

Lenders Compliance Group

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Consumer Financial Protection: Bureau or Bureaucracy?

Part III of a Three-Part Series on Financial Reform Legislation

Dodd-Frank: Legislation - Reactive or Proactive

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Although Elizabeth Warren has left the Consumer Financial Protection Bureau, her views continue to provide inspiration to its management and staff. Perhaps it would be wise to read the article I wrote last October, outlining the CFPB, its mandates, and its prospects.

Society is founded not on the ideals but on the nature of man

and the constitution of man rewrites the constitutions of states.

But what is the constitution of man?^[i]

Will and Ariel Durant

In the first two parts of this 3-part series,^[ii] we have explored the basic structure of the new financial reform law, known as the Dodd-Frank Act ("Act"), as it affects residential mortgage loan originations.^[iii] We have already given consideration to the many mortgage loan regulatory provisions that the Act covers^[iv] and especially to the Mortgage Reform and Predatory Lending Act, a primary component of this landmark financial legislation.^[v]

Now, we will turn our attention to the very core of the Act itself vis-à-vis the mortgage industry and consumer financial protection: the Bureau of Consumer Financial Protection (known also as the "Consumer Financial Protection Bureau," or "CFPB," and hereinafter as "Bureau").^[vi]

But first, a Thought Experiment.^[vii]

A vast, entangled array of very small and sleek wires, super strong magnets, and very wide and long cables extend out omnidirectionally - all of which lines and circuits are laid throughout a network of interlocking, electrically generated devices that are held in place in their respective positions on a shaky iron scaffold by fraying, single-knotted ropes. The devices are needed to power vital and critical services to a community. But, due to wear and tear on their bindings, some devices are about to break free, threatening to pull down with them the entire array of wires, magnets, cables, and other devices. Any device can plummet at any time. Before it is too late, all the lines must be disentangled, traced to each of the devices, and rerouted to a new and more stable grid; plus, the devices themselves must be transferred, one by one, to the new grid without damaging them, and then reconnected to their lines. *But the collapse can take place at any time.* A "crisis" looms!

So, how are you going to accomplish this heroic task quickly and effectively?

Now let's consider this analogue: the energy source is Constitutional authority; the grid is the financial regulatory framework; wires and cables are the ways and means that implementing regulations affect one another; magnets are the legal foundations (i.e., case law precedents (*stare decisis*), statutes (federal and state), Constitutional laws or rights) on which all subject enumerated laws (see below) rest; devices are the existing regulations; and ropes are the various governmental agencies that are charged with enforcement of and monitoring compliance with specific implementing regulations.

By the end of this article, I hope you will have decided how best to solve the above-described and admittedly convoluted "crisis." This article and the preceding articles in this

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Please keep in mind that this series on the Dodd-Frank Act is meant to provide an overview. However, the legislation itself is extremely detailed and extensive. Therefore, for guidance and risk management support, I strongly recommend that you consult a risk management firm, residential mortgage compliance professional, or regulatory counsel to develop policies and procedures to implement the Act's requirements.

One Bureau, Many Bureaucrats

Nothing is more destructive of respect for the government

and the law of the land than passing laws

which cannot be enforced.[\[viii\]](#)

Albert Einstein

There are numerous existing consumer protection laws that will be included in the transfer to the Bureau by July 21, 2011, the Designated Transfer Date,[\[ix\]](#) thereby giving it exclusive rulemaking and examination authority.[\[x\]](#)

These "enumerated laws" include:[\[xi\]](#)

- Alternative Mortgage Transaction Parity Act (AMTPA)[\[xii\]](#)
- Community Reinvestment Act (CRA)[\[xiii\]](#)
- Consumer Leasing Act (CLA)[\[xiv\]](#)
- Electronic Funds Transfer Act (except the Durbin interchange amendment) (EFTA)[\[xv\]](#)
- Equal Credit Opportunity Act (ECOA)[\[xvi\]](#)
- Fair Credit Billing Act (FCBA)[\[xvii\]](#)
- Fair Credit Reporting Act (except with respect to sections 615(e), 624 and 628) (FCRA) [\[xviii\]](#)
- Fair Debt Collection Practices Act (FDCPA)[\[xix\]](#)
- Federal Deposit Insurance Act, subsections 43(c) through 43(f)(12) (FDIA)[\[xx\]](#)
- Gramm-Leach-Bliley Act, sections 502 through 509 (GLBA)[\[xxi\]](#)
- Home Mortgage Disclosure Act (HMDA)[\[xxii\]](#)
- Home Ownership and Equity Protection Act (HOEPA)[\[xxiii\]](#)
- Real Estate Settlement Procedures Act (RESPA)[\[xxiv\]](#)
- S.A.F.E. Mortgage Licensing Act (S.A.F.E. Act)[\[xxv\]](#)
- Truth in Lending Act (TILA)[\[xxvi\]](#)
- Truth in Savings Act (TISA)[\[xxvii\]](#)
- Omnibus Appropriations Act- Section 626 (OAA)[\[xxviii\]](#)
- Interstate Land Sales Full Disclosure Act (ILSFDA)[\[xxix\]](#)

As I have discussed elsewhere, the Bureau would be assigned primary authority to enforce the aforementioned laws, but other federal regulators, including the Department of Housing and Urban Development ("HUD"), the banking agencies, and the Federal Trade Commission, would retain overlapping, secondary enforcement authority over certain requirements. State Attorneys General would be empowered to enforce federal laws under the Bureau (subject to any existing limitations in the laws to be transferred to the Bureau's authority).[\[xxx\]](#) And state consumer financial protection laws would not be preempted, except to the extent that they are inconsistent with federal law (although such state laws could be stricter than the federal laws, in which case they would not be preempted by federal law).[\[xxxi\]](#)

The Bureau is established pursuant to Title X of the Act and is placed functionally within the purview of the U.S. Department of Treasury. It is housed within the Federal Reserve (Fed), but the Fed has no direct, operational authority over the Bureau.[\[xxxii\]](#) Its purpose is to regulate consumer financial products or services under the federal consumer financial laws. [\[xxxiii\]](#) These financial products and services include, but are not limited to, credit extension; credit counseling; loan servicing; Credit Reporting Agencies, their agents and affiliates; real property leases; real estate settlement services; real estate appraisals; depository accounts; financial advisory services; exchange of funds and transmittal of funds; consumer custodial fund services; so-call "stored value cards;" check cashing; debt management, settlement, and collection services; payment processing services; and, a catch-all "other products and services" as the Bureau so defines.

Breaking this down, the Bureau will have purview over virtually all financial products and services that are offered or provided to consumers for personal, family, or household purposes.

The Bureau has authority over the above-stated enumerated laws through rulemaking, orders, guidance, interpretations, policy statements, examinations, and enforcement actions. It will be responding to the changing financial landscape by continual rulemaking, as well as providing guidance and rules in accordance with timeframes required by the Act. Implementation functions include enforcement of existing laws and the Bureau's prescribed rules through civil monetary penalties[\[xxxiv\]](#) as well as in response to "covered persons" and service providers to prevent unfair, deceptive and abusive practices in connection with a

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consumer financial product or service.

To take just one example, regarding disclosures, the Bureau's rulemaking will ensure that the features of any consumer financial product or service are fully, accurately, and effectively disclosed to consumers in a manner that the Bureau determines will permit consumers to understand the costs, benefits, and risks associated with the product or service. Or, with respect to forms, in tandem with the Bureau's new disclosure rules, it may provide model forms, which, although optional, would provide a "safe harbor." Yet another example would be the Act's requirement to restructure the TILA and RESPA Disclosures (i.e., Truth-in-Lending Statement, Good Faith Estimate, and HUD-1 Settlement Statement) by combining them. So, not later than one year after the Designated Transfer Date, the Bureau must propose a new model disclosure that combines the initial and final TILA Statement and the Good Faith Estimate and HUD-1 Settlement Statement into a single disclosure for mortgage loan transactions.

A Penalty Fund^[xxxv] will be established for payments to the victims of activities for which civil penalties have been imposed. The Bureau will have the authority to impose registration requirements on persons subject to its jurisdiction, other than insured depository institutions and insured credit unions and their related affiliates. The Bureau is further permitted to prescribe rules and take enforcement actions. In general, then, the Bureau's enforcement authority includes the right to impose penalties and restitution, bring a civil action in its own name in order to impose a civil penalty or seek equitable relief. And, as a specific power delegated by the Act itself, the Bureau can provide protection for whistleblowers and employees who report violations and cooperate with authorities.

Excluded from the Bureau's purview are insurance products or services, entities regulated by stated insurance regulators, and electronic pass-through services; employee benefit and compensation plans; small merchants, retailers or other sellers offering purchase money credit where the debt is not assigned; real estate brokers; services offering identity theft information; certain retailers of manufactured housing or modular homes; attorneys; persons and entities regulated by a state securities commission; certain charitable contribution functions; accountants and tax preparers; persons regulated by the Farm Credit Administration; activities related to the solicitation or making of voluntary contributions to a tax-exempt organization; and, persons and entities required to be registered with the Securities and Exchange Commission, Commodity Futures Trading Commission ("CFTC"), and the Bureau itself. Automobile dealers who assign their credit contracts to unaffiliated third parties are also excluded.^[xxxvi] The Bureau does not have the authority to establish usury limits, unless explicitly authorized by law.

The Bureau has a five-year term director ("Director"), who is appointed by the President, and requires Senate confirmation. A new bureaucracy will be established in order for the Bureau to fulfill its mission. There will be various units and offices: a research unit to monitor the consumer financial products and services market, and a unit to collect and track complaints; three new offices to be established within one year of the Designated Transfer Date, an Office of Fair Lending and Equal Opportunity, an Office of Financial Education, an Office of Service Members Affairs; and, an Office of Financial Protection for Older Americans, which must be established within 180 days after the Designated Transfer Date. Furthermore, there will be a Private Education Loan Ombudsman to process complaints from borrowers of private education loans.

Periodically, the Director reports to Congress and provides documentation in support of the Bureau's work. The Director forms and appoints members to a Consumer Advisory Board ("Board"), which consists of six members recommended by regional Federal Reserve Bank Presidents. The Board advises and consults with the Bureau regarding consumer financial laws, provides information on emerging practices in the consumer financial products or services industry, and reviews regional trends, concerns, and other relevant information.

It should be noted that the Act establishes the Financial Stability Oversight Council ("Council"), charged with identifying systemic risks to the financial stability of the United States, which is ostensibly meant to monitor conditions leading to "too big to fail" and emerging threats to the U.S. financial system. This Council is composed of ten voting members and five non-voting members, and one of the ten voting members is the Director of the Bureau.^[xxxvii]

The Council may set aside a final regulation prescribed by the Bureau, or any provision thereof, if the Council decides that the regulation will put the safety and soundness of the U.S. banking system or the stability of the U.S. financial system at risk. The Chairperson of the Council also may stay the effectuating of a regulation in order to permit further consideration of a petition to the Council upon the request of any member agency.^[xxxviii] Until such time as the Council decides to vacate its stay, the subject regulation or provision would be unenforceable.

In addition to the Bureau's responsibility to build its own staff and administrative operations, it will collaborate with the federal banking agencies and HUD to choose employees to be transferred from their agencies to the Bureau. All such employee transfers are to be fully effectuated not later than 90 days after the Designated Transfer Date. The Bureau is expected to cost approximately \$500 million to run, an amount not altogether high when compared with the cost to run many other federal agencies - although the cost will no doubt increase over the years.

Bureau and the Banks

If you owe the bank \$100, that's your problem.

If you owe the bank \$100 million, that's the bank's problem.

John Paul Getty

The Bureau has exclusive authority to require reports of insured depository institutions and conduct examinations, including authority over their affiliates. The Bureau's authority extends to credit unions and their affiliates, as well. Threshold size is \$10 billion in total assets; below \$10 billion in assets, bank oversight will remain with their principal supervisory agencies – their prudential regulators. In such instances for banks with total assets below \$10 billion, the prudential regulator will retain exclusive enforcement authority with respect to federal consumer financial laws. The Office of the Comptroller of the Currency ("OCC") will continue to regulate small thrifts. Obviously, the Bureau's mission is to monitor and enforce consumer financial laws; therefore, its authorities will be exercised in this particular area of oversight.

In any event, the Bureau must coordinate examinations with prudential regulators and state bank supervisors. Although the threshold is \$10 billion in total assets, the Director may still require reports from insured depository institutions and credit unions that have total assets of less than \$10 billion. The Bureau is not required to participate in examinations performed by the prudential regulator for such institutions, but it may do so. If the Bureau finds that any institution has materially violated a federal consumer financial law, it notifies the prudential regulator and recommends appropriate action.

Under the Act, a state law is not inconsistent with the provisions of Title X if such law offers greater consumer protection.^[xxxix] Therefore, the Bureau may determine that a state law is inconsistent with Title X on its own motion or in response to a petition by any interested person. Procedurally, the Bureau must initiate a rulemaking whenever a majority of the states enact a resolution to establish or modify consumer protection regulation promulgated by the Bureau. With respect to visitatorial powers, the provisions of Title X do not affect the application of a regulation, order, guidance or interpretation of the OCC or Office of Thrift Supervision (OTS) regarding the applicability of state law to a preexisting contract.

But the Act does provide a preemption standard pursuant to which a state consumer financial law is preempted if it either (1) has a discriminatory effect on national banks in that it "prevents or significantly interferes with the exercise by the national bank of its powers," or, (2) is preempted by a provision of federal law.^[xl]

Determining the **preemption standard** – permitting preemption of state consumer financial protection law – requires the following *de minimus* analysis: (1) If the preemption's application would have a discriminatory effect on national banks, compared to banks chartered by a state; (2) If the preemption determination, made by the OCC or a court on a case-by-case basis, is in accordance with the legal standard in *Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al.*, which set a standard for preempting state regulation in the insurance industry;^[xli] or (3) If it is preempted by another federal law.

Determining that a state law prevents or significantly interferes with a national bank's powers may be made by a court or by the OCC on a case by case basis.^[xlii] The preemption standards also apply to state laws affecting federal savings banks as well. Contrary to the U.S. Supreme Court's decision in *Watters v. Wachovia Bank*,^[xliii] federal preemption will not apply to subsidiaries and affiliates of national banks that are not themselves national banks.

Bureau and the Non-Banks

Neither a borrower nor a lender be,

For loan oft loses both itself and friend,

And borrowing dulls the edge of husbandry.^[xliv]

Polonius, William Shakespeare's "Hamlet"

The Bureau has supervisory authority over several types of non-depository institutions. In coordination with the FTC,^[xlv] the Bureau will determine the scope of its purview over non-depository institutions, with an initial rule to be issued within one year after the Designated Transfer Date.

To identify such non-depository institutions and other entities, a specific classification is established, called "covered persons," which is defined, as follows:

1. A person (entity) that engages in offering or providing a consumer financial product or service; and,

2. An affiliate of a person (entity) described in A, if the affiliate acts as a service provider to such person (entity).

Covered institutions are those persons or entities that:

1. Offer or provide origination, brokerage, or servicing for residential mortgage loans. In effect, all businesses that are involved in mortgage loan originations.
2. Offer or provide other consumer financial products or services for which the Bureau has yet to promulgate a rule.
3. Engage or have engaged in conduct that, in the view of the Bureau, poses risk with regard to the offering or provision of consumer financial products or services, which include non-bank lenders, debt collectors, and consumer reporting agencies.
4. Offer or provide private education loans.
5. Offer or provide payday loans to consumers.

The Bureau requires reports and has examination authority over covered institutions. The scope of such authority extends to (1) assessing compliance with consumer financial protection laws, (2) obtaining information about the activities and compliance systems or procedures, and (3) detecting and assessing risk to consumers and markets of consumer financial products and services.

This also means that the Bureau will promulgate, through its rulemaking authority, recordkeeping and record retention requirements *in concertu* with state and federal regulators.

Indeed, the Bureau can exercise its authority even if other provisions of law grant some enforcement, rulemaking, or examination authority to another agency.

Director of the Bureau

If a sufficient number of management layers are superimposed on top of each other,

it can be assured that disaster is not left to chance. [\[xlvi\]](#)

Norman Augustine

Creating any new governmental agency is a Herculean, and perhaps also a heroic undertaking! To create a new agency that has consumer financial protection as its primary mission requires appointing a Director with considerable managerial, legal, political, and financial knowledge, all of which ideally would be expressed through a balanced temperament, a focused and incisive mind, a fierce consumer advocacy, and sophisticated communication skills.

Consider the ostensible tasks that a Director of the Bureau must accomplish, and it becomes eminently clear that few individuals in or out of government could meet such high standards.

Here is a chart of the units that the Director must establish: [\[xlvii\]](#)

SUPERVISORY UNITS & FUNCTIONS	COMPLIANCE REQUIREMENT
<p>RESEARCH</p> <ul style="list-style-type: none"> • Research • Analyze • Report 	<p>A. Developments in consumer financial product markets, alternative markets with high growth rates, and areas of risk to consumers.</p> <p>B. Access to fair and affordable credit for traditionally underserved communities.</p> <p>C. Consumer awareness, understanding, and use of disclosures and communications regarding consumer financial products or services.</p> <p>D. Consumer awareness and understanding of costs, risks, benefits of consumer financial products or services.</p> <p>E. Consumer behavior – including mortgage loans - with respect to consumer financial products or services.</p> <p>F. Experiences of traditionally underserved consumers, including un-banked and under-banked consumers.</p>
<p>COMMUNITY AFFAIRS</p> <ul style="list-style-type: none"> • Provide Information • Guidance • Technical Assistance 	<p>Support to consumers regarding consumer financial products or services offered and provided to traditionally underserved consumers and communities.</p>
<p>COLLECTING AND TRACKING COMPLAINTS</p>	<p>A. Toll Free Number, Website, centralized Database to monitor and respond to consumer complaints, in coordination with the FTC and other federal agencies.</p> <p>B. Route complaint calls to states.</p> <p>C. Data sharing requirements with prudential regulators, FTC, federal and state agencies.</p>
<p>OFFICE OF FAIR LENDING AND EQUAL OPPORTUNITY</p>	<p>A. Ensure fair, equitable, and nondiscriminatory access to credit for individuals and communities.</p> <p>B. Coordinate fair lending efforts with federal and state agencies.</p>

	C. Work with private industry, fair lending, civil rights, consumer and community advocates. D. Provide annual reports to Congress.
OFFICE OF FINANCIAL EDUCATION	Develop and implement initiatives to educate and empower consumers to make better informed decisions.
OFFICE OF MEMBER AFFAIRS	Educate and empower service members and their families to make better informed decisions regarding consumer financial products.
OFFICE OF FINANCIAL PROTECTION FOR OLDER AMERICANS	Activities designed to facilitate financial literacy of individuals who have attained the age of 62 years or more on protection unfair, deceptive, and abusive practices, and information about current and future financial choices.

All units are required to be established within specific timeframes, include various coordinating and administrative mandates, provide for reporting requirements to Congress, and must function through interacting participations within and across all Bureau units and, where applicable, certain federal and state agencies and regulators. In addition to the foregoing, the Director must also establish the Consumer Advisory Board and appoint its members.^[xlvi] By the time of the transfer of authorities to the Bureau on the Designated Transfer Date, as well as its receiving other authorities pursuant to the Act, the Bureau must, among other things, conduct research relating to consumer financial products and services, develop its nationwide consumer complaint response center, plan and take steps to implement the risk-based supervision of non-depository entities, and prepare for the opening of outreach offices.^[xlix]

On Friday, September 17, 2010, President Barack Obama appointed an Assistant to the President and Special Advisor to the Secretary of the Treasury on the Consumer Financial Protection Bureau. The President's appointment is charged with the responsibility of developing the Bureau. Such an appointment did not require Senate confirmation, because the Act specifically states that the Treasury Secretary is "authorized to perform the functions of the Bureau" and may provide "administrative services necessary to support the Bureau before the designated transfer date" of the many regulatory authorities to it.^[i] Therefore, the Treasury Secretary has purview over the Bureau, and also has the authority to appoint somebody to run the Bureau until a Director is chosen and confirmed by the Senate. Timothy Geithner, the Treasury Secretary, acting on and in agreement with President Obama's wishes, supported this special appointment.

Given the Senate's gridlock and political posturing that have unduly accompanied many of this Administration's nominations,^[ii] it is no wonder that President Obama chose to appoint an Assistant and Special Advisor to develop the Bureau, rather than subject yet another of his nominees to extensive delays in confirmation. And surely there would be long and torturous delays! As the president said recently when Senate delays in confirming his nominees constrained him to name 15 recess appointments, "I simply cannot allow partisan politics to stand in the way of the basic functioning of government."^[iii] The appointed individual will serve until a permanent Director is nominated and confirmed to the five-year position.

Elizabeth Warren, the person President Obama has appointed to develop the Bureau, is the very person who devised the idea of a consumer financial protection agency and then advocated in the halls of Congress, in speeches, lectures, and interviews throughout the United States, for its creation.^[iiii] In some ways, Mrs. Warren has become the face of consumer financial protection advocacy at a time when consumer confidence is at a low mark.^[lv] President Obama expects the Bureau to be a "watchdog for the American consumer, charged with enforcing the toughest financial protections in history."^[lv] As the President stated unequivocally, Mrs. Warren "will help oversee all aspects of the Bureau's creation, from staff recruitment, to designing policy initiatives, to future decisions about the agency."^[lvi]

Her credentials indicate that she would be an exacting, methodical, insightful, and highly competent shepherd of the Bureau's mandates. She has published numerous scholarly articles, and, after teaching at other law schools, she has been teaching contract law, bankruptcy law, and commercial law at Harvard Law School. Mrs. Warren's legal expertise and experience have led to her being unofficially considered a nominee to serve as a Supreme Court Justice, for the position previously held by Justice John Paul Stevens (and now held by Justice Elena Kagan). She has served as the Chief Adviser to the National Bankruptcy Review Commission, and was appointed by Chief Justice Rehnquist as the first academic member of the Federal Judicial Education Committee.

Importantly, her understanding of the financial industry is broad based and hands-on. Mrs. Warren has served as a member of the Commission on Economic Inclusion established by the FDIC. She has been the Chairperson of the Congressional Oversight Panel, charged with investigating the Troubled Asset Relief Program (otherwise known as "TARP"), in which role she has consistently fought for more accountability and transparency in the financial system.

Mrs. Warren is a mature woman of 61 years of age, somebody who is not an ivory tower scholar, having grown up in Oklahoma, attended non-Ivy League colleges, and received a JD from Rutgers University. Her popular books, entitled *The Two-Income Trap: Why Middle-Class Mothers and Fathers Are Going Broke*,^[lvii] and *All Your Worth: The Ultimate Lifetime Money Plan*,^[lviii] reflect her commitment to greater financial planning, transparency, and

Plan,^[iviii] reflect a commitment to proper financial planning, transparency, and responsibility. Her broad abilities are reflected in the fact that she has been elected to the American Academy of Arts and Sciences. She has conducted empirical studies for the National Science Foundation and the Ford Foundation. A fierce advocate for preserving middle class financial opportunities through proper consumer financial protection, Mrs. Warren is a former Vice President of the American Law Institute and she is also a former Sunday School teacher.

A Seat at the Table

On the same day that President Obama appointed Mrs. Warren to develop the Bureau, she wrote:

"The new consumer bureau is based on a pretty simple idea: people ought to be able to read their credit card and mortgage contracts and know the deal. They shouldn't learn about an unfair rule or practice only when it bites them—way too late for them to do anything about it. The new law creates a chance to put a tough cop on the beat and provide real accountability and oversight of the consumer credit market. The time for hiding tricks and traps in the fine print is over. This new bureau is based on the simple idea that if the playing field is level and families can see what's going on, they will have better tools to make better choices."^[ix]

In response to these sentiments, some critics believe that the consumer needs to evince greater responsibility.^[x] This view precisely misses the point: providing consumer financial protection upholds the rule of law by actually making sure that the consumer fully understands the terms of financial products and services in the context of a transparent, two-way financial transaction!

If the need for financial reform has taught us anything at all, it is that a financial system can collapse when market participants are not properly informed of risks, when information about financial risk is not appropriately vetted into the market, where regulatory compliance created to assure an orderly market is not enforced or does not even exist, and if financial products and services are not monitored for defects that may cause systemic failure.

The consumer has never really had a seat at the financial industry's round table - until now!

^[i] Durant, Will and Ariel, from "Character and History," in *The Lessons of History*, p.32, Simon and Shuster, 1968

^[ii] I would like to take this opportunity to thank the Publisher, Editor, and Staff of National Mortgage Professional Magazine (NMP) for permitting me the print space needed to explore the Dodd-Frank Act's impact on the mortgage industry. This 3-part series of articles comprised almost 17,000 words and required significant careful planning. In providing this unique forum and journalistic support to the mortgage originator community, NMP's monthly magazine continues to demonstrate its serious, timely, and unwavering commitment to the needs of the mortgage industry.

^[iii] H.R. 4173: *Dodd-Frank Wall Street Reform and Consumer Protection Act*, 111th Congress (2009-2010): "A bill to promote the financial stability of the United States by improving accountability and transparency in the financial system, to end "too big to fail", to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes." Sponsored by Representative Barney Frank (D-MA) and Senator Christopher Dodd (D-CT)

^[iv] Foxx, Jonathan, *Landmark Financial Legislation: New Rules for Mortgage Originators - Part I: Reformation and Regulations*, National Mortgage Professional Magazine, August 2010, Volume 2, Issue 8, pp 28-42.

^[v] Foxx, Jonathan, *A New Era of Mortgage Reform - Part II: Legislation - Reactive or Proactive*, National Mortgage Professional Magazine, September 2010, Volume 2, Issue 9, pp 22-28

^[vi] I have written extensively about the Bureau. Also see: Foxx, Jonathan, *The Birth of an Agency*, in National Mortgage Professional Magazine, September 2009, Volume 1, Issue 5, pp 24-27. This article provides a chart that outlines the Bureau's structure and authorities; and, Foxx, Jonathan, *The CFPB Controversy: Asking the Tough Questions*, in National Mortgage Professional Magazine, October 2009, Volume 1, Issue 6, pp 22-25.

^[vii] Known in German as "Gedankenexperiment," and made famous by Albert Einstein ("riding on a light beam at the speed of light"), Erwin Schrödinger ("Schrödinger's Cat"), and James Clerk Maxwell ("Maxwell's Demon"), a Thought Experiment is a thinking exercise which extrapolates a theory or hypothesis into and facilitates the imagining of the potential consequences - especially when actual experimentation may not often be practicable or possible.

^[viii] Einstein, Albert, "My First Impression of the U.S.A." 1921, an essay published by

[viii] Einstein, Albert, "My First Impression of the U.S.A.," 1921, an essay published by Einstein after his first trip to the USA in June 1921

[ix] Designated Transfer Date is July 21, 2011, see *Designated Transfer Date*, Bureau of Consumer Financial Protection, Federal Register, Vol. 75, No. 181 (09/20/10)

[x] The Designated Transfer Date must be between January 17, 2011 and July 21, 2011, unless the Treasury Secretary determines that the orderly implementation of Title X is not feasible within 12 months; but, in no case may the Designated Transfer Date be later than January 21, 2012.

[xi] In addition to the "enumerated laws" many other laws are amended to provide for the Bureau's interaction, such as the Expedited Funds Availability Act, Federal Financial Institutions Examination Council Act of 1978, Right of Financial Privacy Act, Telemarketing and Consumer Fraud and Abuse Prevention Act.

[xii] 12 U.S.C. §§ 3801 *et seq.*

[xiii] 12 U.S.C. §§ 2901 *et seq.* Not included as an "Enumerated Consumer Law" in H.R. 3126, but enforcement authority over this Act is transferred to the CFPA. H.R. 3126 § 184(b)(2).

[xiv] 15 U.S.C. §§ 1667 *et seq.* Not specifically referenced in H.R. 3126's definition of "Enumerated Consumer Law," but enforcement authority over this Act is transferred to the CFPA. H.R. 3126 § 184(b)(2).

[xv] 15 U.S.C. §§ 1693 *et seq.*

[xvi] 15 U.S.C. §§ 1691 *et seq.*

[xvii] 15 U.S.C. §§ 1666-1666j. Not specifically referenced in H.R. 3126's definition of "Enumerated Consumer Law;" but enforcement authority over this Act is transferred to the CFPA. H.R. 3126 § 184(b)(2).

[xviii] 15 U.S.C. §§ 1681 *et seq.*; and, 15 U.S.C. §§ 1681m(e), 1681s-3, 1681w.

[xix] 15 U.S.C. §§ 1692 *et seq.*

[xx] 12 U.S.C. § 1831t(c)-(f).

[xxi] 15 U.S.C. §§ 6802-6809.

[xxii] 12 U.S.C. §§ 2801 *et seq.*

[xxiii] 15 U.S.C. § 1639.

[xxiv] 12 U.S.C. §§ 2601-2610.

[xxv] 12 U.S.C. §§ 5101-5116.

[xxvi] 15 U.S.C. §§ 1601 *et seq.*

[xxvii] 12 U.S.C. §§ 4301 *et seq.*

[xxviii] Public Law 111-8, 2009

[xxix] 15 U.S.C. § 1701

[xxx] For a detailed discussion on the enumerated laws transferred to the Bureau, see Foxx, Jonathan, *The CFPA Controversy: Asking the Tough Questions*, in *National Mortgage Professional Magazine*, October 2009, Volume 1, Issue 6, pp 22-25.

[xxxi] In this article I will not be discussing the Act's new regime for national bank federal preemption in the area of state consumer financial laws, or, for that matter, the new framework for determining the states' enforcement powers against financial services companies. With respect to the former, the Act resets the preemption framework for national banks to pre-2004 compliance guidelines - prior to when preemption regulations were promulgated by the Office of the Comptroller of the Currency (OCC). The Act provides now that the federal savings banks will have the same preemption rules that apply to national banks. July 21, 2011 will mark the commencement of national banks and federal savings banks being required to comply with more limited preemption of state laws in accordance with the 1996 Supreme Court holding in *Barnett Bank v. Nelson*. In the *Barnett Bank* decision, the Supreme Court set a standard for delineating preemption for national banks: a state law that "prevents or significantly interferes" with a national bank's exercise of its powers is preempted. See *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. No. 111-203, 124 Stat. 1376 (2010), and *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), 517 U.S. at 32.

[xxxii] The Act states that no rule or order of the Bureau shall be subject to approval or review by the Federal Reserve.

[xxxiii] Op. cit. 3: the subsequent outline of the Bureau of Consumer Financial Protection is based on Title X – Subtitle A, Bureau of Consumer Financial Protection, and various Sections (1001-1100H). Title X commences almost three-quarters of the way through the 2319 page Dodd-Frank Act. For sake of brevity and reading facility, I will not provide a corresponding citation for each and every analytical part of the outline provided in this article.

[xxxiv] Op.cit. 3: *Relief Available*, Title X, Subtitle E, § 1055(c)(2)(A-C). Civil monetary penalties are in three tiers. First Tier: from \$5,000 per day for minor violations of federal consumer financial laws. Second Tier: \$25,000 per day for “reckless” violations. Third Tier: \$1 million per day for “knowing” violations.

[xxxv] Consumer Financial Penalty Fund

[xxxvi] The House and Senate reconciliation conference promulgated this exclusion and authorizes the Federal Trade Commission to prescribe new rules under Section 5 of the FTC Act to address unfair or deceptive practices by auto dealers.

[xxxvii] The ten voting members of the Council are: the Treasury Secretary (who is also the chair of the Council), the FRB Chairperson, the Comptroller of the Currency, the Bureau’s Director, the SEC Chairperson, the FDIC Chairperson, the CFTC Chairperson, the FHFA Director, the NCUA Chairperson, and an independent member having insurance expertise (appointed by the President, confirmed by Senate). The five non-voting members of the Council are: the Office of Financial Research (“OFR”) Director, the Federal Insurance Office (“FIO”) Director, a state insurance commissioner, a state banking supervisor, and a state securities commissioner. The FIO is also a new entity, under the Treasury’s purview, created under the Act.

[xxxviii] Procedurally, upon petition of a member agency of the Council, and only by a two-thirds vote of the Council, a Bureau regulation may be set aside.

[xxxix] Op.cit. 29

[xl] Op.cit. 3: *State Law Preemption Standards for National Banks and Subsidiaries Clarified*, Title X, Subtitle D §1044 (b)(1)(B)

[xli] *Barnett Bank of Marion County, N.A. v. Nelson*, Florida Insurance Commissioner, et al., 517 U.S. 25 (1996)

[xlii] Op.cit. 3: *Periodic Review of Preemption Determinations*, Title X, Subtitle D §1044 (d)(1-2). The Comptroller must publish a list of the OCC’s preemption determinations in effect.

[xliii] *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007)

[xliv] *Hamlet Act 1, Scene 3, 75-77*

[xlv] The Bureau and the FTC must negotiate an agreement for coordinating on enforcement actions and limits the ability of each agency to initiate a civil action for a violation of federal when the other agency has already filed suit based on the same matter.

[xlvi] *Augustine, Norman R., Augustine’s Laws*, 1986, 1997, American Institute of Aeronautics and Astronautics, Inc., Reston, VA

[xlvii] Op.cit. 3: *Administration*, § 1013

[xlviii] Op.cit. 3: *Consumer Advisory Board*, § 1014

[xlix] Op.cit. 9

[l] Op.cit. 3: *Subtitle F - “Transfer of Functions and Personnel; Transitional Provisions,”* Sections 1066 (a) and (b), *inter alia*.

[li] Presidential appointments require the Senate’s Advice and Consent (U. S Constitution, Article II, Section 2, and Clause 2). A simple majority (i.e., 51%) of those voting in the Senate is required for confirmation, once the nomination reaches the Senate for a vote. However, pursuant to agreed-to convention, presidential nominations requiring Senate confirmation must have 60 votes (i.e., “supermajority”) to break a filibuster, in order for those confirmations to be approved. Many high level nominations made by President Obama have faced a filibuster or a Senator has put them on “hold.”

[lii] *USA Today, Obama announces 15 recess appointments, scolds GOP, 3/28/10*. Recess appointments powers are granted to the President in the U. S. Constitution, Article II, Section 2, and Clause 3.

[liii] Warren’s advocacy for a consumer financial protection agency began publicly on March 10, 2009, when she joined Senators Dick Durbin (D-Ill.), Chuck Schumer (D-N.Y.) and Representatives Bill Delahunt (D-Mass.) and Brad Miller (D-N.C.) to announce a bill to create

Representatives Bill Delahunt (D-Mass.) and Brad Miller (D-N.C.) to announce a bill to create what was then being called the Financial Product Safety Commission. In time, its other appellation was Consumer Financial Protection Agency. The Dodd-Frank Act created the Bureau of Consumer Financial Protection.

[liv] The Conference Board announced on 9/28/10 that the Consumer Confidence Index (CCI) for September 2010 stands at 48.5 (1985=100), down from 53.2 in August.

[lv] President Barack Obama's speech in the Rose Garden, September 17, 2010

[lvi] Idem.

[lvii] Warren, Elizabeth and Amelia Warren Tyagi, *The Two-Income Trap: Why Middle-Class Mothers and Fathers Are Going Broke*, Basic Books/Perseus, NY, 2003. Elizabeth Warren's daughter is Amelia Warren Tyagi.

[lviii] Warren, Elizabeth and Amelia Warren Tyagi, *All Your Worth: The Ultimate Lifetime Money Plan*, Free Press, NY, 2005.

[lix] Warren, Elizabeth, *Fighting to Protect Consumers*, The White House Blog, September 17, 2010

[lx] As but one objection to the Bureau: "The vast majority of those who held the billions of dollars in mortgages now foreclosed on knew exactly what they were doing. And one of the dirty little secrets of the financial crisis is that one homeowner after another signed mortgage-loan documents that were filled with inaccurate information about his or her net worth, assets, salaries and ability to make monthly mortgage payments." Cohan, William D., *The Elizabeth Warren Fallacy*, Opinionator, The New York Times, 9/30/10



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