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**CONSTITUTIONAL RIGHTS**

Charles Doskow of the University of La Verne College of Law comments on Westboro Baptist Church's stance on homosexuality. PAGE 5

**LEGAL SERVICES**

Mark Schickman of the ABA Board of Governors highlights pro bono efforts, to be recognized in the first National Pro Bono Celebration Week. PAGE 6

**NATURAL RESOURCES**

Roderick Walston and Robert Sawyer of Best Best & Krieger present remedies for when the government reduces remedies contracted for water supplies. PAGE 7

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## New Consumer Agency Closer to Reality

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WASHINGTON — A U.S. congressional committee passed legislation Thursday creating a stand-alone agency to regulate consumer financial products while allowing California and other states to enforce their own consumer-protection laws.

The Consumer Financial Protection Agency bill still allows for preemption — whereby federal law trumps state statutes — in limited circumstances. The provision granting conditional preemption represents a compromise, as the original proposal allowed for no preemption at all, while the financial services industry pushed to completely exempt national banks from state law.

The potential for a new agency that brings the regulatory duties of nearly a dozen agencies under one roof is of keen interest to attorneys involved in the financial services industry. The CFPA would oversee some areas that are currently unregulated, like payday loans, and would bring robust oversight and rule enforcement to areas like mortgages, credit cards and bank accounts.

“What we see is a pretty significant shift — a potential sea change, depending on the final version of the legislation — away from a disclosure-based financial regulatory system and toward much closer, much more active, substantive regulation,” said Daniel J. O’Rielly, a partner with O’Rielly & Roche LLP in San Francisco who represents financial institutions.

The current regulatory regime, divided across multiple agencies, is premised on financial institutions disclosing to the consumer relevant

aspects of their product. The CFPA, on the other hand, would have the power to impose procedures and responsibilities on financial institutions. It would also have the authority to enforce its regulations and the ability to curtail mandatory arbitration.

For lawyers, the new agency could significantly increase legal work as they guide their clients through the brand new regulatory structure. Some attorneys would need to interpret the new rules, while others would focus on compliance. Litigation could spike in response to disputes over new agency rules, as well as civil claims that were once settled by arbitration but instead wind up in court.

Both defense and plaintiffs’ lawyers are watching how preemption is dealt with in the final version of the bill.

“It could broadly affect remedies that are available under state law,” said Christine D. Spagnoli, president of the Consumer Attorneys of California. “There are states with a very strong history of consumer protection and California is one of them. I hope people won’t be restricted from recognized remedies from state law.”

The compromise on preemption would strike rules issued by the Office of the Comptroller of the Currency in 2004, which preempted most state consumer protection laws regulating national banks. Instead, it would put back in place a standard from a U.S. Supreme Court case for deciding when federal law should preempt state law. *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25 (1996).

The legislation would have the currency office decide on preemption on a case-by-case basis, ex-

empting banks from state law when the law “significantly interferes” with the banking business. State law that unfairly discriminates against national banks compared to state-chartered banks or state statutes would also trigger preemption.

The author of the preemption provision, Rep. Melvin Watt, D-N.C., said he would like the bill, in its final form, to expressly define the standard, rather than leaving it to the courts to interpret the so-called Barnett standard from case law.

In addition to the preemption matter, Democrats had to make a number of concessions to get the bill through the committee. For instance, they agreed to exempt community banks with less than \$10 billion in assets — 98 percent of such banks — from on-site examination by the CFPA.

On Thursday, Newport Beach Republican Rep. John Campbell won an exemption from agency oversight for automobile dealers. The Consumer Federation of America targeted that car dealer exemption, along with an exemption for credit-related insurance and the barriers on examining small banks, as areas needing change before the full House votes on the bill.

Democrats have a long way to go before the CFPA could be created, as the Senate is working on its version of legislation for the agency. Still, they celebrated Thursday’s committee passage.

“When I first came to Washington with the idea for this agency, everybody told me the banks always win,” said Elizabeth Warren, chair of the committee overseeing Congress’ bank bailout. “They didn’t win today.”

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