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Spring

Consumer Financial Services: UDAAP Round Up



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Letter to Readers

Welcome to the latest 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 September 2021 through March 2022.

During this period, we saw nine UDAAP/UDAP enforcement complaints and consent orders from the Consumer Financial Protection Bureau (“CFPB” or “Bureau”) and the Federal Trade Commission (“FTC” or “Commission”),¹ numerous UDAAP/UDAP supervisory findings from the CFPB and the Federal Deposit Insurance Corporation (“FDIC”), and a move by the CFPB to significantly expand its interpretation of the prohibition on unfair acts or practices to include discrimination.

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

- ¹ This review generally covers those actions first filed during this period. Actions that were initiated prior to September 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.

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.² 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.³

Title X of the Dodd-Frank Act provides the CFPB with 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.⁴ These authorities and prohibitions also apply to any person knowingly or recklessly providing substantial assistance to a covered person in the commission of a UDAAP.⁵ A "covered person" is defined as "any person that engages in offering or providing a consumer financial product or service" or a service provider affiliate thereof.⁶ 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.⁷ The Dodd-Frank Act also provides for civil money penalties.⁸

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.⁹ 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.¹⁰

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.¹¹

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.¹² 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 was interpreted to include 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*, 141 S. Ct. 1341 (2021).
- 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.3, UDAAP-5 (March 2022) (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).

3. Expanded Interpretation of UDAAP to Cover Discrimination

One of the most significant developments since the last edition of the UDAAP Round-Up is a move by the CFPB to interpret the prohibition on unfairness to include discrimination. This represents a notable expansion of the agency's interpretation of the unfairness prohibition to-date and it is consistent with the Bureau's focus in recent months on fair lending and racial equity in the consumer credit market.

Specifically, on March 16, 2022, the CFPB released a revised version of its UDAAP examination manual that was updated to direct examiners to consider discriminatory conduct that the agency alleges could constitute unfair acts or practices. The CFPB press release announcing the updated manual gave the example of a person who was denied a bank account because of their religion or race and stated that such a denial would be "unambiguously unfair."¹³

While the CFPB already has authority to enforce the Equal Credit Opportunity Act ("ECOA") and examine creditors for compliance with ECOA's anti discrimination provisions, ECOA only prohibits discrimination in connection with the extension of credit. Under ECOA, it is unlawful for a creditor to treat an applicant less favorably than other applicants because of their race, color, religion, national origin, sex (including gender identity and sexual orientation), marital status, age (as long as the applicant is old enough to enter into a contract), or the fact that they receive money from any public assistance program or are exercising their rights under certain consumer protection laws. The CFPB's press release announcing the updated manual stated that it now will examine entities for discrimination over the broad spectrum of consumer finance markets over which it has supervisory authority, including credit, servicing, collections, consumer reporting, payments, remittances, and deposits. The Bureau's revised exam manual explains that foregone monetary benefits or denial of access to products or services, as well as emotional or dignitary harms arising from discrimination, may constitute "substantial injury" for purposes of the unfairness analysis and that "[c]onsumers cannot reasonably avoid discrimination." The exam manual itself does not address how discriminatory conduct is to be assessed under the final prong of the unfairness analysis, which requires that the injury not be outweighed by countervailing benefits to consumers or competition. Specifically, the CFPB is silent on whether the traditional test used in the ECOA context—whether the underlying policy or practice serves a legitimate business purpose and no less discriminatory alternative would effectively serve the same business interest—would apply in the unfairness analysis.

The Bureau's announcement also suggests that the Bureau may expect supervised entities to perform testing to identify and correct discrimination even outside of the credit context, as it would ask companies to "show their processes for assessing risks and discriminatory outcomes, including documentation of customer demographics and the impact of products and fees on different demographic groups." Read our additional analysis of this development [here](#).

Shortly following the CFPB's announcement, the FTC entered into a consent order with an automobile lender alleging, among other things, that the lender violated ECOA by marking up interest rates for Black borrowers more than for similarly situated non-Hispanic white borrowers. Notably, two Democratic commissioners, Chair Lina Khan and Commissioner Rebecca Kelly Slaughter, issued a separate statement indicating that they also would have supported a count alleging that the discriminatory conduct constituted an unfair practice in violation of Section 5 of the FTC Act. The commissioners explained how, in their view, discrimination could fit the definition of unfairness: (1) discrimination based on protected class status inflicts substantial injury on consumers; (2) injuries from disparate treatment or disparate impact are unavoidable, as consumers cannot change their protected class or have influence over discriminatory practices; and (3) the injuries stemming from disparate treatment or impact generally are not outweighed by countervailing benefits, given that undue benefits provided to other groups in society are likely to exacerbate racial wealth inequalities. Commissioners Khan and Slaughter's approach may soon become law at the FTC, with the impending arrival of a third Democratic commissioner. Read our analysis of this development [here](#).

Endnotes

- 13 CFPB, "CFPB Targets Unfair Discrimination in Consumer Finance," March 16, 2022, available at: <https://www.consumerfinance.gov/about-us/newsroom/cfpb-targets-unfair-discrimination-in-consumer-finance/>.

4. Enforcement Trends

In recent months, we have seen a decrease in UDAAP/UDAP enforcement in the consumer financial services space. We expect that enforcement is still ramping up under the new CFPB and FTC leadership and anticipate increased enforcement in the coming months.

September 2021 – March 2022 numbers at a glance:

- Litigation complaints filed with no settlement: 1
 - » CFPB: 1
 - » FTC: 0
- Consent orders and settlements: 8
 - » CFPB: 5
 - » FTC: 3
- Total civil money penalties: More than \$4 million
- Total consumer redress: More than \$81 million

A. Product Recharacterization

Having their product offerings recharacterized as loans can present UDAAP and other concerns for entities offering certain innovative financial products. These products may have some of the characteristics of traditional consumer financial products but, because they are structured differently, companies offering these innovative products may take the view that the products are not credit products subject to consumer financial protection laws. There is a risk, however, that a regulator will have a different view, in effect “recharacterizing” these innovative products as traditional products that are covered by consumer financial protection laws. For example, income share agreements (“ISAs”) typically are structured as agreements under which students receive education funding in exchange for paying a percentage of future income for a set period of time post-graduation. These agreements generally only require consumers to pay if their income exceeds a contractually defined floor and are subject to a total payment cap. Some ISA providers have taken the position that ISAs are not credit and, accordingly, that ISAs are not subject to the requirements of consumer financial protection laws that apply to credit.

In September 2021, the CFPB entered into a consent order with an education finance nonprofit that offers ISAs. In a statement announcing the settlement, the Bureau asserted that the ISA industry has tried to

evade oversight by claiming that its products are not loans. Instead, the Bureau found that the nonprofit's ISAs are credit agreements that are subject to the UDAAP prohibition, among other consumer protections. According to the Bureau, the respondent represented to consumers that its products were not loans and do not create debt. Because the CFPB found that the ISAs are credit, the CFPB labeled these statements deceptive. Among other things, the settlement requires the respondent to stop stating that its ISAs are not loans or do not create debt for consumers. The settlement does not impose civil money penalties in consideration for the respondent's good faith and substantial cooperation.

B. Violations of Prior CFPB Settlement Agreements

The CFPB recently took action against two entities that the Bureau alleged violated prior settlement agreements. First, in October 2021, the Bureau announced a settlement with a reverse mortgage lender for deceptively advertising reverse mortgage loans by providing consumers with inflated home value estimates in marketing materials. In addition to violating the UDAAP prohibition, the CFPB alleged that the conduct violated a 2016 consent order that prohibited the lender from violating the UDAAP prohibition, among other provisions of law.

Next, in December 2021, the CFPB announced a settlement with an online installment lender for allegedly deceiving consumers about the benefits of taking out repeated loans from the Company. In addition to constituting a UDAAP, the CFPB alleged that the lender violated a prior 2016 consent order that prohibited it from misrepresenting the benefits of borrowing from the company. Significantly, the December 2021 settlement requires the defendant to stop making any new loans and to stop collecting on certain outstanding loans. The CFPB press release announcing the settlement stated that the Bureau was "shuttering" the operations of the company for "repeatedly lying and illegally

cheating" consumers. Both of these cases are discussed in more detail below in the Deceptive Advertising section.

Consistent with these actions, in March 2022, Director Chopra announced that the Bureau will aggressively pursue so-called "repeat offenders" and that "[t]he worst type of repeat offender" is one that "violated a formal court or agency order."¹⁴ For more information on this announcement, please see our [Legal Update](#).

C. Fees

Notably, the first enforcement action issued by the CFPB under new Director Rohit Chopra includes deception and unfairness findings as well as a novel abusiveness finding. The consent order settles claims against a company that contracts with federal, state, and local departments of corrections ("DOCs") around the country to provide debit cards to individuals upon their release from incarceration. The debit cards provided by the respondent could contain the consumer's own funds from commissary or other accounts, as well as funds provided by the government to help ease the individual's transition upon release. Interestingly, in the consent order, the CFPB emphasized the respondent's position in the industry. In particular, the CFPB found that the respondent negotiated exclusive agreements with various DOCs so that the company's debit cards were the sole means by which individuals could obtain the funds due to them upon release. The consent order states that the company "designed and implemented" the debit card product "to eliminate the cash or check options previously offered" by the DOCs and that the company believed that entering into contracts with the DOCs would help it compete for additional contracts to provide other services to the DOCs.

Among other violations, the CFPB found that the company engaged in unfair practices, by charging fees that were not authorized by the cardholder agreement provided to the consumers, and deceptive practices, by misrepresenting the

applicable fees in the cardholder agreement and a fee summary provided to the consumers.

Significantly, the CFPB also found that the respondent engaged in unfair and abusive practices by imposing any fees at all—even those properly disclosed—on consumers who had no choice but to receive their money on the debit cards. The abusiveness claim reflects the agency’s understanding of that aspect of the abusiveness prohibition that prohibits covered persons from taking “unreasonable advantage” of “the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service.” The consent order asserts that consumers were unable to protect their interests in selecting or using the debit cards because they were required to receive the money owed to them at the time of their release on the cards and because there was no reasonably available mechanism by which consumers could close their card account and obtain the balance without paying a fee. In addition, the order explained that the respondent took “unreasonable advantage” of the situation in two ways: (1) causing the fees to be charged and (2) entering into contracts with DOCs for the debit cards, thereby enabling the DOCs to eliminate cash and check options under the belief that doing so could help the company compete for additional DOC contracts.

The second allegation of taking “unreasonable advantage” is novel. Essentially, the CFPB’s position is that the company’s having entered into debit card contracts with DOCs in order to advance its market position was itself conduct that was unlawful under the circumstances. The focus on the respondent’s market position may reflect Director Chopra’s prior experience as an FTC commissioner who dealt with antitrust principles. You can find our analysis of this enforcement action [here](#).

In addition to this settlement, the CFPB has focused on fees in a recent request for information (“RFI”) that is discussed below.

D. Advertising

The CFPB has brought two actions alleging UDAAPs in the advertising space in the last several months.

As discussed above, in October 2021, the CFPB settled claims against a reverse mortgage lender. In its complaint, the Bureau alleged that the lender deceptively advertised reverse mortgage loans to consumers by providing consumers with inflated home value estimates in marketing materials. In addition, the Bureau alleged that the defendant falsely attested to the reliability of the home value estimates by stating that the lender had made “every attempt to ensure the home value information provided is reliable.” Among other things, the settlement prohibits the company from misrepresenting, expressly or impliedly, any fact material to consumers, including estimated home values. In addition, the settlement requires the company to pay approximately \$173,000 in redress to harmed consumers and \$1.1 million in civil money penalties to the CFPB. [\[AAG\]](#)

Next, as discussed above, in December 2021, the CFPB settled a lawsuit against an online installment lender for allegedly engaging in deceptive advertising practices. According to the CFPB, the defendant deceived consumers about the benefits of taking out repeated loans from the company. Specifically, the company advertised that consumers would qualify for better interest rates and larger loans in the future if they made on-time payments and took educational courses. Instead, the Bureau alleged that borrowers continued to receive offers for loans with the same interest rates and low amounts. Significantly, the settlement requires the defendant to stop making any new loans and to stop collecting on certain outstanding loans. The defendant is also required to pay a \$100,000 civil money penalty. The settlement also imposes a judgment for redress of at least \$40.5 million that is suspended upon the payment of the civil money penalty due to the defendant’s inability to pay.

Both of these defendants were subject to prior consent orders and, as discussed above, the CFPB has recently announced that it will aggressively pursue repeat offenders.

E. Debt Collection

In January 2022, the CFPB filed a lawsuit against a company, its affiliates, and its owners for engaging in unlawful debt collection practices by contracting with third-party debt collectors that used deceptive and unfair debt collection tactics. Among other things, the third-party debt collectors expressly or impliedly represented that the consumers would be sued if they did not settle their debts now or that repaying or not repaying the debt would affect their credit score. In fact, defendants had not authorized the debt collectors to sue consumers in connection with the debts, and defendants did not intend to sue these consumers. In addition, the debt collectors did not furnish information on the debts to consumer reporting agencies. The CFPB alleged that the defendants knew or should have known that the debt collection agencies were making false threats and statements to consumers, pointing to, among other things, hundreds of consumer complaints the defendants received about the third-party collectors. The CFPB alleged that despite the fact that the defendants knew or should have known about these practices, the defendants did not take meaningful action to prevent or preclude further false statements, and for the most part continued doing business as usual with the debt collectors.

Interestingly, the CFPB not only alleged that the defendants themselves engaged in deceptive acts or practices through the third-party debt collectors, but the Bureau also alleged that the defendants substantially assisted the debt collectors in committing deceptive acts or practices. In a press release announcing the lawsuit, Director Chopra emphasized that companies cannot “evade liability

simply by creating a maze of shape-shifting entities and enabling third parties to take advantage of consumers.”

F. Student Loan Servicing

In March 2022, the Bureau issued a consent order against a student loan servicer settling claims that the servicer made deceptive statements to consumers regarding the Public Service Loan Forgiveness (“PSLF”) program. Among other things, the CFPB alleged that the servicer falsely stated that borrowers were not eligible for the PSLF program even though borrowers could become eligible by consolidating their loans, that borrowers could not consolidate their loans when in fact they could, and that borrowers’ past payments qualified when they did not. The Bureau also found that when certain borrowers asked about forgiveness options available to them, the servicer did not mention the PSLF program, deceptively creating the net impression that PSLF was not available to the borrower. Among other requirements, the settlement requires the servicer to pay a \$1 million civil money penalty.

As discussed below, the CFPB recently released a compliance bulletin discussing expectations for servicers in connection with the PSLF program and warning servicers that the Bureau will use “all appropriate tools” to hold the servicers accountable if they engage in UDAAPs.

Endnotes

14 Rohit Chopra, Director, CFPB, Lecture at University of Pennsylvania Law School: Reining in Repeat Offenders (March 28, 2022), available at https://files.consumerfinance.gov/f/documents/cfpb_reining-in-repeat-offenders_cited-lecture_2022-03.pdf.

5. Guidance and Supervisory Trends

Since the last edition of the UDAAP Round-Up, the CFPB and the FDIC have both released publications that discuss UDAAP/UDAPs that the agencies identified in examinations of supervised entities. In addition, the CFPB released updated sections of its examination manual, compliance bulletins and an RFI, each addressing UDAAPs. We discuss each of these developments in more detail below.

A. CFPB Supervisory Highlights

In December 2021, the CFPB released a new edition of its Supervisory Highlights.¹⁵ Notably, this publication marks the first Supervisory Highlights issued under Director Chopra. It covers examinations completed between January and June 2021 and details a number of UDAAP findings covering the areas of credit card account management, mortgage servicing, and payday lending. A non-exhaustive list of the issue's UDAAP findings is below.

- *Credit Card Account Management.* Examiners found that credit card issuers engaged in deceptive acts or practices when they advertised to existing customers that the customers would receive bonus offers if they opened a new credit card account and met certain spending requirements but then failed to provide the advertised bonuses. The issuers also failed to ensure that their employees followed procedures for making correct system entries when enrolling existing customers. Additionally, examiners found that credit card issuers engaged in deceptive acts or practices when the issuers failed to disclose or adequately disclose in their advertisements material information about qualifying for the bonus. The bonus was tied to applying for the card online, so consumers who otherwise satisfied advertised requirements, but applied through a different channel, did not receive the bonus.
- *Mortgage Servicing.* Examiners identified multiple unfair acts or practices during examinations of mortgage servicers. For example, examiners found that mortgage servicers engaged in unfair acts or practices by charging prohibited default-related fees to borrowers in Coronavirus Aid, Relief, and Economic Security Act forbearances. Among other things, the Bureau asserted that borrowers could not reasonably avoid the injury caused by the fees because borrowers could not anticipate that their servicer would assess unlawful fees.

In addition, CFPB examiners found that mortgage servicers engaged in unfair acts or practices by failing to terminate preauthorized electronic funds transfers ("EFTs") after receiving notice that the consumer's bank account had been closed. The CFPB determined

that borrowers experienced substantial injury because the servicers' practices resulted in repeated insufficient funds ("NSF") fees, and borrowers could not reasonably avoid the injury because they could not anticipate that servicers would continue to attempt the EFTs. The CFPB pointed out that, in some cases, the EFT agreement disclosed that the EFTs would terminate when the relevant account closes.

Examiners also found that servicers engaged in unfair acts or practices by overcharging consumers for services rendered by a service provider (i.e., inflating the third-party fee) and engaged in deceptive acts or practices by incorrectly disclosing transaction and payment information in online mortgage loan accounts.

- *Payday Lending.* Examiners found that lenders engaged in unfair and deceptive acts or practices when they debited or attempted to debit the loan balance on the original due date, even though consumers had applied for a loan extension and had received a confirmation email that only an extension fee would be charged on the due date. Examiners also found that lenders engaged in unfair acts when they made or attempted to make unauthorized or duplicate debits of consumer accounts, either because lender systems erroneously indicated the transactions did not process or because of coding errors.

B. FDIC Supervisory Highlights

In March 2022, the FDIC released a Spring edition of its Consumer Compliance Supervisory Highlights.¹⁶ This edition discusses the following UDAPs.

- *Overdraft Programs.* First, the FDIC found that some financial institutions engaged in deceptive acts or practices when they converted overdraft programs from a static limit

to a dynamic limit without adequate disclosure. Among other things, the FDIC stated that the institutions failed to disclose the replacement of the fixed amount with an overdraft limit that may change as frequently as daily; that the new overdraft limit may be lower or higher at times than the fixed amount to which the consumer had become accustomed; and that the change may result in transactions being returned unpaid to third parties due to insufficient funds.

The FDIC explained that the entities could mitigate the risk by, among other things, disclosing changes to overdraft limits in real time to consumers as they vary; training customer service and complaint processing staff to explain the terms of the automated overdraft program's dynamic features; and reviewing and revising account-opening disclosures or other communications used to inform consumers about the overdraft program.

- *NSF Fees Charged on Re-Presentments.* This edition of Consumer Compliance Supervisory Highlights also discussed the practice of charging multiple NSF fees for the re-presentment of the same unpaid transaction. Examiners found that some disclosure and account agreements explained that one NSF fee would be charged "per item" or "per transaction," but these terms were not clearly defined. In addition, disclosure forms did not explain that the same transaction might result in multiple NSF fees if re-presented. The FDIC noted that the failure to disclose material information to consumers about re-presentment practices and fees may be deceptive, depending on case-specific facts. The practice also may be unfair, for example, if multiple fees are assessed for the same transaction in a short period of time without sufficient notice or opportunity for consumers to bring their account to a positive balance.

C. Focus on College In-House Lending Practices in Examination Procedures Manual

In January 2022, the CFPB announced that it would begin examining the in-house lending operations of colleges and universities.¹⁷ As part of the announcement, the CFPB also released an updated Education Loan Examination Procedures Manual with a new section on student loans originated by educational institutions. In-house student loan lending is subject to the UDAAP prohibition, and the CFPB's Education Loan Examination Procedures Manual instructs examiners to assess UDAAP risks.¹⁸ For more information regarding this update, please read our analysis of the CFPB's announcement [here](#).

D. RFI Regarding Fees Imposed by Providers of Consumer Financial Products or Services

In February 2022, the CFPB published a request for public comment seeking input related to fees imposed by providers of consumer financial products or services.¹⁹ The request references deposit account maintenance fees, NSF fees, overdraft fees, late fees, online and telephone bill pay fees, and mortgage closing costs, among other fees. The CFPB explained that it is concerned about fees that "far exceed the marginal cost of the service they purport to cover" and that "whether predictable and transparent to the customer or not, can add up and pose significant costs." In particular, the CFPB is seeking information from the public on how "junk fees," back-end, hidden or excessive fees have affected people's lives. The CFPB has previously identified UDAAPs in connection with fees in the context of enforcement and supervision. In addition, in 2017, the CFPB released a bulletin discussing UDAAPs and other legal requirements in connection with phone pay fees.²⁰

E. Compliance Bulletin on Servicer Responsibilities in Public Service Loan Forgiveness Communications

In March 2022, the CFPB issued a compliance bulletin discussing the servicing of federal student loans for borrowers who may be eligible for PSLF.²¹ The bulletin focuses on changes under the new Limited PSLF Waiver (the "PSLF Waiver") which alters the PSLF program's eligibility criteria until October 31, 2022. The CFPB explained that it will scrutinize whether student loan servicers provide complete and accurate information to consumers about the benefits they can receive under the PSLF Waiver and eligibility for PSLF generally. The CFPB warned that it will "use all appropriate tools" to hold the servicers accountable if they engage in UDAAPs.

The Bureau recommended that servicers consider enhancing their compliance management systems to prevent UDAAPs in connection with the PSLF Waiver, including by improving training to make sure representatives effectively identify borrowers who provide information suggesting they may benefit from the PSLF Waiver and by improving training to make sure representatives accurately describe the PSLF Waiver.

F. Compliance Bulletin on Mitigating Harm from Repossession of Automobiles

In March 2022, the CFPB issued a compliance bulletin focusing on UDAAPs in connection with repossessing vehicles.²² The CFPB explained that it is concerned that the high demand for automobiles may create incentives for risky repossession practices. The bulletin highlights numerous acts or practices that constitute UDAAPs in connection with auto repossession. For example, according to the CFPB, repossessing a consumer's vehicle after a consumer completed an option that the servicer offered to avoid repossession was unfair. In addition, charging illegal personal property fees to borrowers to recover personal property in their repossessed vehicles is unfair.

The compliance bulletin recommends that entities work to prevent UDAAPs by, among other things, reviewing policies and procedures, ensuring prompt communication between servicers and repossession service providers, monitoring repossession service providers for compliance, and monitoring for illegal fees charged after repossession. The CFPB emphasized that it will hold servicers accountable for UDAAPs related to vehicle repossession.

G. Focus on Discriminatory Conduct in UDAAP Examination Manual

In March 2022, the CFPB published an updated version of its UDAAP examination manual, which significantly expands the scope of the CFPB's supervisory procedures to include examining supervised entities for discriminatory conduct the agency alleges could constitute unfair practices. This development is discussed in more detail above.

H. Compliance Bulletin on Consumer Reviews

In March 2022, the CFPB issued a compliance bulletin announcing that practices that discourage or hide consumer reviews could be unfair or deceptive.²³ The bulletin discusses the 2016 Consumer Review Fairness Act, which the CFPB does not enforce, as well as FTC enforcement actions. Specifically, covered persons or service providers could violate the UDAAP prohibition by interfering with consumer reviews (1) if they deceive consumers by using contractual restrictions on consumer reviews that are unenforceable under the Consumer Review Fairness Act, (2) if they unfairly deprive consumers of information by using such unenforceable contractual restrictions, or (3) if they deceive consumers reading reviews about the nature of those reviews. Read our analysis of this compliance bulletin [here](#).

Endnotes

- 15 CFPB, *Supervisory Highlights*, Issue 25 (Dec. 2021), available at: https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-25_2021-12.pdf. Read our analysis of this edition of Supervisory Highlights [here](#).
- 16 FDIC, *Consumer Compliance Supervisory Highlights* (March 2022), available at: <https://www.fdic.gov/regulations/examinations/consumer-compliance-supervisory-highlights/documents/ccs-highlights-march2022.pdf>.
- 17 CFPB, "Consumer Financial Protection Bureau to Examine Colleges' In-House Lending Practices" (Jan. 20, 2022), available at: <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-to-examine-colleges-in-house-lending-practices/>.
- 18 CFPB, *Education Loan Examination Procedures* (Jan. 2022), available at: https://files.consumerfinance.gov/f/documents/cfpb_education-loan-servicing-exam-manual_2022-01.pdf.
- 19 "Request for Information Regarding Fees Imposed by Providers of Consumer Financial Products or Services," 87 Fed. Reg. 5801 (Feb. 2, 2022), available at: https://files.consumerfinance.gov/f/documents/cfpb_fees-imposed-by-providers-of-consumer-financial-products-services_rfi_2022-01.pdf.
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- 21 "Servicer Responsibilities in Public Service Loan Forgiveness Communications," 87 Fed. Reg. 11286 (Mar. 1, 2022), available at: <https://www.federalregister.gov/documents/2022/03/01/2022-04266/bulletin-2022-03-servicer-responsibilities-in-public-service-loan-forgiveness-communications>.
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6. Looking Ahead

Although enforcement actions alleging UDAAP/UDAP violations in the consumer financial services space have decreased in the last few months, the CFPB in particular has been active in releasing guidance, updated examination manuals, an RFI, and other announcements that demonstrate the agency's continued focus on the UDAAP prohibition. In the coming months, we expect to see an uptick in enforcement under the new CFPB and FTC leadership and a continued scrutiny of fair-lending issues and discrimination in the broader consumer credit market. We look forward to analyzing those developments in future issues of the UDAAP Round-Up.

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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