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Understanding CFPB Supervision and Enforcement—Important Considerations in Working with the Federal Financial Consumer Watchdog

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In a few short years, the Consumer Financial Protection Bureau (CFPB), with its primary mission of protecting the federal legal rights of consumers established by Congress, has quickly established a strong record of both supervisory and enforcement activity. Its efforts to enforce federal consumer protection laws have resulted in millions of dollars in civil money penalties and restitution payments by banks and other financial services providers. As a result, the agency has garnered a reputation as an aggressive advocate for its constituents, the consumers of financial products and services. This, of course, creates challenges for those subject to the agency's jurisdiction; in particular, how to ensure that the process is fair and reasonable under the circumstances. Certainly, an important consideration is understanding the CFPB, including how the agency is organized, how it functions, and how best to work with staff. All of these considerations and, perhaps more importantly, failing to understand these considerations, can have a dramatic effect on the outcome of any examination, investigation, or informal inquiry commenced by the CFPB.

As most are aware, the CFPB's jurisdiction extends in one way or another to most consumer financial transactions. The Dodd Frank Wall Street Reform and Consumer Financial Protection Act of 2010 ("Dodd-Frank Act") provides the CFPB jurisdiction over all banks holding assets over \$10 billion (representing approximately 110 financial institutions) and tens of thousands of previously unregulated or under-regulated non-bank financial services providers, including mortgage origination and servicing, small dollar or payday lenders, credit reporting companies, debt collection companies, auto finance companies, private student lenders, debt relief companies, credit repair companies, and even certain auto dealers that thought they escaped the CFPB's grasp in the Dodd-Frank Act.

When the CFPB determines that there has been a law violation, its Enforcement Office recommends to the CFPB Director the possible imposition of civil monetary penalties, restitution payments to wronged consumers, other injunctive relief, and whether the agency should initiate lawsuits or enter into settlements to halt illegal practices by entities subject to its jurisdiction. While the efforts of the CFPB's Enforcement Office often grab the headlines, the agency's Supervision Office is approximately four times larger than the Enforcement Office. It is the Supervision Office that has the most contact, by a wide margin, with the entities subject to the CFPB's jurisdiction. There are many more CFPB

examinations than public enforcement actions, and the Supervision Office continues to steadily increase its supervisory jurisdiction in new areas within the agency's regulatory purview. Thus, it is critically important that any CFPB-regulated business understand first and foremost how to navigate the CFPB's supervisory processes. Failing to do so may be the quickest way for an entity to be provided the "opportunity" to familiarize itself with the agency's enforcement side. Following are among the more important considerations in understanding the supervisory and enforcement processes at the CFPB.

Understanding the Unique Structure and Role of the CFPB's Supervision, Enforcement, and Fair Lending Division and its Coordination with Other CFPB Offices and Other State and Federal Regulators.

The CFPB is required by the Dodd-Frank Act to coordinate with the prudential regulators of the banks and other entities subject to the CFPB's consumer financial protection jurisdiction, including state banking regulators, as well as other state regulators that license, supervise, and examine the offering of consumer financial products or services.

CFPB's Supervision, Enforcement, and Fair Lending Division (SEFL), led by the SEFL Director, who also serves as the Deputy Director of the CFPB, is the liaison with prudential regulators. The SEFL Division is comprised of three components: (i) the Supervision Office, (ii) the Enforcement Office, and (iii) the Fair Lending Office (which given its uniquely targeted focus yet prominence within the SEFL structure suggests an area of particular importance within the CFPB).

CFPB's Supervision Office, which conducts examinations of large banks and certain non-bank entities, including mortgage origination and servicing, student lending, payday or small dollar lending, credit reporting, debt collection, and soon auto finance, is divided into two main sections—Supervision Operations and Supervision Policy. Supervision Operations oversees the logistics of the field-based exam teams that are located in four regions across the country (West, Midwest, Northeast, and Southeast). Supervision Operations coordinates closely with examiners, Supervision Regional Directors, who supervise the regional examination teams, management and staff, and the Office of Supervision Policy. In contrast, Supervision Policy oversees the consistency of each examination and its findings, advises examiners on new or novel issues or legal theories, and is involved in determinations regarding whether an act or practice is unfair, deceptive, and abusive (UDAAP). Supervision Policy is divided by product area rather than region. Its staff coordinates closely with examiners, CFPB enforcement exam-support attorneys, and the Office of Enforcement Policy and Strategy.

CFPB's Enforcement Office is divided into four Litigation Teams and a separate Policy and Strategy Team. Three Litigation Teams are based in Washington, D.C. and one Litigation Team is based in the field (divided among all of the regional offices). These teams handle daily enforcement investigations and litigation. The Policy and Strategy Team, based in Washington, D.C., is responsible for the Enforcement Office's strategic plan; monitors market behavior; advises on novel legal theories; assists with consistency of investigations, litigation, and settlements; and coordinates with exam-support attorneys, the Office of Supervision Policy, other divisions within the CFPB, and other state and federal regulators. The Policy and Strategy Team is generally divided by product area.

CFPB's Fair Lending Office is involved in any aspect of a supervisory examination and/or enforcement investigation involving a violation of federal fair lending laws, such as violations of the Equal Credit Opportunity Act and the CFPB Regulation B.

Understanding that the CFPB Employs a Committee Approach—the Action Review Committee (ARC) – to Determine Whether Potential Legal Violations should be Escalated from Supervision to Enforcement.

The ARC, which is composed of the SEFL Director, the Director of Supervision Operations, the Director of Supervision Policy, the relevant Supervision Regional Director, the Director of Enforcement, and the Director of the Office of Fair Lending, determines the recommendation to the CFPB Director in determining whether a supervisory response or an enforcement action is the appropriate agency response to a particular situation involving violation of federal consumer financial protection laws. The ARC considers various factors relating to the violation and the financial entity that is the subject of the review in making an ARC recommendation. The violation-specific factors include, for example, the severity of each violation, whether the violation is ongoing, the likelihood that the violation will recur once stopped, the number of products affected by the violation, whether there is one violation or a variety of violations, and whether the violation effects a protected class of consumers or one in which the CFPB has a special mandate—i.e. students, older Americans, and Service Members. The institution-specific factors include, for example, the institution's size, complexity, financial stability, cooperation, knowledge of the violation, and any prior regulatory action. Knowing these factors, and working with the CFPB examination team may affect the outcome of an examination, including whether the agency's action involves a supervisory response or an escalation to a public enforcement action.

Understanding that Enforcement Attorneys Remain Integrally Involved in Supervisory Examinations.

Until criticized by the Bureau's Ombudsman¹ and industry representatives, enforcement attorneys were routine on-site during supervisory examinations conducted by the Office of Supervision. While it has been suggested that CFPB's enforcement attorneys are no longer integrally involved in the agency's supervisory examinations, in fact, CFPB enforcement attorneys continue to take an active role and involvement in all aspects of the agency's supervisory examinations. This includes involvement in everything from the initial scoping of the examination to drafting and presenting the final report of examination. While enforcement attorneys no longer routinely participate on-site during examinations, they continue to have a presence in examinations.

In addition, CFPB enforcement attorneys continue to provide input into whether a potential violation of law should be resolved through the supervisory process on a confidential basis or whether the violation warrants a formal and public enforcement action. In this regard, the agency's enforcement attorneys regularly participate in meetings with CFPB examination teams and provide examiners guidance on potential violations of a wide range of consumer financial protection laws.

Finally, it is important to note that the agency's enforcement attorneys are not only regular contributors to the CFPB's supervisory examination process, but also coordinate on supervision policy issues by working closely with the agency's Office of Supervision Policy and Office of Enforcement Policy and Strategy.

Understanding How and When to Cooperate and Work With the CFPB will Produce Tangible Benefits.

Perhaps one of the most obvious considerations in working with the CFPB or any other regulatory agency is understanding how and when to cooperate and work with the agency and its staff and when to push back due to a legitimate point of contention or disagreement. Not surprisingly, if the CFPB requests information from an entity through a supervisory request or an enforcement civil

investigative demand (CID), generally how quickly and cooperative a respondent is in responding to the CFPB may materially influence the entire process and, potentially, the outcome. While CFPB management makes the ultimate decision as to whether to make a recommendation to pursue a legal violation through the supervisory or enforcement process and how the matter should be resolved, all recommendations are heavily influenced by the views of the relevant examiners, attorneys, and midlevel management involved in the process.

There is almost always a greater opportunity to influence the reduction of a civil money penalty and resolve a matter through the confidential supervisory process than in the enforcement context. Often, this can be accomplished by proactively working with the CFPB to take prompt and effective steps to halt the allegedly unlawful conduct, remediating consumer harm, and improving compliance systems to prevent the harm from recurring.

While the benefits of cooperation may also be evident in the enforcement context, it is important to note that there are required deadlines that likely more effectively compel cooperation rather than encourage it on a voluntary basis. For example, prompt response to a CID is required within 10 days and a motion to modify or set aside (quash) a CID must be filed within 20 days of receipt of a CID. While modifications of certain elements of CIDs have been permitted by the CFPB, such as document production timing, modifications are generally disfavored.

Regardless of the context, where a respondent cooperates with CFPB staff beyond minimum mandatory requirements in an enforcement investigation, civil monetary penalties can sometimes be reduced and other restrictions, such as conduct prohibitions and reporting requirements, may be minimized. Importantly, these principles are actually articulated by the CFPB in a so-called “responsible conduct bulletin.”² CFPB has articulated a clear list of factors that it will consider as “responsible conduct,” including, for example proactively self-police for potential violations, promptly self-report to the CFPB when a potential violation is identified, quickly and completely remediate the harm resulting from violation, and affirmatively cooperate with any CFPB investigation above and beyond what is required. Working with counsel that understands the CFPB’s “responsible conduct bulletin” will benefit the outcome of any settlement negotiations.

With all of this in mind, respondents should take a measured approach in understanding the risks, potential rewards, and the best method of challenging the CFPB, as well as the relative merits of cooperation. Challenging a supervisory finding or enforcement investigation can be done zealously, but should be also be done thoughtfully and cordially. Frivolous arguments or unnecessary obstreperous behavior predictably will cause the CFPB staff to become more resolute in seeking out a resolution to the issues under review. Finally, as with any other regulator, only in truly exceptional circumstances should respondents seek to circumvent the CFPB staff in the hope of obtaining a better outcome from the agency’s senior management, which typically is extremely deferential to staff findings and recommendations.

Understanding that Receiving an Enforcement CID does not Necessarily Mean that a Respondent is Definitively in Trouble.

Certainly, receipt of an enforcement CID from the CFPB should garner the attention of the target firm’s senior management and Board of Directors. It is important to understand, however, that not all CIDs move forward in the same manner or may even involve the type of culpability one would assume attaches to a CID. The CFPB’s Enforcement Office methodically reviews all facts leading up to and following the issuance of a CID and, in this regard, will take appropriate action to close an

investigation after issuing a CID and undertaking necessary investigatory work, and/or meeting with a CID recipient and its representatives. When the CFPB Enforcement Office issues a CID to a recipient, it is important to understand that at this point the enforcement attorneys only have one point-of-view of the target entity under investigation and that stems mainly from publicly available information and consumer complaints. Therefore, it is both important that a CID recipient respond accurately and completely to the CID, and consider how it presents this information to the CFPB. Certainly, an important consideration in this process is choosing counsel that will enable an entity to understand the risks and assist in effectively, expeditiously, and successfully managing the CFPB supervisory and enforcement investigatory process.

Action Plan—Understanding the CFPB’s organizational structure, decision-making factors, and operating procedure before responding to supervisory examinations and enforcement investigations can have a tangible effect on the outcome of any regulatory action.

- **Responding to a supervisory examination:** Be prepared for meetings with the examiners. Review the relevant product-specific section of the CFPB examination manual on the CFPB’s website to understand what the examiners will be reviewing during their examination. In addition, review any relevant compliance program with special attention devoted to responding to consumer complaints. Prepare any and all material requested by the CFPB in an expeditiously and orderly manner. Consider how the information is presented to the examiners. Often times it might be advisable to provide an overview or summary of the information versus deluging large amount of raw data or material on the examination team with no explanation. Although the CFPB examiners will always review the underlying data or material information, providing a summary or putting the data and information in context may make it easier for the examiners to understand the transaction. If the CFPB examination team determines that there is a potential violation of law, continue to fully cooperate and immediately consult with the appropriate outside counsel to determine the correct course of action. Engaging outside counsel in a timely manner and taking into consideration the various ARC factors and the role of enforcement attorneys supporting examinations may influence the outcome of any examination report or an escalation of the issue to enforcement.
- **Asserting privileges in a supervisory examination:** Since the implementation of the CFPB, there has been concern regarding whether privileged materials provided to the CFPB will be protected from disclosure to third-party litigants. The CFPB has maintained that providing it with privileged material—attorney-client or otherwise—does not waive any privilege that may be asserted against a third-party seeking such privileged information. The CFPB has issued a bulletin and a rule regarding the treatment of confidential supervisory information.³ Moreover, Congress recently amended the Dodd-Frank Act to further clarify that “sharing” information with “regulators, authorities, and agencies [including the CFPB] shall not be construed as waiving, destroying, or otherwise affecting any private or confidentiality” with third-parties.⁴ Considering the CFPB’s bulletin and rule and the recent amendment to the Dodd-Frank Act, the CFPB generally does not view claims by supervised entities to withhold confidential or privileged supervisory information in a favorable light. Doing so without a significant reason and well-found basis may be deemed as unwillingness to cooperate by the CFPB. Therefore, before asserting such a privilege in the supervisory context, it is advisable to consult counsel to consider the costs and benefits of doing so.

- **Responding to an enforcement CID:** The mandatory time with which a respondent must meet with CFPB staff and hold what is called a “meet and confer” regarding the CID is 10 days. This time is very short considering the generally broad scope and large amount of information most CFPB CIDs are seeking. The enforcement attorneys will expect at the “meet and confer” that the respondent be prepared to discuss compliance with the CID, including for example, that all relevant material has been located or is being located, that the respondent has issued a preservation instruction to its employees, and the time necessary to produce all information requested by the CID. In addition, a respondent must file a motion to modify or set-aside (quash) the CID within 20 days of receipt (unless otherwise negotiated). Contrary to supervisory requests, it may appropriate and necessary to assert privileges related to some CID requests. However, assertion of privilege should be request specific and tracked in a clear and understandable privilege log. Should the CID request an investigational hearing, it is extremely important that any witness be prepared to testify and understand how the testimony will be taken. At the CID stage of any investigation the enforcement attorney only has a partial picture of the respondent’s business. Therefore, it may be appropriate for the respondent to present a broader picture of its business model and transactions to the CFPB. This type of activity may be taken into account under CFPB’s “responsible conduct” standard. Working with counsel, the respondent should decide whether this course of action is appropriate.
- **Responsible Conduct:** The CFPB has attempted to encourage cooperation within the enforcement context by issuing its so called “responsible conduct bulletin.” The bulletin provides a detailed list of various factors that the CFPB will consider as “responsible conduct.” The list does not specify how each item will be weighted and specifically points out that there is no specific formula that can be applied to account for cooperation. However, if a respondent to a CFPB investigation self-polices, self-reports, remediates the harm of the violation, and cooperates with the CFPB it will receive some type consideration for its behavior. This consideration will likely always be dependent on the gravity of the violations. This bulletin does not provide for a free pass, but it does articulate benefits of working and cooperating with enforcement attorneys. Considering that remediation or restitution is one of the “responsible conduct” factors, it is unlikely that the CFPB will significantly limit consumer restitution. Notably, however, in a number of recent enforcement actions the CFPB did not impose civil monetary penalties or imposed reduced penalties and limited other relief based on “responsible conduct.” Determining the best manner and timing to self-report a potential violation of law may factor into the type of “responsible conduct” consideration is given by the CFPB.
- **Picking the appropriate issues to contest and doing so courteously and respectfully.** The CFPB staff is involved in every decision regarding action taken against any entity under the CFPB’s jurisdiction. The Director and senior management at the CFPB thoughtfully consider the opinions and advice of staff. It is always best to have the respect of CFPB staff when attempting to resolve examination issues, obtain closure of the investigation or a no action letter, or settle the matter. Picking the appropriate issues to contest and making non-frivolous arguments will substantially benefit the credibility of your point-of-view or arguments.



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- ¹ A copy of the Ombudsman's report is available at
http://files.consumerfinance.gov/f/201306_cfpb_bulletin_responsible-conduct.pdf.
http://files.consumerfinance.gov/f/201211_Ombuds_Office_Annual_Report.pdf.
- ² A copy of the CFPB bulletin is available at
http://files.consumerfinance.gov/f/201306_cfpb_bulletin_responsible-conduct.pdf.
- ³ *Bulletin 12-01*, http://files.consumerfinance.gov/f/2012/01/GC_bulletin_12-01.pdf; *Confidential Treatment of Privileged Information*, http://files.consumerfinance.gov/f/201206_cfpb_final-rule_confidential-treatment-privileged-information.pdf, 12 U.S.C. § 1828(x).
- ⁴ *The Examination and Supervisory Privilege Parity Act of 2014*.
<http://www.gpo.gov/fdsys/pkg/BILLS-113hr5062rfs/pdf/BILLS-113hr5062rfs.pdf>.

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