



Limitations on the Secretary of the Treasury's Authority to Exercise the Powers of the Bureau of Consumer Financial Protection

David H. Carpenter

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The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act; P.L. 111- 203) substantially overhauled the U.S. financial regulatory system. Title X of the Dodd-Frank Act, the Consumer Financial Protection Act (CFP Act), established the Bureau of Consumer Financial Protection (CFPB or Bureau) within the Federal Reserve System. The CFP Act alters the consumer financial protection landscape by consolidating regulatory authority and, to a lesser extent, supervisory and enforcement authority in one regulator—the CFPB. The CFP Act empowers the Bureau through: the transfer of existing consumer protection powers from other federal regulators (“transferred powers” or “transferred authorities”); and the establishment of enhanced consumer protection authorities that were not explicitly provided by law to federal regulators prior to the Dodd-Frank Act’s enactment (“newly established powers” or “newly established authorities”). The Bureau’s transferred authorities will include the power to prescribe regulations under 18 federal consumer protection laws, such as the Truth in Lending Act, as well as certain consumer compliance supervisory and enforcement powers over some large banks and other depository institutions; its newly established powers will include consumer compliance supervisory and enforcement powers over certain non-depository financial institutions, such as payday lenders and mortgage brokers.

Not all of the CFPB’s powers become effective at the same time. Some of the Bureau’s authorities took effect when the Dodd-Frank Act was signed into law on July 21, 2010. However, most of the Bureau’s authorities will go into effect on the “designated transfer date”—a date six to 18 months after enactment, as determined by the Secretary of the Treasury (Secretary). Currently, the designated transfer date is July 21, 2011.

In addition to the effective dates set out in the CFP Act, the authority to exercise the Bureau’s powers may be affected by the appointment of a CFPB Director. The Bureau is designed to be headed by a single Director, who is to be nominated by the President and subject to the advice and consent of the Senate. If a Director is appointed before the designated transfer date, he will be able to exercise all of the powers provided to the Bureau pursuant to the CFP Act. However, a Bureau Director has not yet been appointed. Until a CFPB Director is appointed, the CFP Act provides the Secretary the authority to exercise some, but not all of the Bureau’s authorities. Although not beyond debate, the CFP Act appears to provide the Secretary the authority to exercise the Bureau’s transferred powers, but not the authority to exercise the Bureau’s newly established powers. In practice, the limits of the Secretary’s authorities may not always be clear.

The actions taken thus far by the Bureau predominately have been either administrative functions or measures taken in preparation for the exercise of the substantive authorities that will go into effect on the designated transfer date. These actions appear to fall within the Secretary’s limited Bureau authorities. The Secretary’s interim Bureau powers arguably will be more expansive after the designated transfer date if a Bureau Director has not yet been appointed. This expansion of power would increase the likelihood that the Bureau would move beyond administrative and preparatory steps to engaging in substantive actions that directly, and potentially significantly, impact financial institutions. Parties claiming harm from these potential actions might be inclined to initiate lawsuits arguing that certain actions exceed the Secretary’s

authority. Outcomes of such lawsuits are difficult to predict in the abstract, in part, because of the innumerable facts and circumstances that could give rise to these legal claims.

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