Commentary: The Proposed Consumer Financial Protection Agency Act

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QUARTERLY REPORT

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"), 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 "Chain Roundtable" program on Financial Services Regulatory Reform, airing pros and cons of the proposed CFPA legislation. Some (though far from all) of the comments below are indebted to this presentation. Some

II. The Proposed CFPA Act

The CFPA Act seeks to expand and unify federal consumer financial 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 (the "CFPA Agency") 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 jurisdictions, but these issues are not covered here.

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. Clearly it will drastically alter the provision (and availability) of consumer financial services in the United States, and will have a centralizing 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.

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.

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 regulations and enforcement requirements. The extensive competition among a traditionally large number of mortgage originators will undoubtedly suffer, to the detriment of consumers.

B. American Bankers Association

Other criticisms have been noted by the American Bankers Association, including: (1) consumer protection will suffer if separated from safety 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 problem.

1. 41 U.S.C. 3719 ("End of Fiscal 2009") indicates that, in 2010, 11,725,250,000 matches, 3,689,077,946 (99.21%) of those matches were automatically closed.


3. For example, the "end of fiscal year" matches were not included in the "end of year" matches.

4. 15 U.S.C. 3719 ("End of Fiscal 2009") indicates that, in 2010, 11,725,250,000 matches, 3,689,077,946 (99.21%) of those matches were automatically closed.

5. It is not only consumers who are not adequately served by the EFSA, but the reasons are no different. It is certainly not an unreasoning trust that the EFSA is the worst regulator in the history of government, it is simply that the free market is better at developing better products and services for consumers.

6. 41 U.S.C. 3719 ("End of Fiscal 2009") indicates that, in 2010, 11,725,250,000 matches, 3,689,077,946 (99.21%) of those matches were automatically closed.

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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, it does not necessarily benefit consumers and it is certainly not a politics-free environment. Realistically, it is impossible that the complex interplay of traditional, private judicial remedies by alternatives tailored to influential interests, probably to the detriment of many consumers.

IV. Proponents' Views

A. Introduction

A central precept of the CFPA Act is that there is no conflict between: (1) expanding and enforcing consumer credit transactions and restrictions on consumer credit, (2) lender's safety and soundness; and (3) credit cook and availability. While on this thesis seems contrary to common sense, as illustrated by Milton Friedman's famous observation that "there is no such thing as a free lunch," it is a tenet steadfastly adhered to by advocates of the CFPA Act. In fact, it is argued that increased consumer protection (as defined, as, i.e., more restrictive on private credit transactions and expanded consumer remedies) is consistent with safety and soundness because it will lead to more responsible use of the Federal Truth in Lending Act and its brethren, as well as an increased commitment in the consumer to use the credit card appropriately by providing the bank regulatory exposition of 1989-1993. If these effects are further expounded 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 recent enactments state "predatory lending" laws and federal regulations, in contributing to the mortgage credit transaction that caused the current economic crisis, and may even point to that in the forefront of these new laws and regulations credit and economic activity remains stifled despite almost unbelievable levels of public expenditures and FRR pump priming.

In these circumstances, it seems clear basic approaches to protecting consumers mortgage credit law, (1) disclosure based on burdens of consumer rationality and party autonomy; (2) state substantive and party autonomy, and (3) federal courts and standardized practices. As noted above, alternative (1) is said to have failed as a fundamental matter; in addition, (2) and (3) have failed because of federal preemption of substantial state 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 this case, however, one must admit that there are few prospects for such.

B. Party Autonomy

Another prevalent inherent in the proposed CFPA Act is that party autonomy has fallen out of favor. Once consumer credit, as embodied in the Truth in Lending Act, is based on the party autonomy and the economy will not be beneficial.

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

The 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 unfailed in language in the CFPA Act designed to curtail federal preemption of state enforcement powers and remedies.

C. Centralization Apace

Despite the proposed preservation of state enforcement powers (noted above, and below at Part V), a central facet of the CFPA Act is a draconian centralization of consumer credit law, regulation, and enforcement. This is a part of a long-standing trend (though that has its fans), 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 groups. Because of this correlation of interests, centralization is likely to be accepted as a desirable goal in almost any national forum for the exception possible (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 the same or in the same manner), and (3) separation of consumer protection from safety and soundness regulation of other private transactions. It is certain that 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) by arguing that such uncertainty is needed in order to discourage bad practices, i.e., to prevent creditors from exploiting the outer boundaries of permissible practices. It is an interesting (and perhaps a defensive) defense of the ambiguities that plague so many modern laws and regulations, and often defends the political end goals of the regulatory regime. I side that such uncertainties don't matter unless you are driving near the edge. 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.

Aside, and too often overlooked, is that the regulatory burden will increase (assurances by some that greater simplicity will result are not met with credence, but say that it is inevitable and necessary to protect consumers. It is also concealed by some proponents that this will lead

20. See infra Part IV.
21. In other words, if I were too the luckiest of times, our family might have been an era to a particular project. As an example, in the case of a specific issue, even the least conscientious of the CFPA Act takes its discourse in added currents and flows, as one writer in the alternative. Here, the Federal Reserve System and Federal Reserve System, and other public officials, have been deplored as weak by the public.
22. See infra Part III.
23. See supra note 19, supra notes 4, and notes 5, supra.
24. Address, supra note 1, supra note 19, supra notes 4, and notes 5, supra.
25. Address, supra note 1, supra note 19, supra notes 4, and notes 5, supra.
26. See supra Part IV.
to increased consolidation in the credit industry, the demise of many well-known 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.

Opponents have argued that none of the "reforms" in the CFPA Act address or would have prevented the current problem of the credit markets.33 Even though it is commonly presented as a solution to these problems, Proposers 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.34 Proponents add that the current system is broken (a point on which there is probably larger agreement, though for very different reasons35), and the CFPA Act will fix it36 in the process reclassifying the legal balance between creditors and consumers. In this perspective, the case for the CFPA is self-evident, and opponents have the burden to rebuff this by proving otherwise.

V. Federal Regulatory Perspective37

A. Introduction

As noted, at this writing these remain differences between various federal agencies regarding aspects of the CFPA (among other things).38 Agencies that will lose enforcement or even rule-making authority are obviouslyittenistic 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).39

B. Fraud and Deception

However, the FTC is providing 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 regular 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 and 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 resources, as compared to the well-established enforcement experience 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

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 simplest explanation is that, despite its centralization effects, the CFPA Act purports to limit federal preemption of state laws and enforcement authority. It is likely clear that this is a key state attorney general support. All of this is clothed in more elaborate rhetoric than that presented here, e.g., the current federal law system

(which, of course, includes extensive federal preemption) is broken, and fundamental change is needed; the current credit crosses the line from inadequate to inadequate regulation (including, e.g., too much preemption); and the solution is more state action 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 reinforcement of federal law, a step back from the limits on state attorney general authority under current law.

In this view, the CFPA Act will care 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 em phrases 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 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 consumers, for a further centralization of consumer financial services law.44 The reasons for this support are vast; credit card reform is needed, but one result is that a "balanced" (a term that purports to present diverse points of view may in fact be the opposite).

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.45 Yet all of these are implicated in proposals such as the CFPA Act. Obviously, an absence 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 rules and state statutes, common law rights and private legal remedies, and perhaps even the decline of our adversary system along with party autonomy. These are things that 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.

The economic costs of misguided consumer financial services laws and regulations (which often include reduced credit availability, higher costs, reduced competition, economic adversity, and the rise of illegal loan-sharking, 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 amuck,46 has now been joined by unprecedented fiscal policies and an increasing potential for the displacement of traditional legal institutions in the financial markets. The implications of these results are being felt by the financial markets, and may ultimately impact the evolution of American legal institutions. These are important issues, and the legal profession must take an active role in determining the future of our legal institutions.