Here Comes the Fuzz

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Thomas B. Hudson

The title of this piece sounds like something Henry Winkler might have quipped on the old *Happy Days* TV show, but what follows is more ominous than an alert from The Fonz.

Throughout my 43 years of representing creditors striving to comply with federal and state compliance obligations, I have heard a steady refrain. "Government," they say, "just tell us what the rules are, and we will play by them."

For the most part, governments have responded by proposing regulations, listening to industry and consumer comments, and issuing "bright line" rules that deal with disclosures and other creditor conduct. This clarity made the creditors happy – they might not have been all that crazy about the rules, but the rules applied to all creditors that were similarly situated, so all creditors subject to the rules toed the compliance line.

But then things took an interesting turn. Along came the Consumer Financial Protection Bureau. Elizabeth Warren, when setting up the Bureau, decided that while more laws and regulations were nifty, those laws and regulations were just temporary roadblocks that, she claimed, lawyers would just work their way around.

Nope, she had something a great deal more powerful than black and white regulations. Her new agency had powers granted by the Dodd-Frank Act. Those powers included the prohibition of unfair, deceptive, or abusive acts and practices as well as the mandate to enforce federal consumer protection laws, most notably the Equal Credit Opportunity Act, dealing with credit discrimination. All of these are gray, subjective areas where the creditor's obligation varies depending on the whim and agenda of the enforcer.

Imagine bright lines that creditors can actually see and rules they can actually follow. But no. Instead you have an intentionally fuzzy "we know bad acts when we see them" standard in the hands of an aggressive federal regulator. Apparently, the CFPB thinks that if the line is fuzzy enough, creditors will be wary of getting too close to it.

That may account for the CFPB's favorite choice of weapon for doing battle with those nasty creditors. For the most part, the Bureau has shunned the rulemaking process in favor of enforcement. Rulemaking is, after all, a heavier lift than enforcement, involving, as it does, the burden of actually having to listen to the businesses the Bureau seeks to police.

Why choose the rulemaking route when you have an unlimited budget and the power to hammer

businesses with fines that run to the hundreds of millions of dollars? Based on what we have seen so far, there are precious few creditors willing to go toe-to-toe with the Bureau in defense of an enforcement action. The unwillingness to fight is even more apparent when the enforcement target is small, like the one-store Colorado dealership the Bureau targeted for a $700,000 hit.

So, we've gone from a standard developed through the '80s and early '90s – "disclose and let the consumer take care of himself" – to the pre-CFPB consumer advocate position – "we need more laws to tame the predatory marketplace" – to where we are today: a powerful federal agency that avoids making rules and intentionally blurs the line between legal and illegal conduct.

"We don't need no stinkin' laws – we've got UDAP, UDAAP, and superior moral judgment." Yep, here comes the fuzz.

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