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Just When You Thought it was Safe to Get Back in the Water: Continuing CFPB/State Enforcement Risk for Individuals, Owners and Others

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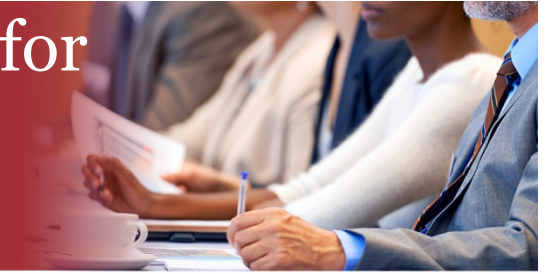
MONTHLY BREAKFAST BRIEFING

States have a form of parallel authority to enforce the statutory title creating the CFPB



- State AG can not bring a UDAAP action against a national bank but can bring UDAAP action against state chartered entities.
- State AG can not bring an action against a national bank to enforce provisions of the Consumer Financial Protection Act (“CFPA”), but it can bring an action to enforce regulations issued by the CFPB. What does that mean? That means they can enforce a UDAAP regulations issued under the CFPA, such as the payday lending rule.
- State licensing authority may bring action against a state chartered licensee for provisions of the CFPA, including UDAAP.
- Whatever remedies are available to CFPB under this title are available to state AG or regulator.
- But CFPB can intervene in any such state action, remove the case to federal court and appeal any order or judgment to the same extent as any other party in the proceeding may.

What is the CFPB enforcement authority for which the states have a form of parallel authority?



- CFPB assumed enforcement authority includes:

- the Alternative Mortgage Transaction Parity Act of 1982
- the Electronic Fund Transfer Act
- the Equal Credit Opportunity Act
- the Fair Credit Billing Act
- the Fair Credit Reporting Act
- the Home Owners [2] Protection Act of 1998
- the Fair Debt Collection Practices Act
- the Gramm-Leach-Bliley Act (in part)
- the Home Mortgage Disclosure Act of 1975
- the Home Ownership and Equity Protection Act of 1994
- the Real Estate Settlement Procedures Act of 1974
- the S.A.F.E. Mortgage Licensing Act of 2008
- the Truth in Lending Act
- the Truth in Savings Act

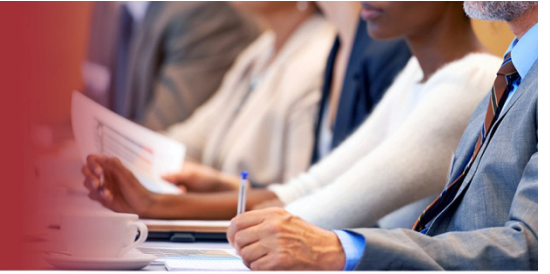


- In addition, the CFPB enforces §§ 1031 and 1036 of the CFPA, which prohibit a “covered person” or “service provider” from committing or engaging in an

- unfair,
- deceptive, or
- abusive

act or practice in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.

Impressive arsenal of remedies



- CFPB has authority to impose additional remedies beyond what is in consumer credit laws, including:
 - rescission or reformation of contracts;
 - refunds of money or return of real property;
 - restitution;
 - disgorgement of compensation for unjust enrichment;
 - monetary damages;
 - limits on activities or functions of the person;
 - public notification of the violation, including costs for notification;
 - civil money penalties of up to \$5,000 per day, up to \$25,000 per day for a reckless violation, or up to \$1 million per day for a knowing violation.

What is a “covered person”?



- Are you a “covered person”?
 - CFPB's UDAAP enforcement authority applies to “covered persons” and “service providers”
 - A “covered person” is one that engages in offering or providing a consumer financial product or service.

What is “consumer financial product or service”?



- Real estate settlement services
- Deposit taking
- Transmitting or exchanging funds or
- “Selling, providing, or issuing stored value or payment instruments”
- Check cashing
- Debt collection
- “Providing payments or other financial data processing products or services to a consumer by any technological means”
- Financial advisory services (note student lending)
- Consumer reporting

What is “consumer financial product or service”?



- Extending credit & servicing loans, “including acquiring, purchasing, selling, brokering, or other extensions of credit (other than solely extending commercial credit to a person who originates consumer credit transactions)”
- What does THAT mean?

What is a “related person”?



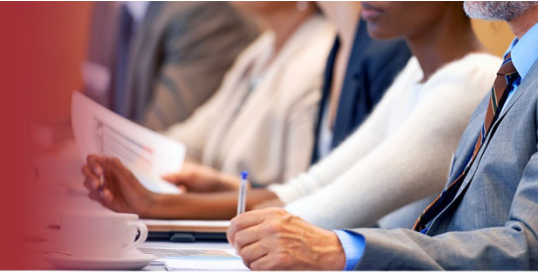
- Related persons also are “covered persons”
- Related persons are:
 - directors, officers, employees with managerial responsibility, controlling shareholders of, or agents for, the covered person;
 - shareholders, consultants, joint venture partners, and any other person as determined by the Bureau who materially participates in the conduct of the affairs of the covered person; and
 - independent contractors (including attorneys, appraisers, or accountants) who knowingly or recklessly participate in any violation of law or regulation or breach of a fiduciary duty.

What is a “related person”?



- Note that the term “related persons” only relates to covered persons that are not part of a bank holding company, credit union or depository institution.
- Why?
- Because the banking agencies have comparable authority with respect to “Institution-affiliated parties” and the statutory goal seems to have been to give the CFPB parallel authority with respect to state chartered, non-depositories.
- Indeed, each appropriate federal banking agency must by statute make a referral to the CFPB when the agency has a reasonable belief that a violation of an enumerated consumer law, as defined in the Dodd-Frank Act, has been committed by any institution-affiliated party within the jurisdiction of that agency.

What is a “related person”?



- Note that in all of the CFPB enforcement actions involving individuals, the named individuals *controlled or had managerial responsibility* for the covered person that committed the violation.
- The CFPB did not bring public enforcement actions targeting *passive* investors that do not materially participate in the covered person's conduct or affairs, but it threatened to do so.

What is a “service provider”?



- The term “service provider” means any person that provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service, including a person that:
 - participates in designing, operating, or maintaining the consumer financial product or service; or
 - processes transactions relating to the consumer financial product or service (other than unknowingly or incidentally transmitting or processing financial data in a manner that such data is undifferentiated from other types of data of the same form as the person transmits or processes).

Are you subject to CFPB's enforcement authority for UDAAP?



- The term excludes a person solely by virtue of such person offering or providing to a covered person
 - a support service of a type provided to businesses generally or a similar ministerial service; or
 - recent decision found that exception applies only to those support services that require no exercise of discretion or judgment
 - time or space for an advertisement for a consumer financial product or service through print, newspaper or electronic media.
- How broadly may the term be defined?

What is consequence of being a “covered person” or “service provider”?



- So what does it mean if you are a covered person, related person or a service provider?
 - The CFPB maintains several tools to initiate an enforcement proceeding upon covered persons and their service providers with respect to UDAAP. Specifically, the CFPB may: (1) issue a civil investigative demand and a file a petition to a court for enforcement; (2) conduct joint investigations, including joint fair lending investigations with HUD and/or the Department of Justice (“DOJ”); (3) issue subpoenas; (4) conduct hearings and adjudication proceedings and issue cease-and-desist orders; and (5) commence civil actions.
 - Remember that a covered person is liable for the UDAAP violations of its service providers.

Did you aid and abet a primary violation?



- Another way to be pulled into enforcement coverage is under the “substantial assistance” provisions.
- Among other provisions, the CFPA expressly prohibits a covered person or service provider from engaging in unfair, deceptive, or abusive acts or practices or any person from knowingly or recklessly providing substantial assistance to a covered person or service provider in violation of the CFPA's UDAP provisions or rules.

Did you aid and abet a primary violation?



- Note that this gives the CFPB authority to bring a UDAAP claim against persons that are NOT covered persons or service providers
- Is this the hook to go after loan purchasers and warehouse lenders? (Remember First Alliance)



- What is “knowingly or recklessly”?
 - “Severe recklessness is limited to those highly unreasonable omissions or misrepresentations that involve not merely simple or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it.”

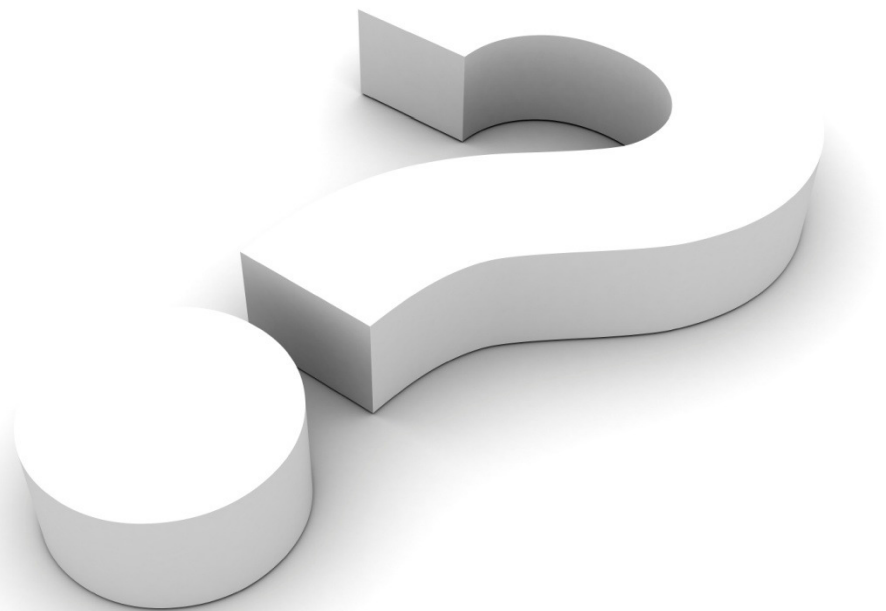


- What is “substantial assistance”?
 - Must allege that “the defendant in some sort associated himself with the venture, that the defendant participated in it as something that he wished to bring about, and that he sought by his action to make it succeed”.



- Note that the CFPB, like the FTC and federal banking agencies, have used UDAAP to bring the functional equivalent of substantial assistance claims.
 - FTC does not have aiding and abetting authority so must rely on UDAAP.
 - Banking agencies have used UDAAP as an aiding and abetting-type claim with respect to banking services--notion that banks have duty to prevent their corporate customers from violating applicable law (e.g., banking payday lenders).
 - Analogy is DOJ's Operation Choke Point.

QUESTIONS?



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