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*Boston Bar Association
Morin School of Banking &
Financial Law
THE BUCK STARTS HERE
Overview of Consumer Financial
Protection Agency Act of 2009
August 19, 2009*

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STATUS

- Introduced as HR 3126 July 8, 2009 and referred to Financial Services Committee and Energy & Commerce Committee
- No hearings to date
- Source was Obama administration bill published in June
- Negative testimony before Senate Banking Committee July 23 & 24 from FRB and OCC
- FDIC neutral at Senate Banking Committee August 4 but now publicly opposed



Key Definitions:

“Consumer Financial Products or Services”

any financial product or service used by an individual or his representative for personal, family or household use.

“Financial Product or Service” means a product or service that directly or indirectly relates to, results from or is related to engaging in a “financial activity.”



“Financial Activity”

14 enumerated classes of activities plus whatever else the CFPA may define, each broadly defined, including

- deposit taking
- extending credit or servicing loans
- check guaranty services
- providing credit history
- debt collection
- real estate settlement
- leasing real or personal property
- investment advice
- financial advisors
- financial data processing
- money transmitting
- sale or issuance of with stored value
- money service business
- custodian of money or financial products

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“Covered Person” means anyone who “engages directly or indirectly in a financial activity, in connection with provision of a financial product or service” or anyone who “provides a material service to or processes a transaction on behalf of” such a person.

“Provision” means advertising, marketing, solicitation, sale, disclosure, delivery, account maintenance or servicing of a consumer product or service.

Conclusion: The scope of the products, services and activities regulated and the persons related to those activities that are regulated is broader than any prior definition of “activities financial in nature,” especially insofar as it covers those involved in sales, marketing and processing.

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“Enumerated Consumer Protection Laws” (ECPL)

These are the laws that the CFPB obtains jurisdiction over:

- | | |
|-------|-------------------------|
| AMTPA | RESPA |
| EFTA | SAFE |
| ECOA | TILA |
| FCRA | TISA |
| FCPA | GLBA Privacy Provisions |
| HMDA | Others |



CFPB also assumes “transferred functions” from consumer protection agencies including all “consumer financial protection functions,” meaning research, rulemaking, issuance of orders or guidance, supervision, examination and enforcement activities, powers and duties relating to the provision of consumer financial products and services, including the authority to assess and collect fees for those purposes . . .” § 161(d)



TITLE BY TITLE SUMMARY

Subtitle A Establishment

- 5 member board, 4 presidential appointees plus national bank regulator § 112
- general authority for rulemaking, enforcement, supervision, examination, prosecution, internal organization, budget making and self funding through assessment of supervisory fees and civil money penalties



Subtitle B Powers

§ 121 Mandate:

- Promote transparency, simplicity, fairness, accountability, and access
- Protect consumers from abuse, unfairness, deception and discrimination
- Promote fair operation of markets
- Protect traditionally underserved consumers and communities



§ 122

Full suite of agency powers including

- Rulemaking, orders and guidance
- Examination and reports
- Exclusive rulemaking for areas transferred from FFIEC members and FTC and HUD (but see SEC, CFTC and Department of Justice authority preserved)
- Primary enforcement authority
- No usury authority



§ 123 Information Collection

§ 124 Monitoring for Risk to Consumers

§ 125 Banning Arbitration



Subtitle C – Specific Authority

§ 131 Prohibit Unfair, Deceptive, Abusive Acts and/or Practices (language similar to § 5 of FTCA)

§ 132 Requiring Disclosures

Using powers under all ECPLs and broadly to regulate all communication of covered persons regarding consumer financial products or services

§ 133 Regulating Sales Practices

§ 134 Power to Implement Test or Pilot Disclosures

§ 135 Operational Standards for Covered Persons

- states given first option to prescribe for nonbanks
- banking regulators keep this jurisdiction but not exclusively



§ 136 Authority to Prescribe “Standard Consumer Products”

- Transparent
- lower risk to consumers than “alternative”
- facilitating comparison and assessment of cost/benefits
- having features prescribed by CFPA

Concept: “safe harbor” against “UDAP/abusive” finding

§ 137 Duties of Providers

CFPA may prescribe suitability, fairness and fiduciary duties of providers of consumer financial products and services, including compensation systems



§ 138 Consumer Access to Business Data

Support discovery of business data from providers by consumers

§ 139 Prohibitions

Unlawful to advertise, market, offer, sell, or attempt to enforce any term, agreement, change of terms, fee or charge that is not in conformity with this title and regulations thereunder.

Unlawful to “knowingly or recklessly provide assistance” to any of the foregoing. (Lawyers?)



Subtitle D Preemption

§ 141 CFPA does not preempt anything except “inconsistent” state laws. Anything “more protective” is not inconsistent. Similar ECPL preemption standards also retained.

§ 142 State AGs can enforce CFPA

§ 143 Repeal National Bank Act Preemption with respect to “State Consumer Law”

Effect is:

- Wipes out most of 2004 OCC regulations
- Expands Cuomo (AG enforcement)
- Overrules Watters (bank subsidiary licensing)
- Overrules Marquette and Smiley (interest rate export)

§ 146 – 149 Federal Thrifts Subject to Same Changes to HOLA



Subtitle E Enforcement

CFPA has:

- subpoenas
- CIDs
- hearings and adjudication of violations
- cease and desist
- ex parte cease and desist
- bring civil actions for all legal and equitable remedies

Civil money penalties up to \$1 million/day

Extensive whistleblower protection



Subtitle F Transfer of Functions

§ 161 Transfer of Functions means “research, rulemaking, issuance of orders or guidance, supervision, examination, enforcement activities, powers and duties relating to the provision of consumer financial products and services” of every agency enumerated, including fed, OCC, OTS, FDIC, FTC and NCUA.

Note this transfer of function is broader than the rulemaking under ECPLs.

§ 162 Process to Set “Designated Transfer Date”
Authorities

§ 163 Preserves Prior Acts and Rules of Exiting Regulators

§ 164 Transfer of Existing Regulatory Personnel



Subtitle G – New Ideas

- Collection of Deposit Accounts “HMDA Data”
- Collection of Small Business “HMDA Data”



Subtitle H – Conforming Amendments and “Earmarks”

- Replace references to agencies in ECPLs
- Earmarks
 - TILA minimum payment disclosure on credit card bills
 - FCRA model disclosure
 - HMDA adding new reporting requirements
 - Adding to § 5 of FTC Act “knowingly or recklessly providing substantial assistance” to a violation of the act



Questions?

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The Legal Stuff

Because of its generality, the information provided in this summary may not be applicable to all situations and should not be acted upon without specific advice from legal counsel. If you have any questions concerning this summary or how it applies to any particular entity or circumstance, please contact Richard P. Hackett by phone at (207) 791-1280 or by email at rhackett@pierceatwood.com.



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