Consumer Financial Protection Bureau Two Years In and Just Beginning the Baby Steps

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The Consumer Financial Protection Bureau (CFPB) is now two years old. The Bureau was envisioned by Professor Elizabeth Warren, now Senator Elizabeth Warren (D-Mass.), and championed by her. While some have believed that she would have made a fine first director of the agency, Congressional opposition made certain that would not happen. Richard Cordray has recently been confirmed as Director by the US Senate after a lengthy filibuster that included a recess appointment with questions as to the constitutionality of the original appointment.[1]

The Senate refused to confirm the Director, Richard Cordray, until a recent agreement on executive appointments allowed this appointment to go forward to a vote in exchange for two presidential nominees for the National Labor Relations Board being withdrawn.[2]

The House Financial Services Committee by Rep. Jeb Hensarling, chairman, banned the director from testifying stating that he was not the agency's legitimate head. [3]

The Consumer Financial Protection Bureau with the Director in place is seemingly ready to go forward. The Bureau's website trumpets their accomplishments including receipt of 175,000 complaints from consumers, and the use of a shopping sheet in conjunction with the Department of Education for evaluating the cost of paying for college at 720 colleges. They have conducted town hall meetings from Seattle, WA to Atlanta, GA and numerous cities in between including Sioux Falls, SD and Durham, NC. They claim to be responsible for returning $430 million into the pockets of wronged consumers and set forth that their goal is to restore trust in consumer financial markets.[4]

As envisioned by the Department of Treasury fiscal year 2012 budget, the Secretary of the Treasury was authorized to perform functions of the bureau until the director of the bureau was appointed. The Consumer Financial Protection Bureau was supposed to, according to the treasury fiscal year 2012 budget, "conduct rule making, supervise, and enforcement for federal consumer protection laws; restrict unfair and deceptive or abusive acts in practice; create a center to take consumer complaints; promote financial education; research consumer behavior; monitor financial markets for new risks to consumers; and enforce law that outlaw discrimination and other unfair treatment in consumer finance.

The CFPB was set up with six primary divisions: supervision and enforcement; consumer engagement and education; research, markets, and regulations; external affairs; general counsel; chief operating officer. The CFPB is funded by authorized transfers from the Federal Reserve System subject to limits established in the Dodd Frank Act. The CFPB is also authorized to request up to $200 million in discretionary appropriations if the amount transferred by the Federal Reserve System is not sufficient.[5]

The Bureau's primary source of funding is not appropriations, like most executive agencies, or assessments on institutions within its regulatory jurisdiction, as is typical of federal banking regulators. Instead, the Bureau is primarily funded by a transfer of non-appropriated funds from the Federal Reserve System operating expenses, in an amount determined by the Director to be reasonably necessary to carry out the authority of the Bureau subject to caps. The cap is 10% of the operating expenses of the Federal Reserve System fiscal year 2011, 11% for Fiscal year 2012 and 12% thereafter.

The Consumer Financial Protection Act requires the Bureau to submit semi-annual reports to Congress that justify its budget requests. A minimum of twice each year the Bureau Director must appear before the Senate Committee on Banking, Housing and Urban Affairs, the House Committee on Financial Services, and the House Committee on Energy and Commerce. The Bureau must also submit certain financial information for Office of Management and budget review and is subject to audits by the Comptroller General.

In addition, to the transfer of funds from the Federal Service System, the act authorizes appropriations if the Director determines that sums available to the Bureau will not be sufficient.

The Act also establishes a Consumer Financial Civil Penalty Fund for civil penalties secured by the Bureau for violation of consumer financial protection laws. The fund is to be used to pay victims of such violations, as well as for financial literacy and consumer education programs.

Before the Consumer Protection Act went into effect, which largely occurred on July 21, 2011, the authority to write rules to implement the majority of the Federal Consumer Protection Laws, the power to enforce those laws and supervisory authority over individuals and companies offering and selling consumer financial products and services where shared by five different banking regulators, as well as, the Federal Trade Commission and Department of Housing and Urban Development. The jurisdiction of those regulators varied based on the type of institution involved and in some cases based on the financial activities in which the institution was engaged.

The authority of the banking regulators depended on the depository charters. The Office of Comptroller of the Currency supervised national banks; the Board of Governors of the Federal Reserve System (FRS) supervised domestic operations of foreign banks and state-chartered banks that were members of the Federal Reserve System; The Federal Deposit Insurance Corporation supervised state-chartered banks and other state-chartered banking institutions that were not members of the FRS; the National Credit Union Administration supervised federally insured credit unions; the Office of Thrift Supervision supervised federal savings and loan association and thrifts. The five banking regulators were charged with the two-pronged mandate of regulating for safety and soundness, as well as consumer compliance.

Banking regulators were given broad authority to subject banks, credit unions, and thrifts to regulatory standards including minimum capital levels, through regulations, orders and guidelines. Regulators were given strong supervisory powers including the authority to perform on-site examinations of depositories and flexible enforcement powers to rectify problems found during the course of their supervision. These powers gave banking regulators at least the potential to catch problems before they caused significant harm to consumers, counterparties, and the depositories. Additionally, consumer compliance issues were often dealt with informally and with confidentially as part of the examination process, rather than through public, ex post formal enforcement orders.

The Federal Trade Commission (FTC) was the primary federal regulator for non-depository financial institution; such as payday lenders and mortgage brokers. Unlike federal regulators, the FTC had little up-front and supervisory enforcement authority. The FTC's powers were after the fact.

In addition to the institution-based distinctions, both depository and non-depository financial institutions were subject to restrictions of federal consumer financial protection laws such as; Truth in Lending Act, Equal Credit Opportunity Act, Real Estate Settlement Procedure Act, Truth in Savings Act, and Fair Debt Collection Practices Act.

While the banking regulators had both prudential and consumer compliance powers, the banking regulators did very little post enforcement action of a consumer nature.

The argument for consolidating the federal consumer financial regulatory powers indicated that if all enforcement was contained in one agency with consumer focus, that enforcement would improve.[6]

The second major criticism of the consumer financial regulatory system before the Consumer Financial Bureau was that no federal agency had both mission and legal authority to effectively regulate consumer markets. While the FTC had an interest, it did not have sufficient authority and motivation to regulate these consumer items.

The Consumer Financial Protection Act significantly altered the consumer protection landscape by consolidating rule making authority in one regulator. The Act transfers existing consumer protection power from other federal regulators and established heightened consumer protection authorities not previously held by federal regulators. The legislative branch debate focused on whether large and small institutions should be treated differently in the regulatory structure and whether there should be clear division between financial and non-financial goods, services and providers in the market place.

The CFPB was established within the Federal Reserve System but has independence from the Federal Reserve Board. The Board does not itself have the formal authority to stop, delay, or disapprove of a Bureau regulation, nor can it intervene in any matter or proceeding before the Director of the Consumer Protection Board; appoint, direct or remove any officer or employee of the Bureau or consolidate the CFPB, or any of the functions or responsibilities of the Bureau.

The Bureau's authority is concentrated within a single Director, rather than in a board or commission. The Director is to be appointed by the President, subject to the advice and consent of the Senate, to serve for a five-year term from which he could only be removed for inefficiency, neglect of duty or malfeasance in office. The Director has authority to hire employees necessary to carry out the duties of the Bureau and to delegate powers to employees. This structure insulated the Bureau from the Office of the President and allows the Director to steer the course of the Consumer Financial Protection Bureau.[7]

The law requires the Director to establish units within the Bureau to focus on consumer financial research; to provide guidance and technical assistance to traditionally underserved areas and individuals; and to monitor and respond to consumer complaints. The act also requires the establishment of an Office of Fair Lending and Equal Opportunity; an Office of Financial Education; an Office of Service Member Affairs directed to members of the military and their families; an Office of Financial Protection for Older Americans to, among other things, facilitate the financial literacy of individuals who have attained the age of 62 years or more; and a Private Education Loan Ombudsman to study and attempt to resolve complaints raised by private education loan borrowers.[8]

The authorities of the bureau fall into three broad categories; supervisory, the power to examine and impose reporting requirements, and enforcement of various consumer laws and regulations including rulemaking.

The CFPB received primary responsibility for enforcing consumer compliance over large depository institutions (more than $10 billion in assets).

The Bureau's supervisory and enforcement power over depositories with $10 billion or less in assets is more limited than its power over the large depositories. The primary consumer protection supervisory or enforcement powers over smaller depository institution remain with the preexisting banking regulators.

The Consumer Financial Protection Act does not provide the Bureau with jurisdiction over all non-depository financial institutes. It does authorize them to regulate providers of three explicit categories of consumer financial products and services, as well as entities that meet one of two discretionary standards. The act explicitly provides the Bureau authority over providers of private student loans, providers of payday loans, and entities that engage in mortgage-related activities, such as mortgage origination, brokerage, mortgage servicing, mortgage modification, and foreclosure relief activities.

In addition, the Bureau has authority over any entity that the Bureau considers to be a "larger participant in a consumer financial market" as well as any entity that the Bureau has reasonable cause to believe is engaging, or has engaged, in conduct that poses risk to consumers with regard to the offering or provision of consumer financial products or services.

While the Bureau does not have expressed authority to regulate merchants, retailers, and sellers of non-financial goods and services, even if an entity extends credit to borrowers for the purchase of their goods and services, these entities could engage in practices that could trigger Bureau regulatory authority. The Bureau could regulate a merchant, retailer, and seller of non-financial goods or services if such an entity regularly extends credit and the credit is subject to finance charges and is engaged significantly in offering or providing consumer financial products or services. Such an entity could also become subject to the Bureau's regulatory authority if it either assigns, sells or otherwise conveys to another person such debt owed by the consumer or extends credit that significantly exceeds the market value of the non-financial good or service provided or otherwise evades the Consumer Financial Protection Act.

The Bureau has supervisory, rulemaking or enforcement powers over automobile dealers engaged in leasing, selling, or servicing automobiles. The Consumer Financial Protection Act streamlines the rulemaking process that the FTC must follow to issue unfair or deceptive trade practices rules against automobile dealers.

By its own language the Consumer Financial Protection Act excludes from the Bureau's rulemaking, supervisory and enforcement authority real estate brokers, real estate agents, sellers of manufactured mobile homes, income tax preparers, and accountants to the extent that they are acting in their normal capacity. However, the Consumer Financial Protection Act authorizes some authority for the Bureau to regulate those entities if they extend credit; otherwise sell or offer to sell a consumer financial product or service; or engage in an activity that makes them subject to an enumerated consumer law.

Similarly attorneys are exempt from the Bureau's supervisory and enforcement authority. But the exemption would not apply if the attorney sells or offers to sell a consumer financial product or service that is not offered or provided as part of or incidental to, the practice of law.

The Consumer Financial Protection Act authorizes the Bureau to prescribe rules and issue orders and guidance as necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws.
The Consumer Financial Protection Act provides the Bureau with the authority to provide rules declaring acts or practices pertaining to covered consumer financial products or services to be unlawful if they are unfair, deceptive or abusive.

The Congressional critics of this have a good deal of complaints. The Republican Senate Government Policy Paper dated August 1, 2012 criticized the unprecedented investigative and rule making authority. The critics say that the CFPB is not subject to appropriations, receiving more than $400 million each year directly from the Federal Reserve System without taxpayer approval or adequate oversight from Congress.[9]

They have also criticized the fact that the words "unfair" and "deceptive" have decades of case law in FTC and other agency determinations. The term "abusive" is entirely new and the definition is subjective. The critics complained of Director Cordray's comment that he would use enforcement authority to define “abusive” standards rather than clarifying it through the rulemaking process.[10]

The D.DC. District Court on August 1, 2013 dismissed a constitutional challenge to the Agency on separation of powers grounds brought by the State National Bank of Big Springs and several state attorneys general for lack of standing. [11]
The critics complained about the unrestricted access to a slush fund through the Civil Penalty fund. The critics complained that if the agency cannot locate the victim or the payments are otherwise not practicable, the agency is allowed to use the funds for consumer education and financial literacy programs. Critics say that job creators and consumers will soon feel the consequences of this “unaccountable agency”. The Republican Policy Paper proposes “reforms” to include a Consumer Financial Protection Bureau board of directors, to require the CFPB to submit a budget request and go through the appropriations process like the Securities and Exchange Commission, the Commodity Futures Trading Commission, and the Federal Trade Commission and to allow the federal bank regulators to oversee Consumer Financial Protection Bureau regulations to ensure they do not needlessly cause bank failures.

Opponents of the agency object to the single director structure and the fact that it does not have the limitations of financial resources that are dependent on Congress. The CFPB is set up as part of the Federal Reserve System and, therefore, is not subject directly to Congressional appropriations.[12]

The CFPB has promoted the use of mortgage and student loan shopping sheets, brought enforcement actions against credit card companies, mortgage foreclosure assistance providers and debt settlement companies, and has adopted sweeping new rules for the mortgage market. They have also signaled policy positions on what constitutes fair auto lending, despite not having clear authority over auto dealers. It is now supervising banks and larger credit institutions, debt buyers and collectors and soon will be supervising student loan services and potentially other non-bank financial services makers.

The general authority of the Consumer Financial Protection Bureau is to regulate unfair, deceptive or abusive acts and practice similar to the long held authority granted to the Federal Trade Commission, Federal Banking Agency and Section 5 of the FTC Act. The CFPB’s enforcement actions, which resulted in consent orders against three credit card companies in 2012, where aggressive displays of enforcement power based on unfair, deceptive or abuse of advertising marketing and debt collection practices. The CFPB seeks to go beyond the FTC and not in just looking at both the advertising and marketing of add-on products to consumer transactions but rather scrutinizing the entire consumer experience including initial advertising enrollment fulfillment complaint handling and more. The CFPB has authority to enforce over a dozen additional statutes, some general to particular products and services, while others are broad including privacy provisions of the Gramm-Leach-Bliley Act in laws and regulations covering electronic transactions.

The CFPB can be expected to have a significant presence in the financial community including many of the stake holders that appear in Chapter 13 matters. As to how the power gets exercised and whether the power gets proscribed or circumscribed to some degree remains to be seen.

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[1] The President appointed Cordray in January 2012 as a recess appointment. The Senate was not in formal recess but was not conducting business at the time.

[2] Washington Post June 16, 2013

[3] Newsmax April 23, 2013.

[4] www.consumerfinancial.gov

[5] See The Consumer Financial Protection Bureau: A Legal Analysis Congressional Research Service June 7, 2012

[6] Bar-Gill & Warren Making Credit Safer 157 U. Penn L.R. 1 (Nov. 2008)

[7] 12 USC § 5491

[8] 12 USC § 5493

[9] http://www.rpc.senate.gov/policy-papers/consumer-financial-protection-bureau-unparalleled-unaccountability

[10] http://www.rpc.senate.gov/policy-papers/consumer-financial-protection-bureau-unparalleled-unaccountability

[11] State National Bank of Big Spring v. Lew, (12-1032 D.D.C. 2013)

[12] http://www.rpc.senate.gov/policy-papers/consumer-financial-protection-bureau-unparalleled-unaccountability