



# PRIVACY & SECURITY LAW



## REPORT

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### The Consumer Financial Protection Bureau Needs a Privacy Office



BY MARK MACCARTHY AND ROBERT GELLMAN

**W**ith the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act,<sup>1</sup> a new Consumer Financial Protection Bureau (CFPB)

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will soon be established inside the Federal Reserve Board to “regulate the offering and provision of consumer financial products or services.” Title X of the new law, the Consumer Financial Protection Act of 2010, details the duties and powers of the new Bureau in 180 plus pages.<sup>2</sup> While the Act is neither short nor simple, much still needs to be done to determine how the Bureau will be structured and how it will work.

Though we both worked as Capitol Hill staffers, our subsequent professional experience and activities have been different. Bob is a privacy expert, with substantial consulting experience in government and the private sector. Mark has worked in public policy positions for major companies, the latest being the payment card company Visa, and is now at Georgetown’s Communication, Culture and Technology Program. Despite these different histories, our take on the CFPB is the same: it needs a privacy office.

The new law sets the Bureau’s initial budget at about \$500 million,<sup>3</sup> which would accommodate approximately 2,000 employees. The Bureau’s broad purpose is clear, but many details of structure and mission remain to be determined. The law mandates that the Bureau have offices for research, tracking consumer com-

<sup>1</sup>H.R. 4173, as enrolled and passed by Congress (Pub. L. 111-203), is available at <http://op.bna.com/pl.nsf/r?Open=dapn-87zlx7>.

<sup>2</sup>Section X covering the Consumer Financial Protection Bureau begins at page 580 of the pdf of the bill, available at <http://op.bna.com/pl.nsf/r?Open=dapn-87zlx7>.

<sup>3</sup>Section 1017, which is available at <http://op.bna.com/pl.nsf/r?Open=dapn-87zm7c>.

plaints, consumer financial literacy, and fair lending, among others. In addition, there will surely be an office of general counsel, an inspector general, and some type of office for plans and policy.

The Bureau will write rules on a wide range of financial products including credit cards, mortgages, and more. Its authority to enforce these rules extends to most companies that generate or use financial information or other information to offer financial products or services. By one count, the legislation requires separate 243 rulemakings and 67 studies.

It is inevitable that the Bureau will be the leading government regulator of consumer financial privacy because the legislation gives the Bureau authority to write rules for and to oversee the two major statutes that govern the use of personal information by financial institutions. The first is the Fair Credit Reporting Act (FCRA), which generally regulates credit bureaus.<sup>4</sup> The FCRA governs how information can be furnished to the bureaus, defines permissible purposes for use of credit reports (such as credit, insurance, and employment screening). The law establishes consumer rights with respect to the reports. One section of the bill broadens the rights of consumers to access credit scores based on credit reports.<sup>5</sup> The Bureau shares enforcement authority over the FCRA with the Federal Trade Commission.<sup>6</sup> The Bureau has authority to revise existing FCRA rules, and it will have to issue new rules about credit scores. In addition, the Bureau must conduct a study on the nature, range, and size of variations between the credit scores.<sup>7</sup> Credit reports have been central to financial decision-making about consumers, but the availability of consumer information from unregulated Internet sources is increasing in significance. Eventually, the Bureau will have to address questions such as the proper rules that should accompany use of social networking sites when making financial decisions about consumers.

The second financial privacy statute that the Bureau is responsible for is the Gramm-Leach-Bliley Act (GLB). The authority under GLB to write and enforce information security rules and rules on identity theft remains under the control of the traditional banking agencies and the FTC. But GLB rules relating to the use of information by financial services companies are under the control of the new Bureau. This includes rules for using information for marketing products and services, for sharing of information with unaffiliated third parties or with affiliated companies, and for providing notice to customers and the opportunity for them to consent to the sharing and use of information. The rules governing information sharing are at the heart of modern marketing activities and affect how financial institutions can interact with third parties to offer products and services to consumers. The use of the Internet by consumers for financial services will only increase the importance of privacy in the coming years.

<sup>4</sup> Section 1088, which is available at <http://op.bna.com/pl.nsf/r?Open=dapn-87zme5>.

<sup>5</sup> Section 1100F, which is available at <http://op.bna.com/pl.nsf/r?Open=dapn-87zmmc>.

<sup>6</sup> Section 1088, which is available at <http://op.bna.com/pl.nsf/r?Open=dapn-87zme5>.

<sup>7</sup> Section 1078, which is available at <http://op.bna.com/pl.nsf/r?Open=dapn-87zmf6>.

In addition to its express jurisdiction over specific legislation, the Bureau has broad rulemaking powers relative to unfairness, deception, and abuse.<sup>8</sup> This authority could and should be used to address privacy issues that are not specifically addressed in these substantive statutes. The Bureau also has jurisdiction over numerous other “enumerated consumer laws” that may affect privacy in some way, although not as directly as the FCRA and GLB.<sup>9</sup> Any additional laws affecting financial privacy are likely to be administered by the Bureau as well.

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It will be impossible for the Bureau to carry out its mission to regulate financial offerings to consumers without addressing privacy. The collection, use, maintenance, and disclosure of consumer information is an essential part of any consumer financial transaction. Rules that govern financial products and services must strike a fair balance between privacy interests and other interests entailed in these activities. Privacy is not the tail that wags the financial products and services dog, nor is privacy the dog itself. Instead, privacy, like consumer information itself, is an integral part of financial activity. Consumer information is also at the heart of illegal activities, such as identity theft, that threaten both consumers and financial institutions.

The Act specifies some offices that the Bureau must establish, but it is silent on privacy. It is also silent on the establishment of an Office of General Counsel, but the creation of necessary offices is within the authority of the Director of the Bureau. We suggest that the Bureau’s substantive privacy responsibilities make it imperative that the agency establish an office devoted to privacy issues.

This Privacy Office would be an institutional mechanism to help ensure that existing financial products and services, developments in the use of technologies and the innovations in the design of new products and services sustain privacy protections relating to the collection, use, dissemination, and maintenance of personal information. This Privacy Office should have several roles:

- **Internal Compliance.** The Privacy Office should be responsible for the Bureau’s compliance with

<sup>8</sup> See, e.g., Section 1031, which is available at <http://op.bna.com/pl.nsf/r?Open=dapn-87zmg6>.

<sup>9</sup> See Sections 1093, 1002(12).

Section 1093 is available at <http://op.bna.com/pl.nsf/r?Open=dapn-87zmhu>.

Section 1002(12) is available at <http://op.bna.com/pl.nsf/r?Open=dapn-87zmk6>.

the Privacy Act of 1974, the E-Government Act of 2002, and other laws and policies. Like any federal agency, the Bureau will have its own personal records that require attention.

- **Establishing Privacy Policy.** The Privacy Office should provide advice and assistance to other parts of the Bureau regarding financial privacy policy. A principal objective should be to make sure that the Bureau takes a coherent and consistent approach to privacy, using tools like Privacy Impact Assessments to help other Bureau offices to understand the privacy stakes in any decisions. There is no reason to have disparate offices in the Bureau reinvent the privacy wheel in each rule-making and each study. An additional function would be coordinating the Bureau's privacy policy with the FTC and other agencies involved in privacy matters. The Bureau's Privacy office should also engage in advocacy of privacy values.
- **Financial Privacy Advisory Committee.** The Privacy Office should establish a financial privacy advisory committee to advise the Director of the Bureau and the Chief Privacy Officer about policy and technology issues relating to financial privacy. Advisory Committee members should be chosen to represent a balance of relevant opinions on privacy from the public sector, private sector, academia, consumers, and the privacy advocacy community.
- **International Coordination.** Under the U.S. sectoral approach to privacy, several regulators do the job that a dedicated privacy commission or commissioner does in other jurisdictions. A CFPB Privacy Office should work with privacy offices at other U.S. agencies, including the FTC, FCC, Department of Homeland Security, and others to represent the U.S. before international organizations, such as the International Data Protection and Privacy Commissioners.

The Privacy Office would likely need only two components, an internal one to satisfy its compliance functions, and an external one for privacy matters affecting consumers and regulated companies. Initially, these functions could be staffed with a Chief Privacy Officer (CPO) and two deputies. As the Bureau gears up other activities, additional resources may be required, but some necessary expertise may come along with staff from other financial agencies that now have privacy responsibilities.

The Privacy Office should be a staff office headed by a Chief Privacy Officer, at the same level and with the same reporting authority as the Bureau's General Counsel. Agency rules, reports and other policy documents would be reviewed by both the Chief Privacy Officer and the General Counsel before it exits the agency.

More importantly, the Privacy Office should work with other Bureau components long before final clearance of documents to make sure that privacy perspectives are properly "baked into" the work of the Bureau.

In addition to its normal compliance and policy roles, and working with other Bureau offices, the Privacy Office should take on specific responsibilities for reviewing the adequacy of existing privacy rules and regulations and developing the factual and legal basis for any new or revised privacy rules and policies. Initially, these initiatives could include:

- **FCRA and GLB:** Conduct workshops to identify issues for improving privacy protections and simplifying operations under these statutes.
- **Offshore Outsourcing:** Review operation of current requirements for financial institutions to monitor their offshore service providers that process customer information.
- **Safe Harbor.** Determine what role the Bureau should play regarding the U.S.-EU Safe Harbor agreement for the financial sector.

What would happen in the absence of a Privacy Office? The responsibilities of the Bureau with respect to privacy would be the same, but privacy would not be addressed or coordinated as well with the many disparate functions that the Bureau has. The Bureau's privacy responsibilities can be informed by the many companies and an increasing number of government agencies that have dedicated offices addressing privacy. For example, the Department of Homeland Security has a Privacy Office that has led the way in making sure that privacy issues are raised early in policy, planning, and implementation phases of the numerous activities that fall within DHS. The DHS Privacy Office, like the one that we propose for the Bureau, provides centralized substantive expertise, assistance to other components that have privacy issues, and the hope of a uniform approach. A privacy office is not a guarantor of an outcome that favors or undermines privacy. A privacy office is more of an assurance that privacy is not overlooked and does not become an afterthought to decisions made by those who may not have sufficient sensitivity to consumer concerns about the use and disclosure of their personal information.

Privacy has become an integral part of any activity that involves consumers and consumer information. The passage of the financial reform bill and the establishment of the Consumer Financial Protection Bureau provide an opportunity to upgrade the importance and visibility of financial privacy issues as an aspect of consumer financial protection and to do so in a coherent and consistent way. We should make the most of this opportunity by establishing a Privacy Office in the new Bureau.