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Early 2014 CFPB Activity Signals Tough Times

Law360, New York (March 24, 2014, 12:24 PM ET) -- The Consumer Financial Protection Bureau's 2014 enforcement actions show an active and aggressive agency with an enforcement strategy covering a wide variety of consumer lending areas. Like the previous year, the CFPB appears intent on communicating to all consumer lending market participants that no matter the size or scope of the business or the alleged violation, the CFPB will be vigilant with its Dodd-Frank mandate to regulate and police the consumer financial arena.

Tough Penalties for Fidelity Mortgage Corp.

On Jan. 16, the CFPB issued its first enforcement order of 2014 against a St. Louis mortgage lender, Fidelity Mortgage Corp., and its president, Mark Figert, signaling its ongoing commitment to actively police the consumer lending industry. The FMC consent order resolves the CFPB's threatened administrative proceeding stemming from its investigation of the alleged "kickback" scheme between FMC's predecessor and an unnamed Missouri bank.[1]

According to CFPB, the Missouri bank began outsourcing its residential mortgage lending business to Fidelity in early 2010 which, at that time, was owned and managed by Figert. Under their outsourcing arrangement, the bank referred all of its customers who were seeking a residential mortgage loan to Fidelity.

Fidelity leased office space within the bank's facility to handle the referrals, and all referrals were originated for the bank. In lieu of a fixed rent payment for use of the bank's office space, Fidelity's "rent" was tied to the volume of loans that Fidelity closed from the bank's referrals — i.e., the higher the volume of new loan originations, the higher "rent" payable to the bank.[2]

For the nine-month period from March 2012 through November 2012, CFPB found that Fidelity's "rent" payments averaged $1,350 per month as compared to market rent of $600-$900 per month for the same or similar office space.[3] Thus, using CFPB's figures, Fidelity paid the bank on average between 150 percent and 225 percent of the true market rent for use of the bank's office space, with excess rent amounting to a "kickback" for mortgage loan referrals in violation of Section 8(a) of the Real Estate Settlement Procedures Act.[4]

For background, RESPA Section 8(a) prohibits the payment of any "fee, kickback or thing of value" in return for the referral of business related to real estate settlement services.[5] Violations are subject to both criminal and civil penalties.

There are specific exceptions in Section 8(c), including one for "the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed." Here, however, CFPB drew from a June 1996 policy statement from the U.S. Department of Housing and Urban Development to determine that a significant portion of Fidelity's "rent" was merely a "disguised referral fee" in an attempt to circumvent Section 8(a).

Under the consent order, the respondents agreed to pay $81,076 for their roles in the scheme.[6] This sum includes disgorgement of $27,076 in origination fees that Fidelity earned from the kickback scheme, plus a $54,000 civil penalty. Additionally, the respondents agreed to a broad injunction prohibiting them from violating RESPA Section 8 in the future, subject to additional monetary penalties.

The Bank of Sullivan acquired Fidelity's assets in 2012 and now owns FMC. The Bank of Sullivan's president and CEO, Mike Hoffman, discussed the consent order in a recent press release: "The cost of defending a claim made by the federal government is too much for a small financial institution to afford. Therefore we decided that it was in the best interests of Fidelity to settle the claim."[7]

Tough Talk From the CFPB

CFPB Director Richard Cordray described the FMC kickbacks as "hampering fair market competition" and "unnecessarily increasing the cost of getting a mortgage."[8] In a press release associated with the Jan. 16 consent order, Cordray commented further that “[t]he Consumer Financial Protection Bureau will continue to take action against schemes that steer consumers to lenders through unscrupulous and illegal business practices.” This follows the CFPB's December 2013 actions against American Express for "deceptive marketing" and National City Bank for "discriminatory mortgage pricing."[9]

If anything, the stern tone set by Cordray in these prior enforcement actions as well as his comments concerning the FMC enforcement action has been accentuated by recent comments from Deputy CFPB Director Steven Antonakes.

In remarks to the Mortgage Bankers Association on Feb. 19, Antonakes described how he is "deeply disappointed by the lack of progress that the mortgage servicing industry has made" over the past eight years. While he did not cite any specific enforcement actions, Antonakes indicated that consumer lending — and, specifically, mortgage lending — will continue to be a priority for the Bureau in 2014: "[CFPB] enforcement actions to date have already ordered the return of more than $1 billion to consumers and … [m]ortgage servicing rule compliance is a significant priority for the Bureau."[10]

Antonakes' comments and the bureau's continued use of its enforcement powers reflect the bureau's interest in continuing the seemingly frenetic pace of action against market participants. Clearly, the bureau will continue to use all of its legislative tools to police the entire consumer lending industry. These tools should include: (1) aggressive responses to consumer complaints, (2) rulemaking, (3) education, (4) supervision and (5) enforcement actions.

We also believe that the CFPB plans to use its "bully pulpit" to make sure that consumer lending market participants are paying close attention. Despite the relatively modest fine imposed on FMC (by consent) on Jan. 16, Cordray's comments about the enforcement action received wide coverage in the financial press.[11] Notably, the press release announcing the Jan. 16 consent order highlighted the potentially severe financial penalties for compliance violations.

While the fine was relatively small compared with some of the bureau's other actions in 2013, the bureau is clearly signaling that enforcement-related costs for market participants will dwarf the economic benefit derived from the violation(s) and that penalties imposed by consent will be much less severe than those imposed after litigation.[12]

Indeed, less than three weeks later, the CFPB has sued the for-profit college chain, ITT Education Services Inc., claiming that the institution engaged in "predatory student lending."[13] The bureau's willingness to move into this area of enforcement should not surprise anyone as Cordray indicated in his comments to the House Financial Services Committee that the bureau will investigate "credit reporting, debt collection, money transfers, bank accounts, and services, credit cards, mortgages, vehicle and other consumer loans, and private student loans."[14] During his testimony, Cordray noted that the CFPB had received over 270,000 consumer complaints in these industries.

Tough Luck for the Unprepared

The CFPB's consent orders and the related press releases reveal several economic realities for banks and other financial institutions in the mortgage and consumer lending arena.

First, the CFPB continues to demonstrate its commitment to investigating and pursuing potential violations of consumer finance laws regardless of scope or magnitude. Second, institutions that become targets of a CFPB investigation may steer toward a consent order rather than engage in protracted litigation, particularly when targets of the CFPB weigh the significant penalties at the CFPB's disposal in the event of an adverse decision.

When Cordray testified to the House Financial Services Committee, he gave an important insight into how the bureau views its role in the marketplace. He declared that "[t]he central concept behind this undertaking is our belief that compliance with regulations is a concern we all share, because successful compliance is good for everyone — consumers, industry and regulators."[15] With that backdrop, every participant in the consumer lending market should consider whether its current compliance efforts are adequate.

As you and your organizations pay attention to evolving CFPB compliance requirements, it is important to not lose sight of the bureau's announced enforcement actions. We urge our clients to proactively initiate internal reviews of all current financial operations, regardless of scope or size, to ensure compliance and avoid costly enforcement proceedings and fines.

If you have not already done so, the first quarter of the year is a great time to review internal compliance policies and procedures to protect against the type of enforcement actions discussed above. Market participants must remain informed of developments in the regulatory arena and review internal policies and procedures to make sure they are up to date with both the spirit and letter of the CFPB’s regulations and enforcement actions.

The proactive market participant does not rely on luck to avoid a CFPB investigation. Nor should response to an enforcement action be the first occasion for a review of your current lending and servicing business practices. If you are a servicer, lender or other market participant in the consumer lending arena, we recommend a thorough review by your advisers and compliance professionals to ensure compliance with the enforcement actions, rules, and regulations emanating from the bureau on virtually a weekly basis.

—By Kevin A. Stine and David W. Adams, Baker Donelson Bearman Caldwell & Berkowitz PC

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[1] U.S. Consumer Financial Protection Bureau (2014 January) Administration Processing File No. 2014-CFPB-0001. (http://files.consumerfinance.gov/f/201401_cfpb_consent-order_fidelity.pdf)

[2] Id.

[3] Id.

[4] 12 U.S.C. § 2607(a).

[5] Id.

[6] Fidelity is ordered to pay the entire sum. Figert is jointly liable for the $54,000 penalty.

[7] Lisa Brown, Fidelity Mortgage Fined Over Referral Arrangement, Jan. 17, 2014, http://www.stltoday.com/business/local/fidelity-mortgage-fined-over-referral-arrangement/article_86abc20a-45dd-542f-9042-409a9fb6f0c7.html.

[8] U.S. Consumer Financial Protection Bureau, Press Office "CFPB Takes Action Against Mortgage Kickbacks" [Press Release] Retrieved from http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-mortgage-kickbacks/

[9] U.S. Consumer Financial Protection Bureau, Press Office "CFPB Orders American Express to Pay $59.5 Million for Illegal Credit Card Practices" [Press Release] Retrieved from http://www.consumerfinance.gov/newsroom/cfpb-orders-american-express-to-pay-59-5-million-for-illegal-credit-card-practices/; U.S. Consumer Financial Protection Bureau, Press Office "Prepared Remarks of CFPB Deputy Director Steve Antonakes at Protecting Nevada's Consumers: A Common Ground Conference" [Press Release] Retrieved from http://www.consumerfinance.gov/newsroom/prepared-remarks-of-cfpb-deputy-director-steve-antonakes-at-protecting-nevadas-consumers-a-common-ground-conference/

[10] U.S. Consumer Financial Protection Bureau, Press Office "Prepared Remarks of CFPB Deputy Director Steve Antonakes at Protecting Nevada's Consumers: A Common Ground Conference" [Press Release] Retrieved from http://www.consumerfinance.gov/newsroom/prepared-remarks-of-cfpb-deputy-director-steve-antonakes-at-protecting-nevadas-consumers-a-common-ground-conference/

[11] Rulffes, Angela (2014 January 16) "Rental Agreement Gets Missouri Lender in Hot Water" RESPA News.

[12] U.S. Consumer Financial Protection Bureau, Press Office "CFPB Takes Action Against Mortgage Kickbacks" [Press Release] Retrieved from http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-mortgage-kickbacks/

[13] U.S. Consumer Financial Protection Bureau, Press Office "CFPB Sues For-Profit College Chain ITT For

Predatory Lending” [Press Release] Retrieved from http://www.consumerfinance.gov/newsroom/cfpb-sues-for-profit-college-chain-itt-for-predatory-lending/

[14] U.S. Consumer Financial Protection Bureau, Press Office “Written Testimony of CFPB Director Richard Cordray Before the House Committee on Financial Services” [Press Release] Retrieved from http://www.consumerfinance.gov/newsroom/written-testimony-of-cfpb-director-richard-cordray-before-the-house-committee-on-financial-services/

[15] Id.
