

Consumer Financial Protection Agency Act of 2009

The House Financial Services Committee recently approved the Consumer Financial Protection Agency Act of 2009. The bill would create a Consumer Financial Protection Agency (CFPA), which would have authority to regulate consumer financial products and services, as well as their providers and servicers. The agency also would have examination and enforcement authority over most covered entities.

Products Covered

The CFPA would regulate offerings of any “financial product or service” used by a consumer primarily for personal, family, or household purposes. A “financial product or service” is broadly defined to include a variety of financial activities, notably extending credit and servicing loans, engaging in any activity connected with credit or loans, and leasing real and personal property. Debt cancellation contracts and debt suspension agreements (collectively DCCs) are frequently offered in connection with extensions of credit and leases, and under Federal law, a debt cancellation contract is defined as a loan term or a contractual arrangement modifying loan terms linked to a bank’s extension of credit.¹ Consequently, DCCs would be covered.

The “business of insurance” is carved out from the definition of “financial activity,” so neither credit insurance nor force-placed insurance is covered by the legislation.

Businesses Regulated

The CFPA would have jurisdiction over “covered persons” and “service providers.” Other businesses would be exempt.

Covered Persons

A covered person is defined as any person (individual or business entity) that engages directly or indirectly in a financial activity connected to providing a consumer financial product or service, which would include banks, thrifts, and most finance companies.

Service Providers

A service provider is defined as “any person who provides a material service to a covered person in providing a consumer financial product or service, including a person who (i) facilitates the design of, or operations relating to the provision of, the consumer financial product or service; (ii) has direct interaction with a consumer (whether in person or via telecommunication device or other similar technology) regarding the consumer financial product or service; or (iii) processes transactions relating to the consumer financial product or service.” The term does not include businesses that merely provide general business services to a covered person, or that only provide space or time for advertising. *A service provider would appear to include developers and administrators of DCCs.*

¹ 12 C.F.R. § 37.2(f).

Auto Dealers

The CFPA would not have jurisdiction over motor vehicle dealers engaged in the sale, servicing or leasing of motor vehicles. Nor would it have jurisdiction over a finance affiliate of an auto dealer as long as at least 90 percent of the finance arm's loans or leases are with one or more of its dealer affiliates, and the loans or leases are routinely assigned to a third party.

Providers of Nonfinancial Services

The CFPA would not have jurisdiction over credit extended by merchants, retailers or sellers of nonfinancial services if the credit is exclusively for the purpose of financing the purchase of a nonfinancial product or service. The exception would not apply to debt that is assigned to another entity, or if the credit significantly exceeds the value of the product or service and is done as subterfuge.

CFPA and its Authority

The CFPA would be an independent agency headed by a Director appointed by the President and subject to Senate confirmation. It would have a very broad mandate: to “regulate the provision of financial products or services,” including compliance with numerous Federal laws that are designed to protect consumers of financial products and services. Generally, the CFPA would be responsible for rulemaking, examination and enforcement connected to covered entities that provide consumer financial products or services, as well as their service providers. If the CFPA and another agency (other than the Attorney General, the Secretary of the Treasury, or the Federal Trade Commission) are given authority under another Federal law to issue regulations or guidance, conduct examinations or require reports to ensure compliance with the Act or the Federal consumer laws, the CFPA would have exclusive authority, except with respect to smaller financial institutions.

Rulemaking Authority

Rulemaking authority under existing consumer banking laws would be transferred from the Federal Reserve and the other Federal banking agencies to the CFPA. (There would be no more “joint rulemaking” regarding consumer protection.) The CFPA would have authority to issue regulations, orders and guidance to administer the Consumer Financial Protection Agency Act as well as what are referred to as “enumerated consumer protection laws” and related regulations. Those laws notably include the Equal Credit Opportunity Act (Regulation B), the Fair Credit Reporting Act, the privacy requirements of the Gramm-Leach-Bliley Act, and the Truth in Lending Act (Regulation Z).² The CFPA also would have broad rulemaking authority to address unfair, deceptive or abusive acts and practices. The CFPA would have no authority, however, to require a covered person to offer a specific (“plain vanilla”) product or service. The

² Other “enumerated consumer protection laws” include the following: Alternative Mortgage Transaction Parity Act, Electronic Funds Transfer Act, Fair Debt Collection Practices Act, Homeowners Protection Act of 1998, Home Mortgage Disclosure Act, Real Estate Settlement Procedures Act, Secure and Fair Enforcement for Mortgage Licensing Act, Truth in Savings Act, and part of the Federal Deposit Insurance Act.

CFPA Director would have to consult with the Federal banking agencies and state bank supervisors or other Federal agencies when issuing regulations.

Examination and Enforcement Authority

The scope of the CFPA's examination and enforcement authority over financial institutions would depend on the institution's size.

Small Institutions

For insured depository institutions with total assets of \$10 Billion or less, the institution's primary banking supervisor (Federal or state) would have primary examination and enforcement authority. That agency would be required to periodically examine, or require reports from, small institutions to ensure compliance with regulations issued by the CFPA and with the enumerated consumer protection laws, and it would have to provide copies of the reports to the CFPA.

The CFPA would have discretion to include its own examiner on any examination conducted by the primary supervisory agency, who could be involved in the entire examination process, including providing input into the scope of an examination. Additionally, the CFPA would have authority to examine small financial institutions for the purpose of monitoring risks to consumers.

The primary supervisory regulator would have primary enforcement authority. The CFPA could recommend that the supervisory regulator initiate an enforcement action, however, and if no action were taken within 120 days, the CFPA could initiate an enforcement action. In the case of a consumer complaint against a financial institution, the CFPA could immediately investigate the institution and take enforcement action if it has reason to believe there has been noncompliance with its regulations or with the Federal consumer protection laws.

Large Institutions

For all other financial institutions, independent of charter, the CFPA would have exclusive examination and enforcement authority related to the requirements of the Act and the Federal consumer protection laws. The CFPA would have to coordinate its supervisory activities with the financial institution's primary supervisory regulator. The CFPA would have access to that agency's examination and financial condition reports, and the primary regulator would have access to the CFPA's reports. The CFPA also would have examination and enforcement authority over nonbank institutions, *including service providers*, for compliance with the Act and the Federal consumer protection laws.

Preemption of State Law

The existing preemption regime would apply to contracts in place as of the date of enactment. For other contracts, the bill provides for preemption of state laws in three situations:

1. If the state law is discriminatory toward national banks when compared to its effect on state banks.
2. If, according to the preemption standard set forth in *Barnett Bank of Marion County, N.A. v. Nelson*, the OCC or the OTS determines that a state law “prevents or significantly interferes with” a federally-regulated bank or thrift’s exercise of its powers. The OCC or OTS would have to make such a preemption determination via regulation or order, and then only on a case-by-case basis using “substantial evidence” on the record. There is no “field” preemption, and a court must review a claim of state law preemption without deference to the Federal agency’s claim that a state law is preempted.
3. If the state law is preempted by a Federal law other than the National Bank Act or the Home Owners Loan Act.

State Enforcement of State Laws

The bill would overturn *Watters v. Wachovia*, so that operating subsidiaries of national banks and federal thrifts would be subject to state laws. It would codify *Cuomo v. Clearing House*, which held that states have the right to enforce state laws against national banks and federal savings associations, but they have no visitation rights. States also could enforce CFPA regulations following consultation with the CFPA.

Consumer Financial Protection Oversight Board

A Consumer Financial Protection Oversight Board would advise the CFPA Director regarding the consistency of a proposed regulation with the prudential, market or systemic objectives administered by the agencies that comprise the Board; with the CFPA Director’s strategies; and with enhancement of consumer protection. The Board would have no executive authority. The Board would be made up of the following individuals: Chair of the Federal Reserve Board of Governors, Comptroller of the Currency, Chair of the FDIC, Chair of the National Credit Union Administration, Chair of the Federal Trade Commission, Secretary of Housing and Urban Development, Chair of the Liaison Committee of Representatives of State Agencies to the Financial Institutions Examination Council. Additionally, the President would appoint five more members, subject to Senate confirmation, who are experts in the fields of consumer protection, fair lending and civil rights; who represent depository institutions that primarily serve underserved communities; or who represent communities that have been significantly affected by higher-priced mortgage loans, as determined by the CFPA Director.

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