

## ALERTS AND UPDATES

### U.S. Financial Reform: Creation of the Consumer Financial Protection Bureau

August 24, 2010

*The [Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010](#) ("the Act") begins sweeping reform for the U.S. financial system. It requires new and existing regulatory agencies to undertake more than 50 studies of the financial system and more than 250 instances of rulemaking. Duane Morris has issued further Alerts on many of the broad topics addressed by the Act, accessible at [www.duanemorris.com/FinancialReform](http://www.duanemorris.com/FinancialReform).*

Title X of the Act is known as the "Consumer Financial Protection Act of 2010." This portion of the legislation establishes the Bureau of Consumer Financial Protection (the "Bureau"), an independent bureau within the U.S. Federal Reserve to regulate consumer financial products and services that are offered or provided for use by consumers primarily for personal, family or household purposes, or that are delivered, offered or provided in connection with a consumer financial product or service. The Bureau will be led by a director appointed by the President and confirmed by the U.S. Senate. Title X transfers to the Bureau numerous consumer protection responsibilities currently managed by the Federal Reserve, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Federal Trade Commission and the U.S. Department of Housing and Urban Development. The Bureau will have the authority to regulate and enforce substantive standards for any person that engages in the offer or sale to any consumer of a financial product or service, including:

- Extending credit and servicing loans, including acquiring, purchasing, selling, brokering or other extensions of credit;
- Extending or brokering leases of personal or real property that are the functional equivalents of purchase finance arrangements;
- Providing real estate settlement services;
- Engaging in deposit-taking activities, transmitting or exchanging funds;
- Selling, providing or issuing stored-value or payment instruments;
- Providing check cashing, check collection or check guaranty services;
- Providing financial advisory services (other than those relating to securities regulated by the SEC);
- Collecting, analyzing, monitoring or providing consumer report information or other account information (including credit history of consumers);
- Collecting debt relating to any consumer financial product or service; and
- Such other financial product or service as may be defined by the Bureau.

The Bureau is also granted authority to supervise "covered persons" (defined as any person, including affiliates, that engages in offering or providing a consumer financial product or service), such as large banks, savings associations and credit unions that offer consumer financial products and services, and the power to enforce federal consumer financial laws. To that end, the Bureau is authorized to issue rules, orders and guidance to implement federal consumer financial laws and bring enforcement actions to uphold federal consumer financial laws. The Bureau will have the power to enforce consumer financial laws in a number of ways, including civil money penalties that can range up to \$1 million per day in some cases, disgorgement for unjust enrichment and restitution.

Title X defines the **purposes, objectives** and **functions** of the Bureau, as follows:

As its legislated **purposes**, the Bureau is tasked to seek to implement and, where applicable, enforce federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services, and that the markets for those products and services are fair, transparent and competitive.

Title X provides, as its specified **objectives**, that the Bureau is authorized to exercise its authorities under federal consumer financial law for the purposes of ensuring that, with respect to consumer financial products and services:

- 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 law is enforced consistently in order to promote fair competition; and
- Markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.

As specified in Title X, the primary **functions** of the Bureau are:

- Conducting financial education programs;
- Collecting, investigating and responding to consumer complaints;
- 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;
- Supervising covered persons for compliance with federal consumer financial law, and taking appropriate enforcement action to address violations of federal consumer financial law;
- Issuing rules, orders and guidance implementing federal consumer financial law; and
- Performing such support activities as may be necessary or useful to facilitate the other functions of the Bureau.

The rulemaking authority provided under Title X enables the Bureau to prescribe rules and issue orders and guidance in its administration of federal consumer financial laws in conjunction with the relevant agency regulators or other appropriate federal agencies. In this regard, the Bureau's director may prescribe rules and issue orders and guidance, as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the federal consumer financial laws, and to prevent evasions thereof. The Bureau is required to consult with the appropriate prudential regulators or other federal agencies prior to proposing a rule and during the comment process regarding consistency with prudential, market, or systemic objectives administered by such agencies. Notwithstanding any other provisions of federal law, for purposes of assuring compliance with federal consumer financial law and any regulations thereunder, the Bureau is given the exclusive authority to prescribe rules subject to those provisions of law. However, the newly created nine-member Financial Stability Oversight Council may, by two-thirds' vote, set aside all or part of a final regulation prescribed by the Bureau, if it concludes that the regulation in question would put the safety and soundness of the banking system or the stability of the financial system of the United States at risk.

As a means to prevent unfair, deceptive or abusive acts or practices, the Bureau is authorized to take action to prevent a covered person or service provider from committing or engaging in an unfair, deceptive or abusive act or practice under federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service. In this regard, the Bureau is authorized to prescribe rules applicable to a covered person or service provider identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service. Title X provides that the Bureau will have no authority to declare an act or practice in connection with a transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service, to be unlawful on the grounds that such act or practice is **unfair**, unless the Bureau has a reasonable basis to conclude that:

- The act or practice causes or is likely to cause substantial injury to consumers that is not reasonably avoidable by consumers; and
- Such substantial injury is not outweighed by countervailing benefits to consumers or to competition.

Additionally, Title X provides that the Bureau will have no authority to declare an act or practice **abusive** in connection with the provision of a consumer financial product or service, unless the act or practice:

- Materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
- Takes unreasonable advantage of:
  - A lack of understanding on the part of the consumer of the material risks, costs or conditions of the product or service;
  - The inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or
  - The reasonable reliance by the consumer on a covered person to act in the interests of the consumer.

Title X authorizes the Bureau to 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. Therefore, in prescribing rules for this purpose, the Bureau is required to consider available evidence about consumer awareness, understanding of, and responses to disclosures or communications about the risks, costs and benefits of consumer financial products or services.

Title X also grants the Bureau the power to institute civil investigations, demand documents and information, issue subpoenas, conduct hearings and adjudication proceedings, issue cease-and-desist orders and commence civil actions. In this regard, the Bureau may use its subpoena power to collect information regarding the business conduct and practices of covered persons. In an apparent effort to detect risks to consumers, the Bureau may require periodic reports from covered persons and may conduct examinations of covered persons to assess compliance with federal consumer financial laws. The Bureau's supervisory activities are to be coordinated with agency regulators and state bank-regulatory authorities and use existing reports to the fullest extent possible. Title X is silent with respect to private rights of action. In administrative proceedings brought thereunder, Title X authorizes the appropriate court or the Bureau to grant any appropriate legal or equitable relief with respect to a violation of federal consumer financial law, including:

- Rescission or reformation of contracts;

- Refund of moneys or return of real property;
- Restitution;
- Disgorgement or compensation for unjust enrichment;
- Payment of damages or other monetary relief;
- Public notification regarding the violation, including the costs of notification;
- Limits on the activities or functions of the person; and
- Civil money penalties, as specified in Title X, including a penalty of up to \$1 million for each day for which a knowing violation continues.

Notwithstanding these remedies, Title X provides that no exemplary or punitive damages will be available for violations of consumer financial law.

As a means of protecting employees who report violations of consumer financial laws by their employer, Title X provides that no covered person or service provider is permitted to terminate or in any other way discriminate against, or cause to be terminated or discriminated against, any covered employee or any authorized representative of a covered employee by reason of the fact that the employee or representative, whether at the initiative of the employee or in the ordinary course of the duties of the employee (or any person acting pursuant to a request of the employee), has:

- Provided, caused to be provided, or is about to provide or cause to be provided, information to the employer, the Bureau, or any other state, local or federal government authority or law enforcement agency relating to any violation of, or any act or omission that the employee *reasonably believes* to be a violation of, any provision of Title X or any other provision of law that is subject to the jurisdiction of the Bureau, or any rule, order, standard or prohibition prescribed by the Bureau;
- Testified or will testify in any proceeding resulting from the administration or enforcement of any provision of Title X or any other provision of law that is subject to the jurisdiction of the Bureau, or any rule, order, standard or prohibition prescribed by the Bureau;
- Filed, instituted or caused to be filed or instituted any proceeding under any federal consumer financial law; or
- Objected to, or refused to participate in, any activity, policy, practice or assigned task that the employee (or other such person) *reasonably believed* to be in violation of any law, rule, order, standard or prohibition, subject to the jurisdiction of, or enforceable by, the Bureau.

The Bureau is required to report to Congress on a semi-annual basis and provide Congress the following:

- A discussion of the significant problems faced by consumers in shopping for or obtaining consumer financial products or services;
- A list of the significant rules and orders adopted by the Bureau, as well as other significant initiatives conducted by the Bureau, during the preceding year and the plan of the Bureau for rules, orders or other initiatives to be undertaken during the upcoming period;
- An analysis of complaints about consumer financial products or services that the Bureau has received and collected during the preceding year;
- A list, with a brief statement of the issues, of the public supervisory and enforcement actions to which the Bureau was a party during the preceding year;

- The actions taken regarding rules, orders and supervisory actions with respect to covered persons that are not credit unions or depository institutions; and
- An analysis of the efforts of the Bureau to fulfill the fair lending mission of the Bureau.

Title X also charges the Bureau with adopting regulations to require that interchange fees charged or received by issuers of debit cards will be reasonable and proportional to the costs incurred by such issuers.

The Bureau is limited with regard to certain entities regulated by others, such as companies regulated by state insurance commissions. In addition, while subject to relevant Bureau regulations, certain merchants are exempt from the Bureau's supervision and enforcement.

Title X also mandates a large number of unrelated studies, including:

- The Department of the Treasury being tasked with a study to end the conservatorship of Fannie Mae and Freddie Mac;
- The Bureau conducting a number of studies relative to credit scores; and
- The U.S. Sentencing Commission reviewing the guidelines for securities fraud.

These studies indicate that the full scope of Title X is yet to be determined. The rules that are implemented and the reaction to the studies will clarify the full scope of Title X. However, it appears that Title X is likely to have a significant impact on covered industries.

## About Duane Morris

Duane Morris has an online **Financial Services Reform Center** – [www.duanemorris.com/FinancialReform](http://www.duanemorris.com/FinancialReform) – which includes videos and the firm's comprehensive series of *Alerts* analyzing the provisions of the Act and emerging policies, as well as links to relevant government websites. Duane Morris' attorneys will be monitoring the rules and regulations released under the Act, as well as the regulatory agencies' interpretive guidance. For [subsequent Alerts](#) on these and other topics, please revisit [www.duanemorris.com](http://www.duanemorris.com) and [www.duanemorris.com/FinancialReform](http://www.duanemorris.com/FinancialReform).

## For Further Information

If you have any questions about the Act or any of the topics described in this *Alert*, including how they may affect your company or its executives, please contact [Loren Schechter](#), [Justin Joseph D'Elia](#), any [member](#) of the [Corporate Practice Group](#) or the attorney in the firm with whom you are most regularly in contact.

*As required by United States Treasury Regulations, you should be aware that this communication is not intended by the sender to be used, and it cannot be used, for the purpose of avoiding penalties under United States federal tax laws.*