
FINANCIAL SERVICES & E-COMMERCE

AN OVERVIEW AND ANALYSIS OF THE CONSUMER FINANCIAL PROTECTION BUREAU

By Sarah Riddell*

Overview

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Act”), signed into law by President Obama on July 21, 2010, created a major overhaul of the financial industry.¹ For years, advocates have praised the benefits of financial reform and promoted legislation that would provide such reform. Specifically, these advocates have focused their support on consumer protection legislation.² The Act addresses many of these concerns by creating an entirely new regulatory regime with 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.”³ This paper describes the new regime and its powers and analyzes the effectiveness of the new bureau, which is still in its early stages.

The Consumer Financial Protection Bureau

The Act not only creates the Bureau of Consumer Financial Protection (the “CFPB”) and gives it enforcement and regulatory authority, but it also transfers enforcement power from the Federal Trade Commission to the new agency. The CFPB is created as an independent executive branch agency, regulating consumer financial products and services under federal consumer financial laws.⁴ A Director, appointed by the President and approved with the advice and consent of the U.S. Senate, serves for five years.⁵ The Director is permitted to establish regional offices.⁶ The CFPB is authorized to implement federal consumer financial laws by issuing rules, orders, interpretations, guidance, statements of policy, examinations, and enforcement actions.⁷ Any rules or orders created by the CFPB are not subject to the review or approval of the Board of Governors of the Federal Reserve System, which is composed of seven appointees of the President.⁸ However, the CFPB’s proposed rules and regulations can be denied by the Financial Stability Oversight Council, a separate and distinct entity created by the Act consisting of ten voting members and five nonvoting members.⁹

The Act requires the CFPB to establish several mini-bureaus that focus on specific areas of consumer protection. For example, the Office of Fair Lending and Equal Opportunity provides “oversight and enforcement of Federal laws intended to ensure the fair, equitable, and nondiscriminatory access to credit for both individuals and communities that are enforced by the CFPB, including the Equal Credit Opportunity Act and the Home Mortgage Disclosure Act.”¹⁰ A new Office of Financial Education is responsible for developing and implementing a

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strategy to increase consumers’ financial literacy.¹¹ The Office strategies, goals, and objectives include providing opportunities for access to financial counseling and mainstream financial institutions’ services, such as savings and borrowing.¹² Moreover, the Office of Financial Education is responsible for providing consumers with methods to evaluate credit products and understand their credit scores and histories.¹³

The Act targets two sub-groups of particularly vulnerable citizens by creating the Office of Service Member Affairs¹⁴ and the Office of Financial Protection for Older Americans.¹⁵ The former is established to help educate service members and their families, enabling them to make informed decisions about consumer financial products and services. The latter has the goal, among others, of alerting seniors to financial advisers who possess unfair, deceptive, and abusive certifications.

Funding & Civil Penalties

The CFPB is funded with the Federal Reserve Board’s earnings, but only as much as is “reasonably necessary to carry out the authorities of the CFPB.”¹⁶ Funding in 2011 cannot be more than 10% of the Federal Reserve System’s total operating expenses, with gradual adjustments over the following two years.¹⁷ Based on the Federal Reserve System’s 2010 budget, which allocates \$4,368,400,000 toward total operating expenses, the maximum amount of funding the CFPB would receive in 2011 is approximately \$436.84 million.¹⁸ Ultimately, the Act provides a cap on the CFPB’s funding of 12% of the Federal Reserve System’s total operating expenses.¹⁹

The Act directs the CFPB to collect civil penalties won against a person under the federal consumer financial laws and deposit the funds into a Consumer Financial Civil Penalty Fund.²⁰ The money in this account is to be distributed as payments to victims or for the CFPB’s use for consumer education and financial literacy programs.²¹

Scope of Coverage

The Act applies to a variety of financial institutions, including non-depository institutions that provide loan origination, brokerage, or servicing for loans secured by real estate and obtained by consumers primarily for personal, family, or household purposes.²² Larger participants of the consumer financial products or services market are covered.²³ Also covered are entities that have engaged in or are engaging in conduct that poses a risk to consumers, as well as those that offer private education loans or payday loans.²⁴ The Act expressly rejects from the CFPB’s coverage various types of entities, including certain merchants, retailers, small businesses, real estate brokers, manufactured and modular home retailers, accountants, tax preparers, and lawyers.²⁵ Entities engaged in providing employee benefit and compensation plans are also excluded.²⁶ State-regulated entities are excluded to a limited extent.²⁷ Other exclusions are provided for entities regulated by the CFTC and Farm Credit Administration and those involved in charitable contribution activities.²⁸

Covered entities are required to submit reports and are subject to periodic examinations in order to permit the CFPB to assess compliance, obtain information, and detect and assess risks to consumers and the consumer financial market.²⁹ Failure or flat-out refusal by covered entities to follow the Act's requirements is unlawful.³⁰ Covered entities are prohibited from offering or providing consumers any financial products or services not in conformity with federal consumer financial laws, or otherwise commit acts or omissions in violation of these laws.³¹ They are also prohibited from engaging in any unfair, deceptive, or abusive acts or practices.³²

Rulemaking and Enforcement Authority

The Act grants the CFPB with sweeping power to "administer, enforce, and otherwise implement the provisions of Federal consumer financial law."³³ The CFPB is authorized to issue rules, orders, and guidance on federal consumer financial law.³⁴ The CFPB has the responsibility to monitor for risks and developments in the consumer financial products or services market.³⁵ Although the Act grants the CFPB with the exclusive authority to make rules to regulate the consumer financial markets, the Financial Stability Oversight Council is permitted to set aside a final 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 . . .".³⁶ Thus, the Act appears to create a conflict by giving priority to the maintenance of the banking and financial systems over the CFPB's goal of protecting consumers. The political climate in which the new CFPB operates might be the key to the success of the CFPB.³⁷

The CFPB also has limited authority to define unfair, deceptive, and abusive acts or practices. The Act expressly prohibits the CFPB from defining unfairness.³⁸ Abusive acts or practices are defined as those that

- (1) materially interfere with a consumer's ability to understand a term or condition of a consumer financial product or service or
- (2) take unreasonable advantage of a consumer's (a) lack of financial savvy, (b) inability to protect himself in the selection or use of consumer financial products or services, or (c) reasonable reliance on a covered entity to act in the consumer's interests.³⁹

The Act gives the CFPB authority to investigate possible violations of federal consumer financial law, hold hearings, and commence civil litigation. The CFPB can issue cease-and-desist orders against covered entities that violate CFPB laws.⁴⁰ The CFPB gives notice to the entity about the violation and holds a hearing between thirty and sixty days after such notice, where it makes a decision about whether a violation occurred.⁴¹ If the covered entity does not appear at the hearing, a presumption that the covered entity consents to the order is made.⁴² A covered entity may appeal the CFPB's decision in federal court.⁴³

The CFPB may also institute a civil action against an entity in violation of federal consumer financial law in order to impose a civil penalty or an injunction.⁴⁴ While no exemplary or punitive damages are available, many other types of relief

are provided within the Act. For example, the Act includes the following types of relief: rescission of contracts, refund of money or return of real property, restitution, disgorgement for unjust enrichment, damages payments, costs of public notification of the violation, limits on the covered entity's activities or functions, and civil money penalties.⁴⁵ The civil money penalties are harsh, with the penalties categorized into three tiers. The first tier provides for a maximum penalty of \$5,000 per day during which such violation or failure to pay continues.⁴⁶ The second tier provides for a maximum penalty of \$25,000 for each day, and the third tier provides for a maximum \$1 million penalty per day.⁴⁷ Mitigating factors may be considered when assessing the penalty, however. These factors include the size of financial resources of the covered entity, good faith, gravity of the violation or failure to pay, severity of consumers' risks or losses, and history of previous violations.⁴⁸

The Act gives the CFPB the authority to take ancillary actions as they pertain to the CFPB's duties. For example, the CFPB is permitted to provide the Commissioner of Internal Revenue information, including the periodic reports or examinations, provided by covered entities, when tax law noncompliance is suspected.⁴⁹ The CFPB is also permitted to give evidence of federal criminal law violations to the U.S. Attorney General.⁵⁰ The CFPB can also restrict or prohibit mandatory pre-dispute arbitration agreements between covered entities and consumers.⁵¹

Post-Transfer Date Analysis

The "transfer date," the date on which the various consumer protection laws are transferred from other agencies to the Consumer Financial Protection Bureau 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 refuse to confirm any such Director until the CFPB's structure and its funding are changed. 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 Elizabeth Warren's vision, protect ordinary consumers from risky financial products and services that threaten the American Dream?

Recent Developments at the CFPB

Since the Dodd-Frank Act was passed, the CFPB has hired over 400 staff, yet it still remains without a Senate-confirmed Director.⁵² Professor 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 the time this article was submitted, the Senate had not confirmed his appointment.⁵³ Even without a Director, the CFPB has

started fulfilling its obligations. Today, it is working to create a single, simple mortgage disclosure form that allows consumers to comparison shop when obtaining a mortgage (a combined RESPA/TILA form).⁵⁴ Under its “Know Before You Owe” project, the CFPB is testing two potential forms that consumers would receive upon applying for a mortgage loan.⁵⁵

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 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.⁵⁶

Once the markets are defined, the CFPB will seek comment on the appropriate way to measure the threshold for the “larger participants” within those markets.⁵⁷ 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.⁵⁸ The threshold measurement may be tailored to each specific market.⁵⁹ The CFPB is considering an absolute approach, which would dictate a larger participant to be one with an annual loan volume of a specific dollar amount.⁶⁰ 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.⁶¹

Challenges the CFPB Faces

As the CFPB moves ahead with these projects, Republicans object to its institutional design and power. House Republicans have introduced several bills that would substantially alter the way the CFPB operates.⁶² 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.⁶³

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 bill proposes to move the CFPB from the Federal Reserve to the Department of the Treasury.⁶⁴ Another brings the CFPB into the regular congressional appropriations process.⁶⁵

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 two-thirds vote to veto the CFPB’s proposed rules and regulations.⁶⁶ A recent amendment to H.R. 1315 required that the two-thirds majority vote be restored, but this amendment failed to pass.⁶⁷

A different amendment that was successfully passed eliminates any potential conflicts of interest by prohibiting members of the Financial Stability Oversight Council from voting on a proposed regulation if that regulation would affect an institution at which the member was employed in the preceding two years.⁶⁸

The Duffy bill would also change the language in 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”⁶⁹ Rep. 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.⁷⁰ 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.”⁷¹ 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 interests thrive and banks are “bailed out,” then this legislation would greatly reduce the CFPB’s intervention power as set out under the Act.

The “Responsible Consumer Financial Protection Regulations Act of 2011,” introduced by Representative Bachus, establishes a five-member commission to head the bureau, and the Vice Chairman for Supervision of the Federal Reserve System must be one of the five members.⁷² Each member serves staggered five-year terms.⁷³ 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.⁷⁴ The legislation requires the commissioners to coordinate with state enforcers.⁷⁵

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.⁷⁶ Specifically, the FTC’s policy perspective, carefully crafted after 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.⁷⁷ 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.⁷⁸ 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.⁷⁹ In fact, the federal consumer financial protection law does not nullify or exempt people from complying with state law unless the state law is inconsistent with the Act.⁸⁰ State laws that provide greater protection to consumers than the Act are not “inconsistent” with the Act and must be adhered to.⁸¹ When a majority of states enact a resolution supporting the establishment or modification of a CFPB regulation, the CFPB will propose a rule in response to the state action.⁸²

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 enforcement responsibilities, such as telemarketing fraud.⁸³ The Memorandum of Understanding due six months from July 21, 2011 will clarify jurisdiction, 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.⁸⁴ “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.⁸⁵ In fact, the CFPB can enforce the rule and investigate, hold hearings, litigate and seek remedies, including substantial civil penalties of up to \$1 million per day.⁸⁶ 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.⁸⁷ Look for enforcement actions to clarify these rules, and for state enforcers and plaintiffs’ attorneys to follow the CFPB’s lead in these actions.⁸⁸

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, 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.⁸⁹ 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.⁹⁰ 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.

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. 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.⁹¹ 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 Democrats, etc.). Will he have time and political capital to ensure that the CFPB is established as intended in the Dodd-Frank Act?⁹² 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.

Endnotes

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

2 See, e.g., Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. Pa. L. Rev. 1 (2008).

3 Act § 1021(a).

4 *Id.* § 1011(a).

5 *Id.* §§ 1011(b)(1), (2).

6 *Id.* §§ 1011(c)(1); 1011(e).

7 *Id.* § 1012(a)(10)

8 Board of Governors of the Federal Reserve System, About the Fed, <http://www.federalreserve.gov/aboutthefed/bios/board/default.htm> (last visited Nov. 17, 2011). The board members serve a fourteen-year term; current board members include Ben Bernanke, Janet Yellen, Kevin Warsh, Elizabeth Duke, Daniel Tarullo, and Sarah Bloom Raskin. Act § 1012(c)(3). In fact, the Board of Governors may not:

(A) intervene in any matter or proceeding before the Director, including examinations or enforcement actions, unless otherwise specifically provided by law;

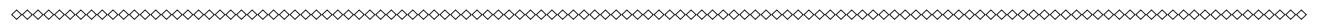
(B) appoint, direct, or remove any officer or employee of the Bureau; or

(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.

Act §1012(c)(2).

9 Act §§ 111(a); 111(b). Voting members include the Secretary of the

- Treasury, Chairman of the Board of Governors of the Federal Reserve System, Comptroller of the Currency, Director of the Bureau, Chairman of the Commission, Chairperson of the Corporation, Chairperson of the Commodity Futures Trading Commission, Director of the Federal Housing Finance Agency, Chairman of the National Credit Union Administration Board, and an independent member with insurance experience appointed by the President and confirmed by the Senate. *Id.* Nonvoting members serve in an advisory capacity and include the Director of the Office of Financial Research, Director of the Federal Insurance Office, a state insurance commissioner, a state banking supervisor, a state securities commissioner. *Id.* The latter three members are to be designated by a selection process determined by their peers. *Id.*
- 10 *Id.* § 1013(c)(1)-(2)(A).
- 11 *Id.* § 1013(d)(1)-(2).
- 12 *Id.* § 1013(d)(2).
- 13 *Id.*
- 14 *Id.* § 1013(e)(1). The Office of Service Member Affairs has authority to develop and implement initiatives intended to “educate and empower service members and their families to make better informed decisions regarding consumer financial products and services.” *Id.* § 1013(e)(1)(A). Moreover, this office must monitor and respond to complaints made by service members and their families. *Id.* § 1013(e)(1)(B). The Bureau has authority to assign this Office’s functions and the maintenance of these functions to regional offices near military bases. *Id.* § 1013(e)(2)(A).
- 15 *Id.* § 1013(g)(1). The duties of this office include developing goals for programs that offer financial literacy and counseling to seniors; monitoring the certification of financial advisors who advise seniors and alert the Bureau and State Regulators about unfair, deceptive, or abusive certifications; recommending best practices for seniors to learn about financial advisors; conducting research to learn these best practices; coordinating with other agencies; and working with community and non-profit organizations. *Id.* § 1013(g)(3)(A)-(F).
- 16 *Id.* § 1017(a)(1).
- 17 *Id.*
- 18 See BD. OF GOVERNORS OF THE FED. RESERVE SYS., ANNUAL REPORT: BUDGET REVIEW 2010, at 9 (2010), available at <http://www.federalreserve.gov/boarddocs/rptcongress/budgetrev/br10.pdf>.
- 19 Act § 1017(a)(2).
- 20 *Id.* § 1017(d)(1).
- 21 *Id.* § 1017(d)(2).
- 22 *Id.* § 1024(a)(1)(A)-(E). The Bureau also has supervisory power over very large insured depository institutions or credit unions (those with total assets of more than \$10 billion) and their affiliates, as well as insured depository institutions or credit unions with total assets of \$10 billion or less. *Id.* §§ 1025(a), 1026(a).
- 23 *Id.* § 1024(a)(1)(A)-(E).
- 24 *Id.*
- 25 *Id.* § 1027. However, the carve-out is inapplicable to those entities that (i) extend credit to a consumer to enable the consumer to purchase a nonconsumer financial product or service, (ii) collect debt, or (iii) sell or convey debt.
- Id.* § 1027(a)(2)(A)(i)-(iii). There is also an exclusion for certain auto dealers. *Id.* § 1029.
- 26 *Id.*
- 27 *Id.* § 1027. For example, entities regulated by a state securities commission or a state insurance regulator are excluded. *Id.*
- 28 *Id.*
- 29 *Id.* § 1024(b)(1)(A)-(C).
- 30 *Id.* § 1036(a)(2).
- 31 *Id.* § 1036(a)(1).
- 32 *Id.*
- 33 *Id.* § 1022(a).
- 34 *Id.* §§ 1022(b)(1), 1022(b)(4)(A).
- 35 *Id.* § 1022(c).
- 36 *Id.* § 1023(a). An agency must first petition the Council to stay or set aside a regulation; the Council Chairperson “may stay the effectiveness of a regulation for the purpose of allowing appropriate consideration of the petition by the Council.” *Id.* § 1023(c)(1)(A). The Council may set aside or issue a stay of any regulation upon a vote of the Council and approval by two-thirds of the then-serving Council members. *Id.* § 1023(c)(3)(A).
- 37 Mark E. Budnitz, *The Development of Consumer Protection Law, the Institutionalization of Consumerism, and Future Prospects and Perils*, 26 GA. ST. U. L. REV. 1147, 1188 (2010) (“The robustness of enforcement efforts by government agencies such as the FTC, bank agencies and state attorneys general depends upon the political climate in which those agencies operate, the resources they receive, and other priorities needing a share of those resources.”).
- 38 Act § 1031(a).
- 39 *Id.* § 1031(b).
- 40 *Id.* § 1053(b).
- 41 *Id.*
- 42 *Id.* § 1053(b)(1)(C).
- 43 *Id.* § 1053(b)(3).
- 44 *Id.* § 1054(a).
- 45 *Id.* § 1054(a)(2).
- 46 *Id.* § 1054(c)(2)(A).
- 47 *Id.* § 1054(c)(2)(B)-(C).
- 48 *Id.* § 1054(c)(3).
- 49 *Id.* §§ 1024(b)(6), 1025(b)(5), 1026(b)(3).
- 50 *Id.* § 1056.
- 51 *Id.* § 1028(a)-(b). This provision permits the prohibition or imposition of conditions on mandatory pre-dispute arbitration agreements after the Bureau conducts a study of the use of such agreements and concludes that such actions are in the public interest and protect consumers. *Id.*
- 52 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.
- 53 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).
- 54 CONSUMER FINANCIAL PROTECTION BUREAU, *supra* note 52, at 10.
- 55 *Id.* at 11.
- 56 *Id.* at 13.
- 57 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).
- 58 *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.*
- 59 *Id.*
- 60 *Id.*
- 61 *Id.*
- 62 H.R. 1121, 112th Cong. (2011); H.R. 1315, 112th Cong. (2011).
- 63 Reid J. Epstein, *Richard Shelby: Cordray is DOA*, POLITICO, July 21, 2011, available at <http://www.politico.com/news/stories/0711/59545.html>.
- 64 Consumer Financial Protection Oversight Act of 2011, H.R. 557, 112th



Cong. (2011).

65 H.R. 1640, 112th Cong. (2011).

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

67 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.).

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

69 Act § 1023(a).

70 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>.

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

72 H.R. 1121, 112th Cong. § 2 (2011).

73 H.R. 1121 § 2.

74 *Id.*

75 *Id.*

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

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

78 *Id.* at 21.

79 *Id.* at 23-24; *see also* note 75 and accompanying text.

80 Act § 1041(a)(1).

81 *Id.* § 1041(a)(2).

82 *Id.* § 1041(c). In proposing a rule in response to the state action, the CFPB will consider the following factors: potential greater protections to consumers offered by the new regulation and the benefits of the regulation weighed against the increased costs or inconveniences to consumers. *Id.* The CFPB will also consider whether unfair discrimination against a class of consumers would result. *Id.*

83 Kovacic, *supra* note 76, at 24.

84 Act § 1023(a).

85 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>.

86 *Id.*

87 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>.

88 *Id.*

89 Act § 1044.

90 *Cuomo v. The Clearing Housing Ass'n*, 129 S. Ct. 2710 (2009).

91 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).

92 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.").

