Auto Dealers Beware: Big Brother Is Looming

By Jonathan Michaels

In some of the most sweeping legislation to hit Capital Hill in years, Senate Financial Reform Bill "S. 3217" is about to change the financial industry's landscape for good. And, that's not welcome news for everybody.

Acting in response to the 2008 financial market meltdown, the Senate is set to begin voting this week on S. 3217, which would create the "Bureau of Consumer Financial Protection" — an agency to be charged with overseeing virtually all consumer-related financial products. The new agency, or the BCFP as it will likely become known, will be given total oversight to stomp out "unfair, deceptive or abusive" lending practices, and will apply to industries far and wide. As President Barack Obama proclaimed, he will block all efforts to exclude from the new agency "banks, credit card companies or nonbank firms such as debt collectors, credit bureaus, payday lenders or auto dealers."

If the intent was to create an 800-pound gorilla in the financial markets, the bill succeeds. In addition to having unfettered oversight to halt any practice the agency determines to be unfair, deceptive or abusive, the BCFP will be required to "conduct examinations" of persons it considers to be "larger participants" of a market. For auto dealers who fall into this category (the BCFP will be left to define what a "market" is, and who is a "larger participant" of that market), they would have to register with the government, and their principles, officers, directors and key personnel may have to undergo background checks by the government.

The intent of the proposed legislation appears to be pure: provide important

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oversight to the financial industry to prevent a repeat of the 2008 debacle. But, in the haste to prevent this situation from ever reoccurring, one has to wonder whether the current legislation is being driven by reason or by fear. History is replete with hastily-made decisions that appear appropriate when made, only to later cause us to cringe when reminded that we ever engaged in such rash conduct. If there is any doubt on this, just ask any of the 110,000 Japanese Americans who were whisked away into internment camps during World War II.

With the auto industry employing, in one form or another, one out of every six persons in the United States, the question of whether the legislation should apply to the nation's 17,000 auto dealers should not be taken lightly. This is particularly true at a time when the auto industry sold 300,000 fewer vehicles in the United States in 2009 than in 1965 (10.6 million in 2009 versus 10.9 million in 1965), and when goliaths such as General Motors and Chrysler — once thought impenetrable — are toppling under the weight of insurmountable debt. A misstep with this industry could have a dramatic impact on our nation's ability to climb out of our economic freefall.

While the proposed legislation may be appropriate, or even necessary, for the mammoth institutions of Wall Street, the same cannot be said for the auto dealers of Main Street. Auto dealers are already one of the most heavily regulated segments, governed by the Federal Trade Commission, the Federal Reserve Board, the Fair Credit Reporting Act, the Truth in Lending Act, the Federal Consumer Leasing Act, and the Gramm Leach Bliley Act. Adding yet another layer of oversight, such as the BCFP, to an already over-burdened process would only serve to require further infrastructure in dealerships, and result in higher prices for consumers.

The legislation would also undoubtedly spawn further consumer litigation against dealers, the cost of which also gets passed on to the consumer. Whether it is a violation of Business and Professions Code Section 17200, the Consumer Legal Remedies Act (Civil Code Section 1780), or the "single document rule" (a requirement that all terms of a loan be contained in a single document), dealers are uniquely positioned to receive attacks from consumers for what are often times hyper technical applications of law. Readers may recall the event in the early 2000s where a southern California law firm filed more than 2,000 lawsuits against auto dealers and repair shops in California for trivial violations, such as abbreviating the words "on approved credit" (O.A.C.) in a print advertisement.

As the bill has been making its way through Congress, at least one Senator has recognized the chilling effect that S. 3217 will have on the auto industry. After the Senate offices received floods of letters and visits from concerned dealers, Senator Sam Brownback (R., Kan.) drafted an amendment to S. 3217 that would exempt nearly all of the nation's dealers from the new consumer protection law. This carve out — what has become known as the "Brownback Amendment" — is set to be voted on by the Senate in the upcoming days. If the Amendment passes, auto dealers will escape the grip of a frightened Congress, and be permitted to rebuild their industry without the added weight of additional governmental oversight. As the vote takes place, one can only hope sound judgment will prevail.

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Solicitor General, and now Supreme Court nominee, Elena Kagan.

Kagan Will Move Supreme Court To the Right

By Marjorie Cohn

President Barack Obama has chosen Elena Kagan to fill the vacancy left by Justice John Paul Stevens' retirement. Sadly, Kagan cannot fill Justice Stevens' mighty shoes.

As the Rehnquist court continued to eviscerate the right of the people to be free from unreasonable searches and seizures, Associate Justice John Paul Stevens filed principled and courageous dissents. For example, the majority held in the 1991 case of *California v. Acevedo* that although the police cannot search a closed container without a warrant, they can wait until a person puts the container into a car and then do a warrantless search because the container is now mobile.

In a ringing dissent that exemplified his revulsion at executive overreaching, Justice Stevens wrote that "decisions like the one the Court makes today will support the conclusion that this Court has become a loyal foot soldier in the Executive's fight against crime."

The founders wrote checks and balances into the Constitution so that no one branch would become too powerful. But during his "war on terror," President George W. Bush claimed nearly unbridled executive power to hold non-citizens indefinitely without an opportunity to challenge their detention and to deny them due process. Three times, a closely divided Supreme Court put on the brakes. Justice Stevens played a critical role in each of those decisions. He wrote the opinions in *Rasul v. Bush* and *Hamdan v. Rumsfeld* and his fingerprints were all over *Boumediene v. Bush*.

Unfortunately, Obama has continued to assert many of Bush's executive policies in his "war on terror." Elena Kagan, Obama's choice to replace Justice Stevens, has never been a judge. But she has been a loyal foot soldier in Obama's fight against terrorism and there is little reason to believe that she will not continue to do so.

During her confirmation hearing for solicitor general, Kagan agreed with Senator Lindsey Graham that the president can hold suspected terrorists indefinitely during wartime, and the entire world is a battlefield. While Bush was shredding the Constitution with his unprecedented assertions of executive power, law professors throughout the country voiced strong objections. Kagan remained silent.

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Justice Stevens ruled in favor of broad enforcement of our civil rights laws. In his 2007 dissent in *Parents Involved in Community Schools v. Seattle School District No. 1*, he wrote that "children of all races benefit from integrated classrooms and playgrounds." When Kagan was dean of Harvard Law School, she hired 32 tenured and tenure-track academic faculty members. Only seven were women and only one was a minority. "What a twist of fate," wrote four minority law professors on *Salon.com*, "if the first black president — of both the Harvard Law Review and the United States of America — seemed to be untroubled by a 21st Century Harvard faculty that hired largely white men."

Obama had a golden opportunity to appoint a giant of a justice who could take on the extreme right-wingers on the Court who rule consistently against equality and for corporate power. When he cast a vote against the confirmation of John G. Roberts Jr. to be Chief Justice, Senator Obama said, "he has far more often used his formidable skills on behalf of the strong and in opposition to the weak." Justice Stevens has done just the opposite.

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If he wanted to choose a non-judge, Obama could have picked Harold Hongju Koh or Erwin Chemerinsky, both brilliant and courageous legal scholars who champion human rights and civil rights over corporate and executive power. Unlike Kagan, whose 20 years as a law professor produced a paucity of legal scholarship, Koh and Chemerinsky both have a formidable body of work that is widely cited by judges and scholars.

But Obama took the cautious route and nominated Kagan, who, like Harriet Miers, has no record of judicial opinions and no formidable legal writings. After the health care debacle, he should know that the right-wingers will not be appeased by this milk toast appointment, but will oppose whomever he nominates.

The Warren Court issued several landmark decisions. It sought to remedy the inequality between the races and between rich and poor, and to curb unchecked executive power. Chief Justice Earl Warren wrote these words, which would later become his epitaph: "Where there is injustice, we should correct it. Where there is poverty, we should eliminate it. Where there is corruption, we should stamp it out. Where there is violence, we should punish it. Where there is neglect, we should provide care. Where there is war, we should restore peace. And wherever corrections are achieved, we should add them permanently to our storehouse of treasures."

Conservatives decry activist judges — primarily those who act contrary to conservative politics. But the Constitution is a short document and it is up to judges to interpret it. Obama has defensively bought into the right-wing rhetoric, saying recently that during the 1960s and 1970s, "liberals were guilty" of the "error" of being activist judges. Rather than celebrating the historic achievements of the Warren Court — and of Justice Stevens — Obama is once again cowering in the face of conservative opposition.

Obama should have done the right thing, the courageous thing, and filled Justice Stevens' seat with someone who can fill his shoes. His nomination of Elena Kagan will move the delicately balanced court to the Right. And that is not the right thing.