

CONSUMER CASUALTIES?

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On July 21, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank),¹ which among other things calls for creation of the Consumer Financial Protection Bureau (CFPB) to serve as a centralized agency charged with protecting consumers from lending abuses and improper practices. The question is when and whether this agency will come to fruition—or suffer as a casualty of political warfare.

This CFPB has instigated a firestorm among liberals and conservatives. Liberals raise the CFPB as an engine for consumer protection from rampant lender abuses and “big bad banks.” Conservatives denounce the Bureau as expensive regulatory fluff in a “leftist” campaign to take over private business.

Both sides have overblown the rhetoric. They seem to forget that consumer rights were once about providing voice for consumers. Consumer activism first took root as a means for political protest, as abolitionists boycotted slave-made goods during the Civil War period and protestors acted collectively in refusing to purchase Japanese silk during World War II. Since that time, proposals for a consumer protection agency have drawn considerable support before falling prey to political gamesmanship. In the 1970s, President Jimmy Carter championed agency proposals that passed the House or Senate five times in seven years. Nonetheless, the agency died in politicians’ “us versus them” warfare.

The Dodd-Frank law now hopes to give the agency life. The problem is that the polemic threatens the key step in the CFPB’s development of naming a Director with the power to tackle the Bureau’s work. From the start, Harvard law professor Elizabeth Warren has been instrumental in conceptualizing the CFPB and most assumed that she would be named as the Director. It is difficult to deny her

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¹ Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified at 15 U.S.C. § 78o-7).

expertise as a long time bankruptcy professor and consumer advocate. Still, politicians began to bash her nomination, and an ugly confirmation battle promised to stymie CFPB progress. This led to the surprising announcement of Warren's appointment as an "advisor" on the CFPB who has been the chief aid in setting up the Bureau while we continue to wait for the naming of a permanent Director with full authority.

The hope was that this "compromise" would placate politicians on both sides because it gives Warren a voice in the development of the CFPB but does not give her Director power such as rule-writing authority. Both sides are nonetheless unhappy. Some claim that this move underhandedly gives Warren unchecked power as a new "Consumer Czar." Meanwhile, others are disappointed with this "watered-down" appointment and question President Obama's commitment to protect consumers and fight lending abuses.

The reality is that we need to set politics aside, name a Director, and get the CFPB up and running with full authority to do its work. The CFPB should be cautious not to over-regulate. However, a properly equipped Bureau could help boost consumer confidence, which continues to be a major stumbling block in the economic recovery. Consumers need a voice in Washington to combat the formidable power of financial institutions. The CFPB will have the opportunity to provide that voice. The Bureau will have authority to write rules that address debt collections, loan modification, excessive bank fees, mandatory arbitration clauses, and risky forms of financial security in a focused manner. The Bureau also will centralize administration of the disjointed consumer protection laws we now have, and take over some enforcement duties from the over-burdened Federal Trade Commission.

For example, the CFPB should invigorate the 1977 Fair Debt Collection Practices Act.² Dodd-Frank transfers power to write guidelines for collections under the Act to the CFPB, and further equips the Bureau with new power to make rules regarding collections. This is supposed to happen by July 21 2011, but may be postponed until 2012 if politicians continue to wrangle over the initial step of naming a Director. Meanwhile, consumers are already lining up at the door of the illusory CFPB with complaints about collectors' practices. Moreover, this line is expected to grow as the debt collection industry finds ways to skirt outdated collections rules by using robo-callers to land lines and cell phones to pester consumers in debt.

The CFPB is now little more than verbiage in Dodd-Frank. July 21 is the designated transfer date when the CFPB will take over consumer financial protection functions. However, many doubt we will have a Director in place by that

² 15 U.S.C. § 1692 (2006).

time, especially since we are still waiting to learn of a nominee and then must face confirmation battles. At the same time, opponents of Dodd-Frank seek to repeal or severely curtail the Act, with some going so far as to claim the Act is an unconstitutional delegation of power. Furthermore, Senator Dodd retired in January after thirty-six years and there seem to be no congressional leaders championing the CFPB.

The CFPB may not be a perfect solution for curing consumer confidence, but it is at least worth a try. It is time for policymakers on all sides of the polemic to call a truce in order to quickly constitute the CFPB and equip it with the tools to tackle its work. The CFPB deserves a chance. Consumers should not be made to suffer as casualties of political warfare.