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Waiting for the CFPB

My sources tell me that the Consumer Financial Protection Bureau (CFPB) will soon announce substantial monetary penalties and other administrative actions against a large nonbank. I guess it is inevitable that when such an announcement is finally out and about, humans - and especially the financial services type humans - will be easily aroused to panic - which means the nascent, CFPB exam preparation industry will receive a steroidal boost. And the *frisson* of dismay and frenzy will be stirred up even further by the ambulance chasers, running to the rescue, with their merry band of products and services to quell the indomitable, bureaucratic brute.

There are plenty of compliance and law firms scouring the horizon for new clients that seek CFPB exam readiness. Indeed, I know of one such firm that has made fear-mongering into a fine art, whirring about and speaking at industry events where a surfeit of anxiety and angst may be supremely generated. As the affrighted crowd bounds into the arms of these ushers of deliverance, seeking the aegis of their singular protection, they are quite sold on a full scale risk assessment and sempiternal, on-going monitoring. But the prospective client, sore at the loss of money in this endeavor, need not be too vexed, inasmuch as they do get action plans, some risk assessment tools, and assorted bric-a-brac of one-size-fits-all templates "specially drafted" for their own unique purposes.

Our industry is a strong bunch, survivors of the toughest real estate cycles, and accustomed to adapting to regulatory mandates. We have seen the largest fall and the lowest rise. We push back, when needed; and we push forward, when appropriate. We know that our industry is the backbone of the economy. Our future will not be compromised by cold sweat and consternation.

So, when considering the legal and regulatory compliance requirements of the CFPB, how alarmed and apprehensive should we be?

Trembling before the Tsar

In the Tsardom of Russia, most people never met the Tsar. They met his agents, which at the time meant the duly constituted orders of functionaries who acted in accordance with the law. The people who did meet the Tsar, even nobles, were known (and even expected) to tremble in his presence. Like the custom required by English kings, the people who stood in the presence of the Tsar stated their views, when called upon to speak, and, upon finishing their statements, they left the reception chamber by bowing and slowly backing out of the room, always facing the Tsar. This kind of obeisance showed respect for the established order and reflected the insuperable power and primacy of the monarchy.

But we do not live in a monarchy and the CFPB is not the Tsar.

We need not tremble before the CFPB!

There are a set of guidelines that the CFPB requires for implementation by lenders, mortgage brokers, servicers, and others in the financial services sector. Most of these guidelines are not particularly ponderous, unless the foregoing entities hadn't been implementing them all along. It is not as if we do not know the importance of fair lending or proper data collection pursuant to the Home Mortgage Disclosure Act (HMDA). There is no real mystery regarding compliance with advertising rules. Every company is keenly aware of the mandates set forth in the Real Estate Settlement Procedures Act (RESPA) and the Truth in Lending Act (TILA).

At this point in the industry's growth, who does not know about the importance of risk controls and risk mitigation? Who does not know about the central importance of responsible and knowledgeable management? How many companies willfully ignore consumer complaints?

A whole generation of bankers, lenders, brokers, and servicers have cultivated a heightened sensitivity to the Fair Credit Reporting Act (FCRA) and Fair & Accurate Credit Transaction Act (FACTA), Gramm-Leach-Bliley Act (GLBA), Bank Secrecy Act and Anti-Money Laundering Program requirements, Equal Credit Opportunity Act (Regulation B), Home Ownership & Equity Protection Act (HOEPA), Secure & Fair Enforcement for Mortgage Licensing Act (SAFE Act), the Fair Housing Act, the Anti-Predatory Lending Act, the National Do-Not-Call Registry, and monitoring third party service providers (sometimes neutrally referred to as "vendor management").

These are the sorts of areas about which the CFPB has an interest in ensuring consumer financial protection. None of the aforementioned is strange or new to anybody who has been paying attention!

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I have said many times that Preparation is Protection - and most companies associated with residential mortgage loan originations and servicing have been preparing, thus protecting themselves, for a long, long time. Many have been through numerous state and federal banking examinations, responding, where needed, with corrective actions. Not a few have retained competent mortgage risk management firms or in-house compliance advisors. Even those who cannot afford compliance counsel have participated in one way or another in conferences, conventions, and training venues in order to be educated in regulatory developments. Everybody now knows unequivocally that sales are cemented to compliance.

Who's afraid of the big bad wolf?

As I wrote recently, the CFPB has considerable enforcement powers. Among other things, it can rescind or reform contracts, require the refunding of money to a consumer and demand other forms of restitution, mandate the disgorgement and refunding of various types of assets, compel the return of real property, cause fees and other compensation to be disgorged for unjust enrichment, require the payment of damages or other monetary relief, cause public notification regarding a violation, limit the activities or functions of alleged violators, and, of course, exact civil monetary penalties.

But, in terms of the remedies mentioned above, none of these administrative actions is really new. Virtually every state banking department in the country has most of these enforcement powers. Nearly all prudential regulators have many such authorities. Banks and nonbanks that have undergone routine examinations are not an unsuspecting lot, completely unprepared for the kinds of detailed review that the CFPB conducts. Having watched the CFPB in action, I can say that a firm that is adequately prepared for a state or federal examination should be prepared for a CFPB examination.

Is the CFPB's examination a bit more detailed? Yes. But most of the exam requirements are re-treads or the kinds of state and federal banking information and documentation requests or guidelines that are mostly customary and *pro forma*.

Does the CFPB create some new readiness challenges? Yes. However, for the most part, if an entity that is subject to the authority of the CFPB is already implementing the "Four Ps" - principles, policies, procedures, and practices - it should be in a position to respond promptly, confidently, and accurately to CFPB examination protocol requirements.

To be utterly reductive, the CFPB examination is not an known unknown, or an unknown unknown, but merely an unknown that is actually, entirely known!

Waiting for Godot

In the absurdist play "Waiting for Godot," by Samuel Beckett, two characters, Vladimir and Estragon, wait for the arrival of someone named Godot (the "t" is silent). While waiting for Godot, the two men, both vagrants, occupy their time by philosophizing, sleeping, arguing, singing, exercising, and even considering suicide - anything "to hold the terrible silence at bay." But Godot never shows up and, although they agree to leave, neither of them ever leaves.

It seems to me that we can be prepared for the CFPB examination, without having to endure the rancorous agitation stirred up at conferences by CFPB "experts," sales pitches by "compliance" firms with a better eye for mining new clients than providing demonstrably worthwhile services, though they promise (for a fee, of course) to offer churned-out, colored-coded charts and unceasing monitoring.

To be sure, being unprepared for the unknown is not qualitatively the same as being prepared for the mostly known! It is easy to conflate the two, but often costly.

Indeed, there are aspects of preparation that probably do require professional support, if a company has not been towing the regulatory line for some time. There may be gaps in legal and regulatory compliance knowledge that will affect management's ability to prepare incisively for a CFPB examination. But we should not underestimate our own track record of complying with the expectations of Examiners and Regulators. We should not depreciate or otherwise minimize our own efforts to prepare for the many state and federal and Agency regulatory examinations heretofore experienced, or what we thereby learned toward improving our compliance with applicable banking laws.

Of course, my firm offers CFPB examination preparedness. We were among the first to set up such procedures, and we even offered (at no fee) a Compendium to navigate the use of CFPB's Supervision and Examiner Manual - Version 1. CFPB exam readiness is important to undertake for certain types of entities.

Like Vladimir and Estragon, some companies wait around endlessly for the CFPB to show up.

Eventually, it may!

But in the meantime, doesn't it make sense to prepare determinedly through proper compliance with all the rules, standards, guidelines, and laws involving residential mortgage loan originations? Isn't it more cost-effective and responsive (rather than reactive) to carefully prepare through continual due diligence? To think that some company or expert is going to offer regulatory deliverance on a silver platter is simply unrealistic. Be cautious of such promises!

Our firm works hard to ensure that our clients are prepared for any banking or due diligence examination, state or federal, Agency or Warehouse Bank, including certainly an examination by the CFPB. We see our role as providing guidance to identify, mitigate, reduce, and, where possible, eliminate risk. This is because we know that going to the goal is the goal! That is a mission which we all should feel confident in pursuing.

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