THE ENFORCEMENT POWERS OF THE CONSUMER FINANCIAL PROTECTION BUREAU

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For several months, the Consumer Financial Protection Bureau ("CFPB" or "Bureau") has implemented a spate of enforcement actions against banks and nonbanks. My interest in this article is neither to re-litigate those cases nor single out any particular financial institution for further scrutiny. Sometimes we must learn our lessons at somebody else's expense, rather than to castigate another for unseemly conduct. None of us, however, is absolved of the responsibilities, the violations of which could lead to enforcement actions against us or the financial institution where we are employed.

It is important, therefore, to have some sense of what is meant by the term "enforcement," especially with respect to the CFPB's authorities. The CFPB received a host of enumerated laws and related authorities on July 21, 2011[1], and, pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), a concomitant set of defined rules were established[2] that gave the Bureau numerous enforcement powers, including the powers to conduct investigations and implement enforcement actions to enforce federal consumer financial law.[3]

For instance, Section 1052 of the Dodd-Frank authorizes the CFPB to engage in joint, interagency investigations and requests for information, including matters relating to fair lending. Though the statute specifically provides that, "where appropriate," the Bureau may conduct "joint investigations" with the Secretary of Housing and Urban Development, the Attorney General of the United States, or both, it also sets forth lengthy provisions governing subpoena powers and civil investigative demands.

HEARINGS AND ADJUDICATIONS

On November 7, 2011, the Bureau issued CFPB Bulletin 2011-04 (entitled "Enforcement"),[4] the first in a series of bulletins relating to policies and priorities of the Bureau's Office of Enforcement. The Bulletin announced that before the CFPB commences an enforcement proceeding, it may (or may not) give the subject of the proceeding notice of the nature of the potential violations and may (or may not) offer the subject the opportunity to submit a written statement in response. The Bulletin also gave specific instructions regarding the submission requirements of the written statement, such as the paper size, spacing, font size, and length, while also mandating that the response had to be received by the CFPB by no more than 14 calendar days after the notice.[5]

Almost a year after the CFPB received its authorities, it adopted rules, on June 29, 2012, regarding the procedures it expected to follow when investigating whether a "person" (a legal term for an individual or entity) is or has been engaged in conduct that would constitute a violation of any provision of federal consumer financial law.[6]

Indeed, Dodd-Frank authorizes[7] the Bureau to conduct hearings and adjudication proceedings to ensure or enforce compliance with the following applicable items:

- Title X, which established the Consumer Financial Protection Bureau as an independent agency within the Board of Governors of the Federal Reserve System, including any rules prescribed by the CFPB under Title X; and
- "… any other Federal law that the Bureau is authorized to enforce, including an enumerated consumer law, and any regulations or order prescribed thereunder, unless such Federal law specifically limits the Bureau from conducting a hearing or adjudication proceeding and only to the extent of such limitation."

Furthermore, Section 1053 of Dodd-Frank sets forth the rules for Cease-and-Desist proceedings and enforcement orders.

Statutorily, Dodd-Frank authorizes the CFPB to apply to the United States district court within the jurisdiction of which the principal office or place of business of the person is located, for the purposes of enforcing any effective bulletin or notice, outstanding notice, or order.

Thus it was that, soon after the Bureau announced its rules for investigating violations, in July 2012 the CFPB announced its first enforcement action. That action consisted of a consent order in which Capital One agreed to refund $140 million to 2 million customers and pay a $25 million penalty. The enforcement was the consequence of alleged deceptive marketing tactics used by

Capital One's vendors to coax consumers into paying for add-on products when they activated their credit cards.[8]

Dodd-Frank authorizes the CFPB to commence a civil action against any person who violates a federal consumer financial law and to impose a civil penalty or to seek all appropriate legal and equitable relief including a permanent or temporary injunction.

When commencing a civil action, the Bureau must notify the Attorney General and, with respect to a civil action against an insured depository institution or insured credit union, the appropriate prudential regulator. Except as otherwise permitted by law or equity, no action may be brought under Title X more than three years after the date of discovery of the violation.

Indeed, the CFPB published an interim rule regarding its awarding of attorney fees and other litigation expenses in certain situations, as required by the Equal Access to Justice Act.[9]

SCOPE OF LEGAL REMEDIES

The CFPB has extensive authorities to not only investigate violations of federal consumer protection laws but also implement broad enforcement relief.

Consider this list, which I do not assert to be comprehensive. These legal remedies are held to be "without limitation:"

- Rescission or reformation of contracts
- Refund of money
- Disgorgement and refund of various types of assets
- Return of real property
- Restitution
- Disgorgement or compensation for unjust enrichment
- Payment of damages or other monetary relief
- Public notification regarding the violation (including the costs of notification)
- Limits on the activities or functions of the person
- Civil monetary penalties

Indeed, Dodd-Frank authorizes the court in a court action, or the CFPB in an administrative proceeding, to grant "any appropriate legal or equitable relief with respect to a violation of federal consumer financial law, including a violation of a rule or order prescribed under a federal consumer financial law."[10]

The relevant statute provides that there may not be an imposition of exemplary or punitive damages; however, in an action to enforce any federal consumer financial law, the CFPB, the states Attorneys General, or state regulators may recover their costs, if they prevail.

Notwithstanding the foregoing exclusion of exemplary or punitive damages, for any violation of a law, rule, or final order, or condition imposed in writing by the CFPB, a civil penalty may not exceed *$5,000 for each day during which the violation or failure to pay continues*. However, take note: that penalty amount jumps to *$25,000 for each day for any person that recklessly engages in a violation of a federal consumer financial law*, and to *$1,000,000 for each day for any person that knowingly violates a federal consumer financial law*.

And if the CFPB obtains evidence that any person has engaged in conduct that may constitute a violation of federal criminal law, the Bureau will immediately refer the case to the Attorney General of the United States.

BLOWING THE WHISTLE ON VIOLATIONS

The Bureau has distinguished whistleblower information from consumer complaints. Section 1057 of Dodd-Frank protects certain employees from retaliation who submit information about their employers' potential violations of the consumer financial protection laws now enforced by the CFPB. On December 15, 2011, the CFPB issued Bulletin 2011-05 (Enforcement and Fair Lending) to solicit information about potential violations of federal consumer financial laws.[11] The Bulletin notes that Dodd-Frank § 1057 protects certain employees and their representatives who provide information against retaliation by their employers.[12]

Dodd-Frank provides broad whistleblower protections to employees of *covered persons* and their subsidiaries (viz., "covered persons" being defined in Sections 1024, 1025, and 1026 of Dodd-Frank).

A covered person or service provider is defined in the foregoing sections as:

Being one that:

- Offers or provides origination, brokerage, or servicing of loans secured by real estate for use by consumers primarily for personal, family, or household purposes, or loan modification or foreclosure relief services in connection with such loans;
- Is a larger participant of a market for other consumer financial products or services, as defined by the applicable section of Dodd-Frank;
- The Bureau has reasonable cause to determine, by order, after notice to the covered person and a reasonable opportunity for such covered person to respond, based on

complaints collected through the CFPB's complaint system under or information from other sources, that such covered person is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services; [13]

- Offers or provides to a consumer any private education loan;[14] or
- Offers or provides to a consumer a payday loan.

Being an:

- Insured depository institution with total assets of more than $10,000,000,000 and any affiliate thereof; or
- Insured credit union with total assets of more than $10,000,000,000 and any affiliate thereof.

Being an:

- Insured depository institution with total assets of $10,000,000,000 or less; or
- Insured credit union with total assets of $10,000,000,000 or less.

A covered person may not terminate or in any other way discriminate against any covered employee or any authorized representative of covered employees.

POLICY STATEMENT AND WHISTLEBLOWER PROTECTION

The protections afforded the whistleblower and the Bureau's procedures relating to whistleblower protection should invoke a response from all affected financial institutions to draft and ratify a policy statement relating to preventing retaliation toward a whistleblower.

Such a policy should include various statements of principle, practice, policy, and procedures – what I call the "Four Ps" – to ensure that all employees understand the importance of internally reporting to a company's chain of command any suspicious practices or potential violations. When the internal route fails, whistleblowers may go to a government entity, such as the CFPB, to report their concerns. As part of the policy statement, there should be a clear and unambiguous provision to protect the whistleblower from any harassment by the employer or any employees.

Therefore, the aforementioned policy should specifically state that whistleblowers will be protected from retaliation if they:

- Provided, caused to be provided, or are about to provide or cause to be provided, information to the employer, the CFPB, or any other state, local, or federal, government

authority or law enforcement agency relating to any violation of, or any act or omission that the employee reasonably believes to be a violation of any other provision of law that is subject to the jurisdiction of the CFPB, or any rule, order, standard, or prohibition promulgated by the CFPB.

- Testified or will testify in any proceeding resulting from the administration or enforcement of any provision of law that is subject to the jurisdiction of the CFPB, or any rule, order, standard, or prohibition prescribed by the CFPB;
- Filed, instituted, or caused to be filed or instituted any proceeding under any federal consumer financial law; or
- Objected to, or refused to participate in, any activity, policy, practice, or assigned task that the covered employee (or other such person) reasonably believed to be in violation of any law, rule, order, standard, or prohibition, subject to the jurisdiction of, or enforceable by, the CFPB.

The Bureau established an email address and phone number for submitting whistleblower tips. Additionally, the CFBP has built a web space for whistleblower communications.

LOCKING HORNS WITH THE DEPARTMENT OF LABOR

Dodd-Frank gives an employee who believes that he or she has been discharged or otherwise discriminated against 180 days after the date on which the alleged violation occurs to file a complaint with the Secretary of Labor. Furthermore, Dodd-Frank sets forth certain rules for Department of Labor investigations, such that if the Department concludes that there is reasonable cause to believe that a violation has occurred, it may issue a preliminary order providing relief. However, the Department must dismiss a complaint unless the complainant makes a *prima facie* showing that the action in question was a contributing factor in the unfavorable personnel action. No investigation is permitted if the employer demonstrates, "by clear and convincing evidence," that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

The Department of Labor has vast authorities to redress the grievances of covered employees. If it determines that a violation has occurred, the Department may order the person who committed the violation to, among other things, take affirmative action to abate the violation; reinstate the complainant to his or her former position, together with compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and provide compensatory damages to the complainant.

At the request of the covered employee who has been retaliated against, the Department may assess a sum equal to the aggregate amount of all costs and expenses (including attorney fees

and expert witness fees) reasonably incurred by the complainant. But, if the Department finds that the complaint is frivolous or has been brought in bad faith, it may award to the prevailing covered employer a reasonable attorney fee, not exceeding $1,000, to be paid by the complainant.

[1] The Designated Transfer Date, *Dodd–Frank Wall Street Reform and Consumer Protection Act*, (Pub. L. 111–203, H.R. 4173), signed into law on July 21, 2010
[2] Ibid. Subtitle E of Title X
[3] Op. cit. 1 Title X
[4] *Enforcement, Early Warning Notice*, CFPB Bulletin 2011-04, November 7, 2011
[5] 77 Federal Register 27446 (May 10, 2012)
[6] Specifically, on June 29, 2012, the CFPB revised the interim rules it had adopted on July 28, 2011 regarding these procedures. See: 76 Federal Register 45168 (July 28, 2011); 77 Federal Register 39101 (June 29, 2012)
[7] Op. cit. 1, § 1052(d)
[8] The Consent Order was issued pursuant to 12 U.S.C. § 5563 (*Hearings and Adjudication Proceedings*, Dodd-Frank § 1053) and § 5565 (Relief Available, Dodd-Frank § 1055).The consent order stated that the CFPB found – though the bank had not admitted or denied - violations of Dodd-Frank §1031 regarding unfair, deceptive or abusive acts or practices.
[9] Op. cit. 6, 77 Federal Register 39117
[10] Op. cit. 1, §1055, codified at 12 USC § 5565
[11] *Enforcement and Fair Lending, Bureau Invites Whistleblower Information and Law Enforcement Tips, and Highlights Anti-Retaliation Protections*, CFPB Bulletin 2011-05, December 15, 2011
[12] Ibid. The bulletin encourages "knowledgeable sources" with information about potential violations to email their information to whistleblower@cfpb.gov or to call toll-free (855) 695-7974. On February 2, 2012, the CFPB published its own whistleblower protection notice for its employees.
[13] Op. cit. 1, § 1013(b)(3)
[14] As defined in § 140 of the Truth in Lending Act (15 USC 1650), notwithstanding § 1027(a)(2)(A) and subject to § 1027(a)(2)(C) of Dodd-Frank