

Litigation Forum: CFPB Enforcement

September 28, 2014

Moderator:

Stephen A. Fogdall, Schnader Harrison Segal & Lewis LLP

Panelists:

Jonice Gray Tucker, BuckleySandler LLP

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Litigation Forum: CFPB Enforcement

CFPB Enforcement Actions in 2014

In re First Investors Financial Services Group, Inc. (FCRA, UDAAP)

In re USA Discounters, Ltd. (UDAAP)

In re Amerisave Mortgage Corporation (TILA, RESPA, UDAAP)

In re Colfax Capital Corporation (TILA, UDAAP)

In re ACE Cash Express, Inc. (UDAAP)

In re Synchrony Bank (ECOA, UDAAP)

In re Stonebridge Title Services, Inc. (RESPA)

In re JRHBW Realty, Inc. d/b/a Realty South (RESPA)

In re Bank of America, N.A. (UDAAP)

In re 1st Alliance Lending, LLC (RESPA)

In re PHH Corporation (RESPA)

In re Fidelity Mortgage Corporation (RESPA)

Litigation Forum: CFPB Enforcement

Enforcement actions typically arise in one of three ways:

- Referral from another agency
- Examination (entities subject to supervisory authority)
- Investigation

Of the 12 administrative actions filed in 2014, all but one (*PHH*) began and ended with the entry of a consent order.

Lesson: In most instances, the “real” enforcement action occurs in the investigation or examination phase before a formal administrative action ever is filed.

The Enforcement Process

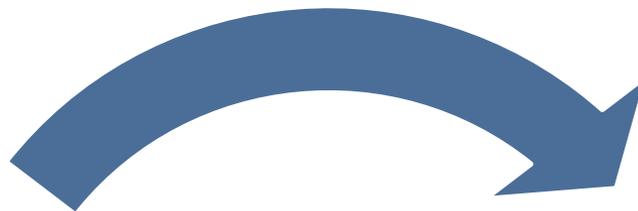
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Presented by
Jonice Gray Tucker
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- Supervision, Enforcement, and Fair Lending
- Routes to Enforcement
- The Life Cycle of an Investigation
- Navigating CIDs
- CFPB Hot Topics in Focus
 - Loan Modification/Debt-relief
 - Loan Officer Compensation

- SEFL is one of the six broader divisions at the Bureau and consists of three offices
 - **Supervision:** Responsible for examining banks and credit unions with more than \$10B in assets, as well as specific types of nonbanks identified in Title X and to-be-determined “larger participants” of other nonbank markets
 - **Fair Lending:** Responsible for enforcement of fair lending laws and supporting Supervision examinations
 - **Enforcement:** Responsible for conducting Bureau investigations and supporting Supervision examinations



SUPERVISION

Supervision may identify violations worthy of public enforcement action, fair lending action, or referral to the Department of Justice. Such actions may move to Enforcement & Fair Lending.

ENFORCEMENT & FAIR LENDING

Enforcement or Fair Lending may identify risks posed by particular institutions or problematic practices. May share them with Supervision to aid them in scoping their examinations.

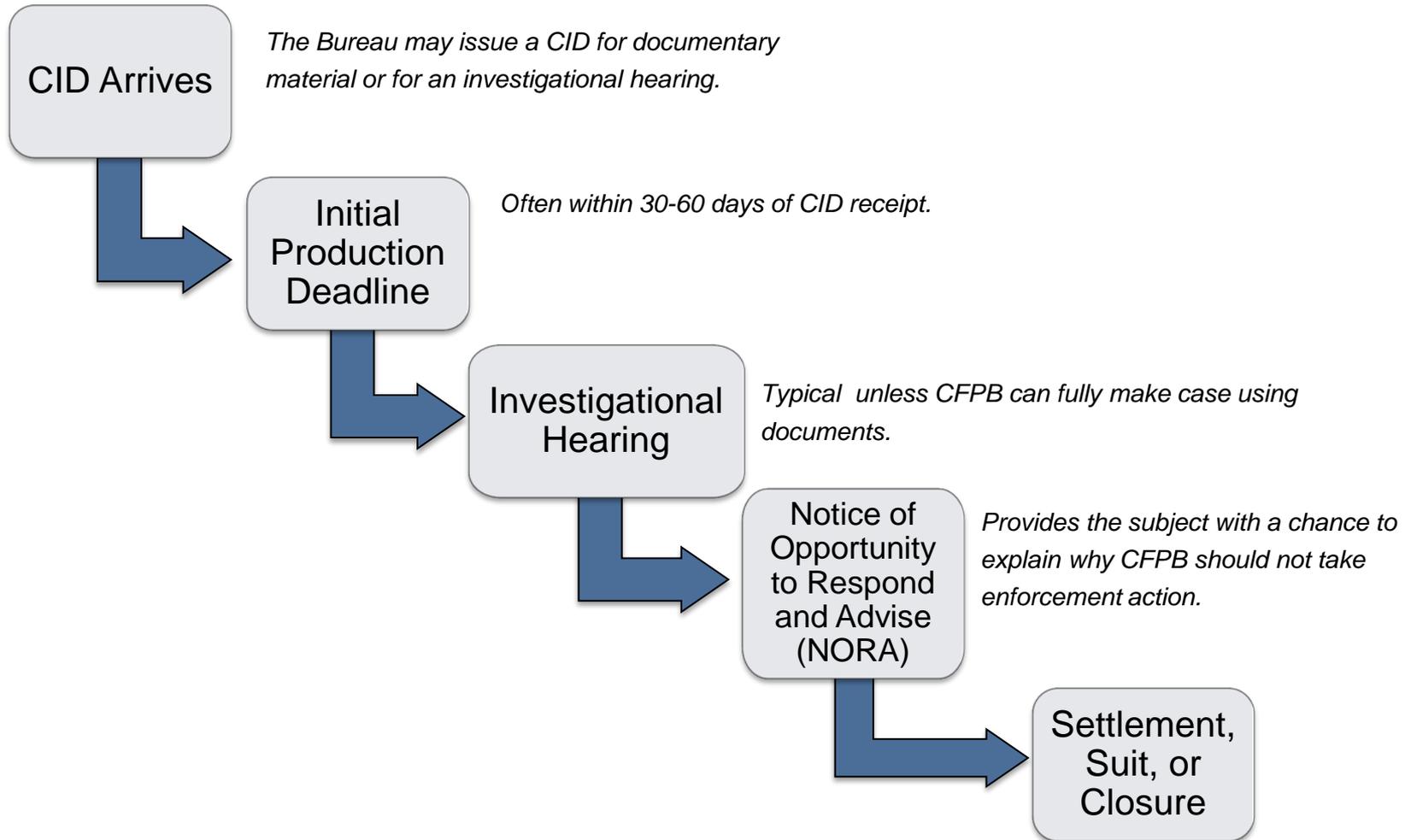


- Supervisory Division can refer matters to Enforcement Division
 - Enforcement commences investigation, or
 - Enforcement proceeds directly to request for consensual resolution or files complaint in U.S. District Court
- Enforcement Division can be made aware of potential violations and commence an investigation
 - Investigations can originate from a variety of sources, including consumer complaints, investigations transferred from prudential banking regulators, state agency investigations, private litigation, or focus on particular industry, product, or practice
- Increasing interagency “collaboration”

- Federal consumer financial laws
 - Unfair, Deceptive & Abusive Acts & Practices (UDAAP)
 - Primary liability
 - Secondary liability: “knowingly or recklessly providing substantial assistance”
 - Nineteen enumerated statutes, several of which were transferred from other prudential regulators, such as Truth-in-Lending or Fair Debt Collection Practices Act
 - Certain rules issued by the Federal Trade Commission, such as the Telemarketing Sales Rule
- Investigative Tools
 - Civil Investigative Demands for documentary material
 - Investigational hearings
 - Cease and desist proceedings
 - Referrals to other law enforcement agencies (some required)
 - Civil actions

- Venues
 - District court (*CFPB v. Frederick J. Hanna & Associates*)
 - Administrative proceeding (*In re PHH Corporation*)
- Remedies
 - Rescission
 - Restitution
 - Disgorgement
 - Injunctive relief
 - Public notification
 - Civil monetary penalties (3 tiers: \$5K/day, \$25K/day, or \$1M/day)

Life Cycle of an Investigation



CFPB's Use of Civil Investigative Demands

- Only CFPB Director, Assistant Director of the Office of Enforcement, or a Deputy Assistant Director of the Office of Enforcement may issue or modify a CID
- CFPB may demand production of documentary materials, tangible things, written reports, answers to questions, or oral testimony
- Can be issued to any person who has information, including third parties over whom the CFPB does not have jurisdiction
- Recipient must be advised of the conduct at issue and the provisions of law that apply to such conduct

CFPB's Use of Civil Investigative Demands

- Meet and confer within 10 calendar days of receipt
- If CID requires oral testimony from an entity, it must describe with reasonable particularity the matters for examination
- Petition for an order modifying or setting aside a CID must be filed within 20 calendar days after receipt
- When matter is referred to Enforcement by Supervision, Enforcement may still issue CID depending on whether sufficient information was collected during Supervision's investigation or scope of investigation is expanded

- Requests for documents, data, or information
 - Do not wait to seek clarification
 - CIDs are often broad and ambiguous
 - Key definitions can change multiple times
 - May be prudent to ask basic questions before meet and confer
 - Involve IT personnel early and often
 - Initiate response efforts quickly but prudently
 - Involve in-house or outside counsel at the outset
 - Should you file a petition to modify?
 - Confidential investigation could be made public
 - Is the result likely to change?

- Investigational hearings
 - Not a deposition
 - Multiple questioners possible
 - Ambiguous questions
 - No time limit
 - Can be used at beginning of investigation to gain knowledge of industry or location of documents and data
 - Prepare witness on process and substance
 - Seek clarification on topics
 - CFPB may not have same level of knowledge or may want to leave themselves “wiggle room”
 - Try to establish ground rules
 - Agreement on objections
 - Ability to cross-examine witnesses

Loan Officer Compensation

November 2013 Consent Order

- November 12, 2013 Consent Order entered against a mortgage bank and two of its officers
 - Alleges violations of the “Loan Originator Compensation Rule” and Regulation Z by paying loan officers quarterly bonuses that varied based on the interest rate of the loans they offered to borrowers
- The Consent Order calls for:
 - **Compliance enhancements:**
 - End unlawful compensation practices
 - Retain compensation records
 - **Restitution:** more than \$9.2 million
 - **Civil Money Penalty:** \$4 million

- Bureau continuing to focus on loan modification and debt-relief services companies
 - Announced three new enforcement actions related to mortgage relief against companies and individuals in mid-July 2014
- Most allege that defendant improperly charged upfront fees and engaged in unfair and deceptive practices
 - Also allegations related to false claims of association with the Independent Foreclosure Review program or with a government agency
 - Several actions involve law firms or companies claiming to be associated with one
- *American Debt Settlement Solutions* (2013) – not related to mortgage relief but first CFPB enforcement action in which “abusiveness” alleged
 - **Takeaway:** CFPB may pursue abusiveness claims when:
 - A covered person charges a consumer for a product or service;
 - The covered person has actual knowledge that the consumer is highly unlikely to benefit from the product or service; and
 - The consumer lacks this knowledge.

For Further Information

Questions???? Call or Email...

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HMDA

The New Regulatory and Enforcement Environment

MORRISON
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HMDA ENFORCEMENT ENVIRONMENT

Theories of Fair Lending Liability

1. **Overt Discrimination**
2. **Disparate Treatment:** Treating members of protected class less favorably
3. **Disparate Impact:** Facially neutral policy results in adverse impact on members of protected class.



HMDA ENFORCEMENT ENVIRONMENT

“These public data are important because . . . they shed light on lending patterns that could be discriminatory.”

Alleged “Fair Lending” Disparities Gleaned from Data

- December 2013 \$35M Joint CFPB / DOJ settlement
- “[A]lleged discretionary pricing and compensation policies” resulting in “discriminatory pricing differences”

HMDA ENFORCEMENT ENVIRONMENT

HMDA Compliance – CFPB Consent Orders

- 1. In the Matter of: Mortgage Master, Inc., No. 2013-CFPB-0006**
 - Nondepository mortgage lender with 21,015 loans on the register
 - Previously subject of MA DOB settlement
 - \$425,000 CMP, Improved CMS, Hire Outside Consultant, Reporting
- 2. In the Matter of: Washington Federal, No. 20 13-CFPB-0005**
 - Insured depository institution with 5,785 loans on register
 - 38% Sample Error Rate
 - \$34,000 CMP and Improved CMS

HMDA Enforcement Environment

Lessons

1. CFPB Factors

- a. Size of HMDA LAR
- b. Observed error rate
- c. Self identification (pre-exam) & corrective action
- d. High error rates in the past
- e. “Substantial progress” vs. error rates remaining high

2. Examination / enforcement nexus

3. HMDA compliance is fair lending compliance.

4. This should “send a strong signal that no mortgage lending institution – whether bank or nonbank – should be able to **mislead the public** with erroneous data.”

HMDA: A Few Words on the New Rules

Expanded Data

HMDA Data Today	Dodd-Frank Requires	Proposed Rule Adds
1. Basic info re: application / loan (e.g. loan amount)	5. Total points and fees; rate spread on all loans	15. DTI
2. Action taken	6. Loan term	16. CLTV
3. Property Location	7. Prepayment penalty term	17. AUS system & results
4. Applicant info (ethnicity, race, sex, annual income)	8. "Teaser rate" term	18. Denial reasons
	9. Nonamortizing features	19. QM status
	10. Lender information	20. Additional rate & points and fees information
	11. Property value	21. Additional property information
Does not include, e.g., data needed to determine FICO, DTI, CLTV	12. Improved property location information	22. Manufactured housing data
	13. Age	23. Unique financial institution identification number
	14. Credit score	

HMDA: A Few Words on the New Rules

Expanded Coverage

- Move from “purpose test” to **dwelling-secured test**
- **Quarterly reporting** for “larger” institutions

Potential Concerns

- Privacy
- HMDA compliance obligations and potential liability
- Fair lending compliance obligations and potential liability



National Mortgage Settlements—Continued

1. December 2013 Settlement

- CFPB and another servicer join the NMS
- \$2 Billion principle reduction
- \$125M refunds to foreclosed borrowers
- Change servicing, bankruptcy, foreclosure practices



2. June 2014 Settlement

- \$500M loss mitigation relief to borrowers
- \$40M to foreclosed borrowers
- \$10M to federal government + \$418M for FHA origination claims
- Change origination, servicing, bankruptcy, foreclosure practices

CFPB's RESPA Actions

Schnader
ATTORNEYS AT LAW

Stephen A. Fogdall
Schnader

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Focus on affiliated business arrangements

CFPB expects strict compliance with the form disclosure in Regulation X

CFPB's position is that inadequate disclosure automatically creates a violation of Section 8(a) of RESPA

May also violate UDAAP

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Confidentiality issues in the *PHH* case

Third parties were permitted to intervene to negotiate a protective order to maintain confidentiality of materials produced to CFPB

Scope of protective order eventually resolved through motion practice

Bases for confidentiality protection include:

FOIA/Trade Secrets Act

State law

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