

PUBLICATION

Lessons Learned from the CFPB and DOJ's Latest Fair Lending Enforcement Action

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On June 29, 2016, the Consumer Financial Protection Bureau (CFPB) and the Department of Justice (DOJ) demonstrated the agencies' continued emphasis on fair lending with the announcement of a joint action against BancorpSouth for discriminatory mortgage lending practices. The parties' consent order, pending court approval, would require BancorpSouth to pay \$10.6 million. Industry participants should note three key aspects of this enforcement action: (1) the effect of BancorpSouth's response to the investigation on the settlement, (2) the CFPB's use of "testers," and (3) the CFPB's continued focus on fair lending issues.

The consent order explains that during the investigation BancorpSouth improved its compliance management system, reduced its fair lending risk and increased its lending in minority areas **prior to entering into the consent order**. These steps included:

- implementing rate sheets to price loans originated by its Community Banking Department;
- transitioning to centralized underwriting in its Community Banking Department;
- appointing a Chief Fair Lending Officer with responsibility over the Bank's fair lending compliance program;
- appointing a Community Development Lending Manager with responsibility over meeting the needs of home buyers in low-to-moderate income and minority communities, and hiring 16 community development mortgage specialists;
- opening a full-service branch in a majority-minority neighborhood in the Memphis area;
- providing financial literacy training in the Memphis area;
- implementing enhanced fair lending training;
- introducing a low down-payment credit product;
- monitoring pricing and underwriting outcomes on a quarterly basis; and
- hiring a new Chief Executive Officer, President, General Counsel, Mortgage Department President, and Chief Banking Officer and Director of Community Lending.

The CFPB's Bulletin 2013-06 titled "Responsible Business Conduct: Self-Policing, Self-Reporting, Remediation and Cooperation" states: "the Bureau principally considers four categories of conduct when evaluating whether some form of credit is warranted in an enforcement investigation: self-policing, self-reporting, **remediation** and cooperation." Some banks and other entities take the wrong approach during an investigation and believe that any changes made to their policies or procedures may indicate that they were guilty of the allegations alleged in the investigation. In fact, as evidenced here, the opposite is true. The CFPB guidance explicitly states that the Bureau gives favorable consideration to banks that "improve internal controls and procedures designed to prevent and detect a recurrence of such violations" and change "business practices, policies and procedures...to remove harmful incentives and encourage proper compliance."

A comparison of this action with the last CFPB/DOJ enforcement action involving similar allegations, *CFPB and USA v. Hudson City Savings Bank, F.S.B.*, is telling. In the Hudson City action, there was no mention of what steps Hudson City took to improve its compliance management system prior to settlement. Instead, the consent order stated that Hudson City simply asserted that it had "treated all of its customers fairly and without regard to impermissible factors such as race and national origin." The CFPB described that settlement as "the

largest redlining settlement in history, as measured by direct subsidies." Hudson City agreed to provide over \$27 million in mortgage subsidies and outreach programs and pay a \$5.5 million penalty. Although Hudson City, when viewed by assets, is a larger institution than BancorpSouth, it is not unreasonable to attribute BancorpSouth's ability to negotiate a settlement far below the value of Hudson City's settlement to BancorpSouth's remediation actions during the investigation.

Finally, the complaint filed against BancorpSouth described how the CFPB sent testers – a white tester and an African-American tester – to inquire about mortgage loans in various BancorpSouth branches. The CFPB relied on the results of that investigation and the testers' interactions with bank employees in its action against the bank. The CFPB's press release stated, "This is the CFPB's first use of testing, sometimes referred to as "mystery shopping," to support an allegation of discrimination. Other government agencies, including the DOJ and the Department of Housing and Urban Development, as well as fair housing organizations, have used testers for decades as a method of identifying discrimination. Courts have long recognized testing as a reliable investigative tool."

With the increasing frequency of CFPB enforcement actions and the mention of "testers" in the press release, it is safe to assume that testers will become a commonly used tool in the CFPB's investigative arsenal. Banks and other regulated entities should educate employees on the existence of testers and build that risk into any fair lending training already in place. If you have any questions about your institution's best practices for compliance or any pending CFPB exams or investigations, please reach out to a member of Baker Donelson's CFPB team.