

# Consumer Financial Protection Bureau (CFPB): Outlook 2015

January 8, 2015

Webinar 12:00 pm – 1:30 pm ET

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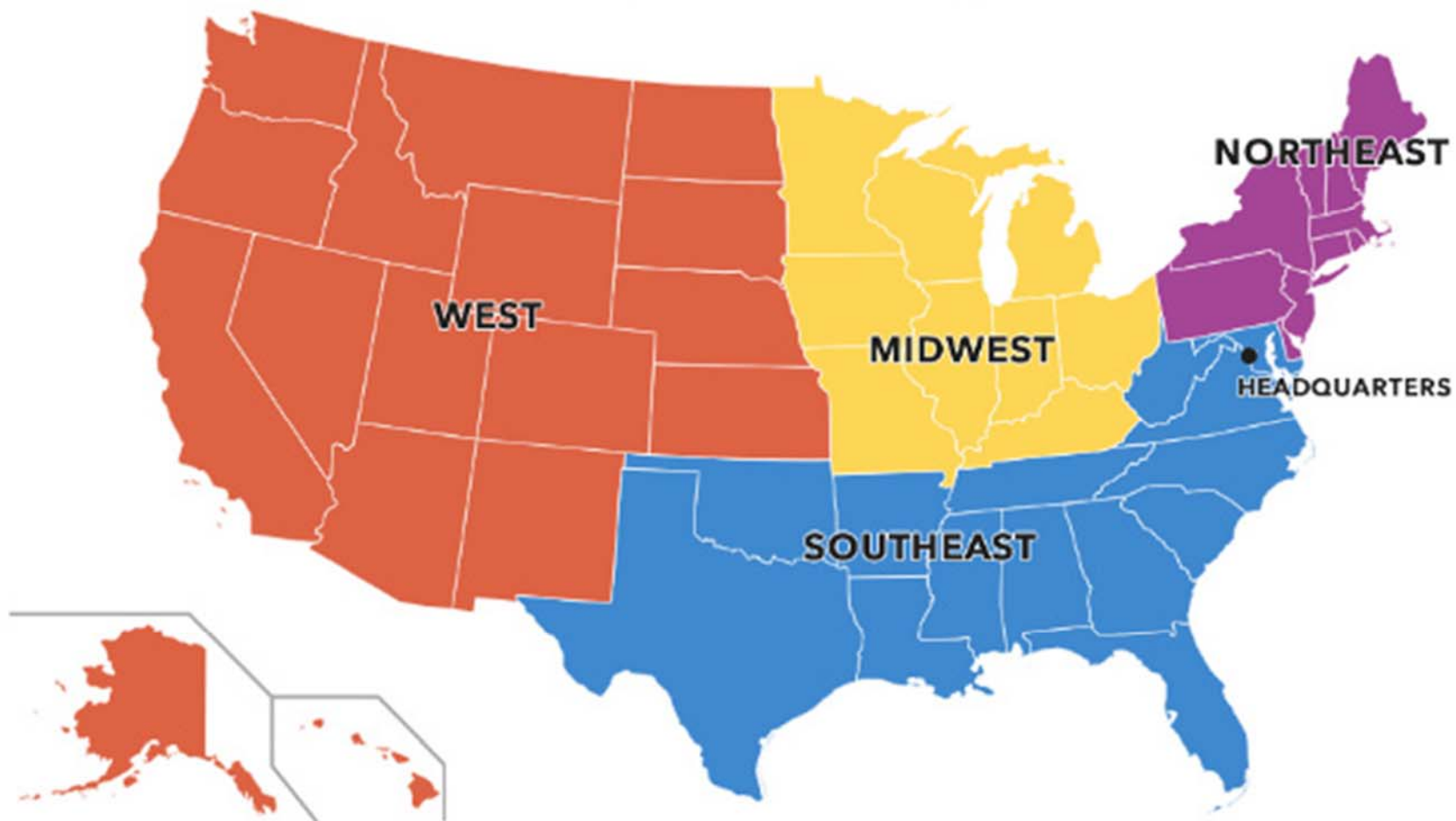
# Agenda

- **Supervision and Examinations**
  - Process and Highlights
  - What to Expect in 2015
- **Enforcement Actions**
  - Review of 2014 Enforcement Highlights
  - What to Expect in 2015
- **Rulemaking**
  - Review of CFPB Fall 2014 Rulemaking Agenda
  - Spotlight on Pending Rulemakings
- **CFPB and Advertising/Marketing Activities**
  - Unfair, Deceptive, or Abusive Acts or Practices
  - Joint Jurisdiction with FTC and Prudential Regulators
  - Compliance Tips
- **Legislative Developments**
- **Additional Resources**
- **Observations and Q & A**



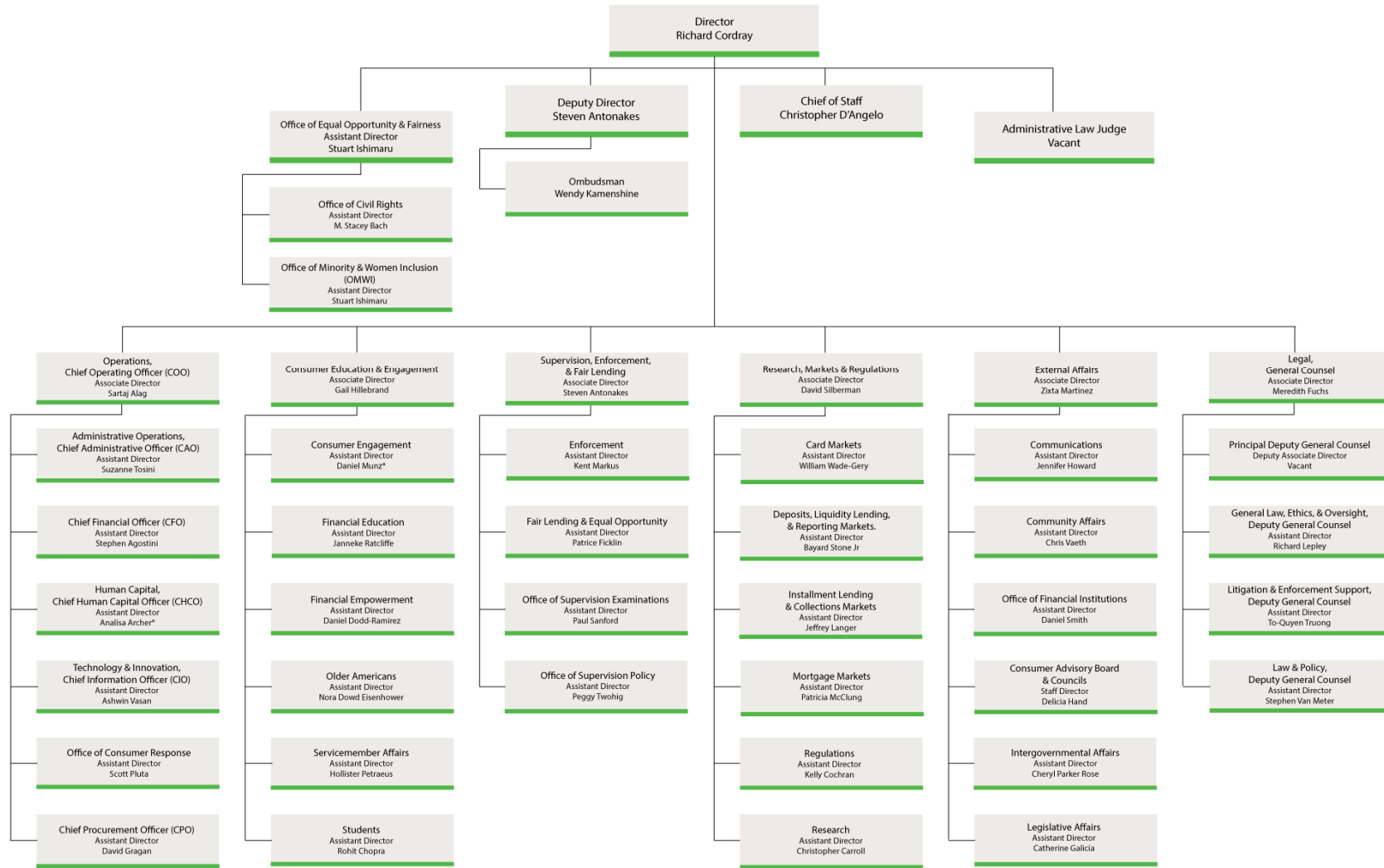
# Supervision and Examinations

# CFPB Supervision Authority





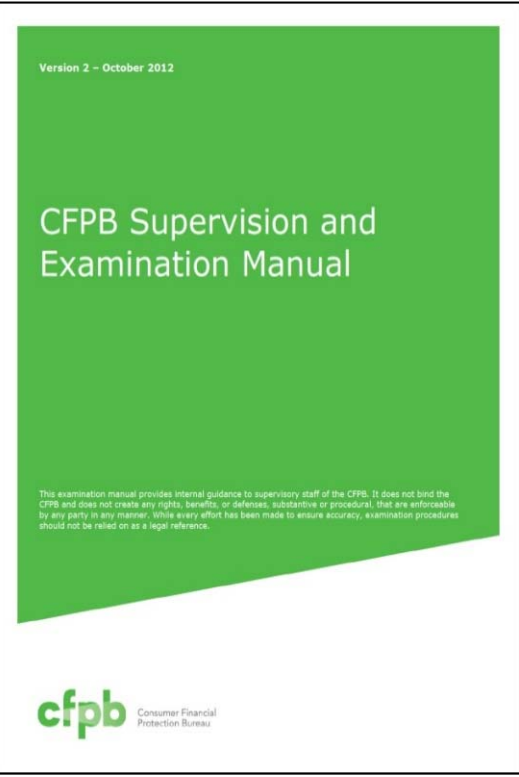
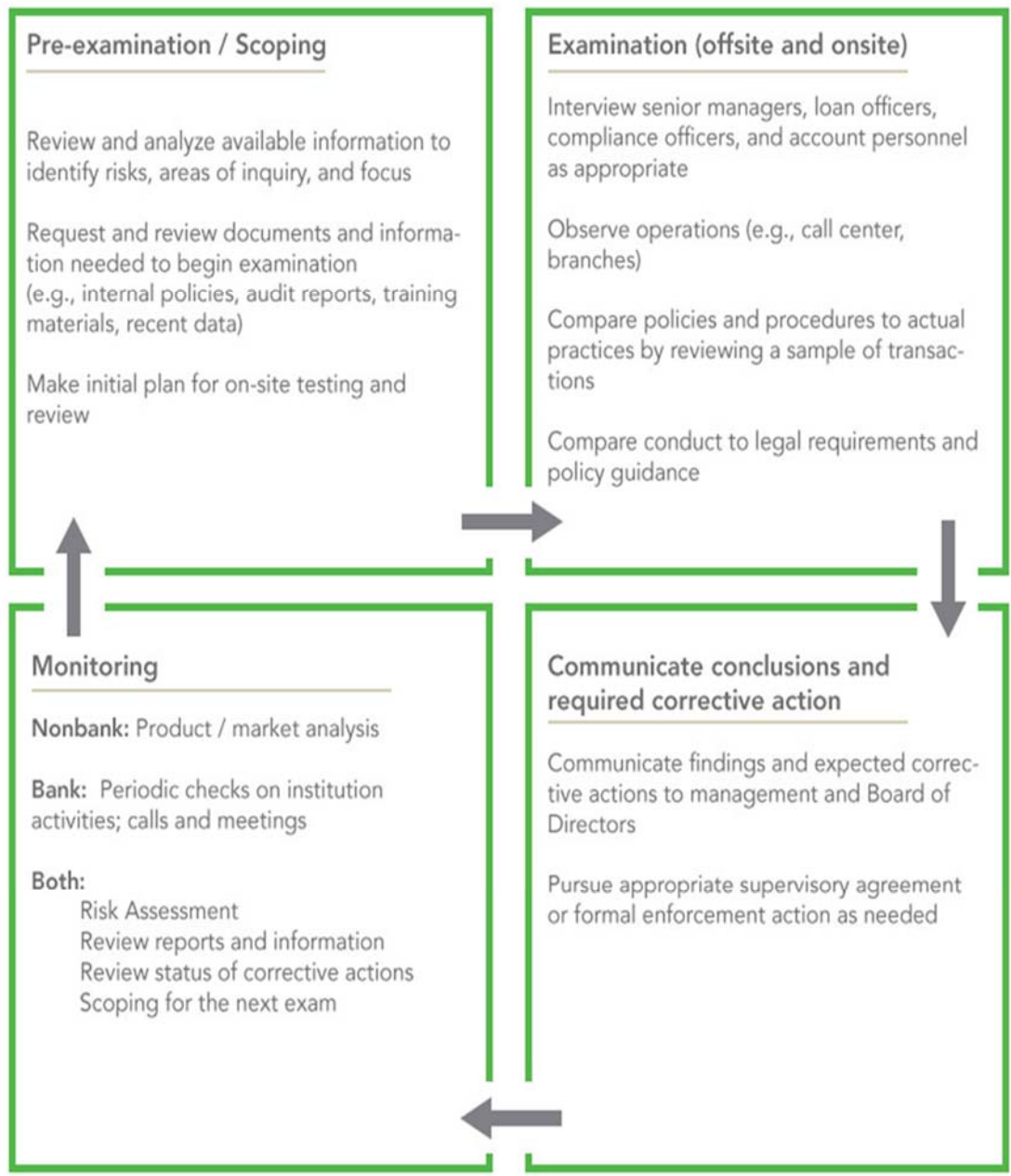
# CFPB Supervision and Examination



**Legend**  
 \* = Position currently filled on an Acting basis  
 \*\* = Position has direct report responsibilities to the Director



# The CFPB Examination Process





# CFPB Examination Objectives

- To assess the quality of the regulated entity's compliance management systems, including its internal controls and policies and procedures.
- To identify acts or practices that materially increase the risk of violations of federal consumer financial laws.
- To gather facts that help to determine whether a regulated entity engages in acts or practices that violate the requirements of federal consumer financial laws.
- To determine, in accordance with CFPB internal consultation requirements, whether a violation of a federal consumer financial law has occurred and whether further supervisory or enforcement actions are appropriate.

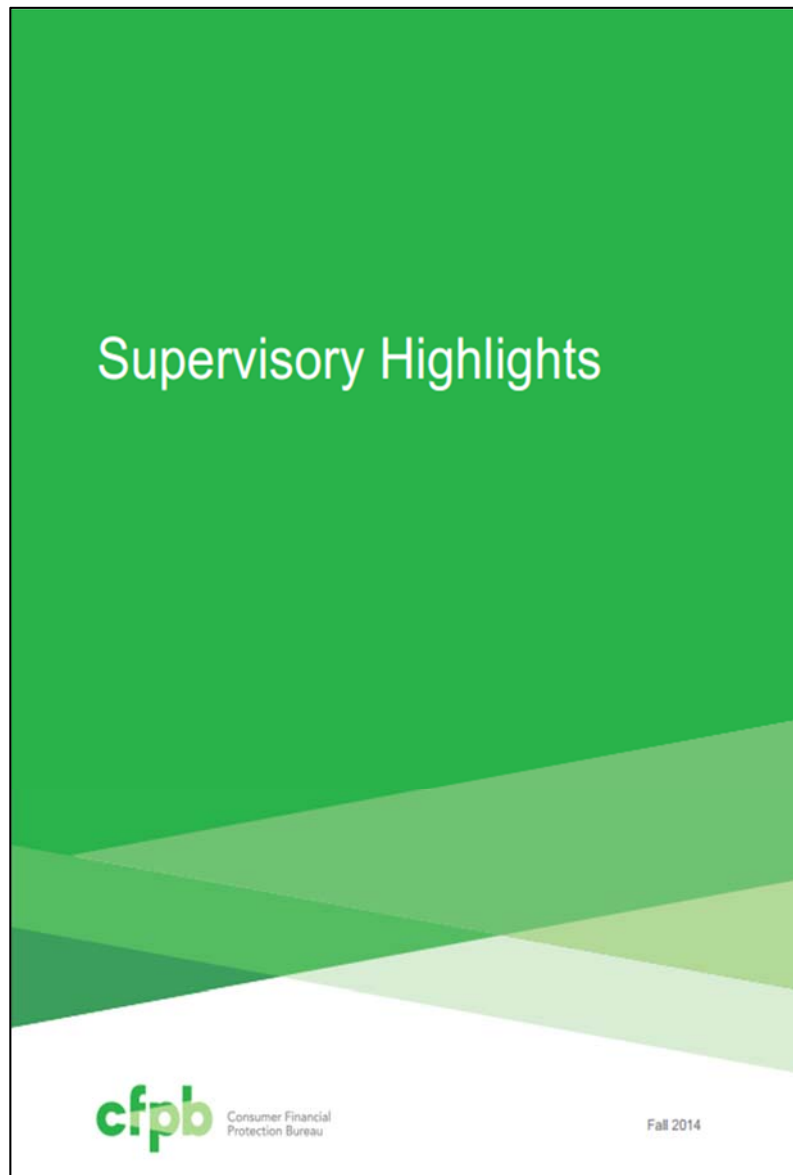


# Examination Observations and Tips

- Exams can take months.
- Keep track of what's reviewed and by whom.
- Consider providing context during and immediately after the onsite exam.
- Anticipate privilege issues.
- Early education and clarification can be key.
- While enforcement may not be onsite, that Office will still be involved in the examination process.
- Prepare to extract data, and prepare to place that data into context early in the process.
- Understand the CFPB's position on remediation and self-policing.
- Consider how an exam may impact overall legal and regulatory profile of company (*e.g.*, private lawsuits, state licensing, *etc.*).
- Prepare and update management and board of directors at all stages
  - Pre-exam prep
  - Scoping
  - Preliminary findings
  - Final report (*e.g.*, for matters requiring attention and other action items)
  - Possible confidential resolution and/or referral to enforcement
  - Appeals process



# Supervisory Highlights



- Goal of “Supervisory Highlights” is to inform both industry and the public about the development of the CFPB’s supervisory program, as well as to discuss broad trends in examination findings in key market or product areas.
- 5 editions to date



# Supervisory Highlights (cont'd.)

- CMS findings
- Consumer reporting
  - Dispute handling / reasonable investigation (FCRA 611)
  - Reporting on furnishing
- Debt collection
  - Convenience fees
  - False threats of litigation
  - Disclosures to third parties due to faulty training materials
  - Unfair practices related to debt sales
  - Call frequency and timing
- Deposits
  - Violations of error resolution requirements
  - Unauthorized transfers
  - Notice deficiencies
- Mortgage servicing
  - Loss Mitigation
  - Short Sales
- Student loan servicing
  - Allocating partial payments in ways that maximize late fees
  - Misrepresentations on billing statements
  - Debt collection practices (including telephone practices)
  - Improper late fees
  - Tax information
- Fair lending
  - HMDA (pre/post 2013 review standards)



# Supervisory Highlights – Enforcement Examples

- Bank - “Free checking accounts” with “no strings attached”
  - Consumers with certain accounts who failed to maintain an average or combined monthly balance of \$1,500 were charged fees of \$5 to \$14 per month.
  - Bank will provide \$2.9 million in refunds to the approximately 59,000 consumers that paid fees, and pay a \$200,000 CMP.
  
- Bank - Mortgage Servicing
  - Halt its illegal mortgage servicing activities, pay \$27.5m to victims, and pay \$10m CMP.
  - Bank will engage in efforts to help affected borrowers preserve their homes, and will be prohibited from acquiring servicing rights for default loan portfolios until it demonstrates it has the ability to comply with laws that protect consumers during the loss mitigation process.





# Supervisory Highlights – Enforcement Examples (cont'd.)

- Bank – Credit Card Practices
  - Provide an estimated \$225m in relief to consumers harmed by illegal and discriminatory credit card practices
    - \$56 million to approximately 638,000 consumers who were subjected to deceptive marketing practices when being sold credit card add-on products.
  - Debt relief related to alleged discrimination on national origin
- Small Dollar Lender – Debt Collection Practices
  - \$5m in refunds; \$5m in CMP
  - Coordinated with TX OCC
  - UDAAP when collecting own debts and when using third party collectors
  - False sense of urgency to get borrowers to take out new loans



# Other Supervisory Activities of Note

- Supervisory Guidance – Recent Examples
  - Brokers shifting to “mini-correspondent” model
  - Application of Regulation Z ability to repay rule to certain situations involving successors-in-interest
  - Mortgage servicing transfers
  - Bulletin on credit card promotional offers
- Coordination
  - CFPB and state regulators coordinate on exams under a framework with CSBS



# Enforcement Actions

# CFPB Enforcement Authority

- CFPB is authorized to conduct investigations to determine whether any person is, or has, engaged in conduct that violates federal consumer financial law.
- Considers many factors including amount of consumer harm and significance of the potential law violation.
- Investigations may be conducted jointly with other regulators, and may include:
  - Subpoenas or civil investigative demands for testimony;
  - Responses to written questions;
  - Documents; or
  - Other materials.



# Common Triggers of Enforcement





# CFPB Enforcement: A Look Back

- Overview
  - Transferred investigations by prudential regulators and HUD
  - New investigations that “span the full breadth of the Bureau’s enforcement jurisdiction”
  - Coordination with states and DOJ
- Over 50 public enforcement actions to date
  - 41 public enforcement actions between Oct. 1, 2013 through Sept. 2014.
- Civil money penalties
  - FY 2014 - \$77m
  - FY 2013 – \$49m
  - FY 2012 – \$32m



# CFPB Enforcement Highlights

- Mortgage loan servicers
- Mortgage lenders
- Mortgage reinsurance
- Mortgage assistance relief services
- Credit card billing and credit card add-on products
- Auto lending
- Student lending
- UDAAPs in debt collection (by creditors and servicers)
- Debt relief services / payment processing
- Robo-signing of court documents in debt collection



# Enforcement: A Look Forward...

- More litigated cases as the CFPB continues to push the envelope on policy and process matters, including scope of authority pre-July 2011.
  - Pending cases may come to a close.
- More joint enforcement actions with other regulators.
- More joint enforcement actions with DOJ.
  - Criminal referrals, joint civil actions, and fair lending
- More enforcement actions that grow out of supervisory activities.
- More enforcement actions that rely on “Related Person,” and “Substantial Assistance,” as well as state law compliance and other aggressive theories of liability.
- More enforcement actions with larger dollar numbers (restitution and civil money penalties).



# Rulemaking

# CFPB Fall 2014 Rulemaking Agenda

<u>Stage</u>	<u>Rulemaking</u>	<u>Issued</u>
Prerule	Payday Loans and Deposit Advance Products	Pending
Prerule	Debt Collection	11/12/2013
Prerule	Overdraft	Pending
Proposed Rule	Requirements for Prepaid Cards	12/23/2014
Proposed Rule	Defining Larger Participants of the Automobile Financing Market	10/8/2014
Proposed Rule	Amendments and Corrections to TILA-RESPA Integrated Disclosure Final Rule	10/29/2014
Final	Defining Larger Participants of the International Money Transfer Market	9/23/2014
Final	Home Mortgage Disclosure Act	8/29/2014
Final	The Expedited Funds Availability Act	3/25/2011
Final	Consumer Financial Civil Penalty Fund	5/7/2013
Final	Further Amendments to 2013 Mortgage Rules	1/03/2014
Final	Amendments to FIRREA Concerning Appraisals	Pending





# Proposed Rule Prepaid Accounts

- The CFPB has proposed comprehensive consumer protections for prepaid financial products under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z).
- Covers traditional plastic prepaid cards, general-purpose reloadable cards, payroll cards, government benefits cards, mobile and other electronic prepaid accounts, peer-to-peer payments, and virtual currencies.



# Proposed Rule Prepaid Accounts (cont.)

- Prepaid Account Protections
  - **Access to Account Information:** Requires periodic statements or account information that can be accessed online for free.
  - **Error Resolution and Fraud Protection:** Requires investigation of errors reported by consumers. Limits consumer losses to no more than \$50 of reported unauthorized charges.
  - **Disclosures:** Requires short and long form disclosures.
- Prepaid Credit Requirements
  - **Ability to Pay / Timing to Repay:** Requires confirming that consumers can repay existing debt before offering credit, and that consumers have 21 days to repay before late fees.
  - **Limited Fees / Interest:** Limits maximum fees to 25% of the credit limit during the first year.
  - **Limited Credit Options:** Prohibits offering a credit product until 30 days after the consumer registered the prepaid account.
  - **No Automatic Withdrawal:** Prohibits moving funds from a prepaid account to pay a debt without consumer authorization.



# Proposed Rule Automobile Financing Market

- Proposed rule would subject certain nonbank automobile financing companies to supervision.
- Covers a nonbank covered person if it has at least 10,000 aggregate annual originations and is engaged in one of the following activities:
  - Granting credit or refinancing;
  - Purchasing or acquiring such credit obligations;
  - Providing leases; and
  - Purchasing leases.
- Nonbank auto finance companies eligible for inclusion in the larger participant category under the proposed rule include (1) specialty finance companies, (2) captive nonbanks, and (3) buy-here-pay-here (BHPH) finance companies.



# Proposed Rule for Home Mortgage Disclosure Act

- Proposed rule that expands the scope of the Home Mortgage Disclosure Act (HMDA) data reporting requirements.
- Covers depositories and nonbanks that originate at least 25 closed-end or reverse mortgages in the previous calendar year.
- Reporting requirements:
  - 17 data fields required by Dodd-Frank and 20 more to “fill information and data gaps” used by CFPB to monitor access to credit and other issues impacting housing market.
  - Aligns the HMDA requirements with the widely used Mortgage Industry Standards Maintenance Organization (MISMO) data standards.



# Other Expected Developments

- Small Dollar Loans and Deposit Advance Products
  - Expected in 2015
  - Enforcement priority for the CFPB
  - CFPB has held a field hearing and issued several white papers on “payday” lending
  - Rulemaking may require disclosures and focus on other acts and practices, including roll over loans
  
- Debt Collection
  - Expected in Spring / Summer 2015
  - CFPB received more than 23,000 comments to the announced notice of proposed rulemaking (“ANPRM”)
  - The ANPRM covered all aspects of the debt collection market and inquired about activities by first party creditors.
  - Rulemaking likely to include specific disclosure requirements, prohibitions on certain abusive or harassing practices, and requirements for substantiation of debt during collections and litigation





# CFPB and Advertising/Marketing Practices

# Expect Increased Scrutiny of Advertising and Marketing in More Markets

- How will the CFPB review your advertising?
  - Not through your eyes or intent
  - Through the eyes of a “reasonable” consumer
- Bear in mind that “reasonable” consumer is not generally very sophisticated.
- Further, if you are advertising to a subset of consumers who are deemed especially vulnerable, *i.e.* those in financial distress or students, the CFPB will adjust the reasonable definition accordingly.
- CFPB has benefit of hindsight.



# Reviewing Your Advertising with the CFPB in Mind

- Ask, first, what do the words expressly say, and is it true?
- Mortgage case – letter to loan holders promising return of excess escrow.
  - Also went to delinquent consumers
  - May not have been reasonable to believe that mortgagor would do that, but it was reasonable to think that's what claim said they would do.
- Fulfillment – Some early enforcement actions allege services were advertised but not provided as offered.



# Reviewing Your Advertising (cont'd.)

- Second, what do your materials imply?
- Look at pictures and net impression.
  - Ex. Does offering credit card add-ons to a consumer imply that the consumer is eligible for the benefit?
  - Unemployed consumers offered protection against loss of job
- Intent is irrelevant.
- Consumer surveys are best way to define implied claims, but FTC can use its own judgment.
  - Watch for court ruling on whether CFPB can do the same
    - CFPB and FTC conduct consumer surveys from time to time, test model forms, *etc.*



# Reviewing Your Advertising (cont'd.)

- Third, have you omitted any material or important information?
  - First 30 days of benefit free of charge (omitted only if you cancel in 30 days) (Care Credit)
  - Payment of benefit is automatic once triggering event occurs (omitted that you must submit application and receive approval) (Care Credit)



# Trends to Watch

- Advertising and marketing practices scrutinized by a new agency in a new way.
- Akin to how FTC scrutinizes advertising, with the twist that CFPB was created because of a perceived problem and need to address.
- Unlike FTC (and banking agencies), examination power means unprecedented access and scrutiny of your advertising and marketing materials, along with product development, fulfillment, and more.
- CFPB's detection of problem can mean tens of millions of dollars in penalties or redress and harsh injunctive relief.
- Ounce of prevention worth pounds and pounds of cure.



# Watch Overlap between CFPB and FTC

- Coordination to date has been pretty seamless.
  - Only aware of a handful of duplicative investigations, though subject matter overlap continues (e.g., debt collection, telecomm).
- However, as CFPB begins to expand scope of its jurisdiction, look for coordination issues to develop.
- CFPB's recent action against Sprint for third-party cramming closely mirrors recent FTC actions.
- Also creates potential for differing standards / scope of injunctive relief / compliance.





# Expect Increased Scrutiny of Disclaimers

- Financial products and services have traditionally been a heavy user of fine print disclosures.
- FTC and NAD increasingly disfavor disclosures:
  - Can you easily say it in body of claim rather than in a disclaimer?
  - Is your disclaimer clear and conspicuous?
  - Does your disclaimer clarify rather than contradict or add important new information?
  - FTC warning letters on use of disclaimers.



# Expect Increased Scrutiny of Continuity / Auto-Renew Programs

- Recent focus of FTC, including in financial areas such as “free” credit report.
- Emphasis on prominent and clear disclosure of enrollment in continuity program.
- Requirement of affirmative consumer consent to enrollment.
- Clear communication of how to cancel.
- Concerns about making it hard to cancel.



# Preventative Steps

- Periodic training
- Audit customer interactions, enrollment process, marketing claims
- Remedy problems when discovered
- Backstop oral representations with written follow-up
- Prepare for supervision/upgrade compliance



# Questions to Consider When Reviewing Advertising

- Do they contain any material misrepresentations, expressly or by implication, including the following:
  - The existence, nature, or amount of fees or other costs;
  - The nature and benefits of the product or service advertised;
  - The means by which to close or cancel the product or service; or
  - Terms and Conditions.
- How do the representations compare to actual practices?
- Do advertisements and promotional materials directed to consumers clearly disclose all material limitations or conditions on the terms or availability of products or services marketed to consumers, such as:
  - Expiration date
  - Material prerequisites for obtaining particular products, services, or benefits (e.g., discounts, refunds, or rebates)
- Is there fine print or other disclosures?
- Are there disclosures required by applicable law or regulation?
- If additional products or services are sold or offered in connection with products or services sold to consumers, determine:
  - Do marketing materials reflect the actual terms and conditions of the product and not deceptive or misleading to consumers?
  - Have you reviewed scripts and manuals used by the entity's telemarketing and customer service centers?
  - What is the cancellation/return policy?
  - Are there any guarantees?
  - Are testimonials or endorsements used?
  - Is the advertisement comprehensible by the target audience?



# Legislative Outlook

# Legislative Outlook 2015 & Beyond

## ■ CFPB Structure and Authority

- Efforts to reform the CFPB will continue and may be attached to otherwise “must pass” legislation.
- Watch for potential shift in positions as 2016 election nears and future of who will get to appoint the next CFPB Director becomes less/more certain.
- Will Director Cordray stay on through end of term?

## ■ Efforts on single issues may pick up tracking

- Efforts to thwart rules and initiatives as gov’t overreach (including focus on related agencies).
- Statutory changes to consumer financial laws, *e.g.*, FCRA, FDCPA, and others (and CROA).



# Additional Resources



# Overview of CFPB's Unfair, Deceptive, or Abusive Acts or Practices (UDAAP) Authority

1. Unfair Acts and Practices: Defined in the CFPA
2. Deceptive Acts and Practices: Not defined in the CFPA; CFPB has looked to the Federal Trade Commission Act (FTCA)
3. Abusive Acts and Practices: Defined in the CFPA; new standard (that appears in the Telemarketing Act/Telemarketing Sales Rule)



# Unfair Acts or Practices Checklist

- Does an act or practice hinder a consumer's decision-making?
- The injury must not be outweighed by countervailing benefits to consumers or competition.
- To be unfair, the act or practice must be injurious in its net effects – that is, the injury must not be outweighed by any offsetting consumer or competitive benefits that also are produced by the act or practice. Offsetting consumer or competitive benefits of an act or practice may include lower prices to the consumer or a wider availability of products and services resulting from competition.



# Deceptive Acts or Practices Checklist

*Acts or practices that may be deceptive include: making misleading cost or price claims; offering to provide a product or service that is not, in fact, available; using bait-and-switch techniques; omitting material limitations or conditions from an offer; or failing to provide the promised services.*

- Is a representation, omission, act, or practice likely to mislead?
  - Is the statement prominent enough for the consumer to notice?
  - Is the information presented (1) in an easy-to-understand format that does not contradict other information in the package and (2) at a time when the consumer's attention is not distracted elsewhere?
  - Is the placement of the information in a location where consumers can be expected to look or hear?
  - Finally, is the information in proximity to the claim it qualifies?



# Abusive Acts or Practices Checklist

- Does the act or practice interfere with consumer understanding?
- Does the act or practice take advantage of:
  - A lack of consumer understanding;
  - Inability of the consumer to protect his or her own interests; or
  - The reliance of the consumer on a financial institution?
- Is the product/service marketed toward an especially vulnerable consumer segment?

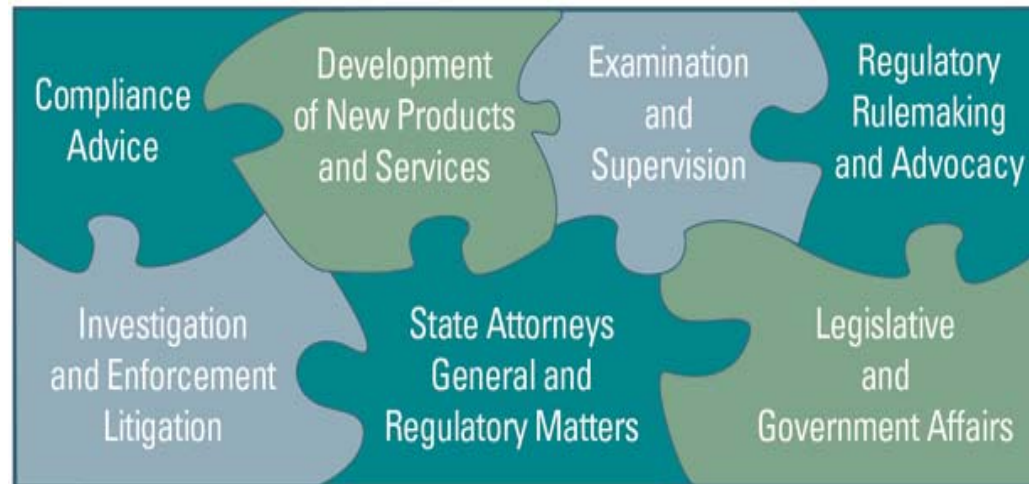


# General Compliance Checklist

- ❑ Update/enhance CMS on an ongoing basis.
- ❑ Develop a Gov't Investigation Response Plan.
  - ❑ Investigatory demands
  - ❑ Examination requests
  - ❑ Enforcement actions
  - ❑ Due diligence requests from vendors/customers
- ❑ Identify all applicable laws and rules (federal, state, and local).
- ❑ Develop written policies, procedures, and practices.
- ❑ Review all consumer-facing materials for compliance.
  - ❑ Claim substantiation
  - ❑ Avoid deceptive disclosures
  - ❑ Use of testimonials
  - ❑ Digital advertising
  - ❑ Social media
  - ❑ Telemarketing (e.g., scripts, dialing)
  - ❑ Market-specific laws and guidance
  - ❑ Privacy and data security
- ❑ Consumer-facing terms and conditions.
- ❑ Payment policies and portals.
- ❑ Review and revise B2B contracts to take into account regulatory environment.
  - ❑ Reporting and monitoring (activities, compliance, and complaints)
  - ❑ Regulatory examinations
  - ❑ Notice of third-party subpoenas, examinations, and investigations
  - ❑ Indemnity
  - ❑ Representations and warranties
- ❑ Due diligence, reporting, and monitoring of internal practices and third-party relationships.
- ❑ Implement a complaint handling process.



# Observations and Q & A



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