

Recent Developments from the Consumer Financial Protection Bureau

By Memrie M. Fortenberry, Esq., Butler, Snow, O'Mara, Stevens & Cannada, PLLC

The Consumer Financial Protection Bureau (the “CFPB”) has been a fully functioning regulatory agency for almost one year now, since July 21, 2011. The CFPB has already proceeded full speed with its bank regulatory and examination scheme. The CFPB has direct examination and enforcement authority for banks with \$10 billion in assets or more. The other federal financial institution regulators (the FDIC, the OCC, and the Federal Reserve Board) still retain examination and enforcement authority for financial institutions below the \$10 billion asset level. The regulation of nonbank financial entities, such as mortgage companies, check cashers, and other non-depository affiliated lenders, was put on hold until a Director of the CFPB could be named. Now that Richard Cordray has finally been appointed as Director, the pace of new developments and regulations has accelerated.

The CFPB’s nonbank supervision program will regulate and examine companies of all sizes in the mortgage, payday lending and private student lending markets, but for other financial companies, the CFPB will only have the authority to supervise those companies categorized as large participants in certain financial product markets such as debt collection, consumer reporting, money transmitting, check cashing, prepaid cards, and debt relief services. The definition of a “large participant” has yet to be finalized, but final rules must be issued no later than July 21, 2012.

One of the CFPB’s first official steps was to place each of the federal bank regulatory agencies under a Memorandum of Understanding, which requires that regulators share with the CFPB their exam procedures, as well as their examination results and the steps to be taken to correct any

violations of consumer financial protection laws or regulations detected during those examinations. That “MOU” exists not only as a direct result of actions by the CFPB, but it is also a direct result of the Dodd-Frank Act, which created the CFPB, making it virtually impossible for the CFPB to cut the bank regulatory agencies any slack.

In November 2011, the agency introduced its Examination Manual as guidance for examination staff to follow as they begin the process of examining larger financial institutions. The CFPB is insisting that regulators place the consumer at the center of all examinations. This consumer-driven approach will make Fair Lending, UDAAP, and product pricing even more of an issue than has been the case in the past.

It is also apparent that the CFPB will insist that examinations be much more statistically driven. New HMDA reporting requirements, when finalized, will add significant new data, including information about an applicant’s age and credit score, to the data currently reported. That data, according to the new CFPB exam procedures, will be subjected to a regression analysis that will form the basis for exam conclusions on a host of issues. Additional data will be required on small business loans to female and minority business owners. All of this new data reporting will place increasing pressure on a bank or other regulated entity to know in advance what information that loan data holds.

The CFPB exam procedures place a great emphasis on an entity’s consumer complaint process. Consumer complaint data will now be a source of information for inquiries during an examination. The CFPB has created a link on its website for consumers to register complaints. Every entity would be well advised to establish a

process for monitoring and dealing with complaints, remembering that all consumer complaints merit follow-up. Complaints from the Better Business Bureau, the Consumer Protection Division of the State Attorney General's Office, and other complaint sources, in addition to complaints received from regulators, should be considered.

More recently, the CFPB issued new Examination Procedures for Mortgage Origination. The emphasis is now on protecting the consumer rather than making sure that a lender uses all of the correct forms, crosses all "t's" and dots all of the "i's". An examination of these new guidelines reveals a number of things.

The CFPB has identified residential mortgage lending, all lenders and all products, as a primary area of focus. That is not surprising given the subprime mortgage crisis of only a few years ago, the underwriting deficiencies that took place, the resulting foreclosure rate for residential mortgages, and the severe impact those events had on the American consumer.

In response to the foregoing problems, and as result of demands from Congress and U.S. citizenry, the Federal Reserve, the Department of Housing and Urban Development, and other regulatory agencies enacted a number of changes aimed at better protecting consumers. Those late responses were not enough. The power to write and enforce those consumer protection regulations were given to the CFPB. The laws and regulations that relate to mortgage lending have been on the books for 35 or more years. They have been amended from time to time, but always with the same regulatory mindset.

In the past, the bank regulators have looked at the consumer protection laws and regulations in much the same way that banks have, now the CFPB is taking a new approach. They are no longer just

looking at TILA requirements as a disclosure issue, RESPA requirements as a loan closing issue, and Fair Lending as a possible discriminatory loan underwriting or loan pricing issue. Instead, they are attempting to look at the entire process of obtaining mortgage loan financing (first lien, second lien, home equity, etc.) as it relates to the consumer and the protection of consumers in all areas.

These new exam procedures list the following exam objectives: to assess the quality of an entity's compliance management system and its mortgage origination business; to identify acts or practices that materially increase the risk of violations of federal consumer protection laws in connection with mortgage loan origination; to gather facts that help determine whether a bank engages in practices that are likely to violate consumer financial laws in connection with mortgage origination; and to decide whether further supervisory or enforcement action would be appropriate.

The new procedures then list seven different modules to be reviewed: the Company Business Module; the Advertising and Marketing Module; the Loan Disclosures and Terms Module; the Underwriting, Appraisals and Originator Compensation Module; the Closing Module; the Fair Lending Module; and the Privacy Module.

This is a new and more efficient way of looking at a number of traditional compliance requirements. It emphasizes all of the recent changes to regulations that have been made to protect consumers. And it looks at issues, such as business models and compensation arrangements, that have not traditionally been reviewed.

The foregoing is a brief summary of a few changes proposed by the CFPB. Many more are to come in the near future.