Predicting the Top Financial Industry Litigation and Compliance Issues in 2015

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As 2014 comes to a close, we take a look at the upcoming litigation and compliance challenges facing the financial industry in 2015. Understanding the compliance and litigation trends to come will help financial institutions prepare for, and avoid, these common challenges. With that said, here is what the financial industry can expect in 2015.

False Claims Act Litigation. During fiscal year 2014, the U.S. Department of Justice (“DOJ”) hauled in a record $5.69 billion in settlements and judgments related to False Claims Act (“FCA”) cases.1 This is the first time that DOJ’s FCA recovery has exceeded $5 billion.2 That historic recovery was due in large part to an unprecedented $3.1 billion FCA haul from the financial industry, related largely to federally insured mortgages and loans.3 While it may be difficult for DOJ to match its 2014 bounty against the financial industry, because FCA litigation creates great upside for DOJ and private whistleblowers it will no doubt continue in 2015.

The FCA provides that a person who “knowingly presents, or causes to be presented” a false claim to the government, or “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim,” is liable to the government for a civil penalty of $5,500 to $11,000 per claim, in addition to treble damages.4 In addition, the FCA permits private individuals (referred to as “relators”) to initiate FCA lawsuits on behalf of the government, called qui tam lawsuits.5 Relators are essentially whistleblowers and are incentivized to bring qui tam actions because the government often intervenes in the action, takes over prosecution, and then rewards the relator between 15 and 25 percent of the settlement or judgment.6 FCA actions have become big business for DOJ and whistleblowers and are incentivized to bring qui tam actions because the government often intervenes in the action, takes over prosecution, and then rewards the relator between 15 and 25 percent of the settlement or judgment.6 FCA actions have become big business for DOJ and whistleblowers, which will likely encourage similar actions in the future—whether those actions are legitimate or not.

Over the last few years, DOJ and whistleblowers have used the FCA to target banks’ government-backed mortgage origination practices, related to the mortgage crisis. Specifically, a significant FCA target has been lenders that made Federal Housing Administration (“FHA”) insured loans. Those lenders would issue FHA-backed loans, but allegedly fail to comply with FHA underwriting requirements, and then seek insurance through Fannie Mae. However, lenders would issue FHA-backed loans, but allegedly fail to comply with FHA underwriting requirements, and then seek insurance through Fannie Mae.

2 Id.
3 Id.
complaints. Not surprisingly, then, CFPB recoveries in 2015. 

For these reasons, mortgage-related products and services made up the greatest number of CFPB’s consumer complaints. These or mortgage-related issues will likely continue to be on CFPB’s enforcement radar in 2015. For these reasons, mortgage-related issues will likely continue to be on CFPB’s enforcement radar in 2015. 

**Consumer Financial Protection Bureau Actions.** The number of enforcement actions brought by the Consumer Financial Protection Bureau (“CFPB”) has steadily increased from 2012 through 2014. That trend is likely to continue into 2015. Predicting exactly which programs CFPB will focus on is challenging, because CFPB views its jurisdictional reach broadly. However, a likely indicator of CFPB’s 2015 enforcement priorities can be gleaned from trends in CFPB’s prior enforcement actions and consumer complaints.

In 2014, consumer complaints related to mortgages or mortgage-related products and services made up the greatest number of CFPB consumer complaints. These complaints also yielded a significant portion of CFPB’s overall recoveries in 2013. For these reasons, mortgage-related issues will likely continue to be on CFPB’s enforcement radar in 2015.

In addition, consumer complaints related to credit cards made up a significant percentage of CFPB’s 2014 complaints. Not surprisingly, then, CFPB recoveries related to credit card and credit card add-on products generated the largest recoveries for CFPB in 2014. Historically, CFPB’s focus concerning credit card add-on products has been on ensuring “that consumers are protected from deceptive sales and marketing practices, including those resulting from failures to adequately disclose important product terms and conditions, or other violations of Federal consumer financial law.”

Given the high volume of consumer complaints and CFPB recoveries in 2014, this will likely be an area CFPB continues to focus on in 2015.

CFPB has also taken an interest in nonbank lenders in the auto industry. Specifically, CFPB and DOJ have initiated investigations into discriminatory lending practices by finance arms of auto lenders. In September 2014, CFPB issued a proposal to oversee large nonbank auto finance companies. In addition, although not comprising a large number of 2014 enforcement actions, debt collection practices made up a significant number of CFPB’s consumer complaints in 2014 and will likely be a major CFPB focus in 2015.

**Cybersecurity.** Although data breaches are still relatively uncommon, they are on the rise. Seemingly no industry is immune from a data breach. However, the potential for a data breach poses unique challenges for the financial industry. For instance, financial institutions can find themselves as victims of a data breach today and in the crosshairs of a lawsuit or regulatory action, as the alleged wrongdoer, tomorrow.

Financial institutions regularly receive, transfer, and store large volumes of data, including customers’ confidential information. Given the large volume of highly confidential customer data that these institutions maintain, they are prime targets for hackers. If a breach occurs, a financial institution is likely to find itself in litigation. Because damages suffered by individual victims of data breaches are generally relatively small, however, victims usually pool their resources and file a class action lawsuit against the alleged wrongdoer, resulting in greater potential liability to the financial institution. While plaintiffs have recently had difficulty prevailing in data breach lawsuits, litigation—even for the victorious party—is expensive and can have negative reputational implications. In addition to civil lawsuits, financial institutions may also face governmental investigations or enforcement actions.

Further, financial institutions also have to worry about the repercussions of third-party data breaches. For instance, when data breaches occur that result in unauthorized charges to a financial institution’s customer’s account, the financial institution typically refunds the customer the amount of the fraudulent charges and replaces the customer’s card. In large scale data breaches, that can become incredibly expensive. The financial institution is then shouldered with the burden of determining who to turn to for reimbursement. That can prove to be difficult either because the responsible party is unknown or, perhaps, no legal claim exists against the responsible party. Several financial institutions are currently litigating this issue against Target Corp., related to its highly publicized data breach.

The outcome of that case will likely affect if, and how, financial institutions in the future can recover their losses related to third-party data breaches.

Given the rise in data breaches and the unique challenges breaches create for financial institutions, on December 3, 2014, Deputy Secretary of the Treasury Sarah Bloom Raskin stated that enhancing the nation’s cybersecurity for the financial industry (among others) “is a top policy priority for the President and the Treasury Department.” Cybersecurity, therefore, will be an important point of emphasis for financial industry compliance personnel in 2015.

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8 Id.

Anti-Money Laundering Compliance. Anti-Money laundering ("AML") compliance is a perennial challenge for financial institutions, and 2015 will be no different. Indeed, on August 11, 2014, the Department of Treasury's Financial Crimes Enforcement ("FinCEN") issued an advisory to financial institutions, which advisory reminded those institutions of the importance of their Bank Secrecy Act ("BSA") and AML compliance obligations and the importance for which FinCEN views those obligations. Leaning on recent BSA/AML civil and criminal enforcement actions for guidance, FinCEN stated that financial institutions should strengthen their BSA/AML compliance culture by ensuring that (1) its leadership actively supports and understands compliance efforts; (2) efforts to manage and mitigate BSA/AML deficiencies and risks are not compromised by revenue interests; (3) relevant information from the various departments within the organization is shared with compliance staff to further BSA/AML efforts; (4) the institution devotes adequate resources to its compliance function; (5) the compliance program is effective by, among other things, ensuring that it is treated by an independent and competent party; and (6) its leadership and staff understand the purpose of the BSA/AML efforts and how its reporting is used.

Although the regulators want to encourage financial institutions to evaluate their BSA/AML policies and ensure compliance therewith, the regulators have made clear that they are not encouraging financial institutions to "derisk"—that is, cancel accounts or otherwise refuse to provide services that could pose a BSA/AML risk, without first conducting a risk-based analysis. However, given the penalties facing individuals and institutions for BSA/AML failures, serious risks exist for financial institutions to ensure that their BSA/AML policies are up-to-date and well implemented.

The Department of Treasury has signaled that a major point of emphasis going forward will be on strengthening financial institutions' due diligence programs related to BSA/AML compliance. In fact, on August 4, 2014, FinCEN issued a proposed rule that would require financial institutions, for purposes of BSA/AML and Know Your Customer obligations, to "look through" a customer or client on beneficial owners having a 25 percent or greater ownership interest in or control of a customer or client. In other words, the proposed rule will put an emphasis on determining beneficial ownership interests and look beyond the use of shell companies or other sophisticated entity formation structures to launder money. Whether this proposed rule passes or not, FinCEN will likely focus on this in 2015.

There is also likely going to be a focus on banks' relationships with money services businesses ("MSBs"), as well as MSBs individually. On November 10, 2014, FinCEN issued a statement to banking institutions regarding their BSA/AML obligations for MSBs. The statement cautioned banks against the wholesale refusal to provide MSBs services, but also warned that FinCEN expects "banking organizations that open and maintain accounts for MSBs to apply the requirements of the [BSA], as they do with all accountholders, based on risk." Also on November 10, 2014, Department of Treasury Undersecretary David S. Cohen remarked that the Department of Treasury intends "to deepen our engagement with industry on strengthening controls and compliance for [MSBs]." In addition, Undersecretary Cohen stated that "FinCEN is partnering with states to more effectively allocate resources for MSB examinations." It is clear, then, that MSBs will be a governmental BSA/AML priority in 2015.

14 Id.
19 Id.
21 Id.