In the first two years of President Obama's administration, a Congress united under the Democrats passed the Dodd Frank Wall Street Reform and Consumer Protection Act of 2010. That law was born out of the financial markets meltdown of 2007, when homeowners and mortgage lenders and their investors saw equities evaporate seemingly overnight. This was the most traumatic economic event to befall the USA since the Great Depression that started in 1929 and lasted until America opened the throttle in the all-out effort to win World War II.

Government Agency Created
A major component of the Dodd-Frank Act was the creation of the Consumer Financial Protection Bureau – a brand new agency of government with vast powers to regulate business and industry for the protection of consumers – those buying or borrowing for their personal, family or household purposes. Unlike earlier efforts including the federal Consumer Product Safety Commission, the federal Equal Employment Opportunity Commission and the United States Civil Rights Commission, the Bureau is a self-sustaining body with almost no Congressional oversight. Its budget is fixed as a percentage of the Federal Reserve System but not controlled by the Board of Governors of the Fed. Its Director is appointed by the President and approved by the Senate, but that is about the extent of Congressional oversight, since its funding is a fixed percentage. The intended independence of the Bureau as envisioned by Professor Elizabeth Warren, now Senator Warren (D-Mass.), seems to have been fulfilled. The power and reach of the Bureau has become evident to the many companies and service providers whose businesses touch consumers.

Since the Bureau's inception, four short years ago, it has recovered millions of dollars in fines, penalties and settlements from some of America's largest financial institutions. The dollar recoveries have been nothing less than dramatic, although consumer advocates argue that the large financial institutions that have settled and paid, were engaged in massive wrongdoing, and that the punishment was fit for the crime. Prior to the establishment of the Bureau, claims against nation-wide companies were difficult to pursue, often requiring the cooperation of multiple states attorneys general, as the Justice Department under the Bush Administration did not evidence an appetite for pursuing unfair and deceptive practices harmful to consumers, against some of America's largest financial providers. Also, there was no overarching body of federal law to enforce against unfair, deceptive or abusive acts and practices.

The Bureau was specifically charged under the Dodd-Frank Act with supervising banks, savings associations and credit unions with assets in excess of $10 billion; and five specific classes of non-depository entities: 1) those who offer or provide origination, brokerage or servicing of consumer real estate loans, or loan modification or foreclosure relief services, 2) larger participants of a market for consumer financial products or services, 3) those who are engaging in conduct that poses risks to consumers, 4) those who offer or provide private education loans, and 5) those who offer payday loans.

The Bureau started right out of the gate looking at the practices of the makers and servicers of residential real estate loans, since mortgage lending practices were the primary cause of the financial collapse and the resulting Great Rescission. Many mortgage lenders and servicers have found themselves in the cross hairs of the Bureau.

Brokerage Firm is Fined
Very recently we saw the reach of the Bureau up close and personal exercised upon RealtySouth – an Alabama grown, though now Berkshire Hathaway owned, business. RealtySouth is one of the largest real estate brokerage firms in the USA. The Bureau fined the brokerage firm $500,000 in connection with improper disclosures given to consumers in a certain aspect of real estate transactions. The Bureau charged that RealtySouth violated the Real Estate Settlement Procedures Act (RESPA) by steering customers to its affiliated title company, without clear disclosure of the affiliated business arrangement. The Bureau did not determine that there was any actual harm caused to consumers as a result of the failure by the real estate brokerage company. However the violation of the underlying law – the Real Estate Settlement Procedures Act – was sufficient to warrant such a fine.

It is interesting to note that the RESPA law has been on the books for many years, and many of its requirements have been given only lip service by the mortgage lending industry over those years. One explanation for the “wink and nod” to the requirements of this law (as well as many other consumer protection laws) has been the lax enforcement of its provisions, primarily due to the fact that there was no single, nationwide regulator whose charge was enforcement. Clearly, the Bureau has now aggressively stepped into this role.

The second item referenced above has caused the most attention from the Bureau since its formation – that is the Bureau has been engaged in determining what businesses and industries are the larger participants of a market for consumer financial products or services. Some of the targeted industries are credit reporting, collection and auto finance. As a consequence, the Bureau has published guidance to its investigators supervising these industries as to what to look for to determine if acts and practices conducted in these and other
industries are unfair, deceptive and abusive.

The student loan and payday loan supervision referenced above is interesting as well. Rather than requiring specific regulations related to these industries, Congress in the Dodd-Frank Act instructed the Secretary of the Treasury to establish grants to eligible persons, to provide incentives to them to offer small-dollar loan products with lower interest rates and less “predatory practices” to compete with private education loans and payday loans. Those eligible persons include any FDIC insured institution, state, local or tribal government entities, community development financial institutions and 501(c)(3) organizations.

The provision of financial literacy training is a required element of such grants. While there have been initial efforts by banks and others to cooperate with this program, the reality of the market place for these products is working against the successful implementation of “small-dollar, low interest” lending. And, it should be noted (and in a bit of irony) that bank regulators, responsible for managing safety and soundness of their supervisees, have looked with a jaundiced eye at many of the very programs promoted by the Bureau and consumer advocates.

Authority to Investigate
The Bureau's authority extends “to prevent a covered person or service provider from committing or engaging in an unfair, deceptive and abusive act and practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.” This ability to determine “unfair, deceptive and abusive” and back up its determination by fines and penalties is what gives the Bureau considerable power and authority.

The Dodd-Frank Act gives to the Bureau standard investigative powers, including the ability to launch investigations, subpoena witnesses, require the production of information, demand written reports, take oral testimony and enforce these demands through contempt powers. Its enforcement powers are carried forward upon petition to the district courts of the United States. The Bureau can also proceed through administrative hearings of its own; and it can order that covered persons or service providers engaged in an activity that violates a law, rule or any condition imposed in writing on such person, cease and desist.

The types of administrative relief available to the Bureau include rescission or reformation of contracts, refund of moneys or return of real property, restitution, disgorgement or compensation for unjust enrichment, payment of damages or other monetary relief, public notification regarding the violation, including the costs of notification, and limits on the activities or functions of the person.

Differing Points of View
The RealtySouth settlement is a single, recent and local example of the reach of the Bureau that is making consumer transactions either more fair or more expensive – depending upon your point of view. Consumer advocates and federal and state regulators are firm to the conclusion that the Dodd-Frank Act created a “sea change” in how business and industry will deal with consumers and customers in the 21st Century, similar to how business and industry dealt with the American workforce following the adoption of the Fair Labor Standards Act at the turn of the 20th Century.

Affected businesses decry the additional cost of regulatory burden and the unbridled power and authority of the regulators as limiting business opportunity and ultimately choices for consumers that should predominate in a free market economy. Opponents point to the most recent example of “Operation Chokepoint” – a secretive structured program seemingly led by the Bureau whereby banks are being urged to drop certain customers whose businesses are deemed by regulators to be less than desirable – as an example of abuse of power by the Bureau in its effort to regulate social policy, even in the absence of legislative authority.

In the world of consumer protection, there is a constant movement of the pendulum. In some eras, business and industry enjoy a laissez faire attitude from government and a free hand in commerce; while in other eras, perceived abuses of consumers are put in check by aggressive law and regulation. We are clearly in the latter era now, and it is difficult to ascertain what lies ahead. What its ultimate impact will be on business and commerce in the USA, and the American people, will be written by future generations.

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