# The Dodd-Frank Wall Street Reform and Consumer Protection Act: Title X, The Consumer Financial Protection Bureau

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# Summary

In the wake of what many believe is the worst U.S. financial crisis since the Great Depression, the Obama Administration proposed sweeping reforms of the financial services regulatory system—including the creation of an executive agency with authority over consumer financial issues, the broad outline of which has been encompassed in a document called the Administration's White Paper (the White Paper). The House of Representatives began consideration of bills seeking similar reform, which in large part were shepherded by Representative Barney Frank, Chairman of the Committee on Financial Services. On December 11, 2009, the House approved H.R. 4173, the Wall Street Reform and Consumer Protection Act of 2009. On May 20, 2010, the Senate approved its own financial reform measure, H.R. 4173, the Restoring American Financial Stability Act of 2010. (For an analysis of the consumer protection provisions of these proposals and how they varied, see CRS Report R40696, *Financial Regulatory Reform: Consumer Financial Protection Proposals*, by (name redacted) and (name redacted); for an overview of the overall financial reform proposals, see CRS Report R40975, *Financial Regulatory Reform and the 111$^{th}$ Congress*, coordinated by (name redacted).)

A conference committee, chaired by Representative Frank and Senator Christopher Dodd, Chairman of the Senate Committee on Banking, Housing, and Urban Affairs, was formed to reconcile the two bills. On June 25, 2010, the conference committee agreed to file a conference report for H.R. 4173, renamed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). On June 30, 2010, the House approved the conference report. The Senate approved the measure on July 15, 2010. The bill was signed into law on July 21, 2010, by President Obama as P.L. 111-203.

Title X of the Dodd-Frank Act is entitled the Consumer Financial Protection Act of 2010 (CFP Act). The CFP Act establishes a Bureau of Consumer Financial Protection (CFPB or Bureau) within the Federal Reserve System with rulemaking, enforcement, and supervisory powers over many consumer financial products and services and the entities that sell them. The law also transfers to the Bureau the primary rulemaking and enforcement authority over many federal consumer protection laws enacted prior to the Dodd-Frank Act (the "enumerated consumer laws"), such as the Truth in Lending Act and the Real Estate Settlement Procedures Act.

This report provides a legal overview of the regulatory structure of consumer finance under existing federal law, which is followed by an analysis of how the CFP Act will change this legal structure, with a focus on the Bureau's organization and funding; the entities and activities that fall (and do not fall) under the Bureau's supervisory, enforcement, and rulemaking authority; the Bureau's general and specific rulemaking powers and procedures; and an analysis of the act's preemption standards over state consumer protection laws as they apply to national banks and thrifts.

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# Introduction

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[1] Financial Regulatory Reform, Obama Administration White Paper, June 19, 2009, available at http://www.financialstability.gov/docs/regs/FinalReport_web.pdf (hereinafter, White Paper).

# Federal Consumer Financial Protection in Absence of the CFPB

Until the CFP Act goes into effect, which will largely occur at some point six to 18 months after enactment (called the "designated transfer date"), the Board of Governors of the Federal Reserve System (FRB) retains its authority to write rules to implement the majority of the consumer financial protection laws. Enforcement of these laws and the supervisory powers over the individuals and companies offering and selling consumer financial products and services will continue to be shared by a number of different federal agencies until the CFPB takes over.

Until the Bureau's powers take effect, the federal bank regulators are the primary consumer protection enforcers and supervisors for the institutions under their jurisdictions. These regulators include the Office of the Comptroller of the Currency (OCC) for national banks; the FRB for domestic operations of foreign banks and for state-chartered banks that are members of the Federal Reserve System (FRS); the Federal Deposit Insurance Corporation (FDIC) for state-chartered banks and other state-chartered banking institutions that are not members of the FRS;[2] the National Credit Union Administration (NCUA) for federally insured credit unions; and the Office of Thrift Supervision (OTS)[3] for federal savings and loan associations and thrifts. Banks, credit unions, and thrifts (which this report will collectively refer to as "depository institutions" or "depositories") are subject to regular examinations to ensure they are complying with consumer protection and other laws, being managed well, and conducting business in a safe and sound fashion. All depositories generally must be examined at least once every 18 months, but the largest depositories have examiners on-site on a near-constant basis.[4] Additionally, federal regulators of depository institutions have a full range of strong and flexible enforcement tools, such as prompt corrective action powers, to rectify any problems that are found during examinations.[5]

The Federal Trade Commission (FTC) is the primary federal regulator for non-depository financial institutions, such as payday lenders and mortgage brokers, in addition to many other non-financial commercial enterprises. However, the FTC's powers generally are limited to enforcement. Unlike the federal depository regulators, the FTC has little up front supervisory authority over non-depository financial institutions. Thus, the FTC does not regularly examine businesses or impose reporting requirements on them. Instead, these non-depository institutions are primarily supervised by state regulators. The powers granted to state regulators and the level of supervision these regulators provide varies considerably from state-to-state, but in most cases, non-depositories have not been as rigorously regulated as depository institutions.

[2] The FDIC, which administers the Deposit Insurance Fund, also has certain regulatory powers over state and national banks holding FDIC insured deposits; however, these authorities generally are secondary to the institution's primary federal regulator.

[3] The Dodd-Frank Act will eliminate the OTS and transfer much of its power to the OCC.

[4] See, e.g., 12 U.S.C. § 1820(d).

[5] 12 U.S.C. § 1831o; 12 U.S.C. § 1818.

# Overview of the Bureau

The CFP Act establishes a Bureau of Consumer Financial Protection that brings the consumer protection regulation of depository and non-depository financial institutions into closer, but not complete, alignment. As proposals that ultimately resulted in Title X of the Dodd-Frank Act were moving through Congress, a couple of fundamental policy questions seemed to arise consistently during debate, which seemed in large part to account for the remaining disparities.

One policy question is how best to balance the safety and soundness regulation of depositories with that of consumer compliance. Although a loan that cannot be repaid is typically bad for both the borrower and the lender, there are some areas in which there can be a conflict between safety and soundness regulation and consumer protection. When a banking activity is profitable, safety and soundness regulators tend to look upon it favorably, since it enables the bank to meet capital requirements and withstand financial shocks. A consumer protection regulator, however, may look at such activity less favorably, especially if the profit is seen to have been gained unfairly at the expense of consumers. Removing consumer compliance authority from the federal bank regulators may weaken the safety and soundness regulation of banks if, for example, the separation results in a less complete picture of bank operations for the prudential regulator. The Fed has argued that its role in consumer protection aids its other authorities, including bank supervision and systemic risk. On the other hand, some, including the Obama Administration, have argued that professional bank examiners are trained "to see the world through the lenses of institutions and markets, not consumers,"[6] and separating compliance and safety and soundness authorities among different regulators is the best way to protect both consumers and financial institutions.

A related question that surfaced frequently during the debate is the extent to which large and small financial institutions should be treated differently in the proposed regulatory structure. Whereas the largest depository institutions are accustomed to having examiners on-site constantly, examinations are far more disruptive for smaller depositories. Enhanced compliance costs also are likely to hit smaller depositories, with their lower aggregate revenues, more than larger depositories. Similar arguments could be made for large versus small non-depository financial institutions. Additionally, when assessing the causes of the Great Recession, many tend to place much more blame on this country's large financial institutions than on smaller ones. Thus, one could argue that the larger institutions should be subject to greater, more-costly regulation than smaller institutions. On the other hand, the goal of the Dodd-Frank Act appears to be geared not just towards eliminating the exact causes of the Great Recession, but also towards preventing future crises.

The CFP Act establishes the Bureau within the FRS to have authority over an array of consumer financial products and services (including deposit taking, mortgages, credit cards and other extensions of credit, loan servicing, check guaranteeing, collection of consumer report data, debt collection, real estate settlement, money transmitting, and financial data processing). It will also serve as the primary federal consumer financial protection supervisor and enforcer of federal consumer protection laws over many of the institutions that offer these products and services.

[6] U.S. Department of the Treasury, *Financial Regulatory Reform: A New Foundation*, June 2009, p. 56, available at http://www.financialstability.gov/docs/regs/FinalReport_web.pdf.

However, apparently as a result of the policy considerations outlined above, the act's allocation of regulatory authority among the prudential regulators and the CFPB varies based on institution size and type. Regulatory authority differs for (1) depository institutions with more than $10 billion in assets (i.e., "larger depositories"); (2) depository institutions with $10 billion or less in assets (i.e., "smaller depositories"); and (3) non-depositories. The Dodd-Frank Act also explicitly exempts a number of different entities and consumer financial activities from the CFPB's supervisory and enforcement authority.

Consequently, compliance costs and the extent to which the cost and availability of credit will be affected by the new regulator will depend on the type of institution that is providing consumer financial products and services, as well as exactly what rules the Bureau prescribes and how aggressively it and the other regulators enforce consumer protection laws and regulations.

# Bureau Structure and Funding

The stated goal of the Bureau is 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.[7]

The Bureau is established within the Federal Reserve System, but it has some measure of independence from the FRB. For instance, the FRB does not have the formal authority to stop, delay, or disapprove of a Bureau regulation, nor can it

> (A) intervene in any matter or proceeding before the Director [of the CFPB], including examinations or enforcement actions, unless otherwise specifically provided by law;
>
> (B) appoint, direct, or remove any officer or employee of the Bureau; or
>
> (C) merge or consolidate the Bureau, or any of the functions or responsibilities of the Bureau, with any division or office of the Board of Governors or the Federal reserve banks.[8]

However, the Bureau is not completely independent of the FRB. As an example, the act allows, but does not require, the FRB to "delegate to the Bureau the authorities to examine persons subject to the jurisdiction of the [Board] for compliance with the Federal consumer financial laws."[9]

The Bureau is to be headed by a director appointed by the President, subject to the advice and consent of the Senate, to serve for a five-year term from which s/he could only be removed for "inefficiency, neglect of duty or malfeasance in office."[10] Until the director is confirmed, the Secretary of the Treasury will have the power to perform some of the Bureau's functions.[11] The

[7] Dodd-Frank Act § 1021.

[8] Dodd-Frank Act § 1012.

[9] Dodd-Frank Act § 1012.

[10] Dodd-Frank Act § 1011.

[11] Dodd-Frank Act § 1066.

director has authority to hire the employees necessary to carry out the duties of the Bureau. The act establishes a procedure by which the FRS, OCC, OTS, NCUA, FDIC, and the Department of Housing and Urban Development will transfer employees to the Bureau as necessary to perform the consumer financial protection functions that are transferred from those agencies to the Bureau.[12]

The law requires the director to establish units within the Bureau to focus on consumer financial research; providing guidance and technical assistance to traditionally underserved areas and individuals; and monitoring and responding to consumer complaints. The act also requires the establishment of an Office of Fair Lending and Equal Opportunity; an Office of Financial Education; an Office of Service Member Affairs directed towards members of the military and their families; an Office of Financial Protection for Older Americans to, among other things, "facilitate the financial literacy of individuals who have attained the age of 62 years or more ... on protection from unfair, deceptive, and abusive practices on current and future financial choices";[13] and a Private Education Loan Ombudsman to, among other things, attempt to settle and study private education loan borrower complaints.[14]

The Bureau will be funded "from the combined earnings of the Federal Reserve System [in an] amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau" subject to specified caps. The cap will be 10% of the total operating expenses of the FRS for FY2011, 11% for FY2012, and 12% thereafter.[15] As a gauge of how much money this will be, the FRS's total operating expenses for FY2009 were $4.98 billion, 10% of which is just under $500 million.[16] These funds are not reviewable by either the House or Senate Committees on Appropriations. The act also authorizes appropriations if the director "determine[s] that sums available to the Bureau [as specified by the caps] under this section will not be sufficient to carry out the authorities of the Bureau under Federal consumer financial law for the upcoming year." Upon making such a finding and submitting a report to both the House and Senate Committees on Appropriations, the CFP Act provides authorization for an appropriation of $200 million per year for FY2010-FY2014.[17]

The act also establishes a Consumer Financial Civil Penalty Fund for civil penalties obtained by the Bureau for violations of consumer financial protection laws. The fund is to be used to pay victims of such violations, as well as for financial literacy and consumer education programs.[18]

# General Powers

The authorities of the Bureau fall into three different categories: supervisory, which includes the power to examine and require reports; enforcement of various consumer protection laws and regulations; and rulemaking. Some of these powers are newly created by the Dodd-Frank Act.

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[12] Dodd-Frank Act § 1064.

[13] Dodd-Frank Act § 1013.

[14] Dodd-Frank Act § 1035.

[15] Dodd-Frank Act § 1017. According to the act, this cap is to be adjusted for inflation.

[16] Federal Reserve 2009 Annual Report, available at http://www.federalreserve.gov/boarddocs/rptcongress/annual09/sec6/c3.htm.

[17] Dodd-Frank Act § 1017.

[18] Dodd-Frank Act § 1017.

Some are to be transferred from other regulators to the Bureau, including the primary rulemaking and enforcement authority of many existing consumer protection laws. These "enumerated consumer laws" are the Alternative Mortgage Transaction Parity Act;[19] the Consumer Leasing Act of 1976;[20] the Electronic Funds Transfer Act[21] except with respect to section 920 of that act;[22] the Equal Credit Opportunity Act;[23] the Fair Credit Billing Act;[24] the Fair Credit Reporting Act,[25] except with respect to sections 615(e) and 628 of that act;[26] the Home Owners Protection Act of 1998;[27] the Fair Debt Collection Practices Act;[28] subsections (b) through (f) of section 43 of the Federal Deposit Insurance Act;[29] sections 502 through 509 of the Gramm-Leach-Bliley Act,[30] except for section 505 as it applies to section 501(b);[31] the Home Mortgage Disclosure Act of 1975;[32] the Home Ownership and Equity Protection Act of 1994;[33] the Real Estate Settlement Procedures Act of 1974;[34] the S.A.F.E. Mortgage Licensing Act of 2008;[35] the Truth in Lending Act (TILA);[36] the Truth in Savings Act;[37] section 626 of the Omnibus Appropriations Act, 2009;[38] the Interstate Land Sales Full Disclosure Act;[39] and most provisions of the Mortgage Reform and Anti-Predatory Lending Act.[40]

The powers under these consumer laws will be transferred to the Bureau within six to 18 months after enactment, as determined by the Secretary of the Treasury in consultation with other federal agency heads.[41] The act refers to this date as the "designated transfer date."

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[19] 12 U.S.C. §§ 3801 *et seq.*

[20] 15 U.S.C. §§ 1667 *et seq.*

[21] 15 U.S.C. §§ 1693 *et seq.*

[22] Section 920 of the Electronic Funds Transfer Act (15 U.S.C. § 1693q) delineates the interaction between the EFTA and state laws.

[23] 15 U.S.C. §§ 1691 *et seq.*

[24] 15 U.S.C. §§ 1666-1666j.

[25] 15 U.S.C. §§ 1681 *et seq.*

[26] 15 U.S.C. §§ 1681m(e) and 1681w. These provisions primarily pertain to "red flag" identity theft prevention measures for federal financial institutions and credit report record retention by federal financial institutions.

[27] 12 U.S.C. §§ 4901 *et seq.*

[28] 15 U.S.C. §§ 1692 *et seq.*

[29] 12 U.S.C. § 1831t(c)-(f). These provisions pertain to disclosure requirements for depository institutions that do not hold federal deposit insurance.

[30] 15 U.S.C. §§ 6802-6809. These provisions deal with financial institutions' use and protection of nonpublic consumer information.

[31] This provision pertains to federal banking agency rulemaking applicable to the safeguarding of nonpublic personal information by banking concerns.

[32] 12 U.S.C. §§ 2801 *et seq.*

[33] 15 U.S.C. § 1639.

[34] 12 U.S.C. §§ 2601-2610.

[35] 12 U.S.C. §§ 5101-5116.

[36] 15 U.S.C. §§ 1601 *et seq.*

[37] 12 U.S.C. §§ 4301 *et seq.*

[38] P.L. 111-8 § 626. This provision pertains to a regulation under which states may bring actions to enforce certain Truth in Lending Act requirements regarding mortgage loans.

[39] 15 U.S.C. §§ 1701 *et seq.*

[40] Dodd-Frank Act, Title XIV, Subtitles A, B, C, and E, and §§ 1471, 1472, 1475, and 1476. See Dodd-Frank Act § 1400.

[41] Dodd-Frank Act § 1062.

Other authorities became effective on the date of enactment. It is unclear exactly how the powers that are effective immediately will be utilized by the new Bureau, which cannot be fully established overnight. Because the Secretary of the Treasury acquires certain powers of the director until a director is confirmed, the Secretary is likely to prescribe regulations to outline how he will utilize these powers while the Bureau gets up and running.

## Covered Entities and Activities

Under the CFP Act, the Bureau has authority over an array of consumer financial products and services, including deposit taking, mortgages, credit cards and other extensions of credit, loan servicing, check guaranteeing, collection of consumer report data, debt collection, real estate settlement, money transmitting, financial data processing, and others.[42] The CFPB does not have authority over most insurance activities[43] nor most activities conducted by firms regulated by the Securities and Exchange Commission (SEC) or the Commodity Futures Trading Commission (CFTC). The Bureau also does not have authority under the CFP Act to impose interest rate caps (a.k.a., usury limits) on any loan or other extension of credit.[44] While the breadth of the products and services that fall within the Bureau's jurisdiction is considerable, the CFP Act imposes some important exceptions on the types of entities and activities that are subject to the CFPB's rulemaking, enforcement, and supervisory powers.

### Non-Depositories

For instance, the CFP Act imposes limitations on the Bureau's supervisory and enforcement powers over non-depository institutions. The Bureau is the primary supervisor and enforcer of non-depository entities that

- are engaged in consumer mortgage related activities (i.e., mortgage origination, brokerage, or servicing activities; mortgage modification or foreclosure relief activities);
- are non-mortgage related consumer financial entities that are "larger participant[s] in a market" as determined by the Bureau in regulations and after consultation with the FTC;
- the Bureau has reasonable cause to believe are "engaging, or ha[ve] engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services";
- provide or offer to provide private student loans; or
- provide or offer to provide payday loans.[45]

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[42] Dodd-Frank Act § 1002(15). The Bureau also has authority over "service providers," which generally includes individuals that provide "a material service to a covered person in connection with the offering or provision of a consumer financial product or service" (Dodd-Frank Act § 1002(26)).

[43] Dodd-Frank Act § 1002(15).

[44] Dodd-Frank Act § 1027(o).

[45] Dodd-Frank Act § 1024. While the Bureau has authority to regulate payday lenders, the Bureau does not have authority to set usury limits. Dodd-Frank Act § 1027(o). Some consumer advocates have argued that interest rate caps are the only proven way to effectively curb predatory practices of payday lenders. Center for Responsible Lending, *Issue Brief: Payday Loans Put Families in the Red*, Feb. 2009, available at http://www.responsiblelending.org/payday-

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Even for a company that falls into one of these categories (a "covered non-depository"), the Bureau must rely on existing reports required by prudential regulators "to the fullest extent possible" and must coordinate examinations with the company's primary regulator (state or federal). The Bureau generally will be the primary enforcer of federal consumer financial laws with respect to covered non-depositories and will have primary rulemaking authority over such entities. Finally, the Bureau has the authority to require covered non-depositories to register with the Bureau, submit to background checks, and adhere to other measures "to ensure that such persons are legitimate entities and are able to perform their obligations to consumers."[46]

The Bureau's authority over covered non-depositories became effective on the date of enactment, except for those powers stemming from the enumerated consumer laws, which will become effective on the designated transfer date.[47]

## Depositories With More Than $10 Billion in Assets

The Bureau will be the primary rule maker, supervisor, and enforcer of consumer protection laws and regulations over depository institutions holding more than $10 billion in assets. The CFP Act requires the Bureau to coordinate examinations and other supervisory activities with large depositories' state and federal prudential regulators and establishes a procedure by which conflicts between the Bureau and a prudential regulator could be resolved.[48] The Bureau acquired its examination powers over these institutions on the date of enactment. However, most of its remaining powers over larger depositories will take effect on the designated transfer date.[49]

## Depositories With $10 Billion or Less in Assets

The primary consumer protection supervisory and enforcement powers over banks, thrifts, and credit unions with $10 billion or less in assets (smaller depository institutions) largely remain in those institutions' prudential regulators. The CFP Act does not provide a process by which the Bureau may acquire enforcement powers over these institutions. However, the Bureau, "on a sampling basis," may participate in examinations of these smaller depository institutions that are conducted by the prudential regulator. The new law also establishes a procedure by which the Bureau can refer potential enforcement actions against smaller depository institutions to their prudential regulators. The Bureau generally will have access to examination reports prepared by prudential regulators of these smaller depository institutions and will have the authority to require reports directly from these depositories, although the Bureau will have to rely on existing reports "to the fullest extent possible."[50] These smaller depositories generally will be subject to the

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lending/research-analysis/payday-puts-families-in-the-red-final.pdf ("Payday lending industry representatives have lobbied for other reforms, such as payment plans and renewal bans, because they understand that these measures have done nothing to slow the rate at which they can flip loans to the same borrowers. But an interest rate cap is the only measure that has proven effective.").

[46] Dodd-Frank Act § 1024.

[47] Dodd-Frank Act § 1029A.

[48] Dodd-Frank Act § 1025.

[49] Dodd-Frank Act § 1029A.

[50] Dodd-Frank Act § 1026.

rulemaking powers of the Bureau. The Bureau's authority over smaller depositories generally will take effect on the designated transfer date.[51]

## Entities and Activities with Explicit Exemptions

The Dodd-Frank Act explicitly exempts a number of entities and activities from the CFPB's jurisdictional reach. However, each of these exemptions is subject to certain limitations that, while spelled out in the act, are subject to interpretation. How the Bureau interprets these limited exemptions could significantly impact the scope of the Bureau's reach.

### *Merchants, Retailers, and Sellers of Nonfinancial Goods and Services*

The act significantly limits the Bureau's supervisory, enforcement, and rulemaking powers over a

> merchant, retailer, or seller of nonfinancial goods or services ... to the extent that such person (i) extends credit directly to a consumer ... exclusively for the purpose of enabling that consumer to purchase such nonfinancial good or service directly from the merchant, retailer, or seller; (ii) ... collects debt arising from [such] credit ... or (iii) sells or conveys [such] debt ... that is delinquent or otherwise in default.[52]

In spite of these restrictions, the CFPB does have authority over a merchant, retailer, and seller of nonfinancial goods or services if such an entity "regularly extends credit and the credit is subject to a finance charge" and is "engaged significantly in offering or providing consumer financial products or services"; or if such entity either (1) "assigns, sells or otherwise conveys to another person such [nondelinquent] debt owed by a consumer," or (2) extends credit that "significantly exceeds the market value of the nonfinancial good or service provided" or otherwise evades the CFP Act. The Bureau will also have authority over merchants, retailers, and sellers of nonfinancial goods or services to the extent that they fall within the ambit of an enumerated consumer law.[53] The Bureau's rulemaking, supervisory, and enforcement authorities are further restricted against certain small businesses that otherwise would only fall under the Bureau's jurisdiction because they "regularly extend[] credit and the credit is subject to a finance charge."[54]

### *Automobile Dealers*

The Bureau generally does not have supervisory, rulemaking, or enforcement powers over automobile dealers engaged in leasing, selling, or servicing automobiles except to the extent that such dealers (1) engage in activities related to either commercial or residential mortgages; (2) engage in the extension of credit or leases directly to consumers that are "not routinely assigned to an unaffiliated third party finance or leasing source"; or (3) sell or offer to sell consumer financial products or services unrelated "to the sale, financing, leasing, rental, repair,

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[51] Dodd-Frank Act § 1029A.

[52] Dodd-Frank Act § 1027(a).

[53] Dodd-Frank Act § 1027(a). Certain small businesses that would only fall within the CFPB's authority because they "regularly extend[] credit" subject to finance charges would not be considered to be engaged significantly in offering or providing consumer financial products or services if they only offer credit for nonfinancial goods or services, keep ownership of such nondelinquent credit, and meet the size threshold under the Small Business Act. Dodd-Frank Act § 1027(a).

[54] Dodd-Frank Act § 1027(a)(D).

refurbishment, maintenance, or other servicing of motor vehicles, motor vehicle parts, or any related or ancillary product or services."[55]

However, the CFP Act does provide the FTC the authority to prescribe unfair or deceptive trade practice rules against automobile dealers in accordance with the standard informal rulemaking procedures of the Administrative Procedure Act[56] rather than having to adhere to the much more rigorous procedures of the Magnuson-Moss Act[57] that normally apply when the FTC promulgates rules declaring unfair or deceptive acts or practices pursuant to section 5 of the Federal Trade Commission Act.[58] Thus, while auto dealers generally are outside of the Bureau's authority, the CFP Act makes it somewhat easier for the FTC to regulate them.

### *Other Entities*

The CFP Act also generally excludes from the Bureau's rulemaking, supervisory, and enforcement authority real estate brokers,[59] real estate agents,[60] sellers of manufactured and mobile homes,[61] income tax preparers,[62] and accountants[63] to the extent that they are acting in their normal capacity (e.g., a real estate broker is exempt to the extent that s/he brings parties together to purchase a property). However, the CFP Act authorizes some authority for the Bureau to regulate these entities if they engage in the extension of credit or otherwise sell or offer to sell a consumer financial product or service or if they otherwise engage in an activity that makes them subject to an enumerated consumer law.

Attorneys generally are exempt from the Bureau's supervisory and enforcement authority (although, the act does not explicitly exempt attorneys from the Bureau's rulemaking authority) when they are practicing law. However, this exemption would not apply to the extent that an attorney sells or offers to sell "a consumer financial product or service ... that is not offered or provided as part of, or incidental to, the practice of law, occurring exclusively within the scope of the attorney-client relationship; or that is otherwise offered or provided by the attorney in question with respect to any consumer who is not receiving legal advice or services from the attorney in connection with such financial product or service." The CFPB could still exert control over attorneys to the extent that they are subject to an enumerated consumer law.[64]

Other entities and activities that generally fall outside of the Bureau's jurisdictional reach include insurance companies;[65] employee benefit plans;[66] entities that are regulated by state securities

[55] Dodd-Frank Act § 1029.

[56] 5 U.S.C. § 553.

[57] 15 U.S.C. § 57a.

[58] 15 U.S.C. § 45.

[59] Dodd-Frank Act § 1027(b).

[60] Dodd-Frank Act § 1027(b).

[61] Dodd-Frank Act § 1027(c).

[62] Dodd-Frank Act § 1027(d).

[63] Dodd-Frank Act § 1027(d).

[64] Dodd-Frank Act § 1027(e).

[65] Dodd-Frank Act § 1027(f).

[66] Dodd-Frank Act § 1027(g).

commissions;[67] those regulated by the Farm Credit Administration;[68] and donations to tax-exempt charities.[69]

## Rulemaking Procedures

The Dodd-Frank Act establishes procedures that the Bureau must follow when proposing and prescribing rules, generally, which are in addition to the notice of proposed rulemaking and comment period procedures required for informal rulemakings under the Administrative Procedure Act.[70] The act also imposes additional procedures for specific types of rulemaking (e.g., when declaring certain acts or practices to be unfair or abusive), which are discussed below.

### General Rulemaking Powers

The CFP Act authorizes the Bureau to "prescribe rules and issue orders and guidance, as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof."[71] Before proposing a rule and during the comment period of a proposed rule, the CFPB is required to consult with the "appropriate" financial regulators. The Bureau must address any written objections by the federal prudential regulators when issuing final regulations. Additionally, the CFPB must consider "the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products and services resulting from such rule," as well as the impact the rule would have on smaller depositories and "consumers in rural areas."[72] These general rulemaking powers became effective on the date of enactment.[73]

Within five years of any CFPB "significant rule or order" becoming effective and after a public comment period, the Bureau must publish a report assessing the effectiveness of the rule or order.[74] The act does not specify what is to be considered "significant," presumably leaving these determinations to the Bureau.

On the designated transfer date, the CFP Act will also transfer to the CFPB rulemaking authority under the enumerated consumer laws. In some instances, the Bureau will share rulemaking powers under the enumerated consumer laws with other financial regulators.[75]

Although previous iterations of H.R. 4173 modified the FTC's rulemaking procedures for declaring unfair or abusive trade practices under the FTC Act, those changes were not included in the Dodd-Frank Act.[76] On a related issue that is outside the scope of the FTC Act, the CFP Act

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[67] Dodd-Frank Act § 1027(h).

[68] Dodd-Frank Act § 1027(k).

[69] Dodd-Frank Act § 1027(l).

[70] 5 U.S.C. § 553.

[71] Dodd-Frank Act § 1022.

[72] Dodd-Frank Act § 1022.

[73] Dodd-Frank Act § 1029A.

[74] Dodd-Frank Act § 1023(d).

[75] Dodd-Frank Act Title X, Subtitle H.

[76] The FTC's rulemaking procedures under the FTC Act (15 U.S.C. § 18b), commonly referred to as "Magnuson-Moss
(continued...)

provides the Bureau new authority to prescribe rules declaring acts or practices to be unlawful because they are unfair or abusive (discussed in the next section).

As a check on the Bureau's rulemaking powers, the Financial Stability Oversight Council—which is established under Title III of the Dodd-Frank Act and mainly composed of the federal financial regulators, including the director of the Bureau[77]—has the ability to set aside or stay a regulation prescribed by the Bureau if the regulation "would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk." These powers are in addition to the Financial Stability Oversight Council's authority to settle jurisdictional disputes among the federal financial regulators.[78] The Council's power to stay and set aside Bureau rules does not appear to be limited to the new rulemaking powers established by the CFP Act, which means the power also may extend to rules prescribed under the authority of an enumerated consumer law.

## Specific Rulemaking Powers

The following specific rulemaking powers will take effect on the designated transfer date.

### *Unfair or Abusive Acts or Practices*

The CFP Act will provide the Bureau the authority to prescribe rules declaring acts or practices pertaining to covered consumer financial products or services to be unlawful because they are unfair or abusive. This is a similar mandate to that provided to the FTC under the FTC Act, except that the Bureau's authority is limited to consumer financial issues and to those entities that fall under the Bureau's rulemaking jurisdiction. When prescribing such rules, the Bureau must consult with the other federal financial regulators, as appropriate.

In order to declare an act or practice unlawful because it is *unfair*, the CFPB must have "a reasonable basis to conclude that the act or practices causes or is likely to cause substantial injury to consumers, which is not reasonably avoidable by consumers; and such substantial injury is not outweighed by countervailing benefits to consumers or competition."

An abusive act or practice may only be deemed unlawful by regulation if it

> materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or takes unreasonable advantage of (a) a lack of understanding on the part of the consumer ...; (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 interests of the consumer.[79]

(...continued)

rulemaking procedures," are far more onerous than standard Administrative Procedure Act (5 U.S.C. § 553) informal rulemaking procedures.

[77] The director also will serve as an ex-officio member of the FDIC board (Dodd-Frank Act § 336).

[78] Dodd-Frank Act § 1023.

[79] Dodd-Frank Act § 1031.

### *Disclosure Requirements*

The Bureau will also have the authority to prescribe rules imposing disclosure requirements to help consumers understand the terms, benefits, costs, and risks of financial products and services. When prescribing these rules, the CFPB is to "consider the available evidence about consumer awareness, understanding of, and responses to disclosures or communications about the risks, costs, and benefits of consumer financial products or services."[80]

### *Rulemakings Initiated by the States*

When a majority of states adopt a resolution requesting a new consumer protection regulation under the CFPB's jurisdiction or a change in an existing rule, the Bureau must submit a notice of proposed rulemaking on the subject. Before finalizing such a rule, the Bureau must address in the final rule notice whether or not the final rule will (1) increase consumer protection; (2) create more benefits than costs for consumers; (3) unfairly discriminate against a group of consumers; and (4) "likely [] present an unacceptable safety and soundness risk to insured depository institutions," if such a concern is raised by a prudential regulator. If the Bureau decides not to finalize such a rule, it will have to justify why a final regulation was not prescribed.[81]

# Preemption of State Laws

## Preemption Standards for National Banks in Absence of the Dodd-Frank Act

The federal government derives much of its power to regulate banks through the Commerce Clause of Article I, clause 8 of the U.S. Constitution. The 10th Amendment of the Constitution reserves the right of states to legislate all matters neither prohibited by the Constitution nor delegated to federal government. At the same time, the Supremacy Clause of Article VI, clause 2 of the Constitution[82] provides that the U.S. Constitution and the laws enacted under it are preeminent to state laws. Although the federal government has extensively regulated depository institutions pursuant to the Commerce Clause, federal law does leave some room for states to regulate national banks and thrifts on consumer financial protection issues. In some cases, it is clear when a state law is preempted by federal law. In many cases, however, preemption is not so clear.[83]

The courts have recognized three different types of preemption: express, field, and conflict. Express preemption involves an explicit preemption statement in a piece of legislation. Conflict preemption occurs either when it is not possible to comply with both federal and state law at the same time or when state law imposes an obstacle to the achievement of a federal law's purpose.

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[80] Dodd-Frank Act § 1032.

[81] Dodd-Frank Act § 1041(e).

[82] U.S. Const., Art. VI, cl. 2, declaring that the Constitution and "the laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of the any State to the Contrary notwithstanding."

[83] The OCC and the OTS (until that agency is abolished pursuant to Title III of the Dodd-Frank Act) as the primary prudential regulators of national banks and thrifts generally would weigh in on preemption questions, which often arise in disputes between a depository and a state regulator. In such instances, courts are likely to give deference to reasonable agency interpretations of federal banking and consumer protection laws.

Field preemption, which is a subset of conflict preemption, arises when federal preemption in a legislative field is so pervasive that it can be reasonably inferred that Congress left no room for states to add to it.[84]

There is a large body of Supreme Court precedent analyzing conflict preemption as it applies to national banks dating all the way back to the 1819 decision in *McCulloch vs. Maryland*,[85] in which the Court expressed its broad interpretation of the Supremacy Clause by stating that "the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." More recently, the Court in a 2007 decision, *Watters v. Wachovia N.A.*,[86] explained that federal laws protect national banks "from unduly burdensome and duplicative [state] regulation."[87] The *Watters* Court went on to reiterate the preemption standard expressed in the Court's 1996 opinion of *Barnett Bank of Marion County, N.A. v. Nelson*[88] by stating the following:

> States are permitted to regulate the activities of national banks where doing so does not prevent or significantly interfere with the national bank's or the national bank regulator's exercise of its powers. But when state prescriptions significantly impair the exercise of authority, enumerated or incidental under the [National Bank Act[89]], the State's regulations must give way.[90]

## CFP Act

Generally, state consumer protection laws are only to be preempted by the provisions of the CFP Act and the regulations prescribed under the authority of the act to the extent of their inconsistency. A state law is not to be considered inconsistent with a federal law if the Bureau determines that the state law provides greater protection to consumers. With some exceptions,[91] the Dodd-Frank Act does not alter the express preemption provisions of the existing enumerated consumer protection laws.

In addition to these more general preemption principles, the act establishes preemption standards specific to national banks and thrifts. The CFP Act will restrict the ability of the OCC to preempt state consumer financial laws as they apply to national banks by imposing procedural standards that the agency must follow when making such determinations. The same standards will apply for federal thrifts. The act also clarifies and expands the rights of state attorneys general to bring civil claims against national banks and thrifts.

Under the act, consumer financial protection laws as they apply to national banks and thrifts are preempted only if (1) the state law "would have a discriminatory effect on national banks" or

[84] CRS Report 97-589, *Statutory Interpretation: General Principles and Recent Trends*, by (name redacted) and Yule Kim.

[85] 17 U.S. (4 Wheat.) 316, 436 (1819).

[86] 550 U.S. 1 (2007).

[87] *Watters*, 550 U.S. at 11.

[88] 517 U.S. 25 (1996).

[89] 12 U.S.C. §§ 1, *et seq.*

[90] *Watters*, 550 U.S. at 12, *citing Barnett*, 517 U.S. at 32-34.

[91] Dodd-Frank Act § 1090.

thrifts as compared to state banks or thrifts; (2) the OCC or a court, on a case-by-case basis, determines by regulation or order that the state law, "in accordance with the legal standard for preemption in the decision ... in *Barnett* ... prevents or significantly interferes with the exercise by the national bank of its powers"; or (3) the state law is preempted by another federal law.[92]

The Dodd-Frank Act establishes standards that the OCC and courts must follow when making case-by-case preemption decisions. The OCC will have to consult with the Bureau before making a determination that a state law that the OCC has determined to be preempted is "substantively equivalent" to another consumer financial law in a different state. In order to preempt such "substantively equivalent" state statutes, the OCC must support its decision with "substantial evidence, on the record of the proceeding" that the preemption decision meets the legal standards of the *Barnett* opinion. When reviewing an OCC preemption decision,[93] a court

> shall assess the validity of such determinations, depending upon the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant to its decision.[94]

The act's preemption standards for depositories do not apply to the non-depository subsidiaries or affiliates of federally chartered banks or thrifts.[95] The CFP Act requires the OCC to review preemption determinations periodically (at least once every five years) and to publicly list each preemption decision "that identifies the activities and practices covered by each determination and the requirements and constraints determined to be preempted."[96]

The CFP Act also places in statute the standard of the U.S. Supreme Court's decision in *Cuomo v. Clearing House Association*,[97] which pertains to the limitations of state regulators' visitorial[98] rights over federally chartered banks. The 2009 opinion confirms the ability of state regulators to enforce non-preempted state laws against national banks. The CFP Act extends these same powers to cover federal thrifts.[99]

Finally, the act creates a right of action for state attorneys general to enforce the substantive provisions of the CFP Act against all covered persons other than national banks and thrifts. State attorneys general are provided the authority to enforce *regulations* prescribed by the Bureau under the authority of the CFP Act against all covered persons, including national banks and

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[92] Dodd-Frank Act §§ 1044 [for banks] and 1046 [for thrifts].

[93] Preemption decisions under the CFP Act or under the authority of 12 U.S.C. § 371, which governs the power of national banks to engage in real estate lending.

[94] Dodd-Frank Act §§ 1044 [for banks] and 1046 [for thrifts].

[95] Dodd-Frank Act §§ 1044 [for banks] and 1046 [for thrifts].

[96] Dodd-Frank Act §§ 1044 [for banks] and 1046 [for thrifts].

[97] 129 S.Ct. 2710 (2009).

[98] "Visitation, in law, is the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations. [Alexander M.] Burrill defines the word to mean 'inspection; superintendence; direction; regulation.'" Guthrie v. Harkness, 199 U.S. 148, 158 (1905). Burrill authored legal dictionaries often used at the time of the case.

[99] Dodd-Frank Act § 1047. For more information on the *Cuomo* decision, see CRS Report R40595, *Cuomo v. The Clearing House Association, L.L.C: National Banks Are Subject to State Lawsuits to Enforce Non-Preempted State Laws*, by (name redacted).

thrifts. However, a state attorney general generally must provide advance notice of an enforcement action to the Bureau, which will then have the right to intervene in the matter.[100]

These preemption standards will take effect on the designated transfer date.[101]

## Miscellaneous Provisions

The CFP Act addresses additional issues including imposing disclosure requirements on remittance transfers;[102] providing the Bureau the authority to curb pre-dispute arbitration clauses;[103] requiring studies on reverse mortgages[104] and credit scores;[105] and requiring the FRB to prescribe rules on debit card interchange fees.[106]

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[100] Dodd-Frank Act § 1042.
[101] Dodd-Frank Act § 1048.
[102] Dodd-Frank Act § 1073.
[103] Dodd-Frank Act § 1028.
[104] Dodd-Frank Act § 1076.
[105] Dodd-Frank Act § 1078.
[106] Dodd-Frank Act § 1075.

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