

V. ***A New Cop on the Beat: The Bureau of Consumer Financial Protection***

A. **Introduction**

The “Consumer Protection” centerpiece in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Act”) is Title X, which creates a new independent agency called the Bureau of Consumer Financial Protection (“Bureau”).¹ In response to the Great Recession, President Obama vowed to create greater consumer protections in the financial products and services markets. This would serve to act as a partial remedy for the recent failures of the U.S. financial services sector. Lauded as President Obama’s most impressive legislative accomplishment behind comprehensive healthcare reform, it may still be years before the public, Wall Street, or even Beltway insiders know what Title X actually does. This article will explore the underlying need, if any, for an agency geared solely towards consumer financial protection, the form and function of the Bureau as created by Title X and some of the effects the Bureau may have on consumers, covered persons and the health and wellness of the consumer financial products and services sector.

B. **Why do we need a consumer financial protection agency?**

Will greater disclosure of products, education for consumers and regulations for providers combine to equal a healthier financial services industry? According to a recent Rasmussen Reports survey, twenty-nine percent of adults in the U.S. believe that more government regulation is the best way to protect borrowers from unfair lending practices, while fifty-one percent would prefer increased competition in the financial sector.² While there is a split amongst consumers, the Bureau’s interim leader, Elizabeth Warren, believes that increased government regulation, when effectively

¹Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1011(a) (2010).

² Scott Rasmussen, Rasmussen Reports, *Most Say Competition Protects Borrowers More Than Regulation* (Sept. 22, 2010), available at http://www.rasmussenreports.com/public_content/business/general_business/september_2010/most_say_competition_protects_borrowers_more_than_regulation.

implemented, should lead to increased innovation and competition.³ Congress must have shared this view when developing the Bureau's purpose and objectives, which are to "implement and . . . enforce Federal Consumer Financial law consistently" in order to ensure equal access to financial products and services and to ensure that these products and services are fair, transparent and competitive.⁴

While there is only tepid support for the creation of the Bureau amongst consumers themselves, Professor Warren says that "without a watchdog in place, the big banks just keep slinging out uglier and uglier products."⁵ Her top priority is making credit card and mortgage agreements shorter and simpler,⁶ but certain provisions in the Credit CARD Act of 2009 have already made significant changes to card agreements.⁷ Warren has also spoken out against exorbitant fees being charged by banks, but cries to cap them may ring hollow if consumers continue to opt-in for "overdraft protection" and other fee-generating schemes.⁸ Given the positive gains already from the CARD Act and consumer support for some of the "abusive" bank fee schemes, it is puzzling that Warren has fixated on credit card and mortgage agreements—especially since the Bureau has power over the whole consumer financial products and

³ Jeff Gelles, *Warren in the Lion's Den*, Philly.com (Oct. 1, 2010), available at http://www.philly.com/philly/business/Elizabeth_Warren_in_the_lions_den.html (contending that expanded government regulations could lead to a better functioning market when implemented properly).

⁴Dodd-Frank, *supra* note 1 at § 1021(a).

⁵ Elizabeth Warren, *Wall Street's Race to the Bottom*, WALL ST. J. Feb. 8, 2010, at A19, available at <http://online.wsj.com/article/SB10001424052748703630404575053514188773400.html> (explaining that without government regulation, consumers will continue to lose trust in the financial sector due to the fact that banks and other similarly situated financial companies have been providing risky sub-par products).

⁶ *Id.* (stating that credit card and mortgage agreements have become complicated to the point where consumers have difficulty comparing products).

⁷ 15 U.S.C.A. § 1601 (some noteworthy changes are improved mandatory disclosures, fee restrictions and restrictions on interest rate hikes for late payments).

⁸Am. Banker's Ass'n, News Release, *Half of Bank Consumers Choose Overdraft Coverage: ABA survey shows customers value overdraft service*, Aug. 31, 2010, available at <http://www.aba.com/Press+Room/083110OverdraftProtection.htm> ("[M]any bank customers value debit card overdraft protection and are willing to pay for the service.").

services industry. Although populist politics may be at work here,⁹ informed consumer advocates hope that the Bureau will go much further than merely trimming verbiage from credit card agreements.

C. Form and Function

To address concerns in the financial markets, the Bureau will have a broad mandate to enforce consumer financial protection laws, which include rules written by the Bureau. The following subsections discuss the form and function of the Bureau.

1. Form

In response to pressure from consumer advocates, the Bureau was made an independent agency and is only nominally part of the Federal Reserve System. It operates under independent budget¹⁰ and direction and is largely insulated from outside pressures. Of course, the Director may want to temper action with substantial input from the financial services sector, unless in the coming years Congress chooses to backpedal with respect to Title X. Indeed, certain Republican senators targeted Title X for repeal not long after the Act was passed.¹¹ And for some of the newly elected Republican congressmen, repeal was even a campaign promise.¹²

⁹ Rasmussen, *supra* note 2. When pollsters ask U.S. adults if they support the creation of the Bureau, the results are even with forty-one percent in favor and forty-one percent opposed. When compared to the other result, this may be indicative of effective stumping for the Bureau by Warren and Obama or could represent a public misunderstanding of Bureau functions.

¹⁰ Dodd-Frank, *supra* note 1 at § 1017(a)(2). Funding will be in the form of 10%-12% percent of the revenues of the Federal Reserve with an additional \$200 million available to the Director upon request.

¹¹ Dave Clark and Rachelle Younglai, *U.S. Senator Wants to Reopen Wall St. Bill*, Reuters (Sept. 20, 2010), available at <http://uk.reuters.com/article/idUKN2010700820100920> (reporting that many Republican Senators want to repeal Dodd-Frank due to its broad nature and its potential to change the makeup of the U.S. financial sector).

¹² Pat Garofalo, *Rand Paul's Job Plan: Repeal Financial Reform*, The Wonk Room (Nov. 2, 2010), available at <http://wonkroom.thinkprogress.org/2010/11/02/paul-finreg-repeal/>.

If Title X survives Republican wrath, however, the Director will sit for a five year term, terminable only for cause.¹³ The Director will have exclusive authority to shape the Bureau, from staffing and budgeting to rule-making, regulation and adjudication.¹⁴ Accordingly, the Federal Reserve's Board of Directors will have no authority to set aside Bureau rules, second-guess administrative decisions, or consolidate divisions of the Bureau.¹⁵ Indeed, once a Director has been confirmed, she will be able to perform her duties without interruption or delay from outside influences.¹⁶ Only the new Financial Stability Oversight Council can set aside or stay a Bureau rule, but the procedural mechanisms for this kind of maneuver are weighty, making this a minor if not insignificant check on the director's power.¹⁷ If Congressional Republicans do decide to take aim at Title X, additional checks on the Director's power might be a good starting point. There is room here to significantly weaken the Director position with only minor changes, thereby avoiding the potentially unsavory political position of repeal.

Additionally, the Bureau will swallow up the consumer financial regulatory powers and personnel of various other agencies who are currently regulating the consumer financial markets in checkerboard fashion.¹⁸ For better or worse, Obama and the Democrats were able to consolidate into one organization nearly all of the federal regulators of consumer financial products and services.¹⁹ Finally, the Bureau will contain at least four specialized

¹³Dodd-Frank, *supra* note 1 at § 1011(b)-1012(a) (summarizing the specifications of the Director and Deputy Director of the Bureau of Consumer Financial Protection and their executive powers).

¹⁴ *Id.*

¹⁵ *Id.* at § 1012(c)(2) (explaining that the Board of Governors of the Federal Reserve may not “. . .(A) intervene in any matter or proceeding before the Director, including examinations or enforcement actions, unless otherwise specifically provided by law; (B) appoint, direct, or remove any officer or employee of the Bureau; or (C) merge or consolidate the Bureau, or any of the functions or responsibilities of the Bureau, with any division or office of the Board of Governors or the Federal reserve banks.”).

¹⁶ *Id.* at § 1012(c) (delegating the autonomous nature of the Bureau).

¹⁷ *Id.* at § 1023(c)(3) (explaining the process by which the Council of Economic Advisers can decide to set aside or stay a Bureau rule).

¹⁸ *Id.* at § 1064 (delegating all personnel and powers that are now shifted to the Bureau).

¹⁹ See generally Pellerin, Walter & Wescott, *The Consolidation of Financial Market Regulation: Pros, Cons, and Implications for the United States.*

offices: the Office of Fair Lending and Equal Opportunity, Office of Financial Education, Office of Service Member Affairs and Office of Financial Protection for Older Americans in order to better meet the needs of particularly vulnerable consumers.²⁰

2. Function

The Bureau is to have three principle functions: 1) information gathering and reporting; 2) regulation; and 3) enforcement.

i. Information Gathering and Reporting

Various divisions of the Bureau will be in charge of different information gathering and reporting projects. Information gathering and reporting consists of “collecting, researching, monitoring and publishing information relevant to the functioning of markets for consumer financial products and services.”²¹ The Bureau will also be required to report to Congress on a large number of topics including education loans, reverse mortgages and how to end the conservatorship of Fannie Mae and Freddie Mac.²²

In addition to the Congressional Reports, the Bureau must make certain data available to consumers to promote informed purchasing decisions.²³ The Bureau’s specialty offices are to be specifically involved in the research and community education and outreach schemes adopted to serve their unique interests.²⁴ The Office of Financial Protection for Older Americans, for example, will be required to offer literacy and counseling services and disseminate

Working Paper Series of the Federal Reserve Bank of Richmond. WP 09-08 (2009) (for an analysis of the pros and cons of a more centralized financial regulatory system), available at, http://www.richmondfed.org/publications/research/working_papers/2009/pdf/wp09-8.pdf (discussing the pros, cons and implications of consolidating financial market regulation).

²⁰Dodd-Frank, *supra* note 1, at § 1013(c)-(g).

²¹*Id.* at § 1021(c)(3).

²²*Id.* at § 1077 (education loans); *id.* at §1076 (reverse mortgages); *id.* at §1074 (Fannie and Freddie). *See also id.* at § 1016.

²³*Id.* at § 1021(b)(1) (“The Bureau is authorized to exercise its authorities . . . with the purposes of ensuring that . . . consumers are provided with timely and understandable information to make responsible decisions about financial transactions.”).

²⁴*Id.* at § 1013(c)-(g).

financial information to Americans over sixty-two years old.²⁵ Congress is generally interested in seeing the Bureau provide better guidance, counseling and information regarding consumer financial products to traditionally underrepresented or underserved areas and populations, as well as to the average consumer.²⁶

ii. Regulation

The regulatory arm of the Bureau has broad authority to require reporting of covered persons, to write rules affecting covered persons and to monitor them for compliance with those rules and other federal consumer financial laws.²⁷ The regulatory component will operate differently depending on the nature of the financial product or service and on the size of the business for depositories and credit unions.²⁸ For non-depository covered persons,²⁹ the Bureau will have exclusive federal authority to make rules, require reports and examine business activities.³⁰ Concerning large banks and credit unions with more than \$10 billion in assets, the Bureau will be the exclusive regulator for reporting and supervision for the purposes of assessing compliance with the federal consumer financial laws.³¹ For smaller banks and credit unions the Bureau may but need not require reporting and may examine these entities only on a sampling basis and in connection with their prudential regulator.³² The Bureau must also coordinate examinations with other regulators so as to keep the regulatory burden to a minimum.³³

The most interesting question regarding the Bureau's rule-making authority is how they will choose to define and interpret

²⁵ *Id.* at § 1013(g).

²⁶ *Id.* at § 1013(b)(1).

²⁷ *Id.* at § 1016(c).

²⁸ *Id.* at §§ 1024-26.

²⁹ *Id.* at § 1024. A large class of businesses including: an offeror of origination, brokerage, or servicing loans secured by real estate; private education loan providers; payday loan businesses; and other entities which "the Bureau has reasonable cause to determine . . . that such person is engaging in conduct that poses risks to consumers" The Bureau will need to define which entities are subject to their jurisdiction under this section within one year of the transfer date.

³⁰ *Id.* at §§ 1024-25.

³¹ *Id.* at § 1025.

³² *Id.* at § 1026.

³³ *Id.* at §§ 1024-26.

“unfair, deceptive and abusive acts or practices.”³⁴ Congress did give some guidance on how to interpret “unfair” and “abusive,” but the standards are sufficiently vague so that Bureau determinations should survive judicial review.³⁵ In particular, it will be interesting to see how the Bureau interprets “abusive,” as this is a new term not found in the Federal Trade Commission Act and therefore represents “uncharted” regulatory waters.³⁶

iii. Enforcement

The Bureau will have exclusive federal enforcement authority over non-depository covered persons and primary federal enforcement authority for large banks and credit unions.³⁷ But with respect to other smaller banks and credit unions, the Bureau can only suggest enforcement proceedings to the prudential regulator.³⁸ For those subject to enforcement, Bureau investigations and administrative discovery may take the form of subpoenas, production of documents or other tangible evidence and demands for written reports or answers to interrogatories.³⁹ The Bureau may also initiate hearings and adjudicative proceedings in order to enforce federal consumer financial laws and to issue cease-and-desist orders.⁴⁰ Finally, subject to the constraints above, the Bureau may bring civil actions before a United States District Court.⁴¹

Relief is available to the Bureau in the form of rescission or reformation of contract, refund of monies or return of real property,

³⁴ *Id.* at § 1031 (setting forth the guidelines for defining unfair and abusive acts or practices).

³⁵ *Id.* at § 1031(c)-(d)

³⁶ Dee Pridgen, *How the New Consumer Financial Protection Law Will Affect FTC Authority*, Public Citizen (Sept. 27, 2010), available at <http://pubcit.typepad.com/clpblog/2010/07/how-the-new-consumer-financial-protection-law-will-affect-ftc-authority-.html> (opining on how the Federal Trade Commission’s loss of authority and new legislative terms like “abusive” will affect the industry).

³⁷ Dodd-Frank, *supra* note 1 at § 1025. Another agency with enforcement authority may only proceed after notifying the Bureau of the infraction and allowing the Bureau 120 days to respond with its own suit.

³⁸ *Id.* at § 1026.

³⁹ *Id.* at § 1052 (covering the process for investigations and administrative discovery).

⁴⁰ *Id.* at § 1053.

⁴¹ *Id.* at § 1054.

restitution, disgorgement, money damages, limiting activities or functions of personnel and penalties.⁴² Only punitive damages are expressly forbidden, ensuring that overzealous bureaucrats cannot topple these financial institutions.⁴³ However, potential penalty fines are very steep, with knowing violations punished most severely—up to one million dollars per day.⁴⁴

D. Expectations and Implications

Right now there is tri-fold uncertainty: what will the Bureau mean for consumers; what will it mean for the entities under the umbrella of the Bureau's authority; and what will it mean for the safety and soundness of America's financial products and services sector generally? Until the designated transfer date and perhaps even for some time after that, these questions will remain largely unanswered. It is yet to be seen how Elizabeth Warren will shape the Bureau in her interim role, and there is even more uncertainty as to which direction the permanent Director will take the Bureau once appointed.⁴⁵ What is certain is that the Bureau's mandate is broad and ambiguous enough to accept many different interpretations, and there is next to nothing in the Act for a District Court Judge to hang her hat on should she be looking to overturn a Bureau rule or reverse an adjudicative determination.⁴⁶

One of the more interesting aspects of the legislation is the tension in the Bureau's mandate between cracking down on large fees and penalties while at the same time ensuring that these financial products and services are available to traditionally underrepresented groups. On the one hand, a larger swath of consumers will not have access to certain consumer financial products if banks and credit unions are forced to change their practices in areas that have been a

⁴² *Id.* at § 1055(a)(2).

⁴³ *Id.* at § 1055(a)(3).

⁴⁴ *Id.* at § 1055(c)(2).

⁴⁵ Chip Read, *Elizabeth Warren Unlikely to Run Consumer Protection Bureau*, CBS News (Sept. 16, 2010), available at http://www.cbsnews.com/8301-503544_162-20016745-503544.html. Especially now that it looks increasingly unlikely that Mrs. Warren will be named permanent director. Her interim appointment appears to be a compromise that acquiesces to the demands of consumer advocates while allowing for the possibility of a permanent director more sympathetic to the realities and uncertainties facing the financial services sector.

⁴⁶ Dodd-Frank, *supra* note 1, at § 1022(b)(4)(B).

boon for years. These include hiding large overdraft fees, transfer fees and adjustable interest rates in marginally-intelligible, multi-volume contracts. On the other hand, if the structure of consumer financial instruments must change to accommodate accessibility concerns while minimizing deceptive practices, then consumers with above average credit are likely to see higher interest rates going forward. However, there is some evidence that banks might not lose out as badly as anticipated while maintaining traditional profitability schemes even in the face of new regulations.⁴⁷ It is yet to be seen how and if the Bureau can juggle these interests.

At this point, however, it seems quite certain that if a financial product or service does not fit one of Title X's exceptions,⁴⁸ then rules affecting the terms of that product or service will be set in the near future. Certain aspects of the Bureau's functioning must wait until the designated transfer date, but rule-making is not one of them.⁴⁹

Another aspect of Title X sure to leave ripples in the financial services industry is the scaling back of federal preemption doctrine.⁵⁰ The bill makes clear that states are free to enact "greater protections" and that the federal consumer financial laws are the regulatory floor rather than the ceiling.⁵¹ Accordingly, Subtitle "D" is meant to overturn the Supreme Court decision in *Watters v. Wachovia*, which held that "operating subsidiaries of national banks and federal thrifts (which generally are state incorporated entities)

⁴⁷ See Am. Banker's Ass'n, *supra* note 8.

⁴⁸ *Id.* at §1022(b)(3)(B). There are many entities explicitly excepted from the Bureau's authority: those regulated by the CFTC, SEC and Farm Credit Administration, real estate brokers, modular home manufacturers, auto dealers and others. See also Dodd-Frank, *supra* note 1, at § 1027. The Bureau may also choose to except certain classes of covered persons from their rules either conditionally or unconditionally after weighing certain factors affecting consumers.

⁴⁹ *Id.* at § 1029A. But cf. Dave Clark, *Geithner: New Consumer Rules to Wait Until 2011*, Reuters (Sept. 22, 2010), available at <http://www.reuters.com/assets/print?aid=USTRE68L5ME20100922>.

⁵⁰ Sonnenschein Client Alert, *Financial Regulatory Reform—Bureau of Consumer Financial Protection*, Sonnenschein Nath & Rosenthal LLP, Aug. 26, 2010, available at http://www.snrdenon.com/news_insights/alerts/financial_regulatory_reform-3.aspx

⁵¹ *Id.*

are not subject to state laws.”⁵² As a result, national banks previously subject only to federal rules are now potentially subject to additional regulations in every state in which they operate.⁵³ Accordingly, the Act brings consolidation of regulation at the federal level, but at the price of multiplying the number of state regulators with jurisdiction to enforce the federal consumer financial laws.

E. Conclusion

In the final analysis, the Bureau is both heralded and condemned as a powerful agency with a sweeping mandate and great regulatory potential. Exactly what shape the new agency will take, however, is largely speculative and unknown. Title X creates more questions than it answers in terms of the effect that the Bureau’s rule-making and enforcement powers will have on consumers, on the financial services industry and on the economy generally. Notwithstanding concerns of the constitutionality of Professor Warren’s recent appointment,⁵⁴ there is also concern that she may be disconnected from the industry or too interested in populist politics. If the Bureau reaches out to the industry in a meaningful way, however, and does not worry about scoring the best headlines, then consumers and banks can both win with regulations that keep banks profitable and protect consumer interests.

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⁵² HOUSE COMM ON FIN. SERV’*S*, 111TH CONG., SUMMARY OF REP ON H.R. 4173 (2009).

⁵³ Sonnenschein, *supra* note 48.

⁵⁴ Bruce Ackerman, *Obama, Warren and The Imperial Presidency*, WALL ST. J., Sept. 22, 2010, at A21 (arguing that Warren’s appointment as special adviser to Treasury Secretary Timothy Geithner is an usurpation of Senate authority).

⁵⁵ Student, Boston University School of Law (J.D. 2012).