Leveling the Playing Field – CFPB Regulations and Guidance Targeted for Review by Treasury Under President Trump’s February 3 Executive Order

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Your Presenters

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Executive Order 13772—Core Principles

- Core Principles of United States financial system regulation:
  - Empower Americans to make independent financial decisions and informed choices in the marketplace, save for retirement, and build individual wealth;
  - Prevent taxpayer-funded bailouts;
  - Foster economic growth and vibrant financial markets through more rigorous regulatory impact analysis that addresses systemic risk and market failures, such as moral hazard and information asymmetry;
  - Enable American companies to be competitive with foreign firms in domestic and foreign markets;
  - Advance American interests in international financial regulatory negotiations and meetings;
  - Make regulation efficient, effective, and appropriately tailored; and
  - Restore public accountability within Federal financial regulatory agencies and rationalize the Federal financial regulatory framework.
Executive Order 13772—Reports

• Treasury Secretary must consult with the heads of the Financial Stability Oversight Council members agencies.
  - Federal Reserve Board, Commodity Futures Trading Commission, FDIC, Federal Housing Finance Agency, National Credit Union Administration, Comptroller of the Currency, SEC, Treasury Department and CFPB

• Within 120 days of February 3, and periodically thereafter, Treasury Secretary must report to the President on:
  - Laws, treaties, regulations, guidance, reporting and recordkeeping requirements, and government policies that promote the Core Principles;
  - What actions have been taken, and are being taken, to promote and support the Core Principles; and
  - Laws, treaties, regulations, guidance, reporting and recordkeeping requirements, and government policies that inhibit federal regulation of financial system in a manner consistent with the Core Principles.
Executive Order 13772—No Effect

• The Order makes clear that it does not impair or otherwise affect:
  - the authority granted by law to an executive department or agency, or the head thereof; or
  - the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.
CFPB’s Proposed Arbitration Rule
CFPB's Proposed Arbitration Rule

- May 2016 – proposed rule issued
- August 2016 – comment period closed
- Approximately 13,000 comments
- Hurdles for the industry and the Trump administration
  - Removal for cause
  - pending PHH case
- Hurdles for Director Cordray and the CFPB
  - Congressional Review Act (CRA)
  - pending PHH case
- Interplay with the final Prepaid Rule (issued October 2016)?
Regulation by Consent Order

“There [consent] orders provide detailed guidance for compliance officers across the marketplace . . . . [I]t would be ‘compliance malpractice’ for executives not to take careful bearings from the contents of these orders about how to comply with the law and treat consumers fairly.”

Richard Cordray, remarks at CBA Live, March 9, 2016

- Bureau has been result-oriented
  - Adversarial, opaque, arbitrary
- Reform
  - Transparent rulemaking to achieve policy objectives
  - Refrain from using enforcement to push jurisdictional boundaries
  - Civil money penalty matrix
  - Policy statement on “abusive”
  - Remove enforcement from examinations
Short-Term, Small Dollar Loans

- The Proposed Rule, released by the CFPB in June 2016, would have made single-installment payday and auto title loans virtually impossible due to an “ability to repay” analysis.

- CFPB stated that it was “reviewing comments” as of publication of Dec. 2016 Rulemaking Agenda.

- In some states, lenders could have adapted by using an installment lending model, but in other states, the product would simply have disappeared.

- The reference in the Executive Order to “assessing regulatory impact” may suggest a willingness to moderate (or even radically change) this rule.
CFPB Options for Debt Collection

• Withdraw or close the rulemaking proceeding
  - Arguably inconsistent with the core principle of empowerment
  - Seems very unlikely given the continued rhetoric around debt collection

• Slow down the rulemaking proceeding (wait out the Administration)
  - Consistent with core principles of efficiency and effectiveness
  - Could conduct further consumer surveys and model and disclosure testing
  - Could reassess costs of specific actions or overall costs of rulemaking
  - Seems a possibility given the lack of any SBREFA panel for first party

• Trim or revise the proposals with the greatest cost impact
  - Consistent with the core principle of appropriately tailoring regulations
  - Likely if CFPB deems it necessary for adoption and to avoid override by Congress
Proposals with Greatest Cost Impact

• Obtaining and tracking additional information  [] In  [] Out
  - Small one-time system costs for tracking system
  - Larger costs where information is not available from creditors

• Assessing and responding to warning signs  [] In  [] Out
  - Small one-time costs for setting up warning systems
  - Moderate costs for investigating and responding to warning signs

• Expanded validation notice and statement of rights  [] In  [] Out
  - Small set-up and programming costs for new format
  - About 5-10 cents per account for statement
  - Mailing costs when consumers request additional copies of statement of rights
Proposals with Greatest Cost Impact

• Limits on contact frequency  [] In  [] Out
  - Moderate one-time costs to review systems
  - Moderate ongoing costs to monitor compliance
  - Reduction in calls for entities with larger clients that call more frequently

• Restrictions on collection of time-barred debt  [] In  [] Out
  - Moderate one-time costs for system set up
  - About 5-10 cents per account for consumer acknowledgment
Initial Dodd-Frank Mortgage Rules

- Ability to Repay/Qualified Mortgages
- Servicing
- Loan Originator Compensation and Qualifications
- Appraisals
  - Appraisal Independence
  - Appraisal Copy
  - Appraisals With Higher-Priced Mortgage Loans
- HOEPA/Counseling-Related Requirements
Additional Dodd-Frank Mortgage Rules

• TILA/RESPA Integrated Disclosure (TRID)/Know Before Your Owe
• Home Mortgage Disclosure Act (HMDA)
  - Primary effective date of January 1, 2018
• Recent Amendments:
  - Servicing Rules, October 2017 and April 2018 effective dates
  - Servicing Safe Harbor Interpretations, October 2017 and April 2018 effective dates
  - Proposed TRID Rule Amendments, July 2016
  - Expected HMDA Rule Proposed Amendments
Fate of Mortgage Rules—Considerations

- Executive Orders
  - CFPB as independent agency or executive agency
- Executive influence on Congress
  - Congressional Review Act
  - Fate of the filibuster
- Industry considerations—it’s complicated
  - Improve not eliminate entirely
  - Change in CFPB approach to rules
    - Staffing
    - Generalist approach
    - Difference between industry and CFPB views as to what is important
The CFPB’s application of the ECOA disparate impact theory to dealer finance charge negotiation and participation has been one of the most powerful lightning rods in the agency’s 5-year existence.

Congressional Republicans have frequently advocated for legislation to “repeal the guidance” and put an end to this controversial legal theory.

The visibility of this issue makes it a prime candidate for a Trump-appointed CFPB director’s attention.

However, the CFPB seems to have already signaled that it is getting away from this issue – at least temporarily (Patrice Ficklin’s Dec. 2016 blog post).

But absent an amendment to ECOA, will repealing the guidance alone have any permanent effect?
Thank you for joining us!

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Moderator – Richard J. Andreano, Jr.

- Practice Leader of the Mortgage Banking Group at Ballard Spahr
- Advises banks, lenders, brokers, home builders, title companies, real estate professionals, and other settlement providers on regulatory compliance and transactional matters, Federal Housing Administration (FHA) issues, and administrative enforcement actions and investigations
- Counsels settlement service providers on issues concerning the Dodd-Frank Wall Street Reform and Consumer Protection Act, Real Estate Settlement Procedures Act (RESPA), Truth in Lending Act (TILA), TILA-RESPA Integrated Disclosure (TRID) Rule, Equal Credit Opportunity Act (ECOA), Fair Housing Act, Fair Credit Reporting Act (including FACTA), Home Mortgage Disclosure Act (HMDA), and Gramm-Leach-Bliley Act
- Assists clients with preparing for and handling CFPB examinations and with a variety of regulatory issues
Panelist – Christopher J. Willis

- Partner at Ballard Spahr and a member of the firm’s Consumer Financial Services and Mortgage Banking Groups. Mr. Willis leads the firms’ Consumer Financial Services Litigation Group.

- Counsels financial institutions on regulatory matters, advises them on compliance with consumer financial services laws, and defends them in both individual and class action lawsuits, as well as governmental enforcement actions (including CFPB investigations)

- Chairs the firm’s Fair Lending Task Force and Collection Documentation Task Force

- Fellow of the American College of Consumer Financial Services Lawyers

- Recognized by Chambers USA for financial services regulation: consumer finance (litigation) nationwide for 2014 & 2015

- Named in The Best Lawyers in America for banking and finance litigation and commercial litigation for 2013-2015

- Frequent author and speaker on issues relating to consumer financial services regulation and litigation
Panelist – John L. Culhane, Jr.

- Partner at Ballard Spahr and a member of the firm’s Consumer Financial Services, Mortgage Banking, Bank Regulation and Supervision, Higher Education, and Privacy and Data Security Groups as well as its Marketplace Lending Task Force, Fair Lending Task Force, TCPA Task Force, and Military Lending Act Task Force

- Compliance practice emphasizes counseling clients on the development and implementation of innovative loan, leasing, and payment programs, and includes counseling on fair lending, servicing and collection issues

- Regulatory practice includes preparing clients for banking agency and CFPB targeted fair lending and full spectrum compliance examinations as well as assisting in the defense of consumer class actions, attorney general investigations, and agency enforcement actions

- Named a top consumer financial services lawyer by Chambers USA, 2015 & 2016

- Charter member of the American College of Consumer Financial Services Lawyers

- Former Chair of the Subcommittee on Fair Lending of the ABA Committee on Consumer Financial Services
Panelist – James Kim

- Of Counsel at Ballard Spahr and a member of the firm’s Litigation Department and Consumer Financial Services, Mortgage Banking, Privacy and Data Security, Marketplace Lending, and Consumer Financial Protection Bureau practice groups
- Advises companies in matters involving consumer-financial regulation and litigation
- Extensive experience with federal consumer financial laws, including Dodd-Frank (DAP), TILE, REAPS, EFTA, and the FCPA
- Tried, as first or second chair, more than 20 cases to verdict and has briefed criminal and civil appeals before the U.S. Court of Appeals for the Second Circuit and the New York State Appellate Division
- Served as a senior enforcement attorney with the Consumer Financial Protection Bureau and is uniquely positioned to help clients avoid or navigate CFPB investigations
- Lead counsel in the CFPB's first enforcement actions involving mobile payments and was a member of the credit card/prepaid card/emerging payments issue team that helped coordinate enforcement activity with other offices at the Bureau