

TITLE X: Bureau of Consumer Financial Protection

Title X creates a new independent watchdog with the authority to regulate the offering and provision of consumer financial products or services. Consumer protection responsibilities currently handled by the OCC, OTS, FDIC, the Fed, National Credit Union Administration, and Federal Trade Commission (the “FTC”) will be transferred to and consolidated in the Bureau of Consumer Financial Protection (the “Bureau”). The Bureau must seek to implement and enforce federal consumer financial protection law for the purpose of ensuring that markets for consumer financial products and services are fair, transparent, and competitive. The Bureau is charged with the mission and authority to ensure that consumers are provided with timely and comprehensible information about financial transactions and protected from unfair or deceptive acts and practices. The Bureau’s primary functions are conducting financial education programs; collecting, investigating, and responding to consumer complaints; collecting and publishing information about the market for consumer financial products and identifying consumer risks; supervising persons that offer consumer financial products and services; undertaking enforcement actions to address violations of federal consumer financial law; and issuing rules, orders, and guidance to implement federal consumer financial law.

Title X also expands the application of state consumer protection laws to federally chartered depository institutions and the authority of state attorneys general to enforce applicable consumer laws. Even though the *Barnett Bank* case preemption standard was generally re-affirmed, it is likely that fewer state laws will be preempted than in recent years because of additional procedural requirements and less deferential judicial review.

A. Establishment and Administration of the Bureau

Title X provides a mandate to the Bureau to enforce federal consumer financial laws. It also establishes the Bureau’s functions with regard to regulation, supervision and enforcement. **Sec. 1021 (p. 615).**

The Bureau must seek to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that markets for consumer financial products and services are fair, transparent, and competitive. **Sec. 1021(a) (p. 615).**

1. Structure of the Bureau of Consumer Financial Protection

The Bureau will be housed within the Fed. **Sec. 1011 (p. 599).** The Director of the Bureau will be appointed by the President and confirmed by the Senate for a five-year term. **Sec. 1011 (p. 599).** Title X includes provisions to ensure the “autonomy” of the new consumer protection bureau (see below).

2. Autonomy of the Bureau

The Fed may delegate to the Bureau the authorities to examine persons subject to Fed jurisdiction for compliance with federal consumer financial laws. The Fed may not interfere or intervene in any matters or proceedings before the Bureau, such as examinations or enforcement actions, unless specifically provided by law. The Fed is also prohibited from appointing,

directing, or removing any of the Bureau's officers or employees, or consolidating any of the Bureau's functions with any of the Fed's divisions or offices. Furthermore, no rule or order of the Bureau will be subject to approval or review by the Fed. **Sec. 1012(c) (pp. 600-601).**

B. Consumer Advisory Board

The Director will be required to establish a Consumer Advisory Board. Six of the Board's members will be appointed by the Federal Reserve Bank Presidents. **Sec. 1014 (p. 609).**

The Director is charged with establishing special functional units to research, analyze, and report on:

- Market developments for consumer financial products or services, including market areas of alternative 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 and communications regarding consumer financial products or services;
- Consumer awareness and understanding of costs, risks, and benefits of consumer financial products or services;
- Consumer behavior with respect to consumer financial products or services;
- Consumer affairs unit to offer information, guidance, and technical assistance to traditionally underserved consumers and communities;
- Unit with a toll-free telephone number, website, and database to collect and track complaints;
- Office of Fair Lending and Equal Opportunity; and
- Office of Financial Literacy. **Sec. 1013(b)-(d) (pp. 603-607).**

C. Functions of the Bureau

The Bureau will be authorized to exercise its authorities under federal consumer financial law for the purposes of ensuring that, with respect to consumer financial products and services, (1) consumers are provided with timely and understandable information to make responsible decisions about financial transactions; (2) consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination; (3) outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens; (4) Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition; and (5) markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation. **Sec. 1021(b) (p. 615).**

The primary functions of the Bureau are: (1) conducting financial education programs; (2) collecting, investigating, and responding to consumer complaints; (3) collecting, researching, monitoring, and publishing information relevant to the functioning of markets for consumer financial products and services to identify risks to consumers, and the proper functioning of such markets; (4) supervising covered persons for compliance with federal consumer financial law, and taking appropriate enforcement action to address violations; (5) issuing rules, orders, and guidance implementing federal consumer financial law; and (6) performing such support activities as may be necessary or useful to facilitate the other functions of the Bureau. **Sec. 1021(c) (p. 615).**

1. Coordination

The Bureau must coordinate with the SEC and CFTC and federal agencies and State regulators to promote consistent regulatory treatment of consumer financial and investment products and services. **Sec. 1015 (p. 609).**

2. Reports to Congress

The Director will be required to present an annual report to Congress not later than March 31 of each year on the complaints received by the Bureau in the prior year regarding consumer financial products and services. Such report must include information and analysis about complaint numbers, types, and, where applicable, information about resolution of complaints. **Sec. 1013(b)(3)(C) (p. 604).**

The Director of the Bureau will appear before the Senate Banking Committee and the House Financial Services Committee at semi-annual hearings. **Sec. 1016(a) (pp. 609-610).**

The Bureau will be required to prepare and submit a report to the President and to the Senate Banking Committee and the House Financial Services Committee. **Sec. 1016(b) (p. 610).** Such report would include: (1) a discussion of the significant problems faced by consumers in shopping for or obtaining consumer financial products or services; (2) a justification of the budget request of the previous year; (3) a list of the significant rules, orders, and initiatives adopted by the Bureau; (4) an analysis of complaints about consumer financial products or services that the Bureau has received and collected in its central database; (5) a list of the public supervisory and enforcement actions to which the Bureau was a party; (6) the actions taken regarding rules, orders, and supervisory actions with respect to covered persons which are not credit unions or depository institutions; (7) an assessment of significant actions by state attorneys general or state regulators relating to federal consumer financial law; and (8) an analysis of the efforts of the Bureau to fulfill the fair lending mission of the Bureau. **Sec. 1016(c) (p. 610).**

D. Audits of the Bureau

The Comptroller General will be required to annually audit the financial transactions of the Bureau in accordance with the United States Generally Accepted Government Auditing Standards. **Sec. 1017(a)(5)(A) (p. 612).**

E. Funding of the Bureau

The Fed must transfer to the Bureau the funds reasonably necessary to carry out its authorities. The Fed may transfer up to 10% of its combined expenditures in 2011, 11% in 2012, and 12% in 2013 and every year thereafter. **Sec. 1017(a)(2)(A) (pp. 610-611)**. If the Director determines that the transferred funds are insufficient, the Director must submit a report to Senate and House Appropriations Committees. There are authorized to be appropriated \$200 million for each of the fiscal years from 2010 to 2014. **Sec. 1017(e) (pp. 614-615)**. The Act does not provide for assessments on covered persons to fund the Bureau.

F. Scope of the Bureau's Powers and Duties

1. Covered Persons, Service Providers, Consumers, and Activities

Title X covers any person that engages in offering or providing a consumer financial product or service. **Sec. 1002(6) (p. 591)**. A consumer financial product or service is a financial product or service offered or provided for use by consumers primarily for personal, family, or household purposes, or delivered, offered or provided in connection with such a consumer financial product or service. **Sec. 1002(5) (p. 591)**.

Financial products and services include extensions of credit and service of loans; real estate settlement services and property appraisals; taking deposits, transmitting or exchanging funds, or acting as a custodian of funds or any financial instrument for use by or on behalf of a consumer; sale, provision or issuance of a payment instrument or a stored value instrument over which the seller exercises substantial control; check cashing, collection, or guaranty services; financial data processing products or services; financial advisory services; and collection and provision of consumer report and credit history information. **Sec. 1002(13) (p. 592)**.

2. Persons and Activities Not Under the Authority of the Bureau

The Bureau does not have authority with respect to credit extended directly by merchants, retailers, or sellers of nonfinancial services exclusively to enable a consumer to purchase a nonfinancial good or service. The Bureau does not have authority over real estate brokerage activities, retailers of manufactured or modular homes, accountants or tax preparers, attorneys, employee benefit and compensation plans, or persons regulated by a state securities commission. **Sec. 1027(a) (pp. 630-632)**. The Act excludes activities related to the writing of insurance or the reinsurance of risks from the purview of the Bureau. **Sec. 1002(3) (p. 590)**.

Title X is not intended to modify the authority of the SEC or CFTC to adopt rules, initiate enforcement proceedings, or take other action with respect to persons or institutions regulated by those agencies. However, the SEC and CFTC would be required to consult and coordinate with the Bureau regarding rulemaking over any product or service subject to the Bureau's jurisdiction. **Sec. 1015 (p. 609)**.

G. Information Collection and Monitoring

The Bureau will monitor for risks to consumers in the offering or provision of consumer

financial products or services, including developments in markets for such products or services. **Sec. 1022(c)(1) (p. 617)**. In allocating its resources to perform the monitoring the Bureau may consider: (1) likely risks and costs to consumers associated with buying or using a type of consumer financial product or service; (2) understanding by consumers of the risks of a type of consumer financial product or service; (3) the legal protections applicable to the offering or provision of a consumer financial product or service, including the extent to which the law is likely to adequately protect consumers; (4) rates of growth in the offering or provision of a consumer financial product or service; (5) the extent, if any, to which the risks of a consumer financial product or service may disproportionately affect traditionally underserved consumers; or (6) other pertinent characteristics of covered persons that offer or provide the consumer financial product or service. **Sec. 1022(c)(1) (p. 617)**.

The Bureau will be required to publish at least one report annually of significant findings of its monitoring. **Sec. 1022(d) (p. 620)**. In conducting research on the offering and provision of consumer financial products or services, the Bureau will have the authority to gather information from time to time regarding the organization, business conduct, markets, and activities of persons operating in consumer financial services markets. In order to gather such information, the Bureau may gather and compile information from examination reports concerning covered persons or service providers, assessment of consumer complaints, surveys and interviews of covered persons and consumers, and review of available databases. The Bureau may also require persons to file with the Bureau, under oath or otherwise, in such form and within such reasonable period of time as the Bureau may prescribe, by rule or order reports, or answers in writing to specific questions. The Bureau may make public such information but must prescribe rules regarding confidentiality. **Sec. 1022(c)(4) (pp. 617-618)**.

H. Rulemaking Authority

The Director will have authority to prescribe rules and issue orders and guidance to enable the Bureau to administer federal consumer financial laws. **Sec. 1022(b) (pp. 616-617)**. To the extent that a provision of federal consumer financial law authorizes the Bureau and another federal agency to issue regulations under that provision of law for purposes of assuring compliance with federal consumer financial law and any regulations thereunder, the Bureau must have the exclusive authority to prescribe rules subject to those provisions of law. **Sec. 1022(b)(4) (pp. 616-617)**.

1. Standards for Rulemaking

In prescribing rules, the Bureau will be required to consider the potential costs and benefits to consumers and covered persons, including any potential reduction of consumer access to financial products or services. The Bureau will need to consult with the prudential regulators and other appropriate federal agencies before proposing a rule and during the comment process. If a prudential regulator provides a written exception to the proposed rule, the Bureau must include the objection in its adopting release. **Sec. 1021(b)(2) (p. 615)**.

2. Prohibiting Unfair, Deceptive, or Abusive Acts or Practices

The Bureau is authorized to take action to prevent a person from committing an unfair,

deceptive, or abusive act under federal law in connection with any consumer financial product or service transaction or offering. **Sec. 1021 (p. 615).**

3. Regulations Regarding Arbitration Agreements

By regulation, the Director may prohibit or impose conditions or limitations on the use of mandatory pre-dispute arbitration agreements between a covered person and a consumer for a consumer financial product if such action is in the public interest and for the protection of consumers. However, the Bureau must first conduct a study of mandatory pre-dispute arbitration provisions, and any limits imposed on arbitration agreements must be consistent with the findings of the study. **Sec. 1028 (p. 639).**

4. Regulations Governing Disclosures

The Bureau may prescribe regulations to ensure timely, appropriate and effective disclosures of costs, benefits, and risks associated with any consumer financial product or service. The Bureau may also issue model disclosures, which are per se compliant. The Bureau may permit a covered person to conduct a trial program to provide trail disclosures to consumers. **Sec. 1032 (pp. 642-643).**

5. Review of Bureau Rules and Regulations

The Bureau will be required to conduct an assessment of each significant rule or order it adopts and publish a report within five years. In addition, on the petition of any of its member agencies, the Council may set aside any of the Bureau's regulations if it decides by two-thirds vote that regulation would put the safety and soundness of the banking system or the stability of the financial sector at risk. The agency would be required to first attempt to work with the Bureau in good faith to resolve any concerns. If this is unsuccessful, the agency would file its petition within 10 days after the publication of the regulation. **Sec. 1023 (pp. 620-622).**

6. Exceptions

The Bureau is permitted to issue rules to exempt any covered person from any provision of Title X or regulations under Title X as the Director deems necessary or appropriate. In issuing such exemption, the Director must take into account the total assets of the covered person, its volume of transactions involving consumer financial products or services, and the extent to which existing laws or regulations adequately protect consumers. **Sec. 1022(b)(3)(A) (p. 616).**

7. Regulations Governing Interchange Fees

Section 1075 of Dodd-Frank amends the Electronic Fund Transfer Act to create a new Section 920 regarding interchanged fees. The new provision gives the Fed authority to establish rules regarding interchange transaction fees that an issuer or payment card network may charge with respect to electronic debit transactions. The rules will require that fees be reasonable and proportional to the actual cost incurred by the issuer or payment card network with respect to the transaction. However, such rules will not apply to issuers with assets of less than \$10 billion. **Sec. 1075 (pp. 704-711).**

Rulemaking and Information Collection. The Fed is required to prescribe regulations in final form establishing standards for assessing whether an interchange fee is “reasonable and proportional to the cost incurred by the issuer with respect to the transaction” within nine months after the enactment date of the Consumer Financial Protection Act of 2010. The Board may require any issuer or payment card network to provide it the information it needs to carry out the new law and as needed to issue rules under the new law. **Sec. 1075 (p. 705).**

Fraud Prevention Costs. The Fed can adjust the interchange fee charged by an issuer if the adjustment is “reasonably necessary to make allowance for costs incurred by the issuer in preventing fraud in relation to electronic debt transactions involving that issuer” and the issuer complies with fraud-related standards set by the Board. The Board must issue regulations within 9 months of enactment establishing standards for making these adjustments. **Sec. 1075 (pp. 705-706).**

Small Issuers. The new requirements for interchange fees do not apply to issuers with consolidated assets of less than \$10 billion. The Board must exempt such issuers from the new regulations. **Sec. 1075 (p. 707).**

Government-Administered Payment Programs and Reloadable Prepaid Cards Exempted. The new requirements for interchange fees do not apply to fees charged or received with respect to electronic debt transactions in which a person issues a debit card provided pursuant to a Federal or State government-administered payment program or a plastic card or device link to funds which are purchased on a prepaid basis and not used to access an account held by the card holder that is redeemable at multiple merchants or teller machines and is reloadable and not marketed as a gift card. **Sec. 1075 (p. 707).**

Dodd on Health Care Prepaid Cards. Senator Dodd in a colloquy (attached at Appendix B) clarified his understanding of the intent behind Section 1075 of the Act with regarding interchange fees. He noted that interchange fees are “a major source of paying for the administrative costs of prepaid cards used in connection with health care and employee benefits programs such as FSAs, HSAs, HRAs, and qualified transportation accounts” and made the point that “we do not wish to interfere with those arrangements in a way that could lead to higher fees being imposed by administrators to make up for lost revenue.” His concern was that such a change could raise health care costs, which would hurt consumers.

Effective Date. The provisions relating to interchange fees require final rules be issued within nine months after the enactment date and are effective 12 months after the enactment date of the Consumer Financial Protection Act of 2010. **Sec. 1075 (p. 708).**

8. Limitations on Payment Card Network Restrictions

No Exclusive Networks. Section 1075 of Dodd-Frank also amends Section 920 of the Electronic Fund Transfer Act to require the Fed to issue regulations providing that an issuer or payment card network may not restrict the number of payment card networks on which an electronic debit transaction may be processed to either a single network or two or more networks owned or controlled by affiliated persons. This must be done within one year of enactment. **Sec. 1075 (pp. 708-709).** The Board must also regulate against routing restrictions within one year of

enactment. **Sec. 1075 (p. 709).**

Limitation on Restrictions on Offering Discounts for Payment Form. A payment card network may not inhibit the ability of any person to provide a discount or incentive for payment by the use of cash, checks, debit cards, or credit cards to the extent that the discount does not differentiate on the basis of the issuer or the payment card network, is offered to all prospective buyers and is clearly disclosed. **Sec. 1075 (p. 709).**

Limitations on Restrictions on Setting Transaction Minimums or Maximums. A payment card network may not inhibit the ability of any person to set a minimum dollar value on the acceptance of credit cards to the extent the minimum does not differentiate between issuers or payment card networks and does not exceed \$10 (which the Board may increase). **Sec. 1075 (p. 709-710).**

I. Supervisory and Examination Authority

1. Reporting Requirements

A non-depository covered person who offers mortgage origination, brokerage, or servicing for use by consumers or is a large participant in the market for consumer financial products and services (“large participant” to be defined by rulemaking) would be subject to periodic reports and examinations by the Bureau under a risk-based supervision program. The risk-based supervision is based on the asset size of the covered person, its volume of transactions, and the risks to consumers created by its financial products. The Bureau would also have primary enforcement authority and exclusive rulemaking authority. **Sec. 1024(a)(1) (p. 622).**

Banks with over \$10 billion in assets would be subject to periodic reports and examinations by the Bureau. The Bureau would also have primary enforcement authority over banks with over \$10 billion in assets. **Sec. 1025 (pp. 625-629).** For banks with less than \$10 billion in assets, the prudential regulator would have exclusive enforcement authority. **Sec. 1026 (pp. 629-630).**

2. Examinations

The Bureau is directed to periodically require reports and conduct examinations to assess compliance with federal consumer financial law, obtain information about an institution’s activities and compliance procedures, and detect risks to consumers. The Bureau also would have the authority to collect information regarding the organization, business conduct, and practices of covered persons in order to conduct research on the provision of consumer financial products or services. The supervisory program should be risk-based and take into consideration the asset size of the covered person, the volume of its transactions involving consumer financial products or services, the risks to consumers created by such financial products or services, and the extent to which such entities are subject to oversight by state authorities. **Sec. 1024(b)(1) (p. 623).**

3. Conflicting Supervisory Determinations

To minimize regulatory burden, the Bureau is required to coordinate its supervisory activities with the activities of prudential regulators and State bank regulatory authorities and use existing reports to the fullest extent possible. **Sec. 1024(b)(3) and (4) (p. 623)**. If the proposed supervisory determinations of the Bureau and the prudential regulator conflict, the covered person may request a joint statement. **Sec. 1025(e)(3) (p. 627)**. If the conflict is not resolved, the covered person could appeal to a governing panel consisting of a representative from the Bureau, a representative of the prudential regulator, and, on a rotating basis, a representative from either the Fed, the FDIC, the National Credit Union Administration, or the OCC. **Sec. 1025(e)(4)(p. 628)**.

4. Illegal Acts

Under Title X, it would be unlawful for any person to:

- i. Advertise, market, offer, or sell a consumer financial product or service not in conformity with this title or applicable rules or orders issued by the Bureau;
- ii. Enforce, or attempt to enforce, any agreement with a consumer, or impose any fee or charge in connection with a consumer financial product or service that is not in conformity with this title or applicable rules or orders;
- iii. Engage in any unfair, deceptive, or abusive act or practice;
- iv. Advertise, market, offer, sell, enforce, or attempt to enforce, any term, agreement, change in terms, fee or charge in connection with a consumer financial product or service that is not in conformity with this title or applicable rules or orders;
- v. Engage in any unfair, deceptive, or abusive act or practice; or
- vi. Fail or refuse to permit access to or copying of records. **Sec. 1034 (pp. 644-645)**.

J. Enforcement Authority

1. General Enforcement Authority

To the extent that federal law authorizes both the Bureau and another federal agency to enforce federal consumer financial law with regard to a non-depository person, the Bureau will have exclusive authority. To the extent that federal law authorizes both the Bureau and another Federal agency to enforce federal consumer financial law with regard to an insured depository institution with over \$10 billion in assets, the Bureau will have primary enforcement authority. **Sec. 1024(c)(1) (p. 624)**.

Any Federal agency could recommend to the Bureau, in writing, that the Bureau initiate a enforcement proceeding. If the Bureau fails to do so within 120 days, the other agency would be authorized to initiate a proceeding to the extent permitted by law. **Sec. 1024(c)(2) (p. 624).**

The enforcement and regulatory authority under the Federal Trade Commission Act (the “FTC Act”) will be preserved following creation of the Bureau. The FTC and the Bureau must enter into a memorandum of understanding and coordinate their regulatory efforts to ensure that businesses are not subject to overlapping/dual regulations. **Sec. 1024(c)(3) (pp. 624-625).**

2. Enforcement Authority for Small Banks, Thrifts, and Credit Unions Under \$10 Billion

Pursuant to the Act, the prudential regulator will have exclusive authority to bring enforcement actions against institutions with less than \$10 billion in assets. The Bureau may notify the prudential regulator of any violations, and the prudential regulator must respond to the Bureau within sixty days. **Sec. 1026(d) (p. 630).**

3. Joint Investigations and Civil Investigative Demands

The Bureau can engage in joint investigations and requests for information with the Secretary of Housing and Urban Development (the “HUD Secretary”), the Attorney General, or both. Bureau investigators will have the authority to issue subpoenas requesting testimony or the production of materials, which are enforceable in federal district court. If the Agency has reason to believe that a person has documentary material or any information relevant to a violation, the Agency could issue a civil investigative demand. If a person fails to comply with a civil investigative demand, the Bureau could file a petition for an order of enforcement in federal district court. **Sec. 1052 (pp. 655-661).**

4. Administrative Proceedings

The Bureau can conduct hearings and adjudication proceedings, including cease-and-desist proceedings, to enforce compliance with Title X and any issued regulations, or any other federal law that the Bureau is authorized to enforce. **Sec. 1053 (pp. 661-664).**

5. Civil Actions

The Bureau can also bring a civil action or seek civil penalties and equitable relief for violations of Title X, related regulations, or other consumer financial protection laws. When commencing a civil action, the Bureau must notify the Attorney General. **Sec. 1054 (pp. 664-665).**

6. Relief Available

In an administrative proceeding or court action, the Bureau may seek specific forms of relief including the rescission or reformation of contracts, refund of money or return of real property, restitution, disgorgement for unjust enrichment, payment of damages, public notification of the violation and related costs, limits on the entity’s activities or functions, or civil penalties. Exemplary or punitive damages are not permitted. The Bureau, state attorney general,

or state regulator could recover the costs it incurred in connection with the action if it is the prevailing party. **Sec. 1055 (pp. 665-667).**

First tier civil penalties would be limited to \$5,000 for each day during which the violation continues. Second tier civil penalties, available when a person recklessly engages in a violation, would be limited to \$25,000 for each day during which the violation continues. Third tier civil penalties, imposed for knowing violations, could not exceed \$1,000,000 for each day during which the violation continues. The penalty would be required to reflect the size of financial resources and good faith of the person charged, the gravity of the violation, the severity of risks or losses to the consumer, any history of previous violations, and “such other matters as justice may require.” The Agency could also make referrals for criminal proceedings to the Attorney General whenever the Agency obtains evidence that a person has engaged in conduct that may constitute a violation of federal criminal law. **Sec. 1055(c) (p. 666).**

All civil penalties would be placed in the Victims Relief Fund. **Sec. 1017(d)(1) (p. 614).**

K. Whistleblower Protection

Title X provides whistleblower protection in so far as a covered person or service provider is prohibited from terminating or discriminating against a covered employee because that employee has provided information to the agency or any other state, local, or federal entity. Likewise, an employee could not be terminated or discriminated against because he or she objected to or refused to participate in any activity, policy, practice, or assigned task that the employee reasonably believed to be in violation of any law, or constitute an unfair, deceptive, or abusive practice. **Sec. 1057 (pp. 667-671).**

L. Transfer of Other Consumer Financial Protection Functions to the Agency

Consumer financial protection functions of the Fed, OCC, OTS, FDIC, NCUA, Department of Housing and Urban Development (“HUD”), and FTC would be transferred to the Bureau subject to backup enforcement authority. **Sec. 1061(b) (pp. 672-674).**

M. Preemption Provisions of Title X (Subtitle D)

1. Preemption Framework Under the Dodd-Frank Act

Subtitle D of Title X, effectively supplants the existing regime of “complete” preemption, under which all state laws that “touch upon” the business of banking are preempted,³⁸ with a

³⁸ In *Barnett Bank v. Nelson*, the Supreme Court held that a federal statute permitting national banks in small towns to sell insurance preempted a state law prohibiting national

milder form of “conflict” preemption, in which only conflicting state laws are preempted.³⁹ Title X makes explicit that the Act does not occupy the field in any area of state law. Courts finding preemption must make a *de novo* finding that federal law provides a substantive standard governing the particular conduct at issue. The Act states that, except as otherwise provided in this Title, federal law “may not be construed as annulling, altering, or affecting” state law unless the state law “is inconsistent with the provisions of this Title and then only to the extent of the inconsistency.” State law is not inconsistent if it affords consumers greater protection than federal law.⁴⁰ Determination of inconsistency “may be made by the Bureau on its own motion or in response to a non-frivolous petition initiated by any interested person.” **Sec. 1041(a) (p. 647).**

2. Preemptive Effect of Federal Consumer Financial Protection Regulations

The preemptive effect of “any provision of any enumerated [federal] consumer law that relates to the application of a law in effect in any State with respect to such Federal law” is preserved. **Sec. 1041(b) (p. 647).** Subtitle D does not explicitly specify whether regulations interpreting such federal consumer laws will be preserved.

The Bureau is authorized to issue regulations to implement Title X. In addition, the Bureau will be required to issue a notice of proposed rulemaking when the majority of states enact a resolution supporting a consumer protection regulation. Subtitle D does not explicitly specify the preemptive effect of the Bureau’s regulations, but it appears that the conflict preemption standards applied to the substantive provisions of Title X would also apply to the Bureau’s regulations.

In prescribing a final regulation in response to a state-initiated action, the Bureau will

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banks from doing so. 517 U.S. 25 (1996). In *Watters v. Wachovia Bank*, the Supreme Court held that a national bank, which is subject to supervision by the Office of the Comptroller, was not subject to the visitorial powers of the states. 550 U.S. 1 (2007).

³⁹ See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (holding that an action under D.C. tort law against an automobile manufacturer asserting negligence for failure to provide airbags was preempted because it actually conflicted with a Department of Transportation standard).

⁴⁰ This form of preemption follows *Fla. Lime & Avocado Growers v. Paul*, in which the mere existence of a less restrictive federal law in the same arena did not raise a preemptive conflict. Under the *Fla. Lime* standard, state law is not preempted unless it is “physically impossible” to comply with both state and federal law. 373 U.S. 132 (1963).

consider whether the proposed regulation will afford greater consumer protection than existing regulations, whether the benefits outweigh increased costs and inconveniences to consumers, whether the regulation could lead to any unfair discrimination, and whether any federal banking Bureau has determined that the proposed regulation would present an unacceptable safety and soundness risk to insured depository institutions. If the Bureau enacts a regulation, it is required to publish a discussion of its considerations in the Federal Register notice of the final regulation. If the Bureau decides not to issue a regulation, it must publish an explanation of its determination in the Federal Register and provide copies to each state enacting a resolution in favor of the regulation, the House Financial Services Committee, and the Senate Banking Committee. **Sec. 1041(c) (pp. 647-48).**

Subtitle D explicitly preserves existing contracts by stating that the statute and implementing regulations “shall not be construed to alter or affect the applicability of any OCC or OTS regulation regarding the applicability of state law under federal banking law to any contract entered into on or before the date of the enactment of this Title.” **Sec. 1043 (p. 650).** Section 1043 preserves extant OCC and OTS regulations insofar as they apply to pre-enactment contracts, but does not indicate whether OCC and OTS regulations will remain valid with regard to contracts entered into after the effective date of the Act.

3. Preemption Standards for National Banks and Federal Savings Associations

Subtitle D provides an explicit framework for determining preemption of state consumer financial laws that relate to national banks. With regard to national banks, state consumer financial law is preempted only if (1) its application would have a discriminatory effect on national banks as compared to state-chartered banks; (2) it is determined (by a court or the Comptroller) to run afoul of the *Barnett Bank* preemption standard; or (3) it is preempted by another federal law. **Sec. 1044(a) (p. 650).**

The *Barnett Bank* standard codified in prong (2) above is a stringent test, preempting only state consumer financial laws that prevent or significantly interfere with the exercise of a national bank’s powers. To make a finding of preemption, the Comptroller must make a case-by-case determination in consultation with the Bureau. OCC preemption determinations must be made public, submitted to Congress, and periodically reviewed by the Comptroller. **Sec. 1044(b) (pp. 650-52).** This “case-by-case” requirement calls into question some of the OCC’s existing regulations, which determine that certain categories of state law conflict with federal law. Federal courts finding preemption must make a *de novo* finding that federal law provides a substantive standard governing the particular conduct at issue.

Under its savings clause, the statute “does not preempt, annul, or affect the applicability of any State law to any subsidiary or affiliate of a national bank (other than a subsidiary or affiliate that is chartered as a national bank.” **Sec. 1044(b)(2) (p. 651).** Section 1045 further clarifies that no provision of this Title may be construed as preempting, annulling, or affecting the applicability of State law to any nondepository subsidiary, affiliate, or agent of a national bank. **Sec. 1045 (p. 653).** This section would effectively overrule *Watters* by making state law applicable to non-depository subsidiaries even if that same law would be preempted if applied to a national bank parent.

Section 1046 applies parallel provisions to federally chartered savings associations.

4. Preservation of Enforcement Powers of States

Title X permits state attorneys general to sue in federal or state court to enforce and secure remedies under provisions of this Title or regulations issued thereunder, or otherwise provided under other law. **Sec. 1042(a) (pp. 648-49)**. State attorneys general must notify the Bureau and prudential regulator of any action to enforce any provision of this Title or any regulation issued thereunder, and the Bureau may intervene in such an action. If emergency action is necessary, the state attorney general must notify the Bureau immediately upon commencing the action. **Sec. 1042(b) (p. 649)**. The Director will issue regulations to implement this section and provide guidance for the coordination of action with state regulators. **Sec. 1042(c) (p. 649)**.

However, state attorneys general may bring suit against a national bank or federal savings association only to enforce a regulation prescribed by the Bureau under a provision of Title X and to secure remedies under provided under title X or other law. **Sec. 1042(a)(2)(B) (pp. 648-49)**. State attorneys general may not otherwise bring a civil action against a national bank or federal savings association with respect to an act or omission that would be a violation of a provision of Title X. **Sec. 1042(a)(2)(A) (p. 648)**.

Section 1042 specifies that no provision of this section should be construed as limiting the authority of a state attorney general or state regulator to bring an action or other regulatory proceeding arising solely under the law of that state. Section 1042 expands upon *Cuomo v. Clearing House* by broadly authorizing state officials to enforce not only state law, but all the provisions of “this Title,” including regulations issued under this Title. By giving the Bureau discretionary authority to intervene, this provision recognizes concurrent federal-state authority (rather than exclusive federal authority). **Sec. 1042(d) (pp. 649-50)**.

Furthermore, the statute will not affect the authority of a state securities commission or state insurance commission to take any action under state law with respect to a regulated person. As a result, state securities and insurance laws may *never* be preempted by the federal banking laws, even if there is an actual conflict. **Sec. 1042(d) (pp. 649-50)**.

5. Visitorial Standards

Visitorial powers⁴¹ provisions of Title X do not limit the authority of a state attorney

⁴¹ Under the National Bank Act, visitation refers to government supervisory powers over corporations. *Cuomo v. Clearing House Ass’n*, 129 S. Ct. 2710, 2721 (2009).

general to bring an action to enforce any applicable federal or state law, after consultation with the appropriate federal agency. State attorneys general may also seek “relief” authorized by federal or nonpreempted state law. The ability of federal officials to bring an enforcement action “shall not be construed as precluding private parties from enforcing rights granted under Federal or State law in the courts.” **Sec. 1047 (p. 654).**

Section 1047 essentially codifies the *Cuomo* decision by stating that the “visitorial powers” under federal law do not preclude state enforcement actions (although state officials are now required to consult with the appropriate federal agency). The additional authorization for state officials to seek “relief” authorized by nonpreempted state law may indicate that damages or other monetary claims (including claims where the attorney general sues on behalf of individual citizens) could be permitted. The statement that private parties are not precluded from “enforcing rights granted” could lead to litigation over whether or not Congress intended to imply any private rights of action.