Our Perspectives:
Commentary on the economy & regulatory policies affecting financial companies

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Brief Note on Comment Fatigue and the Massive Regulatory Calendar*

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The Dodd-Frank Act handed the regulators a difficult job. Many of its provisions were not robustly defined or explained, one of the consequences of trying to pass a law when the research into the causes of the problem the law is designed to address is incomplete or only spotty at the time the law is adopted. But the Act was passed and the regulators were left with a problem. The unintended consequences are before us.

The Federal Reserve Bank of St. Louis has a website dedicated to the review of regulations implementing DFA.[1] Many law firms have done the same, with the Davis Polk website the one that was up the earliest and is devoted, in great part, to determining if the regulators have met the deadlines for adoption of regulations.[2] Davis Polk statistics for October 2012 show that so far the regulators have met the deadlines in 37 percent of the cases in which there have been deadlines already passed, and failed to make those deadlines in the other 63 percent.

While those websites are important and it is at least interesting to see that the regulators are failing to meet a great many of the deadlines, a consequence just as serious is the pressure that certain regulators are exerting to complete the regulations within the deadlines. That kind of pressure can result in regulations that have not received a proper airing and hence may be lacking in serious respects.

For example, the CFPB has eleven proposals out for notice and comment at the present time. That would be a massive number for the public to provide meaningful comment in the ordinary course. But many of those proposals are lengthy and dense. The integrated TILA RSPA proposal,

*The information contained in this newsletter does not constitute legal advice. This newsletter is intended for educational and informational purposes only.

[1]Federal Reserve Bank of St Louis, "Dodd Frank Regulatory Reform Rules."

[2]Davis Polk, "Dodd-Frank Progress Report"

for example, is 1100 pages,[3] and is complex and detailed. While that is the longest, others are long — the proposal for the rules governing loan originator compensation is 370 pages long; mortgage servicing is 420 pages; and the appraisals proposals total nearly 270 pages.

These are the proposals that are still open, and must be seen against the backdrop of an additional 22 proposals and other Interim final rules already closed for comment. Those rules included some of the most important rules the Bureau will adopt during its early years.

For example, faced with the continuing desultory performance of the housing sector, to which is attributed the poor performance of the economy generally, Congress passed a law that on its face makes a lot of sense — no one would receive a loan unless the lender had a reasonable belief that the borrower could repay that loan. Sounds straightforward and correct. But the implementing statute wrestled with the question of what the result might be if the lender failed to do that and decided to impose a very serious set of penalties, so serious that lenders considering the penalties have generally decided they would avoid, at all cost, making loans that failed to meet that standard.

Congress then said that certain loans meeting certain standards would get some protection from those penalties, and identified these loans as Qualified Mortgages. Unfortunately, they failed to say what that protection might be and left a fuzzy line that has devolved into a discussion of Safe Harbors and Rebuttable Presumptions, a difference that might turn out to be meaningful in much litigation. In trying to draft regulations to fit this provision, the Bureau asked for comments, and then reopened the proposal for additional comments. It now is considering what to do, and its choice will define the breadth and scope of mortgage lending for the near term in the U.S.

Frankly, the decision is so important that the question of whether it meets a statutory deadline is not as important as whether it gets it right. And that is the better answer to many of the proposals the Bureau has considered and will consider.

The public must be facing the same problem that the industry is facing in light of this onslaught of proposals. To read carefully 1100 tightly written pages of a proposal and to try to figure out first what the proposal says and

[3]Per the copies published by the Bureau, not Federal Register pages.

second how it fits the many permutations of practice that lenders encounter is both difficult and time consuming. The individuals trying to respond are rushing to try to respond within time frames that have been shortened by the conflicting requirements of responding to other proposals.

It would be difficult but not overwhelmingly strenuous to respond to an 1100 page proposal, even when it was dense, if that was the only proposal on the agenda. It is not, however, and time must be found to deal not only with that proposal, but with all of the others. Regulatory proposal fatigue has set in, and its impact will be felt, probably later rather than sooner. The result will be that errors and ideas that would be helpful will surface only after the fact as the rules are being implemented and borrowers and lenders stumble across conflicting rules or ambiguous provisions.

There are some solutions that would be helpful that could be adopted by the regulators.

Suggested remedies

There is nothing the regulators can do about the statute — it is what it is. But they can try to make it more workable when possible.

1. Extend the comment period as long as possible to permit the public to have ample time to deal with each of the proposals. Do not view each proposal in isolation from the others. Recognize and make allowance for comment fatigue.

2. Utilize real conversational roundtables to review some of the proposals in detail. This might take one or two days to do, but will produce real answers to real questions. Webinars simply don't accomplish that, nor do roundtables that are really presentations.

3. Announce that during transition periods the conversations will continue with the public and the industries affected. Utilize pilot periods without liability to capture existing problems not found in the proposals. Corrections after the fact and before the effective date will be better than after the effective date.

4. Recognize that one year is a short period of time to implement many rules because of operational problems, training problems, and related changes that must be adopted. Effective dates must be based on the

time of the last changes to the rule. At some time, companies will simply have to bake into their operations rules that thereafter may be found to be in conflict with other rules or ambiguous.

At the end of the day, what is wanted is a functioning economy in which consumers are given ample protection and businesses can produce sufficient returns on capital to stay in business. Slavish adherence to getting everything out on time may be in conflict with those goals.

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