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The New Bureau of Consumer Financial Protection – An Overview

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Consumer protection practitioners have a watershed year to look forward to in 2011. On July 15, 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act” or “Act”),⁹ with a vote of 60-39. The Act was signed into law by President Obama on July 21, 2010. The Act creates a new agency dedicated to consumer protection issues relating to consumer financial products and services. This new agency, to be called the Bureau of Consumer Financial Protection (“Bureau”),¹⁰ is expected to “go live” in 2011. The new agency will take over certain consumer protection responsibilities currently housed in other agencies, but will also be responsible for shaping new consumer protection regulations and policies applicable to the consumer financial products and services industries. This article provides a brief overview of the new agency, its authority, and how its authority will overlap with (and mitigate) the Federal Trade Commission’s current consumer protection mandate.

Mechanics of Creating the Bureau of Consumer Financial Protection

The new Bureau will be housed “in the Federal Reserve system.”¹¹ The Act provides that the Bureau will have a Director who is nominated by the President and confirmed by the Senate for a 5- year term.¹² Since the Act was signed into law, it was widely rumored that President Obama would appoint Elizabeth Warren, a professor at Harvard law school and chair of the Congressional Oversight Committee, as the inaugural Director of the Bureau. On Friday, September 17, 2010, the White House announced that Ms. Warren will serve as a special assistant to President Obama and a special advisor to Treasury Secretary Timothy F. Geithner.¹³ In these dual roles, Ms. Warren will be responsible for the Bureau’s formation and will have significant influence over the agency’s direction. Recognizing the challenge of creating an entirely new Federal agency, the Act provides that the Secretary of the Treasury “is authorized to perform the function of the Bureau ... until the Director of the Bureau is confirmed by the Senate....”¹⁴

The agency will have several functional units, including: research, community affairs, collecting and tracking complaints, an office of fair lending and equal opportunity, an office of financial education, an office of service member affairs, and an office of financial protection for older Americans.¹⁵

The Act requires the creation of an advisory board to “advise and consult” with the Bureau “in the exercise of its functions.”¹⁶ Members of this advisory board will be appointed by the Director.¹⁷

The Bureau’s Broad Grant of Authority

The Dodd-Frank Act sought to increase oversight of the financial services industry to prevent the types of perceived abuses that caused or worsened the impact of the recent financial crisis. The stated purpose of the Bureau is to “seek to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.”¹⁸ To accomplish this purpose, the Act grants the Bureau far-reaching authority over a broad range of products and services, using a full panoply of consumer protection statutes, rulemaking authority, and other tools. The Act defines the term “consumer financial product or service” to include all products and services “offered or provided for use by consumers primarily for personal, family, or household purposes,”¹⁹ that are “delivered, offered, or provided in connection with” a lengthy list of financial products and services, including:

- extending credit or servicing loans;
- extending or brokering leases;
- providing real estate settlement services;
- engaging in deposit-taking activities;
- selling, providing, or issuing stored value or payment instructions; and
- providing check cashing, check collection, or check guaranty services.²⁰

Although the scope of the new Bureau’s authority is not unlimited,²¹ imagining how these broadly defined covered products could reach a vast array of commercial transactions is not difficult.

Further, in addition to its broad product and service reach, the Bureau also will inherit broad statutory authority currently housed in other Federal agencies, and will develop and enforce new consumer protection law. Authorities currently scattered among several agencies, including the Federal Trade Commission, Federal Reserve Deposit Corporation, Department of Housing and Urban Development, the Comptroller of the Currency, and others, will be consolidated within the new agency. Specifically, the Act enumerates eighteen Federal laws (specifically excluding the FTC Act) for which some or all authority will be transferred to the new Bureau. These laws include the Fair Debt Collection Practices Act, parts of the FDIC Act, the Truth in Lending Act, and others.²²

Overlap with (and Usurping of) FTC Authority

The creation of the Bureau specifically will diminish the authority and mandate of the Federal Trade Commission’s consumer protection mission. The FTC’s authority for consumer protection issues currently extends to the financial services sector, but the Dodd-Frank Act gives exclusive authority to regulate these industries to the new agency. The Act specifically provides for the transfer of functions currently housed within the FTC: “[t]he Bureau shall have all powers and duties under the enumerated consumer laws to prescribe rules, issue guidelines, or conduct studies or issue reports mandated by such laws, that were vested in the Federal Trade

Commission on the day before the designated transfer date.”²³ Additionally, “the Bureau may enforce a rule prescribed under the Federal Trade Commission Act by the Federal Trade Commission with respect to an unfair or deceptive act or practice to the extent that such rule applies to a covered person or service provider with respect to the offering or provision of a consumer financial product or service as if it were a rule prescribed under section 1031 of this title.”²⁴ Despite this reduction in authority, however, the Act does not mandate the transfer of any employees from the FTC to this new agency.²⁵ And, the Act specifically reserves to the FTC its “supervisory or enforcement authority . . . with respect to credit extended, or the collection of debt arising from such extension, directly by a merchant or retailer to a consumer to purchase nonfinancial goods or services directly from the merchant or retailer.”²⁶ However, this exclusion does not apply if that extension of credit is assigned, sold, or otherwise conveyed to another person, the credit extended significantly exceeds the market value of the nonfinancial good or service provided, the credit extension is done as a subterfuge so as to evade or circumvent the authority of the Bureau, or if the credit provider regularly provides credit that is subject to a finance charge.²⁷

Additionally, the Act creates new consumer protection law, largely, but not wholly, modeled on Section 5 of the FTC Act, with an important addition. In a notable departure from the time-tested language of Section 5, the Act adds the concept that “abusive” conduct may violate the Dodd-Frank Act. The Act provides that “[i]t shall be unlawful for . . . any covered person or service provider . . . to offer or provide to a consumer any financial product or service not in conformity with Federal consumer financial law, or otherwise commit any act or omission in violation of a Federal consumer financial law; or . . . to engage in any unfair, deceptive, or abusive act or practice.”²⁸ The Bureau may take cues from other federal statutes prohibiting abusive conduct, including the Fair Debt Collection Practices Act (“FDCPA”).²⁹ The FDCPA is currently enforced primarily by the FTC and since its enactment in 1978, the FTC has brought more than 60 enforcement actions alleging illegal debt collection practices.³⁰ This gives the new Bureau a body of case law to consult in forming regulations and policy under its new authority under the Act.

Focus on Consultation and Consistency

To implement this broad authority over such a wide range of potential industries and companies, many of the responsibilities and employees of the new agency will be transferred directly from other federal agencies. However, because the new Bureau’s authority extends only to consumer financial products and services, many agencies may retain overlapping authority with the Bureau for federal consumer protection laws as they apply to non-financial products and services.

One theme throughout the part of the Act that establishes the Bureau is consistency between agencies with potentially overlapping authority. For example, the Act requires the new Bureau to coordinate with other agencies exercising overlapping functions. Section 1015 provides that: “The Bureau shall consult with the Commission, the Commodity Futures Trading Commission, the Federal Trade Commission, and other Federal agencies and State regulators, as appropriate, to promote consistent regulatory treatment of consumer financial and investment products and services.”³¹ Further, the Bureau is required to “consult with the appropriate prudential regulators or other Federal agencies prior to proposing a rule and during the comment process regarding consistency with prudential, market, or systemic objectives administered by such agency.”³²

But the Bureau is not required to follow any recommendations by the consulted agency. And, importantly, if the Bureau and one or more other agencies are authorized to promulgate rules, the

Bureau “shall have the exclusive authority” to prescribe those rules.³³ This potentially could mean that rules promulgated by the Bureau intended to apply to consumer financial products and services would be applied to non-consumer financial products and services. Whether the new agency will give more consideration to this soft coordination mandate than lip service, of course, remains to be seen, but there are noteworthy skeptics. For example, FTC Commissioner Kovacic referred to the consultation requirement as merely “aspirational,” noting that the Act provides “no assurance ... that the [Bureau] will account properly for the FTC’s views about the appropriate content of unfairness and deception jurisprudence.”³⁴

Conclusion

Much debate has focused on whether the new Bureau of Consumer Financial Protection is redundant or unnecessary. Although the new agency’s mandate overlaps significantly with that of other agencies, including that of the Federal Trade Commission, the new agency will be the only agency specifically focusing on consumer protection issues in the financial products and services industries. Although many uncertainties remain, one thing about the new Bureau is certain: It will have broad-reaching implications for providers of goods and services to consumers in many industries that may touch upon or include any type of financial product or service.

Notes

⁹ Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010) [hereinafter “Dodd-Frank Act”].

¹⁰ Id. § 1017.

¹¹ Id. § 1011. This section also provides that the new Bureau will be both an “independent Bureau” and an “Executive agency.” Id.

¹² Id. § 1011(b).

¹³ White House Press Release, President Obama Names Elizabeth Warren Assistant to the President and Special Advisor to the Secretary of the Treasury on the Consumer Financial Protection Bureau (Sept. 17, 2010), available at <http://www.whitehouse.gov/the-press-office/2010/09/17/president-obama-names-elizabethwarren-assistant-president-and-special-a>. Ms. Warren’s role as special assistant does not preclude that she may be named Director of the agency at some point in the future.

¹⁴ Dodd-Frank Act, *supra* note 1, § 1066.

¹⁵ Id. § 1013.

¹⁶ Id. § 1014.

¹⁷ Id.

¹⁸ Id. § 1021(a).

¹⁹ Id. § 1002(5).

²⁰ Id. § 1002(15).

²¹ The Act specifically excludes from the Bureau's authority regulation of certain industries, including the practice of law and auto dealers. Id. §§ 1027(e), 1029.

²² See id. §§ 1002(12), (14).

²³ Id. § 1061(b)(5)(B)(i).

²⁴ Id. § 1061(b)(5)(B)(ii).

²⁵ The Act specifically exempts the FTC from the requirement that “[t]he Bureau and each of the transferor agencies (except the Federal Trade Commission) shall jointly determine the number of employees and the types and grades of employees necessary to perform the functions of the Bureau....” Id. § 1064(a)(7).

²⁶ Id. § 1027(a)(2)(D)(i).

²⁷ Id. § 1027(a)(2)(B).

²⁸ Id. § 1036 (emphasis added).

²⁹ 15 U.S.C. § 1692d.

³⁰ FED. TRADE COMM’N, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE, A WORKSHOP REPORT 9 (2009).

³¹ Dodd-Frank Act, *supra* note 1, § 1015 (emphasis added).

³² Id. § 1022(b)(2)(B).

³³ Id. § 1022(b)(4)(A).

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