

Consumer Financial Protection Bureau Attempts to Regulate Telecom

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Since it opened in 2011, the Consumer Financial Protection Bureau ("the Bureau" or "CFPB") has issued thousands of pages of regulations, mostly directed at the home mortgage industry, and aggressively exercised its authority to enforce consumer financial protection law. Dozens of enforcement lawsuits and administrative proceedings filed by the Bureau against major players in the credit card, mortgage, real estate settlement, auto, and debt collection industries have resulted in assessment of more than \$1 billion in penalties and refunds against the targeted companies, along with imposition of costly modifications to industry business practices and continued reporting requirements. Now, based on a recent action filed against wireless service provider Sprint, it appears the Bureau may be attempting to extend its reach beyond industries that offer "consumer financial products and services." Indeed, the Bureau's position in the lawsuit implies that telecom may be subject to CFPB enforcement, despite the fact that the industry does not sell "consumer financial products services," simply because it charges consumers for services. We suggest that this was not the intent of the statute that created it, the Dodd-Frank Act of 2010 ("Dodd Frank"). Dodd Frank was enacted in the wake of the 2008 mortgage and financial crisis, as part of an effort to avert a similar future crisis in financial markets. It was thought that the mortgage meltdown that precipitated the crisis was caused, at least in part, by predatory and unscrupulous lending and underwriting practices that led consumers to take on mortgage debt they could ill afford, secured by over-valued real estate. Therefore, a laudable goal of the law was to protect consumers from such practices in the future. Dodd Frank thus established the Bureau, authorized it to supervise large banks and certain other consumer financial service companies (e.g., mortgage companies, payday lenders and larger debt collectors, and consumer reporting companies) in order to "implement, examine for compliance with, and enforce" "Federal consumer financial law." This includes Title X of Dodd Frank, the Consumer Financial Protection Act ("CFPA"), as well as preexisting federal laws regulating consumer financial products and services. These include the Truth in Lending Act, Equal Credit Opportunity Act, Real Estate Settlement Procedures Act, Fair Debt Collection Practices Act, Fair Credit Reporting

Act, and several other less well known laws. The CFPA defines "Consumer financial products and services" to include consumer lending, leasing, credit, and related services. Typical consumer financial products and services within the definitions include home mortgages; credit, debit, and prepaid cards; auto, student, and payday loans; credit reporting; and consumer debt collection. Entities that offer "consumer financial products and services" are "covered persons" under the law. The Bureau's objectives include ensuring, "with respect to consumer financial products and services," that consumer transactions are transparent, consumers are properly informed before entering into financial transactions, and also protected from "unfair, deceptive, or abusive acts and practices" ("UDAAP") related to the offering of "consumer financial products and services." UDAAP is a new concept that may reach further than the "unfair and deceptive" practices already prohibited by federal and state unfair and deceptive trade practices laws as it adds "abusive" practices to the prohibition. However, the Bureau cannot declare a practice "abusive" under the Act unless it "materially interferes with a consumer's ability to understand a *consumer financial product or service*," or "takes unreasonable advantage of a consumer's lack of understanding of the risks, costs or conditions of such products or services," "the consumer's inability to protect his interests," or "the consumer's reasonable reliance on the provider to act in the consumer's best interests in connection with such products and services." "Unfair" and "deceptive" practices are also defined in the context of offering or providing *consumer financial products or services*. All industries selling to consumers were clearly not intended to be regulated by the Bureau. Indeed, the CFPA expressly provides that the Bureau may not exercise "rulemaking, supervisory, enforcement or other authority" over, *inter alia*, retailers and other sellers of "nonfinancial goods or services," except to the extent that such sellers are engaged in offering or providing consumer financial products or services (defined to exclude extending direct credit to the consumer for the purchase of such non financial good or service), as well as industries regulated by state insurance and securities regulators, real estate brokers, and certain other specified industries. The Bureau's lawsuit against Sprint alleges that it enrolled and charged consumers for third party billing services and merchant text messages to cell phones without the consumers' authority, resulting in unauthorized charges to the consumers ("cramming"), and that the company did not adequately respond to consumer complaints about the charges. The Bureau asserts that Sprint's actions were "unfair acts and practices" in violation of the CFPA. The complaint seeks an injunction, demands refunds, and assessment of civil penalties, in its words, "to deter unauthorized third-party charges in the future." Yet, as explained above, the scope of the CFPA's unfair and deceptive practices prohibition applies only in connection with offering "consumer financial products and services." The statute's definition of "consumer financial products and services" includes neither wireless services, nor "billing" services. While providing electronic payment processing services, and collecting debt related to any consumer financial product or service are included in that definition, the activity alleged in the CFPB complaint involves neither electronic payment processing or the collection of debt for a "consumer financial product or service." Moreover, wireless carriers are regulated by the Federal Communications Commission ("FCC"), which already accepts consumer complaints alleging "cramming" as well as other telemarketing issues. The Federal Trade Commission ("FTC") has brought cramming enforcement

actions against T-Mobile and AT&T that allege conduct virtually identical to the CFPB's allegations against Sprint. The FTC recently announced settlements with T-Mobile for \$90 million in fines and consumer refunds, and with AT&T for \$105 million. In addition, the Federal Telephone Consumer Protection Act regulates and imposes penalties for sending marketing text messages without the consumer's prior express consent. The mortgage, auto loan, credit card, and other arms of the consumer finance industry have not fared well under the CFPB, but neither have they fought vigorously against the Bureau's enforcement actions and regulations. And indeed, with respect to these industries, the Bureau's authority to regulate and enforce laws under the Act is apparent. Telecommunications, however, is not a consumer financial product, and is subject to its own regulations. If the telecom industry accepts the Bureau's attempt to assert jurisdiction over its activities, this may easily lead to new, confusing, and costly regulatory burdens for an industry that is already heavily regulated by other agencies.

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