Special Report:

A Working Summary of the Consumer Financial Protection Act of 2010

(Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act)

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EXECUTIVE SUMMARY

Title X (the Consumer Financial Protection Act, or “CFPA”) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), establishes the Bureau of Consumer Financial Protection (“CFPB”), an independent bureau within the Federal Reserve System with the authority to regulate the offering and provision of consumer financial products or services under federal consumer financial law. Highlights of the CFPA:

1. **Exclusive Rulemaking Authority**

The CFPB is vested with exclusive rulemaking authority over all federal consumer financial law, which is currently delegated among numerous federal agencies. This authority extends beyond rulemaking under existing consumer protection statutes and involves new rules to prohibit unfair, deceptive or abusive acts or practices and issuing model disclosures for financial products and services.

2. **Limited Enforcement Authority—Large Banks and Certain Non-Banks**

The CFPB has the exclusive authority to enforce federal consumer financial law with regard to certain non-banks and primary authority to enforce the same with regard to large banks (those with total assets greater than $10 billion). The CFPB is required to examine such non-banks and large banks for compliance. The applicable prudential regulator retains backup enforcement authority with regard to large banks.

3. **Reporting Authority—Small Banks**

The CFPB may require small banks to provide reports regarding compliance with federal consumer financial law. The applicable prudential regulator retains exclusive authority to enforce federal consumer financial law with regard to small banks.

4. **CFPA Preemption of State Law**

The CFPA does not preempt state law, except to the extent that state law is inconsistent with the CFPA. State law may be more protective to consumers than the CFPA.

5. **Preemption Standards for National Banks and Federal Thrifts**

State consumer financial laws are preempted by federal law only if the state law: (i) has a discriminatory effect on national banks, (ii) prevents or “significantly interferes” with the exercise of national bank powers, or (iii) is expressly preempted by federal law other than the National Bank Act or the Home Owner’s Loan Act (“HOLA”).

National bank or federal thrift contracts entered into on or before enactment of the CFPA that rely upon the more expansive preemption regulations of the Office of the Comptroller of the Currency (“OCC”) or the Office of Thrift Supervision (“OTS”) are preserved, but contracts entered into after enactment may no longer be able to rely on such guidance with repose.
DETAILED SUMMARY

I. Effective Date

Each subtitle of the CFPA, unless otherwise indicated below, is effective on either: (i) the date of enactment, or (ii) the “designated transfer date.” In general, the CFPB is created and funded upon enactment, but most of its powers take effect upon the designated transfer date. We have indicated the applicable effective date for each subtitle in the parenthetical directly below the subtitle heading.

A. Date of Enactment

The CFPA was enacted on July 21, 2010, the date on which President Obama signed the Dodd-Frank Act.

B. Designated Transfer Date (§ 1062)

The designated transfer date will be set at some point after enactment, according to the following requirements:

- Within 2 months (60 days) of enactment, the Treasury Secretary, in consultation with various federal agencies, must publish notice of the designated transfer date in the Federal Register¹;
- The designated transfer date may not be earlier than 6 months (180 days) or later than 1 year after enactment;
- The Treasury Secretary may extend the designated transfer date beyond 1 year upon certain circumstances²;
- In no circumstance will the designated transfer date be later than 18 months after enactment.

According to these guidelines, the Treasury Secretary must provide notice of the designated transfer date prior to September 21, 2010. The designated transfer date cannot be earlier than January 21, 2011 or later than January 21, 2012.

¹ The Treasury Secretary may change the designated transfer date upon notice in the Federal Register.
² The Treasury Secretary may extend the designated transfer date beyond 1 year of enactment upon transfer to the applicable Congressional committees the following: (i) a written determination that the orderly implementation of the CFPA is not feasible within 1 year; (ii) an explanation as to why the extension is necessary; and (iii) a description of the steps to be taken in order to effect an orderly and timely implementation of the CFPA.
II. Organization and Funding
(Subtitle A—effective upon enactment)

A. Autonomy (§§ 1011, 1012)

The CFPB is headed by a Director, who is appointed by the President for a 5 year term. The Director may only be removed for cause.

The CFPB is explicitly autonomous from the Federal Reserve Board of Governors (“FRB”).

B. Functional Units (§§ 1013, 1014)

The Director is required to establish several functional units, including the:

- Research unit;
- Community Affairs unit;
- Consumer Complaints unit;
- Office of Fair Lending and Equal Opportunity;
- Office of Financial Education;
- Office of Service Member Affairs; and
- Office of Financial Protection for Older Americans.

The Director is also required to establish a Consumer Advisory Board, composed of a broad representation of stakeholders, 6 of which must be appointed upon the recommendation of the regional Federal Reserve Bank Presidents.

C. Reports to Congress (§ 1016)

3 The Director in turn appoints a Deputy Director, who may act in his absence. The Treasury Secretary has the authority to perform the functions of the Director until the Director is confirmed in the Senate (§ 1066).

4 This means the FRB may not: (i) intervene in any matter or proceeding before the CFPB; (ii) appoint, direct or remove any officer of employee of the CFPB; (iii) merge or consolidate the CFPB or any functions of the CFPB with any office or division of the FRB; and (iv) review or delay the rules or orders of the CFPB.

5 This unit is focused on the provision of consumer financial products or services to traditionally underserved consumers and communities.

6 This unit is required to establish a single, toll-free telephone number, a website and a database for complaints and must deliver a report to Congress regarding such complaints before March 31st of each year.

7 This office is required to report to Congress annually.

8 This office is required to deliver a report on financial literacy to the applicable Congressional committees within 2 years of the designated transfer date and annually thereafter. In addition, the Comptroller General (the head of the Government Accountability Office or “GAO”) is required to conduct a study to determine the feasibility of certifying financial literacy professionals and developing financial education programs and deliver a report on the same to the applicable Congressional committees within 1 year of enactment.

9 The offices of fair lending, financial education and service member affairs must be established within 1 year of the designated transfer date.

10 This office must be established within 6 months (180 days) of the designated transfer date and must deliver a report regarding any legislative or regulatory recommendations to Congress within 18 months of the establishment of the office.

11 The Advisory Board serves in a purely advisory capacity and has no enumerated powers, though it must meet at least twice a year.
The CFPB is required to report semi-annually to the applicable Congressional committees\(^ {12}\).

D. **Funding (§ 1017)**

Each year, beginning on the designated transfer date\(^ {13}\), and quarterly thereafter, the FRB is required to transfer\(^ {14}\) to the CFPB an amount reasonably necessary to carry out the functions of the CFPB, not to exceed:

- 10% of the total operating expenses of the federal reserve system in fiscal 2011;
- 11% in fiscal 2012; and
- 12% in fiscal 2013 and in each year thereafter, adjusted annually according to the employment cost index.

In addition, if the Director determines that the allocations above are insufficient, a $200 million annual appropriation is authorized for fiscal years 2011-2014.

Lastly, the FRB is required to establish a Consumer Financial Civil Penalty Fund, which is funded by civil penalties obtained by the CFPB in any judicial or administrative action under federal consumer financial law. The CFPB is required to distribute these funds to the victims of activities for which the civil penalties have been imposed, or to the extent that these victims cannot be found, to consumer education and financial literacy programs.

\(^{12}\) The CFPB is required to deliver reports to Congress regarding the following: (i) significant problems faced by consumers in shopping for financial products; (ii) justification for previous year’s budget; (iii) rules and orders adopted and planned to be adopted by the CFPB; (iv) consumer complaints; (v) supervisory and enforcement actions; (vi) rules, orders and supervisory actions with respect to entities that are not credit unions or depository institutions; (vii) actions by state attorney generals or state regulators relating to federal consumer financial law; (viii) fair lending; and (ix) workforce and contracting diversity.

\(^{13}\) From enactment through the designated transfer date, the FRB must transfer an amount determined by the Treasury Secretary necessary to carry out the functions of the CFPB.

\(^{14}\) This transfer is not subject to review by the Appropriations Committee of either the House or the Senate. The financial transactions of the CFPB must be annually audited by the Comptroller General/GAO, and such audit must be reported to Congress. The Director is required to provide the Office of Management and Budget (“OMB”) with financial operating plans and forecasts, but has no obligation to obtain the consent or approval of OMB regarding the same.
III. General Powers
(Subtitle B—effective upon designated transfer date, except where noted below)

A. Coverage

1. Defined terms

Under § 1002, “covered person” means:

- Any person that offers or provides a consumer financial product or service, and
- Any service provider, to the extent that the service provider offers or provides a consumer financial product or service15;
- A “related person,” which is defined as:
  - Any director, officer or employee charged with managerial responsibility for a covered person;
  - Any controlling shareholder of a covered person;
  - Any agent of a covered person;
  - Any shareholder, consultant, joint venture partner or other person16 who materially participates in the conduct of affairs of a covered person;
  - Any independent contractor (including any attorney, appraiser or accountant) who knowingly or recklessly participates in any (i) violation of law, or (ii) breach of fiduciary duty;
  - but excludes all of the foregoing with respect to depository institutions and their holding companies.

The inclusion of “related person” in the definition of covered person means that certain employees of non-banks, for instance, including lawyers and accountants charged with managerial responsibility, are subject to enforcement under the CFPA, which, in the case of non-compliance by the bank with the CFPA or the enumerated consumer laws (see Section III(B) below), may result in civil and criminal sanctions.

“Consumer financial product or service” means:

- Any financial product or service provided for use by consumers primarily for personal, family or household purposes, or
- Certain business to business services provided in connection with the above including credit servicing, settlement services, consumer reporting and debt collection. In general, these are products or services sold to creditors to support consumer lending.

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15 “Service provider” means any person that provides a material service to a covered person, including any person that: (i) participates in designing, operating, or maintaining the consumer financial product or service; or (ii) possesses transactions relating to the product or service (unless it does so unknowingly or incidentally in a manner in which such data is undifferentiated), but excludes: (i) support services generally provided to businesses or of a ministerial nature, and (ii) advertisers of consumer financial products or services.

16 As determined by CFPB rule or on a case-by-case basis.
“Financial product or service” means:

- Credit (extending, servicing, acquiring, purchasing, selling, brokering)\(^{17}\);
- Leasing\(^{18}\);
- Real estate settlement services and appraisals of real and personal property;
- Deposit taking and money transmitting\(^{19}\);
- Stored value (selling, providing, issuing, with exceptions\(^{20}\));
- Checks (cashing, collecting, guarantying);
- Financial data processing\(^{21}\);
- Financial advisory services, including credit counseling, debt management and debt settlement\(^{22}\);
- Consumer reports (collecting, analyzing, maintaining or providing; with exceptions\(^{23}\));
- Debt collection (if related to a consumer financial product);
- Any other financial product or service as defined by the CFPB\(^{24}\).

“Financial product or service” does not include either the business of insurance or electronic conduit services.

2. *Exclusions from Coverage* (§ 1027)

The following persons are excluded from coverage under the CFPA:

- Merchants, retailers or sellers of any non-financial good or services unless also offering financial products or services;
- Merchants, retailers or sellers of non-financial goods and services who\(^{25}\):

\(^{17}\) Other than solely extending commercial credit to a person who originates consumer credit transactions.

\(^{18}\) Extending or brokering leases of personal or real property that are the functional equivalent of purchase finance arrangements, if: (i) the lease is on a non-operating basis, (ii) the initial term is at least 90 days, and (iii) with regard to real property, at the inception of the lease the transaction is intended to result in ownership of the property to be transferred to the lessee.

\(^{19}\) Or otherwise acting as a custodian of funds or any financial instrument for use by or on behalf of a consumer.

\(^{20}\) Exceptions for: (i) a seller that is not a party to the contract with the consumer for a stored value product, for which another person is principally responsible for establishing such terms and conditions; and (ii) advertising nonfinancial goods and services of the seller on the stored value card or device.

\(^{21}\) Excludes retail financial data processing and persons who provide access to host servers for the purpose of enabling another person to establish and maintain a website.

\(^{22}\) Excludes SEC regulated persons or persons regulated by a state securities commission.

\(^{23}\) Exceptions for persons who: (i) use information that relates solely to the transaction between a consumer and itself, (ii) provides such information to an affiliate, or (iii) provides such information for non-consumer financial products and services such as employment, residential leases, etc.

\(^{24}\) If the CFPB finds that such a product or service is: (i) entered into to evade any federal consumer law, or (ii) permissible for a bank or for a financial holding company to offer and has a *material impact* on consumers. The following activities are excluded from this “catch-all” provision: (i) identity authentication, (ii) fraud or identity theft detection, prevention and identification, (iii) document retrieval and delivery, (iv) public information records information retrieval, (v) anti-money laundering products or services.

\(^{25}\) This exclusion does not apply if: (i) the person assigns, sells, or otherwise conveys non-delinquent debt; (ii) the credit extended significantly exceeds the market value of the nonfinancial good or service provided; or (iii) the person regularly extends such credit and the credit is subject to a finance charge. Notwithstanding the foregoing, the exclusion does apply to a person described in clause (iii) above, unless the person is engaged “significantly” in
o Extend credit directly to a consumer in order to enable the consumer to purchase a non-financial good or service;
o Directly, or through an agreement with a third party, collect debt arising from credit extended as indicated above; or
o Sell or convey debt described above that is delinquent or otherwise in default.

- Licensed real estate brokers
- Manufactured home retailers and modular home retailers
- Accountants and tax preparers
- Lawyers
- Persons subject to regulation by a state insurance regulator
- Employee benefit and compensation plans
- Persons regulated by a state securities commission
- Persons regulated by the Securities and Exchange Commission (“SEC”) and Commodities Futures Trading Commission (“CFTC”)
- Persons regulated by the Farm Credit Administration
- Charitable fund-raising

Additionally, the CFPB is barred from defining the business of insurance as a financial product or service and a separate provision of the CFPA (§ 1029) excludes the sale, servicing and leasing of motor vehicles.

Offering or providing consumer financial products and services. Lastly, notwithstanding all of the above, a merchant, retailer or seller who meets the small business threshold defined in § 3 of the Small Business Act is excluded from coverage under the CFPA, as long as that merchant, retailer or seller only extends credit for the sale of non-financial goods and services and retains such credit on its own accounts (except to sell or convey delinquent debt). None of the exclusions apply to the CFPB’s role in enforcement of and rulemaking under the enumerated consumer laws (such as Truth-in-Lending).

26 Limited to brokerage of real property and negotiating any portion of a real estate contract (sale, purchase, lease, rental or exchange).
27 Similar limitation as real estate brokers.
28 Limited to “customary and usual” accounting activity.
29 “Offered, or provided as part of, or incidental to, the practice of law, occurring exclusively within the scope of the attorney-client relationship.”
30 Unless person offers or provides consumer financial products or services.
31 Includes plans described in §§ 220, 223, 401(a), 403(a), 403(b), 408 408A, 529 or 530 of the Internal Revenue Code, or any employee benefit or compensation plan, including any plan subject to Title I of the Employee Retirement Income Security Act or any prepaid tuition program offered by a state.
32 Unless person offers or provides consumer financial products or services.
33 The SEC and CFTC are directed to consult and coordinate with the CFPB with respect to any product or service that competes with a consumer financial product or service.
34 Unless person offers or provides consumer financial products or services.
35 This exclusion is not available to auto dealers who operate a line of business that involves the extension of retail credit or retail leases involving motor vehicles in which the credit or lease is provided directly to consumers and the contract governing the credit or lease is not routinely assigned to an unaffiliated third party. Dealers who only extend credit that is sold to finance companies are exempt from the enforcement and rulemaking authority of the CFPB, even if they would not be exempt as mere “merchants.” An auto dealer is also not excluded to the extent that he provides customers with any services related to residential or commercial mortgages (or self financing transactions involving real property) or offers a consumer financial product or service unrelated to motor vehicles.

It is unclear what federal agency will exercise existing rulemaking authority under existing laws, such as Truth-in-Lending, with respect to retail installment credit offered by exempt auto dealers.
Generally speaking, if an excluded person actively offers a consumer financial product or service that is already subject to an enumerated consumer law (again, see Section III(B) below), the CFPB will have jurisdiction to that extent.

Lastly, the CFPB is barred from establishing usury limits.

B. Exclusive Rulemaking Authority—Federal Consumer Financial Law\textsuperscript{36} (§ 1022—effective upon enactment\textsuperscript{37})

The Director has exclusive rulemaking authority with regard to federal consumer financial law. Under § 1002, “Federal consumer financial law” means (i) the CFPA, and (ii) enumerated consumer laws\textsuperscript{38}. The Bureau is entitled to the judicial deference normally afforded a regulator who is the exclusive interpreter of a statute (“Chevron deference.”)

“Enumerated consumer laws” means the:

- Alternative Mortgage Transaction Parity Act;
- Consumer Leasing Act;
- Electronic Fund Transfer Act (except § 920);
- Equal Credit Opportunity Act (“ECOA”);
- Fair Credit Billing Act;
- Fair Credit Reporting Act (except §§ 615 (a) and 628);
- Home Owners Protection Act;
- Fair Debt Collection Practices Act;
- Federal Deposit Insurance Act (§§ 43(b)-43(f) only);
- Gramm-Leach-Bliley Act (§§ 502-509 only, except § 505 as it applies to § 501(b));
- Home Mortgage Disclosure Act;
- Home Ownership and Equity Protection Act;
- Real Estate Settlement Procedures Act (“RESPA”);
- SAFE Mortgage Licensing Act;
- Truth in Lending Act (“TILA”);
- Truth in Savings Act;
- Omnibus Appropriations Act (§ 626 only); and
- Interstate Land Sales Full Disclosure Act.

1. Consultation with Prudential Regulators

\textsuperscript{36} But see § 1061, which preserves certain FTC powers under non-enumerated consumer laws, discussed in Section VII, “Transfer of Functions” below.

\textsuperscript{37} See section 1029A. The effective date of § 1022 may be subject to a forthcoming technical correction bill. The effect of moving up the effective date of § 1022 is to transfer exclusive rulemaking authority from federal agencies such as the FRB to the CFPB in advance of transfer or staff from such agencies on the designate transfer date, some 6 to 18 months hence. Without such staff, it is unclear how the CFPB could execute its rulemaking authority. See also Section 1063, discussed in Section VII(B) below, which appears to contemplate that the FRB and other agencies will continue to propose rules until the designated transfer date.

\textsuperscript{38} As well as “laws for which authorities are transferred under subtitles F and H.”
The CFPB must consult with the appropriate prudential regulators and other federal agencies prior to proposing a rule and must note the objection of a prudential regulator in its adopting release of a rule.  

2. Exemptions

The CFPB has the authority to exempt any class of covered persons, service providers or category of consumer financial products or services from any provision of the CFPA or any CFPB rule.

3. Monitoring and Gathering Information

The CFPB has the power to monitor risks to consumers in support of its rulemaking function and is required to publish the results of its monitoring activities at least once each calendar year. The monitoring authority of the CFPB includes the authority to gather information from covered persons and service providers. The CFPB also has access to the reports of other regulators and vice versa.

4. Registration

The CFPB may require covered persons (other than financial institutions) to register with the CFPB and publicly disclose certain registration information to the public.

5. Self-Assessment

The CFPB is required to conduct an assessment of each of its rules or orders and to publish a report of such an assessment within 5 years of the effective date of the rule or order.

6. Veto of CFPB Rules (§ 1023)

On petition of one of its members, the Financial Stability Oversight Council (“FSOC”) may set aside a final regulation of the CFPB if such regulation would put the safety and soundness of the financial system at risk.

The petition procedure is as follows:

- The objecting agency must file a petition with the FSOC within 10 days of the publication of the regulation in the Federal Register;
- The objection must be published in the Federal Register and filed with the applicable Congressional committees;
- The Chairperson of the FSOC may stay the effectiveness of the regulation, but only for 90 days;
- The FSOC must reach a decision within 45 days or the petition must be dismissed;

See also § 1015, which requires the CFPB to coordinate with the SEC, CFTC and FTC and other federal and state regulators to promote consistent regulatory treatment of consumer financial products and services.
• The decision to set aside a regulation requires the support of 2/3 of the FSOC; and
• Such decision is subject to judicial review.

C. **Limited Supervisory Authority**

1. *Supervision of Non-Depositories* (§ 1024—effective upon enactment)

The CFPB must require reports and conduct periodic examinations\(^{40}\) of certain covered persons for the purposes of:

• Assessing compliance with federal consumer financial law;
• Obtaining information regarding compliance systems and procedures; and
• Detecting and assessing risk to consumers and markets.

This limited supervisory authority applies to any covered person who:

• Originates, brokers or services loans secured by real estate used by consumers primarily for personal, family or household purposes, or loan modification or foreclosure relief services in connection with such loans;
• Is a “larger participant” in a market for consumer financial products\(^{41}\);
• Offers or provides private education loans\(^{42}\) to consumers;
• Offers or provides payday loans to consumers; or
• The CFPB determines, after notice and hearing, is engaging or has engaged in conduct that poses risks to consumers of financial products or services.

With regard to those covered persons and their service providers\(^{43}\) described above, the CFPB has exclusive authority to enforce federal consumer financial law\(^{44}\).

2. *Supervision of Large Banks, Savings Associations and Credit Unions* (§ 1025)

The limited supervisory authority of the CFPB also applies to any covered person that is an insured depository institution with total assets of more than $10 billion, any affiliate thereof, and service providers to such persons.

\(^{40}\) The CFPB is required to coordinate its supervision with prudential regulators in order to minimize the regulatory burden.

\(^{41}\) The CFPB is required to further define (by rule) a “larger participant” in coordination with the FTC within one year of the designated transfer date.

\(^{42}\) As defined in § 140 of TILA.

\(^{43}\) Service providers of these covered persons are subject to the CFPB’s limited supervision authority to the same extent as if the service provider were engaged in a service relationship with a bank and the CFPB were an appropriate federal banking agency under § 7(c) of the Bank Service Company Act.

\(^{44}\) The FTC retains, under section 1061, the ability to enforce CFPB rules as violations of the Federal Trade Commission Act, against persons within FTC enforcement jurisdiction. The CFPA requires the CFPB and the FTC to negotiate an agreement for coordinating enforcement actions by each agency within 6 months (180 days) of the designated transfer date.
With regard to this category of covered persons, the CFPB has primary enforcement authority with regard to federal consumer financial law. Other applicable federal agencies have backup enforcement authority where the CFPB fails to bring an enforcement action against a covered person within 4 months (120 days) of a referral.

If the supervisory determination of the CFPB and a state or federal prudential regulator are in conflict, the covered person may request a joint statement, which must be issued within 30 days to resolve the conflict. If the CFPB and the prudential regulator fail to issue a joint statement or go ahead with an enforcement action in lieu of a joint statement, the covered person may appeal to a governing panel convened for the purpose of resolving the conflict.

3. Reporting Requirements of Small Banks, Savings Associations and Credit Unions (§ 1026)

The CFPB may require reports from any covered person that is an insured depository institution with total assets of less than $10 billion. The prudential regulator for such covered persons retains exclusive enforcement and principal examination authority with regard to federal consumer financial law. The Bureau may “include examiners on a sampling basis” to accompany the prudential regulator’s examiners.

D. Authority to Restrict Mandatory Arbitration (§ 1028)

The CFPB is required to conduct a study concerning the use of mandatory arbitration provisions and deliver a report to Congress at an unspecified date. The CFPB is authorized to prohibit or impose conditions upon the use of such provisions by regulation.

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45 The provisions described in this paragraph take effect upon enactment.
46 The governing panel consists of an independent member of the CFPB, and a representative of either the FRB, the Federal Deposit Insurance Corporation (“FDIC”), the National Credit Union Association (“NCUA”) or the OCC.
47 Any regulation prescribed by the CFPB must apply to any agreement between a consumer and covered person entered into within 6 months (180 days) of promulgation.
IV. Specific Powers  
(Subtitle C—effective upon designated transfer date)  

A. Prohibiting Unfair, Deceptive\textsuperscript{48}, or Abusive Acts or Practices\textsuperscript{49} (§ 1031)  

The CFPB is authorized to take enforcement actions and to prescribe rules\textsuperscript{50} to prohibit unfair, deceptive or abusive acts or practices.  

“Unfair” means an act or practice that causes or is likely to cause substantial injury to consumers which is not likely to be avoidable by consumers.  

“Abusive” means an act or practice that materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service or that takes unreasonable advantage of a consumer, which includes:  

- A lack of consumer understanding of the risks, costs, or conditions associated with the product or service;  
- The inability of the consumer to protect him or herself in selecting or using the product or service;  
- A consumer’s reasonable reliance on the covered entity to act in the consumer’s interest.  

B. Disclosures (§ 1032)  

The CFPB is authorized to prescribe rules regarding the disclosure of costs, benefits and risks of consumer financial products and services. This includes the authority to issue model disclosures, which must be validated through consumer testing, and to conduct trial disclosure programs. The provision provides a safe harbor for any covered person that uses model disclosures.  

The CFPB is required to propose model disclosures that combine the disclosures required under TILA with those required by §§ 4 and 5 of RESPA into a single, integrated disclosure within 1 year of the designated transfer date.  

C. Other Specific Powers  

1. Consumer Right to Access Information and Response to Consumer Complaints (§§ 1033, 1034)  

A covered person must make information available to a consumer concerning the financial product or service obtained by the consumer from the covered person\textsuperscript{51}. The covered person

\textsuperscript{48} The CFPA does not define the term “deceptive,” so the meaning of “deceptive” may be construed under § 5 of the Federal Trade Commission Act, and the regulations and other guidance of the FTC.  

\textsuperscript{49} This section explicitly allows a creditor to consider the seasonality and irregularity of income in the underwriting of credit secured by residential real estate or a dwelling.  

\textsuperscript{50} In consultation with other federal agencies.  

\textsuperscript{51} Including information related to any transaction, series of transactions, or the account including costs, charges and usage data. We note that the scope of information that can be obtained from a covered person and the requirements
may withhold certain confidential information, and has no duty to maintain or keep any information about a consumer.

In addition, the CFPB must establish procedures to provide a timely response to consumer complaints.

2. **Private Education Loan Ombudsman (§ 1035)**

The Treasury Secretary, in consultation with the Director, must designate an ombudsman within the CFPB to provide timely assistance to borrowers of private education loans. The Ombudsman has the following functions:

- Resolve borrower complaints in collaboration with the Department of Education\(^{52}\) and compile and analyze data on borrower complaints;
- Prepare an annual report to the Treasury Secretary, Secretary of Education and applicable Congressional committees regarding his or her activities.

3. **Prohibited Acts (§ 1036)**

It is generally unlawful for a covered person to provide a consumer financial product or service that is not in conformity with federal consumer financial law, to otherwise violate federal consumer financial law or to engage in unfair, deceptive or abusive practices\(^{53}\). As mentioned above, employees of covered persons, including attorneys and accountants, if charged with “material responsibility,” are subject to this prohibition to the same extent as a covered person (see discussion of “related person” in Section III(A) above).

It is specifically unlawful for a covered person to refuse to permit access to records or fail to maintain such records or for any person to knowingly or recklessly provide substantial assistance to a covered person in violation of unfair, deceptive or abusive acts or practices described in § 1031.

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\(^{52}\) Including the establishment of a memorandum of understanding with the student loan ombudsman established under § 141(f) of the Higher Education Act.

\(^{53}\) The act selling or providing advertising time or space to a covered person or service provider is carved out from this prohibition.
V. Enforcement Powers  
(Subtitle E—effective upon designated transfer date)

A. Investigation and Discovery (§ 1052)

1. Subpoena Power

The CFPB has the power to issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, documents or other material in connection with CFPB hearings.

2. Civil Investigative Demands

Prior to the institution of any proceeding, the CFPB may serve a civil investigative demand requiring a person to produce documentary material, submit tangible things, file written reports, and give oral testimony. Such a demand must state the nature of conduct constituting the alleged violation of federal consumer financial law. If a person represented by an attorney refuses to provide oral testimony on grounds of the privilege against self incrimination, the testimony may be compelled under 18 USC § 6004.

B. Hearings and Cease and Desist Orders (§ 1053)

The CFPB is authorized to conduct hearings to enforce compliance with the CFPA and federal consumer finance law. The CFPB also has authority to issue cease and desist orders to covered persons. A covered person may appeal a cease and desist order with the CFPB and in federal appellate court. Where the violation is likely to cause the covered person to be insolvent or otherwise prejudice the interests of consumers before the completion of cease and desist proceeding, the CFPB is authorized to issue ex parte temporary cease and desist orders. Temporary cease and desist orders can be appealed in federal district court, but must be appealed on an expedited time frame.

C. Litigation Authority (§ 1054)

The CFPB is authorized to commence civil actions in state or federal court against a covered person in order to impose a civil penalty or seek other legal or equitable relief including a permanent or temporary injunction. The CFPB may represent itself in such proceedings, but must coordinate its efforts with the US Attorney General. The CFPB must bring a civil action within 3 years of the date of discovery of the violation to which an action relates. In an action arising solely under an enumerated consumer law, the CFPB must commence the action in accordance with the provisions of that consumer law.

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54 Within 20 days (or before the return date specified in the demand, whichever is shorter) of the service of a demand, the person served with such demand may file a petition with the CFPB for an order modifying or setting aside the demand.

55 The CFPB may also represent itself before the Supreme Court.
D. Relief (§ 1055)

The CFPB or a court is authorized to seek the following relief in an action brought under federal consumer financial law:

- Rescission and reformation of contracts;
- Refund of moneys or return of property;
- Restitution;
- Disgorgement or compensation for unjust enrichment;
- Damages;
- Public notification of violation, including the costs of such notification;
- Limitation of the activities or function of covered persons;
- Recovery of costs by the CFPB, state attorney general or state regulator (if such entity is the prevailing party);
- Civil money penalties:
  - Up to $5,000 for each day during which such violation continues;
  - Up to $25,000 per day for reckless violations;
  - Up to $1,000,000 per day for knowing violations.

E. Criminal Proceedings (§ 1056)

The CFPB is authorized to transmit evidence of criminal wrongdoing to the US Attorney General, who may institute criminal proceedings.

F. Whistleblower Protection (§ 1057)

A covered person cannot terminate or discriminate against an employee who provides information adverse to, testifies against, files a proceeding or objects to a policy of the covered person. An employee who claims to have been improperly discharged or discriminated against by a covered person is required to file a complaint with the Secretary of Labor within 6 months of the alleged violation. Notwithstanding a prima facie showing by the complainant of an improper termination or discrimination, the employer may rebut, by clear and convincing evidence, that the employer would have taken the same action in the absence of the whistleblower activity. The Secretary of Labor may order action to abate the violation, reinstate the complainant and provide compensatory damages to the complainant. The order of the Secretary may be appealed in federal appellate court.

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56 The CFPB or court is barred from imposing exemplary or punitive damages.
57 In the event that the Secretary of Labor has not issued a final order within 7 months of this filing or, in the alternative within 3 months of receipt of a written determination, the complainant may bring a de novo action in federal district court.
58 The Secretary of Labor may also award an employer up to $1,000 in penalties for frivolous or bad faith claims.
VI. Preemption
(Subtitle D—effective upon designated transfer date)

A. Inconsistent State Law Preempted (§ 1041)

The CFPA does not preempt state law, except to the extent that a provision of state law is inconsistent with the CFPA. State law that affords protection to consumers greater than that provided under the CFPA is not inconsistent with the CFPA.

In the event that a majority of states enact a resolution in support of establishing or modifying a CFPB regulation, the CFPB must issue a notice of proposed rulemaking regarding the resolution and consider promulgation of a final rule addressing the resolution59.

B. Retention of Enforcement Powers by States (§ 1042)

A state attorney general or state regulator may bring a civil action in any state or federal district court that has jurisdiction over the defendant to enforce the provisions of the CFPA60. Such an action against a national bank or federal savings association must be brought in a federal district court.

C. Grandfathered Contracts (§ 1043)

National bank and federal thrift contracts with consumers entered into on or before the date of enactment which rely on the preemption guidance OCC or OTS are grandfathered and unaffected by the changes to the preemption standard described below.

D. Preemption Standard for National Banks (§ 1044; 12 USC § 5136C)

1. Preemption Standard

State consumer financial laws are preempted only if the state consumer financial law61:

- Would have a discriminatory effect on national banks in comparison with the effect of the law on a state chartered bank;
- Prevents or significantly interferes with the exercise by the national bank of its powers (in accordance with Barnett62); or

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59 If the CFPB determines not to prescribe a final regulation related to the resolution, the CFPB must publish an explanation of such determination in the Federal Register.

60 Before bringing such an action, the attorney general or state regulator must provide a copy of the complaint to the CFPB and prudential regulator in a timely manner, or if impracticable, provide notice of the action to the same. The CFPB may intervene in the action and remove the action to federal court.

61 “State consumer financial law” means a state law that does not directly or indirectly discriminate against national banks and that directly or specifically regulates the manner, content, or terms and conditions of any financial transaction (as may be authorized for national banks to engage in), or any account related thereto, with respect to a consumer.

62 A “significant interference” preemption determination may be made by a court, or by regulation or order of the OCC on a case-by-case basis. In making a case-by-case determination, the OCC must consult with the CFPB.
• Is expressly preempted by a provision of federal law other than the National Bank Act or Home Owner’s Loan Act or “HOLA”).

2. Standard of Review

A court reviewing an OCC preemption determination may not preempt state law with regard to a national bank in the absence of substantial evidence, made on the record of the proceeding, in accordance with the Barnett standard. The standard of review appears to differ from the Chevron deference generally afforded to administrative agencies when interpreting statutes they are empowered to enforce.

3. OCC Review of Preemption Determinations

The OCC must conduct a review of each preemption determination (including existing rules) within 5 years and at least once during each 5 year period thereafter. This review includes a report to the applicable Congressional committees.

4. Subsidiaries and Affiliates (See also § 1045)

A state consumer financial law applies to a subsidiary or affiliate of a national bank to the same extent that the law applies to any other person subject to such law. This provision overrules the Supreme Court case of Wachovia Bank v. Watters.

5. Interest Rate Export

The authority under 12 USC § 85 that allows for the charging of interest by a national bank at the rate allowed by the laws of the state where the bank is located is preserved.

6. Preemption Standards for Federal Savings Associations (§ 1046; § 6 of HOLA)

The same legal standards applicable to national banks regarding the preemption of state consumer finance law are applicable to federal savings associations. In addition, HOLA explicitly does not occupy the field of any area of state law. This is a major change in the preemption power of federal thrifts.

7. Visitorial Standards (§ 1047; 12 USC § 5136C)

In accordance with Cuomo v. Clearing House, a state attorney general may bring an action against a national bank or federal savings associations and its subsidiaries for violations of non-preempted laws.

63 Other than a subsidiary or affiliate that is a national bank.
VII. Transfer of Functions
(Subtitle F—effective upon designated transfer date))

A. Consumer Financial Protection Functions (§§ 1061, 1064, 1065, 1067)

All consumer financial protection functions of the FRB, OCC, OTS, FDIC, NCUA and HUD\(^{64}\) are transferred to the CFPA, as well as all consumer protection powers and duties that were vested in each agency on the date before the designated transfer date. Each prudential regulator retains its authority with regard to large and small banks as described in Section III(C), “General Powers” above.

The FTC transfers its authority under the enumerated consumer laws to the CFPB. The CFPB may enforce a rule prescribed by the FTC with respect to an unfair or deceptive act or practice to the extent that such rule applies to a covered person and as if it were a rule prescribed under the CFPB’s unfair, deceptive and abusive acts or practices authority described above (§ 1031). The FTC retains the authority to enforce rules related to unfair or deceptive acts or practices under the Federal Trade Commission Act with respect to covered persons subject to the jurisdiction of the FTC. The FTC and the CFPB are required to negotiate a rulemaking agreement to avoid duplication of effort and conflict.

Employees necessary to support the consumer financial protection functions of the CFPB will be transferred from the agencies indicated above. In addition, the Director of the OMB must make such additional incidental transfers of employees and other assets to accomplish the purposes of the CFPA.

B. Savings Provisions (§ 1063)

The existing rights, duties and obligations of the FRB, FDIC, FTC, NCUA, OCC, OTS and HUD are preserved as well as the existing orders, rulings, determinations, agreements and resolutions thereof, which will be enforced by the CFPB. Proposed rules not yet final prior to the designated transfer date become the proposed rules of the CFPB. Interim or final rules not yet effective prior to the designated transfer date become effective according to the terms therein.

\(^{64}\) Limited to the consumer financial protection functions relating to RESPA, the SAFE Act and the Interstate Land Sales Full Disclosure Act.
VIII. Other Provisions
(Subtitle G and H)

A. Regulatory Improvements

1. Small Business Data Collection (§ 1071; § 704B of ECOA)

Requires collection, compilation and maintenance of data by financial institutions\textsuperscript{65} regarding applications for credit by minority or women-owned small businesses.


Expands grant programs for financial education and counseling for prospective homebuyers to economically vulnerable individuals and families.

3. Remittance Transfers (§ 1073; § 919 of EFTA)

Imposes disclosure requirements and error resolution requirements.

4. Ending the Conservatorship of Fannie Mae, Freddie Mac (§ 1074)

Requires the Secretary of the Treasury to conduct a study\textsuperscript{66} regarding ending the conservatorship of Fannie and Freddie and the delivery of a report to the applicable Congressional committees by January 21, 2011.

5. Fees for Payment Card Transactions (§ 1075; § 920 of the EFTA)

Requires the FRB to prescribe regulations regarding interchange transaction fees within 9 months of enactment. Such fees must be “reasonable and proportional” to the actual cost incurred by the issuer.

6. Reverse Mortgages (§ 1076)

Requires the CFPB to conduct a study regarding reverse mortgage transactions within 1 year of the designated transfer date.

7. Private Education Loans and Lenders (§ 1077)

Requires the Director of the CFPB and Education Secretary to deliver a report to the applicable Congressional committees within 2 years of enactment.

\textsuperscript{65} “Financial institution” means any partnership, company, corporation, association (incorporated or unincorporated) trust, estate, cooperative organization, or other entity that engages in a financial activity.

\textsuperscript{66} This study must include recommendations, such as: (i) gradual wind-down and liquidation; (ii) privatization; (iii) incorporation of functions into a federal agency; (iv) dissolution into smaller companies.
8. **Credit Scores** (§ 1078)

Requires the CFPB to conduct a study regarding the variation between credit scores sold to creditors and those sold to consumers by consumer reporting agencies and to submit a report on the same to Congress within a year of enactment.

9. **Exchange Facilitators** (§ 1079)

Requires the Director of the CFPB to review all federal laws and regulations relating to the protection of consumers who use exchange facilitators for transactions primarily for personal, family or household purposes and submission of a report to Congress describing recommendations for legislation or regulation within 1 year of the designated transfer date. Within 2 years of the submission of the report, the CFPB is required to establish a program to protect consumers who use exchange facilitators.

10. **Sentencing Guidelines and Extension of Statute of Limitations** (§ 1079A)

Requires the US Sentencing Commission to review the federal sentencing guidelines and policy statements applicable to persons convicted of offenses relating to securities fraud and fraud offenses relating to financial institutions or federally related mortgage loans. Extends statute of limitations for securities fraud offenses to 6 years after the commission of the offense.

B. **Conforming Amendments** (effective on the designated transfer date, except §§ 1081 and 1082)

Subtitle H is of considerable length and covers all of the correction of cross references and conforming amendments necessitated by the passage of the CFPA. The contents of this section will likely be affected by the upcoming technical amendments bill. This Summary will be updated at the completion of that process.