CFPB Ready for Heightened Enforcement

The new U.S. administration in Washington is likely to increase its scrutiny of consumer financial products and services. Nowhere is this more evident than at the Consumer Financial Protection Bureau (CFPB), which is uniquely positioned to provide greater regulatory oversight of financial services institutions, increase scrutiny of potentially unfair, deceptive, or abusive acts or practices, and take enforcement actions against financial institutions. These organizations need to have clear insight into the agency's priorities and how to address them.

Evolution of the CFPB

The 2008 financial crisis and its impact on consumers prompted the enactment of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act. That landmark legislation created the CFPB to provide federal oversight of consumer financial products and services. The bureau assumed rulemaking authority for certain consumer financial laws and regulations, as well as supervision and enforcement authority over certain bank and non-bank institutions.

Over the last decade, the CFPB has exercised its authorities by writing new or amending existing regulations, conducting examinations of bank and non-bank institutions, and entering into notable enforcement actions, all aimed at addressing business practices, products and services that cause or could cause harm to consumers. In its short history, the CFPB has provided significant restitution to consumers and assessed monetary penalties on supervised institutions for non-compliance.

Since its inception, the CFPB has placed great emphasis on consumer protection and changing practices at financial institutions that contributed to the last financial crisis. Under the Trump administration, the bureau's structure, activities and focus were challenged and the pace of regulatory change and enforcement activity slowed. More recently, the COVID-19 global pandemic resulted in adjusted supervisory priorities to ensure that financial institutions addressed the immediate financial impacts of the pandemic on consumers while also easing the burden on those institutions temporarily to facilitate their response to the pandemic. Under the new administration, the bureau's acting and proposed leadership have communicated their intent to refocus their supervisory and enforcement priorities and strengthen their response to consumer protection matters related to the current economic environment and social justice concerns.

COVID – and more – driving new priorities in the bureau

The 2020 enactment of the Coronavirus Aid, Relief, and Economic Security (CARES) Act provided additional consumer protections, such as moratoriums on eviction or foreclosure proceedings as well as protections related to negative consumer reporting associated with mortgage loan forbearances, many of which were intended to be temporary in nature. The additional consumer protections were aimed at providing a bridge for consumers to help them through the pandemic and prevent the economic downturn experienced in 2008.

Through the CARES Act or other regulatory guidance, the CFPB and other prudential regulators took steps to provide relief for the financial services industry itself. Regulators recognized that the pandemic limited the abilities of both financial institutions and consumers to transact normally. For instance, regulatory relief was afforded to financial institutions for some requirements related to notifications or timeliness for dispute resolution and requirements for obtaining a complete loss mitigation application prior to providing consumers with workout arrangements.

Where temporary regulatory relief was provided during the pandemic or temporary consumer protection-related provisions of the CARES Act begin to lapse, financial institutions must ensure they are prepared to return to previous requirements as those relaxations are rescinded. Institutions should consider both the strategic and tactical elements of the changing regulatory landscape, as well as the possibility of new or changing consumer protections that the bureau itself may prescribe.

The strategic elements are most critical. As the CFPB sets its supervisory and enforcement priorities and rulemaking agenda, financial institutions should evaluate the impact of heightened regulatory expectations. Among the questions institutions should begin to evaluate:

- How robust is the compliance management system (CMS) they have implemented?
- How effectively did the organization's CMS respond and operate during the pandemic, or even leading up to it?

- How do the organization's compliance risk assessments address emerging risks as the economy recovers from the pandemic?
- What CMS or business process investments should organizations make to withstand increased regulatory activity and scrutiny?

Fair lending, fair servicing and responsible banking practices are high-priority areas for the current administration and the bureau. Specific initiatives include forbearances, loan modifications, and various alternative means to keep individuals in their homes or preserve lines of consumer credit. Financial institutions should be assessing their current state against these new strategic priorities. Leaders of financial institutions also need to consider such questions as: *How proactively are we identifying deficiencies in these initiatives? Are we holistically addressing all types of discrimination?* Among other actions, they should review their fair lending programs and servicing practices to determine whether they are operating in a non-discriminatory manner throughout all phases of the credit lifecycle.

New leader at the helm

The bureau is currently awaiting confirmation of President Biden's nominee, Rohit Chopra, to serve as its next director. Chopra, an initial architect of the CFPB and the first person of color ever nominated to head the agency, is expected to focus on the impact of the pandemic on minority communities.

Meanwhile, the current acting director, Dave Uejio, has begun articulating the bureau's priorities. On January 28, 2021, in a statement originally issued internally to bureau employees, he highlighted two primary concerns: (1) relief for consumers facing hardship due to COVID-19 and the related economic crisis, and (2) racial equity. He specifically referenced activities of banks, mortgage servicers, student loan servicers and companies that report information to credit reporting agencies. "In some cases, penalties may be necessary … to ensure that industry gets the message that violations of law during this time of need will not be tolerated," Uejio stated.[1]

In March 2021, the CFPB took another important step, rescinding a January 2020 policy statement that altered how the bureau applied the "abusiveness" standard in its supervisory and

[1] "The Bureau is taking much-needed action to protect consumers, particularly the most economically vulnerable," Dave Uejio, Consumer Financial Protection Bureau, January 28, 2021: www.consumerfinance.gov/about-us/blog/the-bureau-is-taking-much-needed-action-to-protect-consumers-particularly-the-most-economically-vulnerable/.

enforcement matters.[2] The 2020 principle had balanced whether harm to consumers outweighed benefits. At that time, the agency announced that it would avoid "dual pleading" of overlapping facts of abusiveness, unfairness or deception violations. This policy statement was perceived by many consumer advocates to diminish the authorities granted to the CFPB under the Dodd-Frank Act and lessen protections for consumers. Under its new leadership, the bureau has indicated that it intends to exercise its supervisory and enforcement authority consistent with the full scope of its statutory authority under the Dodd-Frank Act.

Racial injustice and other inequities

On January 26, 2021, President Biden signed an executive order committing to revitalize enforcement of fair lending laws to address the "ongoing legacies of residential segregation and discrimination [that] remain ever-present in our society."[3]

Two days later, in his January 28 statement, Uejio echoed these priorities: "I am going to elevate and expand existing investigations and exams and add new ones to ensure we have a healthy docket intended to address racial equality," he said, adding, "we will also look more broadly, beyond fair lending, to identify and root out unlawful conduct that disproportionately impacts communities of color and other vulnerable populations."[4]

After the 2008 financial crisis, regulators began to scrutinize potential discriminatory loss mitigation and foreclosure practices and hold mortgage servicers accountable through supervisory and enforcement activities. Today, servicers are being urged toward more proactive outreach to prevent consumer harm.

Other policy areas related to racial injustice issues are fair housing and fair servicing. Under the previous administration, two federal rules that bar discrimination in housing were suspended. The first rule, the longstanding Affirmatively Furthering Fair Housing rule of 1968, required local governments that accept federal housing dollars to review their policies and actively work toward reversing segregation. The second rule, the discriminatory effects standard, bars

[2] "Consumer Financial Protection Bureau Rescinds Abusiveness Policy Statement to Better Protect Consumers," Consumer Financial Protection Bureau, March 11, 2021: www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-rescinds-abusiveness-policy-statement-to-better-protect-consumers/.

[3] "Memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies," The White House, January 26, 2021: www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-redressing-our-nations-and-the-federal-governments-history-of-discriminatory-housing-practices-and-policies/.

[4] "The Bureau is taking much-needed action to protect consumers, particularly the most economically vulnerable," www.consumerfinance.gov/about-us/blog/the-bureau-is-taking-much-needed-action-to-protect-consumers-particularly-the-most-economically-vulnerable/.

seemingly neutral policies in lending, renting and selling that result in discrimination. Both are expected to be subject to new rulemaking this year to reinstate the previous requirements.

In addition to prioritizing COVID-19 relief and racial equity, the CFPB is refocusing on compliance with the Military Lending Act (MLA). In his January 28, 2021, statement, the bureau's acting director announced that the CFPB would officially resume supervisory examinations of lenders for MLA compliance.

Responding to COVID-related complaints and protections

According to the bureau's 2020 *Consumer Response Annual Report*, published in March 2021, beginning in April 2020, consumers began to submit over 3,000 complaints every month mentioning the coronavirus. Within the report, the bureau notes that insights gained from complaint data are being used to inform its pandemic-related response, including its supervisory and enforcement activities.

Under the new administration, the bureau's leadership has indicated it is imperative to address the pandemic fallout, especially the pain points of housing and mortgage foreclosures. Uejio began by listing egregious examples of violations. He reported that some mortgage servicers were found to be providing consumers incomplete and inaccurate information about CARES Act forbearances, failed to process forbearance requests accurately and timely, and assessed late fees despite having approved forbearances. The CFPB took issue with certain banking practices, describing how some institutions set off stimulus payments and unemployment insurance benefits to cover bank fees and other debt. In addition, examiners found that the widely used policy of banks only taking Payment Protection Program (PPP) applications from pre-existing customers might have a disproportionate adverse impact on minority-owned businesses.

Lastly, on April 1, 2021, the CFPB rescinded seven policy statements issued between March 26 and June 3, 2020, to assist financial institutions at the height of the pandemic. The intent of such assistance had been to allow flexibility in complying with certain regulatory filings and consumer finance laws during an exceptional period of national emergency. These actions demonstrate the bureau's intent to revisit previous policies instituted and lay the groundwork for its new strategic priorities.

Based on these developments, it is clear the CFPB is focused on evaluating how consumers are impacted by the pandemic, enforcing not only existing consumer protections but also evaluating how effective those protections are in addressing the crisis and if and how actions should be taken to enhance consumer protections.

Addressing foreclosures

COVID-19 has taken a toll on consumers, as millions of families nationwide have suffered loss of income and nearly three million homeowners remain behind on their mortgages. A surge of borrowers will likely increase strains on mortgage servicers when forbearances expire. In April 2021, the CFPB proposed a set of rule changes to require servicers and borrowers to work together to prevent avoidable foreclosures and an avalanche of loan defaults and auto repossessions, which may provide to borrowers more time to recover and provide servicers more options to provide mortgage loan modifications and other relief.[5]

Preventing foreclosures helps both homeowners and communities, given that foreclosures are expensive for homeowners and surrounding homes and communities lose value. Meanwhile, the impacts of the pandemic have had a seemingly disproportionate impact on communities of color, deepening racial inequality. According to a March 2021 report, the CFPB found that African-American and Hispanic-American homeowners were more than twice as likely to be behind on housing payments as of December 2020.

Expressing the CFPB's position, Uejio stated, "servicers need to be prepared for a high volume of borrowers exiting forbearance," and proposed "additional guardrails and tools for servicers as they navigate the coming months. We will do everything in our power to ensure servicers work with struggling families to find solutions that prevent avoidable foreclosures."[6]

The bureau's proposed rule would provide a special pre-foreclosure review period that would generally prohibit servicers from starting foreclosure until after December 31, 2021, and allow servicers to offer certain streamlined loan modifications to borrowers with COVID-19-related hardships.

Also, in April 2021, to further protect tenants from foreclosures, the CFPB clarified that tenants can hold debt collectors accountable for illegal evictions. Debt collectors must now provide written notice to tenants of their rights under the eviction moratorium. It is clear that the bureau is placing great emphasis on ensuring American consumers are afforded opportunities to remain in their homes.

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[5] "CFPB Proposes Mortgage Servicing Changes to Prevent Wave of COVID-19 Foreclosures," Consumer Financial Protection Bureau, April 5, 2021: www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-mortgage-servicing-changes-to-prevent-wave-of-covid-19-foreclosures/.

[6] Ibid.

Small business

The CFPB is also prioritizing the implementation of Section 1071 of the Dodd-Frank Act, which requires financial institutions to file certain data with the bureau on credit applications for women- and minority-owned small businesses. Congress enacted this requirement to facilitate enforcement of fair lending laws and to identify development needs and opportunities for those groups.

The bureau's acting director reiterated this commitment in a statement on February 4, 2021: "In addition to the sharpened consumer focus, I want to make sure that we are doing all we can for the small businesses across the country that are on the brink of extinction. The bureau enforces critical laws that protect small business owners, including from harmful discrimination, in their access to and use of credit."[7]

What financial institutions should do now

Financial institutions should be readying themselves for changes that are occurring in, and are forthcoming to, the regulatory environment. Throughout 2021 and beyond, financial institutions should consider the following proactive measures to prepare for the CFPB's forthcoming supervisory activities:

- Perform an internal assessment of the organization's CMS, including an evaluation of its performance relative to the pandemic and how the organization is equipped to manage increased regulatory change and scrutiny.

- Evaluate high-risk products, services, practices and emerging risks relative to the bureau's communicated priorities, including mortgage and student loan servicing, consumer reporting, and fair and responsible banking, among others, and update risk assessments accordingly.

- Increase monitoring and oversight activities for pandemic-related matters, such as forbearances-related requirements of the CARES Act.

[7] "The Bureau is working hard to address housing insecurity, promote racial equity, and protect small businesses' access to credit," Dave Uejio, Consumer Financial Protection Bureau, February 4, 2021: www.consumerfinance.gov/about-us/blog/the-bureau-is-working-hard-to-address-housing-insecurity-promote-racial-equity-and-protect-small-businesses-access-to-credit/.

- Invest in leadership and resources needed to drive the organization's CMS and response to changes in the regulatory environment, as well as technologies and tools that facilitate compliance management and monitoring.
- Ensure internal audit's risk assessment and audit plan include appropriate coverage for consumer compliance.
- Review the effectiveness of change management processes and protocols that enable the timely and accurate implementation of regulatory changes.
- Ensure compliance strategies are communicated broadly and aligned with organizational values.

In closing

Given the changing regulatory landscape, financial institutions should take steps to evaluate the effectiveness of their CMS, as well as the organization's products, services and practices, to determine that they can withstand increased regulatory activity and scrutiny. An effective CMS, properly aligned to an organization's mission, values and strategy, can more than just effectively comply with the law – it can facilitate an organization's ability to address more broadly the impacts of their products, services and practices on their communities and consumers.

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