

THE CONSUMER FINANCIAL PROTECTION ACT



A Broader Perspective™

THE CONSUMER FINANCIAL PROTECTION ACT OF 2010

A. What is the Bureau?

A Super-Agency of consumer protection.

- Intended to eliminate the perceived conflict of interest.
- The Bureau will be an “independent” agency, but with some limits.

1. An “Independent” Bureau “In” the Federal Reserve System.

- The Bureau will be part of the Federal Reserve System, though primarily for funding purposes.

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A. What is the Bureau?

2. Consumer Protection Functions To Be Transferred from the Other Banking Agencies.

- All authority to prescribe rules or issue orders or guidelines, and the related examination authority (the so called “consumer financial protection functions”), will be transferred from the Federal Reserve, the OCC, the OTS, the FDIC, the FTC (with some limits), the NCUA, and HUD.
- “Designated transfer date” in 6 to 12 months unless impracticable.
- All existing federal consumer regulations – TILA, TISA, EFTA, ECOA, HOEPA, FCRA, RESPA, etc., will be put under the Bureau’s jurisdiction

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A. What is the Bureau?

3. Bureau Will Be Staffed By Other Agencies.

- The consumer protection staff will be transferred to the Bureau from all of the other federal banking agencies.
 - Each agency will likely retain at least some staff.

4. Consumer Advisory Board.

- To be formed by the Bureau. Would advise and consult with the Bureau in the exercise of its functions, and will provide information on emerging practices in the consumer financial products and services industry, including regional trends.

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B. Some of the Bureau's Specific Regulatory Functions

1. Take Over Enumerated Consumer Laws.

- Alternative Mortgage Transactions Parity Act
- Truth in Lending
- Truth in Savings
- SAFE Mortgage Licensing Act
- RESPA
- EFTA
- ECOA
- Fair Credit Billing Act
- Home Owners Protection Act
- Fair Debt Collection Practices Act
- Gramm-Leach Privacy
- HMDA
- Home Ownership and Equity Protection Act
- Consumer Leasing Act

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B. Some of the Bureau's Specific Regulatory Functions

2. Implement and Enforce Federal Consumer Financial Laws.

- "Federal consumer financial laws" will include the "enumerated consumer laws," the Consumer Financial Protection Act, all consumer laws of the other agencies for which the basic authority will be transferred, and all rules that the Bureau implements. The only carve out is the Federal Trade Commission Act.
- Ensure with respect to consumer financial products and services that:
 - markets for consumer financial products and services are fair, transparent, and competitive;
 - consumers get timely and understandable information;
 - consumers are protected from unfair, deceptive or abusive acts and practices;
 - the relevant laws and regulations are enforced consistently; and
 - outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens.

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B. Some of the Bureau's Specific Regulatory Functions

3. **Establish A Research Unit.** A unit to research, analyze and report on developments in –
 - markets for consumer financial products, including market areas of alternate consumer financial products or services with high growth rates and areas of risk to consumers;
 - access to fair and affordable credit for traditionally underserved communities;
 - consumer awareness, understanding and use of disclosures;
 - consumer awareness and understanding of costs, risks and benefits;
 - consumer behavior; and
 - experiences of traditionally underserved consumers, including un-banked and under-banked.

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B. Some of the Bureau's Specific Regulatory Functions

4. **Establish A Unit To Collect and Track Complaints.**
 - Director to coordinate with the FTC or other Federal agencies to route complaints to them.
 - To the extent practicable, State agencies may receive appropriate complaints from this collecting and tracking system.
5. **Establish An Office of Fair Lending.**

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C. Other Enumerated Authorities of the Bureau

- Authority to restrict mandatory pre-dispute arbitration requirements.
- Authority to prohibit unfair, deceptive, or abusive acts or practices.
- Authority to require disclosures, both initially and over the term of the transaction.

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D. Limitations on the Bureau's Reach

1. Coordination and Consultation With Agencies and Reports to Congress.

- Coordinate with the federal and state banking agencies (the SEC, CFTC, and FTC) “to promote consistent treatment of consumer financial and investment products and services.”
 - Bureau also is required in its rulemakings to consult with the banking agencies “or other Federal agencies” regarding consistency with prudential, market, systemic objectives administered by such agencies.” The Bureau must explain its ultimate decision.

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D. Limitations on the Bureau's Reach

2. Financial Stability Oversight Council.

- Voting members: Secretary of the Treasury, the Chairman of the Federal Reserve Board, the Comptroller, the Chairman of the SEC, the Director of the Bureau, the Chairperson of the FDIC, the Chairperson of the CFTC, the Director of the Federal Housing Agency, the Chairman of the NCUA Board, and an independent insurance industry person appointed by the President.

- Non-voting members will include, among others, state banking and insurance regulators.

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D. Limitations on the Bureau's Reach

2. Financial Stability Oversight Council (continued).

- **Any voting member (referred to as “member agency”) may petition the council to set aside a Bureau regulation.**
 - Member agency must first attempt to work out the concerns with the Bureau.
 - If the regulation “would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk.”
 - Publish the petition in the Federal Register and send it to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House.
 - 2/3 of the members of the Council must agree.
 - Decisions by the Council to set aside regulations are subject to judicial review.

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D. Limitations on the Bureau's Reach

3. Rulemaking Standards. The Bureau is directed to consider, among other things:

- The costs to covered persons, as well as the potential benefits to consumers; and
- The potential reduction of access by consumers to products and services as a result of the rule.

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E. What Industries Will Be Subject to the Bureau?

With limited exceptions, any person that engages in offering or providing a “consumer financial product or service” and any affiliate of that person if it acts as a service provider to such person.

- Loans: lending, servicing, acquiring, purchasing, selling, brokering.
- Extending or brokering personal or real property leases that are the “functional equivalent of purchase finance arrangements,” if on non-operating basis, initial term of at least 90 days, and, for real property, intended to result in ownership of the property.
- Providing real estate settlement services.
- Performing appraisals of real or personal property.
- Deposit-taking activities.
- Selling, providing, or issuing stored value or payment instruments (with limited exceptions for sellers of stored value without substantial control over the terms of the stored value).
- Others.

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F. What Are the Small Bank Protections?

1. **Exclusive Authority for Large Banks.** For banks and credit unions with total assets of more than 10 billion dollars:
 - Bureau has exclusive authority to require reports and conduct examinations for purposes of (a) assessing compliance with Federal consumer financial laws, (b) obtaining information about the activities subject to such laws and associated compliance systems or procedures, and (c) detecting and assessing associated risks to consumer and to markets.
 - The Bureau must coordinate its supervisory activities with those conducted by federal and state regulators and use the reports of those other regulators “to the fullest extent possible.”
 - But the Bureau has the primary enforcement authority with respect to Federal consumer financial laws.

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F. What Are the Small Bank Protections?

2. **Limited Authority for Small Banks.** For banks and credit unions with total assets of 10 billion dollars or less:
 - Bureau may include examiners “on a sampling basis” of the examinations performed by the other regulators, but apparently will not be able to conduct its own examinations.
 - The primary bank regulator will have exclusive authority (relative to the Bureau) to enforce the Federal consumer financial laws.

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G. What Is The Enforcement Authority of the States?

1. Civil Actions By Attorneys General.

- Attorneys general will be able to initiate civil actions, but it appears they could not institute extra-judicial discovery.

2. Civil Actions or Other Proceedings By State Bank Regulators.

- State regulators likewise would bring civil actions, but also “other appropriate proceedings,” but only with respect to state-chartered, incorporated or licensed entities.

3. Federal Banks.

- With respect to national banks and federal thrifts, an attorney general may bring a civil action to enforce Bureau regulations or to “secure remedies under provisions of this title or remedies otherwise provided under other law.”

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H. What Is the State Of State Law Preemption?

1. The Historical Standard (before 2004).

- Federal thrifts “occupied the field.”
- National banks preempted on a case-by-case basis if the State law prevented or substantially interfered with national bank powers.
 - Supported by the 1996 U.S. Supreme Court Case, Barnett Bank v. Nelson.

2. The 2004 Standard.

- The OCC refrained from occupying the field, but its actual regulation seems to have a very similar effect.

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H. What Is the State Of State Law Preemption?

3. Back to Barnett – Or Something Like It.

- A state “consumer financial law is preempted if either:
 - The law would have a discriminatory effect on national banks as compared to state banks or
 - in accordance with the legal standard for preemption in Barnett, the State consumer financial law prevents or substantially interferes with the exercise by the national bank of its powers.
- Occupation of the field is expressly eliminated.

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H. What Is the State Of State Law Preemption?

4. What About Post-Barnett Court Decisions?

- Probably will be relevant, at least if issued prior to 2004.

5. What About Post-Barnett OCC Rulings?

- Probably will be relevant, at least if issued prior to 2004 without reliance on occupation of the field.

6. Maybe Limited to Consumer Financial Laws.

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H. What Is the State Of State Law Preemption?

7. How Will The OCC Preempt After the Enactment?

- Only on a case-by-case, state-by-state basis: but will be able to include laws substantially equivalent terms.
- Must first consult with the Bureau and take the Bureau's concerns into account.
- Cannot preempt without substantial evidence on the record to support the decision.

8. Federal Thrifts Will Become Subject to the National Bank-Barnett Standard.

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H. What Is the State Of State Law Preemption?

9. Time To Roll Up Your Subs.

- Subsidiaries and other affiliates will have no federal preemption, unless they are banks or the federal law otherwise provides for preemption.

10. Exportation Was Saved.

- All banks and thrifts, state or federal, will still be able to export interest rates and related fees from the State where the bank or thrift is located.

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Questions & Answers

Thank you!