The CFPB’s Enforcement Process

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OVERVIEW
CFPB Enforcement Overview

• The CFPB has broad investigative authority under Dodd-Frank over “any person” to determine whether they have violated a federal consumer law
  – Not limited to supervised entities

• With this broad enforcement authority the CFPB:
  – Has brought over 140 enforcement actions
  – Has obtained more than $11 billion in total relief to date

The Cost of a CFPB Enforcement Action

• The CFPB can seek the following remedies:
  – Injunctive relief
  – Consumer redress (restitution or damages)
  – Penalties

• Potential penalties can be substantial.
  • $5,437 per violation
  • $27,186 per reckless violation
  • $1,087,450 per knowing violation
  – CFPB just obtained its largest civil money penalty: $100 million
Timeline of a Typical CFPB Investigation

• Receive CID (administrative subpoena) for documents, written reports, and information
  – Negotiate over scope of CID
  – Produce documents in accordance with agreed upon modifications
• The CFPB may send additional CIDs for documents, emails, or sworn testimony
  – Depending on the scope of the investigation, this information gathering stage may last many months

Timeline of a Typical CFPB Investigation (Cont.)

• CFPB staff decides whether or not to recommend an action
  – If the CFPB decides not to go forward with an enforcement action, the file will be closed (but may be reopened at any time)
  – If the staff recommends an enforcement action, the entity will receive a Notice of Opportunity to Respond and Advice (“NORA”) notice
    • Entity responds with written submission and can request a meeting
• Negotiate a settlement or the CFPB brings an action in court/through the administrative adjudicative process
  – About ¾ of defendants settle with the CFPB and about ¼ litigate
    • The defendants who decide to litigate are disproportionately smaller entities
A DIFFERENT APPROACH TO ENFORCEMENT

CFPB Enforcement vs. SEC Enforcement Procedure

• Different Turf, Different Priorities – But there is always fraud
  – SEC: Investment Advisers, market abuse, structure products, fraud
  – CFPB: Debt collection, RESPA, fair lending, UDAAP, credit cards, fraud

• Investigation
  – Opening an investigation
    • SEC: MUI, Informal, Formal – All non-public and confidential
    • CFPB: All Formal, Starts out BIG (CID's like to make a point)
CFPB Enforcement vs. SEC Enforcement: Document Demand

• CFPB CID vs. SEC Subpoena
  – Very Formal, unyielding, young
  – Fewer, longer CIDs
  – CIDs include interrogatories
  – Very short timeline, not always negotiable
  – 10 days: Meet-and-confer
  – 21 days: Petition Director to limit CID
    • No objection at meet and confer, cannot petition director
    • Very difficult to succeed: Know Staff, specifics of burden or unfairness
    • Petitions become public

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CFPB Enforcement vs. SEC Enforcement: Document Production

• ESI Document Submission Standards matter
  – Must produce according to CFPB’s standards
    • Requires technical expertise or the help of a specialized data vendor
    • IT specialist on the meet-and-confer call
  – Meet all deadlines
    • Modifications (scope or timing) must be requested in writing
    • If accepted, the CFPB will issue a modification letter
  – Be prepared to produce at least some information/documents by the deadline in the CID

• Withhold and Log Privileged Materials
  – Privilege log must be submitted at time of production, signed by the attorney stating the grounds for privilege
  – Sensitive personally identifiable information may not be withheld
CFPB Enforcement vs. SEC Enforcement: Lessons Learned

• NORA vs. Wells Submission
  – During the NORA call, the CFPB Staff will verbally outline the evidence supporting its decision to recommend an enforcement action
    • The Staff will not outline allegations in writing
    • The amount of detail provided during the NORA call highly dependent on Staff
  – The NORA is not guaranteed. Staff can proceed with an enforcement action without providing the company an opportunity to respond.
  – SEC:
    • More flexibility (time and submission length)
    • Main opportunity to present defense to Management, the Litigation Unit and the Commission

• Getting Adults in the Room
Common Sources of CFPB Enforcement Investigations

- Referrals from CFPB supervisory examinations
- Referrals from other agencies
- Consumer complaints
  - CFPB maintains Consumer Complaint Portal and has access to the FTC’s Consumer Sentinel Network
- Whistleblowers
- Consumer groups
- Private litigation
- Press reports

TOOL Choice

- Unlike prudential regulators, CFPB Enforcement conducts investigations independent of examinations
- For Supervised Entities, CFPB can choose
  - Examination via Supervision, or
  - Investigation via Enforcement.
- Information gathering mechanisms.
- Choice impacts outcome.
Supervision priorities

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<thead>
<tr>
<th>Date</th>
<th>Institution</th>
<th>Product Line</th>
</tr>
</thead>
<tbody>
<tr>
<td>Q1</td>
<td>XYZ Bank</td>
<td>Mortgage Organization</td>
</tr>
<tr>
<td>Q1</td>
<td>ABC Non Bank</td>
<td>Baseline Fair Lending</td>
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<tr>
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<tr>
<td>Q2</td>
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</tr>
<tr>
<td>Q3</td>
<td>ABC Bank</td>
<td>Mortgage Servicing</td>
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- Supervision establishes exam schedule based on risk-based analysis of Institution Product Lines (IPLs).
- Finite (though large) number of IPLs subject to supervisory authority.
- IPLs are risk weighted based on market risk (consumer harm potential) and entity risk (supervisory rating, consumer complaints).
- Result is examination schedule identifying specific IPLs to be examined in coming year.

Enforcement priorities

- Unlike Supervision, Enforcement does not identify institutions as specific targets of investigation as part of strategic planning process
- Instead, Enforcement seeks to identify market areas & practices it wants to address
- Goal: targeted resource allocation
- All suggested enforcement investigations – both organic and referrals from Supervision – are measured against this plan
Enforcement priorities

Tool choice revisited

• CFPB’s approach to Tool Choice is grounded in these Strategic Plans.

• Which tool to use if issue identified?

• General Rule:
  – If IPL is on Supervision exam schedule in next 12 months, strong presumption for Supervision examination.
  – If IPL not scheduled for exam in next 12 months, strong presumption for Enforcement investigation.
Different start/different finish

• In theory, Examination and Investigation are just information gathering tools
• In practice, they often lead to different outcomes
  – Examination: exam report, MOU, or public enforcement action
  – Investigation: closure, public enforcement action
• Currently, no mechanism for confidential supervisory resolution of enforcement investigation

WHO CAN BE A TARGET?
Possible targets of a CFPB Enforcement Action - UDAAP

• Covered persons
• Service providers of covered persons
• Related persons
  – Officers, directors, employees charged with managerial responsibility, and controlling shareholders of covered persons.
  – Shareholders, consultants, JV partners, or other persons materially participating in conduct or affairs of covered persons
  – Independent contractors who knowingly or recklessly participate in a violation of law
• Individuals and entities that provide “substantial assistance” to a covered person committing a UDAAP violation.

Individual Liability

• Approximately 30% of enforcement actions include claims against individuals
• Bases for individual liability:
  – Individual is a “related person”
  – Individual provided “substantial assistance” to a covered person committing a UDAAP violation.
• Most individual liability actions involve officers and individuals who were alleged to have materially participated in the affairs of the covered institution.
QUESTIONS?