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Part I

A VIEW FROM INSIDE: A GUIDE TO CFPB INVESTIGATIONS

In this article, the authors provide a detailed description of the steps in the CFPB's investigation process from the triggers for an investigation to settlement strategies with the agency. The steps include the CFPB's required Meet and Confer for the lawyers, its civil investigative demand process, the NORA procedures, and the agency's options in resolving an open investigation. The authors discuss these steps from the perspective of the company being investigated, and the agency's expectations and common practices. A companion second article, in a forthcoming issue, will describe the investigation process in the New York State Department of Financial Services.

By Anthony Alexis, Matthew L. Levine, and W. Kyle Tayman *

In the wake of the 2008 financial crisis, State and Federal Financial Regulatory and enforcement bodies merged their investigation and enforcement activities to investigate, sue, and settle with consumer financial services entities that had caused adverse consumer impacts in the marketplace. The matters impacted multiple financial services markets including mortgage origination and servicing, student lending and servicing, for-profit schools, debt collection, and small-dollar lending, among many others.

Following the 2016 election, such joint enforcement activity cooled. In response, two major regulatory and enforcement agencies suggested that they would emphasize consumer protection in the financial services sectors and would retool their organizations to once again realize the vision of a "mini-CFPB" at the state level. First, in June 2019, the Superintendent of the New York State Department of Financial Services ("NYDFS"), Linda A. Lacewell, announced the creation of a Consumer Protection and Enforcement Division within NYDFS that combined the Enforcement and Financial Frauds and Consumer Protection divisions. The division places certain of its supervisory functions, as well as enforcement and consumer education, under the same umbrella.

*ANTHONY ALEXIS is a Partner at Goodwin Procter, LLP and the head of Goodwin's Consumer Financial Enforcement Practice. MATTHEW L. LEVINE leads the financial and regulatory services practice at Guidepost Solutions LLC. He previously served as Executive Deputy Superintendent for Enforcement for the New York State Department of Financial Services. W. KYLE TAYMAN is a Partner at Goodwin Procter, LLP and a member of the firm's Consumer Financial Enforcement Practice. Their e-mail addresses are aalexis@goodwinlaw.com, mlevine@guidepostsolutions.com, and ktayman@goodwinlaw.com.

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Then in January 2020, following the NYDFS lead, Governor Gavin Newsom of California suggested during the budget process that he would seek to create a California version of the Consumer Financial Protection Bureau ("CFPB"). Recently, on August 31, 2020, the California Legislature passed Assembly Bill No. 1864, renaming the state's current financial services regulator, the Department of Business Oversight, to the Department of Financial Protection and Innovation ("DFPI"). The new DFPI will have expanded examination and enforcement resources, including the authority to enforce California laws relating to "persons offering or providing consumer financial products or services" in the state, and to enforce the Consumer Financial Protection Act (12 U.S.C. § 5481, *et seq.*). AB-1864 also contains the new California Consumer Financial Protection Law, which makes it unlawful for covered persons or service providers to, among other acts, engage in unlawful, unfair, deceptive, or abusive acts and practices.

With the renewed focus by states on consumer financial protection, and new tools and resources, it is of critical importance to understand the process of a federal and state investigation. The authors Anthony Alexis and Matthew L. Levine of this paper previously led the Enforcement divisions of a federal and a state consumer financial services agency, respectively. During this time, their respective agencies conducted scores of investigations and brought multiple enforcement matters — some which settled, and some which resulted in litigation in administrative proceedings or court actions. In addition, the authors were directly involved with multiple investigations handled in parallel or jointly by the CFPB and state enforcement bodies.

Whether an investigation is brought by the CFPB, a state agency, or both jointly, each investigation takes on a "personality" (so to speak) that reflects the particular agency conducting it. A target or subject of an investigation has to make a number of key decisions in how to respond to such an investigation. One of the most significant is a decision at the outset as to the level of cooperation that it will demonstrate with the investigating agency. This decision can lead to vastly different outcomes, in our experience, for the target or subject of the investigation. Layered also into the entity's decision-making is whether the investigation is parallel, or jointly handled, by two or more agencies, which may interject unforeseen dynamics into the investigation that must be taken into consideration as the company evaluates litigation and settlement strategies.

This article first examines techniques and strategies for managing CFPB investigations generally. Second, we seek to provide insights on what may trigger an investigation. Third, the article examines techniques and strategies for managing CFPB investigations. This article focuses on CFPB investigations. A second article, in a forthcoming issue, addresses investigations by NYDFS.

I. AUTHORITY TO INVESTIGATE POTENTIAL VIOLATIONS OF CONSUMER FINANCIAL LAWS

In 2010, Congress passed the Dodd-Frank Act ("CFPA")[1] that created the CFPB. The CFPB has broad responsibilities for enforcing federal consumer financial laws. This includes supervisory and enforcement responsibilities for a suite of some 16 laws governing consumer financial services, including the CFPA (Title X).[2] In some instances, the CFPB became a primary federal regulator monitoring the consumer financial marketplace for compliance with laws governing consumer financial services and in the event of non-compliance, enforcing those laws against consumer financial services providers.

In addition to transferring a significant number of "known" laws, regulations, and rules to the CFPB, the CFPA created three "new" laws. The CFPB is authorized to "take any action . . . to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service" ("UDAAP").[3] In approximately seven years, the

[1] Pub. L. 111-203, 124 Stat. 1376 (2010).

[2] 12 U.S.C. § 5481.

[3] 12 U.S.C. § 5531. In addition to the CFPB's ability to file matters in district court for alleged violations of the CFPA, any state may also bring a civil action in its name to enforce provisions of the CFPA. 12 U.S.C. § 5552(a)(1).

enforcement of the CFPA has resulted in approximately 31 million consumers receiving $12.4 billion in consumer redress or debt relief. Further, the CFPB has ordered $1.2 billion in fines and penalties. The CFPB's published "enforcement" docket reveals that vast majorities of matters are for alleged UDAAP violations.[4]

UDAAP is the CFPB's primary enforcement mechanism, and it is imperative that UDAAP is understood by a lawyer representing a party before the CFPB. Two of the UDAAP prongs, "unfair" and "deceptive," have substantial precedential history as partial equivalences derived from the Federal Trade Commission Act,[5] which the FTC and Federal Prudential Regulators[6] enforce. The abusive prong did not exist prior to the CFPA.

Fortunately, eight years past the origins of UDAAP there are several sources for understanding abusiveness. These include public consent orders, CFPB administrative adjudications, district court opinions, the CFPB examination manual, published guidance, and most recently, a CFPB policy statement.[7]

II. TRIGGERS FOR AN INVESTIGATION

The CFPB has two tools at its disposal to monitor and trigger an investigation of allegations of consumer financial services violations. The tools are vastly different both in how the CFPB is able to obtain information from the subject and the implications for interacting with the CFPB to discuss resolution of the matter.

A. CFPB Examinations

The CFPB Office of Supervision maintains a team of examiners divided into four geographic regions, each of which is overseen by a director and conducts examinations of financial service companies regulated by the CFPB within its region.[8] The Office of Supervision maintains a strategic priority to determine which institutions and which consumer financial products to examine. Setting these priorities is important because it helps manage the resources of the Office and can identify to the industry what products the Office deems important. The Office generally bases its strategic plan and exam schedule on an assessment of the "risks" posed to consumers in the relevant product market.[9]

The examination process is structured and formal. The CFPB deploys examiners who meet with the company, review files, interview personnel, and conduct follow-up procedures. At the end of the examination process, the examiners may decide to recommend a public enforcement action for potential violations it identified during the examination. Following such a recommendation, the CFPB provides the company with a Potential Action Request for Response ("PARR") letter and requests a formal response from the company being examined.[10] Based on the result of the examination, the PARR letter, and the company's response to the PARR letter, the CFPB will decide whether to formally open an investigation. Senior executives at the CFPB who sit on the Action Review Committee decide to initiate an investigation.[11] When an investigation follows this process from a formal examination, there will be little surprise to the company regarding the source and subject matter of the investigation.

[4] CFPB, Enforcement Actions, *available at* https://www.consumerfinance.gov/policy-compliance/enforcement/actions/.

[5] 15 U.S.C. § 45(a)(1).

[6] The Federal Prudential Regulators with UDAAP enforcement authority are the CFPB, Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Depository Insurance Corporation and the National Credit Union Administration.

[7] CFPB, *Supervision and Examination Process Manual v.2*, Unfair, Deceptive, or Abusive Acts or Practices 2 (Oct. 2012), *available at* https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual.pdf (hereinafter CFPB Exam Manual); Statement of Policy Regarding Prohibition on Abusive Acts or Practices, 85 FR 6733-01 (Feb. 6, 2020).

[8] The regions are identified here: https://www.consumerfinance.gov/about-us/the-bureau/bureau-structure/supervision-enforcement-fair-lending/supervision-regional-directors/.

[9] 12 U.S.C. § 5512(b)(2).

[10] CFPB-2018-0004, *available at* https://files.consumerfinance.gov/f/documents/cfpb_rfi_supervision-program_022018.pdf.

[11] Summer 2015 Supervisory Highlights, § 3.1.4 (describing Action Review Committee Process), *available at* https://files.consumerfinance.gov/f/201506_cfpb_supervisory-highlights.pdf.

B. CFPB Enforcement Investigations

Separate from investigations following the examination process, there are several "organic" sources of CFPB investigations. As a general proposition, the CFPB only opens an investigation when it has access to facts that, if proven, would amount to a violation of a federal consumer financial law. The Office of Enforcement maintains a strategic plan to guide its goals for investigations across a wide market. The strategic plan is created by analyzing the financial services markets, cross-bureau collaboration with other offices, and the meeting of the senior team of the Office of Enforcement. It divides its work and investigations into core work that focuses on market segments and prohibited practices, matters that originated from the Office of Supervision, and Office of Enforcement priorities.

In addition, the Office of Enforcement monitors the CFPB's Consumer Complaint Database for problematic allegations against specific companies or concerns regarding industry trends.[12] Further, the CFPB monitors a Whistleblower and Tips portal.[13] The CFPB may also receive formal referrals from other state and federal agencies regarding potential violations of the CFPA. News reports and other publicly available information, such as the Better Business Bureau, can also provide the basis to investigate a company. Finally, the CFPB may be "invited" to investigate the entity by a state regulator or enforcement agency that is investigating or intends to investigate.

It is often the case that when an investigation surfaces organically, the company is surprised and may have no idea that violations may be occurring. That is, the first notice the company receives that it is a subject of a CFPB investigation is when it receives a civil investigative demand ("CID").[14] The CID is the primary investigation tool of the CFPB and will drive the scope of an investigation into the company from the outset.

The manner in which a company learns of an investigation does matter. In the case of an examination that shifts through a formal process to an investigation, a company has an understanding of the potential violations and a baseline understanding of why some members of the CFPB thought the specific conduct might violate the law. This background helps manage the investigation process and provides needed context to advise the company regarding other similar enforcement actions, the potential scope and magnitude of the potential violation, the particular laws that are implicated, and possibly how to resolve the matter.

In the case of an organic investigation, the company is under extreme pressure to comply with the CID and its rigid timeline for compliance.[15] Initial efforts will require a search for relevant information, identification of witnesses and other knowledgeable persons within the company, and trying to determine what legal violation could be implicated in the investigation. Trying to comply with the CID while simultaneously advising the company on the legal and factual risks that it faces in a compressed period is very challenging, but critical.

III. THE CFPB'S CIVIL INVESTIGATIVE DEMAND PROCESS

To the target of a CFPB CID, the process seems byzantine and complex. A CID has multiple rules, many inflexible tight deadlines, and is accompanied by technical production requirements. However, despite the angst a target may feel upon receiving a CID, the baseline of the process is to drive a quick conclusion of the investigation — which most targets want — by requiring fast compliance with producing information to the CFPB. The CFPB is authorized to issue a CID to any person or entity it has reason to believe is in possession of information relevant to a CFPB investigation.[16] A CID contains a "notification of purpose" that sets forth the nature of the conduct constituting the alleged violation that is being investigated.[17] This means that the CFPB, in theory, has revealed the particular statutes, regulations, and rules that it alleges have been violated along with a vague or opaque statement of the basis for its suspicion that the particular provision of law has been violated. While the CFPB has stated its intention to be more forthcoming in describing the nature of the investigation in the CID itself in the Notification of Purpose section of the CID,[18] for companies that offer multiple products and services, the vagueness of the notice might at best narrow the suspicion to a particular product (*e.g.*, credit cards or

[12] 12 U.S.C. § 5493(b)(3)(A).

[13] https://www.consumerfinance.gov/policy-compliance/enforcement/information-industry-whistleblowers/.

[14] 12 C.F.R. § 1080.6.

[15] 12 C.F.R. § 1080.6(c) & (e).

[16] 12 U.S.C. §5562 (c)(1).

[17] 12 C.F.R. § 1080.5.

[18] https://www.consumerfinance.gov/about-us/newsroom/cfpb-announces-policy-change-regarding-bureau-civil-investigative-demands/.

mortgage loans). The CID permits the CFPB to request documentary material, tangible things, compilation of written reports, answers to questions, and oral testimony.[19]

There are three distinct tasks the recipient of a CID must accomplish in parallel tracks from the outset of the CID process: (1) managing the procedural tasks driven by the CFPB; (2) finding the requested information sought by the CFPB; and (3) learning about the potential violations being investigated.

CFPB Driven Tasks and Deadlines: The CFPB's initial demand requires that the relevant universe of relevant documents must be preserved. This includes the suspension of routine document and record destruction (both hard documents and electronic records), which requires immediately issuing a preservation notice to the relevant custodians, and assignment of IT personnel to ensure the company is complying with the document preservation notice.

Meet and Confer with CFPB Staff: The CFPB requires a Meet and Confer with the relevant attorneys no later than 10 calendar days upon the receipt of the CID.[20] This means that the company and its lawyers need to review the scope of the CID and identify all critical issues that need to be addressed in the first meeting with the CFPB. The CFPB requires, and it is a sound idea to make sure, that the most knowledgeable persons about the company and the subject matter of the CID are present at the Meet and Confer.

As this is the first in-person interaction with the CFPB, it is important to achieve the following: (1) inform that the company intends to cooperate with the CFPB staff (if that is the desired path); (2) gain a sense of the CFPB's concerns, including the origins of the investigation if unknown (such as a whistleblower or public complaint), and if possible, potential theories of unlawful conduct; (3) educate the CFPB about the company, its product, the industry, and its policies and procedures; (4) layout particular issues related to the burden to the company of the investigation; (5) educate the CFPB regarding timing and sequencing of producing information; and (6) begin a relationship with the CFPB staff for subsequent conversations.

During the Meet and Confer, the company should also discuss with the CFPB staff modifications to the CID. The Notification of Purpose is the critical statement by the CFPB regarding the scope and nature of the investigation. The company should use the notification to position itself to discuss issues related to the scope of the CID requests, whether the requests are clearly inappropriate given the subject matter of the CID, the non-existence of categories of information, the lack of subject matter jurisdiction, additional time needed to comply with the CID, and other legitimate concerns to raise before making formal objections or pursuing a motion to quash.[21]

While discussing with the CFPB a "rolling" production or a modified deadline to comply with the CID, the company and counsel should consider: (1) what is the truly realistic deadline for complying with the CID; (2) does information exist, and if not, can it be credibly recreated or adequately substituted; (3) if proposing a rolling production, what is it that staff wants to see first — prioritizing certain documents may eliminate the need produce others; (4) does the CFPB use phrases like "all" regarding some categories of requested information, and does staff truly mean "all" or some subset; (5) where requested datasets would require the production of massive amount of information, would sampling suffice to meet the CFPB's needs; (6) is the time period set forth in the CID truly necessary (for example, the product subject to the investigation did not exist for all of the time period set forth in the CID); and (7) what information is subject to privilege.

Petition to Quash or Modify the CID: After the Meet and Confer, if the company feels it is in its best interest, it may file a petition to set aside or modify the petition. However, absent an extension from the Head of Enforcement or one of the Deputies, it must be filed with the Executive Secretary of the CFPB within 20 calendar days after service of the CID.[22] This creates an enormous burden on the company and its counsel to quickly draft a competent petition.

The process for filing a petition is set out in the CFPB's rules.[23] The CFPB puts a premium on requiring that the Office of Enforcement and the company negotiate various issues surrounding the modification and petition. A filed petition to modify a CID should include all factual and legal objections to the CID in the form of a legal brief, and be supported by affidavits and

[19] 12 C.F.R. § 1080.6.

[20] 12 C.F.R. § 1080.6(c).

[21] 12 C.F.R. § 1080.6 (c)(3) requires that before an issue can be raised in a petition to set aside or modify that it was raised during the meet and confer process.

[22] 12 C.F.R. §1080.6(e).

[23] *Id.*

supporting documents. The petition should also set forth a signed statement from the company of all good-faith efforts to resolve the issues raised in the petition with the CFPB staff.[24] This includes a description of the attempts to resolve the dispute, all issues that had been resolved between the company and the staff, as well as the dates, time, participants, and location of prior meetings with the CFPB where the matters were discussed.[25]

After the petition is filed, compliance with the portion of the CID that is being challenged is stayed pending the Director of the CFPB's decision and order.[26] Often, the petitions are substantive and relatively complex, and will take the Director a substantial period of time before issuing a decision. To date, very few petitions have resulted in a decision to completely set aside the CID demand. As a result, while waiting for a decision from the CFPB Director, the company may find it in its best interest to cooperate with the CFPB on a voluntary basis to set a reasonable schedule for complying with the remaining portions of the CID not being challenged.[27] It is possible that such continued cooperation could result in discussions to resolve the dispute and the petition being withdrawn. Cooperation may also shorten the investigation period from pending longer than necessary and lead to a faster closing of the CFPB's work.[28]

Oral Testimony: A CID resulting in testimony is called an investigational hearing.[29] An investigational hearing is somewhat of a hybrid between a deposition and a grand jury proceeding. First, it is confidential. Second, it is transcribed under oath. Third, the Office of Enforcement controls who can be present at the hearing other than the witness and the lawyer. Fourth, although an attorney for the witness may be present and can advise the witness, the attorney generally cannot make an objection unless the objection relates to "protecting a constitutional or other legal right or privilege," and cannot provide advice to the witness while a question is pending.[30] Lastly, because of the confidential nature of the proceeding, the CFPB closely guards documents that were presented during the hearing and typically limits the distribution of the transcript solely to the witness, who has a designated time period to review and make changes to the transcript.

IV. COMPLYING WITH THE INVESTIGATOR'S DOCUMENT DEMANDS

Regardless of the CFPB CID's timeline and process set forth or agreed upon, counsel is going to need to find all relevant information sought by the CID. Although not necessarily an internal investigation, counsel needs to investigate the facts surrounding the CID. That is, it is necessary that counsel interviews key personnel at the company and reviews critical documents to develop a preliminary assessment of whether the company has potentially violated the law, develop an early action plan for handling the enforcement investigation, and advise the company regarding its risk and potential exposure.

The most likely source for the information is company employees who have knowledge of the matters under investigation. If possible, before speaking with or interviewing these employees, critical documents should be gathered and reviewed. Once the witness is oriented to the purpose of the interview, counsel should spend time trying to determine all of the documents and types of documents (e-mails, hard copy records, and even text messages, for example) that would be relevant to the CID.

After interviewing relevant employees, reviewing relevant policies, procedures, and other baseline documents (including consumer complaints from internal and public sources, such as BBB or the CFPB Complaint Portal), counsel should have a clearer picture of how to develop a plan to respond to the investigation

[24] The company and counsel need to discuss the risk of having the fact of the CFPB's investigation becoming public. Absent a showing of good cause for not disclosing the identity of the petitioner, the petition itself and the CFPB Director's order granting or quashing the petition are public documents. The disclosure could have unintended consequences not anticipated by the company, including reporting requirements, class-action litigation, private litigation, interest by other federal regulators such as the SEC, and state regulators and enforcement bodies.

[25] 12 C.F.R. § 1080.6(e) and (1).

[26] 12 C.F.R. § 1080.6(f).

[27] In the case of complete non-participation or compliance with the CID by the company, the CFPB has an obligation to file in the appropriate district court a motion to seek compliance with the CID in order for the investigation to move forward. 12 U.S.C. § 5562 (e); 12 C.F.R. § 1080.10.

[28] Although the petition may relate to the CFPB getting some information directly from the company, other third-party sources of information may not have the same level of investment in the outcome of the investigation and may provide information to the CFPB without objection and delay. Under these circumstances, the CFPB might only need information from the corporation to round out or complete its investigation.

[29] 12 C.F.R. § 1080.7.

[30] 12 C.F.R. § 1080.9(b)(2).

and better advise the client. Counsel and company should consider two issues to determine if an early remediation to the problem is possible. First, is there a better disclosure for a product, or are there policies and procedures that are incomplete and can be modified to reduce potential regulatory violations or gaps? Although there may be a perception that remediation or corrective steps are an "admission" of wrongdoing, it should be balanced against the consumer benefit that would result in reducing adverse harms to consumers.

Second, counsel and company should consider the advantage of making a disclosure that the investigation has concluded. Such a disclosure can benefit company morale, assuage investor concerns, and bring a host of other benefits to the company. In June 2013, the CFPB issued a Bulletin called the "Responsible Conduct Bulletin: Self-Policing, Self-Reporting, Remediation, and Cooperation."[31] The Bulletin describes activity that a company can engage in before and after the conduct has occurred that the CFPB will consider favorably in exercising its enforcement discretion. While maintaining prosecutorial discretion, the CFPB noted that (depending on the circumstances) it will look favorably at companies who: (1) self-assess through use of resources to prevent violations of consumer financial laws or for early detection of violations; (2) self-report promptly to the CFPB of potential violations; (3) took steps to remediate and fix the problem that caused the consumer financial law violation (including redress for adversely impacted consumers); and (4) cooperated with the CFPB. It may be to the company's advantage to disclose what has been uncovered and what the company did to remedy the problem. The benefit could lead to a range of positive outcomes, such as a shorter investigation, a decision to decline to proceed with a public enforcement matter, reduced penalties or restitution, or a shorter period of monitoring.

V. LEARNING ABOUT THE POTENTIAL VIOLATIONS SUBJECT TO A CFPB INVESTIGATION.

To understand the scope of a CFPB investigation and the potential violations at issue, it is important to understand what it is driving the CFPB's agenda at that moment in time. One of the primary and constant drivers of the CFPB's enforcement arm is to return money to consumers who may have been adversely impacted by a questioned behavior. The enforcement arm also seeks to select matters that communicate to the industry and the public the regulatory and enforcement policies the CFPB is then emphasizing. In this way, the CFPB can message to industry participants how it views the law and how it views how the law should be followed.

The sources for this type of information are plentiful. First, it could be in the CFPB's (or another regulator's) strategic plan or stated emphasized priority.[32] The best way to enunciate a potential risk that draws regulatory and investigation scrutiny by the CFPB is to identify the product or service and type of violation the regulation views as causing profound and immediate harm to consumers — especially if left unchecked. The CFPB publishes its views on what it considers to be a priority in multiple ways. These include:

- CFPB officials' speeches, statements, or blog posts. This is a critical manner of communication. Very little is said by CFPB officials at events that is not officially cleared by the CFPB.

- CFPB's Supervisory Highlights. These frequently direct the reader to various confidential supervisory actions where it informed an examined institution that it was violating the law and describes why the CFPB felt the law was being violated and what type of remediation it wanted the institution to take.

- Reports to Congress. In semi-annual reports to Congress the CFPB provides statements regarding challenges in the consumer financial services market. In addition, it will sometimes include a description of "Plan for upcoming initiatives."

- Recent CFPB or other state and federal regulators' enforcement actions. A public announcement that a company has been sued or settled a matter based on particular activity is a very strong signal how the CFPB might view similar conduct.

- The CFPB and other state and federal agencies publish bulletins and blog posts that describe expectations of business conduct that complies with the law. Reviewing those publications frequently

[31] CFPB Bulletin 2013-06 (*available at* https://files.consumerfinance.gov/f/201306_cfpb_bulletin_responsible-conduct.pdf). The CFPB updated, revised, and re-released the Bulletin on March 6, 2020. CFPB Bulletin 2020-01, *available at* https://files.consumerfinance.gov/f/documents/cfpb_bulletin-2020-01_responsible-business-conduct.pdf.

[32] For the most part the CFPB employs a risk-based strategic plan. 12 U.S.C. § 5512(b)(2). It looks where the riskiest activity is and monitors it for compliance with the law.

provides clues of why the CFPB may have served a CID upon a company.

- The CFPB Complaint Database, the FTC aggregated consumer complaint data (released quarterly), and state agency complaint data. These sources frequently provide trends and signals to problems the CFPB would like to address.

- Consumer complaint portals internal to the company. The CFPB notes "[f]inancial service providers should be responsive to complaints and inquiries from consumers."[33] For companies that have consumer complaint or interaction portals for phone calls, letters, and e-mails where consumers can raise issues about their experiences with the company, reviewing these interactions are a rich source of identifying issues.

Again, reviewing these sources of information could provide a roadmap to what the CFPB is investigating and could provide the basis for counsel to provide strong advice to the company.

VI. DRIVING A CFPB INVESTIGATION TOWARD CONCLUSION

Once the CFPB has gathered all the information it needs, its next step is to determine whether there is a cognizable violation and, if so, whether the matter should result in a public enforcement proceeding. The rationale for closing without further action could be based on several factors, including lack of a violation; a relevant statute of limitation bars the violations; proceeding would serve no substantial interest; the company has been subjected to enforcement in other forums; and factors related to Responsible Business Conduct.[34]

A. The NORA process: benefits and risks

If the CFPB wants a company's input regarding its decision to proceed to an enforcement action, it has developed a process very similar to the SEC's Wells process,[35] known as the "NORA" process (Notice and Opportunity to Respond and Advise), to allow for the company to provide its input on the CFPB's decision. The CFPB described the NORA process in a November 2011 Bulletin as a mechanism to give subjects under investigation opportunity to respond to CFPB concerns about its actions.[36] It provides the company with notice of the alleged violations the CFPB identified in its investigation and permits the company to provide a written statement as to why the CFPB should not proceed with a public enforcement action.

Traditionally, the NORA process commences when a person from the CFPB calls the company's designated representative and explains that it is prepared to request that the Director give it authority to file an action in district court or administratively. During the conversation, staff can provide what facts it is relying upon in pursuing its claim, and the statutes or regulations it asserts were violated. The call is followed up by a letter triggering the NORA process. The company then has 14 days to submit a written response that focuses on reasons of "law or policy" why the CFPB should not take action against it.[37] The submission is limited to 40 pages. Factual assertions in support of the NORA response need to be made under oath.

The benefit of the process is that the Office of Enforcement may be persuaded not to pursue the matter at all, or to narrow the scope or claims in any enforcement proceeding. In addition, lesser but positive outcomes may develop and include not pursuing certain charges or seeking lesser charges. Most likely, it will establish a framework for settlement discussions.

In addition to a written submission, it may be to the company's advantage to appear in person to the CFPB staff to make an oral presentation. During that meeting, there is an opportunity to "read" the staff's reaction to legal, factual, or policy arguments and frame the discussion to address what the staff's concerns are — which is not necessarily the case with a written submission. Counsel might be able to present additional materials during an in-person meeting, post-NORA submission. The ability to humanize the presentation and present a "face" of the company should not be underestimated. In addition, inviting the CFPB to ask questions also makes the presentation useful. Even if the CFPB decides not to decline or close the matter, the company may have created a useful framework for commencing settlement discussions.

[33] CFPB, Supervisory Highlights, at 10 (Summer 2013).

[34] CFPB Bulletin 2020-01.

[35] 17 C.F.R. § 202.5(c); SEC Enforcement Manual section 2.4.

[36] CFPB Bulletin 2011-04 (NORA Bulletin), November 7, 2011.

[37] Although the company has 14 days to submit its NORA submission, it typically must notify the CFPB within seven days that it plans to make a NORA submission. CFPB Enforcement Policies and Procedure Manual at page 96.

Regardless of whether the company opts to make an oral or written submission, the NORA submission will not be ignored and CFPB leaders above the staff level will be aware of the status of the investigation and the arguments made in the NORA response.

The risk of a NORA submission is that as a matter of policy and law, the CFPB treats the information as an admission by the company.[38] That could have unintended consequences later.[39] For example, the NORA may provide the CFPB staff a roadmap of weaknesses in its investigation. In those situations, the staff might be able to strengthen its case before filing any adverse action. Lastly, in some scenarios it may cause the premature revelation of company defenses that could undermine or weaken those defenses later.

B. "Appealing" staff decisions to CFPB executives

Seeking senior leadership's attention to your individual matter and the proposed outcome by CFPB staff may be challenging. There is no "right" built into the policies and procedures at the CFPB to obtain a meeting with a person above the staff level. However, the CFPB does want investigation subjects to be heard depending on the issue at stake. Meetings should not be used to undermine the ability of the staff to perform its work, including the flexibility of the staff to make certain decisions and to promote efficient use of CFPB's resources, ensure uniformity of results and outcomes, and should not be perceived as causing delay. At its core, a request for a meeting at the supervisor level (Assistant Director or Associate Director) should be reserved for issues that are unique; raise significant policy issues; bring to the leadership issues related to unfair or unprofessional behavior by the staff; involve complex legal or factual issues; or flag important issues related to the consumer financial service product or practice in dispute. It should be noted that obtaining a meeting might result in some relief. However, it is highly unlikely that a company will get more than one meeting with the senior leadership, so weighing what to elevate to senior leadership should be considered well in advance. The company should also carefully weigh:

- What stage is the matter, including is there an efficient way to communicate to the senior leadership through another mechanism such as the NORA submission;
- Does the meeting truly present an opportunity for the company to present its views in an unfiltered way that is not available in any other manner;
- Are issues that are going to be raised, ones that were not capable of being resolved with the line attorney (staff) or the appropriate deputies assigned to the matter; and
- Would the meeting result in efficiency or would it result in the perception of delay.

VII. RESOLVING A CFPB INVESTIGATION

The CFPB has a few options to resolve an open investigation. It can decline the matter, it can settle the matter, or it can file suit. If it files suit it can file the matter administratively or in a district court. The CFPB has litigation authority granted by statute to proceed in district court.[40] The CFPB has some flexibility to select a venue, which provides it with a strategic advantage. However, typically, the suit is commenced where the company has its principal place of business. Once it files suit, the CFPB has a wide array of legal and equitable relief it can seek. The CFPA permits the CFPB to seek the following remedies: rescission or reformation of contracts; refund of money or return of real property; restitution; disgorgement or compensation for unjust enrichment; payment of other monetary relief; public notification of the violation; limits on the activities or functions of the person or company; and civil money penalties.[41]

The calculation for civil money penalties is set forth by statute. There are three tiers of penalties that may be calculated per violation, with the tier dependent on the level of the company's knowledge that its conduct violated the law. Specifically, the CFPB can recover civil fines of up to $5,000 per violation of the CFPA; a second tier of up to $25,000 per violation for recklessly violating the CFPA; and a third tier of up to $1,000,000 for knowingly violating the CFPA.[42] The CFPB has the authority to settle the penalty amount. When considering where within the range to penalize the

[38] In joint CFPB state regulator investigations and parallel civil-criminal investigations a statement that may cause the CFPB to reconsider its position regarding bringing a civil or administrative action might strengthen a criminal prosecution or a state matter.

[39] The information could be subject to disclosure pursuant to the Freedom of Information Act ("FOIA").

[40] 12 U.S.C. § 5564.

[41] 12 U.S.C. § 5565(a)(2).

[42] 12 U.S.C. § 5565(c).

company, the CFPB can look at several mitigating factors, such as:

- the size of the financial resources of the company and the good faith of the company;
- the gravity of the violation;
- the severity of the risks to or losses of the consumers; and
- the history of previous violations.

In addition to district court, the CFPB is authorized to resolve the matter through its administrative tribunal.[43] Administrative proceedings are governed by rules promulgated by the CFPB.[44] Proceeding administratively has several challenges. For one, it is a process driven on an extremely tight timeline. It is commenced by filing a "notice of charges" rather than a typical complaint filed in district court.[45] For another, the availability of witnesses to present live testimony may be limited, requiring the parties to instead depose witnesses. Discovery is also very limited. In addition, even after the hearing officer renders his opinion the parties may still have to argue their positions before the Director before a final decision of the CFPB is rendered.[46] Although the parties are able to file an appeal in an appropriate court of appeals, the scope of appeal is extremely narrow pursuant to the Administrative Procedures Act.[47]

VIII. SETTLEMENT WITH CFPB

A vast majority of all CFPB matters settle pre-filing of any adverse action in district court or administratively. Getting authority to settle can be described briefly, as the staff presents a memorandum with the facts, law, NORA submission, and any policy issues to the Director for a decision. The Director reviews the memorandum and considers any Bureau-wide input, and then provides the enforcement staff authority to sue or to settle along specific parameters.

A typical settlement contains three components: (1) the amount of consumer harm that should be redressed; (2) the civil penalty that should be levied against the company; and (3) the conduct provisions that the company needs to undertake.

One of the first things a party should grasp going into the settlement negotiation is determining, based on the CFPB's theory, the total number of consumers harmed and extent of consumer harm. This is a difficult and subjective process resulting in significant negotiation with the CFPB. In some cases, the consumers are harmed in an equal amount across the board. In others, consumers may have been harmed, but their "injury" might be beyond a relevant statute of limitation.

In the earlier days of the CFPB, settlements where the company could only describe the relief to impacted consumers in a broad context were sometimes disadvantaged by having the CFPB insist that a floor for settlement be established. Any amount provided to consumers would be sent to the United States' general fund for distribution. In order to prevent that dynamic, closely identifying adversely impacted consumers during the settlement discussions may help drive a more targeted, and less broad, consumer relief provision.

The conduct provisions are critical. In some cases, conduct provisions can be as simple as an injunction to "stop the unlawful practice." Some conduct provisions can have a real impact on the company that should be understood before a settlement negotiation. For example, there could be orders to create a compliance program (including hiring a consultant to help devise such a program). Other conduct provisions that could cause difficulties on a going-forward basis that need to be fully understood before settlement negotiations include: (1) suspension from a particular industry for a defined period of time (the so-called "penalty-box"); (2) suspension from a particular industry for an undefined period of time until certain conditions are met; (3) writing-off and forgiving debts due from consumers; (4) installing a monitor to oversee parts of the company's operations; (5) correcting forms and templates; (6) changing call scripts; (7) prohibiting participation in legal activity or products or services, such as loan servicing, for a period of time; (8) hiring consultants; and (9) conducting certain type of due diligence before engaging in certain consumer financial services or products. Typically, for a non-depository company, the covered period will be for five years.

In the appropriate case, the company can consider options, such as conceding to a marginally higher civil penalty for fewer (and discretionary) conduct provisions.

[43] 12 U.S.C. § 5565.

[44] 12 C.F.R. § 1081.

[45] Pursuant to 12 C.F.R. § 1081.400 the hearing officer shall submit a recommended decision no later than 90 days after the filing of the post-hearing briefs and in no event later than 300 days after the filing of the notice of charges.

[46] 12 C.F.R. § 1081.405.

[47] 12 U.S.C. § 5563.

Although the penalty is paid out of pocket and is likely not tax deductible, it provides the company with certainty about the scope and length of the CFPB order. The company should also consider the opposite — taking on more conduct provisions (many of which that have real costs) and requesting a lower penalty so the conduct provisions can be satisfied. While that could inject some uncertainties, it could help the company manage reputation issues surrounding a higher penalty.

IX. JOINT INVESTIGATIONS

Under 12 U.S.C. § 5552 of the CFPA, states have the authority to investigate and, where appropriate, bring suit against consumer financial services companies for violation of the CFPA. Frequently, the CFPB investigates matters jointly with other regulators and attorneys-general offices.[48] NYDFS is a common partner with the CFPB in investigating and resolving consumer financial services issues, a practice that will likely increase given the NYDFS current focus on consumer issues.[49] To facilitate what the drafters of the CFPA envisioned would be a regular practice, the CFPA permits the CFPB to share information with state regulators and attorneys-general offices. This is in addition to other avenues of information exchanges, such as common interest agreements and memoranda of understanding.[50]

In light of the fact that the two parties may be working in concert to investigate the perceived violation, the company should remain alert for developments in both agencies. In addition, the company should assume that what has been shared with the CFPB is being shared with the NYDFS. The company should be very strategic regarding how it communicates with either or both agencies. For example, attempts to pit the two agencies at odds might be difficult and counterproductive. However, there are some areas of the investigation that might be outside of the jurisdiction of the other.

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A companion article on NYDFS investigations will appear in a forthcoming issue. ■

[48] On April 23, 2014, NY DFS became the first state regulator to publicly enforce a UDAAP action pursuant to the CFPA in *Lawsky, Superintendent of Financial Services of the State of New York, v. Condor Capital Corporation*, 14 CV 2863 (CM) (JCF).

[49] *Available at*: https://www.dfs.ny.gov/reports_and_publications/press_releases/pr2001091.

[50] *Available at*: https://files.consumerfinance.gov/f/201212_cfpb_statement_of_Intent_for_sharing_information_with_sbfsr.pdf.