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Dodd-Frank, Regulatory Innovation, and the Safety of Consumer Financial Products

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DODD-FRANK, REGULATORY INNOVATION, AND THE SAFETY OF CONSUMER FINANCIAL PRODUCTS

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Among the many components of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank),[1] few received as much mainstream attention as the creation of the Bureau of Consumer Financial Protection (Bureau).[2] As originally contemplated, the Bureau was meant to make credit products safer for households and the economy at large.[3] However, the Bureau has faced strenuous opposition from the financial services industry and the U.S. Chamber of Commerce(with its "stopthecfpa.com" website),[4] among others.[5]

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1. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified in scattered sections of U.S.C).

2. For evidence of this point, see Garance Franke-Ruta, *Saturday Night Live Stars Unite Behind Consumer Financial Protection Agency,* WASH. POST (Mar. 3, 2010), http://voices.washingtonpost.com/44/2010/03/star-power-unites-behind-consu.html.

3. Elizabeth Warren, *Unsafe at Any Rate*, 5 DEMOCRACY 8-19 (2007); Elizabeth Warren, *Redesigning Regulation: A Case Study from the Consumer Credit Market,* (The Tobin Project Conference At White Oak, Gov't & Mkts.: Toward a New Theory of Regulation, Working Paper, Feb. 1-3, 2008); Elizabeth Warren & Oren Bar-Gill, *Making Credit Safer*, 157 U. PENN. L. REV. 101, 106 (2008).

4. *Stop the CFPA*, U.S. CHAMBER OF COMMERCE, http://www.stopthecfpa.com (due to the inclusion of the creation of the Bureau in Dodd-Frank as enacted, the website is no longer operational and redirects to http://www.cfpbspotlight.com/).

5. Brody Mullins, *Chamber Ad Campaign Targets Consumer Agency*, WALL ST. J. (Sept. 8, 2009), http://online.wsj.com/article/SB125236911298191113.html; Karen, Weise, *How a Consumer Protection Agency Would* Work, PUBLIC BROADCASTING SERVICE, http://www.pbs.org/wgbh/pages/frontline/creditcards/themes/howprotect.html (last visited Feb. 12, 2011). Public written commentary of financial services industry representatives tended to be less critical, presumably due to fallout from the financial crisis and the bailout. *E.g.*, Brady Dennis & Steven Mufson, *Bankers Lobby Against Financial Regulatory Overhaul*, WASH. POST (Mar. 19, 2010), http://www.washingtonpost.com/wp-

My goal in this brief commentary is to question a prevalent set of critics' assertions about the Bureau's regulatory approach. Upon review, each lacks a firm foundation in Dodd-Frank as enacted.

A core theme of objectors' complaints is that the Bureau embodies a traditional command and control approach. The Bureau was said to "open the floodgates of regulatory overreach," to anoint a "consumer protection czar," to become "a new unchecked federal super agency to meddle in every day financial interactions," and the like.[6] Some expressly complained that the Bureau will "take away freedoms," including the freedom to make ill-fated financial decisions.[7] Related objections are that people will be worse off because the Bureau will constrict credit[8] and that

dyn/content/article/2010/03/18/AR2010031805370_2.html?sid=ST2010031805667 (discussing how banking lobbyists were reluctant to be publicly critical of new regulation); *Steve Bartlett*, Statement at the Financial Services Roundtable: A New Day For Financial Services 6 (June 8, 2010), http://www.fsround.org/media/pdfs/NewDaySpeech.pdf ("We made some real mistakes with credit cards."); *id*. at 10 ("We have concerns about the design of a new agency separate from safety and soundness regulators, but we will make it work."). However, presumably no one refutes the basic point that the financial services industry opposed a stand-alone agency as well as states' rights to set higher consumer protection standards.

6. Senator Richard Shelby called this agency an "enormous regulatory overreach" that will burden small business owners and empower bureaucrats and leave significant decisions up to the whim of a "consumer protection czar." Richard Shelby, U.S. Senator, Statement: Orthodontists Could Be Covered by New Onerous Consumer Protection Laws (Apr. 30, 2010). Senator Mike Enzi predicted the bureau would "punish" small businesses that would be crushed by huge regulatory burdens, would "open the flood gates of government involvement," and would be "a new unchecked federal super agency to meddle in every day financial interactions." Mike Enzi, U.S. Senator, Statement: Enzi Slams Big Brother Super Agency; Co-sponsors Changes With Checks, Balances, Less Government Intrusion (May 6, 2010) [hereinafter Enzi statement]. Representative Jed Hensarling complained that the Bureau wanted to substitute citizens' judgments with the judgments of a "whole army of bureaucrats" and described the Bureau as an example of the Obama administration wanting to inject itself into every small corner of citizens' lives. Jeb Hensarling, U.S. Congressman, Statement (June 25, 2010), *available at* http://hensarling.house.gov/news/weekly-updates/2010/06/privacy-06-25-2010.shtml. A U.S. Chamber of Commerce representative complained of a "massive new bureaucracy" and a "bureaucratic jumble" insulated from veto by other government actors. Letter from David T. Hirschman to The Honorable Neil S. Wolin, Deputy Secretary, U.S. Department of the Treasury, (Mar. 26, 2010) [hereinafter Hirschman Letter].

7. *E.g.*, Enzi statement, *supra* note 6.

8. Hirschman Letter. *See also* THOMAS DURKIN, THE IMPACT OF THE CONSUMER FINANCIAL PROTECTION AGENCY ON SMALL BUSINESS, U.S. CHAMBER OF

this agency's scope extends too far to cover small businesses such as doctors and dentists.[9]

Politicians and industry representatives were not alone in sounding these alarms; some full-time academics have recently echoed the same super-agency themes and warnings about the Bureau as ultimately enacted.[10] These academic opponents essentially allege that the Bureau will substitute borrowers' judgment and preferences with that of Bureau employees, and that the Bureau's creation reflects the view that more government regulation is inherently better than less.[11]

It is worth reflecting on the objectors' claim – standard in debates of this nature – that the Bureau will constrain people's freedom to pursue their individual preferences. This is factually unsupported with respect to Dodd-Frank's creation of the Bureau.

COMMERCE CENTER FOR CAPITAL MARKET COMPETITIVENESS 20-23 (2009) (commenting on predecessor to version of the Bureau that ultimately was enacted); Scott Garrett & Parker Griffith, U.S. Representatives, Statement: The Dodd Bill Is Bad for Taxpayers (May 6, 2010), *available at* http://garrett.house.gov/News/DocumentSingle.aspx?DocumentID=184436 (suggesting that Bureau will use concerns about safety to restrict credit availability for home mortgages and student loans).

9. For example, in his blog (and cross-posted at BigGovernment.com), Senator Jim DeMint called the creation of the agency "just another power grab" that will hurt small businesses and families. Senator Jim DeMint, *'Brace' Yourself: Wall Street Regulation Bill Snares Dentists, Doctors & Patients*, JIM'S BLOG (May 5, 2010) http://demint.senate.gov/public/index.cfm?p=JimsBlog (navigate by date). He claimed that the potential adverse effect on small businesses such as orthodontists, and the kids who need the braces, is itself "a good reason to oppose" the entire financial reform bill. *Id.* An American Enterprise Institute scholar suggested that Bureau oversight would "eliminate" some small businesses. Peter J. Wallison, *The Dodd-Frank Act: Creative Destruction, Destroyed*, AM. ENTERPRISE INST. FOR PUB. POL'Y RES. 5 (July-Aug. 2010). DeMint and others predicted that unmanageable administrative burdens imposed by the Bureau would lead service providers like dentists and doctors to stop allowing patients to pay in installments, which would discourage patients from seeking necessary treatment. *Id.* This line of critique culminated in a letter from the American Dental Association, the American Medical Association and other groups requesting a clearer exemption from the Bureau's oversight. Letter from American Dental Association et al. to Chris Dodd, Chairman, Senate Committee on Banking, Housing, & Urban Affairs (May 3, 2010).

10. Truth on the Market "Free to Choose" Symposium (Dec. 6-7, 2010), http://truthonthemarket.com/free-to-choose-symposium/ (critiquing Bureau and research underlying it featuring commentaries by Professor Richard Epstein of the University of Chicago and New York University and Professor Larry Ribstein of University of Illinois, among others).

11. *E.g.*, Richard Epstein, Contribution to the Truth on the Market "Free to Choose" Symposium (Dec. 6-7, 2010), http://truthonthemarket.com/free-to-choose-symposium/.

But it also reflects the questionable proposition that true individual preferences adequately explained credit product selection prior to Dodd-Frank. Consider the recent study by economist Susan Woodward that finds, after controlling for a variety of other factors, that African Americans and Latinos pay more in closing costs on their Federal Housing Authority-insured loans than white borrowers.[12] Would objectors really claim that this reflects a preference to pay more for the same product, or that this is an inevitable consequence of the "right to be wrong?" There are innumerable other examples of documented problems in consumer credit markets about which we could ask the same questions.

In any event, as Professors Richard Thaler and Cass Sunstein have observed, a regulatory framework can enhance the exercise of people's own judgment.[13] A closer look at the structure and substance of the Bureau as provided in Dodd-Frank indicates that it is quite consistent with the Thaler and Sunstein model.

Dodd-Frank's creation of the Bureau does not fulfill its credit safety objective through mandating some credit products and banning others. Rather, it aims to facilitate a credit marketplace where borrowers can clearly understand the full costs of products and engage in better comparison shopping.[14] There is

12. SUSAN WOODWARD, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT OFFICE OF POLICY DEVELOPMENT AND RESEARCH, A STUDY OF CLOSING COSTS FOR FHA MORTGAGES, ix, 45-48 (May 2008), *available at* http://www.urban.org/UploadedPDF/411682_fha_mortgages.pdf. This study and its implications are discussed in RICHARD H. THALER AND CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 136 (rev'd and expanded edition 2008).

13. RICHARD H. THALER AND CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 244 (rev'd and expandeded. 2008).

14. Dodd-Frank Act § 1022 states:

(B) OBJECTIVES.- The Bureau is authorized to exercise its authorities under Federal consumer financial law for the purposes of ensuring that, with respect to consumer financial products and services –

> (1) consumers are provided with timely and understandable information to make responsible decisions about financial transactions;
> (2) consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination;
> (3) outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce

a spectrum of approaches that can be deployed to this end. Dodd-Frank's establishment of the Bureau reflects the belief that government has some role to play in overcoming problems in this credit market.[15] But this belief already was underlying the existing consumer credit laws that the Bureau will oversee, and the financial crisis bolstered the justifications for this view.[16]

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unwarranted regulatory burdens;

(4) Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition; and
(5) markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.

(C) FUNCTIONS.- The primary functions of the Bureau are –

(1) conducting financial education programs;
(2) collecting, investigating, and responding to consumer complaints;
(3) collecting, researching, monitoring, and publishing information relevant to the functioning of markets for consumer financial products and services to identify risks to consumers and the proper functioning of such markets;
(4) subject to [provisions addressing specific types of covered persons], supervising covered persons for compliance with Federal consumer financial law, and taking appropriate enforcement action to address violations of Federal consumer financial law;
(5) issuing rules, orders, and guidance implementing Federal consumer financial law; and
(6) performing such support activities as may be necessary or useful to facilitate the other functions of the bureau.

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1021(b)-(c), 124 Stat. 1376, 1980 (2010) (to be codified at 12 U.S.C. § 5511). The Bureau's Director also must collect data on consumer complaints about financial products and to report annually to Congress. Dodd-Frank Act § 1013(b)(3)(C) (to be codified at 12 U.S.C. § 5943).

15. Reza Dibadj, *Four Key Elements to Successful Financial Regulatory Reform*, 6 HASTINGS BUS. L.J. 377, 378 (2010) ("[M]arkets need rules. Government's role is to create the backdrop and regulations to assure free, open markets that operate in the public interest. Consistent with new research in regulatory design, the objective of reform is not to override markets, but rather to ensure fair and open participation in markets.").

16. The Bureau is charged to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws." Dodd-Frank Act, §1011(a) (to be codified at 12 U.S.C. § 5491). It has the ability "to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for

Some may fear regulatory overreach because the Bureau is not formally subject to "cost-benefit analysis,"[17] and the regulatory assessments employed are instead a form of open-ended balancing.[18] Yet, most financial regulation in the U.S. was not subject to cost-benefit analysis even before Dodd-Frank.[19] Professor Howell Jackson has detailed the particular difficulties of quantifying consumer protection benefits in financial regulation,[20] whereas costs such as a decline in credit volume are often easy to allege.[21] On this line of analysis, strict cost-benefit analysis would

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consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive." *Id.; see also* JOINT EXPLANATORY STATEMENT ATTACHED TO DODD-FRANK BILL 874, *available at* http://www.llsdc.org/attachments/files/234/PL111-203.pdf ("The Bureau will have the authority and accountability to ensure that existing consumer protection laws and regulations are comprehensive, fair, and vigorously enforced."). The Bureau gets exclusive rulemaking authority with respect to the Truth in Lending Act, the Fair Credit Reporting Act, the Equal Opportunity Credit Act, the Real Estate Settlement Procedures Act, and other key federal consumer protection laws. Most of these laws' content was generated prior to the enactment of Dodd-Frank. The few exceptions are outside of Title X of Dodd-Frank. Linda Singer, Zachary Best, & Nina Simon, *Breaking Down Financial Reform*, 14 J. CONSUMER & COMMERCIAL LAW 2 (2010). For example, section 1100E amends the Truth in Lending Act to raise the threshold for exempt consumer credit transactions from $25,000 to $50,000 and then provides for annual indexing for inflation. For the Federal Reserve Board of Governors proposed rulemaking to implement this provision, see 75 Fed. Reg. 78,636 (proposed Dec. 16, 2010) (to be codified at 12 C.F.R. pt. 226). The Board's commentary notes, however, that many creditors already comply with Regulation Z for higher-debt transactions. *Id.* at 78,640.

17. Section 1022(b)(2)(A) provides: In prescribing a rule under the Federal consumer financial laws –

> (A) the Bureau shall consider –
>
> (i) the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such a rule; and
>
> (ii) the impact of the proposed rules on covered persons . . . and the impact on consumers in rural areas

Dodd-Frank Act § 1022(b) (to be codified at 12 U.S.C. § 5512). More formal balancing is required for issuing regulations in response to certain state law actions.

18. Sidney A. Shapiro & Christopher H. Schroeder, *Beyond Cost-Benefit Analysis: A Pragmatic Reorientation*, 32 HARV. ENVTL. L. REV. 433, 480-81 (2008).

19. Howell E. Jackson, *Variation in the Intensity of Financial Regulation: Preliminary Evidence and Potential Implications*, 24 YALE J. ON REG. 253, 257 (2007).

20. *Id.* at 258-60.

21. Although the Bureau is required to consider the decline of credit volume, this *may* be an acceptable cost of protecting borrowers and the financial system. Dodd-

impose an unduly high standard on the Bureau's ability to respond to well-documented problems in the market for household financial products.

Furthermore, although it does not require formal cost-benefit assessments for rulemaking, Dodd-Frank does implement some express balancing for certain activities. To declare acts and practices unfair, the Bureau must show it "has a reasonable basis to conclude that (A) the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and (B) such substantial injury is not outweighed by countervailing benefits to consumers or to competition."[22] To deem a practice "abusive," the Bureau must find that the act or practice "materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service" or that it takes unreasonable advantage of a consumer's lack of understanding, inability to avoid the problem, or reasonable reliance.[23] Dodd-Frank also specifies the considerations for expending resources on monitoring consumer credit for risks to borrowers.[24] Thus, Congress required that the Bureau undertake a balanced analysis in overseeing even the most serious problems in the consumer credit market.

The Bureau does have the potential to be more effective than prior regulators in addressing problems in the consumer credit market. First, Congress has given the Bureau a more singular focus than the prior regulators.[25] Second, the Bureau will be quite independent. The Bureau ultimately will be an executive

Frank Act § 1022(a)(2)(A) (to be codified at 12 U.S.C. § 5512). Dodd-Frank's recognition of this point is a much-needed departure from the "more credit is always better" arguments used in recent legislative debates on personal bankruptcy that I characterize as "strict liability cost analysis." Similar complaints have been made about cost-benefit analysis's deterrence of regulation. Shapiro & Schroeder, *supra* note 18, at 454.

22. Dodd-Frank Act § 1031(c) (to be codified at 12 U.S.C. § 5531).

23. *Id.* § 1031(d) (to be codified at 12 U.S.C. § 5531).

24. Those considerations include the nature of the risks and costs, whether consumers are likely to understand those risks, the rates of growth of such credit products, and the impact on traditionally underserved populations. Dodd-Frank Act § 1022(c) (to be codified at 12 U.S.C. § 5512).

25. DAVID SKEEL, THE NEW FINANCIAL DEAL: UNDERSTANDING DODD-FRANK AND ITS (UNINTENDED) CONSEQUENCES 99-100, 107 (2010).

agency housed in the Federal Reserve[26] but is largely insulated from control by the Federal Reserve Board of Governors.[27] It is entitled to appropriations of the Federal Reserve's annual budget rather than from Congress.[28] Appointed by the President and confirmed by the Senate, the Bureau's Director serves for a five-year term with significant job protections.[29] Unlike agencies charged with writing rules to protect health and the environment, the Bureau's rulemaking is not subject to review by the White House's Office of Information and Regulatory Affairs. A super-majority of a new Financial Stability Oversight Council can set aside a Bureau rule, but under only circumscribed conditions relating to "the safety and soundness of the United States banking system" or "the stability of the financial system."[30] As Professor Rachel Barkow recently explained, these institutional design features render the Bureau better insulated from industry capture than many other agencies.[31] Third, the enabling legislation of the Bureau reinvigorates state consumer protection efforts by rejecting broad preemption arguments that regulators like the Office of the Comptroller of the Currency have asserted in the past.[32] This permits state actors to pursue consumer protection

26. Dodd-Frank Act § 1011(a) (to be codified at 12 U.S.C. § 5491).

27. *Id.* § 1012(c) (to be codified at 12 U.S.C. § 5492) (establishing Bureau's autonomy).

28. *Id.* § 1017(a)(2) (to be codified at 12 U.S.C. § 5497) (specifying maximum percentages of Federal Reserve total operating expenses to be allocated to Bureau, including 10 percent in fiscal year 2011, 11 percent in 2012, and 12 percent thereafter, with employment cost index adjustments thereafter). The appropriations to the Bureau are not subject to review by Congressional committees. *Id.* § 1017(a)(2)(C) (to be codified at § 5497).

29. *Id.* § 1011(b)-(c) (to be codified at 12 U.S.C. § 5491) (removal of director only for inefficiency, neglect of duty, or malfeasance in office).

30. *Id.* § 1023 (to be codified at 12 U.S.C. § 5513).

31. Rachel Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 66-77 (2010) (comparing the Consumer Financial Protection Bureau to the Consumer Product Safety Commission). *See also* John F. Duffy, *Innovation and Recovery*, 14 MARQ. INTELL. PROP. L. REV. 237, 247-48 (2010) (discussing "doubly independent" Bureau). Of course, one person's capture is another person's democratic accountability; according to Peter Wallison, this insulation is the "worst thing" about the Bureau. PETER J. WALLISON, THE DODD-FRANK ACT: CREATIVE DESTRUCTION, DESTROYED, AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH 5 (2010).

32. Dodd-Frank Act §§ 1041-1048 (to be codified in scattered sections of U.S.C.). The financial services industry calls this a lack of "uniform national standards" and remains quite opposed to states' right to set higher standards for protecting its

independently and in tandem with the Bureau. Still, these factors cannot be equated with the form and volume of regulation claimed by objectors.

In sum, Title X of Dodd-Frank lacks the regulatory features that objectors suggest.[33] Indeed, Dodd-Frank goes in the opposite direction – for example, by expressly prohibiting the Bureau from imposing a usury rate.[34] Professor Elizabeth Warren, who is charged with setting up the agency, has repeatedly explained the limits of "thou-shalt-not" rules to fix problems in the consumer credit market.[35] The enabling legislation empowers governmental (as well as private) parties to analyze data about financial products in sophisticated ways so that people are poised to exercise freedom to make important financial decisions.[36] In other words, if the Bureau can make the credit markets more transparent, people will have the opportunity to make choices that better fulfill their preferences.[37]

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citizens. Prior to the financial crisis, the Financial Services Roundtable set up a "grass roots" organization, InFact, to lobby for class action reform, bankruptcy reform, and related matters. One of its key issues is explaining to consumers that they are best protected by "uniform national standards" (e.g., if states are precluded from enforcing their own laws). *Uniform National Standards*, INFACT, http://www.bipac.net/page.asp?g=fsr_infact&content=nationalstandards (last visited Feb. 4, 2011).

33. The CARD Act is closer on the spectrum to command and control in that it banned some practices and imposed additional discrete requirements on lenders. Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub L. No. 111-24, 123 Stat. 1734 (2009) (codified in scattered sections of U.S.C.).

34. Dodd-Frank Act §1027(o) (to be codified in 12 U.S.C. § 5517).

35. *E.g.*, David Clarke, *Warren Downplays Role of Rules in Consumer Agency*, MSNBC (Dec. 2, 2010), http://www.msnbc.msn.com/id/38630686/40542173; Sewell Chan, *Consumer Advocate Seeks to Reassure Bankers About Protection Agency*, N.Y. TIMES (Sept. 29, 2010), http://www.nytimes.com/2010/09/30/business/30warren.html?ref=consumerfinancialprotectionbureau. Warren also expressed the view that many current ineffective and burdensome regulations should be eliminated. Dodd-Frank Act § 1021(d)(3) (to be codified at 12 U.S.C. § 5511); *see also id.* § 1100(G) (amending section 609(d) of title 5 of the United States Code to include the Bureau among the agencies that must comply with mandated review process for small business impact).

36. RICHARD H. THALER AND CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 140 (Rev'd and Expanded Ed. 2008) (discussing ways in which private parties can use machine-readable analyses to offer comparative advice to consumers); Douglas G. Baird, *Technology, Information, and Bankruptcy*, 2007 U. ILL. L. REV. 305, 319-21 (2007).

37. THALER, *supra* note 36, at 95.

Objectors to the Bureau combined complaints about the type and volume of regulation with concerns about the scope of covered persons. They particularly contested the Bureau's authority over credit extensions by smaller businesses.[38] The U.S. Chamber of Commerce "ran a multimillion-dollar ad campaign depicting butchers and others as coming under new financial regulators" to pressure Congress to abandon or water down the idea of a standalone agency.[39] These complaints ultimately led to additional provisions that further insulate smaller businesses from the Bureau's reach.

The key scope provision relevant to this concern, section 1027 of Dodd-Frank, is confusing as ultimately enacted. It contains exceptions, then exceptions to exceptions, and so forth.[40] The upshot seems to be that small businesses that primarily provide goods and services are carved out from Bureau oversight, and especially from its rulemaking authority.[41] Furthermore, Dodd-Frank requires the Bureau to avoid unduly burdening small businesses, providing additional protection.[42]

The doctor-and-butcher campaign was clever, but misleading in suggesting that sellers of goods and services were immune from complaints about financial practices, and also in suggesting that falling under the Bureau's umbrella would lead medical providers to encourage patients to pay with high-cost credit. Only a few years ago, lawmakers from across the political spectrum expressed concern about the billing and collection

38. *See supra* note 9.

39. Silla Brush, *Dentists Fear Pain from Finance Reform Bill*, THE HILL (May 3, 2010), http://thehill.com/business-a-lobbying/95769-dentists-fear-finance-reform-could-cause-them-some-pain; Brody Mullins, *Chamber Ad Campaign Targets Consumer Agency*, WALL ST. J. (Sept. 8, 2009), http://online.wsj.com/article/SB125236911298191113.html.

40. *See generally* Dodd-Frank Act § 1027(a) (to be codified at 12 U.S.C. § 5517).

41. Dodd-Frank Act § 1027(a)(2)(D) discusses the scope of rulemaking authority in particular. Even if a person regularly extends credit and the credit is subject to a finance charge, the person "shall be deemed not to be engaged significantly in offering or providing consumer financial products or services" if a conjunctive test is met: the credit is provided only to enable the sale of nonfinancial goods and services, non-delinquent debt is retained on the person's accounts, *and* the provider is deemed a small business under section 3 of the Small Business Act. Sections 1027(a)(2)(D)(iii) and (iv) help determine whether the business meets the SBA thresholds. Dodd-Frank Act § 1027 (to be codified at 12 U.S.C. § 5517).

42. *Id.*

practices of not-for-profit and religiously affiliated hospitals with respect to uninsured patients.[43] Public debates revealed that medical providers already have substantial incentives to encourage patients to use third-party credit.[44] And the health care practice management industry produces voluminous materials encouraging providers to seek up-front payment of patients' out-of-pocket obligations.[45]

Furthermore, long before creation of the Bureau, courts and commentators struggled with the application of consumer credit laws to small businesses such as doctors' offices when they allow patients to pay in installments.[46] Some clarity on these issues, and perhaps a safe harbor form, could relieve some of the uncertainty.

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This commentary aimed to briefly explore allegations about the nature of regulation embodied in the Bureau. Objectors are not correct that Dodd-Frank inherently reflects a traditional command and control regulatory model. If objectors maintain that government has no role to play in household credit markets, or if they believe that pumping up credit volume trumps all other

43. *A Review of Hospital Billing and Collection Practices, Hearing before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 110th Cong. (2004).

44. *Id.*

45. Melissa B. Jacoby & Mirya R. Holman, Jacoby & Holman, *Managing Medical Bills on the Brink of Bankruptcy*, 10 YALE J. HEALTH POL'Y, L. & ETHICS 239, 248-256 (2010).

46. *Id.* at fn 64, 65 (citing sources illustrating that medical providers that extend credit subject to finance charges may be required to comply with and face potential liability under federal truth in lending law as well as state credit laws or deceptive practices statutes). A recent example of Congress pursuing a specific change to exclude medical providers from credit laws is the Red Flag Program Clarification Act of 2010, Pub. L. 111-319, 124 Stat. 3457 (amending 15 U.S.C. § 1681m) (amending the Fair Credit Reporting Act to narrow definition of "creditor" for purposes of red flags rule). FEDERAL TRADE COMMISSION, FIGHTING FRAUD WITH THE RED FLAGS RULE: A HOW-TO GUIDE FOR BUSINESS 9-10 (2009) (defining "creditor" prior to Red Flag Program Clarification Act of 2010 to include "businesses or organizations that regularly defer payment for goods or services and bill customers later. Utility companies, health care providers, and telecommunications companies are among the entities that may fall within this definition, depending on how and when they collect payment for their services.").

considerations (strict liability cost analysis), then of course the Bureau will remain unappealing to them. But a closer look reveals that Title X of Dodd-Frank, which creates the Bureau, invites regulatory innovation. Objectors and lobbyists were successful in reducing the scope of the Bureau's authority (I have discussed one significant example, but there are others). But it is not obvious that parties such as medical providers benefit from preserving the ambiguous status quo regarding their payment plans.

Scholars from a variety of disciplines have engaged in decades of sophisticated thinking about novel forms of industry regulation that empower private parties. Far from abandoning that progress, the Bureau presents an important opportunity to put those ideas to use.