# NCSL 2010
# FALL FORUM

**Arizona Biltmore Hotel: December 9, 2010**

*Dodd-Frank: Who Won – Banks or Consumers?*


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# The Dodd-Frank Wall Street Reform and Consumer Protection Act

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Character comes through.

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# The Dodd-Frank Wall Street Reform and Consumer Protection Act

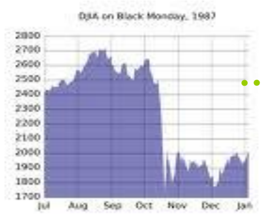
## Presentation Topics:

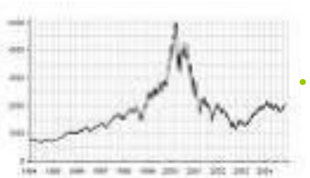
- ***How did we get here?***
- ***Overview of the Act***
- ***A Few Take-a-ways***

# How did we get here? A Brief History of U.S. Banking Regulation Reform

'29 Stock Market Crash and Great Depression; New Deal Reforms

Savings and Loan Crisis; 1987 – "Black Monday" Market Crash

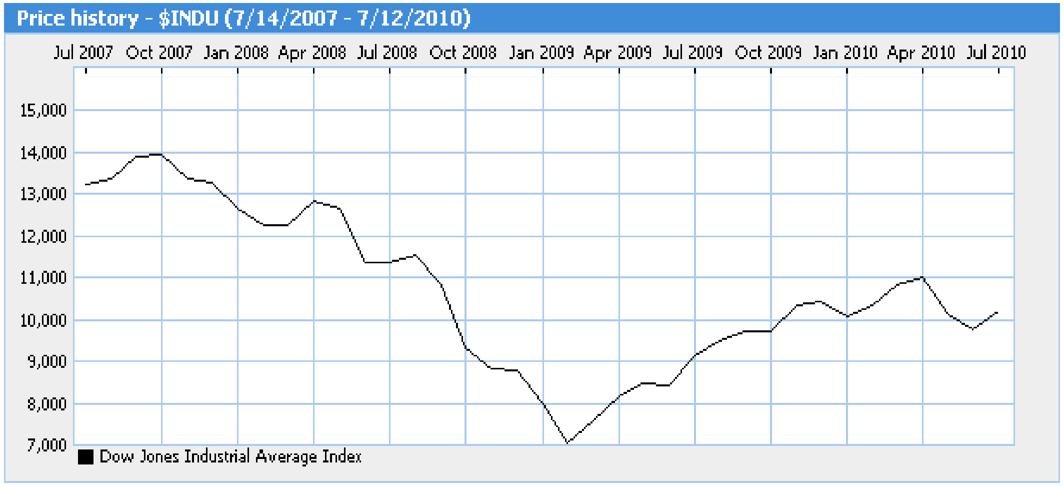


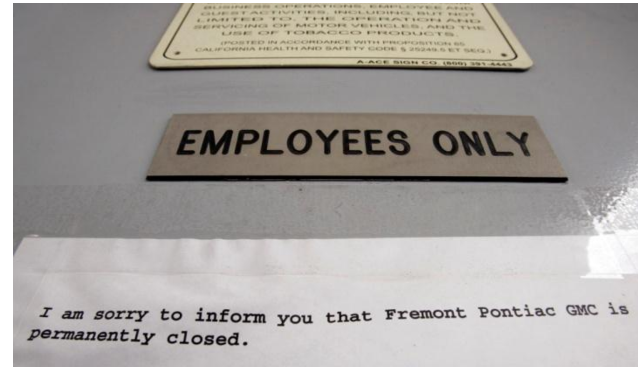



Dot Com Crash - 2000

- **1863** National Bank Act – Chartering of National Banks; National Currency
- **1913** Federal Reserve Act – Establishes the Federal Reserve System
- **1927** McFadden Pepper Act – Prohibited Interstate Banking
- **1933** Bank Act of 1933 (Glass – Steagall) – Establishes FDIC; Separates banking and investment banking
- **1956** Bank Holding Company Act
- **1956** Bank Merger Act
- **1980** Depository Institutions Deregulation and Monetary Control Act of 1980
- **1982** Garn – St. Germain Depository Institutions Act of 1982 – Deregulation of Thrifts
- **1989** Financial Institutions Reform, Recovery and Enforcement Act (FIRREA)
- **1991** FDIC Improvement Act
- **1994** Riegle-Neal Interstate Banking & Branching Efficiency Act
- **1999** Gramm-Leach-Bliley Financial Modernization Act
- **2002** Sarbanes – Oxley Accounting Standards Act of 2002
- **2004** Check 21
- **2006** FDIC Insurance Reform Act
- **2008** Emergency Economic Stabilization Act
- **2010** **Dodd-Frank Wall St. Reform and Consumer Protection Act**

## *How Did We Get Here? 2008–2010: Lead-up to a new regulatory environment*

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DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT

June 29, 2010.—Ordered to be printed

Mr. Frank, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H. R. 4173]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H. R. 4173), to provide for financial regulatory reform, to protect consumers and investors, to enhance Federal understanding of insurance issues, to regulate the over-the-counter derivatives markets, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate to the text of the bill and agree to the same with an amendment as follows:

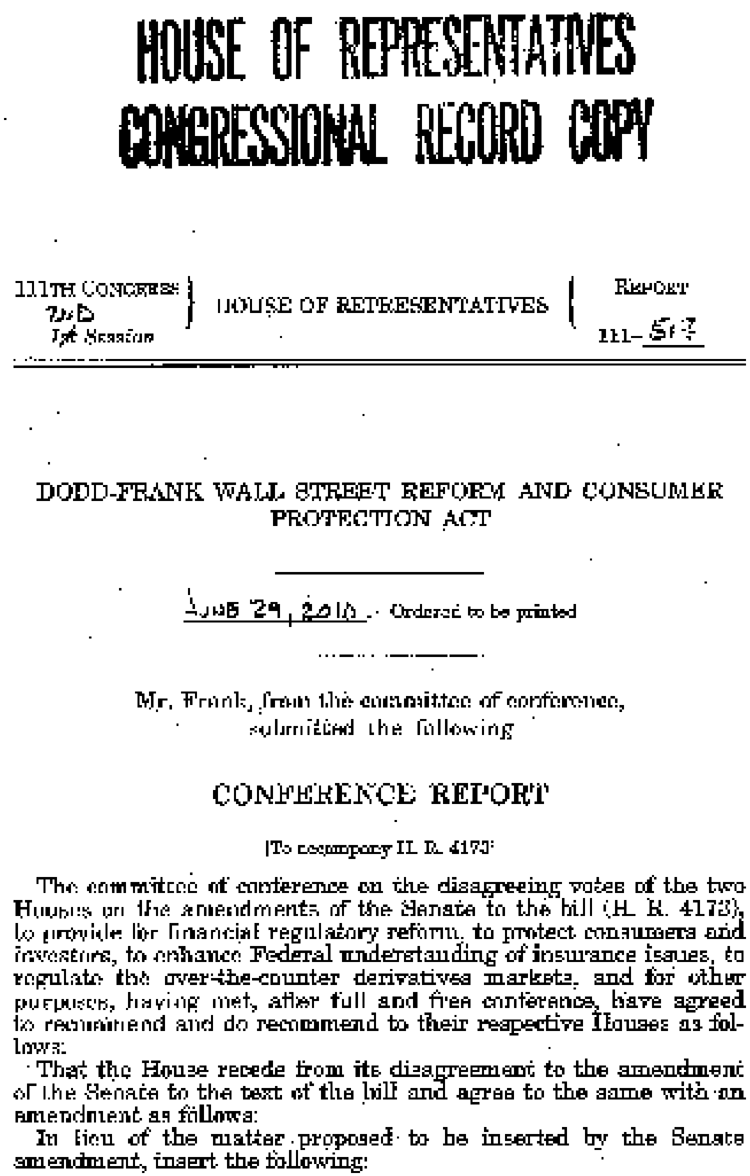
In lieu of the matter proposed to be inserted by the Senate amendment, insert the following:

## Overview of the Act: Legislative History

- Outcome of Congressional and Executive efforts beginning in Fall 2008 during height of financial crisis.
- House passed “Wall Street Reform and Consumer Protection Act of 2009” (H.R. 4173) December 2009.
- Senate passed “Restoring American Financial Stability Act of 2010” May 2010.
- Conference Committee then reconciled two bills into the “Dodd-Frank Wall Street Reform and Consumer Protection Act”
  - Approved by the House on June 30, 2010.
  - Approved 60 – 39 by Senate on July 15, 2010
- President Obama signed into law July 21, 2010 at Ronald Reagan Building ceremony.

# Overview of the Act:

- Immensely complicated
- 2,323 pages long
- Requires:
  - 243 rulemakings
  - 67 studies
- Multiple months or years of implementation activities depending on provision



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## Overview of the Act: Selected Commentary

- ***Commentator:*** "With the President's signature, the bill will mark the greatest legislative change to financial supervision since the 1930's."
- ***President Obama*** – "There will be no more tax-funded bailouts . . . Period. These reforms represent the strongest consumer financial protections in history."
- ***Senator Richard Shelby (R., Ala.)*** – "A 2,300 page legislative monster . . . that expands the scope and powers of ineffective bureaucracies."
- ***Harvey Pitt, former SEC chief –*** "It's likely to take a badly broken regulatory system and make it worse. This legislation fixes nothing, accomplishes nothing, yet promises everything."
- ***American Banker's Association –*** "The Dodd-Frank Act will dramatically and negatively affect ***all*** banks – ***large and small.***"

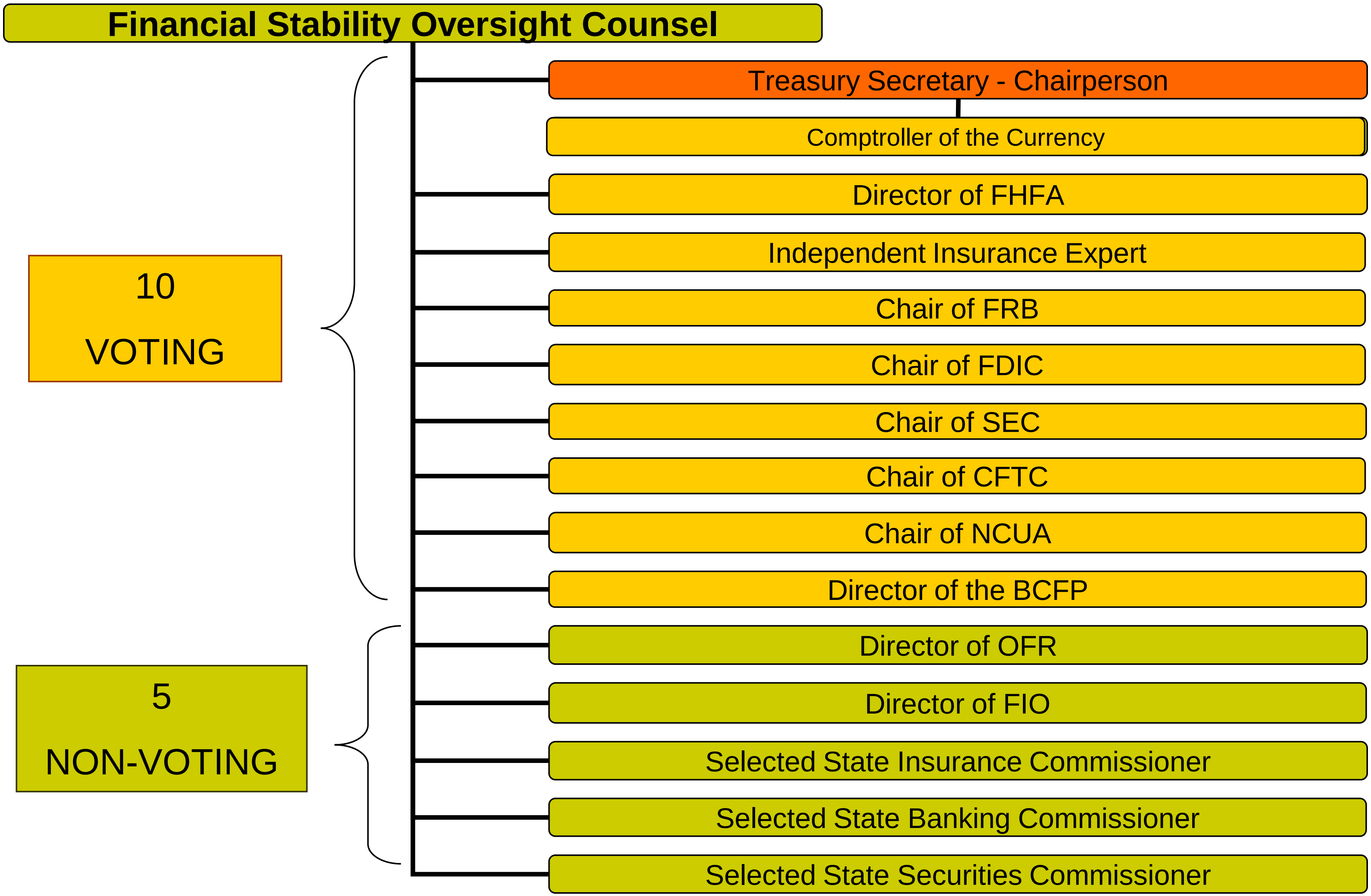
# Overview of the Act: Key Provisions and Impacts

- TITLE I – Financial Stability
- TITLE II – Orderly Liquidation Authority
- TITLE III – Transfer Of Powers To The OCC, The FDIC and the FRB
- TITLE IV – Regulation of Advisers to Hedge Funds and Others
- TITLE V – Insurance
- TITLE VI – Improvements to the Regulation of Bank and Savings Association Holding Companies and Depository Institutions
- TITLE VII – Wall Street Transparency and Accountability
- TITLE VIII – Payment, Clearing, and Settlement Supervision
- TITLE IX – Investor Protections and Improvements to the Regulation of Securities
- TITLE X – Bureau of Consumer Financial Protection
- TITLE XI – Federal Reserve System Provisions
- TITLE XII – Improving Access to Mainstream Financial Institutions
- TITLE XIII – Pay It Back Act
- TITLE XIV – Mortgage Reform and Anti-Predatory Lending Act
- TITLE XV – Miscellaneous Provisions

# Overview of the Act: *The FSOC*

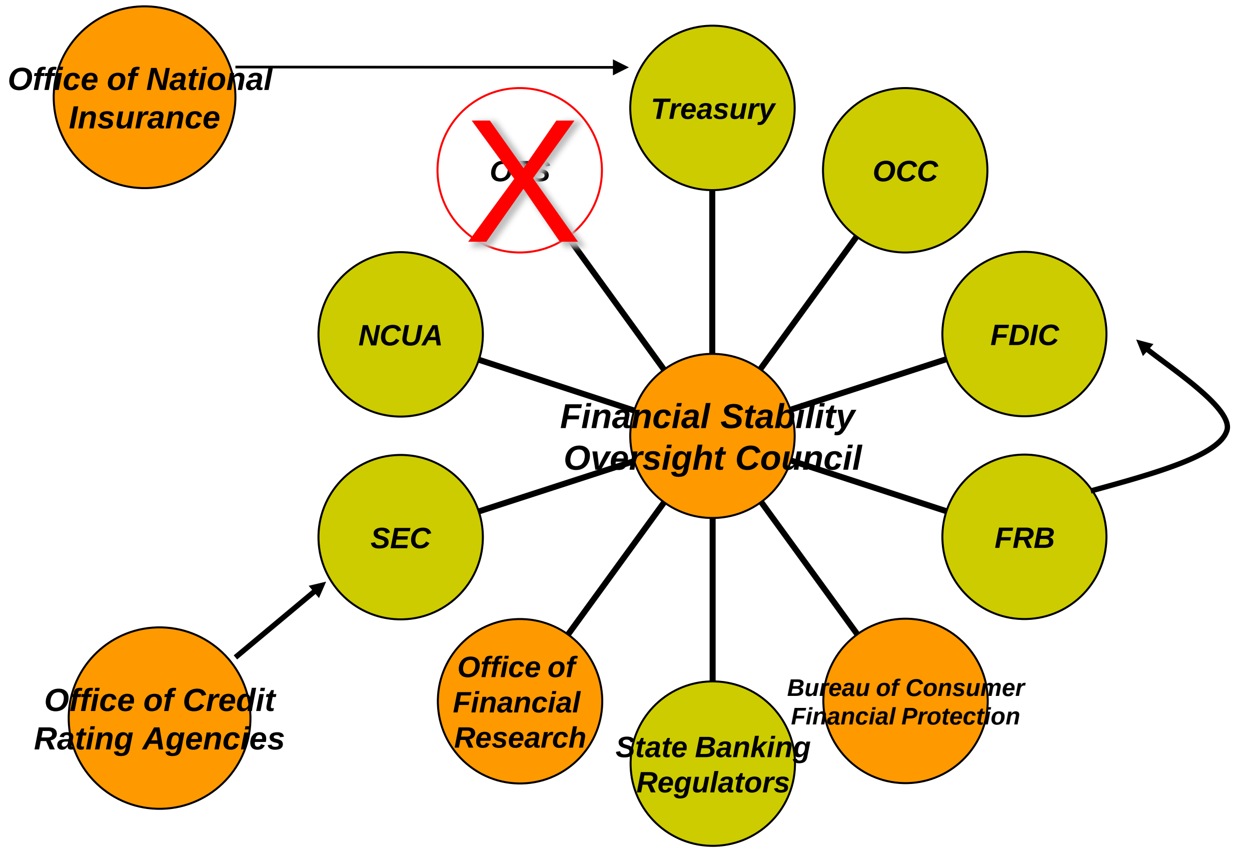
- Establishes the "***Financial Stability Oversight Council***":
  - Inter-agency body responsible for monitoring the activities of the financial system and recommending a framework for ***increased*** regulation;
  - Consists of 15 Members (10 voting): Treasury Secretary (who is chairman), the heads of the Federal Reserve, OCC, Consumer Protection Bureau, SEC, FDIC, CFTC, FHFA, NCUA and independent insurance expert.
  - Purpose: Monitor and identify risks to U.S. financial stability; facilitate information sharing between agencies.
  - Power to require reports from **ANY** financial company to assess threats to U.S. financial stability from an activity, market or the company itself.
  - Power to subject a U.S. nonbank financial company to FRB supervision and to "***prudential standards***" if determines by 2/3 vote that "material financial distress" at the company, or the "nature, scope, size, scale, concentration, interconnectedness, or mix of the activities" could pose a threat to U.S. financial stability.
  - Power to conduct research and reports through newly formed "Office of Financial Research"

# Overview of the Act: *The FSOC*



# Overview of the Act: *The FSOC*

***New shape of "Alphabet Soup" Financial Regulatory Agencies***




***Takeaway***: New regulatory authority focusing on "systemic risk". Will influence regulatory focus.

## *Overview of the Act: New FDIC Powers: Orderly Liquidation Authority (Title II):*

- **"Too big to fail?"** – Congress says, "not any more" and we'll help you do it.
- **Purpose**: eliminate taxpayer bailouts of companies that are "*too big to fail*"; Ensure: (i) private sector (creditors and shareholders) bear the cost of the proceeding; (ii) management is removed; and (iii) the responsible parties are held accountable.
- **Authority:** Grants FDIC authority to conduct orderly liquidation of such companies if determined to pose a "*systemic risk*".
- **Methodology:** Based on Section 11 and 13 of the FDIA, with a few bankruptcy code creditor's rights concepts thrown in.

***<u>4th and 8 game-on-the-line play?</u> – Expected that this authority will be used in very limited circumstances with the Bankruptcy Code remaining the "strong presumption" primary mechanism for resolving non-bank financial companies in financial distress.***

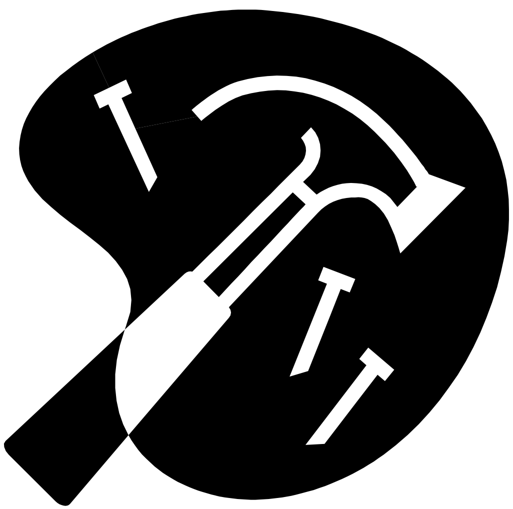
# Overview of the Act: *The Consumer Financial Protection Bureau (BCFP) (Title X):*

- **FRB:** New division within (although largely independent from) FRB.
- **Consolidated Power:** Consolidates consumer protection to one agency.
- **Goal*:*** Implement and enforce federal consumer financial protection laws ***consistently*** in order to ensure that consumers have ***access*** to the markets and that the markets are ***"fair, transparent, and competitive."***
- **Three Specific Units**: (i) research; (ii) community affairs; and (iii) collecting and tracking complaints. To also include divisions for Fair Lending and Equal Opportunity, Financial Education, and Financial Protection for Older Americans.
- **Director??:** Elizabeth Warren, appointed *"special advisor",* September 17, 2010:

  - Leo Gottlieb Professor of Law at Harvard Law School;
  - Long-time advocate of consumer protection agency; and
  - Special advisor doesn't require Senate confirmation.

# Title X: *Consumer Financial Protection and the (CFPB)*

- **Broad Authority:** Broad ***rulemaking***, ***investigative*** and ***enforcement*** authority over "*any person that engages in the offering or providing of a "financial product or service" and any affiliate of such person,"* and to prohibit practices it finds to be "*unfair*, *deceptive* or *abusive*":
    - Limited examination authority over depository institutions < $10B assets;



# Overview of the Act: *The Consumer Financial Protection Bureau (BCFP) (Title X):*

- **“Financial Product or Service”, includes:**
  - Lending and servicing loans;
  - Extending or brokering leases of real or personal property;
  - Deposit taking activities;
  - Providing real estate settlement services;
  - Selling, providing, or issuing stored value or payment instruments;
  - Check cashing;
  - Providing payment or financial data processing services;
  - Providing financial advisory services;
  - Collecting, providing, analyzing or maintaining consumer report information;
  - Debt collection; and
  - Any other financial product or service defined by regulation.
- **Exempt:**
  - Entities regulated by SEC, state insurance regulators, etc.
  - Merchants, retailers and other sellers of non-financial goods and services;
  - Motor vehicle dealers;
  - Attorneys <u>engaged in the practice of law</u>;
  - Employee benefit plans;
  - Consumer reporting agencies;
  - Charitable contributions; and
  - Real estate brokerages.

# Title X: *Consumer Financial Protection and the (CFPB)*

- **BCFP Exclusive Rulemaking Authority:**
  - EFTA; ECOA; FCRA; FDCPA; GLB Privacy; HMDA; RESPA; SAFE Act; TILA; TISA;
  - Unfair, Deceptive, or ***Abusive*** Acts or Practices

- **Federal Preemption/State AG Enforcement:** Reduces federal preemption of state consumer financial laws (not including exportation of interest rates and fees). Preemption only on case-by-case basis after OCC consultation with BCFP, and substantial evidence that:
  - Discriminatory effect on banks;
  - State law prevents or significantly interferes with the exercise of the bank of its banking powers (*Barnett Bank of Marion County, N.A. v. Nelson,* 517 U.S. 25 (1996)); and
  - Actual preemption by federal law.
  - *A state consumer protection law deemed not to conflict with a federal law simply because it offers consumer greater protection.*

- **TILA:** Increased exemption threshold for non-RE consumer loans from $25,000 to $50,000.

# Title III: *Deposit Insurance Changes*

- **Deposit Insurance:** Permanently increased to $250,000.
- **Non-Interest Bearing Accounts:** Extended full insurance coverage to non-interest transaction accounts until December 31, 2012.
- **Assessment Base:** Changed from deposit base to “average consolidated total assets” <u>minus</u> “average tangible equity”. Benefits community banks since assessment includes more large bank assets. *How will market forces impact deposit rates?*
  - In setting bank assessments, FDIC instructed to “offset” effect on institutions with >$15 billion in consolidated assets.
- **FDIC Reserve Ratio:**
  - No longer capped at 1.5%;
  - Eliminated FDIC refund requirement for excess funds;
  - Requires FDIC to take steps to raise the deposit insurance reserve ratio from 1.15% to 1.35% before September 30, 2020. FDIC mandated to look to larger institutions to fund increase.

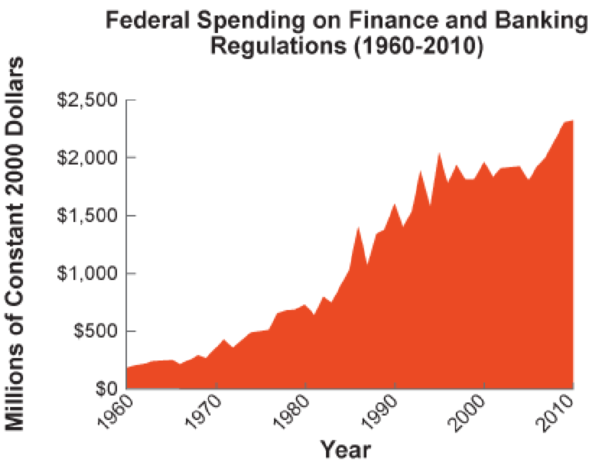
***Takeaways*:** Community Banks may be break on assessment expenses; Deposit insurance changes to help traditional community bank customers.

# *Other Notable Consumer Provisions:*

- ***De Novo* Interstate Branching** – allows national and foreign state banks to establish branches in any other state where a resident state charted bank would be permitted to establish a branch.
- **“Source of Strength” Rule** – Each holding company required to serve as a “source of strength” for any subsidiary depository institutions.
- **Debit Interchange Fees:** Limits interchange fees to a reasonable amount to be established by regulation, but exempts banks <$10B assets. *Hollow exemption – market forces?*
- **Non-Banks; IB’s:** 3-year Moratorium on the establishment or acquisition of industrial banks and other “nonbank banks”.
- **Mortgage Reform and Anti-Predatory Lending Act:**
  - Origination Standards for Mortgage Loans – Duty of Care; licensing;
  - Ability to Repay – No creditor may make a residential mortgage loan without making a reasonable and good faith determination that the consumer has the reasonable ability to repay the loan;
  - Prohibits lenders from making a higher-cost mortgage without written appraisal.
  - Establishes enforceable federal appraisal independence standards.

# The Dodd-Frank Wall Street Reform and Consumer Protection Act: *Some General Takeaways*

- Still a lot of unknowns – waiting on rulemaking;
- Large banks and financial companies were biggest target;
- Expect increase in regulatory fees and spending;
- Continued Increased capital scrutiny and standards;
- Increased reporting and compliance costs
- More enforcement power to States




*Source: Weidenbaum Center, Washington University and Mercatus Center, George Mason University. Author's calculations derived from appendices to the budget of the United States and related documents, various fiscal years.*

# Questions