Cordray's House Testimony Signals Areas of CFPB Focus

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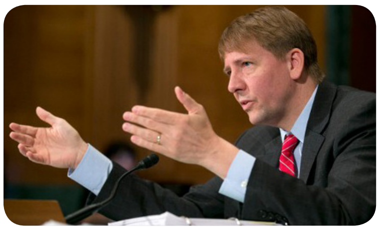

On June 18, 2014, CFPB Director Richard Cordray appeared before the House Financial Services Committee to testify about his agency's fifth Semi-Annual Report. As in past hearings, Cordray and House Republicans clashed over the agency's Qualified Mortgage Rule, which went into effect in January, and its creation of a National Mortgage Database, which the agency says will be a "comprehensive repository of detailed mortgage loan information." Cordray's prepared remarks and testimony provide insights into the agency's upcoming agenda.

The director's written remarks highlighted the CFPB's enforcement actions to date, including actions against loan servicers and a payday lender, and the agency's recent and ongoing rulemaking in the areas of mortgage disclosures and debt collection.

In response to questions about whether the CFPB has been too focused on enforcement actions and whether issuing advisory opinions might help businesses seeking clarification on specific business practices, Cordray indicated that the CFPB might do more in this area. Cordray said that the industry should expect to see the CFPB issue advisory opinions in appropriate cases. During the hearing, both Republican and Democratic members of the House Committee expressed support for the agency's use of advisory opinions to provide guidance. In a recent vote divided along party lines, the Committee approved H.R. 4662, which, if enacted, would require the CFPB to establish a formal process for advisory opinions.

Cordray also stated that the CFPB is preparing a white paper explaining its proxy methodology for identifying disparate impact to determine if indirect auto lenders are engaging in discrimination. Cordray acknowledged that there had been frustration in this area, and he said that the decision to put out a white paper was part of the bureau's effort to be responsive. The white paper is expected to be released later this summer. Notably, the bureau's proxy methodology led to the CFPB and Justice Department's order to Ally Financial Inc. and Ally Bank to pay $80 million in damages back in December.

Also of note, Cordray testified that the agency plans to release its proposed regulations governing prepaid cards for public comment by the end of the summer. Among other things, the new rules will address required fee disclosures.

Proposed Data Reporting Rule Issued

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If you are looking for some light reading these last few weeks of summer, you might want to take a look at the recently released proposed rule regarding changes to the Home Mortgage Disclosure Act (HMDA) also known as Regulation C. HMDA data provides information regarding home mortgage lending activity, and the proposed CFPB rule appears to significantly expand data reporting requirements for mortgage industry participants. The proposed rule itself is 573 pages long. The deadline for comments to the rule is on or before October 22, 2014.

Each year HMDA data is reported for the vast majority of residential mortgage loans originated in the U.S. In 2012, information came from 7,400 financial institutions that reported data for approximately 18.7 million mortgage applications and loans. The information that institutions report includes: the name of the lender; the type and general location of the property; and the race, ethnicity, and sex of the applicant. Reported HMDA data also includes information about the loan amount and whether the loan is for purchasing a home, refinancing an existing mortgage or home improvement.

HMDA data has been considered a "mixed bag" of information as a result of the failure to include certain types of information, such as the age of the borrower or even property value. The CFPB was given direct authority via Dodd-Frank to revise HMDA regulations and the 573-page proposed rule is the agency's attempt to do just that. This rule includes a number of new categories of data to be collected, including the property value, term of the loan, total points and fees, the duration of any teaser or introductory interest rates, and the applicant's or borrower's age and credit score.

In addition to market information, the CFPB is also using the proposed rule to gain data regarding access to credit. The rule would require financial institutions to provide more information about underwriting and pricing, such as an applicant's debt-to-income ratio, the interest rate of the loan, and the total discount points charged for the loan. The CFPB believes that such data would help the Bureau observe how the Ability-to-Repay rule is impacting the market, and would also help the Bureau monitor developments in specific markets such as multi-family housing, affordable housing and manufactured housing. The proposed rule would also require that lenders report, with some exceptions, all loans related to dwellings, including reverse mortgages and open-end lines of credit.

In developing the proposed rule, the CFPB states that it aimed to:

- **Standardize the reporting threshold**. Depository institutions, such as banks, satisfying HMDA's general reporting requirements must submit HMDA data, even if they make only a single home-purchase loan or refinancing in a given year. However, non-depository mortgage lenders may be required to report only if they make at least 100 loans. The proposal would generally require that institutions report HMDA data if they make 25 or more closed-end loans or reverse mortgages in a year.

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Proposed Data Reporting Rule Issued, *continued*

- **Ease reporting requirements for some small banks**. With the proposed standardized reporting threshold, small depository institutions that have a low loan volume—fewer than 25 mortgages a year—would not have to report HMDA data.

In announcing the proposed rule, the CFPB stated that in addition to more robust reporting, the proposed rule furthered the Bureau's goals related to:

- **Aligning reporting requirements with industry data standards**. Using established industry data standards would mitigate the burden on lenders in providing the new data.

- **Improving the electronic reporting process**. The CFPB is analyzing new technological tools to make the data submission process more efficient, ease the data formatting requirements and help financial institutions prevent errors.

- **Improving data access**. Despite significant privacy concerns already being raised, the CFPB specifically stated that it is looking at ways to improve how the public can securely use HMDA data.

State Attorneys General Bringing Actions Under Dodd-Frank

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cfpb Consumer Financial Protection Bureau

As the CFPB celebrates its three-year anniversary, the current trend appears to be lawsuits brought by state attorneys general or state regulators pursuant to their authority under Dodd-Frank Section 1042. Under Section 1042, a state regulator or attorney general is authorized to bring a civil action for a violation of the Dodd-Frank prohibition of unfair, deceptive or abusive acts or practices (UDAAP). Recently lawsuits have been filed by state attorneys general in three different states: Illinois, New York and Mississippi.

Illinois

In March 2014, the Illinois attorney general filed a state lawsuit against a small lender, CMK Investments, Inc., alleging that the lender is evading the state's 36% interest rate cap by offering a short term loan product that acts like a revolving line of credit but offers none of the protections of a credit card. According to the Complaint, the company thwarts the state interest rate cap by tacking on bogus "required account protection fees." When the extra fees are factored into the total cost of the short-term loan, the interest rates soar to 375 percent, and sometimes up to more than 500 percent. It also alleges that the lender instructed borrowers to make a monthly minimum payment, but did not apply any of the minimum payment toward principal. In April 2014, the case was removed to the Illinois federal court and in May 2014, a motion to dismiss was filed, which is now pending before the court.

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State Attorneys General Bringing Actions Under Dodd-Frank, *continued*

In January 2012, the Illinois Attorney General filed a lawsuit against for-profit college Westwood College, alleging that Westwood used deceptive marketing that left students with thousands of dollars of debt and limited job opportunities. The lawsuit alleges that, through marketing its criminal justice program, Westwood falsely convinced students they could pursue a law enforcement career with such agencies as the Illinois State Police and suburban police departments, even though those employers do not recognize a Westwood degree due to its lack of regional accreditation. Additionally, because Westwood is not recognized by regionally accredited colleges, students found they could not transfer their coursework to alternative programs to complete a degree. Lacking a regionally accredited degree and unable to transfer their coursework, Westwood students were left with anywhere from $50,000 to $70,000 in student loan debt.

The state recently filed a motion in a state court seeking leave to further amend its complaint to add new counts alleging that the defendants' practices were unfair and abusive under Section 1042 of Dodd Frank. The second amended complaint added an allegation that the defendants knew but failed to inform prospective students that a majority of students enrolled in the academic program default on the in-house financing. The motion to amend was granted in May 2014. At the hearing on the state's motion to amend the complaint, the defendants indicated that they planned to file a motion to dismiss the complaint. The court has set a briefing schedule for the motion, with oral argument scheduled for July 2.

On July 14, 2014, the Illinois attorney general filed two lawsuits, one against First American Tax Defense, LLC and another against Broadsword Student Advantage LLC. The complaints allege that the unlicensed companies engaged in deceptive marketing practices and illegally charged consumers up-front fees to reduce or eliminate their student loan debt burden using methods available directly to the borrowers. The services that defendants offered for a fee are available free of charge from governments services. The lawsuits allege the companies are in violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, the Credit Services Organizations Act, and the Debt Settlement Consumer Protection Act.

New York

On April 23, 2014, Benjamin Lawsky, Superintendent of the New York State Department of Financial Services, filed a complaint in the U.S. District Court of New York against Condor Capital Corporation, a subprime indirect auto lender, and Stephen Baron, Condor's Chief Executive Officer and sole owner. The complaint alleges that Condor stole funds from its auto loan customers and compromised the personal information of its customers, engaging in unfair, deceptive, and abusive acts and practices. The state won its motion for a temporary restraining order, freezing Condor's accounts and operations. On June 20, 2014, an intervenor complaint was filed by Condor's secured lender seeking a declaratory judgment as to its lien status and its right to exercise various rights and remedies under its loan agreement with Condor.

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State Attorneys General Bringing Actions Under Dodd-Frank, *continued*

Mississippi

The most recent lawsuit was filed in Mississippi in May 2014. The lawsuit accuses Experian of knowingly including erroneous data in the credit files of millions of Americans, threatening their ability to obtain loans and sensitive government security clearances, and tainting employment-related background checks. It further alleges that Experian has even wrongly reported that consumers are on a federal terrorism watch list. The complaint also states that when consumers dispute alleged inaccuracies in their credit reports, Experian and the other agencies failed to conduct reasonable investigations concerning consumers' disputes; indeed, in many cases, failing to conduct any investigation of consumer disputes regarding their credit history or accounts. It is alleged that when consumers file a dispute, Experian reflexively finds in favor of the bank or debt collector that reported the debt and that Experian employees attempt to sell consumers credit-monitoring products of questionable value. In June 2014, Experian removed the case to a federal district court. Earlier this month, the attorney general filed an amended complaint that includes new allegations regarding deceptive marketing practices by Experian.

These lawsuits are significant because their outcomes will likely indicate the types of lawsuits that could be possibly brought by the CFPB in the future.

RESPA Amendment Changes Rules, Deadlines Regarding Errors Communications

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In July of 2010, the Real Estate Settlement Procedures Act (RESPA) was amended by Congress to reduce the time period from twenty days to five days for a servicer to acknowledge receipt of a qualified written request, and from sixty days to thirty days the time for a servicer to respond to a qualified written request.[1] These amendments did not become effective until January 10, 2014. On January 17, 2013, the Consumer Financial Protection Bureau (CFPB) issued a final rule on mortgage servicing which implemented these changes and which revised the requirements found in Regulation X regarding qualified written requests.[2] These new regulations also became effective on January 10, 2014. The CFPB has also issued a "staff commentary" setting forth its interpretation of the new regulations.[3]

Although the prior regulations regarding qualified written requests treated both notices from the borrower asserting errors and requests for information from the borrower as qualified written requests,[4] the new regulations split notices regarding errors and requests for information into two separate categories and establish separate requirements for handling each category.[5] This article explores the requirements regarding notices of error.

1 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1463(c), 124 Stat. 1376, 2183-84 (2010).
2 This rule was published in the Federal Register on February 14, 2013. 78 F.R. 10695.
3 12 C.F.R. § 1024, Supp. I.
4 See, former 24 C.F.R. § 3500.21(e).
5 See, 12 C.F.R. §§ 1024.35 and 1024.36.

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RESPA Amendment Changes Rules, Deadlines Regarding Errors Communications, *continued*

The new regulations apply to all federally related mortgage loans as defined by RESPA.[6] The new regulations define a "notice of error" as "any written notice from the borrower that asserts an error and that includes the name of the borrower, information that enables the servicer to identify the borrower's mortgage loan account, and the error the borrower believes has occurred."[7] A note on a payment coupon or other payment form supplied by the servicer is not treated as a notice of error.[8] The term "error" is defined to include eleven categories of covered errors:[9]

1. Failure to accept a payment that conforms to the servicer's written requirements for the borrower to follow in making payments.
2. Failure to apply an accepted payment to principal, interest, escrow or other charges under the terms of the mortgage loan and applicable law.
3. Failure to credit a payment to a borrower's mortgage loan account as of the date of receipt.
4. Failure to pay taxes, insurance premiums or other charges, including charges that the borrower and servicer have voluntarily agreed that the servicer should collect and pay, in a timely manner.
5. Imposition of a fee or charge that the servicer lacks a reasonable basis to impose upon the borrower.
6. Failure to provide an accurate payoff balance amount upon a borrower's request.[10]
7. Failure to provide accurate information to a borrower regarding loss mitigation options and foreclosure.
8. Failure to transfer accurate and timely information relating to the servicing of a borrower's mortgage loan account to a transferee servicer.
9. Making the first notice or filing for any judicial or non-judicial foreclosure process if the borrower is not more than 120 days delinquent, or before all completed applications for loss mitigation have been reviewed and it has been determined that the borrower is not eligible for loss mitigation and the time for appeal of this determination has expired, or the borrower has rejected the loss mitigation option offered, or the borrower failed to perform under a loss mitigation agreement.
10. Moving for foreclosure judgment or order of sale, or conducting a foreclosure sale if the borrower has submitted a completed application for loss mitigation no more than 37 days before the scheduled foreclosure sale, that the application has not been reviewed, it has been determined that the borrower is not eligible for loss mitigation and the time for appeal of this determination has expired; or the borrower has rejected the loss mitigation option offered; or the borrower failed to perform under a loss mitigation agreement.[11]
11. Any other error relating to the servicing of a mortgage loan.

Correspondence does not qualify as a "notice of error" if it asserts an error which is not defined as an error in the list above. The staff commentary lists three examples of errors which a borrower might assert which are not errors as defined by Regulation X:[12]

1. An error relating to the origination of a mortgage loan.
2. An error relating to the underwriting of a mortgage loan.
3. An error relating to a subsequent sale or securitization of a mortgage loan.

6 See, 12 C.F.R. §§ 1024.2 and 1024.5(b). The new regulations do not apply to home equity lines of credit or open-end lines of credit.
7 12 C.F.R. §1024.35(a).
8 Id.
9 12 C.F.R. §1024.35(b).
10 A reduced period of 7 business days applies to asserted errors regarding failure to provide payoff figures. 12 C.F.R. § 1024.35(e)(3)(i)(A).
11 The response to an asserted error regarding foreclosure procedures (categories 9 and 10) must be sent by the earlier of the date of the foreclosure sale or 30 business days after receipt of the notice of error. 12 C.F.R. § 1024.35(e)(3)(i)(B). However, the response requirements do not apply to notices of error received 7 or fewer days before a foreclosure sale. 12 C.F.R. § 1024.35(f)(2).
12 12 C.F.R. § 1024, Supp. I., § 35(b)(1).

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RESPA Amendment Changes Rules, Deadlines Regarding Errors Communications, *continued*

Additionally, a servicer is not required to comply with the requirements regarding notices of error if:[13]

1. The asserted error is substantially the same as an error previously asserted by the borrower to which the servicer has previously responded, unless the borrower provides new, material information to support the asserted error.
2. The notice of error is overbroad, which is the case if the servicer cannot reasonably determine from the notice of error the specific error that the borrower asserts has occurred on a borrower's account.
3. The notice of error is delivered to the servicer more than one year after (a) the loan was
4. paid in full or (b) servicing of the loan was transferred to another servicer.

A servicer can designate an exclusive address to which all notices of error (and requests for information) must be sent.[14] The servicer must inform the borrower of the designated address by written notice. Additionally the designated address must be identified in (a) any periodic statement or coupon book regarding the mortgage loan; (b) any web site the servicer maintains in connection with servicing of loans; and (c) all early intervention and loss mitigation notices sent to the borrower.[15] Servicers are allowed, but not required, to establish an exclusive process for receiving notices of error by e-mail, through forms on web sites, or by other online methods.[16] Establishing an electronic means of submission does not relieve a servicer of the obligation to establish a process for receiving notices of error by mail.

If a servicer receives a notice of error, within five business days of receipt, it must send the borrower a written response acknowledging receipt of the notice of error.[17] The servicer must then, within 30 business days after receipt of the notice of error, conduct a reasonable investigation of the error(s) asserted by the borrower and either (1) correct the error(s) and send a written notice of correction to the borrower; or (b) send the borrower a written notice that no error occurred.[18] The written notice of correction must include an explanation of the correction made, the effective date of the correction and contact information, including a telephone number the borrower may use to seek further assistance.[19] The written notice that no error occurred must include a statement that the servicer has determined that no error occurred, a statement of the reason(s) for this determination, a statement of the borrower's right to request documents relied upon by the servicer in reaching its determination, information regarding how the borrower can request such documents, and contact information, including a telephone number, the borrower may use to seek further assistance.[20] If the borrower requests the documents that the servicer relied upon to determine that no error occurred, the servicer must provide copies of the documents to the borrower, at no charge, within 15 business days of receiving the borrower's request.[21]

A servicer may request additional documentation from a borrower in connection with the investigation of an asserted error, but the servicer may not: (1) require the borrower to provide the information as a condition of investigating the asserted error; or (2) determine that no error occurred because the borrower failed to provide any requested information without conducting a reasonable investigation.[22] For most of the categories of errors, the servicer may extend the time period for response by an additional 15 business days by sending the borrower written notice of the extension and the reasons for the extension within the original 30-day response period.[23]

13 12 C.F.R. §1024.35(g).
14 12 C.F.R. § 1024.35(c).
15 12 C.F.R. § 1024, Supp. I., § 35(c)(2).
16 12 C.F.R. § 1024, Supp. I., § 35(c)(4).
17 12 C.F.R. § 1024.35(d). Business days do not include Saturdays, Sundays or legal public holidays.
18 12 C.F.R. §§ 1024.35(e)(1)(i)(A) and (B).
19 12 C.F.R. § 1024.35(e)(1)(i)(A).
20 12 C.F.R. § 1024.35(e)(1)(i)(B).
21 12 C.F.R. § 1024.35(e)(4).

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RESPA Amendment Changes Rules, Deadlines Regarding Errors Communications, *continued*

A servicer may not charge a fee, or require a borrower to make any payment that may be owed on a borrower's account, as a condition of responding to a notice of error.[24] After receipt of a notice of error, a servicer cannot furnish adverse information to any consumer reporting agency for 60 days regarding any payment that is the subject of the notice of error.[25] Unless the asserted error falls into category 9 or 10, the regulations do not limit or restrict a lender or servicer from pursuing any remedy it has under applicable law, including initiating foreclosure or proceeding with a foreclosure sale.[26]

If a servicer fails to comply with the requirements regarding notices of error, the borrower may file a lawsuit within three years of the date of the violation.[27] If the borrower is successful in the lawsuit, the court may award him or her any actual damages incurred as a result of the failure to comply; a civil penalty in an amount not to exceed $2,000 and the costs and attorney fees incurred in bringing the action.[28] RESPA also provides for class actions regarding these provisions. A successful class may be awarded the actual damages incurred by each class member as a result of the failure to comply, a civil penalty which may exceed the lessor of $1,000,000 or 1 percent of the net worth of the servicer and the costs and attorney fees incurred in bringing the action.[29]

24 12 C.F.R. § 1024.35(h).
25 12 C.F.R. § 1024.35(h)(i)(1).
26 12 C.F.R. § 1024.35(h)(i)(2).
27 12 U.S.C. §§ 2605(f) and 2614.
28 12 U.S.C. §§ 2605(f)(1) and (3).
29 12 U.S.C. §§ 2605(f)(2) and (3).