WHY FINANCIAL INSTITUTIONS SHOULD STAY THE COURSE

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US Policy and Regulatory Alert

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INTRODUCTION

Many regulated businesses believe that the only thing worse than strict regulations is a wholly uncertain regulatory environment. With many rule changes on hold and enforcement actions and investigations being terminated or limited, how do banks, payments program managers, processors, and fintechs move forward? Do they "take their gloves off" and take advantage of a possible enforcement void to maximize profits, or do they stay the course given that there are 50-year-old laws on the books that still apply and probably are not going anywhere?

We say, continue to innovate with the expectation that certain fundamental laws and rules are unlikely to change and that consumers still want and need financial services and products.

THE RESILIENCE OF STATUTES AND REGULATIONS

Most financial institutions, payments companies, and fintechs have always designed their products and services for compliance. When new rules and orders come out, they often do not have to make changes because they had a robust compliance program in place and had already been using best practices. Similarly, they are not quick to take advantage of a "bad" ruling, knowing instinctively that a new statute, order, or ruling will soon restore the status quo.

Even in a time of regulatory uncertainty, the primary federal consumer protection rules that have existed since the late 1960s and 1970s are likely to stay in place. These include the following:

- The Truth in Lending Act (TILA) and its Regulation Z, which, among other things, require loan disclosures, periodic statements for open-end credit, and prepaid account disclosures, and provide consumers with protections from unauthorized credit card transactions.
- The Electronic Fund Transfers Act (EFTA) and its Regulation E, requiring initial disclosures, regulating electronic fund transfer (EFT) arrangements, and providing significant consumer protections from unauthorized EFTs.
- The Equal Credit Opportunity Act (ECOA) and its Regulation B, prohibiting impermissible forms of credit discrimination and requiring "adverse action" notices or other notifications regarding credit applications and existing extensions of credit. While the scope of the impermissible discrimination rules may change

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from time to time, including as a result of court decisions, the basic credit notification requirements are unlikely to change.

- The Truth in Savings Act and its Regulation DD, which requires initial disclosures for consumer deposit accounts and, if statements are provided, requires specific information to be included in such statements (this law and regulation are from the early 1990s).
- The Real Estate Settlement Procedures Act (RESPA) and its Regulation X. In addition to requiring certain mortgage loan disclosures, Section 8 of RESPA prohibits referral fee and kickback arrangements involving "settlement services." Here is one area for which the rules might be relaxed. For many years, the ability to enter into marketing services agreements and similar arrangements has been severely limited due to the Section 8 interpretations and enforcement actions of the Consumer Financial Protection Bureau (CFPB). With the CFPB being under new leadership and its future uncertain, marketing arrangements that survived Section 8 scrutiny prior to the CFPB might again be viable.

For all of the above, while enforcement by federal regulators might be reduced, enforcement by plaintiffs' lawyers likely will not. This seems particularly likely for those laws such as TILA, the EFTA, and ECOA that provide for class-action liability.

State laws governing credit interest rates, loan and other product and service fees, and consumer disclosures also are likely to stay in place. Those laws might shift in some states, particularly those laws that were made more burdensome in recent years, but they are unlikely to go away entirely.

STATES MAY FILL THE VOID

All of the federal laws listed above are "federal consumer financial laws" under the Dodd-Frank Act, and state attorneys general and state regulators are empowered by that act to bring a civil action to enforce any of these laws. The main exception is that a state attorney general or regulator generally may not bring such civil actions against a national bank or federal savings association.

CONCLUSION

Although there may be some regulatory uncertainty, some things remain constant. Lawyers will be lawyers and lawsuits will be brought, and state attorneys general and regulators can enforce the federal consumer financial laws against most banks and nonbank businesses.

It is just a question of complying with the existing laws, applying common sense rules, and developing attractive consumer options. We are not without regulatory guardrails, but old-fashioned banking with modern innovations still provides routes to develop and market consumer products and services and build customer relationships. Those businesses that continue to innovate can take the lead.

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