



Regulatory Practice Letter

ADVISORY

RPL Number 09-24

Proposed Legislation to establish a new Consumer Financial Protection Agency as released by the Department of the Treasury

Executive Summary

On June 30, the Department of the Treasury ("Treasury") released the Obama Administration's proposed legislation to establish a new Consumer Financial Protection Agency ("CFPA") consistent with its recommendations for financial regulatory reform released on June 17 ("*Financial Regulatory Reform - A New Foundation: Rebuilding Financial Supervision and Regulation*"). The *Consumer Financial Protection Agency Act of 2009* (the "CFPA Act") would establish the CFPA as an independent agency to regulate a broad range of consumer financial products, including credit, savings, payment and other products and services but excluding securities and certain insurance products, pursuant to authority under federal consumer laws. It would operate under a mandate to promote transparency, simplicity, fairness, accountability, and access in the market for consumer financial products or services, and oversee the providers of consumer financial products and services, including insured depository institutions and other firms,

to protect consumers from unfair practices and bring together fragmented responsibility for consumer protection.

The CFPA would be comprised of the consumer financial protection functions of the Federal Reserve Board ("Fed"), Office of the Comptroller of the Currency ("OCC"), Federal Deposit Insurance Corporation ("FDIC"), Office of Thrift Supervision ("OTS"), National Credit Union Administration ("NCUA") and the Federal Trade Commission ("FTC"), which would be transferred to the CFPA along with the powers and duties vested in those agencies relating to consumer protection. Such transfer would generally be required to be completed no earlier than 180 days and no later than 18 months following enactment of the CFPA Act though provision was made to extend the timeframe to 24 months, if needed.

Background

The recommendations for financial regulatory reform released by the Obama Administration (please refer to

Subject:

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As Issued By:

Department of the Treasury

Date:

July 7, 2009

RPL 09-23 for details) were intended to meet five key objectives, one of which was to “protect consumers and investors from financial abuse.” The CFPA was the cornerstone of the recommendations designed to address this objective. As a single, independent agency dedicated to protecting consumers of credit, savings, payment and other consumer financial products and services, as well as the single regulator of providers of those products and services, the Administration expects establishment of the CFPA “should reduce gaps in federal supervision and enforcement; improve coordination with the states; set higher standards for financial intermediaries; and promote consistent regulation of similar products.”

Description

A brief outline of the proposed CFPR Act follows.

Subtitle A: The Consumer Financial Protection Agency

The CFPA Act would provide for the establishment of the CFPA as an independent agency to regulate the provision of consumer financial products or services. The CFPA would be comprised of the consumer financial protection functions of the Fed, OCC, FDIC, OTS, NCUA and FTC and would operate under the authority of the CFPA Act, the powers and duties vested in those agencies relating to consumer protection, and the following “enumerated consumer laws:”

- *Alternative Mortgage Transaction Parity Act;*
- *Community Reinvestment Act (“CRA”);*
- *Consumer Leasing Act;*
- *Electronic Funds Transfer Act;*
- *Equal Credit Opportunity Act;*

- *Fair Credit Billing Act;*
- *Fair Credit Reporting Act* (except with respect to sections 615(e), 624, and 628 (15 U.S.C. 1681m(e), 1681s-3, 1681w); 4 (15 U.S.C. 1681 *et seq.*);
- *Fair Debt Collection Practices Act;*
- *Federal Deposit Insurance Act*, (subsections 43(c) through (f));
- *Gramm-Leach-Bliley Act*, sections 502 through 509 (15 U.S.C. 6802-6809);
- *Home Mortgage Disclosure Act;*
- *Home Ownership and Equity Protection Act;*
- *Real Estate Settlement Procedures Act (“RESPA”);*
- *S.A.F.E. Mortgage Licensing Act;*
- *Truth in Lending Act (“TILA”),* and
- *Truth in Savings Act.*

The CFPA would have a five member Board, comprised of four members appointed by the President and the Director of the National Bank Supervisor (a new agency to be formed by the merger of the OCC and OTS and resident within Treasury). Each Board member would serve a term of five years.

The CFPA would be required to establish functional units for:

- Research – on current developments in consumer products and services, consumer awareness of disclosures and risks, and consumer behavior.
- Consumer Affairs – to provide information, guidance and technical assistance to historically underserved communities and consumers.
- Consumer Complaints – to include establishing a central database for collecting and tracking information on, and resolution, of consumer

complaints and sharing data with federal and state agencies.

The CFPA would be required to establish a Consumer Advisory Board to provide the agency with information on emerging practices in the consumer products and services industry.

The CFPA would be required to coordinate with the Securities and Exchange Commission (“SEC”) and the Commodities Futures Trading Commission (“CFTC”) and other federal and state regulators, as appropriate to promote consistent regulatory treatment of consumer and investment products and services.

Funding for the CFPA would be made available through fees and assessments collected from the insured depository institutions and other firms covered by the CFPA Act.

Subtitle B: General Powers of the Agency

The CFPA would be given the mandate to promote transparency, simplicity, fairness, accountability, and access in the market for consumer financial products or services. To do so, it would have the authority to prescribe rules, issue guidance, conduct examinations, require reports, or issue exemptions with regard to any person subject to the enumerated consumer laws. “Covered persons” would include:

- (A) any person who engages directly or indirectly in a financial activity, in connection with the provision of a consumer financial product or service; or
- (B) any person who, in connection with the provision of a consumer financial product or service, provides a material service to, or

processes a transaction on behalf of, a person in (A) above.

A "financial activity" would include:

- Deposit-taking activities;
- Extending credit and servicing loans;
- Check-guaranty services;
- Collecting, analyzing, maintaining, and providing consumer report information or other account information by covered persons;
- Collection of debt related to any consumer financial product or service;
- Providing real estate settlement services, including providing title insurance;
- Leasing personal or real property or acting as agent, broker, or adviser in leasing such property (subject to exceptions);
- Acting as an investment adviser to any person (not subject to regulation by or required to register with the CFTC or the SEC);
- Acting as financial adviser to any person;
- Financial data processing;
- Sale or issuance of stored value;
- Acting as a money services business;
- Acting as a custodian of money or any financial instrument; or
- Any other activity that the agency defines, by rule, as a financial activity for the purposes of this title. Note: The agency shall not define engaging in the business of insurance as a financial activity, other than with respect to credit insurance, mortgage insurance, or title insurance.

The CFPA also would be required to monitor for consumer risks in the provision of financial products and

services and publish an annual report on significant findings.

Subtitle C: Specific Authorities

The CFPA would be given the following specific authorities with regard to the provision of consumer financial products and services:

- Take any authorized action to prevent a person from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service.
- Prescribe rules to ensure the appropriate and effective disclosure or communication to consumers of the costs, benefits, and risks associated with any consumer financial product or service.
 - The CFPA would be required to propose model disclosures that would combine the disclosures required under the TILA and RESPA within one year of the "transfer date."
- Prescribe rules regarding the manner, settings, and circumstances for the provision of any consumer financial products or services to ensure that the risks, costs, and benefits of the products or services, both initially and over the term of the products or services, are fully and accurately represented to consumers.
- Establish minimum standards for any covered persons that are not regulated by a federal banking agency or comparable state regulator. The States would be encouraged to prescribe standards applicable to covered persons who are not insured depository institutions or credit unions to deter

and detect unfair, deceptive, abusive, fraudulent, or illegal transactions in the provision of consumer financial products or services,

- Adopt rules or issue guidance regarding the offer of a "standard" consumer financial product or service (including consumer warnings about the risks of products and services that are not "standard"), as well as allow for a "meaningful" opportunity for the consumer to decline.
- Prescribe rules establishing duties regarding compensation practices applicable to a covered person, employee, agent or independent contractor who deals or communicates directly with a consumer.

Subtitle D: Preservation of State Law

- Any state consumer protection law of general application will apply to any federally chartered bank or savings association, provided it is not inconsistent with federal law. "National bank" and "federal savings association" would be defined to include any bank or thrift organized under the laws of the U.S. and its affiliates and subsidiaries.
- After consulting with the National Bank Supervisor, states may bring any action against a federally chartered bank or savings association to:
 - Require records as part of an investigation asserting potential violations of state or federal consumer laws;
 - Enforce any state or federal consumer law, as authorized by that law; or

- Seek or recover damages for violations of consumer law.

Subtitle E: Enforcement Powers

The CFPA would be authorized to investigate potential violations of the enumerated consumer laws, any laws prescribed by the CFPA and other authorities transferred to it, as well as to hold hearings and adjudication proceedings in order to enforce or ensure compliance with those laws.

Subtitle F: Transfer of Functions and Personnel

- The consumer financial protection functions of the Fed, OCC, FDIC, OTS, NCUA and FTC would be transferred to the CFPA along with all of the powers and duties vested in those agencies related to consumer financial protection functions. "Consumer financial protection functions" would be defined as research, rulemaking, issuance of orders or guidance, supervision, examination, and enforcement activities, powers, and duties relating to the provision of consumer financial products or services, including the authority to assess and collect fees for those purposes.
- Within 60 days of enactment of the CFPA Act, the Secretary of the Treasury, along with the heads of the Fed, OCC, FDIC, OTS, NCUA and FTC and the Director of the Office of Management and Budget would be required to establish a transfer date.
- The transfer date may be no earlier than 180 days and no later than 18 months after enactment, though provision is made to extend this timeframe up to a total 24 months following enactment if needed.

- All orders, rules, determinations, agreements and resolutions of the transferring agencies outstanding on the day before the transfer date would become enforceable by the CFPA.

Subtitle G: Regulatory Improvements

The CFPA Act would introduce new recordkeeping requirements to enhance the agency's understanding of certain consumer financial products and services.

- Financial institutions (insured depository institutions and credit unions) would be required to maintain records for each deposit taking service facility (such as a branch or automated teller machine) on the number, dollar amount, type of account (checking or savings) and type of customer (residential or commercial). The records would be submitted to the CFPA annually and would be used as part of the CRA examination and for other purposes.
- Financial institutions would be required to maintain records of applications for small business credit submitted by women- and minority-owned businesses.

Subtitle H: Conforming Amendments

- This section would amend the enumerated consumer laws and other laws to make reference to the CFPA, as appropriate.
- A new paragraph would be added to the CRA regulations requiring an assessment of an institution's record of meeting the credit card needs of its community.

Supreme Court Ruling on Preemption

On June 29, the Supreme Court announced a decision in *Cuomo v. The Clearing House Association, L.L.C.*, which concluded that rules issued by the federal banking agencies under the *National Bank Act* do not preempt the states from enforcing their own consumer protection laws against national banks. The OCC had interpreted the *National Bank Act* to give it sole "visitorial powers" over national banks, which was defined to include governmental efforts to judicially enforce compliance with laws regulating permitted activities,

Under the decision, a state that has sufficient evidence of a national bank's violation of a state law would be permitted to sue the bank in court. The lawsuit would be governed by rules to prevent "fishing expeditions" and abusive discovery.

The Supreme Court decision is consistent with the intent of the Administration's proposed CFPA Act in that it permits states to enforce their own laws against federally chartered institutions. However, as it has been proposed by the Administration, the CFPA Act would go beyond the Supreme Court decision and permit the states to bring any action against a federally chartered bank or savings association to investigate potential violations of state or federal consumer laws, as well as to enforce state or federal consumer laws.

KPMG Commentary

Some of the witnesses testifying on the proposed CFPA (based on the Administration's White Paper) before the House Committee on Financial

Services on June 24 expressed concerns with the new agency based on:

- The separation of safety and soundness regulation from consumer protection regulation (as one witness stated, the separation of the regulation of the institution from the regulation of its products);
- The addition of another layer of supervision and the potential for conflicts of interest with the other federal banking agencies (and how such conflicts would be resolved);
- The exclusion of competing products such as securities and money market funds; and
- The separation of CRA examination and enforcement from the safety and soundness function.

However, with the release of the Administration's proposed CFPB Act, Barney Frank, Chairman of the House Committee on Financial Services, issued a statement saying, "The Administration's release of its recommended language is very welcome because it removes any obstacle to the House Financial Services Committee reporting out legislation creating such an agency in July...I have made the creation of the agency one of our highest priorities." He was separately quoted by the *New York Times* as stating, "Anyone who thinks we're not going to create this agency is mistaken. The American public wants it." (Quoted from the *New York Times*, June 30, 2009.)

The principles reflected in the proposed legislation, coupled with the Supreme Court decision, point to more vigorous enforcement of the consumer protection laws in the areas of unfair and deceptive acts and practices, fair

lending and CRA, as well as in the other "enumerated consumer laws" detailed in the proposed legislative language. It is also likely that, in anticipation of a new consumer-oriented agency, such as the CFPB, regulatory expectations in the near term will increase generally in the area of compliance and risk management programs and governance, as well as specifically in the areas of monitoring and customer communication (including product descriptions, applications, disclosures and adverse actions).

Any institution that provides a "financial activity" as defined by the proposed legislation should begin to consider its potential needs with respect to:

- The adequacy of staffing and accountability for consumer protection compliance;
- Enhancing the overall Risk Governance and Compliance Management Program;
- Assessing the "reasonableness" and "suitability" of current and/or anticipated consumer communications with respect to products and services;
- Conducting targeted consumer protection reviews, including program controls and enhanced risk assessments/monitoring in such areas as Fair Lending, UDAP, CRA, RESPA, Fair Debt and Privacy;.
- Developing consumer fraud prevention and detection programs;
- Enhancing new product development processes and risk assessments; and
- Benchmarking current consumer protection practices to industry practices and increased regulatory expectations.

For additional information, please contact Linda Gallagher, Principal: lgallagher@kpmg.com or Amy Matsuo, Director: amatsuo@kpmg.com.