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CFPB WATCH

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Regulatory hustle: Bushels of lending rules up for comment

Call it the serious scramble, the desperate dash or the frenetic foot race, but whatever phrase you use, it somehow doesn't capture the reality of the furious push by lawyers in the banking and financial regulatory community, as they hustle to file comments on a raft of proposed CFPB rules.

With some deadlines for comments having just passed and with others looming just around the corner, the top honchos and hired guns for the financial services industry, along with consumer advocates, have little time to think of anything but how to respond to the CFPB's voluminous, complicated proposed rules that have far-reaching implications for their businesses, for consumers and for the economy.

Commenting to *CFPB:WATCH*, Laurence Platt of K&L Gates said the CFPB "is operating at a level, at a velocity, that's too fast for the industry to be able to digest. There is just so much out there, it is very hard to figure it all out."

Platt worries about the fallout from the process. "They [the proposed rules] are well-intentioned and many of the provisions may even be reasonable," he said. "But transparency requires lenders to be able to implement the policies and for their [document production] departments to be able to produce the forms. It is an incredible amount of requirements in a very short period of time. And it's really straining the ability of the industry to be able to digest, evaluate and implement everything."

Diane Thompson, a veteran advocate for low-income homeowners and of counsel to the National Consumer Law Center, said that the requirements of the Dodd-Frank Act have put the CFPB "under the statutory gun—the sheer volume of pages is staggering to read. We're up to thousands of pages. It is very technical. We are all trying to digest and understand what they have done and make sure they have done what they think they have done, and then think about whether or not that is what Dodd-Frank contemplated or whether it makes sense. It is a scrambling time for all of us."

Clearly it has been just as intense inside the CFPB, which is responding to the requirements in Dodd-Frank to get its proposals out so that comments can be filed and considered in time for the agency to issue final rules early next year to meet its own statutory deadlines. In fact, some observers, even while disagreeing with some aspects of the proposals, are blown away that the agency, which has only been in existence since July of last year, has managed to put out so many proposals.

"Just thinking about the volume of data that they have pushed out in the last six months is mind-boggling," Jeffrey A. Arouh of McLaughlin & Stern in New York, said in an interview with *CFPB:WATCH*. "They were under some statutory deadlines to produce some information that I never thought they'd be able to meet. And lo and behold they have done it."

A quick rundown of some of the CFPB's proposed rules at the heart of all this activity, along with the comment deadlines, follows:

- The comment period on the Information Quality Guidelines that deal with CFPB's public database on mortgage complaints closed on September 4;

- The comment period on the agency's proposed rule on high-cost mortgages closed on September 7;
- Comments on two complex mortgage servicing rulemakings, one under Regulation X and the other under Regulation Z, must be received by the agency by October 9;
- Comments must be filed by October 15 on a proposal to require mortgage lenders to provide home loan applicants with copies of written appraisals and other home value estimates;
- Comments to the CFPB and several other agencies on appraisals for higher-risk mortgage loans also must be filed by October 15;
- The comment period on the rule on loan originator compensation closes on October 16;
- Comments for most provisions of the proposal dealing with the integration of mortgage origination disclosures under the Truth in Lending Act and the Real Estate Settlement Procedures Act—perhaps the most complex and sweeping of the pending rulemakings—are due November 6.

The far-reaching significance of these rules—designed to help consumers make informed choices—is clear to critics, who worry about unintended consequences of the proposals, and to supporters, some of whom wish the agency had gone even further to help consumers as they wrestle with their mortgage options. But whichever side they represent, the advocates recognize that these rules, when combined, are likely to reshape the consumer mortgage industry for many years to come.

Perhaps because of those sky-high stakes, some critics contend the agency has overreached. Platt pointed to the mortgage servicing rules and charged that it looked like the CFPB is trying to use the $25 billion global settlement reached in February between 49 state attorneys general, the Justice Department, HUD and the five largest mortgage servicers for abusive mortgage practices as a template for its proposed actions.

"Part of the [CFPB's mortgage servicing] proposal is an attempt to codify the global foreclosure settlement," Platt said. "That wasn't in the statute either directly or indirectly, but they are trying to squeeze authority under this very, very squirrelly delegation of authority in the statute. Nothing mandated that. It is just their own attempt to expand their jurisdiction as far as they can."

Thompson disagreed and said such a characterization overlooks the language in the Dodd-Frank law that provides wide discretion to the CFPB. "The statute gives them incredibly broad authority," she said in an interview with *CFPB:WATCH*. She noted the language of the pertinent section of the law said that "economic stabilization" will be enhanced by regulation of residential mortgage credit, and it is the job of CFPB to be the regulator of that market.

"The Bureau is given broad authority to do whatever it thinks it ought to do to further those purposes," she said. "It can really do anything that it thinks is sensible. If you are trying to get at practices related to residential mortgage credit, and we're living through the largest foreclosure crisis that the country has ever seen, with widespread evidence of servicing abuses, I think it is a no-brainer that [the CFPB] address servicing abuses."

–*Kirk Victor*

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CFPB staff on the move to Indian Country

The CFPB has dispatched consumer-protection staff to Arizona and New Mexico amid reports that fraudsters are on the prowl in Indian Country trying to siphon away money from the Native American beneficiaries of large financial settlements involving tribal lands.

Several long-standing legal disputes between Native Americans and the federal government over mismanagement of lands or loan programs were resolved after President Barack Obama took office, and the money from some of them is just beginning to get into the hands of the people who were the victims.

"There are already some scams that are popping up," CFPB Director Richard Cordray told legislators on Capitol Hill last week. "When people know that funds are flowing, they try to get their hands on them."

The settlement in the *Cobell v. Salazar* lawsuit, which alleged that the U.S. Interior Department mismanaged tribal lands and trust funds that it controlled, is the biggest, at $3.4 billion, with the funds expected to be disbursed to some 500,000 individual Native Americans. The federal government took the lands under the Dawes Act of 1887, when Congress divided lands owned by Indians into parcels and leased out the land for mining, livestock grazing, timber harvesting and drilling for oil and gas. The Indians alleged they had received much less money from the government-managed trust funds than they should have received. Each claimant will receive a check for at least $1,000, plus additional sums based on how much land their families own. In the spring they were told the checks were almost in the mail, but recently learned that an appeal by one class member to the Supreme Court could delay the payment for a year or more.

The settlement in a second, separate lawsuit brought by 44 tribes totalled about $1 billion. The Northern Cheyenne tribe of Montana, for example, was awarded $50 million, and last month gave out checks of $2,000 each to some 10,522 tribal members, according to the Billings Gazette.

A third lawsuit, *Keepseagle v. Vilsack*, resulted in a $760 million settlement to resolve claims that the U.S. Department of Agriculture discriminated against native Americans. The beneficiaries are farmers, many of whom have seen their crops wither this summer in the heat. Last month lawyers told the recipients their payments were being rushed to them because some are in desperate straits because of the drought. Some will receive payments of up to $50,000 very soon; many will receive some money now and more later, depending on the extent of their damages.

In a Senate banking hearing last week, responding to a question by U.S. Sen. Daniel Akaka (D-Hawaii), Cordray said the CFPB had been alerted to the problems by "a number of senators and others," who had urged the agency to take action. He said the workers being sent are specialists in consumer education and financial literacy.

"And we're coordinating with others, including others in the federal government and locally to figure out how we can best avoid what would be a tragedy [for] people who have fought to receive funds because they were wronged," Cordray said, adding that there have been concerns raised of "fraudulent operators who are aggressive with their scams."

Last year the Securities and Exchange Commission issued an alert to claimants, warning them that they might become victims of investment frauds.

–*Kirstin Downey*

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A critic's view: The CFPB has fatal flaws

A new economics paper from George Mason University touches on a sensitive issue in a politically charged season. "Consumer Financial Protection Board: Savior or Menace?" may accept the notion that financial reforms of some type were overdue, but the title is rhetorical. Author Todd Zywicki sees no redeeming features — none, nada, zip —in an agency that, by his lights, actually menaces the consumers it is supposed to rescue.

Zywicki is not the first critic to level complaints about the CFPB, but 12 months into its existence he musters an argument rooted in his own experience in consumer protection. A former director of the Federal Trade Commission's Office of Policy Planning from May 2003 to August 2004 (and immediate successor to Texas Senate candidate Ted Cruz), Zywicki charges that the CFPB ignores a century of experience in sound regulatory architecture.

The flawed structure in regulations invites a raft of problems, he warns. Some are already visible in cash remittance regulations expected to saddle providers with more than 7 million hours devoted to compliance and mortgage disclosure rules that riled even Habitat for Humanity.

"The CFPB does the same thing that the FTC does," Zywicki told *CFPB:WATCH*.

The difference lies chiefly in accountability. The FTC operates subject to restraints by having a bipartisan commission and the means by which its chairman can be removed in extreme circumstances. But an autonomous CFPB director is accountable to no one, not the Federal Reserve that houses the agency, not Congress or the President. Zywicki calls this a recipe for unintended consequences. Advocates including Elizabeth Warren cite such independence as a way to rule out manipulation by regulated firms, or regulatory capture. *Au contraire,* says Zywicki. If regulatory history means anything, then the potential for regulatory capture rises when accountability is weak or, in this case, non-existent, he wrote.

As examples of captured agencies, Zywicki cites the old Interstate Commerce Commission and the Civil Aeronautics Board, both of which were ultimately shuttered.

On this point Zywicki has reached the same conclusion as Republicans in Congress, who have stressed this point repeatedly in hearings on Capitol Hill. Democrats typically respond by pointing out that CFPB Director Richard Cordray and other agency officials have been called to Congress to testify about the agency's workings repeatedly. At last week's Senate Banking hearing examinining the agency's accountability, Democratic lawmakers pointed out that CFPB officials had testified to Congress 26 times in the past year.

Some progressives may argue that the agency's complete independence and good people guarantee good results. "It's a seductive mindset but history has proven it wrong," said Zywicki. "It's naïve to create unaccountable agencies, put good people in place and expect them to work just fine."

If the CFPB structure is superior as its backers insist, then what about the FTC, which operates in the old fashioned way? "Basically, if you want to say the CFPB has got regulation right you are saying implicitly that the FTC has been doing it wrong for 100 years," said Zywicki, the George Mason University Foundation Professor of Law and editor of the Supreme Court Economic Review. The question supporters of the CFPB must ask, Zywicki said, is whether to completely restructure the FTC along the lines of the brand new agency. "Why are they not also saying that the FTC consumer protection mission has intrinsically failed?" he said. "I don't think that's plausible."

Citing history, the paper pulls no punches. "Although touted as a great leap forward for consumer protection, in fact the institutional design of the CFPB is a great leap backward: into the principles that animated agency design in the New Deal and post New Deal era— but which were abandoned in the 1970s in a bipartisan effort to rectify their deleterious effect on the American economy."

It's simply archaic, he wrote. "In short, the CFPB's institutional design can be seen as the revenge of Richard Nixon: the return of a discredited view of agency design that, like a creature from Jurassic Park, has emerged as if frozen in amber during the Nixon administration and thawed out today without any recognition of the reasons why this model of regulation was abandoned."

Mortgage simplification had a chance to prove the virtue of improved consumer financial protection, but instead the CFPB's proposals are overly complex and contain provisions, such as limits on balloon payments or requirements for financial counseling whose rigidity may harm consumers. "The CFPB flubbed it," he said.

In the right hands it might have been different. "The FTC was the natural place to put this whole project," he told *CFPB:WATCH*. "It has expertise in consumer protection." There is nothing fundamentally unique about consumer protection in financial services that's different from other things that the FTC does, Zywicki insists. Regulatory issues are the same from competition to information economics to how consumers make decisions.

As another alternative, although less appealing to him than the FTC, Zywicki would favor a consumer protection bureau housed within the Federal Reserve steered by a director subject to oversight by the Fed board. Accountability to the Fed would promote safety and soundness and remedial steps if the CFPB gets off track; this could operate more quickly and directly than the Financial Stability Oversight Commission that now has the authority to overrule CFPB actions.

Proponents of bolder financial regulation, however, counter that the FTC and the Federal Reserve both had their chances to impose tighter consumer protections in the years before the financial meltdown of 2008, but chose not to do so.

And so the country ended up with the CFPB—which Zywicki considers the worst possible solution.

"The cost of this historical amnesia is likely to be high," he warned in his paper, especially for those who can afford it least. Far from the solution it was touted to become, Zywicki labeled the CFPB "a repeat of the destructive regulatory philosophies of the past, with disastrous results for consumers and the economy, and especially low-income consumers and other vulnerable consumers with the fewest credit choices."

–*S.L. Mintz*

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CFPB pondering new rules on student lending

The CFPB's leadership has called student loan debt its second-biggest problem, after issues surrounding mortgage servicing. At a conference in Chicago last month, CFPB Student Loan Ombudsman Rohit Chopra suggested that it might be necessary for the country to impose some of the same new rules it is considering on the mortgage sector to the student loan market. He said the agency has seen parallels between mortgage servicing problems and student loans, with borrowers in both areas reporting what he called "runaround and frustration."

He said that the Federal Reserve has suggested in the mortgage arena that loan quality could be improved by requiring other parties to a loan other than the borrower—the securitizer and the originator, in the case of mortgage loans—to share part of the default risk. A similar strategy for student loans could provide an "incentive" to making better loans, he said. Chopra suggested that responsibility for repayment of school loans could be spread among "schools, students, lenders and taxpayers."

He also suggested that it would be helpful to find ways to spur the student loan refinance market. He said that many students are saddled with loans at 8.5 percent interest, but if they could refinance to today's lower interest rates, they would find it easier to repay the loans. "It would be helpful to determine impediments to vigorous competition in the student loan refinance market," he told the Congressional Forum on Student Loans.

The conference was held in the Chicago city council chambers, and was attended by U. S. Rep. Mike Quigley, Rep. Jan Schakowsky and Sen. Dick Durbin, all of Illinois. Charlie Evans, associate vice president of academic affairs at the University of Illinois, gave an overview of student financial aid, and several students who had grappled with heavy school loans described the problems they face and fear.

Alex Brooks, of Normal, Ill., said he studied computer networking at ITT Technical Institute, racking up almost $40,000 in debt, but when he graduated and began applying for jobs, he learned that he had not received the certifications necessary to get hired. His education was useless, he said he learned, and he now supports himself by driving a bus for a non-profit group.

"This degree was supposed to change my life, and it did," he told the *Chicago Tribune*. "I mean, it honestly ruined it."

Chopra pointedly noted that Illinois Attorney General Lisa Madigan had filed a complaint against a for-profit college in Illinois that he said cost students $70,000 for a three-year criminal justice program but was not regionally accredited, leaving students with heavy debt upon graduation but without the correct credential to be hired when they were done.

Some students received loans at up to 18 percent interest, Chopra said.

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Small banks not satisfied with easing of money transfer rules

You would think the CFPB would get some applause for its recent move to ease the burdens on small banks and other small financial firms by exempting many of them from its rule on international money transfers. Instead of loud cheers, however, the agency's action is seen by some representatives of small banks as not going far enough.

These wire transactions involve tens of billions of dollars moving from the United States to foreign countries each year. Such so-called remittance transfers had generally escaped federal consumer regulatory oversight until the CFPB was created last year. Last month, the agency announced that it will exempt firms that handle 100 or fewer of these remittances each year from the rule since such institutions are not providing the service in the "normal course of business," as the law requires.

"We recognize that in regulations, one size does not necessarily fit all," Richard Cordray, the CFPB director, said. "The final remittance rule will protect the overwhelming majority of consumers, while making the process easier for community banks, credit unions, and other small providers that do not send many remittance transfers."

The rule, which will go into effect on February 7, 2013, requires firms that provide remittance transfer services to disclose, upfront, the fees, the exchange rate and the amount the recipient of the transfer will receive after taxes and other charges are deducted. Disclosures must generally be provided when the consumer first requests a transfer and again when payment is made. The rule also provides consumers with cancellation rights.

Some small banks and other institutions contend the rule is burdensome. Cary Whaley, vice president for payments and technology policy at the Independent Community Bankers of America, said in an interview with *CFPB:WATCH* that the agency's move to provide more exemptions, while a step in the right direction, does not go far enough. "We appreciate the fact they developed a safe harbor threshold; we are certainly thrilled with the fact that they raised it from 25, which was a non-starter, to 100," he said.

ICBA had argued for a larger threshold—around 600 transactions per year—in order to give banks incentives to continue offering this service. "Right now, when a bank gets to 101, it could be 101 and done," he noted, though he added that the 100-transaction exemption covers about three-quarters of all banks.

Beyond the question of the exemption threshold, the rule also puts the onus on the banks for global compliance so that they are liable for actions of others that aren't even bound by the rule, Whaley said. Even if the average bank charges between $40 and $45 for a wire transfer, the gross revenue that this business would generate for an exempt bank would be $4500—hardly enough to justify the burden of global compliance, he added.

Even more striking, Whaley said, is that banks are liable for consumers' errors. That is, if a consumer transposes numbers and provides an incorrect account number to which the funds are to be transferred, or if a consumer engages in fraud by directing that money be sent to one account only to return later and say it should have gone to another account, then the bank is on the hook. It must refund the money and collect from the international recipient bank, Whaley said. In the case of fraud, the bank is out of luck when it seeks to retrieve the money from the account to which it was transferred, only to find that it was closed, as part of the scheme.

Even without fraud, when "both banks do everything the customer asked them to do but the customer either made a mistake or changed their mind, the banks either have to provide a refund to the sender or re-send that transaction, and that puts a lot of liability on the bank and that liability gets passed on to consumers as far as costs," Whaley noted.

But given that exposure why should a bank remain in this line of business at all? "Banks are going to do some soul-searching and they are going to have to look at this heightened level of risk [against] just how valuable those customer relationships are to the financial institution," the ICBA vice president said. But if banks remain in the business and get hit with such losses, then he said, "the customers who don't make those mistakes or don't cause that fraud are going to have pay for those who do."

Finally, Whaley said that banks do not object to disclosure of fees and the exchange rate to their customers, but it is unfair to force them to compute taxes imposed by the receiving country. There is no easy way to make that calculation, he said. If the rationale for the disclosure is to enable consumers to comparison shop for the firm with the best rate, then foreign countries' taxes will be the same for all financial firms that provide these services. "For all the infrastructure needed to be built [for this information], you have to wonder if it will provide that much net benefit to the shopper," Whaley said.

Ultimately, the four fixes that Whaley said that ICBA would like to see in the rule include: a phased-in approach to provide the time needed for the banks to get up to speed; elimination of strict liability that makes them liable for customers' mistakes; elimination of the requirement that banks find and compute foreign taxes; and access to the list that the CFPB is planning to compile of countries that are exempt from the disclosures.

Even as Whaley stressed the need for modification of the rule, Cordray recently testified on Capitol Hill that he and the agency are all ears in listening to small businesses and are sensitive to the impact CFPB rules can have on smaller banks and credit unions. During his testimony before the Senate

Banking, Housing and Urban Affairs Committee on September 13, Cordray emphasized that "smaller community banks did not cause the financial crisis" and "we want to be mindful" of their position as the agency implements rules. He singled out the expanded exemption of smaller firms from the remittance rule and said the CFPB is willing to tweak other rules.

Despite those efforts and good intentions, smaller institutions clearly remain wary of Washington's newest watchdog.

–*Kirk Victor*

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PEOPLE

Leonard Chanin

As the Consumer Financial Protection Bureau enters its 14th month, one of its senior staffers in the regulatory area has left for private practice, and the agency reshuffled some staff in the wake of his departure. Leonard Chanin, a key player in the middle of a frenzy of the agency's non-stop activity in writing rules, opted to return to private practice after serving as assistant director of the office of regulations. He has rejoined his old law firm, Morrison & Foerster. At CFPB, Chanin was the point man for the office that has produced a raft of regulations in recent months.

Emphasizing Chanin's regulatory expertise, Rick Fischer, co-head of the Financial Services Practice at Morrison & Foerster, said in a statement: "Leonard will return to us with important insights and broad experience on consumer regulation, having been at the center of regulatory developments in a time of great change in this important area."

Prior to his work at the CFPB, Chanin was deputy director in the Division of Consumer and Community Affairs of the Federal Reserve Board, where he supervised the promulgation of consumer financial protection regulations.

Kelly Thompson Cochran

Kelly Thompson Cochran, who had been Leonard Chanin's deputy, has been promoted to be the acting assistant director for regulations. As deputy she oversaw the team developing a range of rules that implemented the Dodd-Frank Act—including regulations on remittances, mortgage servicing, mortgage disclosures, mortgage loan originator compensation, high-cost mortgages, and appraisals.

Her earlier work at the agency includes supervising project teams and helping to transfer staff from several other federal agencies as the CFPB was getting started. She came to the CFPB via the Treasury Department, where she advised office and departmental leadership about consumer protection issues and Dodd-Frank's requirements. Before her government service, Cochran was with Wilmer Cutler Pickering Hale and Dorr, where she focused on consumer financial regulatory issues before joining Treasury in November 2009.

Chris Lipsett

Chris Lipsett comes to the CFPB from Wilmer Cutler Pickering Hale to be senior counsel in the Office of the Director. At Wilmer Cutler, Lipsett's practice focused on regulatory, compliance, counseling, litigation, and transactional matters in the financial services industry, with an emphasis on credit cards and other consumer products. He has represented financial institutions on consumer protection and disclosure issues, product development and design, network issues, pricing and other subjects. Lipsett also represented financial services clients in litigation in federal and state courts.

Stephen Van Meter

Stephen Van Meter has taken a slot as deputy general counsel, after having served as assistant general counsel for policy since June 2011. In that earlier role, he helped to lead the Legal Division's Law and Policy Group, an office that provides legal advice to the CFPB leadership. Before his arrival at the CFPB, Van Meter worked in the Office of the Comptroller of the Currency for nearly 14 years during which, among other things, he provided legal and policy advice on a wide range of consumer protection issues. Van Meter also has served as a senior attorney in the Legal Division at the Federal Reserve Board, and was an associate at the Boston law firm, Ropes & Gray.

Delicia Reynolds Hand

Delicia Reynolds Hand is the new staff director for the Consumer Advisory Board and Councils, and will plan, direct, coordinate and evaluate the CFPB's advisory boards and councils, including the Consumer Advisory Board, the Community Bank Advisory Council and the Credit Union Advisory Council. She is principal advisor to the Consumer Advisory Board chair and works with senior management to determine the priorities, objectives and policies of these advisory boards and councils. Before joining the CFPB, Reynolds Hand was the legislative director for the National Association of Consumer Advocates, general counsel at the Center for Community Change, and senior counsel to Rep. John Sarbanes, D-Md.

Ronald Rubin

Ronald Rubin, who had been an enforcement attorney in the CFPB's supervision, fair lending, and enforcement division, has left the agency to join Hunton & Williams in Washington.