



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

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## Summary

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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## Introduction

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 Bureau will have jurisdiction over an array of consumer financial products and services, including deposit taking, mortgage lending, credit card lending, loan servicing, check guaranteeing, the collection of consumer report data, debt collection, real estate settlement services, money transmitting, and financial data processing. The Bureau will serve as the primary federal consumer financial supervisor of many of the institutions that offer these products and services. It also will have the authority to prescribe regulations to implement 18 federal “enumerated consumer laws”<sup>1</sup> that were in place prior to Dodd-Frank’s enactment, such as the Truth in Lending Act (TILA) and the Real Estate Settlement Procedures Act (RESPA). These enumerated consumer laws provide for consumer protections over a broad and diverse assortment of consumer financial products and activities.

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.<sup>2</sup>

In addition to the effective dates set out in the CFP Act, the authority to exercise the Bureau’s powers also may be affected by the appointment of a Director, and the date of the appointment. The Bureau is designed to be headed by a single Director, who is to be nominated by the President, subject to the advice and consent of the Senate.<sup>3</sup> If a Director is appointed before the

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<sup>1</sup> These “enumerated consumer laws” are: the Alternative Mortgage Transaction Parity Act (12 U.S.C. §§ 3801 *et seq.*); the Consumer Leasing Act of 1976 (15 U.S.C. §§ 1667 *et seq.*); the Electronic Funds Transfer Act (15 U.S.C. §§ 1693 *et seq.*), except with respect to section 920 of that act (15 U.S.C. § 1693q); the Equal Credit Opportunity Act (15 U.S.C. §§ 1691 *et seq.*); the Fair Credit Billing Act (15 U.S.C. §§ 1666 *et seq.*); the Fair Credit Reporting Act (15 U.S.C. §§ 1681 *et seq.*), except with respect to sections 615(e) and 628 of that act (15 U.S.C. §§ 1681m(e) and 1681w); the Homeowners Protection Act of 1998 (12 U.S.C. §§ 4901 *et seq.*); the Fair Debt Collection Practices Act (15 U.S.C. §§ 1692 *et seq.*); subsections (b) through (f) of section 43 of the Federal Deposit Insurance Act (12 U.S.C. § 1831t(c)-(f)); sections 502 through 509 of the Gramm-Leach-Bliley Act (15 U.S.C. §§ 6802-6809), except for section 505 as it applies to section 501(b); the Home Mortgage Disclosure Act of 1975 (12 U.S.C. §§ 2801 *et seq.*); the Home Ownership and Equity Protection Act of 1994 (15 U.S.C. § 1639); the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. §§ 2601-2610); the S.A.F.E. Mortgage Licensing Act of 2008 (12 U.S.C. §§ 5101-5116); the Truth in Lending Act (15 U.S.C. §§ 1601 *et seq.*); the Truth in Savings Act (12 U.S.C. §§ 4301 *et seq.*); section 626 of the Omnibus Appropriations Act, 2009 (P.L. 111-8 § 626); the Interstate Land Sales Full Disclosure Act (15 U.S.C. §§ 1701 *et seq.*); and most provisions of the Mortgage Reform and Anti-Predatory Lending Act (P.L. 111-203, Title XIV, subtitles A, B, C, and E, and §§ 1471, 1472, 1475, and 1476). The Dodd-Frank Act also substantively amended many of these consumer laws. See, e.g., P.L. 111-203, Title XIV.

<sup>2</sup> Designated Transfer Date, 75 *Federal Register* 57,252, Sept. 20, 2010, available at <http://www.gpo.gov/fdsys/pkg/FR-2010-09-20/pdf/2010-23487.pdf>. Although the designated transfer date could be changed by the Secretary under certain circumstances, this report assumes that the designated transfer date will remain July 21, 2011.

<sup>3</sup> P.L. 111-203 § 1011. Although the CFP Act requires the CFPB Director to be confirmed by the Senate, the President could appoint a Director temporarily without Senate confirmation through his constitutionally provided power to make recess appointments. See U.S. Const., art. II, § 2, cl. 3 (“The President shall have Power to fill up all Vacancies that (continued...)”).

designated transfer date, the Bureau will be able to exercise all of the powers provided to it pursuant to the CFP Act. To date, the President has not appointed a Director to head the Bureau.

The CFP Act provides the Secretary the authority to exercise *some, but not all* of the Bureau's authorities until a CFPB Director is appointed. This report explores the limitations imposed on the Secretary's authority to perform the functions of the Bureau until a Director is appointed.

## The Secretary of the Treasury's Interim CFPB Authorities

### The Source of Authority: CFP Act Section 1066

Section 1066 of the CFP Act serves as the primary source of the Secretary's interim authority over the Bureau.<sup>4</sup> Section 1066 is divided into two subsections, each of which provides the Secretary distinct powers that expire at different times.

Subsection 1066(b) states that the Department of the Treasury (Treasury Department) “may provide *administrative services* necessary to support the Bureau *before the designated transfer date* (emphasis added).” Any administrative services provided pursuant to the authority of 1066(b) will be offered at the direction of the Secretary, as the Treasury Department's head. The CFP Act does not elaborate as to what should be considered “administrative services,” leaving some questions as to how it could be interpreted. The phrase seems to refer to matters such as

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may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”). A recess-appointed Director likely would be considered to have all of the authorities that would be held by a Senate-confirmed Director. CRS Report RL33009, *Recess Appointments: A Legal Overview*, by (name redacted). Another avenue for temporarily filling positions that normally require the advice and consent of the Senate, the Vacancies Act (5 U.S.C. §§ 3345-3349d), likely could not be utilized by the President to fill the CFPB Director position for the first time because the Vacancies Act appears only to apply to positions that are open because of resignation, death, or some other inability of the prior holder to serve—not to newly established positions that no one has previously held. See, e.g., S.Rept. 105-250, at 14 (1998), available at <http://www.gpo.gov/fdsys/pkg/CRPT-105srpt250/pdf/CRPT-105srpt250.pdf> (“The 150 days runs from the ‘vacancy’ referring to the death, resignation, or beginning of inability to serve of the Senate-confirmed officer. This meaning of ‘vacancy’ applies each time it is used in the legislation.”).

<sup>4</sup> Two other CFP Act provisions provide the Secretary authority related to the Bureau, but they do not appear to authorize the Secretary to perform substantive Bureau functions. For instance, section 1062 grants the Secretary the authority to establish the designated transfer date, in consultation with other federal regulators. P.L. 111-203 § 1062. While the determination of the designated transfer date is important because it establishes when the bulk of the Bureau's powers will go into effect, section 1062 does not provide the Secretary explicit authority to exercise any of the Bureau's powers. Another provision of the CFP Act provides the Secretary the authority to request funds from the Board of Governors of the Federal Reserve System (FRB) “as needed to carry out the authorities granted to the Bureau under Federal consumer financial law, from the date of enactment of this Act until the designated transfer date.” P.L. 111-203 § 1017(a)(3). The funds that are requested by the Secretary are to be transferred to the Bureau from the Federal Reserve System without being subject to the general appropriations process. This provision provides the Secretary a great deal of discretion to determine the Bureau's funding levels until the designated transfer date (regardless of whether or not a CFPB Director is appointed before then). However, because the provision is constrained by the language “the authorities granted to the Bureau,” it seems unlikely that the Secretary could interpret this provision as augmenting his authority to perform the Bureau's functions beyond determining necessary funding levels.

providing human resources services and securing access to telephone lines and Internet services.<sup>5</sup> The Treasury Department's administrative support powers under section 1066(b) went into effect on the date of enactment and terminate on the designated transfer date.<sup>6</sup>

The more substantive source of the Secretary's interim authorities derives from CFP Act subsection 1066(a). Subsection 1066(a) states, in its entirety:

(a) In General.—The Secretary is authorized to perform the functions of the Bureau under this subtitle [F] until the Director of the Bureau is confirmed by the Senate in accordance with section 1011.<sup>7</sup>

Subsection 1066(a) does not authorize the Secretary to exercise the full panoply of the Bureau's powers. Rather, the scope of the Secretary's authority under subsection 1066(a) is limited to "the functions of the Bureau under this subtitle [F]." An examination of the powers provided to the Bureau under subtitle F follows below. Unlike the administrative powers of subsection (b) that expire on the designated transfer date, the Secretary's authorities under subsection 1066(a) do not expire *until a Director is appointed*. As previously mentioned, while some of the Bureau's authorities went into effect when the Dodd-Frank Act was signed into law, the majority of the CFPB's authorities—including most that are provided under subtitle F—do not go into effect until the designated transfer date. The Secretary, in exercising Bureau powers within his interim authority, will be subject to the CFP Act's general effective dates.

## **CFPB's Authorities Pursuant to CFP Act, Subtitle F**

Generally speaking, subtitle F transfers certain consumer financial protection functions from seven "transferor agencies" to the Bureau. The transferor agencies are: the Office of the Comptroller of the Currency (OCC), the Office of Thrift Supervision (OTS),<sup>8</sup> the Board of Governors of the Federal Reserve System (FRB), the Federal Deposit Insurance Corporation

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<sup>5</sup> Although the CFP Act does not define "administrative services," at least one publication from the U.S. Government Accountability Office has elaborated on the meaning of the term. U.S. Gov't Accountability Office, *Principles of Federal Appropriations Law*, p. 12-102 (3d ed. 2008) ("Thus, a franchise fund is a type of intragovernmental revolving fund designed to compete with similar funds of other agencies to provide common administrative services. Examples of such services include accounting, financial management, information resources management, personnel, contracting, payroll, security, and training."). Similarly, an opinion from the U.S. Court of Appeals for the District of Columbia described the operational and administrative support services provided by the Office of Administration to the President and the Executive Office of the President (EOP). *Citizens for Responsibility & Ethics in Washington v. Office of Admin.*, 566 F.3d 219, 224 (D.C. Cir. 2009) ("As its name suggests, everything the Office of Administration does is directly related to the operational and administrative support of the work of the President and his EOP staff. OA's services include personnel management; financial management; data processing; library, records, and information services; and office services and operations, including: mail, messenger, printing and duplication, graphics, word processing, procurement, and supply services." (citations omitted) (internal quotation marks omitted)) (*holding* that the Office of Administration is not covered by the Freedom of Information Act, 5 U.S.C. § 552, "... because it performs only operational and administrative tasks in support of the President and his staff and therefore, under our precedent, lacks substantial independent authority.").

<sup>6</sup> P.L. 111-203 § 1066(b).

<sup>7</sup> P.L. 111-203 § 1066(a).

<sup>8</sup> The Dodd-Frank Act will eliminate the OTS and transfer much of its power to other regulators. P.L. 111-203, Title III.

(FDIC), the National Credit Union Administration (NCUA), the Federal Trade Commission (FTC), and the Department of Housing and Urban Development (HUD).<sup>9</sup>

More specifically, the powers that will be transferred to the Bureau under subtitle F include

- “all authority to prescribe rules or issue orders or guidelines pursuant to any Federal consumer financial law,” including the rulemaking authority under the 18 enumerated consumer laws, held by the HUD,<sup>10</sup> FRB, OCC, OTS, FDIC, and NCUA;<sup>11</sup>
- certain consumer compliance examination and other supervisory authorities over “larger depository institutions” (i.e., banks, thrifts, savings associations, and credit unions with more than \$10 billion in assets);<sup>12</sup>
- primary enforcement authority of consumer financial laws and regulations over larger depositories;<sup>13</sup>
- subject to certain limitations,<sup>14</sup> the FTC’s authority “to prescribe rules, issue guidelines, or conduct a study or issue a report mandated under [the enumerated consumer laws] ... ”;
- the authority to coordinate a process by which certain employees of all of the transferor agencies other than the FTC are identified to be transferred to the CFPB, as necessary to perform the transferred authorities.<sup>15</sup>

The authority associated with identifying and transferring personnel from the transferor agencies to the CFPB went into effect on the date of enactment. All identified personnel are required to be transferred to the Bureau “not later than 90 days after the designated transfer date.”<sup>16</sup> Virtually all of the other authorities that are provided to the Bureau under subtitle F will go into effect on the designated transfer date.

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<sup>9</sup> P.L. 111-203 § 1061(a)(2).

<sup>10</sup> The authorities that will be transferred from the Secretary of HUD are provided for in just three of the enumerated consumer laws: the Interstate Land Sales Full Disclosure Act (15 U.S.C. §§ 1701 *et seq.*); the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. §§ 2601-2610); and the S.A.F.E. Mortgage Licensing Act of 2008 (12 U.S.C. §§ 5101-5116).

<sup>11</sup> P.L. 111-203 § 1061(b).

<sup>12</sup> P.L. 111-203 §§ 1061(b)-(c). *Safety and soundness* supervisory and examination powers over depository institutions will remain with the banking regulators (i.e., the OCC, FDIC, FRB, and NCUA). The CFP Act requires the Bureau to coordinate consumer compliance examinations and other supervisory activities with the banking regulators of the larger depository institutions and establishes a procedure by which conflicts between the Bureau and a banking regulator can be resolved. P.L. 111-203 § 1025(a). Until the designated transfer date, the Bureau may participate in examinations conducted by the banking regulators with the banking regulators’ approval.

<sup>13</sup> P.L. 111-203 § 1061(c)(2).

<sup>14</sup> The FTC will retain certain rulemaking and enforcement authorities, particularly under the Federal Trade Commission Act, 15 U.S.C. §§ 45, *et seq.* The FTC and the Bureau are to enter into an agreement “to avoid duplication or conflict between” their respective rulemakings.

<sup>15</sup> P.L. 111-203 §§ 1064 and 1067. Subtitle F also authorizes the CFPB to continue lawsuits or other legal proceedings either initiated by or against the transferor agencies (other than the FTC) that relate to any transferred consumer protection functions. P.L. 111-203 § 1063.

<sup>16</sup> P.L. 111-203 § 1064(b).

Although not beyond debate, CFP Act subsection 1066(a) appears to provide the Secretary the power to exercise all of the Bureau's transferred authorities, as provided under subtitle F, when they become effective and until a CFPB Director is appointed. These authorities include consumer compliance supervisory and enforcement powers over larger depository institutions, as well as the power to issue rules to implement the 18 enumerated consumer laws. The Secretary also has the authority to provide the Bureau necessary administrative support functions until the designated transfer date, pursuant to CFP Act subsection 1066(b). Although the authorities established under subtitle F are expansive, they do not encompass the entire universe of the CFPB's powers.

## **Authorities Established by Provisions Other Than Subtitle F**

The powers provided to the Bureau pursuant to provisions other than those of subtitle F generally are the Bureau's "newly established" powers – i.e., the enhanced consumer protection authorities that were not explicitly provided by law to federal regulators before the Dodd-Frank Act. The Bureau's newly established authorities largely consist of: enhanced, up-front supervisory powers over covered non-depository financial institutions; new rulemaking powers, distinct from the rulemaking authorities provided under the 18 enumerated consumer laws; and certain limited consumer compliance enforcement and examination powers over "smaller depository institutions"<sup>17</sup> (i.e., banks, thrifts, savings associations, and credit unions with \$10 billion or less in assets).

The CFPB's newly established powers to supervise certain non-depository financial institutions are provided for in CFP Act section 1024, which is part of subtitle B. Section 1024 explicitly provides that the Bureau shall supervise non-depository providers of payday loans, mortgage loans, mortgage brokerage services, foreclosure relief services, and student loans.<sup>18</sup> Rather than establishing an exhaustive list, the CFP Act provides the Bureau some flexibility to identify other types of institutions that may be subject to its supervision. For example, the CFP Act allows the CFPB, in consultation with the FTC, to prescribe regulations identifying "larger participant[s]" in a consumer financial market to be subject to the Bureau's supervision.<sup>19</sup> The supervisory powers provided to the Bureau under section 1024 include the authority to conduct periodic examinations of and impose reporting requirements on covered non-depository financial institutions. The goals of the examination and reports are to verify that these institutions have policies and procedures in place to ensure compliance with consumer laws and to assess and detect risks to consumers.<sup>20</sup> Section 1024 also establishes the CFPB's authority to require covered non-depository financial institutions to register with the Bureau and to maintain minimum eligibility standards (e.g., submitting to background checks and meeting bond requirements) before permissibly participating in certain consumer financial markets.<sup>21</sup> In short, these powers will give the Bureau the potential to supervise covered non-depository financial institutions in a much the same way that the federal banking regulators<sup>22</sup> historically have been able to supervise depository

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<sup>17</sup> P.L. 111-203 § 1026(a).

<sup>18</sup> P.L. 111-203 § 1024(a).

<sup>19</sup> P.L. 111-203 §§ 1024(a)(1)(B) and (a)(2). Other sections of subtitle B exempt certain non-depository institutions from the Bureau's general supervisory jurisdiction. See, e.g., P.L. 111-203 § 1029 (automobile dealers).

<sup>20</sup> P.L. 111-203 § 1024(b).

<sup>21</sup> P.L. 111-203 § 1024(b)(7).

<sup>22</sup> This report refers to the OCC, FRB, FDIC, NCUA, and OTS together as the "banking regulators." For a discussion of the banking regulators' jurisdictions, see CRS Report R40249, *Who Regulates Whom? An Overview of U.S.* (continued...)



institutions. Section 1024 also provides the CFPB consumer compliance enforcement powers over covered non-depository financial institutions.<sup>23</sup> The powers of section 1024 went into effect on the date of enactment.<sup>24</sup>

The Bureau's new rulemaking powers largely are provided for in subtitle C and section 1022 of subtitle B of the CFP Act. Section 1022 establishes the Bureau's general authority to prescribe regulations, issue orders, and issue guidance "as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof."<sup>25</sup> Subtitle C provides the CFPB the authority to prescribe more specific regulations. For example, one section of subtitle C provides the Bureau the power to issue regulations declaring acts or practices pertaining to consumer financial products and services to be unfair, deceptive, or abusive.<sup>26</sup> Another provision of subtitle C provides the Bureau the rulemaking authority to require disclosures regarding consumer financial products and services, including the power to establish model disclosure forms.<sup>27</sup> The general rulemaking provisions of subtitle B went into effect on the date of enactment,<sup>28</sup> while the specific rulemaking authorities provided under subtitle C will go into effect on the designated transfer date.<sup>29</sup>

The Bureau's enforcement and supervisory powers over smaller depository institutions are relatively limited; they will leave the Bureau largely playing a back-up role to those institutions' banking regulators. Although the CFP Act does not provide the Bureau primary enforcement power over these institutions, it does establish a process by which the Bureau may refer potential enforcement actions against smaller depository institutions to their banking regulators.<sup>30</sup> Also, the Bureau, "on a sampling basis," may participate in examinations of these smaller depository institutions that are conducted by their banking regulators.<sup>31</sup> The Bureau generally will have access to examination reports prepared by the banking regulators of these smaller depository institutions. Although the CFPB will have to rely on existing reports "to the fullest extent possible," it also will have the authority to require smaller depository institutions to create and submit reports directly to the Bureau.<sup>32</sup> The Bureau's limited supervisory and enforcement authority over smaller depository institutions generally will take effect on the designated transfer date.<sup>33</sup>

As previously noted, the newly established powers are provided for by provisions other than subtitle F. They also likely could not be considered "administrative services" under subsection 1066(b) of the CFP Act. Therefore, they do not appear to be within the scope of the Secretary's

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*Financial Supervision*, by (name redacted) and (name redacted). The Dodd-Frank Act will eliminate the OTS and transfer much of its power to other regulators. P.L. 111-203, Title III.

<sup>23</sup> P.L. 111-203 § 1024(c).

<sup>24</sup> P.L. 111-203 § 1029A.

<sup>25</sup> P.L. 111-203 § 1022(b).

<sup>26</sup> P.L. 111-203 § 1031.

<sup>27</sup> P.L. 111-203 § 1032.

<sup>28</sup> P.L. 111-203 § 1029A.

<sup>29</sup> P.L. 111-203 § 1037.

<sup>30</sup> P.L. 111-203 § 1026(d). The banking regulators generally will have to provide a written response to these referrals.

<sup>31</sup> P.L. 111-203 § 1026(c).

<sup>32</sup> P.L. 111-203 § 1026(b).

<sup>33</sup> P.L. 111-203 § 1029A.

interim Bureau authorities as defined by CFP Act section 1066 and likely may not be exercised until a Bureau Director is appointed.<sup>34</sup>

## **The Secretary's Performance of Bureau Functions Since the Date of Enactment and Potential Issues After the Designated Transfer Date**

Based on a review of information made publicly available by the Secretary and the Bureau,<sup>35</sup> as well as the congressional testimony of multiple Treasury Department officials,<sup>36</sup> it appears that 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. The Bureau has neither prescribed nor formally proposed regulations; it has not entered into any binding enforcement actions; and it has not attempted to exercise supervisory powers over financial institutions. Instead, actions taken thus far include talking to interested parties, such as depository institutions, consumer groups, and state and federal regulators; collecting information on consumer financial products and services; collecting information on consumer complaints; coordinating efforts to transfer personnel from the transferor agencies to the Bureau; conducting planning meetings with personnel from the

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<sup>34</sup> It should be noted that the substance of certain rulemaking powers under the enumerated consumer laws overlaps to a certain degree with the substance of the Bureau's newly established rulemaking powers. Although the Secretary likely may not exercise the Bureau's newly established rulemaking powers, similar ends may be reached by using more discreet rulemaking authority under one of the enumerated consumer laws. For example, a provision in TILA, 15 U.S.C. § 1639, authorizes the FRB to prescribe regulations that "prohibit acts or practices in connection with *mortgage loans* that the Board finds to be unfair, deceptive, or designed to evade the provisions of this section (emphasis added)." On the designated transfer date, the rulemaking authority under TILA will transfer from the FRB to the Bureau. CFP Act section 1066 appears to give the Secretary the authority to exercise this transferred authority after the designated transfer date. Therefore, the Secretary likely could issue rules prohibiting unfair or deceptive practices as they pertain to the mortgages covered under 15 U.S.C. § 1639. The transferred authority under 15 U.S.C. § 1639 is much narrower than the power provided under the newly established rulemaking authority in CFP Act section 1031. An appointed Director could use the newly established authority of CFP Act section 1031 to declare certain practices involving *student loans* to be unfair or deceptive, for instance. A rulemaking regarding student loans likely would not be permissible under the authority of 15 U.S.C. § 1639.

<sup>35</sup> See, e.g., Inspectors General of the Department of the Treasury and Board of Governors of the Federal Reserve System, *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*, Letter to Members of Congress, Jan. 10, 2011, available at <http://www.treasury.gov/about/organizational-structure/ig/Documents/OIG-CA%2011004%20Committee%20of%20Financial%20Services%20Response%20CFPB.pdf>; Consumer Financial Protection Bureau, Official Website, available at <http://www.consumerfinance.gov/>; U.S. Dept. of Treasury, Freedom of Information Act Disclosures, available at <http://www.treasury.gov/FOIA/Pages/other-index.aspx>; and U.S. Dept. of the Treasury, Wall Street Reform: Bureau of Consumer Financial Protection, available at <http://www.treasury.gov/initiatives/Pages/cfpb.aspx>.

<sup>36</sup> See, e.g., *Who's Watching the Watchmen? Oversight of the Consumer Financial Protection Bureau*, Hearing Before the Subcomm. on TARP, Financial Services and Bailouts of Public and Private Programs of the Comm. on Oversight and Government Reform, 112<sup>th</sup> Cong. (2011) (testimony of Elizabeth Warren, Special Advisor to the Secretary of the Treasury for the Consumer Financial Protection Bureau), available at [http://oversight.house.gov/index.php?option=com\\_jcalpro&Itemid=1&extmode=view&extid=276](http://oversight.house.gov/index.php?option=com_jcalpro&Itemid=1&extmode=view&extid=276); *Oversight of the Consumer Financial Protection Bureau*, Hearing Before the Subcomm. on Fin. Inst. and Consumer Credit of the Comm. on Fin. Services, 112<sup>th</sup> Cong. (2011) (written testimony of Elizabeth Warren, Special Advisor to the Secretary of the Treasury for the Consumer Financial Protection Bureau), available at <http://financialservices.house.gov/Calendar/EventSingle.aspx?EventID=231781>; and *Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act*, Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs, 111<sup>th</sup> Cong. (2010) (written testimony of Neal Wolin, Deputy Secretary of the Treasury), available at [http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing\\_ID=45d8ba0b-04b1-41d6-b5b5-2008c0ce72d9&Witness\\_ID=a2a802ec-6db7-....-a73f-902b35d0e51d](http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=45d8ba0b-04b1-41d6-b5b5-2008c0ce72d9&Witness_ID=a2a802ec-6db7-....-a73f-902b35d0e51d).

Treasury Department and the transferor agencies; hiring new personnel; securing office space and websites; and similar actions. These administrative and preparatory steps appear consistent with the description of the Treasury Department's CFPB responsibilities as provided in its 2010 annual report,<sup>37</sup> as well as the explanation of the Bureau's planned activities that was provided in the *Federal Register* notice in which the Secretary identified July 21, 2011 as the designated transfer date.<sup>38</sup>

Each of the actions described above seem to comport with either the administrative support functions authorized to be exercised by the Secretary under CFP Act subsection 1066(b) or the CFPB's transferred authorities that went into effect on the date of enactment, which are authorized to be performed by the Secretary under subsection 1066(a).<sup>39</sup>

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<sup>37</sup> Department of the Treasury, Performance and Accountability Report, pp. 17, 257, 287-88, 297-98, Nov. 15, 2010, available at [http://www.treasury.gov/about/organizational-structure/offices/Mgt/Documents/2010\\_Treasury\\_complete\\_PAR%20Nov30.pdf](http://www.treasury.gov/about/organizational-structure/offices/Mgt/Documents/2010_Treasury_complete_PAR%20Nov30.pdf). Page 17 of the report states:

Under the Act, the Secretary is responsible for standing up the CFPB until the first Director is confirmed by the Senate. The Secretary has designated July 21, 2011, as the "designated transfer date" on which the CFPB will assume certain authorities from seven federal agencies. After the designated transfer date, the CFPB will implement rules for consumer financial products and services, develop supervision programs to regularly examine the most critical bank and nonbank financial services providers, operate programs to promote greater financial literacy among consumers, and establish a nationwide consumer complaint response unit. Immediate tasks include designing an organizational structure, establishing program and administrative support offices, and recruiting staff. On September 17, 2010, President Obama named Elizabeth Warren as Assistant to the President and the Secretary named her as Special Advisor on the CFPB to help stand-up the bureau.

<sup>38</sup> Designated Transfer Date, 75 *Federal Register* 57,252, Sept. 20, 2010, available at <http://www.gpo.gov/fdsys/pkg/FR-2010-09-20/pdf/2010-23487.pdf>. The notice states:

prior to the designated transfer date, the CFPB will begin to 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 nondepository covered persons, and prepare for the opening of outreach offices. ... Prior to the designated transfer date, the CFPB will begin the significant task of building this supervision program, including hiring and training examination staff and making preparations necessary to begin a risk-based supervision program. The CFPB will also work during the intervening period to prepare for the new authorities that will transfer or take effect as of the designated transfer date, for instance by planning the orderly integration of bank, thrift, and credit union examiners....

<sup>39</sup> Another issue that has stirred some debate is the ability of the Secretary to delegate his interim Bureau authorities to other Treasury Department officials. See, e.g., *Oversight of the Consumer Financial Protection Bureau, Hearing Before the Subcomm. on Fin. Inst. and Consumer Credit of the Comm. on Fin. Services*, 112<sup>th</sup> Cong. (2011) (questions to Elizabeth Warren, Special Advisor to the Secretary of the Treasury for the Consumer Financial Protection Bureau), available at <http://financialservices.house.gov/Calendar/EventSingle.aspx?EventID=231781>. The Secretary of the Treasury has wide-ranging statutory powers beyond those pertaining to the CFPB. These powers include managing the U.S. government's receipts and public debt, minting coins and printing currency, and detecting and preventing fraud involving the government's receipts. 31 U.S.C. § 321(a). To exercise these powers, the Secretary of the Treasury is provided the general authority to "delegate duties and powers of the Secretary to another officer or employee of the Department of the Treasury." 31 U.S.C. § 321(b) ("The Secretary may ... delegate duties and powers of the Secretary to another officer or employee of the Department of the Treasury ....") It appears that Treasury Secretary Timothy Geithner utilized this authority to delegate some of his interim Bureau powers to Elizabeth Warren, whom he appointed as his "Special Advisor for the Consumer Financial Protection Bureau." A number of other Treasury Department employees also have devoted significant amounts of time to helping establish the Bureau. Each of these employees seem to be exercising authorities that have been delegated by the Secretary. See Inspectors General of the Department of Treasury and Board of Governors of the Federal Reserve System, *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*, Letter to Members of Congress, pp. 2 and 8-11, Jan. 10, 2011, available at [http://www.treasury.gov/about/organizational-structure/ig/Documents/OIG-\(continued...\)](http://www.treasury.gov/about/organizational-structure/ig/Documents/OIG-(continued...))

The majority of the Bureau's transferred powers that are established by subtitle F do not go into effect until the designated transfer date. For example, after the designated transfer date, the Bureau will acquire its consumer compliance supervisory and enforcement powers over larger depository institutions, as well as the rulemaking authority under TILA, RESPA, and the other enumerated consumer laws.<sup>40</sup> As a result, 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 potential expansion of interim powers 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 that participate in consumer financial markets.

For example, the FRB proposed regulations under its TILA authority that, among other things, would impose origination standards on certain mortgage lenders.<sup>41</sup> The 474-page proposal was issued on April 19, 2011 and is open for comments from interested parties until July 22, 2011—one day after the designated transfer date. On July 21, 2011, the authority to prescribe regulations under TILA will transfer to the Bureau. Therefore, if final regulations are to be issued imposing mortgage origination standards similar to those proposed on April 19, those regulations must be prescribed by the Bureau, not the FRB.<sup>42</sup> Prescribing these final regulations clearly would be within the authority of an appointed Bureau Director, because the authority to prescribe regulations to implement TILA will be transferred to the Bureau under CFP Act, subtitle F. Although not beyond debate, it appears the Secretary also would have the authority to issue these final regulations until a Bureau Director has been appointed, pursuant to CFP Act subsection 1066(a).

In practice, however, the limits of the Secretary's authorities may not always be clear. As is the case for virtually every complex piece of legislation, portions of the CFP Act may be open to multiple reasonable interpretations. Parties who believe their business interests are negatively impacted by certain actions taken by the Secretary under the authority of the CFP Act might be inclined to initiate lawsuits claiming that those 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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(...continued)

CA%2011004%20Committee%20of%20Financial%20Services%20Response%20CFPB.pdf. These delegations appear to be consistent with the Secretary's authority under the CFP Act and his general authority to delegate, as provided by the Treasury Department's organic act.

<sup>40</sup> See *supra* note 1.

<sup>41</sup> Regulation Z; Truth in Lending, 76 *Federal Register* 27,390, May 11, 2011, available at <http://www.gpo.gov/fdsys/pkg/FR-2011-05-11/pdf/2011-9766.pdf>.

<sup>42</sup> The Bureau would not be bound by the proposed regulations. The CFPB could issue new proposed regulations; prescribe final regulations that are different than the FRB's proposal; prescribe final regulations substantially similar to those proposed by the FRB; or not issue final regulations at all.

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