



**First they came for the Payday Lenders
Jonathan Foxx ***

First they came for the payday lenders, and I did not speak out—
Because I was not a payday lender.

Then they came for the auto finance companies, and I did not speak out—
Because I was not an auto finance company.

Then they came for the banks, and I did not speak out—
Because I was not a bank.

Then they came for me—and there was no one left to speak for me.¹

On July 18, 2014 a new rule (“Rule”) goes into effect, promulgated by the Consumer Financial Protection Bureau (“Bureau”). The Rule will be effectuated in accordance with a notice published in the Federal Register on June 18, 2014,² which announced that the Bureau had adopted its interim final rule on the Temporary Cease-and-Desist Order (“TCDO”) without change. Under the Rule, the Bureau will be empowered to issue TCDOs, pursuant to Section 1053(c) of the Dodd-Frank Act (“Dodd-Frank”).³

The provision authorizes a TCDO in a Cease-and-Desist proceeding brought under Section 1053⁴ against a covered person or service provider.⁵ Let’s be clear: a TCDO becomes effective upon service on the regulated entity, its executive officer, director, or an entity-affiliated party, and, unless set aside, limited, or suspended by a court in proceedings (viz., judicial review), it remains in effect and enforceable, pending the completion of the proceedings or until the Bureau dismisses the charges specified in the notice or until superseded by another Cease-and

* Author: Jonathan Foxx, President & Managing Director, Lenders Compliance Group
Publication: National Mortgage Professional Magazine – July 2014

Desist Order.

For the most part, the TCDO is issued where the Bureau believes that circumstances may cause insolvency or significant dissipation of assets or earnings of the subject entity, or is likely to weaken the condition of that entity prior to the completion of the proceedings. Additionally, it is issued where the Bureau requires a regulated entity or entity-affiliated party to cease and desist from any violation or practice stated in a notice of charges. The TCDO may require that the regulated entity or entity-affiliated party take affirmative action to prevent or remedy any anticipated insolvency, dissipation, condition, or prejudice pending completion of proceedings.

As to the judicial review component, a regulated entity, executive officer, director, or entity-affiliated party that has been served with a TCDO may apply to the United States District Court in which the residence or principal office or place of business of the entity is located, or the United States District Court for the District of Columbia, for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order, within 10 calendar days after such service or the judicial review will be automatically be waived. The injunction, therefore, may set aside, limit, or suspend the enforcement, operation, or effectiveness of the TCDO pending the completion of the administrative proceedings pursuant to the notice of charges served upon the entity, executive officer, director, or entity-affiliated party. Jurisdiction is given to the court to issue such injunction.⁶ However, if the matter is litigated, the court's purview occurs after proceedings are concluded in the Bureau's administrative hearing, which is held before a hearing examiner, with discovery and rules of evidence that are subject to the Bureau's permission, and with a right of appeal therefrom only to the Bureau's Director. This means that, in such circumstances, it is only after the Director issues the final decision that a judicial review may be undertaken.

The Bureau has had the authority to issue cease and desist orders to covered persons. A covered person may appeal a cease and desist order with the Bureau and in federal appellate court. But, where the violation is likely to cause the covered entity to be insolvent or otherwise prejudice the interests of consumers before the completion of a cease and desist proceeding, the Bureau will be authorized to issue *ex parte* TCDOs.⁷ These TCDOs can be appealed in federal district court, and they are appealed on an expedited time frame.⁸ The *ex parte* issuance of a TCDO is a critical feature of this authority, insofar as *ex parte* means the legal matter is brought by one person in the absence of and without representation or notification of other parties. In other words, it invokes a judicial proceeding, hearing or order granted on the request of and for the benefit of only one party.

Under the Fifth Amendment to the U.S. Constitution, "No person shall ... be deprived of life, liberty, or property, without due process of law." A bedrock feature of due process is fair notice to parties who may be affected by legal proceedings. Though *ex parte* would appear to violate the Constitution, the operative justification of *ex parte* is that issuing it is based on the proposition that irreparable harm to one or more of the parties would happen if it were not

issued. The Bureau's position would be that its *ex parte* TCDO would be usually reserved for urgent matters where requiring notice would, among other things, subject the consumer to irreparable harm. *Ex parte* matters are considered to be urgent in nature and are usually temporary orders (like a restraining order or temporary custody) pending a formal hearing or an emergency request for a continuance.⁹

Permit me to translate the foregoing: the Bureau is now being empowered to shut down businesses, unilaterally, on the basis of an allegation, at any time it wishes to do so, by issuing a TCDO. Put plainly, this procedure could force a covered entity to close operations entirely until permission is granted to re-commence operations pursuant to an administrative hearing or the holding of a judicial review or the Bureau's Director lifting the TCDO. It is unlikely that many covered entities have the ways and means to resist this TCDO through litigation. So the power to issue the TCDO, in this instance, could be viewed as the power to destroy.¹⁰

Specifically, Section 1053(c)(3) of Dodd-Frank authorizes the issuance of a TCDO, where facts pertain to the Bureau's findings. In this procedure, the books and records of the covered entity are presumably deficient in a way that prevents the Bureau from determining the financial condition of the entity. Or, the findings of the Bureau are sufficiently substantive that it seeks to prevent transactions that materially affect an entity's financial condition. When the Bureau has reached this conclusion, the TCDO mandates that the entity cease and desist from any alleged activity or practice to cause the deficiencies of the books and records. Since the activity and practice are the process by which the deficiencies are allegedly caused, the entity is put into the position of shutting itself down, until such time as the causes of the deficiencies have been remedied to the satisfaction of the Bureau, unless otherwise adjudicated.

In the Interim Final Rule, the Bureau claimed that "The Rules themselves do not impose significant costs upon covered persons, but, consistent with section 1053, provide a straightforward and efficient process for the issuance of a temporary cease-and-desist order, and a direct route to judicial review."¹¹ This statement surely confutes the financial burden imposed on covered entities that must respond to the TCDO by shutting down their operations. The Bureau further claims that "The Rules have no unique impact on insured depository institutions or insured credit unions with \$10 billion or less in assets described in section 1026(a) of the Dodd-Frank Act, nor do they have a unique impact on rural consumers."¹² Most nonbanks in the United States might disagree with the "no unique impact" effect on their operations, if and when they receive a TCDO issued by the Bureau – and, surely, small depository institutions and credit unions would probably find the added burden of administrative and litigation expenses to be quite concerning. The Bureau's response to the burden of these costs is the following: "The manner and extent to which these provisions apply to a rulemaking of this kind, which establishes Bureau procedures and imposes no standards of conduct, is unclear."¹³

The TCDO is accompanied by a notice of charges that must describe the basis for its issuance,

including the alleged violations and the harm that is likely to result without the issuance of an order, and the act or acts the entity is to take or refrain from taking. Since the TCDO is effective and enforceable upon service, the effect on the entity is immediate, pervasive, and possibly devastating.

There are only two ways to respond to the TCDO: (1) the entity must prove to the Bureau that it has ceased any activity or practice which gave rise, whether in whole or in part, to the incomplete or inaccurate state of the books or records;¹⁴ or, (2) the entity must conduct affirmative action to restore such books or records to a complete and accurate state, until the completion of the adjudication proceeding.

The Bureau's TCDO wields enormous power. It may be the power to protect the consumer and remedy loan origination operations that are not in compliance with the applicable law, or it may be the power to destroy the loan origination operations. Hopefully, it will be used sparingly and with considerable evidence in support of that use. The Roman poet Juvenal wrote in his Satires, "Quis custodiet ipsos custodies", which literally means "Who will guard the guards themselves?" Perhaps all covered entities should realize fully that each and every covered entity, whatever its financial purpose, must stand guard over the guards themselves and share the responsibility to ensure that both the consumer and the service provider are adequately protected.

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Lenders Compliance Group, Inc. | 167 West Hudson Street – Suite 200 | Long Beach | NY | 11561

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Phone: (516) 442-3456. Website: www.LendersComplianceGroup.com

Information contained herein is not intended to be and is not a source of legal advice.

¹ "First they came for the Socialists, and I did not speak out—

Because I was not a Socialist.

Then they came for the Trade Unionists, and I did not speak out—

Because I was not a Trade Unionist.

Then they came for the Jews, and I did not speak out—

Because I was not a Jew.

Then they came for me—and there was no one left to speak for me."

NOTE: This is the actual poem, written by Martin Niemöller (1892–1984), who wrote about the cowardice of German intellectuals following the Nazis' rise to power and the subsequent purging of their chosen targets, group

after group. (Source: Wikipedia)

² Federal Register, Vol. 79, No. 117, Wednesday, June 18, 2014, Rules and Regulation, pp 34622-34623

³ Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act)

⁴ On June 29, 2012, the Bureau published the final Rules of Practice for Adjudication Proceedings. That final rule, however, does not apply to the issuance of a temporary cease-and-desist order (TCDO) pursuant to section 1053(c) of the Dodd-Frank Act.

⁵ Rules and Regulations, Federal Register, Vol. 78, No. 187, Thursday, September 26, 2013, pp 59163-59165. *Rules of Practice for Issuance of Temporary Cease-and-Desist Orders (Rules)*, which govern the issuance of orders pursuant to section 1053(c) of the Dodd-Frank Act, 12 U.S.C. 5563(c). See also 77 FR 39058, 39060 (June 29, 2012)

⁶ Section 1053(c)(2) of the Dodd-Frank Act (12 U.S.C. 5563(c)(2))

⁷ *Ex parte*, which in Latin means “for one party,” may also describe contact with a person represented by an attorney, outside the presence of the attorney.

⁸ *Special Report, A Working Summary of the Consumer Financial Protection Act of 2010* (Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act), Hackett, Esq., Richard P. and Frank H. Bishop Jr., Esq., p. 5

⁹ Source: Legal Dictionary, Law.com.

¹⁰ A similar power to destroy is the taxing power; appeals are possible, litigation is possible, but a person or entity usually does not have the financial means to pursue its own rights under the law, by means of such appeals and litigation.

¹¹ *Op. cit.* 5

¹² *Ibid.*

¹³ *Op. cit.* 5, Footnote 6

¹⁴ *Op. cit.* 5, § 1081.502(b)(2) Judicial review, duration: “With respect to a temporary cease-and-desist order issued pursuant to 1081.501(b) only, the Bureau determines by examination or otherwise that the books and records are accurate and reflect the financial condition of the respondent, and the Director or his or her designee issues an order terminating, limiting, or suspending the temporary cease-and-desist order.”