

# Consumer Financial Services UDAAP Round-Up: 2021 Update

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# Letter to Readers

Welcome to the second edition 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 January through August of 2021. President Biden’s nominees to head the CFPB (Rohit Chopra) and the FTC (Lina Kahn) have both been confirmed by the Senate and we expect them to take aggressive enforcement postures at their respective agencies, with respect to UDAAP/UDAP and otherwise.

During this period, we saw 24 UDAAP/UDAP enforcement complaints and consent orders from the Consumer Financial Protection Bureau (“CFPB” or the “Bureau”) and the Federal Trade Commission (“FTC” or “Commission”), numerous UDAAP/UDAP supervisory findings from the CFPB and one from the Federal Deposit Insurance Corporation (“FDIC”), the rescission of the CFPB’s Policy Statement on Abusiveness, and a Supreme Court decision that upended aspects of the FTC’s UDAP enforcement authority.<sup>1</sup>

In the coming year, we expect to see a continued uptick in enforcement activity as Biden Administration appointees settle into leadership roles at the CFPB, the FTC, and other agencies, as enforcement priorities are clarified, and as the pandemic continues to strain consumers and businesses.

Please do not hesitate to contact us for any assistance.

With kind regards from the editors, Ori Lev,  
Stephanie Robinson, Christa Bieker and Brian Stief

#### Endnotes

<sup>1</sup> This review generally covers those actions first filed during this period. Actions that were initiated prior to January 1, 2021, and resolved during this period are counted in the enforcement trend statistics (e.g., total civil money penalties), but they are not discussed in the narrative.

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## 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.<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup> The Act also prohibits any person from knowingly or recklessly providing substantial assistance to a covered person in the commission of a UDAAP.<sup>5</sup> 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.<sup>6</sup> The Dodd-Frank Act provides the CFPB various remedies for violations of federal consumer financial laws, including: (1) rescission or reformation of contract; (2) refunds of money or return of real property; (3) restitution; (4) disgorgement or compensation for unjust enrichment; (5) payment of damages or other monetary relief; (6) public notification regarding the violation, including the costs of notification; and (7) limits on activities or functions of the person.<sup>7</sup> The Dodd-Frank Act also provides for civil money penalties.<sup>8</sup>

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.<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup>

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.<sup>12</sup> While the CFPB has abusiveness authority, the FTC does not.

#### Endnotes

- 2 15 U.S.C. § 45(a)(1). Many states have adopted similar laws.
- 3 *Id.* § 53(b). Historically, injunctive relief under Section 13(b) of the FTC Act included potential orders for restitution or disgorgement. However, a recent U.S. Supreme Court decision eliminated the FTC’s ability to seek equitable monetary relief under Section 13(b). *AMG Capital Mgmt v. FTC*, -- U.S. --, 141 S. Ct. 1341 (2021). This development is discussed in greater detail below.
- 4 12 U.S.C. §§ 5531(a), 5536(a)(1)(B).
- 5 *Id.* § 5536(a)(3). Please see our previous discussion of the CFPB’s use of “substantial assistance” as an enforcement tool. See “Substantial Assistance: the CFPB’s Newest Tool” (July 19, 2016), available at: <https://www.mayer-brown.com/-/media/files/perspectives-events/publications/2016/07/substantial-assistance-the-cfpbs-newest-tool/files/get-the-full-report/fileattachment/160718-update-cfs.pdf>.
- 6 *Id.* § 5481(6). The Dodd-Frank Act also includes a “related person” concept that is intended to reach certain persons related to covered persons, if they manage, control or materially participate in the conduct of the covered person’s affairs. *Id.* § 5481(25).
- 7 15 U.S.C. § 5565(a)(2).
- 8 *Id.* § 5565(c); 12 C.F.R. § 1083.1.
- 9 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).
- 10 15 U.S.C. § 45(n); 12 U.S.C. § 5531(c)(1).
- 11 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.
- 12 12 U.S.C. § 5531(d).

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## 3. FTC Enforcement Developments

The landscape of FTC enforcement was significantly altered this year when the U.S. Supreme Court handed down a decision that stripped the FTC of its ability to seek monetary relief for UDAP violations in federal court under Section 13(b) of the FTC Act.<sup>13</sup> For decades, the FTC relied on Section 13(b) to pursue UDAP enforcement actions because it permitted the FTC to pursue a wider scope of relief in a more immediate fashion than is generally possible under the more cumbersome administrative adjudication process. Below we provide a brief explanation of the FTC's historic reliance on Section 13(b), the Supreme Court's decision, and the immediate steps being taken by the Commission to bolster its enforcement tools in the wake of the change.

### A. Historical Reliance on Section 13(b)

The FTC generally has two routes to pursue UDAP enforcement actions: administrative proceedings or lawsuits in federal court. Under the administrative proceedings process, the FTC must initially seek a cease-and-desist order from an administrative law judge. Only if a cease-and-desist order is granted, survives any appeals, and is violated by the defendant, can the FTC seek to enforce the terms of the order through monetary penalties and equitable relief.

Section 13(b) of the FTC Act authorizes the Commission to file a lawsuit in federal district court to seek a preliminary or permanent injunction if it has reason to believe that "any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission."<sup>14</sup> Importantly, although the text of Section 13(b) is silent regarding monetary relief, courts have historically held that the provision includes an implied right to recover equitable monetary relief, such as restitution or disgorgement, on behalf of consumers. This ability to seek monetary relief while avoiding the more burdensome administrative proceedings process has led the FTC to rely heavily on Section 13(b) for UDAP enforcement for the past several decades.

### B. Supreme Court Decision

On April 22, 2021, the U.S. Supreme Court upended the FTC's generally understood judicial enforcement authority by finding, in a unanimous decision, that Section 13(b) did not include an implied right to recover equitable monetary relief. Writing for the Court, Justice Breyer concluded, "the question presented is whether th[e] statutory language authorizes the Commission to seek, and a court to award, equitable monetary relief such as restitution or disgorgement. We conclude that it does not."<sup>15</sup> In so finding, the Court stripped the FTC of its most potent enforcement tool and provided those subject to past or current FTC actions based on Section 13(b) an avenue to challenge those actions.<sup>16</sup>

The Court dismissed FTC policy arguments regarding the inadequacy of the administrative proceedings process to provide redress to consumers, stating that “[i]f the Commission believes [administrative] authority too cumbersome or otherwise inadequate, it is, of course, free to ask Congress to grant further remedial authority.”<sup>17</sup> In fact, in response to challenges to its Section 13(b) authority, the FTC has been lobbying for such a legislative solution even prior to the Court’s decision.<sup>18</sup>

### C. Section 18 Rulemaking

In addition to seeking a legislative fix, the FTC has also revamped its internal rulemaking procedures in an effort to reinvigorate an alternative and historically underused method of UDAP enforcement. Under Section 18 of the FTC Act, the FTC has the authority to promulgate rules that “define with specificity acts or practices which are unfair or deceptive acts or practices” within the meaning of Section 5.<sup>19</sup> The FTC may then seek civil penalties for knowing violations of a rule promulgated under Section 18, without first obtaining a cease-and-desist order as required under the general administrative proceeding process.<sup>20</sup>

One of the reasons this method of UDAP enforcement has been largely dormant is the lengthy rulemaking process required under Section 18 and internal FTC procedures. Recently, however, the FTC has taken steps to streamline the process. On July 1, the FTC announced that the commissioners had approved a series of procedural changes that cut red tape from the rulemaking process.<sup>21</sup> The changes affect the Commission’s procedure for initiating rulemaking proceedings, and the process by which members of the public can seek an informal hearing in a rulemaking. For example, under the revised rules, informal hearing procedures make it easier for stakeholders to participate. Other changes include elimination of requirements in the current rules that are not

mandated by the FTC Act, including publication of a staff report containing an analysis of the rulemaking record and recommendations as to the form of the final rule for public comment. Importantly, the Section 18 rulemaking process remains subject to the Administrative Procedure Act and several additional statutory requirements.<sup>22</sup>

These changes build on the FTC’s March announcement of a Rulemaking Group within the office of the General Counsel that will be responsible for the Commission’s rulemaking strategy and approach.<sup>23</sup> In announcing the changes, Commissioner Rebecca Slaughter noted the potential impact of the updates on enforcement: “These changes show the FTC is turning the page on decades of self-imposed red tape and returning to the participatory and dynamic process for issuing Section 18 rules that Congress envisioned. Clear rules help honest businesses comply with the law and better protect consumers and workers against bad actors. They will also lead to substantial market-wide deterrence due to significant civil penalties for rule breakers.”<sup>24</sup>

### D. Conclusion

The long-term effects of the Supreme Court’s decision on the FTC’s UDAP enforcement authority will depend on whether Congress acts to restore the Commission’s ability to seek equitable monetary relief through the judicial process and how effectively the FTC’s updated procedures streamline the rulemaking and administrative enforcement process. Market participants subject to the FTC’s UDAP enforcement jurisdiction should monitor the Commission’s rulemaking process and administrative enforcement activities.

Endnotes

- 13 *AMG Capital Management*, 141 S. Ct. 1341.
- 14 15 U.S.C. § 53(b).
- 15 *AMG Capital Management*, 141 S. Ct. at 1344.
- 16 See, e.g., Memorandum Opinion, *In re Sanctuary Belize Litigation*, ECF. No. 1278, Case No. 18-cv-03309 (D. Md. Aug. 24, 2021).
- 17 *AMG Capital Management*, 141 S. Ct. at 1352.
- 18 See, e.g., *Prepared Statement of the FTC: Strengthening the FTC's Authority to Protect Consumers*, Hearing before S. Comm. On Commerce, Science, and Transportation (April 20, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1589164/prepared\\_statement\\_of\\_the\\_ftc\\_before\\_the\\_senate\\_committee\\_on\\_commerce\\_science\\_and\\_transportation.pdf](https://www.ftc.gov/system/files/documents/public_statements/1589164/prepared_statement_of_the_ftc_before_the_senate_committee_on_commerce_science_and_transportation.pdf); see also *Prepared Statement of the FTC: the Urgent Need to Fix Section 13(b) of the FTC Act*, Hearing before H. Comm. On Energy and Commerce, S. Comm. On Consumer Protection and Commerce (Apr. 27, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1589164/prepared\\_statement\\_of\\_the\\_ftc\\_before\\_the\\_senate\\_committee\\_on\\_commerce\\_science\\_and\\_transportation.pdf](https://www.ftc.gov/system/files/documents/public_statements/1589164/prepared_statement_of_the_ftc_before_the_senate_committee_on_commerce_science_and_transportation.pdf).
- 19 15 U.S.C. § 57a.
- 20 *Id.* § 45(m)(1)(B).
- 21 Federal Trade Commission, "FTC Votes to Update Rulemaking Procedures, Sets Stage for Stronger Deterrence of Corporate Misconduct," July 1, 2021, available at: <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-votes-update-rulemaking-procedures-sets-stage-stronger>.
- 22 See 15 U.S.C. § 57a(b).
- 23 Federal Trade Commission, "FTC Acting Chairwoman Slaughter Announces New Rulemaking Group," March 25, 2021, available at: <https://www.ftc.gov/news-events/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group>.
- 24 Federal Trade Commission, "FTC Votes to Update Rulemaking Procedures, Sets Stage for Stronger Deterrence of Corporate Misconduct," July 1, 2021, available at: <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-votes-update-rulemaking-procedures-sets-stage-stronger>.

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## 4. Enforcement Trends

The first seven months of 2021 saw active UDAAP/UDAP enforcement by both the CFPB and the FTC. This period also saw the first actions brought under the new administration. While it may take more time to assess the impact of the new leadership on enforcement priorities, these initial actions provide valuable insight.

### 2020 numbers at a glance

- Litigation complaints filed with no settlement: 4
  - » CFPB: 3
  - » FTC: 1
- Consent orders and settlements: 20
  - » CFPB: 7
  - » FTC: 13
- Total civil money penalties: More than \$18 million
- Total consumer redress: More than \$263 million

### A. Abusiveness Claims

During this period, the Bureau brought two new actions and filed a notable amended complaint in which it alleged that an entity engaged in abusive acts or practices. In fact, the Bureau's first lawsuit since the election of President Biden and the resignation of former Bureau Director Kathy Kraninger included an abusiveness claim, signaling that the new administration will not be shy to pursue allegations of abusiveness. This lawsuit, filed in February 2021, lays out an egregious set of allegations involving a bail bond scheme targeting immigrants detained by U.S. Immigration and Customs Enforcement. According to the CFPB's complaint, the company made false and misleading statements to pressure consumers, many of whom it knew did not understand English, into signing predominantly English-language contracts that required them to pay exorbitant fees in connection with securing their release from federal detention centers. The Bureau further alleged that when consumers failed to make payments the defendant falsely and aggressively threatened consumers, including with deportation or imprisonment. The CFPB concluded that the defendant's use of English language contracts and oral omission and misrepresentation of material terms in the written agreements during the enrollment process "materially interfered with consumers' ability to understand the terms and conditions" of the defendant's services and thus constituted abusive acts or practices. Read our analysis of the complaint [here](#).

In addition, in April 2021, the Bureau filed a complaint and stipulated judgement against a debt-settlement company involving alleged abusive acts or practices. According to the CFPB, the defendant represented to consumers that it would only work in their interests and that it was not owned or operated by any of the consumers' creditors. But the CFPB alleged that the defendant actually had financial connections to certain creditors, and that it prioritized the settlement of debts owed to those creditors.

As we have previously [explained](#), this latter case further muddies the waters of the abusiveness standard by failing to articulate clearly which prong of the abusiveness prohibition the defendant violated. As noted above, an act or practice is abusive if (among other things) it takes unreasonable advantage of (1) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service, or (2) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer. These are two separate standards, but the CFPB mashed them together in its complaint, stating that the defendant engaged in an abusive act or practice because it "took unreasonable advantage of consumers' reasonable reliance that [the defendant] would protect their interests in negotiating debts by engaging in self-dealing." The stipulated judgment in the case requires the defendant to return almost \$650,000 in fees to consumers and pay a \$750,000 civil money penalty.

In June 2021, the Bureau filed an amended complaint in a case initiated against a bank in March 2020.<sup>25</sup> In the amended complaint, the Bureau alleged that the following actions taken without consumers' knowledge or consent were abusive and unfair: (1) opening deposit accounts (but not the funding of those accounts via transfers from consumers' existing accounts), (2) applying for or issuing credit cards, (3) enrolling consumers in online banking services, (4) opening lines of credit

on consumers' accounts, (5) enrolling consumers in overdraft protection, and (6) enrolling consumers in other consumer-financial products (including prepaid debit cards). In addition, the amended complaint also alleged that the banks' sales practices generally (including alleged financial incentives for employees) were abusive. Perhaps most notably, the amended complaint also alleged that (a) the bank's alleged failure to change its sales practices after learning of the opening of unauthorized products and services was unfair, and (b) the bank's alleged failure to identify and remediate consumers who were affected by its sales practices was abusive. These latter two claims, which are not directly based on the challenged underlying conduct, but on the bank's alleged failure to stop the conduct and remediate consumers, are novel uses of unfairness and abusiveness. The CFPB has recently moved for judgment on the pleadings with respect to its failure-to-remediate claim so a court decision may be forthcoming in the near future.

## B. Deceptive and Unfair Advertising

The first half of 2021 has seen active deceptive and unfair advertising enforcement. In some of these actions, allegations of UDAAP/UDAP violations were coupled with allegations of violations of either the Mortgage Acts and Practices Advertising ("MAP") Rule or the Telemarketing Sales Rule ("TSR").

### i. Deceptive Mortgage Advertising

The CFPB filed a lawsuit against a mortgage lender in January 2021 alleging violations of the MAP Rule, Regulation Z, and the CFPB's prohibition on UDAAPs. Specifically, the CFPB relied on state law to allege a federal UDAAP violation. Among other things, the CFPB alleged that the mortgage lender employed individuals working as loan originators who were not licensed as required by state law. The CFPB relied on this state law violation to assert a federal deception violation, alleging that the

employees misrepresented that they actually were licensed mortgage-loan originators. Interestingly, the Bureau's deception allegation relies on both express misrepresentations (where employees allegedly relied on other, licensed employees' license numbers) and on implied misrepresentations and omissions (where employees "created the impression" that they were licensed through social media profiles, among other things, and by performing tasks that required licensing).

Additionally, the CFPB alleged that the lender's employees engaged in deceptive acts or practices by representing that borrowers could refinance their mortgages under improved terms, when there was no assurance that the borrower could actually qualify for refinancing or benefit from better rates. Representatives also allegedly communicated to consumers that they would qualify for mortgages when the lender had already received information from the consumer that would disqualify the consumer from receiving a mortgage. You can read our full analysis of the case [here](#).

### *ii. Deceptive Representation of Credit Card Offering*

The FTC has also been active in filing enforcement actions alleging deceptive marketing practices, and entered into a settlement with a company allegedly engaged in a deceptive credit card scheme. According to the FTC, the company purported to obtain funding for individuals who want to start a business or invest in real estate. Instead of providing funds, the company sells online business training and coaching seminars, and charges consumers thousands of dollars to apply for personal credit cards to pay for course tuition. The company also allegedly inflated consumers' annual incomes on credit card applications and represented to consumers that they could expect the additional income upon completion of the training courses. According to the FTC, most consumers who purchased the training courses did not realize material benefit and instead incurred

substantial personal credit card debt. The settlement requires the company to pay \$2.1 million in equitable relief.

### *iii. Deceptive Representation in Telemarketing*

The CFPB frequently cites violations of the Telemarketing Sales Rule ("TSR") in its deceptive and unfair marketing enforcement actions. In a complaint against a payment processor and its founder filed in March 2021, the CFPB alleged that the defendants engaged in an unfair practice when they processed payments for companies that they knew or consciously avoided knowing were tricking consumers, often senior citizens, into purchasing expensive and unnecessary anti-virus software.<sup>26</sup>

In addition, as discussed above, in an April 2021 proposed settlement against a debt settlement company, the CFPB alleged that the company presented itself as an independent debt settlement company when it was actually affiliated with some lenders. The Bureau noted that the company's call scripts included false representations that it was not owned or operated by any of the consumer's creditors. Under the terms of the settlement, the company is subject to a \$750,000 civil money penalty and must pay nearly \$650,000 in remediation.

Finally, in June 2021, the CFPB settled claims that a debt relief and credit repair company engaged in deceptive acts or practices when it used telemarketing to solicit consumers with false representations that its services would eliminate credit card debt and improve credit scores. The CFPB concluded that the company "rarely if ever" achieved these results, and that the company lacked evidence that its program actually eliminated or lowered consumer debt. Under the terms of the settlement, the company and its principals are required to pay a \$150,001 civil money penalty. The settlement also imposes a judgment for redress of at least \$30 million that is suspended upon the payment of the civil money penalty due to a demonstrated inability to pay.

### C. Debt Collection and Debt Sale

The debt collection and debt sales industries are frequently the target of regulators. In fact, during the first half of 2021, the CFPB and the FTC each brought enforcement actions against participants in these industries that alleged UDAAP/UDAPs.

In April 2021, the CFPB issued a consent order to a third-party debt collection company and its owner based on allegedly deceptive debt collection practices. The CFPB found that the company sent consumers notices that represented that consumers would be sued and that there would be further legal action if the consumer did not pay the amount indicated. Contrary to the statements in the letters, the CFPB found that it was not part of the company's business to sue consumers to collect debts. In fact, the Bureau explained that the company did not even hire lawyers to file any such lawsuits. The consent order requires the respondent to pay \$860,000 in consumer redress, but provides that this amount will be suspended upon the payment of a \$2,200 civil money penalty to the Bureau due to a demonstrated inability to pay.

Also in April 2021, the FTC reached a settlement with a home security company alleging that the company engaged in unfair acts or practices in connection with extending credit to its customers. Among other things, the FTC alleged that sales representatives used the white pages to find an unrelated person with the same or similar name as the customer and used that person's credit history to qualify the customer or, alternatively, added "co-signers", without their consent, to account applications to qualify an unqualified customer for credit. The FTC alleged that the company provided third-party debt buyers with the names and addresses of individuals added to accounts without their consent and, as a result, these individuals were pursued by debt buyers or collectors. The settlement requires the defendant to pay a \$15 million civil penalty and \$5 million in equitable relief.

### D. Unauthorized Loan Origination and Servicing

From January through August 2021, the CFPB made allegations of UDAAP violations against three companies for engaging in unauthorized loan origination and/or servicing. As discussed above, in a complaint filed in January 2021, the CFPB relied on state law to allege federal UDAAP violations related to the use of allegedly unlicensed mortgage originators. In addition, the CFPB alleged that the defendant in that case engaged in a deceptive act or practice when it made misrepresentations to consumers about the availability and terms of loans.

Next, in July 2021, the Bureau settled claims against a finance company that services and facilitates the origination of consumer loans. The CFPB found that the respondent engaged in unfair acts or practices by enabling contractors and other merchants to take out loans on behalf of consumers who did not authorize them. Significantly, the CFPB also found that failing to have effective controls or adequate oversight, training, and complaints management itself was an unfair practice. This settlement underscores the need for entities to maintain robust compliance management systems even if there is no express legal requirement to do so. Failing to maintain adequate controls not only creates a risk that an entity may violate a legal requirement, but, in the CFPB's view, apparently may itself be considered a UDAAP violation. Under the terms of the settlement, the respondent must refund the accounts or cancel the loans of customers harmed by its conduct for a total of up to \$9 million and pay a civil money penalty of \$2.5 million.

In addition, the Bureau issued a consent order against a subprime auto loan servicer. The Bureau found that the servicer engaged in unfair acts and practices by charging interest on late payments of loss damage waiver fees without disclosing the charge to consumers. The order requires the servicer to provide approximately \$565,000 in consumer relief and to pay a civil money penalty of \$500,000.

## E. Substantial Assistance

While the CFPB's prohibition against providing "substantial assistance" in the commission of a UDAAP violation permits the Bureau to make fairly straightforward allegations against persons not directly responsible for alleged UDAAPs, the FTC Act does not contain such a prohibition. As a result, the FTC has relied on a variety of routes to impose liability on persons indirectly engaged in UDAPs.<sup>27</sup> A recent action brought by the FTC demonstrates two of these routes—(1) unfair conduct and (2) the TSR, which prohibits providing substantial assistance or support to third parties who violate the rule.

In June 2021, the FTC filed a lawsuit against an individual and his two companies for participating in a student debt relief scheme that was the subject of separate criminal and civil actions that were

resolved in 2019 and 2020, respectively. In this new lawsuit, the FTC alleged that defendants participated in unfair practices by providing payment processors with false or deceptive information to obtain merchant accounts for the companies running the scheme. For example, the defendants allegedly denied to payment processors that the companies offered prohibited student loan debt relief services and submitted applications misstating the owner of the companies. The FTC also alleged violations of the TSR for providing "substantial assistance" to those responsible for the scheme whom the defendants knew or consciously avoided knowing were violating the TSR.<sup>28</sup> The defendants entered into a settlement agreement with the Commission that included a \$28.6 million monetary judgment that is partially suspended after a payment of \$20,493 due to a demonstrated inability to pay.

### Endnotes

<sup>25</sup> Although this newsletter generally covers only new actions brought during the period, we discuss this amended complaint due to its significance relative to potential shifts in the CFPB's enforcement approach.

<sup>26</sup> Payment processing constitutes a consumer financial product or service under the Dodd-Frank Act. 12 U.S.C. § 5481(15)(A)(vii).

<sup>27</sup> See Federal Trade Commission, "Multi-party liability," January 29, 2021, available at <https://www.ftc.gov/news-events/blogs/business-blog/2021/01/multi-party-liability>.

<sup>28</sup> See 16 C.F.R. § 310.3(b).

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## 5. Supervisory Trends

During this time, the CFPB and the FDIC each has released publications that discuss UDAAP/UDAPs that the agencies identified in examinations of supervised entities. In addition, in March 2021 the CFPB rescinded guidance it issued under former Director Kathy Kraninger that provided a framework for the Bureau's exercise of its abusiveness authority. We discuss each of these developments in more detail below.

### A. CFPB Supervisory Highlights

So far this year, the CFPB has released two editions of its Supervisory Highlights. First, in January, the CFPB released a special edition of Supervisory Highlights that detailed findings of Prioritized Assessments that the Bureau undertook in lieu of planned examinations.<sup>29</sup> The CFPB explained that these assessments were not meant to identify violations of law. Instead, they were designed to identify and assess potential risks to consumers due to the COVID-19 pandemic. But although the report does not expressly identify violations of law, many of the observations the Bureau described in the report might be construed as UDAAPs. Read our analysis of the Prioritized Assessments [here](#).

In June 2021, the CFPB issued a more traditional edition of Supervisory Highlights that included findings from examinations the Bureau completed in 2020.<sup>30</sup> The issue details a number of UDAAP findings covering the areas of auto servicing, mortgage origination, mortgage servicing, payday lending, private student loan origination, and student loan servicing. The emphasis on UDAAPs in this most recent edition of Supervisory Highlights signals that UDAAPs continue to be a focus for the Bureau. A non-exhaustive list of the issue's UDAAP findings are described below.

- *Auto Servicing.* Examiners found that some auto servicers engaged in an unfair act or practice by charging consumers for unnecessary collateral protection insurance as a result of a deficient process when consumers already maintained adequate insurance under their contracts. In addition, examiners found that some auto servicers engaged in a deceptive act or practice by representing on their websites a specific payment application order, and subsequently applying payments in a different order.
- *Mortgage Origination.* Regulation Z states that a "contract or other agreement relating to a consumer credit transaction secured by a dwelling...may not be applied or interpreted to bar a consumer from bringing a claim in court pursuant to any provision of law for damages or other relief in connection with any alleged violation of Federal law." The report states that some supervised entities used

agreements that asked borrowers to waive certain rights related to their mortgages. Examiners determined that consumers could construe these waivers to bar them from bringing claims in court related to their mortgages and, because Regulation Z prohibits agreements from being interpreted in this way, the CFPB found that the use of these agreements constituted a deceptive act or practice. This is not the first time the Bureau has made this or a similar finding in *Supervisory Highlights*. Mortgage originators and servicers should be cognizant of the waivers contained in the agreements they ask consumers to sign.

- *Mortgage Servicing.* Regulation X includes certain restrictions on foreclosure initiations, but these restrictions do not apply in all instances. According to the CFPB, some servicers sent letters to borrowers indicating that the servicers would not initiate foreclosure until a specified date, which aligned with Regulation X requirements, but that the servicers nevertheless initiated foreclosure before that date. The Regulation X requirements did not apply to those particular foreclosure initiations, but the CFPB found that the servicers engaged in a deceptive act or practice by making an inaccurate representation regarding the day foreclosure would be initiated.
- *Payday Lending.* Examiners identified numerous deceptive practices during examinations of payday lenders. For example, the CFPB found that some lenders engaged in deceptive acts or practices when they sent letters to borrowers stating an intent to sue if the consumer did not pay the loan. The Bureau found that a reasonable borrower could understand the letters to mean that the lender had decided it would sue if a borrower did not make payments as required by the letter. But, in

fact, the lenders had not decided that they would sue if the borrowers did not pay and, in most cases, did not sue borrowers who did not pay.

- *Private Student Loan Origination.* Examiners found that entities engaged in a deceptive act or practice when they advertised rates “as low as X%” and disclosed certain conditions to obtain that low rate, but omitted that the rate would depend on a borrower’s creditworthiness. Examiners determined that the net impression of the advertisement misled or was likely to mislead consumers to believe that the low rate was available regardless of the borrower’s creditworthiness.
- *Student Loan Servicing.* Examiners identified multiple UDAAPs in examinations of student loan servicers. For example, examiners found that some servicers engaged in an unfair act or practice when they automatically enrolled consumers in forbearance plans and failed to reverse negative consequences of unwanted automatic forbearances, such as losing payment incentives like interest rate reductions for making on-time payments, when a consumer complained. In addition, examiners found that some servicers engaged in deceptive acts or practices by making misrepresentations about the public service loan forgiveness program.

## B. FDIC Consumer Compliance Supervisory Highlights

In March 2021, the FDIC released an edition of its *Consumer Compliance Supervisory Highlights* that summarized the findings of the agency’s 2020 supervisory activities.<sup>31</sup> The edition included one deception finding. FDIC examiners determined that some institutions engaged in potentially deceptive practices by representing certain loan terms when those terms were not generally available.

### C. CFPB Rescinds Policy Statement on Abusiveness

As part of a larger effort to reverse Kraninger-era policies, on March 11, 2021, the CFPB rescinded its January 24, 2020 Statement of Policy Regarding Prohibition on Abusive Acts or Practices (the “Policy Statement”).<sup>32</sup> The Policy Statement had indicated that the CFPB would (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.

Interpretation of the abusiveness standard is far less developed than are the standards for unfair or deceptive acts or practices, and the Bureau’s reliance on abusiveness in supervisory findings and enforcement actions has been fairly minimal. Because of this, it remains somewhat unclear exactly what conduct might be deemed abusive and what conduct is proscribed by the abusiveness prohibition that is not also proscribed by the prohibition on unfair or deceptive acts or practices. The Kraninger-era Policy Statement acknowledged the uncertainty as to the scope and meaning of abusiveness and stated that it was intended to facilitate the further development of the standard.

In rescinding the Policy Statement, the Bureau explained that, based on its experience in applying the Policy Statement, the Policy Statement does not help clarify the abusiveness standard.

With respect to relying on abusiveness only if the harm to consumers outweighs the benefits, in its rescission notice, the Bureau stated that there is no basis to depart from the normal considerations that guide the Bureau’s use of its enforcement and supervisory discretion.

Next, with respect to avoiding abusiveness claims where the claims rely on the same set of facts that the Bureau alleges are unfair or deceptive, the Bureau rejected this idea, explaining that, among other things, this principle would slow the Bureau’s ability to clarify the abusiveness standard by making abusiveness claims.

Finally, the Bureau noted that not seeking certain types of monetary relief in cases where a party made a good-faith effort to comply with the abusiveness standard is contrary to the Bureau’s goal of achieving deterrence through monetary remedies.

The Bureau emphasized that it intends to exercise its supervisory and enforcement authority consistent with the full scope of its statutory abusiveness authority. And as we explained [here](#), as a practical matter, the rescission of the Policy Statement is unlikely to have a major impact on the Bureau’s supervisory and enforcement activities.

#### Endnotes

29 Consumer Financial Protection Bureau, *Supervisory Highlights*, Issue 23 (Jan. 2021), available at: [https://files.consumerfinance.gov/f/documents/cfpb\\_supervisory-highlights\\_issue-23\\_2021-01.pdf](https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-23_2021-01.pdf).

30 Consumer Financial Protection Bureau, *Supervisory Highlights*, Issue 24 (June 2021), available at: [https://files.consumerfinance.gov/f/documents/cfpb\\_supervisory-highlights\\_issue-24\\_2021-06.pdf](https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-24_2021-06.pdf).

31 Federal Deposit Insurance Corporation, *Consumer*

*Compliance Supervisory Highlights* (March 2021) available at: <https://www.fdic.gov/regulations/examinations/consumer-compliance-supervisory-highlights/documents/ccs-highlights-march2021.pdf>.

32 “Statement of Policy Regarding Prohibition on Abusive Acts or Practices; Rescission,” 86 Fed. Reg. 14808, March 19, 2021.

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## 6. Looking Ahead

### A. Leadership Changes at the CFPB

Rohit Chopra, a former FTC Commissioner and former student loan ombudsman at the CFPB, was confirmed by the Senate to be the next Director of the CFPB on September 30, 2021. As we previously discussed,<sup>33</sup> we expect Mr. Chopra to pursue an aggressive enforcement agenda, with a continued focus on UDAAP issues.

### B. Leadership Changes at the FTC

Lina Khan was sworn in as Chair of the FTC on June 15, 2021. Chairwoman Khan is viewed as a prominent critic of large technology companies (referred to as “Big Tech”) and will likely focus on antitrust issues and other conduct within the technology industry. In her role as chair, Chairwoman Khan has control over the FTC’s agenda, staff, and proceedings. In addition, in May 2021, FTC Commissioner Rebecca Kelly Slaughter, who was Acting Chairwoman at the time, announced her selection of Austin King to be Associate General Counsel for Rulemaking. Mr. King will lead the new Section 18 rulemaking group, discussed above, within the FTC’s Office of the General Counsel.

### C. CFPB Supervisory and Enforcement Priorities

In a statement originally issued internally to Bureau employees, Acting Director Dave Uejio indicated that his two main priorities would be i) relief for consumers facing hardship due to COVID-19 and the related economic crisis and ii) racial equity, with the Acting Director indicating that fair lending enforcement will be a top priority going forward.<sup>34</sup> With respect to fair lending enforcement, during his tenure at the FTC, Mr. Chopra took the view that practices that result in disparate impact on protected classes could also constitute unfair practices. While it remains to be seen whether Mr. Chopra will deviate from the priorities the Acting Director identified, we expect the CFPB’s supervisory and enforcement officials to exercise UDAAP authority in other areas as well, especially as it relates to:

- *Limited English proficient (“LEP”) consumers.* The CFPB issued a guidance statement concerning the provision of financial products and services to LEP consumers.<sup>35</sup> We provide a detailed discussion of the guidance [here](#).
- *Tenant Protections.* In a joint statement, the CFPB and FTC emphasized that both agencies would be evaluating eviction practices to ensure compliance with applicable moratoria, noting that any violation or threatening to evict without apprising tenants of their legal rights under the moratoria may be considered unfair and deceptive

practices.<sup>36</sup> Following up on this statement, the CFPB and FTC sent notification letters (sample [here](#)) to the largest landlords, noting tenants' pandemic protections. In addition, the CFPB issued a statement concerning the reporting of rental information in light of government interventions coming to an end.<sup>37</sup>

- *Foreclosures.* The Bureau warned mortgage servicers that it will scrutinize foreclosure practices in the wake of the pandemic and intends to exercise its UDAAP authority to the fullest extent.
- *Artificial intelligence ("AI").* Several federal financial regulators, including the CFPB, issued a request for information ("RFI") on the use of AI by financial institutions.<sup>38</sup> We discuss the RFI in detail [here](#).

#### D. FTC Enforcement Priorities

In addition to the joint statement with the CFPB regarding tenant protections and the new rulemaking under Section 18 (both discussed above), the FTC set its enforcement agenda when it approved seven resolutions directing use of the FTC's investigative authority. None of the resolutions directly address UDAPs in the consumer financial services space.

#### Endnotes

- 33 See "A New Day Dawns at the CFPB," <https://www.cfsreview.com/2021/01/a-new-day-dawns-at-the-cfpb/>.
- 34 Dave Uejio, Consumer Financial Protection Bureau, "The Bureau is taking much-needed action to protect consumers, particularly the most economically vulnerable," Jan. 28, 2021, available at: <https://www.consumerfinance.gov/about-us/blog/the-bureau-is-taking-much-needed-action-to-protect-consumers-particularly-the-most-economically-vulnerable/>.
- 35 "Statement Regarding the Provision of Financial Products and Services to Consumers With Limited English Proficiency," 86 Fed. Reg. 6306, Jan. 21, 2021.
- 36 Federal Trade Commission, "Joint Statement of CFPB Acting Director Dave Uejio and FTC Acting Chairwoman Rebecca Slaughter," March 29, 2021 available at: [https://files.consumerfinance.gov/f/documents/cfpb\\_ftc-joint-statement\\_03-2021.pdf](https://files.consumerfinance.gov/f/documents/cfpb_ftc-joint-statement_03-2021.pdf).
- 37 "Consumer Reporting of Rental Information," 86 Fed. Reg. 35595, July 7, 2021.
- 38 "Request for Information and Comment on Financial Institutions' Use of Artificial Intelligence, Including Machine Learning," 86 Fed. Reg. 16837, March 31, 2021.

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## 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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