

AVOIDING UDAAP VIOLATIONS IN THE COVID-19 REALITY

Education Finance Council

Education Finance Conference 2020, Friday, September 18, 2020

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Jonathan Pompan, partner and co-chair of Venable’s Consumer Financial Services Practice Group. Jonathan has extensive experience representing financial services companies, including some of the largest debt buyers and collectors and advertisers of financial services in the country, other consumer financial services providers, and their service providers. This work gives him considerable insight into successful strategies for satisfying new and evolving regulatory expectations.

Jonathan has assisted clients in bet-the-company government investigations and litigation pursued by federal agencies such as the CFPB and the FTC, as well as in-state enforcement proceedings involving state attorneys general. His experience includes several CFPB investigations and examination preparation and appeals. In addition, he provides ongoing compliance and general counseling advice to several clients in the debt collection and credit services, lenders, and advertising and marketing sectors.

Jonathan is a frequent speaker, organizer, and moderator of conference panels, and author on legal and regulatory issues of significance to financial services companies. Recent speaking engagements include Association of Corporate Counsel, OLA Compliance University, Lend360, ACA International Annual Convention, and the Receivables Management Association International (RMAI) Annual Conference.

For an index of articles and presentations on consumer financial services legal and regulatory topics, see www.Venable.com/cfs/publications.

Introduction and Presentation

- Servicing and COVID-19 Pandemic
 - CARES Act and Credit Reporting
 - CFPB on FCRA and Furnishing
- Risks Associated with UDAP and UDAAP?
- Legal Authority, Enforcement, Analysis
 - Acts or Practices
 - Unfair
 - Deceptive
 - Abusive
 - Basic UDAAP Concepts
- Managing Risks to Avoid UDAAP Violation
- Student Loan Examination and Enforcement Trends
- Questions & Answers (additional information)

Servicing and COVID-19 Pandemic

Servicing and COVID-19 Pandemic

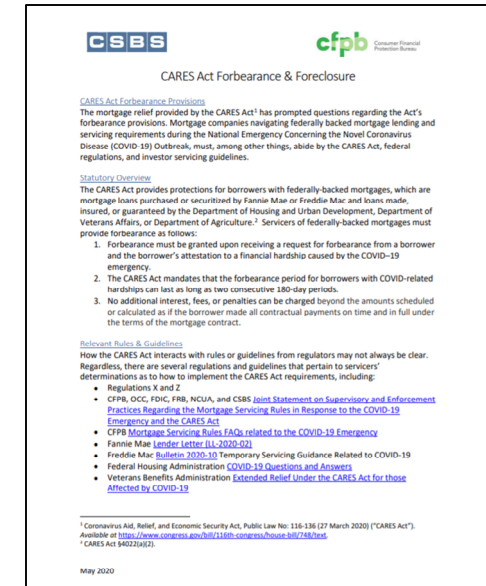
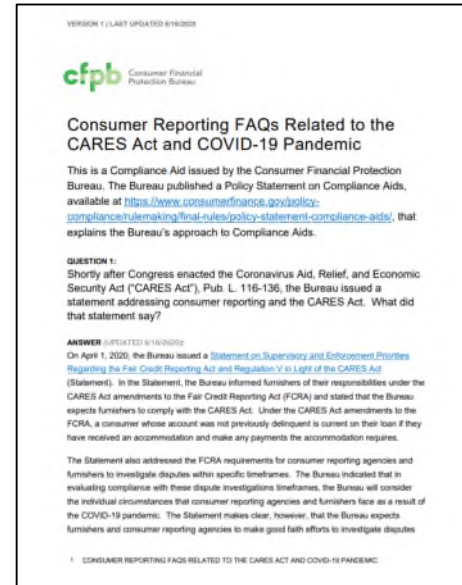
- Many lenders and servicers have taken steps to revamp their collections and credit reporting policies and practices — acting either voluntarily or in accordance with dictates issued through federal, state or local laws.
- **Coronavirus Aid, Relief, and Economic Security (CARES) Act** offers relief for those with federal student loans.
 - Principal and interest payments on federally-held student loans are automatically suspended through December 31, 2020.
 - Suspended payments through December 31, 2020, will count towards any student loan forgiveness program, as long as all other requirements of the loan forgiveness program are met.
 - Will not result in negative credit reporting.
- **FFEL** (commercial) lenders or schools may choose to suspend interest and payments on a voluntary basis, but they are not required by law to do so.
 - Perkins loan borrowers can request forbearance from their institution, not to exceed 3 months. This forbearance counts toward the cumulative 3-year maximum allowed for Perkins loan forbearance. No documentation required to be considered for forbearance.
 - Servicers can grant a 90-day forbearance to borrowers who are experiencing financial difficulties due to the pandemic. Borrower can request to renew this forbearance. Deferment or forbearance will not result in negative credit reporting.

CARES Act and Credit Reporting

Section 4021 of the CARES Act amends the FCRA to address how **furnishers report accounts subject to an accommodation**.

- An “accommodation” includes any payment assistance or relief granted to a consumer who is affected by the COVID-19 pandemic during the period from January 31, 2020, until 120 days after the termination of the COVID-19 national emergency declared by the President on March 13, 2020 under the National Emergencies Act.
 - Such an **accommodation includes, for example, agreements to defer one or more payments, make a partial payment, forbear any delinquent amounts, or modify a loan or contract. An accommodation includes assistance or relief that is granted voluntarily** or pursuant to a statutory or regulatory requirement.
- The CARES Act provisions addressing **how furnishers report accounts subject to an accommodation** apply if:
 1. a furnisher makes an accommodation with respect to one or more payments on a credit obligation or account of a consumer, and
 2. the consumer makes the payments or is not required to make one or more payments pursuant to the accommodation.
- **Current before the accommodation:** during the accommodation the furnisher must continue to report the credit obligation or account as current.
- **Delinquent before the accommodation:** during the accommodation the furnisher cannot advance the delinquent status.
 - Ex.: If at the time of the accommodation the furnisher was reporting the consumer as 30 days past due, during the accommodation the furnisher may not report the account as 60 days past due. If during the accommodation the consumer brings the credit obligation or account current, the furnisher must report the credit obligation or account as current.
- **Charged Off Accounts:** Does not apply with respect to credit obligations or accounts that creditors have charged off.

CFPB on FCRA and Furnishing



- The FCRA requires furnishers and consumer reporting agencies to conduct investigations of disputes within specified timeframes.
- CFPB expects furnishers and consumer reporting agencies to make good faith efforts to investigate disputes as quickly as possible when they are impacted by COVID-19.
- The CFPB also warns that although it encourages furnishers to provide relief to consumers, furnishers should not report consumer accounts as in forbearance if the consumer neither requested forbearance nor is
- The Bureau states that it will "not hesitate to take public enforcement action when appropriate."

Risks Associated with UDAP and UDAAP

Risks Associated with UDAP and UDAAP

- Types of **Risks**:
 - Compliance – violations of law or regulation, and increasingly real or perceived consumer harm
 - Credit –obligor’s failure to meet the terms of any contract
 - Operational –inadequate or failure internal process or systems, human errors or misconduct, or adverse external events.
 - Strategic - business decisions, implantation, or lack of responsiveness to changes
 - Reputation – negative public opinion
- **Consequences**:
 - Litigation and Enforcement Actions
 - Financial including civil money penalties and monetary restitution
 - Injunctive relief
 - Debt cancelation

Legal Authority, Enforcement, and Analysis

Legal Authority, Enforcement, and Analysis

- **Dodd-Frank Act (DFA) / Consumer Financial Protection Act (CFPA)** authority regarding **unfair, deceptive or abusive acts or practices (UDAAP)**
 - **Consumer Financial Protection Bureau**
 - Rule Writing Authority
 - Applicable to any person that engages in offering or providing a consumer financial product or service and any service provider
 - Supervision and Enforcement authority for banks over \$10b and nonbank entities
 - State Attorneys General
- **Federal Trade Commission Act (FTC Act)** authority regarding unfair or deceptive acts or practices (**UDAP**)
 - Federal Trade Commission
 - Federal Banking Agencies
- **Mini-FTC Acts** authority regarding many aspects of UDAP (varies by state)
 - State Attorneys General
 - Some Private Right of Actions

CFPA UDAAP Breakdown

Section 1031 of the DFA

- Unfair (similar to Section 5 of the FTC Act)
- Deceptive (similar to FTC Act guidance)
- Abusive (similar to Telemarketing Act and Telemarketing Sales Rule)

Abusive (new in the DFA) is defined as an act or practice that:

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

FTC Act UDAP Authority Breakdown

- Source of authority:
 - Section 5 of the FTC Act, Section 8 of the Federal Deposit Insurance Act
- Authority of prudential regulators (but not the CFPB):
 - No rule writing authority
 - No upervision and enforcement for supervised entities (any asset size)
- FTC does not have jurisdiction over nonprofit organizations and banks, but will bring enforcement against sham nonprofits, and service providers; and FTC Act is enforced by other federal financial regulators.

UDAAP Legal Standards

Act or Practice

- Applies to *all* products and services
- Applies to *every* stage and activity
 - Product development and rollout
 - Advertising
 - Direct marketing
 - Disclosures
 - Contracts
 - Account statements
 - Billing
 - Loan servicing/loss mitigation/collections
 - Third-party service providers

“Unfair” Act or Practice

- An act or practice is **unfair** where it -
 - Causes or is likely to **cause substantial injury** to consumers,
 - Can **not** be reasonably **avoided** by consumers, and
 - Is **not outweighed by countervailing benefits** to consumers or to competition
- Public policy may be considered
- Must meet all three factors to be considered unfair.

“Unfair” Act or Practice: Substantial Injury, Avoidable, Benefits

- **Not reasonably avoidable** –Can not be reasonably avoided by consumers
 - Gov’t will consider whether the act or practice:
 - Unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decision making,
 - Interferes with the consumer’s ability to effectively make decisions, or
 - Subjects consumers to undue influence or coercion
- **Not outweighed by benefits** - Is not outweighed by countervailing benefits to consumers or to competition
 - Offsetting benefits to consumers may include:
 - Lower prices
 - Wider availability of products and services
 - Also consider the offset of costs to remedy or prevent the injury, such as:
 - Cost to the bank to take preventive measures
 - Cost to society of any increased burden
- **Injury** - Causes or is likely to cause substantial injury to consumers
 - **Injury:**
 - Usually involves monetary harm
 - May include other tangible harm
 - Does not include emotional or other subjective harm
 - **Substantial:**
 - Small amount of harm to a large number of people
 - Significant risk of concrete harm to small number of people
 - Not trivial or speculative harm

“Deceptive” Act or Practice

- Regulators have found these acts or practices to be **deceptive** if they have these three conditions present:
 - The representation, omission or practice is **likely to mislead consumers**
 - Who are **acting reasonably** in the circumstances presented, and
 - The representation, omission, or practice is **material**.
- Must meet all three of the of the above factors to be considered unfair.

“Deceptive” Act or Practice: Misleading

- Misleading – There is a representation, omission, or practice that misleads or is likely to mislead the consumer
 - Representation: Express or implied claims or promises, written or oral
 - Omission: Disclosure of the omitted information is necessary to prevent a consumer from being misled
 - Misleading: Government will evaluate the representation or omission in the context of the entire advertisement, transaction, or course of dealing
 - Actual deception is not required

Four “P’s” of Deception

<u>PROMINENCE</u>	Is it BIG enough for consumers to notice and read?
<u>PRESENTATION</u>	Is the wording and format easy for consumers to understand?*
<u>PLACEMENT:</u>	Is it where the consumers will look?
<u>PROXIMITY</u>	Is it near the claim that it qualifies?

“Deceptive” Act or Practice: Reasonable interpretation

- Reasonable interpretation - The consumer’s **interpretation** of the representation, omission, or practice is considered **reasonable** under the circumstances
 - The act or practice need not be likely to deceive all consumers
 - The act or practice will be considered from the perspective of the reasonable consumer or target audience
 - Oral disclosures or fine print may be insufficient to cure a misleading headline or prominent written representation, especially if the consumer was directed away from limitations

“Deceptive” Act or Practice: “Material”

- Material - The misleading representation, omission, or practice is material.
 - Material: Likely to affect a consumer’s decision regarding a product or service, such as information about costs, benefits, or limitations
 - Express claims and false claims: Presumed material
 - Implied claims: Presumed material if it is demonstrated that the bank intended the consumer to draw certain conclusions
 - Omissions: Presumed material if the bank knew or should have known that the consumer needed the omitted information to evaluate the product or service

“Abusive” Acts or Practices

- The CFPA makes it unlawful for any covered person or service provider to engage in an “abusive act or practice.” An abusive act or practice:
- Materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service or
- Takes unreasonable advantage of –
 - A lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
 - The inability of the consumer to protect its interests in selecting or using a consumer financial product or service; or
 - The reasonable reliance by the consumer on a covered person to act in the interests of the consumer.

Basic UDAP Concepts

- Act or practice may be: unfair, deceptive, abusive or one, two of all
- An act or practice does not have to violate any other law to be considered unfair or deceptive
- There is a three part test for “deceptive”.
 - Does it mislead?
 - **EXAMPLE:** Offering pricing that isn’t actually available or is only available for a limited time. Also a web page where the disclosures are not conspicuous or easy to follow back to a specific feature.
 - Is it reasonable for this consumer?
 - **EXAMPLE:** Is the offer targeting the elderly or an unsophisticated consumer that probably won’t fully understand the product or service?
 - Are the disclosures adequate?
 - **EXAMPLE:** Disclosures should fully explain the costs, uses, and benefits of the product or service.

Relationship with Other Laws

- Acts or practices that violate section 5 of the FTC Act, or sections 1031 or 1036 of Dodd– Frank, may also violate other federal or state laws or regulations.
- Conversely, practices that comply with other federal or state laws may still violate the FTC Act or Dodd–Frank.
- Source of additional information:
 - Dodd–Frank explains the elements of (1) an unfair act or practice and (2) an abusive act or practice. See 12 USC 5531(c) and (d).
 - Consumer Financial Production Bureau (CFPB) Bulletin 2013-07, “Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts,” explains the elements of a deceptive act or practice.
 - CFPB’s “Statement of Policy Regarding Prohibition on Abusive Acts or Practices,” at 85 Fed. Reg. 6733.

Managing Risks to Avoid UDAAP Violations

Risk Management Basics

- Compliance Management System for size, complexity, and risk profile allows:
 - Identify
 - Measure
 - Monitor
 - Control
- To evaluate size, complexity, and risk profile consider volume, product type, size of organization, etc.
- Assessing effectiveness of risk management system, consider policies, procedures, personnel and control systems
- Compliance Management System – method by which organization manages compliance risk, complies with laws and regulations, and prevents consumer harm.
 - Board and Management Oversight
 - Consumer compliance program
 - Monitoring
 - Audit

Risk Assessment

- Consumer compliance program (policies and procedures, training, monitoring and audit, and consumer complaint resolution process)
- Advertising and solicitations
 - All forms of advertising, including upsells and cross sells should be reviewed including materials from third parties
- Account and loan disclosures
 - Monitor compliance with applicable laws and regulations
 - Compare disclosures to actual practices and marketing materials
 - Consider additional levels of review for accuracy and readability
- Servicing and collections
 - Monitor scripts for compliance with applicable laws and regulations and to ensure the product or service is accurately described
 - Provide *frequent* compliance and product/service training
 - Monitor correspondence and listen to customer calls
 - Evaluate debt collection practices
 - Review payment processing practices
 - Review fee practices

Risk Assessment (cont'd)

- Managing and monitoring of third-party service providers
 - A bank's responsibility for third-party IS THE SAME as an activity handled directly by the bank
 - Third-party activities should be integrated into the bank's Compliance Management System
 - Effective third-party management programs incorporate:
 1. Risk Assessment
 2. Due Diligence
 3. Contract Structuring and review
 4. Oversight
 - Does NOT rely solely on the claims made by third-party vendors
- Consumer complaints
 - Maintain procedures for consumer complaints
 - Complaints can be received from other sources such as the Better Business Bureau, website blogs or social networking sites
 - Allegations or claims that might indicate **possible** UDAPs include:
 - Misleading or false statements
 - Undue or excessive fees
 - Inability to reach customer service
 - Previously undisclosed or unauthorized charges

Risk Assessment (cont'd)

- Transaction Testing:
 - This process should determine whether:
 - The entity does not underwrite a given credit product on the basis of ability to repay.
 - A product's profitability depends significantly on penalty fees or "back-end" rather than upfront fees.
 - A product has high rates of re-pricing or other changes in terms.
 - A product combines features and terms in a manner that can increase the difficulty of consumer understanding of the overall costs or risks of the product and the potential harm.
 - Penalties are imposed on a customer when he terminates his relationship with the entity.
 - Fees or other costs are imposed on a consumer to obtain information about their account.
 - A product is targeted to particular populations, without appropriate tailoring of marketing, disclosures, and other materials designed to ensure understanding by the consumers.
- Change Management
 - Effective change management allows financial institution management to prepare for and support changes in areas such as product and service development and delivery, third-party relationships, and operations.

Analyzing Complaints

- Primary channel the regulatory agencies have to use to find egregious problems and red flags.

Canary in the coal mine

- All the regulators have added substantial sections to their websites to help consumers file various types of complaints, including **servicing complaints**.
- Other sources: BBB, State AG, service providers, etc.
- Escalations
- Assess volumes, themes, and trends
- Reporting to compliance committee and management
- Root cause analysis
- Corrective action

How to Summarize Risks Associated with UDAP and UDAAP

Summary of Risks Associated With UDAP and UDAAP				
Risk category	Quantity of risk	Quality of risk management	Aggregate level of risk	Direction of risk
	(Low, moderate, high)	(Weak, insufficient, satisfactory, strong)	(Low, moderate, high)	(Increasing, stable, decreasing)
Operational				
Compliance				
Credit				
Reputation				
Strategic				



Student Loan Examination and Enforcement Trends

UDAP and UDAAP Red Flags

- Red Flags = warnings or indicators of a potential problem that poses risk to the financial institution. Help to identify warning signs of potential areas with higher UDAP or UDAAP risks. This list is not all inclusive nor does the presence of these red flags provide the existence of UDAP or UDAAP issues.
- Inadequate policies, procedures, and control related to servicing and collection activities, including activities by third parties.
- Customer complaints received by the servicer or another service provider.
- Whistleblower referrals
- Higher than average fees, deferment requests, etc.
- Inadequate inclusion of advertising, direct marketing, individual sales pitches, market scripts, and sales practices
- Inconsistencies between account disclosures and operating systems
- Weakness in risk management or internal controls
- Inadequate board and management oversight over incentive compensation programs

Student Loan Servicing Red Flags

- Failure to disclose material loan terms
- Dividing payments across loans to maximize late fees without adequate disclosure
- Misrepresentation of the value of making a partial payment
- Illegal late fees
- Failure to update and correct inaccurate information reported to credit reporting companies
- Misleading advertising of tax deduction benefits
- Failure to honor cosigner release to disclose information
- Student loan debt relief scams
- Overstatement of the minimum amount due on billing statements
- Misrepresentations on website portals of student loan interest paid
- Illegal calls to consumers and debt collection practices
- Predatory lending connected to deceptive advertising and marketing

Navigating Investigations and Examinations

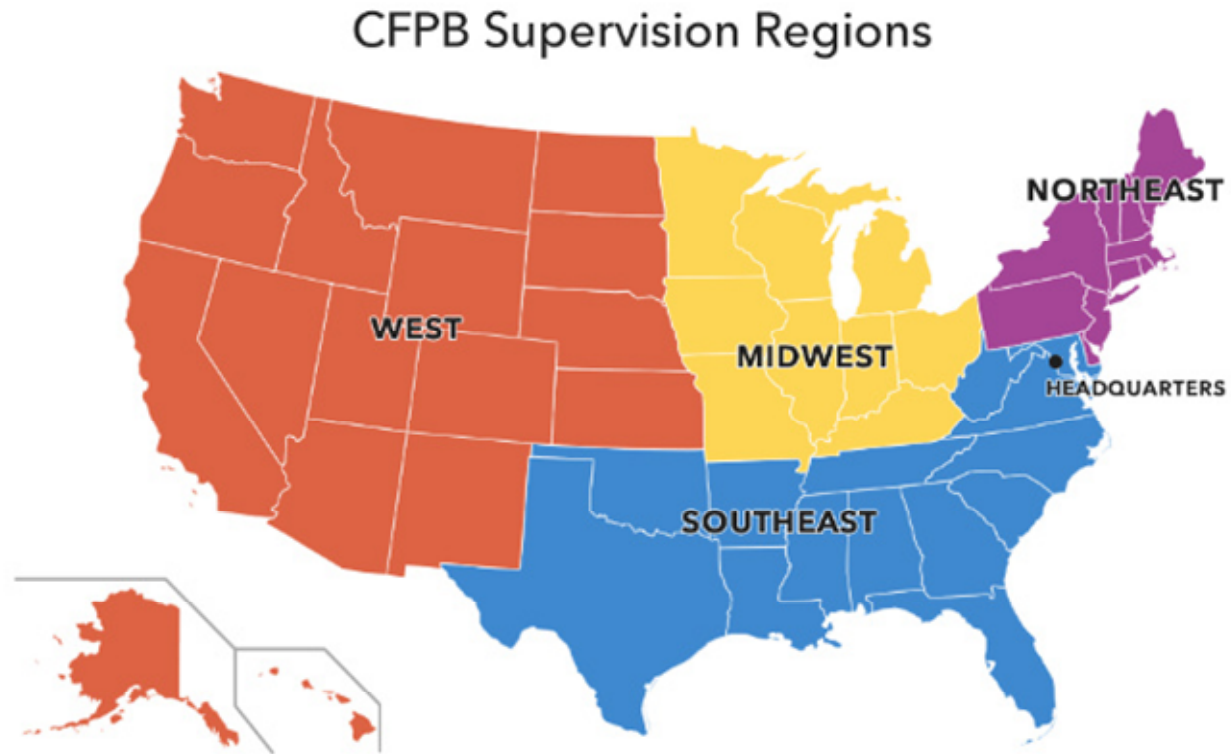
- CFPB has supervisory authority over a number of nonbank student loan servicers. (CFPB Larger Participant Rule (Dec. 3, 2013))
- Focus of Investigations and Exams
 - UDAAP/UDAP
 - Truth in Lending Act (TILA) and Regulation Z
 - Electronic Funds Transfer Act and Regulation E
 - Fair Debt Collection Practices Act (FDCPA) and upcoming Regulation F
 - Fair Credit Reporting Act (FCRA) and Regulation V
 - Equal Credit Opportunity Act (ECOA)
 - Gramm-Leach-Bliley Act (GLBA)

Navigating Investigations and Examinations (cont'd)

Exams and Investigations (Civil Investigative Demands) may review:

- Organizational Charts
 - Board minutes
 - Relevant management reporting
 - Policies and procedures
 - Rate and fee sheets
 - Loan applications, documentation, notes, disclosures, and all other contents of the underwriting and servicing file
 - Servicing contracts, loan transfer policies and procedures
 - Payment posting and allocation policies and procedures
 - Operating manuals and checklists
 - Computer programs and systems
 - Due Diligence and monitoring procedures of service providers
 - Compensation policies
 - Examination file, management response to findings
 - Training programs
 - Advertisements
 - Complaints
 - Transaction testing
- **Note: CFPB has already been examining for “response to COVID-19”**

CFPB Examinations are Managed by Regions and Coordinated by HQ



Drivers of Standards & Expectations

Consumer Financial Protection Bureau

Having a problem with a financial product or service? We have answers to frequently asked questions and can help you connect with companies if you have a complaint.

Submit a complaint

FINAL RULES ISSUED BY THE CFPB

2015

JUNE 10
Defining Larger Participants of the Automobile Financing Market and Defining Certain Automobile Leasing Activity as a Financial Product or Service

JUNE 9
Minimum Requirements for Appraisal Management Companies

APRIL 15
Submission of Credit Card Agreements Under the Truth in Lending Act (Regulation Z)
Homeownership Counseling Organizations Lists and High-Cost Mortgage Counseling Interpretive Rule

JANUARY 20
Amendments to the 2013 Integrated Mortgage Settlement Procedures Act (Regulation X) and the 2013 Loan Originator Rule under the

2014

DECEMBER 30
Appraisals for Higher-Priced Mortgage Loans

2015-CFPB-0016 Document 1 Filed 07/22/2015 Page 1 of 28

UNITED STATES OF AMERICA
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
2015-CFPB-0016

In the Matter of:

DISCOVER BANK, THE STUDENT LOAN CORPORATION, AND DISCOVER PRODUCTS, INC.

CONSENT ORDER

Supervisory Highlights

Consumer Financial Protection Bureau

1700 G Street, N.W., Washington, DC 20552

CFPB Compliance Bulletin 2015-07

Date: December 16, 2015
Subject: In-Person Collection of Consumer Debt

In response to recent practices observed during supervisory examinations and enforcement investigations, the Consumer Financial Protection Bureau (CFPB or Bureau) issues this compliance bulletin to provide guidance to creditors, debt collectors, and others.

Version 2 - October 2012

CFPB Supervision and Examination Manual

This examination manual provides internal guidance to supervisory staff of the CFPB. It does not bind the CFPB and does not create any rights, benefits, or defenses, substantive or procedural, that are enforceable by any party in any manner. While every effort has been made to ensure accuracy, examination procedures should not be relied on as a legal reference.

Consumer Financial Protection Bureau

2015-0001

Administrative Proceeding File No. 2015-CFPB-0011 - Guarantee Mortgage Corporation

- Consent order
- Stipulation

2015-0002

Administrative Proceeding File No. 2015-CFPB-0010 - International Land Consultants, Inc., et al.

- Consent order
- Stipulation

2015-0003

Administrative Proceeding File No. 2015-CFPB-0009 - Regions Bank

- Consent order
- Stipulation

2015-0004

Administrative Proceeding File No. 2015-CFPB-0008 - Fort Knox Military Assistance Company, LLC.

- Consent order
- Stipulation

2015-0005

Administrative Proceeding File No. 2015-CFPB-0007 - R M K Financial Corporation

- Consent order
- Stipulation

2015-0006

Administrative Proceeding File No. 2015-CFPB-0006 - Flagship Financial Group, LLC

- Consent order
- Stipulation

2015-0007

Administrative Proceeding File No. 2015-CFPB-0005 - American Preferred Lending, Inc.

- Consent order
- Stipulation

2015-0008

Administrative Proceeding File No. 2015-CFPB-0004 - New Day Financial, LLC

- Consent order
- Stipulation

2015-0009

Administrative Proceeding File No. 2015-CFPB-0003 - Continental Finance Company, LLC

- Consent order

Examination and Investigation Observations

- Exams can take months; investigations can take years
- Keep track of what's reviewed and by whom.
- Consider providing context during and immediately after the onsite exam (and at appropriate times in an investigation).
- Anticipate privilege issues.
- Early education and clarification can be key.
- While usually Bureau attorneys may not be onsite, they will still be involved in the process.
- Prepare to extract data, and prepare to place that data into context early in the process.
- Understand the CFPB's position on remediation and self-policing.
- Consider how an exam or inquiry may impact overall legal and regulatory profile of company (e.g., private lawsuits, state licensing, etc.)
- Prepare and update management and board of directors at all stages
- Proactive compliance audit

Comparison of Exam and Investigation Steps

Examination

- Pre-exam prep
- Scoping
- Preliminary findings
- Final Report (e.g., for matters requiring attention and other action items)
- Potential Action and Request for Response (PARR) Letter
 - Appeals process
- Possible confidential resolution and/or referral to enforcement

Investigations

- Civil Investigative Demand for Materials and Testimony
- Meet and Confer
- Petition to Modify or Quash
- Respond to Requests
- Possible resolution, closing, or litigation
- Notice of Opportunity to Respond and Advise (NORA) Letter (Bureau discretion)
- Remediation/Litigation/Closing Letter

Wrap-Up and Questions & Answers



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