

The Consumer Financial Protection Agency: Different Ship, Same Chairs?

By Broox W. Peterson

Creation of the Consumer Financial Protection Agency (CFPA) will help protect consumers from the kinds of practices, products, and abuses that were contributing causes to the Great Recession. The CFPA will be an unnecessary regulatory agency that will create regulatory confusion, increase costs, and thus reduce availability of financial products to consumers and harm innovation. (Choose one.)

Whatever your bias, the proposed legislation creating the CFPA approved on October 22, 2009 by the House Financial Services Committee¹ will create a powerful agency with wide-ranging jurisdiction. The CFPA will assume the “consumer financial protection functions” (and many of the related personnel, depending on the agency²) of the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Comptroller of the Currency, the Office of Thrift Supervision, the National Credit Union Administration, the Office of the Secretary of Housing and Urban Development, and the Federal Trade Commission.³ The assumed consumer financial protection functions include “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.”⁴ Functions relating to an agency’s responsibilities under the Community Reinvestment Act of 1977 are not transferred to the CFPA under the proposed legislation.

This article will describe the CFPA and its powers as proposed in the version of H.R. 3126 approved in the House Committee on Financial Services⁵, noting

areas that may change as the bill moves further in the legislative process, with the caveat that the legislative process is essentially unpredictable from the outside (or the inside for that matter). At approximately 291 pages, the proposed legislation contains many details that are important to help understand the implications of the CFPA, and although some readers may not want that much detail, this article attempts to describe most of the relevant provisions of the proposed legislation. The intent is captured in the title of the article: to describe what will be new and what will be the same if the CFPA is created as proposed.

Structure of the CFPA

The CFPA will be headed by a Director with executive powers who will be advised by a Consumer Financial Protection Oversight Board comprised of the heads of the Federal Reserve Board, the national bank regulator, the National Credit Union Administration, the Federal Deposit Insurance Corporation, the Federal Trade Commission, the Secretary of the Department of Housing and Urban Development, and the Chairperson of the liaison committee of representatives of state agencies to the Financial Institutions Examination Council. The Oversight Board will have no executive authority and will be merely advisory. During markup of the legislation in the House Committee, advocates and legislators concerned about conflict between the CFPA’s consumer protection policies and rules and the prudential and systemic objectives of the other bank regulators sought to give the Consumer Financial Oversight Board, or alternatively the other federal regulators, veto power over the decisions of the CFPA, without success.

The CFPA is required to coordinate with other federal and state agencies, including the Secretary of the Treasury, the Federal Trade Commission, Securities and Exchange Commission and the Commodities Futures Trading Commission, to ensure consistent regulatory treatment and enforcement of consumer and investment products, services, and laws. The CFPA will have

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an Office of Financial Literacy and is required to coordinate consumer education initiatives with other federal agencies.

The proposed legislation contains detailed provisions⁶ addressing funding and use of funds by the CFPA, tailored to keep depository institutions from paying for the regulation of non-depository institution covered persons, and ensuring that small and large depository institutions pay similar marginal assessment rates. The Federal Reserve is required to contribute annually to the CFPA an amount equal to 10 percent of total Federal Reserve system expenses.

Powers and Objectives of the CFPA

The CFPA will have a broad mandate to “seek to promote transparency, simplicity, fairness, accountability, and access in the market for consumer financial products or services.”⁷ In pursuing this mandate it is required to accomplish the following objectives:

- (1) consumers have, understand, and can use the information they need to make responsible decisions about consumer financial products or services;
- (2) consumers are protected from abuse, unfairness, deception, and discrimination;
- (3) markets for consumer financial products or services operate fairly and efficiently with ample room for sustainable growth and innovation; and
- (4) traditionally underserved consumers and communities have access to financial services.⁸

These objectives in themselves illustrate the difficult task facing the CFPA, since they can pull in different directions and require balancing that will probably be imperfectly achieved, if at all. Needless to say, supporters of the proposed legislation think that the CFPA can succeed in balancing these objectives, while opponents do not.

With certain exceptions, the CFPA will have the “exclusive authority to prescribe regulations, issue guidance, conduct examinations, require reports, or issue exemptions” with regard to “enumerated consumer laws”,⁹ the legislation creating the CFPA, and

regulations adopted pursuant to it, or any other laws responsibility for which are transferred to the CFPA by the proposed legislation or other law.¹⁰ However, in doing so, the CFPA must “consider the potential benefits and costs to consumers and covered persons, including the potential reduction of consumers’ access to consumer financial products or services, resulting from such rule” and “consult with the federal and state banking agencies, or other federal agencies, as appropriate, regarding the consistency of a proposed rule with prudential, market, consumer protection, or systemic objectives administered by such agencies.”¹¹ This is another example of the proposed legislation’s acknowledging the tension between regulation and availability of consumer financial products and services, as well as the possible conflict with the safety and soundness concerns of the prudential and systemic regulators.

It is fair to say that the CFPA will be diligent in its efforts to comply with the balancing objectives in the proposed legislation as it goes about its business, and it will have adequate budget and staff to do so. It also seems fair to say that the political pressures that led to its creation will create a “thank god I’m here” mentality at the agency that will lead to rules and regulations that do not exist today, covering activities and entities previously unregulated, at least at the federal level (and that there will be regulatory turf wars from time to time).

Examination Powers

Examination powers of the CFPA will be tailored to the risk posed to consumers by an entity,¹² and reports and information from other federal agencies will be used in addition to *de novo* examination. To address objections that adding another regulator to the examination schedule will be burdensome, especially to smaller institutions, examinations by the CFPA of covered persons also regulated by another federal banking agency will be coordinated and conducted simultaneously by both agencies, and draft reports will be shared and comments of the other regulator taken into account.¹³ The CFPA will pursue arrangements with state regulators with the same goals. During markup of the legislation in the House Committee community banks and credit unions won the right to remain with their existing regulators for examination purposes.

In the event of a conflict in the “supervisory determinations”¹⁴ of the CFPA and another federal banking

agency, the proposed legislation provides a conflict resolution escalation process that starts with a request from the examined institution that the agencies reconcile the conflict and, failing that, an appeal to a governing panel consisting of previously uninvolved representatives from each agency and one representative from the agency that is heading the FFIEC (or the next scheduled head agency of the FFIEC if the current head agency is a party to the conflict). Ideally the requirement in the proposed legislation that the CFPA coordinate its rulemaking with the other agencies' objectives will make appeals process moot. Frankly, if a dispute gets that far it is hard to imagine that the decision of the governing panel will be taken as the last word from the losing agency and its supporters, and Congress will have to be the final arbiter.

Enforcement Authority and Penalties

The CFPA will have primary enforcement authority for the laws and regulations within its jurisdiction, although any of the other federal regulatory agencies from which it assumed consumer financial protection responsibilities will have back-up enforcement authority if the CFPA fails to act after notice of a violation from that agency.¹⁵ There is an exception allowing the Federal Trade Commission to initiate enforcement actions on its own initiative (unless the CFPS has moved first, in which case the Commission is stayed), although prior consultation with the CFPA will be required and the CFPA will be able to intervene in any litigation. State attorneys general will also have the power to enforce in state or federal court the regulations that the CFPA has adopted or is responsible for, subject to requirements similar to those applicable to the Federal Trade Commission.¹⁶

Enforcement authority of the CFPA will include the full arsenal available to federal regulatory agencies, including subpoenas and civil investigation demands,¹⁷ hearings and adjudicative proceedings (including cease-and-desist proceedings),¹⁸ and civil litigation¹⁹ to enforce or ensure compliance with any law, regulation, or other requirement within the authority of the CFPA. Legal and equitable remedies for violations are authorized, including rescission or reformation of contracts, refund of moneys or return of real property, restitution, compensation for unjust enrichment, payment of damages, public notification regarding the violation, including assessment of the costs of notification,

limits on the activities or functions of the person, and civil money penalties, although punitive damages are expressly prohibited.²⁰ Costs of successful enforcement by administrative hearing or litigation can be recovered by the CFPA or any state agency permitted to bring enforcement actions under the proposed legislation.²¹

The civil penalties that are authorized in the proposed legislation include:

1. Up to \$5,000 per day for any violation of a law, regulation, final order, or condition imposed in writing by the CFPA, or failure to pay any fee or assessment;
2. Up to \$25,000 per day for reckless violation of any laws or regulations or violation of regulations requiring fair dealing with consumers adopted by the CFPA under § 136 of the proposed legislation; and
3. Up to \$1,000,000 per day for any knowing violation of the proposed legislation, any enumerated consumer law, or any regulation prescribed or order issued by the CFPA under the proposed legislation.²²

Note these penalties will effectively supersede any lesser penalties that currently are contained in the "enumerated consumer laws" for their violation.

The CFPA is given discretion to match the amount of actual civil penalty assessed to the circumstances.

Scope of Jurisdiction of the CFPA: The States Get a Partner

Under the proposed legislation, the CFPA will extend federal regulatory authority to financial activities of entities previously regulated only by the states, if at all. The original draft of the bill was even more expansive in potential coverage (perhaps unknowingly), but was pared back in the version of H.R. 3126 approved by the House Committee. Unless drastically reduced further, the jurisdiction of the CFPA will cover business models that have not been previously subject to federal regulation, thus greatly expanding the scope of federal regulatory authority in consumer financial services.

Covered persons that are not regulated depository institutions or credit unions or other excluded persons will be required to register with the CFPA.²³ Based on an assessment of the risk to consumers posed by a financial activity, the CFPA can require reports and

conduct examinations of the covered persons required to register. Report content can include description of the business and the consumer financial products or services provided, business location, financial condition, ownership and management details, and compliance with applicable laws and regulations. Examination powers of the CFPA with respect to these entities are the same as for any covered person, except that the proposed legislation expressly requires the CFPA to concentrate on those registered covered persons posing the highest risk to consumers. To the extent that state registration or licensing requirements already are in place for a covered person, the CFPA will consult with those states regarding coordination of requirements and systems.²⁴

Who Is a Covered Person?

The CFPA's jurisdiction will reach any "covered person", defined in the proposed legislation.²⁵ A covered person is "any person who engages directly or indirectly in a financial activity, in connection with the provision of a consumer financial product or service".²⁶

The term "provision of a consumer financial product or service" is defined as "the advertisement, marketing, solicitation, sale, disclosure, delivery, or account maintenance or servicing of a consumer financial product or service."²⁷

A "consumer financial product or service" is any product or service for consumer use that arises from one or more "financial activities."²⁸

The definition of "financial activity"²⁹ consists of a list of types of consumer financial services providers and activities and the outsourcing "cloud" that enables them. The specifics of that definition are discussed in the next section.

There is another type of entity not falling under the definition of covered person that is nonetheless subject to CFPA jurisdiction, a "service provider"³⁰, discussed later in this article.³¹

Definitions of Financial Activity

"Deposit-taking" activities head the list, and this is clarified in §101(13) of the proposed legislation to include not only the traditional deposits of banks and other financial institutions but also "the receipt of

money or its equivalent . . . received or held by the covered person (or an agent for the person) for the purpose of facilitating a payment or transferring funds or value of funds by a consumer to a third party." This could encompass PayPal and similar business models as well as gift "wish list" services, although I would expect some disputes over who is agent to whom in these business models, where chartered financial institutions actually hold the deposits. The inclusion of the money services business model here seems redundant to the specific definition of those businesses as a financial activity, so perhaps the intent is to give the CFPA the authority to bring those business models under the Electronic Funds Transfer Act, since the question of what constitutes a deposit account for purposes of jurisdiction under that Act has been discussed for years.

The sale, provision or issuance of stored value is a financial activity, with the caveat that a seller of stored value products is a covered person only if it influences the terms and conditions of the stored value product. Under this definition, retailers selling stored value products issued by others (the "j-hook" business model) are not covered persons (unless the card is the retailer's), but intermediaries designing and providing turn-key programs to third parties (e.g. mall gift cards, employee benefits and incentive cards) based on stored value or gift cards issued by banks likely are.

Financial data processing "by any technological means" involving financial, banking, or economic data is a financial activity. The definition covers data processing services, providing access to data processing or transmission facilities for hire, and providing advice regarding processing or archiving. There is an exclusion for entities that

1. "unknowingly or incidentally" transmit, process, or store financial, banking or economic data "in a manner that such data is undifferentiated from other types of data that the person transmits, processes, or stores";
2. Do not "provide to any consumer a consumer financial product or service in connection with or relating to in any manner financial data processing"; and
3. Do not "provide a material service to any covered person in connection with the provision of a consumer financial product or service."

The exclusion defined in (1)-(3) seems to exempt general telecommunication providers, Internet service providers, and intermediary processors that process or carry undifferentiated traffic from multiple sources. However, the definition is difficult and under one plausible interpretation the exclusion is not available if the services involve the processing or transmission of advertising, marketing, solicitation, sale, disclosure, delivery, account maintenance or servicing information (the definition of providing a consumer financial product or service) relating to a consumer financial product or service. There is also no definition of what constitutes providing a “material service”, absence of which is necessary to qualify for the exclusion (the definition was deleted during markup of the legislation). The extent of coverage of financial data processors under the proposed legislation is unclear and will likely create confusion if enacted as written.

Extending credit and servicing loans is a financial activity, including acquiring and brokering loans, and related services such as appraisals and credit insurance. In addition to the obvious, this definition also probably encompasses many of the Web 2.0 business models involving online borrowing that have been difficult to characterize under existing state and federal regulation, such as person-to person lending communities like Prosper and Lending Club (and other more specialized loan facilitators, such as those involving student loans). The proposed legislation does reserve exclusive regulatory jurisdiction to the Securities and Exchange Commission and the Commodities Futures Trading Commission with respect to persons registered or required to register as a broker-dealer, investment advisor, or investment company. Prosper and Lending Club have been required to register only their person-to-person loan product facilities as securities, leaving the entities themselves subject to CFPA jurisdiction, if any meaningful domain remains given the S-1 registrations of the products of these entities.

Collection of “consumer report information” and “other account information” is a financial activity. This covers the traditional credit reporting business model, but the CFPA apparently will also have jurisdiction, as an example, over entities creating and maintaining transactional databases not amounting to consumer reports under the Fair Credit Reporting Act and providing them to third parties for use in behavioral marketing or

for other purposes. In fact, this would not be inconsistent with the transfer to the CFPA of authority under existing privacy laws, such as Gramm-Leach-Bliley.

Persons acting as an investment advisor or financial advisor and not regulated by the Securities and Exchange Commission, the Commodities Futures Trading Commission or similar state regulators may be subject to CFPA jurisdiction. Again, using person-to-person lending service providers as an example, integrating loan quality rating information and financial education materials with the service, as they do, might be deemed a financial advisor activity subject to CFPA jurisdiction and requirements.³² Other activities deemed financial advising include credit counseling and debt renegotiation or foreclosure prevention services.

Other specific financial activities defined in the proposed legislation are check guarantee services, debt collection, real estate settlement services, leasing or acting as a broker, agent, or adviser in connection with the leasing of real or personal property, and acting as a custodian of money or financial instruments.

The Director of the CFPA is further authorized to define additional financial activities after a finding that (i) the activity has, or there is a substantial likelihood that the activity will have, a material adverse impact on the creditworthiness or financial well being of consumers; (ii) the activity is incidental or complementary to any other financial activity regulated by the Agency³³; or (iii) the activity is entered into or conducted as a subterfuge or with a purpose to evade any requirement under this title, the enumerated consumer laws, and the authorities transferred under subtitles F and H.³⁴ Subsection (ii) seems to expand significantly the reach of the CFPA over non-financial entity activities.

Service Providers

The CFPA will have jurisdiction over certain entities that provide support services to covered persons, although the jurisdiction is more limited than for covered persons. The general definition of service provider³⁵ is “any person who provides a material service to a covered person in the provision of a consumer financial product or service”. The remainder of the definition specifies certain activities that are included within the general definition (a non-exclusive list), and then specifies what activities are not deemed covered by the definition.

It is easier to start with the exclusions. Excluded from coverage are support services “of a type provided to businesses generally or a similar ministerial service.” Payroll services might be an example. Also excluded are services with no material affect on the terms and conditions for, the operation or performance of, or the inclination of consumers to use the service. Marketing services would not be excluded. Providing time or space for consumer financial service advertising is expressly excluded.

Activities that make entities service providers (assuming the activities rise above the threshold created by the exclusions described above) are (i) activities “facilitating the design of, or operations relating to the provision of” consumer financial products or services, (ii) direct interaction with the consumer regarding a consumer financial product or service, or (iii) processing of transactions relating to a consumer financial product or service. Inclusion of consumer financial product or service processing here has to be reconciled with the separate definition making financial data processors covered persons.³⁶ Unfortunately, the logic to do so using the legislative language is not readily apparent.

The inclusion of service providers within the scope of the jurisdiction of the CFPA acknowledges the reality that outsourcing is widespread in the consumer financial services industry. The legislation subjects service providers to some of the same provisions applicable to covered persons. The CFPA will have the right to require periodic reports from service providers for compliance and risk monitoring and research purposes,³⁷ the right to examine service providers,³⁸ and the right to provide information to and obtain information from other agencies regarding service providers. The CFPA will have the authority to prescribe minimum standards applicable to service providers³⁹ and to enforce these standards.⁴⁰ Service providers will not be required to register with the CFPA.⁴¹ Service providers will be governed by rules adopted by the CFPA regulating persons interacting directly with consumers,⁴² and defining unfair, deceptive or abusive practices.⁴³

Specific Exclusions from Coverage

Exclusions for specific entities were added to the legislation after criticisms of the potential breadth of the definition of covered person in the bill originally introduced.⁴⁴ The list includes merchants, retailers and

other sellers of non-financial services providing credit to customers, persons regulated by the Securities and Exchange Commission, the Commodities Futures Trading Commission, and similar state regulators, operators or providers of qualified retirement or eligible deferred compensation plans, persons regulated by a federal housing finance agency, accountants, attorneys, tax preparers, realtors, and automobile dealers providing financing. These entities will remain with their existing regulators, if any.

Specified Rulemaking Powers

The proposed legislation notes specific rulemaking activities, described below, that the CFPA will be responsible for, although these are not exclusive and the CFPA will have the authority to engage in any rulemaking within its mandate and objectives under the proposed legislation, the enumerated consumer laws, or any other legislation that the CFPA will be responsible for administering. It is not clear how much scope the CFPA will have under the foregoing authorities to adopt regulations that effectively modify the enumerated consumer laws enacted by Congress or other enabling legislation. There are few limits on CFPA powers provided in the proposed legislation itself.⁴⁵ Given the lack of restriction in the proposed legislation and the deference shown by the courts to agency interpretations of enabling legislation,⁴⁶ the CFPA may be able to stretch the underlying statutory authorities beyond the original intent of Congress to address new circumstances.

The CFPA will have authority to prescribe and enforce regulations defining unfair, deceptive, or abusive practices in connection with the offering of or providing of a consumer financial service.⁴⁷ In some respects, this authority is similar to that of the Federal Trade Commission (FTC), although “abusive” practices are not part of the standard for FTC enforcement powers under § 5 of the Federal Trade Commission Act.⁴⁸ Since the CFPA assumes the FTC’s jurisdiction under the “enumerated laws,” this may be an expansion of rulemaking or enforcement power over that currently existing. In one respect the FTC’s enforcement standards will remain intact, with any finding of “unfairness” requiring a “reasonable basis to conclude that the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers and such substantial

injury is not outweighed by countervailing benefits to consumers or to competition.” Another power expressly granted to the CFPA is to adopt regulations designed to *prevent* unfair, deceptive, or abusive practices, which is a corollary of the CFPA’s authority to adopt regulations to prevent evasions of enumerated laws, the legislation enabling the CFPA, or regulations adopted pursuant to that legislation.

The proposed legislation contains provisions urging states to adopt standards, including registration and licensing requirements, applicable to covered persons other than depository institutions, credit unions, or excluded persons designed to “deter and detect unfair, deceptive, abusive, fraudulent, or illegal transactions in the provision of consumer financial products or services.”⁴⁹ The CFPA has the authority, subject to consultation with federal and state agencies regarding consistency with consumer protection, prudential, market, or systemic objectives, to prescribe minimum standards that will apply in the absence of equally or more protective state regulation. The standards will address background checks, registration, licensing or certification, bond or similar financial requirements, records maintenance, and “procedures and operations of the covered person relating to the provision of, or maintenance of accounts for, consumer financial products or services.”⁵⁰ The CFPA will have the authority to enforce any federal or state statutes or regulations incorporating those standards.

The CFPA also is authorized to adopt regulations “to ensure the timely, appropriate and effective disclosure to consumers of the costs, benefits, and risks associated with any consumer financial product or service,”⁵¹ including adoption of safe harbor model disclosures. In doing so, the CFPA must take into account disclosures in existing consumer laws to “enhance consumer compliance and reduce regulatory burden” and can provide guidance to promote compliance.

The CFPA may adopt regulations, issue orders, and provide guidance with respect to sales practices “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.”⁵²

The CFPA will also prescribe regulations establishing duties on covered persons and their employees or agents who interact with consumers in the provision of a consumer financial product or service ensuring fair dealing, including restrictions on compensation practices (not including amounts) likely to lead to abuse.⁵³ The provision expressly limits enforcement of these regulations to administrative enforcement, with courts having no jurisdiction.

The CFPA will establish standards and procedures for the approval of disclosures made in connection with pilot programs.⁵⁴

Covered persons may be required by regulation to make available to consumers “information relating to any transaction, series of transactions, or to the account including costs, charges and usage data” with regard to consumer financial products or services provided to the consumer. The obligation does not cover information that cannot be retrieved in the ordinary course of business, confidential commercial information, risk management information, or other information confidential by law, and no covered entity will be required (by this provision) to collect and maintain any records regarding a consumer.⁵⁵

Finally, an amendment added at markup specifically addresses remittance transfer business practices in some detail, and orders the Federal Reserve to study the feasibility of using international ACH capabilities to support these transfers.⁵⁶

Preservation (Some Would Say Extension) of State Authority

Much of the debate over the proposed creation of the CFPA has concerned the concurrent powers that will be granted to the states to enforce both federal and their own consumer protection laws against covered persons. The section of the proposed legislation that addresses this issue is pointedly entitled “Preservation of State Law,” although that is only partially accurate since the proposed legislation also reverses or at least limits significantly existing federal preemption rules and Supreme Court decisions exempting federally chartered financial institutions from enforcement of certain state laws .

The preservation aspect of this section of the proposed legislation permits the states to adopt and enforce

their own consumer protection laws against covered persons so long as those laws are not inconsistent with the proposed legislation, with more protective state legislation expressly deemed not inconsistent.⁵⁷ Further, the proposed legislation will not alter any pre-existing preemption rules and rights of the states specified in the “enumerated consumer laws”⁵⁸ for which responsibility will be transferred to the CFPB.

Except for possibly two,⁵⁹ these enumerated consumer laws contain preemption provisions in some form. Some mirror the preemption rule stated in the proposed legislation.⁶⁰ Other enumerated consumer laws mirror the preemption rule in the proposed legislation but add a provision permitting classes of activities to be exempted under the federal law if the responsible federal regulatory agency determines that there is an equally protective and enforced state regulatory scheme that is applicable.⁶¹ The Truth in Lending Act (TILA) permits more protective state regulation and defers to equally protective state law except for specified provisions of TILA that totally preempt state regulation.⁶² The Fair Credit Reporting Act preempts inconsistent state laws and totally preempts state law with respect to certain provisions.⁶³

The proposed legislation will impose one preemption standard on all future rules and regulations adopted pursuant to authority granted to the CFPB. If the intent of Congress is to delegate future consumer financial protection policy-making to the CFPB, as it seems to be with the proposed legislation, this seems shortsighted at best. The argument made by proponents of the preemption provisions of the proposed legislation is that it will enable States to react earlier to local problems and to act as “consumer protection laboratories” for the rest of the nation. However, it is clear that Congress at times in the past has determined that national consistency of regulation is more important than allowing State experimentation, and it is not clear why that will not also be the case in future regulatory actions by the CFPB. Given the strong indication of congressional intent in connection with the proposed legislation not to preempt state laws, the CFPB will find its hands tied unless it can obtain agreement from the states to allow particular provisions to preempt their laws, and I would not place any bets on that.

The proposed legislation will also generally subject national banks and federally chartered thrift institutions

to state laws (not just consumer financial protection laws) and enforcement authority through amendments to the National Bank Act⁶⁴ and the Home Owners Loan Act.⁶⁵ The amendments provide that these federally chartered entities are subject to state laws unless (i) those laws have a discriminatory impact on the federally chartered institutions relative to state chartered institutions, (ii) the state law is preempted pursuant to other federal legislation, or (iii) the federal regulator responsible for the federally chartered institution determines, on a case by case basis, that the state law “prevents or significantly interferes with the ability of” the institution to engage in the business of banking.⁶⁶

The provision permitting the federal regulator to preempt certain state laws on the grounds of significant interference was a compromise added in markup of the legislation to address industry concerns about the total elimination of federal preemption in the original draft of H.R. 3126. The power harkens back to the standard articulated in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), but the proposed legislation expressly limits how that standard can be applied. The amendments expressly require that any preemption of state law under the amendments is case-by case, and that courts must not give any deference to an agency claim that a state law is preempted.⁶⁷ The amendments giving rise to this scheme are a grand compromise, with something for both sides of the issue, although this is probably not the end of the debate, which will continue as the legislation moves through Congress.⁶⁸

If the state laws in question are consumer financial laws⁶⁹ there are even more stringent limitations on the preemption power of the federal regulators. The federal regulator must base any exercise of this power on “substantial evidence, made on the record of the proceeding” supporting a finding of prevention or significant interference with the exercise of a federally chartered institutions’ banking powers.⁷⁰ Further, prior to adopting a preemption regulation with respect to a state consumer financial law, the federal regulator must, in consultation with the CFPB, find that there is a federal law applicable to the federally chartered institution that regulates “the particular conduct, activity, or authority that is subject to such provision of the State consumer financial law.”⁷¹ This and other restrictions in the amendments are designed to prevent the use

of “field” preemption by federal regulators to prevent state regulation, which was a principal objection to the OCC’s 2004 rules.⁷² Finally, any preemption regulations must be revisited every five years and continued, amended or rescinded as appropriate.⁷³

The legislation permits state attorneys general to enforce against federally chartered institutions state consumer protection laws (or similar federal laws permitting state enforcement) by litigation.⁷⁴ This includes the right to require the financial institution to produce records relating to investigation of violations of state or federal consumer protection law and to obtain injunctive relief or damages for residents of the state harmed by a violation. This affirms and extends the recent decision of the United States Supreme Court in *Cuomo v. Clearinghouse Association*.⁷⁵

The proposed legislation also amends the National Bank Act and Home Owners Loan Act to clarify that non-depository institution subsidiaries or affiliates of national banks or federally chartered thrift institutions are subject to state consumer financial laws to the same extent as any other entity subject to those laws, although the provision applicable to federally chartered thrifts adds “and consistent with Federal law.” This may render obsolete *Watters v. Wachovia Bank*⁷⁶ a 2007 United States Supreme Court decision that upheld the authority of the Comptroller to adopt and enforce a regulation that exempted non-depository subsidiaries of national banks from any state laws that the parent national bank was not subject to.⁷⁷ It is not clear what the status of subsidiaries and affiliates of federally chartered thrifts will be, given the added language described above.

Conclusion

Returning to the title of this article, it appears that the proposed legislation creating the CFPB will do more than simply reorganize the consumer protection functions of the existing regulators into one agency. The legislation will empower the new agency with broad authority to make policy and adopt and enforce regulations to protect consumers in connection with consumer financial products previously unregulated on the federal level and to set minimum standards for such regulation nationwide. As a practical matter the new agency will have authority for more chairs than it will have desk, so the full implications of the powers of the new agency will not be clear for years.

Notes

1. Consumer Financial Protection Agency Act of 2009, H.R. 3126, 111th Congress, 1st Session (approved by House Financial Services Committee on Oct. 22, 2009).
2. H.R. 3126 § 164
3. H.R. 3126 § 161-a. Only the consumer protection responsibilities of the Federal Trade Commission under the “enumerated laws” (*infra* n.9) are transferred. The remaining authorities of the Federal Trade Commission are unaffected.
4. H.R. 3126 § 161-d.
5. The Committee print of H.R. 3126 incorporating all amendments to the Discussion Draft dated Sept. 25, 2009, that were approved during markup was not available at the publication deadline for this article, so some citations here may be slightly incorrect.
6. H.R. 3126 § 119.
7. H.R. 3126 § 121-a.
8. H.R. 3126 § 121-b.
9. Defined in § 101(15) of H.R. 3126 as the Alternative Mortgage Transaction Parity Act, 12 U.S.C. § 3801, *et seq.* (2009), the Electronic Funds Transfer Act, 15 U.S.C. § 1693, *et seq.* (2009), the Equal Credit Opportunity Act, 15 U.S.C. § 1691, *et seq.* (2009), the Fair Credit Reporting Act, 15 U.S.C. § 1681 (2009) (subject to exclusion for provisions relating to the red flag rules and requirements regarding disposal of records, responsibility for which remain with the Federal Trade Commission), the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* (2009), the Federal Deposit Insurance Act, 12 U.S.C. § 1831(t) (2009) (provisions relating to notification of consumers if institution does not have federal deposit insurance), §§ 502-509 of the Gramm-Leach-Bliley Act, 15 U.S.C. § 6802, *et seq.* (2009), the Homeowners Protection Act of 1998, 12 U.S.C. § 4901, *et seq.* (2009), the Home Mortgage Disclosure Act, 12 U.S.C. § 2801, *et seq.* (2009), the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601, *et seq.* (2009), the Secure and Fair Enforcement for Mortgage Licensing Act, Pub. L. 110-289, div. A, title V, July 30, 2008, 122 Stat. 2810 (12 U.S.C. § 5101, *et seq.*) (2009), the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.* (2009), and the Truth in Savings Act, 12 U.S.C. § 4301, *et seq.* (2009).
10. H.R. 3126 §§ 122(b)(1) and (d).
11. H.R. 3126 § 122(b)(2).
12. H.R. 3126 §§ 122(c), 128(a).
13. H.R. 3126 § 123.
14. “Supervisory determinations” expressly do not include decisions to liquidate an institution, supervisory ratings or determinations by an agency, or any regulation or guidance or order of general applicability. H.R. 3126 §§ 123(c)(B), 123(h).
15. H.R. 3126 § 122(e).
16. H.R. 3126 § 142.
17. H.R. 3126 § 152.
18. H.R. 3126 § 153.
19. H.R. 3126 § 154.

20. H.R. 3126 §155(a).
21. H.R. 3126 § 155(b).
22. H.R. 3126 §155(c).
23. H.R. 3126 § 128.
24. In fact, there is widespread state regulation of most of the types of previously non-federally regulated businesses and activities that the CFPA will have jurisdiction over. A non-comprehensive list includes state-chartered banks and financial institutions, consumer finance companies, retail installment finance companies, appraisers, mortgage lenders and brokers, loan servicers, repossession servicers, debt collectors, check cashers, money transmitters, payment instrument issuers and sellers, currency exchangers, and foreign transmittal agencies (examples from Massachusetts and Florida).
25. H.R. 3126 § 101.
26. H.R. 3126 § 101(8)(A)
27. H.R. 3126 § 101(27).
28. H.R. 3126 § 101(7).
29. H.R. 3126 § 101(18).
30. H.R. 3126 § 101(32).
31. *Infra* n.40 and accompanying text.
32. During markup this section was amended to exclude financial advisory publications of general circulation and financial advisory services relating to government issued or guaranteed securities.
33. Expressly excluded from coverage under this provision are identity authentication or validation, risk management, and anti-money laundering information or service providers, and public or other record retrieval services.
34. H.R. 3126 § 101(18)(M).
35. *Supra* n.34.
36. H.R. 3126 § 110(18)(f).
37. H.R. 3126 §§ 122(c)(1), 125(a)(1), 126(a)(2).
38. H.R. 3126 § 122(c).
39. H.R. 3126 § 135(b)(1). *See infra* n.53 and accompanying text.
40. H.R. 3126 § 135(b)(3). *See supra* n.19 and accompanying text.
41. H.R. 3126 § 135(b)(2).
42. *See infra* n.55 and accompanying text.
43. H.R. 3126 § 131.
44. H.R. 3126 § 124.
45. Two examples are prohibitions on (i) imposing usury limits (H.R. 3126 § 214(i)) and (ii) requiring that a covered person provide a particular consumer financial product or service (H.R. 3126 § 140).
46. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844, 865 (1984); *United States v. Shimer*, 367 U.S. 374, 381-382 (1961) (“where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involves questions of law or fact, will not be reviewed by the courts unless he has exceeded his authority or . . . his action was clearly wrong”) (internal quotations omitted).
47. H.R. 3126 § 131.
48. 15 U.S.C § 45 (2009).
49. H.R. 3126 § 135(a).
50. H.R. 3126 § 135(a)(5).
51. H.R. 3126 § 132(a).
52. H.R. 3126 §133.
53. H.R. 3126 § 136(a).
54. H.R. 3126 §134.
55. H.R. 3126 § 137.
56. H.R. 3126 § 139.
57. H.R. 3126 § 141.
58. *Supra* n.9.
59. The Federal Deposit Insurance Corporation Act, (12 U.S.C. §1831(t) (2009) (states not prohibited from adopting different disclosure standards regarding whether federal deposit insurance covers a product, but are stayed from enforcing those laws if the FDIC has moved first to enforce a violation of the state or federal requirement), and the Secure and Fair Enforcement for Mortgage Licensing Act, Pub. L. 110-289, div. A, title V, July 30, 2008, 122 Stat. 2810 (12 U.S.C. § 5101, *et seq.*) (2009) (sets standards for states to adopt, absent which federal legislation will be imposed, which is a different approach with similar effect).
60. *E.g.*, the Alternative Mortgage Transaction Parity Act, 12 U.S.C. § 3803(c) (2009) (although states had ability to opt out of pre-emption within three years of the October 15, 1982, effective date of the Act), the Gramm-Leach-Bliley Act, 15 U.S.C. §6807 (2009), the Real Estate Settlement Procedures Act, 12 U.S.C. § 2606 (2009), the Truth in Savings Act, 12 U.S.C. § 4312 (2009), the Fair Debt Collection Act, 15 U.S.C. § 1692(d)(2009), the Homeowners Protection Act, 12 U.S.C. § 4908 (2009) (certain state laws enacted within two years of July 29, 1998, effective date of the Act are not preempted unless inconsistent; state laws not qualifying for this preemption protection are totally preempted).
61. *E.g.*, the Equal Credit Opportunity Act, 15 U.S.C. § 1691(d) (2009), the Electronic Funds Transfer Act, 15 U.S.C. § 1693(q) (2009), the Home Mortgage Disclosure Act, 12 U.S.C. § 2805 (2009).
62. Truth in Lending Act, 15 U.S.C. § 1620(e) (2009) (total preemption with regard to provisions relating to credit card applications, credit card renewal, and mortgage disclosure requirements).
63. Fair Credit Reporting Act, 15 U.S.C. § 1681(t) (2009) (*e.g.*, total preemption with respect to rules relating to prescreening, time to respond to consumer complaint of inaccuracy in records, certain duties of persons taking adverse action based on information in a consumer report, information prohibited from inclusion in a consumer report, duties to provide accurate information to

- consumer reporting agencies, rights of identity theft victims to obtain records, and consumer information sharing with affiliates, although certain pre-existing state schemes relating to some of the above are grandfathered).
64. National Bank Act, ch. 106, 13 Stat. 99 (1864) (codified as amended in scattered sections of 12 U.S.C.).
65. 12 U.S.C. § 1461, *et seq.* (2009).
66. H.R. 3126 §§ 1443, 1476
67. *See* n.31 and accompanying text.
68. It has been reported that Representative Melissa Bean (D-Ill.) has been guaranteed the ability to introduce a floor amendment imposing full federal preemption during the full House debate of H.R. 3126, apparently as part of a deal to get her to agree to withdraw a similar amendment during the markup in the House Financial Services Committee.
69. A state law that “regulates the manner, content, or terms and conditions of any financial transaction . . ., or any account related thereto, with respect to a consumer.” H.R. 3126 § 144(a)(2).
70. H.R. 3126 § 144(c).
71. H.R. 3126 § 144(d).
72. 12 C.F.R. § 7.4009 (2009). The Office of Thrift Supervision has similar policies and interpretations, and H.R. 3126 effectively invalidates the rules of both agencies.
73. H.R. 3126 § 144(e).
74. H.R. 3126 § 145, 146.
75. *Cuomo v. Clearinghouse Association, L.L.C.*, 129 S. Ct. 2710 (2009).
76. *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1565 (2007).
77. 12 C.F.R. § 7.4006 (2009).