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Bloomberg Law Reports: Risk and Compliance,
Vol. 2, No. 10, October, 2009

George Mason University Law and Economics Research Paper Series

09-51

Bloomberg Law Reports® Risk & Compliance

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Introduction

As part of its overhaul of financial services regulation the Obama Administration has proposed stronger protection of consumers of financial products and services.[1] The Consumer Financial Protection Agency Act of 2009 (CFPA Act), which the Administration submitted to the U.S. Congress on June 30, 2009, would result in a sweeping overhaul of consumer financial protection.[2] The CFPA Act would create a Consumer Financial Protection Agency (CFPA) which would assume the responsibility for enforcing most existing consumer financial protection laws from other federal banking regulators as well as the Federal Trade Commission (FTC).[3] The CFPA would have significant additional powers to regulate consumer financial products, mandate disclosures, and require covered businesses to offer consumers "plain vanilla" products that the CFPA would design. The legislation would limit federal preemption of nationally chartered financial institutions by allowing states and localities to have stronger restrictions than those adopted by the CFPA and would add a new prohibition against "abusive" practices while allowing new interpretations of existing liability for unfair and deceptive practices. This article details how the CFPA Act would change consumer financial regulation, explores the policy rationale for these changes, and examines how the legislation, if enacted in its current form, would affect providers and consumers of financial products and services.[4]

The Road to 'Stronger' Consumer Financial Product Protection

The CFPA Act consolidates existing consumer financial protection regulation into a new, expansive agency and fundamentally changes longstanding federal laws on consumer financial protection.

A. The Consumer Financial Protection Agency

The United States has passed a number of laws that are in whole or in part designed to provide protection to consumers of financial services products.[5] The Federal Reserve Board, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the National Credit Union Administration have responsibility for enforcing these laws for the institutions in their purview in addition to engaging in their main regulatory job of making sure that these institutions meet safety and soundness standards. The FTC also is responsible for preventing unfair and deceptive practices by nonbank lenders such as mortgage companies but not depository institutions and enforcing the Truth-in-Lending Act and others laws against non-depository institutions under Section 5 of the Federal Trade Commission Act. The CFPA Act would transfer the responsibility for enforcing these laws to the new agency and would provide for a process of consolidating the staff of these existing agencies into the new one.

The objective of the CFPA would be to "promote transparency, simplicity, fairness, accountability, and access in the market for consumer financial products or services."[6] The CFPA would obtain additional powers beyond those granted by current laws. The new agency would regulate nearly all consumer financial products and services, regardless of what kind of business provides those products, and would have wide latitude for defining what constitutes a consumer financial product.[7] For these products, the CFPA could:

- prohibit unfair, deceptive, or abusive acts or practices including adopting rules that would prevent such acts or practices;
- prescribe rules for ensuring the disclosure of the costs, benefits, and risks for consumer financial products or services; and,
- define "standard consumer financial products" (also known as "plain vanilla" products), require covered businesses to offer this standard product "at or before the time an alternative consumer financial product or service is offered to a consumer,"[8] and require that consumers to opt out of this standard product before being offered alternative products.

The CFPA would also have various powers to help it achieve its objective of "ensuring that traditionally underserved consumers and communities have access to financial services." The agency would have the ability to impose civil penalties for violations as well as pursue legal and equitable remedies.[9]

B. The Unfair, Deceptive and Abusive Conduct Standard

Federal and state consumer protection laws generally prohibit "unfair and deceptive practices."[10] There is extensive case law interpreting this standard involving both the FTC and state consumer protection legislation.[11] The new agency is not required to define which practices are "unfair" or "deceptive" in a manner that comports with this jurisprudence, nor with the interpretations endorsed by the FTC. The CFPA Act also adds a new standard of "abusive practices" to existing consumer protection regulations for financial products and services.[12] The CFPA Act itself does not define the term "abuse" or "abusive," but grants the new agency wide latitude to create its own definition.

C. The Limitations on Federal Preemption

Much of current banking and lending law preempts states from imposing consumer financial protection laws on federally chartered banks. These federally chartered commercial banks account for 88 percent of commercial bank assets.[13] The Act specifically permits states and municipalities to adopt and enforce consumer protection laws against nationally chartered financial institutions so long as these state or local laws provide consumers with protection which is "greater than the protection provided under"[14] federal law as determined by the agency.

The Rationale for the Consumer Financial Protection Act of 2009

The CFPA Act would result in a sweeping overhaul of state and federal regulation of consumer financial products and services. Six federal agencies would lose their existing authority, consumer protection would be severed from prudential regulation at five federal banking regulators, and potentially hundreds of consumer protection staff would be transferred to a new agency. This section explains the rationales that have been offered for these changes.

A. Failed Consumer Protection and the Financial Crisis

The CFPA Act is part of the Obama Administration's proposed reforms of financial services regulation. Those reforms and their rationale are presented in the U.S. Department of the Treasury (Treasury Department)'s *Financial Regulatory Reform: A New Foundation.*[15] In announcing the plan, President Obama suggested that the new consumer protection agency was needed in part because consumers had chosen to take out too much credit; the present financial crisis was in part "the result of decisions made by ordinary Americans to open credit cards and take out home loans and take on other financial obligations."[16] The Treasury Department argued that mortgage and other companies sold products that "were overly complicated and unsuited to borrowers' financial situation . . . with disastrous results for consumers and the financial system." Regulation failed because there were multiple agencies and these agencies had a conflict between consumer protection and protection of safe and sound banking practices. The Treasury Department concluded that a consumer financial protection agency is needed "to instill a genuine culture of consumer protection."[17]

The Treasury Department's report does not provide evidence to support the assertion that failed consumer protection regulation played a significant factor in the financial crisis. There is a consensus that the financial crisis resulted in large part from the collapse of the housing bubble which resulted in the heavy losses to financial institutions that held mortgage-backed securities.[18] As housing prices declined, more consumers defaulted on their mortgages, leading to losses in the value of the securities that included these bad debts. Consumer protection could have reduced these losses to the extent that it could have prevented consumers from taking out mortgages that they then defaulted on. Consumer protection could have prevented predatory lending in which consumers were induced to take mortgages that they could not possibly afford. There is no evidence that we are aware of that predatory lending or other practices that would violate the consumer protection laws resulted in a significant portion of the loss in value of the mortgage backed securities.[19]

The CFPA Act also provides for stronger regulation of virtually all consumer financial services products and services. There is no evidence that non-mortgage related financial services products played any material role in causing the financial crisis.[20] Credit-card backed securities have fallen in value as a result of the deterioration of the economy and the accompanying rise in credit-card defaults.[21] However, neither these securities nor other consumer financial products to be regulated were part of the derivatives products that caused large financial institutions to teeter on the brink of insolvency in mid-2008.

B. Consumer Mistakes and Irrationality

The proposal to create a new consumer financial protection agency preceded the start of the financial crisis whose beginning is often marked with the collapse of Lehman Brothers in September 2008. Professors Oren Bar-Gill and Elizabeth Warren presented the case for the new agency in an article entitled *Making Credit Safer* that was published in 2008.

These authors argued that credit markets were failing because "sellers of credit products have learned to exploit the lack of information and cognitive limitations of consumers in ways that put consumers' economic security at risk."[22] According to them, "For a growing number of families that are steered into overpriced and misleading credit products, however, credit products only benefit the lenders."[23] A significant part of the problem is that, "Many consumers are uninformed and irrational."[24]

Professors Bar-Gill and Warren argue that the existing regulatory agencies are not up to the job of dealing with these problems: "Federal banking regulators have the authority but not the motivation. For each federal banking agency, consumer protection is not first (or even second) on its priority list. By contrast, the FTC makes consumer protection a priority, but it enjoys only limited authority. . .,[25] To replace this system they proposed the creation of a "single federal regulator" and a regulatory framework with three key elements: "(1) ex ante regulation, rather than ex post judicial scrutiny; (2) regulation by an administrative agency with a broad mandate, rather than by piecemeal legislation; and (3) entrusting the authority over consumer credit products to a single, highly motivated federal agency . . .."

Professor Michael Barr, who is now an Assistant Secretary to the Treasury Secretary leading the efforts on the CFPA Act, proposed some of the key aspects of the CFPA Act in an October 2008 paper.[26] He advocated requiring lenders provide a plain vanilla mortgage option to borrowers and imposing "heightened disclosure and additional legal exposure" on those lenders if they persuade a borrower to opt out of the plain vanilla product for another product. He also suggested a new legal standard in which lenders could be held accountable after the fact if they did not provide "reasonable" disclosure to consumers.[27]

The legal scholars have based their analysis on "behavioral law and economics." This field claims that consumers act irrationally in predictable ways, that businesses exploit these defects in human reasoning, and that it is possible to design regulations that benefit consumers by reducing the social costs associated with irrational consumer decisions. Members of the behavioral law and economics movement tend to believe in some form of paternalism in which the government can help make consumers make the "right" choices. Soft paternalism "nudges" consumers to make the right decision by, for example, having them 'opt into' alternatives that these scholars believe are in the consumer's best interest.[28] Hard paternalism, by contrast, explicitly forbids consumers from making certain choices, such as by preventing sellers from offering some products that consumers would buy.[29] The CFPA Act reflects both of these approaches. The new agency would possess the "soft paternalism" tools of forcing lenders to offer "plain vanilla" products as well as the "hard paternalism" tools of forbidding covered businesses from offering certain products consumers find desirable.

Given this history, and the role of advisors to the new Administration in it, it would appear that the rationale of the new consumer financial protection agency is based on the view that consumers make systematically bad decisions when it comes to consumer lending products. The CFPA, according to this view, is needed to prevent consumers from making those bad choices and to deter businesses that provide consumer financial products from exploiting the tendency of consumers to choose products that are not in the consumers' best interests.

The Effect of the Consumer Financial Protection Act of 2009 on the Provision of Consumer Credit

It is impossible to say with certainty how new laws and regulatory authorities will ultimately affect the marketplace. In the case of the CFPA Act much depends on how the courts interpret the Act, who the President appoints to lead the new agency, and what policies this leadership pursues. Several aspects of the CFPA Act, however, make it likely that the CFPA Act would result in consumers paying more to borrow money and having less choice in how to borrow money.[30] This section explains the basis for our concerns.

Lenders can expect to earn profits from providing credit to consumers when the interest rate returns they receive, after adjusting for the possibility of default, exceed the sum of the cost of the capital they are providing to consumers and the other costs and risks associated with making that loan. Lenders offer particular lending products when the overall expected returns from consumers that use that product—say an adjustable rate mortgage that is fixed for three years and variable annual for 27—exceed the cost of capital, servicing costs, and other fixed costs of making the product available, by enough to provide an adequate return on investment.

Loans vary greatly in their risks because borrowers vary in their creditworthiness and because some loans lack collateral for the lender to fall back on. Financial institutions expend a great deal of effort to design products, and to make lending decisions, to customize the interest rates and other fees to the creditworthiness of the borrower. Consumer credit is one of the most heterogeneous products in the economy.

The CFPA Act would have various effects on the decisions of providers of consumer financial products to supply consumer credit to particular consumers, the types of products they would offer, and the interest rates and fees they would charge.

The CFPA Act would result in two radical changes in consumer protection law that affect consumer lending. First, the CFPA Act introduces a new liability for "abusive" lending practices and effectively permits new interpretations of longstanding restrictions on "unfair and deceptive" practices. Specifically, the CFPA Act authorizes the new agency to take any authorized action 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."[31] The CFPA does not have to adhere to the FTC-related jurisprudence on unfair and deceptive practices.[32] In addition the CFPA Act itself does not define the term "abusive," thereby giving the new agency wide latitude in identifying as abusive any practice that it views as suspect. Without requiring harmonization with FTC interpretations of "unfairness" or "deception," the CFPA interpretations of these terms, as well as the new authority to prohibit undefined "abusive" practices, would raise issues that would need to be resolved through the courts over time.[33] That would create considerable legal uncertainty for financial institutions that would face unknown and unquantifiable liabilities.

Second, the CFPA Act specifically allows states and municipalities to adopt more stringent regulations than those adopted by the CFPA itself. Rather than providing a uniform set of regulations, the CFPA effectively provides a "floor" on regulation. The Treasury Department's *Financial Regulatory Reform* plan seems to suggest that the CFPA would encourage State enforcement actions.[34] Consumer protection requirements for lending products could vary across states and possibly municipalities.[35] That is a likely outcome based on other situations where federal law does not preempt state and local laws, including state antitrust and consumer protection law. Moreover, historically the FTC has imposed important restraints on the judicial interpretation of state consumer protection legislation and thereby encouraged uniformity among states in addition to consistency with the federal government. The CFPA Act would limit those constraints and thereby permit a greater degree of variety and inconsistency.[36]

We do not believe that it is an exaggeration to say that the combination of these two features would likely lead to an exponential increase in the costs and risks associated with litigation and regulation related to consumer lending products. Financial institutions would have to invest resources to comply with potentially incompatible regulations across many federal, state and local jurisdictions, incur the cost of litigation and regulatory actions in many jurisdictions, face a potentially greater liability depending on the eventual interpretation of unfair, deceptive and abusive practices, and bear the uncertainty of how the CFPA, states, localities and ultimately the courts will define unfair, deceptive, and abusive practices. For financial institutions these changes in consumer protection law would raise the expected cost of consumer lending and therefore lead lenders to raise interest rates and fees. Some financial products would be withdrawn or not offered because they would not be profitable in the face of these costs.

The CFPA Act would also create a new agency that, if it proceeds as its proponents advocate, would impose significant costs on lenders for regulatory reviews and negotiations concerning mandatory disclosures particularly for the introduction of new products. The CFPA's powers concerning "plain vanilla" products could result in the most consequential effect on the cost and profitability of lending products. The CFPA could design standard products and require providers of consumer financial products to offer those products first to customers and possibly even require consumers to explicitly opt out of the CFPA product before allowing the lender to offer the consumer its own product.[37] This would take a great deal of discretion over the design of lending products and put it in the hands of a regulatory agency with little knowledge of how those design decisions affect the profitability of lending. In some cases one could imagine a financial institution deciding not to offer a new product because of the risk that the CFPA would mandate the offering of a version of its own that would make the new product unprofitable. In other cases, it is possible that lenders would decide not to offer certain products to some consumers because of the prospect that these consumers would take unprofitable plain vanilla versions of those products.

Rather than protecting consumers, the CFPA Act runs the risk that it would instead harm consumers by making it harder and more expensive for them to obtain credit. Consumers would have to pay more to borrow to cover the increased costs of lending described above. It is also likely that consumers would not be able to borrow in some ways available today because the CFPA would prohibit those methods or because financial institutions would find that those products unprofitable as a result of the increased costs and the requirement to offer the CFPA-designed products to consumers.

Consumers have benefited from the increased availability and democratization of credit over the last 30 years.[38] That expansion of credit came about in part because of the relaxation of regulations that prohibited certain credit products. Consumers in the high-inflation years of the late 1970's were unable to obtain affordable adjustable rate mortgages because they were largely prohibited.[39] Meanwhile state interest rate regulation prevented the emergence of a national market in credit cards and made credit card lending unprofitable for many consumers, particular ones with poor credit, in many states.[40] Over time consumers have been able borrow on increasingly more affordable way as a result of financial innovations.[41] The CFPA Act risks returning the country to an earlier time in which credit was available only to the most qualified individuals for whom financial institutions were most assured they could extend profitable loans.

Conclusion

The CFPA Act would fundamentally change consumer financial protection law and regulation in the United States. It would lead to a remake of consumer protection law through a new "abusive practices" concept and provide for new and expansive interpretations of unfair and deceptive practices; enable and perhaps encourage states and localities to adopt more stringent but not necessarily consistent consumer protection laws; and create a powerful agency that could among other things design its own lending products and force lenders to push those products on consumers. Consumer financial protection is important and the recent financial crisis has revealed some areas in which protections could be improved. The proponents of the CFPA Act have not, however, provided much in the way of explanation or evidence as to why this sweeping overhaul of consumer financial protection is needed now or why it would benefit the public. The Act, as currently written, would most likely result in a significant reduction in the availability of credit to consumers and the reversal of long-term trends towards the democratization of credit in the United States.

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The views expressed herein are those of the authors and do not represent those of Bloomberg Finance L.P.

[1] U.S. Department of the Treasury, Financial Regulatory Reform: A New Foundation 55–75 (2009) [hereinafter New Foundation], *available at*

http://www.financialstability.gov/docs/regs/FinalReport_web.pdf (outlining proposals for various governmental regulations of financial services and credit products).

2 U.S. Department of the Treasury, Financial Protection Agency Act of 2009 (2009), *available at* http://www.financialstability.gov/docs/CFPA-Act.pdf [hereinafter Act] (proposing 2009 Consumer Financial Protection Agency legislation for passage by Congress).

3 *Id*. at § 1011(a).

4 House Finance Committee Chairman Barney Frank has proposed several changes in the Administration's bill including eliminating the ability of the CFPA to the covered businesses make "plain vanilla" products designed by the CFPA available, imposing a reasonableness requirement on covered businesses, and exempting certain kinds of businesses such as retailers from the legislation. See Daniel Indiviglio, "Frank Waters Down Consumer Protection Proposal," The Atlantic Online, September 23, 2009. Because the legislation is a moving target we focus on the CFPA Act originally proposed by the Administration in this article.

5 The Act enumerates several of these laws, including, amongst others, the Equal Credit Opportunity Act, the Fair Credit Billing Act, and the Gramm-Leach-Bliley Act. *Id*. at § 1002(16).

6 *Id*. at § 1021(a).

7 *See* William Kovacic, *The Consumer Financial Protection Agency and the Hazards of Regulatory Restructuring*, Lombard Street, Sept. 14, 2009, at 19, 25–26.

8 Act at § 1036(b)(1).

9 *Id*. at §§ 1037, 1055.

10 *See, e.g.*, 15 U.S.C. § 45(a)(1) (1914) (outlawing "unfair or deceptive acts" in commerce under the Federal Trade Commission Act).

11 For an explanation as to harm requirements and other questions in the construction and application of consumer protection acts, *see generally* Victor E. Schwartz & Cary Silvermann, *Common Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1 (2005).

12 Act, *supra* note 2, at § 1031.

13 As of September 2, 2009, total assets of all commercial U.S. banks were $11,060 total assets of all domestically chartered banks were $9,736(both seasonally adjusted). See Federal Reserve Board, Assets and Liabilities of Commercial Banks in the United States Data- last released September 11, 2009, *available at* http://www.federalreserve.gov/releases/h8/current/default.htm.

14 Act, *supra* note 2, at § 1041(a)(2).

15 New Foundation, *supra* note 1, at 51.

16 Barack Obama, President of the United States, Speech on 21st Century Financial Regulatory Reform (June 17, 2009), *available at* http://www.cfr.org/publication/19658/obamas_speech_on_21st_century_financial_regulatory_reform.html.

17 New Foundation, *supra* note 1, at 56.

18 *See, e.g.*, Martin Neil Baily, Robert E. Litan & Matthew S. Johnson, *The Origins of the Financial Crisis* (Brookings Institute, Working Paper, 2008), *available at* http://www.brookings.edu/papers/2008/11_orgins_crisis_baily_litan.aspx; Dwight M. Jaffee, *The U.S. Subprime Mortgage Crisis: Issues Raised and Lessons Learned* (Commission on Growth and Development, Working Paper, 2008), *available at:*

http://www.growthcommission.org/storage/cgdev/documents/gcwp028web.pdf; VIRAL V. ACHARYA AND MATTHEW RICHARDSON, RESTORING FINANCIAL STABILITY: HOW TO REPAIR A FAILED SYSTEM (Wiley 2009); RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION (Harvard Univ. Press 2009).

19 Oren Bar-Gill and Elizabeth Warren have argued that "the high proportion of people with good credit scores who ended up with high-cost mortgages raises the specter that some portion of these consumers were not fully cognizant of the fact that they could have borrowed for much less." *See* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 39 (2008). They claim that many people who got sub-prime mortgages could have received less expensive prime mortgages. These authors do not provide any evidence that a significant number of homeowners that defaulted would not have done so had they paid lower interest rates. It is doubtful that there would have been fewer defaults since even with lower interest rates these home owners would have had negative equity in their homes and therefore would gain from defaulting. In addition, a Federal Reserve Bank of Boston study finds that most subprime mortgage borrowers would not have received prime mortgages. Christopher L. Foote, Kristopher S. Gerardi, Lorenz Goette & Paul Willen, *Subprime Facts: What (We Think) We Know about the Subprime Crisis and What We Don't* (Federal Reserve Board of Boston, Public Policy Discussion Paper No. 08-2, May 30, 2008), *available at* http://ssrn.com/abstract=1153411. Deterioration of the underwriting standards has also been put to blame for the current crisis. Another study at the Federal Reserve Bank of Boston found that loans issued in 2005–2006 were not very different from loans made earlier, which, in turn had performed well, despite carrying a variety of serious risk factors. While the 2005–2006 loans may have carried risk factors, such as increased leverage, underwriting standards alone cannot explain the dramatic rise in foreclosures. See Kristopher S. Gerardi, Andreas Lehnert, Shane Sherland & Paul Willen, *Making Sense of the Subprime Crisis* (Federal Reserve Board of Boston, Public Policy Discussion Paper No. 09-1, December 22, 2008), *available at* http://ssrn.com/abstract=1341853; Geetesh Bhardwaj & Rajdeep Sengupta, *Where's the Smoking Gun? A Study of Underwriting Standards for US Subprime Mortgages* (Federal Reserve Bank of St. Louis, Working Paper No. 2008-036B, Apr. 1, 2009), *available at* http://ssrn.com/abstract=1286106.

20 These consumer financial products are not identified as contributors to the financial crisis in any of the serious analyses of the crisis that we have seen. *See generally* Foote et al., *supra* note 19, at 2–3; 32–34; Gerardi et al., *supra* note 19, at 2–3, 6–7. .

21 Connie Prater, *Rising Credit Card Bill Delinquencies Vex Card Securities*, http://www.creditcards.com/credit-card-news/credit-card-securities-outlook-1282.php (last visited Sep. 13, 2009).

22 Bar-Gill & Warren, *supra* note 19, at 6.

23 *Id*. at 5.

24 *Id*. at 21.

25 *Id*. at 87.

26 Michael S. Barr, Sendhil Mullainathan & Eldar Shafir, *Behaviorally Informed Financial Services Regulation* (New American Foundation, Working Paper, October 2008), available at http://www.newamerica.net/files/naf_behavioral_v5.pdf.

27 *Id*. at 6.

28 One of the leading proponents of "soft" paternalism is Professor Cass Sunstein, who President Obama was recently confirmed to be Administrator of the Office of Information

and Regulatory Affairs. *See generally* Richard Thaler & Cass Sunstein, Nudge: Improving Decisions About Health, Wealth, and Happiness (Yale University Press 2008).

29 Proponents of this approach in fact believe that a number of consumer financial products should be prohibited. *See* Alan M. White, *The Case for Banning Subprime Mortgages*, 77 U. CIN. L. REV. 617 (2008) (expounding upon banning several "subprime" lending practices because, amongst other grounds, consumers systematically over-value present-day consumption to future detriment); Owen Bar-Gill, *Seduction By Plastic*, 98 NW. U. L. REV. 1373, 1425–28 (2004) (advocating mandatory unbundling of transacting and financing services offered by credit card companies and application of state usury laws to credit cards); George Loewenstein & Ted O'Donoghue, *We Can Do This the Easy Way or the Hard Way: Negative Emotions, Self-Regulation, and the Law*, 73 U. CHI. L. REV. 183, 204 (2006) (advocating ban on credit cards).

30 We focus on lending, which is just one of the financial products and services covered by the Act of 2009, because of its importance to consumers and the economy overall.

31 Act, *supra* note 2, at § 1031.

32 New Foundation, *supra* note 1, at 63.

33 At least one Federal Trade Commissioner has expressed concerns about this feature of the CFPA. *See* William E. Kovacic, Statement on the Proposal to Create a Consumer Financial Protection Agency to the Committee on Energy and Commerce and the Committee on Financial Services (July 28, 2009), *available at* http://www.ftc.gov/speeches/kovacic/090728stmtrecord.pdf. Commissioner Kovacic notes that "conflicts in interpretation and in litigation strategies, along with an increase in litigation over jurisdictional questions, will adversely affect every core area of consumer protection for which the FTC will continue to exercise primary responsibility." *Id*.

34 New Foundation, *supra* note 1, at 50–51.

35 *Id*. at § 1041(b).

36 *See* Henry Butler & Jason Johnson, *Consumer Harm Acts? An Economic Analysis of State Consumer Protection Acts* (Northwestern Law & Economics Research Working Paper, No. 08-02, April 24, 2008), *available at* http://ssrn.com/abstract=1125305.

37 *See* Act, *supra* note 2, at §§ 1036(b)(1)(B); 1036(b)(2).

38 *See generally* David S. Evans and Joshua Wright, *An Assessment of the Impact of the Consumer Financial Protection Act of 2009 on the Availability of Consumer Credit* 40–43 (Working Paper, 2009), *available at* [SSRN CITE] (summarizing the benefits of consumer borrowing).

39 Efforts to introduce adjustable rate mortgages during the 1970s met with considerable opposition from consumer groups and regulators imposed tight restrictions on allowable changes in the interest rates. *See* Kristopher Gerardi, Harvey S. Rosen & Paul Willen, *Do Households Benefit from Financial Deregulation and Innovation? The Case of the Mortgage Market* (Federal Reserve Bank of Boston, Public Policy Discussion Papers, June 2006), *available at* http://www.bos.frb.org/economic/ppdp/2006/ppdp066.pdf.

40 Christopher C. DeMuth, *The Case Against Credit Card Interest Rate Regulation*, 3 YALE J. ON REG. 201 (1986); DAVID S. EVANS AND RICHARD SCHMALENSEE, PAYING WITH PLASTIC: THE DIGITAL REVOLUTION IN BUYING AND BORROWING (MIT Press, 2005).

41 Evans and Wright, *supra* note 38, at 40–43.