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P R O C E E D I N G S

MR. BROWN: So, I'm going to go ahead and get started. We have a lot of material to cover off on, and not a lot of time. I'm starting a few minutes late; and we want to leave at least five minutes for questions at the very end.

I'm Reg Brown from Wilmer Hale. I think you know most of the folks on the panel: Steve Cutler, at Simpson Thatcher now -- that's a new development. Congratulations, Steve. Welcome back.

MR. CUTLER: Thank you.

MR. BROWN: Mei Lin Kwan-Gett from Citigroup. Kristen Donoghue, thank you for coming from the CF -- oh wait, we called it the CFPB, and I think we're not supposed to call it that.

MS. DONOGHUE: BCFP.

MR. BROWN: The BCFP. I thank you for being here. Jesse Panuccio from the JOD, or should I (laughter); and Rich Ashton from the Board of Governors of the Federal Reserve System.

Let's just dive right in. The topic is what's ahead in bank litigation and civil and criminal law enforcement. I think probably the short answer to that

is that's changed; and I'd like to talk, maybe initially, about some areas where there have been some changes.

There's been some guidance that's been issued by both the BCFP and the DOJ -- so-called Brand memo and Director Mulvaney's pushing the envelope memo; and I was wondering, perhaps, if we started with you Jesse. Could you talk a little bit about the Brand memo; what you were trying to achieve' and how it's working so far?

MR. PANUCCIO: Okay. Well, thanks Reg. First, let me just say thanks for having me here. It's good to be with you and thanks to everybody for coming. On the Brand memo, I think I'd just back up for a second and talk about the larger regulatory project that's going on to kind of situate that. That is to say, this administration is really thinking about the regulatory state and how we approach regulatory issues in a comprehensive way; and so, it really started with a presidential executive order that required -- several presidential executive orders -- that required agencies to rethink how they deal with regulation and guidance in all of these issues. What we call the 2-for-1 EO -- that for any new regulation you had to repeal two,

setting a net regulatory cost of zero across the administration and for each agency; and then following on -- and every agency had to have a regulatory reform officer and a regulatory reform projects.

And so, for us, that began with a memo from Attorney General Sessions in November of 2017 dealing with guidance documents; and saying the DOJ would no longer issue what's called sub-regulatory guidance, or what some people have called regulatory dark matter, which is to say guidance that comes not in the form of notice and comment rulemaking as required by the Administrative Procedure Act.

And then the follow on to that was the Brand memo, which said okay, we have our own guidance -- say from ATF or DEA, or some of our regulatory agencies -- but then we also engage in enforcement activities; and for that we are bringing cases on behalf of other agencies, and we're not going to use their guidance in an enforcement setting that essentially turns it into a binding rule.

And so, there can be -- even under the Brand memo -- there still can be instances where reference to guidance documents is appropriate. For example, to show

scienter when guidance is simply clearly explaining what law is and you show that receipt of a guidance shows that there was knowledge of what the statute say or the properly promulgated regulations; or if it's incorporated into a contract. But we're not going to use enforcement to turn this kind of sub-regulatory guidance into the kind of regulation that should have gone through notice and comment rulemaking.

In terms of its affect and its impact, I think it is having an effect on what we say in briefs; what we say about guidance and how we use it; and I know -- without talking about any particular case -- AUSA is out in -- across the country -- are taking that memo and thinking about how they cite to guidance and how they use guidance. So, I think it is having effect.

And then lastly -- and this probably turns it over to my colleagues here on the panel -- I think that the ideas behind the Sessions memo and then the Brand memo have, hopefully, spurred some other agencies to think about how they use guidance documents; and we saw from the financial regulators a series of supervisory memos in recent months that take a similar tone. So, I think it is having a broader affect in how the Federal

Government thinks about and approaches guidance rather than APA regulation.

MR. BROWN: Let's talk about that a little bit more. Kristen, could you, maybe, say a few words about what Dr. Mulvaney was getting at when he said the days of pushing the envelope are over; and what that's meant at a practical level?

MS. DONOGHUE: Sure; I'd be happy to. So, building really on what Jesse said, the guidance that we've gotten in enforcement from Acting Director, Mulvaney has been really to pay particular close attention to the statutory text and to hue to establish interpretations of the laws that we enforce.

So, what that has meant as a practical matter is that we've continued to look at unfair, deceptive, and abusive acts and practices; and we are paying particular attention to the longstanding precedents that exist where courts have offered interpretations of those standards; and we are looking at the facts and circumstances of each case and really applying those established standards.

The other thing that I would say that Acting Director Mulvaney has instructed us is that he really

wants us to strengthen our coordination with other agencies, particular where we have concurrent and overlapping jurisdiction. He's very focused on minimizing unnecessary and duplicative regulatory burden; and so, has asked us to make sure that we cooperate and coordinate with other regulators wherever possible.

MR. BROWN: This is terrific; at least it sounds really terrific. Rich, are you going to be the skunk at the party, or is the Fed with this program? (Laughter)

MR. ASHTON: No; I think the banking agencies and the Bureau did put out a statement on the role of guidance that, I think, reiterated what basically is the basic principal which is guidance which is not adopted pursuant to formal rulemaking procedures; is not and cannot be the subject of enforcement action, only the underlying statute or a regulation. And, I think, you know, we intend to follow that. I think the statement also made clear that the regulators would, in the future, try to avoid situations where guidance -- which hadn't been issued without notice and comment -- would not have numerical thresholds to try to avoid the

impression that those numerical thresholds were of themselves binding legal requirements. We also said that we would put out guidance -- even though it's guidance -- for comment; and we didn't expect that would turn it into a legally binding rule. So, I think, that's sort of where we are.

MR. BROWN: Thought I'd turn to Mei Lin next and just ask about what you're seeing at a practical level in-house; and is this helpful for you, or not helpful for you, to have guidance that isn't necessarily going to be enforced, but is still guidance. What's your perspective on this?

MS. KWAN-GETT: Well, of course, I think it's very helpful. I have to say though that I think the actual laws and statutes, and regulations are sufficiently broad that, you know, the guidance doesn't necessarily affect us so stringently. I do feel like things aren't quite as bad as they were; but we still feel very much under the microscope; and, interestingly, I feel that the trend overseas is going the other way.

So, for those of us who operate on multiple jurisdiction, foreign regulators, I think, are referring matters to enforcement more often than they ever did

before; and so to the extent that there's any void left by U.S. regulators not pushing the envelope as much as perhaps they used to, I think, other countries are more than willing to step into the briefs. So, we still feel very much under the microscope from very many perspectives.

MR. BROWN: What about you Steve, now that you're back in private practice, what are you seeing? Are you seeing positive implications falling from these changes, or is it lagging. What's your take on it?

MR. CUTLER: I guess I, too, think these are positive developments. I think there's just sort of a carefulness -- if you will -- on the part of regulators when they're thinking -- and the Justice Department -- as they're thinking about enforcement actions that's, I think, constructive. So, maybe a little less reflective activity and a little bit more cerebral activity. That's, I think, you know, what you want when you're across the table from an enforcer.

But I, you know, I would say that a lot of this is around the edges -- and just to come back to guidance. I mean, you know, one of the things that Kristen said sort of intrigued me. You know, when you

take something like UDAP and, you know, you're thinking about, you know, focusing on longstanding precedent; or what, you know, judges have said this is what it means -- that's a tough thing to do when you're dealing with something that's new.

So, you've got the abusive prong of UDAP. I don't think there've been a lot of courts that have opined; I don't think you have a long history of precedent. And, maybe, in the category of be careful what you wish for, you know, some guidance from a regulator as to what they think that statute means is actually a good thing, not a bad thing.

MS. DONOGHUE: I'll just say a couple things in response to that. So, you're absolutely right -- unfairness and deception are standards that are in Section 5 of the FTC Act and appear elsewhere have a much longer history of judicial interpretation than the abusiveness standard in Dodd Frank.

There are a few places we look for the Dodd Frank abusiveness standard. Number one is the statute itself which sets forth a relatively detailed description of the abusiveness standard itself. We have had seven cases where we have alleged abusiveness. The

defendant has filed a motion to dismiss, and a court has ruled on the motion to dismiss. The Bureau has prevailed in each of those seven cases; and in each case, the court found that the allegations stated by the Bureau in the complaint did state a claim for abusiveness. So, that provides some guidance in terms of courts affirming the way the Bureau has been thinking about applying that standard to facts and circumstances.

And I would also point to the Bureau's unified agenda, which was just released several weeks ago and indicates that the Bureau is considering taking up a rulemaking pertaining to the abusiveness standard.

MR. BROWN: That's very helpful.

MR. CUTLER: And Reg, can I just say one thing about that?

MR. BROWN: Sure.

MR. CUTLER: I think you're right that for new laws or a new market situation having an understanding of how a regulatory agency might enforce is helpful. And regulatory agencies can still do that. They should just do it through notice and comment rulemaking so that there's actually an opportunity for the regulated parties to have input and say no, that's not what that

should mean, and here's the reality. That's the whole purpose of the APA is that you get better decision making rather than these, what essentially become -- because if an agency puts out guidance that hasn't gone through that process, effectively the market is going to react and conduct itself according; and it hasn't gone through the process that is set up in statute to allow for proper input. So, I think, we can still have that, but follow the APA process that are set up for input.

MR. BROWN: So, I just checked my Twitter account and Rod Rosenstein is still the Deputy Attorney General (laughter); so, I feel comfortable in asking about his new piling on policy, which encourages coordination among DOJ departments and other agencies to avoid multiple penalties for the same conduct. That's been sort of the bane of a lot of companies for a long time.

And I was hoping, Jesse, you could maybe tell us about the aims and implementation of the policy, and how you're approaching things like credit for fines that are paid to other agencies?

MR. PANUCCIO: Well, thanks, Reg. I think it is an important policy; and the basics here are, you

know, what is a concept of fair play; what is appropriate enforcement; and are you having double enforcement for the same violation. So, the goal here with piling on is to say that we have coordination among -- in DOJ, among divisions and various enforcement sections there, but also with other regulations. And so that if one section of DOJ is going to enforce under a certain law and extract a penalty appropriately, the same conduct isn't punished doubly under some other enforcement authority. And I think we're seeing that play out, for example, in June of this year, we announced our settlement with Societe Generale in Paris for FCPA violations, and that was handled by the Department's Criminal Division, but we also dealt with other enforcers and made sure we gave credit.

So, the idea, really, is to make sure that you're having coordination among the enforcers and then apportionment of the penalty so you understand where the penalties are being assessed and that they are not double-counting, essentially.

MR. BROWN: I'm going to jump to you Rich on this one. In June, federal banking agencies issued a policy statement on coordination of enforcement actions.

Could you speak to that; and is it in alignment with the DOJ's position?

MR. ASHTON: Well, actually, that policy statement just replaced an old FFIEC policy from the 90s about when the agencies -- the banking agencies -- would notify each other when they were going to take an enforcement action. So, that was an outdated policy; it's been replaced.

Then the policy deals almost exclusively with notification -- how the agencies are going to notify each other of potential. It's designed to facilitate cooperation; and, I think, the banking agencies, generally, cooperate anyway when one banking agency -- if we're bringing an action at the Fed against the holding company and there's a national bank involved, and some of the conduct overlapping -- we would, as a matter of course, coordinate with the OCC on that.

So, I think, the policy, generally, is designed to improve the infrastructure for notification, but it's really just recognizing what already is a situation among the banking agencies. But it was just a policy for the banking agencies -- didn't deal with the broader issues of how the agencies, when they're working

with criminal and other civil law enforcement agencies, will resolve it.

So, our practice has been we do bring actions whenever it's appropriate, parallel with other law enforcement agencies. We try to the best we can to coordinate with those agencies. When we come to a resolution, we disclose what the other agencies are doing to our board members when they're deciding how to take an enforcement action.

You know, that said, we're certainly aware of the new policy that the Justice Department has undertaken; and, you know, we're always trying to look for ways in which we can improve our enforcement policies.

MR. BROWN: Mei Lin and Steve, are you seeing this cooperation in effect? I've got to tell you, I still see eye-popping numbers in these press releases; and I just wonder if on the ground you're seeing coordination and credit being given.

MS. KWAN-GETT: Yeah; so, your question about the numbers is a good one. I will say we are seeing more coordination but, frankly, I'm not sure that notification and awareness were really the issue. It is

great to see, for example, the Societe Generale resolution, which involved five different regulators; and so, you know, just looking at it from the outside, it's very good to have all five announced on one day, rather than having five different, you know, investigations and resolutions spread out over many months or years.

What we don't know -- you know, we know that the fines that were levied in that case varied from, you know, 54 million to 717 million. What we don't know is whether the total amount of fines is, you know, lower than it would have been had these been spread out over many months or whether the total number ended up being the same. So, one thing that is very difficult for us to discern is whether the increased coordination that is happening now is actually resulting in the agency's giving entities credit for fines or remediation they may be conducting in response to another agency. That part is very difficult to see; and even in the Societe Generale resolution, you know, you can't tell.

Some agencies -- the SEC is sort of notable for that; and their resolutions will often say and we have not issued a penalty because they were already

fined by the DOJ. It would be very nice to see more of that and for us to understand exactly how credit is being awarded when you have multiple regulators involved.

MR. BROWN: Steve, you want to jump in here?

MR. CUTLER: Yeah; sure, a couple of things. I mean one, I think it's telling that, you know, the policy statement that replaced the FFIEC guidance of old didn't speak to the substance of what that coordination would do. You know, it just, essentially, said the regulators ought to be aware of each other and ought to be coordinating, without saying how and what that coordination would look like. And, frankly, I think that's disappointing. And I'm not sure that in real life the problem has been boy, one banking regulator didn't know what another was doing. That's much less the problem than each was levying its own penalty without regard to the other.

Indeed, a couple of years ago on this very panel, a representative of the OCC said we're precluded, we're statutorily precluded, from taking into account what another regulator is doing in levying a sanction. Whether that was right or wrong -- and I think it was

wrong -- as a statutory matter, it was instructive because that was clearly the mindset of that banking regulator, and I suspect of the collective of banking regulators.

My sense is that too has gotten better, but it's not going to get completely better if -- people may have seen a few weeks ago there was a piece in *The New York Times* that analyzed DOJ cases and SEC cases, and criticized the SEC for their total penalty amounts because they reflected also penalty credit that had been given in connection with settlements that respondents had entered into with other agencies. So, if the SEC said your penalty is 100 million, but we're going to deem you to have paid 70 by virtue of your settlement with the Department of Justice, the *Times* said we're only giving you credit for 30. That's the wrong way to look at it; and, I think, as long as critics out there are saying boy, you as an agency don't get credit for stuff that you don't collect for your coffers -- we're never going to get to the place that we should be. And the place we should be is what would the total fine be if all of the agencies were appearing in a consolidated forum before one judge. And that's still not how the

agencies look at this; and while it's getting better, we haven't gotten there yet.

MR. BROWN: Kristen, I want to give you a chance to defend the agencies in a second; but it's interesting that Steve raised *The New York Times* article -- which they called an exposé -- comparing enforcement during the first 20 months under President Trump and the last 20 months of President Obama. And according to the article, there was a 72 percent drop off in corporate penalties assessed by the Department between the two time periods, much of which fell in the FIRREA and False Claims Act enforcement space.

There was a lot of pushback from FEC officials in the article, but DOJ didn't say very much; and so I wanted to give Jesse a chance first to respond to that article. Are you slacking off? (Laughter)

MR. PANUCCIO: Would it surprise you if I said I thought *The New York Times* was in error? We did, in fact, pushback; they just didn't print it, unfortunately. So, it's not clear what methodology they used to calculate this. In their article, they said they had somebody at a New York law firm pull our press releases and add it up.

So, we tried to even pull selections of our press releases to see if we could get to their number, and we couldn't do it. They were off by about a factor of two, and we told them that. So, I think, they said we had in the first 20 months less than $8 billion of FIRREA recoveries. They were wrong about that. In just the last year, we had $10 billion of FIRREA recoveries; and so, like I said, over the 20 month period, they were off by about a factor of two. On our numbers in looking at it, our FIRREA penalties and FCA penalties are fairly consistent with what they have been over time at DOJ.

The main difference between the last administration and this one -- the only main difference I can really tell -- is that the last administration made a feature of their FIRREA settlements third-party payments -- what they called consumer relief. And Attorney General Sessions issued a memo early on saying the DOJ would no longer be in the business of third-party payments because they raise a number of policy and legal problems including end runs around the appropriations process. So, that is one difference; but in terms of main, you know, the actual FIRREA penalties and FCA penalties, we think it's fairly consistent.

MR. BROWN: Kristen -- we're in New York, so I can Hamilton references, as well -- you're in the room where it happened; so, what is actually going on with the regulators now? Are you standing down, deferring each other, portioning -- what's happening?

MS. DONOGHUE: Sure. I'll make a few points in response to that. First of all, as I mentioned at the beginning, Acting Director Mulvaney has been very focused on our coordination with other regulators. That being said, I would say for the entire time that I've been at the Bureau, when it comes to assessing penalties in cases where there are other regulators involved, what the other regulators are doing in terms of a penalty is always part of the conversation. There's not a time where that's not something we advise the director on when we are advising the director on what we think is the appropriate penalty in a given case; and it is absolutely a factor that is considered along with all of the other factors.

So, I think, we and other regulators do strive to coordinate. I will point to an example of coordination that the Bureau engaged in recently that was somewhat unique, which is a case we brought against

Wells Fargo this spring. The Bureau assessed a penalty against Wells Fargo; and we, affirmative and explicitly, gave Wells Fargo credit for the amount of money they paid to the OCC in a penalty -- sort of similar to what Steve was referencing with the SEC. I didn't realize that meant we wouldn't get credit for our full penalty.

But we -- in the past, we have not been as explicit about it in an order as we were in the Wells Fargo case; but that's an example of a time where Wells Fargo paid the Bureau the difference between the penalty assessed by the Bureau and that assessed by the OCC.

I'll just end by noting though that all of these agencies do have their own authorities and their own laws that they enforce, and a number of them provide for different types of penalties, different policies and procedures for assessing penalties; and we all have an obligation to follow the statutes that we are enforcing in terms of penalties. So, it's a balancing act in terms of all of these different factors.

MR. BROWN: Duly noted. I'm going to switch gears a little bit and talk less about entities, and a little bit more about the individuals that work for entities. I sort of heard some guidance from then

Attorney Sessions about focusing on individual responsibility, liability -- as it were. And I guess I'd like to hear a little bit more about trends in that area. And let's reverse the order and maybe start from an inside perspective; and Mei Lin you can talk about what you see happening in that area -- the issue of individual actions?

MS. KWAN-GETT: Great; thanks, Reg. So, the short version is we're seeing more and more focus on individuals. I do think this started really with the Yates memo from the Justice Department back in 2015; and it was interesting because there was so much discussion about it then; and the Justice Department said this is what we've always done. This is really no change; we're just putting it in writing for you all to see, which may, in fact, have been the case. But what was very interesting about it is I do think it had an effect on other regulators within the United States and other regulators overseas. So, now we are seeing, both within the U.S. and globally, regulators who typically focused just on corporations or entities really taking care to also name individuals and their actions; and it's so obvious because you can see, you know, in matters that

banks are involved in a regulator naming four banks, and then one or two executives from each of the banks. And we are seeing that everywhere, not just in the United States, but in Asia, and Australia, and Latin America, and in Europe.

We would like to see a little more guidance on how those decisions get made. I'll point, hopefully, to the OCC's recent guidance that came out -- to back up for a moment. So, the Yates memo came out in 2015. In 2016, the OCC came out with some additional policies and procedures about how they were levying civil money penalties; and in that you could tell that they were starting to focus more on individuals because there was more about intent; more about recidivism; more about responsibility of individuals who have controls over the particular area.

Now, more recently, just, you know, a few weeks ago, the OCC had issued some guidance on how enforcement actions related to individuals will work there; and it's really more a process and procedure, but it's very helpful to know that there is a process and procedure to set up consistent guidelines for how they're going to approach individuals; and, I think, it

would be helpful if that sort of guidance also had a, you know, contagion effect, and we saw more and had a better understanding of how different regulators were focusing on that. But I do think there's a -- I'll say a populous thirst worldwide to hold individuals accountable when they see problems, and regulators are responding to that.

MR. BROWN: Populous thirst -- ah, boy. And in that vein, Rich, the Fed letters of reprimand issued to the directors of Wells Fargo attracted significant attention this year. What was the message that the Fed was looking to send through the public release of those letters?

MR. ASHTON: Well, so those were letters that were sent to the existing board members of Wells Fargo at the same time that we took action against the company for, essentially, lack of oversight over their compliance programs related to the sales practices at the subsidiary bank. We also sent letters to the former lead independent director and the former chairman of the board, who is also the former CEO. The letters criticized their oversight over the compliance and risk management at the bank. I think the decision to issue

those letters was dependent on the particular facts involved in that particular case; and, I think, whether we will use those tools again which we -- that was the first time that we had used letters like that, at least in the Fed's experience -- whether we use them again, I think, will depend on the circumstances involved.

But, as a general matter, we do have a high priority on bringing actions against individuals as one way to maximize the current effect of enforcement actions. I think, just looking at the numbers, we probably have done more individual actions in the last year than in recent memory. So, the standards under the banking laws for prohibiting someone, removing them from their office at a bank, are very high; negligence and bad judgment don't meet the standards. You have to show some additional bad conduct -- scienter-like bad conduct; and those are the standards that we have to apply; but they are still a high priority at the Fed.

MR. BROWN: Steve, you do a lot of work with boards of directors. What was the perception from other companies, and any other observations you'd like to make?

MR. CUTLER: You know, I mean in terms of

perception, I mean I think the message was received loudly and clearly that, you know, board oversight is incredibly important -- indeed critical -- to the sound operation and safety and soundness of a financial institution. I would say, and I would ask Rich -- I mean sometimes I fancy myself a civil rights lawyer.

MR. BROWN: There you go -- lying to the panel. (Laughter) Go ahead.

MR. CUTLER: What are we to think about due process when a government agency issues and publicly releases a letter that's critical of somebody without that person ever having a chance to get somebody with a black robe to say this happened; or it didn't happen; or it's right; or it's not right. So, I think the letters, in and of themselves, did not impose any legally enforceable sanctions.

MR. BROWN: Got that.

MR. CUTLER: They were just statements about the conclusions of the Fed's investigation. So, that's just not -- I just don't think that works -- I mean from a due process perspective. I don't think a government agency's public criticism of directors ought to happen without due process protections; and I know we're not

talking about sending them to jail; we're not talking about sanctions; but, boy, that's reputationally really harmful; and, as a matter of fairness, as a matter of process, there ought to be a process. And, I suspect -- although you can tell us if it's different -- that those directors never had an opportunity to review that letter and say here's why you're wrong.

MR. ASHTON: Well, I don't think I can comment on a particular case, but just speaking generally, I think, in a lot of these cases there is informal discussions going on between the institutions about the particular conduct involved.

MR. BROWN: Jesse, you've got a civil rights division, and you have been, actually, talking about unifying guidance that's coming from lots of various memos with different peoples' names on them; getting them all into the U.S. Attorney's Manual. Can you tell me why you're doing that, and what kind of progress you're making so far?

MR. PANUCCIO: Yeah; so, for those who don't know, the internal policies of the Department had long been collected, or some of them, in something called the USAM or the U.S. Attorney's Manual; and this was really

-- you know, some of it was just basic instructions if you have an environmental case, or a civil rights case, or anything else -- how do you prosecute it; you know, what are some of our basic procedures. But we also had things like the Yates memo, and the Brand memo, and all these named memo out there; and, you know, for me, when we first came into the Associate's office sometimes people would cite, you know, the Delerie memo, or this or that, and I'd say where are these memos; you know, and how many are out there governing things. And, so, the Deputy Attorney General started a project early on that involved hundreds of people throughout the Department to collect everything, all of the internal policies and procedures of the Department into the USAM; rename it the Justice Manual; it will apply department-wide; it's not just for U.S. attorneys; and not really have named memos anymore; and if anything does come out as a memo, it is quickly converted into Justice Manual provisions.

And so, that is going well. The rewrite was done and unveiled, I think, a couple of months ago now; and, of course, as we continue to look at certain issues, there will be updates to it; but, I think, it's

a good and important project, and we've made a lot of progress on it.

MR. BROWN: Cooperation credit -- Steve, we'll start with you on this one. The banking agencies at a time provided guidance on corporate cooperation that, you know, seems to be in conflict at times, even within DOJ, different divisions -- antitrust, criminal fraud -- it provided guidance on cooperation that may be seen as conflicting by many. Can you talk about that issue and, you know, what your clients are facing when they're trying to interpret the guidance?

MR. CUTLER: I mean, first of all, I guess I would say in terms of cooperation with banking regulators -- I mean you don't have a choice but to cooperate; and I don't think of it as getting cooperation credit as much as if you don't cooperate, you're just going to get hammered. And, you know, it's a different animal when you're dealing with, you know, your primary regulators to say, you know, somehow I should get rewarded for what I think is expected.

You know, when it comes to other agencies -- when it comes to the Department of Justice, and when it comes to the SEC, and the like -- I think the challenge

is, you know, how do you cooperate with one and ensure that you're not going to get sort of on the wrong side of another. In a particular area, if you think about things like the antitrust division's amnesty policy and how that works vis-a-vis the fraud section; and, you know, if you run in and say, you know, here's an issue, we'd like amnesty from the antitrust division and, you know, you're going to imperil yourself with another part of the same department; you know, that, I think, creates a conundrum; and, I think, the same is true, you know, when you're talking across agencies that just have different policies on, you know, how cooperation should work and how you're going to be rewarded for it. So, that's the challenge.

MR. BROWN: Jesse, you all have taken on a lot of challenges so far; and, I think, people are very appreciative of the way you've been thoughtfully listening to some of the criticism. Do you have any kind of response to this particular criticism?

MR. PANUCCIO: Yeah; I mean I can say, generally, I think this -- I'd go back to my answer on the piling on policy. You know, the Deputy Attorney General has made clear that he wants to make that a

priority; that coordination and apportionment are important; and, I think, this falls within that bucket. And so, I'm aware of some of the criticism, and were aware of some of the criticisms in the past about, you know, a perceived lack of coordination on some of these leniency policies; and so, I think, it is something we're looking at; we're willing to take input on; and, I think, as part of our overall effort to make sure that we are appropriately applying a piling-on policy that we look at these issues when they come forward. So, I think, that's about as much as I can say on that right now.

MR. BROWN: Fair enough; appreciate it. I'll take one more issue and then kind of open it up; and that is the issue of attorney-client privilege. In May of this year, seven of the major law firms -- including, Steve, yours and ours -- authored a memo arguing that the banking regulators' examination authority does not override the attorney-client privilege. And I was wondering if we could get some reaction to that memo from Rich, and maybe Kristen -- but also to get some sense of kind of the concrete changes that you'd like to see from the banking regulators on this front?

MR. ASHTON: I guess I can address that first. So, at least from the Fed's point of view, how attorney-client privilege applies really sort of depends on the circumstances has been pointed out. The Fed has said publicly that we believe that the statutory authority to examine institution permits the regulators to have access to all information on the premises of the institution that is directly related to the safety and soundness of the institution, including privileged material. Now, we recognize that is not universally accepted, and we've never had an occasion where that argument has had to be tested.

The second area where attorney-client privilege comes up is when we're conducting law enforcement-type investigations where the potential for an enforcement action at the end is there. There, I think we take the position that while we may ask for attorney-client privileged information, in many cases, we ask institutions to provide notes of witness interviews or statements that they've taken in the course of an internal investigation. If the institution asserts privilege in that circumstance, then we would not try to claim exam authority to try and get that

information. We would follow the normal subpoena enforcement process if we thought that we were entitled to the information. And, I don't think -- at least in my regulation -- that we've ever recommended to our board that the board impose some adverse consequences on an institution just because they asserted the attorney-client privilege.

MR. BROWN: Kristen, there was a public comment period on the Bureau's policies related to enforcement and CIDs -- and Mei Lin, you've probably been on the receiving end -- we have how many days to go through this massive document and get a response in; and raise all of our objections; and the like.

MS. KWAN-GETT: I think we gave an extension. (Laughter)

MR. BROWN: Fair enough. Can you talk about what plans may be in the works to implement policy changes in this area?

MS. KWAN-GETT: Sure. I will describe briefly what the initiative is for folks in the audience who may not be familiar with it. So, when the Acting Director joined us at the Bureau, he launched what he refers to as a call for evidence, which is an initiative designed

to solicit feedback on a whole variety of Bureau functions, enforcement being one of them.

We issued a series of 12 RFIs, and they were all, generally, aimed at gathering information about the efficiency and effectiveness of our work. They were all open for comment -- I think it was for 90 days, although I do think there were some extensions granted when requested -- and all interested parties were encouraged to submit feedback.

In the enforcement arena, we solicited feedback on three specific topics. One was our CIDs, our use of CID; the second was our administrative adjudication proceeding; and the third was our enforcement processes, more generally.

So, the 12 RFIs closed in July of 2018. We have nearly 90,000 comments that staff at the Bureau are currently sifting through and organizing; and those comments are, actually, available on line; they're public available at regulations.gov to the extent people are interested in taking a look.

In addition to those comments, the Bureau hosted three roundtables with industry stakeholders and with consumer stakeholders, where we solicited

additional feedback on all of that same information. So, in terms of where things are right now, the responses are being collected, gathered, analyzed; and I expect that decisions about how to proceed in response to the feedback will likely be part of what a new director thinks about -- if it is, in fact, the case that we have a new director coming forth sometime soon.

MR. BROWN: I was going to ask do you have news on that front. Should we be expecting a new director?

MS. KWAN-GETT: I do not have news.

MR. BROWN: Okay.

MS. KWAN-GETT: I know what others have read in the paper in terms of potential timing for a full-Senate vote. Kathy Kraninger has been nominated to be Director of the Bureau. She was voted out of the Senate Banking Committee a number of months ago; and the rumors I see in the papers are that she might have a vote from the full-Senate very soon, but I don't know anything firm about that.

MR. BROWN: Terrific. Rich, why don't we give you a chance to make some news as well -- can you tell us something that nobody else knows about what we can

expect from the Fed priorities in 2019?

MR. ASHTON: Well, we have had significant change in board membership in the last year or so. Jay Powell moved from member to chairman; the vice chairman for supervision has been on the job for a year or so now; just last Monday, our first board member with experience in community banking was sworn in as a board member. I think when you just look at what we have done in the past year or so, there doesn't seem to be any dramatic change in the kinds of cases that we're bringing.

We're still, in appropriate cases, bringing parallel actions with law enforcement and other civil enforcement agencies. We're continuing to target individual bankers where we think we can make a case. We have brought cases to enforce consumer protection laws. And so, at least for now, we expect that to continue. Of course, as new members join our board and become acclimated, that could all change; but, right now, I think, we're basically doing what we have been doing.

MR. BROWN: Jesse, I checked again and Rod Rosenstein is still the Deputy Attorney General.

(Laughter)

MR. PANUCCIO: You can bait me all you want, but I'm not going to say anything. (Laughter)

MR. BROWN: Rod is a very good friend, so I feel comfortable saying this. But one of the challenges that DOJ has been over the last year-and-a-half, not knowing who to go see with issues; and part of that was because the confirmation process has dragged on for a really long time for a number of slots. You've now got people in, I think, almost all of the slots. You know, we saw, you know, the head of the criminal division announce the end to the Monitor Industrial Complex, and some other things; and so, policy seems to be getting made. But, I suspect, people in the room would appreciate understanding how you all think about escalation, you know, who one ought to go see when you see problems or issues, policy, or case-specific issues? Anything you can say about that?

MR. PANUCCIO: Yeah; well, let me say two things. One, I would just say, you know, I saw some articles that over time -- over the last few years -- that I thought were rather humorous because they said things like well, you know a lot of people haven't been

confirmed so there must be nobody in the building doing anything. You know, I happen to think actings can do the job; but we're in a world, you know -- confirmations take a long time; this isn't unique to this administration at this point. It's a modern trend in Congress and with the Executive Branch; and so, we're in a world in which deputy officials step up and take acting roles, and sometimes they're in them for a long period of time; and, I think, you know, from the outside, you should just follow that org chart and realize that those people are there; and they're empowered to do the job; and they are doing the job. And we saw that in the divisions. For example -- I'll just take environmental as one example -- the Acting Assistant Attorney General was Jeff Wood. He did a phenomenal job for 21 months and now Jeff Clark is there, and he's off to a great start. But it wasn't as if we lacked for policy being made in that division; or important cases going forward; or the proper meetings being had.

In terms of escalation, you know, I can give you my own view which is if it's an issue that appears to already be on the radar of one of the leadership

offices as something we've identified as a priority and are working on, it may be appropriate to start there. Although the preference usually is, you know, we are a law enforcement organization in the end and we are somewhat hierarchal, and so, we like to escalate things in the proper order to give the frontline folks a chance to resolve them -- that's their job; and then after that, the leadership of a division and the assistant attorney general; and then, you know, if there's still an appeal to be had and you think it's an issue of crosscutting policy that either the associate's office or the deputy's office, or in some instances, even the office of the attorney general are interested in, you know, that escalation may be appropriate. But when I get calls in the first instance on something I've never heard of, I typically say well, you know, have you actually talked to anyone in the civil division yet, beyond the frontline attorneys -- have you talked to the assistant attorney general. If the answer is no, I usually say can you start with the head of the civil division so I can have his informed views before I make a decision.

MR. BROWN: Great. So, we have a few minutes

for questions; and so, I'll open it up to the audience. Yes; I'll start right here.

SPEAKER: Good morning. I'm interested in the Department's approach to guidance documents where you're now giving industry an opportunity to comment and advanced notice, and how that might relate to the way the Department has previously used a FIRREA, or old statutes to which they're giving some new interpretations. And just to explain a little further -- FIRREA came out in the 80s in response to the Savings & Loan crisis; then it was used in the small-level mortgage fraud cases; and then -- as Steven knows -- was then brought up and used in RMBS cases and (inaudible) which had never been used before.

MR. BROWN: I think Jesse may know a little bit about this.

MR. PANUCCIO: Yeah; great.

SPEAKER: But it's just the kind of thing that you would've liked to see advanced notice from the Government saying this is how we intend to use this statute going forward. Does it relate in any way to your approach to guidance documents?

MR. PANUCCIO: Well, it's a good question; and

somewhat of a difficult one; and I have to tread a little carefully because we have pending cases; so, I probably won't talk too much about it. I guess I'd say this, to speak more generally about the topic. It is certainly true that one way to get notice of what an agency thinks about a statute is there's some guidance document -- and we've talked about that already today -- and our thoughts on that.

Another is, you know, some people say well, there's regulation by enforcement; and that can be an issue, although I'd also say this. You know, new factual situations arise all the time and you can have a good faith debate about whether those factual situations followed in the plain text of a statute; and they can, even though those situations hadn't arisen before. If that weren't the case, we, basically, wouldn't be able to use any statute in any new situation.

For example, we see this -- you know, to take something completely different -- in the opioid crisis right now. The Control Substances Act hasn't always been used in that space because we haven't had that crisis before; but it doesn't mean that it was unforeseen that the Act might apply to doctors, and

pharmacists, and manufacturers that were doing things that if they had really taken account of what the Act says, they would have known their conduct was out of bounds. And so -- I know that's not a perfect answer. It's a little difficult for me because I don't want to comment on the pending FIRREA cases; but, I think, there is a line there, but my personal view would be new conduct and new factual situations can be applied to the hardline of statutes just because they haven't been before.

MR. BROWN: So, last question will go to Greg Baer while I send a note to my opioid clients.

(Laughter)

MR. PANUCCIO: You've heard me say all that before, Reg.

MR. BAER: Question for Rich and, you know, Steve, (inaudible) with your perspective; and, by the way, (inaudible). So, you had said that the recent agency statement on guidance clarified that guidance cannot serve as the basis for the enforcement action. I had read it to say that, actually, guidance could not form the basis for an examiner's citation or criticism; and, in fact, those would be based on (inaudible) of

law; and, I think, most folk have read that to mean MRA or MRIA.

So, I get two (inaudible). First, is that a misreading, and is it simply to say you can't have a formal enforcement action based on guidance. And then, second, and more nuance, how do you think of as an (inaudible) to the MRA, other than as effectively ordered, in that both the agency, and certainly the banks, treated as binding, it's existence is the grounds for branch (inaudible) expansion, investment as a (inaudible) for settling. So, even if you think that it only refers to (inaudible), how do we think of a MRA other than an enforcement action or a (inaudible)?

MR. ASHTON: Well, maybe I'll answer the second one first. So, I mean MRAs, in and of themselves, are not enforceable; they don't have any legal consequences themselves. As you know, bank regulation is highly informal. There is a lot of informal regulation that is done at the exam level where views are explained and criticism is provided. Institutions, you know, have the opportunity. If they don't agree with certain regulatory decisions, for example, there is a procedure that allows ratings to be

appealed internally. We have proposed that policy be streamlined. We have it out for comment. So, that is available if institutions feel that the particular criticism or rating is impairing them somehow, they have the opportunity to raise that. And they have the opportunity to say that, you know, what they're being criticized for is not actually unsafe or unsound, or doesn't violate any laws. So, I think, that's sort of what we were intending to accomplish with the guidance.

MR. BROWN: Great. Well, we'll end it there. I want to thank our panelist for their time and insightful comments, and appreciate you all being here today. Thank you.

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