

Resources

Consumer Financial Protection Bureau Alert—Vol. 1, No. 4

By the Authors of PLI's Consumer Financial Services Answer Book 2011

October 18, 2011

Regulations and Guidance Update

CFPB Releases Mortgage Servicing Examination Procedures and Manual

On October 13, 2011, the Consumer Financial Protection Bureau (the “CFPB” or the “Bureau”) announced its initial approach to supervising mortgage servicers. Specifically, the Bureau released its Mortgage Servicing Examination Procedures (the “Procedures”), along with its CFPB Supervision and Examination Manual (the “Manual”). The devotion of CFPB resources to servicer regulation was foreshadowed by a speech from Raj Date, special advisor to the Secretary of the Treasury, on September 20, 2011. The CFPB, of course, was the brainchild of Professor Elizabeth Warren, who argued in a November 2008 law review article for the creation of a “single, highly motivated federal regulator” to police mortgage servicing activity. The Manual and the Procedures constitute the CFPB’s first broad attempt to implement that vision.

The Dodd-Frank Act gives the Bureau supervision authority over a large number of loan servicers. Examinations will first focus on large banks, thrifts, and credit unions with assets exceeding \$10 billion and their affiliates. The Procedures describe the types of information that the CFPB’s examiners will gather to evaluate mortgage servicers’ policies and procedures, assess whether mortgage servicers are in compliance with applicable laws, and identify risks to consumers that pervade the servicing process. Under the Procedures, the CFPB will examine mortgage servicers’ compliance with various aspects of federal law, including the Truth in Lending Act (TILA), Equal Credit Opportunity Act (ECOA), Fair Debt Collection Practices Act (FDCPA), Gramm-Leach-Bliley Act, Real Estate Settlement Procedures Act (“RESPA”), and Electronic Funds Transfer Act. The Manual is described as a “field guide” for examiners to use in supervising both depository institutions and other consumer financial service providers.

The Bureau has indicated that it will initially focus on loans in default to ensure that (1) information provided to consumers about loan modifications and foreclosures and possible alternatives is timely, accurate, and transparent; (2) the process for referring loans to foreclosure is based on a careful review of all records and the borrower is actually in default; and (3) the fees charged to borrowers in default are not duplicative or otherwise illegal.

It is important to note a few things about the Procedures. First, there are no new rules, regulations, or standards being imposed here; rather, enforcement responsibility for federal servicing laws that previously had been housed in a variety of federal agencies now has simply been moved to a new bureaucratic home. Second, the CFPB clearly signals that a key focus of its enforcement efforts will be racially disparate impact in servicing practices, particularly in the area of loss mitigation. Third, some of the Procedures do speak to servicing standards of a business (rather than legal) nature, e.g., appropriate training and staffing, but remain very vague with respect to any actual standards for compliance.

While they are an important development, to be sure, the impact of these Procedures is somewhat muted in as much as they do not impose any new substantive requirements. In other words, there are no new rules here. Instead, the Procedures simply describe the process the CFPB will follow in auditing servicers’ compliance with existing laws.

While the bulk of the Procedures appear geared toward testing compliance with fairly standardized notice requirements and other basics of mortgage servicing, some areas of enforcement do stand out. Issues of disparate impact based on race have long been a focus of banking regulators appointed by President Obama. Assistant Attorney General Thomas Perez, for example, in testimony before Congress in April 2010, announced that in reviewing servicers’ compliance with HAMP, the Justice Department would carefully review servicing data for any evidence of racial disparities. Note as well that for purposes of a disparate impact analysis, a servicer’s policies and procedures may create a racially disparate impact even if those policies and procedures are entirely race-neutral. The CFPB appears to have taken up that mantle, announcing that it

will examine whether racial disparity exists as to “debt cancellation, debt suspension, or other similar products,” and, with regard to loss mitigation activities, “determine whether the file documents indicated that decisions were made based upon any protected status...” That these disparate treatment concerns take up as much space, in terms of word count, as the procedures for examining loss mitigation procedures more generally should clearly signal to servicers that disparate impact will be a key focus of the CFPB’s examinations. The focus on disparate impact in the loss mitigation process is somewhat odd, however, considering that servicers have little discretion under most of the federal loss mitigation programs, such as HAMP. The HAMP guidelines, written by the Treasury, presumably incorporate only race-neutral decision-making factors.

Finally, the CFPB appears to be concerned about mortgage servicing procedures other than legal requirements—is there sufficient staff and are the staff members adequately trained, are operations properly funded, and do borrower communications receive prompt responses? In these areas, there are no clear requirements or responsibilities and the CFPB offers virtually no guidance on what will “pass” or “fail.”

The Procedures will test, for example, whether loss mitigation disclosures are “clear, prominent, and readily understandable,” without explaining what might be sufficient or insufficient. The CFPB will test whether the servicer “provides adequate methods for consumers to contact it for information about the loss mitigation process, and timely responds to those contacts.” Here again, no guidance as to what is sufficient or insufficient is provided or referenced.

The CFPB has indicated that its supervision will be an ongoing process, including pre-examination scoping, review of information, data analysis, on-site examinations, and regular communication with supervised entities and prudential regulators, as well as follow-up monitoring. When necessary, the Bureau has warned that its examiners will coordinate with enforcement staff to take any appropriate actions necessary to address industry abuses.

CFPB Drafting Qualified Mortgage Regulations in Hopes of Expanding Mortgage Loan Originations

The CFPB is currently drafting regulations that define the requirements of a Qualified Mortgage (QM) and the benefits to lenders whose loans fall within the QM parameters. Recognizing that “[t]here can be little or no access to credit unless suppliers of capital are willing to finance home mortgages,” Patricia McCoy, the CFPB’s assistant director for mortgage markets, is appreciative of the hundreds of extremely thoughtful comment letters received that will inform this “critical and difficult rulemaking.”

While the QM proposed rule was originally drafted by the Federal Reserve Board (FRB), the rulemaking authority was transferred to the Bureau under the Dodd-Frank Act on July 22. Pursuant to section 1412 of the Act, a lender may presume that a residential mortgage loan satisfies the Act’s “ability to repay” requirement if the loan is a QM and meets the Act’s and the Bureau’s standards for such a loan. By satisfying the QM standards, a lender can take advantage of a “safe harbor” as to the ability-to-repay requirement. Balancing the QM underwriting and loan term requirements with lender protection so that lenders will be willing to make the loans while consumers are protected is the regulatory quandary facing the Bureau. Lenders fear that without a true safe harbor, they may not be able to sell the loans on the secondary market.

Complicating matters further is the rulemaking by six federal agencies (SEC, HUD, OCC, FRB, FDIC, FHFA) regarding the standards for a Qualified Residential Mortgage (QRM), which mortgage will be exempt from the 5% risk-retention obligation imposed on financial institutions that securitize mortgage loans (Dodd-Frank Act, section 941). By exempting QRMs, the cost of securitizing such mortgages is reduced, providing an incentive for greater origination of these more responsible mortgages. While the CFPB is not involved in the QRM rulemaking, the industry is hoping that the QM and QRM definitions are coordinated so that QMs are not subject to risk retention and that such loans can be sold on the secondary market.

The Bureau’s Mortgage Market Group will be teaming with the Bureau’s Regulation Group in drafting the new QM rule. The CFPB is hoping to produce a final QM rule early next year.

Examinations/Enforcement Here and Now

Court Grants Preliminary Injunction That Prevents CFPB From Enforcing TILA Rules on Credit Card Fees

A federal district court in *First Premier Bank v. U.S. Consumer Financial Protection Bureau* (D.S.D.) granted a preliminary injunction to First Premier Bank (“Premier”) to block the CFPB’s enforcement of an amendment to Regulation Z, which would narrow the scope of fees credit card companies can impose on the type of cards typically offered to subprime borrowers. The injunction, based in part on the finding that the Federal Reserve Board (FRB) had exceeded its authority, prevents the CFPB from enforcing the amendment until a final decision is made in the case.

The Credit Card Act of 2009 limits fees that can be charged to consumers when they open up a credit card account and specifically prohibits credit card operators from imposing fees that exceed more than 25% of the card’s total available credit in the first year. The Regulation Z provision that implements this change applied to fees charged during the first year after the account was opened; however, the amended rule expanded the definition of up-front fees to include fees charged prior to the opening of the account OR during the first year. The amendment was scheduled to take effect October 1.

According to Premier, the amended rule would significantly impact its profit earnings and workforce, so the credit card lender sued the CFPB, which now has the authority under the Dodd-Frank Act to enforce the Truth in Lending Act, to block the amendment. Premier claims the extension of the rule to fees charged prior to the account opening is beyond the reach of the Credit Card Act and the FRB’s authority. In granting the preliminary injunction, the Court agreed, finding that the language of the Act clearly and unambiguously applies only to fees that were charged after the account was opened. Further, the Court stated the purpose of the law is clear—to keep consumers from paying up-front fees that greatly reduce their effective account credit limit. The FRB’s own rulemaking proposal noted this, the Court said, when the FRB observed that the Act was intended to protect consumers from cards that were represented as having a specified credit limit but actually had a much lower effective limit due to imposed fees. The Act did not prevent charging up-front fees as long as the fees were not financed under the account.

The CFPB asserted that the FRB acted properly to fill a gap or statutory silence, but the Court rejected this argument by saying the rule amendment was an attempt to address conduct that was outside the scope of the Credit Card Act. In the Court’s opinion, it noted the proposed amendment would change the purpose of the statute from preventing fees that reduce the available credit under the account to reaching any fee the FRB does not like. The Court maintained that this was “arbitrary, capricious and contrary to the Board’s statutory authority.”

News from the Bureau

Senate Committee Approves Cordray to Head Consumer Financial Protection Bureau

The Senate Banking Committee voted 12-10 to approve Richard Cordray’s nomination to be the first director of the CFPB. Cordray is a former Ohio attorney general who currently leads the Bureau’s enforcement division. The committee voted along party lines, with no Republican committee member voting to approve the nomination. Cordray’s nomination now proceeds to the full Senate for a vote.

Due to continuing Republican opposition to the CFPB, there are strong indications that Cordray’s nomination will face difficulties in the full Senate. Led by Sen. Richard Shelby (R-AL), a group of 44 Republicans—enough to filibuster the nomination—sent President Obama a letter in May vowing to block the Senate from voting on Cordray or any nominee unless significant structural changes are made to the CFPB, diluting its powers. The group has continually called for the Bureau to be led by a bipartisan five-member board rather than a single director. They also want the Bureau’s funding to be subjected to the congressional appropriations process and to make it easier for other financial regulators to more easily block the Bureau’s actions.

Treasury Secretary Tim Geithner has urged Republicans to reconsider the nomination, reminding them that the agency cannot exercise some of its powers without a Senate-confirmed director. Until a director is in place, the Bureau may not exercise any new powers. In the meantime, the Bureau may enforce existing regulations inherited from other banking regulators. The Bureau has also begun laying the groundwork for future regulations, including seeking feedback on

proposed new rules. President Obama has also called for Republicans to support Cordray's nomination to be "America's chief consumer watchdog" and accused Republicans of wanting to roll back financial reforms that could protect the country from a future crisis.

Still, Republican resistance to confirming Cordray or any other nominee as director of the CFPB remains steadfast. Due to the solid Republican opposition, the nomination is not expected to advance to the full Senate anytime soon.

Date Calls for Greater Transparency in Checking Account Fees

On the heels of Bank of America's announcement that it will impose a monthly fee on debit card users, the Consumer Financial Protection Bureau (CFPB) has signaled that it will work toward increasing transparency regarding checking account fees and might require more simplified checking account disclosures. Raj Date, special advisor to the Secretary of the Treasury on the CFPB, recently issued a statement noting that "checking accounts often come with a wide variety of unexpected costs that can quickly add up for consumers."

Bank of America is not the only financial institution that is imposing new fees or raising existing ones. Citibank recently announced that it will charge customers \$20 per month if their combined midlevel Citibank accounts do not total \$15,000 or more. In addition, Citibank will charge customers \$15 per month if they do not maintain a minimum balance of \$6,000 in their EZ Checking accounts. Wells Fargo and JPMorgan Chase are also imposing debit card fees on customers in some states. Each of these institutions also imposes fees on customers with basic accounts who do not maintain certain minimum balances.

The new fees have stirred controversy with some customers, who have threatened to close their accounts and move their money to local banks or credit unions. Congress has also taken note. U.S. Rep. Brad Miller (DNC) recently introduced "The Freedom and Mobility in Banking Act" to streamline the opening and closing of personal bank accounts. Rep. Miller stated, "As megabanks flirt with menus of new fees, an increasing number of Americans will want to switch banks." In addition, five U.S. House Democrats have asked Attorney General Eric Holder to investigate whether the banks violated antitrust laws by colluding to raise fees.

According to Date, "Different banks give different names to the very same fee," which could cause confusion, noting that "[i]deally, consumers would have a simple way to evaluate checking account costs." Citing a recent poll showing that three-fourths of Americans with checking accounts want increased clarity and disclosure, Date noted that "[t]he CFPB has the ability to simplify checking account disclosures." Doing so would permit consumers to compare fees between banks, according to Date, which "is good for consumers and good for competition."

CFPB Supports Treasury Assistance for Service members Under HAFA Program

The Department of the Treasury recently amended its Home Affordable Foreclosure Alternatives (HAFA) program to assist service members who receive "change of station" orders, even if their income has not declined. Accordingly, if a member of the military receives permanent relocation orders, he or she can obtain assistance under the HAFA program if the person's home is underwater, even though he or she is current on his or her mortgage and there has been no decline in income.

Under the HAFA program, borrowers must document a financial hardship wherein they do not have sufficient liquid assets to make monthly mortgage payments. Effective immediately, Supplemental Directive 11-10 now clarifies that a servicemember's permanent change of station order may be cited as a basis for the financial hardship even when the service member's income has not decreased. The servicemember must still meet the requirement that he or she does not have sufficient liquid assets to make his or her monthly payment obligations.

Holly Petraeus, the CFPB's assistant director of the Office of Service member Affairs, who has been an ardent supporter of military members and whose office has been analyzing various financial issues facing our country's service members, applauded Treasury's modification, which should help members of the military avoid possible foreclosure. Ms. Petraeus, citing the financial issues and difficult choices facing service members who are relocated, supported Treasury's move and is "encourage[ing] all policymakers and the financial industry to work together to create common-sense solutions for our service members in this situation."

Regulatory Scorecard

Below is Dykema's up-to-date chart of pending and final regulatory activities and proceedings at the CFPB.

Consumer Financial Protection Bureau Pending Rulemakings, Final Rulemakings and Other Initiatives under Dodd-Frank Act (DFA) as of October 18, 2011

**NOTE: Click [here](#) to access a printable version of the Scorecard.

Description

Date of Proposal/ Final or Interim Rule

Summary of Contents

Key Dates

Proposed Federal Reserve Board Comprehensive Regulation Z Proposals August 26, 2009
(74 FR 43428)

August 26, 2009

(74 FR 43232) Two proposals issued in August of 2009 contained revisions to disclosures for closed-end mortgage loans and HELOCs. On February 1, 2011, Fed elected not to finalize proposals, recognizing CFPB's impending authority

Proposed Federal Reserve Board Comprehensive Regulation Z Proposal September 24, 2010

(75 FR 58539) Proposed rule to: (1) expand the right to rescind to additional loan types, (2) amend disclosures to explain the right to rescind, (3) clarify lender's responsibilities upon rescission, (4) mandate disclosures for loan modifications, (5) change reserve mortgage disclosures, and (6) place restrictions on certain advertising and sales practices for reverse mortgages. On February 1, 2011, Fed elected not to finalize proposals, recognizing CFPB's impending authority

Department of Treasury Privacy Act System of Records January 10, 2011

(76 FR 1507)

June 15, 2011

(76 FR 35071) In accordance with the Privacy Act of 1974, as amended, Department of Treasury provided notice of the establishment of a Privacy Act System of Records. Written comments due on or before February 9, 2011

Effective Date: July 15, 2011

Proposed Federal Reserve Board Regulation Z: Escrow Requirements March 2, 2011

(76 FR 11598) Proposed rule to: (1) extend the minimum period an escrow account must be maintained for first lien, higher-priced mortgage loans from one to five years, (2) provide an exemption from the mandatory escrow for certain loans, (3) exempt from the mandatory escrow requirement creditors that operate primarily in "rural or "undeserved" counties, and (4) require new disclosure explaining how the escrow account works or what the effects would be of not having an escrow account at all. Written comments due on or before May 2, 2011

CFPB and JAGs Partnership July 6, 2011

The CFPB and JAGs: partnering to protect servicemembers CFPB and Judge Advocate Generals will work together to identify potential violations of consumer law involving service members and their families.

OCC, FED, FDIC, SEC, FHFA, and HUD Risk Retention/Qualified Residential Mortgage (QRM) April 29, 2011

(76 FR 24090)

June 10, 2011

(76 FR 34010) DFA §941 requires sponsors of assetbacked securities (ABSs) to retain at least 5% of the credit risk of assets underlying the securities;

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proposal includes loan-level requirements such as minimum down payment. Written comments due on or before August 1, 2011

Federal Reserve Board Increase in Regulations Z & M Coverage Thresholds April 4, 2011

(76 FR 11598) Consumer credit transactions and consumer leases with transaction amounts up to \$50,000 will be covered by Regulation Z and Regulation M. Beginning the end of this year (December 31, 2011), the threshold will be adjusted annually based upon the Consumer Price Index (CPI) for Urban Wage Earners and Clerical Workers. Effective July 21, 2011

CFPB Data Collection under ECOA April 11, 2011

Section 1701 of the Dodd-Frank Act DFA §1071 amended ECOA to require financial institutions to collect and report credit application information for women- or minority-owned businesses and small businesses. CFPB issued guidance to financial institutions clarifying that DFA §1071 does not take effect until the CFPB issues necessary implementing regulations.

Federal Reserve Board Ability to Repay/Qualified Mortgage (QM) April 19, 2011

(76 FR 27390) DFA §1411 requires creditors, when making loans covered by TILA, to determine the consumer's ability to repay before making a loan and also to establish minimum mortgage underwriting standards; proposal includes alternatives for final regulation. Written comments due on or before July 22, 2011

Federal Reserve Board Foreign Remittance Transfers under Regulation. E May 23, 2011

(76 FR 29902) DFA §1073 amended the EFT Act, adding a new section to require providers of "remittance transfers" to provide disclosures about such transfers, including exchange rate, applicable fees and taxes, and the amount to be received by the "designated recipient." Written comments due on or before July 22, 2011

Federal Reserve Board Collection Data at Motor Vehicle Dealers under Regulation. B June 20, 2011

(76 FR 36885) Proposed rule to clarify that motor vehicle dealers temporarily are not required to comply with certain data collection requirements in the DFA until the board issues final regulations to implement the statutory requirements. Written comments due on or before July 29, 2011

CFPB "Single Integrated Disclosure" Proposal (in advance of proposed rule) under DFA §1032 May – June, 2011
(www.consumerfinance.gov)

July 20, 2011
(76 FR 43374)

September 12, 2011 CFPB posted "sample" forms on its website and sought public feedback; U.S. Treasury has solicited comments "concerning a proposed generic information collection for development and evaluation of integrated loan disclosures" (combining Regulation. Z mortgage disclosure and the RESPA Good Faith Estimate (GFE) into a single, integrated disclosure form). Treasury requests comments on or before September 19, 2011; DFA requires final rule no later than July 21, 2012

CFPB "Larger Participant" Definition June 29, 2011

(76 FR 38059) DFA §1024 provides that CFPB may supervise covered persons in the residential mortgage, private education lending and payday lending markets. For other markets for consumer financial products or services, CFPB's supervision program will apply only to a "larger participant" of these markets, as defined by rule. Written comments due on or before August 15, 2011

CFPB Identification of Enforceable Rules and Orders

July 21, 2011
(76 FR 43569)

CFPB published consumer financial protection authorities that would be transferred from seven federal agencies and that it would enforce after the Transfer Date. Effective Date: July 21, 2011

CFPB Alternative Mortgage Transaction Parity (Regulation D)

July 22, 2011
(76 FR 44226)

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CFPB published interim final rule establishing Regulation D pursuant to the Alternative Mortgage Transaction Parity Act and the Truth in Lending Act.

Effective for state housing creditors July 22, 2011

Written comments due on or before September 22, 2011

FTC Statement of General Policy or Interpretation; Commentary on the Fair

Credit Reporting Act

July 26, 2011
(76 FR 44462)

FTC is rescinding its Statements of General Policy or Interpretations under the FCRA. Effective Date: July 26, 2011

Disclosure of Records and Information

July 28, 2011
(76 FR 45372)

Interim Final Rule establishes procedures for the public to obtain information from the CFPB under the Freedom of Information Act (FOIA). CFPB also established its rules regarding the confidential treatment of information it obtains in connection with the exercise of its authority.

Effective Date: July 28, 2011

Written comments due on or before September 26, 2011

Rules of Practice of Adjudication Proceedings

July 28, 2011
(76 FR 45338)

Interim Final Rule establishes procedures regarding the conduct of adjudication proceedings under §1053 of the Dodd-Frank Act, used to enforce compliance with the Dodd-Frank Act or any laws for which it has enforcement authority.

Effective Date: July 28, 2011

Written comments due on or before September 26, 2011

State Official Notification Rules

July 28, 2011
(76 FR 45174)

Interim Final Rule establishes procedures to be used by state officials to notify the CFPB of their actions or proceedings in enforcing the Dodd-Frank Act or its regulations.

Effective Date: July 28, 2011

Written comments due on or before September 26, 2011

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Rules Relating to Investigations

July 28, 2011
(76 FR 45168)

Interim Final Rule describing the CFPB's procedures for investigations regarding compliance with the federal consumer financial laws.

Effective Date: July 28, 2011

Written comments due on or before September 26, 2011

Notice of Proposed Privacy Act System of Records

August 1, 2011
(76 FR 45767)

(76 FR 45765)

(76 FR 45761)

(76 FR 45757)

(76 FR 45759)

(76 FR 45763)

Notice of new records system to collect process, log, track and respond to all FOIA- and Privacy Act-related requests.

Notice of new records system used to enable the CFPB to carry out its responsibilities with respect to certain banks, savings associations, credit unions, and their affiliates and service providers, including coordination and conduct of examinations, supervisory evaluations and enforcement actions.

Notice of a new records system used to enable the CFPB to carry out its responsibilities with respect to individuals related to non-depository covered persons, including the coordination of examinations, supervision evaluations and enforcement actions.

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Notice of a new records system used to enable the CFPB to carry out its responsibilities with respect to the enforcement of federal consumer financial protection laws.

Notice of a new records system used to assist the CFPB by providing effective, social media-based ways to share information and interact with the public.

Notice of a new records system that will provide the CFPB with a single, agency-wide repository of identifying and registration information concerning entities offering or providing, or materially assisting in the offering or provision of, consumer financial products or services.

Effective Date: September 12, 2011

Written comments due on or before August 31, 2011

Policy on Ex Parte Presentations in Rulemaking Proceedings
August 16, 2011

Policy on Ex Parte Presentations in Rulemaking Proceedings Policy requiring public disclosure of ex parte presentations made to the CFPB staff concerning a pending rulemaking.
August 16, 2011

Notice and Request for Information on Consumer Financial Products and Services for Servicemembers
September 6, 2011
(76 FR 54998)

Request for input regarding consumer financial products and services tailored to servicemembers and their families.
Written comments due on or before September 20, 2011

Proposed Information Collection; Comment Requests; Generic Clearance for Research in Development of Disclosure Forms September 26, 2011
(76 FR 59379) Generic Clearance Request regarding information collection to OMB in connection with research in the development of disclosure forms and request for comments on the collection of information and the estimated burden on respondents. Written comments due to OMB reviewer and to Treasury Department Clearance Officer on or before October 26, 2011.

FRB Final Rule Amending Regulation B to Postpone Auto Dealer Collection of Information on Minority and Women Owned Businesses and Small Businesses

September 20, 2011

Provides that motor vehicle dealers are not required to comply with Dodd-Frank's data collection requirements on credit applications by women- and minority-owned businesses until the FRB issues final regulations to implement the statutory requirement.
effective upon publication in the *Federal Register*

Contacts and Caveats

For more information, please contact a **Don Lampe**, Leader of of Dykema's Financial Services Regulatory and Compliance Team at 704-335-2736, or any of the listed lawyers.

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Practice Areas

Financial Services Litigation – Consumer

Litigation

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