Proposed Consumer Financial Protection Agency Takes a Key Step Forward

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Legislation to promote one of President Obama's key financial reform initiatives was passed last week by the House Financial Services Committee by a vote of 39 to 29. The Committee voted to create the Consumer Financial Protection Agency ("CFPA"), a new independent federal agency responsible for rulemaking, examination and enforcement of financial institutions that provide consumers with financial products. The Consumer Financial Protection Agency Act[1] (the "Act") would transfer the rulemaking authority of the federal banking agencies under existing consumer banking laws to the CFPA and the CFPA would examine both bank and nonbank institutions for compliance with such laws. In addition, the CFPA would have broad authority to address unfair, deceptive and abusive acts and practices that the agency identifies in the future.

While the Act would give the CFPA authority over many financial institutions, the current version of the Act excludes several categories of entities from the oversight of the CFPA. Notably, banks with assets of less than $10 billion and credit unions with assets of less than $1.5 billion would continue to be subject to consumer compliance examinations primarily by their federal prudential regulator, with the CFPA only serving a "back up" role with respect to examinations. Such small banks and credit unions, however, would still be subject to the CFPA's rules. Other entities excluded from the oversight of the CFPA would include: merchants, retailers and other nonfinancial businesses when they extend credit to consumers for the purchase of goods or services and doctors and other businesses that bill customers; accountants and tax preparers; real estate brokers and agents; lawyers; auto dealers; and providers of IRAs, 401(k) plans, 529 plans and pension plans.

The House Financial Services Committee adopted an amendment to the legislation permitting federal regulators to preempt state consumer financial protection laws on a case-by-case basis after a finding that the state law prevents or significantly interferes with a federally regulated bank or thrift's exercise of its powers, though it is likely that the scope of preemption of state law will continue to be a contentious issue as the legislation moves forward.

Because the House Committee on Energy and Commerce has jurisdiction over certain aspects of

the Act, including changes to the Federal Trade Commission's authority, it will consider the Act before it goes to the full House for a vote. It is unclear what, if any, action the Committee on Energy and Commerce will take or the timing of such action. Likewise, it is also unclear what the fate of the CFPA will be when it gets to the Senate.

[1] Consumer Financial Protection Agency Act, H.R. 3126, 111th Cong. (2009). A summary of the bill, prepared by the Financial Services Committee, is available here.