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Tennessee's Bankers to CFPB: "Regulation by Enforcement" Concerns Loom Large

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The conference room was filled to capacity as bank presidents, chief compliance officers and lending executives sat in a U shape, facing the two speakers. A fissure of tension hung in the room and the audience looked wary.

In June 2016, two representatives from the Consumer Financial Protection Bureau came to Tennessee to speak with members of the Tennessee Bankers Association. The CFPB encouraged the audience to set aside their southern hospitality and speak openly and candidly about their concerns regarding the CFPB's regulatory agenda. After all, they explained, the CFPB regarded banks as partners, not enemies, in fulfilling the agency's objectives. In addition, one of its upcoming objectives was regulating small business lending.

Throughout the one-hour meeting, the audience remained polite, but they had come prepared with concrete examples of how the CFPB's previous rule making for checking accounts and overdraft fees had created unintended consequences for banks, their customers and their would-be customers.

Now the assembled bankers expressed genuine concern about the CFPB's intent to collect HMDA-like data on small business loans and how the agency might aggregate that data to assert disparate impact in small business lending to women and minority applicants. The CFPB's new data collection requirement for mortgage loans adds another 20 plus data points for lenders to collect beyond the data that has long since been required. The new data collection requirements for mortgage loans expands beyond the applicant's demographic information and into key terms of the loan and the key financial characteristics of the applicant.

The bankers assembled acknowledged that mortgage loans were more uniform and might be capable of analysis as to disparate impact. Small business loans, however, were a different proposition entirely – too many unique facts and circumstances about the small business to be considered and evaluated in each application. Nevertheless, the audience feared that the CFPB – with its well-known "regulation by enforcement" approach – would gloss over the complexities of small business loans and apply the same data analysis to small business loans as for mortgage loans.

At the end of the hour, the audience left the room without much optimism that the CFPB had actually heard them. Indeed, in its "fair lending priorities in the new year" published in December 2016 – that is, after the presidential election – the CFPB's Associate Director of the Office of Fair Lending indicated that the agency would be shifting its rule making and enforcement priorities away from auto loans and credit cards and towards redlining, mortgage and student loan servicing, and small business lending. At this time, however, the CFPB has not published any proposed rules on data collection for small business loans.

Until the CFPB publishes information about the scope of the data it wants financial institutions to collect and maintain for the CFPB's review, financial institutions can and should do two things. First, banks should review the Dodd-Frank Act's provision entitled "Small Business Loan Data Collection," which requires banks to compile and maintain information about, among other things: 1) the date of application; 2) purpose of the loan; 3) amount of credit sought; 4) type of decision and date of decision; 5) census tract for the principal place of business; 6) the business' gross annual revenue in the last fiscal year; and 7) the race, sex and ethnicity of the principal business owners. Second, banks should ascertain whether their existing software platforms for small business loan applications and small business loan servicing is capable of collecting this data, and if not, ascertaining what kind of technology upgrades would be necessary to collect and maintain this information.