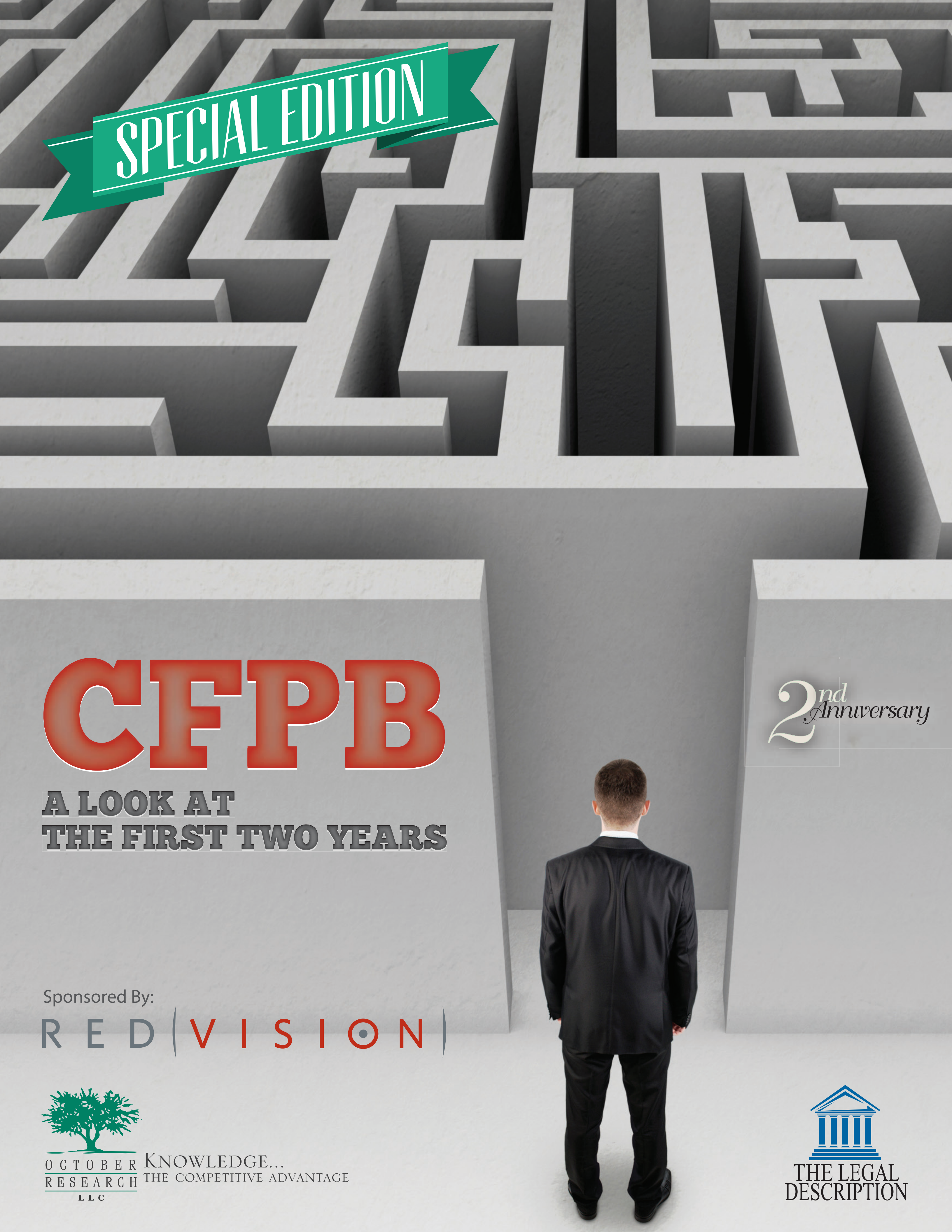

SPECIAL EDITION

CFPB

A LOOK AT THE FIRST TWO YEARS

2nd Anniversary

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THE LEGAL DESCRIPTION

About Us

The Legal Description is a production of October Research, LLC specializing in business news and analysis for the settlement services industry and is published 24 times a year.

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A Note from Our Editor

Dear Readers,

Welcome to a special edition of *The Legal Description*, brought to you by our sponsor **RedVision.**

It has been two years since the Consumer Financial Protection Bureau (CFPB) opened its doors. In that time, a lot has changed. New mortgage forms have been proposed for use at closings; and new lending standards have been finalized and are ready for lenders to implement. The CFPB also effectively changed the lender/title agent relationship when it issued a bulletin outlining financial institutions' responsibility to oversee their third-party service providers. In the midst of all this activity, the CFPB has made great efforts to be a transparent agency. For the past two years, representatives have brought insight to attendees at the National Settlement Services Summit.

Ultimately, the regulatory changes are going to mean closer cooperation between the title and lending industries, and will likely include new technology solutions.

"They are certainly going to have to cooperate a lot more than they have in the past," said **Richard Andreano**, a partner at Ballard Spahr LLP. "[They will have to] be able to communicate electronically, which means their systems are going to need to be compatible, and I think technology is going to be the way to manage this."

With all the moving pieces, the next year will be full of changes.

"I think a year from now, it will be very interesting to see what actually happened," Andreano said. "Next year will be an interesting time to get together as an industry and chat about what's happened."

I believe that as well. Until then, we'll be here to give you the latest on how the CFPB's actions are impacting your business year round.

Enjoy this special edition, and until next time, stay legal.

Andrea Golby

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RED VISION

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LENDER LIABILITY ISSUES START WAVES OF CHANGES IN LENDER/TITLE AGENT RELATIONSHIP

One of the most significant issues the title industry has had to address in the two years since the Consumer Financial Protection Bureau (CFPB) was established is lender liability for its actions. This issue has caused agents and their lender partners to evaluate how to prove that they are doing what the CFPB requires of them and has changed the lender/agent relationship significantly.

THE BULLETIN

On April 13, 2012, the CFPB issued Bulletin 2012-03, clarifying that financial institutions under bureau supervision may be held responsible for the actions of the companies with which they contract. The bureau will take a close look at service providers' interactions with consumers. It will hold all appropriate companies accountable when legal violations occur.

Using outside vendors can pose additional risks, the CFPB stated. A service provider that is unfamiliar with consumer financial protection laws or has weak internal controls can harm consumers. The CFPB wants to ensure that consumers are protected from irresponsible service providers and that banks and nonbanks are contracting with honest third parties.

The bulletin states the bureau's expectation that supervised financial institutions have an effective process for managing the risks of service provider relationships. The CFPB recommends that supervised financial institutions take steps to ensure that business arrangements with service providers do not present unwarranted risks to consumers. These steps include:

- Conducting thorough due diligence to verify that the service provider understands and is capable of complying with the law;
- Requesting and reviewing the service provider's policies, procedures, internal controls and training materials to ensure that the service provider conducts appropriate training and oversight of employees or agents that have consumer contact or compliance responsibilities;
- Including in the contract with the service provider clear expectations about compliance, as well as appropriate and enforceable consequences for violating any compliance-related responsibilities;
- Establishing internal controls and on-going monitoring to determine whether the service provider is complying with the law; and
- Taking prompt action to address fully any problems identified through the monitoring process.

NOT THE ONLY ONE

While the bulletin sent shock waves through both the lending and title insurance community, some were quick to point out it is not the only thing holding lenders responsible for the actions of their service providers.

"Many of us are familiar with the now famous April 2012 service provider memo that we have been trying to understand for almost a year now," said **Frank Pellegrini**, president, Prairie Title Services, and president of the American Land Title Association (ALTA). "But this service provider memo that we are all familiar with was not the first regulatory expression of its kind."

The message that lenders are responsible and liable for the acts of third-party providers has been articulated since 2001, when the Office of the Comptroller of the Currency (OCC) stated in one of its pronouncements that lenders were to ensure that third-party activity is conducted in a safe and sound manner, in compliance with applicable laws, Pellegrini said.

Fast-forward to 2006. Pellegrini pointed out that the Federal Deposit Insurance Corp. issued guidance that stated lenders must understand that while the employment of third-party providers accomplishes certain strategic objectives, it also provides risks. The guidance said this risk must be recognized and effective risk management strategies should be employed.

Pellegrini said that in February 2012, a $25 billion settlement agreement was entered into between several federal agencies and 49 state attorneys general and five of the nation's largest mortgage servicers.

"Then of course, all this culminated in April 2012 with the Consumer Financial Protection Bureau bulletin," Pellegrini said. "But, by that time, the CFPB bulletin shouldn't have taken anyone by surprise."

Shortly after the CFPB bulletin was released, the CPFB entered into enforcement actions against three major credit card issuers. In each case, the issuer hired a third-party call center to sell credit card services to consumers. Each had come up with a carefully crafted script that met regulatory guidelines, but in each case, the call center came up with its own script, one that violated federal laws.

VETTING SOLUTIONS POP UP

Not long after the bulletin was released, third-party companies cropped up, marketing themselves to warehouse banks and mortgage lenders as a way to reduce their overall risk profile during the closing process. They used risk analysis software, a national database and a risk rating system to assist these entities in, among other things, meeting the new regulatory requirements.

Requests from these companies were met with concern from the industry.

After receiving information from concerned members regarding third-party vetting agencies, the Texas Land Title Association (TLTA) sent a letter to the Texas Department of Insurance (TDI), highlighting the concerns it had been hearing.

"A number of our members have told us that they are receiving notices from their lenders requiring them to pay a third party as a condition of doing business," the association stated. "This third-party firm is offering to vet the title agents on behalf of the lender. The company is apparently seeking to charge the title agent an annual flat fee per escrow officer, as well as non-escrow officers who may play some role in closing the transaction or handling the file. This would be a new significant expense for title companies that could quickly become an extreme burden if multiple vetting companies enter the market and the Texas title agent faces the prospect of having to pay the same to several companies in order to be eligible to handle transactions with multiple lenders."

The Escrow Institute of California (EIC) sent a letter to Secure Settlements Inc., one of the companies offering third-party settlement agent vetting services to lenders, outlining its concerns with the company's methods.

After outlining the various regulatory scrutiny its members are already under, EIC noted its disagreement with Secure Settlements' interpretation of the CFPB Bulletin 2012-03.

EIC said Secure Settlements should cease and desist from "pursuing a course that blatantly and coercively mandates that EIC members purchase unwanted and unneeded services to be able to conduct business for which they are already legally licensed and regulated by the state of California and authorized to perform under RESPA and the Wall Street Reform and Consumer Protection Act."

The California Department of Corporations issued a bulletin cautioning lender licensees that using the emerging agent vetting companies to pre-screen their agents may violate state law. It also warned escrow licensees that participating in an agent vetting program could violate state law. The department asked all licensees to be cautious when looking into these programs.

The department reminded escrow agents of the prohibition in Financial Code section 17420 against the payment of referral fees for soliciting escrow accounts. The statute prohibits anyone from paying another person "any commission, fee or other consideration as compensation for referring, soliciting, handling or servicing escrow customers or accounts." The bulletin stated that it appears the payment of fees to be on a referral list falls into this prohibition and may be a violation of the escrow law.

As industry members were growing more concerned about how to show lenders, warehouse bankers and regulators that they demonstrate the safeguard qualities they need, ALTA published a new list of guidelines, the Title Insurance and Settlement Company Best Practices.

The best practices: include seven tenets that focus on issues ranging from controls regarding escrow and trust accounts to protecting customers' personal information and responding to complaints; are based on conversations with lenders; and had the input of the Abstractors & Title Insurance Agents Section Executive Committee, the Underwriters Section Executive Committee and the Future of the Industry Working Group.

ALTA believes following and documenting the best practices provides the assurances lenders and regulators want and removes the need to involve any extra, third-party vetting services. ALTA said it will create a standing committee to regularly review and improve the best practices, provide sample policies and seek comments from stakeholders.

Subsequent to this, ALTA announced it developed a National Title Professional (NTP) designation program to recognize professionals in the land title insurance industry who demonstrate the knowledge and experience essential to the safe and efficient transfer of real property.

The NTP is designed as a tool for ALTA members to differentiate themselves in the marketplace. NTP member benefits include recognition in ALTA publications, on the ALTA website and at ALTA events. Additionally, members who attain the NTP designation can enhance their industry credentials by using the NTP designation on their resume, in networking activities and on marketing materials, subject to any state law or bar association restrictions or limitations.

The designation has several elements, including industry and compliance prerequisites and training requirements.

ALTA BEST PRACTICES

The best practices are:

1. Establish and maintain current license(s) as required to conduct the business of title insurance and settlement services. The purpose of this best practice is to ensure that the company is fully compliant with all applicable business laws and regulations.

2. Adopt and maintain appropriate written procedures and controls for Escrow Trust Accounts allowing for electronic verification of reconciliation. The executive summary of the best practices states, "Appropriate and effective escrow controls and ongoing employee training help title and settlement companies meet client and legal requirements for the safeguarding of client funds. These procedures ensure accuracy and minimize the exposure to loss of client funds. Settlement companies may engage outside contractors to segregate trust accounting duties."

3. Adopt and maintain a written privacy and information security plan to protect non-public personal information as required by local, state and federal law. ALTA stated that the plan must be appropriate for the company's size and complexity and be evaluated and adjusted in light of relevant circumstances.

4. Adopt standard real estate settlement policies and procedures that ensure compliance with federal and state consumer financial laws as applicable. According to ALTA, "Adopting appropriate policies can ensure a real estate settlement company can provide a safe and compliant settlement and meet state, federal and contractual obligations governing the settlement process and provide for ongoing training."

5. Adopt and maintain written procedures related to title policy production, delivery, reporting and premium remittance. This assures that title companies meet their legal and contractual obligations.

6. Maintain appropriate professional liability insurance and fidelity coverage. "Appropriate levels of professional liability (errors and omissions insurance) ensure that title agencies and settlement companies have the financial capacity to stand behind their professional services. In addition, state law and contractual obligations may require a company to maintain fidelity bond and surety bond policies with prescribed minimum amounts of coverage," ALTA stated.

7. Adopt and maintain procedures for resolving consumer complaints. This ensures that any instance of poor service or non-compliance does not go undiscovered.

WORKING WITH LENDERS

The bulletin and the liability it puts on lenders has them concerned about how they are going to adapt to this new responsibility.

"The whole issue of third-party vetting, I think that was a real shock for title agents," said **Charles Cain**, senior vice president and agency manager for the Midwest region, WFG National Title Insurance Co. "I think, too, that as the bureau is holding lenders accountable for their service providers, in terms of safety and soundness, [lenders] have looked at their settlement providers [and assessed], are these guys going to be here the next day? But now lenders are being held to an unfair and abusive practices standard by their service providers, which is very difficult to monitor, and at a level above and beyond what lenders have had to do in the past. We are just starting to see the beginning of this where lenders … are starting to reach out to their title companies and say, 'By the way, here is all the stuff we expect.' It's a real shock for a lot of title agents as to things like data security and what their requirements are going to be by the lenders in order to do business."

David Townsend, president & chief executive officer of Agents National Title Insurance Co., agreed.

"Before, I think agents didn't quite realize as soon as they signed the lender's closing instructions, they were an agent of the lender," he said. "Now they are even more tied to the lender under the CFPB. And it's not just monetary risk: Its reputational risk for the lender."

Cain said he is starting to see changes in the relationship between title agents and lenders.

"Lenders want to know more about who they are sending business to," Cain said. "They are saying, 'Yes, you are a licensed title agent, and yes you are approved with an underwriter, and yes we have a CPL and in many cases you are an attorney, but we'd like to know more. We want to know more about your practices. Do you have data security? Do you have clean desk rules? Do you have all these things that come into play?' I think we are going to see in the second half of this year that lenders, individually, will reach out to title agents and say, 'Here is the list and if you can't demonstrate these things, then we are going to have to say goodbye.'"

Townsend noted that many of these "list" items are things the title industry has been doing for years, but the requirement to report these policies and procedures is so much greater.

Moreover, the CFPB has provided little guidance on the issue, making it hard to create rules and procedures to be in compliance with these new requirements.

"What a lot of lenders are running into now is that they know in the future they are going to have some sort of requirement, but they don't know what those requirements are going to be," Townsend said. "The requirements being placed on them are very vague at this point and the lenders have got to protect themselves."

Penny Reed, senior vice president, Wells Fargo Home Mortgage, noted that the initial reaction she had with Bulletin 2012-03 was that it appeared to be a restatement of the OCC original statement in 2001. However, she said banks knew what the OCC was looking for because it is a safety and soundness regulator. If the bank had a multi-million dollar relationship with the vendor, it did a significantly higher level of due diligence.

"What changed is you have the same statement, different regulator," she continued. "And where lenders are right now is in an environment where we don't know what we don't know. We are not quite certain what the CFPB is going to be looking for in those same third-party arrangements."

Reed said the CFPB is listening to the industry and understands that there are different business models out there in which one size is not going to fit all of them.

"But we don't know what the end result is going to be yet, so it's going to take engagement from the whole industry to make sure they understand," Reed said, pointing out that ALTA and the Mortgage Bankers Association recently met to talk about the issue together and began a dialogue that will continue to make sure the industry as a whole can bring recommendations to the CFPB that are not disruptive to the entire business model.

So what should agents expect to do in the future?

"[Agents] are going to have to communicate with lenders and explain to them everything they are doing as far as oversight goes," Townsend said. "We are already feeling it. There are certain lenders out there that have already changed the way they are ordering title and who they are ordering it from. Agents are going to have to be more transparent; and they are going to have to communicate better with their lenders to make sure that all of their policies and procedures are written down and able to be disseminated to their lender partners."

"I think, too, that as the bureau is holding lenders accountable for their service providers, in terms of safety and soundness, [lenders] have looked at their settlement providers [and assessed], are these guys going to be here the next day? But now lenders are being held to an unfair and abusive practices standard by their service providers, which is very difficult to monitor, and at a level above and beyond what lenders have had to do in the past. We are just starting to see the beginning of this where lenders … are starting to reach out to their title companies and say, 'By the way, here is all the stuff we expect.' It's a real shock for a lot of title agents as to things like data security and what their requirements are going to be by the lenders in order to do business."

__Charles Cain__, senior vice president and agency manager for the Midwest region, WFG National Title Insurance Co.

Reed said the due diligence process is going to include new elements that focus more on the consumer perspective than simply looking at financial viability. The bank will examine things like an agent's information security, how fast the agent responds to consumer complaints and what the process is for responding to consumer complaints. She said regardless of size, those are things banks will expect to be done.

She also noted the CFPB has said it will take into account the size of the provider as well, but that it has certain expectations, such as having written procedures and people at the company ensuring that employees are adhering to those written procedures.

"When it comes to data security, consumer complaints, that kind of thing, have something in writing and somebody who is in charge of that," Reed said. "There may not be a lot more requirements if you are a smaller provider, other than what you are used to seeing from your title underwriters.

"On the other hand, the larger you get or the larger your relationship with a lender, the more requirements [there are] going to be," she continued. "So you are going to hear from lenders more than you did before, but hopefully it is not going to be completely intrusive or change your business model. If you hear things happening that you think will result in that, speak up. Work with your state and national trade groups. Make sure that your voice is being heard."

MORTGAGE DISCLOSURES HOT PRIORITY FOR THE INDUSTRY

Any time the mortgage disclosures given to consumers changes, there is a simultaneous sea change in how the industry does business. This was evident when the industry began using revised Good Faith Estimates and HUD-1 Settlement Statements in January 2010 after a year of preparation. Six months later, the industry began waiting to see what was going to happen when the forms were combined with those required under the Truth in Lending Act (TILA).

From the time Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act in July 2010, the mortgage and settlement industries knew disclosure changes were on the horizon. Title X of the act created the Consumer Financial Protection Bureau (CFPB). The act transferred the authority to regulate the Real Estate Settlement Procedures Act (RESPA) from the Department of Housing and Urban Development (HUD) to the CFPB and mandated the integration of RESPA and TILA disclosure forms.

Section 1032 of the Dodd-Frank Act covers disclosures in general. Section 1032(f) mandates the integration of the RESPA and TILA disclosure forms. Section 1032(f) states: "Not later than one year after the designated transfer date, the bureau shall propose for public comment rules and model disclosures that combine the disclosures required under the Truth in Lending Act and sections 4 and 5 of the Real Estate Settlement Procedures Act of 1974, into a single, integrated disclosure for mortgage loan transactions covered by those laws, unless the bureau determines that any proposal issued by the Board of Governors and the Secretary of Housing and Urban Development carries out the same purpose."

The designated transfer date was July 21, 2011. According to the act, the CFPB had until July 21, 2012, to publish proposed integrated forms.

DISCLOSURES FIRST

The CFPB released its first prototype of the RESPA/TILA integrated mortgage disclosure form in May 2011 before it even officially opened its doors. The bureau went through five rounds of prototypes and consumer testing. During these rounds it met with both consumers and the industry in order to formulate disclosures that would be useful for each side.

The agency engaged in consumer testing of the forms while also posting disclosure prototypes on its website www.consumerfinance.gov and using an interactive comment process. During the 10 months after the release of the initial prototypes, people submitted more than 27,000 comments. It also took its show on the road, performing testing in Baltimore, Los Angeles, Springfield, Mass., Albuquerque, N.M., Des Moines, Iowa, Birmingham, Ala., Philadelphia and Austin, Texas.

During the CFPB's testing process, it developed prototypes for both the Loan Estimate form (to take the place of the initial Truth in Lending (TIL) disclosure and RESPA's GFE) and the Closing Disclosure form (to take the place of the final TIL and the HUD-1).

In February 2012, the CFPB convened a small business review panel to review the impact certain regulatory changes would have on small businesses.

PROPOSED RULE

Fourteen months after it released its first round of proposed integrated mortgage forms, on July 9, 2012, the CFPB released its 1,099-page proposed rule that combines the final proposal for those disclosures and the new requirements as detailed in the Dodd-Frank Act, along with extensive guidance regarding compliance with those requirements.

The proposed rule applies to most closed-end consumer mortgages. The proposed rule does not apply to home-equity lines of credit, reverse mortgages or mortgages secured by a mobile home or by a dwelling that is not attached to real property (in other words, land). The proposed rule also does not apply to loans made by a creditor who makes five or fewer mortgages in a year.

The Loan Estimate form would include the following:

- *Provision by mortgage broker*. The lender may rely on a mortgage broker to provide the Loan Estimate form. However, the lender also remains responsible for the accuracy of the form.
- *Timing*. The lender or broker must give the form to the consumer within three business days after the consumer applies for a mortgage loan. The proposed rule contains a specific definition of what constitutes an "application" for these purposes.
- *Limitation on fees*. Consistent with current law, the lender generally cannot charge consumers any fees until after the consumers have been given the Loan Estimate form and the consumers have communicated their intent to proceed with the transaction. There is an exception that allows lenders to charge fees to obtain consumers' credit reports.
- *Disclaimer on early estimates*. Lenders and brokers may

provide consumers with written estimates prior to application. The proposed rule requires that any such written estimates contain a disclaimer to prevent confusion with the Loan Estimate form. This disclaimer would not be required for advertisements.

The proposed rule and the official Interpretations contain detailed instructions as to how each line on the Closing Disclosure form would be completed. The Closing Disclosure form contains additional new disclosures required by the Dodd-Frank Act and a detailed accounting of the settlement transaction.

- *Timing*. The lender must give consumers this Closing Disclosure form at least three business days before the consumer closes on the loan. Generally, if changes occur between the time the Closing Disclosure form is given and the closing, the consumer must be provided a new form. When that happens, the consumer must be given three additional business days to review that form before closing. However, the proposed rule contains an exception from the three-day requirement for some common changes. These include changes resulting from negotiations between the buyer and seller after the final walk-through. There also is an exception for minor changes which result in less than $100 in increased costs. The bureau seeks comment on whether to permit additional changes without requiring a new three-day period before closing.
- *Provision*. Currently, settlement agents are required to provide the HUD-1, while lenders are required to provide the revised TIL disclosure. The bureau is proposing two alternatives for who is required to provide consumers with the new Closing Disclosure form. Under the first option, the lender would be responsible for delivering the Closing Disclosure form to the consumer. Under the second option, the lender may rely on the settlement agent to provide the form. However, under the second option, the lender would also remain responsible for the accuracy of the form. The bureau seeks comment as to which alternative is preferable.

The proposed rule would restrict the circumstances under which consumers can be required to pay more for settlement services — the various services required to complete a loan, such as appraisals, inspections, etc. — than the amount stated on their Loan Estimate form. Unless an exception applies, charges for the following services could not increase: 1) the lender's or mortgage broker's charges for its own services; 2) charges for services provided by an affiliate of the lender or mortgage broker; and 3) charges for services for which the lender or mortgage broker does not permit the consumer to shop. Also, unless an exception applies, charges for other services generally could not increase by more than 10 percent.

The rule would provide exceptions, for example, when: 1) the consumer asks for a change; 2) the consumer chooses a service provider that was not identified by the lender; 3) information provided at application was inaccurate or becomes inaccurate; or 4) the Loan Estimate expires. When an exception applies, the lender generally must provide an updated Loan Estimate form within three business days.

The proposed rule redefines the way the annual percentage rate (APR) is calculated. Under the rule, the APR will encompass almost all of the up-front costs of the loan. This will make it easier for consumers to use the APR to compare loans and easier for industry members to calculate the APR.

The proposed rule requires lenders to keep records of the Loan Estimate and Closing Disclosure forms provided to consumers in a standard electronic format. This will make it easier for regulators to monitor compliance. The bureau seeks comment on whether smaller lenders should be exempt from this requirement.

The CFPB hopes to finalize the RESPA/TILA disclosure rules in October, according to its rulemaking plan submitted to the Office of Information and Regulatory Affairs.

"Pending the results of additional testing, we expect to issue the [mortgage disclosure] final rule this fall, although we would not expect any implementation work to begin until after the January 2014 effective date for the earlier mortgage rules," wrote **Kelly Cochran**, CFPB assistant director for regulations, in a July 2 bureau blog post.

QUESTIONS TO BE ANSWERED IN THE FINAL RULE

The proposed forms are out and many don't expect them to change dramatically from what was released last July, however there are still significant questions the industry is waiting to be addressed by the final rule.

Charles Cain, senior vice president and agency manager for the Midwest region, WFG National Title Insurance Co., noted that two of the questions that need addressed came from the bureau itself. The first is who will be responsible for delivering the final disclosure.

"Is it the lender's obligation to deliver it, or should the settlement agent deliver it?" Cain said. "I think that is an important question. I think that … certainly the settlement agent wants to be that entity and there is every good reason why the agent should be. The lenders, on the other hand, are concerned about liability, so they are thinking in two directions about how this may work.

Industry members are also waiting to see how long they will have to implement the new rules and forms.

"Hopefully, we will get at least a year for that implementation. That tends to be a magic number," Cain said. "But, if it's less than a year, that is going to be a real struggle for people. The software providers are still trying to [adapt their systems.] They are working in a void. They don't know what the final rule is going to say exactly, but they are trying to figure out how they are going to do this so that it is practical and functional."

It's unlikely an answer will be forthcoming until the proposal is finalized. However, during the National Settlement Services Summit, **Richard Horn**, senior counsel and special advisor with the CFPB's Office of Regulations, said the bureau is weighing industry comments on the implementation deadline issue. He noted that some commenters said the industry would need at least a year to implement the bureau's requirements while others said a 36-month compliance period is appropriate.

Some in the indusrty went to great lengths to describe the technology changes and training that will be needed to implement the new requirements, Horn noted.

A LOOK AT THE MORTGAGE DISCLOSURE PROTOTYPES

- Ficus Bank v. Pecan
- Dogwood Credit Union v. Redbud Credit Union
- Camellia Savings Bank v. Azalea Savings Bank
- Jasmine Home Loans v. Nandina Home Loans
- Yucca Bank v. Pinyon Bank
- Hornbeam Bank v. Ironwood Bank
- Mimosa Bank v. Sassafras Bank
- Basswood Bank v. Tupelo Bank

Prototypes available at www.TheLegalDescription.com

"Some comments actually talked about changes to state disclosure requirements that might need to be made and [said] we should … factor that time into the implementation period as well," Horn added. "That's something that we are looking at very closely."

Cain said the three-day notice rule will be something that is going to impact transactions significantly.

"I think the three-day notice is going to stay in. I don't think that is going to go away. There have been a lot of issues as to why people should be able to waive that, but I don't think the bureau is going to make that waivable," he said. "And that could create problems if there is a significant change in a loan program."

He said the title industry often has what he calls 'domino closings,' where there may be a closing at 9 a.m. and the seller on that closing is the buyer on an 11 a.m. closing and the seller on the 11 a.m. closing is the buyer on the 1 p.m. closing and so on throughout the day.

"I've been in that circumstance dozens of times and most title agents have," Cain said. "If there is a problem with the 9 a.m. closing and you have to run back to another three-day disclosure, every other closing will get pushed back."

"Having been in meetings with the bureau, that concern has been expressed over and over again," he continued. "I know ALTA has expressed that concern that there be some way, on a reasonable basis, that a consumer can opt out of the three days, but I am doubtful that they are going to cut that out, or if so, it's going to be under extremely dire circumstances."

Attendees at the Summit also worried about the costs small businesses will face as they work to implement the forms. Horn said the bureau analyzed the costs and it received feedback on the rule from a small business panel the agency assembled.

Horn noted that the proposal included provisions intended to limit the compliance burden for smaller businesses. For instance, the bureau sought comment on a proposed exemption for small entities from a requirement that certain information be kept in an "electronic, machine readable" format.

PREPARATION

Despite all of the unanswered questions, the industry is advised to prepare to implement the forms. **Bart Shapiro**, principal, Financial Institutions Compliance Practice Group at Offit Kurman, said industry participants should not permit concerns over compliance costs and burdens to keep them from preparing to implement the rule changes. He said businesses need to make a number of determinations.

"Do you build up the training area? Do you outsource to certain consultancies and other firms or do you go to more software improvements and internal quality controls and things of that nature?" Shapiro said. "But you do have to start planning. You do have to start moving on what's going to be coming."

"It's a proposed rule, but it's not going to change so drastically that they can't think about how they are going to change their workflows now. Hopefully people will learn from 2010," said **Leslie Wyatt**, director of industry relations at Softpro." "We've been working on it for a year; we're already trying to figure out what to do instead of waiting until the rule comes out. Hopefully, settlement agents are doing the same thing, educating their staff so when it comes it's not so harsh."

QUALIFIED MORTGAGES – IMPACT ON LENDING AND THE AFFILIATED BUSINESS ARRANGEMENT

One of the key aspects on the mortgage side of the Dodd-Frank Wall Street Reform and Consumer Protection Act was the provision requiring lenders to ensure borrowers can pay back their mortgage loan. So, in January, the Consumer Financial Protection Bureau (CFPB) issued its ability-to-repay regulation that says creditors must make a reasonable and good faith determination that the consumer has a reasonable ability to repay the loan and sets forth penalties if the creditor fails to do this.

ABILITY-TO-REPAY DETERMINATIONS

The final rule describes certain minimum requirements for creditors making ability-to-repay determinations, but does not dictate that they follow particular underwriting models. At a minimum, creditors generally must consider eight underwriting factors: 1) current or reasonably expected income or assets; 2) current employment status; 3) the monthly payment on the covered transaction; 4) the monthly payment on any simultaneous loan; 5) the monthly payment for mortgage-related obligations; 6) current debt obligations, alimony and child support; 7) the monthly debt-to-income ratio or residual income; and 8) credit history.

The rule provides guidance as to the application of these factors under the statute. For example, monthly payments must generally be calculated by assuming that the loan is repaid in substantially equal monthly payments during its term. For adjustable-rate mortgages, the monthly payment must be calculated using the fully indexed rate or an introductory rate, whichever is higher. Special payment calculation rules apply for loans with balloon payments, interest-only payments or negative amortization.

The final rule also provides special rules to encourage creditors to refinance "nonstandard mortgages"— which include various types of mortgages that can lead to payment shock and eventual default — into "standard mortgages" with fixed rates for at least five years that reduce consumers' monthly payments.

QM SAFE HARBOR AND REBUTTABLE PRESUMPTION

The CFPB noted that under Dodd-Frank, qualified mortgages (QM) are entitled to a presumption that the creditor making the loan satisfied the ability-to-repay requirements. However, the act did not specify whether the presumption of compliance is conclusive (that is, creates a safe harbor) or is rebuttable. The question regarding how the bureau should structure this presumption of compliance was a focal point of intense public debate.

The final rule provides a safe harbor for loans that satisfy the definition of a QM and are not "higher-priced" as generally defined by the Federal Reserve's 2008 rule, which prohibits creditors from making "higher-price mortgage loans" without assessing consumers' ability to repay the loans. The final rule provides a rebuttable presumption of compliance for higher-priced mortgage loans.

"The line the bureau is drawing is one that has long been recognized as a rule of thumb to separate prime loans from subprime loans," the CFPB wrote. The CFPB noted that under the Fed's 2008 rule, only higher-priced mortgages are subject to an ability-to-repay requirement and a rebuttable presumption of compliance if creditors follow certain requirements.

HIGHER-PRICED QM

The CFPB said its final rule strengthens the requirements needed to qualify for a rebuttable presumption for subprime loans and defines with more particularity the grounds for rebutting the presumption. Specifically, the final rule provides that consumers may show a violation with regard to a subprime QM by showing that, at the time the loan was originated, the consumer's income and debt obligations left insufficient residual income or assets to meet living expenses. The analysis would consider the consumer's monthly payments on the loan, loan-related obligations and any simultaneous loans of which the creditor was aware, as well as any recurring, material living expenses of which the creditor was aware.

Guidance accompanying the rule notes that the longer the period of time that the consumer has demonstrated actual ability to repay the loan by making timely payments, without modification or accommodation, after consummation or, for an adjustable-rate mortgage, after recast, the less likely the consumer will be able to rebut the presumption based on insufficient residual income.

PRIME QM

With respect to prime loans — which are not currently covered by the Fed's ability-to-repay rule — the CFPB's final rule applies the new ability-to-repay requirement but creates a strong presumption for those prime loans that constitute QMs. Thus, if a prime loan satisfies the QM criteria described below, it will be conclusively presumed that the creditor made a good faith and reasonable determination of the consumer's ability to repay, the CFPB said.

QM GENERAL REQUIREMENTS

The Dodd-Frank Act set certain product-feature prerequisites and affordability underwriting requirements for QMs and the final rule implements the statutory criteria, which generally prohibit loans with negative amortization, interest-only payments, balloon payments or terms exceeding 30 years from being QMs. So-called "no-doc" loans where the creditor does not verify income or assets also cannot be QMs. Finally, a loan generally cannot be a QM if the points and fees paid by the consumer exceed 3 percent of the total loan amount, although certain "bona fide discount points" are excluded for prime loans. The final rule provides guidance on the calculation of points and fees and thresholds for smaller loans.

The final rule also establishes general underwriting criteria for QMs. The general rule requires that monthly payments be calculated based on the highest payment that will apply in the first five years of the loan and that the consumer have a total debt-to-income ratio that is less than or equal to 43 percent.

TEMPORARY QM

The bureau said there are many instances in which individual consumers can afford a debt-to-income ratio above 43 percent based on their particular circumstances, but that such loans are better evaluated on an individual basis under the ability-to-repay criteria rather than with a blanket presumption. However, the bureau said it is concerned that creditors may initially be reluctant to make loans that are not QMs, even though they are responsibly underwritten. For this reason, in light of the fragile state of the housing market, the final rule provides for a second, temporary category of QMs that have more flexible underwriting requirements.

To conform to this temporary standard, a loan would still be required to satisfy the general product feature prerequisites for a QM. Such loans would also be required to satisfy the underwriting requirements of: 1) the government sponsored enterprises while they operate under federal conservatorship or receivership; or 2) the Department of Housing and Urban Development, Department of Veterans Affairs and Department of Agriculture or Rural Housing Service.

POINTS AND FEES AND THE AFFILIATED BUSINESS

An issue of concern to some in the title industry is the increased hardship on affiliated business arrangements because of their inclusion in QM's points and fees calculation. The new requirement that points and fees not exceed 3 percent of the total loan amount has been watched carefully by those with affiliated business arrangements, specifically affiliated title companies. Along with the threshold, the rule clarifies what costs must be added into the 3 percent calculation.

Under the final rule, points and fees means all items included in the finance charge under Section 1026.4(a) and (b), except, among other things:

- Interest or the time-price differential;
- Any premium or other charge in connection with any federal or state agency program for any guaranty or insurance that protects the creditor against the consumer's default or other credit loss;
- Up to two bona fide discount points paid by the consumer in connection with the transaction, if the interest rate without any discount does not exceed, the average prime offer rate by more than 1 percentage point or for transactions that are secured by personal property, or the average rate for a loan insured under Title 1 of the National Housing Act by more than 1 percentage point; and
- Any bona fide third-party charge not retained by the creditor, loan originator, or an affiliate of either, unless the charge is required to be included in points and fees under the new rule.

The CFPB noted that during its public outreach, industry members raised concerns about including in the points and fees real estate related fees paid to an affiliate of the creditor, such as an affiliated title company.

"Although these fees always have been included in points and fees for high-cost loans, creditors using affiliated title companies were concerned they would have difficulty meeting the lower threshold for points and fees for qualified mortgages," the CFPB stated. "The board, however, did not propose to exempt fees paid to creditor-affiliated settlement service providers, noting that Congress appeared to have rejected excluding such fees from points and fees."

"What we have then is an unlevel playing field," said **Phil**

Schulman, a partner in the Washington, D.C., office of K&L Gates. "If I am a lender and I own a title agency, then the title charges are going to be counted toward the three points for the points and fees test. But if I'm a lender and I get my title services from an unaffiliated source then the points and fees don't get counted for title charges. That's unfair, as many affiliated business owners suggest."

Sue Johnson, executive director of the Real Estate Services Providers Council Inc. (RESPRO), said that once the rule is implemented, most lenders will not want to make non-QM mortgages because of the risk of potential liability. Having to include affiliated title fees in the points and fees calculation would bring mortgages closer to the 3 percent cap. She said this would be especially true in low- to moderate-income markets.

If affiliated title fees caused mortgages to go over the 3 percent points and fees threshold, lenders would be hesitant to offer them because those mortgages would no longer be QM mortgages. This would happen even if the affiliated title fees are lower or comparable to non-affiliates and regardless of whether the mortgage otherwise meets the other QM criteria.

"Loans in which consumers purchase affiliated title services are more likely to bump up against that cap," Johnson said. "That is blatantly unfair because affiliated fees would have to be counted even if they are lower than unaffiliated fees. Second, they would have to be counted even if they met all other QM standards. So there is no justification for including them."

Johnson also noted that a recent economic study found that affiliated loans make up about 26 percent of the marketplace. If lenders stopped using affiliates, that would be a substantial reduction of competition in the marketplace.

LEGISLATION TO CHANGE POINTS AND FEES

To address these concerns, **H.R. 1077**, also known as the Consumer Mortgage Choice Act, and **S. 949** were introduced to amend the definition of points and fees in a way proponents of the bills believe will ensure that consumers continue to be able to access affordable housing credit.

Upon introduction, Rep. **Bill Huizenga**, R-Mich., stated, "This bipartisan legislation is designed to help improve low- and middle-income borrowers' access to credit and provide access to lower rates and lower risk loans without overturning the important consumer protections and sound underwriting requirements proscribed under Dodd-Frank's ability-to-repay provision. These common-sense changes will promote access to affordable credit for Americans by ensuring that safer, properly underwritten mortgages pass the qualified mortgage test."

H.R. 1077 would amend the definition of points and fees by:

- Excluding fees paid to lender-affiliated title entities (fees paid to unaffiliated entities are already excluded);
- Preventing double counting of loan officer compensation;
- Clarifying that amounts held in escrow accounts for payment of homeowners insurance, which are not retained by the lender or its affiliates, should not be included in the calculation;
- Excluding lender charges necessary to cover loan level price adjustments charged by Fannie Mae and Freddie Mac; and
- Excluding lender-paid compensation to a correspondent bank or mortgage brokerage in a wholesale transaction.

A similar bill, **H.R. 4323**, was introduced last year. It had 25 bipartisan co-sponsors, but many members of Congress decided they wanted to wait until the final ability-to-repay rule was released before taking action.

There are those for and against the legislation. The Mortgage Bankers Association (MBA) supported the bill, saying it will increase choices and lower costs for borrowers.

"Determining a borrower's ability to repay is a critical part of underwriting a safe and sustainable mortgage, and MBA has worked closely with policymakers to craft a QM rule that works best for borrowers and lenders alike," said MBA Chairman **Deb Still**. "In our review of the final rule, we have identified several concerns with the points and fees calculation that have the potential to limit the choices that borrowers have when selecting a mortgage and increasing the costs of getting those mortgages. This bill goes a long way toward addressing those concerns."

The National Association of Independent Land Title Agents (NAILTA), though, is definitely opposed to the Consumer Mortgage Choice Act excluding lender-affiliated fees from the calculation.

"The new bill is being proposed by the banking and referral source lobbies in an effort to provide those groups with a vital source of revenue — the title insurance premiums and fees generated by those entities," NAILTA wrote. "The proponents of H.R. 1077 incorrectly argue that, without the amendment, low- to middle-income Americans will be unable to obtain access to affordable residential mortgage loans. However, there is an incredible lack of statistical data that supports their veiled premise. An overwhelming majority of American homeowners do not prefer affiliate settlement providers or even know what an affiliate settlement provider does at the closing table."

LENDING SLOW DOWN?

Even if you are not an affiliated business, you could be impacted by the rule when it goes into effect in January.

"It's going to be more and more difficult to get a loan," Schulman said. "Minorities, low-income borrowers and borrowers who have scratch and dent on their credit history are going to find it difficult to get a loan and that affects you because if the lender can't finance the loan, the real estate agent can't sell the house, and if the lender can't finance the loan, the title person is not going to be able to write title insurance or close the loan.

"You are just as impacted by these rules as the lender is. There is no question that lenders are going to underwrite more conservatively, and it will be more and more difficult for folks to get loans at a time when we need to make loans in this country." Schulman continued. "At a time when the housing market is coming back strong, this QM rule is going to suck some of the air out of that recovery unless we get some help from Congress and from the CFPB."

For additional details on qualified mortgages see the *Dodd Frank Update* report, "Ability to Repay."

WATCH OUT FOR MARKETING AGREEMENTS

While RESPA was still governed by the U.S. Department of Housing and Urban Development (HUD), it began looking closely at marketing agreements, particularly those involving home warranty companies. It issued a guidance letter on the subject in February 2008, and came out with an interpretive rule in June 2010 that discussed when it was acceptable under RESPA Section 8 for a home warranty company to pay real estate brokers or agents to market home warranty products.

Flash forward three years. Quite a few attorneys are now saying they believe that the Consumer Financial Protection Bureau (CFPB) is going to take action pertaining to marketing agreements soon. There are indications that the bureau is currently investigating these types of agreements, and an enforcement action or guidance could be coming at any time.

"Everyone should be concerned about the bureau whether you think you should be or not," said **Charles Cain**, senior vice president and agency manager of the Midwest region of WFG National Title Insurance Co. "The bureau is a data driven entity. If you go to their website they talk about that a lot. So, if you are going to do a marketing agreement, you better have data. You better have hard fast numbers. You better have hard fast examples as to why you think this works. The bureau is currently involved in examinations and investigations of marketing agreements in the title industry. We think there is going to be something from the bureau about marketing agreements in the coming months."

MARKETING WATCH

At least one company has received a civil investigative demand (CID) from the CFPB regarding the company's mortgage advertising business. According to the CID, the bureau is conducting an investigation into whether mortgage lenders are engaging in advertising or marketing practices that are in violation of several consumer financial protection laws, including RESPA.

On April 16, the CFPB released its response to a request by Aspire Financial Inc. to modify or set aside the CID. The bureau denied the company's petition, ordering Aspire to produce all responsive documents within 30 calendar days. The decision is unsurprising in that the CFPB has denied all petitions to modify or set aside CIDs that the agency has published online.

On Nov. 19, 2012, the CFPB issued a press release, indicating that it was cracking down on misleading and false mortgage advertisements. In that statement, the CFPB said that it had partnered with the Federal Trade Commission (FTC) to issue warning letters to approximately a dozen mortgage lenders and mortgage brokers advising them to clean up potentially misleading advertisements, particularly those targeted toward veterans and older Americans. The CFPB also announced it has begun formal investigations of six companies that it thinks may have committed more serious violations of the law.

On Jan. 23, the CFPB sent Aspire a CID comprised of 12 interrogatories and eight requests for documents pertaining to the company's mortgage advertising business. The CID stated:

"The purpose of this investigation is to determine whether mortgage lenders have engaged or are engaging in unlawful practices in the advertising, marketing or provision of mortgage and reverse-mortgage products in violation of Sections 1031 and 1036 of the Dodd-Frank Wall Street Reform and Consumer Protection Act; the Mortgage Acts and Practices Advertising Rule; the Real Estate Settlement Procedures Act; or any other federal consumer financial law. The purpose of this investigation is also to determine whether bureau action to obtain legal or equitable relief would be in the public interest."

In its petition, Aspire stated that the CID was overbroad and did not identify the "nature of conduct constituting the alleged violation that is under investigation," as required under Section 1052(c)(2) of the Dodd-Frank Act.

Aspire argued that Sections 1031 and 1036 of the Dodd-Frank Act do not have retroactive effect, so enforcement actions that rely on those sections cannot be predicated on acts that occurred before July 21, 2011, the date those sections went into effect. Because of this, the company said it should not be obligated to provide documents that pre-dated the existence of Sections 1031 and 1036.

Aspire attempted to compromise with the CFPB by providing its marketing agreements; however, the CFPB refused.

"While it is true that the CID also relies upon provisions of the Real Estate Settlement Procedures Act, as well as Regulation X, no provision of RESPA pertains to advertising, nor are any of the requests reasonably related to RESPA," Aspire said in its petition. "Although marketing services agreements arguably are relevant to RESPA, Aspire offered to produce any such marketing services agreements that existed back to the January 2010 time period. The CFPB, however, has refused to accept this reasonable compromise offered by Aspire as of the date of this petition."

The bureau disagreed that its CID failed to identify the alleged violation it was investigating. It said its Nov. 19, 2012, press release along with the questions within the CID and the notification provision, made clear what types of conduct it was investigating.

THE BASICS

Keeping these investigations in mind, if you are planning to pay for goods or services then there are two requirements: 1) the goods or services must be actual, necessary and distinct; and 2) payment must be commensurate with the value of the goods or services (fair market value). The services being provided cannot be of no or nominal value and they cannot be duplicative of services already being provided.

When you decide on a payment, it should be a flat fee for services performed, not a fee based on the amount of business or transactions you receive.

Marx Sterbcow, managing attorney of the Sterbcow Law Group, LLC, indicated that a marketing agreement between any settlement service provider and an individual agent or team of agents is a bad idea.

If a settlement service provider is going to engage in a marketing services agreement, it should only be done with a real estate brokerage," he said.

SERVICES YOU CAN PAY FOR

After getting the basics down, you might be wondering what exactly you can pay for.

Clearly, payment for referrals is prohibited. You can pay fair market value for marketing services that are actually being performed. That means if you are paying for services when those services aren't being provided or if you are paying more than the services are worth, you are likely going to run into issues with RESPA. Remember, the referral isn't the issue, it's receiving a thing of value for a referral, that you need to watch out for.

"RESPA does not prohibit a real estate broker or agent from referring business to [a home warranty company (HWC)]," HUD said in its 2010 interpretive rule. "Rather, RESPA prohibits a real estate broker or agent from receiving a fee for such a referral, as a referral is not a compensable service."

In its interpretive rule, HUD made it clear that it did not want brokers or agents to be paid for marketing directly to homebuyers.

"[I]n a transaction involving a federally related mortgage loan, an HWC's compensation to a real estate broker or agent for marketing services that are directed to particular homebuyers or sellers would be a payment that violates Section 8 of RESPA as an illegal kickback for a referral of settlement service business," HUD said. "For example, a real estate broker or agent actively promoting an HWC and its products to sellers or prospective homebuyers by providing HWC verbal 'sales pitches' about the benefits of a particular HWC product or by distributing the HWC's promotional material at the broker's or agent's office or at an open house is considered to be a referral. Thus, compensating the real estate broker or agent for such promotion would result in a violation of Section 8 of RESPA."

Here are examples of services for which an agent or broker can receive compensation:

- Putting brochures on a brochure rack in the real estate broker's office;
- A website listing or banner advertisement;
- Website links to the company's website;
- Hanging posters in the real estate broker's office; and
- Office space rentals.

According to Sterbcow and **Jonathan Cannon**, an associate with Buckley Sandler LLP, it's okay to pay to have brochures on a rack in a broker or agent's office. The problems arise when agents start handing out brochures to consumers.

"The real estate agent can't say 'please buy this particular HWC or please use this particular title company' if they are being compensated for that," Cannon said. "The real estate agent can't hand out a brochure that says 'if you need title insurance here's a brochure of a title insurance provider' because that is a referral. Paying somebody for a sales pitch, a message directed to a person, is a referral, and HUD said that you cannot pay compensation for that."

According to Cannon, you want to pay for a verifiable service where you are getting your message out, instead of paying someone else to endorse you.

Sterbcow also said to beware of paying for access.

"You really want it to just be an advertising portal, not payment for access to any brokerage or any offices," Sterbcow said. "You want any access payment out of an agreement completely and entirely. No reason to memorialize that in writing."

He advised staying away from marketing agreements that allow a loan officer to attend weekly sales meetings for the real estate brokerage or allow the loan officer to go into the office when it's closed to everyone else. He gave an example where a loan officer provided a Ford F150 truck to a real estate agent for free, but the marketing agreement said the agent was required to have magnetic door signs promoting the lender.

"I would highly recommend against that sort of marketing agreement," Sterbcow said. "The key is anything with access, even merely just any inference at all in a marketing services agreement where you are paying for access, should be stricken immediately. If you are going to get into a marketing services agreement, you really want to pay what the fair market value is for legitimate advertising.

VALUATION

You know now to make sure you are paying fair market value for a service or good. But how do you get that valuation?

Sterbcow said that it's a good practice to bring in a third party to determine the value of services and to do the valuation before the clients sign the agreement.

"You want a third-party independent source to value what those costs are," Sterbcow said. "You don't want either company to come up with their own figures because the regulators don't like that."

He also advised that attorneys who are drafting marketing agreements should state in the agreement that they are not validating the authenticity of the valuation of the services performed.

It's important that the payment makes sense for the services being performed.

"The flat fee has to be the aggregate of all the marketing services," Cannon said. "That is, if your economist says buying a banner advertisement on the website is worth $10 a month, hanging a poster in the lobby is worth $10 a month and the brochures in the brochure rack is $10 a month, your flat fee has to be $30 because if your flat fee is $50 then certainly there is room for a challenge."

Also be aware of ad space in relation to how much you are paying.

"How much of the space does your name cover?" asked Cain during a *RESPA News* webinar, *Reviewing Your Marketing Agreements and the Interpretive Rule: What is the Right Agreement for You?* "If you are buried down there underneath the equal opportunity language so that it's barely visible, you probably can't pay very much, but if your name covers 10 percent of the ad space you can, generally speaking, pay for 10 percent of the advertising cost."

IF YOU THINK YOUR AGREEMENT MIGHT VIOLATE RESPA

What do you do if you think your marketing agreement might violate RESPA?

"The first step is to cancel the marketing agreement," Cain said. "If you think it violates RESPA, it probably does."

The next step is to hire experienced counsel.

"I would certainly stop the agreement ASAP and reevaluate," Sterbcow said. "The CFPB and the other regulators give more deference to folks who voluntarily pull back that program then having them come in and find the issue."

"Be sure that whatever you have is something that, if a regulator were to show up as you came back from lunch, you would feel as comfortable as you could that you've done everything possible," Cain said. "You need flat dollar payments based on facilities and services actually provided that are actual, necessary and distinct from the services the provider otherwise does and that are not for no or nominal value and not duplicative. That pretty much packs in the whole story as to what, at base, your marketing agreement needs to be."

In addition to being aware of RESPA, always keep in mind that states also have laws regulating marketing agreements. It's important to make sure that your marketing agreement complies with state law as well.

TIPS

Here are some additional tips to keep in mind:

- Avoid month-to-month contracts for marketing services agreements;
- The value should be a flat dollar amount;
- Have a numeration of the services that are being performed by the provider. The services should be clear, explicit and in writing. Make sure to specify exactly what the services are and make sure they are verifiable;
- Have a third party valuate the services;
- Don't pay in advance. Payment should be made after the services are furnished;
- Avoid exclusive access and lock outs of competitors;
- You are paying for advertising, not sales;
- Avoid any situation where you are paying a fee but you are not

receiving services;
- The services must actually have to do with marketing;
- It's a good idea to have an audit every 90 days to make sure that services are being performed. Have the provider sign the audit;
- Do not sell directly to the consumer. HUD had a problem with marketing directly to the consumer. General advertisements with providers are okay;
- Avoid the terms preferred or exclusive; and
- If services are not being performed or if the services change, the payment needs to reflect that. The fee should be for the actual services being performed.

UDAAP SUPERVISION – DIRECT AUTHORITY OVER THE TITLE INDUSTRY

Most of the industry's focus when it comes to the Consumer Financial Protection Bureau (CFPB) is on how the CFPB will oversee it through the bureau's requirement that lenders be liable for the actions of their title agents and the requirements lenders have under mortgage servicing regulations. However, title professionals should also be mindful of the authority the CFPB has directly over the industry.

The CFPB has oversight of the title insurance industry through its authority under the Dodd-Frank Act to penalize a company for what it believes are abusive practices. Title X of the act says it is unlawful for anyone who provides a consumer financial product or service to engage in unfair, deceptive or abusive acts or practices (UDAAP).

Under Title X, the bureau is given power to issue rules that identify and prevent these types of acts or practices among the lending community. This means that the CFPB can declare certain acts as unfair or abusive. Many perceive the UDAAP authority under the act to be a broad ambiguous power and one to be wary of.

"It is a broad, wide net," said **Francis "Trip" Riley**, a partner in the Princeton, N.J., office of Saul Ewing. "Putting aside the mortgage servicer regulations and the bulletins, the UDAAP authority that the CFPB has is endless."

Title X defines an "unfair act or practice" as an act that: "A) causes or is likely to cause substantial injury to consumers, which is not reasonably avoidable by consumers and B) such substantial injury is not outweighed by countervailing benefits to consumers or to competition."

An "abusive act or practice" is one that takes unreasonable advantage of: "A) a lack of understanding on the part of the consumer of the material risks, costs or conditions of the product or service; B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or C) the reasonable reliance by the consumer on a covered person to act in the interest of the consumer."

Riley said covered entities will not necessarily have to intend to cause harm or violate consumer laws in order to be violating the UDAAP provision.

"They are going to apply the standard of whether or not they believe it is unfair, deceptive or abusive," he said. "One of the things that may be abusive is if service providers do not have policies and procedures in place to address consumer complaints and then policies and procedures to address those complaints. And it may be equally abusive if the creditors haven't done their due diligence on their service providers to determine whether or not they have those policies and procedures in place. It's really up to those in the enforcement division of the CFPB to make that determination. So we will be looking toward their enforcement actions to see how they flesh all that out."

Under Title X, the CFPB regulates covered persons, which is any person that offers or provides a consumer financial product or service. That's a broad definition that includes real estate settlement service providers, mortgage brokers, lenders and mortgage services, just to name a few.

When companies covered under the bureau's regulatory authority conduct consumer transactions, they should be aware that their actions, if deemed unfair to consumers, could bring the CFPB down on them. That's true even if a consumer financial law is not specifically violated.

Take RESPA, for example. RESPA says that it is illegal to split a settlement service fee when a service is not performed. Under *Freeman v. Quicken Loans Inc. (No. 10-1042)*, the U.S. Supreme Court held that the charge for the settlement service must be divided between two more persons in order for there to be a violation. So, let's say a single settlement service provider charged a fee but did not provide an actual service or perhaps provided the service but marked up the fee, under *Freeman* there wouldn't be a RESPA violation. There could, however, be a UDAAP violation if the CFPB considered the provider's actions to be unfair or deceptive.

If the bureau decides to file a lawsuit against a company for a UDAAP violation, it has the authority to administer significant penalties which include:

- Rescission;
- Refund of money or the return of real property;
- Restitution;
- Disgorgement or compensation for unjust enrichment;
- Payment of damages;
- Public notification regarding the violation;
- Limits on the activities or functions of the individual or company; and
- Civil money penalties.

The civil money penalties that the bureau can impose are substantial, including:

- $5,000 each day for a violation of the consumer protection statutes;
- $25,000 each day if the violation is reckless; and
- $1 million per day for any violation that is committed knowingly.

The CFPB has already used this authority against a debt-relief company. The bureau filed a complaint on May 30 in federal district court, alleging that American Debt Settlement Solutions Inc. (ADSS), a Florida debt-relief company, charged consumers illegal upfront fees for debt-relief services that, in many cases, did not come to fruition. The bureau said the company charged approximately $500,000 in fees to hundreds of consumers. Along with the complaint, the CFPB submitted a consent order requesting that the court halt the company's activities, impose civil money penalties of $15,000, provide restitution to consumers; disgorge the company of any ill-gotten funds, which includes $500,000 in damages; and require the company to pay attorneys' fees and costs.

The bureau said the company advertised and marketed a debt-relief program to consumers whose financial conditions made it unlikely that they could actually complete the program. In order to enroll a consumer, ADSS requested the consumer's financial information. Using this information, the CFPB said that the company knew that certain consumers would be unable to complete the program because they would not be able to afford the monthly payments. The company allegedly told consumers it would negotiate with creditors within the first three to six months of the program. However, the bureau claimed that the company collected enrollment fees from the consumers during that time period, but failed to negotiate with creditors as promised. The effect was that many of the consumers dropped out of the program after paying fees but not receiving any benefits.

WHAT TO DO BEFORE AND AFTER THE CFPB COMES CALLING

The Consumer Financial Protection Bureau (CFPB) has issued several enforcement actions in the two years it has been in practice. One thing these have shown regulated entities is how to handle themselves before and after the CFPB comes knocking on their doors.

RESPONSIBLE CONDUCT FOR FAVORABLE ENFORCEMENT DISCRETION

The CFPB released Bulletin 2013-06, outlining responsible business conduct overseen entities can engage in that the bureau may favorably consider in exercising its enforcement discretion.

"The purpose of this guidance is to encourage activity that has concrete and substantial benefits for consumers and contributes significantly to the success of the bureau's mission," the bulletin stated. "Depending on its form and substance, responsible conduct can improve the bureau's ability to promptly detect violations of the federal consumer protection laws, increase the effectiveness and efficiency of enforcement investigations, enable the bureau to pursue a larger number of worthy investigations with its finite resources, provide important evidence in enforcement investigations and cases, and help more consumers in more matters promptly receive financial redress and additional meaningful remedies for any harm they experienced."

The bureau outlined four factors it will consider in determining whether a company has engaged in responsible business conduct. The first is **self-policing**, which the bulletin stated, "reflects a proactive commitment by a party to use resources for the prevention and early detection of potential violations of consumer finance laws.

"The bureau recognizes that a robust compliance management system appropriate for the size and complexity of a party's business will not always prevent violations, but it will often facilitate early detection of potential violations, which can limit the size and scope of consumer harm," the bulletin stated.

The second factor is **self-reporting**.

"While no substitute for effective self-policing, self-reporting substantially advances the bureau's protection of consumers and enhances its enforcement mission by reducing the resources it must expend to identify potential or actual violations that are significant enough to warrant an enforcement investigation and making those resources available for other significant matters," the bulletin stated. "Prompt self-reporting of serious violations also represents concrete evidence of a party's commitment to responsibly address the conduct at issue. For these reasons, the bureau puts special emphasis on this category in its evaluation of a party's overall conduct."

Thirdly, the bureau mentioned **remediation**. It said its remedial priorities include obtaining full redress for those injured by the violations, ensuring that the party who violated the law implements measures designed to prevent the violation from recurring and, when appropriate, effectuating changes in the party's future conduct for the protection and/or benefit of consumers. The bureau emphasized that remediation may be viewed positively even when the party believes that it may have identified a potential violation.

Lastly, the bureau discussed **cooperation**, which it noted is the only factor that directly relates to the quality of a party's interaction with the bureau.

"In order to receive credit for cooperation in this context, a party must take substantial and material steps above and beyond what the law requires in its interactions with the bureau," the bulletin stated. "Simply meeting those obligations will not be rewarded by any special consideration."

The bulletin also pointed out that the bureau has a wide range of options available to account for responsible conduct in enforcement investigations. For example, the bureau said it could 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 it seeks.

"The bureau intends and expects that this guidance will encourage parties subject to the bureau's enforcement authority to engage in more self-policing," the bulletin stated. "When potential violations of the consumer financial laws arise, the bureau intends and expects that parties will engage in more self-reporting to the bureau, more prompt and complete remediation of harm to victimized consumers, and more cooperation with the bureau in its enforcement investigations. Such an outcome, the bureau believes, would benefit both consumers and providers of consumer financial products and services."

However, it iterated that consumer protection is the ultimate focus of the bureau's enforcement discretion.

"In the bureau's consideration of a party's conduct in these areas it must be stressed that what best protects consumers is ultimately central to the bureau's exercise of its enforcement discretion," the bulletin stated. "Self-policing, self-reporting, remediation, and cooperation with the bureau's investigation are unquestionably important in promoting the best interests of consumers, but so too are vigorous, consistent enforcement of the law and the imposition of appropriate sanctions where the law has been violated."

Shortly after releasing the bulletin, the CFPB showed it meant what it said when it ordered U.S. Bank and a nonbank partner to refund a combined $6.5 million to more than 50,000 service members who participated in an auto loan program for active-duty military. The bureau, however, said it did not seek a civil monetary penalty in the case, in part because the companies exhibited "responsible conduct" after the matter came to light.

U.S. Bank, headquartered in Minneapolis, Minn., and Dealers' Financial Services (DFS), headquartered in Lexington, Ky., created the Military Installment Loans and Educational Services (MILES) auto loans program to finance subprime auto loans to active-duty military worldwide. U.S. Bank finances most MILES loans while DFS is responsible for managing the consumer-facing aspects of the MILES program.

According to bureau consent orders released on June 27, the companies failed to properly disclose fees charged to MILES program participants and misrepresented the costs and coverage of certain add-on products financed along with the auto loans.

The CFPB's orders also require U.S. Bank and DFS to end deceptive marketing and lending practices and prohibit them from making misleading claims or omissions when marketing add-on products through MILES or similar programs in the future. The companies are required to improve their disclosures to service members regarding the cost and other material terms of add-on products.

The bureau did not impose any civil monetary penalties in part because of the manner in which U.S. Bank and DFS cooperated to resolve the CFPB's concerns.

WHEN THE CFPB KNOCKS ON YOUR DOOR

The CFPB has made no secret of the fact that it is currently conducting investigations of potential federal consumer financial law violations. Most recently, the agency announced enforcement actions against four mortgage insurance companies it believed used captive reinsurance arrangements to violate RESPA.

Under the Dodd-Frank Act, the bureau has the authority to conduct investigations, which include sending subpoenas and civil investigative demands (CID), and bring enforcement actions. A CID could include a demand for testimony, responses to written questions, documents or other materials.

If you receive a CID, do you know what steps to take next? *RESPA News* spoke to attorneys **Mitchel Kider**, partner, Weiner Brodsky Kider PC, and **Howard Lax**, member, Bodman PLC, about what a company should do if it receives an investigative demand from the CFPB.

Under the CFPB's rules relating to investigations, the bureau has the authority to issue a CID in any bureau investigation, requiring the person named in the demand to produce documents for inspection (in the form requested by the agency); submit tangible things; provide a written response to questions; or appear before the bureau to offer testimony.

Once an individual receives a CID, that person is required to attend a "meet and confer" conference with a CFPB investigator to discuss any issues regarding compliance. During the conference, the parties can negotiate the scope of the demands and approve the terms of satisfactory compliance.

"You have to set up a meet and confer conference call within 10 days," Lax said. "Not 10 business days, 10 days. That's your one opportunity to help refine the demand. In other words, some terms in the CID may be ambiguous, partially because the CFPB does not always have a good handle on how the business operates and sometimes they are just shooting in the dark. You want to make sure that you and the CFPB are clear on exactly what they want and if there's certain information that they really don't want that might be unintentionally incorporated into the scope of what they ask for. You want to make sure that you further refine the interrogatories and requests for documents so that you don't have to do a lot of unnecessary work."

If a party wishes to file a petition to modify or set aside a CID, they must do so within 20 calendar days after receiving the demand. The bureau will not consider a petition to modify or set aside the demand unless the person has attended the meet and confer conference. The rules say the CFPB will only consider issues within the petition that were raised during the meeting.

When a petition is filed, the time limit for the person to present the documentation to the CFPB will be put on hold until the bureau responds.

The CFPB director decides whether to grant a petition and how it should be modified. If the petition is denied, a new date will be set for compliance. The petition and the director's decision will be disclosed to the public unless the bureau determines the party has shown good reason to keep them private.

So far, it appears the CFPB hasn't been lenient when determining whether to modify or set aside a petition. It denied the two petitions that it published online.

"The CFPB is not going to set aside its request and the CFPB is not going to necessarily limit the scope of the investigation in the sense of certain timeframes or anything like that," Lax explained. "What you want to do is make the CID as efficient and focused as possible so that you limit the amount of work you have to do. These investigative demands don't come with any accusation that you did anything wrong, and they might not have any knowledge that you did anything wrong."

So, what should you do if you receive a CID?

Lax and Kider both say obtaining counsel is the number one priority. The attorney will help interpret the scope of the demand and act as an intermediary between you and the CFPB. They also agree that it's important to reach out to the CFPB and determine the scope of the demand so that both you and the bureau understand what information is being requested. If it's not physically possible for you to gather all the information the CFPB wants in the timeframe allotted, you may be able to negotiate limitations or narrow the scope of the demand.

Here is a list of actions that Kider said companies should be prepared to take if they receive a CID:

- **Obtain counsel**: Obtain competent counsel to formulate objections to the CID. Objections that are not presented by the due date are considered waived if the matter subsequently ends up in court. You should make the objections even if documents are being produced. In addition, the objections should cover any instructions that may be overreaching on the part of the CFPB. The CID will have a specific deadline for filing objections. The CFPB enforces the deadline and rarely grants extensions.
- **Hold potentially responsive documents**: Identify the subject matter of the investigation and put an immediate hold on any potentially responsive documents. Ensure that routine destruction procedures are halted and that all potentially responsive materials are preserved.
- **Review with managers**: Review the CID with senior managers to gain an understanding of the potential issues and to identify key individuals who may have knowledge of the subject matter of the investigation.
- **Determine any reporting obligations**: You may need to report information regarding the investigation to investors or other regulators.
- **Review insurance issues**: Determine whether an insurance claim could or should be made.
- **Recognize that some of the investigation could be made public**: While generally the issuance of the CID is not a matter of public record, subsequent events such as a petition to quash may make the matter public. Requests for extensions of time and other communications with the CFPB should request that identifying information in the communication be withheld from the public, and a redacted copy of the communication should be submitted with the communication for this purpose. Clients should request that information subject to attorney client and work product privileges remain confidential.
- **Contact the CFPB**: Once there is an understanding internally regarding what materials are available and the timeframe required for production, reach out to the CFPB before the due date to try to negotiate appropriate restrictions or limitations on the demands. Prior to placing that call, however, be prepared to move ahead with any objections. As noted above, the CFPB discourages extensions of time for filing objections so generally objections will end up being filed out of necessity so that such objections are preserved.

Although the bureau has been rigid with the petitions it has received so far, Lax said the bureau can be receptive to certain requests.

"They are not unresponsive," Lax said. "They will work with you. They will grant extensions of time for certain things, like when the president of the company, who is the key person who has all the information, is gone on vacation for two weeks. They will also allow you to stagger your responses so you don't have to send information all at once. You can send what you have now and the information that is going to take longer, you send later. It's important also that you don't certify that the response is complete until everything has been sent and everyone is agreed that they've got what they wanted."

He also said the bureau will work with you when it comes to the technology required to fulfill the request. For example, the bureau's standard terms require companies to use BitLocker to encrypt responsive consumer financial information. However, that program is a Windows Professional 7 feature. Lax said there are free programs, such as TrueCrypt, that the bureau will allow you to use instead that will do the same thing.

Just as the Dodd-Frank Act gives the bureau the authority to conduct investigations, it also provides the authority to bring enforcement actions. If the CFPB brings an enforcement action against a company, the legal relief it could request includes:

- Rescission or reformation of contracts;
- Refund of money or return of real property;
- Restitution;
- Disgorgement or compensation for unjust enrichment;
- Payment of damages;
- Public notification regarding the violation;
- Limits on the activities or functions of the person who is the focus of the action; and
- Civil monetary penalties.

RECENT ENFORCEMENT ACTIONS

The CFPB has issued several recent enforcement actions:

- It took action against Genworth Mortgage Insurance Corp., United Guaranty Corp., Radian Guaranty Inc. and Mortgage Guaranty Insurance Corp., alleging the companies violated RESPA by providing kickbacks to mortgage lenders by purchasing captive reinsurance that was essentially worthless but was designed to make a profit for the lenders. According to the bureau, in exchange for kickbacks, the insurers received business referrals from the lenders.
- It ordered Texas homebuilder, Paul Taylor, to surrender $118,194 he allegedly received in kickbacks for referring mortgage origination business to Benchmark Bank and Willow Bend Mortgage Co., using a sham affiliated business arrangement.
- It filed a complaint in federal district court alleging that American Debt Settlement Solutions Inc. (ADSS), a Florida debt-relief company, charged consumers illegal upfront fees for debt-relief services that, in many cases, did not come to fruition. The bureau said the company charged approximately $500,000 in fees to hundreds of consumers. Along with the complaint, the CFPB drew up a consent order requesting that the court halt the company's activities, impose civil money penalties of $15,000, provide restitution to consumers; disgorge the company of any ill-gotten funds, which includes $500,000 in damages; and require the company to pay attorneys' fees and costs. The CFPB based some of its claims against the company on the UDAAP provisions contained in the Consumer Financial Protection Act of 2010, which is Title X of the Dodd-Frank Act.

CFPB LEADERSHIP CONFIRMED AFTER TWO-YEAR BATTLE

A two-year battle over **Richard Cordray**'s nomination to lead the Consumer Financial Protection Bureau (CFPB) ended on July 16 when senators voted 66-34 to confirm him to the bureau's top job. The GOP had blocked the nomination, but their threatened filibuster faded after Democrats and some Republicans struck a deal to permit several contested nominations to move forward.

Cordray said he was honored to be confirmed to the post he's held since January 2012.

"Today's action brings added certainty to the industries we oversee and reinforces our responsibility to stand on the side of consumers and see that they are treated fairly in the financial marketplace," Cordray said. "We will continue our essential work and each one of us, including myself, is grateful for the opportunity to serve our country in this important way."

Despite writing numerous regulations, holding countless meetings with consumers and regulated entities, and several enforcement actions, the ability of the CFPB to work effectively had been called into question until this point because of the way Cordray was first named to his post.

THE INITIAL BATTLE

After much speculation regarding who would head this powerful new entity, especially after its interim leader, **Elizabeth Warren**, was deemed to be too risky a choice, President **Obama** nominated Cordray to be the first director of the CFPB on July 17, 2011.

Even before Cordray was nominated, Senate Republicans made it clear that they would approve no nominations for the post until the CFPB's leadership structure was changed.

"The Dodd-Frank Act grants the CFPB director unprecedented authority over financial institutions and main street businesses," Republicans noted in a May 2 letter to the White House. "Despite this broad mandate, the Dodd-Frank Act failed to provide any real checks on the CFPB director's power. Once confirmed, the director effectively answers to no one. … Accordingly, we will not support the consideration of any nominee … until the structure of the Consumer Financial Protection Bureau is reformed."

On Sept. 6, 2011, Cordray sat before the Senate Banking Committee for his nomination hearing. The event became more of a debate over the bureau's leadership structure and accountability and less a discussion of Cordray's ability to do the job.

Ranking Member **Richard Shelby**, R-Ala., told the committee that his party believed the nomination discussion to be premature.

"We do not believe that the committee should consider any nominee to be the director of the Bureau of Consumer Financial

Protection until reforms are adopted to make the bureau accountable to the American people," he said. "Unfortunately, neither the president nor the majority have made any effort to work with us to improve the accountability of the bureau."

On Dec. 8, 2011, the Senate considered a cloture motion, which would have ended debate on the matter, in an effort to force a vote on the nomination. Democrats were only able to garner 53 votes for cloture — seven votes shy of the 60 needed to break a Republican filibuster.

THE APPOINTMENT

The protracted struggle led to speculation that the president might invoke the U.S. Constitution's recess appointment provisions to install Cordray when senators went home for the New Year's holiday. To block such a move, the Senate instituted a series of procedural *pro forma* sessions intended to limit the amount of time the chamber was in recess. Notwithstanding this procedural move, the president broke the stalemate on Jan. 4, 2012, when he invoked his recess appointment powers to install Cordray and three National Labor Relations Board (NLRB) nominees to their respective posts while the Senate was on break.

Republicans decried Cordray's appointment, arguing the president's controversial move put the new director and the agency's activities in jeopardy. They warned a successful legal challenge could negate the bureau's work. However, a direct legal challenge was long in coming, and questions regarding what the bureau could and could not do without a director receded as the CFPB ramped up its nonbank supervision program, wrote regulations and entered into enforcement actions.

With so much speculation over whether Obama's appointments were constitutional, the Department of Justice (DOJ) published a legal memorandum opinion affirming his right to do so.

"The convening of periodic *pro forma* sessions in which no business is to be conducted does not have the legal effect of interrupting an intrasession recess otherwise long enough to qualify as a 'recess of the Senate' under the recess appointments clause," the DOJ said. "In this context, the president therefore has discretion to conclude that the Senate is unavailable to perform its advise-and-consent function and to exercise his power to make recess appointments."

The opinion explains that the Senate agreed on Dec. 17, 2011, to adjourn and convene *pro forma* sessions with no business conducted on every Tuesday and Friday until Jan. 23. It indicated that the Senate convened a *pro forma* session on Jan. 3 for less than one minute. The next day, Obama appointed Cordray.

NOEL CANNING V. NLRB

At the time Obama appointed Cordray to head the CFPB, he also appointed members of the NLRB, bringing the five-member board to full strength. On Feb. 8, 2012, the board issued an order regarding a dispute between a soft drink bottler and its unionized workers. The company, Noel Canning, challenged the NLRB's action, arguing that the president's recess appointments were invalid. Without valid appointees, the company said, the board did not have a quorum. Without a quorum, the board did not have authority to issue or enforce its order.

Noel Canning petitioned the U.S. Court of Appeals for the D.C. Circuit for a review of the decision, arguing that the NLRB did not have a quorum to conduct business in February 2012, because three of its members were unconstitutionally appointed. The court agreed and vacated the NLRB decision on Jan. 25, 2013.

The court rejected the notion that "the Recess" refers to the passage of a certain significant, yet undefined period of time. Instead, the court opined that the Constitution's language and background documents "suggest that 'the Recess' refers to the period between sessions that would end with the ensuing session of the Senate."

"The president made his three appointments to the board on Jan. 4, 2012, after Congress began a new session on Jan. 3, and while that new session continued. Considering the text, history and structure of the Constitution, these appointments were invalid from their inception," the court said. "Because the [NLRB] lacked a quorum of three members when it issued its decision in this case on Feb. 8, 2012, its decision must be vacated."

The decision is now in the hands of the nine justices of the U.S. Supreme Court.

The U.S. solicitor general, on behalf of the NLRB, filed a petition for a *writ of certiorari* with the U.S. Supreme Court on April 25 asking the court to decide two issues:

- Whether the president's recess-appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between enumerated sessions of the Senate; and
- Whether the president's recess-appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess.

The Court reviewed the petition for a *writ of certiorari* on June 20, and on June 24, it announced that it was granting the petition. The Court posed its own question in addition to the issues it had been asked to review by the solicitor general.

"The petition for a *writ of certiorari* is granted," the Court wrote. "In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: Whether the president's recess-appointment power may be exercised when the Senate is convening every three days in *pro forma* sessions."

POTENTIAL RAMIFICATIONS FOR THE CFPB

Shortly after the D.C. appellate court issued its ruling, people began talking about the potential ramifications for the CFPB. *The Legal Description's* sister publication, *Dodd-Frank Update*, spoke with **Richard Andreano,** partner with Ballard Spahr LLP, and **Jed Mayk**, partner with Hudson Cook LLP, about the potential implications.

For one thing, without a valid director, the bureau may not have authority to supervise nonbank financial service providers. Cordray's apparent defective appointment could also raise questions about the bureau's authority to write rules, introducing the possibility that industry participants may already be violating Dodd-Frank, albeit unwittingly.

> "I have been told that the bureau needs big data to level the playing field. However, the bureau's efforts go far beyond simply leveling the playing field. Unfortunately, for an agency that prides itself on transparency, I have encountered very little concrete answers to very basic questions. Questions still remain about what type of personal information is collected by the CFPB and what is collected by the agency's contractors. But without the structural changes to the agency that we are asking for, it is hard to get answers to the questions."
>
> *Sen. **Mike Crapo**, R-Idaho*

Mayk noted that the recent flurry of CFPB rulemaking was keyed to a provision in Dodd-Frank that would have made certain Dodd-Frank Title XIV provisions effective on Jan. 21 in the absence of such regulations. Among other things, the recent regulations are intended to implement Dodd-Frank's ability-to-repay provisions, mortgage servicing requirements and new protections related to high-cost mortgages. Other CFPB rules delayed implementation of certain Dodd-Frank mandated mortgage disclosures. Questions regarding the rules' validity could inject uncertainty into the industry.

NOMINATION APPROVED

With Cordray's recess appointment scheduled to expire at the end of this year, Obama re-nominated Cordray in January to continue leading the CFPB. As they did in 2011, Republicans in the Senate vowed to block the nomination unless Democrats agreed to certain changes to the bureau's leadership structure and funding mechanism. They said the changes would increase the CFPB's accountability and place an important check on the bureau's broad powers.

Cordray's was also just one of several nominations Republicans attempted to block for various reasons.

Neither side had shown any sign of backing down until Senate Majority Leader **Harry Reid**, D-Nev., signaled he was preparing to make good on a threat to change the rules of the Senate in order to override the Republican filibuster.

In response, Republicans and Democrats met behind closed doors to discuss the nominations and find a way to avert such a rule change. Reid and Sen. **John McCain**, R-Ariz., later announced on the Senate floor that the two sides had reached a tentative understanding that would allow the Cordray nomination and other nominations to move forward.

Ahead of the final vote, some Republicans continued to express grave concern over the bureau's powers and leadership structure. Sen. **Mike Crapo**, R-Idaho, said he's worried about the CFPB's effort to gather large amounts of consumer data.

"I have been told that the bureau needs big data to level the playing field. However, the bureau's efforts go far beyond simply leveling the playing field. Unfortunately, for an agency that prides itself on transparency, I have encountered very little concrete answers to very basic questions," Crapo said. "Questions still remain about what type of personal information is collected by the CFPB and what is collected by the agency's contractors. But without the structural changes to the agency that we are asking for, it is hard to get answers to the questions."

Twelve Republicans ultimately broke ranks to join Democrats who voted to confirm Cordray as CFPB director.

"Consumers won a victory today," said Sen. **Sherrod Brown**, D-Ohio, following the vote. "The two-year-long process that has prevented Richard Cordray from being considered has finally come to an end and we can now move forward."