

CFPB—A New Federal Agency Is On The Prowl

No Worries, Your Business Insurance May Apply

7 tips for maximizing coverage

The new federal agency, the Consumer Financial Protection Bureau (“CFPB”), is rapidly ramping up its enforcement efforts and is coming after banks and mortgage, credit card, and consumer financial service companies. Its reach is long and its ambition unlimited. There is no doubt that the CFPB intends to place itself within the ranks of the Securities and Exchange Commission (“SEC”), the Federal Trade Commission, and the state attorney generals around the country. That’s the bad news. The good news is that there may be insurance coverage for responding to regulatory and legal actions initiated by the CFPB.

The CFPB has generated a flurry of headlines recently with a \$210 million settlement with Capital One over its allegedly deceptive credit card marketing activities. Remarkably, the CFPB even filed a complaint against a law firm for allegedly charging homeowners upfront fees for loan modifications and failing to follow through.

What’s not getting publicity is even more troubling for American businesses -- the numerous investigations initiated by CFPB seeking information and documents about nearly every aspect of a target company’s business.

The CFPB, created by the Dodd-Frank Act, regulates consumer financial products and services. It has unprecedented powers to enforce consumer protection laws and can seek just about any type of relief, including restitution, payment of damages, and penalties. A CFPB investigation usually begins with the issuance of a Civil Investigation Demand (“CID”). A CID can demand documents and compel answers to questions and testimony. Responding to a CID can take months and involve millions of documents and electronic files. Outside counsel is often needed to negotiate with the CFPB attorneys regarding the scope of the investigation and to try to avoid serious sanctions or lawsuits. Even if the CFPB does not take further action, the cost and disruption to a company can be enormous.

Available Coverage

A number of kinds of professional lines liability insurance policies are designed to cover governmental investigations such as CFPB investigations. Errors and Omission (E&O) and Directors and Officers (D&O) policies afford the best opportunities for coverage.

These policies typically provide coverage for the cost of responding to “subpoenas,” “government investigations,” or “regulatory actions.”

Actionable Strategies

Obtaining full coverage for CFPB investigations is not automatic; it requires the implementation of certain time-tested strategies.

1

REVIEW APPLICABLE COVERAGE

If a company receives a CID, it should immediately review its insurance policies for potential coverage. Current year E&O and D&O policies should be reviewed to determine the scope of coverage for governmental investigations, which is typically set forth in the definition of “claim,” “suit,” or “action.” A CID often is issued in response to some private consumer litigation that is already ongoing. In these situations, the CID may be a covered claim because it is related to the consumer action.

2

WHEN IN DOUBT, PROVIDE NOTICE

Even if there are questions about the scope of available coverage, notice should be provided. With claims-made policies such as E&O and D&O policies, a business should almost always provide notice of an investigation, because of timing and interrelated claims requirements set forth in the policies. Unfortunately, investigations often lead to consumer class actions, investor and shareholder lawsuits, which only multiply a company’s exposure. A company’s E&O and D&O policies should cover the costs of attorneys’ fees, settlements and judgments for these later lawsuits, but that coverage may be jeopardized if notice is not provided for an earlier investigation. In addition, D&O and E&O policies often set forth strict deadlines for making a claim, and those deadlines are often tied to policy expiration dates. If those deadlines are missed, coverage may be lost.

3

USE THE LAW TO YOUR ADVANTAGE

Although courts have not yet ruled on coverage for CFPB investigations, courts have found coverage for defense of other governmental investigations. For example, the U.S. Court of Appeals for the Second Circuit held that responding to a state attorney general’s subpoena and the SEC’s oral requests for documents were covered defense costs. *MBIA Inc. v. Federal Ins. Co.*, 652 F.3d 152 (2d Cir. 2011).

4

BE WARY OF INSURER RESTRICTIONS ON DEFENSE COUNSEL

If your insurer does agree to pay defense costs, it may try to do it “on the cheap” by selecting panel counsel, paying significantly reduced rates, and imposing overly restrictive billing guidelines. These kinds of restrictions make no sense when a business is defending against an investigation on a complex matter by a federal agency with wide-ranging powers. Lower priced counsel may be appropriate when defending an automobile accident case, but it is almost never appropriate when dealing with governmental investigations. A business should insist on a proper defense, and depending on how the insurer responds to the claim, the business may be entitled to select counsel of its choice.

5 VIGOROUSLY ADVOCATE COVERAGE

With any new area of liability, insurers may be reluctant to find coverage. Further, some insurers do not even follow their own procedures and legal requirements that require them to provide coverage for potentially covered claim. Insurers often provide coverage when presented with well-reasoned legal analysis setting forth why a claim is covered, but they generally will not provide coverage without being pushed. Without objective and effective coverage counsel, the deck is stacked against policyholders.

6 CAREFULLY SELECT COVERAGE COUNSEL

Outside objective coverage counsel can often help a business maximize insurance coverage, but the selection of outside coverage counsel is mired with potential conflicts. Almost every large law firm supports the insurance industry, either by directly representing insurers or by taking insurers' money when defending claims on behalf of policyholders. These relationships come with serious restrictions – both formal and informal. Some insurers prohibit law firms from initiating suit, and others permit suit, but prohibit bad faith lawsuits. Even more onerous, though, are the unwritten rules governing law firm conduct. A simple phone call from an insurance carrier to a law firm telling them to “back off” may be all that is necessary to bring a claim back into line with insurance company expectations. Engaging a specialized law firm that exclusively represents policyholders in coverage disputes may be the only way to make certain that businesses' rights are fully protected.

7 REVIEW COVERAGE BEFORE A CLAIM IS MADE

Before a company even receives a CID, it should review its policies to make certain that they provide the most favorable coverage available. In particular, businesses should look for broad definitions of “action” or “suit” and specific coverage for government investigations. In addition, businesses should make certain that the policies do not impose a ridiculously low sublimit on coverage for governmental investigations. A simple review of coverage before a claim can often save millions of dollars in the future.

Conclusion

Coverage issues impacting CFPB claims are complex and far reaching. Every aspect of the claims process is littered with landmines. An improperly drafted notice letter could affect a policyholder's right to select defense counsel of their choice. Poorly timed notice letters could result in the forfeiture of coverage not only for a CFPB claim, but for any third-party lawsuits that follow. Moreover, many denied claims go uncovered, and millions of dollars are left on the table simply because insurance brokers are unable to provide an insurer with a written opinion containing sound legal analysis setting forth why a given claim is covered. In any event, the CFPB is just getting started. Costs of responding to investigations and related lawsuits are going to increase. **Now is the time to update your policies and take an aggressive and active approach to presenting and resolving CFPB claims.**

Miller Friel, December, 2012