Civil Investigative Demands, Subpoenas and More: How to Prepare for the Government's Renewed Focus on Financial Services

October 2, 2012 | Richard P. Eckman, Kristin Hynd Jones, Frank A. Mayer, III

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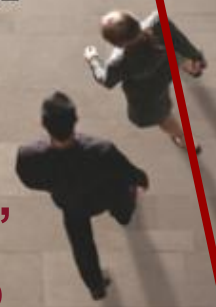

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NEWS

Dodd-Frank Act and Financial Services Reform Resource Center

Tuesday, September 04, 2012

The recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) will affect almost every facet of the U.S. financial services industry. This legislative behemoth, intended to restore public confidence in the financial services industry, prevent future financial meltdowns, and manage systemic risk, will restructure existing regulatory agencies, enhance the powers of federal regulators, and create advisory bodies that will touch upon a broad spectrum of financial services activities, institutions, and professionals.

Despite the comprehensive nature of the Dodd-Frank Act, the legislation leaves an extraordinary number of matters to be addressed through rulemaking and other regulatory action, establishes broad discretion for federal regulators, and may require additional legislative corrections during the next session of Congress.

To prepare for and survive the new legislative and regulatory requirements that will undoubtedly come in the wake of the Dodd-Frank Act, financial institutions and financial professionals must understand who the legislation covers, what activities it will affect, and how

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August 28, 2012

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Webinar Recording Available:

WEBINAR RECORDING:
What You Need to Know About the CFPB's Short-Term, Small-Dollar Lending Examination Procedures

Thursday, September 27, 2012

Thank you for registering for our webinar on the CFPB's Short-Term, Small-Dollar Examination Procedures. These procedures apply to what is commonly known as payday lending and are comprised of examination modules covering the entire lifecycle of a payday loan, including Marketing; Application and Origination; Payment Processing and Sustained Use; Collections, Accounts in Default, and Consumer Reporting; and Third-Party Relationships.

After the webinar, our two speakers, Pepper partner and chair of the firm's Financial Services Practice, Richard P. Eckman, and president of compliance for ICS Risk Advisors, John C. Soffronoff, Jr., discuss what was covered during the session and why the recording would be valuable to watch.

You can view the webinar recording and download the PPT slides at http://www.pepperlaw.com/webinars_update.aspx?ArticleKey=2433.

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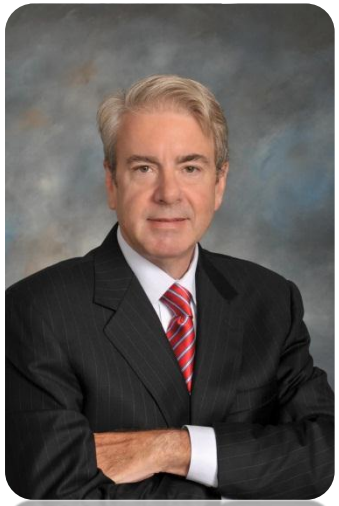
Speaker: Frank A. Mayer, III



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CFPB

- The CFPB enforces 18 federal consumer financial laws.
- Among the laws the CFPB can enforce are the *Fair Credit Reporting Act*, which regulates the collection, dissemination, and use of consumer information, including consumer credit information; the *Truth in Lending Act*, which promotes the informed use of consumer credit by requiring disclosures about its terms and cost to standardize the manner in which costs associated with borrowing are calculated and disclosed; the *Real Estate Settlement and Procedures Act*, which insures that consumers are provided with more helpful information about the cost of the mortgage settlement; the *Fair Debt Collection Practices Act*, which eliminate abusive practices in the collection of consumer debts; and the *Credit Card Accountability Responsibility and Disclosure Act*, which establishes fair and transparent practices relating to the extension of credit under an open end consumer credit plan.

CFPB

- The CFPB can review the practices of various financial services providers, such as credit card marketing, mortgage lending, and credit bureau reporting and step in to require financial institutions to tighten up their business practices if believes that those practices are abusive, unfair or illegal.

Who is Subject to Potential CFPB Investigation?

- Title X of Dodd-Frank, the Consumer Financial Protection Act (CFPA) authorizes the CFPB to conduct investigations to ascertain whether any person is or has been engaged in conduct that, if proved, would constitute a violation of any provision of Federal consumer financial law. This covers:
  - Banks and credit unions;
  - Mortgage related businesses;
  - Small dollar lenders;
  - Private student lenders;
  - Debt collectors;
  - Companies dealing in consumer credit and related activities;
  - Many, many other types of previously unregulated companies.

CFPB Enforcement

- The CFPB may investigate, issue subpoenas and civil investigative demands, and compel testimony, conduct hearings and adjudications to enforce compliance - including issuing cease-and-desist orders. It may also initiate actions for civil penalties or an injunction.
- While there is no provision for exemplary or punitive damages, it can make criminal referrals to the Department of Justice.
- While state attorneys general may also enforce the CFPA with notice to the CFPB, there is no express private right of action under the CFPA.

CFPB Investigations

- Section 1052 the Dodd-Frank Act authorizes the CFPB to conduct investigations to ascertain whether any person has engaged in conduct that would constitute a violation of Federal consumer financial law.
  - 12 C.F.R. 1080 is modeled on investigative procedures of other law enforcement agencies. It describe the CFPB's authority to conduct investigations and explain rights of persons from whom the CFPB seeks to compel information during investigations.
  - Rule § 1080.5 provides that any person compelled to furnish information shall be advised of the nature of the conduct under investigation and applicable laws.
  - While the CFPB must provide notification of purpose with each CID it sends, that "purpose" need not be highly specific.

CFPB Investigations

- Rule § 1080.6 provides that the CFPB's authority to issue Civil Investigative Demands (CIDs).
  - CID's are one way, under various statutes, the government can seek information.
  - Other means by which government may request information include search warrants and grand jury subpoena (both largely in the criminal context – i.e. as a result of DOJ action) and a basic letter request.
- Within the CFPB, the ability to issue CIDs is limited to the Bureau Director and the Enforcement Director/Deputies. CIDs may be issued for documents, tangible things, written reports, answers to questions, and oral testimony.

CFPB Investigations

- Rule § 1080.6(c) requires a "meet and confer" within ten days of CID receipt, however this requirement may be waived for routine third-party CIDs.
  - A "meet and confer" is a conference to discuss a CFPB demand, any limitations on the scope of the demand, issues related to electronically stored information, issues of confidentiality or privilege, and a reasonable timetable for compliance. A petition to quash is only considered after a "meet and confer" takes place.
- Personnel participating in meet and confer are expected to have knowledge of CID recipient's information or records management system, organizational structure and electronically stored information system and methods of retrieval.

CFPB Investigations

- Rule § 1080.6(d) authorizes Enforcement Director/Deputies to negotiate and approve the terms of satisfactory compliance and, for good cause, extend the time prescribed for compliance.
- Rule § 1080.6(e) sets forth the procedure for filing a petition to modify or set aside a CID. Petitions are due within 20 days of service. Such a petition (and any later CFPB Director's order) are public unless "good cause" is shown.
  - A request for confidential treatment must be made at time of filing of the petition and extensions of time for filing petitions disfavored.

CFPB Investigations

- Rule § 1080.7 (Investigational hearings) and Rule § 1080.9 (Rights of witnesses in investigations) limit objections.
  - Objections must be grounded in a witness's constitutional or other legal right.
  - Neither the witness nor counsel can otherwise object or refuse to answer any question.
  - Witness or counsel may request to clarify testimony at the conclusion of the hearing.
  - Hearing attendance limited to witness and counsel - additional attendees are only allowed at the discretion of the CFPB.
- Rule § 1080.8 (Withholding Requested Material) requires the assertation of a claim of privilege not later than the date set for production. There is a "claw back" provision allows for a remedy in case of inadvertent disclosure.

CFPB Investigations

- Rule § 1080.10 authorizes court action to enforce a CID. Under Rule § 1080.11, if enforcement action is warranted, the CFPB can take action in Federal or State court or pursuant to its own administrative adjudication process. The CFPB may also refer investigations.
  - The CFPB can seek a court order to enforce a CID, in the district court of the jurisdiction in which the non-complying party resides, is found or transacts business in connect with failure to comply. It can also seek civil contempt or other appropriate relief to enforce such court orders.
  - The Director of the CFPB has the non-delegable authority to request, from the U.S. Attorney General, the issuance of an order granting immunity and compelling production of testimony or other information.
  - A failure to timely petition the CFPB to modify the CID on grounds of undue burden, or other impropriety, may disable the recipient from raising those same objections in response to the agency's effort to judicially enforce the CID.

Responding to a CID

- A review of the CID, among many things, will identify the purpose of the investigation, the assigned staff, enforcement attorneys, the production deadline (such as, commonly, 30 days from issuance), the definitions, instructions, and interrogatory and document requests.
- Early investigations are often broad in scope, concerning such things as compliance management and monitoring, internal policies and procedures, training, consumer complaints, compliance with past enforcement actions, corrective action taken as per past violations / past representations made to a regulator.

Responding to a CID

- A team to handle the response should be assembled.
- The team should be, among other things, tasked with taking steps to preserve responsive materials (*e.g.*, implementation of a document preservation policy) and actual document collection.
- The team, in conjunction with attorneys (internal or external) should work to ensure compliance with legal obligations and assess whether responsive information is privileged (although the CFPB can take the position that, at least for investigations, that it has a right to receive many forms of privileged information).
- Depending on the scope, timing and specifics of the CID (assuming the CID is issued under valid authority), modifications can be requested.
- A recipient of a CID will need to decide whether public disclosure is required pursuant to other applicable legal and regulatory obligations.

Responding to a CID

- The required "meet and confer" with CFPB Enforcement staff will take place within 10 days after receipt of the CID (it may be potentially be possible to delay). Company personnel involved should be as prepared as possible.
- After the meet and confer, a CID target may file a petition to modify or set aside an information request, provided that the request is filed within 20 days of receipt of the CID (more time is possible if an extension is granted by the CFPB).
- In any case, after the meet and confer, the data collection process should begin. This includes the identification, collection, review, and processing of electronically stored information, such as emails. CID instructions will cover specifics regarding production formats and logistics. Material that is withheld based on asserting a privilege is required to be identified on a privilege log.

Responding to a CID

- **Consider, as post document production follow up:**
  - An internal compliance audit and/or interim "corrective" steps
  - Coordination related to any potential follow-up non-CFPB investigation
  - Preparing, in coordination with counsel, additional material/presentations and or a follow-up meeting with the CFPB

Responding to a CID

- Once an investigation is completed, the CFPB has many options.
  - It can issue a warning (formal or informal) or come to an understanding with a target as to corrective actions.
  - It can bring an action in federal or state court to seek a ruling that there has been a violation of federal consumer financial law. Alternatively, the CFPB can pursue such a ruling before its own administrative law judges.
  - It can also refer investigations to other federal, state or foreign government agencies.
- Of course, if the CFPB does not believe that further efforts are warranted, it can simply close the investigation.

Overriding of Privilege

- In a recent Seventh Circuit Court of Appeals decision (In Re: Special February 2001-1 Grand Jury Subpoena Dated September 12, 2011, case number 11-3799 argued April 17, 2012 and decided August 27, 2012), it was held that the Required Records Doctrine (RRD or the "doctrine") compelled production of subpoenaed foreign bank account records, which were required to be maintained under the Bank Secrecy Act and overrides the Fifth Amendment.
- To conceal the identity of the subject of a grand jury investigation, the 12-page decision refers the subpoenaed individual only as Target Witness, or T.W. It says T.W. learned in 2009 that the Internal Revenue Service had opened a file on him.
- A grand jury later subpoenaed T.W. for foreign bank records from 2006 to 2011. Such records are required under the Bank Secrecy Act of 1970. But T.W. refused to comply, asserting his Fifth Amendment privilege against self-incrimination.

Overriding of Privilege

- A main rationale for the RRD, according to the court, is that the government be able to inspect records it requires as a condition of participation in certain regulated activity, despite assertion of Fifth Amendment privilege. If invocation of the act of production privilege precluded the RRD's application, this objective would be "easily frustrated."
- The court further opined that an individual's voluntary participation in an activity with recordkeeping requirements under a "valid civil regulatory scheme carries consequences, perhaps the most significant of which, is the possibility that those records might have to be turned over upon demand, notwithstanding any Fifth Amendment privilege … whether the privilege arises by virtue of the contents of the documents or by the act of producing them."

Overriding of Privilege

- Having decided that the Required Records Doctrine may indeed trump T.W.'s act of production privilege, the court turned to the question of whether the three requirements of the doctrine were met – which boiled down effectively means that the requested records are essentially regulatory, are customarily kept, and that the records carried some public aspects.
- Bottom line - based on the case, an individual can not invoke the Fifth Amendment to ignore a subpoena for foreign bank records that could implicate him in tax evasion. The same may apply to other records of a regulatory nature where production may result in conviction.

CFPB Early Warning Notice of Potential Enforcement

- An "*Early Warning Notice" (*effectively the same thing as a SEC "Wells Notice") is not required by law, but the CFPB believes it will promote evenhanded enforcement of consumer financial laws.
- Although too new to tell, it is possible that the CFPB may also, on occasion, alert a target that an "Early Warning Notice" may be or should be expected.
- The Early Warning Notice process begins with the Office of Enforcement explaining to individuals or firms that evidence gathered in a CFPB investigation indicates they have violated consumer financial protection laws.
- Recipients of an Early Warning Notice are then invited to submit a response in writing, within 14 days, including any relevant legal or policy arguments and facts.
- The decision to give notice in particular cases is discretionary and will depend on factors such as whether prompt action is needed.

CFPB Early Warning Notice of Potential Enforcement

- On receipt of an "Early Warning Notice" or a head-up that an "Early Warning Notice" may be or should be expected, a target (or more commonly their lawyers) may potentially be able to enter into discussions with the CFPB as to what would be termed, in a different (FINRA) regulatory context, a "Acceptance, Waiver and Consent" where the target acknowledges certain (potentially negotiable) findings by a regulator, but neither admits nor denies wrongdoing.
- At least in other regulatory contexts, such an acceptance generally involves accepting an agreed-to fine and taking corrective action acceptable to the regulator.

Certain Important Internal CFPB Protocol

- 12 USC § 5562 governs CFPB investigations.
- On June 29, 2012, the CFPB issued its final rule clarifying its policies and procedures for investigations. The CFPB's investigative procedures are based primarily on the Federal Trade Commission's (FTC) investigative procedures but draw upon the procedures used by the Securities and Exchange Commission (SEC) and the other prudential banking regulators.
- While the CFPB has discretion to determine whether and when to initiate an investigation, the CFPB has clarified that only the Assistant Director or Deputy Assistant Directors of the Office of Enforcement have the authorize an investigation.
- Investigations are generally non-public and confidential, but the CFPB can disclose the existence of an investigation to the extent necessary to "advance" that investigation – i.e. to third party with "potentially relevant information."

Certain Important Internal CFPB Protocol

- Only the Director of the CFPB and the Assistant Director and Deputy Assistant Directors of the Office of Enforcement may issue CIDs. Responses to CIDs must be made under a sworn certificate.
- If the CFPB demands information or testimony from a person, it must advise that person of "the nature of the conduct constituting the alleged violation that is under investigation and the provisions of law applicable to such violation." However, unlike the FTC's procedures, the recipient need not be advised of the "purpose and scope" of the investigation.
- Oral testimony is taken at a private hearing, and all persons except for the witness, counsel, hearing officer, recorder and CFPB investigator are excluded from the hearing room. Representatives of state or federal agencies with whom the CFPB is conducting a joint investigation can also attend the hearing and/or receive copies of the hearing transcript. A person testifying at a hearing has a right to have counsel present, and that counsel can make objections on legal and constitutional grounds such as privilege.

Things to Consider Before the CFPB Calls In the First Place

- Consider adopting a "Compliance Plan" and have internal written policies against misconduct.
  - Make it easy for employees to report misconduct to the company.
  - Employee training as to the laws applicable to your firm.
  - Thoroughly and quickly investigate against misconduct.
  - Effectively, have a plan for possible visits by government agents before any is ever contemplated or scheduled. A plan can also help provide an opportunity to intervene and correct before outside intervention and mitigate regulatory issues if a problem is not detected and government investigates.

However

- It is better to not have a compliance plan than to have a compliance plan that is not executed or followed correctly (regulators hold companies to their own compliance procedures, even procedures not required under law or stricter than may be required or prudent).
- Compliance officers do need appropriate training, continuing education, and authority to correct mistakes – a practically useless compliance officer can be worse than none at all.

Compliance Plans

- **Some Potential Elements of a Compliance Plan**
  - Hotline / anonymous reporting.
  - Suitable training / education/ experience of Compliance Officer.
  - Review any report timely - do not ignore.
  - Seek outside counsel's assistance ASAP if necessary.
  - Conduct internal audit of appropriate records - consider hiring a consultant or law firm to spearhead a review if issues are found.
  - Identify if there is a problem and if so, determine the cause. If there is a problem, train staff to insure problem does not occur again.

False Claims Act

- **False Claims Act** (31 U.S.C. §§ 3729 *et. seq*.)
- Imposes liability on persons and companies (often federal contractors) who defraud governmental programs.
- Was enacted in 1863 by a Congress who was concerned that suppliers of goods to the Union Army during the Civil War were defrauding the Army, most famously Army Major McKinstry who, though aware of their unfitness, purchased 1000 blind and/or otherwise diseased mules for the government.
- FCA was recently amended by the Fraud Enforcement and Recovery Act of 2009 (FIRREA); the Patient Protection and Affordable Care Act (ACA) in 2010 and the Dodd-Frank Wall Street Reform and Consumer Protection Act, also in 2010.

False Claims Act

- **Key Elements:**
  - Submit or cause to be submitted
  - A claim for payment to the United States
  - That is false or fraudulent
  - "Knowingly"
- **Key Provisions:**
  - **Conduct -** Present or cause to be presented false or fraudulent claims for payment or approval; Use of a false or fraudulent record or statement to obtain payment or approval; Use of false record or statement to conceal, avoid or decrease an obligation.
  - **Knowledge:** Actual knowledge; Deliberate ignorance of truth or falsity; Reckless disregard of truth or falsity.

False Claims Act

- Includes a "qui tam" provision.
- “Qui Tam pro domino rege quam pro sic ipso in hoc parte sequitur" which translates to "Who as well for the king as for himself sues in this matter."
- Qui Tam allows people who are not affiliated with the government to file actions on behalf of the government. Qui Tam filers are referred to as "relators."
- Persons filing under the False Claims Act stand to receive a portion (15–25 percent if the DOJ intervenes, 25-30% if the DOJ declines) of any recovered damages plus attorneys fees, costs and expenses.

False Claims Act

- **Statute of Limitations**
  - "A civil action under section 3730 may not be brought—

    (1) more than 6 years after the date on which the violation of section 3729 is committed, or

    (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

    whichever occurs last."

False Claims Act

- In determining which limitations period applies to an False Claims Act action, courts examine the time at which either the "relator" or the Government became aware or knew of the violation.
- Whistleblower retaliation is explicitly prohibited - relief is afforded to any employee, contractor, or agent who is retaliated against because of lawful acts done in furtherance a False Claims Act action or efforts to stop violations of False Claims Act.
- Whistleblower are to be made whole for retaliation (discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment).

False Claims Act

- What to watch for: Treble damages and per-claim penalties!

FIRREA

- The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), was as a result of the savings-and-loan scandals in the 1980s.
- FIRREA was initially designed to go after individuals who defrauded federally insured financial institutions. But it is a broad statute that allows prosecutors also to bring civil charges against mail and wire fraud. The law allows for civil penalties of up to $1 million for each violation and up to $5 million for continuing violations, with an exceptionally long 10-year statute of limitations.
- While FIRREA incorporates a number of criminal statutes (including mail and wire fraud) it authorizes only civil remedies, not criminal punishment. As a result, unlike a criminal case (with a "beyond a reasonable doubt" standard), a FIRREA mater requires a much lower burden of proof ("preponderance of the evidence" – i.e. only a "more likely than not" standard).

FIRREA

- In financial fraud cases, in which evidence of criminal intent can be difficult to establish, FIRREA offers the government a way to take aggressive enforcement action in response to financial misconduct that does not necessarily rise to the level of a crime.
- For some reasons, FIRREA was only used a few dozen times in the first 20 years of its existence.
- However, in the last couple years, the Justice Department has made significant use of FIRREA, including earlier this year when it issued more than a dozen civil subpoenas to top financial institutions, including Citigroup, requesting documents related to mortgage-backed securities offerings between 2006 and 2008.

FIRREA

- FIRREA is one of the few federal statutes that confers **subpoena authority** directly upon the DOJ's **civil** lawyers. While federal prosecutors in criminal investigations have may issue grand jury subpoenas, only a few statutes empower civil prosecutors to issue compulsory process for purposes of a civil investigation.
- While Civil Investigative Demands (CIDs) are now available to United States Attorneys in certain False Claims Act (FCA) investigations, CIDs issued under the FCA may not be used outside the context of a FCA investigation, which requires some nexus to federal dollars.
- In contrast, FIRREA broadly authorizes the DOJ's civil lawyers to issue compulsory process in civil FIRREA investigations. Specifically, the statute authorizes the DOJ's civil attorneys to compel the production of documents and to take depositions – i.e. engage in civil discovery pre-suit.

FIRREA

- This subpoena authority has been delegated to local United States Attorneys. As a result, FIRREA subpoenas can be issued by civil prosecutors in civil fraud investigations almost as easily as grand jury subpoenas may be issued by criminal prosecutors in criminal cases.
- The disclosure of grand jury material to civil prosecutors is authorized, without a court order, for use in a civil FIRREA investigation. Through FIRREA, attorneys handling civil investigations may explicitly consider evidence that was originally developed in the context of a criminal investigation where, for whatever reason, a criminal prosecution is not warranted.
- This authorization to share grand jury materials for civil FIRREA cases can aid in parallel criminal-civil proceedings as well as civil investigations subsequent to criminal investigations.

FIRREA

- One of the few limitations on the statute is the requirement that certain frauds are actionable under the statute only if the conduct "affects" a federally insured financial institution.
- A financial institution need not have been the victim or object of the fraud to be "affected" by it. Thus, a fraud perpetrated against a wholly owned subsidiary of a financial institution may "affect" the parent financial institution.
- Also, under FIRREA, a financial institution could be "affected" by a fraud even where the financial institution itself was a direct participant in the fraud. Thus, FIRREA arguably could be used against a financial institution for engaging in fraud, even when no other financial institution was "affected" by the fraud.

Whistleblowers

- In May, 2012, the federal Residential Mortgage-Backed Securities Working Group, a joint effort by the Securities and Exchange Commission, the Department of Justice (including many U.S. Attorneys' Offices), the New York State Attorney General, and others to investigate alleged misconduct in the mortgage-backed securities market, appealed on its Web site for whistleblowers to report wrongdoing, and noted that whistleblowers could earn "substantial rewards" not only under the Dodd-Frank Wall Street Reform and Consumer Protection Act, but also the False Claims Act and the Financial Institutions Anti-Fraud Enforcement Act.
- In August, 2012, the SEC announced its first award to a whistleblower under the SEC Whistleblower Program established in August, 2011 as a result of Dodd-Frank.

Whistleblowers

- The award granted was the maximum percentage – 30% ($50,000 based on penalties collected to that point and potentially more than $300,000 if all penalties in the matter are ultimately collected). See http://sec.gov/rules/other/2012/34-67698.pdf for more information.
- However, and interestingly, the SEC simultaneously and publically announced the denial of a claim by another (**name redacted)** whistleblower, stating that "the information of that whistleblower against the un-stated target company did not lead to or significantly contribute to the SEC's enforcement action, as required for an award" as the claimant did not file a response to the SEC's "Preliminary Determination" (possibly asking for further details). See http://www.sec.gov/news/press/2012/2012-162.htm for more information.

Whistleblowers

- One award granted to date for a stated average of about eight SEC whistleblower tips a day would indicate that the SEC may consider many tips groundless or not worth pursuing.
- Some valid and useful tips do come from interesting individuals, see i.e. the recent DOJ's Gallup case (article available at http://dailycaller.com/2012/09/18/source-dojs-gallup-whistle-blower-made-bizarre-work-requests-said-he-was-a-devout-marxist/) involving a whistleblower who reportedly "became sullen and angry" when his employer (Gallup) refused his request to be "paid the same as the managing partner of the Government Division" – which would be a "raise of several hundred thousand dollars". The tipster was also reportedly a devoted Marxist who wanted to work remotely from Brazil and was not liked by co-workers (reportedly, they stopped talking to him because they feared he was recording their conversations).

Whistleblowers

- Presumably even tips that are not actively pursued are at least noted for future reference in a company's electronic regulatory files for use in future investigations and/or inspections.
- With proper internal mechanisms and a positive compliance environment, it may be possible to reduce even the number of unfounded whistleblower tips.
- As noted by the Wall Street Journal earlier this year (see http://blogs.wsj.com/corruption-currents/2012/05/30/most-whistleblowers-report-internally-study-finds/), according to the Ethics Resource Center, in 2011 only 2% of employees solely went outside the company and never reported the wrongdoing they observed to their employers. For those deciding whether or not to go outside the company, a potential monetary award was not a major driving factor - 82% said they'd report externally if it was a big enough crime, but only 43% said they'd do so for a reward.

Recent FDIC/CFPB Action

- On September 24, 2012, the FDIC and the CFPB ordered Discover Bank to refund approximately $200 million to more than 3.5 million consumers and pay a $14 million civil money penalty.
- This action results from an investigation started by the FDIC, which the CFPB joined last year and represents the third major public enforcement action by the consumer bureau, which was created as a result of the Dodd-Frank Act in 2010.
- The joint investigation concerned allegedly deceptive telemarketing and sales tactics used by Discover Bank to sell various credit card "add-on products" – payment protection, credit score tracking, identity theft protection, and wallet protection.

Recent FDIC/CFPB Action

- The agencies jointly determined that Discover engaged in deceptive telemarketing tactics to sell the company's credit card add-on products. Payment Protection was marketed as a product that allows consumers to put their payments on hold for up to two years in the event of unemployment, hospitalization, or other qualifying life events. Discover also sold its Credit Score Tracker, designed to allow a customer unlimited access to his or her credit reports and credit score. The third product was Identity Theft Protection, which was marketed as providing daily credit monitoring. Discover's Wallet Protection product was sold as a service to help a consumer cancel credit cards in the event that his or her wallet is stolen.
- Discover's telemarketing scripts language that was determined to be potentially deceptive to customers as to whether a customer was actually purchasing a product. Discover's telemarketers also, allegedly, often downplayed key terms and spoke quickly during the part of the call in which the prices and terms of the add-on products were disclosed.

Recent FDIC/CFPB Action

- The FDIC and CFPB believed that Discover customers were, among other things, misled about the fact that there was a charge for the products by use of language implying that the products were additional free "benefits," rather than products for which a fee would be applied to their accounts, and were sometimes enrolled without customer consent.
- Discover's telemarketers also did not always disclose key requirements for certain payment protection benefits, such as exclusions for pre-existing medical conditions and certain limitations concerning employment.

Recent FDIC/CFPB Action

- Besides for the approximately $200 million in restitution to more than 3.5 million consumers who were charged for one or more of the products between December 1, 2007 and August 31, 2011, Discover bank was required to pay a penalty, change its telemarking products, submit a compliance plan to the FDIC and the CFPB for approval, and submit to an independent audit.
- The independent auditor is to report to the FDIC and the CFPB on Discover's compliance with the joint FDIC-CFPB Consent Order.

Recent CFPB Action

- On September 20, 2012, the CFPB director formally refused to modify or set aside a Civil Investigation Demand (CID) issued by the CFPB to PHH Corporation (PHH), a leading non-depository mortgage services provider.
- The CFPB served the CID in May 2012 in connection with its investigation to "determine whether mortgage lenders and private mortgage insurance providers or other unnamed persons have engaged in, or are engaging in, unlawful acts or practices in connection with residential mortgage loans in violation of the [Consumer Protection Act] and [the Real Estate Settlement Procedures Act]." PHH objected to the CID as overly broad, unreasonable and irrelevant.
- After finding itself unable to resolve matters with the CFPB, PHH pursued the only option available to it under the Dodd-Frank Act and filed a 75 page petition with Director Cordray to modify or set aside the CID.

Recent CFPB Action

- Under Dodd-Frank, Director Cordray (as director of the CFPB), and not an independent judicial body, is final arbiter regarding objections to CID's issued by the CFPB.
- It its petition PHH argued, among other things, that the CFPB violated Dodd Frank by failing to state the nature of the conduct at issue and, instead, submitted a description that "covers every aspect of mortgage lending." Despite its objections, PHH still produced a number of documents to the CFPB.

Recent CFPB Action

- In denying PHH's petition, Director Cordray found that the PHH "has offered little or no detail to make the kind of showing required to substantiate [its] claims [that the requests are overly broad or unduly burdensome]" and ordered PHH to produce all documents and information responsive to the CID within 21 days.
- Neither Dodd-Frank nor CFPB rules provide PHH with a clear avenue to appeal the decision. As such, the CFPB can simply initiate enforcement proceedings in federal court to compel compliance with the CID (at which time PHH can challenge the authority of the CFPB).

Questions and Answers