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CFPB's Broad Doc Request Ruffles Feathers

By **Evan Weinberger**

Law360, New York (September 25, 2012, 7:58 PM ET) -- A recent battle over a sweeping Consumer Financial Protection Bureau document request in its investigation of mortgage company PHH Corp. publicly revealed the new agency's unusually broad probes of company records, a practice attorneys say will continue until the CFPB gains more experience.

Since the CFPB began operation over a year ago, companies from all sectors that the agency regulates have raised concerns about the broad sweep of its enforcement division's civil investigative demands, which have been broader than similar information requests from other regulators. The hope within the banking and other industries regulated by the new agency is that the scope of those requests will be tempered as the CFPB develops a broader institutional memory, said Jonathan Pompan, of counsel at Venable LLP.

"One has to take what they're writing at face value, but the scope of the investigations appears to be more along the lines of a classic examination than an investigation based on very specific acts and practices," he said.

PHH's challenge, which the CFPB rejected Thursday, relates to the agency's probe into the mortgage insurance industry, in particular the company's mortgage insurance premium ceding practices to its captive reinsurers.

But it also showed that the CFPB has a broad view of the documents it needs and is entitled to in an investigation, according to Troutman Sanders LLP partner David Anthony.

"I think it's safe to say that the CFPB's view of what is relevant has been defined very broadly," he said.

The CFPB began its investigation in January, and the company revealed the probe in a regulatory filing soon after. The CFPB's enforcement team issued a broad CID in May.

PHH and the CFPB's enforcement team were able to negotiate down some of the agency's requests for information, but in June the company challenged the CID's scope.

According to the challenge, CFPB enforcement attorneys asked for documents stretching as far back as 1995. Under the Real Estate Settlement Procedures Act and other relevant statutes, the statute of limitations of claims is three years.

PHH called the broad request a "fishing expedition" that would cost the company a great deal of time and money without necessarily helping the probe.

CFPB Director Richard Cordray rejected that reasoning in his order, finding that the documents enforcement attorneys sought were necessary to develop a full picture of the company's practices. He also said that the request was in line with what other agencies seek in their CIDs.

Attorneys who represent consumer finance companies say their clients have complained that the requests from the CFPB are broader than those brought by similar agencies, like the Federal Trade Commission. Part of the reason for it is that the cases the CFPB is investigating are complex and haven't had the same

level of scrutiny from other regulators.

"The banking regulators have a constant presence and a working familiarity with the institutions they examine and supervise. It's very easy for them to be able to focus and pin down what they are looking for. It's a little different for the CFPB," Pillsbury Winthrop Shaw Pittman LLP partner Joseph Lynyak said.

Although the CFPB has a number of experienced hands in its enforcement division, in many cases the bureau's attorneys are still getting up to speed on the industries they regulate as well as their internal investigative practices, Anthony added.

"The CFPB is new to this, so the sort of authority that has been shaken out over the years over how these things have been done is clearly more highly developed in the other areas than this," he said.

The CFPB's relative youth is one reason why Cordray issued a nine-page ruling rejecting PHH's request to overturn the CID. Calling it "precedential," Cordray said that the ruling was in part designed to show other companies the bureau's thought processes when it comes to the requests.

It also showed that the agency will be aggressive, Anthony said.

"I think it is worded very purposefully. On the one hand, they can talk about transparency and being open, but on the other hand, they're going to get what they want," he said.

The question remains, however, if what the agency wants will change over time.

That might not be the case, said David Reiss, a professor at Brooklyn Law School who monitors the CFPB.

The broad push for information, and the willingness to stand up to regulated companies, in part reflect Cordray's experience as Ohio's attorney general, Reiss said. Cordray also served as the bureau's enforcement director before being named director by President Barack Obama in January.

"He's probably very comfortable with a very assertive use of the subpoena power," Reiss said of Cordray, adding that it was not "intuitive" that the CFPB would become less aggressive.

But what might change is the nature of the investigations, Venable's Pompan said.

"All indications are that they're still very much in the startup phase and are bringing these broad investigations, but at some point it would seem as though they would be able to end up bringing narrower and more focused investigations," he said.

--Editing by John Quinn and Katherine Rautenberg.

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