

STROOCK SPECIAL BULLETIN

Opportunities To Reframe CFPB Enforcement

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The past two weeks have seen major developments in court and at the Consumer Financial Protection Bureau (CFPB or Bureau) concerning the Bureau's past and future enforcement activities, all closely related to changes in the political winds. But thoughtful strategy is needed to achieve a transformation of the CFPB's enforcement framework that will withstand future changes in administration and Bureau leadership.

Shift in CFPB Enforcement

The swing in CFPB enforcement became visible soon after President Trump appointed Office of Management and Budget Director Mick Mulvaney to serve as the Bureau's Acting Director, as the CFPB began pulling back in various individual enforcement matters – from withdrawing its request, two days after the appointment, for the court to require Nationwide Biweekly Administration to post a bond for its \$8 million civil penalty pending appeal, to formally closing its investigation of World Acceptance Corporation last week.

January 2018 saw the declaration of a formal shift in CFPB regulatory policy with the Mulvaney memo, stating that the Bureau's days of "pushing the envelope" are over, and the announcement of a series of requests for information (RFIs) on its enforcement, supervision, rulemaking, market monitoring, and education activities. On January 31, we witnessed a major, concrete change with the

announcement that the Office of Fair Lending and Opportunity would be removed from the CFPB's Supervision, Enforcement and Fair Lending Division, and refocused to "advocacy, coordination and education" within the Office of Equal Opportunity and Fairness, which reports directly to the Director. The removal of a supervision and enforcement team focused exclusively on fair lending issues will significantly reduce the CFPB's enforcement activism in this area.

Yet even more pervasive change could be achieved through the RFIs, starting first with the RFIs on the CFPB's Civil Investigative Demands (CIDs) and administrative adjudication process. Reform of these processes is unlikely to face challenge as the CFPB Director has wide latitude to change agency processes. The majority, concurring and dissenting opinions in the D.C. Circuit's *en banc* ruling this week in *PHH v. CFPB*, upholding the constitutionality of the Bureau's structure, all agree on one thing: their emphasis on the independence and authority of the CFPB Director to determine the agency's course and processes (with the dissent deeming it unconstitutional). While this authority enables major change to the CFPB's operations today, it also threatens a dramatic return to aggressive regulation and enforcement under a future Director.

Accordingly, companies should support their advocacy for regulatory reform with a concrete

demonstration that the requested changes, particularly in the enforcement framework, are needed to assure due process, increase efficiency and transparency, and strengthen the basis for agency actions. Reforms based on such concerns are less subject to attack and thus less likely to be undone with changes in administration and leadership.

RFIs on CFPB CIDs and Administrative Adjudication Process

The CFPB's requests for comments on its CIDs and administrative adjudication process provide opportunities to reform the Bureau's entire enforcement infrastructure. By demonstrating that certain modifications to these processes are needed for due process and transparency, as well as consistency with federal and sister agencies' rules, the industry can achieve extremely impactful, lasting changes to the CFPB's enforcement activities, as even aggressive future agency heads would find it difficult to justify rolling back due process safeguards.

The RFI on the CFPB's CIDs and associated procedures presents a particularly rich opportunity to address significant problems in the enforcement process. The RFI presents 11 preliminary questions on various elements of its procedures, but also invites comment on all aspects of the CID process. Among other issues that we have previously discussed with our clients and that the RFI tees up are:

- the CFPB's internal process for initiating investigations and authorizing CIDs;
- the need for more specific descriptions of the purpose and basis of each CID and request;
- the tight deadlines for the meet-and-confer and petitions to modify or set aside CIDs;
- the CFPB's practice of publishing those petitions (thus forcing companies to either accept the enforcement team's demands/decisions or make the investigation

public) and denying petitioners the opportunity to review and respond to the opposing arguments of the CFPB's enforcement team;

- the CFPB's limits on the rights of witnesses called to testify; and
- the impractical requirements for certification of company responses.

The industry has had less experience (and thus suffered less pain) with the CFPB's administrative adjudication proceedings. Since 2012, the CFPB has used this channel only eight times, while filing 180 actions in court. Yet the greater limits on due process presented by the CFPB's administrative procedures as compared to the courts, and the wide latitude (and potentially greater inclination in the future) that the enforcement team has to choose them over the courts, present a significant threat to the industry. Reflecting this concern, the first of the 12 questions presented in the RFI asks whether, as a matter of policy, the CFPB should pursue contested matters only in court rather than through the administrative adjudication process made available to it by the Dodd-Frank Act.

Among other issues, the RFI also seeks comment on the short timelines provided under the CFPB's administrative procedures, the requirements for the contents of the Bureau's notice of charges and for its production of documents to respondents, and the need to incorporate various requirements of the Federal Rules of Civil Procedure and Federal Rules of Evidence (including the opportunity to stay a decision of the Director pending appeal by filing a supesedeas bond).

The RFIs specifically invite companies and outside counsel that have experience with the CFPB enforcement process to submit comments on ways to improve it. Thus, there is an opportunity for companies to speak through their counsel, as an alternative to filing in their own name or through the filter of trade organizations, to provide specific comments on the lack of due process and other weaknesses in the CFPB's current enforcement

framework and achieve lasting improvements that will withstand future political shifts.

The attorneys of Stroock's Financial Services Litigation, Regulation and Enforcement Group are well-positioned to assist and answer your questions about consumer finance enforcement, supervision, rulemaking, litigation, and related matters, as well as the operations of the CFPB and other federal and state authorities in this arena.

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