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CLIENT UPDATE

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This has been quite a year. The industry has had to deal with HMDA implementation, the TRID rule (including commenting on the CFPB's proposed amendments to the rule), and many other issues. But it looks like 2017 may be interesting as well.

Many of you have been asking me about the potential effects of the election on the CFPB. I've summarized below some possible changes I believe may be made to the CFPB's structure and activities. This also includes a brief summary of the pertinent provisions of the proposed Financial CHOICE Act, which may provide a blueprint for legislation by the next Congress. In addition, recently the CFPB released its Fall 2016 regulatory agenda, issued enforcement actions against three reverse mortgage lenders based on deceptive advertising, and set forth its 2017 fair lending priorities, which I also briefly address below. There's a lot to cover, so let's get started.

I. The Structure of the CFPB

A. Will the CFPB be Eliminated?

Many of you have asked me, what do the election results mean for the CFPB, or for the TRID rule? The GOP platform calls the CFPB a "rogue agency" and for the CFPB to be "abolished." President-Elect Trump said during the campaign that his plans for the Dodd-Frank Act would be "close to dismantling" the legislation. Also, Senator Richard Shelby, chair of the Senate Banking Committee has reportedly stated that he would like to eliminate the CFPB or bring it under the congressional appropriations process for its budget. Senator Shelby is also reported to have stated recently that he would like to repeal the Dodd-Frank Act in its entirety.

However, I believe it is likely that the next administration and Congress will not eliminate the CFPB, but instead seek changes to the CFPB's structure and subject its budget to the congressional appropriations process. It is a relatively popular agency with the public, and the optics of eliminating an agency designed to protect consumers may not square well with Trump's populist campaign. In addition, with changes to the CFPB's structure and budget, the new administration and Congress could solve most of their concerns about the agency, such as its active rulemaking

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and enforcement agenda. If they actually eliminated the CFPB, the rulemaking and enforcement functions for consumer protection statutes would go back to the prudential regulators, which have also stepped up their enforcement after the financial crisis. Eliminating the CFPB does not eliminate the consumer financial protection laws. For these reasons, I believe the next administration and Congress are more likely to change the CFPB into a board or commission and place it under the congressional appropriations process.

Rep. Jeb Hensarling's Financial CHOICE Act (H.R. 5983), which he introduced this year, includes these two proposed changes. Rep. Hensarling is very recently reported as stating that he's going to spend the break working on the legislation. It appears this legislation is a starting point for the next Congress' plans for the CFPB, so it would be worthwhile to review some of the pertinent provisions.

B. The Financial CHOICE Act Could Serve as a Blueprint for Structural Changes to the CFPB: A Brief Summary of the Proposed Legislation

CFPB Structure. The Financial CHOICE Act would revamp the CFPB into the "Consumer Financial Opportunity Commission" (the Commission), moving it outside of the Federal Reserve (currently it is an independent Bureau in the Federal Reserve System) and subjecting it to appropriations. It would be an independent agency led by a five-member commission. The commissioners would be appointed by the President, require consent of the Senate, and would be bi-partisan with only three members from any one political party. The commissioners would also be required by statute to "have strong competencies and experiences related to consumer financial products and services," and would be removable only for cause (inefficiency, neglect of duty, or malfeasance in office). The bill would add to the CFPB's current statutory purpose the objectives to "increase competition and enhance consumer choice." There would also be an independent Inspector General for the Commission.

Enforcement Changes. The bill would have some other amendments to the CFPB's enforcement authorities that are favorable to the industry. Significantly, the bill would eliminate the "abusiveness" prong of the CFPB's UDAAP authority, leaving the Commission with authority only for unfairness and deception. It would add a provision to allow the subjects of an administrative action for a cease and desist order or a penalty to remove the action to federal court. In addition, the bill would add a provision that expressly specifies that the three-year statute of limitations for the agency's civil actions would also apply to administrative actions.[1] The bill would

[1] Remember, this was an issue in the *PHH Corp. v. CFPB* case, because the current statute does not clearly specify a statute of limitations for the CFPB's administration actions. The D.C. Circuit's recent

also allow 30 days for the "meet and confer" after receipt of a civil investigative demand (CFPB rules currently provide only 10 days after receipt, which has been a source of frustration for the industry) and allow motions to set aside a CID to be filed in federal court. Finally, the bill would require funds from the CFPB's Civil Penalty Fund that are remaining after payments to victims to be paid to the U.S. Treasury.

Supervisory and Other Activities. The bill would also affect the CFPB's supervisory and other activities. The bill would raise the threshold for the agency's supervisory authority over depository institutions to $50 billion or more in assets (the current threshold is $10 billion). For the CFPB's consumer complaint database, the agency would be prohibited from making any complaints public in the database until it verified "the accuracy of all facts alleged in such complaint."

Rulemaking Changes. The bill would also have changes to the CFPB's rulemaking and interpretive authority. It would require the Commission to consider the safety and soundness impacts of its rules. In addition, the bill would create an Office of Economic Analysis that would be required to: review all proposed rules and regulations of the Commission; assess their impact on "consumer choice, price, and access to credit products; and publish a report in the Federal Register. For any rules issued by the agency regarding payday loans, auto title loans, and other similar installment loans, the bill would allow states and tribes to obtain five–year renewable waivers from any rules issued by the Commission. It would also repeal the CFPB's indirect auto loan discrimination guidance (Bulletin 2013–02) as well as the agency's authority to ban arbitration clauses. Significantly, the bill would also require the Commission to create a process to issue written advisory opinions regarding compliance issues. These opinions would provide a safe harbor. The CFPB would be required to respond to requests for advisory opinions within 90 days.

The bill would also affect the CFPB's new Home Mortgage Disclosure Act (HMDA) rule. The bill would require the Government Accountability Office to conduct a study and report to Congress on whether the data required to be publicly disclosed under the HMDA rule could expose consumers to harm, such as identity theft or unfair or deceptive marketing, and the legal liability to the Commission from such harm. The bill would also prohibit the public disclosure of the new data points required under the CFPB's HMDA rule by the Commission or any financial

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opinion (which is effectively stayed since the CFPB recently petitioned for an *en banc* rehearing) held that the CFPB's administrative actions are subject to the statutes of limitations of the specific statutes it is enforcing. This legislation would certainly clarify the issue for statutes that may not specify a statute of limitations, which arguably includes the CFPB's UDAAP authority.

institution. The bill would also create a new small-depository institution exemption from HMDA, which would apply to depository institutions that originated less than 100 closed-end loans or 200 open-end loans in each of the past two calendar years from the HMDA requirements that apply to those types of loans.

Other Changes. While not affecting the CFPB, it is worth noting that the bill would revise the "points and fees" definition for purposes of the QM rule's 3% cap to exclude title charges paid to affiliates under affiliated business arrangements, and escrow charges for insurance and taxes. In addition, the bill would require the Treasury Secretary to conduct an annual study on ending the conservatorship of Fannie Mae and Freddie Mac.

Starting Point. This is only proposed legislation in the current Congress, but it is likely a blueprint for the changes to the CFPB sought by the next administration and Congress. As noted above, it is reported that Rep. Hensarling is continuing to work on this legislation. Thus, it is certainly possible that some of these provisions could be expanded and strengthened or not make it into the final legislation. And given the Republican majorities in Congress and the Republican administration, the chances of such legislation becoming law have increased.

II. The CFPB's Rulemaking and Enforcement Agenda

A. How Can the Next Administration or Congress Affect the CFPB's Rules?

Many of you have asked whether the new President or Congress could stop the CFPB's current and future rules. The next administration or Congress could potentially accomplish this in a few ways, which I'll discuss below.

1. Future Rules

As you may remember, during the campaign President-Elect Trump called for a moratorium on new regulations, and has made similar comments after his election. To accomplish this, the President could potentially issue an Executive Order that directs all of the executive agencies to cease rulemakings. Whether this authority extends to, or could legally compel, the independent financial regulatory agencies is uncertain and an issue the next administration would need to consider.

A possible alternative would be to slow down or effectively halt the CFPB's rulemaking by subjecting it to the Office of Management and Budget (OMB) review process. Under Executive Order 12866, executive agencies are required to submit their proposed rules to OMB for review, in part, "to ensure that new or revised

regulations promote the President's priorities." Currently, the order exempts "independent regulatory agencies" from this review. The definition of "independent regulatory agency" cross-references the definition of this term in the Paperwork Reduction Act under 44 U.S.C. § 3502, which the Dodd-Frank Act amended to expressly include the CFPB. Because of this, currently the CFPB's rules are not subject to OMB review. President Trump could potentially issue a new order that expressly includes the independent regulatory agencies, including the CFPB. Whether the President has the authority to subject independent agencies to OMB review is the subject of some debate, but it's possible there is sufficient legal authority for this. And considering that OMB is an office of the White House, the review process could be made to be arduous and lengthy.

Congress can also play a role in this moratorium. Congress can essentially nullify the CFPB's future rules (and some past rules) under the Congressional Review Act. This statute gives Congress 60 days to review a major rule (which is generally a rule with an annual effect on the economy of $100,000,000 or more) and adopt a resolution preventing the rule from becoming effective. The resolution also prevents the agency from issuing a substantially similar rule in the future, unless it is authorized by a new statute. The timing of these 60 days is interesting because it is essentially 60 days in session, which means this period could extend back through this year. Some who have counted this period have determined it can extend as far back as May 2016, meaning this could apply to past rules, such as the CFPB's prepaid card rule. The next Congress could also enact amendments to the Congressional Review Act to expand its opportunity for review and disapproval of the previous administration's rulemakings.

2. Current Rules

President-Elect Trump has also talked about "dismantling" the Dodd-Frank Act, and Republicans in Congress have also expressed a desire to repeal the Dodd-Frank Act, which could include the CFPB's rules promulgated under this statutory authority. The next Congress could force the CFPB to repeal these rules by amending the underlying statutes to mandate their repeal or to repeal the statutory authority for the rules. Alternatively, Congress could amend the rules by making changes to the underlying statutes.

I think it's unlikely that TRID, ATR-QM, or the other mortgage rules will be totally repealed. Implementation of the rules is basically complete, and it cost the industry a substantial amount. It could also cost a substantial amount to revise software systems to "un-implement" them. Specifically with respect to TRID, a repeal could require the industry to "re-implement" RESPA 2010 and the old TIL. This may be an

undesirable, as well as a costly, outcome. Further, there are some industry studies that have shown positive results from the TRID rule. The next administration and Congress may not view TRID as critically as the other mortgage rules, because TRID is a disclosure rule. Mandated disclosure is typically viewed as the method of consumer protection that is the least disruptive to the market, unlike rules that specifically address terms and pricing of financial products.

It is possible that the next Congress or administration may seek amendments to particular provisions of the current mortgage rules. This is especially true for aspects of these rules that they view as restricting lending or that have been the subject of industry criticism. For example, the next Congress could amend TILA to make changes to some aspects of the QM rule, such as the addition of exceptions for portfolio lending and the removal of affiliate fees from the 3% points and fees cap. The next Congress could also seek to amend TILA to address the liability and cures for TRID.

Also, the next Congress could potentially seek changes to the CFPB's new HMDA rule, because the new data collection requirements are not effective until January 2018. Remember that the Republicans in Congress have expressed strong criticisms of the CFPB's data collection activities in the past, raising consumer privacy concerns. Consumer privacy is definitely a concern with the new HMDA rule, especially given the sensitivity of the new data points and recent data breaches of private institutions and government agencies. The Financial CHOICE Act does have some provisions regarding the HMDA rule, as described above, which could also be expanded in final legislation by the next Congress.

Finally, considering that the *PHH Corp. v. CFPB* case remains undecided (pending the CFPB's petition for a rehearing) with respect to the substantive issue of whether RESPA section 8(c)(2) is an exception or an interpretation of the prohibition of section 8, the next Congress could potentially amend section 8 to clarify the issue going forward.

B. The CFPB's Fall 2016 Rulemaking Agenda

Meanwhile, the CFPB recently posted its Fall 2016 rulemaking agenda and a related blog post describing the agenda. Notably, the blog post states that the CFPB submitted its agenda to OMB "in early fall." In addition, the preamble to their *Federal Register* notice for the agenda that is available from OMB also states that the information is current as of October 19, 2016. This means it was likely compiled and submitted before the election. But this still gives us an insight into the CFPB's

future rulemaking plans, and it looks like the CFPB has been planning for an active 2017. I'll summarize some points of interest below.

TRID. The CFPB's agenda confirms that it is actively working on the TRID amendment final rule. The CFPB's blog post states that the, "Bureau is in the process of reviewing comments." The agenda has the final rule scheduled for March 2017. In addition, the CFPB stated in the preamble of the proposed rule that it expects to issue the final rule on or before April 1, 2017. This is likely because the CFPB wants to issue the final rule before the April 1st deadline under TILA (15 U.S.C. 1604(d)) for the final rule to be able to be effective before October 1, 2018.

HMDA. The CFPB's blog post states that they are working on HMDA implementation and on streamlining the HMDA data reporting processes. Significantly, the rulemaking agenda also states that the CFPB identified technical errors and areas of uncertainty in the HMDA final rule, and it plans to issue a proposed rule in March 2017 to make technical corrections and clarify certain requirements in the HMDA rule. Also in March 2017, the CFPB plans to issue a proposed rule to reconcile the race and ethnicity collection requirements under Regulation B and the HMDA final rule.

Non-Depository Lender Registration. The CFPB's blog post also notes that the CFPB is considering whether to require registration of "non-depository lenders." The blog post discusses this in the context of the CFPB's "larger participant" rulemakings, which allow the CFPB to supervise entities in consumer finance markets that are not expressly placed under the CFPB's supervisory authority under the Dodd-Frank Act. For example, the CFPB is considering issuing a rule to allow it to supervise lenders in the auto title loan and installment loan markets. But neither the agenda nor the blog post limits this potential registration requirement to those markets, because it states "these or other non-depository lenders." Based on this language, non-depository mortgage lenders could potentially be made subject to a separate CFPB federal registration requirement, which could be required in addition to state licensing requirements. Note that the SAFE Act licensing and registration requirements apply to individual loan originators, and this CFPB federal registration requirement could apply to the business entities.

Other Rules of Interest. On the CFPB's long-term agenda is a proposed rule to revisit the CFPB's Alternative Mortgage Transaction Parity Act (AMTPA) rulemaking. Remember that on July 22, 2011, the CFPB published an interim final rule under AMTPA to "fill a regulatory gap" created by the Dodd-Frank Act. The CFPB plans to develop a proposal for a broader AMTPA rule.

The CFPB also has several controversial rulemakings in the pipeline. This year the CFPB proposed a rule that would significantly restrict the origination of payday loans and high-cost installment loans, and a rule that would prohibit certain arbitration clauses. In addition, the CFPB started the SBREFA process for its planned proposed rule under the Fair Debt Collection Practices Act (FDCPA). The agenda does not have a timeframe for the issuance of the final payday loan rule, but states that the final arbitration rule is slated for February 2017. The CFPB plans to continue working on the proposed FDCPA rule in 2017, which includes work on first-party debt collection.

In addition, the CFPB is working on other proposed rules, including a rule on overdraft practices, a rule to implement the business loan data collection amendments to ECOA under section 1071 of the Dodd-Frank Act, and, as noted above, a rule to supervise auto title and installment lenders.

As described above, the next Congress may be able to prevent these rules, including the payday loan and arbitration rules, from becoming effective under the Congressional Review Act. The CFPB's blog post is available here: http://www.consumerfinance.gov/about-us/blog/fall-2016-rulemaking-agenda/.

C. Enforcement

I did want to briefly discuss how the next administration or Congress might affect the CFPB's enforcement of consumer financial protection laws. Without any structural changes to the CFPB and with Director Cordray remaining through the end of his term in 2018, I believe the CFPB will continue to be active in its enforcement of the law. Unlike the CFPB's rulemaking activities, the next administration or Congress would have little control over individual CFPB enforcement actions. Perhaps by appointing a different director, they could moderate the CFPB's enforcement activity. Some legal scholars believe President Trump can remove Director Cordray even without a final decision on the constitutionality of the CFPB's structure in the *PHH Corp. v. CFPB* case (an issue in the case is whether the director can be removed without cause). However, whether the administration would actually do this is uncertain, especially if it believes it may have difficulty getting its nominee confirmed by the Senate. In the interim, the Deputy Director of the agency, who is not appointed by the President, would become the acting Director, so this would likely not represent a substantial change in CFPB activities during that time. For this reason, I believe the next administration and Congress is more likely to focus on changing the CFPB's structure, as described above.

If the CFPB is placed under a commission, the commission would most likely need to approve enforcement actions by the agency (or create delegations of authority for such actions). And the Financial CHOICE Act also has some changes to the CFPB's enforcement authorities. This means the CFPB's enforcement activity could be significantly slowed down. But this does not mean there will be no more enforcement. There are still the state regulatory agencies and the prudential regulators, which may fill the void. States have the authority to enforce federal consumer financial protections laws, including TRID and UDAAP, under their own state statutes or the Dodd-Frank Act. In addition, the prudential regulators may be able to continue with their current level of enforcement activity (though the Financial CHOICE Act may affect their structures and budget process as well).

III. CFPB's Reverse Mortgage Advertising Enforcement Actions

Deceptive advertising appears to be on the CFPB's mind. On December 7, 2016, the CFPB issued enforcement actions against three reverse mortgage lenders for deceptive advertising in violation of the Mortgage Acts and Practices - Advertising rule (also known as the MAP rule) and UDAAP. The CFPB determined that among each lender's advertisements and practices, the following representations were misleading and deceptive:

- consumers could not lose their homes
- consumers could obtain a reverse mortgage loan at no cost
- reverse mortgages can be used to eliminate debt, or that the consumer would be debt free
- heirs would be able to keep the home
- consumers would not have to make any payments
- the timeframe to apply for a reverse mortgage loan was limited, and that the consumer's application would be denied if the consumer did not call back by the close of business
- the reverse mortgage loan was from the "United States Housing Department."

One of the enforcement actions cited the lender's advertisements in Spanish as well. In addition, one of the lenders was alleged to have violated the record retention requirement under the MAP rule. The lenders are each required to pay civil money penalties of up to $400,000.

Deceptive advertising has been area of concern for the CFPB. Very recently, on December 16, 2016, the CFPB issued an enforcement action against a payday lender for deceptive online advertising regarding the cost of a service, requiring a civil money penalty of $250,000. Looking back, there have been other CFPB enforcement

actions for deceptive advertising in the mortgage industry. For example, in July 2015, the CFPB took action against a mortgage payment company for deceptive advertisements regarding its bi-weekly payment program, which resulted in a $5 million civil money penalty. And in February 2015, the CFPB issued an enforcement action for deceptive advertising against a prominent lender of VA loans, which resulted in a $2 million civil money penalty.

This should serve as a reminder that lenders should review their advertisements and scripts for potential UDAAP issues. I also want to note that for particular products or representations where there are questions regarding the level of UDAAP risk, consumer testing may serve as a useful tool. As you know, the CFPB used consumer testing for the TRID rule to ensure consumer understanding. And the definitions of "unfair," "deceptive," or "abusive" under UDAAP, in part, are based on the consumer's understanding of the product or practices. For example, whether something is deceptive depends on whether a reasonable consumer is misled or likely to be misled by a representation. Consumer testing that is designed to focus on a consumer's understanding, similar to the CFPB's testing, could be useful to prevent misleading representations or defend against future UDAAP claims. There is another upside to consumer testing to ensure consumer understanding. It can result in advertising and marketing materials that are easier for consumers to understand, which can build trust with consumers. In addition, this type of testing can be done efficiently. It can even be combined with the typical consumer testing used for marketing purposes, which tests for consumer preference. Please let me know if you have any questions about consumer testing. I am available to discuss this further with you.

IV. Fair Lending Issues

The CFPB recently issued a blog post on December 16, 2016 setting forth its fair lending priorities for 2017. The CFPB stated that its areas of focus will include redlining and mortgage servicing. In particular for mortgage servicing, the CFPB essentially stated it would focus on whether some borrowers have more difficulty seeking loss mitigation. The blog post is available here: http://www.consumerfinance.gov/about-us/blog/fair-lending-priorities-new-year/.

Although the CFPB's blog post does not mention the issue of limited English proficiency (LEP) borrowers, I believe this may be an area of focus for the CFPB in the next year. In its most recent Supervisory Highlights (Fall 2016), the CFPB addressed the fair lending issues with LEP borrowers. The CFPB stated that it, "encourage[s] lenders to provide assistance to consumers with limited English

proficiency" and discusses some specific practices the CFPB supports. But the report then discusses the fair lending risks that may be caused by offering products and services to such consumers, and identifies practices of some institutions that posed fair lending risks. Some areas of concern are how products are marketed to LEP borrowers and whether interpreters or translations of documents and disclosures are available. The CFPB also noted that it added questions to its ECOA baseline review modules to include new questions about LEP consumers. The report is available here: http://www.consumerfinance.gov/data-research/research-reports/supervisory-highlights-issue-no-13-fall-2016/.

In addition, this issue was also highlighted by HUD with respect to the Fair Housing Act in September 2016 when it issued its Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency. This guidance also discusses the fair lending risks for mortgage lenders in dealing with LEP borrowers, including issues dealing with the availability of interpreters and document translations.

Considering that both CFPB and HUD specifically addressed this issue in 2016, it appears this is something that mortgage lenders should begin focusing on in 2017. Reviewing policies and procedures, advertising, and translations of documents would be a prudent move this year.

In addition, please also note that on August 30, 2016, the CFPB issued a letter to Services & Advocacy for GLBT Elders (SAGE), an LGBT advocacy organization, in which the CFPB stated that current law supports an argument that the term "sex" under ECOA includes gender identity and sexual orientation. In addition, the CFPB stated that it "recognizes and supports these recent developments in the law" and "regard[s] them as important and relevant to ensuring fair, equitable, and nondiscriminatory access to credit." This essentially means that the CFPB interprets ECOA to prohibit discrimination on the basis of sexual orientation or gender identity. The CFPB also stated to the advocacy group that it would be interested in more information about situations of discrimination on these bases. Unfortunately, it appears that the CFPB has not posted this important letter on its website. Although this was not addressed in the CFPB's fair lending priorities blog post, this may be an issue to consider addressing in policies and procedures.

V. Conclusion

In conclusion, it certainly looks like 2017 will be an interesting year. We have possible changes to the CFPB and the mortgage rules, as well as the threat of enforcement. I look forward to working with you through the many changes ahead. Please let me know if you'd like to discuss any of these issues.