

No NORA, No Problem? Why CFPB's Notice Process Is Crucial

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On May 23, a federal district court ruled that the Consumer Financial Protection Bureau's failure to provide a defendant with advance notice of suit was not a valid affirmative defense.[1] While not surprising, the ruling should shine a spotlight on the CFPB's presuit process in enforcement cases.

Hopefully, the CFPB will continue its general practice of providing putative defendants with advance notice in those cases where the agency is not seeking immediate injunctive relief from the courts, and will also provide greater clarity as to why it sometimes chooses to forgo this important process. Parties subject to CFPB enforcement investigations should, in turn, avail themselves of the opportunity to respond to such notice when it is provided.



Ori Lev

Before it brought its first enforcement action, the CFPB announced its "NORA" process.[2] NORA, which stands for Notice and Opportunity to Respond and Advise, is supposed to provide targets of an investigation with notice of the target's potential legal violations and provide an opportunity for the target to submit a written statement to the CFPB explaining why no enforcement action is warranted for legal, factual or policy reasons.

Modeled after the U.S. Security and Exchange Commission's Wells notice process,[3] the NORA process precedes the Office of Enforcement's recommendation to the director of the CFPB to institute enforcement proceedings, and is intended "to ensure that potential subjects of enforcement actions have the opportunity to present their positions to the bureau before an enforcement action is recommended or commenced." [4] According to the CFPB, "if the Office of Enforcement ultimately recommends the commencement of an enforcement proceeding, the written [NORA response] will be included with that recommendation." [5] That is, the NORA response is forwarded along with the Office of Enforcement's recommendation to the director, who ultimately decides whether an enforcement action is warranted.

Although the CFPB bulletin announcing the NORA process doesn't reference it, the NORA process also serves to implement Executive Order 12988.[6] That executive order provides that lawyers engaged in civil litigation on behalf of the United States government shall not file a complaint initiating civil litigation "without first making a reasonable effort to notify all disputants about the nature of the dispute and to attempt to achieve a settlement." [7]

The purposes of EO 12988 are clear and set forth in the executive order itself — among other things, it is

intended “to facilitate the just and efficient resolution of civil claims involving the U.S. government [and] to encourage the filing of only meritorious civil claims.” That is, the executive order recognizes that presuit notice and settlement talks will help ensure that the government only brings meritorious claims. Given the substantial power vested in government enforcement agencies and the cost and stigma associated with defending against a government enforcement action, this principle is even more important in the government enforcement context than in the ordinary civil litigation context.

Both the CFPB’s NORA bulletin and EO 12988 contain exceptions for cases where prior notice of the action would undermine its efficacy. The NORA process, for example, does not apply “in cases of ongoing fraud or when the Office of Enforcement needs to act quickly.”[8] The pretrial notice and settlement provisions of EO 12988 similarly do not apply in actions to seize property; when assets are subject to flight, dissipation or destruction; when the defendant is subject to flight; when exigent circumstances make providing such notice impracticable or such notice would defeat the purpose of the litigation, “such as in actions seeking temporary restraining orders or preliminary injunctive relief;” and in those “limited classes of cases where the attorney general determines that providing such notice would defeat the purpose of the litigation.”[9]

While both the NORA bulletin and EO 12988 indicate that they do not create any private rights and that the processes they describe are discretionary, it is clear that providing such notice is intended to be the rule rather than the exception, and that the exceptions are to be limited to those instances where notice would jeopardize the litigation.

And, indeed, in our experience the CFPB typically provides a NORA process and an opportunity to settle prior to initiating suit. But that is not always the case, and for reasons that are not always clear. Thus, for example, the CFPB apparently did not provide a NORA to Nationwide Biweekly Administration (NBA) before it filed suit against the entity on May 11, 2015.[10] In response, NBA included an affirmative defense in its answer based on the CFPB’s failure to follow its NORA process. The CFPB in turn moved to strike that affirmative defense.

At the end of May, the federal district court hearing the case granted the CFPB’s motion to strike. The court’s opinion addressed this issue only briefly, noting that the CFPB’s motion argued that the affirmative defense was “legally unavailing, for a number of reasons, including that use of the NORA process is discretionary.”[11] The court did not opine on the validity of the CFPB’s argument but instead granted the motion to strike the defense without prejudice to NBA repleading the defense with “additional factual underpinnings” beyond the lack of a NORA. Presumably, this means that the court found that the lack of a NORA, without more, did not constitute a valid legal defense. Neither the court in its opinion nor NBA in its opposition to the motion to strike referenced EO 12988.

By its terms, the CFPB’s NORA process does not “create or confer upon any person, including one who is the subject of a CFPB investigation or enforcement action, any substantive or procedural rights or defenses that are enforceable in any manner.” In that respect, the district court’s decision is not surprising. But the rationale behind both the NORA process and EO 12988 suggests that the CFPB should have an articulable basis before denying a party presuit notice of the CFPB’s claims and an opportunity to convince the agency that action is unwarranted or a chance to settle the CFPB’s claims.

Put plainly, that is what good government requires. Other than in cases involving the types of exigent circumstances described above, there is nothing lost by providing such notice, other than potentially minor delay. But that is a small price to pay to help ensure that the government has all of the relevant facts and understands a defendant’s perspective before bringing to bear the full weight of its

enforcement authority. Hopefully, the court's ruling will not embolden the CFPB to further restrict the NORA process, but rather cause it to recommit to providing such notice in all but the truly exceptional cases.

Parties subject to CFPB enforcement investigations should consider raising these issues with CFPB enforcement staff at the appropriate juncture. Asking whether staff intends to provide a NORA notice in the event staff is inclined to recommend enforcement action can help ensure that an entity receives such notice. And any entity that receives such a notice should avail itself of the opportunity to present the CFPB with the factual, legal and policy reasons why an enforcement action or particular claims are not appropriate under the circumstances.

Any such response should, of course, be carefully crafted and vetted to ensure that it helps, rather than hurts your cause. But help it can. As noted above, the NORA response is considered not just by enforcement staff in framing their recommendation to the director, but is also included along with that recommendation for the director's consideration. It is a putative defendant's last and best chance to avoid enforcement, and can also serve to frame and inform any settlement negotiations in the event the CFPB elects to proceed with some or all of its claims.

—By Ori Lev, Mayer Brown LLP

Ori Lev is a financial services partner in Mayer Brown's Washington, D.C., office. He was a founding member of the CFPB, where he served as a deputy enforcement director for litigation. Before joining the CFPB, he was a senior adviser and then the head of enforcement at the Office of Foreign Assets Control. He was also a litigator at the U.S. Department of Justice and the Federal Trade Commission.

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[1] CFPB v. Nationwide Biweekly Administration Inc., No. 15-cv-02106-RS (N.D.Cal.), slip op. at 9 (May 23, 2016).

[2] See CFPB Bulletin 2011-04 (Enforcement) (“NORA Bulletin”), Nov. 7, 2011, available at <http://www.consumerfinance.gov/wp-content/uploads/2012/01/Bulletin10.pdf>.

[3] See 17 C.F.R. § 202.5(c); SEC Enforcement Manual § 2.4.

[4] NORA Bulletin.

[5] *Id.*

[6] 61 Fed. Reg. 4729 (Feb. 7, 1996).

[7] EO 12988, § 1(a). The NORA process is distinct from the CFPB's precomplaint settlement process, which typically follows the NORA process and approval by the CFPB director to file suit or settle claims. But the two processes are related in that they both reflect a prelitigation process intended to ensure that defendants' views are considered before litigation is filed. NORA is even more important than the presuit settlement process, as it provides an opportunity to convince the agency not to pursue enforcement at all or to drop claims or parties from the threatened action.

[8] CFPB Bulletin 2011-04 at 1.

[9] EO 12988, § 8(b).

[10] Nationwide Biweekly Administration also claims the CFPB did not provide it advance notice of the lawsuit. <http://www.housingwire.com/articles/33920-nationwide-biweekly-claims-cfpb-suit-contains-multiple-errors>.

[11] CFPB v. Nationwide Biweekly Administration Inc., No. 15-cv-02106-RS (N.D. Cal.), slip op. at 9 (May 23, 2016).

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