InsideCounsel
BUSINESS INSIGHTS FOR LAW DEPARTMENT LEADERS

Regulatory: The Consumer Financial Protection Bureau

The bureau's bark is backed up by its ability to bite.

By Martin Bishop

InsideCounsel
June 29, 2011

This column is the fifth in a series of articles on the coming of the Consumer Financial Protection Bureau and the direction it is likely to take in the regulation of consumer financial products and services.

The bureau has a lot of regulatory power at its disposal. It has already issued its first regulation, and many, many more are expected, indeed, mandated by a variety of provisions of Title X of the Dodd-Frank Act. One of the bureau's statutory purposes is to enforce the federal consumer financial laws, but can the bureau *really* enforce? What *kind* of enforcement power does the bureau have? In short, and as is detailed below, the bureau's regulatory bark is backed up by its considerable statutory enforcement bite, which includes the invasive power to investigate and the persuasive power to litigate. Oh, and we should not lose sight of the fact that the Act provides protection to whistle-blowers.

Investigative Powers

For starters, the bureau can investigate consumer complaints (one of its primary statutory functions). Title X broadly defines a "bureau investigation" as any inquiry conducted to ascertain whether any person has engaged in a "violation." What, you ask, is a violation? A violation under Title X is any violation of the federal consumer financial laws which includes any of the various components of the alphabet soup of consumer protection statutes in the financial services arena (e.g., TILA, RESPA, FCRA, FDCPA). In addition, the bureau will be able to investigate matters of fair lending, meaning the "fair, equitable, and nondiscriminatory access to credit for consumers."

The bureau has the authority to conduct joint investigations with other agencies, such as the Department of Housing and Urban Development, as well as with the Attorney General of the United States. In conjunction with these investigations, the bureau can issue subpoenas or civil investigative demands that require witness testimony, written responses to questions, and the production of documents and other relevant information. Failure to comply with these requests can lead to punishment through contempt proceedings in the federal courts. The bureau's civil investigative demands will be afforded confidential treatment, although the extent of such treatment will not be fully known or understood until the bureau issues proposed rules on the issue at a later date.

Hearings, Adjudications, Litigation

Among other things, the bureau has the authority to bring "cease and desist" proceedings against anyone covered by Title X. A cease and desist proceeding can result in exactly what you might expect: the bureau ordering a defendant to stop violating the federal consumer financial laws and/or to take corrective action. Title X also authorizes the bureau to seek temporary restraining orders where appropriate to stop violations until a hearing officer or court can address the merits.

Title X does not provide a private right of action and, thus, plaintiff's lawyers cannot bring lawsuits under Title X on behalf of their clients, either individually or as a putative class. The bureau, on the other hand, can bring civil actions against any covered person for violating the federal consumer financial law. Time will tell how and to what extent these proceedings will provide blueprints for private litigants to bring suits under the consumer laws of the various states.

Any bureau action brought under Title X is subject to a three year statute of limitations, except where the action arises solely under one of the enumerated consumer laws, in which case the statute of limitations for that law applies. By way of example, in the case of the FDCPA, a one year statute of limitations would apply to bureau actions arising solely under that statute.

The remedies available to the bureau are extensive and include, among others: (1) the recission or reformation of contracts; (2) restitution; (3) disgorgement of unjust enrichment; (4) damages; (5) public notification of violations; and (6) civil money penalties. The bureau's civil money penalties are steep and come in three varieties. First, for run of the mill violations, the penalty can be up to $5,000 per day. Second, reckless violations lead to penalties of up to $25,000 per day. Finally, for knowing violations, the bureau has the power to impose penalties of up to $1,000,000 per day. The bureau is required to consider mitigating factors when imposing these penalties, such as the defendant's good faith, the gravity of the violation, and the defendant's prior history.

Employee Protection

Title X protects certain employees of covered financial services companies from retaliation for "whistle blowing." Pursuant to the Act, if one of these employees is discharged or discriminated against for exposing the conduct of her employer and wants protection, she must file a complaint with the Secretary of Labor. If the Secretary does not act in a timely fashion, the employee can then bring suit in federal court. Remedies available to the employee include reinstatement and damages. Notably, the Act prohibits employers from requiring an employee to waive the protective rights provided under the Act and from requiring an employee to submit these disputes to arbitration.

About the Author

Martin Bishop

Martin J. Bishop is a partner and the vice chair of the Consumer Financial Services Litigation Practice at Foley & Lardner LLP. He can be reached at mbishop@foley.com.

Article Link: http://www.insidecounsel.com/2011/06/29/regulatory-the-consumer-financial-protection-burea