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Reforming Consumer Financial Protection Bureau Necessary to Protect Consumers

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Creation of the Consumer Financial Protection Bureau (CFPB) ranks among the most contentious provisions of the vast Dodd–Frank financial regulation statute.[1] Largely unaccountable to Congress and imbued with sweeping powers, the agency is the epitome of regulatory excess.

Legislation introduced last month by Representative Spencer Bachus (R–AL) seeks to tame the CFPB by replacing its directorship with a bipartisan commission.[2] Although well-intended, the proposal falls short of the reforms necessary to rein in the bureau.

Running the CFPB. Under current law, the CFPB is to be run by a single director, nominated by the President and confirmed by the Senate, with a term of five years.[3] (The director may be removed by the President for cause.) While more than 100 employees have been hired during the past five months,[4] the White House has not formally named a director. Instead, President Obama appointed Harvard law professor Elizabeth Warren to manage start-up of the bureau as his "special advisor" (read czar) given the long odds of her winning confirmation.[5]

Whether Warren or someone else takes the helm when the agency officially opens on July 21, the director will exert enormous power: consolidated and expanded regulatory authority over credit cards, mortgages, and a host of other consumer financial products previously wielded by *seven* federal agencies.[6]

In place of a lone director, H.R. 1121 would establish a five-member commission, also nominated by the President and confirmed by the Senate, for staggered five-year terms.[7] No more than three commissioners could represent a single political party, and a commission chairman would be appointed by the President. A similar structure exists at the Federal Trade Commission, the Federal Deposit Insurance Corporation, and the Securities and Exchange Commission.

Introducing the bill on March 16, Representative Bachus, chairman of the House Financial Services Committee, characterized the bureau as likely "the most powerful agency ever created."[8] Consequently, the change in management is necessary, he said, "to ensure that a non-partisan, balanced approach to consumer protection prevails."

A bipartisan commission may seem less autocratic than a single director vested with bureau control. Arguably, group decision making could slow the regulatory gears, as could partisan bickering. But the rulemaking process is not the fundamental problem with the CFPB, and tinkering with organizational structure will not reduce the harm of regulatory overkill to consumers and the economy. The real problem is the bureau's lack of accountability and the virtually unconstrained power bestowed upon it under the Dodd–Frank statute.

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CFPB Set Apart with Little Accountability. Because the bureau is ensconced within the Federal Reserve, its budget is not subject to congressional control. Instead, CFPB funding is set by law at a fixed percentage of the Fed's 2009 operating budget—increasing from 10 percent in 2011 to 12 percent in 2013.[9] (The bureau may also request up to $200 million in additional funds from Congress.) This budgetary independence limits congressional oversight of the agency. The CFPB's status within the Fed also effectively precludes presidential oversight, while the Federal Reserve is statutorily prohibited from "intervening" in bureau affairs.[10]

The Bureau's accountability is also minimized by the vague language of its statutory mandate. It is empowered to punish "unfair, deceptive and abusive" business practices. While "unfair" and "deceptive" have been defined in other regulatory contexts, the term "abusive" is largely undefined, granting the CFPB officials inordinate discretion.

Warren and other bureau proponents deny any lack of accountability,[11] claiming the CFPB can be overruled by the Financial Stability Oversight Council, composed of representatives from eight other financial regulatory agencies.[12] However, the council's oversight authority is narrow, confined by statute to cases in which CFPB actions would endanger the "safety and soundness of the United States banking system or the stability of the financial system of the United States."[13] Any veto of bureau action would also require the approval of two-thirds of the council's 10-member board.

Excessive Regulatory Reach. Whether headed by a director or a commission, the bureau's regulatory reach will remain dangerously uninhibited. The statutory definition of "financial products or services" within bureau purview is as vague as it is broad: "(A)ny financial product or service that is… offered or provided for use by consumers primarily for personal, family, or household purposes…and is

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1. For example, see Damian Paletta, "Fight Over Consumer Agency Looms as Overhaul Is Signed," *The Wall Street Journal*, July 22, 2010, at *http://online.wsj.com/article/SB10001424052748704746804575367502836650966.html* (April 7, 2011).
2. H.R. 1121, Responsible Consumer Financial Protection Regulations Act of 2011, at *Bill Text - 112th Congress (2011-2012) - THOMAS (Library of Congress)* (April 7, 2011).
3. Public Law 111–203, Dodd–Frank Wall Street Reform and Consumer Protection Act, Title X: Bureau of Consumer Financial Protection, Sec. 1011: Establishment of the Bureau of Consumer Financial Protection, July 21, 2010, at *http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf* (April 7, 2011).
4. Anna Canfield, "CFPB Implementation Team Reaches 100 Employees," Consumer Financial Protection Bureau, February 16, 2011, at *http://www.consumerfinance.gov/2011/02/16/december-2010-cfpb-implementation-team-reaches-100-employees/#* (April 7, 2011).
5. Kate Andersen Brower, "Obama Appoints Warren to Shape New Consumer Agency," Bloomberg, September 17, 2010, at *http://www.bloomberg.com/news/2010-09-16/obama-will-announce-warren-s-new-role-in-rose-garden-tomorrow.html* (April 7, 2011).
6. Public Law 111–203, Title X: Bureau of Consumer Financial Protection, Sec. 1061: Transfer of Consumer Financial Protection Functions.
7. H.R. 1121, Responsible Consumer Financial Protection Regulations Act of 2011.
8. Press release, "Bachus Introduces Bill to Promote Robust Consumer Protection," at *http://bachus.house.gov/index.php?option=com_content&task=view&id=1092* (April 7, 2011).
9. Public Law 111–203, Title X: Bureau of Consumer Financial Protection, Sec. 1017: Funding; Penalties and Fines.
10. *Ibid.*
11. Carter Dougherty, "Wren Defends Openness of Consumer Bureau to Congress," Bloomberg, March 15, 2011, at *http://www.bloomberg.com/news/2011-03-15/warren-defends-openness-of-consumer-bureau-to-congress-public.html* (April 7, 2011).
12. Composed of representatives from the U.S. Treasury, the Federal Reserve, the Comptroller of the Currency, the Securities and Exchange Commission, the Federal Deposit Insurance Corporation, the Commodity Futures Trading Commission, the Federal Housing Finance Agency, the National Credit Union Administration, and the CFPB itself.
13. Public Law 111–203, Dodd–Frank Wall Street Reform and Consumer Protection Act, Title X: Bureau of Consumer Financial Protection, Sec. 1023: Review of Bureau Regulations.

delivered, offered, or provided in connection with a consumer financial product or service referred to [as above]."[14]

As cited in the Dodd–Frank Act, these "products and services" include, but are not limited to:

- Extending credit and servicing loans, including acquiring, purchasing, selling, brokering, or other extensions of credit;
- Extending or brokering leases of personal or real property that are the functional equivalent of purchase finance arrangements;
- Real estate settlement services;
- Deposit-taking activities, transmitting or exchanging funds, or otherwise acting as a custodian of funds or any financial instrument for use by or on behalf of a consumer;
- Selling, providing, or issuing stored value or payment instruments;
- Providing check cashing, check collection, or check guaranty services;
- Providing payments or other financial data processing products or services to a consumer by any technological means, including processing or storing financial or banking data for any payment instrument, or through any payments systems or network used for processing payments data, including payments made through an online banking system or mobile telecommunications network;
- Providing financial advisory services to consumers on individual financial matters or relating to proprietary financial products or services, including: providing credit counseling to any consumer and to assist a consumer with debt management or debt settlement, modifying the terms of any extension of credit, or avoiding foreclosure;
- Collecting, analyzing, maintaining, or providing consumer report information or other account information, including information relating to the credit history of consumers, used or expected to be used in connection with any decision regarding the offering or provision of a consumer financial product or service;
- Collecting debt related to any consumer financial product or service; and
- Such other financial product or service as may be defined by the Bureau, by regulation if the Bureau finds that such financial product or service is entered into or conducted as a subterfuge or with a purpose to evade any Federal consumer financial law, or permissible for a bank or for a financial holding company to offer or to provide under any provision of a Federal law or regulation applicable to a bank or a financial holding company, and has, or likely will have, a material impact on consumers.

Urgent Need for Repeal or Reform. Change is obviously needed, and eliminating the bureau outright would be the best option. Short of repealing Title X of the Dodd–Frank financial regulation statute, the following reforms are urgent:

1. Abolish the bureau's current funding mechanism (a fixed percentage of the Federal Reserve's operating budget) and subject it instead to congressional control. Although some financial regulatory agencies, such as the Federal Deposit Insurance Corporation and the Fed itself, also fall outside the congressional appropriations process, they are the exceptions rather than the rule among government agencies. An exception is typically justified by the sensitive nature of the agency's work in ensuring the "safety and soundness" of financial institutions. The CFPB, however, does not share that mission and instead is charged with a broad policymaking role. There is no justification for allowing the agency to escape congressional oversight.
2. Strike the undefined term "abusive" from the list of practices under CFPB purview. There is no regulatory precedent or jurisprudence that interprets the term in the context of consumer financial services, and the bureau should not have discretion to define its own powers.
3. The bureau should be explicitly required to apply definitions of "unfair" and "deceptive" practices in a manner consistent with regulatory convention and case law. The agency is widely expected

14. *Ibid.*, Sec. 1002: Definitions.

to adopt such an interpretation, but that should be made certain. Otherwise, regulatory uncertainty will inhibit the availability of financial products and services.

Demanding Lawmakers' Attention. Although the Bachus bill would not impose meaningful restraint or accountability on the Consumer Financial Protection Bureau, there is a measure of comfort in the fact that it has drawn bipartisan support. At least lawmakers on both sides of the aisle evidently are concerned that the CFPB as currently fashioned could unleash unwarranted regulations that would raise the costs of financial products and services and make them harder to obtain. Doing so would further stymie economic growth and job creation. Representative Bachus would do well to build on this support for more extensive reforms.

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