



August, 2010

Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111-203)

**Title X—Bureau of Consumer Financial Protection (CFPB)
 (“Consumer Financial Protection Act of 2010” or “CFPA”)**

Summary of Key Provisions

- I – Structure, Funding, Independence
- II – Scope of CFPB jurisdiction
- III – Rule-making, supervision and enforcement authority under CFPA
- IV – Standards and procedures for CFPB rule-making
- V - Enforcement remedies
- VI- Exemptions
- VII- Specific substantive topics addressed
- VIII- Relation to states: Preemption (CFPA, NBA and HOLA), and state enforcement
- IX- Selected timeline and effective dates
- X- Transition Issues
- XI- Miscellaneous provisions

Appendices – Summary charts

- Section I – Jurisdiction and Authority (Table)
- Section II-- Exemptions (Table)
- Section III Preemption and state enforcement

I. Basic Structure, Funding, Independence

- Independent Bureau within the Federal Reserve; with explicit statutory autonomy from Federal Reserve Board of Governors. (sec. 1011, 1012(c))
 - Includes functional units within Bureau – research, community affairs, and Offices of Fair Lending and Equal Opportunity, Financial Education, Service Member Affairs and Financial Protection for Older Americans. (sec. 1013)
- Headed by a Director appointed by President with advice and consent of Senate, serving 5 year term, removable by President only for “inefficiency, neglect of duty or malfeasance in office.” (sec. 1011)

- Interagency disputes
 - *Systemic risk council veto* – CFPB regulations subject to review by systemic risk Council.¹ Council may set aside CFPB regulation if, by 2/3 vote, it determines that the rule would put the safety and soundness of the US banking system or the stability of the US financial system at risk. (sec. 1023). Decision to set aside a CFPB regulation is subject to APA judicial review (but action or inaction that sustains a CFPB regulation is not subject to review). (APA notice and comment do not apply.)
 - *Inter-agency jurisdictional disputes* -- may be raised to Council, which may make non-binding recommendation for resolution by 2/3 vote. (sec. 119).
- Funding – transfer from earnings of Federal Reserve System, to be capped at 10% of the Fed’s FY 2009 budget for FY 2011, 11% of the same Fed FY 2009 budget for FY 2012, 12% for FY 2013, and thereafter the cap is increased for inflation. The FY 2013 amount comes to \$485 million. The money transferred from the Fed is not reviewable by Congressional Appropriations. If that amount is insufficient, the CFPB Director may request Congressional appropriation of up to \$200 M (through 2014).

II. Fundamental scope of jurisdiction for CFPB

Two different fundamental sources of CFPB rule-making authority – 1) organic authority (including grants of specific authority to take steps to prevent unfair, deceptive or abusive acts and practices – “UDAAP”); and 2) transfer and consolidation of regulatory authority under most existing federal consumer financial statutes, called “enumerated statutes” in the CFPA.

- “Organic” authority – to implement federal consumer financial laws, (sec. 1021-1022), and to prevent “covered persons” from engaging in unfair, deceptive or abusive acts or practices in connection with offering or providing a “consumer financial product or service.” (sec. 1031)
 - “*federal consumer financial laws*” is defined as the CFPA plus the enumerated and transferred statutes. (sec. 1002(14)). [Note: FTC Act is not included in the term. The CFPB’s UDAAP authority under the CFPA is independent of the FTC’s UDAP authority under the FTC Act.]

¹ Voting members of systemic risk council are: Sec. of Treas. (Chair), FRB Chair, Comptroller of the Currency, CFPB director, SEC Chair, FDIC Chair, CFTC Chair, FHFA director, NCUA Chair, and an independent member with insurance expertise, to be appointed by President and subject to confirmation. (sec. 111).

- Rule-making authority under existing “enumerated” federal consumer laws is transferred to CFPB, including, *e.g.* Truth in Lending Act, Consumer Leasing Act, Equal Credit Opportunity Act, Fair Credit Reporting Act (with limited exceptions), AMTPA, Fair Debt Collection Practices Act, Electronic Funds Transfer Act, HOEPA, HMDA, and RESPA.² (sec. 1022, Subtitle F) Note: the rulemaking authority under the FDCPA is new.
- Also includes research and monitoring functions, among other functions. (sec. 1013(b)(1). (*See also* sec. 1022(c) for monitoring authority.)
- Consumer complaints (sec. 1013(b)(3); 1034)

III. Specific authority to implement and enforce CFP Act and enumerated statutes

Three separate categories of regulatory duties set forth regarding implementation and compliance with CFPA: rule-making, supervision, and enforcement. (*See also Appx, Section I, table for summary overview*)

- Rulemaking authority: (to promulgate regulations under federal consumer financial laws) (sec. 1022) and prevent unfair, deceptive and abusive acts (sec. 1031)
 - Covers all providers of “consumer financial products and services” (including both large and small banks, thrifts and credit unions), and non-banks, subject to limited exemptions (detailed below, Sec. VI) for, among others, merchants, motor vehicle dealers, attorneys, and insurance products.
 - “Consumer financial products and services” is defined broadly. Generally includes, *e.g.* credit, real estate settlement services, deposit-related services, payment systems, credit bureaus, debt collection by debt collectors or by providers of a consumer financial product or service (*i.e.*, a credit card issuer but not a hospital), debt management/settlement/loan mod/ counseling services; check-cashing. CFPB has authority to add other services (except insurance) that are used as subterfuge to evade the Act or are permissible banking activities that have a material impact on consumers. (Sec. 1002(5), (15)).
 - *Note:* Insurance, including credit insurance, is not a consumer financial product or service. It is unclear whether rent-to-own contracts are.
 - CFPB has authority to issue rules under both the organic CFPA law and under the transferred statutes, except where specifically limited (see exemptions, Sec. VI, below.).

² The definition of “enumerated consumer laws” lists all the transferred statutes at Section 1002(12).

- Supervision authority – (routine, on-going examination and monitoring for risks and new developments, as well as on-going compliance.)
 - *Large banks, thrifts and credit unions* – those with more than \$10 billion in assets; CFPB has exclusive supervision at federal level for compliance with federal consumer financial laws and detecting and assessing risks to consumers and markets (sec. 1025). For *large state-chartered banks*, CFPB and state regulator have concurrent authority.
 - *Small banks, thrifts and credit unions* – those with less than \$10 billion in assets; CFPB has limited supervision – may require reports, refer suspected violations to appropriate agencies, and may “ride-along” on a sampling basis with bank supervisor; otherwise supervision is left with the appropriate prudential regulator. For *small state-chartered banks*, state banking regulator has concurrent supervision authority with FDIC (for non-member banks) and FRB (for member banks) (sec. 1026)
 - *Non-bank providers* – (subject to certain exemptions, Sec. VI, below) – (Sec. 1024)
 - providers of mortgage-related products and services,
 - payday lenders,
 - private student loan providers,³
 - “larger participants” in a market for other consumer financial products and services, to be defined by CFPB rule (after consultation with FTC), and
 - any *individual* provider not otherwise covered that CFPB determines, by order, that it has cause to believe is engaging in conduct that poses risk to consumers.
 - State regulators have concurrent supervision authority over entities under their jurisdiction; CFPB to coordinate supervisory activities.
 - *Note:* -- CFPB supervision priorities for non-banks are to be risk-based. The Bureau is to assess risks to consumers in product and geographic markets, and taking into consideration asset size, transaction volume, risks, and the extent to which institutions are subject to state oversight.

³ If the authority covers student loans that meet TIL’s Student loan definition, (15 USC §1650) (closed-end loans). However, the loan might be exempt if the school is covered by merchant exception (discussed below), which generally will cover a school under \$7 million that makes loans directly and does not sell or assign them.

- Enforcement authority
 - *Large banks* – CFPB has primary enforcement for consumer financial laws, with back-up enforcement authority in the respective federal banking agency (as applicable); state regulators for state chartered large banks; state attorneys general (subject to special provisions for national banks, below) (sec. 1025, 1042)
 - *Small banks* – the relevant federal banking regulator (OCC for national banks/federal thrifts, FDIC for state non-member banks, FRB for state member banks. No CFPB enforcement); state regulator for state-chartered small banks; state attorneys general (subject to special provision for national banks and thrifts, below) (sec. 1026, 1042)
 - *Special provisions for state attorneys general with respect to large and small national banks and federal thrifts* – (sec. 1042) (see also Sec. VIII, below).
 - as to CFP Act, can only enforce CFPB regulations, not the general ban on unfair, deceptive and abusive practices that have not been reduced to formal regulation;
 - as to enumerated statutes – retains status quo from those specific statutes.
 - *Non-banks* – CFPB as to categories described in supervision, (above), plus CFPB and FTC are to negotiate agreement as to enforcement for those on this list; state regulators (as applicable); state attorneys general. (sec. 1024, 1042)
 - *For non-bank smaller market participants* – FTC , state regulators (as applicable), and state attorneys general (sec. 1024, 1042)

IV. Standards and Procedures for CFPB rule-making

- *Standards* –
 - Rules for all “federal consumer financial laws” – CFPB must consider the potential benefits and costs to consumers and covered persons, including potential reduction of access by consumers to products or services, and the impact on small banks and rural consumers. (sec. 1022(b)(2)(A))
 - Rules for unfair, deceptive, or abusive acts or practices [“UDAAP”]–
 - *“Unfairness” defined* – causes or likely to cause substantial injury to consumers which is not reasonably avoidable by consumers and is not outweighed by countervailing benefits to consumers or competition. [Same as FTC Act definition). (sec. 1031(c)].

- Bureau may consider established public policies as evidence, but public policy may not serve as primary determination for unfairness determination.
- “Abusive” defined – materially interferes with ability of consumer to understand terms or conditions of product or service; takes unreasonable advantage of a lack of understanding of material risks, costs or conditions; takes unreasonable advantage of the inability of the consumer to protect the interests of the consumer in selecting a product or service, or takes advantage of the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.⁴
- *Disclosures* -- may prescribe rules for disclosure, including model disclosures. (Independent of enumerated laws regarding disclosures.) Includes a mandate to provide combined TIL/RESPA disclosures if FRB and HUD have not already done so. (sec. 1032 (CFPB); sec. 1098 (RESPA), sec. 1100A (TIL)).
- *Coordination and Consolation With Other Agencies*
 - CFPB to coordinate with other federal agencies and state regulators to promote consistent regulatory treatment of consumer financial and investment products. (Sec. 1015, 1031(e)[for UDAAP])
 - Consultation with federal banking regulators or other federal agencies regarding consistency with safety and soundness, market, or systemic objectives of those agencies, and publish a description of any written objection they lodge. (Sec. 1022(b)(2)(B),(C).
 - Systemic risk council veto (sec. 1023, see Sec I, above)
- *Rulemaking Procedures*
 - Rulemaking under Administrative Procedures Act.
 - Small business preview of intended rules (Snowe-Pryor Amendment -sec. 1100G) – In addition to the standard required federal agency compliance with Regulatory Flexibility Act, the CFPB must comply with special, extra procedures, prior to issuing initial publication, including –
 - Notifying the Chief Counsel for Advocacy of Small Business of potential impact on small entities; that person is to identify representatives of

⁴ Some elements of the definition of “abusive” might be considered similar to those for unconscionability under common law or codifications of common law. “Deceptive” is not defined in CFPB, but there is an FTC definition, which the CFPB is likely to adopt or adapt. See generally National Consumer Law Center, Unfair and Deceptive Acts and Practices, §4.2 (7th Ed. 2008) for discussion of state and federal UDAP interpretations of deception.

affected small entities” (e.g. mortgage brokers, small payday lenders, etc), to obtain their advice and recommendations.

- Convene a review panel, consisting of CFPB, Office of Information and Regulatory Affairs within OMB, and Chief Counsel for Advocacy of Small Business, which is to report within 60 days on certain specified issues.⁵
- Initial regulatory flexibility analysis to include projected increase on credit costs to small entities; significant alternatives which might minimize such costs, compliance costs, and identification of any overlapping or conflicting rules, and advice of small entities regarding those issues.

V. Enforcement remedies available

- **CFPB enforcement remedies:** Cease & desist administrative orders, injunction in civil action, appropriate legal or equitable relief including rescission or reformation of contracts, refund, restitution, monetary relief, civil penalties (Subt. E, §§1051-1057)
- **Private rights of action:**
 - No private right of action to enforce CFP Act and CFPB rules;
 - *Status quo* as to private rights of action under enumerated statutes.

VI. Exemptions from CFPB jurisdiction

The exemptions are typically partial exemptions. Generally, to the extent these entities are exempt from CFPB jurisdiction; they *are* subject to the Federal Trade Commission’s jurisdiction and its authority to enforce the FTC Act’s ban on unfair and deceptive acts and practices, which incorporates UDAAP rules issued by the CFPB.⁶ They are also subject to any applicable state law. (*See Appx, Section II, table, for a summary overview.*)

⁵ By virtue of defining the CFPB to be a “covered agency” (sec. 1100G(a)), the CFPB becomes subject to this procedure spelled out in 5 USC 609(b). The EPA and OSHA are the only other federal agencies which must comply with these extra procedures.

⁶ Sec. 1061(b)(5)(C). The FTC’s primary tool for addressing unfair acts and practices (UDAP) is enforcement. It has no supervision authority under the FTC Act. It has UDAP rule-making authority, but generally the process it must use to do so, under the statute, is so expensive, time-consuming and cumbersome, that it generally does not use it. However, the CFPA gives the FTC regular APA rule-making authority over the motor vehicle dealers that are exempt from CFPB jurisdiction. (sec. 1029(d)).

Notes:

- Except where otherwise noted, “subject to CFPB” means subject to CFPB rule-making authority. Where these partially exempt entities are subject to CFPB rules, the *supervision and enforcement* authority will be allocated as described in Section III, above.
- Many of the exempt providers below may be considered “service providers,” and also may be subject to CFPB requests for information necessary to carry out its functions. (1027(n)).⁷
- *Motor vehicle dealers* – (sec. 1029)
 - Subject to CFPB (as to the provision of financial products and services only) –
 - Dealers who provide credit directly to their customers to purchase or lease⁸ the vehicle *and* routinely keep the finance account in house or assign it to an affiliated lender. (*Example:* Buy-here, pay here dealer that assigns accounts to an affiliated finance arm is not entitled to the motor vehicle dealer exemption.)
 - Dealers who provide consumer financial service *not related* to the sale, lease, rental, repair, etc. of the motor vehicle.

Note: Dealers who do not sell or assign the loan may be exempt under the merchant exemption (discussed below) if the dealer is a small business (under \$29 million for new car dealers, \$23 for used car dealers, \$7 million for other vehicle dealers). Whether motor vehicle dealers that do not qualify for the motor vehicle exemption can seek this separate, independent exemption as a small business merchant (section 1027(a), see below) is unclear as a matter of statutory construction. Presumably regulations will clarify the relationship between these two independent exemptions. *See also* note 10.

⁷ The exempt entities that are not listed as subject to this residual authority are the exemptions regulated by other federal regulators (SEC, CFTC and FCA), and the motor vehicle dealers.

⁸ Leases are “financial products or services” if the initial term of the lease is at least 90 days, (sec. 1002(15)(A)(ii), which typical car leases are.

- Exempt from CFPB –
 - Dealers who provide or arrange credit to their customers to purchase or lease a vehicle *and* the purchase/lease contracts are routinely sold to an unaffiliated third party lender (“indirect lender”).
 - Motor vehicle dealers who sell paper to unaffiliated indirect lenders are exempt from CFPB’s jurisdiction as to transferred enumerated statutes, as well as its organic authority. (*Note: this is unique among the general consumer exemptions.*⁹)
 - Notes:
 - The exemption for motor vehicle dealers who sell their loans to indirect lenders is personal to those dealers. The CFPB has jurisdiction over motor vehicle finance products generally, as well as the indirect lenders who buy the loans and leases from those dealers, and other lenders that provide motor vehicle finance directly to consumers, such as banks, credit unions, and non-bank direct lenders.
 - Definition of “motor vehicle” dealers encompasses dealers selling other types of self-propelled, titled motor vehicles, including recreational boats, motorcycles and RVs.
 - Motor vehicle dealers that are exempt from CFPB *are* subject to FTC jurisdiction at the federal level. *FTC is given authority to issue UDAP rules as to motor vehicle dealers under the APA procedures.* (sec. 1029(d))

⁹ This unique provision results in irrational and peculiar anomalies. For example, the CFPB is responsible for promulgating Truth in Lending disclosure rules for motor vehicle loans made by motor vehicle dealers that keep their loans in house, banks, credit unions and non-banks making direct motor vehicle loans, while the FRB makes TIL disclosure rules *solely* for loans made by motor vehicle dealers who sell their loans to unaffiliated indirect lenders. The CFPB is responsible for anti-discrimination rules under the Equal Credit Opportunity Act that apply to the indirect lenders who buy loans from motor vehicle dealers, and motor vehicle dealers who keep their loans in-house, while the FRB is responsible for ECOA rules *solely* as to dealers that sell their loans to unaffiliated lenders.

- Merchants & sellers of non-financial goods and services – (sec. 1027(a))¹⁰
 - Subject to CFPB --
 - as covered by transferred, enumerated statutes, (sec. 1027(a)(1), 1027(a)(2)(C)(ii)(II))
 - Covered by CFPB’s general CFP Act authority --
 - as to credit the merchant extends credit directly to customer to purchase the merchant’s own non-financial goods and services **if** it sells or assigns such accounts to third parties before default or delinquency. (*e.g.* furniture store offers retail installment contract to its buyers, then assigns the contracts to a finance company.) (sec. 1027(a)(2)(B)(i), 1027(a)(2)(C)(ii)(I)); or
 - where merchant extends credit to its customers that significantly exceeds market value of non-financial goods or services sold, or the CFPB otherwise finds the sale of the goods or services is a subterfuge to evade CFPA. (sec. 1027(a)(2)(B)(ii), 1027(a)(2)(C)(ii)(I); or
 - covered as to credit if merchant “regularly” extends credit that is subject to a finance charge, *except* if the merchant is not “significantly” engaged in offering consumer financial services. (**Note:** Small business will be deemed to be not “significantly engaged” for if they meet certain SBA thresholds.)
 - The merchant offers a consumer financial product or service other than the credit described above.

¹⁰ The merchant exemption is an example of convoluted legislative drafting, and this represents our best efforts at finding the bottom line. Also, it is unclear how the general merchant exemption does – or does not – interact with the Act’s specific treatment of certain categories of merchants, such as sellers of manufactured homes or otherwise-covered motor vehicle dealers. General principles of statutory construction should suggest that the explicit provisions are the ones that apply, with the merchant exception being a residual bucket for all other types of merchants of non-financial goods and services not otherwise addressed specifically. Regulations should bring more clarity to both questions.

- Exempt from CFPB jurisdiction (other than its authority under enumerated statutes.) --
 - As to credit the merchant extends directly to customers to purchase the merchant's own non-financial goods and services **if**
 - The merchant's accounts are kept in-house (at least until they are delinquent or in default) (Sec. 1027(a)(2)(A)(iii) and (B)(i)), *and*
 - The credit does not significantly exceed the market value of the good or service, the sale is not done as a subterfuge or to evade or circumvent the Act (Sec. 1027(a)(2)(B)(ii) and (C)(ii)(I), *and*
 - The merchant either:
 - does not regularly extend credit that is subject to a finance charge. (*e.g.* the butcher that only occasionally lets a customer pay later.) (Sec. 1027(a)(2)(B)(iii), *or*.
 - is not "significantly engaged" in offering or providing financial products or services (Sec. 1027(a)(2)(C)(i)). (Merchants meeting SBA size thresholds for small businesses are deemed to be "not significantly engaged", sec. 1027(a)(2)(D)(ii)).
 - *Note:* if the merchant is exempt from CFPB authority under this section, then a state attorney general or applicable state regulator also may not enforce any claim under the CFP Act. (sec. 1027(2)(E). (The merchants, however, would remain subject to state enforcement of any applicable state law, including state UDAP, as well as FTC enforcement of federal UDAP under the FTC Act. [sec. 1042(d)(1)(states); sec.1027(b)(D)(FTC).])
- *Real Estate Brokers* – (sec. 1027(b))
 - Subject to CFPB –
 - as covered by an enumerated statute,
 - to the extent that broker is engaged in offering or providing consumer financial products or services, (*Example.* Not covered as to sale of a house, but covered as to brokering mortgage to finance the sale of that house.)

- *Manufactured and modular home retailers* – (sec. 1027(c))
 - Subject to CFPB –
 - as covered by an enumerated statute,
 - to the extent that it is engaged in offering or providing consumer financial products or services, (*Example*, Not covered as to sale of a manufactured home, but covered as to financing that sale.)

- *Accountants and tax preparers* -- (sec. 1027(d))
 - Subject to CFPB –
 - as covered by an enumerated statute,
 - to the extent it is engaged in offering or providing consumer financial services *except* that which is “customary and usual accounting activity” or incidental thereto.
 - Extending or brokering credit is generally covered. (Includes credit extended by the provider to the customer to pay for the “customary and usual” accounting services, but, as to that credit, only where it is either subject to a finance charge or payable in more than 4 installments by written agreement.¹¹)
 - *Examples:*
 - Tax preparers who broker Refund Anticipation Loans *are covered* as to that activity.
 - Accountant that permits its customers to pay for “customary and usual accounting services,” or services incidental thereto, over time, but either charges a finance charge or uses a written agreement that calls for more than 4 installments *is covered* as to that credit.
 - Accountant that permits its customers to pay for “customary and usual accounting services,” or services incidental thereto, over time but neither charges a finance charge or uses a written agreement that calls for more than 4 installments *is exempt* as to that credit

- *Attorneys* – (sec. 1027(e)) **Note: Attorneys are subject to CFPB rule-making authority to the extent they provide financial goods and services. Attorneys that qualify for this exemption are exempt only as to CFPB’s supervision and enforcement authority.** This means, for example, that CFPB rules relating to debt settlement schemes, loan modification or foreclosure prevention schemes, etc.,

¹¹ This incorporates the definition of “credit” that is subject to the Truth in Lending Act.

would apply in any case to attorneys, even if they are in theory representing the consumers in those cases. Enforcement in such cases would be left with FTC and state authorities.

- Subject to CFPB
 - as covered by an enumerated statute,
 - when providing consumer financial services or products, if not part of the practice of law, or if the consumer is not the client, or if not exclusively within the scope of attorney-client relationship with the consumer. (*Examples:* debt collection attorneys are not exempt because the attorney –client relationship is not with the consumer.)
- *Persons regulated by state insurance regulator – (sec. 1027(f))*
 - Subject to CFPB
 - as covered by an enumerated statute,¹²
 - when providing consumer financial services or products, *except* that “the business of insurance” is not a financial service or product.¹³
 - “business of insurance” is defined as writing insurance or reinsuring risks by an insurer, conducted by officers, directors, agents or employees of insurers of those who are authorized to act on their behalf. (sec. 1002(3).)
- *Activities related to charitable contributions – sec. 1027(l)*
 - Subject to CFPB
 - as covered by an enumerated statute,
 - when offering or providing a consumer financial service or product, *except* to the extent the agent of the organization is soliciting or providing advice, information, education or instruction to any donor or potential donor relating to a contribution to the organization.
- *Other exemptions not summarized here: employee benefit and compensation plans (1027(g)), persons regulated by state securities commission (1027(h)),*

¹² Except as to Section 505(a)(6) of the Gramm-Leach-Bliley Act.

¹³ The CFPB is expressly forbidden to define “the business of insurance” as a financial product or service. (Sec. 1027(m)).



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person regulated by the SEC (1027(i)), persons regulated by the CFTC (1027(j)), and persons regulated by the Farm Credit Administration (1027(k)).

VII. Specific Topics Addressed

- Usury caps -- The CFPB has **no** authority to set usury caps unless explicitly authorized by law. (sec. 1027(o))
- Arbitration – CFPB is to study pre-dispute arbitration agreements used in connection with financial products and services, and may prohibit or impose conditions on such agreements in accordance with the findings, if it is in the public interest and for the protection of consumers. (May not do so with respect to voluntary post-dispute arbitration agreements.) Application of any new rules will be delayed for 6 months after the rule’s effective date. (sec. 1028).
- Consumer rights to information – Consumers to have access to information from providers concerning their transactions with the providers, with some limitations. (sec. 1033).
- Remittances – [not summarized here] (sec. 1073)
- Interchange -- reasonable interchange fees and rules for debit card transactions (sec. 1075)
- Small business data collection for ECOA – (sec. 1071)
- Reverse mortgages -- CFPB study required, and authority to issue rules prior to or as follow up (sec. 1076)
- Private education loans and lenders – CFPB, DOE, in consultation with FTC and US AG to issue report to Congress. (sec. 1077).
- Credit scores – Free credit score to be made available to consumer under FCRA (sec. 1100F): CFPB to study differences in variation on scores made available to consumers and to creditors. (sec.1078)
- Exchange facilitators – report required and program to protect consumer users mandated (sec. 1079)

VIII. Relation to State Law: Preemption and States’ Enforcement Authority

- Preemption of state laws – CFPA (sec. 1041):
 - CFP Act and CFPB rules do not preempt state laws except to the extent they are inconsistent; state laws that provide greater protections to consumers are not inconsistent. CFPB may make that determination on its own motion or in response to a non-frivolous petition by any person.

- *Frank-Dodd amendments to National Bank Act(NBA) and HOLA regarding preemptive effect of those federal banking statutes on state law and state enforcement of laws – (sec. 1044-1047)*¹⁴
 - As to national banks and federal thrifts, *state “consumer financial laws”* are preempted if they discriminate against national banks, or if, in accordance with the legal standard of *Barnett Bank*, they prevent or significantly interfere with the exercise of national bank powers. (sec. 1044, 1046)
 - *State “consumer financial laws”* are those that do not discriminate against national chartered institutions and “directly and specifically regulate[] the manner, content, or terms and conditions of any financial transaction as are authorized for a [federal charter] to engage in, or any account related thereto, with respect to a consumer.” (sec. 1044, 1046).
 - Preemption determinations as to state “consumer financial laws” may be made by a court, or by the OCC on a case-by-case basis; OCC case-by-case determination may apply to law of any other state law with substantially equivalent terms. (sec. 1044)
 - Comptroller must consult with CFPB in making such determination, and must be made on the basis of “substantial evidence” made on the record, that the *Barnett* standard has been met.
 - Comptroller must conduct periodic reviews of its preemption determinations of state consumer financial laws, at least once every 5 years, subject to notice and comment.
 - Substantive preemption of state laws other than state “consumer financial laws”
 - Dodd-Frank amendments to NBA are silent as to NBA preemption of state laws of general applicability.¹⁵
 - No *Chevron* deference due to OCC preemption determinations; adopts standard that is functionally *Skidmore* deference. (Leaves status quo as to

¹⁴ Dodd-Frank eliminates the OTS, and the supervision of both national banks and federal thrifts will now be the job of the OCC.

¹⁵ The implications of Dodd-Frank’s silence on OCC’s authority to make preemption pronouncements as to non-consumer financial state laws will undoubtedly be the subject of litigation. On the one hand, the OCC will likely argue that Dodd-Frank leaves its authority to do so as to laws of general applicability at the status quo. On the other hand, it also might be argued that Congress failed to explicitly give the OCC any authority to make preemption determinations apart from this, and therefore the agency has no other authority to do so.

- deference due to the OCC on non-preemption matters, including “meaning or interpretation” of NBA or other federal laws.)
- *Marquette* right to export interest rates is preserved. (sec. 1044).
 - Neither HOLA nor NBA occupies the field; federal thrifts and national banks both subject to conflict preemption, not field preemption. (sec. 1044, 1046).
 - Non-bank affiliates and subsidiaries of national banks are subject to state consumer financial laws (*i.e.* no preemption) to same extent as any other person, corporation or entity covered by that state law, explicitly. (sec. 1044)
 - *Watters* reversed generally – no preemption for non-bank subsidiaries, affiliates, or agents. (sec. 1045)
 - Grandfather clause preserves existing preemption benefits under OCC and OTS rules to existing contracts of national banks and federal thrifts as against CFP Act (including NBA and HOLA changes discussed below) and CFPB rules, guidances, etc. (sec. 1043) [*Note:* This grandfather clause applies only to contracts entered into before the date of enactment of CFPA.]
- *State enforcement of CFP Act* – (sec. 1042(a),(b))
 - State AG may enforce the CFP Act generally (*i.e.*, the general ban against unfair, deceptive or abusive conduct) (except as to national banks and federal thrifts), and CFPB regulations (as to everyone).
 - State AGs may enforce CFPB *regulations* against national banks and federal thrifts, but not the general provisions of the Act.
 - State regulators may enforce CFP Act and CFPB regulations as to state-chartered entities under their jurisdiction.
 - State AGs and state regulators must give CFPB and, if applicable, prudential regulator, prior notice.¹⁶
 - CFPB has authority to intervene in the proceeding.¹⁷
 - State authority to enforce enumerated statutes is status quo as provided in those statutes. (sec. 1042(a)(3)).
 - *Savings clause preserves states’ ability to enforce state laws.* --(sec. 1042(d))
 - *Dodd-Frank amendments to NBA and HOLA regarding states’ general “visitation” authority over national banks and federal thrifts* – (sec. 1047)

¹⁶ “Prudential regulators” refers only to the federal bank regulatory agencies. *See* 1002(24).

¹⁷ The CFP Act is silent as to the authority of a prudential regulator to intervene, but the regulators may have intervention authority generally under their own enabling statutes.

- Codifies *Cuomo v. Clearing House Ass'n*. Nothing in National Bank Act or HOLA limits authority of any State AG to bring action to enforce applicable law against national banks or federal thrifts.

IX. Selected Timeline and Effective Dates¹⁸

- *Effective on the date of enactment (July 21, 2010) –*
 - CFPB established (Subt. A, sec. 1018)
 - CFPB’s general authority to enact rules to carry out the purposes of the Act (but not the specific UDAAP authority), to monitor and collect information (under sec. 1022); supervision and enforcement authority as to non-banks (under sec. 1024); mandate to coordinate supervision with prudential regulators over very large banks (under sec. 1025(e)). (Subt. B, sec. 1029A)
- *Effective on the “designated transfer date” – to be set by Secretary of Treasury, in consultation with other agencies, by September 19, 2010 (within 60 days of enactment); transfer date is to be between 6 and 12 months from date of enactment (1/21/11 – 7/21/11), except that Secretary of Treasury may seek extension for up to 18 months after date of enactment. – (sec. 1062)*
 - UDAAP rule-making (sec. 1037)
 - Transferred functions under federal consumer financial law from other federal agencies. (sec. 1061)
 - *Note:* There is some inconsistency between the delayed effective date for transfer functions from other regulatory agencies and the immediate effective date of its general rule-making under 1022. As a practical matter, the demands of getting the CFPB up and running will almost certainly take enough time that there will be little occasion to test the limits of that inconsistency.

X. Transition Issues

- *Administrative & organizational matters –*
 - Treasury Secretary to perform CFPB functions until CFPB Director is confirmed. (sec. 1066)

¹⁸ A more detailed memo on that is available, “Effective Dates & Timelines: Dodd-Frank”

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- Personnel transfers – Transferring positions to be determined jointly by CFPB and transferor agency. (sec. 1064)
- Treasury Department may provide administrative services to support CFPB prior to transfer date. (sec. 1066(b))
- *Impact on matters pending at transferring agencies –*
 - Proposed rules of transferring agencies not finalized by “designated transfer date” shall be deemed proposed CFPB rules. (sec. 1063(j).)
 - Rules finalized by transferring agencies, but not yet effective as of designated transfer date will become a CFPB rule, effective by their terms.
 - Transferor agencies’ existing lawsuits and proceedings continue (sec. 1063).

XI. Miscellaneous

- *HMDA* amendments – adds new information fields (sec. 1094)
- *Truth in Lending & Consumer Leasing Act* jurisdictional limits raised to \$50,000, with an inflation adjustment, damages increased. (sec. 1100E)
- *AMTPA* preemption -- limits it to variable rate loans only (not other “creative financing terms”); transfers interpretive authority to CFPB (effective at designated transfer date) (sec. 1083)
- *Whistleblower Protections for Covered Person Employees --*
 - Unlawful for covered person employer to retaliate against employee for reporting violation or cooperating with CFPB, or for refusing to do work she reasonably believes to be a violation. Procedure for complaints to Department of Labor and de novo review by the courts. (sec. 1057)



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CFPB JURISDICTION AND AUTHORITY UNDER TITLE X OF DODD-FRANK (June 29, 2010 text)

Section I – Summary of CFPB Jurisdiction & authority generally

Section II – Exemptions

Section III – States’ authority

I. CFPB Jurisdiction & Authority

	Rule-making a. (both CFP Act organic authority and transferred enumerated statutes except where noted) : “as necessary and appropriate to carry out the purposes and objectives of Federal consumer financial laws, and to prevent evasions thereof.”(1022(b)) ¹⁹ b. Unfair, deceptive, or abusive acts and practices (“UDAAP”) (1031)	Supervision – federal level (see Section III below for state authority)	Enforcement – federal level (see Section III below for state authority)	Comments (see Section III below for state authority)
Large banks (“insured depositories”) (over \$10 Bn)	x	x (exclusive for purposes of compliance with federal consumer financial laws and detecting and assessing risks to consumers and markets for those products and services. (Sec. 1025)	x – primary enforcement; back-up enforcement by other federal agency with authority to enforce (i.e. appropriate federal banking agency.)	
Small banks (“insured depositories”)	x	Limited to requiring reports, and “ride-along” on sampling basis	No CFPB authority – federal banking regulator enforcement	

¹⁹ Section 1022(b)(1). Rule-making authority is exclusive, except with respect to some FTC functions per section 1061(b)(5). Section 1022(b)(4).



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<i>(under \$10 Bn)</i>		with banking supervisory agency <i>(Sec. 1026)</i>	only at federal level.	
<p>Non-banks (generally – subject to specific exemptions – as described below in Section II)</p>	<p>x</p>	<ul style="list-style-type: none"> ➤ all mortgage-related non-bank providers ➤ private student loan providers²⁰ ➤ all payday loan providers ➤ other “larger participants” of a financial service/product market (“larger participant” to be defined by rule) ➤ any <u>specific</u> covered person, as determined by order, where complaints or other information that indicates the person is engaged in conduct posing risk to consumers. <p><i>Sec. 1024.</i></p>	<p>x` (CFPB and FTC to negotiate agreement for enforcement actions against persons on this list.)</p>	<p>RE: non-bank “smaller participants” in markets that are not otherwise captured in the supervision list –</p> <p><u>Supervision</u> -- will not be subject to supervision at the <i>federal</i> level. [The FTC has no supervision authority.] If it’s an activity that requires licensing at state level, appropriate state regulators can supervise.</p> <p><u>Enforcement</u> -- federal enforcement is with FTC.</p>

²⁰ But schools that are small businesses (under \$7 million) and make loans directly that they do not sell or assign may be exempt under the merchant exemption discussed below.



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II. SPECIAL EXEMPTIONS FROM CFPB JURISDICTION

Category of provider	Covered by CFPB	Exempt from CFPB (including CFP Act rules)	If not CFPB, then who?
<p><i>Merchant/seller of non-financial goods and services (Section 1027(a))</i></p>	<ul style="list-style-type: none"> ○ When the merchant extends credit to its customer to finance the purchase of the merchant’s own non-financial product or service <u>and sells it to a third party prior to delinquency.</u> (e.g. furniture store sells sofa on credit and assigns the contract to American General finance company). ○ When the credit “significantly exceeds the value of the non-financial good or service,” or CFPB finds that sale is otherwise done as subterfuge or to evade CFP Act, ○ As subject to enumerated statute transferred to CFPB by this Act, ○ When the merchant “regularly extends credit subject to a finance charge,”²¹ except if – 	<ul style="list-style-type: none"> ○ When the merchant extends credit to its customer to finance the purchase of its own non-financial product or service <u>and</u> <ul style="list-style-type: none"> ▪ keeps the account in house,²² <u>and</u> ▪ either does not “regularly extend credit subject to a finance charge,” or, if it does regularly extend credit subject to a finance charge, it is “not significantly engaged” in offering consumer financial products. That criteria is automatically met for small businesses SBA threshold for “small business concern”²³ 	<ul style="list-style-type: none"> ○ Still subject to FTC UDAP law and enforcement ○ Still subject to <u>state UDAP laws</u> and state enforcement of state laws. (States cannot use federal CFP Act against merchants exempt from CFPB jurisdiction)

²¹ This is language used in Truth in Lending, where “regularly” for non-mortgage credit is defined as more than 25 times per year.

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	<ul style="list-style-type: none"> ▪ -- the merchant is “not engaged significantly” in offering financial goods or services, ▪ -- is automatically deemed to qualify for this carve-out if it (i) only extends purchase-money credit for the nonfinancial good and service, (ii) keeps it in house and (iii) meets SBA definition of “small business.” 		
<i>Real estate brokers (1027(b))</i>	<ul style="list-style-type: none"> ○ when engaged in offering or providing consumer financial services, with respect to that activity ○ as subject to transferred, enumerated statutes 	when acting with respect to the real estate transaction	<ul style="list-style-type: none"> ○ FTC/ UDAP ○ Existing applicable state laws & enforcement
<i>Manufactured and modular home retailers (1027(c))</i>	<ul style="list-style-type: none"> ○ when engaged in offering or providing consumer financial services, with respect to that activity ○ as subject to transferred, 	when acting to sell or facilitate sale of home, other than providing financing	<ul style="list-style-type: none"> ○ FTC/UDAP ○ Existing applicable state laws & enforcement

²² If the merchant sells the accounts after default or delinquency, that doesn’t alter this exemption.

²³ The exemption does not apply if the credit “significantly” exceeds the value of the non-financial goods or services or if the Bureau finds that the sale is otherwise for the purpose of subterfuge or evasion. (sec. 1027(a)(2)(C)(i)(I).)

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	enumerated statutes		
Accountants and tax preparers (1027(d))	<ul style="list-style-type: none"> ○ when engaged in offering or providing consumer financial services , <i>except</i> that which is “customary and usual accounting activity” or incidental thereto. <ul style="list-style-type: none"> ▪ <i>Brokering credit is covered, e.g. tax preparers selling RALs are covered.</i> ○ Extending credit to purchase accounting services is covered if it meets TIL definition ○ As subject to transferred enumerated statutes 	<ul style="list-style-type: none"> ○ When providing customary and usual accounting services, ○ When extending credit to pay for customary and usual services, if it wouldn’t be subject to TIL, either. 	<ul style="list-style-type: none"> ○ FTC/UDAP ○ Existing applicable state laws & enforcement
Attorney (1027(e))	<ul style="list-style-type: none"> ○ subject to CFPB <i>rule-making</i> authority when engaged in offering or providing consumer financial product or service. ○ Subject to CFPB supervision and enforcement authority (subject to section 1024) if not part of the practice of law, or the consumer is not the client, or if not exclusively within the scope of attorney-client relationship with the consumer. ○ as subject to transferred enumerated statutes 	<ul style="list-style-type: none"> ○ if exempt, exempt only as to supervision and enforcement for conduct that is the practice of law ○ if involves offering financial services but is exclusively within scope of attorney-client relationship with the consumer. 	<ul style="list-style-type: none"> ○ FTC/UDAP ○ Existing applicable state law and enforcement
Summary omitted §1027(f) – (l) -- Persons regulated by state insurance regulator ; employee benefit and compensation plans, persons regulated by state securities commissions, federal SEC, CFTC, Farm Credit Administration, and Activities related to Charitable Contributions.			



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<p><i>Motor vehicle dealers (1029) – Notes:</i></p> <p>1. the exclusion is for motor vehicle dealers, not for motor vehicle finance products and services. Therefore other providers of motor vehicle finance, including indirect lenders, all non-dealer direct lenders, and dealers not qualifying for the exclusion <u>are</u> subject to CFPB.</p> <p>2. Definition of “motor vehicle” includes boats, motor cycles and motor homes²⁴</p> <p>3. Motor vehicle dealers that do not sell or assign their credit may also qualify for the merchant exemption.</p>	<ul style="list-style-type: none"> ○ when providing credit to purchase the vehicle directly to the consumer <u>and</u> generally keeps the accounts in-house, ○ when providing any consumer financial service not related to the sale, lease, rental, repair etc of motor vehicle. ○ As subject to transferred enumerated statutes <i>only</i> where also subject to CFPB jurisdiction. ○ <i>Note:</i> It is unclear under statutory construction principles whether small dealers subject to CFPB under this provision could get a second bite at a carve-out under the merchant exception. Regulations may clarify the relationship between these two exceptions. 	<ul style="list-style-type: none"> ○ when extending credit to consumer to purchase vehicle <i>and</i> the purchase contracts are routinely assigned to third parties. ○ Where exempt from CFPB jurisdiction for CFPA, also exempt from CFPB as to transferred enumerated statutes. (Unique among the exemptions) 	<ul style="list-style-type: none"> ○ FTC/UDAP. (FTC given APA rule-making process for motor vehicle-dealer UDAP) ○ FTC as applicable for rule-writing under other transferred, enumerated statutes, but only for dealers that routinely sell their finance paper to third parties. ○ FRB as to rule-writing under TIL/ECO/ EFTA but only for dealers that routinely sell their finance paper to third parties. ○ Existing applicable state law and enforcement
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²⁴ “Motor home” is a defined term. See separate treatment for sellers of manufactured and modular homes.

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III. STATE AUTHORITY

A. To enact laws and regulations regarding consumer financial products and services— i.e. preemption provisions in Title X

- As to all providers except federal depositories – CFP Act does not preempt state law except to the extent it is inconsistent. Greater protection is not inconsistent. Determinations as to whether a state law is inconsistent may be made by CFPB on its own motion, or to the non-frivolous petition from “any interested person” (*Section 1041*).
- As to national banks and thrifts and “state consumer financial laws” -- Title X amendments to National Bank Act and HOLA
 - State consumer financial laws defined – do not discriminate against national banks and that “directly and specifically regulate the manner, content, or terms and conditions of any financial transaction” authorized for national banks/thrifts to engage in.)
 - State consumer financial law preempted only when
 - Discriminates against national banks
 - Prevents or significantly interferes with exercise by national banks of their powers in accordance with decision in *Barnett* (OCC must make determination on a case by case basis; court can also determine), or
 - Is preempted by some other federal law
 - The NBA amendments in Title X are silent as to laws of general applicability. The general principle as been that laws of general applicability are not preempted, although it depends upon how they are applied in the context of the federally chartered banks.²⁵
 - As to operating subsidiaries and affiliates – state consumer financial laws will apply (*Watters* is reversed in full, including laws of general applicability, not just as to state consumer financial laws.)

²⁵ State UDAP laws would typically be considered a law of general applicability, unless the specific provision would meet the definition of “state consumer financial laws.” See note 15, above, regarding the potential implications of this silence as to the OCC’s authority to make preemption determinations. NCLC’s “Cost of Credit”, Chapter 3, will chronicle future developments.



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➤ Miscellaneous

- Transferred enumerated statutes – status quo as to preemptive effect.
- Specific savings clause to preserve *Marquette*, allowing exportation of interest rates under NBA Section 85 and DIDA.

B. Supervision –

➤ State Attorneys general – none (typically have none under state law, either)

➤ State banking/financial services regulator –

- Supervise for compliance with state law
- As to large state-chartered depositories (over \$10 Bn) -- concurrent with CFPB (to coordinate exams as much as possible)
- As to small state-chartered depositories (under \$10 Bn) – concurrent with appropriate federal banking regulator (FDIC for non-member banks, Fed for member banks or NCUA for credit unions)
- As to state-chartered or licensed non-bank providers – state DOB/DFI has supervision authority for compliance with CFPB (coordinate with CFPB, § 1024(b)(3)).

C. Enforcement

➤ CFP Act and rules

- State Attorneys General – have authority to enforce CFP Act (general UDAAP prohibition) as to all but federal depositories, and the specific CFPB rules as to everyone.
 - Advance notice to CFPB, which can intervene. Also prior notice to prudential regulator, if any.²⁶
- State banking / state financial services regulators – have authority to enforce CFP Act and regs as to state-chartered/ licensed entities

➤ State claims – CFP Act does not alter, limit or affect authority of state AG or regulator to proceed solely under state law

²⁶ Though there is no reference in CFP Act to right of prudential regulator to intervene, probably the regulator has that right under its organic law in any event.



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- *Enumerated federal financial laws* – authority to enforce if given in the statute; clarification that this includes enforcement as to federal depositories.

- *Special issues as to national banks /federal thrifts and state AGs*
 - CFP Act – State AGs can enforce CFPB regulations only – not the general ban on unfair, deceptive, abusive acts and practices
 - Other laws – codifies *Cuomo* – NBA& HOLA do not affect right of state AG to enforce applicable law (including non-preempted state law) as to national banks & federal thrifts.