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CFPB Enforcement

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Office of Enforcement

Q 26.1 What is the Consumer Financial Protection Bureau’s Office of Enforcement?

As detailed in chapter 2, the Consumer Financial Protection Act of 2010 (CFPA)¹ established the Bureau of Consumer Financial Protection (“CFPB” or the “Bureau”) as an independent bureau within the Federal Reserve System under the authority of a single director, appointed by the President to a five-year term. The CFPB regulates, supervises, and enforces the offering and provision of consumer financial products or services under federal consumer financial protection law.² Within the CFPB, the Office of Enforcement (Enforcement) is charged with investigating potential violations of federal consumer financial law, which include nineteen enumerated statutes, certain rules issued by the Federal Trade Commission (FTC), and a broad statutory prohibition against unfair, deceptive, and abusive practices (UDAAP).³ Insofar as Enforcement concludes that a violation of law has occurred, it may take administrative enforcement action, pursue a civil action in a Federal District Court, or seek consensual resolution with the target of the investigation.

Q 26.1.1 Where does Enforcement sit within the CFPB’s organizational structure?

The CFPB consists of six primary divisions.⁴ These divisions include the Operations Division, the Consumer Education and Engagement Division, the Research, Markets and Regulations Division, the External Affairs Division, the Legal Division, and the Supervision, Enforcement and Fair Lending Division (SEFL). Each of these divisions

is led by an Associate Director who reports directly to the CFPB's Deputy Director and Director.

SEFL houses not only Enforcement but also the separate Offices of Supervision Policy and Supervision Examinations (collectively "Supervision"), and the Office of Fair Lending ("Fair Lending"). Each of the SEFL offices, Enforcement, Supervision Policy, Supervision Examinations, and Fair Lending, is led by an Assistant Director who reports directly to the Associate Director of SEFL. Supervision is responsible for examining institutions under the CFPB's supervisory jurisdiction, such as banks and credit unions with an excess of \$10 billion in assets and certain nonbank institutions.⁵ Fair Lending is primarily responsible for supervision and enforcement relating to federal fair lending laws such as the Equal Credit Opportunity Act and the Home Mortgage Disclosure Act (HMDA).⁶ Fair Lending also works with financial institutions, consumer advocates, and community groups to promote fair lending compliance and education.

Q 26.1.2 Does Enforcement coordinate with the Offices of Fair Lending and Supervision?

Yes. Supervision and Fair Lending work closely with Enforcement. Supervision's findings in examinations may result in enforcement action and enforcement attorneys routinely assist in shaping the scope of examinations and opining on supervisory findings. In the past, CFPB enforcement attorneys joined the Supervision staff onsite at supervised institutions, but the CFPB discontinued this practice in November 2013 after receiving substantial criticism.⁷ Enforcement also collaborates closely with Fair Lending, which has enforcement jurisdiction, in addition to other powers. Fair Lending and Enforcement have worked in tandem on a number of public enforcement actions.⁸

Q 26.2 How is Enforcement organized?

Enforcement is led by an Assistant Director, who reports directly to the Associate Director of SEFL. The Assistant Director manages all of Enforcement, sets the overall strategic direction of the office's investigative work and approves the terms of public enforcement settlements. The Principal Deputy Enforcement Director is a direct report to the Assistant Director of Enforcement and is responsible for overseeing

the five general teams within Enforcement. These five teams include the Strategy & Policy Team, which is responsible for directing the strategic direction and policy initiatives of Enforcement's investigations, and four litigation teams. Each litigation team consists of approximately twenty enforcement attorneys who conduct investigations of potential violations of federal consumer financial law and undertake enforcement actions related thereto.⁹

Each litigation team is led by a Deputy Enforcement Director who reports directly to the Principal Deputy Enforcement Director and the Assistant Director of Enforcement. The Assistant Director of Enforcement and the Deputy Enforcement Directors possess the non-delegable authority to open investigations, issue civil investigative demands, modify the terms of civil investigative demands, and close investigations.¹⁰ Two Assistant Litigation Deputies report to each Deputy Enforcement Director. They assist the Deputy Enforcement Director in overseeing their team and managing the work of the enforcement attorneys. Enforcement attorneys, who make up the majority of Enforcement, are the primary employees responsible for conducting investigations of potential violations of federal consumer financial law and undertaking subsequent enforcement action, including litigation, on behalf of the division.

Q 26.2.1 What is the Enforcement Policies and Procedures Manual?

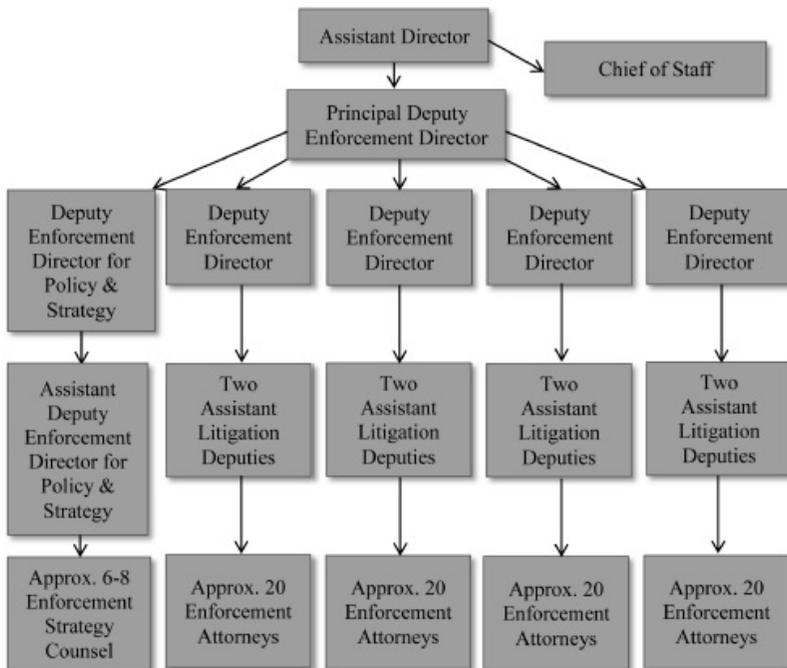
The CFPB maintains and regularly updates an Enforcement Policies and Procedures Manual (the "Enforcement Manual") that governs the enforcement action process. Significant portions of the Enforcement Manual were produced in 2016, in redacted form, as a result of a Freedom of Information Act request.¹¹

Q 26.3 What is the scope of the CFPB's enforcement authority?

The scope of the CFPB's enforcement authority turns on the type of institution or individual at issue and the subject matter. There are two categories of persons that can fall within the scope of the CFPB's enforcement authority: covered persons and service providers.¹²

A covered person or service provider may be a bank, a credit union, a nonbank, or an individual. See Q 25.17.3 (regarding prosecution of individuals).

FIGURE 26-1
CFPB Office of Enforcement Organizational Chart



Q 26.3.1 Who is a “covered person” for purposes of CFPB enforcement authority?

A covered person is any person that “engages in offering or providing a consumer financial product or service,” which is defined as a product or service that fits within any of the eleven categories found in 12 U.S.C. § 5481(15), such as the extension of credit, servicing of loans, provision of real estate settlement services, deposit-taking activities, credit reporting or debt collection.¹³

Q 26.3.2 Who is a “service provider” for purposes of CFPB enforcement authority?

A service provider is any person that provides “a material service to a covered person in connection with the offering or provision” of a consumer financial product or service, such as a person who “participates in designing, operating, or maintaining the consumer financial product or service; or (b) processes transactions relating to the consumer financial product or service.”¹⁴ Service providers do not include persons who provide ministerial support services or time or space for an advertisement through print, newspaper or electronic media.¹⁵

Q 26.3.3 Are there any limitations on CFPB enforcement authority tied to the size of the financial institution?

Yes, but only with respect to banks. The CFPB has primary enforcement authority against banks and credit unions with more than \$10 billion in assets.¹⁶ The CFPB has little enforcement authority over banks and credit unions with less than \$10 billion in assets, except for a limited ability to require reports.¹⁷ As this edition went to press, Congress was considering material changes and limitations on this authority.

All nonbank financial institutions that meet the definition of a “covered person” or a “service provider” are subject to the CFPB’s enforcement jurisdiction, regardless of whether they are subject to the CFPB’s supervisory power. Finally, individuals may be subject to the CFPB’s enforcement authority if they meet the definition of a “related person,” which includes directors, officers, employees, shareholders, consultants, or joint venture partners who possess managerial responsibility over or materially participate in the conduct of the affairs of a covered person. This may also include an independent contractor, such as an attorney, appraiser or accountant, who “knowingly or recklessly participates in any (I) violation of any provision of law or regulation; or (II) breach of a fiduciary duty.”¹⁸

Q 26.3.4 Are any entities excluded from CFPB enforcement authority?

Yes, with some important caveats. There are key markets that are excluded from the CFPB's authority by statute under 12 U.S.C. § 5517. The CFPB generally may not exercise enforcement authority over merchants, retailers, real estate brokerages, certain individuals in the manufactured/modular home business, accountants, tax preparers, lawyers, or "the business of insurance." In addition, under 12 U.S.C. § 5519, certain auto dealers are excluded from the CFPB's enforcement jurisdiction. See chapter 10.

The majority of these exclusions also contain powerful exceptions, which preserve some level of CFPB enforcement authority. For example, although lawyers are excluded by 12 U.S.C. § 5517(e), they are still subject to the CFPB's enforcement authority to the extent they offer or provide a consumer financial product or service "that is not offered or provided as part of, or incidental to, the practice of law, occurring exclusively within the scope of the attorney-client relationship." At the time of this publication, the CFPB is currently in active litigation against a Georgia law firm, alleging that the law firm is subject to its enforcement authority notwithstanding 12 U.S.C. § 5517(e) because it engages in "debt collection," a consumer financial product or service under 12 U.S.C. § 5481(15)(x).¹⁹

Q 26.4 How might an institution become subject to a CFPB enforcement investigation?

There are three principal ways that an institution may become subject to a CFPB investigation: (1) Enforcement opens a research matter or investigation based upon information it has gathered independently; (2) Supervision, based upon examination findings, refers a matter to Enforcement for public enforcement action; or (3) another federal or state agency refers the institution to CFPB Enforcement.²⁰

Q 26.4.1 Under what circumstances might Enforcement decide to open an investigation on its own?

In order to open an enforcement matter, the CFPB requires that there be information that a covered person may have committed, or

may commit, a violation of federal consumer financial law.²¹ Enforcement may decide to investigate an institution based on information gathered from any number of sources. Such sources may include complaints filed with the CFPB, information gathered from whistleblowers, or information provided by the CFPB's other divisions, such as the Research, Markets or Regulations or Consumer Response Divisions. It may likewise be triggered by market observation, supervisory examinations, and law enforcement "partners," such as the Department of Justice. In addition, Enforcement may open investigations based on information gathered from external sources, such as media coverage of certain practices and institutions, social media or recent public settlements and litigation. Before opening such a matter, the CFPB will consider the impact on CFPB resources, the market in general, the potential subjects of such investigation, other CFPB divisions, the unit's strategic plan, and on law enforcement partners.²²

An enforcement matter may be opened as a "research matter" or as a formal "investigation."

Q 26.4.2 What is a "Research Matter"?

The primary purpose of a research matter is to collect and analyze readily obtainable information in order to, among other things: (1) determine whether the relevant conduct likely violates federal consumer financial law; (2) determine whether non-CFPB law enforcement partners are already investigating the matter or should be advised of the CFPB's interest in the matter; and (3) evaluate whether an investigation is in the CFPB's best interests and would be an effective use of resources. In opening the matter, the CFPB will likewise determine staffing, identify the key action items for the enforcement action process, and draft an Investigation Opening Memorandum.²³

Q 26.4.3 What is an "Investigation"?

There are nominally more stringent standards to open an actual investigation, as opposed to just a research matter. For example, an investigation may be opened only after the approval of the Assistant Director for Enforcement. That said, the CFPB is authorized to investigate on mere *suspicion* that a covered person has violated a federal consumer financial law, or to seek assurance that a violation has *not*

occurred. The CFPB acknowledges that the mere existence of such an investigation does not suggest a violation, nor does it suggest there is any evidence of one, and the CFPB may proceed even if merely to assure that no violations are occurring.²⁴

Prior to opening a formal investigation, the CFPB directs its personnel to consider myriad factors, including, among other things: (1) whether there is a need for immediate action to protect consumers; (2) the egregiousness of the potential violation, and whether the conduct is ongoing; (3) the magnitude of potential harm to consumers, and whether they are particularly vulnerable or at risk; (4) whether the conduct can be investigated efficiently and within the relevant statute of limitations. The CFPB will also consider other seemingly tangential factors, such as whether the investigation would raise the Bureau's profile in a community that might not otherwise be familiar with the CFPB.²⁵

Q 26.4.4 May Enforcement investigate an institution based on a referral from another regulatory body?

Yes. Another federal or state agency may refer an institution to the CFPB for investigation by Enforcement, based on its identification of potential violations of federal consumer financial law. These referrals may originate from prudential banking regulators, other federal government agencies, state attorneys general or state regulatory agencies. In May 2014, for example, the CFPB disclosed that a public enforcement action for violations of the Real Estate Settlement Procedures Act (RESPA) stemmed from a referral from the Department of Housing and Urban Development (HUD).²⁶

Q 26.4.5 May a matter be referred to Enforcement based upon findings made by Supervision in an examination?

Yes. An institution may become subject to a CFPB enforcement investigation as a result of an examination conducted by Supervision. As discussed in chapter 2, Supervision examines institutions for compliance with federal consumer financial law. At the conclusion of its exams, it issues an Examination Report that includes its findings, Matters Requiring Attention (if any), and potential violations of

federal consumer financial law (if any). In some circumstances, the examination team may identify violations that appear worthy of public enforcement action. In those circumstances, the examination team will issue a PARR letter, described below.

Q 26.4.6 What is the Investigation Opening Memorandum?

In opening an investigation, a Bureau staffer is assigned to draft an “Investigation Opening Memorandum,”²⁷ detailing: (1) the investigation’s internal identification number; (2) the name of the subject(s) of the investigation; (3) the origin or source of the investigation; (4) a brief description of the background facts, *i.e.*, the central facts and issues that led to the opening; (4) potential violators, other relevant parties, and their respective counsel (noting potential violators for internal conflicts recusal purposes); (5) a statement of purpose (that is, the statutory purposes of the investigation, as required by 12 C.F.R. § 1080.5); (6) the names of the assigned litigation director and assistant litigation directors (ALDs); (7) the CFPB’s jurisdiction; and (8) potential legal violations.

Q 26.4.7 Will the CFPB advise whether a person or entity is the target of an investigation?

No. At some point during most CFPB investigations, usually upon being contacted by Enforcement staff, counsel or the person being questioned will typically ask whether they are a “target” of the investigation. The CFPB directs its staff to answer this question precisely as follows: “No. Bureau investigations do not have targets.” The CFPB position is that the term “target” is used in criminal law, and that carries a specific meaning with legal consequences. In the grand jury process, individuals are often identified as the target of a criminal investigation, and that characterization has important Fifth and Sixth Amendment implications. Because CFPB investigations are civil, the notification of “targets” is not required, the CFPB claims. Further, the CFPB argues that the term “target” incorrectly implies that the objective of an investigation is to reach a specific result (legal action against the target) rather than to search for the truth. Although some parties involved in investigations eventually may be named as defendants or respondents in subsequent litigation, the CFPB claims that it does not have *targets* of its preliminary inquiries or investigations.²⁸

Q 26.4.8 What is a PARR letter?

The Proposed Action and Request for Response (PARR) letter is intended to provide the institution with an opportunity to inform the examination team as to why a public enforcement action is not appropriate for the violations referenced in the PARR letter. Generally, the PARR letter and the institution's response will be the last exchange between the institution and the CFPB before a determination is made on whether the matter should be transferred to Enforcement; accordingly, the responsive submission can be a critical document for the institution as it can be determinative of whether the institution is referred to Enforcement.

Based on its review of the PARR letter response, SEFL may decide formally to recommend a public enforcement action for potential violations identified in the examination. A five-member committee, known as the Action Review Committee (ARC), convenes to decide whether to refer the matter to Enforcement. The five ARC members are the Assistant Director of Enforcement, the Assistant Director of Fair Lending, the Assistant Director of Supervision Policy, the Assistant Director of Supervision Examinations, and the Supervision Regional Director in charge of the examination at issue. The ARC considers violation-focused factors, institution-focused factors and policy-focused factors. Violation-focused factors include the egregiousness of the violations, the number of consumers affected, the magnitude of the harm, and whether the violations have ceased or are ongoing. Institution-focused factors include the institution's level of cooperation with the CFPB, its willingness take corrective action, its history of violations, and whether the institution self-identified, self-corrected, or self-reported the violations. Finally, policy-focused factors include how public enforcement fits with the CFPB's strategic priorities or other CFPB activity related to the product or practice involved with the violations.

These three categories of factors, taken together, will influence the recommendation of the ARC. Following receipt of the recommendation of the ARC committee, the Associate Director of SEFL will decide whether the matter should be handled with confidential supervisory action or public enforcement action. If it is transferred to Enforcement, the institution will immediately become subject to an enforcement

investigation that may proceed expeditiously to public enforcement action. In some circumstances, Enforcement may immediately commence settlement negotiations once the matter is transferred.

PRACTICE TIP

PARR Letter Responses Should Be Comprehensive

It is critical that the PARR response be used as an opportunity to correct any factual misunderstandings on the part of Supervision and, as necessary and appropriate, provide legal analysis as to why the alleged conduct does not violate federal consumer financial law. The PARR letter, and the response thereto, may be the final, formal exchange between an institution and the CFPB before a determination is made about whether to transfer the matter to Enforcement. For this reason, it is critical to ensure the Bureau's ultimate decision is fully informed by relevant facts and law.

Enforcement's Tools and Powers

Q 26.5 What tools are available to Enforcement to conduct its investigations?

The CFPB has a variety of tools at its disposal in exercising its enforcement authority. In particular, the CFPB may issue a written, civil investigative demand (CID) requiring a person to produce documentary material (in a specified form or medium), submit tangible things, and respond to interrogatories and data-related requests. In addition, a CID may require oral testimony in an investigational hearing conducted by the CFPB, which relates to the production of any documentary material or other information requested by Enforcement. In an investigational hearing, the testifying witness may be represented by counsel, but the right for counsel to object in the hearing is very limited, including only objections for constitutional or legal rights and privileges.

CIDs may be issued to any person who has the information sought, including third parties. The CFPB has been actively using its power to obtain information from third parties in investigations. The failure to comply with a CID can have significant consequences, since the Dodd-Frank Act authorizes U.S. District Courts to issue orders to show cause to anyone who fails to obey a subpoena issued by the CFPB and may hold a refusing person in contempt. Such an order holds the potential to publicize a previously confidential investigation into the recipient's practices.

Q 26.5.1 When and to whom may the CFPB issue a civil investigative demand (CID)?

The CFPB has relied heavily on the use of civil investigative demands in investigations. The authority to issue CIDs resides with the Director of the CFPB, the Assistant Director of Enforcement, and the Deputy Assistant Directors of Enforcement. Under section 1052(c) (1) of the Dodd-Frank Act, the CFPB may issue a CID “[w]henever the Bureau [CFPB] has reason to believe that any person may be in possession, custody, or control of any documentary material or tangible things, or may have any information, relevant to a violation.” The CIDs must state “the nature of the conduct constituting the alleged violation that is under investigation and the provisions of the law applicable to such violation.”²⁹

Q 26.5.2 What is the “Notice to Persons” form?

Whenever the CFPB requests documents, data or answers to questions voluntarily or under oath, the CFPB will include a “Notice to Persons Supplying Information” form in order to advise that person of his or her constitutional rights, including the right against self-incrimination. Prior to taking any substantive examination of the witness, the CFPB requires that the witness be questioned to confirm that such witness received, reviewed and (if unrepresented by counsel) understands the notice. The form is not used, however, when conducting informal interviews with consumers and third-party witnesses.³⁰

Q 26.5.3 Must the CFPB provide any documents to the respondent in an enforcement action?

Yes, but only once the CFPB brings such formal enforcement action. Generally speaking, the CFPB must make available for inspection and copying documents obtained by the Office of Enforcement prior to the institution of proceedings, from persons not employed by the Bureau, in connection with the investigation leading to the institution of proceedings, including: (1) any documents turned over in response to CIDs or other written requests to provide documents or to be interviewed issued by Enforcement; (2) all transcripts and transcript exhibits; (3) any other documents obtained from persons not employed by the Bureau; (4) each CID or other written request to provide documents or to be interviewed issued by Enforcement in connection with the investigation leading to the institution of proceedings; and (5) any final examination or inspection reports prepared by any other Office of the Bureau if Enforcement either intends to introduce any such report into evidence or to use any such report to refresh the recollection of, or impeach, any witness.³¹

The Office of Enforcement must commence making documents available to the respondent for inspection and copying no later than seven days after service of the notice of charges.³² Rule 206 provides the Office of Enforcement with discretion regarding the timing and format of production (*e.g.*, paper, electronic copies, or making documents available for inspection and copying). However, the Office of Enforcement has committed to making documents available to the respondent as soon as possible (but in any event commencing no later than seven days after service of the notice of charges) and to producing the information in electronic format, unless electronic production is not feasible.³³

Q 26.5.4 What categories of documents may the CFPB withhold from production?

By rule, the CFPB may withhold the following categories of documents: (1) privileged documents (12 C.F.R. § 1081.206(b)(1)(i)); (2) internal memoranda, notes, or other writings prepared by a person employed by the Bureau or another governmental agency, other

than examination or supervision reports, or documents subject to the work product doctrine that will not be offered into evidence (12 C.F.R. § 1081.206(b)(1)(ii)); (3) documents obtained from a domestic or foreign governmental entity that is either not relevant to the proceeding or was provided on condition that the information not be disclosed (12 C.F.R. § 1081.206(b)(1)(iii)); (4) documents that would disclose the identity of a confidential source (12 C.F.R. § 1081.206(b)(1)(iv)); (5) documents prohibited from disclosure under applicable law (12 C.F.R. § 1081.206(b)(1)(v)); and (6) documents that the hearing officer has granted leave to withhold as not relevant to the subject matter of the proceeding or for good cause shown (12 C.F.R. § 1081.206(b)(1)(vi)).

Q 26.6 What is the CFPB’s authority to commence adjudicative or federal court proceedings?

The CFPB is authorized to commence enforcement proceedings by administrative tribunal³⁴ or federal court,³⁵ has the authority to commence cease-and-desist proceedings and can issue orders in accordance with such proceedings.³⁶ These acts and proceedings are addressed below.

Q 26.6.1 What is the CFPB’s authority to commence enforcement proceedings in federal court?

Pursuant to 12 U.S.C. § 5564(a), the CFPB may commence a civil action against persons under its jurisdiction for any violation of federal consumer financial law. The CFPB may file the action in any federal or state court in a district in which the defendant is located, or resides, or is doing business.³⁷ Before commencing the enforcement litigation, the Bureau must notify the U.S. Attorney General or, where the defendant is an insured depository institution or credit union, the defendant’s prudential regulator.³⁸ The CFPB may commence litigation within three years of the date of discovery of the violations in question, unless law or equity permits otherwise.³⁹ If the CFPB’s litigation arises solely under its enumerated statutes, however, the CFPB may commence its litigation in accordance with the requirements of the specific enumerated statutes, which may impose their own statutes of limitations.⁴⁰

Q 26.6.2 What is the CFPB’s authority to commence enforcement proceedings in its administrative tribunal?

Under 12 U.S.C. § 5563(a), the CFPB is authorized to conduct adjudication proceedings to ensure or enforce compliance with any rules prescribed by the CFPB, as well as any federal law that the CFPB is authorized to enforce. In June 2012, the CFPB released its Rules of Practice for Adjudication Proceedings which outline the procedure and rules regulating the adjudicatory process, which were largely modeled on rules for other regulators’ administrative processes.⁴¹ Proceedings typically commence with a notice of charges, which contains the relevant facts and law showing that the CFPB is entitled to relief. The respondent has fourteen days to file an answer, which must “respond to each paragraph or allegation of fact contained in the notice of charges and must admit, deny, or state that the party lacks sufficient information to admit or deny each allegation of fact.”⁴² The respondent may propose settlement offers to the CFPB at any time which, if agreed to, may conclude the proceedings.⁴³ Otherwise, the rules state that the hearing officer must file a recommended decision no later than 300 days after the filing of the notice of charges, unless an extension is granted.⁴⁴ All appeals are decided by the Director.

Q 26.6.3 What is the CFPB’s authority to issue or seek cease-and-desist orders?

The CFPB also is able to issue cease-and-desist orders.⁴⁵ If it determines that a violation of law, rule, or order has been committed, the CFPB is empowered to issue and serve a notice of charges, and designate a time and place for a hearing (to be held within thirty to sixty days after the notice) to determine whether a cease-and-desist order should issue.⁴⁶ The hearing is to be held in the federal judicial district in which the person resides or has its principal office or place of business.⁴⁷ A person who fails to appear at the hearing will be deemed to have consented to the cease-and-desist order. Affirmative corrective action also may be required of any person subject to a cease-and-desist order. Persons subject to a proceeding brought by the CFPB may appeal any order to the U.S. Court of Appeals.⁴⁸

Q 26.7 What relief may be granted in an administrative proceeding or court action brought by the CFPB?

In a proceeding or action brought under federal consumer financial law, the CFPB may pursue both legal and equitable relief, as permitted by statute, including without limitation:

- (a) rescission or reformation of contracts;
- (b) refund of money or return of real property;
- (c) restitution;
- (d) disgorgement or compensation for unjust enrichment;
- (e) payment of damages or other monetary relief;
- (f) public notification regarding the violation at the alleged violator's cost;
- (g) limits on the alleged violator's activities or functions; and
- (h) civil money penalties.⁴⁹

Q 26.7.1 How does the CFPB determine the amount of civil money penalties to assess in an administrative proceeding or court action?

Pursuant to 12 U.S.C. § 5565, the CFPB may impose civil money penalties (CMPs) for violations of any provision of federal consumer financial law. The CFPB established three tiers of civil penalties that can be assessed for these violations. A person who commits an ordinary violation of law, rule or order may be required to pay \$5,000 per day. A person who recklessly engages in a violation of a federal consumer law may be required to pay up to \$25,000 a day for continuing violations. For knowing violations, the civil penalty could be up to \$1 million per day.⁵⁰

Certain statutes provide specific CMP amounts for violations of law that are different from the amounts set forth in section 1055 of the Dodd-Frank Act. If a particular statute provides a different maximum CMP amount or framework for calculating CMPs, The CFPB allows staff to rely on the framework set forth in that particular statute or

may rely on section 1055 of the Dodd-Frank Act for violations of that statute that occurred after the transfer date. Before relying on the penalty framework set forth in such statutes, CFPB staff are directed to review the applicable penalty procedures to ensure compliance with any technical requirements they may contain.⁵¹

In determining the amount of civil penalties to assess, the CFPB or the court must take into account certain mitigating factors:

- (a) the alleged violator's size of financial resources and good faith;
- (b) the gravity of the violation or failure to pay;
- (c) the severity of the risks to or losses of the consumer, which may take into account the number of products or services sold or provided;
- (d) the history of previous violations; and
- (e) such other matters as justice may require.⁵²

The CFPB has significant latitude in determining the amount of civil penalties to assess in an administrative proceeding or court action under federal consumer law. At the time of this publication, civil money penalties, where assessed, have ranged from as low as \$5,000 to as high as \$35 million.

Q 26.7.2 What additional factors does the CFPB consider in determining the civil monetary penalty to seek?

In addition to the statutory factors, the CFPB directs staff to consider the following related factors: (1) evidence that the violation or practice was intentional or was committed with a disregard of the law; (2) the duration and frequency of the violations or practices; (3) the continuation of the violations or practices after the respondent was notified or, alternatively, its immediate cessation and correction; (4) the failure to cooperate with the agency in effecting early resolution of the problem; (5) evidence of concealment of the violation or practice, or alternatively, voluntary disclosure of the violation or practice; (6) any threat of loss, actual loss, or other harm to the institution, and the degree of such harm; (7) evidence that a participant or his or her associates received financial gain or other benefit as a result

of the violation or practice; (8) evidence of any restitution paid by a participant of losses resulting from the violation or practice; (9) history of prior violations or practices, particularly where they are similar to the actions under consideration; (10) previous criticism of the institution or individual for similar actions; (11) presence or absence of a compliance program and its effectiveness; (12) tendency to engage in violations of law; and (13) the existence of agreements, commitments, orders, or conditions imposed in writing intended to prevent the violation or practice.⁵³

Q 26.7.3 Does the CFPB allow parties to delay CMP payments, or be indemnified by others?

The CFPB directs staff to require that a CMP be paid in full at the time an Order to pay a CMP is issued. In cases where the CFPB determines that a suspension of a CMP or a payment plan for a CMP is appropriate, Staff consult with the supervising ALD to determine whether one of these options is appropriate. In cases involving CMPs against individuals, the CFPB will generally require that individuals pay CMPs with their own resources and not be indemnified by another entity. If the individual is able to persuade CFPB staff that it is appropriate to allow that individual to be indemnified by another entity, such arrangement must be approved by a supervising litigation director.⁵⁴

Q 26.7.4 What is the Civil Penalty Fund?

Section 1017(d)(1) of the Dodd-Frank Act established a separate fund in the Federal Reserve known as the Bureau of Consumer Financial Civil Penalty Fund (Civil Penalty Fund). The CFPB deposits CMPs it collects from persons in any judicial or administrative action enforcing federal consumer financial law into this Fund.⁵⁵ On May 7, 2013, the CFPB's issued a final rule that governs how it uses money in the Civil Penalty Fund. Pursuant to the rule, the CFPB must use the money to compensate consumers who were impacted by federal consumer law violations that gave rise to civil money penalties and who are not expected to receive full compensation for the alleged harm. To the extent that the CFPB cannot locate an impacted consumer or payment to that consumer is not practicable, the CFPB may use funds in the Civil Penalty Fund for consumer education and/or financial literacy programs.

The Civil Penalty Fund is managed by a Fund Administrator, who reports to the Chief Financial Officer of the CFPB. The Civil Penalty Fund Governance Board may advise and direct the Fund Administrator on the administration of the fund. The Civil Penalty Fund Governance Board, chaired by the CFPB's Chief of Staff, is comprised of the following senior CFPB officials: Associate Director of SEFL, the Associate Director for Consumer Education & Engagement, the Chief Operating Officer, and the General Counsel.

Enforcement's Investigations

Q 26.8 What is the process for responding to a CID?

Responding to a CID can be challenging and cumbersome. The CID will set forth the information requested by the CFPB as well as the time-frame within which the information will be sought, which is typically within thirty calendar days. CID recipients must evaluate requests and make important decisions in a compressed time frame, which makes it imperative for the institution to make decisions as quickly as possible. The nature of the information requests may provide the only preliminary indication into the issues being investigated. Unfortunately, it is not uncommon for the requests to be so broad that it may be difficult to decipher the true nature of the potential violation under investigation.

A CID recipient is generally required to "meet and confer" with the CFPB within ten calendar days of receiving the CID. To prepare for the meet and confer, the CID recipient should thoroughly review the CID and quickly assemble the people most knowledgeable about the existence and location of documents, information and data, including technology personnel. This early preparation will inform objections to the CID, as well as negotiations about the scope of the CID and whether any extensions of time should be sought.

Q 26.8.1 What happens during the Meet-and-Confer process?

The meet-and-confer process for CIDs may be held in person or by telephone. The meet and confer is the first formal opportunity a CID recipient will have to discuss the scope of the CID with the CFPB and

negotiate the terms of compliance, although clarifying questions may be asked sooner. To the extent that modifications are being requested, they must be raised during the meet and confer process. CFPB personnel participating in the meet and confer typically include enforcement attorneys as well as the CFPB's technology personnel. On the recipient's side, personnel typically include legal counsel and may also include relevant information technology personnel. The recipient must be prepared to address whether it anticipates any challenges with providing the requested information within the allotted time frame. It is not uncommon to have multiple meet and confer sessions within a compressed time frame.

PRACTICE TIP

Confer with Internal IT Personnel

It is imperative to involve the company's IT personnel early and often during the process of analyzing the effort that will be required to comply with the CID. The CFPB's electronic information requests often can be extensive, particularly with respect to data. Making matters more complicated, the CFPB typically has little knowledge about how electronic information is stored within a company, making its requests imperfect. Under such circumstances, extraction can be challenging within the best of systems and for the most experienced of IT personnel. The importance of gathering information from IT personnel is underscored by the CFPB's final rules which state that the meet and confer must include people with knowledge of the recipient's information systems. This is not lip service—early involvement of IT personnel will pay dividends in the long run.

The CFPB generally will not grant a request for a modification to the CID unless the request is specific and accompanied by a detailed justification. The Assistant Director or the Deputy Assistant Directors of Enforcement may negotiate the terms of satisfactory compliance with

the CID and, for good cause shown, may extend the time for compliance. These negotiations typically are handled by CFPB enforcement attorneys, and the terms of such negotiations are approved by the Deputy Assistant Directors.

Of note, if an issue is not raised in a meet and confer session, it cannot be raised in any petition to set aside or modify a CID. See Q 26.9 below.

Q 26.9 What is the process for challenging or modifying a CID?

Under the CFPB's formal Rules Relating to Investigations,⁵⁶ a recipient of a CID may file a petition for an order to modify or set it aside. It is filed with the Executive Secretary of the Bureau with a copy to the Assistant Director of the Office of Enforcement within twenty calendar days after service of the civil investigative demand, or, if the return date is less than twenty calendar days after service, prior to the return date. Such petition shall set forth all factual and legal objections to the civil investigative demand, including all appropriate arguments, affidavits, and other supporting documentation. The attorney who objects to a demand must sign any objections.⁵⁷

A successful petition may result in the elimination of certain interrogatories, requests for documentary material or requests for written reports, or the setting aside of the CID altogether. Upon service of the CID, the recipient has twenty calendar days to file the petition or if the return date is less than twenty calendar days from service, the recipient must file the petition by the return date. While a recipient may make a request for an extension of time to file a petition, "requests for extensions of time are disfavored."⁵⁸ The petition must be filed with the Executive Secretary of the CFPB and a copy must be provided to the Assistant Director of Enforcement.

As the Rules Relating to Investigations illustrate, the petition is designed for circumstances where there is a significant breakdown between the petitioner and Enforcement counsel in their negotiations of the terms of the CID. The Rules Relating to Investigations encourage both parties to exhaust all options to resolve their disagreements and differences before proceeding to the petition stage. Critically, this

gives CID recipients less than twenty days to determine whether they can resolve all of their objections to the CID with Enforcement counsel, since they only have twenty calendar days from service of the CID to file their petition with the CFPB.

Q 26.9.1 What must a petition to modify or set aside a CID contain?

The Rules Relating to Investigation impose several requirements in connection with the petition to set aside or modify a CID. As a general matter, the petition must contain “all factual and legal objections to the civil investigative demand, including all appropriate arguments, affidavits, and other supporting documentation.”⁵⁹ The meet and confer discussions provide critical foundation because the CFPB “will not consider petitions to set aside or modify a civil investigative demand unless the recipient has meaningfully engaged in the meet and confer process.”⁶⁰ Further, the CFPB will only consider issues raised during the meet-and-confer process. Therefore, failure to raise a particular objection or modification request at the meet and confer may constitute a waiver for that issue or modification in any subsequent petition. The CFPB has rejected petitions because the recipient failed to satisfactorily meet and confer with the Enforcement staff.

In light of the meet-and-confer requirement, the petition must be accompanied by a signed statement representing that the petitioner’s counsel has conferred with CFPB counsel in good faith and that the parties have been unable to reach an agreement. In addition, this signed statement must recite the date, time and place of each meet-and-confer session, the names of all parties participating, and the issues in controversy that remain unresolved, as well as the issues that were resolved.⁶¹

Q 26.9.2 What are the potential consequences of filing a petition to modify or set aside a CID?

In determining whether to file a petition to set aside or modify a CID, the recipient should consider the consequences of making the filing. First, the filing of a petition does not stay compliance with the CID in its entirety but only stays compliance with the portion of the CID being challenged.⁶² Second, the filing of a petition and its resulting

decision may be made public, which makes a previously confidential enforcement investigation public. This can have significant adverse consequences to an institution or individual, so each CID recipient should carefully decide whether filing the petition is prudent. Although persons may request confidential treatment for petitions, such requests are not typically granted.

PRACTICE TIP

Move Quickly in Analyzing the Ability to Comply

The decision about whether to file a petition to modify or set aside a civil investigative demand must be made on a tight timeframe. Accordingly, it is important that a CID recipient quickly identify any and all portions of the CID with which it may be unable to comply, whether due to burden, accessibility, privilege, or other concerns. The faster a recipient identifies potential areas of disagreement, the more targeted the parties can be in trying to resolve issues. This will best position the recipient to determine whether a petition should be filed.

Q 26.9.3 How often has the CFPB granted a petition to modify or set aside a CID?

An additional factor to be considered is the likelihood that the petition to modify or set aside the CID will be granted because, to date, the CFPB has denied all petitions that have been made public. The decision to grant or deny a petition is made by the Director, and the CFPB has published several orders that provide the Director's reasoning for its decisions. In its first public ruling, the Director stated that the test for whether a CID should survive a petition turns on whether: "(1) the investigation is for a lawfully authorized purpose; (2) the information requested is relevant to the investigation; and (3) procedural requirements are followed."⁶³ The Director also noted that a petitioner "must undertake a good-faith effort to show the exact nature and extent of

the hardship” imposed, and state specifically how compliance will harm its business” in order to successfully modify or set aside a CID.⁶⁴ Therefore, a petitioner’s failure to detail specific burdens may result in a denial.

As a practical matter, it is difficult for petitioners to succeed in challenging CIDs. First, Enforcement does not need probable cause for any violation of federal law before issuing a CID; instead, it only need show that there is a “reason to believe” the CID recipient has “documents, items, or information relevant to a violation.” Second, the CID may seek documents, items and information extending outside the applicable limitations period, since that information may be relevant to violations that are within the applicable limitations period. Thirdly and finally, the Director has ruled that whether a CID recipient “is covered by or has violated a federal consumer financial law are not defenses to the enforcement of a CID, even if they might eventually be defenses to legal claims contemplated in the CID.”⁶⁵ Therefore, a CID recipient may not file a petition to modify or set aside a CID on the grounds that it is beyond the CFPB’s enforcement jurisdiction or the applicability of a specific federal consumer financial law. Taken together, it is evident that the Director’s rulings to date set a high bar for successfully filing a petition to modify or set aside a CID.

Q 26.10 What is the process for an investigational hearing?

Investigational hearings are noticed through CIDs and conducted “for the giving of oral testimony in the course of any CFPB investigation, including inquiries initiated for the purpose of determining whether or not a respondent is complying with an order of the CFPB.”⁶⁶ Through an investigational hearing, the CFPB may request testimony from a corporate representative on behalf of an entity or notice the testimony of persons in their individual capacities. While the CFPB is required to describe “with reasonable particularity” the matters for examination, the agency’s descriptions are often so broad that it may be difficult to decipher the actual topic(s) for examination. As a result, a CID recipient should work with the CFPB to gain clarity on the topics to be covered during the investigational hearing during the meet and confer.

Under the CFPB's Rules Relating to Investigations, the process for conducting investigational hearings presents many traps for the unwary. For example, while there are some similarities between investigational hearings and depositions, different rules apply with respect to objections, the role of witness counsel, and counsel's right to examine his or her own witness. For example, there is no time limit on investigational hearings and one notice can be for multiple days of testimony. In addition, it is not uncommon for the CFPB to seek corporate witness testimony on topics that are complex enough to span multiple days.

As with handling a CID more generally, preparation for an investigative hearing is also critical. The witness, who will be testifying under oath in the presence of a court stenographer, should be prepared to cover the topics identified by the CFPB. It is also important for the witness to be briefed on what to expect at the investigational hearing so that he or she can feel as comfortable as possible. In some instances, the CFPB will request that a corporate entity designate witnesses to testify about specific areas. In those circumstances, the CFPB will obtain a list of the individuals designated to testify on the entity's behalf and the subject areas each designee will be testifying about in advance of the hearing.⁶⁷ If a corporate designee is unable to provide information about a specific subject area, the CFPB will probe the witness to determine what that witness did to prepare.⁶⁸ In all examinations, absent compelling circumstances, the CFPB will limit party attendance to counsel and the witness.⁶⁹

PRACTICE TIP

Examination Procedures Are Unlike a Deposition

Whether or not the witness has testified in private civil cases, it will be important to explain the differences between a civil deposition and an investigational hearing as the witness may be expecting counsel to make objections that he or she cannot make. At the beginning of the examination, the CFPB lawyer will advise the witness and counsel that investigational hearings are

governed by 12 U.S.C. § 5562 and its implementing regulations, and that objections that may be properly raised are limited as set forth in those regulations (usually only those pertaining to privileges).⁷⁰ Further, the CFPB will advise the witness and counsel that the Bureau investigator controls the record at the investigational hearing, and to the extent either the witness or counsel wishes to go off-the-record, those requests should be directed to that investigator.⁷¹ As a result, because the lawyer may not be able to make any (or many) objections and because off-the-record discussions will be almost nonexistent, the witness must be trained to be his or her own lawyer in some ways. For example, the witness needs to be trained not to speculate, to ask for clarification where necessary, to ask that compound questions be broken down into individual questions, and to ask for breaks when needed. While counsel to the witness is prohibited from making statements on the record, such counsel may, at the end of the examination, ask the Bureau investigator that the witness be allowed to clarify any of his or her answers. It is in the Bureau investigator's discretion to grant the request.⁷²

Q 26.10.1 Will the witness be given a copy of the transcript?

After the hearing, the witness is permitted to review and correct a copy of the transcript of his or her testimony. Following an investigational hearing, the Bureau furnishes a copy of the transcript (upon payment of reasonable charges for the transcript) to the witness only, except that the Bureau may for good cause limit such witness to mere *inspection* of the official transcript of his testimony. While the witness only is permitted to order a copy of that transcript upon prior approval of the CFPB, there is a presumption under CFPB enforcement procedures that such request will be granted absent certain enumerated grounds, such as that the subject of the investigation is unaware of such investigation. Nevertheless, third parties are not entitled to a copy.⁷³

PRACTICE TIP

Take Great Notes

While the witness is provided an opportunity to review and correct a copy of the transcript of his or her testimony, he or she is only permitted to order a copy of that transcript upon prior approval of the CFPB. That means that the witness may not obtain a copy of the transcript in the near term or, in some instances, never at all. This practice makes good note-taking imperative on the part of counsel, as such notes may be the only record that counsel may have of what was said during testimony. Relatedly, the CFPB may give many exhibits during the testimony, and it typically (and promptly) takes back those exhibits when the hearing is over. Accordingly, jotting down document index numbers (if the documents were produced by an individual or corporate defendant) and descriptions of documents can be extremely important.

Q 26.11 Is information provided to Enforcement in an investigation confidential?

Yes, but the CFPB's regulations enable the CFPB to share confidential investigative information and other confidential information in accordance with applicable law. For example, the CFPB may share confidential investigative information with other state and federal law enforcement agencies. As is discussed in Q 26.19 below, the CFPB already routinely coordinates its enforcement activity with various federal and state regulators and has signed a Memorandum of Understanding with several agencies that expressly permits the sharing of confidential investigative information. In addition, the CFPB may share confidential investigative information and other confidential information, in accordance with applicable law, with either house of the Congress, congressional committees or subcommittees, in administrative court proceedings to which the CFPB is party or in investigational hearings and witness interviews, as is reasonably necessary.⁷⁴

With respect to the confidentiality of the investigation more generally, the CFPB's rules relating to investigations provide that CFPB investigations generally will be non-public; however, the agency reserves the right to disclose the existence of an investigation to potential witnesses or third parties to the extent necessary to advance the investigation.⁷⁵

Q 26.12 Will the CFPB provide notice to the subject of an intended enforcement action prior to initiating such proceedings?

Maybe. In Bulletin 2011-04, issued on November 7, 2011 (updated January 18, 2012), the CFPB published guidance stating that Enforcement may provide notice to the subject of an investigation indicating that it intends to bring formal enforcement proceedings stemming from potential legal violations identified at the subject.⁷⁶

The decision whether to provide notice is discretionary. In certain circumstances, the CFPB may decide against providing the notice described below. Circumstances may include instances of ongoing fraud, where Enforcement needs to act quickly, such as where it seeks a temporary restraining order, or where Enforcement believes that the subject already has been provided with a full and fair opportunity to respond (including, but not limited to, a responsive submission to a PARR letter).⁷⁷

Q 26.12.1 Where the CFPB does provide notice, what is that process called?

If the CFPB provides notice of intention to bring formal enforcement proceedings, the CFPB will afford the subject an opportunity to respond with a Notice and Opportunity to Respond and Advise (NORA) submission, which is a written statement that contains any reasons of law or policy as to why the CFPB should not take legal action against the subject. NORA letters are based on the so-called Wells notice process used by the U.S. Securities and Exchange Commission.⁷⁸ The submission may be discoverable by third parties in accordance with applicable law, and its information may be considered as an admission in CFPB enforcement proceedings.

The formal NORA letter typically is preceded by a meeting, usually by telephone, during which enforcement attorneys broadly discuss the potential violations and the NORA process. The objective of the notice is to ensure that potential subjects of enforcement actions have the opportunity to present their positions to the CFPB before an enforcement action is recommended or commenced. Since the NORA letter itself is often very short and devoid of details regarding the basis for the underlying legal allegations, the meeting preceding the NORA is a very important information gathering exercise for the target of an investigation.

Q 26.13 What is responsible conduct?

In June 2013, the CFPB issued CFPB Bulletin 2013-06, titled “Responsible Business Conduct: Self-Policing, Self-Reporting, Remediation and Cooperation.” Among other things, the bulletin discusses how certain conduct can favorably affect the outcome of an enforcement investigation. For example, if the CFPB finds an institution engaged in responsible conduct, it may resolve an investigation with no public enforcement action, treat the conduct as a less severe type of violation, reduce the number of violations pursued, or reduce the sanctions or penalties sought by the CFPB in an enforcement action.

Q 26.13.1 What is the standard for responsible conduct?

The CFPB has indicated that “in order for the [CFPB] to consider awarding affirmative credit in the context of an enforcement investigation, a party’s conduct must substantially exceed the standard of what is required by law in its interactions with the [CFPB].”⁷⁹ Therefore, the CFPB is unlikely to consider compliance with a civil investigative demand or a supervisory request to constitute responsible conduct, since compliance is required by law. Instead, the conduct must “substantially exceed” what is required by law, as discussed below in the different types of responsible conduct.

The bulletin stresses that the CFPB “is not adopting any rule or formula, or making a promise to any person about any specific case,” nor is it “in any way limiting its discretion and responsibility to evaluate each case individually on its own facts and circumstances.” In fact, even where a party substantially exceeds what is required by law,

“there may be circumstances where the misconduct is so egregious, or the harm inflicted so great, that no amount of cooperation or other mitigating conduct could justify a decision not to bring an enforcement action, or even to forgo seeking the imposition of a civil money penalty.” In this respect, while the bulletin sets out criteria for responsible conduct, it also preserves Bureau discretion to use the fullest extent of its enforcement power where it deems necessary.

Q 26.13.2 How does the CFPB define “self-policing”?

Under the bulletin, self-policing “reflects a proactive commitment by a party to use resources for the prevention and early detection of potential violations of consumer financial laws.” The institution must demonstrate a robust compliance management system that can facilitate early detection of potential violations to limit the size and scope of consumer harm. Self-policing also includes a culture of compliance in the institution, where the “tone at the top” emphasizes compliance with federal consumer financial law. For example, in January 2015, the CFPB closed an investigation of an institution without an enforcement action because it “self-identified the problematic practices and terminated loan officers involved.”⁸⁰

Q 26.13.3 How does the CFPB define “cooperation”?

According to the CFPB, cooperation centers on the quality of a party’s interactions with the CFPB after it becomes aware of a potential violation of federal consumer financial laws. Consistent with the standard for responsible conduct, the institution must take substantial and material steps “above and beyond” what the law requires in its interactions with the CFPB to qualify for responsible conduct by cooperation. If an institution is prompt in responding to the CFPB, encourages cooperation from its employees, provides voluntary disclosures of relevant information not requested by the CFPB or facilitates enforcement action against other potential targets, its cooperation may be considered responsible conduct. For example, in June 2013, the CFPB did not impose a civil money penalty on an institution in a public enforcement action because it was “proactively altering problematic aspects” of its programs and was “readily working with the [CFPB] to provide refunds” to affect consumers.⁸¹

Q 26.13.4 How does the CFPB define “remediation”?

Remediation includes providing full redress for those injured by violations of federal consumer financial law, implementing measures designed to prevent the violations from recurring, and conforming conduct to protect and benefit consumers. The CFPB also values remediation provided in cases of potential violations, even if the institution is not certain an actual violation occurred. For example, in June 2014, the CFPB did not impose a civil money penalty for one of its claims in a public enforcement action because, for that claim, the institution “self-initiated remediation for the harm done to affected consumers.”

Q 26.13.5 How does the CFPB define “self-reporting”?

Of the four types of responsible conduct described in CFPB Bulletin 2013-06, the CFPB noted that self-reporting deserves “special mention,” since it substantially advances the Bureau’s protection of consumers and enhances its enforcement mission. Self-reporting includes prompt and complete self-reporting of significant and potential violations to the CFPB. However, it is less likely that the CFPB will credit an institution with self-reporting that occurs before likely discovery or disclosure. For example, the CFPB may not credit self-reporting if it occurs due to impending supervisory activity, public company reporting requirements, the emergence of a whistleblower, consumer complaints or actions, or the conduct of a CFPB investigation. By way of example, in a February 2014 enforcement action, a mortgage lender self-reported potential violations of the Real Estate Settlement Procedures Act. Although the lender was still assessed an \$83,000 civil money penalty, the CFPB stated that its self-reporting was “taken into account in resolving this matter.”⁸² And in a June 2014 matter, the CFPB did not assess a civil money penalty for illegal discrimination due to the company’s self-reporting, among other factors.⁸³

PRACTICE TIP**Responsible Conduct Credit Not Guaranteed**

The CFPB's Responsible Conduct Bulletin contains a number of caveats, making its crediting of responsible conduct unpredictable. For example, the responsible conduct must "substantially exceed the standard of what is required by law," but even if one were to meet that higher bar, the CFPB has noted that it is "not in any way limiting its discretion and responsibility to evaluate" each case on its own.

Q 26.14 What actions may the CFPB take at the end of an investigation?

Based on the facts developed by the CFPB in an investigation, the CFPB may: (1) initiate court action in federal or state court; (2) initiate an administrative action in its own administrative tribunal; (3) reach a mutually agreeable settlement and announce a public consent order; (4) refer investigations to another agency; or (5) close the investigation without further action if the CFPB determines an enforcement action is unnecessary or not in the public interest.

Q 26.14.1 How does the CFPB formally close a research matter or an investigation?

A supervising litigation director may close a matter at his or her discretion with advance notice to the Assistant Director for Enforcement. Closing an Investigation also requires subsequent notice to Supervision; the Office of Fair Lending; Research, Markets, and Regulations; Legal Division; and Consumer Engagement. Staff should recommend the closure of a Research Matter as soon as it becomes clear that no Investigation will be opened, even if every possible research action has not been completed. Staff should recommend the closure of an Investigation as soon as it becomes apparent that no enforcement

action will be recommended, even if every possible investigative action has not been completed.⁸⁴ Before closing an investigation, the CFPB staffer will prepare an Investigation Closing Memorandum.

Q 26.14.2 Does the CFPB advise when an investigation is being closed?

Yes, with most *investigations*. Staff are directed to send a termination letter once the litigation director decides that no enforcement action will be recommended against any person or entity who: (1) was identified as a potential violator of consumer financial laws in the Investigation Opening Memorandum and Staff contacted to make aware of the Investigation, including any subject who received a CID; (2) submitted or was solicited to submit a NORA submission; (3) received a third-party CID and subsequently requested written confirmation that Staff would recommend no enforcement action against them; or Staff otherwise reasonably believes that the subject is aware that Staff considered recommending an enforcement action against the subject. A Termination Letter should be sent unless there is a valid reason to refrain from doing so. And should send letters to the above individuals or entities even if an Investigation remains open as to other potential defendants or respondents.⁸⁵

CFPB Enforcement to Date

Q 26.15 Is there a time limitation in which the CFPB must bring an enforcement action?

Yes. Subtitle E of the Dodd-Frank Act states that “except as permitted by law or equity, no action may be brought under this title more than 3 years after the date of discovery of the violation to which an action relates.”⁸⁶ That said, for actions arising solely under the enumerated consumer laws or the transferred laws (that is, the laws transferred to the CFPB for enforcement purposes), the action may be brought in accordance with the requirements of that provision of law.⁸⁷ Since most of the enumerated consumer laws do not contain an explicit time period for bringing a CFPB enforcement action, the CFPB has taken the position that, where no statute of limitations is specified in the law, an action seeking a fine, penalty, or forfeiture must

be brought within five years from the date the claim first accrued.⁸⁸ The CFPB further takes the view that, under the enumerated consumer laws, unless specified otherwise, there is no limitations period when bringing an action for other relief, including equitable monetary relief.⁸⁹ Moreover, the CFPB argues that statutes of limitations are inapplicable to *administrative* actions but at least one appellate court has rejected this extraordinarily broad reading of CFPB powers.⁹⁰

Q 26.16 How has Enforcement relied on its UDAAP authority?

In addition to nineteen enumerated statutes, the CFPB is authorized to enforce 12 U.S.C. § 5536, which broadly prohibits unfair, deceptive, or abusive acts or practices (UDAAPs). In the CFPB's enforcement activity to date, the agency has relied extensively on its UDAAP authority, citing institutions for unfair, deceptive or abusive practices in more than half of its actions. See chapter 2 and chapter 24 for additional discussion of the CFPB's UDAAP enforcement activities.

Q 26.16.1 What is an unfair or deceptive act or practice?

An unfair act or practice is one that causes or is likely to cause a substantial injury to consumers that is not reasonably avoidable and is not outweighed by countervailing benefits to consumers or competition.⁹¹ A deceptive act or practice occurs where a material misrepresentation or omission is likely to mislead a consumer acting reasonably under the circumstances. The standards for unfairness and deception mirror the standards used by the Federal Trade Commission in its enforcement of section 5 of the Federal Trade Commission Act, which prohibits "unfair or deceptive acts and practices" See generally chapter 24.

Q 26.16.2 What is an abusive practice?

An abusive act or practice materially interferes with the ability of the consumer to understand a term or condition of a consumer financial product or service or takes unreasonable advantage of (1) a consumer's lack of understanding of the material risks, costs, or conditions of the product or service; (2) a consumer's inability to protect his or her interests in selecting or using a consumer financial product or service; or (3) a consumer's reasonable reliance on a covered person to act in his or her interests.⁹²

The concept of abusiveness is an entirely new theory of federal consumer protection law.⁹³

Q 26.16.3 To what extent has the CFPB used its UDAAP authority for violations of enumerated statutes?

Given the breadth of each UDAAP standard, it is possible for a practice that violates an enumerated statute to simultaneously constitute an unfair, deceptive or abusive practice. By way of example, several enumerated statutes contain prohibitions against deceptive or unfair practices, such as the Telemarketing Sales Rule, the Mortgage Acts & Practices Rule (Regulation N), or the Mortgage Assistant Relief Services Rule (Regulation O). In addition, violations of certain statutes that require accurate disclosures can constitute deceptive acts or practices prohibited by 12 U.S.C. § 5536. For example, in June 2013, the CFPB announced an enforcement action against a major U.S. bank and its affiliate for “failing to accurately disclose the finance charge, annual percentage rate, payment schedule, and total of payments” for certain loans, in violation of 12 C.F.R. § 1026.18 of Regulation Z of the Truth in Lending Act. The CFPB also cited these violations as a deceptive act or practice under 12 U.S.C. § 5536.⁹⁴ As reflected by that enforcement action and others, it is clear that the CFPB will find violations of certain enumerated statutes to also constitute violations of its UDAAP prohibition.

Q 26.16.4 To what extent has the CFPB used its UDAAP authority where enumerated statutes cannot apply?

Where an enumerated statute does not apply to a particular actor or proscribe a specific type of conduct, the CFPB may rely on its UDAAP authority to fill the gap. For example, the Fair Debt Collection Practices Act (FDCPA) primarily applies to third-party creditors because the “debt collectors” regulated by the statute do not include “any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor.”⁹⁵ However, in July 2013, the CFPB released CFPB Bulletin 2013-07, which states that certain acts prohibited by the FDCPA may also constitute UDAAPs, such as “threatening any action that is not intended,” “misrepresenting that a debt

collection communication is from an attorney,” or “revealing the consumer’s debt, without the consumer’s consent, to the consumer’s employer and/or co-workers.”⁹⁶

In an April 2014 enforcement action, the CFPB found that a payday lender was “disclosing the existence of consumers’ debts to non-liable third parties” and “falsely threatening litigation.”⁹⁷ Both practices are prohibited by the FDCPA, but the CFPB could not hold the lender liable under the FDCPA because it was a “creditor” collecting its own debts. To avoid this jurisdictional obstacle, the CFPB relied on its UDAAP prohibition and alleged the lender’s disclosures to third parties as unfair and its false threats of litigation as deceptive under 12 U.S.C. § 5536. For those violations and others, the lender agreed to substantial injunctive relief, provided \$5 million in restitution and paid a \$5 million civil money penalty.

Q 26.16.5 How has the CFPB used its abusiveness authority?

In ten of its enforcement actions through early 2017, the CFPB has alleged that the institution engaged in an abusive act or practice. Although the Dodd-Frank Act defined actions that may constitute abusive conduct, the CFPB has not defined this new theory further in any regulation or published guidance. The Director has stated publicly that it would “not be useful to try to define a term like that in the abstract” and that the question of whether a covered person has engaged in abusive conduct is a “facts and circumstances issue.”⁹⁸ The CFPB typically has alleged abusiveness where the conduct affects consumers that are vulnerable due to a lack of financial sophistication, distress, or other personal circumstances. For example, affected consumers in actions involving abusiveness have included service-members, students enrolled in for-profit colleges or delinquent payday loan borrowers.⁹⁹

The CFPB’s use of abusiveness is not exclusive to any industry. The authority has been used to charge a payment processor, a payday lender, a debt relief company, a retail installment lender and a tax preparation franchise. It also has not been limited to any particular practice, as the CFPB has identified abusive acts or practices in debt collection, the assessment of certain fees, and the accrual of deferred interest in certain credit products.¹⁰⁰ For example, the CFPB alleged

that a payday lender engaged in an abusive act or practice when it “created and leveraged a sense of urgency to induce delinquent borrowers with a demonstrated inability to repay” their loans to take out a new payday loan.¹⁰¹ Although past enforcement actions have provided some guidance on how the CFPB will use its new authority, there remains minimal precedent on its contours. The CFPB continues to rely on its prohibitions against unfairness and deception more often.

Q 26.17 Which industries, products or practices has Enforcement targeted?

Since the CFPB opened its doors, it has pursued enforcement actions across a wide range of industries, products, and practices. These industries have included credit cards, mortgage origination, mortgage servicing, debt collection, credit reporting, payment processing, payday lending, and auto lending, among others. The products at the heart of its enforcement actions have included conventional consumer financial products such as credit cards or mortgages, as well as lesser-known products such as those which may be sold in tandem with a financial service product such as identify theft protection, debt cancellation, extended warranties, and the like.

Enforcement has announced more enforcement actions in the mortgage industry than any other industry. Approximately a third of all enforcement actions through date of publication of this 2017 edition relate to mortgage origination or servicing. Many of these enforcement actions have involved alleged violations of the Real Estate Settlement Procedures Act (RESPA), with the CFPB targeting, in particular, alleged exchanges of things of value for referrals of business. See chapter 5. Other mortgage-related public enforcement actions have focused on fair lending, loan originator compensation, loss mitigation, and more generalized customer service failings.

Enforcement has also focused significant resources on the marketing and sale of ancillary products, which are products sold in connection with other consumer financial products or services. For example, Enforcement has reached numerous public enforcement actions against major credit card issuers, alleging practices associated with the marketing, sale and administration of ancillary products constituted unfair and deceptive practices. In some circumstances, these

enforcement actions have also involved violations of enumerated statutes, such as the Equal Credit Opportunity Act, the Truth in Lending Act, and the Fair Credit Reporting Act.

Enforcement also has focused significant resources on debt relief providers and debt collection activities. In the debt relief space, Enforcement has announced a number of public enforcement actions against entities for charging upfront or advance fees for debt settlement or debt consolidation. In many of these actions, Enforcement alleged that the debt relief or settlement services provided to consumers were not as effective or useful as advertised.

With respect to debt collection, Enforcement has announced public enforcement actions with entities involved in various phases of debt collection, including first-party collection activities (that is, collection by a creditor), third-party collection activities regulated by the Fair Debt Collection Procedures Act, and sellers of debt. For example, Enforcement announced a June 2015 enforcement action against a third-party collector of medical debt and a July 2015 enforcement action against a major U.S. bank for its first-party collection activities, as well as certain practices relating to its sale of debt to debt buyers.¹⁰²

In addition to these areas, Enforcement has announced a series of public enforcement actions in other noteworthy industries. For example, in December 2013, there was an enforcement action against an indirect auto finance lender housed in a major U.S. bank for alleged discriminatory pricing against minority borrowers. The enforcement action marked the CFPB's first public foray into applying the "disparate impact theory" of fair lending to the indirect auto lending industry.¹⁰³ See chapter 6. And in May 2015, the CFPB announced a public enforcement action against two major telecommunications providers for certain acts in connection with their mobile wireless plans.¹⁰⁴ The enforcement actions related to certain charges assessed against mobile wireless customers on their phone bills. These enforcement actions demonstrate that, regardless of which industry Enforcement takes on the most, no industry under its jurisdiction is immune to public action. In February 2016, the CFPB announced its goals for the next two years. In enforcement, its priorities include consumer reporting, debt collection, mortgage servicing and fair lending, open-use credit, and student lending.¹⁰⁵

Q 26.18 What types of actors has Enforcement pursued in its enforcement actions?

Q 26.18.1 Does Enforcement pursue only institutions of a particular size or nature?

No. Enforcement has pursued a wide variety of institutions in its enforcement actions to date. These include entities across a wide range of industries and include the largest banks in the country, as well as the smallest nonbanks. Each of its first three enforcement actions was against a major U.S. bank, and in the aggregate, these actions resulted in \$400 million in restitution and \$50 million in civil money penalties. The CFPB has continued to announce public enforcement actions with the country's largest banks each year, especially since it retains supervisory authority over the largest banks by statute.

However, the CFPB has also announced public enforcement actions against smaller nonbank entities, such as a buy-here pay-here used car dealer,¹⁰⁶ loan origination companies, debt settlement companies, payday lenders, and title insurance companies. The smallest nonbank entities may still find themselves subject to a public enforcement action; for example, the CFPB filed an action in federal court against a law firm with no more than sixteen attorneys for alleged violations related to debt collection litigation.¹⁰⁷ The wide variance in the type of actor pursued by Enforcement is reflected in the range of relief obtained in these actions; although it obtained \$27,076 in restitution from a mortgage lender in January 2014, the CFPB obtained \$727 million in restitution from a major U.S. bank just three months later.

Q 26.18.2 Does Enforcement pursue institutions for assisting in another person's violations of federal consumer financial law?

Yes. Under 12 U.S.C. § 5536(a)(3), it is unlawful for any "person to knowingly or recklessly provide substantial assistance to a covered person or service provider in violation of the provisions of section 5531 of this title, or any rule or order issued thereunder." In keeping with its authority under this statute, the CFPB has pursued institutions that were not directly involved in the conduct at issue, but

instead, were alleged to have substantially assisted in a legal violation by another institution(s).

By way of example, in April 2015, the CFPB announced that it had filed a lawsuit against certain debt collectors that, as alleged in the complaint, engaged in unauthorized robo-calling, attempted to collect debts not owed, and threatened legal action against consumers where they had no intent or ability to do so. In the same complaint, the CFPB also named four payment processors who had no direct involvement in the collection activities but by providing key transactional and payment processing services to the collection companies, they facilitated “the Debt Collectors’ efficient collection of consumers’ funds.”¹⁰⁸ Based on this action and other actions against payment processors, providing material transactional and payment processing services to a covered person may constitute substantial assistance under 12 U.S.C. § 5536(a)(3) and create enforcement liability.¹⁰⁹

Q 26.18.3 Does Enforcement pursue individuals?

Yes. The CFPB has authority to pursue individuals for violations of federal consumer financial law under two distinct provisions. First, the CFPB has enforcement jurisdiction over any “covered person” that “engages in the offering or providing of a consumer financial product or service,” and the term “person” includes “individual[s].”¹¹⁰ Therefore, any “individual” that offers or provides a consumer financial product or service is subject to the CFPB’s enforcement authority. Second, “covered persons” includes “related persons,” which extends to three different categories of individuals that are subject to the CFPB’s enforcement authority. A “related person” includes directors, officers, or employees “charged with the managerial responsibility” for a covered person.¹¹¹ It may also include “any shareholder, consultant, joint venture partner, or other person [. . .] that materially participates in the conduct of the affairs of such covered person.”¹¹² Finally, a related person may be “any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in any (I) violation of any provision of law or regulation; or (II) breach of a fiduciary duty.”¹¹³

Under these authorities, the CFPB has announced public enforcement actions that expressly name individuals, subjecting them to the obligation to pay restitution and civil money penalties; and to comply with injunctive relief. These individual defendants have included chief executive officers, chief financial officers, presidents, principals, executive officers, senior vice presidents, attorneys, loan officers and lower level employees. For example, in November 2013, the CFPB announced a public enforcement action against a mortgage company, alleging that its compensation of loan officers violated the Federal Reserve Board's Loan Originator Compensation Rule.¹¹⁴

In the same enforcement action, the CFPB named the company's president and vice president, alleging that they were responsible for sanctioning the policy, calculating the loan officers' compensation and authorizing the disbursement of certain bonuses subject to the enforcement action. As "related persons," the president and senior vice president allegedly engaged in unlawful conduct under 12 U.S.C. §§ 5531 and 5536, according to the complaint. In the resulting consent order, the individual defendants were subject to its injunctive relief and were jointly and severally liable for both the restitution and civil money penalty amounts. In recent enforcement actions, the CFPB has sought injunctive and other relief against individually named defendants; and expressly assessed civil money penalties on individuals, demanding that they personally pay the civil money penalty as part of the final consent order.¹¹⁵

Q 26.19 Has Enforcement coordinated with other federal or state regulatory agencies?

The CFPB has coordinated its enforcement work with federal and state regulatory agencies or authorities. These coordinated activities have occurred pursuant to formal agreements between the agencies in some circumstances, while in others, the agencies have announced joint enforcement actions together.

Q 26.19.1 Does the CFPB coordinate with other federal regulatory authorities?

To date, the CFPB has entered into Memoranda of Understanding (MOU) with certain federal agencies, allowing it to coordinate its

enforcement efforts with those agencies and share information as necessary. For example, the CFPB entered into an MOU with the Federal Trade Commission on January 20, 2012, in order “to prevent duplication of efforts, provide consistency and ensure a vibrant marketplace for consumer financial products and services.” In particular, the MOU requires that the CFPB and FTC:

- Coordinate their law enforcement activities and jointly conduct training;
- Coordinate regarding potential court actions and administrative proceedings;
- Consult with each other regarding rulemaking under their respective statutory authorities;
- Provide sixty days’ notice before publishing proposed rulemaking or final rules;
- Consult promptly on formal comprehensive agency guidance documents that address unfair, deceptive or abusive acts or practices regarding consumer financial products or services;
- Cooperate in the receipt and handling of consumer complaints, as well as share such complaints with each other; and
- Develop methods and procedures for guiding consumers to the agency best suited to assist them with their issues, complaints or needs.

The MOU requires the CFPB and the FTC to coordinate their enforcement efforts by setting up notice requirements between the two agencies. For example, if the CFPB or FTC wishes to pursue action against an entity that has already been subject to an investigation and judgment by the other, the CFPB and FTC must articulate why they believe that a new investigation is needed. Similarly, each agency must provide five days’ business notice to the other before commencing an investigation against an entity under their mutual jurisdiction, which includes providing the identity of the person to be investigated and the intended scope of the investigation. Finally, the agencies must provide each other ten business days’ notice prior to filing a complaint, a consent decree, consent order or settlement agreement.

The CFPB entered into an MOU with the Department of Justice on December 6, 2012, agreeing to coordinate their efforts in the enforcement of fair lending laws. As with the CFPB's MOU with the FTC, the DOJ MOU lays out a framework for increased information sharing between the two agencies and coordination in enforcement investigations into potential violations of fair lending laws. As detailed in the MOU, the CFPB will refer creditors to the DOJ where they have engaged in a pattern and practice of discouraging or denying applications for credit in violation of ECOA. See generally chapter 6.

Finally, other federal banking authorities also retain concurrent enforcement authority over certain institutions under the CFPB's supervision and enforcement powers (and note, a memorandum of understanding coordinates aspects of the supervision activities of the CFPB and the prudential regulators). These federal banking authorities include the Office of the Comptroller of the Currency, the Federal Reserve and the Federal Deposit Insurance Corporation, all of whom have been party to CFPB enforcement actions to date. See chapters 1 and 2. The agencies' decision to coordinate enforcement actions with the CFPB is typically a discretionary one, which can make for complexities in investigations and also in settlement negotiations as an institution could be dealing with two or more separate agencies demanding relief.

Q 26.19.2 Does the CFPB coordinate with state regulatory authorities?

Although it is not public whether the CFPB has entered into an MOU with all state attorneys general to date, the CFPB has announced that it has agreements with some state attorneys general for specific purposes. For example, the CFPB maintains agreements with some state attorneys general that facilitate the sharing of confidential investigative information and each entity's obligation to preserve the confidentiality of all information shared. In addition, the CFPB has indicated on numerous occasions that it intends to coordinate its enforcement activity with state attorneys general.

Director Cordray, who himself was once a state attorney general, has noted continued cooperation between the two groups as they tackle a number of financial industry topics. Director Cordray noted

that his staff and that of the National Association of Attorneys General already coordinate via a number of working groups on mutual areas of interest, including payday lending, auto loans, and collection abuses. See chapters 10, 18 and 23. Director Cordray has also noted that the CFPB already shares significant complaint information with state attorneys general, allowing them to review and search for complaints “by company, product, or issue.”¹¹⁶ In addition, as discussed in Q 26.18.3, the CFPB already has announced numerous enforcement actions alongside state attorneys general.

In addition to coordinating their enforcement work, under 12 U.S.C. § 5552, a state attorney general may commence a civil action to enforce provisions of Title X, including regulations released by the CFPB, provided that they first consult with the CFPB on the civil action. The state attorney general must provide the CFPB with the complaint it intends to file, naming the identity of the parties, the alleged facts underlying the proceeding and whether there is a need to coordinate the prosecution of the proceeding with the CFPB to avoid interference with any CFPB (or other federal agency) initiative, rulemaking or action. Upon receiving this notice, the CFPB may join the state attorney general and decide intervene in the proceeding. States have already filed litigation against companies under 12 U.S.C. § 5552, alleging UDAAP violations under 12 U.S.C. § 5536.¹¹⁷

Q 26.19.3 Has the CFPB announced enforcement actions undertaken in coordination with other federal regulators or state authorities?

Yes. An important feature of many of these joint enforcement actions is that the coordinating regulator may seek its own relief, demanding its own restitution and assessing its own civil money penalty. To date, both federal and state authorities have sought civil money penalties *in addition to* the civil money penalty imposed by the CFPB and, in some cases, the coordinating regulator’s penalties were higher.¹¹⁸

At the time of publication, the CFPB has announced more than twenty public enforcement actions that involved some level of coordination with federal or state authorities. The CFPB has announced joint enforcement actions with the Department of Justice, the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance

Corporation (FDIC), the Federal Reserve Board, the Federal Communications Commission, the Federal Trade Commission and numerous State attorneys general. By way of example, in one enforcement action in October 2012, the FDIC, OCC and the Federal Reserve joined the CFPB, while in two different enforcement actions in December 2013 and May 2015, the CFPB was joined by forty-nine state attorneys general.

These actions have involved a wide range of industries and institutions, such as credit card issuers, mortgage lenders, mortgage servicers, and debt relief companies. The enforcement actions have involved both federal authorities and state authorities alike and in some enforcement actions, more than one authority is involved. For example, the CFPB and the DOJ have undertaken joint enforcement actions related to fair lending violations. These enforcement actions alleged violations of the Equal Credit Opportunity Act with respect to the pricing of annual percentage rates in indirect auto finance (discussed in chapters 6 and 10), the assessment of broker fees in mortgage lending, and the marketing and sale of ancillary credit card products. State attorneys general also have joined in a wide array of CFPB enforcement actions, which have mostly focused on debt relief providers and mortgage servicing.

Q 26.20 How often does Enforcement litigate in administrative or federal court?

Enforcement's investigations may result in a mutually agreeable settlement, if the subject of the investigation and Enforcement agree on the appropriate injunctive relief, restitution, and civil money penalties, if any. However, where settlement negotiations fail, the CFPB has two options: file an action in its administrative agency tribunal or file an action in federal court.

Q 26.20.1 How does the CFPB proceed in an administrative enforcement proceeding?

In June 2015, the Director ruled on the first appeal from an administrative proceeding since the CFPB was established.¹¹⁹ The appellant, a mortgage lender that received its administrative notice of charges in January 2014, appealed the administrative law judge's (ALJ's) decision that the lender violated provisions in RESPA and should pay

\$6.4 million in disgorgement. The Director affirmed parts of the ALJ's decision, reviewing the administrative law judge's findings de novo and without deference to the judge's factual or legal findings. In determining the appropriate remedy, the Director used the lender's gross revenue, instead of net revenue, to substantially increase the lender's disgorgement from \$6.4 million to \$109 million. Notably, the Director also affirmed the ALJ's finding that there may be no applicable statute of limitations to enforcement actions brought by the CFPB in his administrative tribunal. The lender appealed the Director's ruling to the United States Court of Appeals for the District of Columbia Circuit, commencing the first federal court appellate review of an administrative ruling by the CFPB. A three-judge panel of the U.S. Court of Appeals for the D.C. Circuit overturned the Director's ruling in October 2016, including as to the statute of limitations and his interpretation of RESPA and likewise ruled that the CFPB's structure is unconstitutional.¹²⁰ In February 2017, however, the court granted the CFPB's request for a rehearing *en banc*, thereby vacating its previous order.¹²¹

Q 26.20.2 How does the CFPB proceed in federal court litigation?

The CFPB has commenced litigation in federal courts across the country, from New York to Texas to California. The defendants have included smaller nonbank entities, such as loan modification or debt relief companies, but also large nonbank institutions. For example, the CFPB filed complaints in federal court against two of the largest for-profit colleges in February 2014, alleging UDAAPs and violations of the Truth in Lending Act.¹²² Similarly, in December 2014, the CFPB commenced federal court litigation against one of the largest providers of mobile phone services, alleging UDAAPs in connection with certain fees billed to its customers.¹²³ And on February 7, 2017, the CFPB joined the State of New York in a suit against a settlement advance company.¹²⁴

In some cases, the CFPB's litigation ends quickly due to a settlement agreed to by both parties; for example, the provider of mobile phone services named in the CFPB's December 2014 complaint agreed to a public settlement in May 2015. In other cases, the CFPB's litigation could last years, such as its case against a debt relief services company that began in August 2013 and ended in March 2016.¹²⁵

Notes to Chapter 26

1. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010).
2. 12 U.S.C. § 5491(a).
3. *Id.* § 5481(14).
4. Beyond the six divisions, there are an additional three offices, which include the Office of Minority & Women Inclusion, the Office of Civil Rights, and the Office of Equal Opportunity and Fairness. These offices are not housed in any specific division.
5. *See* 12 U.S.C. §§ 5514, 5515, 5516.
6. *See id.* § 5493(c).
7. CFPB Ombudsman's Office, *FY2013 Annual Report to the Director* (Nov. 15, 2013), http://files.consumerfinance.gov/f/201311_cfpb_annual-report_ombuds-office.pdf.
8. *See, e.g.*, Consent Order, Consumer Fin. Prot. Bureau v. Nat'l City Bank, No. 13-1817 (W.D. Pa. Dec. 23, 2013).
9. Three teams are based in Washington, D.C., while the fourth team is a field litigation team spread across the CFPB's offices in Washington, D.C., New York City, San Francisco, and Chicago.
10. 12 C.F.R. §§ 1080.4, 1080.6, 1080.11(c).
11. *See* <https://www.venable.com/a-look-inside-the-official-cfpb-enforcement-policies-and-procedures-manual-09-21-2016/> (noting acquisition of Enforcement Manual as a result of FOIA request).
12. 12 U.S.C. §§ 5531(a), 5536.
13. The categories also include a broad, catch-all category for any financial product or service "entered into or conducted as a subterfuge or with a purpose to evade any Federal consumer financial law." *Id.* § 5481(15)(xi).
14. *Id.* § 5481(26)(A).
15. *Id.* § 5481(26)(B).
16. *Id.* § 5515(c).
17. *Id.* § 5516(d).
18. *Id.* § 5481(25).
19. Complaint, CFPB v. Frederick J. Hanna & Assocs., P.C., No. 1:2014-cv-02211 (July 14, 2014); *see also* Complaint for Permanent Injunction and Other Relief, CFPB v. Morgan Drexen, Inc., No. 13-01267 (C.D. Cal. 2013).
20. Although the term "institution" is used here, it is important to note that the CFPB retains enforcement jurisdiction over institutions, as well as individuals. *See* 12 U.S.C. § 5481(19), (25); *see also* Q 25.17.3.

21. CFPB Enforcement Policies and Procedures Manual (“Enforcement Manual”), at 2–13, www.venable.com/files/upload/CFPB_Enforcement_Policies_and_Procedures_Manual.pdf.
22. Enforcement Manual, at 2–13.
23. *Id.*
24. *Id.* at 2–14.
25. *Id.* at 2–15.
26. Consent Order, *In re* JRHBW Realty, Inc., No. 2014-CFPB-0005 (May 28, 2014).
27. Enforcement Manual, at 2–15.
28. *Id.* at 2–59.
29. *Id.* at 2–37, citing 12 U.S.C. § 5562; 12 C.F.R. § 1080.5.
30. Enforcement Manual, at 2–35.
31. *Id.* at 5–3, 5–4.
32. 12 C.F.R. § 1081.206(d).
33. Enforcement Manual, at 5–4.
34. 12 U.S.C. § 5563(a).
35. *Id.* § 5564(a).
36. *Id.* § 5563(b).
37. *Id.* § 5564(f).
38. *Id.* § 5564(d).
39. *Id.* § 5564(g)(1).
40. *Id.* § 5564(g)(2).
41. CFPB Rules of Practice for Adjudication Proceedings, 12 C.F.R. § 1081 (2012).
42. *Id.* § 1081.201.
43. *Id.* § 1081.120.
44. *Id.* § 1081.400.
45. 12 U.S.C. § 5563(b).
46. *Id.* § 5563(b)(1)(B).
47. *Id.* § 5563(b)(3).
48. *Id.* § 5563(b)(4).
49. *Id.* § 5565(a).
50. *Id.* § 5565(c)(2).
51. Enforcement Manual, at 4–5.
52. 12 U.S.C. § 5565(c)(3); *see also* Enforcement Manual, at 4–5 through 4–8.
53. Enforcement Manual, at 4–7.
54. *Id.* at 4–5.
55. 12 U.S.C. § 5497(d); CFPB Consumer Financial Civil Penalty Fund, 12 C.F.R. § 1075 (2013).
56. 12 C.F.R. pt. 1080.
57. *Id.* § 1080.6(e).
58. *Id.* § 1080.6(e)(1).

59. *Id.* § 1080.6(e).
60. *Id.* § 1080.6(c)(3).
61. *Id.* § 1080.6(e)(1).
62. *Id.* § 1080.6(f).
63. Decision and Order on PHH Corporation's Petition to Modify or Set Aside Civil Investigative Demand, *In re* PHH Corp., 2012-MISC-PHH Corp.-0001, at 5 (Sept. 20, 2012), http://files.consumerfinance.gov/f/201209_cfpb_setaside_phhcorp_0001.pdf.
64. *Id.* at 6 (citing *FTC v. Markin*, 391 F. Supp. 865, 870–71 (W.D. Mich. 1974), *aff'd*, 532 F.2d 541 (6th Cir. 1976)).
65. Decision and Order on Next Generation Debt Settlement, Inc.'s Petition to Modify or Set Aside Civil Investigative Demand, *In re* Next Generation Debt Settlement, Inc., 2012-MISC-Next Generation Debt Settlement-0001, at 2 (Oct. 5, 2012).
66. 12 C.F.R. § 1080.7(a).
67. Enforcement Manual, at 2–43.
68. *Id.* at 2–47.
69. *Id.* at 2–44.
70. *Id.* at 2–43.
71. *Id.* at 2–44.
72. *Id.* at 2–46.
73. *Id.* at 2–47, citing 12 U.S.C. § 5562(c)(13)(G).
74. 12 C.F.R. §§ 1080.14(a), 1070.45.
75. *Id.* § 1080.14(b).
76. CFPB Bulletin 2011-04, Notice and Opportunity to Respond and Advise, (Jan. 18, 2012), <http://files.consumerfinance.gov/f/2012/01/Bulletin10.pdf>.
77. *Id.*
78. 17 C.F.R. § 202.5 states that “[u]pon request, the [SEC enforcement]staff, in its discretion, may advise such persons of the general nature of the investigation, including the indicated violations as they pertain to them, and the amount of time that may be available for preparing and submitting a statement prior to the presentation of a staff recommendation to the Commission for the commencement of an administrative or injunction proceeding.” Like the NORA letter process, a Wells notice (originating from John Wells, who chaired an advisory committee) is a communication from the staff to a person involved in an investigation that: (1) informs the person the staff has made a preliminary determination to recommend that the Commission file an action or institute a proceeding against them; (2) identifies the securities law violations that the staff has preliminarily determined to include in the recommendation; and (3) provides notice that the person may make a submission to the Division and the Commission concerning the proposed recommendation. *See* Securities and Exchange Commission, Division of Enforcement, Enforcement Manual (Oct. 28, 2016 edition), at 20, <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>.

79. CFPB Bulletin 2013-06, Responsible Business Conduct: Self-Policing, Self-Reporting, Remediation, and Cooperation, at 1 (June 25, 2013), http://files.consumerfinance.gov/f/201306_cfpb_bulletin_responsible-conduct.pdf.

80. CFPB Newsroom, CFPB Takes Action Against Wells Fargo and JPMorgan Chase for Illegal Mortgage Kickbacks (Jan. 22, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-wells-fargo-and-jpmorgan-chase-for-illegal-mortgage-kickbacks>.

81. See Consent Order, *In re* U.S. Bank Nat'l Ass'n, No. 2013-CFPB-0003 (June 26, 2013).

82. See <https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-mortgage-lender-for-illegal-payments/>.

83. See <https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-give-capital-to-pay-225-million-in-consumer-relief-for-deceptive-and-discriminatory-credit-card-practices/>.

84. Enforcement Manual, at 2-61, 2-62.

85. *Id.* at 2-62.

86. 12 U.S.C. § 5564(g)(1).

87. 12 U.S.C. § 5564(g)(2)(B).

88. Enforcement Manual, at 3-3, citing 28 U.S.C. § 2462.

89. Enforcement Manual, at 3-3.

90. PHH Corp. et al. v. Consumer Fin. Prot. Bureau, 839 F.3d 1 (D.C. Cir. 2016). As this edition went to press, the D.C. Circuit had granted a rehearing *en banc*, thereby vacating the ruling.

91. 12 U.S.C. § 5531(c).

92. *Id.* § 5531(d).

93. 15 U.S.C. § 45(a).

94. See Consent Order, *In re* U.S. Bank Nat'l Ass'n, No. 2013-CFPB-0003 (June 26, 2013).

95. 15 U.S.C. § 1692a(6)(A).

96. CFPB Bulletin 2013-07, Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts (July 10, 2013), http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf.

97. See Consent Order, *In re* Ace Cash Express, Inc., No. 2014-CFPB-0008 (July 10, 2014).

98. *How Will the CFPB Function Under Richard Cordray: Hearing Before the Subcomm. on TARP, Financial Services and Bailouts of Public and Private Programs*, 112th Cong. 112-107, at 69 (2012).

99. See, e.g., Consent Order, *In re* Ace Cash Express, Inc., No. 2014-CFPB-0008 (July 10, 2014); CFPB v. ITT Educ. Servs., Inc., No. 1:14-cv-292 (S.D. Ind. 2014); Consent Order, CFPB v. Freedom Stores, Inc., No. 2:2014-cv-643 (E.D. Va. 2014).

100. See, e.g., Consent Order, *In re* Ace Cash Express, Inc., No. 2014-CFPB-0008 (July 10, 2014); Consent Order, CFPB v. Coll. Educ. Servs. LLC, No. 8:2014-cv-03078 (Dec. 11, 2014); Consent Order, CFPB v. PayPal, Inc., No. 1:15-cv-01426 (May 19, 2015).

101. See Consent Order, *In re* Ace Cash Express, Inc., No. 2014-CFPB-0008 (July 10, 2014).
102. See Consent Order, *In re* Syndicated Office Sys., LLC, 2015-CFPB-0012 (June 18, 2015); Consent Order, *In re* Chase Bank, USA N.A., 2015-CFPB-0013 (July 8, 2015).
103. See Consent Order, *In re* Ally Fin. Inc., No. 2013-CFPB-0010 (Dec. 20, 2013).
104. See Stipulated Final Judgment and Order, CFPB v. Sprint Corp., No. 1:14-cv-09931 (May 12, 2015); Stipulated Final Judgment and Order, CFPB v. Cellco P'ship d/b/a Verizon Wireless, No. 3:15-cv-03268 (June 9, 2015).
105. See <http://www.consumerfinance.gov/about-us/blog/our-priorities-to-ensure-a-fair-marketplace/>.
106. See Consent Order, CFPB v. Y King S Corp., No. 2016-CFPB-0001 (Jan. 21, 2016).
107. See Complaint, CFPB v. Frederick J. Hanna & Assocs., P.C., No. 1:2014-cv-02211 (July 14, 2014).
108. See Complaint, CFPB v. Universal Debt & Payment Sols., LLC, No. 1:15-cv-0859 328 (Mar. 26, 2015).
109. See Consent Order, CFPB v. Meracord LLC, ¶ No. 3:13-cv-05871 (Oct. 4, 2014); Stipulated Final Judgment and Consent Order, CFPB v. Glob. Client Sols. LLC, No. 2:14-cv-06643 (Aug. 25, 2014). See also Consent Order, CFPB v. Santander Bank, N.A., No. 2016-CFPB-0012 (July 14, 2016), in which the respondent was held responsible for the marketing actions of a third-party service provider, but “substantial assistance” was not alleged.
110. 12 U.S.C. § 5481(19).
111. 12 U.S.C. § 5481(25).
112. *Id.*
113. *Id.*
114. See Stipulated Final Judgment and Order, CFPB v. Castle & Cooke Mortgage, LLC, et al., No. 2:13CV684DAK (Nov. 7, 2013).
115. See Complaint for Permanent Injunction and Other Relief, CFPB v. Howard, No. 8:17-cv-00161 (Jan. 30, 2017); see also Stipulated Final Judgment and Consent Order, CFPB v. RPM Mortgage, Inc., No. 4:15-cv-02475 (June 9, 2015); see also CFPB Newsroom, CFPB Takes Action Against Wells Fargo and JPMorgan Chase for Illegal Mortgage Kickbacks (Jan. 22, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-wells-fargo-and-jpmorgan-chase-for-illegal-mortgage-kickbacks>.
116. Scott Pluta, Sharing Consumer Complaint Data with State Agencies, CFPB Blog (Dec. 11, 2012), <http://www.consumerfinance.gov/blog/starting-today-sharing-consumer-complaint-data-with-state-agencies/>.
117. These actions were commenced by state authorities from Illinois, Mississippi, New York, Florida, and Connecticut.
118. See, e.g., Stipulation and Consent Order, *In re* Capital One Bank, N.A., No. 2012-CFPB-0001 (July 18, 2012).

119. See Decision of the Director, *In re* PHH Corp., et al., 2014-CFPB-0002, (June 4, 2015).

120. See *PHH Corp. v. CFPB*, 839 F.3d 1(D.C. Cir. 2016).

121. See *PHH Corp. v. CFPB*, No. 15-1177 ((D.C. Cir. 2017).

122. See Complaint for Permanent Injunction and Other Relief, *CFPB v. Corinthian Colls., Inc.*, No. 1:14-cv-07194 (N.D. Ill. 2014); Complaint for Injunctive Relief and Damages, *CFPB v. ITT Educ. Servs., Inc.*, No. 1:14-cv-292 (S.D. Ind. 2014).

123. See Stipulated Final Judgment and Order, *CFPB v. Sprint Corp.*, No. 14-cv-09931 (S.D.N.Y. 2015).

124. See Complaint for Permanent Injunction and Other Relief, *CFPB and People of the State of New York v. RD Legal Funding, LLC.*, No. 1:17-cv-00890 (S.D.N.Y. 2017).

125. See Complaint for Permanent Injunction and Other Relief, *CFPB v. Morgan Drexen, Inc.*, No. 13-01267 (C.D. Cal. 2013). See also Final Judgment and Order, *CFPB v. Morgan Drexen, Inc.*, No. 8:13-cv-01267-JLS-JEM (C.D. Cal. 2016).

