Consumer Financial Protection Bureau Investigations and FTC Coordination Tips &Techniques: A Practioner's Perspective

Section of Antitrust Law
Private Advertising Litigation, Consumer Protection, Insurance and Financial Services Committees
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Webinar

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A note about today's remarks

This presentation is for general informational purposes only and does not represent and is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to specific fact situations.

The views expressed today are my own and do not necessarily represent the official views of past, current, or future clients or Venable.

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Introduction

- Who's subject to a potential CFPB investigation?
- CFPB Enforcement Authority
- CFPB Investigations Triggers
- CFPB Coordination with Other Federal and State Enforcement Agencies
- Key Steps to Responding to an Investigation
- What to Watch out For in the Months Ahead

Who's subject to a potential CFPB Investigation?

The CFPA authorizes the Bureau to conduct investigations to ascertain whether <u>any person</u> is or has been engaged in conduct that, if proved, would constitute a violation of any provision of Federal consumer financial law.

- Banks and credit unions
- All mortgage related businesses
- Small dollar lenders
- Private student lenders
- Debt collectors
- Consumer reporting
- Consumer credit and related activities
- Money transmitting, check cashing, and related activities
- Prepaid cards
- Debt relief services
- Financial advisors
- Service Providers
- And more…

CFPB Investigation and Enforcement Authority

- CFPB may investigate, issue subpoenas and civil investigative demands, and compel testimony
- CFPB may conduct hearings and adjudications to enforce compliance, including issuing cease-and-desist orders
- CFPB may initiate actions for civil penalties or an injunction
  - Penalties up to $1M per day for knowing violations
  - No exemplary or punitive damages
- Criminal referrals to DOJ
- Whistleblower protection
- <u>State attorneys general may also enforce the CFPA with notice to the CFPB</u>
- <u>May enforce rules issued by the FTC to the extent such rules apply to a covered a person or service provider</u>
- No express private right of action under the CFPA

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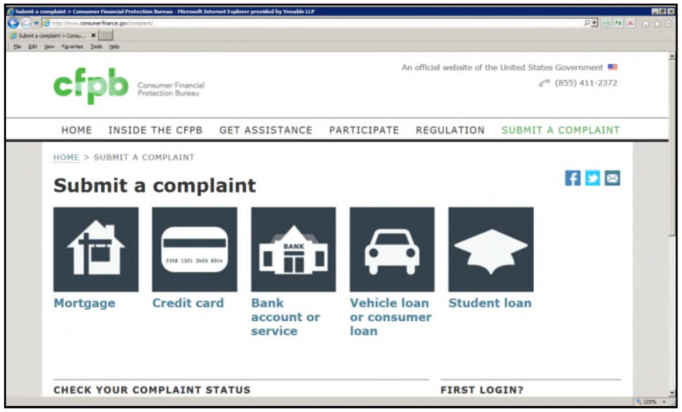
CFPB Investigation Triggers*

- Violation of Federal Consumer financial law
- Risk to consumers
- Consumer complaints to the CFPB and third-parties
- Government agency referrals and complaints
- Whistleblower complaint (*e.g*., employee or ex-employee)
- Media coverage
- Targeted market
- Low history of supervision
  (pre-CFPB to present)



* Non-exhausitve list

CFPB Coordination with Other Federal and State Enforcement Agencies

- Announced in January 2012 (after State of the Union Address)
- Unit within the Financial Fraud Enforcement Task Force that was created in late 2009, and is led by the DOJ
- CFPB, FTC, DOJ, DoE Inspector General, state AGs, and more are participating

STOPFRAUD.GOV
FINANCIAL FRAUD ENFORCEMENT TASK FORCE

"The newly-created group will work across federal law enforcement and regulatory agencies, and with state and local partners, to strengthen efforts to address consumer-related fraud, including schemes targeting vulnerable populations, such as the unemployed, those in need of payday loans, and those suffering from the burden of high credit card and other debt. The new working group will also focus on scams that exploit prospective students, active-duty military personnel and veterans." DOJ Press Release (Feb. 10, 2012)

Compliance with Federal Consumer Financial Laws

- **Consumer Financial Protection Act:** Unfair, Deceptive, or Abusive Acts or Practices (UDAAP)
- Other **Federal Consumer financial laws**
  - – Lending (*e.g.*, TILA, RESPA, ECOA, FCRA, SAFE Act, FDCPA, MARS Rule, etc.)
  - – Deposits (*e.g.*, EFTA)
  - – Privacy (GLBA)
  - – Telemarketing (Telemarketing Sales Rule)

Key Steps to Responding to a CFPB Investigation

Step 1: Review the CID –

A review of the CID, among many things, will identify the purpose of the investigation, the assigned staff enforcement attorneys, the production deadline (*e.g.*, 30 days from issuance), the definitions, instructions, and interrogatory and document requests.

Early Investigations are Broad in Scope: Typical Areas of Focus

- Governance, Management, and Employee Information
- Acts and practices (transactional level data);
- Compliance Management Systems;
- Policies and procedures;
- Training;
- Monitoring;
- Consumer complaints
- Compliance with enforcement actions; and
- Corrective action

Key Steps to Responding to a CFPB Investigation (cont'd)

Step 2: Establish a Response Team –

- Document Collection
- Ensure compliance with legal obligations
- Assess whether responsive information is privileged
- Take proper steps to preserve responsive materials (*e.g.*, implementation of a document preservation policy)
- In addition, a recipient of a CID will need to decide whether public disclosure is required pursuant to other applicable legal and regulatory obligations.

Key Steps to Responding to a CFPB Investigation (cont'd)

Step 3: Assess the CID for Possible Modification Requests –

- Determine the scope and timing of the CID response and whether any modifications are needed.
- The scope of the Bureau's authority in issuing the CID also needs to be determined.

Key Steps to Responding to a CFPB Investigation (cont'd)

Step 4: Meet and Confer with Bureau Enforcement Attorneys –

- Within 10 days after receipt of the CID.
- Be prepared, flexible, and knowledgeable.

Key Steps to Responding to a CFPB Investigation (cont'd)

Step 5: Petition to Modify or Set Aside the CID –

- May file a petition to modify or set aside an information request if the request is filed within 20 days of receipt of the CID unless an extension is granted by the head of the Office of Enforcement.

Key Steps to Responding to a CFPB Investigation (cont'd)

Step 6: Address Electronically Stored Information –

- The identification, collection, review, and processing of electronically stored information, such as emails, poses certain challenges on most businesses.
- The burden and cost continues to increase as the amount of electronically stored information that the average organization or custodian regularly maintains continues to rise.

Key Steps to Responding to a CFPB Investigation (cont'd)

Step 7: Production Considerations -

- The CID instructions will cover specifics regarding production formats and logistics.
- Material that is withheld based on asserting a privilege is required to be identified on a privilege log.

Key Steps to Responding to a CFPB Investigation (cont'd)

Step 8: Consider Appropriate Follow-up -

- Client Focused
  - Compliance Audit and Corrective Steps
  - Coordination related to non-CFPB investigations
  - Market Specific Focus
- Advocate to the Bureau
  - White Papers (Tell your side of the story)
  - Presentations / Meetings
  - Introduction to the Market

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Practical Tips to Survive an Investigation

Understand Inherent Risk

- Nature and structure of products
- Consumers to whom products are marketed
- Marketing methods
- Ongoing customer relationship
- Complexity of organization
- Other factors
  - Legal and regulatory landscape
    - Company specific
    - Market specific

Take Steps to Control and Mitigate Risk

- Board of directors and management
- Authority and accountability for compliance
- Compliance risk management program and oversight
- Product system development and modification
- Training
- Complaint management
- Other factors
  - Service Provider Relationships

CFPB and Service Providers

Under the CFPA, “Service Providers” may be liable for acts and practices that violate the law or assist others in doing so. The CFPB recommends that supervised financial institutions take steps to ensure that business arrangements with service providers do not present unwarranted risks to consumers. According to the CFPB, these steps include:

1. Due Diligence;

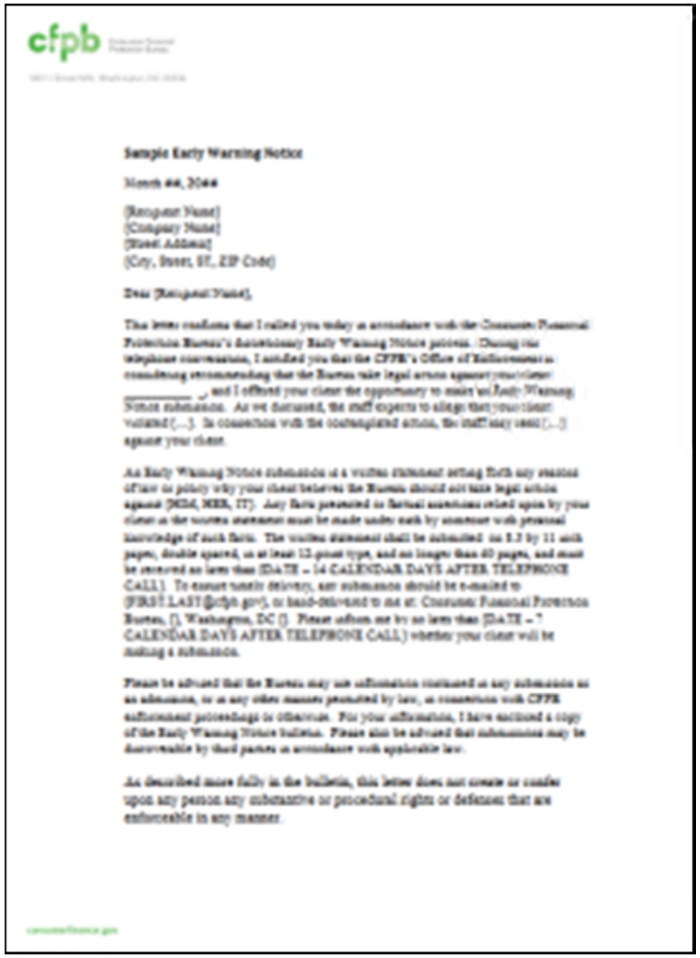
2. Requesting and reviewing the service provider’s policies, procedures, internal controls, and training materials;

3. Appropriate contract provisions;

4. Internal controls and on-going monitoring; and

5. Taking prompt action to fully address any problems identified through the monitoring process.

CFPB Early Warning Notice of Potential Enforcement



- The *Early Warning Notice* is not required by law, but CFPB believes it will promote even-handed enforcement of consumer financial laws.

- The decision to give notice in particular cases is discretionary and will depend on factors such as whether prompt action is needed.

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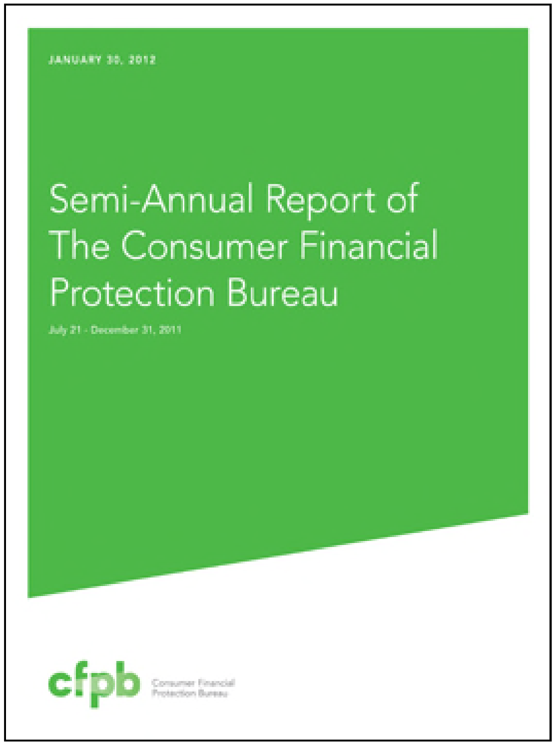
What to Watch For in the Months Ahead

- Next CFPB Semi-Annual Report expected by end of July
- CFPB 1st Anniversary July 21, 2012
- Voluntary disclosures of

  Non-public CFPB Investigations
- Announcements of settlements

  or enforcement actions
- Examinations of supervised entities



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