

# The Art of the New War:

## A Guide to Handling CFPB Examinations, Investigations, and Enforcement Actions

One of the stated goals of the Consumer Financial Protection Bureau (CFPB) is to make it more expensive to break the law than abide by it. To that end, the CFPB has begun and completed scores of examinations, launched dozens of probes, and issued more than 100 subpoenas to mortgage insurance carriers, high cost auto loan lenders, and for-profit colleges. A cursory review of subpoenas issued by the CFPB reflect a “mini-exam” motivation as opposed to a specific factual investigation. It is anticipated that many of examinations and mini-exams will result in enforcement and adjudication actions.

# **This Presentation will Focus on Four Areas:**

- 1. CFPG's Role as an Examiner**
- 2. CFPB's Role as an Investigator**
- 3. CFPB's Role as an Enforcer**
- 4. CFPB's Role as a Friend of the Court**

# CFPB as Examiner

What we learn through examination activity [i.e., supervision] will help us determine whether we need a rule to change something across the board. Or, if we are examining it and spreading the word that it's a concern to us, and you need to get your compliance in order, whether that [supervision] can resolve the problem. Whether we need to do one or more enforcement actions. Those are all different tools.... [I]t's going to be a mix and a balance for us.

-CFPB Director Richard Cordray

"Starting on July 21, we will be a cop on the beat - examining banks and protecting consumers."

–(Now Senator) Elizabeth Warren

# Examination Process

- The CFPB examination process is intended to be continuous, with different phases (**scoping; examination; conclusions/corrective actions; monitoring**).
- During the Pre-Examination Phase, the Examiner in Charge (“EIC”) creates an **Information Request (“IR”)**, which is a list of information that the supervised entity (“SE”) must either furnish before the examination or upon the examination team’s arrival.

# Composition of Exam Team

- Early feedback from examined entities tells us that the CFPB is sending teams of “rookies” (examiners with less industry experience, perhaps managed by a few seasoned veterans of a federal agency such as the FDIC) to examine entities with less perceived risk, while more experienced teams are being sent to more complex, potentially higher-risk entities.

The distribution of rookies and veterans across examination teams will likely even out as time progresses. **The CFPB has announced its intention to double its examination force in the near future.**



# Risk Assessment

- The annual **Risk Assessment** is designed to assess and evaluate the extent of risk to consumers posed by the target entity's activities. **“Risk” for these purposes is the potential for consumers to suffer economic loss or other legally cognizable injury from a violation of federal consumer law.**

# No One is Safe

- Many non-depository institutions or banks that don't meet the \$10 billion in assets threshold for regular examinations have been lulled into a "they'll never get to us, they've got enough on their plate" attitude. Not so. **Recently a small mortgage banking firm in Florida was given two weeks' notice that the CFPB would be arriving for a review.** This notification was the result of a separate CFPB exam of a large bank. The mortgage banker had originated a small number of loans on a wholesale basis with this large bank and the Bureau had questions.

# Scope Summary

- The EIC prepares a **Scope Summary** based upon the Risk Assessment; the Scope Summary sets the **breadth and depth of the examination** of the entity and the activities to be undertaken during the examination. The Scope Summary is revised after the exam.

# Before the Exam

- The EIC contacts the SE approximately 60 days before the scheduled on-site date to set up either a telephone or an in-person meeting to discuss the IR. During this discussion, the EIC will inform the SE's management of which personnel should be made available for interview during the on-site exam. After this discussion, the EIC and team prepare the IR. **The Bureau prefers responses to the IR to be provided in electronic form.**

# Before the Exam, *continued*

- Should I share attorney-client privileged materials with the CFPB?
- The answer is not clear. CFPB claims that sharing privileged documents with the Bureau does not waive the privilege vis-à-vis third parties and other government agencies (Bulletin 12-01).
- Shaky legal basis.

# Before the Exam, *continued*

- Ask the Bureau if they will put their request for privileged material in writing. The written directive must recite that the CFPB was unable to obtain the information from sources that are not privileged, that the information is requested as a part of the examination process, and that the CFPB will not further disclose the information to third parties without the consent of the financial institution or a court order compelling the CFPB to do so.

# Before the Exam, *continued*

- If Congress were to amend the Federal Deposit Insurance Act to state that the CFPB is a federal banking agency, then the CFPB's privilege claim would be more on solid ground.
- The state attorney generals are not banking agencies for purposes of federal law. Thus, CFPB-supervised financial institutions should also seek a commitment from the CFPB that it will not share with the state attorney generals any privileged information in the absence of a court order requiring the CFPB to do so.

# Every Examination Must Include:

- A review of compliance management;
- Any potential unfair, deceptive or abusive practices;
- Regulatory compliance matters presenting risks to consumers; and
- If the SE is a lender, a review for discrimination.



# Entry Meeting

- When the team arrives on-site, the EIC will meet with the SE's management to introduce the team, discuss the exam procedures, clarify any issues that the SE might be concerned about, coordinate the team's visit (building security, where they will be housed onsite, etc.), and set the general tone of the examination.

The EIC will meet periodically with a contact person in the SE's management to discuss the progress of the exam and interim findings. The EIC will also keep prudential regulators and state regulators apprised of the progress of the exam as well as keeping his/her field manager updated on the exam progress.

# Workpapers

- **Workpapers** are the written product of the examination staff produced during the examination. For example, a write-up of notes from an interview with a compliance officer of the SE would constitute a workpaper. Meeting agendas and notes also become workpapers.

# Specific Areas of Review

- What exactly does the CFPB want to see when it examines an SE? The overarching mantra that emerges from the CFPB's examination manual is **“policies and procedures.”** **The Bureau will want to see, and the SE must be ready to share, any and all internal policy and procedure manuals** concerning almost any conceivable aspect of the SE's business, including compliance, record retention and destruction, employee training, management training, handling of consumer complaints, etc.

**\*Policy Review:** The examination team will likely begin with an overall review of written policies and procedures of the SE, its compliance audit function, and its ability to effectively respond to consumer complaints.

# Consumer Protection

- CFPB is very concerned with preventing what Section 1031 of the Dodd-Frank Act refers to as “abusive” acts toward consumers by financial services providers. Just what the Bureau considers “abusive” will develop over time as more examinations become known and the Bureau issues more public statements. An important source of identifying potential abusive acts for the Bureau is consumer complaints.

# Transaction Testing

- If UDAAP concerns arise during an exam, such as during the review of a particular product and its marketing, the exam team will likely engage in transaction testing.

# Third-Party Service Providers

- CFPB's first public announcement of an examination result: Capital One credit card add-on phone solicitations. Capital One agrees to revamp its compliance program on these products and submit new plan to CFPB before resuming solicitations-also \$140 million refund. The Bureau obviously intended this to be a strong message about its power and ability to achieve results in dealing with even the biggest financial service providers.



# Third-Party Service Providers, *continued*

It must be noted that the transgressions at Capital One were largely those of a **third-party vendor**, but the CFPB demonstrated its zeal to hold supervised entities accountable for the actions of their vendors as well as of the entities themselves. This, in turn, has raised some questions among supervised entities:

- Does the definition of “service provider” include law firms, technology companies, and settlement agents?
- What about sub-contractors of vendors (those supporting the direct vendor, but having no contract with the supervised entity)?

# Review of Specific Products

- When reviewing an SE's specific products (loan products, for example), the CFPB examiners will be on the lookout for any indicia of the potential for that product to be unfairly, deceptively, or abusively offered and/or employed to the public.
- Of specific concern is any practice that interferes with a consumer's ability to effectively make decisions or to take actions to avoid injury.

\*The CFPB will also review terms and conditions of products for any indicia of deceptive acts or practices. An example would be inadequate disclosure of material automobile lease terms in the fine print in television ads.

# Closing Meeting

- Once the onsite exam is completed, the EIC will hold a meeting with the SE's management to explain preliminary exam findings, expected corrective action, recommended rating, and next steps. Management will be reminded that this information is confidential and can only be shared as the CFPB allows.

# Closing Meeting, *continued*

- Management will be notified if a meeting with the SE's board of directors or principals will be required. Such a meeting is required if the proposed entity rating is a "3", "4" or "5" (see the following), an enforcement action, or informal supervisory agreement is recommended by the Bureau, or management requests the meeting.

# Closing Meeting, *continued*

- Management will be told that no findings or ratings will be final until the Bureau's internal review is complete and, in the case of an insured depository institution or affiliate, the prudential regulator has been able to review and comment on the Bureau's draft report.

# Ratings

- After the examination, the SE is assigned a **confidential consumer compliance rating** on a scale of **1 (lowest concern) to 5 (highest concern)** based upon its level of compliance with federal consumer law and its compliance management procedures and controls. A “3” rating indicates a need for continuing closer supervision and internal improvement of compliance systems; a “4” or “5” signals a situation of “substantial or general disregard of law” and a need for continuing close supervision.

# Report

- Once a rating is assigned, the EIC drafts the Examination Report, which is designed to communicate exam findings to the board of directors or principals of the SE. The amount and depth of commentary should increase from little discussion for a “1” rated entity to substantial commentary for a “5” rated entity.



# Report, *continued*

- Specific examples of statutory violations should be provided so the SE understands the conclusions and the need, if any, for corrective action. The report should include specific time frames for **Matters Requiring Attention** and **Required Corrective Actions**.

# Report, *continued*

- Once the draft report is complete, it is uploaded into the Supervision and Examination System by the EIC for review by the Field Manager and such other internal review as CFPB policy requires as well as prudential review in the case of insured depository institutions.
- **Final reports are taking a long time in some cases.** One large bank that was examined earlier this year does not expect to receive its final examination report until sometime in 2013.

# Post-Exam

- When an examination yields negative findings, the CFPB has a number of potential courses of action, from self-correction by the examined entity to a public enforcement action, depending upon the type of problem found and the severity of harm to consumers.

# Post-Exam, *continued*

- The CFPB may refer matters to other agencies or to the Department of Justice for potential criminal action if it finds that an entity or one of its customers, is engaged in violating federal criminal law. The Bureau must also report any suspected violation of federal tax law to the IRS.

# Appeals?

- You might wonder: Is there an appeals process from CFPB examination findings? Yes, there is.
- On October 31, 2012, the CFPB issued its appeals procedures, which are available to a supervised entity that receives a “3”, “4” or “5” rating, an adverse finding in an examination report, or adverse findings set forth in a supervisory letter.

# Appeals? *continued*

- An “adverse finding” is a finding that results in a Matter Requiring Attention.
- The appeal must be submitted to the Bureau via e-mail within 30 days of receipt of the communication containing the matter being appealed.

# Appeals? *continued*

- Informal efforts must have been made to resolve the matter prior to the appeal being filed, e.g., raising the issue with the examination team.
- The associate director of the CFPB will appoint an assistant director, who within five days of receipt, will assign the appeal to an appellate committee.

# Appeals? *continued*

- The committee will: review the appeal, the examination report or supervisory letter at issue, and supporting documents for both; if applicable, seek input from the prudential regulator; solicit input from the examination team and other CFPB staff; and hear a presentation from the appealing entity, if requested.



# Appeals? *continued*

- The appeal committee will issue a written decision and submit it to the associate director, who will review and modify it as appropriate, before it is transmitted to the SE.
- The appeal should be concluded within 45 days of assignment to the appeal committee.
- The decision is final.
- An appeal will **NOT** stay an enforcement action or relieve an SE from complying with the decision or action under appeal.

# Length of Exam?

- **HOW LONG IS A CFPB EXAM? HOW COSTLY IS IT TO COMPLY WITH THE EXAMINERS' DEMANDS?** These are good questions, but there are no consistent answers. It depends upon the supervised entity and the examination team.

# Length of Exam, *continued*

- In one case, a mortgage banking firm's CFPB examination lasted nearly 12 weeks. The exam notification, which was received seven weeks before the on-site exam, included a request to complete a questionnaire and make a substantial amount of data available (including policies and procedures), prior to the onsite exam.

# Length of Exam, *continued*

- During the initial onsite meeting, the company was given the opportunity to provide an overview of their business and introduce its management team. The CFPB team answered questions and candidly shared its process and expectations. This firm was very pleased with the exam. The CFPB staff was knowledgeable, detailed, bright, and reasonable. Weekly status meetings were held with the firm's management to share progress and raise issues. Cooperation with the exam was, however, a substantial effort for the firm. **After considering internal costs including time of primary participants, the firm estimated the cost of the exam at \$1 million.**

# Specific Areas of CFPB Concern

- **ECOA:** The CFPB is very concerned with compliance with the Equal Credit Opportunity Act, which is implemented by Regulation B. Lending institutions will be carefully scrutinized for compliance with this law and its implementing regulations.

# Specific Areas of Concern, *continued*

- **Examples:** the Bureau will examine where a lender's outlets are to determine if they serve minority and non-minority communities proportionally; the Bureau will look at Spanish and English language advertising and disclosures to see if these materials emphasize different products.

# Specific Areas of Concern, *continued*

- During one recent examination of a large bank, the CFPB hammered at stock photographs on the bank's website.
  - Were they ethnically targeted or appropriately diverse considering the products offered and demographics shown in the photos?
  - How were these perceived by potential consumers?

The questions reflected a concern related to potential deceptive marketing; the bank was ultimately able to ease the Bureau's fears, but not without great effort.

# Specific Areas of Concern, *continued*

- **Fair Lending:** Hundreds of pages of the CFPB's examination manual are devoted to procedures for fair lending examinations. If you are a lending institution, be ready for a thorough examination of your compliance function as well as whether or not any of your underwriting policies have an intended or unintended disparate impact.



# Specific Areas of Concern, *continued*

- **TILA Compliance:** The CFPB is also very concerned with lenders' compliance with the Truth in Lending Act and its implementing regulations in Regulation Z. The Examination Manual contains exhaustive instructions for review of virtually every aspect of a loan from inception to closing, including review of advertising copy utilized since the most recent examination and, if necessary, transactional testing.

# Specific Areas of Concern, *continued*

- **RESPA and HPA Compliance:** For mortgage lenders, the CFPB will exhaustively examine compliance with the Real Estate Settlement Procedures Act and Regulation X, which implements RESPA, and the Homeowners Protection Act (“HPA”), which concerns difficulties homeowners encounter in cancelling PMI (private mortgage insurance).

# Specific Areas of Concern, *continued*

- Consumer Leasing Act Compliance
- Fair Credit Reporting Act Compliance
- Fair Debt Collection Practices Act Compliance
- Electronic Funds Transfer Act Compliance
- Truth in Savings Act Compliance
- Privacy of Consumer Financial Information (Gramm-Leach-Bliley, etc.)
- Mortgage Servicing

# So You've Received an Exam Notice

- One question that comes to mind is whether or not the supervised entity should have legal counsel present during the CFPB examination. One large bank chose to have its legal team on standby, and sent the lawyers in when the Bureau began to have an enforcement attorney sit in on exam meetings. The bank reported that the Bureau seemed comfortable with this approach.

# So You've Received an Exam Notice, *continued*

- **NOTE:** If an attorney from the CFPB's enforcement division accompanies the examiners at your entity, this does not necessarily spell doom: the director wants each arm of the Bureau to understand the tasks of the other divisions, so the involvement of the enforcement division **may** be purely innocuous.

# So You've Received an Exam Notice, *continued*

## **Before an exam:**

- Review the Bureau's examination manual in detail. It's available to the public for a reason.
- Take a good hard look at your business' policies and procedures for handling and responding to consumer complaints. Rest assured the CFPB is doing the same thing in anticipation of your exam.

# So You've Received an Exam Notice, *continued*

- Make sure your vendor management policies are clearly documented and geared toward ensuring compliance with consumer financial laws.
- Nominate a single person to be the contact person with the examiner-in-charge during the exam.
- Be prepared to get out ahead of any concerns the examination team is expressing during the exam before these concerns become written findings.

# So You've Received an Exam Notice, *continued*

- Get current copies of all internal policy and procedure manuals ready to turn over to the examination team. They will ask for them.
- Be ready to discuss your compliance management system; this is the Bureau's chief area of concern after its first year of examinations.
- And if you're a lender, be ready to discuss fair lending, a huge area of Bureau concern in exams conducted thus far.



# So You've Received an Exam Notice, *continued*

- Be ready to be cooperative and to share everything that the Bureau asks for. A good relationship with the CFPB from the outset will make the entire examination experience easier to handle.

# Final Thoughts

- **The CFPB is here to stay.** It is the most comprehensive regulatory organization that U.S. financial services providers have ever been confronted with. The best way to deal with the CFPB and its examiners is to develop, at the outset, a strong working relationship with the Bureau, and maintain an effective compliance program and clear documentation of your business's programs, policies and procedures.

# The CFPB's Investigative Powers

- On June 29, 2012, the CFPB issued its final rule clarifying its policies and procedures for investigations into potential violation of federal consumer laws in the Federal Register (77 FR 39101).
  - This rule provides the agency great latitude to commence and pursue investigations.
  - Its investigative procedures are based on the Federal Trade Commission's (FTC) procedures with influences from the Securities and Exchange Commission (SEC) and other regulators.

# Initiation of an Investigation

- Investigations may be begun as a follow up to the examination process; however, other potential triggers include: consumer law violations, a glut of customer complaints, agency referrals, and whistleblowers.
- Only the assistant director or deputy assistant directors of the Office of Enforcement for the CFPB may authorize an investigation. Limiting who could initiate an investigation was an effort to allay industry concerns that any “staff-level employee could unilaterally open an investigation[.]”

# Initiation of an Investigation, *continued*

- Investigations may be coordinated with other agencies, for example, the FTC and the CFPB have a memorandum of understanding in place and other agencies that could be involved with a CFPB investigation include the OCC, the FDIC, the Financial Fraud Enforcement Task Force.
- Investigations can also be coordinated with State regulators, though as September 20th, only 12 states (all but one with Democratic AGs) have signed cooperation agreements with the CFPB and the AGs of South Carolina, Oklahoma, and Michigan joined the federal lawsuit challenging Dodd-Frank's unconstitutional provisions. In addition, State AGs may enforce certain provisions of Dodd-Frank, after notifying the CFPB.

# Confidentiality

- Investigations are generally non-public and confidential, but the CFPB can disclose the existence of an investigation to advance the goals of such investigation.

# Information that can be Requested

- The CFPB can issue “civil investigative demands” (CIDs) for documents, tangible things, written reports, answers to questions and/or oral testimony.

# Information that can be Requested, *continued*

- Only the director of the CFPB and the assistant director and deputy assistant directors of the Office of Enforcement may issue CIDs. Such CIDs may be focused on: institution management and governance, specific types of transactions, compliance with specific laws and regulations, compliance training, and the institutions' monitoring of its service providers as institutions are charged with ensuring that service providers' policies and practices conform with applicable law and regulation and promptly addressing compliance issues as they arise.
- Responses to CIDs must be verified under oath.



# Disclosure of the Nature of the Investigation

- 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.

# Meet and Confer

- Within ten calendar days after receipt of the CID, the recipient and the CFPB should conference to discuss the 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.

# Requests to Modify the CID

- The recipient can, within 20 calendar days of service of the CID, petition to modify the CID. The petition will only toll the response period for those portions of the CID that are specifically attached. For example, a claim of privilege would only toll the CID for those documents on which privilege is claimed and a privilege log would need to be provided.
- While an extension of this deadline can be requested, the rules make clear that the CFPB disfavors such requests.

# Requests to Modify the CID, *continued*

- The petition to modify the CID will be sent, along with the CFPB investigator's statement in reply, to the director of the CFPB. The director will then accept or deny the petition.
- That order and the petition will both be made public, but the investigator's statement in reply to the petition will not be made public.

# A Recent Example Illustrates the Process

- On June 12, 2012, PHH Corp. filed the first challenge to a CID, calling the agency's request for information "overly broad and unduly burdensome." Recently, Director Cordray, in a nine-page decision, denied the petition and ordered the company to produce all relevant documents within 21 days. Both the petition and the decision are on the CFPB's website.

# A Recent Example Illustrates the Process, *continued*

- The dispute arose from an investigation to determine whether mortgage lenders and private mortgage insurance providers engaged in “unlawful acts or practices in connection with residential mortgage loans.”
- In its petition, PHH complained that the CFPB failed to state the nature of the conduct at issue, as required by Dodd-Frank, and that the description covered “every aspect of mortgage lending...which prejudiced PHH’s ability to formulate appropriate objections.” PHH also complained because the CID was comprised of 21 interrogatories and 33 document requests.

# A Recent Example Illustrates the Process, *continued*

- Director Cordray ruled that an initial CID may be “crafted broadly because the enforcement team needs to be thorough and comprehensive about its inquiries into possible violations of law that harm consumers.” Further, he noted, the CFPB’s letter to PHH, was specific and stated that the agency was looking into whether “premium ceding practices by PHH involving captive reinsurers and private mortgage insurance carriers” complied with RESPA.”

# A Recent Example Illustrates the Process, *continued*

- When faced with PHH's objection to the CFPB's request for documents created 11 years ago, well outside the statute of limitations, was illegitimate and created an undue burden, the director ruled that that the issue "is not whether all such information is actionable; rather, the issue is whether such information is relevant to conduct for which liability can be lawfully imposed."
- Director Cordray considered this a precedential ruling and admittedly designed it to show other companies the CFPB's thought process in reviewing CID modification requests.



# Negotiating the Scope of CID Request

- The key to successfully negotiating a CID is preparation and working quickly. The CFPB typically will not grant a modification to a CID request unless the justification for the modification is both legitimate and specific. The more details you provide the CFPB to support your rationale for seeking the modification and substantiate claims of burden—especially with respect to any technical burden imposed on the company—the greater likelihood you will succeed. It also is advisable to offer specific alternatives and suggestions for responding to the requests instead of simply asserting that the requests are too broad.

# Negotiating the Scope of CID Request, *continued*

- The first opportunity you likely will have to discuss the scope of the CID with the CFPB and negotiate the terms of compliance is during the meet and confer with the CFPB attorneys.
- In order to be prepared for the meet and confer, you must quickly assemble a legal team, assess the scope of the CID, consult with the relevant IT and business personnel, and outline, request-by-request, a proposal for modifying the CID.

# Negotiating the Scope of CID Request, *continued*

- There are many ways to push back on the scope of a CID, and all options should be put on the table in order to reach maximum results. While each CID is different and highly dependent on the underlying legal issues and facts, there are several areas common to all CIDs that greatly affect the burden and cost of complying with a CID. Below we provide an overview of these areas and some suggestions.
  - Applicable Time Period. Each CID includes a defined time period covered by the CID. Typically the CFPB will seek information and materials going back several years, until “the date of full compliance with this CID.” Although the CFPB may not agree to a blanket modification to the applicable time period, it may consider limiting the time period for select requests.

# Negotiating the Scope of CID Request, *continued*

- Definitions. It is easy to overlook the Definitions section of the CID and go straight to the CID requests, but it is important to review the definitions carefully because they greatly affect the scope and burden of the CID. For instance, the CFPB typically defines the term “company” broadly to include the CID recipient plus all entities affiliated with the recipient—even if those affiliates are in different lines of business than the recipient. Depending on the company, this could significantly expand the scale of the document/data collection and review. This is particularly true for larger entities with complicated corporate structures.

# Negotiating the Scope of CID Request, *continued*

- Redundant or Superfluous Documents. Like other government investigators, the CFPB typically will phrase its requests as broadly as possible to capture all documents and information (using phrases such as “all documents relating to.”) Often times such requests require the production of numerous copies of materials that are, in all material respects, identical. For instance, a request for all consumer contracts could potentially require the production of millions of contracts, all of which are identical except for the name and signature of the consumer. Consider offering the CFPB models, templates, or samples of documents in lieu of a full production to reduce the overall burden and cost of the document production. Further, companies that are publicly traded will have disclosed through filings with the Securities and Exchange Commission information that may duplicate information responsive to the CID.

# Negotiating the Scope of CID Request, *continued*

- ESI Considerations. The search, collection, and production of ESI are particularly daunting when dealing with a CID. You should treat the issue of ESI here the same as you would in civil litigation. At a minimum, you will need to:
  - Issue a records retention notice to ensure all potentially responsive ESI is preserved
  - Confer with your IT staff to identify potential sources, locations, and storage and retrieval mechanisms of ESI
  - Work with the IT and business departments to determine the nature and volume of potentially responsive ESI

# Negotiating the Scope of CID Request, *continued*

- Depending on the volume of potentially responsive ESI and the degree of difficulty of retrieving it, you may need to narrow the amount of ESI collected. To do so, you will need to present to the CFPB information about the unavailability, inaccessibility, or excessive volumes of ESI. In any event, the first step will be to understand where and what ESI is held by the company and how that fits with the requests of the CID.

# Negotiating the Scope of CID Request, *continued*

- Privileged and Confidential Information. The CID likely will require you to identify all materials withheld or redacted on the grounds of privilege. The process of identifying privileged documentation and creating a privilege log may, depending on the nature of your business, be extremely time consuming and costly. Consider ways to modify the scope of the CID to minimize this burden (for example, excluding the company's lawyers from any custodian lists). At the same time, it may be useful to consider whether privileged material would be useful to disclose and whether it can still be protected with causing waiver issues.



# Negotiating the Scope of CID Request, *continued*

- Time for Compliance. Regardless of what you ultimately negotiate with respect to the terms of compliance with the CID, you should consider requesting a rolling production of information and documents, in order to help manage the time and resources needed to respond to the requests. Whether the CFPB will grant the request will depend upon the circumstances and if it's a "win-win" for both parties. Obviously, an extension and rolling production can allow the CFPB to receive some materials sooner, but also it can give recipients of a CID valuable time to collect and process other information that is potentially responsive to the request.

# Negotiating the Scope of CID Request, *continued*

- Responding to a CFPB investigation can be a difficult process. A company that is the recipient of a CID will be better able to be successful if it understands and minimizes its risks and at the same time maximizes its opportunity for a successful long-term relationship as a regulated entity.

# Enforcement of the CID

- 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. It can also seek civil contempt or other appropriate relief to enforce such court orders.
- As with FTC CIDs, a failure to timely petition the CFPB to modify the CID on grounds of undue burden, or other impropriety, usually will preclude the recipient from raising such objections in response to the agency's effort to judicially enforce the CID.

# Oral Testimony

- If oral testimony is requested, it is taken at a private hearing, which involves the witness, counsel, hearing officer, recorder, and CFPB investigator.
- Representatives of state or federal agencies with whom the CFPB is conducting a joint investigation may also attend the hearing and/or receive copies of the hearing transcript.
- The 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.

# Close of the Investigation

- Once its investigation is completed, the CFPB can:
  - Bring an action in federal or state court to seek a ruling that there has been a violation of federal consumer financial law
  - Pursue such a ruling before its own administrative law judges
  - Refer the investigation to other federal, state or foreign government agencies
  - Simply close the investigation

# The CFPB's Adjudication Rules

- On June 29, 2012, the CFPB also published its rules establishing the procedures by which it would conduct adjudicatory proceedings (77 FR 39057).
  - The CFPB modeled its procedures after those used by other regulators, the SEC, the FTC and the Administrative Conference of the United States.
  - The CFPB procedures are intended to resolve issues quickly with limited discovery. However, the CFPB is taking the position that may conduct investigations and examinations of the defendant while the adjudication process unfolds.

# Applicability

- The CFPB must follow these procedures before issuing orders finding a violation of consumer financial law.
- The relief sought by the CFPB can include cease and desist orders, rescission or civil money penalties – but not punitive damages.
- These procedures do not apply to temporary orders to cease and desist, or to CFPB investigations, rulemaking or other proceedings. In lieu of a CFPB adjudication, the CFPB can pursue an enforcement action in Federal or State court.

# Early Warning and Settlement

- Similar to the “Wells” process used by the SEC, the CFPB will provide advance warning of a possible enforcement action.
- If the parties reach a settlement before a notice of charges is filed, the CFPB may commence a proceeding by filing a stipulation and a consent order concluding the proceeding.
- As was seen in the recent action against Capital One Bank, the CFPB can also refer matters to other regulators and coordinate its actions with them.



# Notice of Charges, Answer and Scheduling Conference

- The formal adjudication process starts with a Notice of Charges issued by the CFPB's Office of Enforcement that must be answered within 14 days of service.
- A scheduling conference is required within 20 days of service of the Notice of Charges.
- The hearing officer has 300 days, beginning with the service of the notice of charges, to issue a recommended decision. Extension of the 300-day deadline is permitted, but the CFPB intends to grant such extensions only in rare circumstances.

# Discovery

- Within seven days after service of the Notice of Charges, the CFPB's Office of Enforcement will make certain documents obtained in connection with the investigation leading to the Notice of Charges available to the respondent. The Office of Enforcement must supplement these disclosures if it acquires additional information that it intends to rely on at a hearing.

# Discovery, *continued*

- These documents will not include CFPB work materials unless the CFPB intends to use them at the hearing. The CFPB may also withhold documents on the basis of privilege, work product, or relevance, as well as to protect the identity of confidential sources not intended to be called as witnesses. However, if material exculpatory evidence is contained in documents that could otherwise be withheld, the Office of Enforcement will disclose such documents (though it does not have an obligation to search the entire CFPB for exculpatory evidence).

# Discovery, *continued*

- Respondents may seek information by subpoena which will be issued and enforced by the CFPB if they are not “unreasonable, oppressive, excessive in scope or unduly burdensome.”
- Interrogatories are not allowed, nor are depositions of third parties who are available to testify at the hearing. If a witness is unavailable for a hearing, a deposition may be requested with a 14 day notice.

# Discovery, *continued*

- Generally, respondents can request copies of witness statements if the CFPB intends to call that witness during the hearing; however, the CFPB will not provide such statements if the respondent does not request them.

# Discovery, *continued*

- Parties can request a protective order to protect confidential information. And, if confidential information obtained from a third party is to be disclosed, that third party must be given ten days' notice to request a protective order. Protective orders will be granted only upon a finding that “public disclosure will likely result in a clearly defined, serious injury” or if the information is “sensitive personal information.” Parties can also stipulate to a protective order.
- Each party is limited to five expert witnesses, each of whom must generally provide a report before testifying at a deposition or hearing.

# Motions

- Non-dispositive motions will be ruled on within 14 days of filing of all motion papers.
- Dispositive motions arguing that dismissal is required as a matter of law, even if all of the CFPB's facts are accepted, will be ruled on within 30 days of filing of all moving and responding papers.
- Third parties can apply to file amicus submissions.

# Interlocutory Review

- Parties can request an interlocutory review by the director of the CFPB of any decision made by the hearing officer during the adjudication within five days of service of the ruling. Such requests must be filed with the hearing office and will be granted if they seek additional production of evidence, or if there is substantial ground for difference of opinion and immediate review is appropriate.
- If the hearing officer denies a request for interlocutory review, such request can then be made directly to the CFPB director.



# Interlocutory Review, *continued*

- No later than ten days prior to the hearing, a prehearing statement providing a list of witnesses, evidence and stipulations is to be filed. The hearings are generally public.
- Objections to the admission of evidence a hearing must be made in a timely manner.
- Within 30 days after the filing of the hearing transcript, the parties can propose findings of fact and conclusions of law.

# Decision and Appeals Process

- The hearing officer shall make a recommended decision by the earlier of (a) 90 days after the deadline for filing post-hearing briefs or (b) 300 days after the service of Notice of Charges.
- The recommended decision may be appealed to the CFPB director within 10 days.
- If the recommended decision is not appealed, the CFPB director will either accept or deny the recommended decision.

# Decision and Appeals Process, *continued*

- If the recommended decision is appealed, then the appealing party must file its brief within 30 days of the recommended decision.
- An appeal is necessary if the party intends to seek judicial review of the director's final decision; in other words, parties must "exhaust" their administrative remedies within the agency. Once appeals briefs have been filed, the director may request an oral argument and will issue a final decision within 90 days.
- A motion for reconsideration is allowed within 14 days of the service of the director's decision.

# Judicial Review

- Per 5 U.S.C. §703 judicial review can be sought in a “court of competent jurisdiction” which will generally be the District Court unless a cease-and-desist order is being contested, in which case it will be a United States Court of Appeals, per 12 U.S.C. §5563(b)(4). Judicial review will be governed by the Administrative Procedures Act, 5 U.S.C. §706(2) which allows the decision to be set aside if it was made, for example, “without observance of procedure required by law,” or if it is “unsupported by substantial evidence[.]”.

# Judicial Review, *continued*

- In lieu or in addition to challenging the CFPB's adjudication, the appeal can challenge the CFPB's regulation under the same statute, generally as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."
- If the respondent seeks judicial review of the director's decision, it can also ask the director to stay his or her final order pending that review.

# The CFPB Rose as Amicus

- On August 2, 2012, the CFPB announced that it is soliciting recommendations for cases in which to file amicus briefs, asking to be notified of “federal court of appeals or state supreme court” cases with “important legal questions about the interpretation or application of a federal consumer financial protection statute or regulation” that it interprets or enforces.

# The CFPB Rose as Amicus, *continued*

- The CFPB's solicitation of recommendations for cases in which it should weigh in as a "friend of the court" confirms, follows its filing of numerous amicus briefs already, and shows that it intends to have an active amicus practice.
- Thus far, all of the amicus briefs filed by the CFPB have supported consumer positions. It is reasonable to expect that to continue.

# The CFPB Rose as Amicus, *continued*

- It is worth noting that not all courts have followed the position advocated by the CFPB as amicus. Last year, in *Freeman v. Quicken Loans, Inc.*, the United States Supreme Court rejected the CFPB's argument that a violation of Section 8(b) of RESPA could be based upon a fee retained by only one service provider. That unanimous decision demonstrates that administrative agencies, including the CFPB, will not be allowed to expand federal consumer protections beyond the express terms enacted by Congress.



# The CFPB Rose as Amicus, *continued*

- One issue on which the CFPB might seek to file future amicus briefs is whether disparate impact analysis can be used to prove a violation of fair lending laws, such as the Equal Credit Opportunity Act or the Fair Housing Act. The CFPB signaled support for disparate impact analysis in a recent Bulletin 2012-04[10] and may try to articulate that support in an amicus filing as such cases make their way through the appellate courts. In light of the Supreme Court's decision in *Freeman*, it will be interesting to see what tact the CFPB takes.

# Conclusion

- In addition to having powers of examination, the CFPB has broad investigative powers that allow it to gather evidence before commencing judicial proceedings. Recipients of CIDs will have limited time to respond to and comply with CIDs. If the recipient is unable to modify the CID through the meet and confer process, it must preserve its rights through a detailed petition to modify, this, thereafter, will also provide the basis for narrowing the CID — either before the CFPB or in court.

# Conclusion, *continued*

- It may be wise for institutions to create a response team to coordinate document collection and CID compliance. And response team members should keep be cognizant of the maintaining privilege, ensuring that all potentially relevant documents (even if not produced) are preserved – especially since the CFPB is applying a very broad definition of relevance; and that any public disclosure obligations that would be triggered by other regulatory or contractual obligations are followed.

# Conclusion, *continued*

- The CFPB's adjudication procedure requires careful planning and decision making at each stage of the administrative process. If respondents choose to proceed with an enforcement action and not settle, they will face a discovery mechanism that is far more limited than would be available in a traditional court setting. The CFPB can also use its investigation and examination powers in parallel with its pursuit of litigation.

# Conclusion, *continued*

- In addition to bringing claims directly, the CFPB will also be an active friend of the Court. This amicus practice is consistent with the CFPB's general intent to be an active regulator. And its mere participation is likely to influence proceedings, especially if courts request that the CFPB file amicus briefs to interpret laws and regulations under the CFPB's purview.

# Conclusion, *continued*

- Thus, regardless of whether it is taking on the role of investigator, instigator, or friendly interloper, the CFPB will have an active presence in the consumer finance industry. It will open and transparent, but it will not be timid.

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