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What to Know about CFPB Supervision and Examination

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The Consumer Financial Protection Bureau (“CFPB”) recently issued its final rule that establishes procedures to bring under its supervisory authority nonbanks whose activities it has reasonable cause to determine pose risks to consumers. Nonbanks subject to the rule are companies that offer or provide consumer financial products or services but do not have a bank, thrift, or credit union charter. As a result, providers of financial advisory services, credit counseling, debt management plans, debt settlement, and money transmission services, and their service providers, may be subject to supervision and examination if certain criteria are met. The rule takes effect on August 2, 2013.

The CFPB’s Expansive Supervisory Authority

The CFPB claims under the Dodd-Frank Act that it has broad authority to prescribe rules to supervise nonbanks that otherwise fall under its jurisdiction. The final rule includes procedures the CFPB will use to notify a nonbank that it is being considered for supervision because the CFPB may have “reasonable cause to determine that it poses a risk to consumers.” The rule also sets out the procedures that the CFPB will follow to give the nonbank in question a reasonable opportunity to respond to such notice.

Already, under the Dodd-Frank Act the CFPB supervises nonbanks, regardless of size, in certain specific markets: mortgage companies (originators, brokers, and servicers including loan modification or foreclosure relief services); payday lenders; and private education lenders. The CFPB can also supervise the “larger participants” in other nonbank markets set by the CFPB: the consumer reporting market (September 2012); and the debt collection market (January 2013). A proposed larger-participant rule for the student loan servicing market was issued in March 2013. On top of all this, the CFPB recently announced, as part of a list of regulatory priorities, its intention to engage in additional “larger participant” rulemaking that could specifically be focused on debt relief services.

What this Means...

Nonbanks and their service providers may be supervised by the CFPB. The CFPB is authorized to require reports from and conduct examinations of nonbanks subject to its supervision. Not surprisingly, we expect larger nonbanks in markets not previously subject to CFPB supervision to be a major focus of the CFPB. So now would be a good time to review your organization’s overall compliance practices with the following items in mind:

- **UDAAP and other Federal Consumer Financial Law** - The CFPB has two primary areas of enforcement authority: the Consumer Financial Protection Act’s prohibition on unfair, deceptive, or abusive acts and practices (“UDAAP”); and the laws and rules that it inherited from other agencies. For a primer on the laws and regulations that fall under the scope of the CFPB, review the *CFPB Supervision and Examination Guidance* on its website – www.consumerfinance.gov. This material is geared for CFPB examination staff, so it provides a good overview of the ways examiners will approach an examination. Perform a risk assessment to determine if any changes are required, and be prepared to document how those changes were made. Consider adjustments to policies, procedures, practices, products and services, or discontinuation, based on the risk analysis and legal evaluation.
- **Compliance Management Systems** - In an examination, the CFPB also will assess an institution’s efforts to develop and maintain effective compliance management systems. To do so, CFPB examiners evaluate the quality of the policies and practices that institutions have implemented to ensure that they and their service providers are acting in accordance with federal consumer financial law.
- **Detailed Reviews of All Operations** - Other areas of interest during an examination can include organizational charts, contracts, reporting, training, monitoring, historical legal and regulatory actions, internal reports and analyses about specific products and services, and training and compensation plans. In addition, the CFPB will review advertising and marketing practices,

consumer-level transactional data and related information about fulfillment, privacy practices, payment processing practices, and complaint handling.

- **What to Be on the Lookout for...** - The available guidance includes examples from federal enforcement actions and provides insight into practices that have been alleged to be unfair, deceptive, or abusive by other regulators and may inform the CFPB's determinations. Moreover, the CFPB's primary area of focus in its enforcement actions has been alleged unfair, deceptive, or abusive acts and practices. Indeed, the nonbank risk supervision rule was preceded by a number of enforcement actions, including several that addressed unfair, deceptive, or abusive acts and practices in the design, advertising and marketing, and fulfillment of consumer financial products and services offered by nonbanks.
- **CFPB Can Share with Others** - The CFPB has agreed to share with the Federal Trade Commission, state regulators, and other government agencies information the CFPB obtains through its supervisory and examination process. Further, copies of examination reports may be shared and the CFPB has the ability to make referrals to the Department of Justice and Internal Revenue Service.
- **Prepare for a CFPB Onsite Examination** - While the CFPB may perform a paper exam, the vast majority of first-round exams are being conducted by onsite teams comprised of a handful to dozens of examiners (often accompanied by an enforcement attorney) that are onsite for weeks. The CFPB may seek to start an exam with 30 to 60 days' advance notice. Consider how you will accommodate their needs, who will be their primary contact, and how you will handle requests for documents, information, and access to staff for interviews. The onsite portion of a CFPB exam can last several weeks or even a few months.
- **Review Findings Closely and Be Prepared to Respond** - A CFPB examination will include a report of examination provided to the examined company. The report will be detailed and include potential deficiencies and action items that are expected to be addressed. Be prepared to independently assess the report of examination and its findings, as well as to provide evidence of corrective action taken. Consider explaining in detail how issues may not be issues or how they have been addressed, and requesting feedback on approaches under consideration, as appropriate. The failure to address findings in a report of examination can lead to additional scrutiny and a potential enforcement action.

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Starting August 2013, virtually all providers of consumer financial products and services may be subject to CFPB supervision and examination with the exception of certain small depository institutions. As a result, providers of consumer financial products and services and their vendors will need to be able to demonstrate that they are in compliance with the law. CFPB examinations are an intensive and time-consuming process. To help prepare your organization, take steps now to be able to confirm and demonstrate that it operates in accordance with federal consumer financial law.

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For more information, please contact **Jonathan L. Pompan** at 202.344.4383 or .

Jonathan L. Pompan, a partner in the Washington, DC office of Venable LLP, co-chairs the firm's Consumer Financial Protection Bureau Task Force. His practice focuses on providing comprehensive legal advice and regulatory advocacy to a broad spectrum of clients, such as nonbank financial products and services providers, advertisers and marketers, and trade and professional associations, before the CFPB, the FTC, state Attorneys General, and regulatory agencies.

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