



# BANKING REPORT



## REGULATORY REFORM

### Regulatory Reform

## The Consumer Financial Protection Bureau: Stand-Up or Stand-Off?



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One of the more controversial reforms implemented by the Dodd-Frank Wall Street Reform and Consumer Protection Act (“**Dodd-Frank**”) was the creation of the Consumer Financial Protection Bureau.<sup>1</sup> Dodd-Frank provides for a Director to head the Bureau,<sup>2</sup> but to date, no one has been nominated for that position. Currently, Harvard Law School Professor Elizabeth Warren informally heads the Bureau, in her capacity as Special Advisor to the Secretary of the Treasury. She also serves as an Assistant to the President.

<sup>1</sup> Dodd-Frank created a “Bureau of Consumer Financial Protection,” to be housed within the Federal Reserve. Section 1011 of Dodd-Frank. Notwithstanding the statute, the agency refers to itself as the “Consumer Financial Protection Bureau” (see <http://www.consumerfinance.gov>). We use “**Bureau**” to refer to both iterations.

<sup>2</sup> Section 1011. Unless otherwise specified, all section references in this article are to Dodd-Frank.

Most of the political and media attention in recent days has been given to the political *stand-off* between Prof. Warren, the Bureau and its Congressional oversight committees, rather than to the merits of Prof. Warren’s substantive efforts to establish or “stand-up” the Bureau. Much of this controversy has focused on whether the Bureau should or can operate without a Senate-confirmed Director, and whether the Director-less Bureau may be exceeding its statutory powers.<sup>3</sup> This issue is likely to be resolved politically, rather than by what is actually permitted by the letter of Dodd-Frank, but a closer examination of Title X of Dodd-Frank will reveal the legal fault lines underlying the matter and may help the reader assess its merits.

### Designating a Leader Without Appointing a Director – the Issue of Delegation

Dodd-Frank empowers the Secretary of the Treasury (“**Secretary**”) to take a variety of specific actions with respect to the Bureau, including in circumstances where no Director has been appointed.<sup>4</sup> Separate au-

<sup>3</sup> See, e.g., Hearing of the Financial Institutions and Consumer Credit Subcommittee of the House Financial Services Committee: Oversight of the Consumer Financial Protection Bureau (Mar. 16, 2011) (“**Oversight Hearing**”). The U.S. Chamber of Commerce and other business associations separately have expressed concern that a Director-less Bureau might improperly engage in rulemaking or enforcement activity, with no accountability. In the Chamber’s view, subjecting an appointed Director to the Senate confirmation process “provides Congress with one of its few opportunities to exercise its oversight over the Bureau.” See Letter dated Feb. 28, 2011 from the U.S. Chamber of Commerce, *et al.*, to Treasury Secretary Timothy F. Geithner (“**Chamber of Commerce Letter**”).

<sup>4</sup> Section 1066. Title X permits the appointment of a Deputy Director who may act in the absence or unavailability of the Director, but that position may only be filled by the Director. See Section 1011(b)(5). Prior to the appointment of an initial Director, there can be no Deputy Director.

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thority permits the Secretary to delegate any of his powers to an officer or employee of the Treasury Department.<sup>5</sup> Secretary Geithner relied on those authorities to delegate to Prof. Warren apparently all of his powers under Title X with respect to the Bureau.<sup>6</sup>

The Secretary did not, however, commit to writing the terms or the scope of the delegation to Prof. Warren. In contrast, the Secretary made separate written delegations to a number of other Treasury employees, authorizing them to act in various ways in connection with the establishment of the Bureau.<sup>7</sup> Although some have questioned whether the delegation to Prof. Warren is effective and proper, there are no restrictions in Dodd-Frank on the Secretary's ability to delegate his authority. The plain language of Dodd-Frank does not prescribe the formalities for an effective delegation. Most often the Secretary makes delegations in writing and certainly this should be considered a best practice.<sup>8</sup> It is unclear why the Secretary has chosen to use an unwritten delegation in this instance.

Assuming the validity of the Secretary's delegation and that the delegation covered the entirety of the Secretary's authority under Title X, Prof. Warren may perform every action available to the Secretary under Title X of Dodd-Frank. Conversely, she may not act beyond the scope of the Secretary's authority. Thus, any reference in this article to the Secretary's authority under Title X *a priori* also applies to Prof. Warren as the Secretary's delegatee. While certainly broad, the Secretary's powers under Title X are not coextensive with those of a Senate-confirmed Director. As detailed below, a careful reading reveals that Title X gives the Bureau certain expansive powers that Prof. Warren has no authority to exercise unless and until she is appointed by the President and confirmed by the Senate as the Director.

<sup>5</sup> See 31 U.S.C. § 321(b)(2).

<sup>6</sup> See Testimony of Elizabeth Warren before the Financial Institutions and Consumer Credit Subcommittee of the House Financial Services Committee (Mar. 16, 2011) ("**Warren Testimony**") and "Joint Response by the Inspectors General of the Department of the Treasury and Board of Governors of the Federal Reserve System: Request for Information Regarding the Bureau of Consumer Financial Protection" (Jan. 10, 2011) ("**Inspectors-General Report**") at p. 2. Rep. Spencer Bachus, Chairman of the Senate Committee on Financial Services, and Rep. Judy Biggert, Chairman of the House Committee on Financial Services Subcommittee on Insurance, Housing and Community Opportunity prompted the response by asking the Inspectors General of the Treasury Department and the Board of Governors of the Federal Reserve System ("**Inspectors-General**") to review the circumstances surrounding the delegation to Prof. Warren.

<sup>7</sup> "Apart from standing delegation orders, Treasury officials told [the Inspectors-General] that the delegation of the Secretary's interim authority [to Prof. Warren] under section 1066 has not been documented." *Inspectors-General Report* at P.2. Cf. delegations made pursuant to the Interagency Agreement between the U.S. Department of the Treasury and the Board of Governors of the Federal Reserve System for Providing Funds for the Bureau of Consumer Financial Protection (Nov. 18, 2010), at PP. 2-3 (which is appended to the Inspectors-General Report as an exhibit).

<sup>8</sup> See, e.g., *E. Bruce Hatcher v. United States, et al.*, 733 F. Supp. 218 (M.D. Pa. 1990) ("The method which the Secretary uses most often to delegate authority . . . is the issuance of a Treasury Department Order").

## What Powers May the Secretary Exercise with Respect to the Bureau?

Title X, which contains eight subtitles, is the source of all authority for the Bureau. That Title permits the Secretary to perform two functions in the absence of a Senate-confirmed Director: provide the Bureau with administrative services prior to the Transfer Date (as discussed below), and exercise authority under Subtitle F.<sup>9</sup> Entitled "Transfer of Functions and Personnel; Transitional Provisions," Subtitle F at first blush implies only housekeeping functions, but in reality includes far more.

The Secretary must specify a date ("**Transfer Date**") on which the transfers under Subtitle F will occur, including the transfer by several federal regulatory agencies<sup>10</sup> to the Bureau of their authority to administer several federal consumer laws ("**Enumerated Consumer Laws**"). Until the Transfer Date, most substantive authority under federal consumer financial law remains with the federal regulatory agencies that currently bear those responsibilities. The Secretary already has set the Transfer Date for July 21, 2011:<sup>11</sup> the Secretary's administrative authority to help stand-up the Bureau will also expire on that date.

Importantly, the Bureau has several new authorities that are located outside of Subtitle F, including sections 1022 and 1024, and Subtitles C and H of Title X. The most important new functions with respect to the Enumerated Consumer Laws involve rulemaking, supervisory, and enforcement powers with respect to non-depository financial institutions.<sup>12</sup> These "new" authorities under Title X will become effective on the Transfer Date.

### Authority That Terminates on the Transfer Date

The Secretary may exercise limited powers to establish the Bureau by providing administrative services.<sup>13</sup> These powers generally relate to employee transfers from the Transferring Agencies, negotiations, and compensation, and they will lapse on the Transfer Date, re-

<sup>9</sup> Section 1066 provides:

(a) *In General.*—The Secretary is authorized to perform the functions of the Bureau under this subtitle [Subtitle F] until the Director of the Bureau is confirmed by the Senate in accordance with section 1011.

(b) *Interim Administrative Services by the Department of Treasury.*—The Department of Treasury may provide administrative services necessary to support the Bureau before the designated transfer date.

<sup>10</sup> Federal bank regulatory agencies transferring powers to the Bureau include the Federal Reserve Board, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, and the National Credit Union Administration. The Department of Housing and Urban Development and the Federal Trade Commission ("FTC") also are transferring authority to the Bureau. See Section 1061. We refer to these agencies collectively as the "**Transferring Agencies.**"

<sup>11</sup> The Secretary alone has authority to designate a Transfer Date. Once that date is set, the Secretary's powers under this category will begin to sunset. See 75 Fed. Reg. 57,252 (Sept. 20, 2010).

<sup>12</sup> See Sections 1022 and 1024.

<sup>13</sup> See Section 1066(b). We refer to authority under this provision as "**Section 1066(b) Powers.**"

ardless of whether a Director has been confirmed.<sup>14</sup> One may reasonably read Section 1066(b) Powers to permit the Secretary to prepare the Bureau for its mission, such powers relating both to functions that are being transferred from various regulatory agencies under subtitle F and new functions that are created by Dodd-Frank.

However, after the Transfer Date, there is no statutory basis for the Secretary to provide administrative services in support of the “new” functions created for the Bureau by Dodd-Frank. Thus, if no Director has been confirmed by the Transfer Date, the Bureau may find itself in the unfortunate situation of being required to discontinue its preparations for such “new” functions. This design for the transfer of substantive authority clearly presumes the confirmation of a Director no later than the Transfer Date. Put another way, the design does not effectively anticipate or deal with the consequences should the post go unfilled.

This prompts analogous questions about the administration of the Bureau. For example, after the Transfer Date the Director is responsible for determining the Bureau’s budget, preparing financial reports, controlling funds and reporting on forecasts.<sup>15</sup> Nothing in Dodd-Frank affirmatively permits the Secretary to exercise these administrative functions after the Transfer Date, so the Bureau could well grind to an administrative halt if there is no Director by the Transfer Date.

### Post-Transfer Date Authority in the Absence of a Director

The Secretary can perform indefinitely all of the Bureau’s functions under Subtitle F until a Director is confirmed.<sup>16</sup> These functions center on the powers that were received from the Transferring Agencies, including rulemaking, supervisory and enforcement powers over the consumer products and services provided by financial institutions.<sup>17</sup>

As of the Transfer Date, Subtitle F permits a Secretary-led Bureau to:

- prescribe rules related to the Enumerated Consumer Laws that were, prior to the Transfer Date, within the authority of the Transferring Agencies; and
- conduct examinations of banks, savings associations, and credit unions with total assets in excess of \$10 billion, including affiliates.

The Secretary may not conduct supervisory examinations prior to the Transfer Date. Until that time, consumer compliance examinations may be conducted by the regulatory agencies that have examination authority under current law. However, during this interim period, the Secretary may exercise the Bureau’s authority to have Bureau examiners “ride along” or participate in a sample of examinations of credit unions, savings as-

<sup>14</sup> See Sections 1064 and 1066(b).

<sup>15</sup> Section 1017.

<sup>16</sup> Section 1066(a). We refer to such authority as “**Section 1066(a) Powers.**”

<sup>17</sup> Section 1061. Not all rulemaking, supervisory and enforcement powers relating to consumer financial products, services and laws will be transferred to the Bureau: some remain with the Transferring Agencies. For a more detailed discussion of which powers have been transferred and which have not, see Donald N. Lamson and Hilary Allen, *Consumer Financial Protection: It’s a Smaller World After All*, 96 Banking Rep. (BNA) 552, 03/22/2011 .

sociations, and banks with more than \$10 billion in assets conducted by other regulators prior to the Transfer Date.<sup>18</sup>

After the Transfer Date, a Secretary-led Bureau would also inherit the rule-making powers of the FTC under the Enumerated Consumer Laws.<sup>19</sup> While this might seem like a broad grant of powers, in reality, the FTC currently has very limited rule-making powers under the Enumerated Consumer Financial Laws.<sup>20</sup> The more substantive powers transferred to the Bureau from the FTC are the enforcement powers under rules made pursuant to the Federal Trade Commission Act, “with respect to an unfair or deceptive act or practice to the extent that such rule applies to a covered person or service provider with respect to the offering or provision of a consumer financial product or service”;<sup>21</sup> the FTC retains all other enforcement powers. The line dividing the enforcement authority of the Bureau and the FTC is not abundantly clear, and thus it is open to interpretation whether Subtitle F gives enforcement power over non-depository financial institutions to the FTC, or to the Bureau. Once the Bureau has a Director, it can take steps to clarify whether it has enforcement authority over non-depository financial institutions,<sup>22</sup> but before a Director is confirmed, the Bureau will need to tread very carefully in this respect.

The Section 1066(a) Powers presumably would permit the Secretary to continue to provide (even after the Transfer Date) complementary administrative services with respect to functions conferred by Subtitle F, but Section 1066(a) does not give the Secretary authority with respect to those functions that are newly-created for the Bureau, outside of Subtitle F. It is here that much attention will be focused to determine whether a Director-less Bureau may be exceeding its authority.

### Powers That May Be Exercised Only After a Director Is Confirmed

After the Transfer Date,<sup>23</sup> a confirmed Director, but not the Secretary, may carry out all the rulemaking, ex-

<sup>18</sup> Sections 1025(e) and 1029A.

<sup>19</sup> Section 1061(b)(5).

<sup>20</sup> The FTC has limited rule-making powers under the Fair Credit Reporting Act (15 U.S.C. § 1681 *et seq.*), Gramm-Leach-Bliley Act (as it relates to privacy – 15 U.S.C. § 6802 *et seq.*), the Fair Debt Collection Practices Act (15 U.S.C. § 1692 *et seq.*), and Section 43 of the Federal Deposit Insurance Act (12 U.S.C. § 1831t).

<sup>21</sup> Section 1061(b)(5)(B)(ii).

<sup>22</sup> For example, a Director-led Bureau in consultation with the FTC can make rules that define who is subject to the Bureau’s supervisory and enforcement authorities (see Section 1024(a)(2)).

<sup>23</sup> This article is premised on the probability that the Transfer Date will pass before the confirmation of a Director. If a Director were confirmed by the Senate prior to the Transfer Date, the Director would have limited rulemaking powers to make the following rules even prior to the Transfer Date: conditional or unconditional exemptions of certain individuals, institutions, or consumer financial products or services from the Bureau-related provisions of Dodd-Frank; the process for gathering information from individuals or institutions participating in the consumer financial services markets; the filing of limited reports to the Bureau for determining whether a non-depository institution should be supervised and regulated by the Bureau; the confidential treatment of information obtained from persons in connection with an exercise of the Bureau’s authority; the process for registering persons that participate

amination and enforcement powers that Dodd-Frank confers on the Bureau. These include powers with respect to non-depository institutions like payday lenders, mortgage companies, debt collectors, and consumer reporting agencies. Stated another way, without a confirmed Director, the Bureau cannot exercise any powers over such non-depository institutions unless they were already subject to regulation under authorities transferred to the Bureau under Subtitle F.

The Bureau's "new" authorities that become effective after the Transfer Date are located variously in title X, including sections 1022 and 1024, and Subtitles C and H. The Inspectors-General have identified the following powers as "new," *i.e.*, not transferred from another agency as part of Subtitle F:

- Prohibiting unfair, deceptive or abusive acts or practices under Subtitle C in connection with consumer financial products and services;<sup>24</sup>
- Promoting model disclosure forms under Subtitle C to ensure that the features of consumer financial products and services are fully, accurately and effectively disclosed;<sup>25</sup>
- Prescribing rules relating to reports for determining whether a non-depository institution should be supervised by the Bureau,<sup>26</sup> including registration requirements and the grant of exemptions; and
- Supervising non-depository institutions, including (a) prescribing rules defining the scope of non-depository institutions subject to supervision, (b) prescribing rules establishing recordkeeping requirements, and (c) conducting examinations of non-depository institutions.<sup>27</sup>

If follows from the Inspectors-General analysis that any administrative steps taken in support of these "new" activities must terminate on the Transfer Date, absent a confirmed Director.

It is unclear to what extent these activities overlap the administration of Enumerated Consumer Laws transferred under subtitle F. The Inspectors-General reading of Section 1066(a) thus may be too restrictive. The Treasury could assert that its inherent authority permits it to act beyond the scope of the Secretary's Section 1066(a) Powers to fill the void identified by the Inspectors-General. Given the restrictive view of the Inspectors-General and the hostility shown by some in Congress, however, additional assertions of jurisdiction may be even more controversial than the steps already taken by Prof. Warren.

in the consumer financial services markets; the scope of non-depository institutions subject to the regulation of the Bureau; and the process of recordkeeping and other informational requirements that the Bureau determines would facilitate the supervision of non-depository institutions. See Sections 1022(b)(3), 1022(c)(4), 1022(c)(5), 1022(c)(6)(A), 1022(c)(7)(A), 1024(a)(2), 1024(b)(7), and 1029A. A confirmed Director would also be able to examine non-depository institutions in advance of the Transfer Date. See Sections 1024 and 1029A. As it is unlikely that any Director will be confirmed before the Transfer Date, July 21, 2011, however, this point is largely moot.

<sup>24</sup> Section 1031.

<sup>25</sup> Section 1032.

<sup>26</sup> Section 1022.

<sup>27</sup> Section 1024.

## What Has the Bureau Accomplished So Far?

To date, there is little indication that Prof. Warren has obviously exceeded the limits of the Secretary's authority, but the Bureau has been aggressive. Prof. Warren has characterized her work as centered on setting up the Bureau, and public consultation and information gathering, but clearly there are more substantive aspects of her work and these have prompted Congressional criticism.<sup>28</sup>

*Goals.* The Treasury Department has identified the following goals for Prof. Warren and the Bureau:

- Meet with "stakeholders" to better understand the needs and concerns of consumers and financial services companies;
- Lay groundwork to enforce Federal consumer financial laws and to write new rules required by Dodd-Frank;
- Collect information about consumer financial products and services and potential risks and benefits to consumers;
- Develop a toll-free consumer hotline and website; and
- Open Bureau offices to focus on specific consumer groups, including offices for Service Member Affairs and Financial Protection for Older Americans.<sup>29</sup>

Prof. Warren has taken a number of actions to accomplish these goals.

*Administration.* The Bureau has drafted an organizational structure and a budget for FY 2011 and FY 2012 and is planning three mission-related directorates: Education and Engagement; Supervision and Enforcement; and Research, Markets, and Rules.

*Supervision and enforcement.* The Bureau has not engaged in any supervisory or enforcement actions, but it is developing plans, policies, procedures, and staffing levels for its enforcement function. The Bureau has not yet established priorities for enforcement activities after the Transfer Date, but it has hired team leaders for enforcement and supervision. The Bureau is negotiating memoranda of understanding with the Transferring Agencies to gain access to proprietary and restricted regulatory information associated with enforcement issues. The Bureau also has provided advice to the Justice Department and other agencies concerning enforcement actions and possible settlements involving mortgage services.

*Rulemakings.* The Secretary may not prescribe rules prior to the Transfer Date and the Bureau has not yet proposed any rulemakings. In recent testimony before Congress, Prof. Warren indicated that the Bureau would not focus on rulemakings as a tool to achieve its objectives.<sup>30</sup> While this should alleviate the concerns of her critics, the Secretary reportedly is considering whether to issue advance notices of proposed rulemaking, not to promulgate substantive rules, but to "gather information and input" before the Transfer Date.

*Policy Initiatives.* Examples of Prof. Warren's policy initiatives include:

- consolidating duplicate and overlapping mortgage disclosure forms mandated by the Truth in Lend-

<sup>28</sup> Inspectors-General Report; Warren Testimony.

<sup>29</sup> See Treasury Department webpage entitled "Bureau of Consumer Financial Protection (CFPB)," available at <http://www.treasury.gov/initiatives/Pages/cfpb.aspx>.

<sup>30</sup> Warren Testimony.

ing Act and the Real Estate Settlement Procedures Act<sup>31</sup> (although the Inspectors General have taken the view that, without a Director, the Bureau does not have the authority to require model disclosure forms<sup>32</sup>);

- simplifying credit card agreements to ensure that customers fully understand fees and finance charges; and

- working with federal and state regulators to lay the groundwork for coordination with other regulators in the regular examination of mortgage servicers.

*Close to the Line.* None of these activities may outright exceed the Secretary's powers, although some may come close.

## What Oversight Applies to the Secretary?

The foregoing discussion makes it clear that the boundaries on the powers of a Director-less Bureau are not obvious. This begs the question whether the Secretary is subject to oversight that might prevent overreaching, particularly in dealings with non-depository institutions. Some have pointed out that the Senate confirmation process for a Director of the Bureau is one of the few oversights over the Bureau.<sup>33</sup> However, while the Bureau is not subject to the appropriations process for its funding, nor is it headed by a bipartisan commission, there are some checks on the Bureau's powers besides Senate confirmation of its director.

- *FSOC.* The agencies sitting on the Financial Stability Oversight Council ("**FSOC**") have authority to review and overturn Bureau regulations.<sup>34</sup>

- *Inspector General.* Both the Treasury Department's Inspector General and the Inspector General for the Board of Governors of the Federal Reserve System ("**Board**") oversee the Bureau during the interim period until there is a Director. The Board's Inspector General has acted as permanent Inspector General for the Bureau, effective on the date of enactment of Dodd-Frank. The Treasury Department's Inspector General is overseeing the interim efforts to establish the Bureau.

- *Treasury.* The Treasury Department has a framework for regular reviews of the Bureau's implementa-

tion. Prof. Warren meets regularly with the Secretary and other senior Treasury officials for this purpose.

- *OMB.* The Bureau submits its financial operating plans and forecasts and quarterly financial reports to the Office of Management and Budget.

- *Congress.* It seems that the most substantive oversight of the Bureau is likely to come from its interactions with Congress. Dodd-Frank requires the Bureau to provide regular reports to and testimony before Congress regarding the Bureau's activities and to justify its budget from the previous year.<sup>35</sup> Further, the GAO annually audits the Bureau's expenditures and submits a report to Congress.

## Congressional Oversight to Date

As of this writing, the Bureau has been subject to only one Congressional oversight hearing and a Congressionally-requested review by the Inspectors-General. While the Inspectors-General Report was dispassionate in its review of the Bureau's authority and actions, the Congressional oversight hearing was almost electric. As might be anticipated, Congressional Republicans are focusing on the limits of Prof. Warren's authority, while Prof. Warren has consistently argued that she operates within the authority that has been delegated to her. While the first Congressional oversight hearing ended in a stand-off, there undoubtedly will be future engagements in which the issues will continue to play out.

## Conclusion

The creation of the Consumer Financial Protection Bureau has proven to be one of the more controversial aspects of Dodd-Frank. Even more controversial is the decision to delegate to Prof. Warren the Secretary's authority to stand-up the Bureau. Critics are increasingly questioning whether the Bureau should or can operate without a Senate-confirmed Director, and whether the Director-less Bureau may be exceeding its statutory powers. Rather than focus on standing-up the Bureau, eyes now are on the political *stand-off* between the Bureau and its Congressional oversight committees. This issue will most likely be resolved politically during the confirmation process, once the President nominates the Bureau's first Director. Until such a nomination, however, the provisions of Dodd-Frank are the only guide we have as to whether Prof. Warren's actions to date have exceeded her authority.

<sup>35</sup> Section 1016.

<sup>31</sup> Warren Testimony.

<sup>32</sup> Inspectors-General Report, page 7.

<sup>33</sup> See, e.g., Chamber of Commerce Letter.

<sup>34</sup> This power is set out in Dodd-Frank Section 1023, although, as discussed in Donald N. Lamson and Hilary Allen, *Consumer Financial Protection: It's a Smaller World After All*, 96 Banking Rep. (BNA) 552, 03/22/2011, it is questionable whether the FSOC would ever choose to exercise this power.