

Q&A on Obama's consumer agency proposal (August 4, 2009)

"Consumer Financial Protection Agency" would consolidate federal consumer protection functions, but split them from bank safety and soundness issues

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"The great temptation in Washington with every financial panic is to play around with the regulatory boxes," said Wayne Abernathy, ABA executive vice-president for financial institutions policy and regulatory affairs at a recent association event. "Government officials want to do something, they feel that's what they were sent here to do, and since they are not in the financial business themselves, they work with what they have, the government agencies."

It's the rare financial debacle that hasn't resulted in a revision to the regulatory scheme. Abernathy reeled off a series of such shifts. Among examples he cited: The Panic of 1907 which led to creation of the Federal Reserve Board, the Great Depression, which spawned the FDIC, and the 1980s S&L crisis that created the Office of Thrift Supervision.

Will the crisis of 2008 lead to a Consumer Financial Protection Agency?

The Administration's far-reaching regulatory reform blueprint was introduced in late June. Of its many parts and pieces, ABA supports some in whole, some in part. But one of several elements that ABA does not support is the creation of a new regulatory body, the proposed CFPB. While the Administration's plan covers many areas, Abernathy said that the CFPB proposal "is the one that will most likely affect the on-the-ground business of banking more than any of the other proposals currently being offered." He added that CFPB "is the worst, most intrusive legislative proposal that I have ever seen, and I've been here working on these issues since 1978."

Two very different views

In the words of Treasury Secretary Timothy Geithner, the Administration supports the CFPB because:

"There is broad agreement that consumer protection needs to be stronger. Achieving this objective requires mission focus, market-wide coverage, and consolidated authority, none of which exist in today's system. That is why we are proposing one agency for one marketplace with one mission—protecting consumers."

ABA President and CEO Ed Yingling testified against the idea in mid-July before the House Financial Services Committee, saying:

“We believe that a separate consumer regulator should not be enacted, and, in fact, is in direct contradiction with an integrated, comprehensive approach that recognizes the reality that consumer protection and safety and soundness are inextricably bound. Consumer protection is not just about the financial product, it is also about the financial integrity of the company offering the product. Simply put, it is a mistake to separate the regulation of the banking business from the regulation of banking products.”

Yingling has also made this point in testimony: “Financial integrity is at the core of good customer service. Banks can only operate safely and soundly if they are treating customers well.”

Two very different schools of thought on meeting the same goal. Here is a summary of the key issues of the CFPA debate.

Q. What would the Consumer Financial Protection Agency do?

A. Quite literally, for most purposes, the regulation of banking products would be separated from the banking business. As introduced, in somewhat amended form from the Administration’s draft by House Financial Services Committee Chairman Barney Frank (D.-Mass.), the proposed agency would take up the consumer financial regulatory powers of the Federal Reserve, FDIC, the Comptroller’s Office, the Office of Thrift Supervision, the National Credit Union Administration, and the Federal Trade Commission, as well as part of what is presently handled by the Department of Housing and Urban Development.

This would include existing rulemaking, research, data collection, examination, and enforcement powers. Indeed, a big chunk of the legislation, H.R. 3126, deals with the transfer of the consumer and compliance-oriented staff members from all of the agencies mentioned to the proposed new agency’s payroll.

Q. How would the CFPA relate to the other agencies?

A. It wouldn’t, not directly, and that’s one of the key objections of ABA and others.

The agency would be headed by a board of five players. Only one seat would go to one of the safety-and-soundness (“prudential”) regulators.

Defenders of the plan point out that the new consumer protection regulator and the other regulators would confer on examination reports in draft in order to avoid giving institutions conflicting orders and direction. Opponents are skeptical and indicate that, as they read the bill, the consumer agency would have the final word.

Q. Would CFPA get new powers?

A. The bulk of the regulations currently applicable to banks and other financial services companies (with the exception of

those administered by the Securities and Exchange Commission and state-level insurance regulators) would be transferred to CFPA's jurisdiction. But that's just the beginning, really.

As proposed, CFPA would be more than just a place to unite the consumer protection and compliance efforts currently under multiple agencies. CFPA would be created with some brand-new authorities built in.

Broadly, CFPA would have oversight on the way providers market and sell their products and services, and how they make related disclosures to consumers. It would also be empowered, as proposed, to design so-called "plain vanilla" products. As introduced, the legislation would permit CFPA to require providers to offer a plain-vanilla version of a product that they already offer. (Chairman Frank, however, in a late July speech, indicated that he did not think you could force people to offer a plain vanilla product.)

In addition, while it would not engage in setting specific pay levels, CFPA would be able to prescribe rules on compensation practice.

Q. What is this new agency going to cost, and how will it be paid for?

A. An estimate, by a reliable source, of the cost to fund CFPA would range, conservatively, from \$3 billion to \$4 billion in 2010.

This estimate was based on a blend of two approaches: the basis of what the government spends currently on agencies with similar missions and scopes, and on the cost of consumer compliance exams multiplied by the number of institutions that would have examinations performed, under the Administration blueprint. The estimate is based on the need to examine 57,507 organizations, including banks, independent mortgage companies, and money service businesses such as check cashers and payday lenders. The CFPA's proposed turf actually goes beyond those institutions.

Regarding where the funds for these costs will come from, that is not contained in detailed form in the legislation. The bill states that "there are appropriated to the Agency such sums as are necessary." Separately, it empowers the agency to collect "annual fees or assessments" on covered companies. The CFPA would be permitted to issue regulations setting up assessments on its own terms. The legislation gives the following as examples only: "outstanding volume of consumer credit accounts, total assets under management, or consumer financial transactions."

The bill would also empower CFPA to charge penalties and fines for noncompliance. These would go into a special fund, for disbursement "to victims of activities for which civil penalties have been imposed …"

Q. What are specific objections to CFPA?

A. In addition to the points broadly sketched out earlier, the banking lobby has many more detailed objections. Among them:

• CFPB will not close existing gaps in regulation, it will only add another layer of bureaucracy. Bankers have pointed out that they feel that their institutions, already regulated and examined for consumer compliance, will be easier for CFPB to oversee because “they know where they live.” By contrast, many of the nonbank organizations that caused the problems fell into the regulatory gaps and would likely continue to do so. In part, this is because the CFPB would make the state regulatory system the first line of defense for consumer protection for the so-called “shadow banking” network of nonbank providers. The belief is strong that cash-strapped state regulators won’t be able to do much, if anything, about these companies.

• CFPB will disrupt interstate commerce in financial products and services. The legislation envisions federal financial consumer protection law and regulations as a “floor.” States would be able to impose stricter approaches within their borders that would apply to both state- and federally-chartered institutions.

The legislation would destroy the federal preemption of state laws that has applied to national banks, potentially creating a patchwork of state and federal jurisdictions that would make providing financial services across state lines much more difficult.

• CFPB is an extreme approach—simpler solutions can be tried. In his July testimony, ABA’s Ed Yingling suggested several ideas, among them: expanded and enhanced use of regulators’ “UDAP” powers (unfair and deceptive acts and practices); an improved approach to disclosures, ensuring both clarity for consumers and adherence to legal requirements; centralized call centers for consumer complaints; and congressional oversight and review of existing agencies’ consumer regulation efforts.

Q. How do federal banking regulators feel about CFPB?

A. In proposing CFPB, the Obama Administration essentially, as one banker recently put it, “threw the regulators under a bus.” All through the evolution of the concept, the Administration cast it in terms of the failures of existing regulators.

Initially quiet about the Obama plan, the banking regulators have begun to speak out. Each brought somewhat different views to the table, but their testimonies made it clear they did not endorse H.R. 3126 as is.

Federal Reserve Board Governor Elizabeth Duke, for instance, testified that the Fed “believes there is a compelling case for leaving consumer protection rule-writing functions within the Federal Reserve and supervision with the agencies responsible for prudential supervision. . . . we believe that replicating in another agency the deep expertise and full array of functions embedded within the Federal Reserve and used to support our consumer protection program would be enormously challenging.”

FDIC Chairman Sheila Bair—while calling for a continued, unified approach to compliance and safety-and-soundness supervision—indicated a willingness to work within a revamped version of the Obama plan, with CFPB handling rulewriting authority over consumer financial services and federal regulators examining for and enforcing those rules.

Bair indicated that by freeing up CFPB from direct supervision of banks, "CFPB would be able to focus its examination and enforcement resources on the non-bank financial providers."

Q. What are the chances of CFPB becoming reality?

A. At one point, the CFPB proposal looked like a juggernaut. Now, the momentum has slowed, and, as indicated, opposition has begun to spring up.

Chairman Frank postponed markup of CFPB legislation until September, after originally planning a July markup. At the time this was announced, he warned opponents of CFPB in this way:

"The people opposed to this in the financial community have troops on the ground and they have brought them into this effort. I accept the fact that they want to have a big national debate over this. Frankly, if I were the bankers I would not invite a debate over whether I had been all that great in the consumer area and whether or not people should just trust us."

Less than a week later, Frank declared the CFPB and the rest of the Obama blueprint would become law before yearend.

He expects the House to pass a financial reform package by September or October.

On the Senate side, Banking Committee Chairman Chris Dodd (D.-Conn.) clearly supports the CFPB concept. In July hearings, he opened with a statement that said, in part that: "Gaping holes in the regulatory fabric allowed mortgage brokers and bankers to make and sell predatory loans to Wall Street that turned into toxic securities and brought our economy to its knees."

Dodd plans to take up the legislation in the September-October period, and also hopes to have final legislation in front of the President before yearend.

The industry has its work cut out. BJ

ABA seeks more comments to Congress on this issue and provides a streamlined process and other materials.

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