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The CFPB's Supervisory and Enforcement Functions and How They Work Together

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In an October 9 speech to the FDIC's Advisory Committee on Economic Inclusion, Steve Antonakes, the Deputy Director of the CFPB and also the Associate Director of the CFPB's Supervision, Enforcement and Fair Lending (SEFL) Unit, discussed the CFPB's supervisory and enforcement tools.

Antonakes noted that the Bureau has "the opportunity to oversee consumer financial products and services across charters and business models," and that for this reason, "charter or license type is becoming less relevant in determining how [the Bureau] will prioritize and schedule [its] examinations and investigations." Instead, as Antonakes explained, the CFPB has "begun to implement a prioritization framework that allocates [its] examination, investigation, and fair lending resources across product types." In a rare public assessment of Bureau Supervision priorities, Antonakes then outlined the "qualitative and quantitative factors" used to determine – in part, at least – supervision priorities. "These factors include: (1) the size of a product market; (2) a regulated entity's market share in that product market; (3) the potential for consumer harm related to a particular product market; and (4) field and market intelligence that encompasses a range of issues including, but not limited to, the quality of a regulated entity's management, the existence of other regulatory actions, default rates, and consumer complaints."

This list provides useful guidance to banks and nonbanks subject to the Bureau's supervision authority, and if nothing else, provides at least a tentative roadmap of how the Bureau might prioritize its deployment of supervisory resources. In addition, this guidance also provides some insight into the Bureau's interest in crafting policies that concern a particular market or industry, regardless of whether that market or industry's participants are comprised of banks, nonbanks or both.

Also in this October 9 speech, Antonakes stressed that although the Offices of Supervision and Enforcement operate under the same SEFL unit umbrella, the Bureau's Office of Enforcement has "tools" that operate independently from the Bureau's Supervisory function. He noted that instead of relying on information gathered through the Bureau's examination process, the Office of Enforcement can rely on information it gathers through its investigative function, as well as information gathered from "listening to and analyzing consumer complaints, industry whistleblower tips, and information from government agencies, industry, and consumer groups." Antonakes further described some of the ways in which the Office of Enforcement acts independently.   He also discussed an unusual aspect of the Bureau's enforcement jurisdiction, that the Bureau can seek the same remedies in either district court or in the agency's administrative forum. The availability of the same remedies in either forum means that the Bureau's decision to bring a case in one forum instead of another forum is not driven by the availability of certain remedies but by other circumstances specific to a case. Finally, in emphasizing the independence of the Bureau's enforcement function, Antonakes reminded his audience that the Bureau has independent litigating authority, meaning that it can bring cases in its own name in district court, without referring a case to the Department of Justice for prosecution.

The Dodd-Frank Act and the Bureau's rules of investigation provide for a Bureau Enforcement function that is robust and independent. But notwithstanding this independence and Antonakes' description of the Bureau's specific enforcement "tools" that are not dependent on the Bureau's supervision authority, it would be wrong to assume that the Offices of Supervision and Enforcement are not inter-connected in their work. It seems likely that the two offices are increasingly working closely together.

Indeed, on October 8, one day earlier before Antonakes' speech, the CFPB announced two enforcement actions that had derived from the Bureau's examination of a mortgage broker and of a bank's mortgage lending operations. The Bureau's two enforcement actions, *In the Matter of Washington Federal*, File No. 2013-CFPB-0005 and *In the Matter of Mortgage Masters*, File No. 2013-CFPB-0006, each allege violations of the Home Mortgage Disclosure Act (HMDA), a statute which requires that lending institutions report and disclose certain loan information. The consent orders in each of these matters allege "violations of law and deficiencies in the applicable compliance systems with respect to [each] Respondent's compliance with the Home Mortgage Disclosure Act (HMDA)." Both of these actions, as noted in each order, derive from the Bureau's authority to examine an entity's implementation of "processes for managing compliance with the Federal consumer financial laws," and to identify "violations of law and deficiencies in the applicable compliance systems." Thus, the predicate facts giving rise to these enforcement actions derive largely, if not exclusively, from the Bureau's examination of Washington Federal and Mortgage Masters.

These two actions are a powerful reminder that the Bureau's Office of Supervision has already prioritized mortgage market participants. These actions also are an important reminder that although the Office of Enforcement has tools that operate independently from the Bureau's Supervisory function, the Offices of Enforcement and Supervision also work closely together. Any bank or nonbank that is the subject of a Bureau examination should be cognizant that although each office acts through independent functions, both offices also operate in an interconnected environment that shares priorities and information.

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Allyson Baker, a partner in the Washington, DC office of Venable LLP, was, until recently, an Enforcement Attorney with the Consumer Financial Protection Bureau (CFPB) where she served as lead counsel on one of the first enforcement actions which also resulted in one of the largest agency settlements to date. She was a member of the initial team of attorneys hired to stand up the CFPB Office of Enforcement, and she helped formulate policies on litigation, investigations, and Dodd-Frank Act jurisdiction issues. Before joining the CFPB, Ms. Baker was a Trial Attorney with the U.S. Department of Justice, Civil Tax Division where she served as lead counsel in a number of jury and bench trials involving complex financial transactions.