

February 24, 2011

Amanda M. Logan
Department of the Treasury
CFPB Implementation Team
1801 L Street, N.W.
Washington, D.C. 20036

Dear Ms. Logan:

Thank you for the invitation to the American Bankers Association¹ to share our views on the burden that the Bureau of Consumer Financial Protection (BCFP) will impose on the banking industry and particularly on community banks, “that includes data to back it up.” Our response cannot credibly reference data that does not exist on compliance with rules and regulations that do not yet exist, but we do offer concrete examples of sources for future data development. ABA is encouraged that the Bureau has reached out to begin laying the groundwork for more rigorous analysis of this issue—so that we can all better gauge when future regulatory action successfully reduces burden and contributes to efficiency in the consumer financial marketplace. Excessive paperwork is no small part of the burden currently faced by consumers and bankers alike, and none of us like it.

In the area of regulatory compliance, there is no question that over the past few years bankers have been experiencing increasing demands on their management resources from new laws—many of which will end up among the enumerated laws transferred to the Bureau (e.g., Credit CARD Act, SAFE Act). This past November a web-based straw poll on the home page for ABA’s Center for Regulatory Compliance specifically asked about Dodd-Frank Act (DFA) compliance impact and, although not exclusively directed at the Bureau, it yielded the following results:

What will be the impact of DFA compliance on your bank? (Select as many as apply.)

By Institution Size	Under \$100M	\$100- \$500M	\$500M- \$2B	Over \$2B	Totals
Increase cost of compliance	100	100	100	100	100
Reduction of products or services	50	47	74	40	56
Incur higher attorney fees	33	41	54	57	47
Explore acquisition or merger	17	3	5	8	5
Change charters	0	0	0	8	1
None of the above	0	0	0	0	0

By percent in each size tranche

¹ The American Bankers Association represents banks of all sizes and charters and is the voice for the nation’s \$13 trillion banking industry and its two million employees. The majority of ABA’s members are banks with less than \$165 million in assets.

As is evident from this simple poll, there is no doubt among bankers that compliance costs will increase. Also important are the other manifestations of regulatory impact: reduction of products or services, higher legal fees and last, but certainly not least, increased consideration of consolidation—particularly at the smallest size banks. None of this should be surprising. As the regulatory page count increases, there is more to do, more to interpret, more to audit, more to examine and more to train for. While President Obama’s call for regulatory relief has increased our hopes, so far no one is taking burden away.

Studying Consumer Compliance Costs

BCFP regulatory burdens may be categorized in several ways. We suggest the following taxonomy:

1. Reporting requirements (e.g., HMDA and small business lending data)
2. Disclosure requirements (e.g., notices, disclosures, communications, and marketing)
3. Delivery requirements (e.g., constraints on conducting transactions)
4. Management requirements (e.g., explicit processes like dispute resolution or board approvals)
5. Product design (e.g. identifying classes of mortgages that would receive the “Qualified Residential Mortgage” designation)

Each of these requirements is accompanied by compliance obligations with associated costs. This includes system design, record-keeping, monitoring, audit, governance, supervisory relations, complaint handling and training. This compliance structure surrounding each requirement serves as a multiplier of the costs of performing the actual requirement. Although compliance obligations are occasionally hard-wired in the regulatory language, more often they are supervisory expectations or represent recommended risk management practices. They are no less real or burdensome for that distinction.

In addition to these categories and multipliers, there are three major drivers of compliance burden within the Bureau’s framework erected by DFA:

- Existing consumer financial protection laws transferred to the Bureau,
- New consumer protection requirements and authorities bestowed on the Bureau, and
- Distributed supervision and fragmented enforcement divorced from prudential safety and soundness.

ABA will address these drivers in more detail below.

Legacy Regulatory Burden Analysis and Efforts

As a starting point to understand Bureau generated burden, we suggest beginning with the realization that the Bureau assumes responsibility for the enumerated consumer financial protection laws identified in the Dodd-Frank Act and their associated burdens. One historically deficient measure of these burdens is the Paperwork Reduction Act (PRA) estimates for each of those laws. These measures are poor representations of the actual regulatory costs associated with the enumerated laws, because they do not include the costs for practices that are not considered “information collections.” A further flaw is the estimation process has been unable to arrive at a comprehensive and accurate measure of the time or costs required to perform fully those activities that are considered “information collections.” Nevertheless, PRA estimates are one existing source for data on Bureau burdens that in fact is mandated by Congress to be calculated.

An important early step for the Bureau is to evaluate the utility of the PRA in arriving at meaningful and complete information about regulatory burden. Under the PRA, the following types of activities are among those that constitute burden to be estimated in connection with a covered information collection:²

1. Design, procurement and operation of data *collection*, data *management*, data *reporting* systems necessitated by the collection of information.
2. Responding to changes in the requirements of an existing collection of information where such collection requires different or more detailed information, redefines terms or concepts, or alters in any way the consequences of responding in the same manner as before.
3. Training staff or other agents about how to comply with the collection, including whatever time or money resources are necessary to ensure staff understands enough about the nature of the program and policy context to respond to the collection.
4. Time, effort and other resources to perform all required tasks, including completion and fulfillment of the information request, as well as to certify the accuracy and/or reliability of information provided. Effort to certify compliance with any statutory or regulatory provision represents paperwork burden, generally requires intensive scrutiny by senior officers, cannot be delegated and generally entails a comprehensive audit. Such certification burden should be evaluated with the context of the legal consequences to respondent for improper certification.
5. Time, effort and other resources devoted to transmitting the collection of information to the federal agency or a third party.

We urge the Bureau to obtain the files supporting the agency estimates of PRA burden associated with the enumerated consumer financial protection laws being transferred to the Bureau and evaluate the reliability of the estimates and consider how the completeness and reliability of such estimates could be improved.

ABA understands that data to support the estimates is difficult to obtain and to apply effectively, but the difficulty does not mean that the burden does not exist and can therefore be ignored. Often, the difficulty of quantifying the burden can be an indicator of the considerable weight of the burden, all the more in need of being understood and assessed. Moreover, it must not be forgotten that the

² These factors are described in The Paperwork Reduction Act of 1995: Implementing Guidance for OMB Review of Agency Information Collection, August 16, 1999 (Draft by Office of Information and Regulatory Affairs, OMB) at pp. 45 – 48. (OIRA Guidance)

responsibility for calculating burden lies with the regulator not with the regulated. Here are some points to consider: First, for new rule-makings there are naturally limited experiences to draw on to quantify the work associated with a rule that has not been finalized, let alone implemented. Second, banker priorities are on conducting transactions correctly, self-correcting errors, and performing efficiently. Third, the estimates made by the agencies are generalized over the entire population of their respective jurisdictions and in doing so lose any correlation with institution size and relative burden. Fourth, there is a tendency for the agency estimates to capture only the discrete element of recording, disclosing or reporting an information collection and to ignore the system costs associated with training personnel and assuring accuracy that are components of a comprehensive estimate according to OIRA Guidance.

Ultimately, the shortcomings of PRA as a vehicle for achieving burden reduction have not been cured by the Regulatory Flexibility Act nor by additional amendments by the Small Business Regulatory Enforcement Fairness Act (SBREFA). Unfortunately, this process suffers from its own defects. Historically, the threshold of “Reg Flex” has almost never been triggered according to banking agency estimates. Second, agency response to small business burden tends to be addressed by providing additional guidance accompanying the rule. In actuality, the guidance is universally applicable and has no special small bank focus and is not immune from adding to regulatory burden.

Section 1100G of DFA does provide a further small business-oriented process that may have some impact on improving both data quality about burden and achieving meaningful burden relief. As with the EPA, the Bureau is subject to a pre-promulgation process intended to assure more direct input in rule-making for the purpose of devising regulatory proposals that minimize burdens at the outset. ABA understands that the Bureau is already making room for this process in its rule-making approach. ABA and its members intend to be constructively engaged in this special process.

Prospects for Controlling New BCFP Regulatory Burden

In addition to the inherited rules and regulatory requirements, the Bureau has new powers and mandates to exercise. Among them are the expansively defined new cause of action for “abusive” practices and the micro-managed scheme for mortgage regulation in DFA Title XIV. Much could be written about the prospects for future regulatory burden derived from these sources, but at this time ABA will concentrate on three specific components of the Bureau’s new authorities that threaten to generate immediate new regulatory burdens: new data collection requirements, consumer complaint and information access processes, and TILA/RESPA reform.

Data collection. Section 1071 of DFA introduces a new data collection regime for small business lending. This new Congressional mandate is another example of add-on burden. The key to managing this in the regulatory process is to begin with sensible data collection and reporting specifications that allow appropriate time for system implementation, all based on adequate notice and comment rule-making. ABA believes that section 1071 becomes effective on the designated transfer date so that the Bureau has the authority to take appropriate regulatory action to establish just such a sensible program. Section 1071’s statutory language is not sufficient to compel immediate data collection without an agency rule-making to make sense of the collection and reporting process. ABA believes that the best legal and practical reading of section 1071 is that the Bureau must propose and then implement a data collection rule-making that defines the data to be collected and the manner of recording and reporting them so that the goal of sound analysis can be achieved.

Because banks are trying now to plan how to meet their near-term data technology obligations, ABA requests that the Bureau take immediate action to confirm clearly that there will be no 1071 data collection obligation until there is a Bureau rule that describes how it is to be conducted and provides adequate time for implementation of the necessary systems at banks and at the Bureau. Such a prompt and clear statement helps avoid uncertainty and the resulting wasteful efforts that banks may be urged to initiate in the absence of an authoritative Bureau announcement.

Consumer complaint and information access. As fundamental as the consumer complaint processing function is to the objectives of the BCFP, the Bureau should keep in mind that the banking agencies and the banks in their jurisdictions have an established individualized complaint process. In contrast, the Federal Trade Commission (FTC) does not resolve consumer complaints on an individual-by-individual basis. In implementing its own consumer complaint and inquiry process, the Bureau should avoid duplicating or complicating the existing prudential regulator programs that already serve bank customers well.

ABA members respect the customers' need for accurate information about their financial transactions and they provide periodic statements, check images, and receipts to facilitate responsible personal financial management. Today, access to customer transaction information is being augmented by electronic banking channels as well as web-based and mobile communication platforms. What the Bureau should keep in mind is that these new means of communication of financial information are the result of private sector innovation in response to customer interest; they are not the fruit of regulatory compulsion. Of course, banks of different sizes and complexity have different capabilities in this area that need to be kept in mind to reach a flexible, not burdensome, implementation of Section 1033 of DFA. For example, community banks generally specialize in high touch; larger institutions leverage economies and technologies of scale.

In any case, DFA 1033 should not be allowed to be wielded as a pre-complaint discovery process seeking limitless records where the cost of production becomes a strike suit tactic to leverage settlements over frivolous claims. Such unwarranted pressure has been witnessed in connection with abuse of RESPA's qualified written request process and should be avoided from the beginning when implementing Section 1033.

TILA/RESPA reform. The Bureau has already focused on its Congressional mandate to reform the TILA/RESPA disclosure process. Professor Warren describes a *tabula rasa* approach and a reverse-engineering of the existing regulations based on a disclosure developed by asking what a prospective borrower needs to know and when they need to know it. This is a worthwhile goal that ABA and its members support and have long called for—provided that the changes truly simplify the disclosures, resulting in fewer forms with greater transparency, and eliminate compliance burden, not add to it. Imposing an additional “umbrella” form while retaining the existing regimen of disclosure is not a burden-reducing solution—it would neither help customers fully appreciate their loan's documentation (or their obligation as borrowers), nor relieve banks of unnecessary paperwork.

Of course, TILA/RESPA reform is only the tip of the mortgage regulatory iceberg. A slew of new mortgage regulatory requirements are compelled by Title XIV of DFA that will impose standardization of mortgage products while increasing penalties and litigation risk for community bankers that attempt to tailor mortgage solutions to customers or to apply flexible underwriting standards when qualifying local borrowers.

Controlling Supervisory and Enforcement Burden

DFA also adds compliance burden by unleashing a fragmented enforcement mechanism on banks that enables States to pile new laws on top of Bureau rules and empowers Attorneys General to invent their own interpretations of federal standards and bring actions without regard for the exam conclusions of the Bureau or prudential regulators. This generates increased regulatory uncertainty and litigation risk that will chill innovation and raise barriers to market competition, especially for banks without an army of lawyers to navigate the enforcement minefield.

As former FTC Chairman Muris testified, “By their nature, however, rules also must apply to legitimate actors, who actually deliver the goods and services they promise. Remedies and approaches that are entirely appropriate for bad actors can be extremely burdensome when applied to legitimate businesses, and there is usually no easy or straightforward way to limit a rule to fraudulent activities. Rather than enhancing consumer welfare, overly burdensome rules can harm the very market processes that serve consumers' interests.”³ In other words, the good intentions of remedying bad conduct by a few, when translated to market-wide rules, makes it harder for legitimate businesses to perform as flexibly and efficiently as before, to the ultimate detriment of their customers.

In addition to the direct compliance outlays that banks incur from regulatory requirements, banks and customers experience opportunity costs or consequential damages from the foreclosure of choice that results from regulatory requirements. These barriers arise from a change in the profitability of a product line due to compliance costs, the seductive effect of safe harbors when compared to the regulatory and legal risks outside of the harbor, the chilling effect of the supervisory shadow that accompanies regulatory oversight, and the enforcement risk from various prosecutorial interpretations and acts of discretion (especially given the opportunity for state AG enforcement activities.)

The best way to guard against these undue enforcement burdens on legitimate businesses is to leaven supervisory expectations and enforcement discretion with a significant degree of deference earned by the entity's record of performance and the demonstrated good faith of such businesses evidenced by their reasonable efforts to develop appropriate risk-based controls and correct self-identified deficiencies. The Bureau must not be afraid to say no to AGs that seek to bring actions that undermine the federal supervisory process and to require States that seek to pile on more consumer protection requirements to meet the same analytical standards DFA requires of Bureau rule-making.

An indirect measure of the consequences of these risks and impediments is illustrated in an ABA website poll conducted in April 2010 about the impact of compliance burdens on bank business choices, with the following result:

³ Testimony of Timothy Muris before the Senate Committee on Commerce, Science and Transportation, Subcommittee on Consumer Protection, Product Safety, and Insurance, 111th Cong., 16, (July 14, 2009) *available at* <http://commerce.senate.gov/public/files/MurisJuly14Testimony.pdf>, p. 12.

Have compliance burdens caused your bank to reduce your consumer financial product or service offerings? (e.g., fewer mortgage options, stopped some overdraft protection features of deposit accounts)

by Institution Size	Under \$100M	\$100-\$500M	\$500M-\$2B	Over \$2B	Totals
Yes, for loans and deposit accounts	15	25	16	7	63 (30.3%)
Yes, for loans	24	41	27	12	104 (50.0%)
Yes, for deposit accounts	2	2	0	1	5 (2.4%)
No	1	17	7	11	36 (17.3%)
Total	42	85	50	31	208 (100%)

Consideration of these impacts from barriers and costs are part of the Bureau’s mandate when prescribing a rule under the Federal consumer financial laws, because they address not only potential costs and benefits to consumers and covered persons, but they also address the potential reduction of access by consumers to products and services and the impact on covered persons that are under the supervisory scope of the prudential regulators—such as community banks. (See, DFA 1022(b)(2)(A).) However, calculation of the costs is not the final goal so much as translating that information into avoidance of future undue burden and elimination of existing unwarranted burden. (See, DFA 1021(b)(3).)

Conclusion

ABA and its members are keenly interested in contributing to the Bureau’s achievement of its objectives to improve consumers’ understanding of the information they need to make responsible decisions, to identify and address outdated, unnecessary or unduly burdensome regulations, and to enable consumer financial markets to operate transparently and efficiently. To meet these goals there is much existing regulatory underbrush to clear away and much vigilance to apply to avoid burdensome regulatory overgrowth from the future exercise of Bureau powers. Neither banks nor their customers will benefit from inefficient and wasteful regulatory requirements. We look forward to a continuing dialogue on these issues as the Bureau embarks on exercising its rule-making authorities and incorporates considerations of the benefits and costs to consumers and covered persons, the potential for reduction of access, and the impact of such rules on community banks and on consumers in rural areas.

Please contact me at any time for further involvement of ABA in your efforts.

Sincerely,



Richard R. Riese
Senior Vice President