Part I:
An Overview of the Dodd-Frank Wall Street Reform and Consumer Protection Act

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Overview. The Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act"), signed into law by President Obama on July 21, 2010, created a major overhaul of the financial industry.[1] For years, advocates have praised the benefits of financial reform and promoted legislation that would provide such reform. Specifically, these advocates have focused their support on consumer protection legislation.[2] The Act addresses many of these concerns by creating an entirely new regulatory regime with the purpose of "ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."[3] This paper describes the new regime and the powers of the new Bureau of Consumer Financial Protection.

The Bureau of Consumer Financial Protection. The Act not only creates the Bureau of Consumer Financial Protection (the "Bureau") and gives it enforcement and regulatory authority, but it also transfers enforcement power from the Federal Trade Commission to the new Bureau. The Bureau is created as an independent Executive branch agency, regulating consumer financial products and services under Federal consumer financial laws.[4] A Director, appointed by the President and approved with the advice and consent of the U.S. Senate, serves for five years.[5] The Director is permitted to establish regional offices.[6] The Bureau is authorized to implement Federal consumer financial laws by issuing rules, orders, interpretations, guidance, statements of policy, examinations and enforcement actions.[7] Any rules or orders created by the Bureau are not subject to the review or approval of the Board of Governors of the Federal Reserve System, which is composed of seven Presidential-appointees.[8] However, the Bureau's proposed rules and regulations can be

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[1] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 100-203, 124 Stat. 1376 (2010) [hereinafter the "Act"].
[2] *See, e.g.,* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1 (2008).
[3] Act § 1021(a).
[4] Act § 1011(a).
[5] Act §§ 1011(b)(1), (2).
[6] Act §§ 1011(c)(1); 1011(e).
[7] Act § 1012(a)(10)
[8] "Board of Governors of the Federal Reserve System," About the Fed, *available at* http://www.federalreserve.gov/aboutthefed/blos/board/default.htm (the board members serve a fourteen-year term; current board members include Ben Bernanke, Janet Yellen, Kevin Warsh, Elizabeth Duke, Daniel Tarullo and Sarah Bloom Raskin); § 1012(c)(3). In fact, the Board of Governors may not:

> (A) intervene in any matter or proceeding before the Director, including examinations or enforcement actions, unless otherwise specifically provided by law;
> (B) appoint, direct, or remove any officer or employee of the Bureau; or
> (C) merge or consolidate the Bureau, or any of the functions or responsibilities of the Bureau, with any division or office of the Board of Governors or the Federal reserve banks.

prevented and denied by the Financial Stability Oversight Council, a separate and distinct entity created by the Act consisting of ten voting members and five nonvoting members.[9]

The Act requires the Bureau to establish several mini-bureaus that focus on specific areas of consumer protection. For example, the Office of Fair Lending and Equal Opportunity provides "oversight and enforcement of Federal laws intended to ensure the fair, equitable, and nondiscriminatory access to credit for both individuals and communities that are enforced by the Bureau, including the Equal Credit Opportunity Act and the Home Mortgage Disclosure Act."[10]

A new Office of Financial Education is responsible for developing and implementing a strategy to increase consumers' financial literacy.[11] The Office's strategy's goals and objectives include providing opportunities to access to financial counseling and mainstream financial institutions' services, such as savings and borrowing.[12] Moreover, the Office of Financial Education is responsible for providing consumers with methods to evaluate credit products and understand their credit scores and histories.[13]

The Act targets two sub-groups of particularly vulnerable citizens by creating the Office of Service Member Affairs[14] and the Office of Financial Protection for Older Americans.[15] The former is established to help educate service members and their families, enabling them to make informed decisions about consumer financial products and services. The latter has the goal of alerting seniors to financial advisers who possess unfair, deceptive, and abusive certifications, among other goals.

Act §1012(c)(2).

[9] Act §§ 111(a); 111(b). Voting members include the Secretary of the Treasury, Chairman of the Board of Governors of the Federal Reserve System, Comptroller of the Currency, Director of the Bureau, Chairman of the Commission, Chairperson of the Corporation, Chairperson of the Commodity Futures Trading Commission, Director of the Federal Housing Finance Agency, Chairman of the National Credit Union Administration Board, and an independent member with insurance experience appointed by the President and confirmed by the Senate. *Id.* Nonvoting members serve in an advisory capacity and include the Director of the Office of Financial Research, Director of the Federal Insurance Office, a State insurance commissioner, a State banking supervisor, a State securities commissioner. *Id.* The latter three members are to be designated by a selection process determined by their peers. *Id.*

[10] Act § 1013(c)(1)-(2)(A).

[11] Act § 1013(d)(1)-(2).

[12] Act § 1013(d)(2).

[13] *Id.*

[14] Act § 1013(e)(1). The Office of Service Member Affairs has authority to develop and implement initiatives intended to "educate and empower service members and their families to make better informed decisions regarding consumer financial products and services." Act § 1013(e)(1)(A). Moreover, this office must monitor and respond to complaints made by service members and their families. Act § 1013(e)(1)(B). The Bureau has authority to assign this Office's functions and the maintenance of these functions to regional offices near military bases. Act § 1013(e)(2)(A).

[15] Act § 1013(g)(1). The duties of this office include developing goals for programs that offer financial literacy and counseling to seniors; monitoring the certification of financial advisors who advise seniors and alert the Bureau and State Regulators about unfair, deceptive, or abusive certifications; recommending best practices for seniors to learn about financial advisors; conducting research to learn these best practices; coordinating with other agencies; and working with community and non-profit organizations. Act § 1013(g)(3)(A)-(F).

Funding. The Bureau is funded with the Federal Reserve Board's earnings, but just enough to be "reasonably necessary to carry out the authorities of the Bureau."[16] Funding in 2011 cannot be more than 10% of the Federal Reserve System's total operating expenses, with gradual adjustments over the following two years.[17] Based on the Federal Reserve System's 2010 budget, which allocates $4,368,400,000 toward total operating expenses, the maximum amount of funding the Bureau would receive in 2011 is approximately $436.84 million.[18] Ultimately, the Act provides a cap on the Bureau's funding of 12% of the Federal Reserve System's total operating expenses.[19]

Consumer Financial Civil Penalty Fund. The Act directs the Bureau to collect civil penalties won against a person under the federal consumer financial laws and deposit the funds into a Consumer Financial Civil Penalty Fund.[20] The money in this account is to be distributed as payments to victims or for the Bureau's use for consumer education and financial literacy programs.[21]

Scope of Coverage. The Act applies to a variety of financial institutions, including those that are non-depository institutions that provide loan origination, brokerage or servicing for loans secured by real estate and obtained by consumers primarily for personal, family, or household purposes.[22] Larger participants of the consumer financial products or services market are covered.[23] Also covered are entities that have engaged in or are engaging in conduct that poses a risk to consumers, as well as those that offer private education loans or payday loans.[24] The Act expressly rejects from the Bureau's coverage various types of entities. For example, certain merchants, retailers, small businesses, real estate brokers, manufactured and modular home retailers, accountants, tax preparers, and lawyers are excluded from coverage.[25] Entities engaged in providing employee benefit and compensation plans are also excluded.[26] State-regulated entities are excluded to a

[16] Act § 1017(a)(1).
[17] *Id.*
[18] *See* Board of Governors of the Federal Reserve System, *Annual Report: Budget Review 2010* 9, *available at* http://www.federalreserve.gov/boarddocs/rptcongress/budgetrev/br10.pdf.
[19] Act § 1017(a)(2).
[20] Act § 1017(d)(1).
[21] Act § 1017(d)(2).
[22] Act § 1024(a)(1)(A)-(E). The Bureau also has supervisory power over very large insured depository institutions or credit unions (those with total assets of more than $10 billion) and its affiliates, as well as insured depository institutions or credit unions with total assets of $10 billion or less. Act §§ 1025(a), 1026(a).
[23] Act § 1024(a)(1)(A)-(E).
[24] *Id.*
[25] Act § 1027. However, the carve-out is inapplicable to those entities that (i) extend credit to a consumer to enable the consumer to purchase a nonconsumer financial product or service, (ii) collect debt, or (iii) sells or conveys debt. § 1027(a)(2)(A)(i)-(iii). There is also an exclusion for certain auto dealers. Act § 1029.
[26] *Id.*

limited extent.[27] Other exclusions are provided for entities regulated by the CFTC and Farm Credit Administration and those involved in charitable contribution activities.[28]

Covered entities are required to submit reports and are subject to periodic examinations in order to permit the Bureau to assess compliance, obtain information and detect and assess risks to consumers and the consumer financial market.[29] Failure or flat-out refusal by covered entities to follow the Act's requirements are unlawful.[30] Covered entities are prohibited from offering or providing consumers any financial products or services not in conformity with Federal consumer financial laws, or otherwise commit act or omissions in violation of these laws.[31] They are also prohibited from engaging in any unfair, deceptive, or abusive acts or practices.[32]

Rulemaking Authority. The Act grants the Bureau with sweeping power to "administer, enforce, and otherwise implement the provisions of Federal consumer financial law."[33] The Bureau is authorized to issue rules, orders and guidance on Federal consumer financial law.[34] The Bureau has the responsibility to monitor for risks and developments in the consumer financial products or services market.[35] Although the Act grants the Bureau with the exclusive authority to make rules to regulate the consumer financial markets, the Financial Stability Oversight Council is permitted to set aside a final regulation if it believes that the regulation would threaten the "safety and soundness of the United States banking system or the stability of the financial system of the United States . . ."[36] Thus, the Act appears to create a conflict by giving priority to the maintenance of the banking and financial systems over the Bureau's goal of protecting consumers.

The Bureau also has limited authority to define unfair, deceptive and abusive acts or practices. The Act expressly prohibits the Bureau from defining unfairness.[37] Abusive acts or practices are defined as those that (1) materially interfere with a consumer's ability to understand a term or condition of a consumer financial

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[27] Act § 1027. For example, entities regulated by a state securities commission or a state insurance regulator are excluded. *Id.*
[28] *Id.*
[29] Act § 1024(b)(1)(A)-(C).
[30] Act § 1036(a)(2).
[31] Act § 1036(a)(1).
[32] *Id.*
[33] Act § 1022(a).
[34] Act §§ 1022(b)(1), 1022(b)(4)(A).
[35] Act § 1022(c).
[36] Act § 1023(a). An agency must first petition the Council to stay or set aside a regulation; the Council Chairperson "may stay the effectiveness of a regulation for the purpose of allowing appropriate consideration of the petition by the Council." Act § 1023(c)(1)(A). The Council may set aside or issue a stay of any regulation upon a vote of the Council and approval by two-thirds of the then-serving Council members. Act § 1023(c)(3)(A).
[37] Act § 1031(a).

product or service or (2) take unreasonable advantage of a consumer's (a) lack of financial savvy, (b) inability to protect himself in the selection or use of consumer financial products or services, or (c) reasonable reliance on a covered entity to act in the consumer's interests."[38]

Enforcement Authority. The Act gives the Bureau authority to investigate possible violations of Federal consumer financial law, hold hearings, and commence civil litigation. The Bureau can issue cease-and-desist orders against covered entities that violate Bureau laws.[39] The Bureau gives notice to the entity about the violation and holds a hearing between thirty and sixty days of such notice, where it makes a decision about whether a violation occurred.[40] If the covered entity does not appear at the hearing, a presumption that the covered entity consents to the order is made.[41] A covered entity may appeal the Bureau's decision in Federal court.[42]

The Bureau may also institute a civil action against an entity in violation of Federal consumer financial law in order to impose a civil penalty or an injunction.[43] While no exemplary or punitive damages are available, many other types of relief are provided within the Act. For example, the Act includes the following types of relief: rescission of contracts, refund of money or return of real property, restitution, disgorgement for unjust enrichment, damages payments, costs of public notification of the violation, limits on the covered entity's activities or functions, and civil money penalties.[44] The civil money penalties are harsh, with the penalties categorized into three tiers. The first tier provides for a maximum penalty of $5,000 per day during which such violation or failure to pay continues.[45] The second tier provides for a maximum penalty of $25,000 for each day and the third tier provides for a maximum $1 million penalty per day.[46] Mitigating factors may be considered when assessing the penalty, however. These include: the size of financial resources of the covered entity, good faith, gravity of the violation or failure to pay, severity of consumers' risks or losses, and history of previous violations.[47]

State Law. Federal consumer financial protection law does not nullify or exempt people from complying with state law unless the state law is inconsistent with the Act.[48] However, state laws that provide greater

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38 Act § 1031(b).
39 Act § 1053(b).
40 *Id.*
41 Act §1053(b)(1)(C).
42 Act § 1053(b)(3).
43 Act § 1054(a).
44 Act § 1054(a)(2).
45 Act § 1054(c)(2)(A).
46 Act § 1054(c)(2)(B)-(C).
47 Act § 1054(c)(3).
48 Act § 1041(a)(1).

protection to consumers than the Act are not "inconsistent" with the Act and must be adhered to.[49] When a majority of states enact a resolution supporting the establishment or modification of a Bureau regulation, then the Bureau will propose a rule in response to the state action.[50] In doing so, the Bureau will consider the following factors: potential greater protections to consumers offered by the new regulation and the benefits of the regulation weighed against the increased costs or inconveniences to consumers.[51] The Bureau will also consider whether unfair discrimination against a class of consumers would result.[52]

Other Provisions. The Act gives the Bureau the authority to take ancillary actions as they pertain to the Bureau's duties. For example, the Bureau is permitted to provide the Commissioner of Internal Revenue information, including the periodic reports or examinations, provided by covered entities, when tax law noncompliance is suspected.[53] The Bureau is also permitted to give evidence of Federal criminal law violations to the U.S. Attorney General.[54] The Bureau can also restrict or prohibit mandatory pre-dispute arbitration agreements between covered entities and consumers.[55]

Conclusion. The Dodd-Frank Wall Street Reform and Consumer Protection Act provides sweeping changes to the consumer financial products and services industries. The Act transfers powers of other agencies to a centralized agency, the Bureau of Consumer Financial Protection. The Bureau is responsible for ensuring that consumers are protected from unfair, deceptive and abusive acts or practices. While the Act grants the Bureau broad authority to create regulations that halt or prevent these acts and practices, it also grants the Financial Stability Oversight Council the authority to prohibit regulations that are deemed to pose a threat to the soundness and safety of the U.S. banking and financial systems. Thus, the political climate in which the new Bureau operates is key to the success of the Bureau.[56] Industry capture is a legitimate concern, as it is with any government agency.[57] The Act's true success will occur when consumer protection becomes an integral part of the culture of American society such that a high value is placed on helping all consumers thrive.[58]

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[49] Act § 1041(a)(2).
[50] Act § 1041(c).
[51] *Id.*
[52] *Id.*
[53] Act §§ 1024(b)(6), 1025(b)(5), 1026(b)(3).
[54] Act § 1056.
[55] Act § 1028(a)-(b). This provision permits the prohibition or imposition of conditions on mandatory pre-dispute arbitration agreements after the Bureau conducts a study of the use of such agreements and concludes that such actions are in the public interest and protect consumers. *Id.*
[56] Mark E. Budnitz, *The Development of Consumer Protection Law, the Institutionalization of Consumerism, and Future Prospects and Perils*, 26 GA. ST. U. L. REV. 1147, 1188 (2010) ("The robustness of enforcement efforts by government agencies such as the FTC, bank agencies and state attorneys general depends upon the political climate in which those agencies operate, the resources they receive, and other priorities needing a share of those resources.").
[57] *Id.* at 1188-89.
[58] *Id.* at 1206.