

Powers of the Proposed Consumer Financial Protection Agency

- **Scope of Activities Covered by the CFPA**

The proposed Consumer Financial Protection Agency (the “CFPA”) would have jurisdiction over *any* financial activity or related service associated with the provision of financial products or services to be used by a consumer for consumer, family or household purposes, aside from those regulated by the Securities and Exchange Commission (“SEC”) or the Commodity Futures Trading Commission (“CFTC”).

- **The CFPA’s Jurisdiction is Hugely Broad**

The CFPA would have virtually unfettered jurisdiction over the advertisement, marketing, solicitation, sale, disclosure, delivery or account maintenance or servicing of:

- Deposit-taking activities;
- Extension of credit;
- Loan acquisition, brokering or servicing;
- Real estate appraisal;
- Title insurance, credit insurance and mortgage insurance;
- Real estate settlement services, including title insurance;
- Leasing of personal or real property (or acting as an agent, broker or advisor in such activity);
- Credit reporting services;
- Check guaranty services;
- Money transmission and services business;
- Stored value instruments (e.g., debit cards);
- Certain financial data processing, transmission and storage services;
- Debt collection services;
- Investment advice not subject to SEC or CFTC regulation;
- Financial advisory services (e.g., credit counseling, tax planning or preparation, financial management advice, etc.);
- Financial custodial services; and
- Any other financial activity or related service specified by rule by the CFPA.

- **What Entities Are Covered By The CFPA?**

Any person who engages directly or indirectly in a financial activity listed above would be subject to CFPA regulation, including any person who provides a material service to or processes a transaction on behalf of, such financial activity.

- **What Authority Would The CFPA Have?**

Primary supervision and enforcement authority over the consumer financial protection functions currently performed by the federal bank regulatory agencies and the Federal Trade Commission (the “FTC”) would be transferred to the CFPA, including exclusive authority over

all related research, rulemaking, guidance, supervision, examination and enforcement activities. Accompanying this transfer of authority would be the transfer of exclusive rulemaking and examination authority to the CFPB for the consumer protection provisions in at least 16 existing federal consumer protection laws, including the Real Estate Settlement Procedures Act (“RESPA”) and the Truth-In-Lending Act (“TILA”).

- **Other Agencies Would Retain Overlapping Authority**

Nevertheless, other federal regulators, including the banking agencies and the FTC, would retain overlapping, secondary enforcement authority over certain requirements. Further, state attorneys general would also be empowered to enforce federal laws under the CFPB’s authority.

- **Federal Preemption Curbed**

The draft legislation makes clear that “any consumer protection provision in state consumer protection laws” is expressly applicable to national banks, federal thrifts or any operating subsidiaries of these institutions. Under current law, if a state law affects or impairs a national bank’s or federal thrift’s lending activities, it is generally presumed to be preempted.

The proposed legislation preserves and encourages dual federal and state regulation of financial products and services and effectively establishes the CFPB as a regulatory floor for state action, rather than a ceiling.

This overlapping authority has the potential to create uncertainty and additional costs for regulated persons and will necessitate substantial interagency coordination.

- **CFPB Funding**

The CFPB would be funded by: (a) annual fees or assessments imposed by the agency upon persons covered by its authority, and (b) the fees and assessments collected under the various consumer protection laws to be transferred to the CFPB.

- **Rulemaking, Orders and Guidance**

The CFPB is empowered to “prescribe rules and issue orders and guidance as necessary . . . and, by rule or order may conditionally or unconditionally exempt any covered person or consumer financial product or service.”

- **Noteworthy Augmented Powers**

Some notable CFPB powers include:

- The promulgation of model disclosures that would integrate the required TILA and RESPA disclosures within one year, a task that has eluded federal agencies for years.
- The authority to ban or limit the use of pre-dispute arbitration agreements between parties subject to CFPB’s jurisdiction.

- New requirements on entities to collect and publish data on the performance of loans and other financial products to improve CFPA’s regulatory review and analysis.

- **Authority to Prohibit Deceptive Acts**

The CFPA is authorized to take any action to prevent the commission of “unfair, deceptive or abusive acts or practices under federal law in connection with any transaction with a consumer for a consumer financial product or service.”

- **Sales Practices**

The CFPA is empowered to “prescribe rules and issue orders” regarding “sales practices,” a nearly all-encompassing definition.

- **Standard Consumer Financial Products or Services**

The CFPA is authorized to prescribe rules applicable to a “standard consumer financial product or service,” and may adopt rules regarding instances when a “standard consumer financial product or service” must be offered to a consumer before an “alternative consumer financial product or service” is offered.

- **Possible Regulations Emerging for the Draft Legislation**

Moreover, a white paper entitled *Financial Regulatory Reform: A New Foundation* issued recently by the Obama administration provides an indication of the types of regulations that may emerge from the agency once it is operational. Such regulations could impose, among other things:

- Additional disclosure and communication requirements to adequately present to consumers the risks and benefits of financial products and services;
- Tailored restrictions on financial product terms and provider practices;
- Defined standards for “plain vanilla” financial products that are simple and have straightforward pricing;
- Requirements that firms offer standard “plain vanilla” financial products to consumers and, in some cases, prohibitions against offering alternative financial products until after a consumer has opted out of the standard products;
- Heightened duties of care on financial intermediaries, including mortgage brokers, such as a duty of best execution among available mortgage loans and a duty to determine whether a mortgage is affordable to a borrower;
- Restrictions on compensation practices, including a ban on yield spread premiums paid to mortgage brokers and a requirement that mortgage brokers be paid over time based upon continued loan performance rather than in a lump sum at closing;
- A requirement that loan originators or sponsors of securitizations to retain some of the credit risk following securitization of loans;
- A ban on borrower prepayment penalties; and

- Additional operational standards, such as licensing, bonding and recordkeeping requirements and background checks for persons subject to CFPA jurisdiction (excluding persons subject to the jurisdiction of state or federal bank regulatory agencies).
- Other duties on the employees, agents or independent contractors of persons subject to CFPA jurisdiction who deal or communication directly with consumers in the provision of consumer financial products or services.

- **Duties**

The CFPA is authorized to impose “duties” on covered persons, their employees, agents or affiliates, who deal directly with consumers in the provision of a consumer financial product or service as agency deems appropriate to ensure “fair dealing” with consumers.

- **Enforcement Provisions**

Among other things, the proposed legislation declares unlawful:

- efforts to advertise, market, offer, sell or enforce any agreement, term, change in terms, fee or charge in connection with a consumer financial product or service that does not conform to the laws enforced by the CFPA;
- failure or refusal to maintain required records, permit access to or copying of records, or provide required information to the CFPA; and
- knowing or reckless provision of substantial assistance to another person in violation of the CFPA’s prohibitions against abusive, unfair, deceptive or discriminatory practices.