

Client Alert

February 8, 2018

CFPB's Third Request for Information Broadly Seeks Feedback on Enforcement

By Steven M. Kaufmann and Natalie A. Fleming Nolen

In its third Request for Information (RFI) to “ensure the Bureau is fulfilling its proper and appropriate functions to best protect consumers,” the Consumer Financial Protection Bureau (CFPB or “Bureau”) seeks comments “to help assess the overall efficiency and effectiveness” of its enforcement process. We issued client alerts previously on the CFPB’s outreach and RFI process, the first RFI relating to Civil Investigative Demands, and the second RFI on administrative adjudications. All three of the RFIs seek to address primary criticisms that the Bureau’s enforcement process has been overzealous and an inappropriate burden on the financial industry. The Bureau seeks comment from any and all commenters. Respondents may well address the issues in all three related RFIs together. The comment period on this RFI will run for 60 days after the RFI is published in the *Federal Register*, which is anticipated to happen by February 12.

Now is the time for participants in the consumer financial services markets to consider submitting thoughtful, yet practical, observations on the workings of the CFPB’s enforcement policy, including the highly controversial regulation through enforcement approach that the CFPB appears to have been engaged in for the past several years.

Unlike the two prior RFIs dealing with specific process and procedure issues, the RFI on enforcement goes to a basic function of the Bureau in investigating, enforcing, and seeking redress for violations of federal consumer financial laws. This broad request seeks to address the concern of many critics that the Bureau’s enforcement process is overly zealous and unduly burdensome and costly. The gist of all three RFIs is to keep in place the Bureau’s continued enforcement of federal consumer laws and, at the same time, “achieve meaningful burden reduction” and otherwise improve the Bureau’s processes.

The third RFI is broad, seeking “[s]pecific suggestions regarding any potential updates or modifications to the Bureau’s enforcement processes,” as well as “[s]pecific identification of any aspects of the Bureau’s enforcement processes that should not be modified.” Topics identified include:

- Communications between CFPB staff and subjects of investigations;
- Duration of investigations;
- The Bureau’s Notice and Opportunity to Respond and Advise (NORA) process, where the Office of Enforcement gives the subject of an investigation an opportunity to present its case that an enforcement action should not commence;
- Whether the NORA process should involve in-person presentations by subjects of investigations;
- The calculation of civil money penalties;
- Standard provisions in Bureau Consent Orders; and
- The manner and extent of coordination of Bureau enforcement efforts with those of other federal and state agencies having concurrent jurisdiction.

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While the RFI goes to the overall burden of CFPB enforcement actions in terms of the cost of defense and the nature of remedies and penalties, the RFI does not specifically address the CFPB's basic approach of attempting to regulate through enforcement. The Bureau has not admitted that it has done so, but criticisms of that approach abound. For example, rather than set clear guidelines and regulations for financial firms or "covered persons" to follow, the CFPB instead has set standards for legal compliance through enforcement where consent decrees or publicly filed complaints or briefs attempt to give some insight into performance standards that the Bureau expects. In some instances, there were no regulations on these issues, while in other instances the regulations issued were unclear or incomplete and enforcement provided the only available clarity. There also were instances where the CFPB's enforcement standard actually reflected a change from prior government guidance and practice before creation of the CFPB. The CFPB's approach of regulating by enforcement unfairly, and without due process, held industry participants accountable for unknown and unclear standards, as was the case with PHH Corporation under the Real Estate Settlement Procedures Act which has been the subject of extensive litigation.

Use of enforcement actions to convey compliance expectations also required industry participants to closely monitor and adhere to emerging guidelines that arose out of the enforcement process. Such enforcement information and related expectations would arise irregularly and without prior notice and opportunity to comment. As a result, the Bureau could not benefit from industry feedback and the industry constantly needed to adjust its processes as new consent orders came down.

The RFI also does not address the fact that the Bureau has both broad enforcement and oversight responsibilities for many financial firms. Any entity subject to Bureau supervision had a strong incentive to cave to Bureau enforcement demands because of this two-headed approach. Thus, those who chose to defend against Bureau enforcement actions often were firms whose very existence was challenged by the enforcement action or firms not also subject to CFPB supervision. While prudential regulators may also have dual enforcement and supervision authority, prudential regulators, unlike the Bureau, ordinarily do not use enforcement as a vehicle for establishing industry guidelines or standards.

Certainly, robust regulation and enforcement have the salutary effect of improving industry legal compliance programs and encouraging self-correction and self-reporting. This affects all industry participants, not just the targets of specific enforcement actions. The uncertainty of the Bureau's approach often made responsive compliance programs unnecessarily costly and inefficient. All of these issues should be addressed in responses to the RFI, so the Bureau will have the benefit of the comments in reshaping its regulatory and enforcement approach.

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