

# Fair Lending and the Consumer Financial Protection Bureau

ABA Consumer Financial Services Committee

January 8, 2012

Eric Mogilnicki

WILMERHALE® 

WILMER CUTLER PICKERING HALE AND DORR LLP ©



## CFPB Started the New Year with a Bang

- Recess appointment of Richard Cordray as the Bureau's first Director
- Confidentiality Guidance Bulletin on confidentiality of materials provided to the Bureau
- Both have significance for Fair Lending and for the overall relationship between the Bureau and the regulated



## Title X Places CFPB at the Center of Fair Lending

- Establishes an Office of Fair Lending and Equal Opportunity
- Broadly defines Fair Lending
  - “fair, equitable, and nondiscriminatory access to credit for consumers” 12 U.S.C. § 1002(13)
  - CFPB will flesh out that definition over time
- Provides Bureau with rulemaking authority over ECOA and HMDA
- Provides Bureau with primary examination and examination authority over large banks with regard to ECOA and HMDA
  - Other agencies retain authority but must notify CFPB, which has 120 days to bring its own action
- CFPB and FTC share authority with regard to non-banks and must reach an agreement on coordinating enforcement by January 21



## How will the CFPB Exercise its Fair Lending Authority: Some First Impressions

- Bureau will make Fair Lending a priority
  - Focus on Fair Lending during examinations

Requests for privileged materials relating to fair lending – and some pushback from banks – helped precipitate recent Confidentiality Guidance Bulletin
  - Focus on Fair Lending in CFPB complaint portals

Mortgage and credit card questionnaires ask if complainant believes discrimination was involved
  - Appointment of Patrice Ficklin as Assistant Director



- Bureau will have an expansive view of fair lending
  - “fair, equitable and nondiscriminatory access to credit”
  - Bureau will not only look backwards to see if individuals faced discrimination, but look prospectively at whole communities’ current access to credit
  - ECOA and HMDA have not changed but will be interpreted from this new perspective



- Bureau will place new emphasis on fair lending in areas other than mortgages
  - Student loans

Congress requires a Bureau report on private education loans by July 21

Fair Lending is co-leading the study because Congress specifically asked about:

the racial and socioeconomic status of private education loan borrowers

whether regulators have access to enough information to determine lender compliance with fair lending laws

whether federal regulators need better tools to enforce fair lending with regard to student loans

- Assistant Director Ficklin has made clear that the Office of Fair Lending will focus on the full range of consumer financial transactions.



## Cordray Appointment

- Constitutional issues
- Legal challenge may focus on recess appointments of NLRB members



## If a challenge succeeds, new problems for the CFPB – including for the Office of Fair Lending

- Cordray argues Director is needed for full supervision over nonbanks.
  - Section 1066 of Dodd-Frank gives the Secretary of the Treasury the authority “to perform the functions of the Bureau *under this subtitle* [Subtitle F] until the Director of the Bureau is confirmed by the Senate.”
- In absence of Director, Bureau has not performed functions most plainly outside of Subtitle F, including the supervision of non-bank institutions
- If recess appointment is invalid, Bureau will likely retreat to its prior position – and cannot then argue it has inherent authority over nonbanks.
- A court might take a still stricter view of the CFPB’s authority without a Director
- Office of Fair Lending at risk:
  - Dodd-Frank states in Subtitle A that “the Director” must establish the Office of Fair Lending. 12 U.S.C § 1013
  - Similar problems for other Offices and Bureau initiatives



## Other Appointments

- Raj Date was appointed by Director Cordray to serve as Deputy Director
  - Deputy Director may serve as Director if there's a vacancy – such as when recess appointment ends
- Kent Markus has been named Assistant Director for Enforcement
- Still no Associate Director for Supervision, Enforcement, Fair Lending and Equal Opportunity



## Congressional Hearing on January 24

- House Oversight Committee Subcommittee on TARP and Financial Services
- Likely issues for hearing
  - Constitutionality of appointment
  - Confidentiality Guidance Bulletin
  - Accountability and transparency at the CFPB
  - Abusive practices by nonbanks
- Director Cordray's likely approach
  - Appointment was valid
  - Bureau will provide a new focus on consumers of financial services and products
  - Bureau can now examine nonbanks that provide financial services



## Confidentiality and Fair Lending

- Guidance issued this week addresses:
  - The scope of the Bureau's authority to require the production of documents;
  - The status of attorney-client communications produced to the Bureau;
  - The Bureau's treatment of confidential supervisory information, including sharing information with state Attorneys General.
- Guidance designed to:
  - proactively address objections to the Bureau's requests on relevance and privilege grounds;
  - warn institutions about enforcement actions; and
  - reassure financial institutions that if they do comply the Bureau will exercise discretion in sharing information and help protect the confidentiality of documents that are produced.



## The Bureau's Assertion of Plenary Review Authority

- No limitations on documents the Bureau may insist on reviewing
  - “[su]pervised institutions may not selectively withhold responsive documents based on their judgment that such materials are not necessary to the bureau
  - Bureau needs to “thoroughly understand the institution”
  - A refusal to provide requested documents “is a violation of law for which the Bureau will pursue all available remedies”
- Bureau leadership believes it is important that the Bureau assert its rights and prevent institutions from redacting or withholding documents when responding to Bureau requests
- Likely to be worked out over time as CFPB and the regulated get used to each other
  - Direct confrontation is not in any one bank's interest
  - Bureau has expressed some willingness to work with financial institutions



## Non-Waiver of the Attorney-Client Privilege

- Confidentiality Guidance Bulletin maximizes The Bureau's access, including to Fair Lending work done by counsel
- Two arguments made by the Bureau:
  - Production of privileged documents is non-voluntary, and therefore not a waiver.

Only support cited is the Magistrate's opinion in *Boston Auction Co., Ltd. v. Western Farm Credit Bank*, 925 F.Supp. 1478, 1482.

- "Congress intended the bureau's examination authority be equivalent to that of the prudential regulators." Because those regulators have the ability to obtain privileged materials without any waiver, *see* 12 U.S.C. §1828(x), the Bureau reasons that it must have the same power.



## Potential Problems with the Bureau's Arguments

- Other cases have found a waiver from production to a banking regulator. *See Frankford Trust Co. v. Advest, et al.*, 1995 U.S. Dist LEXIS 11825 (E.D.PA 1995) (FDIC examination), *Bank One Securities Litigation*, 209 F.R.D. 418 (N.D. Ill. 2002) (OCC investigation).
- This line of cases caused the OCC to propose, and Congress to adopt, 12 U.S.C. §1828 (x).
- The very existence of this statutory provision undermines the Bureau's first argument: if non-voluntary production to a regulator is not a waiver, no statutory protection from waiver would be necessary.
- In addition, 12 U.S.C. §1828(x) applies only to a "federal banking agency" as defined in 12 U.S.C. §1813(x), and that definition clearly does not include the CFPB.



## Consequences of the Bureau's Position on Privilege

- Substantial risk for financial institutions, which must either
  - withhold privileged materials and defy Bureau requests risking enforcement action; or
  - produce privileged materials and risk waiving the privilege.
- Risk is compounded by:
  - the likelihood that courts in different jurisdictions will resolve the issue differently; and
  - the possibility that the waiver could be read to extend to entire subject matters.



## Some Silver Linings

- These risks may be reduced somewhat by the Bureau's promises to:
  - "take all reasonable and appropriate actions to rebut" a claim that waiver has occurred
  - "give due consideration to supervised institutions' requests to limit the form and scope of any supervisory request for privileged information"
  - request such information only when the Bureau determines that "it cannot practicably obtain the same information from non-privileged sources"



## What Regulated Institutions Can Do

- Develop protocols for memorializing privilege claims (as the Bureau has invited institutions to do).
- Build internal escalation procedures – and seek the same from the Bureau
- Carefully consider the Bureau's privilege position: any challenge should occur before privileged information is shared



## Information Sharing

- Confidentiality Guidance Bulletin designed to prevent banks from objecting to document requests on the grounds that the documents will be shared with other agencies.
- “[T]he Bureau’s policy is to treat information obtained in the supervisory process as confidential and privileged.”
- In particular, “the Bureau’s policy is to share confidential supervisory information with ... State Attorneys General, only in limited circumstances.”



## Unresolved Issues

- *Bank Examination Privilege:* No statement that the bank examination privilege applies to documents shared between the Bureau and a bank.
  - Judicial decisions upholding the bank examination privilege emphasize the close working relationships of prudential regulators and banks. A “cop on the beat,” may be unwilling to describe its relationship in the same manner.
- *Non-Banks:* The Guidance also fails to mention the confidentiality issues that will arise with regard to the Bureau’s examination of nonbanks.
  - Issue is ripe in light of the recess appointment of a Director, which was thought necessary for the Bureau to exercise its full authority with regard to nonbanks.
  - The Confidentiality Guidance Bulletin relies upon analogies between prudential regulators and the Bureau. The application of these same arguments to describe the Bureau’s authority over nonbanks may prove difficult.
  - Failing to extend these same positions to nonbanks will demonstrate that the Bureau is dissimilar to the prudential regulators, and undermine some of the Bureau’s current reasoning.



## Closing

- Director Cordray recently spoke of the importance of listening to consumers. Quoting John Dewey, he explained “The man who wears the shoe knows best that it pinches and where it pinches.”
- We should heed that adage in understanding the Bureau’s needs
- And hope that the Bureau does as well whenever it pinches the regulated.



## For further information, contact

Eric Mogilnicki  
(202) 663-6410  
[Eric.mogilnicki@wilmerhale.com](mailto:Eric.mogilnicki@wilmerhale.com)

Reginald Brown  
(202) 663-6430  
[Reginald.brown@wilmerhale.com](mailto:Reginald.brown@wilmerhale.com)

Russell Bruemmer  
(202) 663-6804  
[Russell.bruemmer@wilmerhale.com](mailto:Russell.bruemmer@wilmerhale.com)

Franca Harris Gutierrez  
(202) 663-6557  
[Franca.gutierrez@wilmerhale.com](mailto:Franca.gutierrez@wilmerhale.com)

David Medine  
(202) 663-6220  
[David.medine@wilmerhale.com](mailto:David.medine@wilmerhale.com)

Douglas Davison  
(202) 663-6690  
[Douglas.davison@wilmerhale.com](mailto:Douglas.davison@wilmerhale.com)

Andrea Robinson  
(617) 526-6360  
[Andrea.robinson@wilmerhale.com](mailto:Andrea.robinson@wilmerhale.com)