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Consumer Financial Services UDAAP Round-Up: 2020 Year in Review

Contents

Letter to Readers

Welcome to the inaugural addition of the UDAAP Round-up.
This newsletter is designed to provide you with a periodic resource to stay abreast of federal activities regarding the prohibition on unfair, deceptive, or abusive acts or practices ("UDAAPs") in the consumer financial services space. In this edition, we cover notable policy, enforcement, and supervisory developments from 2020.

In 2020, we saw more than 50 UDAAP/UDAP enforcement complaints and consent orders from the Consumer Financial Protection Bureau ("CFPB" or the "Bureau") and the Federal Trade Commission ("FTC"), a new Policy Statement on Abusiveness from the CFPB, and a new UDAAP/UDAP handbook from the Office of the Comptroller of the Currency ("OCC").
In the coming year, we expect to see an uptick in activity, as the pandemic continues to wreak havoc on the economic security of Americans and a new administration and Democratic-controlled Congress take the reins in Washington. We look forward to analyzing those developments in future issues of the UDAAP Round-Up.

We hope you will enjoy reading the inaugural edition of the UDAAP Round-Up and future editions to come.
Please do not hesitate to contact us for any assistance.

With kind regards from the editors,

Ori Lev and Anjali Garg

2. Background on UDAAP/UDAP Authority and Elements

For those who are new to the UDAAP space, welcome. Below, we provide a high-level overview of the CFPB's and FTC's authority and basic definitions, which provide context for the information that follows.

Section 5 of the FTC Act prohibits unfair and deceptive acts and practices ("UDAPs") in or affecting commerce.[1] The FTC has enforcement authority with respect to nonbank financial services companies under the FTC Act. Penalties for violation of the FTC Act include cease-and-desist orders (the violation of which is subject to civil penalties) and injunctive relief (which historically has included include orders for restitution or disgorgement).[2]

Title X of the Dodd-Frank Act provides the CFPB's UDAAP supervisory and enforcement authority, and prohibits any covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law 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.[3] A "covered person" is defined as "any person that engages in offering or providing a consumer financial product or service" or service provider affiliate thereof.[4] The Dodd-Frank Act provides the CFPB various remedies for violations of federal consumer financial laws, including: (i) rescission or reformation of contract; (ii) refunds of money or return of real property; (iii) restitution; (iv) disgorgement or compensation for unjust enrichment; (v) payment of damages or other monetary relief; (vi) public notification regarding the violation, including the costs of notification; and (vii) limits on activities or functions of the person.[5] The Dodd-Frank Act also provides for civil money penalties.[6]

An act or practice is unfair if (1) it causes or is likely to cause substantial injury to consumers; (2) the injury is not reasonably avoidable by consumers; and (3) the injury is not outweighed by countervailing benefits to consumers or to competition.[7] In determining whether an act or practice is unfair, the FTC and the CFPB may consider established public policies as evidence to be considered with all other evidence, but such public policy considerations may not serve as a primary basis for such determination.[8]

A representation, omission, or practice is deceptive if (1) it is likely to mislead the consumer; (2) the consumer's interpretation of the representation is reasonable under the circumstances; and (3) the misleading representation is material.[9]

An act or practice is abusive if it (1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or (2) takes unreasonable advantage of: (a) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service; (b) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or (c) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.[10]

Endnotes

1 15 U.S.C. § 45(a)(1).

2 15 U.S.C. § 53(b). The Supreme Court heard argument on January 13, 2020, regarding whether the injunctive relief authorized by Section 53(b) authorizes the FTC to demand monetary relief such as restitution. AMG Capital Mgmt v. FTC, No. 19-508.

3 12 U.S.C. §§ 5531(a), 5536(a)(1)(B).

4 12 U.S.C. § 5481(6).

5 15 U.S.C. § 5565(a)(2).

6 15 U.S.C. § 5565(c); 12 C.F.R. § 1083.1.

7 15 U.S.C. § 45(n); 12 U.S.C. § 5531(c)(1). The statutory language is modeled on the FTC's December 17, 1980, Policy Statement on Unfairness, appended to Int'l Harvester Co., 104 F.T.C. 949, 1070 (1984).

8 15 U.S.C. § 45(n); 12 U.S.C. § 5531(c)(1).

9 FTC Policy Statement on Deception (Oct. 14, 1983), appended to Cliffdale Assocs., Inc., 103 F.T.C. 110, 174 (1984); CFPB, Examination Manual v.2, UDAAP-5 (Oct. 2012) (citing FTC Policy Statement on Deception). The CFPB has indicated that it will look to authorities under the FTC Act for guidance in defining the scope of deception under Title X of the Dodd-Frank Act. See id. at 5 n.10.

10 12 U.S.C. § 5531(d).12 U.S.C. § 5481(6).12 U.S.C. § 5481(6).

3. CFPB Policy Statement on Abusiveness

The CFPB kicked off 2020 by publishing a Policy Statement clarifying how it intends to exercise its authority to prevent abusive acts or practices under the Dodd-Frank Act. According to CFPB Director Kathy Kraninger, the purpose of the Policy Statement is to promote clarity, which in turn should encourage both compliance with the law and the development of beneficial financial products for consumers. The Policy Statement describes how the Bureau will use and develop the abusiveness standard in its supervision and enforcement work, pursuant to a three-part, forward-looking framework. Under the framework, the Bureau will: (1) generally rely on the abusiveness standard to address conduct only where the harm to consumers outweighs the benefit; (2) avoid making abusiveness claims where the claims rely on the same facts that the Bureau alleges are unfair or deceptive; and (3) not seek certain types of monetary relief against a covered person who made a good-faith effort to comply with a reasonable interpretation of the abusiveness standard. The Policy Statement suggests that the Bureau will use its abusiveness authority even less frequently than it has in the past. While that may be welcome news to regulated parties, it is also likely to mean slower development of meaningful guideposts as to what constitutes abusive conduct. A new CFPB Director in the Biden administration may rescind this policy statement.

Background

The Dodd-Frank Act prohibits covered persons and service providers from engaging in UDAAPs in connection with the offering or provision of consumer financial products or services, and provides the Bureau with supervision and enforcement authority to enforce these prohibitions. While the FTC has used its own similar enforcement authority under the FTC Act to address UDAP for 80-plus years, the abusiveness standard is relatively new. The Dodd-Frank Act outlines four prongs that can constitute an "abusive" act or practice. An act or practice is "abusive" if it:

- materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
- takes unreasonable advantage of:
    - » a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
    - » the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or
    - » the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.

Unlike "unfair" and "deceptive," the abusiveness standard is largely underdeveloped. It has never been clear why Congress considered it necessary to bestow the Bureau with the abusiveness authority in addition to the more clearly defined and established unfairness and deception authority.

In practice, the Bureau's reliance on the abusiveness standard has been relatively minimal. In virtually all cases alleging abusiveness, as the Bureau itself acknowledges, the Bureau also alleged unfairness and/or deception based on the same facts it found abusive, suggesting that little if any conduct is proscribed by abusiveness that wouldn't already be prohibited by the traditional UDAP prohibitions. In cases where abusiveness has been alleged as a stand-alone claim, the Bureau has taken an inconsistent approach to applying it across cases.

In the Policy Statement, the Bureau acknowledges the dearth of administrative, legislative, and judicial guidance and precedent on the contours of the abusiveness standard. The Policy Statement is intended in part to facilitate the orderly development of such precedent in the future.

CFPB Policy Statement

Under the new three-part framework, the Bureau will (1) apply a cost-benefit analysis before asserting abusiveness claims; (2) where consistent with the abusiveness standard and the Policy Statement, allege "stand-alone" abusiveness claims in a way that makes clear the nexus between the facts alleged and the legal analysis; and (3) not seek certain types of monetary relief against those who made a good-faith effort to comply with a reasonable interpretation of the abusiveness standard.

Cost-Benefit. Under the first part of its framework, the Bureau states that it will focus on citing conduct as abusive in those circumstances where it concludes that the harm to consumers from the conduct at issue outweighs the benefits—in other words, it will rely upon a cost-benefit analysis. Such an analysis is already part of the test for unfairness. And although it is not an express part of the deception standard, the Bureau notes that commentators have suggested that deception presumes that the harms to consumers from deceptive conduct outweigh any benefits. In assessing consumer benefit, the Bureau expressly notes that it will consider how the conduct at issue affects access to credit.

Stand-alone claims. Under the second part of the framework, the Bureau sets out its intention generally to avoid making an abusiveness claim that relies on all or virtually all of the same facts as an unfairness or deception claim. According to the Policy Statement, as of the date of its issuance, the Bureau had brought 32 enforcement actions alleging abusiveness. Only two of those did not also have an unfairness or deception claim. And in most cases, as we have previously noted, the abusiveness claim was based on the same course of conduct that the Bureau found unfair or deceptive. Going forward, the Bureau says it intends generally to allege "stand-alone" abusiveness violations as opposed to pleading abusiveness in conjunction with unfairness and/or deception. In doing so, the Bureau anticipates drawing a closer nexus between the cited facts and the legal analysis underlying the abusiveness claim. The Bureau predicts that such "stand-alone" pleading will promote a body of jurisprudence more clearly defining the contours of what constitutes abusive conduct. The Policy Statement notes that the Bureau may, in limited circumstances, still allege an abusiveness claim and a "related" unfairness or deception claim "where it would help clarify the scope of the abusiveness standard," but it would seek to do so in a manner that distinguished one standard from the other when it does so.

While the Bureau's efforts described above may serve to help further clarify the meaning of abusiveness, it is not clear if they will help tease out what conduct is abusive that could not also be considered unfair or deceptive. That is, although the Bureau indicates that it will generally not plead abusiveness in addition to unfairness or deception, that does not mean that conduct pled as a stand-alone abusiveness claim could not also be considered unfair or deceptive. Nor do these changes address the Bureau's past inconsistency in using the abusiveness standard. While the Bureau states that use of the cost-benefit analysis described above will "ensure[] that the Bureau's supervisory and enforcement decisions are consistent across matters," it is not clear why that would be the case. As with cost-benefit analysis, the limitation of the use of abusiveness to "stand-alone" claims is likely to mean that fewer such claims will be brought.

Monetary remedies. The third part of the framework is not about when the Bureau intends to allege abusiveness, but about the consequences when it does so. To "ensure that uncertainty regarding the abusiveness standard does not impede beneficial conduct," the Policy Statement provides that absent unusual circumstances, the Bureau will not seek civil penalties or disgorgement for abusive acts or practices where the covered person made a good-faith effort to comply with a reasonable interpretation of the abusiveness standard. The Bureau will still hold a covered person accountable for legal or equitable remedies, such as damages and restitution, to redress "identifiable consumer injury caused by the abusive acts or practices that would not otherwise be redressed." The Policy Statement makes clear that the Bureau will aggressively pursue civil money penalties against those not acting in good faith.

Oddly, the Bureau states that in determining whether a covered person made a good-faith effort to comply with the abusiveness standard, it will consider all relevant factors, expressly including those outlined in the CFPB's Responsible Conduct Bulletin. The Responsible Conduct Bulletin, however, describes the kind of conduct that the Bureau will take into account when considering how to exercise its enforcement discretion, and the considerations identified in the Bulletin – self-policing, self-reporting, remediation, and cooperation – have little to no relevance to the question of whether a party's interpretation of the abusiveness standard is reasonable or whether its efforts to comply with that interpretation were in good faith. Rather, the considerations relate to a party's capacity to identify and respond to violations of the law. It is also odd that the Bureau would adopt this approach to abusiveness but not to other legal violations. Shouldn't a party's good-faith effort to comply with a reasonable interpretation of the law always mitigate against civil penalties? This aspect of the Policy Statement appears to provide greater leeway to those accused of abusive conduct than to those facing novel interpretations of the unfairness and deception standards.

Conclusion

As described below, since promulgation of the policy, the CFPB has asserted abusiveness claims in two enforcement actions, both against banks. In the first, the CFPB alleged that enrolling consumers in online-banking services and activating lines of credit on consumers' accounts without a consumer's consent constituted an abusive practice; at the same time, the CFPB alleged that opening deposit and credit-card accounts in consumers' names without their consent, and transferring funds from consumers' existing accounts to new, improperly opened accounts without consent, constituted an unfair practice. In this case, the CFPB was true to its pledge to not plead abusiveness for the same set of facts that it alleged constituted unfair or deceptive conduct. But it is less clear why the facts underlying the two abusiveness claims constitute abusive as opposed to unfair conduct. In the second case, the CFPB found that a bank's practices for consumers to opt in to its overdraft protection service (e.g., the use of talking points downplaying fees, the framing of the service as a "feature" rather than an option that must be opted into, and the use of a form with a pre-checked box) were abusive because they materially interfered with the consumers' ability to understand the terms or conditions of the service. Again, the CFPB was true to its commitment to not double plead abusiveness plus unfairness or deception, but it is not clear why the conduct at issue was deemed abusive as opposed to unfair. It will be interesting to see whether new CFPB leadership rescinds or amends the policy statement and how they utilize their abusiveness authority.

4. Enforcement Trends

2020 saw active UDAAP/UDAP enforcement by both the CFPB and the FTC, but no public enforcement actions by other federal banking regulators. 2020 included a mortgage advertising sweep by the CFPB, announcement of a new coordinated debt collection enforcement initiative among federal and state regulators, and many other enforcement actions in the areas of advertising, servicing, debt collection, payment processing, debt settlement, and deposits.

2020 numbers at a glance

- Litigation complaints filed: 25
  - » CFPB: 15
  - » FTC: 10
- Consent orders and settlements: 30
  - » CFPB: 25
  - » FTC: 5
- Total civil money penalites (CMPs): More than $80 million
- Consumer redress: More than $536 million

A. Deceptive Advertising

Key Takeaways

- **Responding to concerns brought to its attention by the VA, the Bureau announced numerous enforcement actions in 2020 stemming from its sweep of mortgage companies that use deceptive mailers to advertise VA-guaranteed mortgages.**
- The CFPB and FTC also pursued deceptive advertising claims made in television ads and telemarketing calls, and in connection with lead generation and high-interest lending activities.

2020 saw active deceptive advertising enforcement by both the CFPB and the FTC, including a mortgage advertising sweep, and lawsuits and enforcement actions against lenders and lead generators.

CFPB Enforcement

The CFPB brought eleven deceptive advertising matters in 2020, resulting in a total of approximately $5.6 million in civil money penalties and $287,000 in consumer redress.

Deceptive VA Mailer Sweep

In a sweep between late July and October, the Bureau announced nine different settlements with companies that engaged in deceptive advertising to service members and veterans. These companies were mortgage lenders and brokers that advertised VA-guaranteed loans, principally through direct-mail ads. The CFPB found that the ads were false or misleading, constituting deceptive advertising. Because these were mortgage ads, they also violated the Mortgage Acts and Practices-Advertising Rule (MAP Rule), as well as Regulation Z. The companies had to pay civil money penalties ranging from $50,000 to $1.8 million each; no consumer redress was required in any of these cases. In addition to injunctions of future misconduct, several of the consent orders expressly required companies to designate an advertising compliance official who must review advertising for compliance with mortgage advertising laws prior to dissemination and required companies to comply with certain enhanced disclosure requirements to prevent future misrepresentations.

Government affiliation: The most common finding was that the ads contained misleading statements strongly implying that they were being sent by or on behalf of the U.S. government. For example, some ads said things like: "To confirm your eligibility for this VA Loan Guarantee Program contact your VA Loan Representative [phone number] no later than [date] to confirm benefits before they expire." Another common tactic was to mimic IRS formatting.

Cost of credit: The CFPB also alleged that the ads made false or misleading representations about the cost of the loan or the terms of credit. For example, some ads misleadingly advertised a fixed introductory interest rate on the front of the mailer, but in fine print on the back, stated that the advertised loan was, in fact, a variable-rate mortgage. Others also advertised rates that were not substantiated based on the rate sheets. Advertisements also commonly misrepresented the payment amount applicable to the advertised mortgage or the existence, nature, or amount of cash available to the consumer in connection with the advertised mortgage.

Prescreened offers: Numerous ads implied or stated that the consumer had been prescreened, preselected, or prequalified for the credit advertised, when in fact they had not. Some ads also created the false impression that the lender had obtained an assessment of the consumer's property featured in the advertisement and that the proposed loan terms were based on that assessment.

The Bureau commenced this sweep in response to concerns from the US Department of Veterans Affairs about potentially unlawful advertising in the VA market. The sweep should serve as a reminder to anyone advertising credit products to follow best practices to avoid deception risk, including but not limited to making clear and conspicuous disclosures, substantiating advertised rates, and performing a compliance review before releasing marketing materials.

Deceptive Television Ads and Telemarketing Calls

The CFPB settled with a payday lender for $286,675.64 in consumer redress plus a civil money penalty of $1,100,000 for deceptive practices. Among other things, until June 2015, the company allegedly stated in television ads that consumers could save 50% on finance charges, when in fact the discount was available through a rebate that applied only to the first scheduled loan payment. The ad claimed "Save 50%" in large font and in a voiceover, and only included a fine print disclaimer indicating that the promised discount was available only as a rebate, and applied only to the finance charge for the first scheduled payment. Similarly, in telemarketing calls, the Bureau found that in most cases, the company failed to mention the limitations on the 50% discount and did not direct consumers to the company's website where the consumer might have seen the relevant disclosures. The consent order also included findings related to excessive collections calls and credit reporting issues.

Deceptive Marketing of APRs

The CFPB filed a lawsuit against a lender and its CEO for misrepresentations about the annual percentage rate (APR) associated with its loans and false statements about the security of deposited funds. The Bureau alleged that the company used deposited funds to make usurious loans to other consumers, engaging in deceptive practices in doing so. The Bureau alleged that the lender misrepresented both the risks associated with the deposit product and the APRs associated with extensions of loans offered to consumers. The CEO allegedly runs the business' day-to-day operations and approves content for its website.

With regard to deposits, the Bureau alleged that the company falsely represented that deposits had a fixed and guaranteed annual percentage yield of 15%, and that consumer deposits were FDIC-insured up to $500,000, despite the fact that the deposits were not held in FDIC-insured institutions. Rather, the deposits were lent out to borrowers through loans with APRs over 975%, which the company falsely marketed as having APRs of only 440%. Moreover, the Bureau alleged that the loans made with these deposits were usurious under state law, potentially relieving borrowers of the obligation to pay. As a result, the company may have been unable to collect delinquent loan payments, which could cause it to be unable to meet its obligations to depositors who want to withdraw funds.

FTC Enforcement

The FTC similarly filed several deceptive advertising actions in 2020, including a suit against a fintech offering high-interest deposit accounts that allegedly misrepresented the ability of customers to access their funds and an action against a company operating a loan comparison website, which failed to disclose that lenders could pay to promote themselves on the website.

Deceptive Representations of Deposit Accounts

The FTC sued a fintech offering high-interest deposit accounts for misleading customers, who were promised 24/7 access to their money plus above-market interest on federally insured deposits. The FTC received a pattern of complaints from customers about delays in receiving funds when closing accounts and issues when contacting customer service. Allegedly, some customers were unable to access their funds for months. The FTC also alleged that when customers requested a withdrawal, the company immediately stopped paying interest on the funds, but did not actually return the money to the customers for weeks or months afterward. Further, the company allegedly advertised base interest rates as high as 1% on the deposits, even though customers received a .04% rate. The FTC found that the company's representations that consumers would receive substantial interest rates, including minimum base rates of 0.2% or 1%, were false, misleading, or unsubstantiated.

Deceptive Marketing of Aggregator Website

The FTC settled a matter alleging a lead generator falsely claimed its website provided objective, accurate, and unbiased information about consumer financial products, such as student loans, personal loans, and credit cards, when in fact it offered higher rankings and ratings to companies that paid for placement. The FTC further alleged that the company falsely claimed the information on its site was not affected by compensation from advertisers.

In addition, the company allegedly posted fake positive reviews of its website on third-party review platforms, which were false and misleading and constituted deceptive acts or practices in violation of Section 5(a) of the FTC Act. The FTC required the company to stop its misrepresentations, make required disclosures, and pay a fine of $350,000.

B. Servicing and Debt Collection

Key Takeaways

- Servicing and collection continue to represent a large portion of UDAAP actions.
- Regulators continue to use UDAAP authority to fill perceived gaps in federal consumer financial protection laws, such as the FDCPA and mortgage servicing rules.
- The CFPB continues to pursue novel deception theories that essentially federalize state law violations.

UDAAPs in the servicing and collection context continued to be a priority for the CFPB and FTC, with the agencies issuing more than 10 complaints and consent orders against debt collectors, debt buyers, and mortgage servicers in 2020. These actions resulted in more than $21 million in civil money penalties and $25 million in consumer redress. The agencies also announced yet another multi-agency initiative, Operation Corrupt Collector, to combat abusive and threatening debt collection practices, including "phantom" debt collection, abusive calls, and false or misleading representations under the Fair Debt Collection Practices Act ("FDCPA"). The 2020 actions reflect the types of UDAAP claims we are used to seeing in this space. With respect to debt collectors, the FTC and CFPB continue to focus on entities that engage in deceptive debt collection practices, including attempts to collect on "phantom debts." The CFPB continues to allege that mortgage servicers engage in unfair and deceptive loss mitigation and foreclosure practices. The CFPB also brought a novel deception claim, alleging that violations of state licensing requirements constitute an unfair act or practice, and also brought an action against an auto finance company for allegedly unfair repossession practices.

Novel Deception Claim

In December, the CFPB issued a consent order to a debt buyer alleging a somewhat novel deception claim deriving from a state licensing violation. In that matter, the CFPB alleged that the respondent threatened to sue, and did sue, consumers for unpaid debts in three states that required a license to recover payment of consumer debts through the judicial process. In the CFPB's view, the debt buyer was implicitly representing that it had a legally enforceable right to recover payment from consumers through the judicial process when, in fact, its failure to comply with applicable state licensing laws meant it had no such right. The CFPB has taken a similar position with respect to the collection of loans that are void under state law, but this was the first case asserting a deception claim based on failure to obtain a state collections license.

Unfairness Claims in Collections

Although the year's UDAAP actions against debt collectors focused mainly on deceptive collection practices with respect to collecting on "phantom debts," the Bureau also filed and settled an unfairness suit against several debt buyers and collectors. The CFPB alleged that the companies engaged in unfair acts or practices by using a foreign payment processor, which resulted in some consumers' banks charging them international transaction fees. According to the Bureau, the companies did not disclose this fact to consumers and deprived them of the opportunity to pay with an alternative method that did not include such fees. The settlement also included findings that the debt collectors violated the terms of a CFPB consent order entered into in 2015.

Mortgage Servicing UDAAPs

The CFPB and its state counterparts continued to bring UDAAP claims against mortgage servicers, particularly in connection with loss mitigation and foreclosure practices. In conjunction with actions by the attorneys general and/or bank regulators in all 50 states, Puerto Rico, the Virgin Islands and the District of Columbia, the Bureau filed and settled unfairness claims against one mortgage servicer for allegedly failing to honor pending loan modifications on loans transferred from previous servicers ("in-flight" loan modifications), and for improperly increasing some borrowers' permanent monthly payments after the borrowers successfully completed their trial period plans. The Bureau also claimed that the mortgage servicer engaged in deceptive foreclosure practices by foreclosing on borrowers while their loss mitigation applications were pending despite promising not to do so, and by misrepresenting the loan-to-value requirements regarding cancelling private mortgage insurance. Many of the alleged violations took place prior to implementation of the Mortgage Servicing Rules in 2014.

The Bureau issued a consent order against another mortgage servicer for engaging in unfair acts or practices when it allegedly failed to accurately review, process, track, and communicate to borrowers information regarding their applications for loss mitigation options. The order further alleged that the mortgage servicer engaged in deceptive acts or practices by sending loss mitigation application acknowledgment notices that misrepresented the status of borrower application documents as received or missing and provided inaccurate due dates for submission of borrower application documents.

Unfair Auto Servicing Practices

CFPB Supervision has been citing auto loan servicers for allegedly unfair repossession practices since at least 2016, but 2020 marks the first public enforcement action regarding such practices. In October, the Bureau alleged that an auto loan servicer engaged in the following unfair acts: wrongfully repossessing vehicles when there was an agreement in place with consumers to prevent repossession (such as an extension agreement); conditioning release of personal property found inside a consumer's vehicle at repossession on payment of a fee; and depriving consumers making phone payments the option to select a payment option with a significantly lower fee and failing to disclose the exact fee amounts in consumer-facing materials. The Bureau also alleged that the servicer deceptively represented in its loan extension agreements that consumers could not file for bankruptcy, even though such agreements were void as against public policy. In a separate action, the Bureau issued a consent order against an auto loan servicer alleging that the servicer unfairly billed consumers for loss damage waivers without providing coverage, and collected fees that consumers were not contractually obligated to pay under their loss damage waiver contracts.

Look Ahead

In October, the CFPB issued its final rule implementing the FDCPA, which will take effect November 30, 2021. The final rule does not address UDAAPs, nor does it address first-party debt collection. Although the FDCPA prohibits a debt collector from using unfair, deceptive, or abusive debt collection tactics, the Bureau declined to use its UDAAP authority in the final rule, relying instead solely on its authority under the FDCPA. As such, while the final rule provides some long-awaited clarity to debt collectors, it does not clarify the CFPB's view of the activities that constitute UDAAPs in the debt collection context. Additionally, as the pandemic rages on and the CFPB engages in targeted reviews of mortgage servicing practices such as loss mitigation, we expect to see a continued focus on potential UDAAPs in the mortgage servicing space.

C. Payment Processing

The FTC entered into a settlement with one of the world's largest payment processors and a former vice president for more than $40.2 million related to the processor's provision of payment services to merchants engaged in fraud and the executive's role in enrolling and overseeing the merchants. The settlement indicates the FTC is willing to hold payment processors responsible for the acts of merchants to whom they provides services even when the processor has not interacted with consumers directly.

The FTC's complaint alleges that the defendants engaged in unfair acts or practices by enabling merchants engaged in fraud to accept credit card payments from consumers. The FTC alleged the former vice president was directly involved in enrolling the merchants for the payment services and providing false information to the processor's acquirer, ignoring evidence that sales agents were engaged in fraud, and failing to adequately underwrite, monitor, or timely terminate merchants which he knew, consciously avoided knowing, or should have known were engaged in fraud.

To enable the credit card payments, the processor opened merchant accounts and processed payments for at least four deceptive schemes that had been the subject of FTC or U.S. Department of Justice law enforcement actions (the "Schemes"). According to the FTC, the processor ignored warnings from third parties and direct evidence that the Schemes were engaged in fraud and also failed to comply with its anti-fraud policies, the rules of its acquiring bank, and the credit card networks when onboarding and overseeing accounts owned by the Schemes. Although the processor did not engage directly with consumers beyond enabling the acceptance of credit cards, the FTC determined the processor, by providing services to the Schemes, had caused or was likely to cause harm to consumers that could not be reasonably avoided.

The processor agreed to pay a $40 million fine to settle the claim. The former vice president agreed to pay a fine of more than $270,000 to settle the claim.

Additionally, the CFPB issued consent orders to two companies that offer consumer auto loan payment acceleration plans. When a consumer enrolled in a payment acceleration plan, the consumer authorized the company to debit the consumer's bank account more frequently than would be required if the consumer made payments according to the payment schedule established by the consumer's lender. This would result in one extra loan payment each year, resulting in a faster payoff of the loan.

Each company sold the plans to auto dealers, who used the companies' marketing materials to market the products to consumers as a cost savings mechanism by displaying the amount of money the consumer would save by enrolling in a payment plan. However, the disclosed savings did not reflect the fees associated with the plan, which in most cases resulted in the consumer paying more in payments and fees than they would have if they had paid according to their non-accelerated payment schedule. The CFPB determined that failure to account for fees paid in the cost savings statement constituted a deceptive act or practice.

The first company was required to pay $7.5 million in equitable monetary relief, which was partially set aside due to inability to pay. That company was also assessed a civil money penalty of $1. The second company was required to pay $9.3 million in equitable monetary relief, which was also partially set aside due to inability to pay. The company was also assessed a civil money penalty of $1.

D. Debt Settlement

The debt settlement industry continues to face heavy regulatory scrutiny by the CFPB and the FTC. Debt settlement providers assist consumers in obtaining settlements with creditors for past-due debts, including in the context of credit cards, student loans, and mortgages. Debt settlement is a highly regulated industry, with providers subject to scrutiny by state and federal regulators, and explicit prohibitions and requirements under the Telemarketing Sales Rule ("TSR"). Unlike many other consumer financial services companies, debt settlement companies are on notice of the types of acts and practices that will be considered deceptive and abusive through the TSR, and the vast majority of enforcement actions brought against debt settlement companies allege one or more TSR violation.

In recent years, the CFPB and FTC have supplemented these TSR-related claims with unique UDAAP claims that appear designed to capture a broader range of conduct than contemplated by the TSR, particularly in the context of student loan debt settlement companies. As total outstanding student loan debt has grown significantly in recent years, regulators have responded by paying greater attention to student loan debt relief companies: since 2016, there have been more than eighteen enforcement actions brought against such companies.

In 2020, some of these actions included typical UDAAP claims, such as allegations that a debt settlement company misled consumers into believing that their monthly payments would be reduced or loan balances forgiven, which resulted in a total monetary judgment of $43.3 million (which was partially set aside due to the financial institution's inability to pay). Others involved specific UDAAP claims related to unique features of student loans, including the various repayment options and relief programs associated with federal student loans. For instance, the FTC and CFPB brought deception claims against companies who misrepresented that they were affiliated with the Department of Education (which resulted in consumer redress ranging from approximately $2.5 million to $35 million, although redress was suspended in a number of cases due to inability to pay), that they would properly instruct consumers on how to file loan modification requests with the Department of Education or would accurately file such requests on a consumer's behalf (resulting in a $23.9 million consumer redress judgment, although this was reduced due to inability to pay), and that they would renegotiate, settle, or alter payment terms on a consumer's student loan debt, remove tax liens and wage garnishments, or fully refund fees if they failed (that matter resulted in $2,329,456 in consumer redress, but was suspended due to inability to pay).

Other debt settlement enforcement actions have included somewhat novel claims. For example, the CFPB filed a complaint against a debt settlement company that allegedly represented to consumers that it could help consumers obtain a loan, including through the use of terminology such as "underwriting" or "qualifying," when in fact the company did not underwrite or provide loans. The CFPB separately filed a complaint against a debt settlement company and two owners alleging that their advertisements deceptively claimed that student loan debt relief services would result in eliminated or reduced student loan payments, improved credit scores, and the removal of negative credit-status codes or ratings from credit reports when that was not always the case. With regard to these allegations, the CFPB also noted that the debt settlement company did not track whether it achieved results advertised and thus could not substantiate the claims, signaling that the Bureau expects debt settlement companies should affirmatively track results to ensure that their advertising claims remain accurate.

E. Deposits

The Bureau brought three public enforcement actions involving deposit products and services in 2020. The actions reinforce the Bureau's focus on employee incentive plans and deceptive marketing practices as areas of UDAAP risk while providing two of the first examples of the Bureau's use of the "abusive" standard since issuing the Statement of Policy Regarding Prohibition on Abusive Acts or Practices in January 2020.

Employee Incentive Plans

The CFPB has repeatedly identified sales and production incentive plans as a potential source of UDAAP risk, both through enforcement actions and regulatory guidance. That trend continued this past year in the deposit products and services area. In the CFPB's lawsuit against a bank in March 2020, the CFPB alleged, among other things, that the bank engaged in unfair and abusive acts or practices by opening deposit and credit-card accounts in consumers' names; transferring funds from consumers' existing accounts to new, improperly opened accounts; enrolling consumers in unauthorized online-banking services; and activating unauthorized lines of credit on consumers' accounts—all without the consumers' knowledge. The complaint attributed these violations primarily to employee goals, incentives, and performance metrics related to the selling of new products or services to existing customers.

Notably, this was one of the first actions by the Bureau since issuing the Policy Statement. Here, the Bureau alleged that enrolling consumers in services without their knowledge or consent amounted to an abusive act or practice because it (1) materially interfered with consumers' ability to understand the terms and conditions of the service and (2) took unreasonable advantage of consumers' inability to protect their interest in selecting or using the service.

Deceptive Marketing

This past year saw two CFPB actions that took aim at deceptive marketing practices related to deposit products and services. First, in July 2020, as described in the Deceptive Advertising section above, the Bureau filed a lawsuit against a Delaware financial company and its founder for engaging in deceptive acts and practices related to inaccurate marketing representations of high-yield certificate of deposit accounts.

Second, in August, the Bureau issued a consent order against a bank for, among other things, deceptive acts or practices related to marketing by mail an overdraft protection service. The Bureau also found that the bank's account-opening practices related to its overdraft protection service (e.g., the use of talking points downplaying fees, the framing of the service as a "feature" rather than an option that must be opted into, and the use of a form with a pre-checked box) were abusive acts or practices because they materially interfered with the consumers' ability to understand the terms or conditions of the service. The consent order required the bank to pay $97 million to redress affected consumers as well as a $25 million civil money penalty.

Abusive Practices

Although two matters alleged an abusiveness claim, neither are particularly instructive in defining exactly what conduct is "abusive" that could not also be considered unfair or deceptive. In the lawsuit filed in March, the Bureau generally alleged unfairness when the action involved money (e.g., transferring funds) while limiting abusiveness claims to those that did not (e.g., enrolling someone in online banking). This distinction presumably resulted from the Bureau's inability to meet the "substantial injury" prong of an unfairness claim in the latter instances. Beyond that distinction, however, the only significant departure from past practice appears to be that the abusiveness claims were supported by facts separate from those supporting unfair or deceptive claims—an element of the framework laid out in the Policy Statement. Time will tell whether 2021 will bring additional clarity around a general understanding of what constitutes “abusive” conduct.

5. Supervisory Trends

In 2020 the OCC and the CFPB took several important steps with respect to their supervision of regulated entities for UDAAP risks. These supervisory activities reinforce the importance of remaining cognizant of and proactively addressing UDAAP risks, as UDAAP likely will continue to be a focus area in the coming year.

OCC UDAAP Booklet

For the first time, the OCC has issued a Comptroller's Handbook booklet on UDAAPs (the "Booklet"), for use by examiners in their examination and supervision of OCC-supervised entities and their third parties. The OCC has supervisory and enforcement authority for the UDAP provisions of Section 5 of the FTC Act for all OCC-supervised banks and the UDAAP provisions of the CFPA for banks with total assets of $10 billion or less (the CFPB has exclusive supervisory authority over insured depository institutions with total assets over $10 billion).

The Booklet provides a detailed analysis of UDAAP standards and risk factors. With this publication, the OCC appears to be signaling a continued focus on UDAAP risks in its supervisory processes and a clear expectation that banks identify and address potential UDAAP risks. Specifically, the Booklet covers the OCC's supervisory approach, UDAAP risks, risk management, and examination procedures. In addition, the Booklet includes appendices of UDAAP and UDAP red flags (Appendix A) and risk indicators (Appendix B) that provide a framework for entities to detect and prevent potential UDAAP risks.

The Booklet identifies five areas of UDAAP risks: compliance, credit, operational, strategic, and reputational. Examiners use a chart to summarize these five categories of risks by evaluating the quantity of risk, quality of risk management, aggregate level of risk, and direction of risk for each category. The Booklet provides detailed discussions of the quantity of risk and quality of risk management, including Appendix B's discussion of risk indicators. These risk indicators touch upon 10 areas related to UDAAP, including risk management systems, management commitment and oversight, and risk assessments and reports.

The Booklet's nine red flags in Appendix A provide detailed warning signs of potential UDAAP risk and focus on, for example, customer complaints, whistleblower referrals, high volume charge-backs or refunds, and weak servicing and collection practices.

The Booklet will assist examiners in identifying potential UDAAP risks and assessing regulated banks' efforts to evaluate and address potential UDAAP risks.

CFPB Supervisory Highlights

The CFPB's Winter and Summer 2020 editions of *Supervisory Highlights*, which describe the CFPB's supervisory findings in an effort to help industry limit risks to consumers and comply with federal consumer financial law, discussed examiner findings of UDAAP violations concerning payday lending and student loan servicing.

Payday Lending

Examiners found one or more payday lenders engaged in unfair acts or practices related to failing to apply borrower overpayments. The Bureau noted that the lenders lacked systems to detect the unapplied payments, resulting in the borrower accounts being treated as delinquent and borrowers ultimately paying more than owed. In addition, examiners observed payday lenders engaging in an unfair act or practice by imposing an unauthorized fee as a condition of paying or settling a delinquent loan. The lenders made changes to their compliance management systems and refunded the fees in response to the findings.

Examiners also determined that one or more lenders engaged in deceptive acts or practices by misrepresenting on websites and in direct mail ads the ability to apply for loans online, even though consumers were required to visit a physical store to complete the application process. Additionally, examiners observed one or more lenders engaging in deceptive acts or practices by advertising that they would not perform credit checks when, in fact, they used credit reports in making decisions to extend credit. In response to both sets of findings, entities discontinued the representations and implemented improved advertising policies and procedures and oversight.

Examiners also observed one or more lenders engaging in deceptive acts or practices by sending collections letters falsely threatening lien placement or asset seizure if payments were not made, even though no such measures were taken. Furthermore, examiners found one or more lenders engaging in deceptive acts or practices when sending collections letters falsely threatening to charge late fees if payments were not made, where late fees were not actually charged. The identified statements were removed from the collections letters in response to the findings.

Student Loan Servicing

Examiners found that servicers engaged in an unfair act or practice when they sent periodic statements with an amount due in excess of what was owed or by receiving an excessive payment via automatic payments. According to the Bureau, these issues arose from data mapping errors while transferring the loans between servicing systems. The servicers implemented processes to mitigate data mapping errors and remediated the affected consumers.

CFPB Prioritized Assessments

In July 2020, in light of the significant impacts of the COVID-19 pandemic, the CFPB announced it would shift its supervisory priorities and begin performing Prioritized Assessments ("PAs") instead of planned examinations. The PAs are a new, targeted supervisory approach developed to evaluate the pandemic's effect on consumers and the consumer financial marketplace. These are meant to be high-level inquires, as compared to a traditional examination, to obtain real-time information from regulated entities in markets with elevated risks of consumer harm because of the pandemic. After evaluating which COVID-related issues were likely to pose risks to consumers, the CFPB determined that its assessments would focus on (i) areas where it believes the risks are highest to consumers who have lost jobs or income and have trouble making loan payments, and (ii) markets where Congress provided special consumer provisions under the CARES Act, such as residential mortgage servicing, student loan servicing, auto loan servicing, and collections, among others. There is the possibility that violation of the CARES Act may be considered a UDAAP by the CFPB.

The Bureau indicated that it will share important anonymized findings related to its PAs (consistent with confidentiality required in supervision) in *Supervisory Highlights*, blog posts, or other appropriate documents. In January 2021, the CFPB published a special issue of Supervisory Highlights detailing the market challenges and risks observed during the PAs in the areas of mortgage servicing, auto servicing, student loan servicing, credit card account management, consumer-reporting furnishing, debt collection, deposits, prepaid cards, and small business lending. We will address the substance of the Bureau's findings in a separate legal update.These findings may preview the CFPB's approach to its supervision of regulated entity responses to the pandemic going forward.

6. Look Ahead

Significant changes to the UDAAP supervisory and enforcement landscape appear imminent. The previous administration has laid the groundwork for a more industry-friendly approach to regulatory uncertainty, but the change in presidential administration and economic fallout from the global pandemic may test those initiatives.

Bureau Leadership Changes

The Supreme Court's decision in *Seila Law* has paved the way for swift change at the top of the CFPB. That decision struck down the portion of the Dodd-Frank Act—which created the Bureau—that provided that the CFPB's Director could be removed by the President only for cause. As a result, President-elect Biden will have the authority to remove the current CFPB Director before her term expires. As confirmation of a new CFPB Director will be in the hands of a Democratic-controlled Senate, it is all but certain that the Bureau will have a new Director early in Biden's tenure, a change that will likely mean significant changes to the priorities and functions of the Bureau. As of the date of publication, it has been reported that current FTC Commissioner and former CFPB Student Loan Ombudsman Rohit Chopra will be nominated by President Biden to serve as CFPB Director.

Regulatory Guidance Programs

This past year also saw the introduction of a new avenue for entities to seek regulatory guidance from the CFPB in the form of Advisory Opinions ("AO"). The AO Policy—introduced as a pilot program in June 2020 and finalized as a policy in November 2020—establishes procedures through which an interested party can request an AO from the Bureau. The Bureau intends to issue AOs under the Policy to address ambiguities in legal requirements that are not suited to be addressed through other Bureau programs such as the Regulatory Inquiries Function and Compliance Aids. The Bureau has already issued three AOs on topics including student loans, earned wage access programs, and special purposes credit programs. It remains to be seen how actively industry participants will utilize the AO Policy to seek guidance or whether the Bureau will issue UDAAP-related AO's under the Biden Administration.

Entities can also request regulatory guidance from the Bureau through the CFPB's No-Action Letter Policy ("NAL Policy"), which was revised and streamlined by the Trump Administration in 2019. The NAL Policy permits an interested party to request a NAL from the Bureau, which generally state that it will not bring a supervisory or enforcement action under identified statutory and/or regulatory provisions against the party for providing a product or service under certain facts and circumstances.

The Bureau issued several NALs that covered UDAAPs in 2020. For example, in November 2020, the Bureau issued a NAL to a bank to cover a new small-dollar credit product. That NAL states that the Bureau will not take action against the bank under the CFPB's authority to prevent UDAAPs provided that the information in the NAL application is accurate. It will be interesting to see if the CFPB continues to issue NALs covering UDAAPs under the next administration now that the NAL Policy has been more firmly established.

Although entities can also seek regulatory guidance from the Bureau through its Compliance Assistance Sandbox, that avenue is limited to certain consumer finance laws and does not cover potential UDAAPs.

Policy and Enforcement Priorities

After the last financial crisis, it took three years for federal and state regulators to enter into the National Mortgage Settlement, and five years before the Mortgage Servicing Rules were implemented. The CARES Act provided temporary relief for consumers, but Congress has yet to pass broad-sweeping consumer protections to prevent or address the economic impacts of the pandemic. With a Democratic-controlled House and Senate, we may see additional consumer protections, including in the area of debt collection, student loans, and non-mortgage lending. In the interim, between the CFPB's pandemic-related Prioritized Assessments, the OCC's new UDAAP Handbook, and the change in administration, we expect to see regulators fill the gap with more UDAAP enforcement.

7. Mayer Brown's UDAAP Capabilities

Mayer Brown offers a full array of representation to the financial services industry, including:

- Providing day-to-day strategic regulatory advice;
- Assessing legal risks in product development;
- Developing compliance management programs;
- Performing compliance reviews and risk assessments;
- Handling state and federal supervisory examinations and associated findings;
- Responding to 15-day and Potential Action and Request for Response (PARR) letters;
- Representing clients in state and federal enforcement matters, including responding to civil investigative demands (CIDs) and subpoenas;
- Designing consumer redress plans; and
- Handling consumer and government litigation.

Our attorneys have experience providing UDAAP advice to a diverse range of clients, including large global financial institutions, national and regional banks, credit unions, fintech companies, mortgage lenders and servicers, consumer and small business lenders, secondary market investors, payment processing companies, insurance companies, and online advertising platforms, among others.

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