives” of the federal consumer financial laws and “to prevent evasions” of such laws. This broad authority, particularly suggested by the “necessary or appropriate” language, arguably would empower the Bureau, beyond merely interpreting statutory provisions, to make new rules the Director deems necessary or appropriate to meet the aims of the statutes, but for which no express statutory authority exists.

The Bureau is charged with exercising its broad rulemaking and enforcement authority for the purposes, among others, of:

- Educating consumers and providing them timely and readily understandable information needed to make responsible decisions about financial transactions;
- Protecting consumers from unfair, deceptive, or abusive acts and practices and from discrimination;
- Assuring that markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation;
- Collecting, investigating, and responding to consumer complaints;
- Supervising covered persons, including, without limitation, mortgage bankers, mortgage brokers, and mortgage subsidiaries of depository institutions, for compliance with federal consumer financial law and taking appropriate enforcement action to address violations of law;
- Issuing rules, orders, and guidance implementing federal consumer financial law; and
- Enforcing violations of federal consumer financial laws by administrative and court actions against covered persons, granting extraordinary relief, imposing civil penalties, and referring criminal activity for prosecution.

The Bureau will be no paper tiger. It will have unprecedented enforcement powers to grant relief for any violation of consumer financial law, including, without limitation:

- ordering rescission or reformation of contracts;
- ordering refunds of money or return of real property;
- ordering restitution,
- ordering disgorgement of compensation for unjust enrichment,
- requiring payment of damages or granting other monetary relief,
- making public notification regarding a violation,
- imposing limits on the activities or functions of covered persons, and
- imposing civil money penalties. For any violation of a law, rule, or final order imposed on a covered person, whether by act or omission, the Bureau in an administrative or judicial action may impose civil penalties:
  - up to \$5,000 for each day that the violation or failure to pay continues in an ordinary case.
  - up to \$25,000 for each day if the covered person “recklessly” engages in a violation of federal consumer financial law, and,
  - upwards of \$1,000,000 per day if the covered person “knowingly” engages in such a violation.

The Bureau when operational will be authorized and directed to prescribe rules to ensure that the features of any consumer financial product or service are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service in light of the facts and circumstances:

- Any final rule prescribing disclosure obligations is intended to be accompanied by one or more model forms that may be used by covered persons to assure compliance with required consumer disclosures.
- The proper use of a model form to satisfy a disclosure obligation is intended to provide loan originators and other covered persons “safe harbor” protections against claims of violations.
- Model forms adopted by the Bureau must contain clear and conspicuous disclosures that at a minimum use plain language comprehensible to consumers contain a clear format and design, succinctly explain the information that must be communicated to consumers, and be validated through consumer testing before adoption by the Bureau through rule.
- Most particularly, the Bureau is mandated not later than one (1) year after the designated date of transfer establishing its authority to act to propose for public comment rules and model disclosures that combine the disclosures required under the Real Estate Settlement

Procedures Act (RESPA) and the Truth in Lending Act into a single, integrated disclosure for mortgage loan transactions covered by those laws.

But rule changes will not happen over night:

- The Act was signed into law July 21, 2010;
- Notice of the designated transfer date on which all functions, powers and duties, personnel and facilities of the affected federal agencies will be transferred to, and vested in, the Bureau must be published within 60 days after the date of enactment of the legislation;
- The designated transfer date was determined in consultation with the chairmen, directors, or other administrative heads of the various federal government regulatory agencies affected by the legislation and was required to be fixed on a date that is not earlier than 180 days or later than 18 months after the date of enactment of the legislation;
- Accordingly, the designated transfer date on which the Bureau will commence operations has been designated as July 21, 2011., and the proposed rule for combining RESPA and TILA consumer disclosures will then be required by July 21, 2012;
- Assuming a typical three-month public comment period and a three-month period in which to consider comment and adopt a final rule under the federal Administrative Procedures Act, the earliest date on which a final rule would likely be published would be January 21, 2013;
- Assuming a deferred effective date of at least six months to allow the industry to train, re-program computer programs, and otherwise prepare for significant rule changes, it follows that the earliest effective date of such a final rule likely would be July, 2013.

**THIS MEMORANDUM SHOULD NOT BE RELIED UPON AS LEGAL ADVICE. YOU SHOULD CONSULT LEGAL COUNSEL OF YOUR CHOICE REGARDING THE APPLICATION OF THE LAWS AND REGULATIONS DISCUSSED IN THIS MEMORANDUM TO YOUR SPECIFIC CASE OR CIRCUMSTANCES.**