

The CFPB's 'UDAAPification' Of Consumer Protection Law

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Questions about the scope of the Consumer Financial Protection Bureau's jurisdiction abound for financial institutions and other entities that work with them. What are the boundaries of the CFPB's authority? How might these parameters expand in the future? Are there other ways the CFPB may take action against a company even if it does not have supervisory authority, and what would that action look like? These are just a few of many jurisdictional questions that financial institutions and their kin have pondered since the CFPB opened its doors in July 2011.

The CFPB's jurisdiction is wide and its reach seems to grow longer as time passes. The bureau regulates many entities through direct supervisory authority and holds the power to indirectly "regulate" many others through its ability to enforce a veritable alphabet soup of consumer protection laws. These laws include Sections 1031 and 1036 of the Consumer Financial Protection Act, a far-reaching statute that broadly prohibits unfair, deceptive or abusive acts or practices in connection with any transaction with a consumer for consumer financial products and services or the offering of such products or services.[1]

The CFPB has extended its supervisory jurisdiction to include credit bureau reporting agencies, debt collectors and student loan servicers. Pending rulemaking may soon also bring international money transmitters into the CFPB's jurisdictional ambit, and the bureau has indicated it will continue to expand its supervisory jurisdiction into other industries as well, including auto lending by nonbanks.

Using its expansive enforcement authority, the CFPB can also take action against institutions that it may not supervise directly. Such entities have included debt-relief service providers and mortgage insurers, for example.

Supervision 101: Are You Covered?

In broad strokes, the CFPB gives the CFPB authority, in varying degrees, over three groups of entities:

- banks that are "covered persons" and meet certain threshold requirements;
- nonbanks that are "covered persons" and meet certain threshold requirements; and



Jonice G. Tucker

- service providers to covered banks and nonbanks.

In framing this discussion, a few details about the definition of a “covered person” under Dodd-Frank are useful. In general terms, a “covered person” is any person who offers financial products or services to consumers primarily for personal, family or household purposes, or any person who offers credit, loan servicing, real estate settlement services, credit history reporting services or debt collection services in connection with consumer financial products or services.[2]

A “covered person” also includes any affiliated service providers of any person offering consumer financial products or services.[3] The term “consumer financial products or services” includes, among other things, extensions of credit, loan servicing, real estate settlement services, deposit-taking, stored-value or payment instruments, check cashing, financial data processing products provided to consumers by technological means, financial advisory services, credit counseling, debt relief services, consumer credit reporting and debt collection.[4]

The CFPB exercises its supervisory authority primarily by conducting examinations. Activities that occur in connection with examinations may include requesting and analyzing information, onsite observation and interviews, assigning consumer compliance ratings, issuing reports of examination and ongoing monitoring.

In addition, the CFPB has enforcement authority which permits it to enforce compliance with “enumerated” consumer financial laws and regulations or unfair, deceptive or abusive acts or practices through civil actions, administrative proceedings, consent orders and memoranda of understanding. Enforcement tools include the ability to impose civil money penalties, seek restitution on behalf of consumers and mandate injunctive relief (which often includes sweeping business practice changes).

As part of its enforcement authority, the CFPB may investigate violations of consumer financial laws through subpoenas and civil investigative demands seeking documents, written responses or reports and testimony. The CFPB does not have criminal enforcement authority, but may refer criminal matters to the U.S. Department of Justice, as demonstrated by the recent guilty plea of a debt settlement company based on a CFPB referral.

Jurisdictional Expansion through "UDAAPification"

As noted above, the CFPB has jurisdiction to pursue violations of a host of consumer protection laws. There remain, however, certain key laws that may not be enforced by the CFPB directly. These include the Servicemembers Civil Relief Act and the Fair Housing Act. In addition, with respect to other laws, such as the Fair Debt Collections Practices Act, long standing statutory carve-outs make these laws inapplicable to certain players in the industry.

The CFPB has significant latitude to pursue infractions that it asserts rise to the level of unfair, deceptive or abusive acts or practices, commonly referred to as UDAAP. The CFPB is now using this authority to push its jurisdictional limits by alleging that an act constitutes a UDAAP when the CFPB may not otherwise have authority to pursue the perceived legal violation.

In a July 10, 2013, bulletin issued in connection with debt collection, for example, the CFPB noted that the FDCPA only applies to certain entities but proceeded to list examples of UDAAPs that mirror many FDCPA provisions. This “UDAAPification” of the FDCPA further extends the CFPB’s authority. More

recently, putting theory into action, the CFPB initiated an action in federal court against entities which purchased, serviced and collected on consumer-installment loans from an online lender, alleging that practices which would have violated the FDCPA were UDAAPs.

Banks with the Bucks

Turning to the groups of entities within the CFPB's jurisdiction, the bureau has supervisory and enforcement authority over large, insured depository institutions and credit unions with over \$10 billion in total assets.[5] This authority extends to their affiliates as well. The CFPB's supervisory authority over smaller insured depository institutions and credit unions with under \$10 billion in total assets is limited to accompanying the prudential banking regulators on examinations.[6] Furthermore, while the CFPB may notify prudential banking regulators of potential violations of federal consumer financial laws, those regulators (the Office of the Comptroller of the Currency, Federal Reserve and Federal Deposit Insurance Corporation) retain enforcement authority over small banks.[7]

Not a Bank? Not a Problem!

Banks have long been accustomed to supervision by federal banking regulators. Under Dodd-Frank, many nonbanks are now subject to CFPB supervision, enforcement or both, and the CFPB continues to bring more entities into its jurisdictional purview through various rulemakings.

Dodd-Frank granted the CFPB supervisory and enforcement authority specifically over the following types of nonbanks, regardless of their size:

- mortgage originators, brokers and servicers;
- private student lenders;
- payday lenders;
- "larger participants" of consumer financial services markets as defined by CFPB rulemaking; and
- "covered persons" that pose "risks to consumers" with regard to the offering of consumer financial products or services.

The last two groups are discussed in greater detail below.

"Larger Participants"

To date, the CFPB has defined "larger participants" of consumer financial products or services markets to include consumer reporting agencies, debt collectors and student loan servicers meeting certain size thresholds. Specifically, "larger" consumer reporting agencies have over \$7 million in annual receipts from consumer reporting activities,[8] and "larger" debt collectors have over \$10 million in annual receipts from consumer debt collection.[9]

A rule effective March 1, 2014, further extended the CFPB's jurisdiction to "larger participants" of the federal and private student loan servicing market that service more than 1 million accounts.[10] Note that private student lenders of any size are under the CFPB's authority independent of this rule. The CFPB estimates that the rule encompasses about seven student loan servicers responsible for servicing more than 49 million borrower accounts. Recently, the CFPB also issued a final rule extending supervisory authority to international money transfer providers with at least 1 million aggregate annual international transfers, which will become effective Dec. 1, 2014.[11] The CFPB's most recent

rulemaking agenda stated that it would propose a rule no sooner than August 2014 to bring larger nonbank auto lenders within its supervisory jurisdiction as well.

Covered Nonbanks Posing a “Risk to Consumers”

The CFPB also has supervisory and enforcement authority over another amorphous category of “covered persons,” defined as those whom it has reasonable cause to believe are engaging or have engaged in conduct posing “risks to consumers” with regard to the offering of consumer financial products or services. Under the CFPB’s process for making this reasonable cause determination, the CFPB issues a notice to the person whom the bureau believes “poses risks to consumers” and the basis for that belief. The person has 30 days to respond, after which the director of the CFPB will make a final determination.[12] If the director determines that the person poses a risk to consumers and issues an order, then the person will be subject to the CFPB’s supervisory and enforcement authority until termination of the order. The CFPB may also provide notice of the preliminary reasonable cause determination and an opportunity to respond in a notice of charges initiating an adjudication proceeding against a person.

Reeling in Service Providers

The CFPB has supervisory and enforcement authority over service providers to covered banks and nonbanks.[13] In the case of small bank service providers, however, they must serve a “substantial number” of covered small banks to fall under CFPB authority.

The term “service provider” means any person that provides a “material service” to a “covered person” in connection with a consumer financial product or service.[14] It includes persons participating in “designing, operating or maintaining” or processing “transactions” related to consumer financial products or services.[15] Persons providing general business or ministerial support to “covered persons” or time or space for advertising, however, are not considered “service providers.”[16] A “service provider” need not be affiliated with the supervised bank or nonbank.

In previous guidance, the CFPB said that it intends to “exercise the full extent of its supervision authority over supervised service providers” and use its enforcement authority when it identifies violations of law.[17] The CFPB specifically stated it will examine service providers’ compliance with Dodd-Frank’s prohibition against unfair, deceptive or abusive acts or practices.

The guidance cautioned, however, that liability may fall with both the financial institution and the service provider: “[T]he mere fact that a supervised bank or nonbank enters into a business relationship with a service provider does not absolve the supervised bank or nonbank of responsibility for complying with federal consumer financial law to avoid consumer harm.”[18] According to the CFPB, in certain circumstances, the supervised bank or nonbank may have “legal responsibility” for the conduct of service providers, and this guiding principle has been a driver in many recent enforcement actions by the CFPB.[19]

Casting a Wide Enforcement Net

The CFPB’s authority to investigate potential violations of consumer financial laws and enforce those laws is expansive and may extend beyond its current supervisory authority in several ways. Specifically, Dodd-Frank grants the CFPB authority to investigate and take enforcement action against nearly “any person” who violates a federal consumer financial law the bureau has jurisdiction over, not just

supervised entities. Illustrative of this point, the CFPB has taken enforcement actions against certain debt relief service providers and mortgage insurers even though it did not have supervisory jurisdiction over these entities at the time.

Relatedly, when conducting an investigation, the CFPB has authority to obtain information relevant to a violation of federal consumer financial law from any person, including both the target and third-parties not subject to the CFPB's jurisdiction.[20] The CFPB typically exercises its investigatory authority by issuing civil investigative demands requiring production of documents, written responses or reports and oral testimony.

Conclusion

The CFPB has broad authority over numerous entities, both banks and nonbanks, involved in offering consumer financial services or products. As should be expected of a relatively young agency, the CFPB is still in the process of defining this authority and applying it to the full range of entities potentially subject to its scrutiny. Businesses involved in consumer financial services, especially nonbanks and service providers, should be familiar with the potential scope of the CFPB's authority and should be preparing for the possibility that the CFPB will come knocking.

—By Jonice Gray Tucker and Aaron C. Mahler, BuckleySandler LLP

Jonice Tucker is a partner and Aaron Mahler is counsel in BuckleySandler's Washington, D.C., office.

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[1] Consumer Financial Protection Act of 2010 §§ 1031, 1036, 12 U.S.C. §§ 5531, 5536.

[2] CFPA § 1002(6), 12 U.S.C. § 5481(6).

[3] *Id.*

[4] CFPA § 1002(15), 12 U.S.C. § 5481(15).

[5] CFPA § 1025, 12 U.S.C. § 5515.

[6] CFPA § 1026, 12 U.S.C. § 5516.

[7] CFPA § 1026(c), (d), 12 U.S.C. § 5516(c), (d).

[8] Defining Larger Participants of the Consumer Reporting Market, 12 C.F.R. § 1090.104 (2012).

[9] Defining Larger Participants of the Consumer Debt Collection Market, 12 C.F.R. § 1090.105 (2012).

[10] Defining Larger Participants of the Student Loan Servicing Market, 12 C.F.R. § 1090.106 (2013).

[11] Defining Larger Participants of the International Money Transfer Market, 12 C.F.R. § 1090.107 (2014), http://files.consumerfinance.gov/f/201409_cfpb_final-rule_larger-participant-rule-international-

money-transfer-market.pdf.

[12] Procedural Rule to Establish Supervisory Authority over Certain Nonbank Covered Persons Based on Risk Determination, 12 C.F.R. § 1091.100, et seq. (2013).

[13] CFPA §§ 1024(e), 1025(d), 1026(e), 12 U.S.C. §§ 5514(e), 5515(d), 5516(e).

[14] CFPA § 1002(27), 12 U.S.C. § 5481(27).

[15] Id.

[16] Id.

[17] Consumer Fin. Protection Bureau, CFPB Bull. 2012-03, Service Providers (Apr. 13, 2012), available at http://files.consumerfinance.gov/f/201204_cfpb_bulletin_service-providers.pdf.

[18] Id.

[19] Id.

[20] CFPA § 1052(c)(1), 12 U.S.C. § 5562(c)(1).

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