

CFPB Ombudsman Annual Report Highlights Consumer Complaint Process, CFPB Enforcement Attorneys at Exams

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On November 30, 2012, the Bureau of Consumer Financial Protection (“CFPB”) Ombudsman’s Office delivered its first annual report (“Annual Report”) to the CFPB Director.¹ The 14-page report discusses the Ombudsman’s efforts to establish its role at the CFPB and its activities thereafter, starting in July 2011 through September 30, 2012, the end of its first fiscal year in operation. Although broad in details and short in length, the Annual Report offers clients who interact with the CFPB a valuable glimpse into one of the ways the CFPB regulates itself.

CFPB Ombudsman’s Creation and Advocacy Role

Pursuant to Section 1013(a)(5) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”),² the CFPB Ombudsman is required to “act as a liaison between the [CFPB] and any affected person with respect to any problem that such party may have in dealing with the [CFPB], resulting from the regulatory activities of the [CFPB].”³ In addition, the Dodd-Frank Act requires that the Ombudsman “assure that safeguards exist to encourage complainants to come forward and preserve confidentiality.”⁴ Thus, the Ombudsman’s Office is structured to serve as an impartial and confidential⁵ reviewer of the CFPB’s actions. Specifically, the mission of the Ombudsman is to advocate for and ensure that a fair process exists between “consumers, the providers of consumer financial products and services, and the CFPB.”⁶

The Ombudsman receives complaints regarding the CFPB’s supervisory activities, the enforcement process, the consumer complaint process, supervisory appeals, and interagency disputes. An important aspect of the Ombudsman’s mission is to engage the CFPB whenever the Ombudsman deems the agency’s actions or processes to be unfair. In this capacity, the Ombudsman’s role is structured to enable the Office to provide independent recommendations and informal feedback to the CFPB in an effort to change processes the Ombudsman views as unfair or lacking adequate support.

During its initial reporting period, the Ombudsman’s Office received 775 inquiries that involved 1,003 issues. Individual consumers submitted the vast majority of the complaints, representing 80% of the inquiries. “Business persons”⁷ and “Bank/Nonbank Contacts”⁸ reflected 4% and 3% of the inquiries received by the Office, respectively. Proportionally, the largest number of complaints received by the Ombudsman – approximately 40% of the issues handled by the Office – related to understanding the agency’s consumer complaint process. An additional 20% of the issues were redirected to the agency’s

Consumer Response office or another CFPB office. Generally, the Ombudsman encourages complainants first to pursue established avenues within the CFPB to resolve problems; thus, it typically gets involved only when other avenues fail satisfactorily to resolve an issue.

Ombudsman's Review of Systemic Issues

An important and somewhat unique aspect of the Ombudsman's role is to study agency processes and provide recommendations to the CFPB Director on a systemic level. The Office's oversight may involve issues regarding a national or regional concern or may focus on a particular agency process. Two systemic issues that the Ombudsman addresses in the Annual Report with recommendations to the CFPB Director involve: (i) increasing the transparency of the agency's consumer complaint process, and (ii) the CFPB's practice of having agency enforcement attorneys present during supervisory examinations. In reviewing these systemic issues, the Ombudsman is pursuing change on a broader scale, as discussed below.

Improving Transparency of the Consumer Complaint Process

As noted previously, the most frequent issue raised by consumers with the Ombudsman's Office involved confusion regarding how and when the CFPB consumer complaint process worked. The Ombudsman outlines in the Annual Report several broad recommendations to help the CFPB explain the complaint process to consumers.

As proof of its successful relationship with the CFPB and demonstration that the Ombudsman understands consumer needs, the Annual Report notes that the CFPB changed its policies to address the Ombudsman's recommendations. These changes include adding a description of the consumer complaint process and screening criteria in the CFPB's first Semi-Annual Report, providing an explanation of when the CFPB cannot assist when communicating directly with consumers, and publishing more information about the consumer complaint process on the CFPB website.

In one situation, after receiving a recommendation from the Ombudsman about the lack of transparency in CFPB letters sent to consumers at the close of a dispute with a company, the agency's Consumer Response office reviewed and revised the language in the letters. In addition, following a recommendation by the Ombudsman, the CFPB's Consumer Response office has worked to increase access to the agency's consumer complaint process for those without computer and internet access.

Presence of Enforcement Attorneys at CFPB Supervisory Examinations

Since the start of its examination program, it has been the CFPB's policy to involve agency enforcement attorneys in examinations of financial firms (and service providers) subject to the agency's oversight. The Ombudsman received numerous complaints about this policy. While the presence of enforcement attorneys throughout the supervisory examination is intended to increase the efficiency of the CFPB, there is a strong concern that the practice causes providers to be less willing to share information freely with the agency.

In reviewing the current policy, the Ombudsman met with those affected by the policy, including CFPB leaders and staff, bank officials, outside attorneys, and consultants to discuss the strengths and weaknesses of the current practice. Pursuant to these discussions, the Ombudsman recommended that the CFPB review and clarify an enforcement attorney's role during supervisory examinations. The Annual Report notes that the CFPB has not yet acted on the Ombudsman's recommendations, but it

appears that the agency is reviewing the issue. At this point, it is difficult to predict whether the agency will make meaningful reforms to address the issues raised by the Ombudsman regarding the dampening effect that an enforcement attorney at an examination may have on a full and frank discussion of the issues during an exam. It is, however, a promising sign that the CFPB is considering the issue.

Interestingly, another issue that received considerable attention during the first year of the CFPB's operations for adversely affecting the free flow of information between financial firms and the CFPB during examinations was the absence of the same statutory bank examination privilege available to the federal banking agencies in the conduct of their supervisory examinations. Notwithstanding the CFPB's final rule implementing a regulatory privilege,⁹ the absence of a statutory privilege, coupled with the presence of CFPB enforcement attorneys at CFPB examinations, are aggravating factors that potentially inhibit the type of information exchange necessary to facilitate an effective and constructive examination process. While the CFPB has taken the steps available to it to shore up the protection of information shared with the agency by financial firms during examinations, ultimately the issue is best resolved by a statutory fix. In contrast, it is entirely within the CFPB's power to end the practice – or find ways to modify the impact – of having agency enforcement attorneys present at supervisory examinations. The practice clearly has a chilling effect on the main objective of the supervisory examination process to promote the free flow of information between the regulator and the regulated institution so that issues may be effectively and efficiently addressed during an exam.

Future Action and Influence of the CFPB Ombudsman

For 2013, the Ombudsman intends to continue receiving individual inquiries and reviewing systemic issues while focusing on training CFPB staff, consumers, and providers about its role, as well as continuing its data collection efforts with respect to the CFPB's activities. The Office noted it will also continue to make recommendations to ensure the CFPB operates fairly.

As the CFPB Ombudsman's Office moves into its second year of operation with an established and perhaps further emerging role, the Office may offer opportunities to serve as a valuable resource to clients involved in the CFPB regulatory and supervisory process. What remains to be seen, however, is how much influence the Ombudsman will have at the CFPB. While the Annual Report provides important answers about the Ombudsman's current and emerging role and influence, the most important question that remains is how much weight the CFPB will place on the Ombudsman's recommendations. Generally, the Ombudsman Offices of the other federal banking agencies have been effective at times in addressing individual issues and concerns (on behalf of consumers or institutions), but have not benefitted from strong agency support in addressing systemic issues. This is perhaps due, in part, to a somewhat narrower and more focused job description for the other banking agency Ombudsman Offices than the CFPB appears to have articulated for its Ombudsman's Office. Ultimately, it may be the difference in supervisory and regulatory cultures between the CFPB and other federal banking agencies that either distinguishes the CFPB Ombudsman as yet another voice of change at the CFPB or, perhaps, one that cannot overcome the forces of change already set in motion at the young agency.

Paul Hastings attorneys are currently working with clients on a variety of CFPB regulatory and supervisory matters, and will continue to monitor the CFPB Ombudsman's activities and the agency's response to the Ombudsman's recommendations regarding the agency's consumer complaint process and the presence of agency enforcement attorneys at CFPB supervisory examinations. If you have any questions, please contact any of the following Paul Hastings' attorneys below for assistance:



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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¹ CFPB Ombudsman's Office, FY2012 Annual Report to the Director (2012), available at http://files.consumerfinance.gov/f/201211_Ombuds_Office_Annual_Report.pdf.

² 12 U.S.C. § 5493(a)(5).

³ *Id.*

⁴ *Id.*

⁵ The CFPB Ombudsman will not release identifying information except when a person consents, "if there is a threat of imminent risk of serious harm, the person raised an issue of government fraud, waste, or abuse, or if required by law." Annual Report at 3.

⁶ *Id.*

⁷ "Business Person" is defined in the Annual Report "as an individual who has an inquiry related to his business interests." Annual Report, 7 note 3.

⁸ For purposes of the Annual Report, "Bank/Nonbank Contact" is defined as "an individual who currently works or previously worked for a provider of financial products or services under the CFPB's jurisdiction. An individual who works for a provider of financial products or services, but is contacting the Ombudsman about his individual consumer issue is a 'Consumer.'" Annual Report at 7, note 3.

⁹ 12 CFR §§ 1070.47(c) and 1070.48. See Confidential Treatment of Privileged Information, 77 Fed. Reg. 39617 (July 5, 2012).