



An Assessment of the Regulatory Authority of the Consumer Financial Protection Bureau*

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There has been a lively debate over the impact of the Consumer Financial Protection Bureau proposed in the pending Senate financial regulatory reform bill. The Administration and others argue that the bill simply consolidates existing consumer protection authority, currently dispersed among a number of different agencies, into the new Bureau. Others believe that the legislation would allow this new agency to go far beyond current law, and issue regulations that could create new duties and responsibilities for a wide swath of companies, including companies only incidentally providing financial services.

To better appreciate this debate, we decided to go to the source. We read the title of the bill that establishes the Bureau (Title X of S. 3217). In our view, the legislation can be read to give the Bureau virtually unlimited regulatory authority over consumer financial products and services, whether offered by a bank or non-financial company

The bill states that the purpose of the new Bureau is to ensure that “markets for consumer financial products and services are fair, transparent, and competitive.” The Bureau’s objectives are to prevent unfair, deceptive, or abusive acts and practices, to prevent discrimination, and to ensure that markets for consumer financial products operate “efficiently to facilitate access and innovation.”

The bill grants to the Bureau the authority to write regulations and issue orders to implement and enforce these goals. The Bureau can therefore issue regulations and take enforcement actions to ensure that markets operate efficiently, to prevent discrimination, and that markets are fair. The Bureau can also issue rules to facilitate access to financial products.

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While these goals are laudable, they go far beyond the usual concepts of consumer protection. Further, because these terms are not defined, and because concepts such as “fairness” and “abusive” are often based on the view of the beholder, the potential reach of the Bureau’s regulations is huge.

Thus, in writing rules to implement these purposes and objectives, the Bureau could regulate the structure of markets for consumer financial products and services and the design of products and services offered in such markets. For example, in determining whether a market is “competitive” or “efficient,” the Bureau could decide to control what firms may or may not enter the market. Likewise, in determining whether that market is “fair,” the Bureau could determine what products and services could or could not be provided by firms operating in that market, and could regulate the terms and conditions of those products, including price. The Bureau could even determine that it is unfair for a company to offer a complex product without also providing a “plain vanilla” alternative. And in order to promote access to financial products and services, the Bureau could mandate that “low cost” alternatives be offered, or that companies have a responsibility to serve lower income neighborhoods.

In short, the bill provides an unprecedented grant of authority to a regulatory agency. In effect, the Bureau would be able to write new law, wholly beyond the traditional concepts of “consumer protection” by implementing the broad goals and purposes of the legislation as required by the statutory language.

Do the authors of Title X intend the Bureau to have such extensive power? There is some support for this interpretation in the Committee Report accompanying the Senate bill. The Committee Report states that “[the legislation] authorizes the Bureau to administer, enforce and implement the provisions of Federal consumer financial law, *and more specifically, authorizes the Bureau to prescribe rules and issue orders and guidance as may be necessary to carry out the purpose and prevent evasions of these laws...*” (emphasis added). Moreover, the Committee Report states that the Bureau must have the flexibility to write new rules to cover new activities and practices as they emerge:

The CFPB will have enough flexibility to address future problems as they arise. Creating an agency that only had the authority to address the problems of the past, such as mortgages,

would be too short-sighted. Experience has shown that consumer protection must adapt to new practices and new industries.

A broad interpretation of the Bureau's rule-writing authority would give the Bureau the flexibility to regulate new practices and new industries.

This interpretation of the Bureau's rule-writing authority also is reinforced by another section of the bill (Section 1036) that makes it unlawful to enforce any contract or to impose any fee or charge that is not in conformity with the Bureau's rules and orders. This implies that the Bureau's rulemaking authority can reach any feature of a consumer financial product or service, including the price of the product or service. Presumably, this expansive authority comes from the Bureau's ability to write rules to ensure that financial markets are "fair," "competitive," "transparent" and "efficient."

If enacted in its current form, it will be up to the new Bureau to parse the limits of its regulatory authority. Under long-standing precedents, the Federal courts will give deference to that interpretation. Nothing in the bill, as it is currently drafted, expresses any meaningful limit on the ability of the Bureau to issue regulations governing the operations of the markets for consumer financial products and services.

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