Thursday, March 10, 2016

In a wide-ranging speech yesterday before the Consumer Bankers Association, Consumer Financial Protection Bureau (CFPB) Director Richard Cordray forcefully defended his agency’s approach to consumer financial regulation and supervision against critics who call it “regulation by enforcement.” Saying that criticism of this practice (and even the term) is “badly misplaced,” he argued for the need to work “toward a pattern of actions that conveys an intelligible direction to the marketplace, so as to create deterrence that can be readily understood and implemented.”

Director Cordray noted that the “vast majority” of CFPB enforcement actions involve some sort of deception or fraud and commented on the difficulty of creating specific rules to address fraud or untruth. In turn, he said, the CFPB has sought to present specific enforcement orders that meticulously catalogue the facts we have found in our very thorough investigations and set out the legal conclusions that follow from those facts. These specific orders are also intended as guides to all participants in the marketplace to avoid similar violations and make an immediate effort to correct any such improper practices.

In this regard, the Director’s speech included an unambiguous warning to financial institution compliance officers and executives about the need to pay attention to CFPB enforcement actions:

These orders provide detailed guidance for compliance officers across the marketplace about how they should regard similar practices at their own institutions. If the same problems exist in their day-to-day operations, they should look closely at their processes and clean up whatever is not being handled appropriately. Indeed, it would be “compliance malpractice” for executives not to take careful bearings from the contents of these orders about how to comply with the law and treat consumers fairly.

Whether one agrees or not with Director Cordray’s views on the term “regulation by enforcement,” the speech starkly summarizes the divide between the CFPB on the one hand—which believes that it is appropriate to define the law through enforcement orders)—and financial institutions on the other hand—which believe that the CFPB should interpret the law through rules properly promulgated through the notice and comment process of federal rulemaking.

Of more immediate significance, however, is Director Cordray’s blunt admonition to financial institutions and providers of consumer financial services that they must pay close attention to the CFPB’s enforcement actions, as well as proposed and final regulations and industry guidance, as part of their regulatory compliance activities. The clear message that emerges from these remarks is that the CFPB will hold consumer financial services providers accountable for their knowledge—or the lack thereof—of applicable CFPB regulatory and enforcement activities.

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