

## Chapter 13 Outline

### I. Intro

- History of the Bureau

### II. Jurisdiction

- Bureau Jurisdiction

- o *Parameters of Bureau Jurisdiction*

- DFA outline of Bureau authority
  - DFA Sect. 1021 – Purpose, objectives and functions of the Bureau
  - DFA Sect. 1011(a) – Establishment of Bureau as exec. Agency.
  - DFA Sect. 1012(a)(10) – Power of the Bureau
  - Regulatory Req'd Organizational issues
    - o DFA Sect 1013(b)-(g) – Specific Functional Units (Research, Community Affairs, Collection/Tracking Complaints, Office of Fair Lending, Office of Financial Education, Office of Service Member Affairs, Office of Financial Protection for Older Americans
  - Exemplary issue - Bureau authority with respect to car dealers
  - DFA Sect. 1071 Authority with respect to small businesses
- Enumerated statutes under the Bureau's jurisdiction
  - DFA Sect. 1022(a) – rulemaking authority. Authority to “administer, enforce, and implement” provisions of the federal consumer financial law. DFA Sect. 1022(b) Director may prescribe rules, issue orders and guidance to enable Bureau to “administer and carry out the purposes and objectives” of the federal consumer financial laws and prevent “evasions”
  - DFA Sect. 1022(c) – stds for rulemaking which include cost/benefit to consumers.
  - Principle based vs. prescriptive rules
- Express limits on Bureau's Authority
  - E.g. Bureau cannot issue legislation implementing usury ceilings
- Contested Areas of Bureau Jurisdictional authority
  - Explore whether DFA is in line with interpreted authority
  - E.g. [[HYPERLINK "https://www.govinfo.gov/content/pkg/USCOURTS-insd-1\\_14-cv-00292/pdf/USCOURTS-insd-1\\_14-cv-00292-0.pdf"](https://www.govinfo.gov/content/pkg/USCOURTS-insd-1_14-cv-00292/pdf/USCOURTS-insd-1_14-cv-00292-0.pdf)]
  - E.g. CFPB v. Sprint Corp. & CFPB v. CellCo Partnership d/b/a Verizon Wireless (cases re third-party charges on phone bills)
  - E.g. In the matter of: Int'l Land Consultants, Inc., et al. (Real Estate developer ordered to build roads because it affected mortgages.
  - CFPB v. Meridian (RESPA case)?
  - E.g. auto finance cases
- *Seila Law Case*
  - Summary of case

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- Consistencies/Inconsistencies with how other executive agencies operate currently (how are executive agencies currently classified and why?)
  - DFA Sect. 1011(a)
- Consistencies/Inconsistencies with current structure of the Bureau
- DFA v. Seila Law
  - Does the holding conflict with DFA requirements, expectations, or structure?
    - E.g. Is there a conflict between what OMB and White House can do with respect to the Bureau under the DFA?
      - DFA Sect. 1017(a)(4) – Bureau required to provide budget to OMB, which doesn't have approval authority.
    - Are there inconsistencies between the DFA's express provisions compared to the new model the case created?
    - Given the court holds the Director is removable, does this eliminate the independence created by the Director's 5-year term?
      - There are examples of single, but accountable, administrators that work (FDA, Comptroller of the Currency)
    - FTC – Can FTC or any other independent agency exercise any executive authority? Does the ruling mean if you exercise executive authority the chair has to be removable by the president?
    - What constitutes executive authority? Any process that leads to the issuance of sanctions? CID v. supervisory authority
      - See page 16 of Seila slip opinion

- *Advantages*
- *Disadvantages*
- *Lingering questions*

- Areas of Shared Jurisdiction

- *Interagency (Bureau-Federal/Bureau-Prudential Interplay)*
  - How is jurisdiction determined?
    - DFA - Is there a particular provision that establishes areas of joint jurisdiction?
      - DFA Sect. 1015 – Bureau req'd to coordinate with federal and state regulators.

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- DFA Sect. 1013(b)(3)(D) – Data sharing req't (for prep of reports) for prudential regulators, FTC, other fed and state agencies
  - DFA Sect. 1022(b)(2)(B) – must consult with prudential regulators/federal agencies prior to proposing rule and during comment process
  - E.g. Bureau has supervisory authority over banks, thrifts, and credit unions with assets over \$10 billion (see [ [HYPERLINK](https://www.consumerfinance.gov/policy-compliance/guidance/supervision-examinations/institutions/) "https://www.consumerfinance.gov/policy-compliance/guidance/supervision-examinations/institutions/" ] )
- Working Together
  - How do Bureau/federal regulators decide who handles a particular matter/issue when they both have authority?
    - Address limits on fines/penalties that can be assessed (e.g. FTC v. Bureau)
    - Major MOUs – Identify agencies with which Bureau has MOUs (discuss entities with which agency could have MOUs in modernization discussion)
      - Who does the Bureau have MOUs with for general practices, e.g. FTC, DOE, etc., and other case-by-case ones, e.g. for specific investigations
      - Why did the Bureau terminate certain MOUs?
- Advantages
  - How does this approach serve consumers? (consumer groups likely favor more “cops on the beat”)
  - FTC/Bureau and Data Breach
    - Bureau has authority via unfair deceptive application to data breaches
    - Bureau and FTC have specific skillsets, and FTC has more experience and expertise with handling data breaches
- Disadvantages
  - Are there redundancies?
  - Does shared jurisdiction result in multiple examinations/excess expenditure of resources?
  - Friction in findings/interpretations of each regulator?
- Lingering questions
- *Federalism (Federal-State Interplay)*
  - How is Jurisdiction Determined?
    - DFA – Does this regulation establish parameters of where Bureau has authority vs. states?
    - Current flavors of state jurisdiction
      - Home state rules
      - 50-state oversight
    - Preemption

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- Waters vs. Wachovia (2007) – preemption background
    - DFA language on preemption (explore what has happened with preemption since DFA enactment)
    - Summary of OCC bank chartering and preemption of state law
    - E.g. non-depository institutions subject to multiple state laws
  - Working Together
    - How do Bureau and states work together in the areas of supervision, regulation and enforcement (e.g. see notes re [\[HYPERLINK "file:///Z:/External%20Affairs/Consumer%20Advisory%20Boards/Taskforce/Meetings/Chair/CSBS/CSBS%20-%20July%2022%20Listening%20Session%20Notes.docx"\]](#))?
    - How do they decide who handles which matter from an supervision/enforcement perspective?
  - Advantages
    - Do costs of federal/state supervision outweigh benefits?
      - Consumer groups likely favor more “cops on the beat”
  - Disadvantages
    - Patchwork quilt of laws (data privacy laws)
    - Friction in findings from each regulator?
    - Do costs of federal/state supervision outweigh benefits?
  - Lingering questions
- Chart of jurisdiction (Appendix?)

### III. Regulatory Modernization

- Regulatory Effectiveness (what works)
  - Areas where the Bureau and federal regulators have cooperated and where it might be effective for them to cooperate.
  - Overlapping Jurisdiction
    - Preemption
      - The Case Against Preemption
        - To what extent should states be able to enact laws to protect their consumers?
        - Home State rules
          - There are advantages to consumers in allowing states to act as well (home state rules). Home state rules structure doesn’t eliminate state oversight but eliminates 50-state oversight.
          - Disadvantage of home state rules is states may lure businesses by having lowest possible consumer protections. States may be unable to protect their consumers in the way they’d like as a result because the businesses may relocate to areas in which they are subject to less restrictions. (race to the bottom literature in taxes).

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- When E.U. was standing up, wasn't clear what the default rules was going to be. There may be literature on impact of diff default rules (whose law controls). (Howard)
  - E.g. of home state rules structure in contract choice of law provisions
    - States have proven responsible regulators
- The Case for Preemption
  - Growth of a national economy leads to a seeming need for more federal preemption.
  - Cost of federalism grows with federal dominance.
  - Decisions like Marquette fostered competition beyond state boundaries and thus more consumer choice.
  - With the presence of a national entity (CFPB) is preemption more appropriate than before this national entity?
    - The arg for preemption is stronger in a world where the bureau exists because it is uniquely well designed to deal with national providers of products/services.
- Interagency/Prudential Regulators
  - CFPB are the experts in consumer financial protection. CFPB has the overall view of consumer welfare. Prudential regulators have legitimate views as to the intersection of safety and soundness with consumer protection but CFPB has the broad view across markets. Other regulators are siloed.
  - Taskforce recommends continuation on the current path. Coordinate among regulators as best they can. Formal lines of authority are not yet needed. The CFPB-FTC relationship continues to evolve. Shared jurisdiction can be a good thing because each entity has a skill set, CFPB specializes in financial institutions while FTC is a data breach specialist. It's a messy configuration but it works.
  - MOUs
    - Bank Policy Institute RFI response - "Work with other federal regulators to make clear that CFPB is the consumer compliance examiner. Do this by revising the MOU that exists now between federal regulators."
    - What other bodies should the Bureau have MOUs with?
    - Should any MOUs be updated?
- Regulatory Modernization (What doesn't work as well/Updates)

Where should the Bureau have authority? Where should the Bureau have more authority?  
Where should the Bureau have less authority (if applicable)

  - *Exemplary issue* - MLA (what authority does Bureau currently have; should it have supervisory/enforcement authority); what role does the DOD play?)

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- *FTC/Auto Dealer Issue* – Shared jurisdiction over auto dealers (Bureau and FTC) is appropriate given Bureau covers financial service providers within state transactions in other purchase transactions (FTC-auto sale, Bureau-auto finance)
- *Principal-based rules* - Taskforce leans toward principal-based rules with the use of enforcement action to clarify rules via incremental actions. The Taskforce acknowledges that this approach can create uncertainty within the regulated community, so the Taskforce endorses the use of safe harbors and issuance of more and frequent guidance by regulators.
- *Seila Law* - Does Congress need to take any action to resolve potential conflicts or confusion?
  - Congress should consider legislation restyling the Bureau as an executive agency or as a bipartisan independent agency. Would help to align powers and accountability.
  - Should Congress consider instituting a bipartisan commission to resolve conflicts?
- *Preemption* – Growth of internet has raised issues around preemption relative to the past. Changes in world have suggested that role in a lot of areas for state regulation is weaker than it was. Case for preemption stronger than it was before. Bureau's creation/advent of internet/growth of interstate mkts weighs more in favor of preemption and there's a stronger case for fed oversight. Here are ways that might be effectuated:
  - Allow OCC to issue charters like they are now
  - congress could consider enacting a new law that creates a new nat'l charter for non-depository institutions and could define scope of preemption
  - Follow DE model/Home state rules (internal affairs doctrine; what we do with interest rates and the like for credit cards, i.e. the home state rule)
    - provision like this in the office of innovation related to reg sandbox (internal free trade zones-if you get a fintech charter in Utah, e.g., states can voluntarily enter into free trade agreement in which states defines who has enforcement authority with respect to issues that may arise, e.g.

#### IV. Cost Benefit Analysis Structure (Ross)

- Intro/Preface
- History of Cost-Benefit Analysis in Agency Rulemaking
- Dodd-Frank Cost-Benefit Requirement
- Purpose of Cost-Benefit Analysis
- Principles and Best Practices of Cost-Benefit Analysis
- Implementation of CBA
- Evaluation of CFPB's Regulatory Guidance "Regulatory Analysis Policies and Procedures for Substantive Rulemaking"<sup>[1]</sup>
- Valuing Benefits

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<sup>[1]</sup> Is there a public link?

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- Criticisms of Cost-Benefit Analysis
- Recommendations for Reform

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