

*Part II:
An Analysis of the Consumer Financial Protection Bureau*

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Introduction

The “transfer date,” the date on which the various consumer protection laws are transferred from other agencies to the Consumer Financial Protection Bureau (“CFPB”) and when the CFPB can exercise new authorities, arrived on July 21, 2011. In the months following the transfer date, many challenges still loom large before the CFPB. First, there is still no Senate-confirmed Director, and Republicans flat-out refuse to confirm any such Director until President Obama changes the CFPB’s structure and its funding. Second, the CFPB must negotiate its turf with the Federal Trade Commission (“FTC”), which is itself threatened by the removal of its jurisdiction over consumer financial policy and enforcement. Third, businesses covered under the CFPB may find implementing vague rules, such as the “unfair, deceptive, or abusive acts or practices” rule, to be difficult. With all of these challenges, the question remains: Will the CFPB become a toothless agency weakened by the current state of politics or will it rise to the occasion, and to Professor Warren’s vision, and protect ordinary consumers from risky financial products and services that threaten the American Dream?

Recent Developments at the CFPB

In the year since the Dodd-Frank Act was passed, the CFPB has hired over 400 staff yet it still remains without a Senate-confirmed Director.¹ Professor Elizabeth Warren was passed over for Director of the CFPB and instead President Obama nominated Richard Cordray, former Ohio Attorney General and previous head of the CFPB’s enforcement division, on July 18, 2011. As of October 17, 2011, the Senate has not yet confirmed his appointment.² Even without a director, the CFPB has started fulfilling its obligations. Today, it is working on creating a single, simple mortgage disclosure form that allows consumers to comparison shop when obtaining a mortgage (a combined RESPA/TILA form).³ Under its “Know Before You Owe” project, the CFPB is testing two potential forms that consumers would receive upon applying for a mortgage loan.⁴

The CFPB is also working to define its “larger participant” rule, which must be defined by July 21, 2012. The CFPB has supervisory authority over nondepository businesses, including those

¹ Consumer Financial Protection Bureau, Building the CFPB: A Progress Report 24 (2011), available at http://www.consumerfinance.gov/wp-content/uploads/2011/07/Report_BuildingTheCfpb1.pdf.

² The White House Blog, <http://www.whitehouse.gov/blog/2011/07/18/president-obama-nominates-richard-cordray-lead-consumer-financial-protection-bureau> (July 18, 2011, 15:55 EDT).

³ Consumer Financial Protection Bureau, *supra* note 1, at 10.

⁴ *Id.* at 11.

in the payday lending, private education lending and residential mortgage markets. The new agency also has supervisory authority over other markets that provide consumer financial products or services, but only over the larger participants of those markets. The definition of “larger participant” will thus create a broader supervisory role for the CFPB, and greater compliance for those companies that fall within the larger participant definition. The CFPB is currently seeking public comment on various aspects of this rule, including the primary consideration of specific markets that should be covered by the rule. The CFPB has proposed inclusion of six markets in its initial definition, which incorporates debt collection; consumer credit and related activities; prepaid cards; debt relief services; consumer reporting; and money transmitting, check cashing, and related activities.⁵

Once the markets are defined, the CFPB next seeks comment on the appropriate way to measure the threshold for the “larger participants” within those markets.⁶ The CFPB proposed several methods of calculating a larger participant, but wants feedback on whether to use just one or a combination of several criteria in the calculation.⁷ The threshold measurement may be tailored to each specific market.⁸ The CFPB is considering an absolute approach, which would dictate a larger participant to be one with, for example, an annual loan volume of \$X.⁹ Another consideration is using a relative approach based on market share or some other calculation that compares the market participant to others in the market.¹⁰

Challenges the CFPB Faces

Even with all the progress the CFPB has made within the past year, Republicans threaten the institutional design and power of the CFPB. House Republicans have introduced several bills that would severely alter the way the CFPB operates.¹¹ Senator Shelby says that any Director is “dead on arrival” and will not be confirmed by the Senate until President Obama comes to the negotiating table to discuss the reform found in the House bills.¹²

⁵ *Id.* at 13.

⁶ Defining Larger Participants in Certain Consumer Financial Products and Services Markets, 76 Fed. Reg. 38,059, 38,060 (June 29, 2011) (to be codified at 12 C.F.R. ch. X).

⁷ *Id.* The CFPB seeks feedback on whether one or a combination of the following factors should be used to determine whether a market participant is a “larger participant”: number of transactions in the market, annual value of transactions, annual receipts or revenues, geographic coverage (number of states the participant is located), asset size, and outstanding loan balances. *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ H.R. 1121, 112th Cong. (2011); H.R. 1315, 112th Cong. (2011).

¹² Reid J. Epstein, *Richard Shelby: Cordray is DOA*, POLITICO, July 21, 2011, available at <http://www.politico.com/news/stories/0711/59545.html>.

The three House bills would dramatically alter the structure of the CFPB and the veto procedure for new regulations proposed by the CFPB. For example, one piece of legislation proposes to move the CFPB from the Federal Reserve to the Department of the Treasury.¹³ Another bill brings the CFPB into the regular Congressional appropriations process.¹⁴

Representative Duffy introduced H.R. 1315, or the “Consumer Financial Protection Safety and Soundness Improvement Act of 2011;” it allows for a simple majority of the Financial Stability Oversight Council instead of a 2/3 vote to veto the CFPB’s proposed rules and regulations.¹⁵ A recent amendment to H.R. 1315 required that the 2/3 majority vote be restored, but this amendment failed to pass.¹⁶ A different amendment that was successfully passed eliminates any potential conflicts of interest by prohibiting members of the Financial Stability Oversight Council to vote on a proposed regulation if that regulation would affect an institution at which the member was employed in the preceding two years.¹⁷

The Duffy bill goes further by changing the language of the Dodd-Frank Act that permits the Financial Stability Oversight Council to set aside a final CFPB regulation if it believes that the regulation would threaten the “safety and soundness of the United States banking system or the stability of the financial system of the United States . . .”¹⁸ Duffy’s legislation replaces “may” with “shall,” thus requiring the Financial Stability Oversight Council to intervene when a CFPB regulation is inconsistent with the safe and sound operations of United States financial institutions.¹⁹ The legislation also replaces “regulation or provision would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk” with “regulation which is the *subject of the petition is inconsistent* with the safe and sound operations of United States financial institutions.”²⁰ The change of language begs the question: What types of regulations are inconsistent with the operation of our financial institutions? Those that increase costs and risks for banks and decrease costs and risks for consumers? If recent history is any indication of how U.S. financial institutions operate “safely and soundly” in a political environment where special

¹³ Consumer Financial Protection Oversight Act of 2011, H.R. 557, 112th Cong. (2011).

¹⁴ H.R. 1640, 112th Cong. (2011).

¹⁵ Consumer Financial Protection Safety and Soundness Improvement Act of 2011, H.R. 1315, 112th Cong. §2 (2011).

¹⁶ H.AMDT. 687 (amending H.R. 1315), 112th Cong. (2011) (Congresswoman Sheila Jackson Lee offered the amendment on July 21, 2011, and it failed by recorded vote (170-239), roll no. 615.).

¹⁷ H.AMDT. 688 (amending H.R. 1315), 112th Cong. (2011).

¹⁸ Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 100-203, § 1023(a), 124 Stat. 1376 (2010) [hereinafter “Dodd-Frank Act”].

¹⁹ H.R. 1315, 112th Cong. § 103(A) (2011). This legislation passed in the House, but will likely fail in the Democrat-controlled Senate. See Seung Min Kim, *House Bill Revamps Consumer Agency*, POLITICO, July 21, 2011, available at <http://www.politico.com/news/stories/0711/59624.html>.

²⁰ H.R. 1315 §103(B) (emphasis added).

interests thrive and banks are “bailed out,” then this legislation would amend the Dodd-Frank Act to create a toothless agency unable to operate as originally intended: as a cop on the beat for consumers.

The “Responsible Consumer Financial Protection Regulations Act of 2011,” introduced by Representative Bachus, establishes a five-member commission to head the bureau; the Vice Chairman for Supervision of the Federal Reserve System must be one of the five members.²¹ Each member serves staggered five-year terms.²² An interesting aspect of this proposed legislation is that one commissioner has the special responsibility for the oversight of the CFPB’s consumer protection activities, specifically focusing on protecting minorities, older citizens, youth and veteran consumers from unfair, deceptive, and abusive lending practices.²³ The legislation requires the commissioners to coordinate with state enforcers.²⁴

A Turf Battle with the FTC?

The FTC will likely lose funding for the employees who have moved to the CFPB and for its financial programs and enforcement activities involving consumer finance schemes. Former FTC Commissioner William Kovacic is concerned that the CFPB will actually diminish current consumer financial protection policies by overseeing functions typically performed by the FTC but without the FTC’s institutional design.²⁵ Specifically, the FTC’s policy perspective, carefully crafted after thoughtful insight from the FTC’s Bureau of Economics and Bureau of Competition, is a unique component of the FTC, making it more than a mere enforcement agency.²⁶ Kovacic believes that the FTC already conducts important research and provides educational programs in an independent manner that may not carry over to the CFPB or, if it does, it will be inferior to the FTC’s pre-existing structure.²⁷ Kovacic questions why the FTC must abandon its consumer protection functions and transfer all of these important roles to the CFPB when states will continue to enforce consumer protection laws.²⁸

Another major concern is that the Dodd-Frank Act defines the CFPB’s consumer protection functions so broadly as to overlap and threaten the FTC’s seemingly non-financial research and

²¹ H.R. 1121, 112th Cong. § 2 (2011).

²² H.R. 1121 § 2.

²³ *Id.*

²⁴ *Id.*

²⁵ William E. Kovacic, *The Consumer Financial Protection Agency and the Hazards of Regulatory Restructuring*, 1 LOMBARD STREET 12, 20 (2009).

²⁶ *Id.* Kovacic points out that the FTC, as an enforcement agency, brought 70 consumer protection cases in the five years preceding the article’s writing. *Id.* at 22.

²⁷ *Id.* at 21.

²⁸ *Id.* at 23-24. *See also* note 24 and accompanying text.

enforcement responsibilities, such as telemarketing fraud.²⁹ The Memorandum of Understanding due six months from July 21, 2011 will clarify jurisdiction and turf, but many grey areas may crop up unexpectedly if the battle lines are not clearly drawn. For example: will the FTC retain enforcement jurisdiction over violations of advertising rules when the violators are banks and other “larger participants,” or will the CFPB be responsible for enforcing those rules under the unfair, deceptive, or abusive acts or practices language found in the Dodd-Frank Act?

Vague Rules Will Impact Financial Product Providers

The expanded FTC § 5 language found in the Dodd-Frank Act covers abusive acts or practices along with the standard unfair or deceptive acts or practices. What exactly is an abusive act or practice? The Dodd-Frank Act defines it, but not very clearly. An abusive act or practice is one that causes a consumer to fail to understand the financial product or service’s terms or takes “unreasonable advantage” of a consumer’s lack of understanding or inability to protect his own interests.³⁰ “Enhanced amorphousness” of this language will cause a much higher risk for the consumer financial services industry, especially considering that a dedicated “cop on the beat” will enforce this vague rule.³¹ In fact, the CFPB can enforce the rule and investigate, hold hearings, litigate and seek remedies, including substantial civil penalties of up to \$1,000,000 per day.³² For a compliance officer at a bank or one of the as-of-yet undefined “larger participants,” such vagueness can threaten conformity with the rules; clearer rules are necessary to avoid these large penalties.

Another chilling prospect for covered entities is the fact that a single credit disclosure violation could potentially lead to liability under the FTC Act, states’ Little FTC Acts, TILA and the new unfair, deceptive, or abusive acts or practices language the CFPB can enforce.³³ Look for enforcement actions to clarify these rules, and for state enforcers and plaintiffs’ attorneys to follow the CFPB’s lead in these actions.³⁴

Litigation will also clarify the extent to which the Dodd-Frank Act alters federal preemption of state consumer financial laws. Although somewhat peripheral to the CFPB because the Office of the Comptroller of the Currency (“OCC”) retains authority to issue preemption regulations, orders

²⁹ Kovacic, *supra* note 25 at 24.

³⁰ Dodd-Frank Act § 1023(a).

³¹ Martin Bishop, *Regulatory: Unfair, deceptive or abusive acts or practices. Amorphous new statutory provisions create serious compliance risks.*, INSIDE COUNSEL, July 27, 2011, available at <http://www.insidecounsel.com/2011/07/27/regulatory-unfair-deceptive-or-abusive-acts-or-pra>.

³² *Id.*

³³ Martin Bishop, *Regulatory: Unfair, deceptive, or abusive acts or practices – Part II. Symbiotic relationships among state and federal laws, regulators and plaintiffs’ bar creates difficult compliance environment.*, INSIDE COUNSEL, Aug. 10, 2011, available at <http://www.insidecounsel.com/2011/08/10/regulatory-unfair-deceptive-or-abusive-acts-or-pra>.

³⁴ *Id.*

and determinations on a case-by-case basis, the Dodd-Frank Act mandates that the OCC consult with the CFPB before making a preemption determination.³⁵ The Dodd-Frank Act codifies a Supreme Court Case and empowers state enforcers to bring lawsuits against national banks that are not in compliance with non-preempted state laws.³⁶ The changes in federal preemption standards, similar to the change in the “unfair or deceptive acts and practices” language, remain somewhat vague; future cases will help illuminate the contours of the law. The way in which the OCC consults with the CFPB on future determinations will be interesting, and may give rise to another turf battle with the OCC protecting its own interests while the CFPB protects consumers and the integrity of state consumer financial laws.

Going Forward

As the CFPB sets up shop and hires more people, it will be that much more difficult to dismantle or change the structure of the new agency if Republicans are ever able to do so. The continuing uncertainty over the CFPB’s relationship with the FTC poses a threat to the CFPB’s jurisdiction. The FTC and CFPB have six months from July 21, 2011 to negotiate an agreement on areas over which each will possess jurisdiction. Things may be clearer in November, when the ABA Antitrust Section hosts its Fall Forum and presents a panel on how the FTC and CFPB will engage with industries and coordinate their enforcement and policymaking efforts.³⁷ The panel will address enforcement priorities in areas that focus on consumers, including privacy, marketing and the Internet. President Obama has a lot on his plate (a health care bill in jeopardy, a new jobs bill criticized by Congressional Dems); will he have time and political capital to ensure that the CFPB is established as intended in the Dodd-Frank Act?³⁸ Until its first Director is confirmed, the CFPB will lack the ability to command the respect and wield the power that the Dodd-Frank Act intended.

³⁵ Dodd-Frank Act § 1044.

³⁶ *Cuomo v. The Clearing Housing Association*, 129 S. Ct. 2710 (2009).

³⁷ Julie Brill, Commissioner, Fed. Trade Comm’n, and Peggy Twohig, Director of the Office of Consumer Protection at the Dept. of Treasury and Policy Lead for the CFPB, Panel at the ABA Antitrust Section Fall Forum: Working with the FTC and CFPB (forthcoming Nov. 17, 2011).

³⁸ Editorial, *Consumers vs. the Banks*, N.Y. TIMES, July 24, 2011, at A20 (Cordray will need Obama’s support to win confirmation; the President’s “decision to jettison Ms. Warren is not a reassuring sign.”).