



MAYER | BROWN

Consumer Financial Services UDAAP Round-Up
SPRING UPDATE



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1. 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 October 2022 through March 2023.

During this period, we saw 13 UDAAP/UDAP enforcement complaints and consent orders from the Consumer Financial Protection Bureau (“CFPB” or “Bureau”), the Federal Trade Commission (“FTC” or “Commission”), and the Federal Deposit Insurance Corporation (“FDIC”),¹ the imposition of severe penalties for UDAP/UDAAPs, numerous UDAAP supervisory findings from the CFPB, and a focus from both the CFPB and FTC on fees charged to consumers.

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'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 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 The Dodd-Frank Act also prohibits 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 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; (7) limits on activities or functions of the person; and (8) civil money penalties.⁷

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.⁸ 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.⁹

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.¹⁰

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.¹¹ While the CFPB has abusiveness authority, the FTC does not.

3. Focus on Fees

Back in January 2022, the CFPB began an initiative to reduce so-called “junk fees” charged to consumers in connection with consumer financial services.¹² Since then the Bureau has continued to focus on fees. Last fall the Bureau released guidance on deposit account fees, and this year the Bureau released a Notice of Proposed Rulemaking (“NPRM”) on credit card late fees and an edition of *Supervisory Highlights* focused entirely on fees. For its part, the FTC released an Advanced Notice of Proposed Rulemaking (“ANPR”) targeting fees.

FTC ISSUES ANPR ON FEES

In October 2022, the FTC issued an ANPR targeting “junk fees.”¹³ The FTC defines such fees as unnecessary, unavoidable, or surprise charges that inflate costs while adding little to no value. The ANPR sought public comment on the following types of fees: (1) unnecessary charges for worthless, free, or fake products or services; (2) unavoidable charges to captive consumers; and (3) surprise charges that secretly increase purchase prices. In particular, the FTC sought comments on the harms caused by these fees, the unfair or deceptive tactics used to impose them, and whether a new rule would better protect consumers.

The ANPR explained that the rulemaking is designed, in part, to expand the remedies available to the FTC in matters involving fees. While the FTC can and has taken action against companies it alleges charge fees that are deceptive and/or unfair, absent a rule prohibiting specific acts or practices, the FTC typically cannot seek penalties against first-time violators or obtain redress for consumers.

The rulemaking is pursuant to the FTC’s authority under Section 18 of the FTC Act, which allows the FTC to issue rules that identify specific business practices that are unlawful because they are unfair or deceptive. Notably, rulemaking using this process is slow and cumbersome—even compared to typical notice-and-comment rulemaking under the Administrative Procedures Act—and typically takes several years.

DEPOSIT ACCOUNT FEE GUIDANCE

The Bureau has recently issued a variety of guidance related to deposit account fees. In October 2022, the CFPB released Circular 2022-06, which provides that overdraft fees assessed by financial institutions that a consumer would not reasonably anticipate may be unfair.¹⁴ The Circular discussed transactions that incur an overdraft fee even though the account had a sufficient available balance at the time the financial institution authorized the payment. These types of transactions are known as “Authorize Positive, Settle Negative”—or APSN—transactions. A transaction might be authorized positive but settle negative for a variety of reasons, including because of intervening authorizations or because of the settlement of other transactions. The CFPB stated that the overdraft practices of financial institutions are “extraordinarily complex” and difficult for many consumers to understand. If a transaction is authorized positive, the CFPB takes the view that consumers may reasonably expect that they will not be charged an overdraft fee in connection with the transaction. The CFPB also cited entities for charging overdraft fees on APSN transactions in the Winter 2023 edition of *Supervisory Highlights*.¹⁵

In addition, in the Winter 2023 edition of *Supervisory Highlights*, the CFPB publicly stated for the first time that charging non-sufficient funds (“NSF”) fees on represented items could be unfair. If a transaction is returned unpaid, a merchant may choose to represent the transaction. If the consumer’s balance is insufficient to cover the represented transaction, the consumer may be charged multiple NSF fees in connection with the same transaction. Without restrictions on representations or on assessments of NSF fees, this cycle can occur multiple times. Significantly, the CFPB explained in *Supervisory Highlights* that the injuries to consumers caused by the assessment of multiple NSF fees were not reasonably avoidable regardless of account opening disclosures. The CFPB directed institutions at issue to refund consumers. The CFPB further stated that “virtually all” institutions it had engaged with on this issue planned to eliminate NSF fees entirely.

The CFPB also released guidance on November 7, 2022 addressing returned deposit item fees in Compliance Bulletin 2022-06.¹⁶ These fees are charged when a consumer deposits a check into their checking account, and the check is returned because it could not be processed against the originator’s account. The CFPB takes the position that blanket policies of charging return deposited item fees on all returned transactions irrespective of the circumstances or patterns of behavior on the account are likely unfair. According to the CFPB, in many instances consumers are not able to reasonably avoid the fee because a consumer depositing a check is often unaware of, and has little to no control over, whether a check originator has funds in their account, will issue a stop payment instruction, or has closed the account. On the other hand, the Compliance Bulletin states that it is unlikely an entity will violate the UDAAP prohibition if it charges returned deposit item fees only in more targeted circumstances—for example, only if a consumer repeatedly deposits bad checks from the same originator.

CFPB CREDIT CARD LATE FEE NOTICE OF PROPOSED RULEMAKING

On February 1, 2023, the CFPB issued a Notice of Proposed Rulemaking (“NRPM”) proposing to enact major changes to Regulation Z’s provisions on credit card late fees.¹⁷ The most significant of the proposed changes include:

- Reducing the safe harbor amount for credit card late fees from \$30 for an initial late payment, and \$41 for subsequent late payments within six months of the initial late payment, to \$8 for any late payment.
- Reducing the cap on late fees credit card issuers may charge from 100% of the borrower’s minimum payment amount to 25% of the borrower’s minimum payment amount.
- Eliminating the rule requiring the CFPB to annually adjust the credit card late fee safe harbor amount for inflation.

In remarks on a press call announcing the NRPM, CFPB Director Chopra directly connected the NPRM to the CFPB’s efforts to rein in “out-of-control junk fees in the financial sector.”¹⁸ The CFPB issued the NPRM under its authority to promulgate rules to implement the Truth in Lending Act, as amended by the Credit Card Accountability Responsibility and Disclosure Act. Although the CFPB does not take the position in the NPRM that imposing credit card late fees constitutes a UDAAP, the NPRM demonstrates that the CFPB is targeting even those consumer fees that are expressly permitted under applicable statutes and regulations.¹⁹

OTHER FEES

The CFPB has recently cited entities for charging other fees in two editions of its *Supervisory Highlights*, including the Winter 2023 edition of *Supervisory Highlights* that the CFPB marketed as the “Junk Fee” Special Edition.²⁰ A non-exhaustive list of the issues’ UDAAP findings related to consumer fees is below.

Mortgage Servicing. CFPB examiners found that servicers engaged in abusive acts or practices by charging fees for phone payments when the representatives did not disclose the fees' existence during the call. The CFPB found that general disclosures, provided prior to making the payment and indicating consumers "may" incur a fee for phone payments, did not sufficiently inform consumers of the costs. According to the CFPB, the servicers took unreasonable advantage of consumers' lack of understanding because the phone payment fee was materially greater than the cost of other payment options.

The CFPB also found that servicers engaged in unfair acts or practices when they charged consumers fees during forbearance plans pursuant to the Coronavirus Aid, Relief, and Economic Security ("CARES") Act. Such fees were illegal under the CARES Act, and accordingly, consumers could not reasonably avoid them because they had no reason to anticipate servicers would impose illegal fees.

Auto Loan Fees. The CFPB identified several UDAAP violations related to auto loans fees. These UDAAPs included charging late fees greater than the amount allowed in the auto loan contract, payment processing and vehicle repossession fees that exceeded the actual processing and repossession costs, fees to retrieve personal property from repossessed vehicles, and charging late fees and repossessing vehicles before payments became due.

Student Loan Fees. The CFPB found that student loan servicers engaged in UDAAP violations when they retroactively rejected credit card payments on student loans, after initially accepting the payments in violation of their own internal policies, causing borrowers to incur overdraft fees and other repercussions.

We expect the CFPB and FTC's scrutiny of fees to continue. Regulated entities should carefully review the fees they charge consumers in light of this growing focus on fees.

4. Enforcement Trends

In the last six months, we have seen a decrease in UDAAP/UDAP enforcement in the consumer financial services space. Despite the decrease, the amount of civil money penalties and required consumer redress has sharply increased to nearly \$4 billion from October 2022 through March 2023, though those totals were substantially impacted by a single case.

OCTOBER 2022 – MARCH 2023 NUMBERS AT A GLANCE

Litigation complaints
filed with no settlement: 2
CFPB: ■ 2

Consent orders and settlements: 11
CFPB: ■ 5
FTC: ■ 5
FDIC: ■ 1

Total civil money penalties:
More than \$1.729 billion

Total consumer redress:
More than \$2.04 billion

ABUSIVENESS

In January 2023, the CFPB, in conjunction with the New York State Office of the Attorney General (“NYAG”), brought a complaint against an indirect auto lender alleging that the lender misrepresented the cost of credit for used car loans. The complaint alleges that the lender engaged in abusive practices by taking unreasonable advantage of a consumer’s lack of understanding of the risk of default and the severity of the consequences associated with the loans and of consumers’ inability to protect their interests. As with many CFPB actions alleging abusiveness, the complaint also alleges that the lender engaged in deceptive practices by misstating key terms, such as the true cost of the loan. Further, the complaint alleges that the lender substantially assisted dealers in the deceptive sale of add-on products. We expect the CFPB to continue to exert its abusiveness authority, even when unfair and deceptive claims are available, especially as it continues to define and refine the abusiveness standard.

DISCRIMINATION AS UNFAIRNESS

In October 2022, the FTC announced that it settled claims with an auto dealer related to the dealer’s advertising, pricing, and financing practices.²¹ Among other things, the FTC alleged that the dealer discriminated against Black and Latino customers by charging them higher interest rates and charging them for “junk fees” more often than White customers. The FTC alleged that the dealer’s discriminatory conduct violated the unfairness prong of Section 5 of the FTC Act, the first enforcement action to use this theory.

In a joint statement, FTC Chair Lina Khan and Commissioners Rebecca Slaughter and Alvaro Bedoya, the three Democratic commissioners, described the concept of unfair discrimination as a “straightforward application of Section 5” and explained that “Black and Latino consumers suffered substantial economic injury in the form of higher fees for the same products and services.

These consumers could not reasonably avoid this injury, because they typically had no way of knowing they were being charged more than their White counterparts. And [the auto dealer’s] pricing practices did not yield countervailing benefits.” The two Republican (now-former) commissioners, Christine Wilson and Noah Phillips, each dissented from the unfair discrimination count.

The FTC’s action is part of a recent line of agency actions and statements aimed at expanding broad unfairness authority to police discrimination that might not otherwise be covered by more specific antidiscrimination statutes. For its part, the CFPB announced in 2022 that its UDAAP examinations would include a review for “unfair” discrimination outside of the credit context.²²

REPEAT OFFENDERS

In February 2023, the CFPB took aggressive action against a mortgage lender that allegedly continued to disseminate the same types of deceptive advertisements that were expressly prohibited under the terms of the lender’s 2015 consent order with the Bureau. Specifically, the advertisements allegedly misrepresented that the lender was affiliated with the VA or FHA, misrepresented that the benefits available to qualified applicants were time limited, and misrepresented the amount of monthly payments. The CFPB ordered the mortgage lender to pay a \$1 million civil money penalty and permanently banned the company from engaging in mortgage lending activities or assisting others in doing so.

In addition, late last year, the CFPB entered into a consent order with a national bank for alleged violations of law, including UDAAPs. For example, the Bureau alleged that the bank wrongfully denied consumers for mortgage loan modifications for which they qualified and charged consumers unlawful fees, including unlawful overdraft fees. The Bureau’s press release pointed to multiple prior enforcement actions against the bank and stated that the bank had a “rinse-repeat cycle of

violating the law,” demonstrating the harsh stance the Bureau is taking with respect to so-called repeat offenders. The consent order required the bank to pay a \$1.7 billion civil money penalty and provide \$2 billion in redress to consumers.

In March 2023, the CFPB filed a complaint and proposed stipulated final judgment against a debt collector. The debt collector previously entered into a consent order with the Bureau in 2015 for, among other violations, alleged UDAAPs. In the 2023 complaint, the CFPB alleged that the debt collector violated the terms of the order, as well as the prohibition against UDAAPs, by misrepresenting the amount or validity of unsubstantiated debt, collecting on debt without offering to provide necessary documentation, misrepresenting that it would provide documents within thirty days, collecting on time-barred debt without making required disclosures, initiating debt collection lawsuits without possessing the required documentation, and suing to collect time-barred debt. The debt collector was ordered to pay \$12.18 million in redress to consumers and a \$12 million civil money penalty.

The CFPB settled allegations that an automobile title lender engaged in unfair acts or practices when it charged borrowers for an insurance product that purported to protect against potential losses, but did not actually provide any coverage. The automobile lender previously entered into a consent order with the CFPB for providing deceptive information about loan costs as well as engaging in unfair collection practices. The Bureau labeled the lender a “repeat offender” and ordered the lender to pay over \$5 million in consumer redress as well as a \$10 million penalty.

These actions demonstrate that the CFPB continues to remain focused on entities that it deems “repeat offenders,” particularly companies that allegedly engage in conduct that was the subject of prior CFPB enforcement actions.

DECEPTIVE AND UNFAIR MORTGAGE SERVICING PRACTICES

In November 2022, the CFPB entered into a consent order with a mortgage servicer to settle UDAAP and other allegations related to the servicing of loans for consumers seeking forbearances under the CARES Act. The CFPB alleged that the mortgage servicer engaged in deceptive acts or practices by making various misrepresentations to borrowers, including the following, among others: (i) falsely representing that consumers with fraud alerts placed on their accounts were not eligible for forbearances; (ii) falsely representing that consumers who had paid more than one month ahead during their forbearance request were ineligible for a forbearance; (iii) prompting consumers to provide the specific reason for their hardship when making a forbearance request, when in fact consumers only needed to attest to a financial hardship; and (iv) incorrectly indicating in letters that consumers were granted six or nine months of forbearance, when in fact they were not granted that specific amount of time. The settlement requires the servicer to pay a \$5,250,000 civil money penalty.

In December 2022, the CFPB entered into a consent order with a national bank that included UDAAP allegations related to mortgage servicing. The consent order stated that the bank engaged in unfair acts or practices because it incorrectly denied loan modifications to qualified borrowers and miscalculated fees and other charges. The consent order noted that some of the alleged failures were tied to software calculation errors that persisted for several years. As discussed above, the settlement required the bank to pay a \$1.7 billion civil money penalty and more than \$2 billion in redress to consumers for these and other violations.

DECEPTIVE AND UNFAIR MARKETING

The last several months have seen active deceptive and unfair marketing enforcement across a wide range of industries. First, in January 2023, the FTC issued a proposed order against an investment advice company that requires the company to pay a \$500,000 penalty and \$1.2 million in consumer redress for allegedly making deceptive claims about its trading service. Among other things, the FTC alleged that the company's marketing featured examples of highly profitable investments as well as testimonials from successful subscribers when the company lacked reasonable data to support its earnings representations.

In addition, the FTC filed a complaint and temporary restraining order against a credit card relief company, alleging that the company and its principals falsely promised to eliminate or reduce consumer credit card debt in return for substantial fees. Specifically, the FTC alleged that the defendants falsely claimed that the company would eliminate or substantially reduce consumers' credit card debts after 12 to 18 months; that the upfront fee the company charges is part of the overall debt that it will eliminate; and that the company is affiliated with banks, credit card associations or credit reporting agencies.

Next, the FTC issued a stipulated order against an automobile dealer and financing company for, among other things, advertising vehicles for sale at specific prices, but then imposing additional fees for reconditioning, inspection, and certification when the advertised vehicle was already reconditioned, inspected, and certified. The FTC required the company to pay over \$3.3 million in consumer redress.

The FTC and the California Attorney General issued a proposed consent order against a home improvement financing provider for allegedly misrepresenting the benefits of Property Assessed Clean Energy ("PACE") financing and for recording liens on consumers' homes without their informed consent. When a

homeowner uses PACE financing to pay for energy efficiency upgrades, a first-priority lien is placed against the consumer's home and the consumer makes payments on the financing through their property tax bill. The FTC and the California Attorney General alleged that the financing company failed to oversee its home improvement contractors and that these contractors provided false or misleading information about the lien. Among other things, the complaint alleged that the contractors falsely represented that PACE financing will not create any new obstacles to, or interfere with, consumers' ability to sell or refinance their home. The complaint also alleged that the contractors' sales practices prevented consumers from meaningfully reviewing key terms of PACE financing and that the company used the consumer's home as collateral to secure the PACE loan without having obtained the consumer's express, informed consent. For example, in some cases the contractor told the consumer that they do not need to read the agreement, told the consumer the agreement merely says what the contractor had already told the consumer, or rushed the consumer through the electronic signing. According to the FTC, this conduct constituted an unfair act or practice. The proposed order requires the company to oversee its contractors and requires \$3 million in consumer redress.

In addition, the FDIC issued a consent order against a bank for, among other things, making deceptive and misleading misrepresentations in some of its prescreened offers of credit. As part of the settlement, the bank was required to pay a \$425,000 civil money penalty.

Finally, as discussed in the "Repeat Offender" section, the CFPB issued a consent order against a mortgage lender, permanently banning the company from the mortgage lending industry for allegedly engaging in deceptive advertising practices. The CFPB also ordered the mortgage lender to pay a \$1 million penalty.

5. Guidance, Supervision, and Rulemaking Trends

Since the last edition of the UDAAP Round Up, the CFPB released two editions of its *Supervisory Highlights* and guidance on negative option marketing, and the FTC has issued a NPRM on negative option rulemaking and an ANPR on deceptive or unfair reviews.

CFPB SUPERVISORY HIGHLIGHTS

As discussed above, recent editions of the CFPB's *Supervisory Highlights* include many findings related to fees. The Bureau's Fall 2022 edition of *Supervisory Highlights* also includes other findings.²³ A non-exhaustive list of those other findings is below.

Credit Card Account Management. The Fall 2022 edition of *Supervisory Highlights* discussed several UDAAPs related to credit card account management. Among other things, CFPB examiners identified unfair and deceptive practices related to add on products. Specifically, examiners found that entities engaged in deceptive acts or practices by claiming in marketing materials that consumers could cancel the products simply by calling a toll-free number when, instead, they were required to take additional steps to cancel. In addition, examiners found that the entities engaged in unfair acts or practices when they failed to cancel the products on the date of the consumer's request and failed to issue pro rata refunds based on the date of the request as required by the insurance agreement.

Mortgage Origination. Examiners found that some entities engaged in a deceptive practice by including a waiver provision in a loan security agreement that provided that borrowers who signed the agreement waived their right to initiate or participate in class action. 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." In light of this provision, examiners found that the waiver at issue was misleading because a reasonable consumer could understand the provision to waive their right to bring a class action on any claim, including federal claims, in federal court.

Auto Servicing. The CFPB also cited auto servicers for deceptive representations during collection calls. Specifically, servicers told consumers that their driver's licenses and tags would be suspended if they did not make a prompt payment when the servicers did not actually have the authority to suspend consumers' driver's licenses or tags. In addition, examiners cited auto servicers for deceptive practices when, in calls in which consumers requested payment assistance, servicers stated that the consumers were preliminarily approved for a loan modification but had to make a payment before servicers would finalize the modifications. The CFPB stated that this representation created a net impression that the modification likely would be finalized if the consumers made the requested payment, but servicers ultimately denied most of the modification requests after consumers had made the payment.

NEGATIVE OPTION MARKETING

Both the CFPB and the FTC have recently focused on negative option marketing practices, with the CFPB releasing a Circular on the topic in January 2023 and the FTC releasing a NPRM on the topic in March 2023. Negative option marketing practices include subscription plans, continuity plans, trial marketing plans, and other plans that renew automatically.

CFPB Circular 2023-01. In January 2023, the Bureau issued Circular 2023-01, providing guidance on when negative option marketing practices may violate the prohibition against UDAAPs.²⁴ The CFPB stated that negative option marketing practices may constitute UDAAPs when a seller (1) misrepresents or fails to clearly and conspicuously disclose the material terms of the negative option offer, such as the affirmative steps to cancel the product or service; (2) fails to obtain informed consumer consent, including by concealing the negative option feature; or (3) misleads consumers who wish to cancel, erects unreasonable barriers to cancellation or impedes the effective operation of promised cancellation procedures.

FTC NPRM on Negative Option Marketing Plans.

In March 2023, the FTC released a NPRM to overhaul the agency's rule regarding negative option marketing plans.²⁵ The rule would require that before a negative option transaction is completed, the business must make several disclosures to the consumer. Specifically, the business must disclose that the payment will be recurring, the deadline by which the consumer must act to prevent the next charge, the amount or range of the charge to the consumer, the date the charge will take place, and information about the cancellation mechanism. The business must also obtain express, informed, and affirmative consent to the negative option feature separate from any other portion of the offer, as well as affirmative consent to the entire transaction. And importantly, the business must provide a means of cancellation through the same medium the consumer used to initiate the transaction that is "as simple as" the method the consumer used to sign up. Further, for automatic renewal programs, the proposed rule would require the business to send the consumer a notice at least annually providing information about, among other things, how to cancel. Comments are due on June 23, 2023.

FTC ISSUES ANPR ON DECEPTIVE OR UNFAIR REVIEWS AND ENDORSEMENT PRACTICES

On October 20, 2022, the FTC published an ANPR on fake reviews and other deceptive endorsements.²⁶ The ANPR notes that the FTC is focused on the following types of reviews and endorsements:

- fake reviews by people who do not exist or who have not used the product or service;
- review reuse fraud, in which sellers repurpose reviews posted for another product;
- paid reviews, in which sellers pay for positive reviews or negative reviews of a competitor's product;
- insider reviews, in which company employees write reviews without noting their connection to the company;
- review suppression, in which companies claim their websites display all reviews when they suppress negative reviews or attempt to suppress negative reviews on other platforms by threatening the reviewers;
- fake review websites when a seller sets up a purportedly independent website or organization to review or endorse its products; and
- buying followers, which involves buying or selling followers, subscribers, views, or other indicators of social media influence.

The ANPR requested comment on a wide range of topics, including the extent to which consumers are harmed by the practices and approaches to address the issues. Comments were due on January 9, 2023.

6. Looking Ahead

Over the last six months, the CFPB and FTC have continued to be active in the UDAP/UDAAP space with numerous enforcement actions and stiff penalties for violations. For its part, the FTC is continuing to promulgate rules that will allow it to more easily assess penalties for UDAP violations. We expect to see more rulemakings and other creative solutions from the FTC as it works to redefine its powers after a 2021 US Supreme Court ruling that limited its ability to assess penalties for UDAP violations.

With respect to CFPB, the future is somewhat uncertain. In February 2023, the U.S. Supreme Court agreed to hear the CFPB's appeal of the Fifth Circuit's ruling that the CFPB is unconstitutionally funded. Because the case likely will not be decided before 2024, the Fifth Circuit ruling likely will continue to impact the CFPB for some time.

We look forward to analyzing these and other developments impacting UDAAP/UDAP trends in future issues of the 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 lawyers 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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ENDNOTES

1. This review generally covers those actions first filed during this period. Actions that were initiated prior to October 1, 2022 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. 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 US 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.mayerbrown.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. 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).
9. 15 U.S.C. § 45(n); 12 U.S.C. § 5531(c)(1).
10. 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.
11. 12 U.S.C. § 5531(d). You can read our prior analyses of the CFPB's abusiveness authority in our November 2, 2021 and May 2, 2023 Legal Updates.
12. "Consumer Financial Protection Bureau Launches Initiative to Save Americans Billions in Junk Fees," January 26, 2022, available at: <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-launches-initiative-to-save-americans-billions-in-junk-fees/>.
13. FTC, "Unfair or Deceptive Fees Trade Regulation Rule Commission Matter No. R207011," 87 Fed. Reg. 67413 (Nov. 8, 2022). We go more in depth in our Legal Update.
14. Consumer Financial Protection Circular 2022-06, "Unanticipated Overdraft Fee Assessment Practices," Oct. 22, 2022, available at: https://files.consumerfinance.gov/f/documents/cfpb_unanticipated-overdraft-fee-assessment-practices_circular_2022-10.pdf.
15. CFPB, *Supervisory Highlights*, Junk Fees Special Edition, Issue 29, March 8, 2023, available at: https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights-junk-fees-special-edition_2023-03.pdf.
16. CFPB, Bulletin 2022-06: Unfair Returned Deposited Item Fee Assessment Practices, 87 Fed. Reg. 66,940 (Nov. 7, 2022).
17. CFPB, "Credit Card Penalty Fees (Regulation Z)," 88 Fed. Reg. 18,906 (Mar. 29, 2023).
18. CFPB, "Director Chopra's Remarks on Press Call for Credit Card Late Fees NPRM," Feb. 1, 2023, available at: <https://www.consumerfinance.gov/about-us/newsroom/director-chopras-remarks-on-press-call-for-credit-card-late-fees-nprm/>.
19. Read our more detailed analysis in our February 8 Legal Update.
20. CFPB, *Supervisory Highlights*, Issue 28 (Nov. 2022), available at: https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-28_2022-11.pdf; CFPB, *Supervisory Highlights*, Junk Fees Special Edition, Issue 29, March 8, 2023, available at: https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights-junk-fees-special-edition_2023-03.pdf. For a more detailed discussion of this edition of the Junk Fees Special Edition of *Supervisory Highlights*, read our blog post.
21. For a more detailed discussion of this case, read our Legal Update.
22. We discussed this development in a March 17 Legal Update.
23. CFPB, *Supervisory Highlights*, Issue 28, Fall 2022, available at: https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-28_2022-11.pdf.
24. Consumer Financial Protection Circular 2023-01, January 19, 2023, available at: <https://www.consumerfinance.gov/compliance/circulars/consumer-financial-protection-circular-2023-01-unlawful-negative-option-marketing-practices/>. Read our more detailed analysis in our Legal Update.
25. FTC, Negative Option Rule, 88 Fed. Reg. 24716, April 24, 2023. We go into further detail in our April 25 Legal Update.
26. FTC, "Trade Regulation Rule on the Use of Reviews and Endorsements," 87 Fed. Reg. 67424, Nov. 8, 2022.

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