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MEMORANDUM

Date: July 3, 2009
To: SIFMA—Financial Reform Working Group
Re: Highlights of the Proposed Consumer Financial Protection Agency Act of 2009

This memorandum summarizes some of the main features of the Obama Administration's [Consumer Financial Protection Agency Act of 2009](#) (the "**Act**") which would create the Consumer Financial Protection Agency (the "**CFPA**"). Based on our preliminary review of the text, the main themes, all of which are likely to be subject to intense debate during the coming months, are:

- As expected, the CFPA would be given extraordinarily broad and sweeping powers to regulate and enforce substantive standards for "consumer financial products or services." Existing federal banking agencies and the FTC would be stripped of their consumer financial protection functions.
- The scope of persons involved in consumer financial products and services who would be covered by the Act is very wide with uncertain boundaries.
- Despite statements from Treasury that the authority and jurisdiction of the SEC and CFTC would not be impinged upon, the Act is not clear on the subject.
- The CFPA would have broad authority to seek information, under oath, in virtually any form for any reason from any source, and would be able to prescribe rules regarding the confidential treatment of such information. Confidentiality rules established by the CFPA would not prevent disclosure of confidential information to Congress.
- The CFPA would have the authority to bring a civil action, after providing notice to the Attorney General, to seek monetary or equitable relief, and could represent itself in its own name in any court, including the Supreme Court.
- In line with the Obama Administration's deference to state power, the states, rather than other federal agencies, would be the close partners to the new CFPA. There would be no limit on state power to impose standards with respect to the regulation of consumer financial products and services stricter than applicable federal standards and state attorneys general would have the ability to bring suits in federal court to enforce federal law.
- The Act allows the CFPA to collect annual fees and assessments from covered persons to fund its expenses. The Act does not place any explicit limit on the fees that can be imposed and there is no express Congressional oversight over such fees.
- The broad definitions of what would be regulated by the CFPA, the overlap with other federal agencies, the sweeping mandate and the directive to coordinate and harmonize create the

risk of turf wars both at the federal level and, despite the Obama Administration's efforts to decrease the scope of preemption, the federal to state level.

An outline of the key elements of the proposed legislation follows.

1. Mandate and Structure

- **Broad Mandate.** The proposed CFPA's mandate would be "to promote transparency, simplicity, fairness, accountability and access in the market for consumer financial products and services." The CFPA would be explicitly required to ensure that consumers "have, understand and can use information they need to make responsible decisions"; that consumers are "protected from abuse, unfairness, deception and discrimination"; that markets for consumer financial products and services operate "fairly and efficiently" with "ample room for growth and innovation"; and that "traditionally underserved consumers and communities have access to financial services." A wide range of consumer financial products and services would fall within the scope of this Act, as well as a wide range of product and service providers.
 - A "**consumer financial product or service**" is a financial product or service to be used by a consumer, including an agent, trustee or representative acting on behalf of an individual, primarily for personal, family, or household purposes.
 - A "**financial product or service**" is a product or service that relates to a range of financial activities, including:
 - deposit taking
 - extending credit of any type (mortgage loans, personal loans, car loans, credit cards, etc.)
 - loan servicing
 - real estate appraisals
 - mortgage insurance
 - credit insurance
 - check cashing (pay day lenders)
 - consumer reports/credit bureaus
 - debt collection
 - real estate settlement, including title insurance
 - rental agent for rent to own
 - acting as an investment adviser, if not otherwise regulated by or registered with the CFTC or the SEC
 - acting as a financial adviser
 - financial data processing and data transmission services
 - money transmittal and money services businesses
 - sale of stored value (gift cards/service vouchers)
 - custodial activities
 - tax preparation
 - **and any other activity the CFPA adds by rule.**
 - A "**covered person**" would include any person who engages, directly or indirectly, in a financial activity in connection with the provision of a consumer financial product or service, as well as any person who provides a material service to, or processes a transaction on behalf of, a covered person. The breadth of the covered person definition implies that the CFPA would be funded by a base that is far broader than what is classically understood as

the financial sector. There is also no requirement that a covered person be engaged in a regular business of providing financial activities.

- **Insurance**, other than mortgage, title and credit insurance, is specifically excluded from the scope of the Act.
 - **Investment Advisers**. Treasury has said at press briefings that there is no intent to regulate securities activities, but the text of the Act is not quite as clear, especially in light of the changing requirements in this area. Any persons required to be registered with the SEC and CFTC as broker-dealers, investment advisers, investment companies, futures commission merchants, commodity pool operators, and commodity trading advisers would be exempt but only with respect to activities subject to registration. Unregistered hedge fund advisers would not be exempt, and would be subject to regulation by the CFPB, as would be state-registered investment advisers. It is not clear whether hedge fund advisers that voluntarily register with the SEC would be exempt. Hedge funds themselves would not be exempt, even if their adviser were registered. Other entities regulated by the SEC and CFTC also would not be explicitly exempt, including exchanges, transfer agents, clearing agencies, rating agencies, and foreign broker-dealers doing business with US investors. There is clearly clarification required in this respect, and to the extent other Administration and SEC proposals extend registration requirements to currently unregistered entities, the scope of the Act's application would change to exempt such registered entities with respect to registered activities.
- **Transfer of Certain Functions from Existing Agencies**. All consumer financial protection functions of the following entities, including the authority to carry out the purposes of enumerated existing consumer protection laws,¹ would be transferred to the CFPB along with related personnel, who would now be paid on the Federal Reserve pay scale:
 - The Federal Reserve Board
 - Office of the Comptroller of the Currency
 - Office of Thrift Supervision
 - Federal Deposit Insurance Corporation
 - Federal Trade Commission
 - National Credit Union Administration
 - **Transfer Date**. The CFPB would have between 6 and 24 months after the Act is passed to get itself up and running and for all of the authorities and personnel to be transferred to it. In the meantime, the other agencies would continue as they were.
 - **Governance**. The CFPB would be set up as an "independent" agency within the executive branch. Like other independent agencies, it would have a board composed of five members. The members would include the Director of the Administration's recently proposed National Bank Supervisor, and four members to be appointed by the President with the advice and consent of the Senate who would serve staggered terms of 5 years. The President would designate one board member to serve as the chief executive of the CFPB—a title and role which imply a greater level of power than the chairman of a commission. There is no

¹ The enumerated consumer laws are: the Alternative Mortgage Transaction Parity Act; the Community Reinvestment Act; the Consumer Leasing Act; the Electronic Funds Transfer Act; the Equal Credit Opportunity Act; the Fair Credit Billing Act; the Fair Credit Reporting Act (only certain sections); the Fair Debt Collection Practices Act; the Federal Deposit Insurance Act (only certain sections); the Gramm-Leach-Bliley Act (only certain sections); the Home Mortgage Disclosure Act; the Home Ownership and Equity Protection Act; the Real Estate Settlement Procedures Act; the S.A.F.E. Mortgage Licensing Act; the Truth in Lending Act; and the Truth in Savings Act.

requirement, as there is with other independent agencies, that two of the five be of a party different from the President's party. The President would have the broad power to remove a director for inefficiency, neglect of duty or malfeasance in office.

- **Funding.** The CFPA would be appropriated "such sums as are necessary" to carry out its authority, and would be able to recover its expenditures through the collection of annual fees or assessments on covered persons. The Act does not place any explicit limit on the fees or the methodology by which fees would be imposed; this is likely to be of some concern to covered persons.
- **Consumer Advisory Board.** The CFPA would be required to establish a Consumer Advisory Board, similar to the SEC's recently created Investor Advisory Board, composed of industry experts, consumer representatives and others.
- **Preemption.** In line with the Obama Administration's deference to state power, see [Presidential Memorandum Regarding Preemption, dated May 20, 2009](#), the Act would not annul, alter, or affect any state law, or exempt any person from complying with a state law, except to the extent that such law is inconsistent with the Act. A state law would not be inconsistent if it affords consumers greater protection than the Act, as determined by the CFPA. How "greater protection" would be evaluated and the distinction between "greater" and merely "different" is not dealt with and will likely be an area of litigation once the legislation is enacted and states begin to enforce their laws and federal laws.
- **Coordination with Other Federal Agencies and the States.** The CFPA would be required to coordinate with the SEC, CFTC, and other federal and state agencies and regulators in order to promote regulatory consistency with respect to consumer financial products and services; further, the CFPA would be required to coordinate on financial literacy and education initiatives with each agency within the Financial Literacy and Education Commission.² This coordination role is largely undefined, but the intent seems to be to move towards harmonized regulations at both the federal and state level. However, the CFPA is set up to be a "first among equals," with primary enforcement authority before other federal agencies with enforcement authority. Also, how this coordination goal would intersect with the Obama Administration's clear intent not to preempt state law is left unclear.
 - The Act could still potentially infringe upon the SEC's jurisdiction and limit the SEC's discretion and autonomy where there is regulatory overlap. In addition, the authority of the CFPA could arguably extend to areas traditionally regulated by the SEC, such as securities issuer disclosures.

2. Powers

- **Exclusive Rulemaking Authority.** The CFPA would have the *exclusive authority* to prescribe rules, issue guidance, conduct examinations, require reports or issue exemptions with regard to *any person* (not limited to covered persons) subject to the laws under the CFPA's purview, except with regard to the following:

² The member agencies of the Financial Literacy and Education Commission are the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Federal Deposit Insurance Corporation, the Federal Trade Commission, the National Credit Union Administration, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Small Business Administration, the Social Security Administration, the U.S. Department of Agriculture, the U.S. Department of Defense, the U.S. Department of Education, the U.S. General Services Administration, the U.S. Department of Health and Human Services, the U.S. Department of Housing and Urban Development, the U.S. Department of Labor, the U.S. Office of Personnel Management, the U.S. Department of the Treasury, the U.S. Department of Veterans Affairs, and the U.S. Securities and Exchange Commission.

- The authority of the Department of Justice would not be affected.
 - The authorities of the SEC and the CFTC to adopt rules, initiate enforcement proceedings or take any other action with respect to a person regulated by these entities would not be affected, and the CFPA would have no authority to exercise any enforcement power over a person regulated by the SEC or CFTC. However, the SEC and CFTC would be required to coordinate with the CFPA on any rules regarding products or services of the same type as, or that compete directly with, a consumer financial product or service subject to the CFPA's jurisdiction.
 - The Act prohibits the CFPA from establishing a usury limit applicable to an extension of credit offered or made by a covered person to a consumer.
- **Primary Enforcement Authority.** The CFPA would have *primary enforcement authority* to enforce federal law to the extent that a federal law authorizes both the CFPA and another federal agency to enforce that law. To the extent that the CFPA receives an enforcement recommendation from another federal agency and does not bring an enforcement proceeding within 120 days, the other federal agency may then exercise "backstop" authority to initiate an enforcement action.
 - **Exemptions.** The CFPA would be able to conditionally or unconditionally exempt any covered person or any consumer financial product or service or class thereof from any provision of the Act, any of the enumerated existing consumer laws, or any rule created by the CFPA. How such exemptions would work with stricter state laws is unclear, and as such the scope or utility of such exemptions might be quite limited.
 - **Authority to Restrict Mandatory Pre-Dispute Arbitration.** The CFPA would have authority to prohibit or limit, by rule, the use of mandatory arbitration agreements between a covered person and a consumer to the extent that the CFPA finds such prohibition or limitation to be in the public interest and for the protection of consumers.
 - **Examinations and Reports.** The CFPA would be required, on a periodic basis, to examine or require reports from a covered person that may include information on compliance procedures, and, for nondepository covered persons, the financial condition of the person, for the purpose of assessing the ability of such person to perform its obligations to consumers.
 - The CFPA would also have access to any report or examination of financial condition made by other federal regulators having supervision of a covered person.
 - The CFPA would be required to provide "reasonable assurances of confidentiality" before being given access to reports or examinations from other regulatory bodies and agencies.
 - The access between agencies provided for in the Act would be a drastic change from historical and current levels of disclosures.
 - **Collection of Information.** The CFPA would have broad authority to gather information from any covered person and to require covered persons to submit annual or special reports. Covered persons would have no assurance of confidentiality as this information could then be made public by the CFPA.

3. New Standards and Duties

- **Prohibiting Certain Acts and Practices Based on a Reasonableness Standard.** Similar to the authority granted the SEC under section §10(b) of the Exchange Act, the CFPA would

have the power to prescribe rules to identify certain unfair, deceptive or abusive acts or practices as unlawful in connection with any transaction with a consumer for a consumer financial product or service. In order to prescribe a rule, the CFPA must have a reasonable basis to conclude that the act or practice is likely to cause substantial injury to consumers that is not reasonably avoidable by consumers and is not outweighed by countervailing benefits to consumers or competition.

- **Standards and Duties that Could be Imposed.** The Act would authorize the CFPA to impose standards and duties via rules or otherwise in the following areas:
 - **Regulating Disclosures and Communications.** Appropriate disclosure or communication to consumers of the costs, benefits and risks associated with any consumer financial product or service. This includes model disclosures that combine the disclosures required under the Truth in Lending Act and the Real Estate Settlement Procedures Act into a single, integrated disclosure for mortgage loan transactions.
 - **Regulating Certain Sales Practices.** Sales practices in order for the risks, costs and benefits of the products or services, both initially and over their term, to be appropriately represented to consumers.
 - **Imposing Duties.** Imposition of duties to ensure fair dealing with consumers on covered persons and their agents, employees or independent contractors, who deal or communicate directly with consumers in providing consumer financial products or services. Such rules may establish duties regarding compensation practices but may not include a limit on the total amount paid to any person.
 - **Establishing Minimum Operational Standards.** Minimum operational standards applicable to covered persons, other than those persons subject to the jurisdiction of a federal banking agency or comparable state regulator, to deter transactions considered by the CFPA to be unfair, abusive, fraudulent, or illegal. The states are also encouraged to prescribe such standards for covered persons, except insured depository institutions and credit unions.
 - **Offering Standard Consumer Products or Services.** Rules requiring a covered person to offer a “standard consumer product or service” (as defined by the CFPA) at the same time or before it offers an “alternative consumer product or service.” In addition, the CFPA would be authorized to adopt rules regarding the offer of standard and alternative consumer products and services including:
 - rules on the use of warnings about the heightened risks of alternative consumer products or services, and
 - rules requiring that consumers be given a meaningful opportunity to decline to obtain the standard consumer financial product or service.
 - **Establishing Consumer Rights to Access Information.** Rules requiring covered persons to provide to consumers, in electronic form, information related to a consumer financial product or service provided by the covered person, including information relating to any transaction, series of transactions, or to accounts, including costs, charges, and usage data. The CFPA would also be authorized to prescribe standards for covered persons to promote the use of standardized formats when providing information to consumers.

- **Compiling Data to Examine Consumer Access.** Rules for consumer data collection for the purpose of identifying business and community development needs and consumer access to financial services.
 - Financial institutions would be required to maintain records of the number and dollar amounts of their customers' deposit accounts, and to submit this data annually to the CFPB to be used as part of its examination of a financial institution under the Community Reinvestment Act.

4. Enforcement Powers

- **Enforcement Powers of the CFPB.** The CFPB could issue subpoenas, civil investigative demands for written material, answers or testimony, and cease-and-desist orders; conduct hearings and adjudication procedures; and transmit evidence of federal criminal law violations to the Attorney General. In addition, upon notification to the Attorney General, the CFPB would have the ability to bring a civil action against any person who violates the Act or a rule promulgated thereunder; available remedies include monetary penalties and/or broadly enumerated equitable relief. Unlike other independent agencies, the CFPB would have the authority to represent itself, and to act in its own name, in both state and federal court, including the US Supreme Court.
- **Enforcement Powers of States.** Any state attorney general or state regulator could enforce any enumerated federal consumer law or bring any action or regulatory proceeding arising under state law in both federal and state court. In addition, state attorneys general would be able to bring civil actions for violations of any provisions of the Act or any rules and regulations issued under the Act.
- **State Law Applicability to National Banks and Federal Savings Associations.** In provisions likely drafted before the Supreme Court's recent decision in *Cuomo v. Clearing House Association, LLC*, and which are designed to achieve a similar result, the Act subjects national banks and federal savings associations to actions by state attorneys general to enforce state and federal consumer protection laws.
- **Whistleblower Provisions.** Any employee that is fined or discriminated against by any person for providing information to the CFPB or otherwise acting under the Act may apply to the CFPB for review of that termination or alleged discrimination. The CFPB could investigate and would have the authority to reinstate such employee and to award attorney's fees.