

October 13, 2009

The Honorable Barney Frank
Chairman
Committee on Financial Services
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Frank:

Thank you for your efforts and the work of your staff in offering a revised discussion draft of the Consumer Financial Protection Agency (CFPA) Act. Your September 22nd memorandum outlining the revisions identified a number of specific concerns we have previously identified. However, the complexity of the issues at hand and the need to carefully consider the impact of the legislation are demonstrated by the fact that, by and large, the changes in the bill and subsequent Manager's amendment do not, in our judgment, achieve all the goals stated in the memorandum.

Specifically, we remain concerned that the current draft and Manager's amendment:

- extend authority of the CFPA broadly to encompass almost the entire economy;
- extend CFPA regulation to employees, shareholders, consultants and directors;
- continue to cover stored value cards;
- fail to preempt state laws;
- include vague and ambiguous regulatory standards;
- fail to provide adequate coordination between the CFPA and the regulators responsible for ensuring the safety and soundness of our financial system;
- continue to allow the CFPA and the states to mandate "plain vanilla" products;
- allow the CFPA authority unilaterally to expand its jurisdiction, with little oversight; and
- grant the Federal Trade Commission (FTC) vague and expansive new authority that explicitly does *not* apply to financial services businesses.

Accordingly, we remain concerned that this legislation will have significant and harmful unintended consequences for consumers, businesses, and the overall economy. We agree enhanced consumer protection is a critical component of financial regulatory reform, but the CFPA as currently drafted will do far more harm than good.

CFPA Authority Extends to a Vast Segment of the Economy

The scope of the discussion draft remains extraordinarily broad. As was the case with the original draft, the current language does not focus on entities that are solely, or even principally, engaged in financial services.

Although section 124(a) provides that the CFPA does not have authority “regarding credit or other financial activity issued **directly** by a merchant, retailer, or seller of nonfinancial services to a consumer,” the definitions of “extending credit” and “covered person” remain unchanged. This leaves open the possibility that a merchant could be found by the CFPA to “indirectly” engage in financial activity or to be a “material service” provider to a covered person. For example, a business that merely accepts credit cards could meet either of those qualifications – either as indirectly engaging in a financial activity (the provision of credit by the credit card network) or as providing a material service to the credit card network.

In addition, the revised draft attempts to exempt certain persons from the bill –such as auto dealers and real estate licensees. However, the exemptions are significantly flawed. The legislation exempts these professionals but provides that the exemption “shall not apply...to the extent such person is” engaged in a “financial activity” or is otherwise subject to the existing federal consumer laws. As a result, any and all of their activities that fall within the broad “financial activity” definition, or within any activity that the CFPA later unilaterally decides to classify as a financial activity under its rulemaking authority, would trigger the applicability of the statute.

For example, many real estate licensees engage in activities that could be argued to assist in the financing process, yet these activities could subject them to the CFPA’s jurisdiction. For auto dealers, the exemption would not apply to lease transactions and excludes all activities relating to the arranging of financing – meaning that auto dealers would likely be covered for all activities other than all-cash vehicle sales, which constitutes only 6% of dealers’ sales.

“Related Person” Standard Extends CFPA Regulation to Employees, Shareholders, Consultants and Directors

A new provision added to the most recent draft would drastically *expand* the scope of the CFPA’s jurisdiction. The bill establishes that any person who is a “related person” will be a “covered person” for the purposes of the new statutory and regulatory requirements and existing laws. “Related person” is defined as “any director, officer, **employee charged with managerial responsibility**, or controlling stockholder of, or agent for, such covered person” and “any shareholder, consultant, joint venture partner and any other person as determined by the Director who materially participates in the conduct of the affairs of such covered person.” It goes further to establish that “any independent contractor, with respect to such covered person who knowingly or recklessly participates in any” violation of “any” law or regulation or breach of fiduciary duty, would also be covered.

In short, this provision has sweeping, unprecedented implications. It allows the CFPA to impose fees on and require reports from employees, shareholders, directors and others – subjecting them to the Agency’s authority, even with respect to activities unrelated to the covered person with which they are associated. The portion of the definition relating to independent contractors casts the net even farther: any association with a covered person that engages in wrongful conduct could trigger regulatory obligations based on a very vague and uncertain standard.

Stored Value Cards Continue to be Covered

The revised draft exempts businesses that sell stored value cards. But the CFPA still regulates businesses that issue stored value cards, permit their names or trademarks to be used on stored value cards, or that “influences the terms or conditions of the stored value provided to the consumer”. That means that businesses large and small, nonprofit institutions (particularly colleges and universities), and numerous other entities will be subject to the Agency’s authority.

Lack of Preemption

Rather than adopting a new national standard and eliminating multiple and conflicting state laws, the legislation establishes the new agency’s standards as merely a floor, creating inconsistencies, duplications and conflicting mandates between state and federal agencies. By failing to preempt state law and authorizing every State and their respective attorneys general to enforce the federal law based on their own interpretation of what the federal standards mean, the revised draft, unfortunately, remains fundamentally flawed in this respect.

Vague Statutory Standards

The revised draft actually exposes businesses to broader and more vague standards than the language deleted from the bill that threatened to impose vague “reasonableness” standards on covered entities.

New language added to Section 138(1) makes it “unlawful” for any person to engage in any unfair, deceptive, or abusive act or practice. This provision imposes broad liability on anyone, not just covered persons, anytime the CFPA later determines that the person’s conduct is “unfair,” “deceptive” or “abusive.” These terms are vague and open to endless interpretation – making it both costly and risky for businesses attempting to comply.

On September 23rd, the U.S. Chamber of Commerce released a study conducted by Thomas Durkin, an economist who spent more than 20 years at the Federal Reserve Board. Durkin concluded that the CFPA would likely cause “disruptions in credit markets due to extensive legal uncertainty arising from provisions of the proposed Act.” The revised draft contains the provisions cited by Durkin as well as this new language that creates a new standard “without existing legal precedents for guidance.”

Insufficient Coordination Among the CFPA and Safety and Soundness Regulators

We remain greatly concerned about the sharp divide created by the CFPA between regulation of financial products and regulatory expertise regarding the safety and soundness of the financial institutions that offer them. On the one hand, the revised draft attempts to establish a dispute resolution process to address conflicting regulatory directives between prudential regulators and the CFPA – a threat to consumers as well as the stability of the financial system. At the same time, however, Section 123 (c)'s resolution procedure applies only to conflicting “material supervisory determinations” between banking agencies and the CFPA. It does not apply to any regulation or guidance or order of general applicability – the very areas in which conflicts are most likely to arise.

Plain Vanilla by a New Name

Although the revised draft does not include an explicit requirement that covered persons offer “plain vanilla” products, it authorizes the CFPA to issue regulations imposing that very same requirement, or otherwise forcing the standardization of consumer products. Indeed, the Agency's broad authority to put in place rules to prevent “abusive” acts and practices and its “fair dealing” authority is just as broad, and perhaps even broader, than the former “plain vanilla” provision.

In addition, the lack of preemption allows states to impose their own “plain vanilla” requirement – in fact 50 different sets of plain vanilla requirements.

Authority to Expand Jurisdiction with Little Oversight

The revised draft includes standards the Agency must meet (without Congressional oversight) to expand its authority, but the standards establish vague thresholds that impose no real limitations. For example, requiring a “substantial likelihood” that an activity will have “a material adverse impact on the creditworthiness or financial well-being of consumers” gives the CFPA the ability to hypothesize adverse consequences and extend its regulatory reach based on its own theorizing. In addition, one of the key terms in the revised draft that links businesses to coverage by the CFPA, “financial activity”, can be expanded by the CFPA, with the result that much of the exclusory language incorporated into this draft may be subsequently nullified by the CFPA.

Expanded FTC Authority Entirely Unrelated to Financial Services

The revised draft also continues to include provisions that dramatically expand the FTC's authority and eliminate longstanding procedural protections applicable to FTC rulemakings. None of these changes have anything to do with financial services because the bill essentially eliminates the FTC's authority in that area.

Conclusion

Taken together, the provisions of this legislation will have a devastating impact on consumer and small business access to credit at exactly the time when such access is vitally important for the economy to recover.

We share your goal of enhancing consumer protection and filling regulatory gaps that contributed to the current crisis. However, creating a stand-alone agency with these vast regulatory powers is not, in our view, the correct approach. Rather, enhancing the regulatory powers of the existing prudential regulators accomplishes the same goal and does not create such unintended consequences.

Thank you for taking our views into account as you consider the discussion draft. We look forward to working with you to achieve our shared goal of enhanced consumer protection.

Sincerely,

American Advertising Federation
American Association of Advertising Agencies
American Financial Services Association
Association of National Advertisers
Business Roundtable
Consumer Data Industry Association
Consumer Mortgage Coalition
Financial Services Institute
Financial Services Roundtable
National Association of Mutual Insurance Companies
National Association of Professional Insurance Agents
National Automobile Dealers Association
Real Estate Services Providers Council, Inc.
The National Business Coalition on E-Commerce and Privacy
U.S. Chamber Institute for Legal Reform
U.S. Chamber of Commerce
United States Organizations for Bankruptcy Alternatives

cc: The Members of the U.S. House of Representatives