THE CONTROVERSIAL CONSUMER FINANCIAL PROTECTION BUREAU

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- Scope of Consumer Financial Protection Act: "Deceptive," "Unfair," and "Abusive" Practices
- These vague terms provide the CFPB with substantial ammunition for bringing claims.
- As we will discuss, these terms are used by the CFPB to craft very broad allegations.

- The CFPB regulates banks and nonbank consumer financial services providers, such as mortgage lenders and servicers.

- Its total budget for 2012 was $300 million. In 2013, it jumped to $541 million.

- Other than “Centralized Services,” the largest part of its budget is for “Supervision, Enforcement, and Fair Lending,” which includes enforcement.

- This unit's budget has doubled in 3 years.
- The number of budgeted full-time employees is nearly 800.
- A consumer-friendly former prosecutor, Richard Cordray, heads the CFPB.
- As Attorney General for Ohio, he was extremely successful in suing major financial institutions.

- Consumers have filed more than 300,000 complaints.
- About 40 cases have been filed by the CFPB
- The pace of filings has increased. It took the CFPB a year to file its first enforcement action. But in December 2013, it filed six cases in that month alone.
- Cases are split almost equally between actions filed in court and administrative actions.

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- More than half of the court cases were filed as settled actions, but a number of the court cases are being litigated.
- Individuals have been named in about one-third of the cases.
- In most of those cases, however, the individual named was the owner of the company or the principal alleged wrongdoer.
- Almost half of the CFPB cases involved mortgages. Cases have also involved credit cards and alleged debt collection/debt relief abuses.

Flagstar Consent Order

- Just two months ago, the CFPB issued a consent order involving Flagstar's mortgage servicing practices.
- The CFPB alleged that Flagstar committed unfair acts and practices by limiting borrowers' access to loss mitigation.

- Flagstar was alleged to have:
  - Failed to review loss mitigation applications in a reasonable amount of time.
  - Withheld information that borrowers needed to complete their loss mitigation applications.
  - Improperly denied borrower requests for loan modifications.
  - Improperly prolonged trial periods for loan modifications.

- The relief ordered by the CFPB was remarkably broad in scope.
- The company was enjoined from violating the loss mitigation provisions of the Mortgage Servicing Rule and engaging in unfair, deceptive and abusive acts or practices.
- How is anyone to know what specific conduct is prohibited?

- Flagstar was also prohibited from acquiring the right to service any third-party original loan that is in default.
- Flagstar was required to undertake a detailed home preservation plan.
- A third-party consultant must be retained to review Flagstar's policies and procedures.

- The Flagstar board is required to develop a comprehensive written compliance plan.
- Flagstar was ordered to pay $27.5 million to the Bureau with $20 million being distributed to foreclosure consumers.
- Flagstar was ordered to pay a civil penalty of $10 million to the Bureau.

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Ocwen Consent Order

- On December 16, 2013, the CFPB and 49 state attorneys general filed a consent judgment in the District of Columbia against Ocwen.
- According to the CFPB, Ocwen engaged in "systemic misconduct" in mortgage servicing which allegedly pushed consumers into foreclosure.
- Ocwen was ordered to provide $2 billion in principal reduction to underwater borrowers and refund $127 million to borrowers already foreclosed upon.

- The CFPB and Attorneys Generals specifically found that Ocwen violated the CFPA's UDAAP prohibitions when it:
  - failed to timely and accurately apply payments made by borrowers;
  - failed to maintain accurate account statements;
  - charged borrowers unauthorized fees for default-related services;
  - imposed force-placed insurance on consumers when it knew or should have known that they already had adequate home-insurance coverage;
  - provided false or misleading information in response to consumer complaints;

Kickbacks Are Prohibited

- In *CFPB v. Paul Taylor, et al.*, a residential real estate developer was found to have violated RESPA by accepting "fee[s], kickback[s], or thing[s] of value" in connection with a mortgage servicing joint venture created by the developer with a bank.
- The prohibited practice was that the developer received payments based on his interest in the joint venture in exchange for referrals of customers for mortgage loans and other real estate settlement services.
- The developer was ordered to disgorge more than $118,000.00 in fees received from the banks.

- Another case involved four national mortgage insurers: Genworth, United Guaranty, Radian Guaranty and Mortgage Guaranty Insurance.
- It was alleged that the insurers received insurance business in exchange for kickbacks to the lenders in violation of RESPA and the Consumer Finance Protection Act (“CFPA”).
- The kickbacks were allegedly provided to the lenders through the purchase by the defendants of reinsurance from the lenders’ captive reinsurers that was essentially worthless.
- The CFPB assessed $15 million in civil penalties.

- The CFPB has filed a suit in federal court against a Kentucky law firm for allegedly paying illegal kickbacks for real estate settlement referrals through a network of shell companies.

- It was alleged that the firm and its principals violated RESPA by operating a network of affiliated companies to pay kickbacks for referrals of mortgage settlement business.

- This case is currently being litigated.

Violations of HMDA

- In consent orders entered in administrative proceedings brought against Washington Federal and Mortgage Master, Inc., the CFPB found that the defendants violated reporting requirements of the Home Mortgage Disclosure Act (“HMDA”).
- Their compliance management systems did not maintain procedures reasonably adapted to avoid errors in their HMDA data reporting.

- The CFPB expended substantial resources in this case. It conducted a data integrity review of a sample of its HMDA reporting data and found a 38% error rate.
- The Consent Order required Washington Federal to cease and desist violating the law, submit a written compliance plan to the CFPB for approval, to include, inter alia, reporting requirements, regular testing of data integrity, and training on HMDA requirements.
- A $34,000.00 civil penalty was also assessed.

Ally Bank Consent Order

- In a December 20, 2013 consent order, the CFPB ordered Ally Bank, an auto lender, to pay approximately $80 million in refunds and $18 million in penalties for an alleged pattern of discrimination against minorities in setting interest rates.
- The CFPB and DOJ used a proxy based analysis in finding the alleged pattern of discrimination. Their methodology employed combined geographic and name-based probabilities, based on census bureau data. The joint race and national origin probabilities were then used in the CFPB and DOJ models to estimate disparities in dealer markup on the basis of race or national origin.

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PHH Corporation Litigation

- In January of this year, the CFPB initiated an administrative proceeding against PHH Corporation alleging that PHH harmed consumers through a mortgage insurance kickback scheme dating back to 1995.
- The notice of charges accuses PHH of having received as much as 40% of premiums paid to mortgage insurers.
- The Bureau alleges that PHH manipulated its allocation of mortgage insurance business to maximize kickback reinsurance payments for itself.

Conclusions

- The CFPB has expansive authority and can impose very broad relief.
- RESPA has certainly been a focus.
- So have alleged “deceptive practices.”
- The CFPB has brought both large and small enforcement cases. For example, the Ocwen case resulted in more than $2 billion of relief for borrowers. But it also brought a reporting violation case involving only $34,000 in monetary relief.
- Very hard to tell how the amounts of civil money penalties are calculated.