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## MEMORANDUM

July 9, 2009

To: Interested Parties

From: Wright Andrews

Re: Highlights of the H.R. 3126, the “Consumer Financial Protection Agency Act of 2009”

House Financial Services Committee Chairman Barney Frank on July 8, 2009 introduced H.R. 3126. This measure essentially incorporates the draft bill released recently by the Treasury Department that would create a new independent federal agency with sweeping powers intended to ensure consumer protections in financial services products and practices. This new Consumer Financial Protection Agency (CFPA) would have broad rulemaking and enforcement powers based both on authorities transferred to it from various other federal agencies and on new powers granted to it by this legislation. The bill also contains provisions that would make federally chartered depositories, which historically have largely had the benefit of federal preemption, subject to the consumer protection laws of the various states. With respect to CFPA, the primary difference between H.R. 3126 (the “bill”) and the Administration’s proposal is that it retains the current federal banking regulators’ enforcement role for the Community Reinvestment Act (CRA).

While not covering all aspects of this 200-plus page bill,<sup>1</sup> this memo will highlight many of the key provisions which, if enacted, would create a federal agency with unprecedented powers to control the consumer financial services marketplace.

**Structure** - CFPA would have a five member Board, one of whom would be designated by the President to serve as its Director. Four members would be appointed by the President and the fifth would be “the head of the agency responsible for chartering and regulating national banks.” Its various functional units would include, among other things, research, community affairs and a consumer complaint department which would establish and operate a central database for tracking consumer complaints and sharing data and complaints with various federal and state regulators. The bill also calls for a Consumer Advisory Board to advise and consult with CFPA regarding its functions and to provide information regarding emerging practices and financial products. CFPA would be required to coordinate with other federal and state agencies to help ensure consistent regulatory treatment and with the Financial Literacy and Education Commission to enhance financial literacy and education initiatives.

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<sup>1</sup> The text of H.R. 3126 is available via the Financial Services Committee’s website at: [http://www.house.gov/apps/list/press/financialsvcs\\_dem/press\\_070809.shtml](http://www.house.gov/apps/list/press/financialsvcs_dem/press_070809.shtml) . The original draft proposed by the Obama Administration is available at: <http://www.ustreas.gov/initiatives/regulatoryreform/>.

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**Operational Funding** – After initial appropriations to launch the agency, costs would be recovered through annual fees or assessments imposed on financial services providers. CFPA would prescribe regulations on how such fees or assessments would be set and collected.

**Coverage Definitions** – CFPA would have authority over “*consumer financial products or services*” which in general mean “any financial product or service to be used by a consumer primarily for personal, family, or household purposes.”

- “*Financial product or service*” means “any product or service that, directly or indirectly, results from or is related to engaging in 1 or more financial activities.”
- “*Covered persons*” subject to the bill’s requirements include: “(A) any person who engages directly or indirectly in a financial activity, in connection with the provision of a consumer financial product or service; or (B) any person who, in connection with the provision of a consumer financial product or service, provides a material service to, or processes a transaction on behalf of a person described in...(A).” And, “*provision of a financial product or service*” means “the advertisement, marketing, solicitation, sale, disclosure, delivery, or account maintenance or servicing of a consumer financial product or service.”
- “*Financial activity*” is defined to include deposit-taking, extending credit and servicing loans and “any other activity usual in connection with extending credit or servicing loans,” and numerous other specified activities that are generally considered financial in nature, plus any activity defined by CFPA regulation as financial (except the business of insurance other than credit, mortgage or title insurance).

**Mandate and Objectives** – CFPA’s mandate is to “seek to promote transparency, simplicity, fairness, accountability, and access in the market for consumer financial products or services.” It is authorized to exercise its authorities to ensure that “(1) consumers have, understand, and can use the information they need to make responsible decisions about consumer financial products or services; (2) consumers are protected from abuse, unfairness, deception, and discrimination; (3) markets for consumer financial products or services operate fairly and efficiently with ample room for sustainable growth and innovation; and (4) traditionally underserved consumers and communities have access to financial services.”

**General Authorities** – CFPA’s legal authorities are based on the various consumer protection powers and duties transferred to it from other federal agencies and specified in the bill.

- Its authority includes rulemaking and the ability to issue orders and guidance and to make conditional or unconditional exemptions of any covered person or product or service or class thereof. When issuing regulations, CFPA must “(A) consider the potential benefits and costs to consumers and covered persons, including the potential reduction of consumers’ access to consumer financial products or services, resulting from such regulation; and (B) consult with the Federal banking agencies, or other Federal agencies, as appropriate, regarding the consistency of a proposed regulation with prudential, market, or systemic objectives administered by such agencies.”

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- CFPA also may periodically examine or require reports from covered persons to ensure compliance and “reports regarding financial condition from covered persons which are not subject to the jurisdiction of a Federal banking agency or a comparable State regulator for the purpose of assessing the ability of such person to perform its obligations to consumers.”
- CFPA is granted “exclusive authority to prescribe regulations, issue guidance, conduct examinations, require reports, or issue exemptions” with regard to matters within its jurisdiction and has primary enforcement authority for such matters (backup enforcement authority generally is retained by other agencies and exceptions from its authority are provided with respect to the Department of Justice and persons regulated by the SEC and the CFTC).
- *Usury Cap Limitation* - An express limitation on CFPA’s power provides that “[n]othing in this title shall be construed as conferring authority on the Agency to establish a usury limit applicable to an extension of credit offered or made by a covered person to a consumer, unless explicitly authorized by law.”

**Information Collection and Monitoring** – CFPA is empowered to “gather information from time to time regarding the organization, business conduct, and practices of covered persons,” including the power “(A) to gather and compile information; and (B) to require persons to file with [CFPA], in such form and within such reasonable period of time as [CFPA] may prescribe, by regulation or order, annual or special reports, or answers in writing to specific questions, furnishing information [CFPA] may require; and (C) to make public such information obtained by it under this section as is in the public interest in reports or otherwise in the manner best suited for public information and use” and to prescribe “regulations regarding the confidential treatment of information” it obtains. In addition, CFPA must “monitor for risks to consumers in the provision of consumer financial products or services, including developments in markets for such products or services....by examinations of covered persons, analysis of reports obtained from covered persons, assessment of consumer complaints, surveys and interviews of covered persons and consumers, and review of available databases.” CFPA also must conduct effectiveness assessments, including obtaining public comments, of “each significant regulation prescribed or order issued” generally within three, but no more than five years after the effective date of the regulation or order.

**Mandatory Pre-Dispute Arbitration** – CFPA by regulation “may prohibit or impose conditions or limitations on the use of agreements between a covered person and a consumer that require the consumer to arbitrate any future dispute between the parties arising under this title or any enumerated consumer law if [CFPA] finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of consumers.”

**Specific Authorities** – In addition to the general authorities highlighted above, CFPA is granted various specific authorities, including:

- *Prohibiting unfair, deceptive or abusive acts or practices* – It may prescribe regulations “to prevent a person from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service.” Such regulations “may include requirements for the purpose of preventing

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such acts or practices.” In doing so, CFPA must have “a reasonable basis to conclude that the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers and such substantial injury is not outweighed by countervailing benefits to consumers or to competition.” When “determining whether an act or practice is unfair, [CFPA] may consider established public policies as evidence to be considered with all other evidence.” It also must “consult with the Federal banking agencies, or other Federal agencies, as appropriate, concerning the consistency of the proposed regulation with prudential, market, or systemic objectives administered by such agencies.”

- *Disclosures and communications* – It may “prescribe regulations to ensure the appropriate and effective disclosure or communication to consumers of the costs, benefits, and risks associated with any consumer financial product or service.” Covered persons must provide to a consumer disclosures and communications that: “(1) balance communication of the benefits of the product or service with communication of significant risks and costs; (2) prominently disclose the significant risks and costs, in reasonable proportion to the disclosure of the benefits; (3) communicate significant risks and costs in a clear, concise, and timely manner designed to promote a consumer’s awareness and understanding of the risks and costs, as well as to use the information to make financial decisions; and (4) comply with standards prescribed by [CFPA].” In prescribing such regulations, CFPA must “consider available evidence about consumer awareness, understanding of, and responses to disclosures or communications about the risks, costs, and benefits of consumer financial products or services.” CFPA also must within one year of receiving its transferred authority propose regulations and model disclosures that combine TILA and RESPA mortgage loan disclosures unless it determines that a proposal by the Federal Reserve and HUD had accomplished this purpose. In addition, CFPA must “establish standards and procedures for approval of pilot disclosures to be provided or made available by a covered person to consumers in connection with the provision of a consumer financial product or service...[and these] procedures shall provide that a pilot disclosure must be limited in time and scope and reasonably designed to contribute materially to the understanding of consumer awareness and understanding of, and responses to, disclosures or communications about the risks, costs, and benefits of consumer financial products or services.”
- *Sales practices* – CFPA “may prescribe regulations and issue orders and guidance regarding the manner, settings, and circumstances for the provision of any consumer financial products or services to ensure that the risks, costs, and benefits of the products or services, both initially and over the term of the products or services, are fully and accurately represented to consumers.”
- *Operational standards to deter unfair, deceptive or abusive practices* – “The States are encouraged to prescribe standards applicable to covered *persons who are not insured depository institutions or credit unions* to deter and detect unfair, deceptive, abusive, fraudulent, or illegal transactions in the provision of consumer financial products or services, including standards for-- (1) background checks for principals, officers, directors, or key personnel of the covered person; (2) registration, licensing, or certification; (3) bond or other appropriate financial requirements to provide reasonable assurance of the ability of the covered person to perform its obligations to consumers; (4) creating and maintaining records of transactions or accounts; or (5) procedures and operations of the covered person relating to the provision of, or maintenance of accounts for,

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consumer financial products or services....[In addition, CFPA] may prescribe regulations establishing minimum standards under this section for any class of covered persons other than covered persons which are subject to the jurisdiction of a Federal banking agency or a comparable State regulator....[and in doing so] shall consult with the State authorities, the Federal banking agencies, or other Federal agencies, as appropriate, concerning the consistency of the proposed regulation with prudential, market, or systemic objectives administered by such State authorities or such agencies.”

- *Standard consumer financial products or services* – CFPA “may prescribe regulations or issue guidance regarding the offer of a standard consumer financial product or service at or before the time an alternative consumer financial product or service is offered to a consumer, including: (A) warnings to consumers about the heightened risks of alternative consumer financial products or services; or (B) providing the consumer a meaningful opportunity to decline to obtain the standard consumer financial product or service.” The bill states that generally “a standard consumer financial product or service is one that: (1) is or can be readily offered by covered persons that offer or seek to offer alternative consumer financial products or services; (2) is transparent to consumers in its terms and features; (3) poses lower risks to consumers; (4) facilitates comparisons with and assessment of the benefits and costs of alternative consumer financial products or services; and (5) contains the features or terms defined by [CFPA] for the product or service.” An “alternative consumer financial product or service” is defined as “a consumer financial product or service that is of the same type or class as a standard consumer financial product or service, but that contains different or additional terms, fees, or features.” CFPA “may not require a covered person to offer a standard consumer financial product or service at or before the time an alternative consumer financial product or service is offered to a consumer unless [CFPA] prescribes regulations, after notice and comment, regarding the features or terms of the product or service...” Such regulations “shall apply only to any covered person who — (A) voluntarily offers or provides a consumer financial product or service that is of the same type, or in the same class, as a standard consumer financial product or service; or (B) maintains an account or has a relationship with a consumer involving a product or service that is substantively similar to the standard product or service.”
- *Duties on covered persons* – CFPA must “prescribe regulations imposing duties on a covered person, or an employee of a covered person, or an agent or independent contractor for a covered person, who deals or communicates directly with consumers in the provision of a consumer financial product or service, as [CFPA] deems appropriate or necessary to ensure fair dealing with consumers.” In doing so, CFPA must “consider whether—(A) the covered person, employee, agent, or independent contractor represents implicitly or explicitly that it is acting in the interest of the consumer with respect to any aspect of the transaction; (B) the covered person, employee, agent, or independent contractor provides the consumer with advice with respect to any aspect of the transaction; (C) the consumer’s reliance on any advice from the covered person, employee, agent, or independent contractor would be reasonable and justifiable under the circumstances; (D) the benefits to consumers of imposing a particular duty would outweigh the costs; and (E) any other factors [CFPA] considers appropriate.” These regulations may include “establishing duties regarding compensation practices applicable to a covered person, employee,

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agent, or independent contractor who deals or communicates directly with a consumer in the provision of a consumer financial product or service for the purpose of promoting fair dealing with consumers....[but CFPA] shall not prescribe a limit on the total dollar amount of compensation paid to any person.” Any such regulations are only enforceable by CFPA or a state regulator through administrative proceedings, and may not apply to attorneys who provide a financial product or service within the attorney-client relationship and certain other persons acting in a fiduciary capacity in connection with a trust.

- *Consumer rights to access information* – “Subject to regulations prescribed by [CFPA], a covered person shall make available to a consumer, in an electronic form usable by the consumer, information in the control or possession of the covered person concerning the consumer financial product or service that the consumer obtained from such covered person including information relating to any transaction, series of transactions, or to the account including costs, charges and usage data.” This requirement does not apply to confidential commercial information, information to prevent fraud or money laundering or to detect and report unlawful or potentially unlawful conduct, or required to be kept confidential by law, or that cannot be retrieved in the ordinary course of business. This section also does not impose “any duty on a covered person to maintain or keep any information about a consumer.” CFPA must prescribe by regulation “standards applicable to covered persons to promote the development and use of standardized formats for information, including through the use of machine readable files, to be made available to consumers under this section.”
- *Prohibited acts* – The bill makes it “unlawful for any person to—(1) advertise, market, offer, sell, enforce, or attempt to enforce, any term, agreement, change in terms, fee or charge in connection with a consumer financial product or service that is not in conformity with this title or applicable regulation or order issued by [CFPA]; (2) fail or refuse to permit access to or copying of records, or fail or refuse to establish or maintain records, or fail or refuse to make reports or provide information to [CFPA], as required by [applicable law or regulation]; or (3) knowingly or recklessly provide substantial assistance to another person in violation of the provisions of [CFPA’s unfair, deceptive or abusive acts or practices regulations] and any such person shall be deemed to be in violation of that section to the same extent as the person to whom such assistance is provided.”

**Preservation of State Law** – The bill does not preempt state laws “except to the extent that such statute, regulation, order, or interpretation is inconsistent with the provisions of this [bill] and then only to the extent of the inconsistency....[and a state law is not inconsistent if it affords consumers greater protection] than the protection provided under [the bill], as determined by [CFPA].” The inconsistency determination “may be made by regulation, order or guidance adopted by [CFPA] on its own motion or in response to a non-frivolous petition initiated by any interested person.”

- *Preservation of State Enforcement Powers* – State Attorneys General may bring civil actions in federal or state courts to secure monetary or equitable relief for violations of the bill’s provisions or CFPA’s implementing regulations. States must provide timely notice to CFPA before implementing the action, or if this is impracticable, must do so immediately thereafter and CFPA may intervene as a party and may have state actions removed to federal court.

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- *Federal Depositories and their non-depository subsidiary institutions* – The bill amends applicable federal laws to subject national banks and federal savings associations and their non-depository institution subsidiaries and affiliates to nondiscriminatory and generally applicable state consumer protection laws, including state unfair or deceptive acts or practices statutes, to the extent the state laws are not “inconsistent” with relevant federal law. “[A] State consumer law is not inconsistent with Federal law if the protection [it] affords consumers is greater than the protection provided by Federal law as determined by the Agency.” State Attorneys General are authorized to bring actions requiring such federal depositories to produce records “relative to the investigation of violations of State consumer law, or Federal consumers laws” and to enforce such laws and seek relief and damages.

**Enforcement Powers** – The bill provides CFPB with broad administrative powers to investigate possible violations and to enforce the law, including authority to issue civil investigative demands and subpoenas and to institute litigation.

**Transfers of Functions and Personnel and Conforming Amendments** – The bill generally transfers consumer financial protection functions to CFPB from the Federal Reserve, OCC, OTS, FDIC, FTC and NCUA, while generally reserving backup enforcement authority to such agencies in cases where CFPB has not initiated an enforcement proceeding within 120 days of having received an enforcement recommendation from such agencies. “Consumer financial protection functions” are defined as: “research, rulemaking, issuance of orders or guidance, supervision, examination, and enforcement activities, powers, and duties relating to the provision of consumer financial products or services, including the authority to assess and collect fees for those purposes.” The bill also establishes procedures for transferring current consumer protection personnel from such agencies to CFPB. In addition, it makes various conforming amendments to other related statutes, including the: Inspector General Act; Privacy Act; Alternative Mortgage Transaction Parity Act; Electronic Fund Transfer Act; Equal Credit Opportunity Act; Expedited Funds Availability Act; Fair Credit Reporting Act; Fair and Accurate Credit Transactions Act; Fair Debt Collection Practices Act; Federal Deposit Insurance Act; Gramm-Leach-Bliley Act; Home Mortgage Disclosure Act; Home Ownership and Equity Protection Act; Omnibus Appropriations Act (As Amended By The Credit Card Accountability Responsibility and Disclosure Act); Real Estate Settlement Procedures Act; Financial Privacy Act; Secure and Fair Enforcement For Mortgage Licensing Act; Truth In Lending Act; and Truth In Savings Act.