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OVERVIEW OF THE PROPOSED CONSUMER FINANCIAL PROTECTION AGENCY (CFPA)

*Kyle Gaffaney**

The collapse of the financial industry has led to calls for reform by many consumers and consumer groups across the country. Consumers and regulators are trading blame about which party is ultimately responsible for the cause of the financial collapse. The Obama Administration is attempting to address these complaints and calls for reform with the release of a white paper proposing changes to the financial services regulatory system.¹ The white paper outlines five reform objectives:

- (1) Promote robust supervision and regulation of financial firms,
- (2) Establish comprehensive supervision and regulation of financial markets,
- (3) Protect consumers and investors from financial abuse,
- (4) Improve tools for managing financial crises, and
- (5) Raise international regulatory standards and improve international cooperation.²

To promote these objectives, the Obama Administration drafted legislation to create a new executive agency, the Consumer Financial Protection Agency (CFPA).³ If created, this executive agency would have the duty of protecting consumers of

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¹ David H. Carpenter and Mark Jickling, *Financial Regulatory Reform: Analysis of the Consumer Financial Protection Agency (CFPA) as Proposed by the Obama Administration and H.R. 3126*, Congressional Research Service, July 17, 2009, 7-5700 R40696, (hereinafter referred to as *CRS Report*).

² *Id.* at 1.

³ *Id.*

financial products and services.⁴ The legislation to create the CFPA was proposed in June 2009 and the Obama Administration has indicated that the passage of a bill of this nature is a priority.⁵

However, the Obama Administration's version of the bill is not the one currently being debated in Congress. The current proposed version of the bill, H.R. 3126, is authored by Barney Frank (D-Mass) and was released in July 2009.⁶

I. Summary of the CFPA

The bill proposed by the Obama Administration and H.R. 3126, proposed by Frank, have as their purpose the creation of the CFPA. Moreover, Frank's version of the bill bears the same name as the bill proposed by the Obama Administration, The Consumer Financial Protection Agency Act of 2009 (CFPA Act).⁷

A. Purposes

The stated purposes of the bill are similar to the objectives outlined in the Obama Administration white paper. At its core, H.R. 3126 is designed to protect consumers of financial products and services. The text of the CFPA Act delineates the following goals:

- To promote transparency, simplicity, fairness, accountability, and access in the market for consumer financial products or services.
- To ensure consumers have, understand, and can use the information they need to make responsible decisions about consumer financial products or services.
- To ensure consumers are protected from abuse, unfairness, deception and discrimination.
- To ensure markets for consumer financial products or services operate fairly and efficiently with ample room for sustainable growth and innovation.
- To ensure traditionally underserved consumers and

⁴ *Id.*

⁵ Kenneth R. Harney, *Consumer Financial Protection Agency: An Overview*, L.A. TIMES, August 2, 2009, available at <http://www.latimes.com/classified/realestate/news/la-fi-harney2-2009aug02,0,7083818.story>.

⁶ *Id.*

⁷ *CRS Report*, *supra* note 1.

communities have access to financial services.⁸

Like the Obama Administration's objectives in its white paper, the purposes of the CFPA Act are broad. As a result, the types of products and services the CFPA would oversee are numerous. In order to accomplish its broad objectives, the powers of the CFPA must also be broad.

B. Powers Under the CFPA Act

The types of services the CFPA would regulate are vast and varied. The CFPA would be given authority over financial activities including deposit taking, mortgages, credit cards and other extensions of credit; investment advising by entities not subject to registration or regulation by the SEC or the Commodity Futures Trading Commission; loan servicing; check-guaranteeing; collection of consumer report data; debt collection; real estate settlement; money transmitting; and financial data processing.⁹ In order to undertake the enforcement of all of these areas, the CFPA would consolidate the power of other consumer protection regulatory and enforcement agencies by transferring those powers to the CFPA.¹⁰ Along with transferring those regulatory and enforcement duties and powers, the employees associated with the tasks now included in the scope of the CFPA would also be transferred to the CFPA.¹¹ Consequently, the funding associated with these regulatory and enforcement functions and the associated employees would be diverted from these six agencies into the newly formed CFPA.¹²

The functions that would be transferred to the CFPA are held by six different agencies, including functions currently held within the following:

- Board of Governors of the Federal Reserve System
- Office of the Comptroller of the Currency (OCC)
- Office of Thrift Supervision (OTS)
- Federal Deposit Insurance Corporation (FDIC)

⁸ Consumer Financial Protection Act of 2009, H.R. 3126, 111th Congress, §121 (2009).

⁹ *CRS Report*, *supra* note 1, at 2.

¹⁰ *Id.*

¹¹ *Id.*

¹² Ronald D. Orol, *Lawmakers Battle Over Proposed Consumer Loan Agency*, MarketWatch, September 30, 2009, available at <http://www.marketwatch.com/story/lawmakers-battle-over-consumer-mortgage-agency-2009-09-30>.

- Federal Trade Commission (FTC)
- National Credit Union Administration (NCUA)¹³

However, the CFPA's power and duties would not end with these products and agencies. Monitoring the market and the innovation of new products and services would also be within the responsibility of the CFPA.¹⁴ To do this effectively, the new agency will have power over persons, national banks, credit unions and federal savings and loan associations.¹⁵ To carry out its duties of regulation and enforcement, the CFPA would have the authority to promulgate rules and issue guidance orders.¹⁶

Two hotly-debated provisions in the proposed legislation are the CFPA's ability to regulate arbitration clauses and the unusual preemption conditions present in the bill. Arbitration agreements between consumers and any of the people or entities the CFPA exercises power over may be regulated by the CFPA.¹⁷ The CFPA would have the ability to prohibit or impose conditions or limitations on mandatory arbitration agreements if it finds that such conditions or limitations are not in the public interest and affect the protection of consumers.¹⁸ For example, if the agency finds that mandatory arbitration agreements in credit card contracts are against the public interest, the CFPA may prohibit such agreements.

The second hot topic of the CFPA Act exists in the unusual manner it handles federal preemption. As we know, in most instances, federal law trumps state law. Under the CFPA, however, if a state consumer protection law provides greater protection than the CFPA, the state law would preempt the CFPA within that state.¹⁹ For example, if a financial institution is federally chartered and is in compliance with the CFPA, it still must comply with the laws of the state in which it seeks to operate if that state's laws are stricter.²⁰ This is a dramatic divergence from the status quo and is causing a lot of criticism

¹³ *Id.* at 3.

¹⁴ *CRS Report, supra* note 1, at 4.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ H.R. 3126, *supra* note 8, at §126.

¹⁸ *Id.*

¹⁹ *CRS Report, supra* note 1, at 5.

²⁰ Jane Sasseen and Phil Mintz, *A New Push for Obama's Consumer Finance Agency*, BUSINESSWEEK, October 9, 2009, available at http://www.businessweek.com/bwdaily/dnflash/content/oct2009/db2009109_398579.htm.

and debate.

C. Leadership of the CFPA

Both the proposed plan by the Obama administration and H.R. 3126 call for a five-member board to govern the CFPA.²¹ In both plans, four of the five members would be appointed by the president for five-year terms, and the terms would be staggered so that the board members would rotate off the board in different years.²² Furthermore, the appointed members would only be removable by showing cause for removal.²³ The fifth member would be someone who holds a leadership position in a different agency.²⁴

The specific leadership role that would fill this fifth board position is one of the areas in which the Obama Administration's proposal and H.R. 3126 differ. The Obama Administration's plan calls for the National Bank Supervisor to fill the fifth seat of the CFPA board.²⁵ H.R. 3126 states that the fifth seat would be held by "the head of the agency responsible for chartering and regulating national banks."²⁶ Exactly who this agency head is may be answered by further Obama Administration proposals. There is some discussion that the National Bank Supervisor would fill this role.

A second difference between the Obama Administration's proposal and H.R. 3126 is that H.R. 3126 does not transfer the oversight and enforcement authority over the Community Reinvestment Act (CRA) to the CFPA.²⁷ The CRA is designed to help meet the credit needs of low to moderate-income neighborhoods and to help create consistent and safe banking operations.²⁸ Currently, examinations to insure compliance with the CRA are conducted by the same agencies that would lose regulatory powers to the CFPA, and include the Federal Reserve, the FDIC, the OCC, and OTS.²⁹

The Obama Administration and H.R. 3126 also propose

²¹ *CRS Report, supra* note 1, at 2.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 6.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Consumer Reinvestment Act, *Background & Purpose*, available at <http://www.ffiec.gov/CRA/history.htm>.

²⁹ *Id.*

different outcomes for the Office of Thrift Supervision. Unlike the Obama Administration's proposal, H.R. 3126 does not eliminate the OTS.³⁰ The OTS supervises the thrift industry which is responsible for supplying affordable home financing for Americans.³¹

Finally, H.R. 3126 states that non-financial businesses are exempt from the CFPA's oversight, even if they offer financial products.³² For example, retailers who have credit or layaway plans and auto dealers who offer loans that enable consumers to buy vehicles would be exempt from oversight under the new CFPA.³³

D. Opposition

Opposition to the CFPA has poured in from business associations and government agencies alike. However, most opponents to the new regulatory agency will also admit that the existing regulatory system is broken.³⁴

The Mortgage Bankers Association, the Financial Services Roundtable, and the U.S. Chamber of Commerce all oppose the CFPA.³⁵ The president of the Mortgage Bankers Association, John Courson, has expressed his view that the CFPA would stifle innovation and limit consumer choices in home loans and other financial products.³⁶ However, Elizabeth Warren, a Harvard Law Professor, counters with the argument that this type of criticism about stifling the industry is simply an effort to preserve the status quo.³⁷ Warren chairs the Congressional Oversight Panel of the Troubled Asset Relief Program (TARP) and is the person Frank would like to see in charge of the CFPA.³⁸

³⁰ *CRS Report*, *supra* note 1, at 6.

³¹ Office of Thrift Supervision, *About the OTS*, available at <http://www.ots.treas.gov/?p=AboutOTS>.

³² Jim Puzzanghera, *White House Retreats on Key Part of Proposed Financial Overhaul*, L.A. TIMES, September 24, 2009, available at <http://www.latimes.com/business/la-fi-reg-reform24-2009sep24,0,1745332.story>.

³³ *Id.*

³⁴ Harney, *supra* note 5.

³⁵ *Id.* See also *White House Retreats*, *supra* note 32.

³⁶ Harney, *supra* note 5.

³⁷ *Id.*

³⁸ Kim Dixon and Rachele Younglai, *US Rep. Frank Eyes Warren As Top Financial Watchdog*, REUTERS, Nov. 3, 2009, available at <http://www.reuters.com/article/rbssBanks/idUSN0351170120091103>.

Furthermore, some critics of the CFPA feel that efforts to create the CFPA are misplaced. David Hirshmann, President and CEO of the U.S. Chamber Center for Capital Markets Competitiveness, feels that creating a massive new federal agency with unprecedented powers is the wrong solution.³⁹ Instead, he thinks that the powers of existing regulatory agencies should be expanded.⁴⁰ Not surprisingly, the heads of some of the agencies who would lose funding upon the establishment of the CFPA are also against its formation. For example, the heads of the OTS, the OCC, and the FDIC all oppose the creation and transfer of power to the new CFPA.⁴¹

In contrast, one federal agency that is losing power to the CFPA may be gaining responsibility in other areas. Under the CFPA, the Federal Reserve would lose its power to write and enforce consumer protection rules for financial products.⁴² However, in spite of criticism that the Federal Reserve faltered on all fronts leading up to the financial crisis, the Obama Administration wants to add to it the responsibility of supervising large financial firms that currently fall outside government banking regulations.⁴³

E. Evidence of Dedication to the CFPA Through Concessions

The Obama Administration's desire to create the CFPA may be linked to the Administration's willingness to accept modifications to the CFPA. This can be seen in the removal of the 'plain vanilla' requirement of the Act.⁴⁴

The 'plain vanilla' requirement would have forced companies to provide products such as fixed rate mortgages or no-frills credit cards.⁴⁵ The requirement received a lot of opposition because the government would dictate the type of products companies could offer.⁴⁶

³⁹ Sasseen, *supra* note 20.

⁴⁰ *Id.*

⁴¹ White House Retreats, *supra* note 33.

⁴² *Id.*

⁴³ Jim Puzzanghera, *Lawmakers Would Curb Federal Reserve's Power, Not Expand It*, L.A. TIMES, October 2, 2009, available at <http://www.latimes.com/business/la-fi-fed2-2009oct02,0,3274331.story>.

⁴⁴ White House Retreats, *supra* note 33.

⁴⁵ *Id.*

⁴⁶ *Id.*

F. Expectations

While the future of the CFPA is currently unknown, there are high hopes for its success. The bill is expected to pass the House of Representatives and will then meet what is expected to be its greatest opposition in the Senate.⁴⁷ Nevertheless, Barney Frank expects the Senate to act on the bill this year.⁴⁸

⁴⁷ Harney, *supra* note 5.

⁴⁸ White House Retreats, *supra* note 33.