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The Shifting Regulatory Environment: A Federal, State and Local Perspective

Alexandra Megaris, Venable LLP

Know Your Regulator(s) and Regulatory/ Political Climate

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Uptick in State Attorneys General and Regulatory Activity

BUSINESS INSIDER

'First line of defense': Democratic attorneys general vow to fight Trump in court

Lawrence Hurley, Reuters
Nov. 18, 2016, 6:37 AM 10,259

On consumer protection, states can both challenge any Trump efforts to loosen regulations and ramp up their own enforcement efforts, said Doug Gansler, a Democrat who served as Maryland's attorney general from 2007 to 2015.

"If the federal government abdicates that responsibility, the more aggressive and progressive state attorneys general will fill that vacuum," he said.

LAW360

State Regulators Aim To Fill Trump's Vacuum

By Evan Weinberger

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FTC's Enforcement Authority

- FTC Act
- Broad jurisdiction
- Section 5
  - Deception
  - Unfairness
- Rules – e.g., TSR, MAP

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Liability Under FTC Act

- Who can be held liable
  - ✓ Publisher
  - ✓ Affiliate Network
  - ✓ Service Provider
- (*FTC v. LeanSpa, FTC v. Inbound Call Experts,*
- *FTC v. Five Star Auto*)

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Unfair Use or Sale of Personal Data

- Payday Loan Applications
  (*FTC v. Sequoia One, FTC v. Sitesearch)*
- Confidential Phone Records
  (*FTC v. Accusearch)*
- Debt Portfolios
  (*FTC v. Cornerstone, FTC v. Bayview Solutions)*

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"Follow the Lead" Workshop

STAFF PERSPECTIVE | SEPTEMBER 2016

www.ftc.gov/reports/follow-lead-workshop-staff-perspective

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“Follow the Lead” Workshop Takeaways

- Disclose clearly to consumers who you are and how you will share their information.
- Monitor lead sources for deceptive claims and other warning signs like complaints.
- Vet lead buyers and avoid selling remnant leads to buyers with no legitimate need for sensitive data.
- Keep sensitive data secure.

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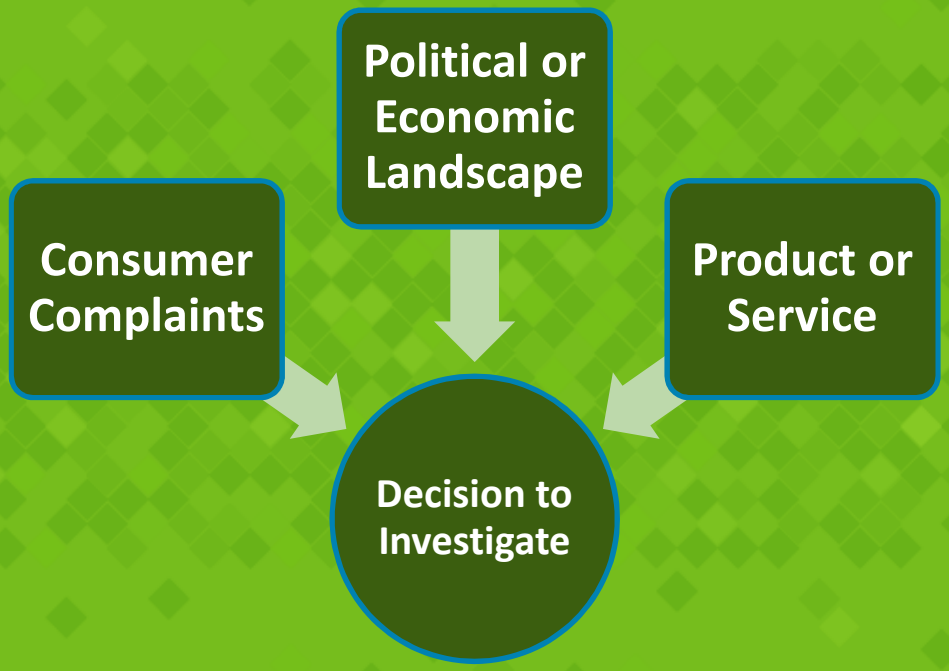
The Laws Enforced by State Attorneys General

- State AGs are the chief legal officers of their states and have the authority to bring actions against companies operating in their states on behalf of consumers or the public in almost any area of law; and
- Many federal statutes authorize state AGs to enforce the federal statute (or portions thereof).
  - Under Dodd-Frank Section 1042, a state AG or state regulator is authorized to bring a civil action to enforce the Consumer Financial Protection Act.

Consumer Protection Laws That Are Enforced by State AGs

- AGs investigate and bring actions under their states' respective unfair, deceptive, and abusive practices laws ("UDAP laws").
- UDAP laws tend to broadly prohibit "deceptive" or "unconscionable" acts against consumers.
- Most states also have specific consumer protection laws regulating:
  - Debt collection
  - Credit reporting
  - Credit services
  - Lending and loan servicing
  - Debt relief services
  - Money transmission
  - Often more….

Launch of an Investigation



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Steps to Take in Response to an Investigation

- Receipt of CID, civil subpoena, or requests for information
- Evaluate source of requests
- Assess scope
- Determine legal posture — voluntary or compulsory
- Weigh options

- Engaging with staff to limit burden and understand basis for investigation

- Record hold
- ESI considerations
- Collection, review, and production of documents

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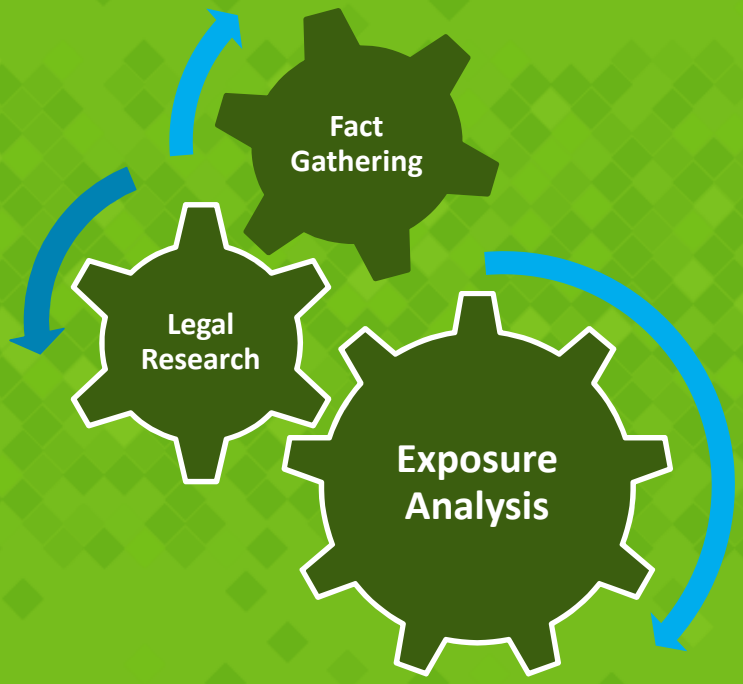
Preparing the Defense



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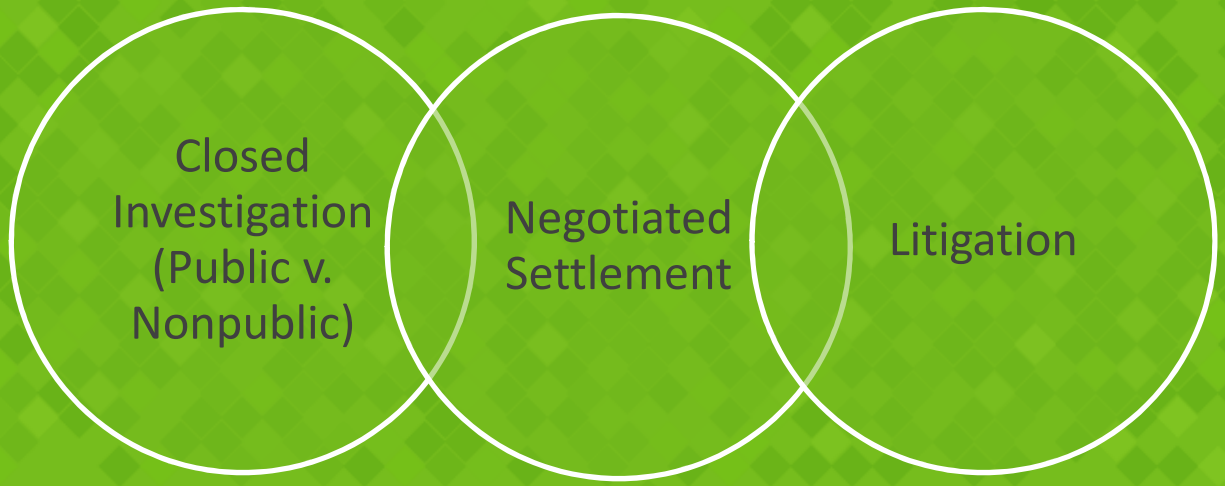
How Does a Government Investigation Typically Resolve?



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Cost of Noncompliance

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Investing in Compliance to Avoid Investigations and Maximize Outcome

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Additional Information

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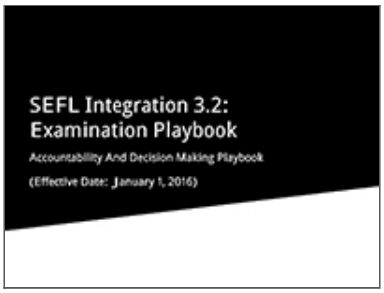
ARTICLES

May 12, 2017

THE CFPB'S *EXAMINATION PLAYBOOK* REVEALED



An internal Consumer Financial Protection Bureau (CFPB) playbook and memo reveal how key decisions are made throughout the examination process, who is responsible for making those decisions, how information is evaluated, and the intersection between CFPB examinations, investigations, and enforcement.

Although many institutions supervised by the CFPB look to the *CFPB Supervision and Examination Manual* and *Supervisory Highlights* to know what to expect during examinations, even companies accustomed to government examination can find the process to be particularly opaque and confusing. To shed light on the CFPB examination process, we obtained through a Freedom of Information Act (FOIA) request the CFPB's *Supervision, Enforcement, and Fair Lending (SEFL) Examination Playbook* (Playbook) and *SEFL Integration Memorandum* (Memorandum). A copy of the Playbook and Memorandum are available for download **here**.

The documents show that the outcome of a CFPB examination will depend on multiple decision makers, at various stages, and the importance of such factors as the exam findings and matters requiring attention, whether there is a violation of law, deterrence, variety of products and potential violations, size and complexity of the institution, self-correction, history, and cooperation. Companies that disagree with the examination findings should provide substantive input and objections to the findings, present additional information and documentation at the earliest stages possible, and consider appropriate remediation steps, if any.

The Examination Process

The *Playbook* identifies and describes the key decisions that arise at each stage of the examination process, as well as who within the CFPB is responsible for making and implementing each key decision. The purpose of the *Playbook* is to provide guidance to decision makers on their roles and responsibilities, referred to as "decision rights," throughout the examination or target review.

As outlined by the *Playbook*, the examination process is composed of four stages: scoping, on-site analysis, off-site analysis, and report review. An overview of each of the activities that are conducted at each stage is provided below, as are key decisions and corresponding decision rights.

Scoping

Scoping involves setting examination priorities and schedules across markets and for individual examinations. It also includes conducting pre-examination activities such as preliminary information requests and determining the scope of the examination. Key decisions that arise during this stage, and relevant decision makers, include the following:

- **Examination Priorities.** The Assistant Directors (ADs) for the Office of Supervision Policy (OSP) and the Office of Fair Lending (FL) are responsible for determining examination priorities.
- **Examination Schedule.** Regional Directors (RDs) in the Office of Supervision Examinations (OSE) are responsible for determining the timing and sequence of examinations for the calendar year.
- **Specific Scope and Schedule.** The Examiner-in-Charge (EIC) is responsible for making decisions regarding the scope of the examination, the preparation of the Information Request, and the

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examination schedule. These decisions involve determining which activities will be conducted during the examination and relevant modules, and which items of information are pertinent to the examination of the particular institution.

On-Site Analysis

On-site analysis involves conducting interviews, observing the institution, transaction testing, and other examination processes that assess the institution's compliance with federal consumer financial laws and potential violations. After the on-site examination is complete, additional time may be granted for the off-site analysis of relevant factual findings and other information.

- **Formal Documentation and Modifications.** The EIC is responsible for making decisions regarding formal documentation of the examination, including appropriate work papers and Fact Verification Memoranda. These decisions involve identifying and clarifying examination procedures and findings. The Field Manager/Senior Examination Manager (FM/SEM) is responsible for making decisions regarding modifications to the scope of the examination once it has commenced.
- **Initial Examination Findings.** The EIC is responsible for conducting the closing meeting and making related decisions, including any preliminary examination findings, expected corrective actions, recommended rating, or next steps. The EIC is also responsible for preliminarily deciding whether an examination is "clean"—i.e., does not involve any potential violations of federal consumer financial laws—and eligible for review on an expedited track. The Assistant Regional Director (ARD), the OSP AD, and the Office of Enforcement (ENF) are responsible for approving review of an examination on an expedited review track.

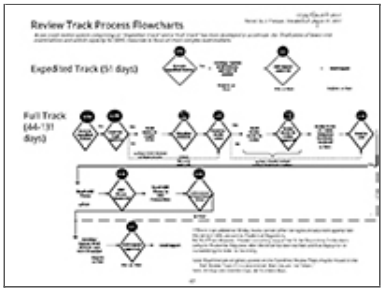
Off-Site Analysis

Off-site analysis involves escalating potential violations of federal consumer financial laws discovered during the examination and determining whether an enforcement or supervisory action should be pursued. It is at this stage that collected information and findings can lead to an enforcement action.

- **Interpretations of Non-Routine Questions of Law.** If an examination involves potential violations of federal consumer financial laws, the OSP Program Manager is responsible for determining whether an interpretation is required, and for framing the potential violations through preparation of a memorandum seeking the interpretation. For non-routine questions of law, the Legal Division is responsible for determining whether a violation has occurred, except where the question of law involves a regulation – then the Office of Regulations is responsible for the determination.
- **PARR Letter.** A Potential Action and Request for Response (PARR) Letter notifies the institution that the CFPB is considering whether to propose a supervisory or enforcement action, based on preliminary findings of potential legal violations. The FM/SEM is responsible for determining whether a PARR letter should be sent. The OSP Program Manager is responsible for drafting the PARR Letter, which is approved by the RD.
- **ARC.** Decisions on whether potential legal violations should be escalated to the Action Review Committee (ARC) are also made by the FM/SEM, who drafts the ARC memorandum to support the ARC's evaluation of relevant facts and law in determining whether public enforcement is appropriate. The ARC evaluates over thirteen factors spread among four categories: violation, institution, policy, and justice. The RD is ultimately responsible for approving the ARC memorandum. The ARC then recommends to the Director whether the matter should be handled through the supervisory process or public enforcement action.

Report Review

Once an examination report is prepared, the review process depends on whether it is scheduled for expedited or full review.



- **Expedited Review.** Under the expedited track, the examination report is reviewed by the FM/ SEM and the OSP Program Manager and Deputy AD. The ARD is responsible for collecting input from the OSP POC and finalizing the report, which is then approved by the RD.
- **Full Review.** Under the full-review track, the examination report

is reviewed by the FM/ SEM, the OSP Program Manager and Deputy AD, the Legal Division, and staff of the Office of Enforcement. The ARD is responsible for collecting and incorporating input, and finalizing the report after the content has been reviewed and ratified by the OSE AD, OSP AD, RD, and SEFL Associate Director.

In addition to providing further information on key decisions throughout the examination process, the *Memorandum* contains sections on:

- SEFL Coordination and Prioritization: Includes information on SEFL strategy, information sharing and scheduling, and tool choice (i.e., oversight through examination or investigation)
- Enforcement Attorneys' Role in Examination Work
- Action Review Committee (ARC) Process
- Compliance and Disposition of Required Actions

Supervisory Appeals

The *Playbook* and *Memorandum* do not provide any information or guidance on the examination appeals process, which remains an area for which the CFPB has not provided any public statistics and there is little substantive transparency. That said, in our experience, the appeal of supervisory matters benefits from having a robust submission of relevant information during an examination, and doing so can help to stave off an enforcement recommendation. The CFPB **appeals policy** states that only facts and circumstances upon which a supervisory finding was made will be considered by the appeals committee, and that it is an appellant's burden to show that the contested supervisory findings should be modified or set aside.

* * * * * * * * * * *

Prior to the establishment of the CFPB depository, institutions were the only members of the consumer finance industry subject to federal supervision. The paradigm shifted with the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), which vested the CFPB with broad regulatory powers, including the authority to examine certain non-depository institutions for compliance with the federal consumer financial laws.

The CFPB has supervisory authority over depository institutions with over $10 billion in assets, as well as payday lenders, mortgage companies, private student lenders, and larger participants of other consumer financial markets, such as debt collection and credit reporting. In accordance with the Dodd-Frank Act, supervision is risk-based, and in exercising its authority the CFPB must focus on the institutions and products that pose higher degrees of risk to consumers. Through examinations, the CFPB is responsible for assessing institutions' compliance with the federal consumer financial laws and detecting risks posed to consumers and markets for consumer financial products and services.

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Jonathan L. Pompan, Partner, **Alexandra Megaris**, Counsel, and **Katherine M. Lamberth**, Associate, advise on consumer financial services matters and represent clients in examinations, investigations, and enforcement actions brought by the CFPB, FTC, state attorneys general, and regulatory agencies.

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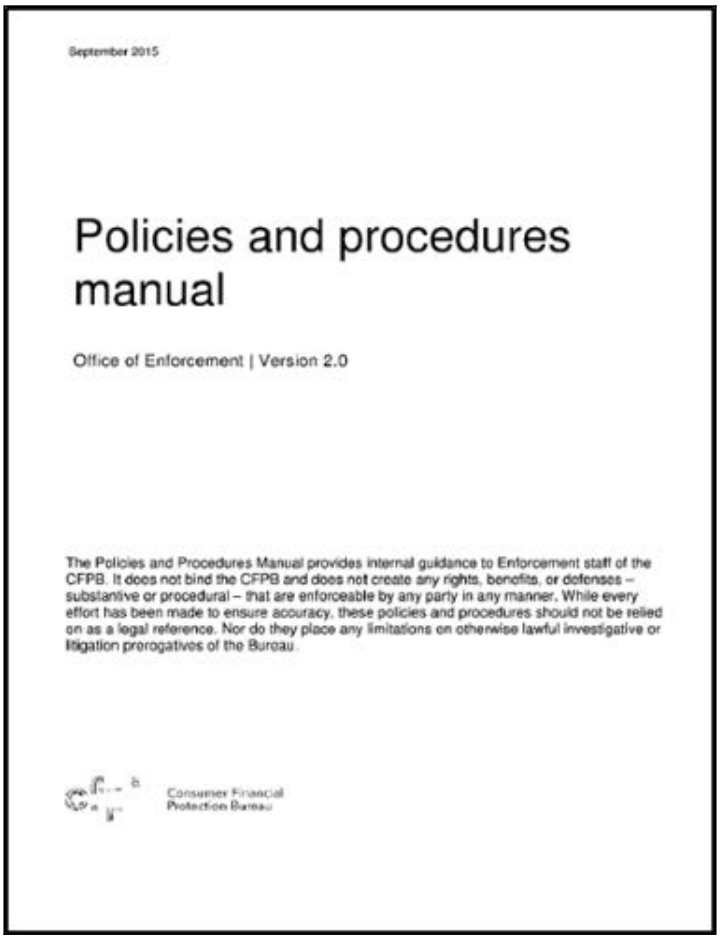
ARTICLES

April 18, 2017

WHAT'S INSIDE THE CFPB *ENFORCEMENT POLICIES AND PROCEDURES MANUAL 2.0*

insideARM

*This article was republished by **insideARM** on May 8, 2017.*



Despite facing significant legal challenges and a shifting political landscape, the Consumer Financial Protection Bureau (CFPB) is virtually unrestrained in its ability to launch investigations and threaten enforcement actions. We've obtained through a Freedom of Information Act (FOIA) request the most recent official *CFPB Enforcement Policies and Procedures Manual Version 2.0*. The *Enforcement Policies and Procedures Manual* "is the source for policies governing the work of the Consumer Financial Protection Bureau Office of Enforcement." As a result, it is the agency's playbook for investigations and enforcement actions that continue to make headlines and reverberate through the consumer financial services legal and regulatory landscape.

The document, available for download **here**, represents the most concrete and definitive statement of the CFPB Office of Enforcement's views on the agency's jurisdiction, authority, and strategy and tactics for launching investigations and bringing enforcement actions. The manual is important reading for anyone responding to a CFPB Civil Investigative Demand (CID), preparing to respond to a Notice of Opportunity to Respond and Advise (NORA) letter, litigating with the CFPB, advocating for the close of an investigation, or even preparing for or responding to an examination or Potential Action and Request for Response (PARR) letter.

Table of Contents

Here's a sample from the table of contents:

Part 1: Office Policies

- Document Maintenance and Retention Policies, including sections on maintenance of documents collected during an investigation or discovery
- Investigative Policies, including sections on CIDs, taking testimony, no targets of investigations,

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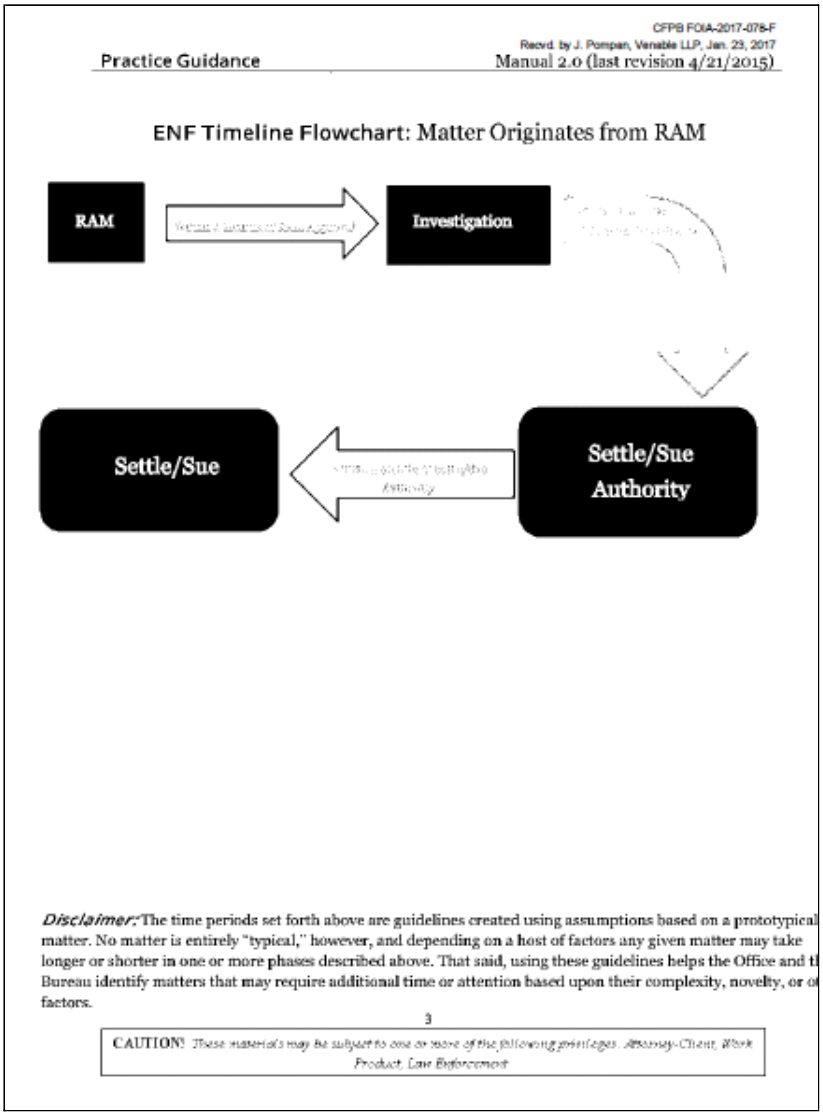
NORA, and closing an enforcement matter
- Litigation Policies, including sections on statutes of limitations and tolling agreements, notice and ex parte preliminary relief, and procuring an expert/consulting witness
- Remedies Policies
- Adjudicative Proceedings Policies
- Law Enforcement Partners Policies, including sections on working with criminal law enforcement partners, exchanging confidential information with law enforcement agencies, civil referrals (incoming and outgoing), and Section 1042 Notices: state action under the CFPA

Part 2: Practice Guidance

Includes sections with a timeline cheat sheet, timeline flowchart (with diagrams for matters that originate from investigations, examinations), and ethical guidance related to obtaining information from consumer response.

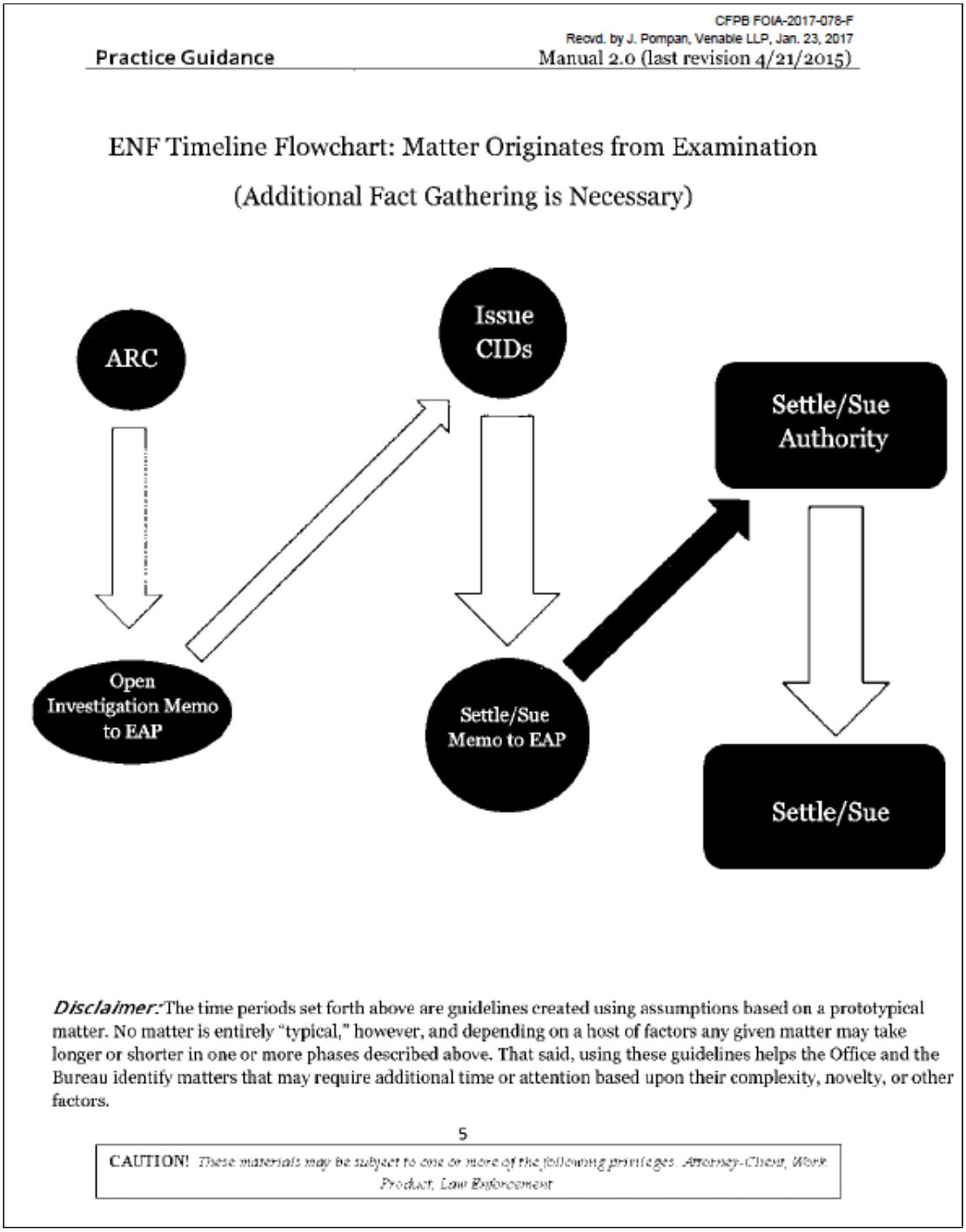
Part 3: Administrative Policies

Enforcement Timeline Guidance



A significant addition from an earlier version of the enforcement manual we posted **here** is the inclusion that is referred to as the "ENF Timeline." The timeline provides guidelines to staff regarding how much time should elapse before a research matter or investigation should evolve into an enforcement action (or be closed). Notably, the timelines are only suggestions and not concrete rules for enforcement staff.

The charts provide details on how much time staff have to close or settle the case or bring an enforcement action—depending on where the action originated. For example, matters originating from Open Research Matters or a CFPB-created Research Assignment Memo typically open within 3 months, whereas open investigations typically are expected to move to a suit or settlement within 18 months of opening of the investigation (if not closed).



CFPB FOIA-2017-078-F
Recvd. by J. Pompan, Venable LLP, Jan. 23, 2017

Practice Guidance — Manual 2.0 (last revision 4/21/2015)

ENF Timeline Flowchart: Matter Originates from Examination

(Additional Fact Gathering is Necessary)

Disclaimer: The time periods set forth above are guidelines created using assumptions based on a prototypical matter. No matter is entirely "typical," however, and depending on a host of factors any given matter may take longer or shorter in one or more phases described above. That said, using these guidelines helps the Office and the Bureau identify matters that may require additional time or attention based upon their complexity, novelty, or other factors.

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a recommendation to the CFPB director on whether an enforcement action or a supervisory response is the appropriate reaction to a specific violation of consumer financial law.

Revision History and Disclaimer

While the manual cover has a "September 2015" date, internal sections list more recent revision dates, including June 2016. There is a blanket disclaimer stating that the manual "does not bind the CFPB and does not create any rights, benefits, or defenses—substantive or procedural—that are enforceable by any party in any manner."

Related Articles and Presentations

What to Expect When You're Under a CFPB Investigation – Negotiating the Scope of the CID

How to Prepare for and Survive a CFPB Examination

The Present and Future Role of State Attorneys General in Consumer Financial Services Regulation and Enforcement

What Lead Generators Need to Know about the Consumer Financial Protection Bureau (CFPB)

Navigating CFPB Investigations and Enforcement

Managing Evolving CFPB Regulatory Risk through Effective Change Management

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Jonathan L. Pompan, **Alexandra Megaris**, and **Jennifer S. Talbert** advise on consumer financial services matters and represent clients in investigations and enforcement actions brought by the CFPB, FTC, state attorneys general, and regulatory agencies.

For more information about this and related industry topics, see **www.Venable.com/cfpb/publications**.

VENABLE LLP LEND360 Legal & Regulatory Update

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LOOK INSIDE

GUIDING YOUR BUSINESS THROUGH UNCHARTED WATERS

There has never been a more exciting or challenging time to be in the consumer and business lending sectors, as the underlying technology and regulatory framework changes on a daily basis. We combine an in-depth knowledge of the online lending industry with our nationally recognized practices in the areas of financial services, regulatory compliance, privacy and data protection, consumer protection, legislative advocacy, and litigation to provide clients with solutions that efficiently and effectively resolve their unique business challenges.

REGULATORY COMPLIANCE

We counsel and advise online consumer and business lenders, and their service providers on the applicability of federal and state regulations across the lending industry and the legal risks and potential penalties associated with compliance questions covering not only the business of providing loans but also associated industries that support lenders, including advertisers, marketers, lead generators, payment providers, and debt buyers and collectors.

Our lawyers in Washington, DC and across the country have you covered at all of the agencies across the "alphabet soup" of financial services regulations and consumer protection laws, whether your concern is advertising and marketing, underwriting and loan disclosures, "true lender" and investor agreements, BSA/AML compliance, OFAC, cybersecurity, payments and electronic fund transfer laws, debt collection, or due diligence. Our experience includes product reviews, mock-compliance audits and examinations, designing compliance management systems, assisting clients through supervisory examinations, responding to examination findings and appeals, and advising on state licensing and regulatory requirements. Many of our attorneys formerly served as government regulators and their experience enables us to help our clients understand and comply with the evolving expectations of federal and state regulators, including the CFPB and FTC.

LAW ENFORCEMENT INVESTIGATIONS AND ACTIONS

Venable counsels clients across the non-bank financial services sectors in responding to federal and state civil investigative demands, subpoenas, and general requests for information. We regularly advise clients before the FTC, CFPB, U.S. Department of Justice, and state regulatory agencies and Attorneys General, on appropriate strategies and tactics when responding to government requests about compliance with financial services laws and regulations. When clients face an investigation or enforcement action, we work across the enterprise to provide knowledgeable, creative, and tenacious defense counsel. This approach has helped numerous clients avoid or minimize overly burdensome and potentially damaging discovery responses to government investigative demands, and has put Venable at the forefront of legal arguments central to the online lending industry.

BUSINESS, CLASS ACTION AND GOVERNMENT LITIGATION

Venable's litigators, among the best in the nation, are well versed in the nuances and complexity of the financial services industry, and relevant government regulatory agencies. From business disputes to class actions and government litigation, we have helped numerous lenders and service providers fight for their interests and defend their businesses.

PRIVACY AND DATA SECURITY

Venable's privacy team comprises more than a dozen attorneys that focus their practices, on the laws, regulations, and policies governing ecommerce and the ever-expanding use and protection of consumer data by corporations and other entities. We assist clients with the implementation of best practices and compliance with U.S. and international legal requirements, deployment of anti-fraud technology, legislative advocacy, internal and public responses to data breaches, and defending clients in government enforcement actions and private litigation.

FINTECH AND MARKETPLACE LENDERS UNDER SCRUTINY

FinTech and marketplace lenders are fast realizing that the CFPB, FTC, and even state regulators are focused on their activities. Recent announcements that the CFPB is taking consumer complaints on marketplace lenders and has established an office of small business lending means that lenders and service providers should prepare for the possibility of investigations and examinations in the not too distant future. At the same time, the FTC is hosting a series on *"Financial Technology Forum on Marketplace Lending"* to explore the growing world of marketplace lending and its implications for consumers. And, at the state level, the California Department of Business Oversight recently released a survey on marketplace lending in California finding that consumer and small business lending increased by 936% from 2010-2014, to $2.3 billion.

All of these developments point to increased federal and state regulatory scrutiny of FinTech lending and their service providers. Below are four tips for managing enforcement and compliance risk.

Increased Scrutiny Means Investigations and Possibly Enforcement Actions: The CFPB has investigations under way that span the full breadth of the Bureau's enforcement authority over providers of financial products and services and their vendors. The process of responding to a civil investigative demand (CID) from the CFPB (or even the FTC) is challenging and resource intensive, but critical. We've got you covered with materials on our firm's website such as a primer on negotiating the scope of the CID and navigating examinations. We also reveal the CFPB's enforcement settlement principles to illustrate exactly how the CFPB implements its regulation by enforcement agenda.

Advertising, Marketing, and Lead Generation Are Being Scrutinized: Online lead generation continues to face increased scrutiny and regulation on multiple fronts, including from consumer groups, state regulators, the FTC, and the CFPB. This squeeze is being felt by all participants—publishers, aggregators, and buyers—and, notably, the lines of legal responsibility and accountability continue to blur. Because of this pressure, the viability of some forms of online lead generation is in jeopardy. Regulators will continue to most actively pursue: (1) use of deceptive advertisements to generate leads; (2) how sensitive consumer data is stored and whom it is shared with; and (3) whether, and the extent to which, publishers and lead aggregators are liable for the end users' legal compliance.

Service Provider Liability Can Be Minimized by Strong Vendor Due Diligence and Compliance Monitoring Programs: Federal and state regulators expect lenders to manage their service providers for compliance with applicable laws and regulations. One of the first things the CFPB or a state regulator will ask for during an investigation or examination is a list of the regulated entity's service providers. Failing to conduct vendor due diligence and monitor service providers is a surefire way to put your company at risk. On the flip side, the CFPB has been targeting service providers using its "substantial assistance" authority, which allows the CFPB to bring an action against any person it believes knowingly or recklessly provided substantial assistance to actors that fall under the CFPB's jurisdiction. The result is an environment in which covered entities and their service providers are expected to police each other's regulatory compliance.

Collecting Accounts Receivable: The CFPB (teaming with the FTC) has taken aim at first-party and third-party debt collection activities, including enforcement settlements with lenders and collectors. In November 2015, federal, state, and local regulators and enforcement agencies announced Operation Collection Protection, a national initiative that targets debt collectors. This program complements recent CFPB enforcement, supervisory, and rulemaking efforts focused on the debt collection industry, including first-party creditors and billing services, and on the intersection of data furnishing and debt collection. In addition, the CFPB continues to work on developing proposed rules for debt collection following publication of its advanced notice of proposed rulemaking in November 2013.

- Jonathan L. Pompan, Andrew E. Bigart, and Alexandra Megaris

A LOOK INSIDE THE OFFICIAL CFPB ENFORCEMENT POLICIES AND PROCEDURES MANUAL

Since its launch in 2011, the CFPB has developed a reputation for its aggressive investigation and litigation tactics. The Bureau's Enforcement Policies and Procedures Manual for its enforcement staff provides a peek behind the curtain at how CFPB enforcement actions unfold.

Despite the CFPB's push for transparency, a copy of the 390-page document is not available on its otherwise comprehensive website. (By comparison, the Federal Trade Commission (FTC) has for many years made available its Operating Manual as a public record.)

Following sections on document maintenance and retention policies, the manual includes a discussion of its policies governing the conduct of investigations, litigation, remedies, adjudicative proceedings, working with other law enforcement partners, practice guidance, and administrative issues, as well as model forms and sample language used in investigations and litigation by CFPB enforcement staff.

A memo written by then Enforcement Director Richard Cordray (now Director) setting out the "enforcement action process" also is included, which sets out the notification, consultation, and approval policies and procedures that the Office of Enforcement follows when taking critical action throughout the various stages of the enforcement process.

The manual also describes the steps CFPB staff are supposed to follow when opening an enforcement matter and how staff identify subjects for investigations in the first place. For example, triggers for an inquiry can come from a number of sources, including informants, news media, market observation, supervisory examinations, and law enforcement partners. While the manual includes extensive discussion of the process for consultation between enforcement staff and other CFPB divisions, there's no

specific instruction to consider the cost to companies from the disruption caused by an investigation or the length of time an investigation may take.

Enforcement matters are divided into two categories: (1) the "Research Matter" and (2) the formal "Investigation." According to the manual, an enforcement matter may be opened at any stage, whether it is the research, the investigation, or when the CFPB is ready to approach a subject to settle or file a complaint. The decision process of whether to conduct a Research Matter or Investigation is considered in light of its impact on (1) Bureau resources; (2) the market in general; (3) the potential subject(s); (4) other Bureau divisions; (5) the Office of Enforcement Strategic Plan; and (6) law enforcement partners.

The FTC and the Bureau have overlapping jurisdictions over a number of nonbank entities and share the ability to enforce a number of the same federal consumer financial laws. Pursuant to the Consumer Financial Protection Act and a memorandum of understanding, staff are required to notify the FTC upon approval of a Research Matter and at least five days before opening an Investigation of nonbanks.

In the manual, enforcement staff are reminded that the CFPB is authorized to investigate merely on suspicion that any person has violated any provision of federal consumer financial law, or to seek assurance that a violation has not occurred, which is a practice that has come under criticism. Based on petitions to quash CIDs published by the CFPB, the practice of investigating "any person" appears to continue to be standard operating procedure.

As part of the litigation policies section of the manual, staff are told to consider whether alleged violations fall within the applicable statute of limitations, and whether it would be prudent to seek an agreement tolling the application limitations period. The manual also sets out the Bureau's view on the legal standards for seeking extraordinary remedies, including temporary restraining orders, asset freezes, and receiverships. There's also a section on remedies, including the detailed framework for civil money penalties.

Last, there are detailed policies on the sharing of information with law enforcement, criminal investigations, and storage of materials obtained during an investigation. There's also ethical guidance provided to staff, including when and how information may be obtained from the consumer response office, which handles consumer complaints for the Bureau.

The manual was released in response to a Freedom of Information Act request, and portions of the copy made available to us were redacted. The Enforcement Policies and Procedures Manual is available for download on the Venable website.

The manual includes a blanket disclaimer stating that "it is not intended to nor should it be construed to (1) restrict or limit in any way the CFPB's discretion in exercising its authorities; (2) constitute an interpretation of law; and (3) create or confer, upon any person, including one who is subject of a CFPB investigation or enforcement action, any substantive or procedural rights or defenses that are enforceable in any manner." The manual does not include dates or details concerning its revision history, if any.

- Jonathan L. Pompan, Andrew E. Bigart, and Alexandra Megaris

FTC RELEASES STAFF PERSPECTIVES ON LEAD GENERATION

The staff of the FTC Bureau of Consumer Protection released a much-anticipated paper on lead generation in September 2016. The 13-page report provides staff perspectives on the information covered at the FTC's October 2015 workshop on lead generation, "Follow the Lead." Below are a few of the paper's themes:

The paper describes the mechanics of lead generation and how it functions in the modern economy, including such topics as:

- What is Lead Generation?
- Who is Collecting Leads Online, and What happens to Them After Consumers Press "Submit"?, with descriptions of leads collected by a publisher or affiliate, leads transmitted to aggregators, leads sold to end-buyer merchants, and leads verified or supplemented with additional information.
- A deep dive into the online lending sector's "ping tree" model (an auction-style approach) that allows consumers to be quickly matched with lenders that can underwrite and fund loans.
- Potential benefits to consumers and competition, including allowing interested consumers and merchants to maximally and efficiently connect with each other; and the ability to connect consumers quickly with multiple merchants, and their associated offers, that consumers may not find on their own.

The paper also covers potential concerns for consumers and competition, and shares a number of suggestions to lead buyers and sellers for avoiding consumer protection concerns—and, in some cases, potentially unlawful conduct:

- Disclose clearly to consumers who you are and how you will share information.
- Monitor lead sources for deceptive claims and other warning signs like complaints.
- Avoid selling remnant leads to buyers with no legitimate need for sensitive data.
- Vet potential lead buyers and keep sensitive data secure.

The paper promotes the benefits of industry efforts to adopt policies to help protect consumers, including references to the Advertising Self-Regulatory Council's Electronic Retailing Self-Regulation Program established by the Electronic Retailing Association, and the Online Lenders Alliance's "Best Practices."

"As FTC staff has noted previously, for self-regulatory programs to be effective, industry participants should ensure that such programs include mechanisms for robust monitoring and enforcement, such as dismissal from the program and referral to the FTC for companies that fail to comply with the standards outlined in the code."

Lead generation has become a key marketing technique used in a variety of industries, particularly lending (including credit cards, marketplace, small-dollar/short-term, and mortgage), postsecondary education, and insurance. Considering how common online lead generation is, because of its benefits for consumers and merchants, it is important to understand how it operates, the types of legal and regulatory requirements that potentially apply, and ways to avoid government scrutiny.

- Jonathan L. Pompan and Ellen Traupman Berge

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- **FinTech and Marketplace Lenders Under Scrutiny**
- **A Look Inside the Official CFPB Enforcement Policies and Procedures Manual**
- **FTC Releases Staff Perspectives on Lead Generation**

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September 27, 2012

WHAT TO EXPECT WHEN YOU'RE UNDER A CFPB INVESTIGATION – NEGOTIATING THE SCOPE OF THE CID

AUTHORS

Jonathan L. Pompan
Alexandra Megaris

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The Consumer Financial Protection Bureau ("CFPB") has investigations underway that span the full breadth of the Bureau's enforcement authority over providers of financial products and services and their vendors. If your company is the recipient of a civil investigative demand ("CID") from the CFPB the process is not an easy one. You have to issue a record retention notice, negotiate the scope of the CID, collect responsive information and materials, respond to the CID, and then wait for the CFPB to make decision on whether it will bring an enforcement action or close the investigation.

All of this can be challenging, especially since the CFPB is still in the process of rolling out regulatory reforms and articulating its positions. On top of this, for many nonbanks, the CFPB has or will be able to exercise supervision authority and launch examinations of business practices. (For depository institutions with assets over $10 billion the CFPB already has supervision authority). As a result, there is likely no escaping additional CFPB scrutiny in the future—even after the investigation is concluded.

When the CFPB launches an investigation, it operates under its procedures for investigating whether persons have engaged in conduct that violates federal consumer financial law. The CFPB's investigation rules are somewhat similar to those used by other regulators, such as the Federal Trade Commission, and they establish the procedures the CFPB follows when conducting investigations. CFPB investigations generally will not be made public by the Bureau until a public enforcement action is filed or consent order is issued.

While the CFPB has the power to compel information in an investigation, the CFPB's investigatory process is not self-executing. Accordingly, when a CID is received, the recipient first must decide whether to (1) petition the CFPB for an order modifying or setting aside the CID, or (2) negotiate the scope of the CID. These decisions must be made quickly. The CFPB's rules require the CID recipient and the CFPB to meet and confer within 10 days on the terms of compliance with the CID, including appropriate limitations on the scope of the request, issues related to electronically stored information ("ESI"), issues related to privilege and confidential information, and a reasonable time for compliance. Moreover, the CFPB rules allow only for a short window—20 days—to petition the CFPB for an order to modify or set aside the CID.

Accordingly, a CID recipient must decide quickly on an approach and overall strategy to navigate the investigation and identify long- and short-term goals.

Petition to Modify or Set Aside the CID

The Consumer Financial Protection Act ("CFPA") provides a mechanism whereby the recipient of a CID may challenge a CID by filing a petition with the CFPB Director seeking a petition to modify or set aside the CID altogether. When deciding whether or not to file a petition, the recipient of a CID must balance many factors. For instance, while the investigation itself is nonpublic, a petition to modify or set aside the CID is made public by the CFPB. On the other hand, under FTC precedent, the failure to file a petition could result in the waiver of any objections to the CID.

The CFPB's regulations relating to petitions to modify or set aside a CID impose the following requirements:

- **Timing.** A petition must be filed within 20 days after service of the CID. However, if the return date on the CID is less than 20 days after service, the petition must be filed prior to the return date.
- **Requests for Extension of Time.** The Assistant Director of the Division of Enforcement may grant a request for an extension of time to file a petition (although such requests are disfavored).

- **Substance.** The petition must set forth all assertions of privilege or other factual and legal objection to the CID, including all appropriate arguments, affidavits, and other supporting documentation.

To date, the CFPB has issued only one decision in response to a petition to modify or set aside a CID. In this order, the CFPB Director denied the request and ordered the recipient to comply with the CID. The Director cited the CFPA and the broad latitude in the use of investigative subpoenas afforded to administrative agencies in order to advance the government's duty to enforce the law. As a result, the decision process on whether to petition the CFPB or negotiate can feel like a catch-22 situation that is setup to result in cooperation.

Negotiating the Scope of CID Request

The key to successfully negotiating a CID is preparation and working quickly. The CFPB typically will not grant a modification to a CID request unless the justification for the modification is both legitimate and specific. The more details you provide the CFPB to support your rationale for seeking the modification and substantiate claims of burden—especially with respect to any technical burden imposed on the company—the greater likelihood you will succeed. It also is advisable to offer specific alternatives and suggestions for responding to the requests instead of simply asserting that the requests are too broad.

The first opportunity you likely will have to discuss the scope of the CID with the CFPB and negotiate the terms of compliance is during the mandatory meet and confer with the CFPB attorneys, which is supposed to take place within 10 calendar days after receipt of the CID. In order to be prepared for the meet and confer, you must quickly assemble a legal team, assess the scope of the CID, consult with the relevant IT and business personnel, and outline, request-by-request, a proposal for modifying the CID.

There are many ways to push back on the scope of a CID, and all options should be put on the table in order to reach maximum results. While each CID is different and highly dependent on the underlying legal issues and facts, there are several areas common to all CIDs that greatly affect the burden and cost of complying with a CID. Below we provide an overview of these areas and some suggestions.

. **Applicable Time Period.** Each CID includes a defined time period covered by the CID. Typically the CFPB will seek information and materials going back several years, until "the date of full compliance with this CID." Although the CFPB may not agree to a blanket modification to the applicable time period, it may consider limiting the time period for select requests.

. **Definitions.** It is easy to overlook the Definitions section of the CID and go straight to the CID requests, but it is important to review the definitions carefully because they greatly affect the scope and burden of the CID. For instance, the CFPB typically defines the term "company" broadly to include the CID recipient plus all entities affiliated with the recipient—even if those affiliates are in different lines of business than the recipient. Depending on the company, this could significantly expand the scale of the document/data collection and review. This is particularly true for larger entities with complicated corporate structures.

. **Redundant or Superfluous Documents.** Like other government investigators, the CFPB typically will phrase its requests as broadly as possible to capture all documents and information (using phrases such as "all documents relating to"). Often times such requests require the production of numerous copies of materials that are, in all material respects, identical. For instance, a request for all consumer contracts could potentially require the production of millions of contracts, all of which are identical except for the name and signature of the consumer. Consider offering the CFPB models, templates, or samples of documents in lieu of a full production to reduce the overall burden and cost of the document production. Further, companies that are publicly traded will have disclosed through filings with the Securities and Exchange Commission information that may duplicate information responsive to the CID.

. **ESI Considerations.** The search, collection, and production of ESI are particularly daunting when dealing with a CID. You should treat the issue of ESI here the same as you would in civil litigation. At a minimum, you will need to (1) issue a records retention notice to ensure all potentially responsive ESI is preserved, (2) confer with your IT staff to identify potential sources, locations, and storage and retrieval mechanisms of ESI, and (3) work with the IT and business departments to determine the nature and volume of potentially responsive ESI. Depending on the volume of potentially responsive ESI and the degree of difficulty of retrieving it, you may need to narrow the amount of ESI collected. To do so, you will need to present to the CFPB information about the

unavailability, inaccessibility, or excessive volumes of ESI. In any event, the first step will be to understand where and what ESI is held by the company and how that fits with the requests of the CID.

. **Privileged and Confidential Information.** The CID likely will require you to identify all materials withheld or redacted on the grounds of privilege. The process of identifying privileged documentation and creating a privilege log may, depending on the nature of your business, be extremely time consuming and costly. Consider ways to modify the scope of the CID to minimize this burden (for example, excluding the company's lawyers from any custodian lists). At the same time, it may be useful to consider whether privileged material would be useful to disclose and whether it can still be protected with causing waiver issues.

. **Time for Compliance.** Regardless of what you ultimately negotiate with respect to the terms of compliance with the CID, you should consider requesting a rolling production of information and documents, in order to help manage the time and resources needed to respond to the requests. Whether the CFPB will grant the request will depend upon the circumstances and if it's a "win-win" for both parties. Obviously, an extension and rolling production can allow the CFPB to receive some materials sooner, but also it can give recipients of a CID valuable time to collect and process other information that is potentially responsive to the request.

Responding to a CFPB investigation can be a difficult process. A company that is the recipient of a CID will be better able to be successful if it understands and minimizes its risks and at the same time maximizes its opportunity for a successful long-term relationship as a regulated entity. The decision to challenge a CID or to negotiate the terms of the CID, and that negotiation, is just the first step on this long road.

* * * * *

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ARTICLES

July 22, 2016

HOW TO PREPARE FOR AND SURVIVE A CFPB EXAMINATION

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If you're a compliance officer at a consumer financial services company, the two words most likely to keep you awake at night are "CFPB" and "examination." As the Consumer Financial Protection Bureau (CFPB or Bureau) celebrates its fifth anniversary on July 21, 2016, the Bureau has settled into its role as the primary supervisor of consumer financial products and services. For compliance officers, the prospect of a CFPB examination can be daunting: voluminous document requests, several months of onsite visits, and the potential for remediation and penalties in the event of significant identified deficiencies.

The key to surviving a CFPB examination lies in careful preparation – preferably before the Bureau targets your company for scrutiny. The companies in the best position to manage a CFPB examination are usually those that understand and follow applicable laws, have invested significant time and resources into building their compliance management programs, and have the capacity to make corrections when needed.

The Examination Process

Established by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Act), the CFPB supervises depository institutions and other providers of consumer financial services. The CFPB is responsible for implementing and enforcing federal consumer financial law, including the Electronic Fund Transfer Act, the Fair Credit Reporting Act, and the Truth in Lending Act. In addition, the CFPB has enforcement and supervision authority over unfair, deceptive, or abusive acts or practices (UDAAP) involving consumer financial products or services.

When it comes to supervision, the CFPB has authority over large banks, thrifts, and credit unions with over $10 billion in assets and their affiliates and service providers, as well as "larger participants" in markets for other consumer financial services, such as debt collection and credit reporting, among other activities. In other words, there are entire industries that are now subject to CFPB examination that were previously unregulated at the federal level, including nonbank financial services providers, debt collectors, small-dollar lenders, debt relief companies, and auto dealers, to name just a few.

The purpose of the CFPB's examination process is to assess a company's compliance with federal consumer financial laws, obtain information about the company's activities and compliance systems or procedures, and detect and assess risks to consumers and markets for consumer financial products and services. The CFPB identifies an entity for examination based on an assessment of the entity's risk to consumers, including its size, volume of consumer financial transactions, and volume of complaints in the CFPB's consumer complaint database. The CFPB will usually provide an entity with 30 to 60 days' advance notice of an examination.

Depending on the nature of the examinee's operations, the CFPB will generally engage in the following during the course of an examination:

- Collect and review available information (from within the CFPB, from other federal and state regulators, and from public sources);
- Request and review documents and information from the entity, including, for example, compliance policies and procedures, training materials, contracts, and audit findings;
- Go onsite to observe, conduct interviews, and review documents and information;
- Draw preliminary conclusions about the regulated entity's compliance management and its statutory and regulatory compliance;
- Draft the examination report; and

- After final internal clearance, finalize and transmit the report to the supervised entity.

The CFPB has adopted the Federal Financial Institutions Examination Council (FFIEC) Uniform Consumer Compliance Rating System, through which the CFPB will assign a confidential consumer compliance rating to an entity as part of the examination. The rating system evaluates an entity's compliance with Federal consumer financial law and the adequacy of its compliance systems. The rating is based on a scale of 1 through 5, with "1" representing the highest rating and lowest level of supervisory concern, and "5" representing need for "the strongest supervisory attention."

The CFPB will generally close an examination by providing the examinee with a report setting forth a compliance rating and any identified supervisory concerns. The report will provide a detailed summary of the examination, a discussion of areas of concern, and potential deficiencies and action items for remediation (known as "matters requiring attention"). The CFPB encourages proactive self-correction, but some circumstances may nevertheless be sufficiently serious to warrant a public enforcement action.

If an examination matter is referred for enforcement, the CFPB has authority to bring an administrative proceeding or file a civil complaint in federal district court. The Bureau can obtain legal or equitable relief for violations of federal consumer financial law, including, but not limited to, equitable monetary relief (e.g., restitution) and civil monetary penalties (which range, depending on the severity of the challenged conduct, from $5,437 to $1,087,450 for each day during which a violation continues).

How to Manage a CFPB Examination

If the best defense is a good offense, then the best way to prepare for a CFPB examination is to conduct a detailed internal review of your compliance operations (a "mock audit") prior to a formal examination to identify areas of potential weakness or other areas that might draw the attention of examiners. This exercise not only will help button up areas of potential weakness before an examination, but will also train staff on how to respond to requests for information, interviews, and other examination activities in a timely and professional manner.

Once an examination notice is received, there are a number of steps that can help ensure a smooth process and, it is hoped, a positive outcome:

- Designate an employee (preferably within the legal or compliance department) to serve as the point of contact for the CFPB examination team and the document collection and production process.
- Prepare and train staff who will likely interface with CFPB examiners.
- Set up an initial meeting with examiners to explain the company's business model and set appropriate expectations. The beginning of the examination is the best opportunity to demonstrate your "culture of compliance" and educate the examiners on the company's structure and operations. This may include preparing brief presentations on the company's organizational structure and compliance framework.
- Set aside dedicated office and workspace for CFPB examiners onsite.
- Respond in a timely manner to examiner requests and work with examiners to identify their key areas of interest and how the company can best provide the requested information. At the same time it is important to manage examiner expectations and maintain clear lines of communication. Establishing boundaries early in the process can help conserve your staff's resources and ensure that you provide accurate and clear information.
- Work with counsel to review all submissions to the CFPB for responsiveness, privilege, and consistency.

Most importantly, if the examiners identify areas of concern, work with counsel to assess the preliminary findings, and "self-correct" or resolve the issues prior to the CFPB's issuance of a final examination report (as appropriate). In this regard, CFPB enforcement attorneys play an important and active role in the examination process, including helping to frame the scope of individual examinations through drafting and presenting the final report of examination. CFPB enforcement attorneys help determine whether a potential violation of law identified during an examination should be resolved through the confidential supervisory process or through a formal and public enforcement action. The examination process has led to or supported several recent public enforcement actions, resulting in over $50 million in consumer remediation and other payments, and over $8 million in civil money penalties.

It is therefore critical to resolve examiner concerns before they snowball into a bigger problem. Document the steps you take and then provide a copy to the examiners to ensure that your company's commitment to compliance is included as part of the examination record. Taking steps to resolve examiner concerns in advance can result in a final report with a better rating (meaning less future scrutiny), and in cases of serious identified deficiencies, limiting damages to a "matter requiring attention" instead of an "enforcement action."

If unsuccessful in addressing the Bureau's concerns, your company will likely receive a Potential Action and Request for Response (PARR) letter listing the Bureau's preliminary findings of alleged violations and informing your company that the Bureau is considering an enforcement action. Providing a strong written response to the PARR letter is the last, best chance to avoid an adverse examination report or enforcement action. To be effective, the written response should aggressively argue the supporting facts and legal arguments, highlight the steps taken to self-correct, and explain why an enforcement action is unnecessary.

Finally, adverse examination findings or a less than satisfactory compliance rating (a 3, 4, or 5) may be appealed by following the CFPB's appeal process, which establishes strict timeframes, requires that submissions be in writing, and puts CFPB staff in the role of final arbiter of the appeal. The appeals process also does not allow appeals of findings that have been recommended for an enforcement action. This underscores the importance of challenging adverse findings as early as possible in the examination process.

Matters that are good candidates for appeal are those that are based on specific established facts and disputed interpretations of law that have been developed and preserved through the examination process. Thus, having a strong record of factual findings, including efforts to correct such findings, as needed, can be critical. The process is often difficult, but well worth it for supervised entities that are seeking to push back against the CFPB and preserve their ability to challenge findings in court.

* * * * * * * * * * *

Preparing for and responding to a CFPB examination can be a daunting process. The key to surviving an examination is to understand and follow applicable laws, invest time and resources in your CMS program and staff, and work closely with examiners to ensure a fair and accurate process.

Jonathan L. Pompan, Partner and Co-chair of Venable's **CFPB Task Force**, **Andrew E. Bigart**, Counsel, and **Alexandra Megaris**, Associate, advise on consumer financial services matters and represent clients in examinations, investigations and enforcement actions brought by the CFPB, FTC, state attorneys general, and regulatory agencies.

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Related Articles:

What to Know about CFPB Supervision and Examination

What to Expect When You're Under a CFPB Investigation – Negotiating the Scope of the CID

CFPB Enforcement Settlement Principles Revealed

For more information about this and related industry topics, see **www.Venable.com/cfpb/publications**.

VENABLE LLP

ARTICLES

March 22, 2016

CFPB ENFORCEMENT SETTLEMENT PRINCIPLES REVEALED

UPDATE: A look inside the official CFPB *Enforcement Policies and Procedures Manual* can be viewed **here**.

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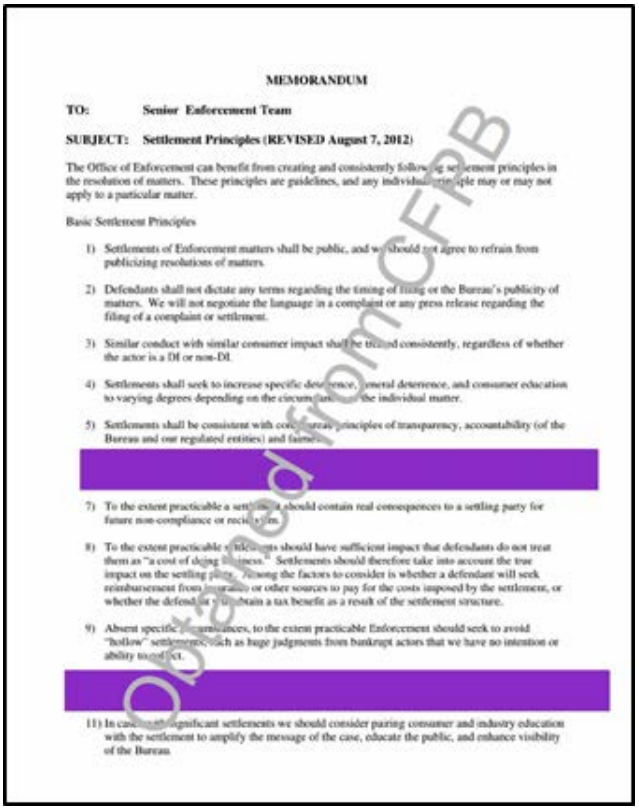
When companies are faced with a Consumer Financial Protection Bureau (CFPB or Bureau) investigation and threatened with litigation over alleged violations of consumer financial law, often there is the potential to reach a negotiated settlement. But settling a CFPB enforcement action presents a number of unique challenges, including the CFPB's internal priorities and philosophy regarding the use of negotiated settlements to resolve enforcement matters. This article examines these dynamics.

Our observations are based on our personal experience defending companies before the CFPB, including having secured the closing of investigations on a nonpublic basis, a review of the Bureau's public enforcement actions brought to date, and the CFPB's internal guidance on the topic. For instance, it maintains an ***Enforcement Policies and Procedures Manual*** (Manual) to impose administrative structure and uniform standards on how enforcement staff achieve their mandate to enforce federal consumer financial laws.



MEMORANDUM

TO: Senior Enforcement Team

SUBJECT: Settlement Principles (REVISED August 7, 2012)

The Office of Enforcement can benefit from creating and consistently following settlement principles in the resolution of matters. These principles are guidelines, and any individual principle may or may not apply to a particular matter.

Basic Settlement Principles

1) Settlements of Enforcement matters shall be public, and we should not agree to refrain from publicizing resolutions of matters.

2) Defendants shall not dictate any terms regarding the timing of filing or the Bureau's publicity of matters. We will not negotiate the language in a complaint or any press release regarding the filing of a complaint or settlement.

3) Similar conduct with similar consumer impact shall be treated consistently, regardless of whether the actor is a DI or non-DI.

4) Settlements shall seek to increase specific deterrence, general deterrence, and consumer education to varying degrees depending on the circumstances of the individual matter.

5) Settlements shall be consistent with core bureau principles of transparency, accountability (of the Bureau and our regulated entities) and fairness.

[redacted]

7) To the extent practicable a settlement should contain real consequences to a settling party for future non-compliance or recidivism.

8) To the extent practicable settlements should have sufficient impact that defendants do not treat them as "a cost of doing business." Settlements should therefore take into account the true impact on the settling party. Among the factors to consider is whether a defendant will seek reimbursement from insurance or other sources to pay for the costs imposed by the settlement, or whether the defendant will obtain a tax benefit as a result of the settlement structure.

9) Absent specific circumstances, to the extent practicable Enforcement should seek to avoid "hollow" settlements, such as huge judgments from bankrupt actors that we have no intention or ability to collect.

[redacted]

11) In cases of significant settlements we should consider pairing consumer and industry education with the settlement to amplify the message of the case, educate the public, and enhance visibility of the Bureau.

The Bureau's Broad Investigatory and Enforcement Reach

The CFPB is charged with implementing and, where appropriate, enforcing "Federal consumer financial law" with the goal of "ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive." "Federal consumer financial law" is a defined term that includes eighteen enumerated consumer laws enacted prior to the Dodd-Frank Act, including, for example, the Electronic Fund Transfer Act, the Fair Credit Reporting Act, and the Truth in Lending Act.

The CFPB has authority to bring an enforcement action for any unfair, deceptive, or abusive act or practice (UDAAP) involving consumer financial products or services, and for conduct that violates any of the eighteen enumerated consumer financial laws.

The Bureau can investigate merely on suspicion that any person has violated any provision of federal consumer financial law, or to seek assurance that a violation has not occurred. In other words, it is not necessary to have evidence that a law has in fact been violated before opening a formal Investigation. In fact, according to the Manual, the Bureau could conduct a compliance sweep to investigate whether industry participants are complying with a law or regulation.

Understanding the Bureau's Settlement Priorities

The Manual sets out the Bureau's policies on initiating investigations, drafting civil investigative demands and taking testimony, closing investigations, seeking a settlement or filing a lawsuit in court or the administrative forum, how to analyze statute of limitations, when to seek a tolling agreement, seeking civil money penalties, sharing and gathering information from third parties, including banks and Internet Service Providers, and more.

The CFPB also has developed specific settlement principles to guide enforcement staff during investigations and settlement talks. Although CFPB staff are given leeway and discretion to adjust their negotiations in response to particular facts and circumstances, an examination of a number of consent orders, as well as our own personal experience, reveals that enforcement staff typically closely follow these principles. Nonetheless, there's no substitute for tough negotiation, recognizing that every fact situation is different, and that the ultimate resolution of an enforcement matter once alleged violations of law are made depends on each party's perception and understanding of litigation risk and specific facts.

Below we summarize some of our observations regarding what drives the Bureau's settlement posture:

. Settlements must be public; the CFPB does not appear willing to agree to private settlements.

. Timing of filings or the Bureau's publicity of matters and the language in a complaint or any press release may not be negotiable.

. Similar conduct with similar consumer impact is supposed to be treated consistently.

. Settlements should aim to meet the goals of increasing specific deterrence, general deterrence, and consumer education. As such:

    - Settlements should sufficiently impact the settling party and not be treated simply as a cost of doing business. For example, the CFPB typically limits the party's ability to seek reimbursement from insurance or other sources to pay for the costs imposed by the settlement, or to obtain a tax benefit as a result of the settlement structure.

    - Settlements should avoid being "hollow" or otherwise not enforceable (for example, if the settling party has filed for bankruptcy and is unable to pay the assessed penalty).

    - Announcements of settlements often are accompanied by publications of compliance bulletins or other forms of consumer or industry guidance.

. Settlements should be transparent, accountable, and fair.

Not surprisingly, these settlement principles reflect the "regulation through enforcement" stance of the CFPB. As a result, companies faced with an investigation and alleged violations of consumer financial law may face an uphill battle to get the enforcement staff to focus on the specific facts of an investigation.

Negotiating a Satisfactory Resolution

When considering settling a CFPB enforcement action (and when responding to an inquiry), companies need to understand the range of these issues and positions in order to develop an appropriate strategy, set realistic expectations, and, if possible, reach a satisfactory agreement.

Based on our review of guidance to enforcement staff, consent orders and litigation, and our own experience, the following strategies may be useful:

. Engage in every opportunity to advocate for your position by framing the issues in the best possible light. Although most interactions will be with enforcement staff assigned to the case, there are multiple points of review and approval by supervisors and stakeholders from other departments in the Bureau throughout the process. It is therefore important to take every opportunity to prevent an investigation from gaining momentum, and to understand the full extent of the CFPB views on products and services being reviewed.

. Maintain an open dialogue with the Bureau staff, who have a significant amount of discretion in the

day-to-day aspects of an inquiry, if they decide to use it.

. Do your research – understand CFPB precedent or enforcement actions in other, similar circumstances that you can use to press your case.

. Analyze the data that may be used by the Bureau to calculate consumer harm and understand potential civil money penalty (CMP) calculations.

. The CFPB manual makes clear that guidance from other agencies, including "Civil Money Penalty Matrices" published by other banking regulators, may be used for reference. But enforcement staff are directed that they "should rely primarily on [their] calculation of the statutory daily maximum, Bureau precedent, and other statutory factors in determining the appropriate CMP in [their] case." As a result, a CMP assessed by the CFPB has the potential to be far greater than one assessed by other agencies for the same or a similar alleged violation of law.

. Understand the Bureau's settlement priorities and attempt to address them in each proposal or offer made.

- It is looking to make a big impact (and headlines).

- It will reject any approach blatantly designed to neutralize the consequences of the settlement for the settling party.

- It is seeking to maximize deterrence and consumer education.

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Beware The Gov't Squeeze On Lead Generation Marketing


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Law360, New York (March 17, 2016, 12:22 PM EDT) -- Online lead generation continues to face increased scrutiny and regulation on multiple fronts, including from consumer groups, state regulators, the Federal Trade Commission, and the Consumer Financial Protection Bureau. This squeeze is being felt by all participants — publishers, aggregators and buyers — and, notably, the lines of legal responsibility and accountability continue to blur. All told, the viability of some forms of online lead generation is at stake.

The government agencies are targeting a broad set of business practices, from the representations made to consumers about the products, services and merchants they are being connected to and how their data is being used, to the collection and security of personal information, and even whether the products or services ultimately sold to consumers comply with applicable (and in some cases potentially inapplicable) laws.

This article reviews recent regulatory and enforcement activity by the FTC and CFPB related to online lead generation. Our review focuses on the three areas we believe the regulators will continue to most actively pursue: (1) use of deceptive advertisements to generate leads; (2) how sensitive consumer data is stored and whom it is shared with; and (3) whether, and the extent to which, publishers and lead aggregators are liable for the end users' legal compliance.

Background

Lead generation is the practice of identifying or cultivating consumer interest in a product or service, and selling this information to third parties. The FTC has led the charge against what it believes are prevalent abuses committed by sellers and buyers of online leads. In addition to bringing enforcement actions against companies, which we discuss in some detail below, it also has spent considerable resources researching and understanding the industry.

In October 2015, the FTC hosted a workshop titled, "Follow the Lead: An FTC Workshop About Online Lead Generation," where a variety of stakeholders, including industry representatives, consumer advocates and government regulators, discussed consumer protection issues. This workshop, and the subsequent public comment period that closed on Dec. 20, 2015, provides key insights into how online lead generation works and its variations, and the types of conduct that may be unfair or deceptive, and may be the start of identifying practices sellers and buyers of leads can adopt.

Of course, the FTC is not the only government agency focused on the intersection of lead generation activity and possible consumer harm. State regulators — in particular the New York State Department of Financial Services and attorney general — and the CFPB also have been focused on the advertising and marketing of consumer financial services, such as student loans, mortgages and payday loans, including by lead generators.

The CFPB's authority is both broader and narrower than the FTC's. It has broader authority to

directly regulate third-party service providers, but it's narrower in the sense that it is limited to companies in the consumer finance space (e.g., loans, credit cards and mortgages). In recent years, the CFPB has widened its focus to include companies, such as payment processors and advertising networks, that serve as vendors to financial services companies. It is relevant here that the CFPB has investigated several lead generators, particularly those involved in short-term, small-dollar loans, and to date, has sued one such company.

There are three broad sets of laws that regulate lead generation:

1. General advertising and marketing law principles, enshrined in the FTC Act, the Consumer Financial Protection Act, and state laws (known as "mini-FTC Acts"), that prohibit unfair or deceptive acts or practices, including the dissemination of false or misleading advertising. The CFPA also prohibits "abusive" practices.

2. Specific statutes, both state and federal, regulate certain marketing channels. For example, the Telephone Consumer Protection Act and CAN-SPAM Act regulate telephone and email communications, respectively, and the Telemarketing Sales Rule applies to many forms of telemarketing.

3. There are statutes that regulate specific consumer products and services, such as mortgages, credit cards and other consumer loans (e.g., Truth in Lending Act and Regulation Z, Credit Card Act, and the Mortgage Acts and Practices Advertising Rule ("MAP Rule" or Regulation N)). These laws typically regulate how such products are advertised, in addition to how they must be structured and serviced.

Deceptive Advertising to Generate Leads

For years, the FTC has been actively pursuing lead generation companies for using false or deceptive ads to induce consumers to submit a lead. It has targeted both publishers and network operators that play an active role in designing and/or distributing the allegedly deceptive ads. For example, in the cases against GoLoansOnline.com Inc. (announced May 2014) and Intermundo Media LLC (announced September 2014), the FTC concluded that ads targeting consumers seeking mortgage refinancing included unsubstantiated representations about the terms of the refinancing, including the interest rates, fees and payment periods. According to the FTC, these advertised terms were not based on any mortgage credit products actually available to consumers by the companies in the network, and thus were deceptive. The FTC also alleged the ads failed to comply with the technical requirements of the Truth in Lending Act and Regulation Z and MAP Rule.

The FTC also has pursued affiliate or lead generation networks for their participation in the creation and/or dissemination of false or deceptive ads. In the case it brought against LeanSpa, a seller of weight-loss products, the FTC also sued LeadClick, the affiliate network with whom LeanSpa contracted to provide advertising services. Some affiliate marketers on the network used "fake news sites" to market LeanSpa's products, and the FTC alleged that LeadClick was liable for those deceptive websites because LeadClick (1) knowingly hired affiliates who used fake news sites, (2) knew those affiliates were using such sites, and (3) failed to object to their use.

The court agreed, emphasizing LeadClick's role in vetting the affiliates and its authority to review their advertising. It also found that LeadClick actively participated in the deception by purchasing ad space at genuine news websites and then selling the space to the affiliates (thus creating "the bridge" between genuine and fake news sites, making the fake ones appear more legitimate).

For publishers, the implications of these cases are fairly straightforward. Advertising content, including emails, banner ads, SEO ads and websites, must be truthful and substantiated, and include all material information necessary to ensure it is not misleading. Importantly:

- Advertising content cannot obscure where the lead information is going. This means that if the publisher is directing the consumer or the consumer's information to a lead aggregator

instead of directly to the merchant, consumers need to be made aware.

- If the publisher does not know the exact terms of the offer that ultimately will be made to a consumer, it cannot make specific representations in its advertising, either expressly or implicitly, about such offers.

On the other hand, the rules of the road for lead aggregators and buyers are murkier. Whether these parties can be responsible for advertising created by others largely has been answered in the affirmative. The questions now are: Under what circumstances and to what extent are these parties responsible? While the exact bounds of the answers are not yet defined, at a minimum aggregators and buyers need to have basic due diligence, monitoring and enforcement processes in place to vet and keep track of their advertising partners.

Data Security

The collection and transfer of consumer data is the heart of online lead generation. The type of data collected varies by industry/product vertical, but typically includes the consumer's contact information, information about the device and IP address the consumer is using, and, notably, sensitive data such as Social Security numbers, bank account and credit card numbers, etc.

The risk of consumer harm if this data were to get into the wrong hands is considerable. And, despite the significant data security measures taken by responsible parties involved in lead generation, there continues to be anecdotal examples that the FTC and other regulators cite of high rates of data breaches and unscrupulous sales, resulting in a proliferation of scams targeting consumers who submitted their data to lead generators. Whether real or perceived, the alleged consumer harm has become a primary area of concern for regulators and consumer groups.

Regulators are attacking this problem from multiple angles. While they have cracked down on the individuals and companies operating these alleged scams or otherwise engaged in illegal activities, they also have focused on the parties that transferred or sold the data to them.

For example, in its recent case against Sequoia One LLC, a lead aggregator and generator for small-dollar loans, the FTC argued that Sequoia One knew or had reason to know that one of its buyers, Ideal Financial, used the purchased data to make unauthorized debits from consumers' bank accounts, thus causing injury to consumers. Among other things, the FTC pointed to the fact that Sequoia One continued to sell leads to Ideal Financial, which came under fire for large amounts of refunds or chargebacks, customer complaints and inquiries by government agencies. At the request of the FTC, a federal court has frozen the assets of Ideal Financial.

In another example, the FTC targeted several affiliated data brokers, Sitesearch Corp., Leads Co. LLC and LeapLab LLC, and their founder for purchasing payday loan applications that contained consumers' bank account and Social Security numbers and other private information, that the parties then sold without permission to nonlender companies. The FTC alleged that the nonlenders were engaged in fraudulent email and telemarketing, and made the same allegations regarding the activities of Ideal Financial. The enforcement action has resulted in the founder reaching a settlement with the FTC with strict injunctive relief and nearly $10 million in suspended payments, and default judgments against the companies.

Other recent lead generation related cases include FTC v. Cornerstone and FTC v. Bayview Solutions, where settlements were reached against the defendants for allegedly exposing too much personal information about consumer-debtors.

These FTC enforcement actions illustrate the importance of appropriate safeguards and other procedures to mitigate the risk of exposure of consumers' personal information without their permission.

End Buyer Compliance

Lead generators need to take into account the end purchasers' regulatory landscape when developing lead generation campaigns, especially in the area of consumer financial services. State

regulators have been particularly active in online lead generation of consumer loans and other financial services. For example, states generally require a license to lend to their residents and many impose interest rate caps that make lending impractical to certain high-risk borrowers. While many online lenders take the position that they are not always required to obtain a license in the state where the borrowers reside, state (and, more recently, federal) regulators disagree. In recent years, states have pushed back on these lenders by halting their activities, forcing them to get licensed and, increasingly, preventing them from marketing to their residents.

For example, in 2015, the New York State Department of Financial Services announced a settlement with MoneyMutual, a lead generator for online lenders, based on MoneyMutual's marketing of short-term, small-dollar loans to consumers in New York — where payday loans are essentially illegal. It found that MoneyMutual's customers were not permitted to make such loans to New Yorkers, regardless of what MoneyMutual's clients may have represented to MoneyMutual, and thus the company could not collect lead information from consumers in New York.

This theme — holding the lead generators (and other service providers) responsible for their clients' legal compliance — is likely to grow. The CFPB has used similar theories of liability in analogous cases. For example, in its lawsuit against CashCall, a company that purchases and services loans, and others, the CFPB has argued that the underlying loans are void, and thus CashCall's attempts to collect on them are illegal. Specifically, the loans were originated by a company affiliated with a Native American tribe, which, based on tribal sovereign immunity, argues it is exempt from state licensing and usury laws. According to the CFPB, the lender is not exempt from state laws, the loans fail to comply with those loans, and, therefore, the loans were void and CashCall engaged in deceptive, unfair and abusive practices when trying to collect repayments from the borrowers. While the CFPB cannot enforce state laws, its importation and federalization of state law requirements under its UDAAP authority is a novel theory that will also test the strength of the bureau's ability to police "abusive" conduct.

Conclusion and Outlook

Lead generation is neither new nor illegal. Indeed, as Jessica Rich, Director of the FTC Bureau of Consumer Protection, noted, "Lead generation is a well-established industry that has served a very important role in the marketplace for many, many decades." At the same time, government enforcement agencies continue to target lead generation in increasingly aggressive and novel ways.

It is worth noting that regulators appear to have adopted the position that all of the parties involved in the generation and purchase of a lead are required to police each other's activity, or face liability for each other's noncompliance. Given the level of "blindness" that is characteristic in online lead generation — for example, end buyers often do not know the identity of the publishers and vice versa — this is a serious and potentially insurmountable development.

Accordingly, all parties involved in lead generation will need to closely monitor developments in order to properly weigh compliance risks.

—By Alexandra Megaris and Jonathan L. Pompan, Venable LLP

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CONSUMER FINANCIAL SERVICES

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FINTECH AND MARKETPLACE LENDERS UNDER SCRUTINY

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FinTech and marketplace lenders are fast realizing that the Consumer Financial Protection Bureau (CFPB), Federal Trade Commission (FTC), and even state regulators are focused on their activities. Recent announcements that the CFPB is taking **consumer complaints** on marketplace lenders and has established an office of small business lending means that lenders and service providers should prepare for the possibility of investigations and examinations in the not too distant future. At the same time, the FTC has announced a "**Financial Technology Forum on Marketplace Lending**" series, starting on June 9, 2016, to explore the growing world of marketplace lending and its implications for consumers. And, at the state level, the California Department of Business Oversight recently released a **survey** on marketplace lending in California finding that consumer and small business lending increased by 936% from 2010-2014, to $2.3 billion.

All of these developments point to the potential for increased federal and state regulatory scrutiny of marketplace lending and their service providers. Below are five tips for managing enforcement and compliance risk, along with several hyperlinks to relevant articles and presentations.

- **Increased Scrutiny Means Investigations and Possibly Enforcement Actions:** The CFPB has investigations under way that span the full breadth of the Bureau's enforcement authority over providers of financial products and services and their vendors. The process of responding to a civil investigative demand (CID) from the CFPB (or even the FTC) is challenging and resource intensive, but critical. Your company will have to issue a record retention notice, negotiate the scope of the CID, collect responsive information and materials, respond to the CID, and then wait for the CFPB to make a decision on whether it will bring an enforcement action or close the investigation. All of this can be challenging, but we've got you covered with a primer on **negotiating the scope of the CID** and **navigating examinations**. We also reveal the CFPB's **enforcement settlement principles** to illustrate exactly how the CFPB implements its regulation by enforcement agenda.
- **Advertising, Marketing, and Lead Generation Are Being Scrutinized:** Online lead generation continues to face increased scrutiny and regulation on multiple fronts, including from consumer groups, state regulators, the FTC, and the CFPB. This squeeze is being felt by all participants—publishers, aggregators, and buyers—and, notably, the lines of legal responsibility and accountability continue to blur. Because of this pressure, the viability of some forms of online lead generation is in jeopardy. Our primer, **Government Puts Squeeze on Lead Generation Marketing**, focuses on the three areas we believe regulators will continue to most actively pursue: (1) use of deceptive advertisements to generate leads; (2) how sensitive consumer data is stored and whom it is shared with; and (3) whether, and the extent to which, publishers and lead aggregators are liable for the end users' legal compliance.
- **Service Provider Liability Can Be Minimized by Strong Vendor Due Diligence and Monitoring Compliance Programs:** Federal and state regulators expect lenders to manage their service providers for compliance with applicable laws and regulations. One of the first things the CFPB or a state regulator will ask for during an investigation or examination is a list of the regulated entity's service providers. Failing to conduct vendor due diligence and monitor service providers is a surefire way to put your company at risk. On the flip side, the CFPB has been targeting service providers using its "**substantial assistance**" authority, which allows the CFPB to bring an action against any person it believes knowingly or recklessly provided substantial assistance to actors that fall under the CFPB's jurisdiction. The result is an environment in which covered entities and their service providers are expected to police each other's regulatory compliance.
- **Collecting Accounts Receivable:** The CFPB (teaming with the FTC) has taken aim at first-party and third-party debt collection activities, including enforcement settlements with lenders and

collectors. In November, federal, state, and local regulators and enforcement agencies announced Operation Collection Protection, a national initiative that targets debt collectors. This program complements recent CFPB **enforcement**, **supervisory**, and **rulemaking** efforts focused on the debt collection industry, including **first-party creditors and billing services**, and on the intersection of **data furnishing and debt collection**. In addition, the CFPB continues to work on developing proposed rules for debt collection following publication of its **advanced notice of proposed rulemaking** in November 2013.

Need more info? During **our annual kick-off webinar** in January 2016, members of Venable's **CFPB Task Force** provided an outlook on what to expect this year, as well as practical tips and examples from their work on the front lines. We also have a **primer for marketplace lenders** on potentially relevant federal and state consumer protection law for a quick refresher.

For more information, please contact Jonathan L. Pompan at 202.344.4383 or **jlpompan@Venable.com**.
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