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ENFORCEMENT 2012

2012 Bank Enforcement Actions Still High, But Significantly Lower Than 2010-11

BY

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Overall Trends & Outlook

In 2012, the federal banking agencies, including the Federal Deposit Insurance Corporation (''FDIC''), Office of the Comptroller of the Currency (''OCC''), Consumer Financial Protection Bureau (''Bureau'') and Board of Governors of the Federal Reserve System (''Board''), issued over 800 formal enforcement actions.[2] While this continues to be extremely high compared to levels over the last 30 years, it was a significant decrease in enforcement activity from the over 1200 and 1500 formal enforcement actions issued in 2011 and 2010, respectively. Notably, these numbers do not include the thousands of informal actions that have been issued during these years which are not required to be made public.

This decrease in enforcement activity is consistent with the slow but steady recovery from the financial crisis that the economy is experiencing. Notably, while the total number of enforcement actions declined in 2012, it is still a relatively large number of actions to be brought in a year[3], and the size of penalties enforced against institutions, particularly civil money penalties, continues to increase.

The enforcement environment in 2012 was impacted by the requirements of the Dodd-Frank Act,[4] an increased sense of enforcement and retribution, and most notably, by the creation of the Bureau, which issued its first enforcement actions. But perhaps most significant, the Bureau imposed penalties on institutions which

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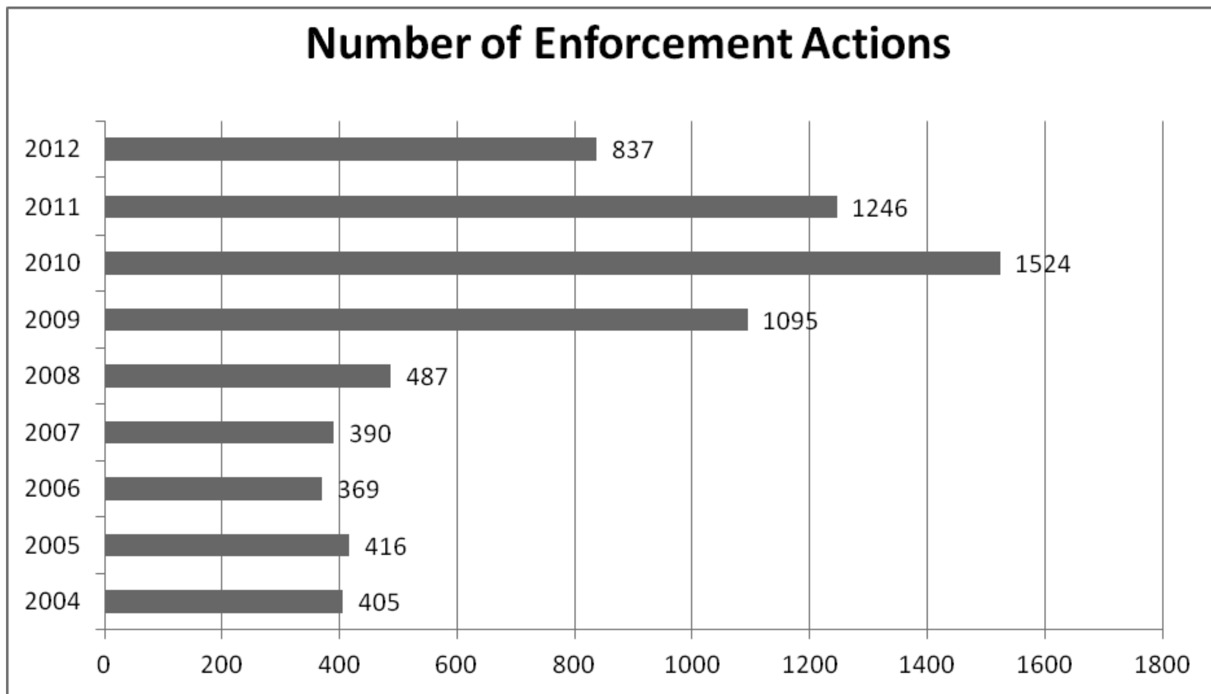
[2] These enforcement actions include cease and desist orders, consent orders, assessments of civil money penalties, prompt corrective actions, removal and prohibition orders, written agreements and adjudications.

[3] For example, in 2004, 2005, 2006 and 2007 the total number of enforcement actions was 405, 416, 369 and 390, respectively.

[4] The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (July 21, 2010).



were on the higher side of amounts previously seen from banking regulators. Additionally, the enforcement landscape was also affected by the elimination of the Office of Thrift Supervision (''OTS''), whose responsibilities over federal thrifts were transferred to the OCC, and authority over savings and loan holding companies transferred to the Board.

Overall, the 2012 enforcement actions focused heavily on consumer protection, anti-money laundering and OFAC policies, and bank safety and soundness policies. We expect that 2013 will continue these trends and include cross-border issues as systemic issues gain attention. Also, expect more joint enforcement actions by federal and state agencies, and disputes regarding the use of documents provided to one agency being made available to others. It is clear that the most noticeable trend that institutions will see is an increase in the size of penalties and reimbursement awards, and the pressure on bank regulators to demonstrate that they will not be out-done by the Bureau or state attorneys general.

The Bureau Gets to Work

After taking over official responsibility for consumer issues on July 21, 2011, and the appointment of Richard Cordray as its Director on Jan. 4, 2012, the Bureau quickly demonstrated its impact on financial institutions by bringing five significant enforcement actions. Perhaps more importantly, however, it has completed examinations of a wide variety of financial companies and requested thousands of documents, while sending messages about how it will do business. For example, it has diverged from examination practices of the bank regulatory agencies by sending enforcement attorneys to examinations and taking an aggressive position with regard to privileged documents and their examination right to them.[5]

At the same time, the Bureau was confronted with one significant hurdle by the recent D.C. Circuit decision in *Noel Canning v. National Labor Relations Board*[6] (''NLRB''), which suggests that the appointment of Richard Cordray, who was not a party to the lawsuit, was unconstitutional. The NLRB decision by the D.C. Circuit ruled that the President's appointments to the NLRB were unconstitutional because Congress was not in recess at the time. Director Cordray was appointed at the same time as the NLRB members were, raising significant issues as to the legality of his appointment and the regulations issued and a handful of enforcement actions taken by the Bureau under his leadership.[7]

Several important operational issues also face the Bureau. First, there is the question of whether it establishes consumer compliance standards through enforcement or regulation. Given the strings tied to the rulemaking authority given to the Bureau by Congress, it is unfortunately easier for the Bureau to create standards through enforcement rather than rulemaking.[8]

[5] *See* Title X of the Dodd-Frank Act (creating the Bureau and empowering it as an agency); 12 U.S.C. 1828(x) (stating that the information given to the Banking Regulators is still privileged); *and See* 12 C.F.R. 1070 Subpart D (Bureau rule establishing that documents given to it during an investigation are privileged). The Board's Office of Inspector General has announced that it plans to evaluate the Bureau's integration of enforcement attorneys into its examinations with the intention of assessing the potential risks associated with this approach, and the effectiveness of any safeguards that the Bureau has adopted to mitigate the potential risks associated with this approach. Board Office of Inspector General, Work Plan, March 8, 2013 at 14.

[6] 12-1115, 12-1153, U.S. Court of Appeals for the District of Columbia.

[7] A challenge to the legality of Director Cordray's appointment is currently pending in *State National Bank of Big Spring v. Geithner*, (D.D.C.).

[8] See, e.g., Thomas P. Vartanian, Will CFPB Make Policy Via Rules –or Enforcement?, Am. Banker, Nov. 14, 2011. The Bureau's actions to date suggest that it is well aware of these factors. It has already brought enforcement actions that have identified standards that it expects in the lending and credit

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Second, while the Bureau has been given the authority to define and enforce ''abusive'' practices, it had not done so yet, and has chosen not to use that authority in the enforcement actions that it has brought. Indeed, Director Cordray has stated that the Bureau will not define ''abusive,'' and will simply continue to rely on the more traditional interpretations of unfair and deceptive practices.[9] The only guidance the industry has stems from Bureau enforcement actions against three major credit-card companies and an official Bulletin outlining the factors the Bureau considers when bringing such actions.[10]

The Bureau's Enforcement Cases

The Bureau's enforcement actions in 2012 focused on how credit providers sold their products, whether directly or through third party vendors. Specifically, the Bureau examined and brought actions involving (i) companies' use of charging wrongful late fees, (ii) misinforming customers about the cost of products, and (iii) enrolling customers in add-on programs without their consent. In sum, the Bureau's actions led to fines totaling $68.5 million and restitution totaling $425 million — a large price tag on its consumer-related enforcement actions.

You Are Your Service Providers

Two of the Bureau's enforcement actions focused on the process of selling credit card add-on products by credit card issuers' service providers, and a third focused on the issuer's debt collection practices. This reaffirms the fact that financial institutions should assume that they will be responsible for the acts of their service providers in the eyes of their customers and the regulators.

One such action announced on Sept. 24, 2012 alleged that the credit card issuer and its service providers were engaging in deceptive practices by using telemarketing scripts containing misleading statements.[11] The telemarketers were allegedly told to adhere strictly to the scripts, and the Bureau argued that telemarketers also tended to speak faster during the disclosure portions of the script. The Bureau found that the telemarketers often confused the consumers to the point that they were not sure if an add-on product was purchased during the call or not. The consent order found these actions to be deceptive practices.

The second enforcement action against a major credit card issuer announced on July 16, 2012 involved that issuer's sale of payment and credit protection services, and also identified deficiencies in the issuer's compliance systems.[12] Although this action also involved the issuer's service providers and their use of telemarketing scripts, these telemarketers did not always strictly adhere to the script. Instead the Bureau found that the telemarketers often did not follow or misinterpreted the instructions on the script, thus creating misleading and deceptive sales pitches. The Bureau found that the issuer's monitoring of the service providers was inadequate and failed to ''prevent, identify, or correct the improper sales practices.''[13]

The third enforcement action brought by the Bureau on Oct. 1, 2012, involved three entities of a major credit card issuer.[14] These entities were alleged to have violated Sections 1031 and 1036 of the Consumer Financial Protection Act for deceptive debt collections, TILA for charging unlawful late fees, and the Fair Credit Reporting Act for failing to report consumer disputes to the respective consumer reporting agencies. In all three instances, the issuer or its service providers were alleged to have deceived cardholders by stating their debt would be forgiven, but not disclosing that the debt would have to be paid in full before the issuer would process any future credit transactions. In other instances the issuer or its service providers allegedly charged excessive late fees and then misreported disputes to the credit rating agencies. Because of these activities, the Bureau also charged the Board and Management of the issuer for failing to oversee properly the implementation of its compliance program and failing to oversee properly its service providers.

Joint Enforcement Actions

The Bureau also demonstrated agility in working with other regulatory agencies. The agency's inaugural enforcement actions involved joint efforts with the FDIC, the OCC, the Board, and state regulators. Indeed, two of its enforcement actions in 2012 were referred to the Bureau by the Office of the Special Inspector General for the Troubled Asset Relief Program. These two enforcement actions dealt with alleged loan modification scams which included freezing the assets of the organizations involved. Both cases involved persons allegedly falsely claiming that they could provide relief to distressed homeowners by obtaining loan modifications, while in reality no help was ever forthcoming. The Bureau announced that it will continue to focus on loan modification schemes that involve fictitious claims of performing legal work or falsely representing that the organization is backed by the Federal Government.

The Bureau is also working with state regulators, which is a trend that is likely to become quite significant. In that regard, the Bureau and attorneys general from six states won a judgment against a debt settlement company specializing in payday loan debts in Miami, Florida. During an investigation, the Bureau found that the payday lender was unlawfully charging advanced fees on debt settlements that were never reached.

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card businesses, and its ability-to-repay regulations, for example, do not clearly specify the standards of liability. Thomas P. Vartanian and Robert H. Ledig, Home Lenders Damned if they Stick to QM, Damned if They Don't, Am. Banker, Feb. 28 2013.

[9] *See* ''The Consumer Financial Protection Bureau's Threat to Credit Access in the United States,'' Staff Report, U.S. House of representatives, 112th Congress, Committee on Oversight and Government Reform (Dec. 14, 2012), available at http://oversight.house.gov/wp-content/uploads/2012/12/Access-to-Credit-Report-12.14.12.pdf.

[10] Marketing of Credit Card Add-on Products, Bureau Bulletin 2012-06 (July 18, 2012) (''Bureau Bulletin''). The Bulletin focuses on credit card add-on products and whether disclosures made during the sale of these products prevented the sale from being deceptive. Among the factors the Bureau will look to are: (i) the prominence of the statement; (ii) whether it is easy to read and in a place where the consumer will read it; and (iii) whether the information is in close proximity to the claim it qualifies. Bureau Bulletin at 2-3.

[11] No. 2012-BUREAU-0005.

[12] No. 2012-BUREAU-0001.

[13] *Id.* at 4.

[14] No. 2012-BUREAU-0002; No. 2012-BUREAU-0003; and No. 2012-BUREAU-0004.

Mortgage Reform

Bank regulators and the Bureau continued to focus on mortgage products, servicing and foreclosure review processes in 2012, largely as a result of the robo-signing and other foreclosure and servicing issues that arose as the financial crisis and foreclosures peaked. In 2012 and in the beginning of 2013, the Bureau has issued a blizzard of mortgage and other lending rules in either proposed or final form that will literally transform the mortgage business in the United States.

During the same period, the Board and the OCC assessed civil money penalties (''CMPs'') and orders requiring plans to correct deficiencies in the residential home loan sector in many different scenarios. In 2011, the Board and the OCC issued numerous cease and desist orders related to unsound practices involving bank holding companies and their mortgage servicers. In 2012, however, the Board and the OCC reached numerous settlements derived from those 2011 cease and desist orders which required the servicers to pay aggrieved borrowers and CMPs to regulators. The first such settlement occurred on Feb. 9, 2012 and was agreed upon between the OCC and four large mortgage servicers, requiring the servicers to pay $394 million.[15] On the same day, the Board reached a settlement with five large bank holding companies requiring them to pay a combined $766.5 million.[16] The Board, on Aug. 7, 2012, in a similar (albeit much smaller) settlement as the Feb. 9 settlements, reached an agreement with one more mortgage servicer for $3.2 million.[17] The principal bases for these actions were mismanagement of the foreclosure process, in particular, the failure to expand staff and devote resources necessary to handle the increasing number of foreclosures, and the failure to ensure that documents were properly notarized and in order before initiating foreclosure proceedings were.

Additionally, in a continuation from settlements reached in 2011, the OCC and the Board approved action plans submitted by 13 holding companies. The action plans were to be designed, among other things, to : (i) strengthen communications with borrowers by providing a single point of contact, (ii) strengthen compliance programs, and (iii) establish limits on foreclosures where loan modifications have already been approved. The action plans also required the holding companies to submit acceptable plans to the Board to improve oversight of the mortgage servicing subsidiaries, and to compensate borrowers who suffered financial injury due to servicer errors.

In conjunction with the 2011 orders, the holding companies were also mandated to enter into engagements with independent consulting firms to review each mortgage servicers' files in traditional ''look-back'' fashion to determine the extent of the financial injuries suffered by the affected borrowers. The independent review process required mortgage servicers subject to the agreement to analyze, on a case-by-case basis, the amount of damages affected borrowers suffered. However, the independent review process was later terminated in January 2013, when the OCC and the Board preferred instead to come to an agreement requiring 10 of the mortgage servicers to pay $3.3 billion in payments and $5.2 billion in mortgage assistance.[18]

Unfair and Deceptive Practices

The FDIC pursued enforcement actions and assessed CMPs ranging from a few thousand dollars to $14 million against a variety of institutions for violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (''Section 5''). Section 5 prohibits ''unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.'' The bank regulators have the authority to enforce Section 5 against banks.

In a case announced on August 7, 2012, a bank was fined with regard to its non-sufficient funds fees policies.[19] The institution also agreed, among other things, to develop an enhanced compliance system and refrain from charging any non-sufficient funds fees against customers with negative account balances, except under specified conditions. The institution additionally agreed to deposit $5 million, and more funds if it becomes necessary, into a segregated deposit account to be used to satisfy its restitution obligations to consumers affected by the allegedly deceptive bank product.

The FDIC brought an action against another bank on Sept. 24, 2012, in conjunction with the Bureau, because the institution had allegedly violated Section 5 as well as sections 1031 and 1036 of the Consumer Financial Protection Act, which, among other things, prohibit an entity regulated by the Bureau from engaging in abusive or deceptive practices.[20] The FDIC and the Bureau alleged that the institution's telemarketing scripts contained material misrepresentations and omissions that ''were likely to mislead reasonable consumers about whether they were purchasing a Product during a telemarketing call.'' Specifically, the FDIC and the Bureau cited statements (i) implying that the product was a free benefit rather than a program for a fee; (ii) asking customers to agree to ''become a member'' without stating that membership constituted an agreement to purchase the product; (iii) soliciting interest in ''enrolling'' in a product without first stating the material terms and conditions, including price; (iv) implying that the customers would receive a letter before being required to pay for the product when in fact the letter was sent only after the consumer had enrolled in the program; and (v) suggesting that customers could comparison shop by reviewing a list but then only providing the list once the product had been purchased.

In addition to paying restitution to affected customers, the institution agreed to pay a CMP of $14 million. The institution additionally agreed to, among other things, enhance Board oversight and create an over-

[15] *See* the OCC Press Release (Feb. 9, 2012), *available at* http://www.occ.gov/news-issuances/news-releases/2012/nr-occ-2012-20.html.

[16] *See* The Board Press Release (Feb. 9, 2012), *available at* http://www.federalreserve.gov/newsevents/press/enforcement/20120209a.htm; and These settlements were reached shortly after the National Mortgage Settlement that involved 49 state attorneys general, the Department of Justice, U.S. Department of Housing and Urban Development, and the five banking organizations involved a similar action brought by the Board.

[17] *See* Federal Reserve Board Press Release (Aug. 7, 2012), *available at* http://www.federalreserve.gov/newsevents/press/enforcement/20120807a.htm.

[18] See joint OCC and Board Press Release (Jan. 7, 2013), *available at* http://www.occ.gov/news-issuances/news-releases/2013/nr-ia-2013-3.html.

[19] FDIC 11-700b; FDIC-11-704k.

[20] FDIC-11-548b; FDIC-11-551k; 2012-Bureau-0005.

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sight committee within the Board, take a variety of corrective actions, and enhance its compliance management system.

Anti-Money Laundering/ Bank Secrecy Act Violations

Banking regulators continued their focus on violations of the Bank Secrecy Act ("BSA") and the enforcement of Anti-Money Laundering ("AML") regulations as they had in 2011. Similar to 2011, the enforcement actions from 2012 demonstrate the regulators' scrutiny of institutions' AML policies, procedures and programs. With the reduced jurisdiction of the banking regulators regarding consumer law issues, AML/BSA will continue to be a major focus. Experience suggests that complete AML/BSA compliance is extremely difficult to attain given the complexity of the rules and how they must be applied in a dynamic market where the movement of funds never stops. In addition, we are seeing and will likely continue to see an increase in OFAC cases regarding banks that deal either directly or through affiliates with sanctioned countries.

In a December 2012 settlement, an institution was ordered to pay $1.9 billion for AML and OFAC violations by OFAC, the OCC, the Board and the Financial Crimes Enforcement Network ("FinCEN")[21]. The charges included claims that the institution had transferred money for sanctioned countries, enabled drug cartels to launder money and violated the BSA by willfully failing to maintain an effective AML program. Specifically, it was charged that the institution failed to: (i) obtain and maintain due diligence information on financial institutions owned by the institution; (ii) monitor wire transfers from customers located in countries which it classified as "standard" or "medium" risk; (iii) monitor purchases of physical U.S. dollars from financial institutions owned by the institution; and (iv) provide adequate staffing and other resources to maintain an effective AML program.[22] As many other similar actions have in the past, this settlement included a deferred criminal prosecution agreement for the next five years while the institution rectifies the problems in its AML program.

The FDIC and FinCEN separately assessed a concurrent CMP in the amount of $15 million against an institution alleged to have "willfully" lacked an adequate AML program.[23] FinCEN found that the institution "facilitated consumer fraud and abuse by originating electronic transactions on behalf of dishonest third-party payment processors and merchants by providing them with access to consumer bank and credit card accounts without proper BSA controls." The institution additionally failed to collect sufficient information from the customers and failed to take into account the increased risks, such as high unauthorized return rates, when monitoring the automated clearing house merchant customers and the heightened risks associated with money services businesses. In addition to failing generally to provide an adequate program and training, the institution also failed to report suspicious transactions.

Additionally, the FDIC issued a series of consent orders to institutions requiring the implementation of enhanced BSA internal controls and AML programs, usually requiring enhanced procedures regarding risk assessments, customer due diligence and improved training of personnel, including directors, regarding BSA and AML requirements and procedures.[24] In one case, the institution agreed to implement procedures that would address: (i) timely dissemination of unclaimed tax refunds and depots; (ii) timely remittance of funds to the Internal Revenue Service; (iii) the obtaining of all required customer identification information; (iv) timely responses to law enforcement inquiries; and (v) the monitoring of suspicious activity, including record-keeping of customer transactions.[25] Consent orders continue to require that institutions have a qualified BSA officer responsible for BSA/AML oversight and reports to the Board.[26]

Holding Company Source of Strength

As the financial crisis developed the Board sought to ensure that bank holding companies of troubled banks would serve as a source of financial strength to their bank subsidiaries. Board cease and desist orders to bank holding companies in these circumstances would in various terms call for the bank holding company to take actions to cause a bank subsidiary to maintain specified levels of capital, or require Board approval for capital distributions by the bank holding company and in some cases, prior approval for bank holding company payments on subordinated debt or other debt obligations.

Interestingly, while 2012 saw the continued use of this approach, the Board decreased the number of enforcement actions issued which required bank holding companies to serve as a source of strength. But this is most likely due to the fact that there were simply less orders entered as the effects of the crisis began to wane. Interestingly, the particular words used in capital support and source of strength orders, have a huge impact on a subsequent bankruptcy of a bank holding company since valid capital obligations of a parent to a bank subsidiary have priority in bankruptcy and must be satisfied before all other claims.[27]

FDIC Lawsuits Against Directors and Officers of Failed Institutions[28]

2012 saw the continued rise of suits against directors and officers ("D&Os"), authorizing suit against 369 directors and officers. That does not include accountants, appraisers, attorneys and other professionals that the FDIC may sue on behalf of the failed bank.

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[21] Eastern District of New York Information Cr. No. 12-763.
[22] *Id.*
[23] FDIC-12-306K; FinCEN Number 2012-01

[24] *See,* FDIC-12-367b
[25] FDIC 12-307b; 2012-DB-46
[26] *See e.g.,*. FIDC-12-525b; FDIC-12-397b and FDIC-12-363b
[27] In a case involving Colonial Bancgroup, the bank holding company for Colonial Bank, the FDIC sought to treat certain Board actions with respect Colonial Bancgroup, including provisions of a cease and desist order as a capital maintenance obligation under section 365(o) of the Bankruptcy Code. A bankruptcy court rejected the FDIC's claims in this regard and the case is currently on appeal. *See In re the Colonial Bancgroup, Inc.*, 436 B.R. 713 (Bankr. M.D. Ala. 2010).
[28] A fuller exposition of FDIC theories, defenses and cases is set forth in our *Bank D&O Manual*, *available at* at http://www.dechert.com/files/Publication/7f7fad0c-600b-4f85-8cab-461dc3e08b49/Presentation/PublicationAttachment/0f32f58c-b774-4c95-9c37-118103b6d303/Bank%20DO%20Defense%20Manual_May2012.pdf

Year[29]	Authorized Director and Officer Defendants
2009	11
2010	98
2011	264
2012	369

The FDIC filed 25 lawsuits in 2012, an increase over the 16 that were filed in 2011. The potential damages to be awarded in these lawsuits are high, as demonstrated by the verdict awarded in December in a suit filed by the FDIC in 2010.[30] On Dec. 7, 2012, a California jury found three former executives of an institution that failed in 2008 liable for $169 million in damages, finding that the officers negligently made loans to homebuilders without regard for creditworthiness and despite knowledge that the market was uncertain and volatile.

Prompt Corrective Actions

In 2012, the FDIC issued 16 Prompt Corrective Action (''PCA'') directives.[31] The Board issued five.[32] The OCC also issued five.[33] PCA is used with much greater frequency in distressed periods as regulators attempt to resolve a troubled bank before it becomes a failing or failed bank. In most PCAs, institutions are required to take one or more of the following actions: (i) increase capital to a level sufficient to restore the institution to an ''adequately capitalized'' capital category; (ii) increase the institution's leverage ratio and total risk-based capital ratio to 8 percent and 10 percent respectively; and/or (iii) be acquired.

PCA appears to be used in some cases after resuscitation is too late. Five of the 16 institutions against whom FDIC PCAs were entered failed subsequent to the PCA being issued. Four of these institutions failed less than a month after their respective PCA was issued.[34] Of the OCC PCAs, three institutions failed approximately one month after their respective PCA was issued. In many cases, where the PCA was entered into while the institution was still solvent, that institution was already too close to failure, thus preventing the PCA from serving its intended purpose.

Fair Lending Actions

2012 brought an increased focus on fair lending issues. Fair lending actions have heavily focused on disparate treatment allegations, situations where authorities allege that similarly situated prospective borrowers are treated differently in regard to loan approval decisions or pricing.

In 2012, the Department of Justice (''DOJ'') pursued a fair lending claim based on a disparate impact theory. Under the disparate impact theory of discrimination, a ''facially neutral'' policy which has a disparate adverse impact on a protected group may be asserted to be a violation of the fair lending laws. Once a disparate impact is shown, the burden shifts to the lender to demonstrate a business justification for that policy and there is no less discriminatory means of achieving the same objective.

The most significant of these actions was the DOJ's settlement with an institution against which the DOJ pursued a claim based on the institution's general $400,000 minimum loan amount for single family loans policy that was in place from 2006 to 2011.[35] The DOJ asserted that because the minimum loan amount was so high, African-Americans and Hispanics were largely precluded from accessing the institution's mortgages. The DOJ alleged that the institution's policy was not justified by business necessity or legitimate business considerations.

The settlement between the institution and the DOJ requires the institution to keep its current minimum loan amount at $20,000 and not raise it during the course of the agreement. Additionally, the institution will have to spend $900,000 on partnerships with certain community groups. Finally, the institution will have to set aside $1.1 million to fund a special financing program designed to make available credit to persons seeking residential mortgages for loan amounts less than $400,000.[36]

In a more traditional disparate treatment claim, the DOJ alleged that a large bank had engaged in a pattern or practice of discrimination against qualified African-American and Hispanic borrowers between 2004 and 2009.[37] The DOJ alleged that the bank steered minority borrowers into subprime loans while similarly qualified white borrowers received prime loans.

The settlement provides for the bank to provide $125 million in compensation for minority borrowers who were allegedly steered to subprime loans. The bank will also provide $50 million in direct down payment assistance to borrowers in communities identified by the DOJ.

[29] This data can be found on the FDIC website at ''Professional Liability Lawsuits'' *available at* http://www.fdic.gov/bank/individual/failed/pls/.

[30] Case No. 2:10-cv-04915-DSF-CW (U.S. District Court for the Central District of California).

[31] FDIC-11-651PCAS; FDIC-11-654PCAS; FDIC-11-652PCAS; FDIC-12-091PCAS; FDIC-11-655PCAS; FDIC-11-654PCAS; FDIC-12-572PCAS; FDIC-12-225PCAS; FDIC-12-247PCAS; FDIC-12-282PCAS; FDIC-12-258PCAS; FDIC-12-250PCAS; FDIC-12-254PCAS; FDIC-12-381PCAS.

[32] Docket No. 12-0580PCA-SM; Docket No. 12-043-PCA-SM; Docket No. 12-038-PCA-SM; Docket No. 12-005-PCA-SM.

[33] AA-EC-12-44; AA-EC-12-41; AA-EC-12-119; AA-EC-12-43; AA-EC-12-38.

[34] The fifth of these institutions failed approximately four months after the issuance of the PCA.

[35] *See* Justice Department Press Release (Sept. 12, 2012), *available at*, http://www.justice.gov/opa/pr/2012/September/12-crt-1104.html.

[36] For an in-depth discussion of the disparate impact theory *see* Dechert OnPoint, U.S. Department of Justice Turns Spotlight on Disparate Impact Discrimination Claims (Sept. 2012), *available at*, http://op.bna.com/bar.nsf/r?Open=jtin-96cm34. The Bureau, which has assumed jurisdiction over the Equal Credit Opportunity Act (''ECOA''), issued a bulletin reaffirming that the doctrine of disparate impact remains applicable as it exercises its supervision and enforcement authority to enforce ECOA compliance. Bureau Bulletin 2012-04, April 18, 2012. More recently the Department of Housing and Urban Development issued rules under the Fair Housing Act (''FHA'') codifying disparate impact discrimination as a basis for proving liability under the FHA. *See* Dechert OnPoint, U.S. Department of Housing and Urban Development Issues Final Rule Affirming Use of Disparate Impact to Establish Liability for Violations of the Fair Housing Act (Feb. 2013), *available at*, http://op.bna.com/bar.nsf/r?Open=jtin-967r8j.

[37] *See* Justice Department Press Release (July 12, 2012), *available at*, http://justice.gov/opa/pr/2012/July/12-dag-869.html.

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Conclusion

While the financial crisis is abating, the effects of it are not. An increased focus on regulation and enforcement of near or actual violations of laws, rules and policies will continue for the immediate future, generating significant compliance and remediation costs among financial institutions. Perhaps just as significant will be the law that will be created by settlements, which will further expand the enforcement powers of the agencies.