

# The Wall Street Reform & Consumer Protection Act, Title X

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As a reminder, the information contained herein is not legal advice and is not a comprehensive analysis of issues that may impact your business. Specific questions on how it may impact your products and services should be directed to your legal counsel.

## The Bureau of Consumer Financial Protection

### Establishment of the Bureau

Title X of the Wall Street Reform Act establishes an independent bureau within the Federal Reserve system known as the Bureau of Consumer Financial Protection that will regulate the offering and provision of consumer financial products or services under federal consumer financial laws. The Bureau will be led by a Director who will be appointed by the President and confirmed by the Senate for a five-year term. The Bureau will be funded by combined earnings of the Federal Reserve system.

Although the Bureau will be housed within the Federal Reserve, the Federal Reserve Board may not intervene in any activity of the Bureau. Several offices will be established within the Bureau, including an Office of Fair Lending & Equal Opportunity, an Office of Financial Education, an Office of Service Member Affairs and an Office of Financial Protection for Older Americans. Additionally, a Consumer Advisory Board will be established to advise and consult the Bureau in exercising its functions with regard to consumer financial laws and advise on industry practices and trends.

### Scope

In addition to its regulatory authority over consumer financial products/services, the

Bureau will have exclusive authority to require reports and periodically conduct examinations on banks and credit unions (and their affiliates) with combined assets of \$10 billion or more. (Service providers to these financial institutions will be subject to the same regulatory oversight.) The Bureau may also require reports from banks and credit unions with assets less than \$10 billion in order to implement consumer financial protection requirements, to support its examination activity, and to assess and detect risks to consumers and consumer financial markets.

The Bureau's regulatory scope also extends to entities that offer, broker or service mortgage loans, entities that provide private education loans or entities that offer payday loans.

However, the Bureau does not generally have regulatory authority over the following:

- Merchants, retailers and other sellers of nonfinancial goods or services, unless the merchant or retailer is offering or selling consumer financial products or services, extending credit to consumers, collecting debt from the retail credit card or selling or conveying debt from the retail credit card (small businesses are exempt)
- Real estate brokerage activities
- Retailers of manufactured and modular homes
- Tax accountants and tax preparers
- Attorneys engaged in the practice of law

From a federal regulatory perspective, the Dodd-Frank Wall Street Reform & Consumer Protection Act is the most significant issue that the financial services and payments industries have faced in decades.

Intended to prevent another economic crisis, the sweeping regulatory reform package fundamentally changes the financial services landscape and includes the creation of a financial stability council, regulation of derivatives, creation of a new executive agency overseeing consumer protection elements of financial products and services, restrictions on debit card interchange fees, regulation of executive compensation and registration of hedge funds, among other things. Industry experts are predicting that the law will result in over 5,000 pages of new regulations.

It is difficult to assess the impact of this law, in part because we do not yet know the extent of the regulations that will be developed in response to the Act. In the meantime, provided is a summary of two critical provisions within the Act, the Bureau of Consumer Financial Protection and the debit card regulations.

## Key Definitions

**Covered Person:** any person who engages in offering or providing a consumer financial product or service and any affiliate of a covered person if the affiliate acts as a service provider to the covered person.

**Service Provider:** any person who provides a material service to a covered person in connection with the offering or provision by the covered person of a consumer financial product or service, or who processes transactions relating to the consumer financial product or service.

A service provider will be considered a covered person if it offers or provides its own consumer financial product or service. **EXCEPTIONS:** service provider does not include a person solely by virtue of such person offering or providing to a covered person (i) a support service of a type provided to businesses generally or a similar ministerial service; or (ii) time or space for an ad for a consumer financial product or service through print, newspaper or electronic media.

**Related Person:** applies to non-bank-covered persons and means (i) any director, officer or employee charged with managerial responsibility for, or controlling shareholder of, or agent for, the covered person; (ii) any shareholder, consultant, joint venture partner or other person, as determined by the Bureau, who materially participates in the conduct of the affairs of the covered person; and (iii) any independent contractor who knowingly or recklessly participates in any violation of any provision of law or regulation or breach of a fiduciary duty.



- Activities relating to charitable contributions
- Employee benefit and compensation plans
- Auto dealers
- Persons regulated by state insurance regulators
- Persons regulated by state securities commissions
- Persons regulated by the Federal Trade Commission, the Commodity Futures Trading Commission or the Farm Credit Administration

If the Bureau and another federal regulator are authorized to issue regulations for a consumer financial law, the Bureau will have exclusive authority to prescribe rules under the law.

## Purpose

The Bureau's purpose will be to implement and enforce federal consumer financial requirements consistently to ensure that:

- All consumers have access to markets for consumer financial products and services
- Markets for consumer financial products and services are fair, transparent and competitive
- Consumers are provided with timely and understandable information to make responsible decisions about financial transactions
- Consumers are protected from unfair, deceptive or abusive acts and practices and from discrimination
- Outdated, unnecessary or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens

- Federal consumer financial requirements are enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition
- Markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation

## Function

The Bureau's primary functions will be to (1) conduct financial education programs; (2) collect, investigate and respond to consumer complaints; (3) collect, research, monitor and publish information relevant to the functioning of markets for consumer financial products and services, and to identify risks to consumers and the proper functioning of such markets; (4) supervise covered persons for compliance with federal consumer financial law and take appropriate action to address violations; (5) issue new rules, orders and guidance implementing federal consumer financial law; and (6) perform other necessary support activities.

The Bureau may not establish a usury limit on extensions of credit by covered persons to a consumer unless explicitly authorized by law.

## Rulemaking

The Bureau may take action to prevent covered persons from committing or engaging in unfair, deceptive or abusive acts or practices under federal law in connection with a



transaction or offering of a consumer financial product or service. The Bureau may prescribe rules identifying unlawful, fair, deceptive or abusive acts or practices.

The Bureau may prescribe rules to ensure that the features of any consumer financial product or service, both initially and over the term of the product or service, are fully, accurately and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits and risks associated with the product or service, in light of the facts and circumstances. Disclosures must be clear and conspicuous and model forms may be used.

The Bureau may, by rule, prohibit or impose conditions or limitations on contracts with consumers for consumer financial products or services that provide for arbitration of future disputes if the Bureau finds that it is in the public interest and for the protection of consumers. This would be applicable to agreements made 180 days after the effective date of the Act.

During its rulemaking process, the Bureau must consider the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule, the impact of proposed rules on covered persons and the impact on consumers in rural areas.

The Bureau must assess each significant rule or order it issues to address its effectiveness and publish the assessments in a report five years after the effective date.

### Responsibilities of Covered Persons

Covered persons must provide to consumers, upon request, information in the covered person's control or possession about the financial product or service the consumer obtained, including information relating to any transaction, series of transactions or to the account including costs, charges and usage data. This does not apply to confidential commercial information, including algorithms used to derive credit scores or other risk scores or predictors, information for preventing fraud or money laundering or detecting or reporting on other unlawful activities, information required to be confidential by other laws or information that a covered person cannot retrieve in the ordinary course of business. The information must be made available in electronic form. Standardized formats will be prescribed by the Bureau by rule.

It is unlawful for covered persons and service providers to:

- Offer or provide to a consumer any financial product or service not in conformity with federal consumer financial laws/regulations, or otherwise commit any act or omission in violation of a federal consumer financial law

## Key Definitions

### Consumer Financial Product or Service:

any financial product or service that is offered or provided for use by consumers primarily for personal, family or household purposes.

### Financial Product or Service:

1. Extending credit and servicing loans, including acquiring, purchasing, selling, brokering or other extensions of credit
2. Extending or brokering leases of personal or real property that are the functional equivalent of purchase finance arrangements (certain conditions apply)
3. Providing real estate settlement or appraisal services
4. Engaging in deposit-taking activities, transmitting or exchanging funds, or otherwise acting as a custodian of funds or any financial instrument for use by or on behalf of a consumer
5. Selling, providing or issuing stored value or payment instruments (applies to stored value when the seller exercises substantial control over the terms and conditions)
6. Providing check cashing, check collection or check guaranty services
7. Providing payments or other financial data processing products or services to a consumer by any technological means, including processing or storing financial or banking data for any payment instrument, or through any payments systems or network used for processing payments data, including payments made through an online banking system or mobile telecom network (may not apply to certain merchants, retailers or sellers that initiate consumer payment transactions or provide access to a host server to maintain Web sites)



- To engage in any unfair, deceptive or abusive act or practice
- To fail or refuse, as required by federal consumer financial law or any rule or order issued by the Bureau:
  - To permit access to or copying of records
  - To establish or maintain records
  - To make reports or provide information to the Bureau
- To knowingly or recklessly provide substantial assistance to a covered person or service provider in violation of any rule or order issued

## Effect on State Laws

Except for specified sections, Title X does not annul, alter, affect or exempt any person from complying with state statutes, regulations, orders or interpretations unless there are inconsistencies between the state and federal law.

The Bureau may institute civil actions against violators of the law, and state attorneys general may bring an action in any state to enforce provisions under the title or regulations issued by the Bureau.

A state regulator may bring a civil action to enforce provisions under the title or regulations issued by the Bureau for entities that are state-chartered, incorporated, licensed or authorized to do business in that state.

**Contracts.** Title X does not alter or affect federal or state law applicable to any contract entered into by national banks or federal savings associations on or before the date of enactment of the Act (July 21, 2010).

## Key Definitions

### Financial Product Or Service (Cont'd)

8. Providing financial advisory services (other than securities services) to consumers on individual financial matters or relating to proprietary financial products or services including providing credit counseling and providing services to assist a consumer with debt management or debt settlement, modifying the terms of any extension of credit, or avoiding foreclosure
9. Collecting, analyzing, maintaining or providing consumer report information or other account information, including credit history used in connection with offering or providing a consumer financial product or service (subject to certain conditions, e.g., providing information for use solely in a decision for employment, government licensing, or a residential lease or tenancy involving a consumer)
10. Debt collection
11. Other financial products or services as may be defined by the Bureau



## Key Definitions

**Stored Value:** funds or monetary value represented in any electronic format, whether or not specially encrypted, and stored or capable of storage on electronic media in such a way as to be retrievable and transferred electronically, and includes a prepaid debit card or product, or any other similar product, regardless of whether the amount of the funds or monetary value may be increased or reloaded. This term does not include merchant-issued closed loop, non-reloadable prepaid cards.

**Transmitting or Exchanging Funds:** means receiving currency, monetary value or payment instruments from a consumer for the purpose of exchanging or transmitting the same by any means, including transmission by wire, facsimile, electronic transfer, courier, the Internet or through bill payment services or through other businesses that facilitate third-party transfers within the United States or to or from the United States.

## National Bank Preemption

State consumer financial laws are preempted only if:

- Application of a state consumer financial law would have a discriminatory effect on national banks in comparison to state-chartered banks. According to the legal standard in the *Supreme Court of the United States in Barnett Bank of Marion County, N. A. v. Nelson, Florida Insurance Commissioner, et al., 517 U.S. 25 (1996)*, the state consumer financial protection law prevents or significantly interferes with the exercise by the national bank of its powers—any preemption determination may be made by a court, or by regulation or order of the Comptroller of the Currency on a case-by-case basis, in accordance with applicable law
- The state consumer financial law is preempted by another federal law

National banks may continue to charge interest at the rate allowed by the state where the bank is located.

## Transfer of Powers

The consumer financial protection functions of the Federal Reserve Board, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Department of Housing and Urban Development will be transferred to the Bureau. Additionally, the Federal Trade Commission's authority with respect to an enumerated consumer law to prescribe rules, issue guidelines, conduct studies or issue reports will be transferred to the Bureau. The Bureau Director and the agencies will designate a specific transfer date for these authorities.

## Debit Regulation

### Regulation of Interchange Fees

The Federal Reserve Board was provided regulatory authority to determine PIN and signature debit interchange fee parameters. By April 2011, the Board must establish standards for debit interchange fees, taking into account that the interchange fees must be reasonable and proportional to the cost incurred by each issuer, as well as other considerations such as the comparison to checks cleared at par and incremental costs. Adjustments may be made to the fee amounts for fraud prevention and to comply with fraud-related standards (to be established by the Board by April 2011). Card issuers with assets less than \$10 billion are exempt from the debit interchange fee regulation.

The Board will biannually post aggregate or summary information on costs, interchange fees and fees associated with authorization, clearing and settlement of electronic debit transactions.

### Exemption for Prepaid Cards and Government Benefit Cards

Interchange fees for general use prepaid cards and government benefit cards are exempt (the prepaid cards must be reloadable and not marketed as a gift card). By summer 2011, interchange fees for prepaid cards will be subject to the regulations if an overdraft fee is charged for an amount that exceeds the balance on the card or if a fee is imposed by the issuer for the first in-network ATM withdrawal each month.

### Regulatory Authority Over Network Fees

The Board may prescribe regulations for any network fee. However, the Board's authority is limited to ensuring that a network fee is not used to directly or indirectly compensate an issuer for electronic debit transactions and ensuring that the fee is not used to circumvent or evade the interchange fee parameters established by the Board (the Board will issue regulations by April 2011).

### No Exclusive Networks

No issuer or payment card network may restrict the number of networks on which an electronic debit transaction may be processed to only one network or to two or more networks that are affiliated with each other (the Board will issue regulations by July 2011).

### No Routing Restrictions

No issuer or payment card network can impose restrictions on how a merchant routes electronic debit transactions. (The Board will issue regulations by July 2011.)

### Discounts for Payments

Effective immediately, merchants will be allowed to offer discounts to consumers in an effort to serve as an incentive for payment by an alternative method (e.g., cash, check), provided the discount/incentive for debit cards or credit cards does not differentiate on the basis of the issuer or the payment card network and the discount/incentive is offered to all prospective buyers and is clearly and conspicuously disclosed.

### Minimum and Maximum Amounts

Effective immediately, merchants will be allowed to establish minimum transaction amounts for the acceptance of credit cards, provided the minimum does not differentiate between issuers or payment card networks and the minimum amount does not exceed \$10 (the Board may increase the \$10 minimum by regulation). Additionally, a payment card network may not inhibit a federal agency or institution of higher education from setting a maximum dollar value for acceptance of credit cards to the extent that such maximum does not differentiate between issuers or between payment card networks. No debit or credit cards within a payment card network may be discriminated against on the basis of the issuer of the card.

