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CFPB Focus

March, 2016

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What You Need to Know About the CFPB's Priorities for 2016 and 2017

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The CFPB recently announced its policy priorities for the next two years. There are not too many surprises, since the CFPB has been targeting most of these areas in recent months and years. Here's what the Bureau is planning, and what you can do to prepare for what is coming:

Arbitration. The CFPB has been studying pre-dispute arbitration provisions in consumer contracts since 2012. In March 2015, the Bureau reported on its study of arbitration agreements, including a comparison of consumer finance disputes that were resolved through arbitration, individual lawsuits and class actions. Among other findings, the study noted that roughly 32 million consumers each year were eligible for relief as part of class action settlements in federal court, and the Bureau expressed concern about arbitration clauses blocking class actions.

In October the Bureau announced two proposals it is now considering: a rule prohibiting pre-dispute arbitration clauses that waive the right to bring class actions, and a rule requiring that companies report claims and awards in arbitration to the Bureau. According to Director Richard Cordray during a speech in February to the American Constitution Society, "Companies could still have an arbitration clause, but they would have to say explicitly that it does not apply to cases brought on behalf of a class unless and until the class certification is denied by the court or the class claims are dismissed in court."

We expect that CFPB will announce the new rules in the first part of 2016, and they would likely apply to arbitration agreements beginning in early 2017. While the new rules may give rise to legal challenges, since the U.S. Supreme Court upheld class action waivers in agreements to arbitrate as recently in 2013 in American Express v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013), it could take years before any challenge reaches the Court. Entities regulated by the CFPB will need to plan for the time and expense of revising contract language and complying with reporting requirements about arbitration claims, as well as for increased legal and compliance costs due to greater class action exposure.

Consumer Reporting. The CFPB cites concerns over consumers who lack credit reports and complaints received by the Bureau about inaccuracies in credit reports. The Bureau has targeted both the credit reporting companies that track a consumer's credit history and the financial institutions that furnish information to the credit bureaus. Both groups can expect continued investigations by the CFPB into alleged inaccuracies and deficient dispute resolution mechanisms. Back in 2012, the CFPB warned credit reporting agencies that they may be violating the law by failing to provide a streamlined process for consumers to request free reports. Now the Bureau says it is considering rulemaking about furnishing and reporting company accuracy and dispute resolution, and we expect that rulemaking to happen during the next two years.

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Debt Collection. The CFPB has made the debt collection industry an enforcement priority since 2012. The Bureau issued a rule establishing its supervisory authority over large nonbank debt collectors in October 2012 and began accepting debt collection complaints in July 2013. Because about one-third of all consumers with credit reports have at least one collection item on their credit reports, and because the highest number of complaints received by the CFPB are about collections, the Bureau continues to set its sights on first- and third-party debt collectors, collection agencies and debt buyers. The Bureau also continues to bring enforcement actions seeking monetary penalties and requiring companies to overhaul their debt collection processes, such as the actions the Bureau took against Citibank in February.

In December, the CFPB published a bulletin highlighting in-person debt collection activities that violate the Fair Debt Collection Practices Act (FDCPA) or constitute unfair, deceptive or abusive acts or practices (UDAAPs). The bulletin listed such examples as visits to a consumer's workplace that led to negative employment consequences or visits to a consumer's home that are harassing or harm the consumer's reputation.

During the next two years, the Bureau will be working on finalizing regulations for both first-party and third-party debt collectors. Proposed regulations may include prohibiting particular acts or practices, requiring disclosures about debtor rights and the debt collection process, and mandating that debt collectors obtain and retain the information necessary to substantiate the debts at issue. In the meantime, debt collectors should expect continued rigorous supervision and enforcement actions.

Demand-Side Consumer Behavior. Recent studies of consumer attitudes about financial security and about retirement saving indicate that large numbers of Americans report struggling to make ends meet and are not financially prepared for retirement. In response, the CFPB plans to spend time during the next two years to research and develop consumer financial decision-making tools and educational programs to help consumers build financial skills and make better decisions.

Household Balance Sheets. The Bureau believes that existing research on household financial decisions does not adequately address a household's balance sheet over time or how a household's use of financial products changes. According to the Bureau, better and more comprehensive studying of household balance sheets will help identify trends and lead to more effective regulations. Over the next two years, the CFPB will devote additional resources to studying and understanding the dynamics of household balance sheets.

Mortgages. The $10 trillion mortgage market has been a CFPB priority since the agency was first created. Back in January 2014, the agency's Qualified Mortgage Rule, which governs how lenders assess a borrower's ability to repay a mortgage before making the loan, went into effect. That rule and the creation of a National Mortgage Database, which the agency intended as a "comprehensive repository of detailed mortgage loan information," have been controversial, with critics charging that the QM Rule gives lenders insufficient flexibility and complaining about the possible risks from the CFPB's amassing of so much consumer data.

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Last fall the CFPB finalized the Home Mortgage Disclosure Act regulations, which are designed to improve information reported about the residential mortgage market and to shed more light on consumers' access to mortgage credit. Mortgage lenders will be required to report on all applications and mortgage loans. Additional requirements include reporting on property value, term of the loan, the duration of any teaser or introductory interest rates, as well as more information about underwriting and pricing to help the CFPB identify possible fair lending problems. Lenders must collect the new information starting on January 1, 2018, and start reporting by March 1, 2019.

The CFPB is also concerned about discrimination in the mortgage market. According to the CFPB, both denial rates and mortgage prices are higher, and credit access is lower for people of color. Lenders should expect that supervisory and enforcement actions will target alleged discriminatory access to mortgage credit.

Finally, the CFPB will be working on implementation of its servicing rules, which have been in effect since January 2014 and are designed to protect delinquent borrowers suffering from economic setbacks and to ensure that servicers handle future delinquencies fairly.

Open-Use Credit. The open-use credit market encompasses a wide range of financial products such as credit cards, overdraft products, payday loans, auto title loans and installment loans. The Bureau complains that lenders can structure these products to ensure their own success even if the borrower cannot afford to repay the loans when due. Even more concerning to the CFPB is its finding that these products are typically used by consumers from low- and moderate-income households who are disproportionately female and persons of color. The agency's supervisory and enforcement actions in the coming years will focus on alleged deceptive marketing and debt collection processes.

The CFPB has also been critical of bank overdraft products, as the agency noted in a 2014 report that the vast majority of overdraft fees are paid by a fraction of customers and that the transactions that lead to overdrafts can be small, averaging $50. Over the next year or so, the CFPB will be initiating a rulemaking process intended to make the overdraft market "fairer and more transparent."

In November 2014, the CFPB proposed rules to govern prepaid products. A final rule on prepaid products is expected in the next few months and is likely to cover payroll cards, certain government benefit cards, student financial aid disbursement cards, tax refund cards and certain peer-to-peer payment products. The new rules are expected to require enhanced disclosures provided to consumers, better access to account information and requirements that prepaid companies investigate and resolve errors and limit consumers' losses when funds are stolen or cards are lost.

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Small Business Lending. Small business loans, including term loans, credit lines and business credit cards, have a market size of more than $1 trillion. This market serves more than 28 million businesses, including those owned by women and minorities, and the Bureau is concerned about discrimination. Under the Dodd-Frank Act, the CFPB is required to issue a rule on small business lending data collection. During the next two years, the Bureau will start that process by beginning market research for rulemaking on business lending data collection, and it is also considering building additional infrastructure to handle small business lending complaints. Lenders should also be prepared that the Bureau will continue to examine them for compliance with fair lending laws.

Student Lending. The Bureau has expressed concern about the amount of outstanding student debt – almost $1.2 trillion – and the number of borrowers in default or struggling to make payments – roughly 11 million people. In the fall 2015, the CFPB published a report that identified deficiencies in student loan servicing and recommended reforms to improve consistency, accuracy, accountability and transparency. Those findings and recommendations, coupled with significant public and political pressure, have raised the profile of this problem. The CFPB has and will likely continue to partner with the U.S. Department of Education to improve student loan servicing practices and reduce defaults. We expect continued supervisory and enforcement activity as the Bureau targets servicers that it believes are not complying with their obligations to borrowers.

Five Steps to Boosting TCPA Compliance

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The Telephone Consumer Protection Act (TCPA) continues to be a tool utilized by the plaintiffs' bar for class action litigation. But the Act is also being wielded in run-of-the-mill bankruptcy adversary proceedings as debtors' lawyers see an opportunity to recover potentially large damages not available under other statutory schemes. As a result, it is important to remember what exact conduct the TCPA prohibits and review a checklist of actions to help boost compliance with the Act.

The TCPA is found at 47 U.S. Code § 227 and prohibits the following:

a. Making any call ... using any automatic telephone dialing system or an artificial or prerecorded voice – (iii) to any ... cellular telephone service...;

b. Initiating any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party...; and

c. Using any telephone facsimile machine ... to send ... an unsolicited advertisement, unless – (i) the unsolicited advertisement is from a sender with an established business relationship with the recipient; (ii) the sender obtained the number of the telephone facsimile machine through – [permissible means] and (iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D) ....

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Five Steps to Boosting TCPA Compliance, *continued*

The key component of the TCPA is the amount of damages available for violations. Damages range from $500 to $1,500 (if willful or knowing) per call with no cap on aggregate damages. One call, text or fax often can form the basis of a nationwide class action complaint or a more expensive settlement in a standard bankruptcy or state court case. There have been cases with the possibility of billions of dollars in exposure and settlements of up to $75 million. Even innocent TCPA violations can place companies at risk. Here are five actions to take now to help bolster compliance with the Act:

1. Use opt-out messaging in all outbound calls or text messages.

2. Investigate the options for mobile app notifications as an alternative form of communication.

3. The ability for a customer to opt-out of inbound contact must be easy. Ensure there are opt-out options imbedded in your processes at various points in the relationship and look for opportunities available at account set up as part of regular billing and during customer service calls.

4. In addition to multiple opt-out options during the lifecycle of the relationship, consider having a specific, annual opportunity for customers to update their preferences.

5. Conduct an analysis of training of front-line employees. Could your team use a refresher on the importance of validating customer contact information each time there is customer interaction?

FTC's Annual FDCPA Enforcement Letter to CFPB Filled with Insight into 2016 Focus

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Under the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Consumer Financial Protection Bureau (CFPB) is required to submit annual reports to Congress on the Fair Debt Collection Practices Act (FDCPA). Since this task was previously assigned to the Federal Trade Commission (FTC), it assists the CFPB by preparing its own report, summarizing its recent work on debt collection issues.

The FTC sent its annual letter to the CFPB's Director Richard Cordray on February 12, 2016, summarizing its 2015 efforts to end allegedly illegal debt collection practices. These letters provide insight into the FTC's and CFPB's focus in the coming year by detailing their enforcement actions from the previous year.

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FTC's Annual FDCPA Enforcement Letter to CFPB Filled with Insight into 2016 Focus, *continued*

Among other things, the FTC's FDCPA actions included "aggressive law enforcement activities and public outreach to address new and troubling issues in debt collection." In 2015, the FTC engaged in activities that included:

- Coordinating the first federal-state-local enforcement initiative targeting deceptive and abusive debt collection practices;
- Prosecuting "a sweep" of cases against collectors who used unlawful text messaging in their efforts to collect on debts;
- Filing 12 new cases against 52 new defendants (the FTC's highest number of debt collection enforcement action in a one-year time period);
- Resolving nine cases and obtaining nearly $94 million in judgments;
- Banning 30 companies and individuals that engaged in "serious and repeated violations of law" from ever working in the debt collection business again AND publishing a list of these companies and people;
- Filing three amicus briefs, two of them with the CFPB, on major debt collection issues; and
- Hosting three Debt Collection Dialogues "to promote a more robust exchange of information" between the debt collection industry and the governmental entities tasked with regulating the industry's conduct.

The FTC brought or resolved 18 debt collection cases in 2015 – the highest ever. The resolutions, either by means of settlement or judgment, are similar in the FTC's request for asset freezes, immediate access to business premises and the appointment of receivers to take over the debt collection businesses.

Of interest is the FTC's joint action with law enforcement partners, including the CFPB, the New York Attorney General's Office and the Illinois Attorney General's Office, to combat "egregious collection practices." In light of the Commission's success in these partnerships ($63 million settlement in joint action with CFPB; $8,507,423 settlement in joint action with New York AG; and $6.4 million settlement in joint action with Illinois AG – the remaining actions are still in litigation), it's likely that the FTC will continue to seek out partnerships with federal and state law enforcement agencies to combat aggressive and illegal debt collection actions.

Phantom debt collections (actions by debt collection agencies to collect on debts that either do not exist or are not owed to the phantom debt collector) and debt collection via unlawful text messages and e-mails were a focus of the FTC during 2015. As our technology continues to shift away from written letters and telephone calls, this concentration and the resultant enforcement actions will likely carry over into 2016. The FTC detailed a loss in a case in which it filed an amicus brief. In that case,

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FTC's Annual FDCPA Enforcement Letter to CFPB Filled with Insight into 2016 Focus, *continued*

the Commission unsuccessfully argued that a person who buys debts in default and collects on them qualifies as a "debt collector" under the FDCPA. You can expect the FTC to challenge this ruling and perhaps even seek out enforcement actions to shore up its argument.

The Commission is quite proud of its so-called "Debt Collection Dialogues," which were held in three cities – Buffalo, New York; Dallas, Texas and Atlanta, Georgia – and were intended to give debt collectors the opportunity to hear from the government entities that police their industry and to allow the law enforcement community and industry members to highlight areas of concern, share strategic priorities and generate ideas for compliance. Since tickets to all three Dialogues were "sold out," it seems logical that the FTC will look to hold future sessions in additional cities in 2016.

The FTC and CFPB will undoubtedly continue to cooperate and aggressively seek opportunities to engage in litigation on issues of consumer protection relative to debt collection in 2016.

Looking Ahead: What the Auto Lending Industry Can Expect from the CFPB in 2016

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The CFPB's critics are getting louder, arbitration clauses are spending some time on the chopping block, and credit reporting continues to garner more and more attention. These are all things we can expect to focus on this year as the auto lending industry continues its power struggle with the CFPB.

Senate passing "Reforming CFPB Indirect Auto Financing Guidance Act" (H.R. 1737)

All signs point to the Senate passing the Reforming CFPB Indirect Auto Financing Guidance Act (H.R. 1737) this year. Currently, the Act is in the Senate and has not been taken up for a vote yet, but several industry leaders are estimating as many as 60 votes in its favor.

Last November, the House passed the Act with a resounding 392-96 vote. The Act aims to curtail the CFPB's attempts to regulate purportedly discriminatory auto lending practices. According to the CFPB, auto lenders are charging minorities a higher markup on products than similarly situated white borrowers. Auto dealers and lenders, however, have questioned the methodology used by the CFPB to reach this conclusion, and the Act is the auto industry's attempt to obtain more transparency from the CFPB.

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Looking Ahead: What the Auto Lending Industry Can Expect from the CFPB in 2016, *continued*

Although President Obama will likely veto the Act if it passes in the Senate, there is a high probability that the Act will get passed by a Congressional override. If nothing else, the strong bipartisan support for the Act is a powerful indictment on the CFPB's forays into the auto lending space so far. We are likely to see stronger, louder outcry from the auto lending industry regarding the CFPB's attempts to issue guidance in 2016.

Additional movement toward limiting arbitration clauses

This year, the CFPB is likely to issue a formal, proposed rule limiting the use of arbitration clauses in consumer lending agreements. In October 2015, the CFPB announced its plans to propose rules limiting the use of arbitration clauses that affect a consumer's right to participate in a class action lawsuit.

Once the CFPB publishes its proposed rule and the comments period opens, we expect that many auto lending companies will submit comments opposing a final rule. A proposed rule is expected in mid-to-late 2016.

If the CFPB enacts a final rule curtailing arbitration clauses in consumer finance products, it is very likely that the rule will end up before the U.S. Supreme Court at some point. Arbitration clauses have been a hot topic in the Supreme Court as of late. In fact, the Court issued a new decision upholding arbitration clauses in December 2015: *DIRECTV, Inc. v. Imburgia*. In that case, Justice Ginsburg issued a dissent and relied on the CFPB's study finding that mandating arbitration and banning class action lawsuits harms consumers.

To be sure, Supreme Court involvement regarding a CFPB rule curtailing arbitration clauses is still years in the future. The recent landscape of case law regarding arbitration clauses will influence many commenters and will ultimately influence the CFPB's position as to whether such a rule is in the consumers' best interest.

Continued criticism regarding the CFPB's methodology

In January 2016, the Republican staff of the House's Committee on Financial Services issued a report finding that the CFPB improperly issued settlement checks to white consumers in connection with the 2014 Ally Financial settlement. (In the 2014 CFPB/DOJ joint enforcement action against Ally, Ally was ordered to pay $80 million in damages to a large class of claimants for its "discriminatory pricing system." There, the CFPB found that Ally charged minorities higher markups on auto loans than their white counterparts.)

According to the House Committee, the CFPB inflated the number of potential claimants in order to inflate the settlement figure to which Ally ultimately agreed. Then, once a settlement agreement was achieved, the CFPB employed questionable metrics to identify 419,669 potential claimants – none of which were required to disclose their race before becoming eligible for compensation. The House Committee concluded that the CFPB unfairly "targeted a company that it knew had a strong incentive to settle for business reasons and applied undue leverage against the company to extract a large settlement."

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Looking Ahead: What the Auto Lending Industry Can Expect from the CFPB in 2016, *continued*

The House Committee is the latest in a long line of critics of the CFPB's data mining processes, particularly in connection with its research regarding disparate impact on minorities. Many expect that CFPB Assistant Director Patrice Ficklin will be called to testify before the Financial Services Subcommittee on Oversight and Investigation in the spring of 2016. It will be interesting to see how, if at all, the CFPB reacts to the mounting criticism.

Increased scrutiny regarding credit reporting

In its Monthly Complaint Report published on March 1, 2016, the CFPB reported that, between November 2015 and January 2016, it received an average of 3,536 consumer complaints per month focusing on credit reporting. Although this figure represents a seven percent decrease from credit reporting complaints received in the same period last year, it is still the third most common type of complaint received by the CFPB.

Last August, the CFPB reported a "sharp increase" in credit reporting complaints between June and July 2015, and the CFPB has since been increasing its scrutiny in this arena. Unlike complaints against one specific product (like a mortgage or student loan), credit reporting complaints can implicate several different parts of the financial services industry.

According to the CFPB, 97 percent of the credit reporting complaints deal with the three major credit reporting agencies (Equifax, Experian and Trans Union). If the CFPB continues to increase regulation of these three companies, auto lenders may start feeling the pinch as the regulation inevitably spreads to data furnishers as well.

The CFPB Seems Poised to Increase Their Scrutiny of Mortgage Banking Fair Lending Issues

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The Director of the Office of Fair Lending and Equal Opportunity within the CFPB, Patrice Alexander Ficklin, said this in last year's CFPB Fair Lending Report: "We maximize our resources by targeting our efforts on practices, products and institutions that pose the greatest risk to consumers. Data plays a critical role in helping to identify areas of risk." Back up for Ms. Ficklin's claim that data plays a big role can be found in the CFPB's HMDA information website.

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The CFPB Seems Poised to Increase Their Scrutiny of Mortgage Banking Fair Lending Issues, *continued*

When the site went live in 2014, it offered the general public the ability to search, download and filter Home Mortgage Disclosure Act (HMDA) data for the first time. A user can filter by applicant sex, race, ethnicity, income, lender, loan type, lien status, if loan is high priced, property type, occupancy status and location down to the census tract. The technology is the same that the CFPB's customer complaint database runs on, and it presents the same risk to the industry in that plaintiffs' attorneys could be trolling for ammunition as the wide availability of this data and the ease of sorting it could lead to new fair lending allegations brought by borrowers. The CFPB openly states that they use public and private fair lending litigation of which they become aware as part of the prioritization process on how and what areas are targeted as consumer risks.

Late last year the CFPB finalized the HMDA Rule's changes to Regulation C. As part of their overhaul of HMDA they are requiring 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, unique loan identifier, property value, application channel, points and fees, 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 just increases a lenders' exposure to fair lending claims as there are more opportunities for well-intentioned lenders, who were operating with no prejudice at all, to fall into a statistical anomaly on a product.

Lenders will collect the new information in 2018 and then report 2018's information by March 1, 2019, which presumably will be fed right into the CFPB's HMDA information site referenced above and just makes the risks presented by this tool that much greater. The implementation date sounds far off, but when factoring in what will be necessary changes in lender's policies, procedures, software, application forms and training, the industry should already be underway in their attempts to comply with the changes.

After looking at the steps the CFPB has taken in 2014 and 2015 to protect mortgage consumers from fair lending risks, the obvious question would be where will they be focused in 2016 when they initiate an audit or review a complaint? For this we can look back to Ms. Ficklin, who has stated, "Our work in mortgage lending includes a significant focus on HMDA data integrity and validation, as well as more in-depth mortgage lending analyses both in examinations and investigations. Given the tight credit environment of the last few years, our focus is on underwriting and redlining, though we also consider pricing policies and practices that present fair lending risk."

This continues the trend of policymakers and regulators in our industry reacting to a tight credit market and limited access to credit, which arguably was created by the over-regulation drafted and enforced by the very same policymakers and regulators.

The Single Director Structure of the CFPB Needs to Change

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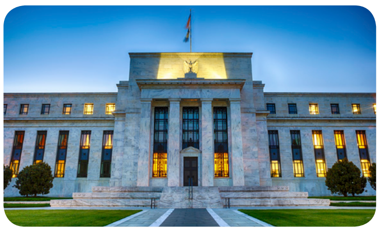

At times the CFPB can take actions that appear very aggressive. To fully realize the agency's power and ability it helps to understand their formation and their structure, and to remember that the CFPB was specifically organized to operate with as little oversight as possible – which makes it powerful and independent from the start. Upon creation, the agency was placed under the Federal Reserve and given a budget that is derived from a fixed percentage of the Federal Reserve's operating expenses. This effectively keeps the CFPB from having to appear before Congress for any funding oversight. Then it was given an organizational structure that has the entire bureau reporting to a single director, which was presumably meant to help the CFPB avoid the delays and compromises inherent in organizations led by commission.

The single director structure of the CFPB has been contested in Washington from day one. In 2011, before the CFPB assumed any of its powers, Elizabeth Warren argued for the structure, stating, "The work facing the new bureau is very challenging; additional restrictions would undermine the consumer bureau before it even begins its work of protecting American families." She was claiming the tasks that await the CFPB were seemingly insurmountable and would only be hindered if decisions had to go through a committee rather than a single person. Later, when Richard Cordray was being put through the confirmation process, Republicans stepped in and argued they would block any nominee for the post if the CFPB's structure was not changed to accommodate a five-member bipartisan commission as opposed to a single director. Obviously, they did not follow through.

Those who advocate for switching the CFPB to one with a commission argue that the efforts would give the work the CFPB does a longer lasting effect, given that the rules drafted by the agency under the guidance of a commission would be bipartisan and therefore would not be a target to tear down after a change in power. The CFPB's current shape happened under a Democratic president and a Democratic-controlled Congress. Richard Cordray was nominated by the same Democratic president. When Cordray's term is up and a new nomination is sought, if Republicans are in power, a director with sharply different views and priorities will be nominated. And if the Bureau's current single-director structure stands, the incumbent could unravel whatever progress has been made thus far.

The Republicans are not waiting to see if they can retake the White House. The most current attack on the structure is coming from Rep. Randy Neugebauer (R-TX), Chairman of the Financial Institutions and Consumer Credit Subcommittee. He has sponsored a bill (H.R. 1266 Introduced on 03/04/2015) that would change the structure of the CFPB's leadership to a commission composed of five members who would be appointed by the President, by and with the advice and consent of the Senate, from among individuals who are citizens of the United States, and have strong competencies and experiences related to consumer financial products and services. The members of the Commission would serve staggered terms, which initially would be established by the President for terms of one, two, three, four and five years respectively.

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The Single Director Structure of the CFPB Needs to Change, *continued*

The idea of a commission for leadership at a regulator is not a novel one. The Federal Trade Commission, the Securities and Exchange Commission, the Commodities Futures Trade Commission and the Consumer Product Safety Commission all have bipartisan leadership; the latter was even the model for Elizabeth Warren when she was creating the CFPB.

Outside of the political issues, the single-director structure enables the CFPB to create issues such as those raised in the action against PHH Corp (PHH). In 2014, the CFPB's enforcement division levied charges against PHH and the matter went to hearing in front of an administrative law judge (ALJ) in the Office of Administrative Adjudication (OAA), an independent judicial office within the CFPB. The ALJ held that PHH's actions were in fact in violation of the Real Estate Settlement Procedures Act (RESPA) and levied a $6.4 million fine. PHH then appealed. Appeals of ALJ findings in the CFPB are heard by Director Cordray himself, who reviewed the matter and not only sided with the CFPB but increased the penalty to $109 million and confirmed a new interpretation of the law which is at the center of the case. Proponents of a restructuring of the CFPB believe a result such as this would not be likely if the Bureau was led by commission. PHH is now appealing to the United States Court of Appeals for the District of Columbia Circuit.

It seems readily apparent that even if you bought into the argument that the CFPB needed to be created as single-director organization to overcome the herculean task of centralizing the regulatory and enforcement responsibilities of all consumer financial laws, they have now done so and the benefits of having the Bureau report to a commission far exceed any criticisms. The delays and compromises inherent with a regulatory body may not be a bad thing. It may be exactly what the CFPB needs to create a long lasting bureau that is reasonably handling their duties.

Recent CFPB Enforcement Actions Focus on Data Security and Discriminatory Lending

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In the past two months, consent orders were reached in two high profile enforcement actions. In February 2016, a consent order came out between the Consumer Financial Protection Bureau (CFPB), Department of Justice (DOJ) and Toyota Motor Credit Corporation. More surprisingly, the CFPB stretched its authority under Dodd-Frank to enter into the data security arena. This most recent consent order signals that the CFPB may be shifting its focus from transparent communication between consumers and creditors to the high tech world of data security.

With data security being a recent hot topic of concern for consumers, it comes as no surprise that the CFPB has tossed its name in the data security enforcement hat. Just this month, the CFPB imposed a $100,000 civil penalty against an online payment processor, Dwolla, for allegedly deceiving consumers

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Recent CFPB Enforcement Actions Focus on Data Security and Discriminatory Lending, *continued*

about its data-security practices and safety of its online payment system. (Read our March 7 Alert about it.) Dwolla operates an online payment system and collects and stores consumers' sensitive personal information, including names, addresses, Social Security numbers and bank account information.

The enforcement action alleges that from December 2010 until 2014, Dwolla claimed to protect consumer data from unauthorized access by employing data security practices which exceeded industry standards. Additionally, Dwolla told consumers it encrypted all sensitive personal information. However, as laid out in the Consent Order, this was far from the truth. It was discovered that from its inception until at least October 2013, Dwolla had not adopted or implemented a written data security plan to govern the collection, maintenance or storage of consumers' personal information. Moreover, employees received little to no data security training before December 2012. Most alarmingly, it was revealed that in numerous instances, Dwolla transmitted consumers' personal information without encrypting the data.

As a result of the CFPB enforcement action, Dwolla must stop misrepresenting the data security practices implemented by it and must enact comprehensive data security measures and policies, including a program of risk assessments and audits. Additionally, Dwolla must train employees on the company's data security policies and procedures. Notably, the Consent Order requires Dwolla's board to ensure compliance with the order and provides that the board will bear ultimate responsibility for Dwolla's compliance.

This enforcement action is of particular interest because it is the first data security enforcement action by the CFPB and signals a potential new target area by the agency. Financial institutions should take note to ensure that their data security policies are compliant because now they face scrutiny from yet another government agency. Financial institutions should not only ensure that policies are in place but that their policies are accurately communicated to consumers.

In a separate matter, the CFPB and the DOJ last month resolved an action with Toyota Motor Credit Corporation (TMC). Pursuant to the order, TMC is required to pay up to $21.9 million in restitution to African American and Asian and Pacific Islander borrowers who paid higher interest rates than white borrowers for their auto loans.

According to the Order, the discriminatory conduct occurred because TMC allowed auto dealers' discretion to mark up interest rates prior to finalizing the deal. Usually, when consumers finance automobile purchases from auto dealerships, the dealer facilitates indirect financing through a third-party auto lender like TMC. The indirect auto lender, TMC in this case, sets the rates for consumers based on credit worthiness. Those rates are then relayed to auto dealers. The auto dealers are allowed to charge a higher interest rate when they finalize the deal with the consumer. It was alleged that in the instant case, consumers' rates were marked up as much as 2.5 percent by auto dealers.

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Recent CFPB Enforcement Actions Focus on Data Security and Discriminatory Lending, *continued*

The CFPB and DOJ investigated TMC's indirect auto lending activities' compliance with the Equal Credit Opportunity Act. The investigation found that TMC's policies resulted in minority borrowers paying higher dealer markups without regard to the credit worthiness of the borrowers. The investigation found that on average, African American borrowers were charged over $200 more for their auto loans, and Asian and Pacific Islander borrowers were charged, on average, over $100 more for their auto loans than white borrowers. It is important to note that the investigation did not find that TMC intentionally discriminated against consumers, but rather its discretionary pricing and compensation policies resulted in discriminatory outcomes.

Pursuant to the Order, TMC must reduce dealer discretion to mark up interest rates to only 1.25 percent above the rate set by TMC for loans with terms five years or less and one percent for auto loans with longer terms. TMC has the option to move to non-discretionary dealer compensation.

This action solidifies the relationship between the CFPB and the DOJ, as it is the fourth joint public resolutions addressing the fair lending risks in dealer discretion and financial incentives.

Both of these enforcement actions signal that the CFPB is not slowing down and is using its authority under Dodd-Frank to touch upon various aspects of the consumer finance industry.

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