



## FINANCIAL REGULATORY REFORMS UPDATE

### Title X — Bureau of Consumer Financial Protection

- **The Bureau.** The Act creates the Consumer Protection Bureau within the Federal Reserve; the Act prohibits the Federal Reserve Board from interfering with the Bureau's operations.
- **Single Director.** The Consumer Protection Bureau will be led by a sole Director appointed by the President with the advice and consent of the Senate.
- **Transfer of Powers.** The Act transfers to the Consumer Protection Bureau the consumer financial protection functions (including rule-making and enforcement authority) of other Federal agencies under various consumer protection laws. However, the Chairperson of the Council (the Treasury Secretary) has the authority to temporarily stay regulations issued by the Bureau, and the Council, upon a two-thirds vote of its members, can permanently set aside such regulations in limited circumstances.
- **Mandate and Rule-Making.** The Consumer Protection Bureau's mandate is to implement and enforce consumer financial protection laws 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. The Bureau will have broad rule-making authority to implement its mandate and objectives, as well as more specific rule-making authority under Title X and existing statutes transferred to the Bureau's jurisdiction.
- **Preemption.** The Act substantially revises the scope of preemption of State law for national banks and Federal savings banks. State consumer laws will be preempted only to the extent that they prevent or significantly impair the Federally chartered banks' exercise of their powers, and the preemption decision must be made on a case-by-case basis.
- **Effective Dates.** The Act requires the Secretary of the Treasury, in consultation with other agencies, to establish a "designated transfer date," between six and 18 months after enactment of the Act, for the transfer of consumer financial protection functions to the Consumer Protection Bureau. Most provisions of Title X become effective on that date. However, various provisions are subject to separate effective dates.

## Creation and Organization of the Consumer Protection Bureau

- The Act creates the Consumer Protection Bureau within the Federal Reserve, with jurisdiction over credit, savings, payment and other consumer financial products and services. Financial products or services include the “catch-all” category of those that the Consumer Protection Bureau determines: (1) are permissible for a bank or financial holding company to offer and (2) have, or likely will have, a material impact on consumers.
- The Act does not give the Consumer Protection Bureau responsibility for mutual funds or other investment products, which remain with the SEC and CFTC, and the Bureau does not have authority over insurance products.
- Although the Consumer Protection Bureau is part of the Federal Reserve, the Federal Reserve Board is prohibited from intervening in matters before the Consumer Protection Bureau, appointing or removing officers or employees of the Consumer Protection Bureau or merging or consolidating the Consumer Protection Bureau or any of its functions with any other division or office of the Federal Reserve. The Bureau’s budget will be principally funded by the Federal Reserve.
- The Consumer Protection Bureau’s authority extends to all entities engaged in providing financial products within its jurisdiction, as well as entities covered by any of the “consumer protection” statutes that will be transferred to the Consumer Protection Bureau under the Act. The Act also extends the Consumer Protection Bureau’s jurisdiction to include affiliates of covered persons which act as a service provider to the covered person, thus subjecting a wide range of companies to the Consumer Protection Bureau’s jurisdiction. There are a number of exceptions to the Bureau’s authority, discussed below.
- The Consumer Protection Bureau will be led by a Director appointed by the President with the advice and consent of the Senate; the Director will serve a five-year term, and can be removed by the President for cause.
- Offices of Fair Lending, Financial Education, Service Member Affairs and Financial Protection of Older Americans will be created within the Consumer Protection Bureau, and an ombudsman for private education loans will be designated. A Consumer Advisory Board will also be created.

## Authority of the Consumer Protection Bureau

- The Consumer Protection Bureau’s mandate 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. The Act broadly defines the Bureau’s objectives and functions.
  - In addition to general rule-making authority to implement Federal consumer financial law, the Act gives the Consumer Protection Bureau the authority to prescribe: (1) rules and regulations applicable to covered persons or service providers identifying unlawful, unfair, deceptive or abusive acts or practices in connection with consumer transactions for a consumer financial product or service, (2) consumer disclosure requirements for financial products and services, including model disclosures that would provide a safe harbor for covered persons and (3) rules requiring a covered person to make available to a consumer, upon request, information concerning the consumer financial product or service obtained from such covered person.
  - The Consumer Protection Bureau has exclusive authority to issue and interpret regulations under a broad array of existing laws (such as the Truth in Lending Act, the Fair Credit Reporting Act, the Equal Credit Opportunity Act and the Real Estate Settlement Procedures Act). Other agencies which currently have rule-making authority under these statutes will lose that authority; however, the Act provides that the Federal Trade Commission (“FTC”) retains its authority under the FTC Act and any other law, other than its authority under the enumerated consumer finance laws which are transferred to the Consumer Protection Bureau.

- Prior to proposing a regulation, the Consumer Protection Bureau must consult with appropriate prudential regulators and other Federal agencies; if a prudential regulator provides the Consumer Protection Bureau with a written objection to a proposed regulation, the Consumer Protection Bureau must include a description of the objection, and of the Consumer Protection Bureau's decision regarding the objection, in the adopting release for the proposed regulation.
- When proposing a regulation, the Consumer Protection Bureau must consider the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services that will result from the rule, and the impact on consumers in rural areas and very large banks.
- The Council may permanently set aside regulations issued by the Consumer Protection Bureau if two-thirds of the Council members agree that the regulation would put the safety and soundness of the U.S. banking system or the stability of the U.S. financial system at risk; the Chairperson of the Council (the Treasury Secretary) may stay the effectiveness of a regulation issued by the Consumer Protection Bureau for up to 90 days upon receipt of a petition by a member of the Council to have the regulation set aside, so that the Council may consider the petition.
- The Consumer Protection Bureau is authorized to prohibit or restrict the use of mandatory predispute arbitration provisions; however, the Consumer Protection Bureau must first conduct a study of the use of such provisions and provide a report to Congress.
- The Act requires the Consumer Protection Bureau to conduct a study on reverse mortgage transactions, which must be completed within one year after the designated transfer date. If the Consumer Protection Bureau determines based on the study that conditions or limitations on reverse mortgage transactions are necessary or appropriate to protect borrowers, it may issue regulations imposing such conditions and limitations, including regulations identifying unfair, deceptive or abusive practices or establishing disclosure requirements and model disclosure forms.
- The Consumer Protection Bureau will assume the role of examining very large banks for compliance with consumer financial laws and regulations, and will have primary authority to enforce consumer financial laws with respect to such institutions.
  - Very large banks are insured depository institutions and insured credit unions with total assets of more than \$10 billion, and their affiliates.
  - The Consumer Protection Bureau is required to coordinate its supervisory activities with those conducted by prudential regulators and State bank supervisors; if supervisory determinations by the Consumer Protection Bureau conflict with those of a prudential regulator, the conflicts are to be resolved by a panel consisting of a representative of the Consumer Protection Bureau, a representative of the prudential regulator and a representative of another banking agency.
- The Consumer Protection Bureau also may require depository institutions other than very large banks to provide reports to the Consumer Protection Bureau, and may participate in examinations of such institutions that are performed by prudential regulators.
- The Act gives the Consumer Protection Bureau supervisory authority over mortgage brokers, lenders and servicers, private education loan lenders, payday loan lenders, other large nondepository institutions that offer consumer financial products or services and service providers to all of the foregoing. Other nondepository institutions will be subject to supervision principally at the State level, and in many cases by the FTC.
- The Act gives the Consumer Protection Bureau broad authority to investigate potential violations of consumer protection laws, including the power to conduct hearings, subpoena records and the testimony of witnesses and

issue civil investigative demands for records and oral testimony. The Act also includes protections for whistleblowers at covered entities.

- The Act provides that the Consumer Protection Bureau will not have any rule-making, supervisory, enforcement or other authority over: (1) many merchants, retailers or other sellers of nonfinancial goods and services, except if they are covered by one of the transferred consumer protection laws (such as the Truth in Lending Act) or significantly engaged in providing consumer financial products or services, (2) licensed real estate brokers, (3) a person who acts as an agent or broker for a buyer or seller, or otherwise facilitates the purchase by a consumer of a manufactured home or modular home, (4) accountants and tax preparers, (5) activities of attorneys as part of the practice of law, (6) persons regulated by State insurance regulators, State securities commissions, the SEC, the CFTC or the Farm Credit Administration, (7) employee benefit and compensation plans or (8) activities relating to charitable contributions to tax-exempt organizations.
- The Act also generally exempts from the Consumer Protection Bureau's authority automobile dealers which are predominantly engaged in the sale and servicing of motor vehicles and/or the leasing and servicing of motor vehicles. However, automobile dealers will be subject to the Bureau's authority if they engage in mortgage-related activities, if they finance automobile loans or leases without selling the paper to third parties or if they engage in other financial products or services not related to automobile finance.

### Preemption/State Authority

- The bills that passed the House in December and the Senate in May both significantly changed the scope of preemption of State laws applicable to national banks, under the National Bank Act, and Federal savings banks, under the Home Owners' Loan Act. The Senate Bill, in a compromise measure adopted near the end of the debate on the bill, expressly incorporated the Supreme Court's decision in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), as the standard for preemption. The House Bill, rather than incorporating *Barnett Bank* expressly, used language drawn from the decision to define the scope of preemption. The final Act substantially follows the Senate Bill's compromise, however, it refers to *Barnett Bank* only as a guidepost and defines the preemption standard by drawing language out of that opinion, similar to the House Bill. Under the Act, preemption may apply if, "in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in *Barnett Bank of Marion County, N. A. v. Nelson, Florida Insurance Commissioner, et al.*, 517 U.S. 25 (1996), the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers."
- Preemption determinations may only be made on a case-by-case basis, must follow procedural rules and be reviewed on a regular basis and may be made only by the Comptroller of the Currency rather than any designee.
- Preemption under the National Bank Act and Home Owners' Loan Act no longer applies to any non-bank operating subsidiaries of national banks and Federal savings bank.
- The Act confirms that Federal preemption of State interest rate limits (the "exportation" doctrine for banks) is preserved.
- The new Consumer Financial Protection Act (Title X) itself does not preempt State law unless the State law is inconsistent with Federal law. A State law providing additional consumer protection is not considered an inconsistency.
- The Act follows the Senate Bill compromise in defining the enforcement powers of the States. State attorneys-general may bring actions in a court in that attorney-general's own State to enforce the Act or its regulations, although the State officials must consult with the Consumer Protection Bureau before initiating such an action, and the Consumer Protection Bureau would have the power to intervene. With respect to enforcement of the new Act against Federal chartered banks, however, State attorneys-general are only permitted to bring actions to

enforce specific regulations adopted by the Bureau under Title X. As to enforcement actions more generally, the Act adopts the Supreme Court's decision in *Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710 (2009), under which State attorneys-general are authorized to bring, in courts of appropriate jurisdiction, litigation to enforce non-preempted law.

- The Consumer Protection Bureau is required to commence a rule-making if a majority of the States enact resolutions calling for regulation of a particular matter.

### Private Right of Action

- The Act does not expressly create a private right of action for consumers.
- The Act provides that it is “unlawful” to “offer or provide to a consumer any financial product or service” that is “not in conformity with” Federal consumer financial law, or otherwise “commit any act or omission” in violation of a Federal consumer financial law. This provision of the Act is substantially different from the versions passed by both the House and Senate, which also made it unlawful to “enforce” or “attempt to enforce” contracts not in compliance with the Act.

### Other Provisions

- The Act amends TILA to increase the caps on credit transactions and consumer leases that are subject to TILA from \$25,000 to \$50,000, and to permit the Consumer Protection Bureau to adjust such caps annually based on increases in the Consumer Price Index for Urban Wage Earners and Clerical Workers.
- The Act amends the Electronic Fund Transfer Act to allow the Federal Reserve to issue regulations governing interchange for debit and certain prepaid card transactions. This provision was modified substantially from the version included in the Senate Bill, and now: refers only to the interchange received by issuers (rather than network fees); permits a rule-making procedure to adjust interchange amounts based on fraud costs; and exempts small issuers, government-sponsored programs and many reloadable prepaid card programs. The provision restricts issuers' and networks' ability to impose requirements for routing transactions. The provision also precludes networks from prohibiting merchants from offering discounts based on the method of payment, as long as the discounts do not discriminate between debit or credit cards based on the issuer, and are offered and disclosed in compliance with other legal requirements. Finally, networks may not prohibit merchants from setting a minimum credit card transaction amount of \$10 or less, and may not prohibit institutions of higher education and government entities from setting a maximum transaction amount.
- The Act provides for increased disclosures and other regulations relating to remittance transfers.
- The Act amends the Fair Credit Reporting Act to require a person which takes adverse action against a consumer on the basis of a consumer report to disclose to the consumer his or her credit score and information concerning the model used to generate the credit score. In a final Conference Committee change, the effective date for this provision was moved from the day after enactment of the Act to the designated transfer date, providing substantial additional time for affected entities to comply.
- The Act requires the Treasury Secretary to conduct a study of, and develop recommendations regarding, the options for ending the current conservatorship of Fannie Mae and Freddie Mac and the role of the Federal government in the U.S. housing finance system, and submit the recommendations to the Committee on Banking, Housing and Urban Affairs of the Senate and the Committee on Financial Services of the House by not later than January 31, 2011.
- The Act requires a number of additional studies and reports, including in relation to private education loans, the use of credit scores and tax-deferred exchange facilitation services.

- The Act directs the United States Sentencing Commission to review and, if appropriate, amend its guidelines and policy statements concerning sentences for securities fraud and financial institution fraud based on a number of specified factors including the seriousness of the offenses and the need for deterrence. The Act also revises the statutes of limitations for certain securities fraud and other violations.
- The Act also provides a six year statute of limitations for criminal prosecutions for violations of 18 U.S.C. § 1348 (the Federal criminal code for securities fraud), the Exchange Act, the Securities Act, the Advisers Act, the Investment Company Act and the Trust Indenture Act of 1939.

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