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Chopra Takes the Helm: What his Confirmation Means for CFPB Enforcement Activity

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Today's Topics

- CFPB's Changing Direction
- Recent Actions Brought by the CFPB
- Update on Constitutional Challenges to CFPB
- What to Know about CFPB Investigations

CFPB's Changing Direction

- New Director
- Major Changes to Previous Trump Administration Policies
- Fair Lending/Equity/Redlining
- COVID-19

CFPB's Changing Direction

- New Director – Rohit Chopra
 - Former CFPB student loan ombudsman
 - Most recently an FTC commissioner
 - Commonly referred to as a Warren/Cordray acolyte
 - Comments to the Senate Banking Committee during his confirmation give a flavor of his attitude towards the industry:
 - “In the last economic crisis a decade ago, we saw how unlawful and avoidable foreclosures proved to be catastrophic in cities, small towns, and rural areas alike, contributing to deeper social divisions and inequities. We once again face an important test to ensure that troubles in the housing market do not sabotage the recovery of our local economies. In the mortgage market, fair and effective oversight can promote a resilient and competitive financial sector, and address the systemic inequities faced by families of color. Perhaps most importantly, administration of consumer protection laws can help families navigate their options to save their homes.”

CFPB's Changing Direction

- On January 24, 2020, the CFPB issued a policy statement to provide clarification on how it intends to enforce abusiveness in connection with the provision of consumer financial products or services.
- The CFPB issued the policy statement, in large part, in response to feedback it received at its Symposium on Abusive Acts or Practices. Academics and practitioners at the Symposium agreed that the CFPB should seek to resolve uncertainties surrounding the abusiveness standard.
- The policy statement outlined several principles the CFPB intends to apply when it challenges conduct as abusive, including:
 - challenging conduct only when harm to consumers outweighs the benefit;
 - isolating “abusive” act allegations from “unfair” or “deceptive” act allegations; and
 - seeking monetary relief only when there has been a lack of good-faith effort to comply, except that the CFPB will seek restitution where conduct has injured consumers.

CFPB's Changing Direction

- In March of this year, the CFPB (under Acting Director Dave Uejio) rescinded its 2020 abusiveness policy statement, citing concerns that the statement limited the Bureau's ability to exercise the full scope of its supervisory and enforcement authority to stop abusive practices.
- The CFPB stated that the rescinded policy statement only provided market participants with uncertainty and slowed the CFPB's ability to clarify the statutory abusiveness standard. Going forward, the CFPB stated that it intends to apply the full scope of Congress's definition of an abusive practice through the use of money penalties and disgorgement.

Fair Lending a Priority

- CFPB created a racial equity page on its website addressing its concerns
<https://www.consumerfinance.gov/about-us/racial-equity/>
- Acting Director Dave Uejio on June 2 issued a statement: “As Acting Director of the Consumer Financial Protection Bureau, my top priorities are to take bold and swift action to address issues of pervasive racial injustice and the long-term economic impacts of the COVID-19 pandemic on consumers. Growing opportunities for those who have historically been denied them increases opportunity for *everyone*.”

Fair Lending a Priority

- Summer 2021 Supervisory Highlights
- Home Mortgage Disclosure Act (HMDA)
 - Examinations found “widespread” errors in new HMDA fields.
 - CFPB blamed on deficient compliant management systems and poor data mapping.
- Equal Credit Opportunity Act (ECOA) - redlining
 - CFPB found it relevant that the lender conducted a number of direct mail marketing campaigns “that featured models, all of whom appeared to be non-Hispanic white.”
 - The marketing materials of its “mortgage professionals” showed “only professionals who appeared to be non-Hispanic white”
 - The lender’s office locations were nearly all concentrated in majority non-Hispanic white areas.

Fair Lending a Priority

- Trustmark Bank Consent Order - \$5 million CMP
- CFPB, DOJ, OCC joint consent order
- Allegations of redlining
- Violations of Fair Housing Act, Community Reinvestment Act, and ECOA
 - Avoided majority-Black and Hispanic communities
 - Avoided assigning Los to majority-Black and Hispanic communities
 - Failed to monitor fair lending compliance
 - Discouraged applications and prospective applications from majority-Black and Hispanic communities

Fair Lending a Priority

- Townstone Financial Case
 - Lawsuit brought in federal district court in Chicago
 - Suit brought against a small mortgage lender for allegedly violating ECOA and the Consumer Financial Protection Act (CFPA) based on the lender's sponsorship of and participation in talk radio programs of a political nature
 - the complaint alleges that in a radio show sponsored by the defendant company, the company's president made disparaging remarks about neighborhoods with majority-black populations.
 - Motion to Dismiss filed in February – waiting on court to rule

COVID-19

- The CFPB issued a compliance bulletin in April on “Supervision and Enforcement Priorities Regarding Housing Insecurity,” stating that the CFPB will be paying attention to how mortgage servicers respond to borrowers requesting loss mitigation assistance.
- A warning to mortgage servicers that they should be prepared for “a wave of avoidable foreclosures this fall” when COVID-19 related federal mortgage protections expire.
- The CFPB expects an “extraordinarily high volume of loans needing loss mitigation assistance at relatively the same time”
- concerned about communication from servicers and that borrowers’ loss mitigation applications are at risk of not being adequately processed.
- CFPB will prioritize mortgage servicing in its enforcement and supervision work within the coming year.

Recent Enforcement Actions

- Since July of this year, CFPB has entered into 6 consent orders, filed 2 lawsuits against, and filed an amicus brief in a fourth circuit matter regarding Fair Credit Reporting Act
 - 4th Circuit amicus is interesting – shows a renewed interest by the CFPB to step outside its statutorily proscribed bounds
 - Wading into the Section 230 debate from Communications Decency Act (basically, immunity from internet comments for sites that host them)
- Cases range from income share agreements, services provided to prisoners, to fintech companies

JPay Consent Order

- October 19, 2021 CFPB publicized a settlement with Jpay, a company that provides financial services to recently released prisoners
- Brought under the Electronic Funds Transfer Act
- CFPB alleged the company required prisoners to sign up for a debit card in order to receive certain state-benefits that help recently released prisoners meet their essential needs upon release
 - Found company abused its market dominance by charging unavoidable fees
 - Required individuals to sign up for the cards to receive the benefit
 - Charged unauthorized fees contrary to cardholder agreement
 - Misrepresented fees

AAG Consent Order

- The CFPB alleges that the company sent mail advertisements with inflated home value estimates. The advertisements claimed that the provider “attempt[ed] to ensure the home value information provided is reliable.” The complaint, however, alleges the provider made no such attempts. The CFPB claims that the provider violated the CFPA because it made deceptive representations about the estimated home values and the accuracy of home estimates.
- The CFPB’s proposed stipulated order requirements include, but are not limited to, the following: a detailed and comprehensive compliance plan to be submitted by the provider to the CFPB for review and determination of non-objection; provider to pay \$173,400 in redress to affected customers; and a \$1.1 million civil money penalty.

Credit Repair Cloud Lawsuit

- In September 2021, CFPB filed a lawsuit in U.S. District Court for the Central District of California, alleging violation of the Telemarketing Sales Rule and the Consumer Financial Protection Act (providing a financial service in violation of another federal law)
- Brought claims against the company and its owner
- The lawsuit claims that the company, which sells software and other tools to help others start and operate credit-repair businesses, encouraged credit-repair businesses that use their services to charge unlawful advance fees, causing broader consumer harm in the marketplace. The lawsuit is seeking monetary relief for consumers, disgorgement of unjust gains, injunctive relief, and a civil penalty

LendUp Lawsuit

- In September 2021, CFPB filed a lawsuit in US District Court for Northern District of California against LendUp Loans, LLC
- “LendUp lures consumers with false promises that repeat borrowing would allow them to ‘climb the LendUp Ladder’ and unlock lower interest rates. For tens of thousands of borrowers, the LendUp Ladder was a lie,” said CFPB Acting Director Dave Uejio.
 - Allege deception regarding the benefits of repeat borrowing
 - Allege failure to timely and accurately provide adverse action notices
 - Alleged violations of a previous 2016 Consent Order
 - Note the pattern – multiple new actions over violations of past consent orders

Income Share Agreements

- In September 2021, CFPB entered into a Consent Order with a group of related companies called Better Future Forward, which provide Income Share Agreements to college students
 - In exchange for money upfront to pay for education, the student agrees to make payments once income exceeds a specified threshold
 - Company took position that the product was not a loan, and the contracts explicitly stated this
 - CFPB took the position that they were loans, and the company violated regulation Z because no disclosures were provided and imposed prepayment penalties
 - CFPB required the company to recalculate payment caps under the contract without prepayment penalties, and issued an order reforming of all of the Company's ISA's to eliminate part of the calculation of the total payment cap

Fair Collections & Outsourcing

- In August 2021, CFPB entered into a Settlement of a lawsuit filed in US District Court for District of Maryland (in 2019) with a company called Fair Collections & Outsourcing, as well as its owner, for violations of the Fair Debt Collection Practices Act
 - Failed to implement proper policies and procedures
 - Failed to conduct reasonable investigation of disputes, including those related to identity theft
 - Told consumers they owed debts for which the company did not have a reasonable basis to assert the debt was owed
 - \$850,000 Civil Penalty

GreenSky

- In July 2021, the CFPB entered into a Consent Order with a Fintech company for allegedly allowing merchants to take out loans on behalf of consumer without receiving their authorization
- According to the CFPB, the company used primarily home improvement merchants to offer financing to customers on the spot through partner banks
- Proceeds are disbursed directly to the merchants
- Some consumer claimed they had never heard of the company before receiving a bill
- Order required the company to refund or cancel up to \$9 million in loans, and pay a civil penalty of \$2.5 million

An Update on CFPB Challenges

- Seila Law, LLC v. CFPB
 - CFPB's single-director structure unconstitutional
 - SCOTUS severed the for-cause removal provision in the statute, so the CFPB Director now serves at the pleasure of the President – Kraninger was the first to be terminated shortly after Biden's inauguration
 - SCOTUS sent it back to the Ninth Circuit for a decision on what the remedy is for such a constitutional violation
 - Ninth Circuit found the actions had been ratified by the Director after the for-cause provision was removed, thus no constitutional violation to be remedied
 - Seila Law decided not to seek cert on the remanded opinion – this case is, for all intents and purposes, over

An Update on CFPB Challenges

- Collins v. Yellen
 - This case was not specifically about the CFPB, but the FHFA
 - The two cases were linked because they arose around the same time, and the FHFA had a similar for-cause removal structure as the CFPB
 - When SCOTUS took the case up (after Seila Law was decided), they added a question: if the FHFA's structure was unconstitutional, what is the remedy?
 - SCOTUS ruled in June, finding that the FHFA structure was unconstitutional for the same reasons in Seila Law
 - But they punted on the remedy – they found that the most recent action complained of in the lawsuit had been taken by an Acting Director, who by statute was removable at will by the President, so the action was constitutional and the Court did not need to rule on the remedy

An Update on CFPB Challenges

- All American Check Cashing v. CFPB
 - This case has been pending for years – it at one point looked like it may be the case taken to the Supreme Court on the constitutionality of the CFPB’s structure
 - Original opinion found the structure constitutional, despite the arguably-controlling authority from Collins v. Mnuchin (both from the Fifth Circuit)
 - Collins v. Mnuchin is the same case as Collins v. Yellen (Treasury Secretary changed before the final ruling in the Supreme Court)
 - The Court (sua sponte) took the case up en banc
 - The case now is focused on the remedy issue – unclear when a ruling will come from the Fifth Circuit, but this case may ultimately end up in the Supreme Court as well

How You May Learn About an Investigation

- Subpoena
- Civil Investigative Demand (CID)
- Current and former employee interviews by agents
- Examinations (e.g., CFPB PARR letter)

Why is Your Company Being Investigated?

- It may not be readily apparent why the government has initiated an investigation. The following are possible reasons:
 - Compliance or other audits
 - Example: HUD OIG Audit
 - Whistleblowers (qui tam complaints)
 - Government investigation of competitors
 - Anonymous tips/complaints
 - Data mining

Example: CFPB Investigations

- The Enforcement Division starts a typical investigation with a broad CID
- Under the Bureau's rules, the recipient of a CID *must* confer with Enforcement Counsel within 10 days of service of the CID. 12 C.F.R. § 1080.6(c)
- Failure to raise objections at that initial “meet-and-confer” waives the right to assert such objections later in a request to set aside or modify. 12 C.F.R. § 1080.6(c)(3)
- Typical CID objections:
 - overly broad; unduly burdensome; oppressive; and irrelevant to the investigation's purpose

Example: CFPB Investigations (*cont.*)

- After meet and confer, Enforcement Counsel may ask for a written modification request, frequently put in writing what it believes were the issues raised by the recipient
- You must be careful to ensure that any subsequent writing contains a comprehensive description of what was discussed at the meet-and-confer; after all, if an objection was not raised, it is waived
- Under the Bureau's rules, extensions are "disfavored." 12 C.F.R. § 1080.6(e)(2)
- Some Enforcement Counsel may ask for tolling agreements in connection with routine extensions of time
- Investigations routinely call for document requests, written reports, interrogatories, and investigational hearings

What to Expect from the Investigation Process

- The initial CID or Subpoena
 - Documents Requests
 - Interrogatories
 - Interviews/Investigational Hearings/Depositions
- Tolling Agreements
- Follow-up CIDs or Subpoenas

Investigation is Ending, Now What?

- Three possibilities:
 - The government takes no action
 - Settlement
 - Enforcement Action

Facing a Government Investigation

- Don't panic. The initiation of an investigation does not mean that you did anything wrong.
- The best defense is to take a thoughtful and reasoned approach when interacting with the government and responding to its requests
- Contact your in-house counsel or WBK to assist in responding to the government
 - You only have so much time to respond, so don't procrastinate
- Consider providing notice to your insurance carriers

Facing a Government Investigation (*cont.*)

- Preserve the documents, data, and information requested
 - This must be done promptly
 - Prepare a document hold notice
 - Distribute to relevant employees
 - This includes the IT folks
 - Document retention rules must be reviewed
 - You cannot let potentially relevant documents be destroyed
- Why is this important?
 - Lost or destroyed information may be viewed as intentional and prompt the government to expand its investigation

Facing a Government Investigation (*cont.*)

- Read the request carefully and consider its scope
 - What is the alleged misconduct?
 - How broad are the requests?
 - How long will it take to respond?
- Discuss these topics with your counsel
- Consider giving notice to your insurers
- Reaching out to the government—always a good idea even if not necessary:
 - CFPB requires a meet-and-confer within 10 days
 - Discuss limiting the scope of the requests
 - Responding to requests can be costly and the government doesn't want irrelevant material

Questions?

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