Financial Regulatory Reform: Dodd-Frank and Beyond

March 11, 2011
Panel Three: Consumer Protection

A Bank Lawyer's Perspective on Dodd-Frank's 'Abusive' Standard

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Dodd-Frank creates the Bureau of Consumer Financial Protection and gives the Bureau broad power to take enforcement action to prevent a bank or other covered entity from engaging in an unfair, deceptive or abusive act or practice in connection with offering a consumer financial product or service, or a transaction with a consumer for such a product or service. While there are well-known standards in federal consumer law for determining whether acts or practices are "unfair" or "deceptive," the concept of "abusive" acts or practices is not as well developed and there is considerable uncertainty about how the Bureau will exercise its consumer protection duties.

This paper maintains that the Bureau should proceed very cautiously in exercising its authority to pursue enforcement action, and engage in rulemaking, regarding "abusive" acts or practices. While it is clear that there have been bad practices within the consumer financial services industry that is now subject to Bureau enforcement and rulemaking, most banks are responsible players who are concerned about regulatory compliance and reputational risk, and want to do the right thing. Unless the Bureau takes early steps to clarify its enforcement intentions and create regulatory safe harbors, the likely consequences of the "abusive" standard in the Act – or more precisely, banks' fears about how it will be enforced – could be significantly less financial product innovation, a reduction in consumer choice, and an increase in the cost of banking products to consumers. Banks may begin to limit themselves to "plain vanilla" products and services to avoid scrutiny by the Bureau and the risk that explanations of more complex products will not be adequate under the new standards of the Act.