

## News Bulletin

July 7, 2009



## Consumer Financial Protection Agency Act of 2009

The Consumer Financial Protection Agency Act of 2009 (“CFPAA”) is Title X of the Obama Administration’s proposed comprehensive financial overhaul legislation. The CFPAA would create a new federal agency (“Agency”) to oversee consumer protection for all financial services. The new Agency would assume both rulewriting and enforcement roles under existing consumer protection laws that apply to financial services. The Agency also would be given additional powers over these services. In addition, the CFPAA would subject federally chartered financial institutions to state consumer protection laws that have historically been preempted. The CFPAA also transfers existing statutory authority and existing agency personnel to the new Agency.

### Key Definitions

- The CFPAA applies generally to consumer financial products or services.
- Consumer financial products or services are defined as financial products or services primarily for personal, family, or household purposes.
- The term financial product or service is defined broadly to include any product or service that directly or indirectly results from, or is related to, a financial activity.
- Financial activities are also broadly defined based, at least in part, on the Bank Holding Company Act (“BHCA”) concept of financial activity, although it is not identical to the concept. The definition of financial activity can be extended by the new Agency by rule, but cannot be extended to cover the business of insurance.
- The scope of the CFPAA also is determined by the term covered person. Covered person is defined to include any person who engages directly or indirectly in a financial activity in connection with a consumer product or service, as well as any person who provides services, advice, or processes a transaction on behalf of such a person.

### Five-Member Board

- The legislation calls for a five-member Board consisting of four members appointed by the President and confirmed by the Senate with strong competencies and experiences related to consumer financial products or services, as well as the Director of the National Bank Supervisor. One board member would be designated as Director and chief executive officer.

### Administration of Agency

- The new Agency is to have several functional units, including research, community affairs and consumer complaint units.

### Coordination with Other Agencies

- The Agency would coordinate its activities with the SEC, CFTC, FTC and other agencies. It would also coordinate with the Financial Literacy and Education Commission agencies.

### Reports to Congress

- The Agency would be required to report to Congress on its activities during each Congressional session.

### Funding for the Agency

- The CFPAA would provide for an initial appropriation. Thereafter the Agency would fund itself through assessments and fees. The CFPAA would also establish a victim relief fund funded by civil penalties imposed by the Agency.

### *General Powers of the Agency*

### Mandate and Objectives

- The CFPAA identifies the mandate of the Agency as the promotion of transparency, simplicity, fairness, accountability and access in the market for consumer financial services.
- The CFPAA also provides that the Agency should exercise its authorities to ensure that:
  - Consumers have, understand, and can use the information they need to make responsible decisions about consumer financial products or services;
  - Consumers are protected from abuse, unfairness, deception, and discrimination;
  - Markets for consumer financial products or services operate fairly and efficiently with ample room for sustainable growth and innovation; and
  - Traditionally underserved consumers and communities have access to financial services.

### Authority of the Agency

- The Agency would exercise the authority under existing consumer laws for which responsibility is transferred to the Agency.
- The Agency would have broad rulewriting power to administer and carry out the purpose and objectives of the CFPAA, the transferred authorities and to prevent evasions. In doing so, the CFPAA may actually broaden the existing rulewriting powers under the consumer laws transferred to the Agency.
- In prescribing rules the Agency is to consider the benefits and costs to consumers and covered persons, including the potential for reduction in access by consumers to financial products and services. In

addition, the Agency is to consult with the federal banking agencies and other agencies regarding the consistency of any proposed rules with prudential, market, or systemic objectives.

- The Agency would be given broad power to exempt covered persons or consumer financial products from the CFPAA or any transferred consumer laws.
- The Agency also would be given broad power to examine or require reports from covered persons for purposes of ensuring compliance with the CFPAA and the transferred laws. The Agency could also require reports on the financial condition of persons that are outside of the jurisdiction of the federal banking agencies or state regulators, and the Agency could obtain reports from other regulatory agencies.
- The Agency would have exclusive rulemaking and examination authority within the scope of its responsibilities, and would have the primary enforcement authority. Other agencies may have backup enforcement authority.
- However, the Agency's powers do not extend to persons regulated by the SEC or the CFTC to the extent that the covered person acts in its regulated capacity; instead the Agency would consult and coordinate with those agencies.
- The authorities of the Department of Justice would not be affected.
- The Agency would be specifically precluded from establishing usury limits.

### Collection of Information

- The Agency would have broad power to collect information from covered persons, including obtaining answers to specific questions.

### Monitoring; Assessment of Significant Rules; Reports

- The Agency would be required to monitor risks to consumers in the provision of consumer financial services, including developments in these markets. Monitoring could include examinations of covered persons. The Agency would be required to report its findings based on this monitoring annually.
- The Agency would be required to conduct an assessment, including public comment, of each significant rule or order three to five years after the effective date of the rule or order.

### Arbitration

- The Agency would be empowered to prohibit or limit arbitration agreements within the scope of its responsibilities if the Agency finds it in the public interest and for the protection of consumers.

### *Specific Authorities*

### Prohibiting Unfair, Deceptive, or Abusive Acts or Practices

- The Agency would be authorized to prescribe rules or take enforcement action to prevent or make unlawful unfair, deceptive, or abusive acts or practices. "Unfair" is defined in a way that is similar, but not identical, to language in the FTC Act. "Abusive" is not defined.

## Disclosures and Communications

- The Agency would be authorized to prescribe rules to ensure effective disclosure or communications to consumers of costs, benefits and risks associated with consumer products or services. Rules regarding disclosures and communications by covered persons to consumers are to balance the benefits and the risks and costs, prominently disclose significant risks and costs, and require covered persons to communicate in a clear, concise and timely manner to promote consumer understanding of the risks and costs.
- The Agency would be required to prescribe a mortgage disclosure that combines TILA and RESPA disclosures into a single disclosure within the first year unless the Agency finds that HUD or the Federal Reserve Board already has an effective disclosure for this purpose.

## Sales Practices

- The Agency would be empowered to prescribe rules and issue orders and guidance regarding the manner, setting and circumstances for providing consumer financial products and services to ensure risks, costs and benefits are fully and accurately represented to consumers.

## Pilot Disclosures

- The Agency would be required to establish standards and procedures for approving “pilot” disclosures that are limited in time and scope.

## Adopting Operational Standards to Deter Unfair, Deceptive, or Abusive Practices

- The CFPAA would encourage states to prescribe standards for covered persons that are not insured depository institutions or credit unions to deter unfair, deceptive, abusive, fraudulent or illegal transactions, including standards for background checks, registration or licensing, bonding, maintenance of records and operational procedures.
- The Agency itself would be empowered to prescribe minimum standards to deter certain deceptive or abusive practices for covered persons that are not subject to the jurisdiction of bank regulators.

## Standard Consumer Financial Products or Services

- The CFPAA would define a standard consumer financial product or service as one that covered persons who seek to offer alternative consumer financial products or services can readily offer, is transparent to the consumer, poses lower risks to the consumer, facilitates comparisons with alternative consumer financial products or services and contains the features defined by the Agency.
- The Agency would be empowered to adopt rules or issue guidance regarding the offering of standard consumer financial products or services at or before offering alternative products, including warnings about heightened risk or an opt out for the standard product or service. The requirements for offering standard products or services would only apply where the covered person offers a product or service in the same class, or of the same type as the standard product or service, or has a relationship with a consumer involving a product or service that is substantially similar to the standard product or service.

## Duties of the Agency

- The Agency would be required to prescribe rules imposing a duty of fair dealing on covered persons and their employees and contractors. The Agency also would be required to consider whether the person is

implicitly or explicitly acting in the interest of the consumer, the person provides advice, the consumer relies on the covered person's advice, the benefits to the consumer of imposing the duty and other factors.

- The rules could address compensation practices, but could not limit the total dollar amount of compensation.
- These rules would only be enforceable by the Agency and state regulators through administrative proceedings.
- The rules would not apply to attorneys or other fiduciaries.

### Consumer Rights to Access Information

- Subject to limited exclusions for confidential commercial information, risk control or legal purposes, covered persons would be required to provide to consumers, in electronic form, the cost, charge and usage data relating to the transactions with the covered person. However, the CFPAA would not impose any duty on a covered person to maintain or keep information.

### Prohibited Acts

- It would be unlawful to violate the CFPAA or any rule or order issued by the Agency, to refuse to maintain or provide information as required by the Agency or to knowingly or recklessly provide substantial assistance to another person engaging in unfair, deceptive or abusive acts or practices.

### *Preservation of State Law*

#### Relation to State Law

- The CFPAA would not preempt state laws unless the state laws are inconsistent with the CFPAA and the state laws are less protective than the CFPAA.

#### Preservation of Enforcement Powers of States

- Under the CFPAA, state Attorneys General could bring actions in federal court to enforce the CFPAA. The state must notify the Agency, and the Agency may intervene in the action.

#### State Law Preemption for National Banks and Subsidiaries

- The CFPAA would amend the National Bank Act to subject national banks to nondiscriminatory state consumer protection laws.

#### Visitorial Standards

- The CFPAA would amend the National Bank Act to allow state Attorneys General to bring an action in court to obtain records from national banks relative to the investigation of violations of state or federal consumer laws and to enforce these laws against national banks.

#### Nondepository Subsidiaries

- The CFPAA would amend the National Bank Act to apply state laws generally to nondepository subsidiaries, affiliates and agents of national banks.

### ***Enforcement Powers***

The CFPAA would provide the Agency with broad administrative enforcement powers and litigation authority to address violations of the laws administered by the Agency.

- The CFPAA also would provide whistleblower protection for private sector employees.

### ***Transfer of Functions and Personnel***

- The CFPAA would transfer the consumer financial protection functions of the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Federal Trade Commission and the National Credit Union Administration to the Agency.
- The transfer date would be established by the Secretary of the Treasury between 180 days and 18 months after the date of enactment.
- The CFPAA also would provide for the identification and transfer of existing personnel at these agencies to the Agency.

### ***Regulatory Improvements***

#### **Collection of Deposit Account Data**

- The CFPAA would provide for the collection of deposit account data by census tract for each facility where deposit accounts are accepted.

#### **Small Business Loan Data**

- The CFPAA would amend the Equal Credit Opportunity Act to collect data on loans to small businesses to facilitate enforcement of fair lending laws and to identify opportunities for women- and minority-owned businesses.

### ***Conforming Amendments***

- The CFPAA would generally make conforming amendments to substitute the Agency for the agency currently responsible for administering the identified statutes. In most cases this substitution would be straightforward. In other cases, however, the FTC's enforcement responsibility may be retained by the FTC. In the case of other statutes, specific issues are identified with the appropriate statute.
- Statutes affected would include:
  - Inspector General Act.
  - Privacy Act of 1974.
  - Alternative Mortgage Transaction Parity Act of 1982.
  - Community Reinvestment Act of 1977. The assessment is done by the Agency and provided to the appropriate federal supervisory agency. This would appear to cause an inadvertent narrowing of the application to credit cards.
  - Consumer Leasing Act of 1976.
  - Electronic Fund Transfer Act.
  - Equal Credit Opportunity Act.

- Expedited Funds Availability Act. The Federal Reserve Board would be required to consult with the Agency, but the Agency would not assume the Board's rulewriting powers.
- Fair Credit Billing Act.
- Fair Credit Reporting Act and Fair and Accurate Credit Transactions Act.
- Fair Debt Collection Practices Act.
- Federal Deposit Insurance Act.
- Gramm-Leach-Bliley Act.
- Home Mortgage Disclosure Act.
- Home Ownership and Equity Protection Act of 1994.
- Omnibus Appropriations Act, 2009 (as amended by the Credit Card Accountability Responsibility and Disclosure Act of 2009).
- Real Estate Settlement Procedures Act.
- Right to Financial Privacy Act.
- Secure and Fair Enforcement for Mortgage Licensing Act of 2008.
- Truth in Lending Act. These amendments may inadvertently repeal an amendment to minimum payment disclosures in the Credit Card Accountability Responsibility and Disclosure Act of 2009.
- Truth in Savings Act.
- These amendments would become effective on the transfer date of responsibility for these statutes, except that the amendments to the Inspector General Act and the Privacy Act would become effective on the date of enactment.

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