CFPB Examinations and Investigations: Defense Strategies and Best Practices

FRANCA HARRIS GUTIERREZ, D. BRADFORD HARDIN, JR., THOMAS KOST, AND MICHAEL E. GORDON, WILMERHALE, WITH PRACTICAL LAW LITIGATION AND PRACTICAL LAW FINANCE

Search the Resource ID numbers in blue on Westlaw for more.

This Practice Note examines the Consumer Financial Protection Bureau's (CFPB's) examination and investigation processes, including its scope of authority, enforcement methods, and recent enforcement activity across different industries.

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) overhauled the financial regulatory system and created the **Consumer Financial Protection Bureau** (CFPB or Bureau) as an independent arm of the Federal Reserve System. In addition to consolidating powers previously shared by several agencies, the Dodd-Frank Act gave the CFPB authority to enforce consumer financial laws against any entity that offers or assists in offering or selling a consumer financial product or service.

The CFPB's supervisory authority extends to both large banks and certain nonbank financial services companies that previously had not been closely regulated at the federal level. As a result, financial institutions engaged in activities like auto finance or debt collection must navigate a new regulatory environment that significantly differs from regulation at the state level.

Given the CFPB's broad mandate and powerful enforcement tools, regulated entities and their counsel should become familiar with the Bureau's:

- Scope of authority (see Scope of Authority).
- Examination process (see Examination Process).
- Enforcement methods (see Enforcement Methods).
- Recent enforcement activity across different industries (see Enforcement Trends By Industry).

For more information on the creation and role of the CFPB, see Practice (2-543-6265) Note, Summary of the Dodd-Frank Act: Consumer Financial Protection.

SCOPE OF AUTHORITY

The Dodd-Frank Act provided the CFPB with the authority to supervise compliance with the federal consumer financial laws including, most prominently:

- The **Equal Credit Opportunity Act** (ECOA).
- The **Fair Credit Reporting Act** (FCRA) (for more information, see Practice Note, Understanding the Fair Credit Reporting Act).
- The **Real Estate Settlement Procedures Act** (RESPA).
- The **Fair Debt Collection Practices Act** (FDCPA) (for more information, see Practice Note, Consumer Regulations Governing Debt Collection).
- The **Home Mortgage Disclosure Act** (HMDA) (for more information, see Practice Note, What the HMDA Data Reveals About the Mortgage Market).
- The **Truth in Lending Act** (TILA).
- The **Electronic Fund Transfer Act** (EFTA) (for more information, see Practice Note, Electronic Fund Transfer Act: Key Provisions).

The Bureau assumed the authority previously held by several banking agencies to enforce these statutes and now possesses exclusive supervisory authority to oversee compliance by:

- Banks, savings associations, and credit unions with assets of over $10 billion (12 U.S.C. § 5515(a)).
- Consumer mortgage companies, payday lenders, and private education lenders (12 U.S.C. § 5514(a)(1)(A), (D), (E)).
- Any larger participant in a market for consumer financial products or services, as determined through CFPB rulemaking (known as a larger participant rule). The CFPB has defined certain debt collectors, student loan servicers, auto finance companies, international money transfer providers, and consumer reporting agencies as larger participants subject to its supervisory authority. (12 U.S.C. § 5514(a)(1)(B).)
- Anyone who engages in "conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services," if the CFPB:
  - has reasonable cause to conclude, based on complaints received or information from other sources, that the entity engages in conduct that poses a risk to consumers; and

- provides notice to the entity and a reasonable opportunity to respond.

(12 U.S.C. § 5514(a)(1)(C).)

The CFPB's broad supervisory authority includes the power to send in a team of examiners to review a supervised entity's records and inquire about its practices. The Bureau targets entities for examination based on their impact on consumers and other factors, including asset size, volume of transactions, extent of other federal and state oversight, and, where applicable, the examination schedules of prudential regulators. (See Examination Process.)

The CFPB also has broad investigative and enforcement authority where it suspects violations of federal consumer financial law or the Dodd-Frank Act's prohibition on unfair, deceptive, or abusive acts and practices (UDAAPs) (12 U.S.C. § 5531(a)). This authority includes the power to demand production of documents, tangible things, written reports, answers to questions, and oral testimony by issuing a Civil Investigative Demand (CID) that describes the nature of the conduct at issue and the law being violated (known as the notification of purpose) (12 U.S.C. § 5562(c); 12 C.F.R. § 1080.5). The Bureau has asserted this authority over third parties not otherwise subject to its jurisdiction.

Controversy has surrounded certain elements of the CFPB's investigative jurisdiction. For example, CID recipients have used petitions to modify or set aside a CID to challenge the scope of the Bureau's discovery powers based on either the Bureau's failure to provide a sufficiently specific notification of purpose or its lack of authority over conduct outside of the CFPB's enforcement jurisdiction. However, because the Bureau takes a broad view of its investigative powers and the CFPB Director decides petitions to modify a CID, these efforts are rarely successful. (See CIDs.)

For more information on the CFPB's scope of authority, and its processes for investigating and initiating enforcement actions, see Practice Note, CFPB Supervision and Enforcement Procedures.

EXAMINATION PROCESS

In contrast to the emphasis in traditional bank examinations on institutional safety and soundness, CFPB examinations focus on the consumer experience. Nonetheless, the CFPB examination process does not differ markedly from the process followed by prudential regulators like the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, or the Board of Governors of the Federal Reserve System.

Entities and their counsel should adopt appropriate best practices when preparing for, participating in, and concluding a CFPB examination.

PREPARING FOR AN EXAMINATION

It is important that entities take proactive steps to prepare for a possible examination. Engaging in regular audits and self-assessments can help mitigate compliance risks before an examination begins.

In addition to installing robust compliance risk management systems, entities must formulate a well-designed examination response system. Counsel should help:

- **Implement written business policies.** Simply having good practices is not enough. The Bureau will expect the entity to have detailed policies, procedures, and training materials in place.
- **Ensure there is a clear communication channel.** Often, entities will designate a lead point of contact to manage the relationship with the examiners, ensure examiners' needs are met, and track requests so that they are promptly addressed.
- **Organize information on the entity's business.** In some areas, examiners might not have a deep understanding of business processes or industry specifics. Proactive efforts to inform the examiners can improve the entity's position with the Bureau.
- **Develop a records management strategy.** Because examinations occur on a tight timeframe, entities will benefit from a pre-determined strategy to collect and review documents.

For more information on the steps a financial institution should take to prepare for a CFPB examination, see Preparing for a CFPB Examination Checklist.

PARTICIPATING IN AN EXAMINATION

Entities under examination should:

- **Communicate with CFPB staff in a strategic, respectful, and timely manner.** Entities should recognize the benefits of candor and good faith in their dealings with CFPB staff. They should demonstrate that they appreciate the Bureau's concerns and are committed to resolving any issues fairly and promptly.
- **Maintain a thorough record of requests received and information provided.** Entities are likely to create many records and reports during the examination process that analyze and respond to the Bureau's requests. Detailed recordkeeping can help avoid misunderstandings and inform future interactions with the Bureau.

Some of the information provided to the Bureau during an examination might be deemed confidential supervisory information (CSI) and subject to special disclosure rules. Entities typically may disclose CSI to their officers, directors, trustees, members, general partners, or employees, as well as their accountants, counsel, contractors, or consultants. However, entities generally may not disclose CSI to other third parties without written approval from the Bureau. This confidentiality runs both ways. The CFPB typically treats CSI as confidential and privileged, subject to certain exceptions. (CFPB Bulletin 12-01, 2012 WL 11423396 (Jan. 4, 2012).) (For information on the attorney-client privilege in examinations, see Box, Privilege Issues During Examinations.)

CONCLUDING AN EXAMINATION

After completing an examination, and in consultation with the CFPB's headquarters and legal division, the supervisory staff may:

- Conclude the examination by issuing a report accompanied by a compliance rating from one (highest) to five (lowest).
- Communicate supervisory concerns and matters requiring attention (MRAs) to the entity, so that the entity can begin to address any violations of law or weaknesses in compliance management.
- Send a Potential Action and Request for Response (PARR) letter to the entity.

A PARR letter lists the Bureau's preliminary findings regarding any alleged violations of federal consumer financial law and notifies the entity that the Bureau is considering whether to pursue supervisory or enforcement action. The Bureau typically allows 14 days to respond to a PARR letter, though short extensions may be granted. Crafting a strong response is critical to achieving the best outcome and requires counsel to:

- Frame the entity's defense by setting out the best supporting facts and legal arguments.
- Describe in detail the proactive measures the entity has taken to identify and remediate any issues.
- Explain why there is no need for a public enforcement action.

An entity's response to a PARR letter may be reviewed by the Action Review Committee (ARC), a group comprised of directors for various units of the CFPB. The committee makes the initial decision on the proper resolution of an action in the event that potential violations were uncovered, namely, whether to pursue a public enforcement action or a confidential supervisory resolution.

After receiving the entity's response to the PARR letter, the ARC summarizes the violations found and analyzes the strength of the case in an ARC memo. The committee considers the magnitude of risk, harm, or loss to consumers, as well as the entity's cooperation during the examination process. The committee makes a recommendation to the CFPB Director, who ultimately decides whether to proceed with a supervisory or an enforcement approach.

The Director and the Bureau generally consider the following four factors when evaluating whether a regulated entity has engaged in responsible business conduct, weighing against a public enforcement action:

- The extent to which the entity proactively self-polices for potential violations.
- Whether the entity has self-reported potential violations promptly.
- Whether the entity has quickly and completely remediated harm from the violation.
- The extent of the entity's cooperation, including whether it was "above and beyond what is required."

(CFPB Bulletin 13-06, 2013 WL 9001233 (June 25, 2013).)

ENFORCEMENT METHODS

The primary means used by the CFPB when exercising its enforcement authority include:

- CIDs (see CIDs).
- Notice and Opportunity to Respond and Advise (NORA) letters (see NORA Letters).
- Consent orders (see Consent Orders).
- Administrative and judicial proceedings (see Administrative Proceedings).

The Dodd-Frank Act requires the CFPB to treat documents and tangible items produced during the enforcement process, whether through a CID production or a NORA submission, as confidential (12 U.S.C. § 5562(d)). Unlike in the supervisory context, confidentiality of information during an investigation is generally one-sided. Regulated entities may (but usually do not) disclose information related to a CID or an investigation, but the Bureau generally may not disclose information to third parties other than government agencies unless and until it institutes a public enforcement action.

CIDS

A CID is the CFPB enforcement staff's primary fact-gathering device. The enforcement staff may issue a CID whenever the Bureau "has reason to believe that any person may be in possession, custody, or control of any documentary material or tangible things, or may have any information, relevant to a violation" (12 U.S.C. § 5562(c)(1)).

After receiving a CID, an entity must accomplish several tasks quickly, starting with issuing a document preservation notice to all appropriate custodians and implementing an appropriate legal hold.

For a collection of resources counsel and their clients can use to implement a legal hold and preserve documents, see Litigation Hold Toolkit.

The entity must then schedule a meet and confer with CFPB enforcement staff within ten days of receiving the CID. After this conference, counsel should decide whether to file a petition to modify or set aside the CID and prepare for next steps in the investigation.

Meet and Confer

The meet and confer provides a critical opportunity for an entity to:

- Engage with the enforcement staff at an early stage.
- Gather information about the Bureau's objectives in issuing the CID.
- Begin framing the entity's defense and overall approach to the investigation.

At the meet and confer, a CID recipient may request extended production deadlines and seek modifications narrowing the scope of the CID. However, vague objections that a particular aspect of the CID is burdensome are unlikely to persuade the CFPB. Instead, recipients should be prepared to quantify the burdens imposed by the CID by marshalling specific information about the volume or accessibility of the requested data. Indeed, the Bureau requires the recipient to make available at the conference personnel with the knowledge necessary to resolve any CID compliance issues and provide information about any burdens imposed. Necessary personnel might include employees with records management or IT expertise, particularly where the CID seeks electronically stored information. (12 C.F.R. § 1080.6(c)(1)-(2).)

Petitions to Modify

CFPB enforcement staff cannot formally modify the CID during the meet and confer. Instead, changes to the CID must be approved by the Office of Enforcement's Assistant Director or a deputy assistant, through a formal modification letter. If the Bureau is unwilling to make the requested modifications, a CID recipient may file a petition with the CFPB Director to modify or set aside the CID within 20 days of receipt. (12 C.F.R. § 1080.6(e).)

The Bureau considers these petitions only if the recipient has "meaningfully engaged" in the meet and confer process and raised the CID issues during that process. Therefore, a recipient's failure to raise a legal objection to the CID during the meet and confer might constitute a waiver. (12 C.F.R. § 1080.6(c).)

Counsel should bear in mind that the CFPB Director's decision denying a petition does not conclusively resolve the matter. Because CIDs are not self-executing, their enforcement requires a court order. Counsel also should consider that, while CIDs generally are nonpublic, any petition to modify or set aside the CID is a public filing and might draw attention to the investigation (12 C.F.R. § 1080.6(g)).

Next Steps

After negotiating the scope of the CID request at the meet and confer and, if necessary, filing a petition to modify the CID, the recipient and its counsel should:

- **Assemble the document production.** An entity responding to a CID that requests documents should:
  - consider requesting a rolling production schedule, which often is preferred by the Bureau and the CID recipient;
  - pay close attention to the Bureau's data submission standards, and work with IT staff to ensure that the requirements are met; and
  - assert all claims of privilege by the specified production deadline and, if required, produce a privilege log detailing the specific grounds for each privilege claim.
- **Prepare witnesses for the investigational hearing.** Like a civil deposition, an investigational hearing is given under oath and recorded by a stenographer. Unlike a civil deposition, however, the Bureau may use multiple questioners and a witness's attorney may object to questions only to protect a constitutional or other legal right or privilege (12 C.F.R. § 1080.9(b)(2)). Counsel should therefore encourage witnesses to advocate for themselves when a question is unclear or unfair.
- **Certify the CID response.** An entity must certify the completeness of its document production and written answers in response to the CID. Ordinarily, the CFPB seeks a sworn certification in a form provided with the CID. Counsel may find it helpful to use sub-certifications for each custodian providing materials responsive to the CID, rather than relying on one individual to certify the entire response.

For more information on CID responses, including tips for formulating a strategy to respond to the Bureau's requests and defending against alleged violations, see CFPB Civil Investigative Demand Compliance Checklist.

NORA LETTERS

In certain circumstances, CFPB enforcement staff may (but is not required to) send a NORA letter notifying the entity of the nature of potential violations and offering the entity an opportunity to submit a written response. A NORA letter often is accompanied by a telephone call during which CFPB staff members describe their findings and any alleged violations. (CFPB Bulletin 11-04, 2012 WL 11423390 (Nov. 7, 2011).)

The objective of the discretionary NORA process is to ensure that potential subjects of enforcement actions have the opportunity to present their arguments to the enforcement staff before it recommends that the Director authorize an enforcement action. The entity's response:

- Must not exceed 40 pages.
- Must be received by the Bureau no more than 14 days after the entity received the NORA letter, although short extensions are sometimes given.
- Should be primarily focused on:
  - the factual, legal, and policy matters relevant to the potential enforcement proceedings; and
  - other factors that demonstrate the entity's responsible business conduct.

The strategic considerations in drafting a NORA response are similar to the considerations in drafting a PARR response (see Concluding an Examination).

CONSENT ORDERS

When an entity is faced with an enforcement action, it often is provided an opportunity to reach a negotiated settlement with the CFPB through a consent order. Compliance with a consent order is similar to the supervisory process in that entities must meet deadlines, comply with substantive requirements, and demonstrate a commitment to responding to the Bureau's concerns. Because violations of a consent order can result in additional enforcement efforts, an entity should consider designating a manager to oversee compliance and involve counsel at every stage.

Additionally, an entity negotiating a settlement agreement should take special care with:

- **Factual findings.** Although consent order findings are most commonly presented in a "neither admit nor deny" format, during negotiations it is important to scrutinize the Bureau's factual findings to ensure that they are accurate and narrowly drafted, so that unnecessary adverse facts are not included.
- **Injunctive requirements.** The entity should carefully consider the draft consent order's injunctive requirements and tailor them to the Bureau's allegations and factual findings. These mandates can be especially burdensome, costly, and distracting. Because these costs might not be immediately apparent to counsel, compliance and business staff should advise on which requirements are most onerous.
- **Settlement language.** Counsel should bear in mind that the CFPB may be unwilling to modify the boilerplate consent order language it uses to address recurring issues.
- **Collateral consequences.** An entity must consider the collateral consequences of a proffered consent order before reaching an agreement on its terms. Certain provisions can impose disclosure obligations, have ramifications with other regulators, or create or impact potential liability to other private parties.

ADMINISTRATIVE PROCEEDINGS

If the CFPB does not reach a negotiated settlement through a consent order, it may commence either litigation in a federal district court or an administrative adjudication before an administrative law judge (ALJ) under the Administrative Procedure Act (APA) (12 U.S.C. § 5563). The enforcement staff who worked on the investigation will likely be on the litigation team, with more attorneys added as necessary.

An administrative proceeding applies the CFPB's own rules of practice, and differs from a district court action in the following ways:

- **Initiating documents.** An administrative proceeding is commenced when the CFPB's Office of Enforcement files a public Notice of Charges (Notice). An entity must respond to the Notice within 14 days and attend a scheduling conference with the ALJ within 20 days.
- **Permitted discovery.** Most traditional forms of pretrial discovery, such as interrogatories and depositions, are not allowed, but limited expert discovery is permitted. Additionally, the Office of Enforcement must make available for inspection and copying certain documents obtained during the investigation that led to the proceeding. The CFPB may withhold documents on the basis of privilege, work product, or relevance, but may not withhold material exculpatory evidence.
- **Hearing process.** The hearing typically begins 30 to 60 days from the date of the Notice. As in a civil trial, the parties at the hearing make opening and closing statements and present evidence to the ALJ through testimony and exhibits.
- **Motion practice.** The CFPB's rules allow the filing of dispositive motions, including motions to dismiss and for summary disposition, and authorize the ALJ to grant partial summary disposition, if warranted. The ALJ must rule on dispositive motions within 30 days of their filing.
- **Decisions and appeals.** The ALJ must issue a merits decision within 300 days of the date of the Notice. Both parties may appeal aspects of the ALJ's decision to the CFPB Director, but must file a notice of appeal within 10 days after the service of the decision. On appeal, the Director reviews both the facts and law in the ALJ's decision *de novo*. The Director's decision, in turn, can be appealed to the US court of appeals in the circuit in which the entity's principal office is located or the District of Columbia Circuit.

(See generally Rules of Practice for Adjudication Proceedings, 12 C.F.R. pt. 1081.)

Notably, under the APA, a court usually affords considerable deference to the CFPB Director's legal determinations that interpret a statute or implement regulations under the Bureau's jurisdiction, and reviews the decision using a standard that examines whether the Director's factual findings are supported by substantial evidence (see 5 U.S.C. § 706(2)(E); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984)).

ENFORCEMENT TRENDS BY INDUSTRY

The CFPB brought over 40 enforcement actions in a range of industries in 2016. Enforcement will likely continue to be an important device in the Bureau's regulatory toolkit (Richard Cordray, CFPB Director, Prepared Remarks at the Consumer Bankers Ass'n (Mar. 9, 2016)).

In light of the Bureau's approach, regulated entities should pay close attention to trends in CFPB enforcement activity. This is especially true for UDAAP claims under the Dodd-Frank Act, which the CFPB has so far opted to define principally through enforcement. Some industry priorities for the CFPB include:

- Mortgage lenders and servicers (see Mortgages).
- Auto finance companies (see Auto Loans).
- Credit card providers (see Credit Cards).
- Debt collectors (see Debt Collection).
- Consumer reporting agencies (CRAs), users, and information furnishers (see Consumer Reporting).
- Credit repair companies (see Consumer Reporting).
- Online lenders (see Online Marketplace loans).
- Student loan providers (see Student Loans).
- Deposit-related product providers (see Deposit-Related Products).
- Pawnbrokers and Payday lenders (See Pawnbrokers and Payday Lenders).

Additionally, the CFPB recently announced that its online database accepts complaints on marketplace lending. This announcement signals a change in messaging and, perhaps, an attempt to warn marketplace lenders that they can expect heightened scrutiny from the Bureau. (See Online Marketplace Loans.)

MORTGAGES

The mortgage market has attracted special attention from the CFPB since its inception, sometimes in connection with fair lending practices (see Box, Fair Lending). The CFPB has focused its enforcement efforts primarily in the origination and servicing contexts.

Origination

Approximately half of the CFPB's mortgage origination enforcement actions have concerned alleged kickback schemes under RESPA. In recent years, the Bureau's mortgage enforcement actions have focused on marketing services agreements (MSAs). Although the Bureau has not declared MSAs to be per se RESPA violations, it has signaled its intent to continue actively scrutinizing the use of these agreements. Mortgage lenders should consider reevaluating their practices in this respect and discontinuing MSAs to minimize the risk of a future enforcement action.

Other origination actions have focused on loan originator compensation rules and TILA or UDAAP violations for misleading advertising.

For guidance on complying with the rules regarding mortgage loan originator compensation found in Regulation Z implementing TILA, as amended by the Dodd-Frank Act, see Loan Originator Compensation Checklist.

Additionally, mortgage lenders should monitor the Bureau's new TILA-RESPA Integrated Disclosure (TRID) rule, which went into effect on October 3, 2015. Although the Bureau has stated that it will initially focus on good faith efforts to comply with the rule, it remains to be seen how the CFPB will handle violations of the new TRID requirements in practice.

For information on complying with the TRID rule, see TRID Compliance Checklist for Residential Mortgage Originations.

Servicing

Enforcement activity in mortgage servicing has focused on UDAAP violations by servicers who allegedly misled borrowers on the loss mitigation options available to them. For example, the CFPB brought an enforcement action against a mortgage servicer who allegedly:

- Demanded payments before providing loss mitigation options.
- Failed to honor in-process modifications.
- Delayed short sales.
- Harassed and threatened borrowers.
- Deceptively charged convenience fees when it serviced mortgage loans.

The Bureau's mortgage servicing rules took effect on January 10, 2014, and amendments to those rules are expected to be finalized later this year. As in the origination context, the Bureau has provided some indication that any initial good faith servicer errors in complying with the new rules will be handled through the supervisory process.

Now that the rules have been in place for more than two years, entities should prepare for the possibility that the Bureau will use enforcement to compel compliance, particularly following its announcement that ensuring compliance with the CFPB mortgage servicing rules is a high priority (see CFPB, Supervisory Highlights, 15 (Summer 2015)).

For more information on the CFPB's mortgage servicing rules, see Practice Note, The Mortgage Servicing Rules Implementing Dodd-Frank.

For guidance residential mortgage servicers can use to navigate the foreclosure process after a borrower has submitted a loss mitigation application, see Loss Mitigation During Foreclosure Checklist.

AUTO LOANS

The CFPB has brought multiple enforcement actions against indirect auto lenders as part of an effort to eliminate or significantly limit dealer markups. In a representative action announced in 2016, the CFPB and the Civil Rights Division of the **Department of Justice** (DOJ) alleged that a captive auto finance company violated the ECOA by adopting policies that resulted in African-American, Hispanic, and Asian/Pacific Islander borrowers being charged higher interest rates than non-Hispanic white borrowers as a result of dealer markups. Actions involving auto lending have not been limited to ECOA allegations, however. The CFPB also has relied on allegations of deceptively marketed loan terms and ancillary loan products.

Additionally, in 2015, the CFPB finalized a larger participant rule to include certain nonbank auto finance companies (see Scope of Authority). This new rule extends the Bureau's supervisory authority and affords it a greater opportunity to scrutinize auto loan servicing going forward.

For an overview of the various federal consumer financial laws and regulations that apply when a financial institution makes a loan to a consumer to purchase or lease a motor vehicle, see Practice Note, Consumer Regulations Governing Automobile Financing.

CREDIT CARDS

The CFPB's first actions, and the largest penalties and redress payments the Bureau has recovered to date, arose out of the credit card industry. These actions often target add-on products, such as identity theft monitoring and credit protection products, that the CFPB alleges are deceptively marketed and billed to credit card customers. Almost all major credit card issuers have been subject to this type of enforcement action.

For information on the various consumer regulatory issues raised by a credit card issuer's marketing, sale, and offering of add-on products, see Practice Note, Consumer Issues Affecting Ancillary Credit Card Products.

Other emerging trends in the credit card industry involve the Bureau's focus on:

- **Credit card debt sales to third parties.** In 2016, the CFPB brought an enforcement action asserting UDAAP violations against a major card issuer for allegedly selling bad credit card debt and illegally signing court documents. Specifically, the CFPB alleged that the issuer sold faulty debts to third-party collectors, including debts that were owed by deceased borrowers, and filed misleading debt collections lawsuits using fraudulent sworn statements to obtain judgments for unverified debts.
- **Rewards programs.** A report released in 2016 on the effects of the Credit Card Accountability Responsibility and Disclosure Act (CARD Act) indicated that the CFPB will increase its scrutiny of card issuers' rewards programs in the near term. The Bureau is particularly interested in how these rewards programs are marketed to consumers and the fees involved. (See CFPB, The Consumer Credit Card Market, 229-36 (Dec. 2015).). In March 2017, the CFPB included rewards programs among the topics in its consumer credit Request for Information (RFI) (see CFPB, Request for Information on Consumer Credit Card Market, Docket No. CFPB 2017-0006 at 13314 (March 10, 2017)).
- **Deferred-interest credit products.** In its report on the CARD Act, the CFPB stated its intention to carefully examine deferred-interest products, which in the Bureau's view "remain the most glaring exception to the general post-CARD Act trend towards upfront credit card pricing." (See CFPB, The Consumer Credit Card Market, at 147-207.) In March 2017, the CFPB included deferred interest products among the topics in its consumer credit RFI (see CFPB, Request for Information on Consumer Credit Card Market, Docket No. CFPB 2017-0006 at 13314 (March 10, 2017)). On June 8, 2017, Director Cordray wrote a letter to banks "encouraging them to consider using more transparent promotions (see Press Release, CFPB, Consumer Financial Protection Bureau Encourages Retail Credit Card Companies to Consider More Transparent Promotions (June 8, 2017))."

For more information on the CARD Act, see Practice Note, Key Provisions of the Credit Card Act.

DEBT COLLECTION

The CFPB has brought enforcement actions against a wide variety of debt collection entities, including medical debt collectors and law firms, alleging both UDAAP and FDCPA violations. Among other enforcement actions, the CFPB has sued:

- A for-profit college that conducted an allegedly predatory lending scheme involving the use of unlawful debt collection tactics to influence students to pay back private student loans while still in school.
- A debt collector that allegedly attempted to collect debts not owed, and harassed and deceived consumers.

- A law firm that allegedly used non-attorney staff to prepare court filings and affidavits from individuals who may have lacked personal knowledge of the information attested to in the sworn statements.
- A medical debt collection company that allegedly mishandled credit reporting disputes, and did not send debt validation notices as required by law.

The CFPB's debt collection cases also offer insight into its views on abusive practices for UDAAP claims. Consistent with the statutory definition in the Dodd-Frank Act, the CFPB tends to allege abusive practices where the practice at issue might exploit consumers who the Bureau believes lack the ability to protect themselves, such as consumers who may not understand or have alternatives to the product, or those who incorrectly believe that a financial institution is acting in their best interests. For example, the CFPB alleged in one action that a debt collector's enrollment of consumers in a debt relief program was an abusive practice where it knew that the consumers' financial conditions made it highly unlikely that they could complete the program.

On July 28, 2016, the CFPB released its outline of proposals under consideration pursuant to the Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking, following an advanced notice of proposed rulemaking in 2013. The next step is for the CFPB to issue the proposed rule, however, whether it issues the proposed rule, and when, is uncertain.

For more information on the regulation of debt collection activities, see Practice Note, Consumer Regulations Governing Debt Collection.

CONSUMER REPORTING

As the first federal regulator with supervisory jurisdiction over CRAs, the CFPB's early focus was on improving the accuracy and quality of consumer reports issued by the largest three national CRAs. That focus has now broadened to include other CRAs, users, and information furnishers. Although the CFPB pursued only two public enforcement matters asserting FCRA claims in 2014, six in 2015, and one in 2016, the Bureau has continued to insist on credit report corrections as conditions for settling cases where the alleged misconduct affected consumer reporting.

The CFPB has also focused on entities' policies and procedures related to the accuracy of information furnished in connection with deposit account relationships and adverse action notices provided to consumers. It has suggested that some entities are:

- Failing to update their policies and procedures regularly, as required by the FCRA.
- Not adequately monitoring and tracking complaints and disputes related to the FCRA.
- In 2017, the CFPB focused on credit reporting and consumer repair companies' promises to improve credit reports. The Bureau filed complaints against four credit repair companies and three associated individuals. The allegations included charging illegal fees and misleading consumers about the effectiveness of credit repair products, such as promising the removal of negative entries on consumer credit reports, without providing the benefit.

STUDENT LOANS

The CFPB has brought multiple enforcement actions related to student lending in recent years. For example, the CFPB brought an action against the nation's largest student loan servicer for allegedly making it difficult for borrowers to repay their loans and avail themselves of lower repayment options. The CFPB also brought an action against a private student loan servicer for allegedly misstating the minimum amounts due on billing statements and limiting borrowers' access to information needed for certain income tax benefits. In addition to alleging that the servicer's debt collection practices constituted UDAAP violations, the Bureau also claimed that they violated the FDCPA.

It remains uncertain whether student lending is likely to remain high on the enforcement agenda given the impending change in leadership at the Bureau and the political disagreement over the Bureau's student loan jurisdiction. Student loan servicing will likely receive increased significant political attention this year, which may be beneficial for student loan servicers. The CFPB and the Department of Education currently disagree about the extent of the CFPB's jurisdiction. Secretary of Education Betsy DeVos recently ended the Department of Education's agreement to share information with the Bureau.

For more information on the federal consumer financial laws that apply to private education lending and servicing activities, see Practice Note, Consumer Issues Affecting the Student Loan Industry.

DEPOSIT-RELATED PRODUCTS

Large banks have been the subject of enforcement actions for UDAAP violations related to deposit products. The Bureau's Enforcement Division has focused on unauthorized account opening and related issues. In September 2016, the CFPB brought an enforcement action against Wells Fargo that resulted in a $100 million penalty, which is the highest penalty the Bureau ever imposed. Another example includes one national bank that faced an enforcement action for failing to credit some consumers for deposit reconciliation errors that fell below a certain dollar threshold.

The Bureau has been particularly focused on overdraft fees following a study it published highlighting alleged deficiencies in several banks' practices. In 2015, one bank agreed to a consent order for allegedly charging overdraft fees after failing to obtain consumers' affirmative opt-in. The Bureau has identified account overdraft programs on checking accounts as an area where it is currently preparing a rulemaking (see CFPB, Spring 2017 Rulemaking Agenda (July 20, 2017)).

ONLINE MARKETPLACE LOANS

Online marketplace lending has emerged as an alternative to traditional bank or student loans. Nonbank lenders in this space can offer lower rates because they are not subject to the same capital and safety and soundness regulations governing traditional banks. However, nonbank lenders are subject to the same consumer financial protection laws as banks.

The CFPB's announcement in March 2016 that its online database is accepting complaints on marketplace lending resulted in additional scrutiny (see CFPB, CFPB Now Accepting Complaints on Consumer

Loans from Online Marketplace Lender (Mar. 7, 2016); see also CFPB, Online Payday Loan Payments (Apr. 20, 2016) (observing that online payday loans and other online high-cost loans may entail significant additional costs when online lenders attempt to debit payments from a borrower's checking account)). Since then, a number of online lenders have been the subject of public enforcement actions. For example, in September 2016, the Bureau issued a public consent order alleging that an online lender failed to improve consumers' credit scores as it had advertised. In April 2017, the CFPB sued four online lenders for allegedly collecting debt it could not collect legally, either due to state interest rate caps or lender licensing issues.

In connection with the announcement, the Bureau also released a consumer advisory counseling consumers to borrow no more than they need and can afford, shop around for the best interest rates, and monitor their credit reports before and after engaging in marketplace lending (CFPB, Understanding Online Marketplace Lending, 1-2 (Mar. 7, 2016)).

Marketplace lenders face several challenges beyond scrutiny from the Bureau. For example, many marketplace lenders form relationships with national banks so that they can offer higher-interest loans that are originated by the banks. Because the National Bank Act (NBA) preempts state usury laws, a loan that is originated by a national bank but then assigned to a marketplace lender can charge an interest rate that is higher than the state usury limit through the interest rate exportation allowed by the NBA.

This model is no longer viable in the Second Circuit, which found that the NBA's interest rate exportation did not apply to a loan assigned by a national bank to a debt collector. In *Madden v. Midland Funding, LLC*, the court held that a debt collector who attempted to collect payment on a debt bearing an interest rate higher than New York's usury cap was bound by that state law. The court found that even where a national bank originates a debt, a debt collector assignee cannot rely on NBA preemption of a state usury law because the NBA ceases to apply after the national bank assigns the debt. (786 F.3d 246, 249-52 (2d Cir. 2015), cert. denied 136 S.Ct. 2505 (2016).)

PAWNBROKERS AND PAYDAY LENDERS

The Bureau has brought enforcement actions against pawnbrokers and addressed payday lenders through its rulemaking authority. From November 2016 through February 2017, the CFPB sued or settled with six different pawnbrokers, largely alleging that the pawnbrokers deceived consumers regarding annual loan costs. On October 5, 2017, the Bureau issued a final rule requiring, among other things, payday lenders to conduct an "ability-to-repay" analysis before agreeing to lend. The rule remains subject to potential efforts to overturn it in Congress. For more on payday lending, see Practice Note, Payday Lending Regulation and Enforcement (6-618-6937).

PRIVILEGE ISSUES DURING EXAMINATIONS

The CFPB initially was not included in the provisions of the Federal Deposit Insurance Act that preserve the attorney-client privilege over materials that are provided to covered banking regulators or shared by one covered regulator with another (12 U.S.C. §§ 1821(t), 1828(x)). After regulated entities voiced concerns about waiver where privileged material was shared between regulators, Congress passed a law in 2012 that amended the Federal Deposit Insurance Act to add the CFPB as a covered banking regulator. The amendment also permits the CFPB to share privileged information with other federal agencies without waiving any privilege recognized by state or federal law. (Pub. L. No. 112-215 (2012).)

The amendment does not address the underlying question of whether the CFPB may require the production of privileged documents. The Bureau has long taken the position that it may compel the production of material protected by the attorney-client privilege during an examination, but it has made repeated assurances that it will request privileged materials only when the underlying information is "material to its supervisory objectives" and the Bureau "cannot practicably obtain the same information from non-privileged sources." (CFPB Bulletin 12-01, 2012 WL 11423396.)

The Bureau's position raises difficult questions about how to engage in a candid dialogue with counsel while avoiding unnecessary regulatory exposure. When privileged material is the subject of a supervisory request, the entity should take a thoughtful approach to claiming privilege to avoid causing unnecessary friction with the CFPB, while at the same time protecting the confidentiality of sensitive information. More generally, counsel should bear in mind that their emails and other documents may be accessible to CFPB examiners.

FAIR LENDING

The CFPB's Office of Fair Lending possesses both supervisory and enforcement responsibilities for the federal fair lending laws, including the ECOA and the HMDA. Counsel should be aware of the potential for fair lending enforcement actions in the following areas:

Mortgage lending. The Bureau has prioritized investigations of HMDA data integrity and potential risks related to underwriting, pricing, and redlining (the practice of denying financial services to minority borrowers based on the racial or ethnic makeup of their geographic area). Once the CFPB's expanded HMDA data reporting requirements become effective, mortgage lenders can expect the Bureau to rely on the HMDA data to an even greater extent in its attempts to pinpoint fair lending violations. In

2015, the CFPB and the DOJ brought a redlining action against Hudson City Savings Bank for allegedly denying residents in majority African-American and Hispanic neighborhoods fair access to mortgage loans. The consent order requires the bank to pay $25 million in direct loan subsidies to qualified borrowers in the affected communities, $2.25 million in community programs and outreach, and a $5.5 million penalty, in addition to adopting a host of remedial measures.

Indirect auto lending. Pricing and compensation policies that allow auto dealers to raise the interest rates on auto loans remain enforcement priorities for the CFPB. These dealer markups allegedly result in increased costs for non-white borrowers.

Language accessibility. The Bureau has signaled an interest in improving access to credit for borrowers with limited English proficiency. Lenders must balance a desire to make credit available to these populations against UDAAP concerns arising from consumers' ability to understand the terms and conditions provided in English.

Big data. Using voluminous amounts of data generated by consumers both online and offline to target credit products and offers to distinct market segments might present risks of redlining and steering (the practice of deliberately guiding borrowers toward or away from certain products or channels on a prohibited basis). Although no actions have yet been brought, the Bureau has indicated that it is developing an approach to analyze lenders' use of big data.

For more information on the various federal laws that prohibit financial institutions from engaging in discriminatory conduct in connection with lending transactions, see Practice Note, Fair Lending Laws.