

**State Bar of California
Business Law Section
Consumer Financial Services Committee**

**CONSUMER FINANCIAL PROTECTION AGENCY ACT OF 2009
Part III: Transfer of Functions from Other Agencies Under the CFPA**

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Subpart F, sections 161 through 166, of the Consumer Financial Protection Agency Act (the “Act”) of 2009 (HR 3126, July 8, 2009) provides for the transfer of broad areas of power to regulate consumer financial protection functions from a variety of federal agencies and the Federal Reserve to the proposed Consumer Financial Protection Agency (“CFPA”).

In general, the CFPA would have the authority and accountability to supervise, examine, and enforce consumer financial protection laws, including mortgages, credit cards, student loans, auto loans, payday loans, and more. The agency would be authorized to define and to ban deceptive practices, to regulate new consumer financial products and, to promote “transparency, simplicity, fairness, accountability, and access.”

The Act would transfer functions and personnel to the new CFPA and provide for interim powers for the Secretary of Treasury pending the establishment of the CFPA and the completion of the transfer of powers and people.

A. Transfer of Functions

1. Transfer of Consumer Financial Protection Functions Under Section 161

- The Act would transfer “all consumer financial protection functions” currently vested in the Board of Governors of the Federal Reserve, the Comptroller of the Currency, the Director of the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the Federal Trade

Commission, and the National Credit Union Administration to the new CFPA. *Sections 161(a)(1)–(6)*.

- “Consumer financial protection functions” is defined by the Act 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, except that such term shall not include any such function relating to an agency’s responsibilities under the Community Reinvestment Act of 1977.” *Section 161(d)*.

- The transfer of authority for consumer financial protection would not affect the authority of the transferring agencies from initiating enforcement proceedings under the circumstances described in section 122(e)(3), which provides “backstop enforcement authority” for the transferring agency. (This backstop authority means that the transferring agency may enforce if the CFPA does not initiate an enforcement proceeding for a federal law that authorizes both the CFPA and the transferring agency to enforce the law.) *Section 161(b)*.

- Sections 161(a) and (b) are effective on the “designated transfer date,” defined in Section 162, below.

- After the designated transfer date, the transferring agencies may no longer collect fees for consumer financial protection functions. *Section 161(c)*.

2. The Designated Transfer Date Under Section 162.

- No later than 60 days after the enactment of the Act, the Treasury Secretary must choose a “designated transfer date” for the transfer of authorities as provided in Section 161, in consultation with the chairpersons of the transferring agencies as well as the Director of the Office of Management and Budget, and publish the date in the Federal Register. *Section 162(a)*.

- Notwithstanding the designation of the date in part (a), the Treasury Secretary may change the “designated transfer date” (*Section 162(b)*) subject to the following restrictions:

- > any designated transfer date cannot be earlier than 180 days or later than 18 months after the date of the enactment of the Act. *Section 162(c)(1)*.

BUT

- > The Treasury Secretary may designate a date that is later than 18 months after the date of the enactment of the Act if the Secretary transmits to Congress:

(A) a written determination that orderly implementation of this title is not feasible on the date that is 18 months after the date of the enactment of this Act;

(B) an explanation of why an extension is necessary for the orderly implementation of this title; and

(C) a description of the steps that will be taken to effect an orderly and timely implementation of this title within the extended time period. *Section 162(c)(2).*

AND

> The designated transfer date cannot be later than 24 months after the date of Enactment of the Act in any event. *Section 161(c)(3).*

3. Savings Provisions Under Section 163.

- For each of the transferring agencies identified in Section 161, the transfer of authority required by Section 161(a):

- > does not affect the validity of any right, duty or obligation that arises under any provision of law related the consumer financial protection function of the transferring agency that existed on the day before the designated date of transfer. *Section 163(a)–(f).*

AND

- > does not abate any proceeding commenced by the transferring agency before the designated transfer date with respect to any consumer financial protection function of the transferring agency, except that the CFPB will be substituted in those proceedings for the transferring agency. *Section 163(a)–(f).*

- All orders, resolutions, determinations, agreements, and regulations that have been issued by the transferring agencies, or by a court of competent jurisdiction, in the performance of transferred consumer financial protection functions and that are in effect on the day before the designated transfer date, shall continue in effect according to the terms of those orders, resolutions, determinations, agreements, and regulations, and shall be enforceable by or against the CFPB until modified, terminated, set aside, or superseded by the CFPB, or by any court of competent jurisdiction, or by operation of law. *Section 163(g).*

- Prior to the designated transfer date, the CFPB shall identify the regulations continued under subsection (g) that will be enforced by the CFPB, after consultation with the

chairpersons of the transferring agencies, and shall publish the list in the Federal Register. *Section 163(h)*.

- Any regulation proposed by a transferring agency before the designated transfer date, but not published, related to a transferred consumer financial protection functions shall become a proposed regulation of the CFPB. *Section 163(i)(1)*.

- Any interim or final regulation of a transferring agency relating to transferred consumer financial protection functions, published before the designated transfer date, but not yet effective before that date, shall take effect as a regulation of the CFPB according to its terms. *Section 163(i)(2)*.

B. Transfer of Personnel

Section 164 of the Act includes detailed provisions related to the transfer of employees from the transferring agencies to the CFPB, including details related to timing of transfers and position assignments, transfer of functions, personnel status and tenure, benefits and seniority, and limitations on personnel actions for transferred employees.

Section 165 of the Act provides for incidental transfers of personnel for up to 5 years after the enactment of the Act.

C. Transitional Provisions

- The Treasury Secretary is authorized to perform the functions of the CFPB until 3 of the appointed Board members are confirmed by the Senate. *Section 166(a)*.

- The Treasury Secretary may also approve administrative services for the CFPB before the designated transfer date (*Section 166(b)*) and provide interim funding (*Section 166(c)*.)

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Mr. O’Rielly is a partner in the San Francisco law firm O’Rielly & Roche LLP, a business litigation law firm founded by litigators with extensive experience representing corporate clients throughout California. Mr. O’Rielly focuses his practice on consumer financial services litigation and commercial litigation. He specializes in the defense of financial institutions, including banks, credit card issuers, mortgage lenders, and consumer lenders in litigation involving state and federal consumer finance laws. Mr. O’Rielly has extensive experience defending financial institutions in class actions.

Mr. O’Rielly publishes a blog entitled *California Consumer Finance Litigation*, (www.consumerfinancelitigation.com) reporting on recent developments and providing analysis of important finance topics related to banking, credit cards, mortgages, and consumer finance statutes and regulations.

Mr. O’Rielly also represents businesses in commercial litigation, including contract disputes, employment litigation, and related issues. He is a certified mediator, focusing on mediating disputes involving consumer finance claims, contract disputes, and unfair business practices.

Education

Cornell University J.D., 1998.
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Bar Admissions

Illinois, 1998; U.S. District Court for the Northern District of Illinois; U.S. Court of Appeals for the Seventh Circuit; California, 2001; U.S. District Courts for the Northern, Eastern, Central, and Southern Districts of California; U.S. Court of Appeals for the Ninth Circuit.

Special Training

Mediation and Conflict Resolution (Certified Mediator). University of California at Berkeley, Extension. Berkeley, California, 2008.

National Institute for Trial Advocacy. Southwest Regional Trial Skills Program. Los Angeles, California, 2003.