Jonathan Green, a shareholder in the Atlanta office of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC. Contact him at 404-221-6518 or jegreen@bakerdonelson.com.

Could New Mortgage Rules Implementation Deadline Be Delayed?

The oncoming mortgage rules promulgated by the Consumer Financial Protection Bureau constitute a massive shift in the regulation of financial institutions and the mortgage market. These rules will place new duties and requirements on banks, mortgage servicers and mortgage originators, as well as other entities. While the CFPB intended to provide companies with ample lead time to implement the rules, most of them were not promulgated until less than a year before their effective date.

Moreover, implementation of the rules was delayed by the distinct possibility that the rules would be overturned by litigation as part of the controversy created by the recess appointment of its director, Richard Cordray. This issue was not resolved until the Senate confirmed him as director of the CFPB on July 16.

The uncertainty regarding the appointment certainly led a few institutions to delay upgrading their procedures. Moreover, although the CFPB may have attempted to provide ample lead time in promulgating its rules, the rules that were promulgated were anything but finalized. In fact, on Sept. 13 the CFPB issued revisions to certain of its prior mortgage rules. It is not clear that these revisions will be the last.

One hope is the potential that the CFPB may delay the imposition of these rules to provide more lead time for financial institutions to adapt. However, Cordray's comments have made it clear that this is unlikely. In his prepared remarks for the American Mortgage Conference, which were issued on Sept.11, Cordray states "[w]e do not believe that the bureau's regulatory implementation project should slow down the implementation process at any lender or servicer…We believe that it is critical to move forward so that these rules can deliver the new protections intended for consumers and the certainty that the industry has been seeking." Based on these comments, it is unlikely that the effective date of the new mortgage rules will be pushed back any further.

Thus, it is critical that financial institutions prepare themselves for the oncoming rules. This is more than simply issuing new rules or procedures. The modern reality of the financial services industry is that consumer lending is controlled not by individuals or procedures, but by software. Accordingly, it is imperative that financial institutions get ahead of the curve.

The CFPB has made it clear that it will be looking closely at a company's compliance with its rules. It also has made it clear that it expects compliance to be taken seriously and that it expects both the board of directors and senior management to play a role in ensuring that its rules are complied with. They must act sooner rather than later to ensure that they have the necessary software systems in place to hit the ground running in January 2013.

Here are a few things that financial institutions should consider as they transition their systems to comply with the CFPB rules:

Look inward: Examine the institution's role in the mortgage market and determine what areas of the mortgage rules affect it. Does it originate mortgages? Does it service any mortgages? Does it fall under any of the exceptions to the CFPB, such as the rural or underserved market or small servicer exception? A thorough self-analysis may limit the costs of complying with the CFPB. This self-reflection may also lead financial institutions to close a small or unprofitable business area to narrow the compliance costs.

Keeping up with the Joneses: The CFPB has also acknowledged that compliance will vary from entity to entity and that it does not expect a small bank's compliance efforts to be the same as a large national bank's compliance efforts. Each financial institution should determine how its compliance compares with its peers. Do comparable institutions employ a large suite of software to ensure compliance or do they largely rely on human compliance? Institutions should look at their systems in conjunction with their peers. You don't need to be first, but you definitely want to be in middle of the pack.

Monitoring: Simply having policies and procedures is not enough. A financial institution should have procedures to look at what is actually happening to ensure that the rules are followed.

Document retention: One of the most important steps is to update and implement an appropriate document-retention and management system. The CFPB expects that documents will be retained as required by its examination procedures and all relevant provisions. This is one of the easiest ways to comply with the CFPB requirements. BN