

Date: Tuesday, June 2, 2015

To: State Associations

From: Virginia O’Neill, Jonathan Thessin

Re: Bureau’s 1022 Order on Overdraft Services

## Background

In November 2014, the Bureau of Consumer Financial Protection (Bureau) ordered three financial services core processors—Fiserv, FIS Global, and Jack Henry—to provide significant amounts of information and anonymized data about the overdraft program services each processor provides to depository institutions and the configurations of those services. The Bureau stated that the information it receives pursuant to the order “is intended to help the Bureau carry out its market monitoring obligations.” The Bureau issued the order under the authority granted to it by Section 1022(c)(4) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). The Bureau has for several years been conducting a study of debit overdraft programs but has until recently gathered most of its data from only very large banks, presenting an incomplete view of overdraft programs, their value to customers, and their significance to community banks.

Fiserv has informed its clients that it is “tracking [its] costs carefully with the likelihood that these will be passed through to [its] clients on [its] hosted bank platforms.” The other two core processors have made no such announcement and have already provided information to the Bureau.

## Analysis

**The Key Problem.** The order demonstrates the dangers of the authority provided to the Bureau by Section 1022 of the Dodd-Frank Act. That section grants the Bureau overly broad authority to request virtually any information from any company that offers a financial product or service, or acts as a service provider to financial companies, like Fiserv, FIS, and Jack Henry. The Bureau’s order raises serious questions about Section 1022, including issues of due process, appropriate limitations, who bears the costs, and perhaps even constitutional matters. This example certainly makes clear that Congress must reform this provision.

- **Section 1022 grants the Bureau sweeping—and potentially unconstitutional—power.** Section 1022 gives the Bureau “the authority to gather information . . . regarding the organization, business conduct, markets, and activities” of any person that offers or provides a consumer financial product or service, or any service provider to such company. Unlike federal law governing subpoenas—which provides authority for the subpoena’s recipient to ask a court to quash or modify the subpoena—Section 1022 does not provide a process for a recipient of an order to challenge or limit the breadth of the order. The absence of such a process raises questions about Section 1022’s constitutionality under the Due Process Clause of the Fifth

Amendment, particularly considering the fact that section 1022 orders are issued by an independent agency with few limits on its power.

- **The Bureau has ordered private companies to perform work that the agency is fully able, resourced, and staffed to do itself.** The Bureau has directed Fiserv, FIS Global, and Jack Henry to provide approximately 60 data elements about each of its client bank's system settings. The data request will require Fiserv to expend "thousands of hours" of employee time, according to a statement Fiserv recently released. Inevitably, all three core processors will pass the costs of responding to the 1022 order on to their client financial institutions, resulting in higher fees for consumers. The Bureau estimates that its Fiscal Year 2016 budget will be \$605.5 million and will fund the work of 1,690 full-time employees. Clearly, the Bureau has the resources to reimburse the companies from which it has requested data, or otherwise conduct and pay for its research.
- **The order shows the need to reform the expansive authority granted to the Bureau under Section 1022.** Section 1022 allows the Bureau to demand whatever information it wants, from any industry participant, with little or no consideration for the cost of producing that information or for the impact the demand will have on other entities, including financial institutions and their customers.

#### Next Steps

1. **Encourage the Bureau to seek all relevant information before engaging in rulemaking.** The Bureau begins with negative preconceived notions about bank overdraft products and services. We want to be sure that the Bureau looks at all of the relevant information before it engages in rulemaking. That includes how overdraft programs affect the customers of community banks and the role that these programs play in how community banks provide deposit services. We do not want to discourage the Bureau from conducting a complete review of all of the relevant facts regarding overdraft programs. The issue is not fact finding. The issue is, who pays for this fact finding, which in the last analysis is part of the Bureau's job.
2. **Insist that the Bureau fund its data collection efforts.** We will call for the Bureau to carry the cost of this information gathering, either by conducting the research itself, or reimbursing those to whom it has issued its information orders.
3. **Support the introduction of legislation to address Section 1022 of the Dodd-Frank Act.** We will seek legislation to amend Section 1022, at the very least, to ensure that the costs of these information gatherings be borne/reimbursed by the Bureau, and that they be conducted with appropriate due process protections.