UDAAP: What lies beneath Dodd-Frank’s prohibition on unfair, deceptive and abusive acts or practices?

When the Consumer Financial Protection Bureau (CFPB) is fully operational on July 21, it will have myriad tasks to accomplish. Its purpose, as stated in Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, is to seek to implement and, where applicable, enforce federal consumer financial law consistently for the purpose of ensuring 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.

“It’s fair to say that the bureau has a broad mandate to regulate,” said Marty Bishop, partner in the Chicago office of Foley & Lardner LLP.

Perhaps one of the most important and ambiguous provisions of Title X is its ban on unfair, deceptive and abusive acts or practices, known as the UDAAP provision. During a recent October Research Webinar titled, “Managing Risk: Gearing Up for Title X’s Unfair, Deceptive or Abusive Practices,” Bishop discussed the nuances of this provision, how the CFPB may decide to enforce this provision and how industry members can prepare for the coming implementation.
Dear Readers,

Welcome to the first edition of the Dodd Frank Update!

One year ago, President Obama signed into law a bill that is completely changing the way that financial service providers conduct their business. At over 2,000 pages, the Dodd-Frank Act could be the biggest regulatory reform since the Great Depression of the 1930s. Over the next few years, federal banking regulators will be conducting numerous studies and implementing hundreds of regulations designed to ensure that a similar financial crisis will not happen again.

With all of these changes coming, or already proposed, how is a financial services professional supposed to keep track of them all? Not to mention the legislation being proposed to counter the act or the actions of industry associations to give input on the regulations that will significantly impact their business.

That is where the Dodd-Frank Update comes in. On these pages, and on www.DoddFrankUpdate.com, you will find the latest news from the government agencies proposing regulations to implement the act, Congressional hearings and studies on the potential effects of the act and its individual regulations, and expert analysis from industry insiders detailing how to comply with the new law and still be successful.

Each month, we at the Dodd-Frank Update will provide subscribers with this PDF compilation of the most important stories regarding the implementation of the Dodd-Frank Act. These stories can also be found on www.DoddFrankUpdate.com, where you will not only find up-to-the-minute news on all things Dodd-Frank, but expert testimony, study reports and full texts of regulations being proposed by the various government agencies, including the new Consumer Financial Protection Bureau.

We hope you continue to let us help you navigate the new world that the Dodd-Frank Act is creating.

Until next time,

Andrea Golby

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UDAP and UDAAP

In helping attendees understand where the UDAAP standards will take the industry, Bishop was quick to compare UDAAP with the longstanding standards addressing unfair or deceptive acts or practices (UDAP). The Federal Trade Commission Act (FTC Act) provides that unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce are unlawful. The FTC was responsible for enforcing most of the FTC Act’s UDAP provisions, with few exceptions, one of which was enforcement of UDAP against federally regulated financial institutions.

There is no private right of action under the UDAP provisions of the FTC Act, or the UDAAP provisions of Title X, something consumer advocates consider an unmitigated flaw. Bishop noted that as a result of this perceived limitation, each state has adopted their own so-called FTC Acts. These state laws gave consumer attorneys the power to bring actions as private attorneys general. The result is that there are 50 such statutes that are codified and enforced differently from each other and from the federal enforcement of the FTC Act.

Bishop pointed out that state UDAP statutes vary in the availability of private remedies and class actions available, creating difficulties for banks attempting to comply with these laws. He noted that preemption under Dodd-Frank does not cover operating subsidiaries, affiliates or agents of national banks. This means that mortgage businesses, which are usually run from a bank’s operating subsidiary, are not protected from a private right of action under its UDAAP provisions or the bureau’s regulations.

“I would nonetheless expect plaintiffs and their lawyers will start filing state civil UDAP cases based on the UDAAP pronouncements made by the bureau in its regulations,” Bishop said.

Title X and Title XIV

Bishop then outlined how Title X and Title XIV of the Dodd-Frank Act use UDAAP standards.

“Under Title X, it’s unlawful for any covered person or service provider — generally speaking of anyone who provides a consumer financial product or service, as well as their servicers — to engage in unfair, deceptive, or abusive acts or practices,” Bishop noted. “Title X goes on to give the bureau power to prevent UDAAP and to issue rules identifying and preventing UDAAP with respect to consumer financial products or services.”

Title X of the Dodd-Frank Act defines an “unfair act or practice” as one that: “A) causes or is likely to cause substantial injury to consumers, which is not reasonably avoidable by consumers and B) such substantial injury is not outweighed by countervailing benefits to consumers or to competition.”

The Act defines an “abusive act or practice” as one that “materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service, or takes a reasonable advantage of A) a lack of understanding on the part of the consumer of the material risks, costs or conditions of the product or service; B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or C) the reasonable reliance by the consumer on a covered person to act in the interest of the consumer.”

“This language, both from unfair and abusive, largely mirrors the FTC Act’s prohibition on unfair or deceptive acts or practices affecting commerce and essentially adopts the FTC’s unfairness policy as it’s been published in a couple of different iterations,” Bishop said.

Bishop then looked at how Title XIV uses these terms and previous UDAP concepts. He noted that UDAAP concepts are a bit more focused on particular issues in the mortgage industry as a result of Title XIV.

Title XIV amends the Truth in Lending Act (TILA) and was drafted for the purpose of ensuring that consumers are offered and receive residential mortgage loans in terms that reasonably reflect their ability to repay their loans and are understandable and not unfair, deceptive or abusive, Bishop noted.

“To that end, Title XIV, gives the Fed (but it will be the bureau which actually does this) the authority to promulgate regulations to ban acts or practices of mortgage originators that it finds to be unfair, deceptive, abusive, predatory or necessary or proper to ensure that responsible, affordable mortgage credit remains available to consumers,” he said.

Title XIV also contains provisions intended to address concerns that have a connection with the financial crisis — that mortgage originators engaged in a range of practices that resulted in borrowers being placed in residential mortgages that they were unlikely to be able to repay, Bishop noted. He said that the Act directs the Fed to issue regulations prohibiting originators from, among other things, steering a consumer to a residential mortgage that has predatory characteristics or affects, such as equity stripping, excessive fees or abusive terms. The board can also issue rules to prohibit abusive
practices that promote credit disparities among consumers of equal credit worthiness but different race, ethnicity, gender or age.

Bishop noted a few differences between UDAP under the FTC Act and UDAAP under Titles X and XIV.

“First, although you can find the term deceptive in the FTC Act, and there has been enough judicial and executive interpretation of the term to lead to a definition, Title X curiously doesn’t define deceptive,” he said. “In other words, it remains open for further judicial and agency interpretation.

“The unreasonable advantage concept under the definition of abuses seems to incorporate the notion advanced by academics that consumers are generally not capable of comprehending the terms of mortgages and other consumer financial products or services and the resulting consequences for various defaulting behaviors like, say for example late payments,” Bishop continued. “Since this is new and largely uncharted territory, I would expect some significant developments to rise under this portion of the statute.”

Existing precedent

Because the scope of the UDAAP standards seems limitless, Bishop had attendees look back at some of the major recent developments that he felt may provide some insight into the direction that UDAAP regulations might take going forward.

First, he examined the lawsuit brought by the Massachusetts attorney general against Fremont Investments and Loan, in which the attorney general sought a preliminary injunction to enjoin Fremont from foreclosing on 200 homes it intended to foreclose upon. While the court found that Fremont was unaware of any exaggeration of the borrowers’ income in the stated income loan applications, and Fremont made no false representations to borrowers about the terms of their loans, the court ordered a preliminary injunction that stopped Fremont from closing on its foreclosures without prior court approval.

In making its decision, the court determined that Fremont could not reasonably have believed that the borrower could repay the loans at issue and concluded that the loans were presumably unfair, stating that “to issue a home mortgage loan, who’s success relies on the hope that the fair market value of the home will increase during the introductory period, is as unfair as issuing a home mortgage loan whose success depends on the hope that the borrower’s income will increase during the same period.”

“Equally surprising is that the court held that Fremont’s conduct was quote, ‘not generally recognized in the industry to be unfair at the time the loans were made,’” Bishop said. “But nonetheless, the court went on to find that the meaning of unfairness is not fixed in stone or limited to conduct that is unlawful under the common law’s prior statute. Unfairness, the court said, is forever evolving, so as to reflect what we have learned to be unfair from our experience.

“Recall that Title XIV amends TILA to include as one of its purposes assurances that consumer mortgages reflect ability to repay,” he continued. “In some sense, the Fremont case has been codified at the federal level. If that is true, consider this. I think it’s a fair reading of Fremont that the case stands for the proposition that UDAAP laws may be applied retroactively. … This will make UDAAP under Dodd-Frank very difficult to navigate from a compliance perspective.”

Bishop also pointed to complaints filed in late 2009 by then Ohio Attorney General Richard Cordray, who has been hired to lead the enforcement division at the CFPB, against three mortgage servicers alleging various violations of Ohio’s UDAP laws, such as “inadequate, incompetent and insufficient handling of complaints, inquiries disputes and requests for information and assistance.” Bishop pointed out that at the time of the suit, there were no standards on the books at the state or federal level regarding what constitutes adequate, competent or efficient complaints in the mortgage servicing context.

“One thing is clear from the press release on this case, as well as Cordray’s public comments, is that one of the attorney general’s office policy goals was addressing the reduction of foreclosures,” Bishop said. “Because there was no statutory or regulatory mechanism for achieving
that goal, the Ohio attorney general relied on UDAP. I think that we can all expect a lot more of this using UDAP and UDAAP as gap fillers as we proceed into the age of the CFPB.”

Previous regulatory movements
The expanded use of UDAP goes beyond litigation and enforcement, Bishop noted, pointing out that UDAP is getting traction in statutes and rules as well.

“The Homeownership Equity Protection Act (HOEPA) authorized the Federal Reserve Board to prohibit acts or practices in connection with A) mortgage loans that the Federal Reserve Board finds to be unfair, deceptive or designed to evade the provisions of the section and B) refinancing of mortgage loans that the Federal Reserve Board finds to be associated with abusive lending practices or that are otherwise not in the interest of the borrower,” he noted as an example.

Although the Fed was granted this authority in 1994 when HOEPA was enacted by Congress, the Fed waited until 2008 to exercise its authority as a response to the housing crisis, Bishop said.

“The Fed’s rulemaking is important. It is the first rulemaking based solely on its UDAP authority,” he said, noting that some provision of the HOEPA UDAP rule may signal a change in the way unfair and deceptive actions are viewed.

Bishop noted that part of the HOEPA UDAP rule requires verification of a borrower’s income, effectively prohibiting stated income or no documentation loans for certain loan categories. “This, I believe is a fundamental change in the Fed’s idea of what constitutes an unfair and deceptive practice,” he said. “By making it an unfair practice for a private party to lend money without verifying the borrower’s income, the Fed has effectively made it a UDAP violation for a lender to believe a borrower’s representation regarding her income.”

“These and other UDAP provisions we’ve talked about are highly subjective standards,” Bishop told his audience. “Every company that provides, develops or sells mortgage products is doing something right now that could theoretically be challenged under UDAP.”

Preparation tactics
While both the UDAP and UDAAP standards are subjective, moving targets, there are things that companies can do to prepare for the new standards.

“Financial products can be difficult for consumers to understand. We all know that,” Bishop said. “As a result, in this new era of the bureau, an era which will undoubtedly be one of aggressive enforcement, discretionary standards under UDAAP will make it very difficult, if not impossible, for mortgage companies to know whether they are complying with these provisions until someone tells them they are not complying.”

While the new regulations may not be easy to navigate, there are certain things Bishop said companies can do to be proactive.

First, Bishop suggested that lenders conduct an audit directed at UDAAP. This would include reviewing program and product materials, disclosures and customer lists.

“Look for red flags like large numbers of customers receiving terms less favorable than those that are published or advertised,” he said. “The audit should include literally all of the mortgage products and services and any related marketing activity in the shop. Nothing should be overlooked because everything could fall within UDAAP.”

His second recommendation is to incentivize compliance and ethical conduct. Bishop said this includes affirmatively discouraging troubling conduct, not incentivizing employees to make misleading statements and scrutinizing sales programs that reward extra charges.

Bishop also suggested that companies facilitate informed choices by consumers. “Focus their attention on limitations, conditions and other key terms in the mortgage,” he said. “Make your mortgage products readable and understandable.”

In addition, he said that banks should be proactive, seeking input from consumers and employees. “Make it safe for employees to raise questions or concerns about products and programs,” he said. “Consolidate review of customer complaints so that discernable complaint trends are not simply ignored because, for example a mortgage product otherwise technically complies with the law. We’ve seen what can happen there.”

Lastly, Bishop recommends keeping the suitability of products and programs for each consumer at the very front of everyone’s mind. He noted that Title XIV requires this and if lenders don’t comply on their own, their regulator or a court might do it for them.

“What we essentially need to do is make a switch from identifying what we can’t do from a compliance perspective to proactively deciding what we can and should do based on how we perceive and handle risk,” Bishop said. “While there is much we still don’t know and may not know until it’s too late, complying with all of this new UDAAP stuff is not impossible.”
House panel hears Warren’s plans for CFPB

On March 16, Elizabeth Warren, special advisor to the Secretary of the Treasury for the Consumer Financial Protection Bureau (CFPB), provided the U.S. House Subcommittee on Financial Institutions and Consumer Credit with an update about the creation of the new bureau and answered questions regarding the oversight of the bureau.

Warren noted that by law, the CFPB is obligated: 1) to ensure that consumers have timely and understandable information to make responsible decisions about financial transactions; 2) to protect consumers from unfair, deceptive, and abusive acts or practices, and from discrimination; 3) to reduce outdated, unnecessary, or overly burdensome regulations; 4) to promote fair competition by enforcing the federal consumer financial laws consistently; and 5) to advance markets for consumer financial products and services that operate transparently and efficiently to facilitate access and innovation. Building an agency that can accomplish all of these goals is a substantial undertaking.

“The past few years have demonstrated how problems in the mortgage market can pose a systemic threat to our overall economy.”

Elizabeth Warren
Special advisor to the Secretary of the Treasury for the Consumer Financial Protection Bureau (CFPB)

Mortgage reform

The first area Warren said the CFPB was working on was mortgage reform.

“The past few years have demonstrated how problems in the mortgage market can pose a systemic threat to our overall economy,” she said. “If there had been basic rules and a cop on the beat to enforce them, we could have avoided or minimized the greatest economic catastrophe since the Great Depression. In the future, the new consumer bureau will be that cop.”

Warren noted that of the 300 complaints the bureau received as of March 1, half of them were about mortgages and home loans. In comparison, credit cards accounted for 20 percent and deposit products and other consumer loan products both accounted for five percent of the complaints.

Part of the reform required by the Dodd-Frank Wall Street Reform and Consumer Protection Act, is the consolidation of the Good Faith Estimate (GFE) and the Truth in Lending (TILA) disclosures. Warren discussed the bureau’s efforts at consolidation during the hearing. “These are two forms that community bankers tell me have roughly about an 80 percent overlap in terms of the
content. But they are written differently, and they are organized differently. They have different pieces to them, and, as a result, they are expensive to fill out. They have regulatory compliance costs — that is they’ve got to show that they’ve complied with the regulations. And there are real regulatory consequences if they get something wrong or if they leave something blank. In fact, in several meetings I’ve had community bankers and credit unions come to me and show me these forms, and show me what it’s like, and how much time they have to spend and how much training to fill these out,” Warren said. 

“So what we’ve proposed to do at the consumer agency, and we’re very much doing this in concert with the banking industry and with the mortgage industry, is to bring those two forms together,” she continued. “Because financial regulation has been scattered and consumer issues have been scattered among seven different agencies, this particular one has been held by two different agencies and there have been negotiations for more than 15 years to try to merge those two forms into one.”

Now they are both coming to the new CFPB. We’re now able to work with the community banks, with the credit unions, with others in the industry, and we’re going to put those together. What we’re looking for is a one-page mortgage shopping sheet that is simpler, easier, shorter, more value to the consumer. So, lower regulatory costs, higher value to the consumer. We regard that as the sweet spot for this agency,” Warren said.

Oversight questioned

During the hearing, several Republican members of the committee questioned the broad authority they felt the bureau was given and the role of the director in particular. Among the most vocal was House Financial Services Committee Chairman Spencer Bachus, R-Ala.

“The CFPB was the crown jewel of the 2,300-page Dodd-Frank Act that President Obama signed into law last July. This new bureaucracy, which will be headed by one person, a director as opposed to a board, will regulate providers of credit, savings, payment and other consumer financial products and services,” Bachus said.

“The Dodd-Frank Act confers virtually unfettered discretion on the director of the bureau to identify financial products and services that the director finds to be ‘unfair, deceptive, or abusive’ and ban them under a highly subjective standard that has no legally defined content.

“This broad and undefined authority makes the CFPB perhaps the single most powerful agency ever created by an act of Congress.

“The Dodd-Frank Act allows for the CFPB to draw funds from the Federal Reserve Board as the director of the bureau determines to be ‘necessary,’” Bachus continued. “There is a funding cap in place of 10 percent of the Federal Reserve Board’s operating expenses. In addition, if $500 million is deemed insufficient, the CFPB may seek appropriations of up to $200 million for a grand total of $700 million or more per year. By comparison, the Commodity Futures Trading Commission had a budget of $169 million in 2010. The SEC had a budget of approximately $900 million. The Federal Trade Commission had a budget of less than $300 million in 2010.

“Throughout the months of debate on the CFPB, House Republicans warned that a massive budget with no strings attached represented an unprecedented delegation of responsibility to a single unelected bureaucrat. The situation has been made worse as we are now more than six-months into Dodd-Frank’s implementation and we don’t even have a nomination for the CFPB Director. When asked about the timing of a nomination at a hearing last September, Treasury Secretary Timothy Geithner simply responded ‘soon.’ That was almost five months ago,” Bauchus said.

Warren countered by identifying the measures put in place to check the CFPB’s actions.

“As is true with respect to all other federal agencies, Congress has the last word on CFPB rule-making,” she said. “If Congress is unhappy with a rule, it can overturn that rule. In addition, the CFPB is subject to judicial review to be certain that it operates only within the authority granted by Congress and otherwise acts in accordance with law. If it fails to do so, the courts can overturn its actions. In addition to these fundamental constraints, Congress took important further steps in the Dodd-Frank Act to ensure meaningful oversight and accountability of the CFPB. In particular, the Dodd-Frank Act specifically requires that:

• The CFPB submits annual financial reports to Congress;
**Congressional Activities**

- The CFPB reports to Congress twice each year to justify its budget from the previous year;
- The director of the CFPB testifies before and reports to Congress twice each year regarding the CFPB’s activities;
- The GAO conducts an audit each year of the bureau’s expenditures and submits a report to Congress; and
- The CFPB submits its financial operating plans and forecasts and quarterly financial reports to the Office of Management and Budget.

“In addition to the various process requirements that the CFPB must meet, which are far more extensive than those that govern other banking regulators, the CFPB also faces several additional forms of oversight:

- The agencies sitting on the Financial Stability Oversight Council (FSOC) can review regulations issued by the CFPB and, in some cases, even reject the consumer bureau’s regulations — which the FSOC lacks the authority to do over any other banking regulator; and
- The Inspectors General of the Treasury Department and the Federal Reserve Board have been reviewing the CFPB’s activities and inform Congress and the public about the consumer bureau’s programs and activities.

“In brief, there will be more oversight and accountability of the CFPB than of any other federal banking regulator. Over time, I believe these limits will succeed in ensuring both sunlight and accountability in the consumer bureau’s operations,” she said.

**Associations share impact of Dodd-Frank**

During a hearing on March 2 titled, “The Effect of Dodd-Frank on Small Financial Institutions and Small Businesses,” industry associations told the U.S. House Financial Institutions and Consumer Credit Subcommittee about the impact the Dodd-Frank Wall Street Reform and Consumer Protection Act was having on the small banks and businesses in their associations.

**Burden on small banks**

Consumers and the economy need to expand traditional installment credit, not look for ways to curtail it, said American Financial Services Association (AFSA) president and Chief Executive Officer Chris Stinebert during the hearing, speaking on behalf of the association’s non-bank finance company members.

Stinebert emphasized the valuable role that finance companies play in local communities in testimony before the House Subcommittee on Financial Institutions and Consumer Credit. Finance companies provide small-dollar personal loans to individuals, families, and small business owners such as “the carpenter who needs to repair the transmission on his pickup, the family that needs a new washer and dryer, or the start-up company that needs a little short-term help to land the next client,” he said.

Finance companies are fundamentally different from depositories. “When a finance company makes a loan, the deposits of its customers are not at risk, and the government and its taxpayers do not insure its capital.” Some regulators and others in the industry are calling for a level playing field for supervision and examination, but finance companies operate under an entirely different structure than banks and credit unions, Stinebert said.

State regulators are often the first to identify emerging issues, practices or products that may need further investigation or may pose additional risk to the financial industry due to their familiarity with local and regional situations and issues faced by lenders, as well as their geographic proximity. According to Stinebert, AFSA’s finance companies are concerned that this wealth of knowledge will be lost on federal regulators and their emphasis on bank-centric experience. In addition, U.S. Small Business Administration studies show that the expense for small firms to comply with federal rules is 45 percent greater than for larger businesses.

Albert C. “Kell” Kelly, Jr., chairman of the American Bankers Association (ABA) and chief executive officer of SpiritBank in Bristow, Okla., agreed, saying that the level of regulatory burden that is being foisted on banks must be addressed in order to give all banks a “fighting chance” to survive and to meet the needs of their local communities.

Kelly gave three examples of how the legislation will negatively impact small banks.

He noted first that through the Act the government has
inserted itself in the day-to-day business of banking. As an example, Kelly cited the Durbin Amendment and the debit interchange price control proposal promulgated by the Federal Reserve pursuant to the amendment. He stated that the so-called “carve-out” for institutions with less than $10 billion in assets will simply not work.

“The price cap proposed by the Federal Reserve is so severe that it creates enormous economic incentives for retailers to adopt strategies to favor the cards with lower interchange rates,” he said. “Market share will always flow to the lowest priced product, even if those lower prices are mandated only for some. Having two different prices for the exact same product is not sustainable.”

Kelly urged the Congress to revisit the amendment and take immediate action to stop the proposed Fed rule from being implemented.

Kelly then raised the notion that the cumulative burden of complying with hundreds of new regulations will lead to massive industry consolidation. In particular he mentioned the additional weight of having to comply with the rules promulgated by the new Consumer Financial Protection Bureau (CFPB).

Kelly argued that the CFPB should focus its energies on supervision and examination of non-banks, maintaining that many of the problems that led to the financial crisis occurred outside the regulated banking sector. He noted that this helped spur the creation of the CFPB and urged Congress to ensure that focusing on non-banks is a top priority for the bureau.

Finally, Kelly said that some rules under Dodd-Frank will drive banks out of some business lines. He noted that rules relating to municipal advisors, if not properly implemented, will drive community banks out of providing basic banking products to local and state governments. He also said that mortgage risk-retention rules, again, if not done properly, will drive some community banks out of mortgage lending. Kelly urged Congress to exercise its oversight authority to assure that the rules adopted will not have adverse consequences for municipalities and mortgage credit availability.

**Access to credit**

With the housing production credit crisis taking a severe toll on the nation’s small home building firms and threatening future job growth and the fragile economic recovery, the National Association of Home Builders (NAHB) called on Congress to take tangible steps to improve access to credit for small builders.

“With the spigot for housing production loans cut off, and the threat that the uncertainty from new rule-making under the Dodd-Frank financial services law will further impact the ability of small community lenders to service the credit needs of our industry, it is clear that congressional action is needed to help open the flow of credit to home builders,” NAHB Chairman Bob Nielsen, a home builder from Reno, Nev., told members of the House Financial Services Subcommittee on Financial Institutions and Consumer Credit.

“Without such action,” he added, “there can be no housing recovery, which has major implications for our nation’s ability to recover from the current economic downturn.”

Builders are coming under increased pressure from lenders — including calls for additional equity, denials on loan extensions and demands for immediate repayment on acquisition, development and construction (AD&C) loans — even when their loans are current. Lenders are often citing regulatory requirements or pressure from bank examiners to reduce AD&C loan exposure as the rationale for their actions.

To address this situation, NAHB has presented banking regulators with specific instances of credit restrictions, provided data showing no difference in credit access across market conditions and requested specific changes
To date, these efforts have yielded no concrete results, which is why NAHB will soon be offering a formal legislative blueprint to Congress that focuses on fixing specific instances of regulatory excess while helping to ensure adequate credit availability to homebuilders.

Nielsen stressed that problems in the housing sector resulting from the economic impact of the credit crunch have placed an enormous toll on the nation’s economy. The sharp decline in home building from the 2005 peak—a drop of one million units—has translated into 1.4 million lost jobs for construction workers and the loss of $70 billion in wages. Factoring in the effect of the housing plunge on industries that provide materials and services to homebuilders, the total impact of the housing slump has been the loss of more than three million jobs and $145 billion in wages in all housing-related industries.

“NAHB estimates that over the next decade there will be a need for at least 1.7 million additional homes per year,” Nielsen said. “This translates into five million jobs and significant economic activity. Without increased AD&C lending, this future demand will not be met, job loss will occur and job creation will suffer.”

Qualified Residential Mortgages

NAHB also urged the federal banking regulators to take an expansive interpretation regarding forthcoming credit risk retention rules required by the Dodd-Frank Act concerning the definition of a Qualified Residential Mortgage (QRM). The law requires lenders to have “skin in the game” by holding a small percentage of each loan that they sell into the secondary market. What is still to be determined is how the risk retention rules will be established and what definition regulators should apply to include an exemption from the QRM requirements for certain high-quality, lower-risk mortgages.

If agencies establish a QRM standard that is significantly tighter than current credit standards, which are already tougher than they have been in decades, Nielsen warned that millions of creditworthy borrowers would be deemed, by regulatory action, to be higher-risk borrowers.

“As a result, they would be eligible only for mortgages with higher interest rates and fees, which would prohibit many potential first-time home buyers from purchasing a home, especially if the definition includes an excessively high minimum downpayment requirement,” Nielsen said.

Further, an overly restrictive QRM definition would also drive numerous current lenders from the residential mortgage market, including thousands of community banks, and enable only a few of the largest lenders to originate and securitize loans.

“This sharp dilution of mortgage market competition would have a further adverse impact on mortgage credit cost and availability,” said Nielsen. “We therefore urge the agencies to define the QRM’s parameters in a way that facilitates a housing recovery and ensures access to conventional mortgage credit for all buyers and refinance, while preserving high quality, empirically sound underwriting and product standards.”

House bill changes CFPB leadership structure

Rep. Spencer Bachus, R-Ala., chairman of the House Financial Services Committee, has introduced legislation that would replace the position of director of the new Bureau of Consumer Financial Protection (CFPB) with a five-person commission.

“It always seemed clear to me that the Dodd-Frank Act put too much power in the hands of one person,” Bachus said. “Under the Dodd-Frank Act, the director of the CFPB is given a broad and virtually unlimited mandate to substitute his or her judgment for that of consumers and the free market.”

Under HR 1121, dubbed the Responsible Consumer Financial Protection Regulations Act, a five-member commission would carry out all of the duties that would otherwise fall to the director of the CFPB.

The bill states that the members of the commission would be appointed by the president with the consent of the Senate and would be required to possess “strong competencies and experiences related to consumer financial protection.”

The members of the commission, including the chair, would serve staggered five-year terms, and could be removed by the president only for “inefficiency, neglect
The federal banking agencies are working on it now...  

… A rule that will bring an avalanche of new requirements to the mortgage industry, affecting the entire mortgage community, settlement services industry, consumers and anyone else who touches a mortgage loan.

... And the proposed rule has already been released!

There is grave concern about the imminent rule that will implement the risk retention and qualified residential mortgage (QRM) provisions of the Dodd-Frank Act. Our speakers are analyzing this highly impactful regulation and will provide complete instruction in the 90-minute, April 19 Webinar, The Future of Mortgage Lending: Evolution or Revolution?

By potentially reducing the number of mortgage lending transactions and therefore, real estate sales — and imposing significant requirements for the servicing of loans — these rules may literally threaten your business. Legal authorities are highly recommending the industry focus on the QRM requirements that this Webinar will cover.

This Webinar will:

• Explain the general risk retention requirement and narrow QRM exception to the requirement;

• Explore the major components of the QRM exception, including the 20 percent down payment requirement, underwriting requirements, prohibited loan features and servicing requirements related to loss mitigation;

• Address how the QRM exception may effectively define what loans are originated;

• Explain a reduced risk retention requirement provided for in Dodd-Frank that is not addressed in the proposal; and

• Address actions that industry members may want to take to address the proposal.
The Future of Mortgage Lending: Evolution or Revolution?
QRMs, risk retention and the business and legal implications of the new mortgage standards

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of duty or malfeasance in office.” Further, not more than three of the commissioners would be permitted to be members of any one political party.

The chair of the commission would be appointed by the president from among the commission members and would “exercise all of the executive and administrative functions of the bureau.”

Bachus said his proposed structure is the same employed by several other regulatory bodies including the FTC, FDIC and SEC.

“Because the CFPB might be the most powerful agency ever created, I am introducing this bill to ensure that a non-partisan, balanced approach to consumer protection prevails,” Bachus said.

**House, Senate bills seek to slow Fed ‘swipe fee’ rules**

Two bills recently introduced into Congress seek to delay implementation of the Federal Reserve’s debit card interchange price rules.

**HR 1081**, introduced on March 15 by Representatives **Shelly Moore Capito**, R-W.Va. chairman of the House Financial Institution Subcommittee; and **Debbie Wasserman Schultz**, D-Fla., would delay for one year the Fed’s so-called “swipe fee” rules. A day earlier, Senators **Jon Tester** D-Mont.; and **Bob Corker**, R-Tenn., introduced **S. 575** which calls for a two-year implementation suspension.

Proponents of the House bill, which has 27 original bipartisan co-sponsors, said the measure would delay implementation of the rule so that the FDIC, Office of the Comptroller of the Currency (OCC) and the National Credit Union Administration (NCUA) would have eight months to conduct a study that would analyze all costs associated with debit transactions. The study would also examine the proposed rule’s effect on consumers, debit card issuers and merchants.

“My bipartisan bill provides for a one year delay and allows the Federal Reserve, FDIC, OCC and NCUA to study potential unintended consequences of capping the interchange fee at 12 cents, then make recommendations for changes, if necessary,” Capito said in a statement.

Last December, the Fed proposed to cap debit card swipe fees at 12 cents per transaction. Currently, those fees average about 44 cents. The final rule is scheduled to be published April 22 and would be implemented by July 2011.

Capito is among those who worry that the loss of fee revenue could prompt small financial institutions to increase fees on checking accounts and other services.

“No one wins when consumers are levied with fees or even forced out of the banking system altogether — not consumers, not banks and not merchants. With unemployment hovering around 10 percent and our economy slow to recover, we cannot afford to implement a rule with far-reaching consequences that may harm the economy,” Capito said.

Similarly, the Tester-Corker legislation introduced into the Senate would mandate a two-year rule delay and one-year study of debit interchange fees.

“The stakes are simply too high to move forward with this rule without a closer look at the impact on consumers, credit unions, community banks, and the small businesses and jobs they sustain,” said Tester, a member of the Senate Banking Committee.

Banking industry advocates were quick to support the measures.

“Various concerns over the Fed’s proposal have been raised in recent weeks by bank regulators, including Fed Chairman **Ben Bernanke** and **Sheila Bair**, chairman of the Federal Deposit Insurance Corporation, and by numerous lawmakers from both sides of the political aisle,” wrote **Frank Keating**, president and CEO of the American Bankers Association.

“The legislation introduced by these Senators today rightly recognizes that the Fed’s rule will cause significant and immediate harm to community banks, consumers and the broader economy,” Keating said.
FDIC hopes to clarify Title II’s orderly liquidation authority

The board of directors of the Federal Deposit Insurance Corporation (FDIC) have approved a notice of proposed rulemaking (NPR) to further clarify application of the orderly liquidation authority contained in Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act, “Orderly Liquidation Authority” (OLA). The NPR builds on the interim rule approved by the FDIC on Jan. 18, which clarified certain discrete issues under the OLA.

The NPR establishes a comprehensive framework for the priority payment of creditors, for the procedures for filing a claim with the receiver and, if dissatisfied, for pursuing the claim in court. The NPR also clarifies additional issues important to the implementation of the OLA, including how compensation will be recouped from senior executives and directors who are substantially responsible for the failure of the firm.

The NPR, along with the interim final rule, is intended to provide clarity and certainty about how key components of the OLA will be implemented and to ensure that the liquidation process under Title II reflects the Dodd-Frank Act’s mandate of transparency in the liquidation of covered financial companies.

“This action is another significant step toward leveling the competitive playing field and enforcing market discipline on all financial institutions, no matter their size. Under Dodd-Frank, the shareholders and creditors will bear the cost of any failure, not taxpayers,” said FDIC Chairman Sheila Bair. “This NPR provides clarity to the process by letting creditors know clearly how they can file a claim and how they will be paid for their claims. This is an important step in providing certainty for the market in this new process.”

In addition to the priority of claims and the procedures for filing and pursuing claims, the NPR defines the ability of the receiver to recoup compensation from persons who are substantially responsible for the financial condition of the company under Section 210(s) of the Dodd-Frank Act. Before seeking to recoup compensation, the receiver will consider whether the senior executive performed his or her responsibilities with the requisite degree of skill and care, and whether the individual caused a loss that materially contributed to the failure of the financial company.

However, for the most senior executives, including those performing the duties of chief executive officer, chief operating officer, chief financial officer, as well as the chairman of the board, there will be a presumption that they are substantially responsible and thus subject to recoupment of up to two years of compensation. An exception is created for executives recently hired by the financial company specifically for improving its condition.

The NPR also ensures that the preferential and fraudulent transfer provisions of the Dodd-Frank Act are implemented consistently with the corresponding provisions of the Bankruptcy Code. The proposed rule conforms to the interpretation provided by the FDIC general counsel in December 2010.

Finally, the NPR clarifies the meaning of “financial company” under the OLA. Under the proposal, a financial company will be defined as “predominantly engaged” in financial activities if their organization derived at least 85 percent of its total consolidated revenue from financial activities over the two most recent fiscal years. This rule will enhance certainty about which financial companies could be subject to resolution under the OLA.

The proposed rule will be out for comment 60 days after publication in the Federal Register.

SEC seeks to readopt existing beneficial ownership rules

The Securities and Exchange Commission (SEC) has moved to readopt, without change, existing beneficial ownership rules regarding persons who purchase or sell security-based swaps in order to clarify that the rules will continue to apply after a new section of the Securities Exchange Act of 1934 takes effect this summer as mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Section 766 of the Dodd-Frank Act adds new Section
13(o) to the Exchange Act, which provides that “[f]or purposes of this section and section 16, a person shall be deemed to acquire beneficial ownership of an equity security based on the purchase or sale of a security-based swap, only to the extent that the commission, by rule, determines after consultation with the prudential regulators and the Secretary of the Treasury, that the purchase or sale of the security-based swap, or class of security-based swap, provides incidents of ownership comparable to direct ownership of the equity security.”

The new section will become effective on July 16.

In its rule published in the Federal Register on March 22, the SEC explains that it is proposing its rulemaking in order to preserve the existing scope of its rules relating to beneficial ownership after Section 766 of the Dodd-Frank Act becomes effective.

“Absent rulemaking under Section 13(o), Section 766 may be interpreted to render the beneficial ownership determinations made under Rule 13d–3 inapplicable to a person who purchases or sells a security-based swap. In that circumstance, it could become possible for an investor to use a security-based swap to accumulate an influential or control position in a public company without public disclosure,” the SEC notes.

Similarly, the SEC fears that if it does not readopt without change the relevant portions of Rules 13d–3 and 16a–1 as it is proposing, “a person who holds a security-based swap that confers beneficial ownership of the referenced equity securities under Section 13 and existing Rule 13d–3, or otherwise conveys such beneficial ownership through an understanding or relationship based upon the purchase or sale of the security-based swap, may no longer be considered a 10 percent holder subject to Section 16 of the Exchange Act.”

In addition, private parties may have difficulty making, or exercising private rights of action to seek to have made, determinations of beneficial ownership arising from the purchase or sale of a security-based swap.

Comments regarding the SEC proposal are due on or before April 15.

Illinois insurance director to head FIO

U.S. Treasury Secretary Timothy Geithner has tapped Illinois Insurance Director Michael McRaith to serve as the new director of the Federal Insurance Office (FIO). Geithner made the announcement at the March 17 meeting of the Financial Stability Oversight Council (FSOC).

The FIO was created in the Dodd-Frank Act and will operate from within the U.S. Department of Treasury. FIO will be required to monitor the insurance industry, advise Congress on insurance issues, help lead U.S. efforts on international insurance issues and advise various federal entities on insurers’ systemic risk exposure.

The new insurance office will not have regulatory power.

Prior to his appointment at the Illinois department of insurance, McRaith worked 15 years in private practice as an attorney in Chicago.

McRaith is secretary and treasurer of the National Association of Insurance Commissioners (NAIC), and also serves as chairman of the board of directors for the Illinois Comprehensive Health Insurance Plan — a high risk health insurance pool.

He supervises the state’s Senior Health Insurance Program (SHIP) and has actively participated in developing, drafting and advocating for statewide and national health insurance modernization.

The Property Casualty Insurers Association of America (PCI) hailed the announcement.

“We are pleased that the Department of Treasury has listened to the calls from the insurance sector and congressional leaders from both sides of the aisle to fill this critically important position,” said David Sampson, president and chief executive officer of PCI in a release.

“Director McRaith brings extensive experience in the insurance sector and a deep understanding of the state insurance regulatory system.”
The Financial Stability Oversight Council (FSOC) is seeking comment on proposed rules to be used in determining which financial market utilities (FMUs) are “systemically important” as mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act.

The Dodd-Frank Act generally defines an FMU as any person that manages or operates a multilateral system for the purposes of transferring, clearing or settling payments, securities or other financial transactions among financial institutions or between financial institutions and that person.

Section 804 of the Dodd-Frank Act gives the FSOC the authority to identify and designate as systemically important an FMU if the council determines that its failure or disruption could create or increase the risk of significant liquidity or credit problems spreading among financial institutions or markets, and thereby threaten the stability of the U.S. financial system. An FMU designated by the FSOC as systemically important would become subject to the heightened prudential and supervisory provisions of Title VIII of the Dodd-Frank Act.

This is the second step in the FSOC’s rulemaking process for designating systemically important FMUs. An advance notice of proposed rulemaking (ANPR) was discussed and approved for public comment at the FSOC’s November meeting. This most recent notice of proposed rulemaking (NPR) describes the criteria that will inform, and the processes and procedures established under the Dodd-Frank Act for, the FSOC’s designation of FMUs as systemically important.

Under the Dodd-Frank Act, in making a determination on whether an FMU should be designated as systemically important, the FSOC must consider:

- The aggregate monetary value of transactions processed by the FMU;
- The aggregate exposure of the FMU to its counterparties;
- The relationship, interdependencies, or other interactions of the FMU with other FMUs or payment, clearing or settlement activities;
- The effect that the failure of or a disruption to the FMU would have on critical markets, financial institutions or the broader financial system; and
- Any other factors that the Council deems appropriate.

Of those five considerations, the FSOC notes in its NPR that the first four are specific, and has proposed the inclusion of subcategories.

“The council believes including illustrative subcategories will give the public a better understanding of the designation process,” the FSOC writes in its NPR.

With regard to the first factor covering the aggregate monetary value of transactions processed by an FMU, the FSOC proposes to consider the number of transactions processed, the value of transactions cleared, settled and processed, and the value of other financial flows.

For the second factor covering the aggregate exposure of an FMU to its counterparties, the council proposes to consider credit exposures and liquidity exposures.

Regarding the third factor involving the relationship, interdependencies or other interactions of an FMU with other FMUs or payment, clearing or settlement activities, the proposed rule focuses on understanding the FMU’s interactions by types of participants.

For the fourth factor covering the effect that the failure of or a disruption to an FMU would have on the broader financial system, the proposed rule lists subcategories focused on the roles of the FMU in the market served, the availability of substitutes, the concentration of participants and product types, the degree of tiering and the potential impact or spillover in the event of a failure or disruption.

The FSOC is also seeking input on the proposed processes by which FMUs will be notified of council inquiries and determinations, and how they may respond to and appeal council actions. Further, the NPR describes under what circumstances some FMUs may be required to collect and submit information to the FSOC for the purpose of assessing whether an FMU is systemically important.

The NPR includes a 60-day public comment period, with FSOC action on the final rule expected later this year.
Commodity Futures Trading Commission (CFTC) Chairman Gary Gensler said the commission will not finalize its Dodd-Frank rulemaking in time to meet a July 21 deadline. In a March 16 speech prepared for the Futures Industry Association’s (FIA) annual conference in Boca Raton, Fla., Gensler revealed that rules regarding key areas such as capital and margin, product definitions and the Volcker Rule still require significant coordination with other regulatory bodies. Further, Gensler said the CFTC has delayed the propagation of proposed rules regarding segregation for cleared swaps and testing and supervision in order to solicit additional public input.

“Other than the Volcker Rule, it is our goal — though we are human and we might slip — to complete proposed rules by the end of April,” Gensler wrote.

Gensler said the CFTC will likely divide the remaining rule proposals into categories based on when they may be finalized.

Rules regarding entity definitions and the associated swap dealer and major swap participant registration requirements are among those likely to be included in the early group. Additional rules that may constitute the early group include:

- A final rule on the end-user exception from clearing;
- Two process rules related to the process for mandatory clearing and rule submissions from clearinghouses and exchanges;
- The large trader reporting rule;
- Rules relating to enforcement, such as the whistleblower rule and the anti-manipulation rule; and
- The fair credit reporting rule, consumer information privacy rules, conflicts of interest and the definition of agricultural commodities.

The CFTC hopes to take up the early group of final rules in the spring.

“Beyond the rules that we will possibly consider in the early group, there are four broad clusters of rules, as well as a number of more specific rules, that may be included in the middle group,” Gensler wrote. Likely middle group rule clusters include:

- Rules relating to clearinghouses, such as risk management, financial resources, participant eligibility, recordkeeping and straight-through processing;
- Rules relating to business conduct standards for swap dealers — both internal and external;
- Data rules; and
- Rules related to trading markets.

Another important potential middle group rule relates to position limits. Gensler said the CFTC has already received 3,500 public comments on that proposed rule and it will take some time to consider them all. The CFTC is discussing finalizing the middle group of rules in the summer.

Late group rules could include the disruptive trading practices interpretive order, product definitions, capital and margin requirements, supervision and testing requirements and conforming rules. In addition, among the late rules, the CFTC may consider finalizing the joint rule with the SEC regarding reporting requirements for investment advisors as well as a similar rule on commodity pool operators. Rules in the late group probably will not be considered until the late summer and early fall, Gensler wrote.

Though the CFTC has many rules left to write, Gensler insisted the rulemaking process is being conducted with great care, and continues to rely heavily on public comment.

Gensler said the CFTC also plans to make full use of the flexibility that Congress gave the commission as to implementation and effective dates of the rules.

“We are looking at phasing implementation dates based upon a number of considerations, possibly including asset class, type of market participant and whether the requirement would apply to market platforms, like clearinghouses, or to specific transactions, such as real time reporting,” he wrote.
On March 18, the Federal Reserve filed its memorandum in opposition to the lawsuits that the National Association of Independent Housing Professionals (NAIHP) and the National Association of Mortgage Brokers (NAMB) brought against it regarding its loan originator compensation and steering rule that is set to be implemented on April 1. In addition, District Judge Beryl Howell denied NAMB’s motion to have the cases heard separately.

NAIHP filed its suit against the Fed on March 7 and NAMB filed its suit on March 8. On March 11, the court consolidated the two lawsuits.

Both organizations sought a temporary restraining order and a preliminary injunction enjoining the Fed from implementing the rule on April 1.

The Fed opposed the viability of the suits, stating that, “Because the plaintiffs have not made the showings required to obtain extraordinary relief, the Fed opposes the respective applications for temporary restraining order and preliminary injunction.”

According to the Fed, in order to obtain the sought relief, NAMB and NAIHP must demonstrate: 1) irreparable harm to the plaintiff if the temporary restraining order is not granted; 2) the likelihood of success on the merits; 3) that the balance of equities tips in his favor; and 4) that the injunction is in the public interest.”

The Fed claims that:

• NAMB and NAIHP have failed to show any imminent, irreparable harm;  
• NAMB and NAIHP cannot succeed on the merits because the Fed acted reasonably and within its statutory authority; and  
• An injunction will substantially harm other parties and the public interest.

On March 14, NAMB filed a motion for reconsideration of the court’s decision to consolidate the lawsuits.

NAMB argued that it was not provided with an opportunity to oppose the Fed’s motion and that the briefing scheduling will “cause NAMB’s members significant irreparable harm and prejudice.” The organization urged the court to reconsider, stating that it cannot wait until the end of March for a hearing on its motion for a temporary restraining order.

On March 21, Judge Howell denied NAMB’s motion stating that “The factual arguments presented by NAMB confirm that the two actions were properly consolidated and that the briefing schedule ordered will ensure expeditious, fair and full consideration for the issues at stake.”

NAMB also moved for expedited discovery of documents “in order to develop the factual record for consideration with its motion for a preliminary injunction and to further demonstrate that NAMB is likely to succeed on the merits.”

NAMB is seeking to discover the entire administrative record and any other documents that relate to the Fed’s loan originator compensation rule.

The court granted NAMB’s request as to the administrative record but denied it as to other documents.

For more on the loan officer compensation rule and other regulations being introduced by the Federal Reserve, go to www.DoddFrankUpdate.com
A bill that would require registration of appraisal management companies with the Department of Financial and Professional Regulation has been introduced in the Illinois legislature. If passed, registration would be required beginning in January 2012.

HB 2956 was introduced by Angela Saviano, R-77th District, and Robert Rita, D-28th District. The bill provides that it is unlawful for a person or entity to act, or assume to act, as an appraisal management company (AMC), to engage in the business of appraisal management service or to advertise or hold himself or herself out to be a registered appraisal management company without first obtaining a certificate of registration.

AMCs are permitted to continue in business until the department adopts rules implementing the act, but are required to apply for registration within 180 days after the effective date of the regulations.

The act also sets forth the powers and duties of the department, registration qualifications, grounds for discipline, civil and criminal penalties, and administrative procedure. It also sets forth provisions concerning standards of practice and prohibited activities.

Independence requirements
According to HB 2956, AMCs are required to be in compliance with the appraisal independence standards established under Section 129E of the federal Truth in Lending Act, including the requirement that fee appraisers be compensated at a customary and reasonable rate when the AMC is providing services for a consumer credit transaction secured by the principal dwelling of a consumer.

The AMC is required to certify to the department that it has policies and procedures in place to be in compliance. However, the department may not adopt rules or policies that contradict or change the presumptions of compliance as established under the Final Interim Rule of the federal Dodd-Frank Wall Street Reform and Consumer Protection Act.

The bill also states that no AMC procuring or facilitating an appraisal may have a direct or indirect interest, financial or otherwise, in the real estate or the transaction that is the subject of the appraisal, as defined by the federal Dodd-Frank Wall Street Reform and Consumer Protection Act.

Prohibited activities
AMCs are prohibited from improperly influencing or attempting to improperly influence the development, reporting, result or review of any appraisal by engaging, without limitation, in any of the following:

(1) Withholding or threatening to withhold timely payment for a completed appraisal, except where addressed in a mutually agreed upon contract.

(2) Withholding or threatening to withhold, either expressed or by implication, future business from, demoting, terminating or threatening to demote or terminate an Illinois-licensed or certified appraiser.

(3) Expressly or impliedly promising future business, promotions, or increased compensation for an independent appraiser.

(4) Conditioning an assignment for an appraisal service or the payment of an appraisal fee or salary or bonus on the opinion, conclusion or valuation to be reached in an appraisal report.

(5) Requesting that an appraiser provide an estimated, predetermined or desired valuation in an appraisal report or provide estimated values or sales at any time prior to the appraiser's completion of an appraisal report.

(6) Allowing or directing the removal of an appraiser from an appraisal panel without prior written notice to the appraiser.

(7) Requiring an appraiser to sign a non-compete clause when not an employee of the entity.

(8) Requiring an appraiser to sign any sort of indemnification agreement that would require the appraiser to defend and hold harmless the appraisal management company or any of its agents, employees or independent contractors for any liability, damage, losses or claims arising out of the services performed by the
appraisal management company or its agents, employees or independent contractors and not the services performed by the appraiser.

(9) Prohibiting or attempting to prohibit the appraiser from including or referencing the appraisal fee, the appraisal management company name or identity, or the client's or lender's name or identity within the body of the appraisal report.

(10) Require an appraiser to collect a fee from the borrower or occupant of the property to be appraised.

(11) Knowingly withholding any end-user client guidelines, policies, requirements, standards, assignment conditions, and special instructions from an appraiser prior to the acceptance of an appraisal assignment.

AMCs are also prohibited from altering or modifying an appraisal report.

National banking associations fight proposed debit card rules

A coalition of major nationwide bank and credit union trade associations has filed an amicus brief supporting TCF National Bank’s legal challenge to the Federal Reserve Board’s (FRB) proposed caps on debit card interchange fees.

The associations’ brief submits that the FRB’s proposed rule erroneously interprets the debit card interchange fee provisions of the Durbin Amendment.

“The Durbin Amendment directs the Board to establish ‘standards for assessing’ whether an interchange fee is ‘reasonable and proportional’ to an issuer’s costs with respect to a debit card transaction,” the brief states. “The statute does not authorize the Board to issue standards that would preclude an issuer from receiving an interchange fee that is sufficient to cover its debit-card costs plus a reasonable rate of return, much less to mandate a fee amount that is far below an issuer’s actual costs.”

The coalition argues that the FRB acted contrary to that directive, instead proposing “a harsh, one-size-fits-all price cap of 12 cents per transaction — an amount the Board itself acknowledges is far below debit card issuers’ actual costs and does not allow for any return on the issuers’ substantial investments in their debit card businesses.”

In their brief, the associations argue that the consequences of this below-cost price cap would be severe for banks, credit unions and consumers.

“If the Board’s rule were to take effect, it would reduce interchange fee revenues by as much as 80 percent, cutting the revenues of banks and credit unions by approximately $12 billion per year. It would also result in increased banking fees and costs for consumers; deprive significant numbers of Americans (particularly low-income Americans) of access to the reliable, convenient, secure and efficient debit card method of payment,” the coalition writes.

The associations joining the brief are The Clearing House Association, American Bankers Association, Consumer Bankers Association, Credit Union National Association, Mid-Size Bank Coalition of America, The Financial Services Roundtable, Independent Community Bankers of America and National Association of Federal Credit Unions.

TCF’s lawsuit is currently pending in the United States District Court for the District of South Dakota.

To find out what other associations are saying about proposed rules, go to www.DoddFrankUpdate.com
Study shows SEC needs resources

An independent Dodd-Frank Wall Street Reform and Consumer Protection Act mandated study of the Securities and Exchange Commission’s (SEC) organization and structure was released on March 10. The study, performed by The Boston Consulting Group, was conducted from October 2010 to March 2010. The study focused on four areas: organization structure; personnel and resources; technology and resources; and relationships with self regulatory organizations (SROs). The group did not examine the regulatory philosophy behind the SEC’s authorizations, whether the current statutory framework is optimal for regulating the U.S. securities markets or other related topics.

The study contains numerous recommendations including:

- Reprioritizing regulatory activities and reallocating resources to areas in need of improvement;
- Reshaping the organization including roles, accountability, and staff. The study instructs the SEC to seek flexibility on Dodd-Frank mandated offices to avoid unnecessary duplication;
- Investing in infrastructure, including key systems, technologies, human resource needs and performance management systems;
- Enhancing the self-regulatory organization model;

The report highlights misallocation and a shortage of resources in the SEC. For example, the report found that the SEC is short 125 full-time employees in one department, while a department in the same division was overstaffed by 65 external contractors.

“The independent consultant’s report offers valuable recommendations that will help us improve SEC operations and market oversight,” said SEC Chairman Mary Schapiro. “In fact, I am immediately undertaking the following first steps:

- I plan to ask for the authority to expand the responsibility and strengthen the authority of our chief operating officer by moving under him all of the functions that currently report to our office of the executive director.
- I also have assigned to our chief operating officer the responsibility for leading a series of working groups that are being created to address each of the report’s recommendations. He, along with other members of our senior leadership team, will ensure that we report to Congress and the public on our progress.

“These are significant steps, but they will not be our last. In the coming months we will report back to Congress on the other steps we will be taking to effectively and efficiently fulfill our market oversight and investor protection mission,” Schapiro said.

That same day, U.S. Sen. Robert Menendez, D-N.J., a member of the Senate Banking Committee, joined with Banking Committee Chairman Tim Johnson, D-S.D., and Chairman of the Subcommittee on Securities, Insurance, and Investment Sen. Jack Reed, D-R.I., to call on Congress to provide Wall Street regulators with the resources they need to hold Wall Street accountable and protect middle class investments.

The senators released a letter to the Senate Appropriations Committee chairs and Subcommittee chairs calling on them to support full funding for the SEC and the Commodity Futures Trading Commission (CFTC) both in the 2011 Continuing Resolution and in the FY 2012 budget.

Specifically, the proposed Republican budget cuts both the SEC and CFTC budgets by two percent and 34 percent, respectively. President Obama is proposing an increase to $1.43 billion for the SEC and $308 million for the CFTC. Cuts to the SEC and possibly the CFTC will not affect the federal deficit because of regulatory collections from the industry.

The GOP’s reckless cuts come at the same time as the new Wall Street reform requires new responsibilities, the senators said in their letter. The SEC and the CFTC are now responsible for oversight of the over-the-counter derivatives market and hedge fund advisors, greater disclosure regarding asset-backed securities, and creation of a new whistleblower program. In fact, the CFTC was already responsible for overseeing actively traded futures and options contracts on U.S. exchanges, which have increased nine-fold in the last decade.

“It has only been a few years since Ponzi schemes run by Bernard Madoff and Allen Stanford were unearthed. And the economy is still reeling from risky bets made by Wall Street executives,” Johnson said. “Wall Street Reform passed by Congress last year gave the SEC and CFTC new authorities to protect investors and prevent future crises. It is reckless and irresponsible to gut funding for these critical new protections.”
During the annual convention of the Independent Community Bankers of America, members heard from prominent federal regulators who shared their thoughts on the Dodd-Frank Wall Street Reform and Consumer Protection Act and how the regulations they are writing to implement the act will impact community bankers.

After outlining the resources available for regulating and assisting community banks, Acting Comptroller of the Currency John Walsh outlined the concerns he has heard from community banks.

“Given the extent of our commitment to community banking, it’s a matter of great concern to me when I hear, as I sometimes do, that community bankers feel the business is no longer sustainable, or — worse — that regulators, including the OCC, agree and are encouraging community banks to exit the business,” he said. “This latter point is both completely untrue, and particularly troubling. While I won’t try to minimize the very significant challenges facing smaller institutions, I can assure you that we at the OCC believe very strongly in the future of community banks. America has long had a diverse banking system, and there is no reason to believe that will change.”

One area of concern Walsh had with the Dodd-Frank regulations being introduced was the limits on interchange fees mandated by the law. “It’s worth notice that Congress intended to exclude community banks from this provision of Dodd-Frank but community banks recognize that the exemption granted has little practical benefit because the price the Fed sets for larger banks will end up being the price smaller banks can charge,” he said.

He was also concerned that all of these new requirements may counteract one another.

“Layered onto these specific challenges is the simple accretion of new regulations that limit profitability and increase compliance costs for the industry,” Walsh said. “It’s not that any one requirement is a bad idea, but it’s hard to judge the cumulative effect when so many changes are made at once. I worry that there could be ‘drug interactions:’ one pill that’s good for the heart, one for the head, but taken together they’re dangerous. Neither is any one requirement so hard to implement, but the cumulative effect can be punishing, particularly for small banks that don’t have spare resources to deal with the expanded compliance burden.”

Elizabeth Warren, assistant to the president and special advisor to the secretary of the treasury, promised community bankers a Consumer Financial Protection Bureau dedicated to protecting communities and leveling the playing field.

“During my many visits with you, I’ve heard about the high cost of regulatory compliance,” she said. “I understand the difficulty of determining what is or is not required by a particular regulation — and the costs that creates. I appreciate the widespread anxiety and frustration over the future of community banks and other small financial institutions.”

In applying the lessons she has learned from community bankers, Warren said the CFPB will serve the American people by embracing a strong, diversified banking system. She also said that the bureau will “aim at problems where they exist.”

“We are committed to ensuring that all providers — including community banks, credit unions, large banks, non-bank mortgage lenders and payday lenders — must follow the rules for offering consumer financial products,” Warren said. “We can’t enforce the law only against the banks that are easiest to find. Instead, we will build a strong enforcement arm that will — for the first time ever — put significant federal resources behind ensuring compliance by non-bank financial companies.”

Warren also pointed out that the CFPB will get smarter on regulation. “One of the amazing things about this new consumer agency is that it has the opportunity to cut back on regulatory costs,” she said. “With your help, we have sent our first initiative squarely in mortgage documentation. We are aiming to consolidate the TILA and RESPA forms to create a shorter, cheaper form that consumers can understand — and that you can fill out more quickly and easily.”

“This is an important moment in history,” Warren added. “Much has gone wrong in the financial world, and there are many moving parts right now. We have only a brief time to get this right, so I’ll strip this down to the basics. This consumer agency is dedicated to serving America’s families. In the long run, these families will not be better off if only a handful of big banks are left standing.

“Change is coming,” she concluded. “I want it to be a change that gives families good choices and the chance to find long-term financial partners they can trust. I want us to work together for the right changes.”
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City: _____________________________________________ State: __________ Zip Code: _________________ 
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Payment Information

☐ Visa  ☐ American Express  ☐ Mastercard  ☐ Check (Payable to October Research) 
Name on card: __________________________________________________________________________________ 
Account number: ____________________________ Exp: _______ ___ CCV number: _______ ___ 
Signature: ____________________________________________________________________________ 
CCV are the last 3 digits printed over the signature on the back of your card. American Express cards show the 4-digit CCV printed above and to the right of the imprinted card number on the front of the card. 

Credit card billing address (Required only if different than above address) 
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