NEWS

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CFPB Focus

May 2016

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CFPB and Other Regulators Warn Banks about Customer Deposit Errors

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On May 18, 2016, five federal banking agencies issued guidance on how banks and other financial institutions should handle customer account deposit discrepancies. In their Interagency Guidance Regarding Deposit Reconciliation Practices, the agencies stated that they expect financial institutions to adopt policies and practices to avoid and resolve discrepancies to treat deposit customers fairly.

That the banking agencies – the Federal Reserve Board, the CFPB, the FDIC, the OCC and the National Credit Union Administration – have chosen to highlight this issue means depository institutions should be prepared for this issue to be tested on examinations.

As explained in the guidance, discrepancies occur any time an amount that a bank credits to the account differs from the actual amount deposited. Examples of credit discrepancies include typographical errors on deposit slips, poor image quality, damaged items and encoding errors. The agencies report that in some instances, financial institutions do not sufficiently research or correct errors, which can result in the customer not receiving the amount of the actual deposit. According to the agencies, banks that do not appropriately and timely reconcile credit discrepancies may run afoul of the Expedited Funds Availability Act, Regulation CC, Section 5 of the Federal Trade Commission Act and/or the Dodd-Frank Act.

The guidance warns that deposit discrepancy practices that fail to comply with applicable laws and regulations could lead to liability and possible enforcement actions. Notably, the CFBP's announcement about the new guidance mentioned the enforcement action brought by the CFPB, OCC and FDIC in 2015 against Citizens Bank, N.A., for failing to credit consumers the full amounts of their deposited funds. The consent order required Citizens Bank to pay a total of $18.5 million in refunds to consumers and a penalty for the violations.

The agencies expect banks (1) to adopt policies and practices to avoid, reconcile and resolve discrepancies such that customers are not disadvantaged; (2) to manage their reconciliation processes to comply with applicable laws and prevent harm to customers; (3) to provide accurate information to customers about deposit reconciliation practices; and (4) to implement compliance management systems including internal controls, training and oversight, and review processes.

Banks and other regulated institutions should view the new guidance, coupled with last summer's enforcement action against Citizens Bank, as a clear signal that the agencies will be focusing more closely on credit discrepancies. To avoid adverse findings on exams and potential liability, financial institutions should make sure to have appropriate policies and procedures in place and to add this issue to the top of their audit and testing checklists, no matter what their asset size. Financial institutions should also review their customer complaint data to determine whether customers are complaining about deposits not being properly credited and then take steps to address those issues. If you have questions regarding the new guidance or how to prepare for your next exam, please contact a member of Baker Donelson's CFPB Team.

Supreme Court Reshapes Consumer Financial Law with Two Recent Decisions

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The Supreme Court issued two interesting decisions recently that will affect the consumer financial industry. In *Spokeo, Inc. v. Robins*, the Court held that when it comes to Fair Credit Reporting Act (FCRA) violations, standing requires a concrete injury even in the context of a statutory violation. And in *Sheriff v. Gillie*, the Court held that the use of an attorney general's letterhead by a private attorney hired to collect the 'attorney general's debts is not deceptive or misleading, and as such is not in violation of the Fair Debt Collection Practices Act (FDCPA).

Spokeo, Inc. v. Robins

In a potentially important decision for consumer class action cases, the Supreme Court voted 6 to 2 to remand a case involving allegations of violation of the FCRA back to a lower court for a determination of whether the plaintiff had suffered an actual injury. Spokeo.com is a website allowing users to type in someone's name and receive a report containing information about the person. The plaintiff, Robins, claimed the information provided about him by Spokeo.com was incorrect and that providing such incorrect information was a violation of the Fair Credit Reporting Act. Specifically, Robins alleged that the report generated by the website stated he had more education and was better off financially than was accurate. He claimed that this inaccurate information had harmed his job prospects and his credit. The district court had dismissed his case, saying that his claims regarding job prospects and credit were "speculative," but on appeal the Ninth Circuit Court of Appeals reinstated the case, finding that violation of a statute was "sufficient injury to confer standing."

The question before the Supreme Court was whether a mere statutory violation (here, the FCRA) without more is enough for a plaintiff to have standing to bring suit under Article III. In the opinion delivered by Justice Alito (joined by Justices Roberts, Kennedy, Thomas, Breyer and Kagan, with Justices Ginsburg and Sotomayor dissenting), the Court concluded that "Article III standing requires a concrete injury even in the context of a statutory violation. For that reason, Robins could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III."

This is the decision that class action defendants have been waiting for in light of proliferating class actions, especially in the consumer finance area, based on statutory violations without actual injury or damages. Importantly, the decision does not clarify the types or gravity of harm or damage sufficient to satisfy the "injury-in-fact" requirement. Without such clarity, we will have to rely on lower courts to undertake a case-by-case factual analysis before there is any guidance on the parameters of what constitutes "enough" harm to obtain Article III standing.

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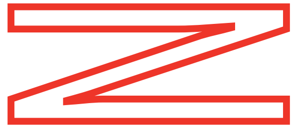
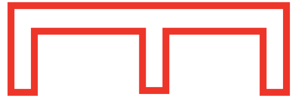
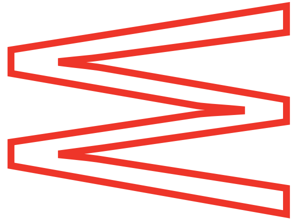




Supreme Court Reshapes Consumer Financial Law with Two Recent Decisions, *continued*

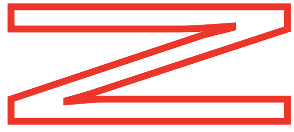
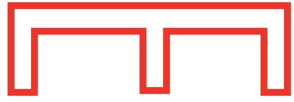
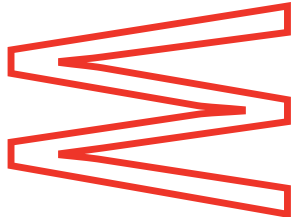
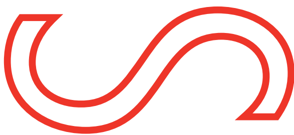
Sheriff v. Gillie

The Supreme Court ruled 8-0 in the matter of *Sheriff, et al. v. Gillie, et. al.*, holding that a private attorney using government letterhead is not in violation of the FDCPA when hired by the state to collect their debts. The Court summarized the issue by stating, "Under Ohio law, overdue debts owed to state-owned agencies and instrumentalities are certified to the State's Attorney General for collection or disposition. Carrying out this responsibility, the Attorney General appoints, as independent contractors, private attorneys, naming them 'special counsel' to act on the Attorney General's behalf. The Attorney General requires special counsel to use the Attorney General's letterhead in communicating with debtors." Mark Sheriff and Eric Jones, the petitioners in this matter, are collections attorneys who were named 'special counsel' and utilized the attorney general's letterhead in their collection efforts against respondents Hazel Meadows and Pamela Gillie.

The respondents filed a class action suit in Federal District Court "alleging that defendants had, by using the AG's letterhead, employed deceptive and misleading means to attempt to collect consumer debts, in violation of the FDCPA." The Sixth Circuit vacated the District Courts' judgment, finding that the AG's special counsel were not entitled to the FDCPA's state-officer exemption. The Supreme Court's holding only reviewed the issue of whether the act of utilizing the AG's letterhead was false, deceptive or misleading. They held it was not.

The case is not only interesting due to the ramifications on the consumer lending industry, but also its effects on the future direction of the CFPB in regards to that bureau's rule promulgation of a new debt collection rule and any near term enforcement and supervisory actions it takes on in the debt collection space. The CFPB filed an amicus brief with the Supreme Court on behalf of the United States in this matter, which opens by stating that the FDCPA authorizes the CFPB to "prescribe rules with respect to the collection of debts by debt collectors," and that "The CFPB and other federal regulatory agencies are responsible for enforcing the Act through administrative proceedings and civil litigation."

The Bureau then lays out a lengthy argument on their position as to why the actions of the petitioners were in violation of the FDCPA and why their actions were false, deceptive and misleading. Given the fact the Court knows the position of the CFPB, their authority granted under Dodd-Frank and the fact they are in the midst of creating a new rule that governs debt collection, it is surprising that the Court more or less ignored the brief filed by the CFPB in issuing a unanimous opinion that is contrary to the CFPB's arguments. Even more interesting will be what the CFPB places in their final rule on debt collection. Many expect that given the aggressive approach the CFPB takes in its actions, that it will try to legislate around this opinion and include the authorized use of state agencies' letterhead by private attorneys in the collection state debt as an example of a deceptive act.

GAO's Report Suggests Congress Give CFPB More Oversight

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This past February, the United States General Accounting Office (GAO) released a report to Congress entitled "Financial Regulation – Complex and Fragmented Structure Could Be Streamlined to Improve Effectiveness" (the Report). In its Report, the GAO examines "(1) the overall structure of the U.S. financial regulatory system, (2) [the] effects of fragmentation and overlap on agencies' oversight activities, and (3) the collaborative efforts and relevant authorities of agencies involved in systemic risk oversight." The GAO also makes several recommendations as to changes that Congress should consider in an effort to improve the financial regulatory system. One of those "suggested" recommendations is the transfer of the remaining consumer protection responsibility for large depository institutions from the existing "prudential regulators" to the CFPB.

In the Report, the GAO examined roles and responsibilities of the Board of Governors of the Federal Reserve System (Federal Reserve), the Commodity Futures Trading Commission (CFTC), the Bureau of Consumer Financial Protection (CFPB), the Federal Deposit Insurance Corporation (FDIC), the Federal Insurance Office (FIO), the Federal Trade Commission, the U.S. Department of the Treasury (Treasury), the Office of the Comptroller of the Currency (OCC), the Office of Financial Research (OFR), the National Credit Union Administration (NCUA), the Securities and Exchange Commission (SEC) as well as various state regulatory agencies in the oversight and regulation of the United States financial system. The GAO also examined the history of development of financial regulation over the last one hundred and fifty years which has resulted in the current "complex and fragmented" structure.

The GAO also indicates that there are three types of problems with the current financial regulatory system. Those three problems are (1) "Fragmentation," which occurs when each regulatory agency has a different role to play within the same financial industry sector; (2) "Overlap," which occurs when regulatory agency's jurisdiction covers portions of the same financial industry sector; and (3) "Duplication," which occurs when multiple regulatory agencies have jurisdiction over the same financial industry sector. The GAO suggests that because of these problems, "the existing regulatory structure does not always ensure (1) efficient and effective oversight, (2) consistent financial oversight, and (3) consistent consumer protections."

As to the CFPB, the Report's focus is the overlapping regulation of the consumer protection issues involving "Depository Institutions" and "Nondepository Entities that offer consumer financial products and services (Nondepository Providers)." The GAO's examination of the CFPB's role in the current "complex and fragmented" structure began with the CFPB's creation pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Act). The GAO states that the Act established the CFPB "as an independent bureau within the Federal Reserve System and provided it with rulemaking, enforcement, supervisory, and other powers over many consumer financial products and services and

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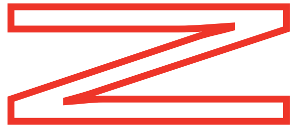
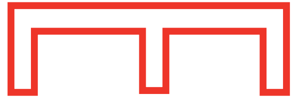
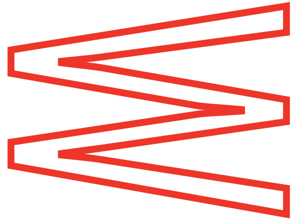

GAO's Report Suggests Congress Give CFPB More Oversight, *continued*

many of the entities that sell them." The GAO also indicates that the Act authorized the CFPB "to supervise certain nonbank financial companies and large banks and credit unions with over $10 billion in assets and their affiliates for consumer protection purposes."

Once the CFPB was created in 2010, it had to co-exist in the existing regulatory structure. The CFPB therefore currently shares overlapping regulatory and supervising authority with several other agencies. As to Depository Institutions, the existing regulators are the Federal Reserve, the FDIC, the OCC, the NCUA and the state banking regulators. As to Nondepository Provides, the existing regulators are the FTC and the state banking regulators.

According to the GAO, the creation of the CFPB "helped to reduce fragmentation in consumer financial protection oversight [as to Depository Institutions] by consolidating authority for a number of consumer financial protection laws that had been handled by seven different agencies." Nevertheless, the Act did not end fragmentation; as noted in the Report:

> For example, the act fragmented consumer protection supervision and enforcement for depository institutions, based on a depository institution's size. Specifically, while most consumer protection oversight responsibilities were transferred from the prudential regulators to [the] CFPB for depository institutions with more than $10 billion in assets and their affiliates, prudential regulators retained authority for certain consumer protection laws for these institutions. In addition, the prudential regulators continue to supervise institutions with assets of $10 billion or less for consumer protection.

The state banking regulators also retain jurisdiction to initiate proceedings against state chartered institutions that violate the Act and the CFPB rules promulgated thereunder.

Furthermore, the focus of the CFPB and the focus of the existing regulators is different. The CFPB's primary goal is consumer protection. Conversely, the primary goal of the existing regulators of Depository Institutions, which the GAO calls "prudential regulators," is the "safety and soundness" of the financial system. Consumer protection is a secondary issue for the prudential regulators.

Similarly, oversight of Nondepository Providers is divided between the CFPB, the FTC and state banking regulators. Under the Act, the CFPB has consumer protection oversight as to "certain kinds of mortgage market participants, private student lenders, and payday loan lenders, for the purposes of enforcing the consumer financial protection laws" which were previously unregulated. However, the FTC retained its authority over "most nondepository entities, including mortgage companies, mortgage brokers, finance companies, auto dealers, payday lenders, debt collectors and others." State agencies also regulate the activities of Nondepository Providers under a myriad of laws.

The GAO also recognized that the CFPB has specific priorities which may differ from the other regulators. The GAO states that in contract to very broad OCC compliance management reviews, "CFPB officials told us that [the] CFPB goes through a prioritization process each year to determine the areas in which it will conduct compliance management system reviews and where follow-up is needed. This may result in CFPB reviewing the compliance management system for compliance with one or two specific consumer protection laws."

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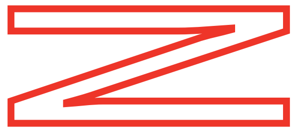
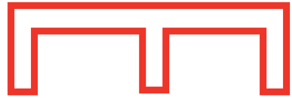
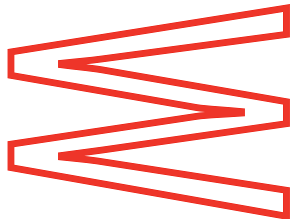

GAO's Report Suggests Congress Give CFPB More Oversight, *continued*

Because the regulation and oversight of the United States financial regulatory system remains divided, the GAO suggested changes that Congress could consider in order to consolidate and reorganize the financial regulatory system. In one example of a potential change, the GAO suggested that Congress could consider transferring "the remaining prudential regulators' consumer protection authorities over large depository institutions to [the] CFPB." Specifically, the Report stated:

For example, Congress could consider consolidating the number of federal agencies involved in overseeing the safety and soundness of depository institutions, combining the entities involved in overseeing the securities and derivatives markets, transferring the remaining prudential regulators' consumer protection authorities over large depository institutions to [the] CFPB, and the optimal role for the federal government in insurance regulation, among other considerations. (Emphasis added.)

While the suggestion that Congress consider such a transfer of authority to the CFPB was made in the context of an example of changes that could be made, the GAO has clearly raised the issue for Congress's consideration. As a result, large financial institutions should be aware of the potential for even greater CFPB oversight in the future.

Was a CFPB Enforcement Action Based on "Racial Profiling and Junk Science"?

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In a press release dated April 18, 2012, the Consumer Financial Protection Bureau (CFPB or Bureau) declared that it would "use all available legal avenues, including disparate impact, to pursue lenders whose practices discriminate against consumers." Shortly thereafter, the CFPB made good on its promise. On December 20, 2013, the Department of Justice and the CFPB announced a settlement with Ally Bank, formerly General Motors Acceptance Corporation or GMAC, requiring the payment of $80 million in consumer redress and $18 million to the Bureau's Civil Penalty Fund for alleged discrimination in connection with discretionary dealer markups. The settlement also articulates a "compliance plan" to which Ally is required to adhere.

While the investigation against Ally was pending, the CFPB proceeded to issue guidance to institutions whose portfolios include loans that may include dealer markups. Although enforcement actions and regulatory guidance don't have the force and effect of law, financial institutions ignore them at their own peril – lest they be on the receiving end of the CFPB's next $98 million enforcement action.

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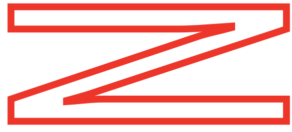
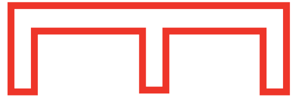
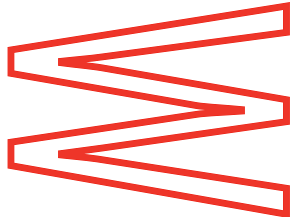

Was a CFPB Enforcement Action Based on "Racial Profiling and Junk Science?", *continued*

The Ally Settlement

In September 2012, the CFPB and the DOJ conducted a joint examination of Ally's indirect auto lending program for compliance with the Equal Credit Opportunity Act (ECOA). The ECOA prohibits creditors from discriminating against loan applicants in credit transactions on the basis of characteristics such as race and national origin. The result of such treatment is known as "disparate impact." To prove a disparate impact claim, the CFPB must: (1) identify a specific policy or practice adopted by a creditor; (2) demonstrate a disparate impact on a prohibited basis; and (3) show a causal relationship between the challenged practice and the alleged disparate impact.

The CFPB and DOJ's coordinated investigation concluded that Ally violated the ECOA by charging African-American, Hispanic, and Asian and Pacific Islander borrowers higher dealer markups for their auto loans than similarly-situated non-Hispanic white borrowers. Since the CFPB, DOJ and Ally resolved their differences before any adjudicative administrative proceeding, the claims by the CFPB and the DOJ were never subjected to any serious scrutiny.

Issues With Methodology

The CFPB would likely have had difficulty proving disparate impact on Ally's customer base because the methodology it used was, by its own admission, flawed. Since creditors are prohibited (outside the mortgage context) from collecting race data, the CFPB had to rely on "proxy" data. Despite alternatives, the CFPB chose to rely upon outdated census data that attempts to determine whether a borrower is a minority by looking at surnames, geographic location or a combination of both. According to a Report Prepared by the Republican Staff of the Committee on Financial Services, U.S. House of Representatives, the CFPB's process for estimating the rate of minorities affected by dealer markups has led some news outlets to refer to the CFPB's conclusions on the extent of the disparate impact of dealer markups as "racial profiling and junk science."

According to the CFPB's own reports, the CFPB's methodology overestimates the number of people categorized as ethnic, including a 20% overestimation of African Americans. Perhaps for this reason, the CFPB chose to settle its claims with Ally rather than to go forward with regulatory enforcement action. In connection with the settlement, Ally is to pay approximately $80 million in redress to approximately 235,000 consumers against whom it allegedly discriminated. Shockingly, although the CFPB and the DOJ have admitted their own methodology overestimates the number of minorities, the Bureau isn't verifying whether proposed recipients of the $80 million fund actually are minorities. As a result, in a January 19, 2016, letter to Attorney General Loretta Lynch and the CFPB, Financial Services Chairman Jeb Hensarling (R-Texas) urged the Bureau to suspend the distribution of settlement funds until all recipients verified their eligibility.

Issues With Causation

Had it not settled, the CFPB would also have had difficulty proving that Ally's dealer markups were actually caused by some perceived discrimination. In other words, the CFPB and DOJ would have needed to prove that Ally's dealer markup policies caused the discrimination and that the higher markups for non-whites was not the result of some other factor.

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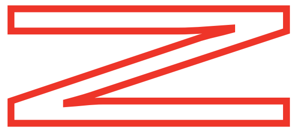
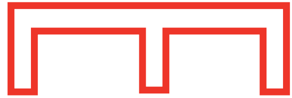
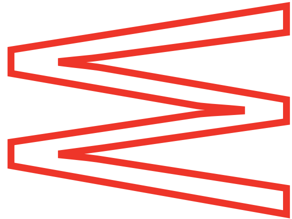

Was a CFPB Enforcement Action Based on "Racial Profiling and Junk Science?", *continued*

Recently, the Supreme Court of the United States stated that the mere existence of statistical disparities without a policy that actually were the direct result of those disparities does not give rise to liability under the disparate impact theory:

> [A] disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement ensures that '[r]acial imbalance...does not, without more, establish a prima facie case of disparate impact' and thus protects defendants from being held liable for racial disparities they did not create.

In Ally's instance, several other factors could account for the alleged disparate impact of dealer markups. These factors include a borrower's creditworthiness, the characteristics of the vehicle, the timing, location, and structure of the deal, the composition of a creditor's portfolio, customer monthly payment constraints, competing dealer or credit offers, promotional financing or incentive campaigns, and inventory reduction considerations. The CFPB and DOJ were never required to address these flaws in their allegations because the matter was not subjected to the scrutiny of an administrative proceeding and was instead settled.

The CFPB's settlement of its claims against Ally was not made on strictly monetary terms. The settlement terms also required that Ally implement certain policies and procedures in order to ensure compliance with the ECOA going forward. Most striking is the requirement for Ally to conduct "quarterly and annual analysis of portfolio-wide retail installment contract pricing data for disparities on a prohibited basis resulting from [Ally's] dealer compensation policy that reflects the same methods and controls the CFPB and the DOJ applied in their analyses ..." In other words, although the CFPB has acknowledged its methodology is faulty, it is now requiring that Ally use the same methods in analyzing its portfolio.

Although guidance and regulatory settlements of enforcement actions don't have the force of law, agency pronouncements must be taken seriously by market participants, because the cost of being subjected to a CFPB investigation, even if it does not result in a CFPB enforcement action, is enormous. In the dealer markup context, the CFPB has repeatedly promised "to ensure that the market for auto lending provides fair, equitable and nondiscriminatory access to credit for consumers." As such, indirect auto lenders ignore the Ally settlement and the March 21, 2013, guidance at their own peril, however misguided the CFPB's actions may seem.

Lenders should review their policies and procedures to show a good-faith effort in complying with the ECOA. Here's a list to get started:

- Maintain records for substantiating markups, such as borrower's creditworthiness, the characteristics of the vehicle, the timing, location, and structure of the deal, the composition of a creditor's portfolio, customer monthly payment constraints, competing dealer or credit offers, promotional financing or incentive campaigns, and inventory reduction considerations;

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Was a CFPB Enforcement Action Based on "Racial Profiling and Junk Science?", *continued*

- Depending on the size of your institution, perform an analysis of the lender's portfolio (dealer-specific and portfolio-wide) for potential disparities on a prohibited basis in pricing, underwriting, or other aspects of the credit transaction;
- Adopt a fair lending policy statement, train employees, monitor compliance and coordinate with your regular dealers to do the same;
- Commence prompt corrective action against dealers, including termination of the business relationship, when analysis identifies unexplained disparities on a prohibited basis; and
- Provide meaningful oversight of fair lending compliance by management and, where appropriate, the financial institution's board of directors.

CFPB's New HMDA Rule Still Leaves Privacy Concerns Unanswered

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The implementation date of the CFPB's final Home Mortgage Disclosure Act (HMDA) Rule is fast approaching and the mortgage industry still has not received any answers in regards to their data privacy concerns. As widely reported, the new rule requires lenders to provide more data points in their HMDA reporting. Some of the new data points include borrower age, credit score, automated underwriting system information, a unique loan identifier, property value, application channel, points and fees paid, borrower-paid origination charges, discount points, lender credits, loan term, prepayment penalty, non-amortizing loan features, interest rate and loan originator identifier. The complete list of data points as well as their descriptions can be found on the CFPB's Summary of Reportable HMDA Data – Regulatory Reference Chart. The expansion of these data points also expands the risk of possible disclosure of a borrower's personal information.

While the privacy issue has been raised repeatedly by those in the mortgage industry, the CFPB has thus far avoided addressing the valid concerns and states that the Bureau will use a "balancing test" to "determine whether and, if so, how HMDA data should be modified prior to its disclosure in order to protect applicant and borrower privacy while also fulfilling HMDA's disclosure purposes."

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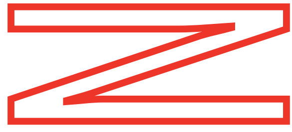
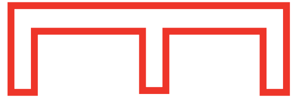
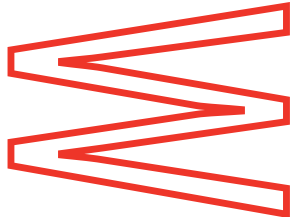

CFPB's New HMDA Rule Still Leaves Privacy Concerns Unanswered, *continued*

The CFPB simply states that at a later date, the Bureau will provide a process for the public to provide input regarding the application of this balancing test to determine the HMDA data to be publicly disclosed. That "later date" is fast approaching. Currently there is a lot of public data on the internet and more is being added daily. The CFPB publishes HMDA data and makes it all downloadable and searchable through their online HMDA tool. And don't forget the National Mortgage Data Base, a separate joint project between the CFPB and the Federal Housing Finance Agency (FHFA) that is in the works and will also house a lot of loan specific and possibly personally identifying data. There are also online county records systems, such as the one used in the five boroughs of New York City, called Automated City Register Information System (ACRIS). All these databases offer different identifiable data points about a property and the owner. Currently, the mortgage industry has no idea how the CFPB is even utilizing the fact that information from multiple database's can be aggregated to re-identify a borrower.

The data being collected could not only be used for criminal purposes, but it would also be extremely valuable if used to create marketing lists. Remember the new data points contain things like age, credit score, combined loan to value (CLTV) ratio and debt-to-income (DTI) ratio – all of which are personal identifiers that sales departments look for in leads to generate sales. Even competing mortgage companies would be interested in the data. With all the money that one can make compiling and parsing this data, you can be guaranteed someone will attempt to re-identify each applicant with whatever data is published. So the fact that the CFPB is not actively doing more to quell these concerns should distress not only the lenders who are collecting and reporting said data, but also to anyone who plans to apply for a residential mortgage post 2018.

Since the lenders are the ones who will be collecting, storing and reporting this data, it's natural to assume that in the event of a data breach or identity theft resulting from the improper sharing or publishing of this data, borrowers will look to the mortgage industry for relief…which may result in increased litigation. The CFPB has stated that the liability of the data being improperly used would not lie with the lenders and those required to report under HMDA. But what they fail to consider is that no one can control who an individual can sue. It will not matter if the data was being collected for regulatory purposes when the resulting lawsuits are filed. Even if the complaints are meritless and can be defeated, the increase in complaints brought against mortgage lenders has a very real cost attached to them, no matter what the outcome of the litigation may be.

As we always advise, the best approach to limit your institution's liability is to get ahead of any new rule promulgated by the CFPB early. As we previously reported, outside of the data security issues raised above there is still the concern that these data points will increase your institutions exposure to fair lending issues. If you can start collecting the data points as soon as possible and internally test for data integrity or any evidence of disparate impact, you can begin to limit that risk exposure by proactively remediating any identified issues.

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