

ABA Section of Real Property, Trust & Estate Law  
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1000 H Street NW  
Washington D.C. 20001

## “You've got a friend”

(With apologies to James Taylor)

Or

## The Friendly Side of the Social Network

By

Daniel J. Homick

- “Winter, spring, summer, or fall, all you have to do is [click], and I’ll be there.”

*Social media is not a fad; it is a new way of communicating that attorneys need to master. First generation static web pages and emails are being supplemented or replaced entirely by interactive Web 2.0 technology. Video gaming may not be of interest to you, but its programming has carried over to the web. Multiple 360 degree photos of real estate, today’s cutting edge for Realtor web pages for example, will be replaced by a virtual walk through of a property similar to that of today’s video war game. Paperless land surveys and title exceptions will be a click away and tied to photos, allowing simultaneous comments from several sources and saving time and money for real estate attorneys. Trust and estate work will increasingly include online assets. A brief review of our Section’s social media pages and what has been posted by our members already reflects how dynamic Web 2.0 is.*

Today’s web is interactive. It is fast. It is visual. It is mobile and most importantly it “talks” to you. In short, it is social. “Friending,” networking, following, updating, micro-blogging, commenting, and sharing photos and videos has replaced conventional facsimile transmissions, list serves, chat rooms, voice mail and email. If your practice is not changing to reflect this, clients that prefer turning to the internet for information will not find you. Last year Facebook, for example, toppled Google as the world’s most popular web page. For many, Facebook is their home page of choice and Facebook and Twitter are clearly preferred over email. LinkedIn has

become the darling of head hunters for leads within a targeted company. Hard to find “inside” information is suddenly available. Is the social media an effective tool of communication? Just ask a dictator from Tunisia, Egypt or Libya. It is a communication revolution with powerful overtones for every aspect of society. It is sweeping the world.

- “You just call out my name, and you know where ever I am, I’ll come running...”

*Martindale’s Connected has a data base of over one million legal professionals throughout the world; LinkedIn, our Section’s most popular site, has over 90 million business professionals and one million attorneys. Facebook has grown from 175 million users in 2009, to over 500 million users in 2010 and claims it will reach over one billion users by the end of 2011. Regardless, all three networks are expected to grow exponentially for the remainder of this decade. Why join? Ask the Queen. Last year Queen Elizabeth II joined Facebook. It was not for social purposes but to help shape her “online brand.” Many major companies have staff whose sole job is to monitor and respond to what is being said online. Protecting your image online is a new business strategy that attorneys need to master.*

- “They’ll hurt you and desert you. Well they’ll take your soul if you let them.”

*As attractive a communication tool as these social media sites may be, attorneys are subject to the same rules as before regarding the practice of law and the marketing of their profession. The social network is a new media, not an excuse to break these tested rules. Before you do anything online, check with your state bar regulators as to what is allowed. Clients also need to know that regardless of what they may have heard, nothing is truly private on the web. Everything is subject to eDiscovery. The web has little or no privacy. It is easy to make a high profile mistake. It is less personal and it is less targeted.*

- “...And soon I will be knocking upon your door.”

*Web 2.0 is now in the process of being replaced by Web 3.0 and will dramatically change our use of the Internet in the future. Broadband voice, video and information over wires, satellite and newly available “white space” airwaves as a result of the*

*changeover from analog to digital TV will transform instant messaging, searching and surveillance on the web.*

The third generation web will find you when you go online! Advertising will be highly targeted. Previous searches will generate more “suggestions.” The battle lines are already drawn. Microsoft (Bing), Google (Chrome, Android and Google TV), Apple (iPhone, iPad and Apple TV) and Facebook all want to change the web to their advantage. Lawyers will need to adapt quickly to stay ahead of this new technology.

- “Ain't it good to know you've got a friend.”

*Clients routinely use Google, Bing and Yahoo to learn more about the attorneys they intend to hire. What will they learn about you? Have you “Goggled” your name recently? Do you use Google Alert? There is no better time than now to review your “online brand” and to improve it by posting a profile you control on appropriate social network sites and by joining our Section on its Connected, LinkedIn and Facebook pages.*

Our Section has established itself on three of the most popular social network sites for attorneys. This is an excellent mix of professional, business and personal social media sites for your consideration. Joining one of our group pages on Connected or LinkedIn or listing our Section as a “fan” of yours on Facebook clearly establishes for millions of potential clients and other attorneys your interest in real property, trust and estate law. In addition, Martindale’s Connected is the perfect place for sharing ideas among peers and asking for their suggestions in an online environment with many built-in safeguards for legal professionals. It is also a good place for referrals and to connect with in-house counsel. LinkedIn on the other hand is ideal for researching companies and reaching out to business professionals as well as establishing a cost efficient, increased visibility personal profile that can easily be tied to your firm’s web page. Facebook rounds off your online persona with personal information about your family, hobbies and other interests with information that is within your control. It puts a friendly, less formal, face on your “personal brand” or public image that you have created online. LinkedIn and Facebook also increase your personal search engine rank, especially if you regularly post comments, discussions, questions and news items that are also tied to your web page or blog. Search Engine Optimization or SEO is easy when you have a LinkedIn or Facebook page. LinkedIn and Facebook profiles usually appear in the top three search engine hits for your name.

For our Section, our social media sites are also a low cost way to attract new members, increase our Section's visibility (including the work of our committees), promote our publications and CLE events, open some of our benefits to the public, and preserve our work. It is also an excellent tool to expand our diversity efforts and to attract new corporate sponsors. Social media is here to stay; use it effectively.

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

*Presentation to the ABA Section of  
Real Property, Trust and Estate Law*

*April 2011*

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**Snell & Wilmer**

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**A Brief History of U.S. Banking Regulation Reform**

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
2006	FDIC Insurance Reform Act
2008	Emergency Economic Stabilization Act
2010	<b>Dodd-Frank Wall St. Reform and Consumer Protection Act</b>

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**S&W** **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"**.
- Power to conduct research and reports through newly formed "Office of Financial Research".

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**S&W** **The FSOC: Members**

**Financial Stability Oversight Council**

**10 VOTING**

- Treasury Secretary - Chairperson
- Comptroller of the Currency
- Director of FHFA
- Independent Insurance Expert
- Chair of FRB
- Chair of FDIC
- Chair of SEC
- Chair of CFTC
- Chair of NCUA
- Director of the BCFP
- Director of OFR

**5 NON-VOTING**

- Director of FIO
- Selected State Insurance Commissioner
- Selected State Banking Commissioner
- Selected State Securities Commissioner

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**S&W** **The FSOC: Regulators**

<u>Type of Financial Institution</u>	<u>Primary Federal Regulator Under New Regime</u>
Bank Holding Companies	Federal Reserve (no change)
Financial Holding Companies	Federal Reserve (no change)
Thrift Holding Companies	Federal Reserve (no change)
National Banks	OCC (no change)
Federally Chartered Thrifts	OCC (change from eliminated OTS)
State-Chartered Member Banks	Federal Reserve (no change)
FDIC-Insured State-Chartered Non-Member Banks	FDIC (no change)
FDIC-Insured State-Chartered Thrifts	FDIC (no change)
Federal Credit Unions	NCUA (no change)
FDIC-Insured State-Chartered Credit Unions	NCUA (no change)
Fannie Mae, Freddie Mac, & FHLB's	FHFA (no change)

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

The diagram illustrates the 'Alphabet Soup' of financial regulatory agencies. At the center is the **Financial Stability Oversight Council**. Surrounding it are the following agencies: **Treasury**, **OCC**, **FDIC**, **FRB**, **Bureau of Consumer Financial Protection**, **State Banking Regulators**, **Office of Financial Research**, **Office of Credit Rating Agencies**, **SEC**, and **NCUA**. The **Office of National Insurance** is shown with a red 'X' over it, indicating its removal or restructuring.

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**The Volcker Rule**

Prohibits all "banking entities" from (1) *proprietary trading* and (2) engaging in certain *hedge fund and private equity activities*.

- Purpose:** Addresses concerns that banks have moved too far beyond traditional banking into other business lines that present undesirable risk.
- Exclusions:**
  - Transactions in US government securities
  - Customer transactions
  - Transactions in connection with underwriting or market making
  - Bona fide risk-mitigating or hedging
  - Buying/Selling securities in context of insurance business
  - Certain De Minimis Investments in bank organized and offered funds
- Timing:** Earlier of 12-months after final rules or 2-years after enactment.
- Coverage:**
  - Depository Institutions (except those engaged solely in trust activities) and its affiliates and subsidiaries
  - Bank and thrift holding companies
  - Certain US branches of foreign banks

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**The Collins Amendment**

**Risk-Based Capital and Leverage Limits: Creates new capital maintenance standards for all depository institutions, holding companies and "systemic" non-banks.**

- Requires regulators to adopt the same minimum capital requirements for depository institutions and holding companies based on FDIC's "prompt corrective action" minimum capital requirements.
- Regulators expected to require increased capital for riskier activities.
- BHC's must exclude trust preferred securities from Tier 1 capital.
  - BHC with <\$15 billion assets grandfathered for preferred securities issued before May 19, 2010.
  - BHC >\$15 billion have 5-years to comply.
- Purpose:** Eliminate, or at least reduce, the use of hybrid capital instruments to comply with regulatory requirements.

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**S&W** **Other Key Banking Provisions**

1. Permanent increase in FDIC Insurance coverage to \$250,000.
2. Extension of Full FDIC Insurance Coverage to Noninterest-Bearing Transaction Accounts until December 31, 2012.
3. *De Novo* Interstate Branching – elimination of the requirement that a state expressly “opt-in” to *de novo* branching. Under new law, federal regulators are authorized to approve applications for *de novo* interstate branches of national banks and state banks if under the law of the state in which the branch is to be located, a state bank chartered by that state would be permitted to establish the branch.
4. “Source of Strength” rule – Each holding company required to serve as a “source of strength” for any subsidiary depository institutions.
5. Authorization of Commercial Interest-Bearing Transaction Accounts.
6. 23A and 23B – “Covered Transactions” Rule tightened.
7. 3-year moratorium on the establishment or acquisition of industrial banks and other “nonbank banks”. GAO required to complete study of IB’s within 18 months.

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**S&W** **Other Key Provisions**

**Securitization “Skin-in-the-Game” Requirements:**  
 requires originators of asset-backed securities to retain an economic interest in the credit risk (generally 5%) (“qualified residential mortgages” excepted).

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**S&W** **Regulation of Non-Bank Financial Companies**

**A non-bank financial company is any company “predominantly engaged” in financial activities.**

1. 85% of annual gross revenues/assets represented by activities that are financial in nature.
2. Financial activities include:
  - Lending
  - Advisory services
  - Underwriting
  - Ownership of an insured depository
3. FSOC after 2/3 vote (including vote of the Treasury Secretary) may designate a financial company a “systemically significant financial institution” (“SSFI”).
  - BHC’s with at least \$50 billion in assets automatically considered as SSFIs.
  - Certain factors must be considered: e.g., leverage; off balance sheet liabilities; transactions with other banks and nonbank financial companies, amount and nature of activities, extent to which it is an available source of credit.
  - The company is entitled to an administrative hearing.
  - Once designated as SSFI there is a right to judicial review but the standard is “arbitrary and capricious”.
4. The FRB may implement “prudential standards” applicable to supervised nonbank financial companies:
  - Capital; leverage; concentration limits; public disclosures; short term debt limits
  - SSFI’s may be required to submit Resolution Plans (“Living Wills”)

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**S&W** **Orderly Liquidation**

1. New process to handle insolvency and liquidation of qualifying financial companies.
2. Treasury Secretary has authority to appoint FDIC as receiver if certain conditions are met.
3. Financial Companies:
  - BHC
  - Non-Bank SSFI's
  - Companies predominately engaged in activities that are financial in nature and subsidiaries.
4. To be subject to receivership and resolution. The relevant banking authorities must first determine if it poses systemic risk.

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**S&W** **Orderly Liquidation (cont'd)**

5. To trigger orderly liquidation authority requires 2/3rds vote of Fed, 2/3rds vote of FDIC, determination by Treasury Secretary and judicial determination.
6. Once determination is made, liquidation is the only option. No taxpayer funds – cost of liquidation borne by state or financial sector.
7. Practical implications – how much will this remedy of last resort be used?

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**S&W** **Consumer Financial Protection Act**

1. Consumer Financial Protection Act of 2010 ("CFPA") is Title X of the Dodd-Frank Act.
2. The CFPA attempts to strengthen protections for consumers in financial transactions, and, among other things, creates the Bureau of Consumer Financial Protection to oversee the rules for virtually all federal consumer financial laws.

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**S&W** **Designated Transfer Date**

Many of the major items under the CFPA are to take effect on the “Designated Transfer Date” which the Treasury Secretary was required to determine.

It is currently set to occur on July 21, 2011, but can be extended to January 2012.

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**S&W** **Bureau of Consumer Financial Protection**

1. Bureau of Consumer Financial Protection (“BCFP”) is housed within the Federal Reserve System and is funded by it.
2. BCFP’s purpose is to regulate the offering and provision of consumer financial products and services under the federal consumer financial laws.
3. The Director of the BCFP is the head of the Bureau.
  - Director is appointed by the President with the consent of the Senate
  - Director serves for a term of 5 years
  - Director can only be removed by the President for “cause” (i.e., inefficiency, neglect of duty, or malfeasance)

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**S&W** **Powers of the BCFP**

1. The BCFP will have almost exclusive authority to issue and implement rules and regulations regarding federal consumer financial laws.
2. The only exception being that the Federal Trade Commission will retain its authority to implement the Federal Trade Commission Act.

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**S&W** **Federal Consumer Financial Laws**

- Alternative Mortgage Transaction Parity Act
- Consumer Leasing Act of 1976
- Electronic Funds Transfer Act
- Equal Credit Opportunity Act
- Fair Credit Billing Act
- Fair Credit Reporting Act
- Home Owners Protection Act of 1998
- Fair Debt Collection Practices Act
- Portions of the Federal Deposit Insurance Act
- Portions of the Gramm-Leach-Bliley Act
- Home Mortgage Disclosure Act
- Home Ownership and Equity Protection Act of 1994
- Real Estate Settlement Procedures Act of 1974
- Truth in Lending Act
- Truth in Savings Act
- Interstate Land Sales Full Disclosure Act

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**S&W** **Federal Agencies Transferring Rule-Making Authority Relating to Consumer Financial Laws**

- Federal Reserve
- Comptroller of the Currency
- Office of Thrift Supervision
- FDIC
- Federal Trade Commission (FTC will still have some authority under the Federal Trade Commission Act)
- National Credit Union Administration
- Dept. of Housing and Urban Development
- Transfer of authority is effective upon the Designated Transfer Date
- Employees from the various agencies will also be transferred to BCFP within 90 days of the Designated Transfer Date

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**S&W** **Powers/Enforcement Actions**

The BCFP has authority to proceed with enforcement actions and create rules to prohibit unfair, deceptive or abusive acts or practices by "covered persons" and "service providers".

- *What is a "covered person"?*
  - Any person that offers or provides a consumer financial product or service;
  - Any affiliate of such person that acts as a "service provider" to such covered person;
  - Certain "related persons" to a "covered person" including directors, officers, controlling shareholders and some independent contractors (but excluding those associated with a depository institution or bank holding company).

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**S&W** **Powers/Enforcement Actions (cont'd)**

"Service Provider" is any person that provides a material service in connection with a covered person's offering of a consumer financial product or service, including

- A person that participates in designing, operating or maintaining a consumer financial product or service, or
- A person that processes transactions relating to a consumer financial product or service (except for unknowing or incidental transmission or processing of data that isn't differentiated from any other data transmitted or processed by that person).
- "Service Provider" excludes someone that provides ministerial or business services, or time or space for an advertisement for a consumer financial product or service through print or electronic media.

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**S&W** **New Regulations Required for the BCFP**

**New Model Disclosures**

- BCFP required to issue new combined model disclosure for RESPA and Truth in Lending for mortgage loans within one year after the Designated Transfer Date.
- BCFP also to permit institutions to operate limited test disclosure programs, in order to improve upon the disclosures recommended by the BCFP.

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**S&W** **New Regulations Required for the BCFP (cont'd)**

1. Information Regarding Financial Products and Services
  - BCFP to issue rules regarding a "covered person" providing information regarding consumer financial products or services.
2. Arbitration Clauses
  - BCFP required to conduct a study of arbitration clauses in consumer financial products of services, and issue regulations regarding the use of such procedures.
  - Any rules and requirements presented by BCFP will not affect an agreement entered into within 180 days after the rules become effective.
3. Financial Stability Oversight Council has power to veto BCFP regulations.

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**S&W** **Prohibited Acts**

1. The Dodd-Frank Act makes it unlawful for any covered person or service provider to:
  - Offer or provide a consumer a financial product or service that does not conform with federal consumer financial laws, or otherwise violates such laws.
  - Engage in any unfair, deceptive or abusive act or practice.
  - Refuse or fail to provide BCFP access to information required under federal consumer laws or regulations.
2. Also unlawful for any person to knowingly or recklessly provide substantial assistance to a covered person or service provider in violation of federal law or regulations.

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**S&W** **BCFP Supervision and Enforcement of Consumer Financial laws for Depositories**

The BCFP's regulatory authority is different for "Very Large" and "Other" Insured Depositories.

- "Very Large" Depositories are insured banks, thrifts and credit unions with total assets of more than \$10 billion, and any affiliates.
- "Other" Depositories are insured banks, thrifts and credit unions with total assets of \$10 billion or less.

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**S&W** **Supervision of Very Large Insured Depositories**

1. The BCFP has *exclusive supervisory* authority over Very Large Depositories with respect to federal consumer financial laws.
  - The BCFP is the only agency that can require reports and conduct examinations of these depositories to assess compliance with federal consumer financial laws and risks posed to consumers and financial markets for consumer financial products and markets.
2. Coordination of Supervision over Very Large Depositories
  - The BCFP needs to coordinate with institution's prudential regulator to minimize regulatory burdens.
  - The BCFP to attempt to schedule simultaneous examinations with an institution's federal prudential regulator, and to share drafts of reports.
  - The BCFP also attempts to coordinate with state regulators.
  - If the BCFP and prudential regulator can't agree on a joint report, then the depository can appeal to a three member panel to reconcile. The panel will be made up of one representative from BCFP, one from depository's prudential regulator, and one from another prudential regulator.

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**S&W**

**Enforcement of Consumer Financial Laws for Very Large Insured Depositories**

- The BCFP has **primary enforcement** authority (but not the exclusive enforcement authority) over Very Large Depositories with respect to federal consumer financial laws.
- Service Providers to a Very Large Depository are also subject to the BCFP's authority.
- An institution's prudential regulator is the backup enforcement authority. It can recommend the BCFP take an enforcement action. If the BCFP doesn't take action in 120 days, the prudential regulator can bring action.

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**S&W**

**Regulation of "Other" Insured Depositories**

1. "Other" Depository is an insured bank, thrift or credit union with total assets of \$10 billion or less.
2. The BCFP has less authority and responsibility to regulate smaller depositories.
3. The BCFP can require reports from institutions to support its role in implementing consumer financial laws and assess risks to markets.
  - But is required to rely in large part upon publicly available information and reports from institutions provided to federal or state regulators.
4. The BCFP can have its examiners go with institution's prudential regulator to conduct examinations on a sampling basis.

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**Regulation of "Other" Insured Depositories (cont'd)**

1. An "Other" Depository's prudential regulator has **exclusive enforcement authority** for federal consumer financial laws.
2. The BCFP does not have enforcement authority against "Other" Depositories.
  - If the BCFP believes the depository violated federal consumer financial protection law, then it can recommend a course of action to prudential regulator. Prudential regulator must respond to the BCFP within 60 days.
3. A "Service Provider" to a substantial number of "Other" Depositories is subject to BCFP's authority as if it were a Service Provider to a "Very Large" Depository.

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## Regulation of Non-Depository Covered Persons

- The BCFP has supervision authority over a "covered person" (excluding Insured Depositories) that:
  - Offers or provides origination, brokerage or servicing of consumer real estate loans, or loan modification or foreclosure relief services for such loans.
  - Is a larger participant in a market for consumer financial products or services.
  - BCFP determines that person has engaged in conduct that posed risks to consumers in connection with financial products or services.
  - Offers or provides private education loans to consumers.
  - Offers or provides to a consumer a payday loan.
- The BCFP to issue regulations on which "covered persons" fall within these categories within one year of the Designated Transfer Date.

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## Regulation of Non-Depository Covered Persons (cont'd)

- The BCFP will have **exclusive enforcement authority** relative to other federal agencies, to enforce consumer financial laws against non-depository covered persons.
- The BCFP is required to coordinate with the FTC regarding enforcement actions.
- Service Providers to "covered persons" are also subject to enforcement actions.

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## Exclusions from Regulation

- Certain companies are excluded from oversight from the BCFP (to the extent they are providing typical services and not providing a consumer financial service or product).
  - Merchants and retailers
    - If offering financial product or service, it must be provided directly to a consumer to allow for the purchase of a non-financial good or service
    - Cannot be a significant provider of consumer financial products
  - Real Estate Brokers/Real Estate Agents
  - Manufactured/Modular Home Retailers
  - Accountants
  - Attorneys
  - Persons regulated by a State Insurance Regulator
  - Employee Benefit Plans
  - Persons regulated by SEC Commodity Futures Trading Commission, Farm Credit Administration, or State Securities Authorities
  - Charities
- Auto Dealers explicitly are not regulated by the BCFP. Instead, they are regulated by the FTC.

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**S&W** **Effect on State Law**

1. Dodd-Frank Act does not preempt state law as long as state law does not conflict with federal law and regulations.
2. If state law provides greater protection to consumers than federal law, the state law will be deemed to not conflict with federal law. In other words, a state law is not preempted solely because it is more restrictive than federal law.
3. If a federal law (other than National Bank Act) states that it preempts state law, then state law will be preempted.
4. Dodd-Frank Act also gives states the ability to initiate a new federal rule by the BCFP. If a majority of states enact resolutions supporting a new regulation or amendments to existing regulations, the BCFP will issue a notice of proposed rulemaking, but must consider effects on consumers and the markets in adopting the rule.
5. This becomes effective on the Designated Transfer Date.

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**S&W** **Effect on State Laws (cont'd)**

7. Preemption for National Banks and Federal Thrifts
  - Previously, non-depository subsidiaries of national banks and federal thrifts were shielded from state laws under preemption rules that affected national banks.
  - The Dodd-Frank Act provides that subsidiaries and affiliates of national banks and thrifts can not claim national bank and thrift preemption rules shield them from state consumer financial laws.
  - State consumer financial laws will also apply to national banks and thrifts unless any of the following criteria is present:
    - State law would have a discriminatory effect on national banks.
    - State law meaningfully interferes with the ability of national banks to engage in the "business of banking" as set out in the *Barnett Bank v. Nelson* case.
      - Either a court judgment or the Comptroller of the Currency must make this determination. This is to be done on a case-by-case basis.
    - State law is otherwise preempted by federal law other than the National Bank Act.
  - National Banks retain the ability to charge interest at the rate allowed by the laws of the state where the bank is located.
  - This change becomes effective on the Designated Transfer Date.

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**S&W** **Mortgage Reform and Anti-Predatory Lending**

1. Dodd-Frank
  - Amends Truth in Lending Act
  - Sets fiduciary standards for Mortgage Originators
  - Effective 12 months after regulations issued; no later than 18 months after Designated Transfer Date
2. Mortgage Originator – anyone who for compensation or gain takes a residential mortgage loan application or assists a consumer in applying for a residential mortgage loan or offers or negotiates terms of a residential mortgage loan. Exceptions for purely administrative tasks, certain employees of manufactured home retailers, real estate brokers, certain servicers engaged in modifications; the creditor (except in a table funded transaction and under anti-steering). Also exempts persons providing carryback financing for up to 3 properties per 12 month period subject to certain conditions.
3. Background: SAFE Act
  - Requires licensing and registration of Mortgage Originators

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**S&W** **Mortgage Reform and Anti-Predatory Lending (cont'd)**

4. Prohibition of Steering Incentives

- Mortgage Originators may not receive compensation that varies based on loan terms other than the amount of principal. Intended to prohibit yield spread premiums or other compensation based on terms including rate that would cause an originator to "steer" the borrower to particular mortgage products.
- No origination fees from any person other than consumer; except Mortgage Originators may receive an origination fee from a third party if nothing from consumer.

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**S&W** **Mortgage Reform and Anti-Predatory Lending (cont'd)**

- The CFPB is directed to issue regulations to further prohibit steering borrowers to loans for which the customer lacks reasonable ability to pay and certain other practices.
- Maximum liability of Mortgage Originators (in addition to court costs and attorneys fees) is greater of actual damages or 3x the total amount of direct and indirect compensation accruing to Mortgage Originator in connection with the loan.

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**S&W** **Minimum Standards for Mortgages**

All loans – Creditor must make a reasonable and good faith determination of the ability to pay.

- Must be based on verified and documented information (Act specifies what must be included).
- Some exemptions for loans insured or guaranteed by federal departments or agencies (e.g., streamlined refinances).
- Does not apply to reverse mortgages and bridge loans of 12 months or less.

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**S&W** **Minimum Standards for Mortgages (cont'd)**

Non-standard loans require different methods of determining ability to repay.

- E.g., for variable rate loans that defer repayment of principal or interest, Creditor must use full amortizing repayment schedule.

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**S&W** **Qualified Mortgage Exemption**

1. Permits creditor and assignee to presume that the loan has met the ability to pay requirements if the loan is a "Qualified Mortgage"
2. Qualified Mortgage defined:
  - No negative amortization
  - No payment deferrals
  - Limitation on balloon payments
  - Income is qualified and documented
  - If fixed rate underwriting is based on payment schedule fully amortizing over loan term and taking into account all taxes, insurance and assessments
  - If variable rate underwriting is based on maximum rate during first 5 years and fully amortizing payments taking into account all taxes, insurance and assessments
  - Complies with CFPB requirements re debt to income and other measures
  - Total points and fees not more than 3% of loan
  - Term not to exceed 30 years
  - Other requirements and exemptions by regulation

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**S&W** **Foreclosure Defenses**

If there is a prohibited fee or failure to comply with the ability to pay standard for a residential mortgage loan, the violation may be asserted as a defense by recoupment or set-off even if the statute of limitations has expired for a direct action.

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**S&W** **Other standards and requirements**

- If not a qualified mortgage, no prepayment penalty.
- On other qualified mortgages, the penalty is capped at 3-2-1.
- Creditors that include prepayment penalties must also offer products without the penalty.
- No single premium credit insurance is allowed.
- No mandatory arbitration in residential mortgages and open-end consumer credit secured by principal dwelling.
- Additional requirements for negative amortization loans.
- In anti-deficiency states the creditor must provide notice of the right and before taking any action that could cause the right to be lost.
- Must disclose policy regarding partial payments and if and how applied.

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**S&W** **Other requirements**

- Notice of reset on certain hybrid mortgages.
- Certain other adjustments in disclosures (e.g., escrows).
- Certain disclosures in monthly statements.
- Certain additional TILA disclosures, such as maximum initial monthly payment amounts for variable loans; additional disclosures regarding settlement costs; fees paid.

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**S&W** **High Cost Mortgages**

1. "High Cost" Mortgages have additional requirements.
2. Amends HOEPA which requires special disclosures, and provides consumer with right not to complete transaction.
3. Defined to include loans secured by principal dwelling (other than reverse mortgages) with one or more of the following characteristics:
  - In first lien transactions APR exceeds prime offer rate by 6.5% (8.5% if dwelling is personal property and transaction less than \$50,000).
  - In second lien transactions the rate exceeds 8.5% over prime offer rate (lowered from prior law).
  - Total points and fees exceed 5% for transactions over \$20,000 or 8%/\$1,000 for transactions under \$20,000 (lowered from prior law).
  - Prepayment fees can be collected for more than 36 months or exceed 2% of amount prepaid.

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**S&W** **High Cost Mortgages (cont'd)**

4. Requirements triggered for high cost mortgages:

- Limits balloon payments.
- Creditor cannot recommend or encourage defaults on other debt.
- Late fees limited to 4% (unless higher specifically authorized); 15 day grace period applies.
- Late fees cannot be charged more than once per payment.
- Debt acceleration only for payment default, due on sale violation or other "material" violation.
- No financing of prepayment fee, points and fees in refinancing by same creditor or affiliates.
- No evasion of requirements, e.g. by dividing loan into separate parts.
- No fees to amend, extend or defer payments.
- No fees for payoff statements.
- Cannot make a high-cost mortgage without certification from HUD approved housing counsel or that the consumer received counseling as to the mortgage.

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**S&W** **Other**

- Creation of Office of Housing Counseling in HUD
- Requirements regarding maintenance of tax and insurance escrows
- New RESPA requirements regarding force-placed insurance
- Prompt crediting of payments
- Prompt pay-off statements
- Appraisal requirements including requirements for USPAP compliance and physical inspection; stronger appraiser independence requirements; additional requirements for delivery of appraisal to consumer; prohibitions on broker price opinions for lending purposes
- HUD to develop program to provide foreclosure assistance to promote transfer of property with 5 or more units that are at risk of foreclosure
- Other studies and reports (mortgage foreclosure scams, drywall issues)

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