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In the debate over the Consumer Financial Protection Agency (CFPA), some have argued that an independent CFPA might issue rules that jeopardize bank safety and soundness. However, as with other agencies whose actions to protect public safety can have an impact on important industries, the Administrative Procedure Act (APA) ensures that the CFPA will properly consider bank safety and soundness.

The CFPA bill requires the agency to consider the impact of a rule on safety and soundness. The APA also requires the agency to take seriously any significant concerns raised in comments on its proposed rules. If the agency fails in either task, and issues a rule without adequately considering serious impacts on safety and soundness, the rule will be challenged and will be subject to judicial reversal under the APA.

#### ***Rulemaking and Judicial Review Under the APA***

The APA permits agencies to issue rules only after “consideration of the relevant matter presented” by interested parties.<sup>1</sup> An affected party can challenge a rule, and the reviewing court can set it aside if, among other grounds, the agency’s action was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;” or “without observance of procedure required by law.”<sup>2</sup>

Court decisions over the years have made these provisions “extremely demanding”: “To have any reasonable prospect of obtaining judicial affirmance of a major rule, an agency must ... respond[] to all major criticisms contained in the comments on its proposed rule.”<sup>3</sup> It is not merely a matter of a perfunctory response:

“If a comment criticizes in detail some characteristic of the agency’s proposed rule, ... and the agency retains that characteristic in the final rule without including in its statement of basis and purpose a relatively detailed response to that criticism, a reviewing court is likely to hold the rule unlawful on the grounds that the statement of basis and purpose is inadequate and the rule is arbitrary and capricious.”<sup>4</sup>

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<sup>1</sup> 5 U.S.C. § 553(c).

<sup>2</sup> 5 USC §§ 706(2)(A), (C), (D).

<sup>3</sup> Richard J. Pierce, Jr. *Administrative Law Treatise*, Vol. I at 593 (5<sup>th</sup> ed. 2010).

<sup>4</sup> *Id.* at 594.

An industry challenge to a CFPA rule would have particular force if it were supported by the prudential regulators, for example on safety and soundness grounds. The prudential regulators would have ample opportunity to provide input within the traditional APA framework.

Courts will nullify an agency action if the reasoning is inadequate even if the agency discusses the issue in detail.<sup>5</sup> Courts scrutinize the agency's response to criticism, and "an agency rule would be arbitrary and capricious if the agency ... offered an explanation for its decision that runs counter to the evidence before the agency ...."<sup>6</sup>

### ***Courts Will Look to the CFPA Statute, Which Requires Serious Consideration of Prudential Concerns***

The factors set forth in an agency's enabling statute are the cornerstone of judicial review under the APA. The Supreme Court "has begun to attach greater significance to statutory language in determining the scope of the obligations courts can impose on agencies."<sup>7</sup>

Courts reviewing agency rules expect agencies to balance the impacts on individuals and those on industry,<sup>8</sup> even if the Congress did not explicitly require them to do so.<sup>9</sup> In the case of the CFPA, multiple provisions in the bill require the agency to consider prudential concerns and will give a court an opportunity to review and reject a CFPA rule that inappropriately disregards safety and soundness.

The CFPA's objectives include ensuring that:

"markets for consumer financial products or services operate fairly and efficiently with ample room for sustainable growth and innovation."<sup>10</sup>

A rule that created safety and soundness problems for banks would not permit markets to operating efficiently and would not provide room for sustainable growth or innovation.

In prescribing a regulation, the Director "shall":

“(A) consider the potential benefits and costs to consumers, covered persons, and the Federal Government, *including the potential reduction of consumers' access to consumer financial products or services*, resulting from such regulation; and (B) consult with the Federal banking agencies, State bank supervisors, the Federal Trade Commission, or other Federal agencies, as appropriate, *regarding the consistency of a*

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<sup>5</sup> *Id.* at 600; *see, e.g.,* AFL-CIO v. OSHA, 965 F.2d 962 (11<sup>th</sup> Cir. 1992).

<sup>6</sup> Motor Vehicle Mfr's Ass'n v. State Farm Mut. Auto. Ins. Co., 43 U.S. 29, 43 (1983).

<sup>7</sup> Pierce, *supra*, at 597; Brower v. Evans, 257 F.3d 1058 (9<sup>th</sup> Cir. 2001) (reversing agency rule for failure to comply with explicit statutory mandates).

<sup>8</sup> *See* Warren v. EPA, 159 F.3d 616 (D.C. Cir. 1998) (reviewing EPA rule and noting that statute was the product of compromise between goal of clean air and goal of not disrupting the gasoline market).

<sup>9</sup> Grand Canyon Air Tour Coalition v. FAA, 154 F.3d 455 (D.C. Cir. 1998) (FAA properly considered interests of air tour industry though statute referred only to pursuit of natural quiet).

<sup>10</sup> H.R. 4173, § 4201(b)(3) (as passed House 12/11/09).

*proposed regulation with prudential, consumer protection, civil rights, market, or systemic objectives administered by such agencies or supervisors ...*<sup>11</sup>

This requirement is repeated for emphasis in the provision authorizing rules against unfair, deceptive or abusive practices.<sup>12</sup> Thus, the bill explicitly requires that the CFPB consult with the prudential regulators and ensure that the rule is consistent with prudential and systemic concerns.

The bill requires the CFPB to use the Federal Trade Commission Act standards in considering a rule to prevent “unfair” practices.<sup>13</sup> The FTC Act permits rules based on unfairness only if the harm to be prohibited is “not outweighed by countervailing benefits to consumers.”<sup>14</sup> The benefit from a rule that jeopardized bank safety and soundness would be outweighed by the benefits of keeping consumer deposits safe.

Thus, the CFPB statute requires the agency to balance consumer protection against the imperative of keeping banks safe and sound. If the agency failed to do so and disregarded serious prudential concerns, its rule would be overturned by judicial review under the APA.

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<sup>11</sup> *Id.* § 4202(b)(2).

<sup>12</sup> *Id.* § 4301(d).

<sup>13</sup> *Id.* § 4301(c).

<sup>14</sup> 15 U.S.C. § 45(n).