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Fair Lending: What to Do When the Government Comes Knocking

Governmental investigations of lenders and servicers addressing fair lending and consumer protection issues have increased markedly in recent years. What steps should be taken when that letter or subpoena or Civil Investigative Demand (CID) arrives notifying your company that it is the next target of such an inquiry? Although the initial reaction may be panic, there are a number of practical actions to consider and we will offer some suggestions in this alert.

The Impetus for Increased Investigative Activities

A number of factors have combined to cause the increase in investigative activities. The amendments to the Home Mortgage Disclosure Act's (HMDA) Regulation C provided the first publicly available information on loan pricing in the spring of 2005. The data provided a possible nexus between fair lending and consumer protection issues, in that data on higher priced lending could be correlated with the race and national origin of the persons receiving such loans. The Federal Reserve Board reportedly identified some 200 lenders exhibiting disparities correlated with race or national origin that might warrant closer scrutiny. As a result, each of the federal financial regulatory agencies as well as the Department of Justice, HUD and the Federal Trade Commission (FTC) received data revealing possible targets for investigation.

The merger of fair lending and consumer protection concepts also presented new challenges for state attorneys general, who, for many decades, have considered themselves to be the champions of consumer protection. State attorneys general have become involved incrementally in major lending matters, first by partnering with the FTC in actions such as that brought against First Alliance Mortgage, and then striking out on their own with major actions against Household/Beneficial and Ameriquest. Notably, the states joined forces for these actions, and attorneys general from virtually all states in which the lender operated joined the legal challenges.

The previous attorney general actions were initiated pursuant to their consumer protection statutory authority, but now that data is available revealing the race and national origin of borrowers receiving higher cost loans, the attorneys general have begun to consider the applicability of civil rights laws, which they have authority to enforce. The recent action by the New York Attorney General against Countrywide, for example, was initiated pursuant to civil rights laws, although the settlement agreement contains many provisions designed to ensure that consumers are properly informed of the advantages and disadvantages of various loan products and are given an opportunity to make an informed choice, *i.e.*, traditional consumer protection concepts.

The legal battle over preemption also impacts investigative activities. Again, state attorneys general contend that they are the champions of consumer protection and the federal financial regulatory agencies cannot be trusted to perform comparable protection. Thus, the states argue that consumers are harmed if the states are preempted from enforcing their laws in certain circumstances. The federal regulatory agencies respond that they have exclusive examination and visitation authority over certain

types of entities and that they aggressively enforce consumer protection laws, particularly in recent years after it was decided that they have the authority to enforce the Federal Trade Commission Act as to the lenders that they regulate. Obviously, each side—state and federal—seeks to prove its success in enforcing consumer protection laws by conducting investigations of lenders.

The FTC has perhaps the broadest investigative authority in that it has authority to enforce both fair lending laws (*e.g.*, the Equal Credit Opportunity Act (ECOA)) and consumer protection laws. The agency is conducting investigations of possible discrimination in loan pricing on the basis of race or national origin (*i.e.*, fair lending issues) as well as continuing its traditional role of enforcing the Federal Trade Commission Act.

The Department of Justice's role is limited to fair lending enforcement, but it is known that the agency is conducting loan pricing investigations in addition to diverse other issues that it has addressed, such as racial redlining, marital status discrimination and even sexual harassment in lending. Also, ECOA requires the federal financial regulatory agencies (*i.e.*, the Federal Reserve Board, Office of the Comptroller of the Currency (OCC), Office of Thrift Supervision (OTS), Federal Deposit Insurance Corporation (FDIC) and National Credit Union Administration) to refer a lender to the Department of Justice if the agency has reason to believe that the lender is engaged in a pattern or practice of unlawful discrimination. Loan pricing investigations frequently implicate these types of issues.

HUD, with authority similar to the Department of Justice, is conducting loan pricing investigations, as well as pursuing issues referred by advocacy groups such as loan eligibility criteria that have a disparate impact on racial or ethnic minorities. These issues raise particular concern for secondary market investors who establish the eligibility criteria for loans that they purchase.

It can reasonably be expected that this enforcement surge will continue. A new round of HMDA data became available in 2006, and lenders recently have filed data that will be available this year. Loan pricing remains an important enforcement priority of both state and federal officials. The downturn in

the housing market, the cutback on nontraditional mortgages, the recent advice on subprime lending, and a Congress now controlled by Democrats will add to the complexities. Advocates already contend, for example, that persons have been steered to nontraditional mortgages on the basis of race or national origin, and investigations of these types of claims will further merge the concepts of fair lending with consumer protection.

Thus, the letter or subpoena can emanate from a host of governmental agencies and can raise a variety of issues. Every investigation is unique, but there are a number of initial considerations and decisions that will apply in most or all cases. The discussion that follows will concentrate on loan pricing investigations, primarily because those seem to be the most common type of investigations being conducted at the present time. The suggestions, however, are readily transferable to any type of fair lending or consumer protection investigation involving a lender, servicer, investor or other type of settlement service provider.

Suggested Steps to Follow When the Letter Arrives

Analyze Scope of Inquiry

The obvious first step in dealing with any governmental inquiry is to analyze the scope. In particular, a lender should carefully review the letter announcing the investigation to determine (i) the precise subject matter being reviewed (*e.g.*, fair lending practices in general, decisioning, pricing, product placement, other consumer protection issues, or a combination thereof), (ii) the type of information requested (*e.g.*, electronic loan data, written policies and procedures, rate sheets, underwriting guidelines, organizational charts), and (iii) the time period in question. From the outset, the lender should attempt to determine what is being examined and what information is being requested.

In many instances, the types of information and data fields being requested by the agency will reveal the issues they are exploring. In other instances, a lender can only guess at the focus of the inquiry. For example, even if the agency requested the type of data that traditionally is used in the analysis of loan pricing, it might remain unclear which loan products

will be included in the analysis (*e.g.*, conventional or governmental; purchase or refinance) or the type of discrimination that will be reviewed (*e.g.*, race, national origin, gender, age, marital status).

Some governmental agencies will tell the lender the issues that they are exploring and the methods for doing so. Counsel, experienced in working with the agencies, also are usually able to predict the focus of the inquiry.

An immediate initial assessment should also include an analysis of the potential risks presented to the company by the investigation. Potential monetary exposure and reputational risk should be evaluated. Such an analysis might be imprecise at such an early stage, but it is an important consideration in staffing and allocating resources to the matter.

Identify and Engage Your Team

A lender facing a fair lending or consumer protection investigation will need to assemble a response team as quickly as possible.

An initial consideration in this process is whether to retain outside counsel. Cost is an important consideration and some lenders have thought that their credibility with government agencies may be enhanced if they appear without outside counsel. On the other hand, they may be walking into a hornets' nest if they are not experienced in dealing in matters of the type under review. Particularly on matters presenting major monetary or reputational risks, lenders may benefit from counsel with experience in the issues presented, and who have credibility with the agency conducting the investigation. Additionally, experienced outside counsel may be of important assistance in developing the facts in a manner that exonerates the company, or at least minimizes the damage that the company otherwise would suffer.

Statistical analyses are frequently an important component of governmental investigations, and it is useful to consider whether a statistician or economist should be retained at an early stage. Again, expense is a major consideration in addressing this issue. But in the modern investigative era, most governmental agencies are searching for data that can be analyzed electronically, and it is difficult to even respond to the data requests—let alone analyze the data upon

which the investigation is based—if the company does not have qualified people on the defense team. Sometimes in-house staff can provide the necessary expertise, but in many instances they cannot.

The overall size and composition of the team will vary depending on the lender's size, complexity and resources. Generally, however, on major matters such as loan pricing investigations, the team will consist of a senior level executive (often a lawyer), who will oversee the process and keep other key executives informed of the progress of the investigation; outside counsel, who generally will work with the lender to develop strategy, prepare responses, engage and work with statistical consultants, and communicate with the investigating agency; outside statistical consultant, who will analyze loan data to assist outside counsel in assessing whether the lender has pricing or other disparities; and an internal employee who will coordinate the gathering of data and information in response to the request.

Deadlines for Replying to Requests

In most cases, a governmental agency conducting an investigation will request a large volume of loan data, documents and information in a fairly short time frame. It is quite common for governmental requests for information to seem overbroad to lenders. From the governmental perspective, the agencies are concerned that their specific requests will be read to exclude information that might be relevant. Thus, they tend to draft their requests very broadly. A lender may view the request as unnecessarily burdensome, and demanding information that is not relevant to the issues under review. Governmental agencies generally are responsive to claims of undue and unnecessary burden, and usually are willing to narrow the request so long as they can be assured that the information they feel they need will be included. Reasoned discussions often resolve these issues.

It is important to gather the requested materials carefully to ensure, among other matters, that all relevant items are identified and produced, and that nonresponsive and privileged materials are excluded from the production. Gathering the electronic loan data almost always presents a challenge and often takes longer than the other materials. Most

governmental agencies are willing to provide a reasonable extension to allow the lender enough time to prepare its initial response. It is advisable to engage in discussions with the governmental agency as soon as possible to discuss the scope of the requests and the time that is reasonably necessary to respond. The agencies become upset when the lender calls shortly before the due date and requests additional time primarily because the lender has not yet devoted attention to the matter.

Determine Your Initial Strategy: The Level of Cooperation

Often, governmental agencies will begin inquiries with a request that a lender voluntarily submit certain information. For example, although the FTC has authority to issue CIDs compelling the production of documents, data and information, the agency will often begin an inquiry with a letter seeking a voluntary submission. The Department of Justice regularly sends letters of this type, largely because it lacks the authority to issue investigative subpoenas under the Fair Housing Act.

At the outset, a lender who has been targeted in an investigation must decide whether to cooperate or resist. Cooperating generally entails providing the investigating agency with the information and data they have requested in a format that they can understand, answering questions to aid in their analysis, and providing access to employees for interviews or depositions. Although a cooperating lender may request the agency to narrow its scope of inquiry, decline to produce privileged materials, request reasonable deadline extensions, etc., it generally will provide the agency with the items requested in a timely manner.

The benefits of cooperating are that it will allow the parties to avoid contention early on, enable the lender and its counsel to establish a cordial relationship with the investigators and, ideally, allow the lender to establish credibility and goodwill. Also, a lender that fails to cooperate may receive process that legally requires a response, such as an FTC CID. Even the Department of Justice, which lacks investigative subpoena power, can team with HUD, which possesses that authority. Or worse yet, the Department may decide to file suit based on limited information, and use the discovery process to obtain the information that it desires.

The obvious downside to cooperating early on is that the information and data provided to the investigating agency may be used to build a case against the lender. Early cooperation could impair the lender's future use of certain legal defenses (*e.g.*, preemption) and, once an investigator gets access to information and loan data, it can be used against the lender.

Resisting an investigation typically involves challenging the agency's legal authority (*e.g.*, based on federal preemption), refusing to provide information voluntarily (*e.g.*, requiring a subpoena) and declining to assist the agency in understanding the information provided. The risks of resistance are obvious, but the tactic has been used by some to delay the process—in some cases by years—and potentially enable the lender to avoid the inquiry altogether. Resisting from the outset also will allow the lender to avoid being viewed as having waived its legal defenses if the agency decides to pursue a claim. Of course, the tactic also will establish a contentious atmosphere from the beginning and, if efforts to resist are unsuccessful, it will likely result in a more aggressive investigation and perhaps a more aggressive prosecution.

In determining whether to cooperate or resist, a lender will need to consider a variety of factors, including the strength of its arguments for resisting, and whether it has an ongoing relationship with the investigating agency. The consequences of resisting also need to be evaluated carefully; for example, lenders may be more likely to display a higher level of cooperation with their primary regulators than on inquiries from others. A lender also would consider whether it has a strong substantive defense to the issues under investigation. For instance, if a lender knows that credit and collateral factors explain disparities in its HMDA data, it may decide to cooperate in a pricing case, even if the investigator's jurisdiction is questionable.

Assemble Data, Documents and Information

Assuming a lender has opted to cooperate, it is important to begin assembling the data, documents and information requested as quickly as possible. Identifying, gathering and preparing information and loan data for production is time-consuming and almost always takes longer than anticipated.

It is advisable to give consideration to the accuracy and completeness of the data being produced. As noted earlier, governmental agencies are frequently searching for data that is available in electronic format. Electronically maintained data, however, may not accurately reflect the information in the loan file itself. For example, a borrower's debt ratios may change from the initial application to the final underwriting decision, as a result of verification of income and debts, but it is not uncommon for a lender's electronic data to contain ratios that were not final. Other important data elements may be missing from the electronic data simply because it was not inputted by the responsible official. The accuracy or completeness of all electronic information may not be of importance for the normal operation of the business, but it may lead to false conclusions by the governmental agency that could cause severe injury to the company.

If the review reveals inaccuracies or incompleteness of data, it may be appropriate to so advise the government officials. In some circumstances, it may be necessary for the lender or the government agency to turn to the loan files for accurate information.

Upon resolution of such issues, a lender will need to make sure that it has identified all of the information that is responsive to the agency's request, while ensuring that it is not inadvertently providing materials that go beyond the scope of the request. The proposed production also must be reviewed carefully to ensure that no privileged information is inadvertently disclosed.

Assess Potential Exposure Based Upon Materials and Data Produced

An issue facing the lender is whether to analyze the materials and data being produced to measure its potential exposure, or simply wait until the agency identifies a potential problem. With the agency investigation frequently based on a statistical analysis, resource and expense considerations are relevant. In most instances, governmental agencies will afford lenders an opportunity to respond to the results of the investigation. Thus, some may choose to await those results before incurring the expense of analysis. The downside of this approach is that the agencies often afford a short time for a response and

are frequently hardened in their opinion by the time they reveal the results of the investigations.

Thus, the preferable approach, resources permitting, is to conduct your own analysis of the data and assess legal risk. In statistical cases, this usually requires engaging an experienced and qualified consultant to perform a statistical analysis of loan data to determine, for example, the extent to which price disparities are present. The consultant should be engaged by a lawyer—ideally outside counsel (although in-house counsel can handle the engagement if necessary)—and the work should be performed under attorney-client privilege. Although the lender ultimately may choose to disclose its pricing analysis to the investigating agency, at the outset, the purpose of the analysis is to support the lender's lawyers' efforts to render legal advice. As such, the work should be treated as privileged unless and until a decision is made to disclose it.

Some lenders perform statistical analyses using internal resources, but in most cases it is preferable to engage an outside consultant to perform the work. Economists experienced in analyzing mortgage loan data typically are familiar with the types of analyses and methodologies that the governmental agencies use, and will perform the same types of tests on the lender's data that the government is likely to perform. Economists also will work with the lender's lawyers to develop the most appropriate way to analyze the lender's data given the lender's scope of operations, product mix and pricing practices.

Although most current mortgage loan pricing investigations are centered around a statistical analysis of the lender's loan data, it also is critical to review other materials, including a lender's product descriptions, underwriting policies, rate sheets, originator compensation plans, fair lending training materials and fair lending complaint/litigation logs. These materials will provide information necessary to properly analyze loan data. For instance, to accurately determine why one group of borrowers appears to pay higher prices than another, it is critical to fully understand how the lender establishes the price on any given loan. This will require a review of rate sheets, which show the interest rate and point combinations for various borrower and transaction characteristics, as well as upward and downward

price adjustments for certain loan features. It also is essential to understand how loan officers are compensated, including whether and how much discretion they have for granting price exceptions and charging overages.

A review of materials also is important for identifying any evidence of overt discrimination. For example, some recent complaints have been based on published price sheets containing allegedly discriminatory eligibility criteria. Finally, a lender that has strong fair lending policies and procedures, price monitoring programs, etc., can use these materials to demonstrate a commitment to fair lending compliance.

Develop Your Defense Without Being Limited by the Materials and Data Requested by the Agency

It is important to understand that a governmental investigation is designed to obtain sufficient information to allege that a lender has violated the law. Some governmental agencies have lower thresholds of proof for filing claims than others. But all of the agencies are limited to the information that they can acquire by voluntary cooperation or compelled production. In virtually all circumstances, however, the investigating agency, even at the close of the investigation, will not have as thorough an understanding of the company's operations as the company does itself.

A targeted lender has the ability to dig much deeper into the facts than does the investigating agency. Lenders certainly view the investigative process as a major intrusion, but investigating agencies view it as very tedious and complicated, and believe it difficult to obtain all of the information necessary to make an informed decision.

The lender's defense team has access to all of the company's records, not merely the records that the agency requested. The defense team has much easier access to employees who are able to give meaning to data as well as to provide crucial information that is not reflected in either electronic data or loan files.

The crucial issue for the defense team, therefore, is to decide what type of analysis it will perform to demonstrate to the agency that a legal violation has not occurred. That might result in a battle among

statisticians as to the appropriate factors to consider in statistical modeling.

A statistical analysis might reveal disparities that are unexplained by the model, and thus allegedly support an assumption that the disparities result from unlawful considerations. In some circumstances, a lender will challenge the agency's modeling and demonstrate that proper modeling removes, or at least narrows, the disparities.

It is equally important, however, not to leave the issue of a legal violation to the statisticians. Statistics are often blind to reality, which is why responsible enforcement officials have generally examined loan files to determine if the statistical targeting accurately predicted the victims of unlawful conduct. Unfortunately, governmental agencies seem to be increasing their reliance on statistics, and thus, when the methodology cannot be credibly challenged, it is even more important for the lender to search for explanations for disparities that do not implicate statutes on which the agency relies. The lending process is exceedingly complex and no one model can accurately capture all of the factors that are considered in the lender's decision-making process.

The challenge for the defense team is to dig deeper than the investigating agency has dug. Again, your team has better access to data and witnesses, and what primarily is needed is a thoughtful and critical analysis of the totality of circumstances that are relevant to the inquiry. You may be challenged in developing facts that had not been considered before or in using data sources that had not been previously used for this purpose. Relevant information may be in the hands of persons who are normally outside of the decision-making structure. The challenge, at this stage, is by no means easy, and it may lead to an ultimate conclusion that the enforcement agency is correct in its charges. Just as likely, however, it may lead to a conclusion that the charges are not correct, and the intense review will allow you to present the information that will avoid a legal challenge.

Conclusion

These suggestions may provide some guidance for the increasing number of lenders facing governmental investigations. We emphasize,

however, that each investigation is unique, and there is no one-size-fits-all response. Rather, a great deal of thinking and analysis is required. The overall goal is to take the appropriate action to properly defend your company, ensure that all facts relevant to the company's defense are uncovered and considered, and to avoid, or at least minimize, the injury to the company that might otherwise result.

Please also review recent K&L Gates' client alerts about [Countrywide Home Loans, Inc's](#) settlement with the New York State Attorney General and [Ameriquest Mortgage Company's](#) settlement with state attorneys general.

If you have any questions, please call either Paul F. Hancock at 305-539-3378, Melanie Brody at 202-778-9203, or any other member of K&L Gates'

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