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Commentary: The Proposed Consumer Financial Protection Agency Act

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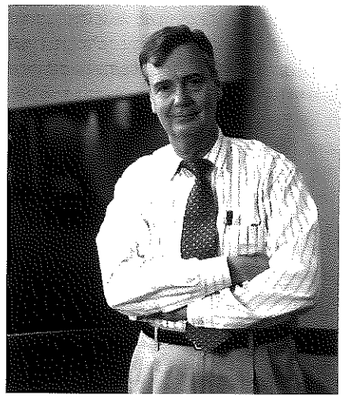
By Alvin C. Harrell



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I. Introduction

By now, presumably anyone interested in consumer financial services law has heard of the proposed Consumer Financial Protection Agency Act of 2009 (the CFPA Act),[1] and understands where this is all headed. So only the briefest description of the CFPA Act will be provided here. A more thorough analysis will have to await the details in any final bill.

At this writing most of the published commentary on the proposal has been at a general level, although as noted above there probably is little doubt as to the intended direction of this initiative. At the 2009 Annual Meeting of the American Bar Association in Chicago, Illinois, on August 3, 2009 the Consumer Financial Services Committee of the Business Law Section conducted a "Chairs Roundtable" program on Financial Services Regulatory Reform, airing pros and cons of the proposed CFPA legislation.[2] Some (though far from all) of the comments below are indebted to this presentation.[3]

II. The Proposed CFPA Act

The CFPA Act seeks to expand and unify federal consumer protection law by creating a new agency with comprehensive authority to regulate all aspects of consumer financial products and services, essentially setting standards, terms, and conditions for all such transactions (with limited exceptions governed by the Securities and Exchange Commission or the Commodities Futures Trading Commission). The Consumer Financial Protection Agency (CFPA) would have full supervisory, examination and enforcement authority over all providers of consumer financial products and services.

The results apparently are intended to include significant displacement of the state and common law principles that traditionally have governed consumer financial transactions in the United States (although, as noted below, not state attorney general enforcement authority), and to consolidate the federal enforcement authority now spread among federal banking regulators and the Federal Trade Commission. Other aspects of the proposed legislation would consolidate the federal banking agencies themselves, and further rearrange the scope of their jurisdiction, but these issues are not covered here.

1. H.R. 3126, 111th Cong., 1st Sess. (2009). Indeed, it is possible that it will have been enacted by the time this article is published, given the accelerated 2009 legislative process. *See, e.g.*, Heartland Community Bankers Association, Bulletin B-09-9 (Aug. 1, 2009) ("Passage of the Consumer Financial Protection Agency Act is a major priority of Chairman [Barney] Frank. He sees it as defining his tenure as Chairman…."). *See also* the Obama administration's Regulatory Reform Framework (the administration's model bill), *available at* www.treas.gov.press sreleases (June 30, 2009); U.S. Dept. of Hous. & Urban Dev., White Paper: Financial Regulatory Reform: A New Foundation: Rebuilding Financial Supervision and Regulation, http: //www.financialstability.gov/docs/regs/FinalReport-web.pdf; Damian Paletta, *Historic Overhaul of Finance Rules*, Wall Str. J., June 18, 2009, at A1. On the other hand, at this writing there is also some opposition, or at least friction, relating to the CFPA Act, *e.g.*, among the federal interests affected by the proposal. *See, e.g.*, Associated Press, *FDIC Chief resists parts of regulatory plan*, Oklahoman, Aug. 15, 2009, at 3B; Stephen Labaton, *Leading Senator Pushes New Plan to Oversee Banks*, N.Y. Times, Sept. 20, 2009, at 1.

2. The panel included: Donald C. Lampe, Committee Chair; former Committee Chairs Lynne Barr and Roland Brandel; and University of Wisconsin Professor of Law James Brown, along with representatives of the Federal Trade Commission and the Illinois Attorney General's office.

3. Of course, your author is responsible for any errors. Moreover, no view should be attributed to any other person on the basis of this article, without further confirmation.

III. Criticisms of the CFPA Act

A. Introduction

As suggested above at Part I., the direction and therefore the criticisms of the CFPA Act are apparent and well known.[4] Clearly it will drastically alter the provision (and availability) of consumer financial services in the United States, marking a major shift toward a centralized administrative structure for determining who will receive consumer credit and what products and services they will receive. Many proponents expressly want this, although it is inevitable that it will further reduce credit availability for some consumers, as well as diminishing the innovation and expansion of financial services products that has previously characterized American finance.[5]

While some proponents argue that the result will be greater simplicity, if that is true it may be the first time that increased regulation has simplified anything. While this is always an appealing argument, it surely represents a triumph of hope over experience.[6]

Consolidation in the financial services industry will almost surely be another result, as small entities realize that they cannot cope with the inevitable, continuous flow of complex new federal regulations and legal requirements. The extensive competition among a traditionally large number of mortgage originators will undoubtedly suffer, to the detriment of consumers.[7]

B. American Bankers Association

Other criticisms have been noted by the American Bankers Association, including:[8] (1) consumer protection will suffer if separated from safely soundness regulation for banks, as the two may work at cross-purposes; (2) the CFPA Act will not close gaps in regulation, it will merely add more layers; (3) the CFPA Act unfairly discriminates against private, voluntary transactions in favor of government mandates; (4) the CFPA Act will impair the free flow of financial products and services; (5) the cost of the CFPA Act will be "extraordinarily large"; and (6) there are far superior ways to attack the targeted problems.[9]

C. An Independent CFPA?

Central to the advocacy favoring the CFPA Act is the argument that (given sufficient authority) the CFPA will be a truly independent agency, to fairly and accurately balance the interests of consumers and all industry segments, without regard to politics. With due respect to the eternal hopes and dreams of mankind, this is very unlikely.[10]

While there are limited exceptions,[11] the history of administrative agencies demonstrates that, as political institutions, they are inherently susceptible to political influences (far more so than an independent judiciary resolving disputes between private parties on the basis of a common law model). Anything is possible, of course, and hope truly does spring eternal, but anyone familiar with the way things work in Washington, D.C. must surely be skeptical of entreaties that the CFPA will be different.

Perhaps some consumer advocates hope that the CFPA Act will be structured to assure that the new agency will be entirely consumer-friendly, and will favor an expanding federal regulatory role.[12] But again, it is unreasonable to expect such an agency to ignore other,

4. *See also* "The Consumer Financial Protection Agency Act (H.R. 3126): The Wrong Approach to Stronger Consumer Protection," American Bankers Association CEO Alert (July 30, 2009); Diane Casey-Landry, Opposing View: *New regulatory body would add complexity, not help consumers*, USA Today, May 27, 2009, at 8A (Ms. Casey-Landry is chief operating officer of the American Bankers Association).

5. This trend is considered desirable by some and is already well underway. *See, e.g., infra* note 45. Moreover, as a trend it is not entirely new. In terms of consumer financial services law and products, the last half-century has been an exceptional, if not unique, period in world history; it now seems likely that the next half-century will be very different. For one prediction, *see* Ben Stein, Everybody's Business, *Decline and Fall: A View From 2089*, N.Y. Times, May 24, 2009, at BU 7 (predicting a collapse of the U.S. currency due to excessive federal spending programs in response to a decline in private credit). Certainly there is no shortage of evidence to support this thesis. *See, e.g.*, Associated Press, *Congress urged to slow U.S. debt*, Oklahoman, Aug. 20, 2009, at 3B; Ann Zimmerman & Sara Murray, *Reluctant Shoppers Hold Back Recovery*, Wall Str. J., Aug. 19, 2009, at A1; Review & Outlook, *Fannie Mae Enron, the Sequel*, Wall Str. J., Aug. 17, 2009, at A10; Marcus Walker & David Gauthier-Villars, *Europe Recovers as U.S. Lags*, Wall Str. J., Aug. 14, 2009, at A1; Review & Comment, *No Exit*, Wall Str. J., Aug. 13, 2009, at A14; Tom Barkley & Deborah Solomon, *Chinese Convey Concerns on Growing U.S. Debt*, Wall Str. J., July 29, 2009, at A8; Justin Lahart, *The Great Recession: A Downturn Sized Up*, Wall Str. J., July 28, 2009, at A12 ("…No Prior Slump Since World War II Has Hurt So Much on So Many Fronts"); Associated Press, *Enterpreneurs see dry spell*, Oklahoman, Oct. 18, 2008, at 6B. As of late 2009, the apparent dangers of this scenario are accelerating. *See, e.g.*, Tom Lauricella, Jason Zwlig & Conor Dougherty, *Drought of Credit Hampers Recovery*, Wall Str. J., Oct. 8, 2009, at A1; Jon Hilsenrath & Mark Gongeoff, *U.S. Stands By as Dollar Falls*, Wall Str. J., Oct. 9, 2009, at A1; Review & Outlook, *The Dollar Adrift*, *id.*, at A18; David Malpass, Opinion, *The Weak Dollar Threat to Prosperity*, Wall Str. J., Oct. 8, 2009, at A17.

6. This is not the only current example. *See, e.g.*, Review & Outlook, *Hope vs. Financial Experience*, Wall Str. J., June 18, 2009, at A16 ("Next time, we're told, the regulators will have 20-20 foresight."); Edward Chancellor, Bookshelf, *Boom, Bust. Repeat.* (book review of CARMEN REINHART & KENNETH ROGOFF, THIS TIME IS DIFFERENT (2009)), Wall Str. J., Oct. 9, 2009, at A17.

7. Based on 2007-2008 HMDA reports, the Federal Reserve Board (FRB) recently estimated that there are 11,170 small mortgage lenders in the United States. *See* Truth in Lending, Final Rule, 74 Fed. Reg. 23289, at 23300 (May 19, 2009). This number will almost certainly decline under the CFPA Act, and with it private mortgage credit availability. *See also* Rep. Frank Lucas, *Lucas: Too Small to Matter*, The Journal Record, July 20, 2009 (noting the likely adverse impact of the CFPA Act on small institutions); *infra* note 45.

8. *See supra* note 4. Your author does not speak for (and has not consulted with) the American Bankers Association (or any other organization); so this discussion is intended to reflect only the personal comments of your author, and may not accurately describe the position of the American Bankers Association.

9. *Id.* It can be noted at this point that the entire CFPA exercise sounds a lot like the problem of Generals still fighting the last war. The targeted problem is an expansion of subprime credit supposedly foisted on consumers unable to resist, and ultimately unwilling or unable to pay due to an economic recession and housing collapse. But the credit and housing bubble was created in large measure by federal monetary policy and housing finance programs, and the collapse was brought about by a decline in

(Continued in next column)

9. *(Continued from previous column)*

the availability of such credit, in part due to an avalanche of new, unwise and onerous state and federal consumer protection laws and regulations. This suggests that the current problem is too little credit, not too much, and too much regulation, not too little. This is implicitly recognized in the recent series of federal stimulus programs, proudly seeking to reflloat the credit markets. *See, e.g.*, Review & Outlook, *The Next Fannie Mae*, Wall Str. J., Aug. 11, 2009, at A16. The suggestion, inherent in the CFPA Act, that what is needed to free-up the credit markets is more restrictive regulations, is counterproductive on its face, though it apparently represents the current political wisdom. Moreover, recent and current federal "reform" efforts notably omit any effort to address the root causes of the current problems, *e.g.*, federal monetary policy and subsidized housing finance programs, in conjunction with onerous legal requirements that discourage private competition and credit. *See also infra* Part III; *supra* note 5.

10. While the political rhetoric of advocacy groups on all sides of the political spectrum regularly reflects such arguments, history consistently paints a different picture. One suspects that the rhetoric often clothes a more partisan purpose. But such hopes live on, in our public debates and policy. *See, e.g., supra* note 6.

11. The FRB is the obvious example, though even this unusual institution is not immune to political pressures. *See, e.g.*, Kimberly Strassel, *Bernanke in the Cross-Hairs*, Wall Str. J., Aug. 14, 2009, at A11.

12. The latter does, indeed, seem likely, as the CFPA will have an inherent self-interest in such expansion.

politically-influential interests. The traditional result of any administrative process tends to be a bias in favor of such interests, on both sides of the spectrum, to the detriment of those less-well represented. While this may result in a balancing of interests, of a sort,[13] it does not necessarily benefit consumers and it is certainly not a politics-free environment.

Realistically, it is inescapable that the CFPA will be more political than independent, with a bias toward larger institutions and other influential interest groups,[14] popular rhetoric to the contrary notwithstanding. This will mean increased consolidation in the industry, with less competition and reduced credit availability, and a displacement of traditional, private judicial remedies by alternatives tailored to influential interests, probably to the detriment of many consumers.

IV. Proponents' Views[15]

A. Introduction

A central precept of the CFPA Act is that there is no conflict between: (1) expanded federal consumer remedies and restrictions on consumer credit; (2) lenders' safety and soundness; and (3) credit costs and availability. While on its face this seems contrary to common sense, as illustrated by Milton Friedman's famous observation that "there is no such thing as a free lunch,"[16] it is a tenet steadfastly advanced by proponents of the CFPA.[17]

It is argued that increased consumer protection (defined as, *i.e.*, more restrictions on private credit transactions and expanded consumer remedies) is consistent with safety and soundness because it will lead to more responsible uses of credit and therefore fewer defaults.[18] In turn this will attract more funding to the credit markets, enhancing credit availability.[19] It is also said that eliminating the "bad actors" by prohibiting their practices will "level the playing field" for more legitimate businesses, allowing them to prosper within the bounds of fairness as prescribed by the CFPA. These arguments have appeal, at least in a political context.

There is, however, by alternatives tailored to influential interests, probably extensive disagreement on these foundational issues, and given this lack of consensus on such basic matters it may be that efforts to debate these issues at a more technical level will be little more than window-dressing. In other words, it may be that political considerations and broad policy arguments will carry the day regardless of the technicalities.

For example, opponents of the CFPA obviously assert that, contrary to the proponents' assertions noted above, there is a direct impact on lenders' safety and soundness each time creditor burdens and liabilities are ratcheted upward, and that inevitably this reduces credit availability and increases its cost. But it is not apparent that there is widespread interest at policy-making levels in having this issue fully explored. Moreover, despite the adverse economic impact of reduced private credit availability, there seems to be surprisingly little concern among policy-makers as to the macroeconomic impact of measures like the CFPA Act. And while the CFPA Act presents an unprecedented expansion of the federal administrative state (and a corresponding diminution of traditional American concepts of federalism and state law), and therefore pushes our legal system into uncharted territory, it appears that this issue also is being ignored.[20] As to these issues, opponents can point to the higher credit costs that apparently have resulted from the federal Truth in Lending Act and its brethren, as well as the dramatic consolidation in the banking system that followed the bank regulatory expansion of 1989–1993.[21] If these effects are further expanded under the CFPA Act, the impact on consumers and the economy will not be beneficial.

Opponents of the CFPA Act may additionally point to the impact of recently-enacted state "predatory lending" laws and federal regulations, in contributing to the mortgage credit contraction that caused the current economic crisis,[22] and may even note that in the aftermath of these new laws and regulations credit and economic activity remains stifled despite almost unbelievable levels of public expenditures and FRB pump-priming.[23] In these circumstances, it seems clearly counter-productive to enact a measure that will result in even more restrictions on credit. But none of this seems to have penetrated into the public consciousness.

In the end, the two sides of this argument seem irreconcilably polarized, and probably will never be able to agree with respect to these broad issues. As with any proposed legislation, this means that any compromises probably must relate to small details and narrow issues.

13. *But see infra* Part IV.

14. *See supra* note 7. No doubt this is one reason why many such groups support the proposal.

15. As emphasized *supra* at notes 3 and 8, your author cannot speak for any others in this discussion, including proponents of the CFPA Act; this discussion is merely an effort to describe those views as your author understands them. As always, the *Quarterly Report* invites contrary or additional views to be submitted for publication.

16. Milton Friedman, *There's No Such Thing as a Free Lunch*, Open Court Publishing Co. (April 1977).

17. Though, it should be noted, some of these advocates have argued for years that there is "too much consumer credit," suggesting that they may consider restraints on private credit and party autonomy to be of paramount importance, regardless of the impact on safety and soundness, and credit costs and availability. *See also infra* this text at note 33.

18. No doubt this will be one result of reduced credit availability. *See id.*

19. Thus reduced credit availability will mean increased credit availability. Got that?

20. *See infra* Part IV.

21. An expansion imposed in response to our previous credit crisis. *See, e.g.*, Alvin C. Harrell, *Penn Square Bank—20 Years Later: Introduction to the Symposium*, 27 Okla. City Univ. L. Rev. 945 (2002); Alvin C. Harrell, *Deposit Insurance Issues and the Implications for the Structure of the American Financial System*, 18 Okla. City Univ. L. Rev. 179 (1993). *See also* Alvin C. Harrell, *It's the Banking Legislation, Stupid*, 47 Consumer Fin. L.Q. Rep. 81 (1993); Alvin C. Harrell, *Strong Banks, Weak Economy*, 46 Consumer Fin. L. Q. Rep. 49 (1992); Alvin C. Harrell, *The Wrath of Khan[gress]*, 45 Consumer Fin. L.Q. Rep. 2 (1991). Rereading these commentaries today may give one a sense of deja vu. *See also infra* note 45.

22. *See, e.g., supra* note 9; Alvin C. Harrell, Commentary, *The Subprime Lending Crisis—the Perfect Credit Storm?*, 61 Consumer Fin. L.Q. Rep. 626 (2007).

23. *See supra* note 5; Cari Tuna, Liz Rappaport & Julie Jargon, *Halting Recovery Divides America in Two*, Wall Str. J., Aug. 29-30, 2009, at A1 (noting that large businesses receiving hefty federal credit subsidies have benefited; but the overall economy has not); Associated Press, *Economic recovery remains in doubt*, Oklahoman, Aug. 29. 2009, at 6B; Christopher Wood, *The Fed is Out of Ammunition*, Wall Str. J., Nov. 24, 2008, at A19.

In this case, however, one must admit that there are few prospects for such.[24]

B. Party Autonomy

Another precept inherent in the proposed CFPA Act is that party autonomy has failed. Our current system of federal consumer credit law, as embodied in the Truth in Lending Act, is based on the need to protect rational consumers by giving them better information on which to base their personal decisions (*e.g.*, better credit disclosures). Proponents of the CFPA say this regime has failed, citing behavioral economists who allege that the rational consumer is a myth. It is argued that behavioral analysis disproves the underpinnings of party autonomy, as a basis for credit allocation, and that the crash of 2007–2008 further demonstrates this point.[25]

In this view, there are three basic approaches to protecting consumers in mortgage credit law: (1) disclosure based on assumptions of consumer rationality and party autonomy; (2) state substantive law and litigation; and (3) federal laws and regulations mandating transaction terms and standardized practices. As noted above, alternative (1) is said to have failed as a fundamental matter; in addition, alternative (2) is said to have failed because of federal preemption of state substantive laws. Therefore, alternative (3) is alleged to be the only viable model, *i.e.*, a federal administrative system mandating acceptable credit transaction terms and conditions (as contemplated in the CFPA Act).

In response to arguments that alternatives (1) and (2) can be made to work better by improved and "more robust" regulations, CFPA Act proponents argue (quite accurately, in your author's view) that this is largely another convenient myth: Seeking "better regulation" is like promising to "eliminate waste in government"--obviously desirable, and politically appealing, but it will never happen.[26]

It should be noted that CFPA Act proponents do not necessarily advocate eliminating alternatives (1) and (2) (at least not immediately); for now, the CFPA is intended to supplement these existing consumer protection regimes (while imposing jurisdiction over them in significant ways). For example, as noted below, the support of state attorneys general is prefaced on language in the CFPA Act designed to curtail federal preemption of state enforcement powers and remedies.

C. Centralization Apace

Despite the purported preservation of state enforcement powers (noted above, and below at Part V.), a central facet of the CFPA Act is a dramatic centralization of consumer credit law, regulation, and enforcement.[27] This is part of a long-standing trend (though one that has progressed in fits and starts), and has strong support (at least as a general proposition) among some seemingly strange bedfellows, *e.g.*, in academia, the national credit industry (and some of its law firms), federal regulatory agencies, public sector labor unions, and consumer advocacy and lobbying groups. Because of this correlation of interests, centralization is likely to be accepted as a desirable goal in almost any national forum (except possibly a meeting of the National Conference of Commissioners on Uniform State Laws, which represents the primary, state law alternative).

From a consumer advocacy perspective, the arguments for centralization (as in the CFPA Act) include: (1) elimination of the benefits of charter choice for creditor institutions; (2) elimination of inconsistencies between the laws applicable to various types of institutions (this suggests a likelihood of more, not less, federal preemption, though not necessarily of state attorney general enforcement authority); and (3) separation of consumer protection from safety and soundness regulation (it is argued that, when these enforcement powers are combined, consumer protection takes a back seat).

D. Other Considerations

Proponents respond to concerns about the impact of the CFPA Act, in terms of creating legal uncertainties (*e.g.*, a fiduciary-like "best interests of the borrower" requirement[28]) by arguing that such uncertainty is needed in order to discourage bad practices, *i.e.*, to prevent creditors from exploring the outer boundaries of permissible practices. It is an interesting (and unusually candid) defense of the ambiguities that plague so many modern laws and regulations, and too often impair private transactions. It is said that such uncertainties don't matter unless you are driving near the edge.[29] Of course, this will reduce innovation (some proponents admit this), but it is argued that less innovation is good because most innovation is designed to lure consumers into untenable transactions.[30]

Proponents also have conceded that the regulatory burden will increase (assurances by some that greater simplicity will result are surely not credible[31]), but say that this is inevitable and necessary to protect consumers. It is also conceded by some proponents that this will lead

24. *See, e.g.,* Associated Press, *supra* note 1.

25. At this point your author cannot resist observing again that the largest drivers of the 1993-2006 housing bubble were agencies carrying out federal housing and monetary policy, in part to encourage home ownership, and in this context (low interest rates and a boom in housing prices) consumers were acting quite rationally in seeking to join the party. Indeed, federal policy today, far from seeking to prevent a repeat, is fervently seeking to recreate the bubble. *See, e.g.*, Review & Outlook, *The Next Fannie Mae*, Wall Str. J., Aug. 11, 2009, at A16; *supra* note 9; Strassel, *supra* note 11. But this time it is being done largely without private capital. *See, e.g.*, Heard on the Street, *Uncle Sam Bets the House of Mortgages*, Wall Str. J., Sept. 18, 2009, at C12 (85% of mortgage loans are being guaranteed by the U.S. government, most are being originated by TARP-funded banks, and 80% are being bought by the FRB).

26. Quite amazing how often this obviously silly notion carries the day. *See, e.g., supra* note 6.

27. *See infra* Part IV.

28. *See, e.g.*, Bennet S. Koren, *Suitability and HOEPA*, 61 Consumer Fin. L.Q. Rep. 201 (2007).

29. If only the law really worked that way. Unfortunately, in this area of law too often there is no safety zone.

30. *But see supra* notes 9 and 25. And surely credit availability will also suffer. *Compare* the goals of the uniform law process, *e.g.*, as articulated at Uniform Commercial Code § 1-103(a), *i.e.*, simplicity, clarity, modernization, and "the continued expansion of commercial practice through custom, usage, and agreement of the parties."

31. *See supra* Part II.

to increased consolidation in the credit industry, the demise of many small, independent credit providers, and reduced competition.[32] But, the argument continues, this is okay because currently there are too many credit providers and too much credit; if increased regulation is necessary and this reduces competition and credit availability, so be it.[33]

Opponents have argued that none of the "reforms" in the CFPA Act address or would have prevented the current problems in the credit markets,[34] even though it is commonly presented as a solution to these problems. Proponents respond that this is not the point; rather, the question is whether the CFPA Act will make things better now. To this they answer yes.[35] Proponents add that the current system is broken (a point on which there is probably larger agreement, though for very different reasons[36]), and the CFPA Act will fix it,[37] in the process recasting the legal balance between creditors and consumers. In this perspective, the case for the CFPA is self-evident, and opponents have the burden to rebut this by proving otherwise.

V. Federal Regulatory Perspective[38]

A. Introduction

As noted, at this writing there remain differences between various federal agencies regarding aspects of the CFPA (among other things).[39] Agencies that will lose enforcement or even rule-making authority are obviously unenthusiastic about such changes. In the case of both the Federal Trade Commission (FTC) and Federal Reserve Board (FRB), considerable expertise and experience could be lost if jurisdiction is ceded to a brand-new agency (the CFPA).

B. Fraud and Deception

However, the FTC is provided an offsetting expansion of its authority in the CFPA Act, in terms of: a reduced burden when designating a practice as fraudulent or deceptive; expanded power to levy civil penalties; expanded enforcement authority; and increased resources. Given that past FTC efforts to designate some popular practices as fraudulent or deceptive have failed by reason of statutory limits on FTC authority,[40] this is likely to be viewed as welcome news by some at the FTC.

For example, the CFPA would allow the FTC to follow the more flexible rule-making requirements in the Administrative Procedures Act (APA), in place of the more stringent burden that must be met under current law.[41] It would also allow the FTC to impose civil money penalties (in addition to today's injunctive relief) based on new, creative designations of fraud or deception. Business practices now considered routine and prevalent could be put at risk as a result of these changes.

C. Enforcement Authority

The CFPA Act would transfer enforcement authority with respect to consumer financial services, from the FTC to the CFPA (and also, in the current proposal, from the federal banking agencies to the CFPA[42]).

The FTC would retain its other enforcement authority, *e.g.*, with respect to unfair and deceptive acts and practices. The FTC would lose its current jurisdiction over Truth in Lending Act enforcement,[43] but could undertake joint enforcement actions with the CFPA.

D. FTC Position

At this writing the FTC Commissioners are reported to be split two-to-two (with a fifth position vacant). Commissioners have expressed concern over the time needed for a CFPA to become effective, given its lack of experience and massive mandates, as compared to the well-established expertise of the FTC. At this writing, two Commissioners are said to oppose the CFPA Act, while the other two have not announced a position.

VI. State Attorneys General[44]

Initially, it may come as a surprise that some state attorneys general support the CFPA Act, given its obvious bias toward a national administrative structure. Probably the simple explanation is that, despite its centralization effects, the CFPA Act purports to limit federal preemption of state laws and enforcement authority. It is likely that this is a key to state attorney general support.

All of this is clothed in more elaborate rhetoric than that presented here, *e.g.*: the current federal law system

32. Again, it seems impossible to rationally argue that this can occur without reduced private credit availability and higher credit costs. *See, e.g., supra* this text and notes 7 and 16-17.

33. *Id.* This follows the example of an old-fashioned European administrative state.

34. *See also supra* notes 9 and 25.

35. Considering the risk of reduced competition, higher costs, reduced credit availability, and politicized credit allocation problems noted here, this seems less than a compelling conclusion.

36. *See, e.g.*, Harrell, *supra* note 22; Donald C. Lampe, Fred H. Miller & Alvin C. Harrell, *Introduction to the 2009 Annual Survey of Consumer Financial Services Law*, 64 Bus. Law. 465 (2009); Donald C. Lampe, Fred H. Miller & Alvin C. Harrell, *Introduction to the 2008 Annual Survey of Consumer Financial Services Law*, 63 Bus. Law. 561 (2008). The CFPA Act and other 2008-2009 federal and state law initiatives steadfastly decline to address any of the deficiencies noted in this literature.

37. *But see supra* notes 32-36.

38. Here your author is again on thin ice, as obviously I have no authority to speak on behalf of any federal agency. These comments are purely an academic's opinion. *See supra* notes 3, 8, and 15.

39. *See* Associated Press, *supra* note 1.

40. *See, e.g.*, Frederick H. Miller, Alvin C. Harrell & Daniel J. Morgan, Consumer Law Cases, Problems and Materials 53-64 (1998).

41. *Id.*

42. *See* Associated Press, *supra* note 1.

43. As would the banking agencies; *see id.*

44. Again, your author cannot speak for anyone but himself, and these are purely the personal views of your author.

(which, of course, includes extensive federal preemption) is broken, and fundamental change is needed; the current credit crisis resulted from inadequate federal regulation (including, *e.g.*, too much preemption); and the solution is more regulation and enforcement authority (including, *e.g.*, less preemption). Thus, the expansion of federal law and authority in the CFPA Act may be viewed by the office of a state attorney general as a retrenchment of federal law, a step back from the limits on state attorney general authority under current law.

In this view, the CFPA Act will cure the lack of state attorney general oversight over banking institutions currently protected by federal preemption, which has thwarted state attorney general efforts to control and restrict such things as subprime mortgage lending and assignee liability. The CFPA is seen as a way to allow state attorneys general to impose heavier penalties on bad actors so as to drive them from business, and to create a level playing field applicable to all types of creditors (by subjecting them to attorney general inspection and supervision). It is a theme that clearly envisions an expanded role for the state attorney general, even as the law is generally centralized by an expansive federal CFPA. It will be interesting to see if it works out that way in practice, if the CFPA Act is enacted.

VII. Conclusion: The Role of the Legal Profession

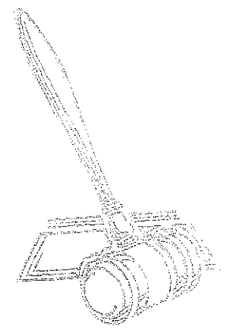
This article has attempted to describe various perspectives. While your author's perspective is surely evident through-out this Commentary, and therefore it may not do justice to or fully explain every such perspective, these perspectives are also being vigorously asserted by their adherents. Nonetheless, not all views are being equally represented, and some additional, basic points are appropriate to note here.

Support for the CFPA Act reflects a strong preference, among some major credit industry players and consumer advocates, for a further centralization of consumer financial services law.[45] The reasons for this support are varied and need not be noted further here, but one result is that a "balanced" forum that purports to present diverse points of view may in fact be one-sided. There are few organized constituencies that consistently favor our common law traditions, including the adversary system, federalism, party autonomy, separation of powers, and limited government.[46] Yet all of these are implicated in proposals such as the CFPA Act.

Obviously, an avalanche of new federal laws and regulations is under way, the CFPA Act being merely an example. The result may be more legal work, at least for some law firms and for a short time. But this should not obscure the fundamental shifts accompanying these events.

For example, state attorney general enforcement authority may be protected in the CFPA Act, but ultimately the centralization of consumer financial services law, in an expanding federal administrative structure, likely means a diminished role for local counsel, state laws and state courts, common law rights and private judicial remedies, and perhaps even the decline of our adversary system (along with party autonomy). These are matters that should be of interest to the legal profession. If the legal profession does not safeguard these fundamental precepts, they may well decline or even disappear.[47] A comprehensive federal administrative state is a very different thing from our traditional legal system. Of course, lawyers must represent their clients and these changes may be what many clients and constituent groups want. But lawyers also have an obligation to explain legal consequences that others may not intuitively understand.

The economic costs of misguided consumer financial services laws and regulations (which often include reduced credit availability, higher credit costs, reduced competition, economic adversity, and the rise of illegal loansharking, corruption and organized crime) may be the least of our worries, compared to a potential decline in American legal traditions resulting from a concentration of legal authority in an administrative regime. The credit crisis, arguably the result of state and federal laws and monetary policy run amok,[48] has now been joined by unprecedented fiscal policies and an increasing potential for the displacement of traditional legal norms. The implications deserve the fullest exploration by members of the legal profession, who are uniquely situated to understand the potential consequences.



45. The obvious trend is to impose onerous legal requirements and a severe enforcement regime on private service providers, which induces industry consolidation, a credit contraction and calls for even more regulation, and ultimately demands for alternative sources of federal funding. Any resulting problems are then said to be the result of inadequate regulation, and so the cycle repeats. Student lending law and regulation provide an obvious example. *See, e.g.*, Review & Outlook, *Single Payer for Kids*, Wall Str. J., Aug. 20, 2009, at A12; Maya P. Hill & Thomas A. Hill, *The New World of Student Lending Laws*, 62 Consumer Fin. L.Q. Rep. 170 (2008). However, mortgage lending is not far behind. *See, e.g.*, Review & Comment, *The Next Fannie Mae*, Wall Str. J., Aug. 11, 2009, at A16; Jessica Holzer, *Fed Unveils Rules to Protect Borrowers*, Wall Str. J., July 24, 2009, at A3; Review & Comment, *Hope vs. Financial Experience*, Wall Str. J., June 18, 2009, at A16. The CFPA Act will facilitate this trend. Among the ironies, agencies and advocates responsible for the problems are often rewarded with increased authority, resources, and jurisdiction as a result, providing an inherent incentive for the pursuit of irresponsible policies. *See supra* notes 5, 9, and 21-26.

46. As a whole, the legal profession seems strangely silent on these issues. Indeed, many lawyers and lawyer groups favor this centralization of authority, despite the adverse impact on local law practice and the obvious movement from a judicial to an administrative law system. Of course, lawyers represent their clients, and as noted above this is what many clients and constituencies say they want.

47. It is possible, of course, that this will not happen. But experience suggests that an expanding federal agency, with authority to displace state laws and remedies, will mean the displacement of state law and remedies.

48. *See supra* notes 21, 22, 28 and 36.