



SBLC WEEKLY

Via E-mail
May 3, 2010

Volume XII, Issue 15

TRUST THE REGULATOR?

The Senate is debating whether to undertake financial institutions' regulatory reform. The legislation creates a new Bureau of Consumer Financial Protection (BCFP). There has been a sub-debate about the application of the legislation to retailers that sell consumer products and providers of services to consumers.

The first thing to keep in mind is that this bill regulates only financial products and services. As a result, it not regulating the consumer products or services themselves (e.g. for safety) but if the retailers or service providers offer financing related to sale of the nonfinancial goods or services (yep, *nonfinancial* is used in the bill), they might find the financing aspects regulated by the BCFP.

In fairness, some retailers and service providers are already regulated because they extend credit. The Truth in Lending Act is the most comprehensive, but the Gramm-Leach-Bliley Act, the Fair Credit Reporting, and even last year's Credit Card Accountability, Responsibility, and Disclosure Act have some provisions that apply to retailers and service providers.

Most of the current "substantive" laws relating to consumer credit remain and basically the BCFP is the consolidation of the various current consumer credit regulators. But, the BCFP is given new administrative authority and enforcement powers.

The "catch-all" authority is the BCFP "*may take any action authorized by the law to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.*"

So, to follow the bouncing ball as to whether my financing program is covered or not, the logic first question is what is a "consumer financial product or service."

According to the bill, the term "consumer financial product or service" means any financial product or service that is described in one or more categories under paragraph (13) and "*is offered or provided for use by consumers primarily for personal, family, or household purposes*,"

or is found under clause (i), (iii), (ix), or (x) of paragraph (13)(A), and "*is delivered, offered, or provided in connection with a consumer financial product or service referred to in subparagraph (A).*"

If you mosey on down to paragraph 13, which defines "financial product or service, you find the paragraph (13) (A) clauses (i) and (ix) (x) are the ones most likely applicable to a retailer or service provider:

(i) *extending credit and servicing loans, including acquiring, purchasing, selling, brokering, or other extensions of credit (other than solely extending commercial credit to a person who originates consumer credit transactions);*

(ix) *collecting, analyzing, maintaining, or providing consumer report information or other account information, including information relating to the credit history of consumers, used or expected to be used in connection with any decision regarding the offering or provision of a consumer financial product or service, except to the extent that— a person collects, analyzes, or maintains information that relates solely to the transactions between a consumer and such person; or provides the information to an affiliate of such*

person; and the information described is not used by such person or affiliate in connection with any decision regarding the offering or provision of a consumer financial product or service to the consumer.

(x) collecting debt related to any consumer financial product or service.

Now Senator Thomas Dodd (D-CT), Chairman of the Senate Banking, Housing and Urban Affairs Committee, says “Hold on, there is more to the bill.” He cites another section that says, “*the Bureau may not exercise any rulemaking, supervisory, enforcement, or other authority under this title with respect to a merchant, retailer, or seller of nonfinancial goods or services that is not engaged significantly in offering or providing consumer financial products or services*” and he says that most consumer goods merchants or service providers will not meet the “significantly” threshold.

To understand how you get through this analysis to his conclusion, there is one section of the bill with three subparagraphs. Only in Washington could you craft a section that sounds like it excludes everybody from the bill, adds some back in, and then takes few of those back out. Here we go.

(A) **IN GENERAL.**— (A) Except as provided in subparagraph (B), and subject to subparagraph (C), the Bureau may not exercise any rule making, supervisory, enforcement, or other authority under this title with respect to a merchant, retailer, or seller of nonfinancial goods or services who—(i) extends credit directly to a consumer, in a case in which the good or service being provided is not itself a consumer financial product or service (other than credit described in this

subparagraph), exclusively for the purpose of enabling that consumer to purchase such nonfinancial good or service directly from the merchant, retailer, or seller; (ii) directly, or through an agreement with another person, collects debt arising from credit extended as described in clause(i); or (iii) sells or conveys debt described in clause (i) that is delinquent or otherwise in default.

Sounds pretty good, mostly everybody is out. Then you move to subparagraph B

(B) **APPLICABILITY.**— Subparagraph (A) does not apply to any credit transaction or collection of debt, other than as described in subparagraph (C), arising from a transaction described in subparagraph (A)—

(i) in which the merchant, retailer, or seller of nonfinancial goods or services assigns, sells or otherwise conveys to another person such debt owed by the consumer (except for a sale of debt that is delinquent or otherwise in default, as described in subparagraph (A)(iii)); (ii) in which the credit extended exceeds the market value of the nonfinancial good or service provided, or the Bureau otherwise finds that the sale of the nonfinancial good or service is done as a subterfuge, so as to evade or circumvent the provisions of this title;

or (iii) in which the merchant, retailer, or seller of nonfinancial goods or services regularly extends credit and the credit is— (I) subject to a finance charge; or (II) payable by written agreement in more than 4 installments.

Oops, some of us have been thrown back in the water. It is the (I) and (II) that do the deed. Note the “or” too.

Then there is subparagraph (C), the one cited by Senator Dodd: “the

Bureau may not exercise any rulemaking, supervisory, enforcement, or other authority under this title with respect to a merchant, retailer, or seller of nonfinancial goods or services that is not engaged significantly in offering or providing consumer financial products or services.”

Head throbbing? Looks to me if you extend credit directly and there is either a finance charge or more than 4 payments, there is at least a chance you might be covered. So it comes down to what does “significantly” mean? The bill does not define it so it will be up to the BCFP to decide what it means.

This is what Senator Richard Shelby (R-AL) says, “Democrats are asking America’s small business owners to relax and trust them and the bureaucrats they empower. Republicans trust small business owners. That is why we oppose this enormous regulatory overreach.”

I might mention there is another provision that provides the BCFP does *not* have jurisdiction over “a merchant, retailer, or seller of any nonfinancial good or service who engages in financial data processing by transmitting or storing payments data about a consumer exclusively for purpose of initiating payments instructions by the consumer to pay such person for the purchase of, or to complete a commercial transaction for, such nonfinancial good or service sold directly by such person to the consumer.” This would take retailers and service providers out of the regulatory waters if all they are doing is processing a third party credit transaction for the sale.

There are also some specific exclusions and exemptions that would take up too much space to describe.