



# CFPB Update: Regulatory and Enforcement Developments

## a CLE webinar for the American Law Institute

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## ARTICLES

August 27, 2014

### STRIKING STATS ABOUT INTERNET MARKETING AND ONLINE LEAD GENERATION

*All About Advertising Law Blog*

*This article was originally published in Venable's [All About Advertising Law blog](#) on August 27, 2014.*

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Online advertisers and marketers, including lead generators, and their service providers, have long had to contend with scrutiny from the FTC, state Attorneys General, competitors, and customers. And, since 2012, advertisers of consumer financial products and services have had to contend with the CFPB. Regardless of what you are promoting, bedrock advertising law says an advertiser can't over promise, be misleading, or deceptive. Moreover, depending on *how* you advertise, you may have to comply with numerous medium specific requirements, such as the Telemarketing Sales Rule. Finally, some advertisers have to meet *product specific* regulations (e.g., consumer financial services laws). And, the list goes on. There are many ways for advertising to cause legal risk. But, what are some of the root causes? Survey says:

We recently organized and participated in a panel, "Staying Current with Consumer Protection: Practical Lessons from Recent Enforcement Actions," at LeadsCon NY 2014. The other panelists included enforcers from the CFPB and FTC—Natalie Williams (Assistant Litigation Deputy, Office of Enforcement, CFPB) and Roberto Anguizola (Assistant Director, Division of Marketing Practices, FTC) and David Morgan, Chief Revenue Officer of PerformLine. David identified several compliance trends in his opening comments from a recent infographic that pulled from over 22 billion "compliance observations from a wide sampling websites and contact centers" from January to June.

Here are some of the findings from the data that jumped out at us:

- . Webpages without violations—determined by the presence of banned language or the absence of required language—doubled from 11% to 20%. In other words, 80% of the pages still present potential legal violations, and that's just based on the words displayed on the webpages without taking into account more complex aspects of an ad, such as its "overall" net impression.
- . In the education advertising market, the top trigger terms were: "scholarship," "salary," "FAFSA," "earn," and "largest."
- . In the consumer finance market, the top trigger terms were: "bad credit," "will qualify," "free credit," "credit score," and "up to \$."
- . At contact centers, the top trigger terms were: "call will be recorded," "enrollment is not required", "grant," "one of the best," and "automated technology."
- . Of the websites reviewed in the study, the percentage of sites that appeared to comply with TCPA's express written consent and disclosure requirements rose to 57% since October 2013 (when the rule took effect).

More data, including a full list of flagged rule categories by vertical, and an expanded analysis of education trigger terms, are [available here](#). To be clear, these aren't the most common terms on the websites that were reviewed. They represent the terms that correlate to a list of "banned" or "required" compliance terms, relevant to each vertical, which are selected and maintained by the company.

According to the company, the terms are checked for contextual relevancy and are flagged if a banned term is present or a required term is missing. They are not always indicative of an issue and depending on the fact situation may not be material. Nevertheless, the stats provide some insight into what could be a potential violation depending on how they're used and the overall net impression conveyed to a consumer. Of course, data from websites doesn't tell the full story of legal compliance, or help to identify all areas of potential risk.

For a deeper dive on related topics, see:

- **The FTCs Revised com Disclosures Guide What Third Party Advertisers and Lead Generators Need to Know** - In 2013, the FTC issued new guidance for digital advertisers and marketers titled “.com Disclosures: How to Make Effective Disclosures in Digital Advertising.” It’s focus is on one of the most confusing yet important advertising issues confronting digital advertisers: disclosures. There are critical distinctions in this area that are important to understand for online and mobile advertisers, and there is a host of valuable design techniques and guidance of which every advertiser (and their lawyers) should be aware.
- **Navigating CFPB, FTC, and State Attorneys General Consumer Protection Investigations** - Advertising, marketing, and third party lead generation is increasingly being scrutinized by the CFPB, FTC, and state Attorneys General. All three are focused on compliance with restrictions on unfair, deceptive, or abusive practices, restrictions on telemarketing, consumer privacy, and other subject matter or medium specific statutes and regulations. Government enforcers are issuing civil investigative demands and subpoenas in the areas of education, small dollar lending, debt relief services, mortgage, credit monitoring, business opportunities, coaching and mentoring, and more. This presentation discusses what’s driving investigations, what to do when you’re the target versus a recipient of a third-party request, and ways to avoid scrutiny all together.
- **Lessons for Marketers from the CFPB and FTC Attack on For-Profit Education** - The CFPB and FTC have stepped-up scrutiny on for-profit education and related marketing. The opening round of federal enforcement actions started in February, when the CFPB filed a lawsuit against a large private sector school with accusations that it “used high-pressure tactics to push many students into expensive private student loans that were likely to end in default.” The CFPB is seeking restitution for consumers, a civil fine, and an injunction against the company. For-profit schools and marketers of all types can learn important lessons from this enforcement action.

\* \* \* \* \*

Given the high stakes of not complying with the substantive and procedural legal and regulatory requirements applicable to online advertising and marketing, compliance is a topic that deserves attention.

## ARTICLES

September 16, 2014

### FTC CONTINUES ENFORCEMENT PUSH ON MORTGAGE LEAD GENERATION

A mortgage lead generator has settled charges that it engaged in deceptive advertising with ads that falsely claimed they could refinance their mortgages for free, according to recently filed court documents by the Federal Trade Commission (FTC). “Lead generators need to understand that federal laws governing truth in advertising apply to them as well as everybody else,” according to Jessica Rich, Director of the FTC’s Bureau of Consumer Protection.

The FTC in a complaint filed on September 12, 2014 alleges the lead generator designed and distributed deceptive refinancing ads as part of its service. According to the complaint, the company ran these ads on well-known third-party Internet websites and ad networks, as well as on its own websites. The ads took consumers to a landing page where they provided contact information, which was passed on to providers of mortgage refinancing.

According to the FTC’s complaint, the lead generation company allegedly made deceptive and unsupported claims in its advertisements that overstated how much consumers could reduce their payments if they refinanced their mortgages, how low their annual percentage rate would be, and how easy it would be for them to qualify for refinancing. The complaint also says that some ads falsely claimed there were no hidden fees, and that the mortgage refinancing was “free,” and that other ads claimed that fixed interest rates were available, when in fact the rates and the amount consumers spent on interest were variable.

The complaint charges the lead generator with violating the Federal Trade Commission Act; the Mortgage Acts and Practices Advertising Rule, or “MAP” Rule, and Regulation N; and the Truth in Lending Act and Regulation Z.

The terms of the settlement include a \$500,000 civil penalty and prohibition on:

- misrepresenting the terms and conditions of any financial product or service, and any term or condition of a mortgage credit product;
- disclosing, selling, or transferring the consumer data obtained through the Delta Prime Refinance lead generation service; and
- violating the FTC Act; the MAP Rule and Regulation N; and the Truth in Lending Act and Regulation Z.

The lead generator did not admit or deny any wrongdoing under the terms of the settlement.

The settlement reflects that the FTC remains focused on lead generation and, more specifically, mortgage advertising, even though it shares enforcement authority for nonbank mortgage advertising with the Consumer Financial Protection Bureau (CFPB). In addition, the settlement is an important reminder that lead generators and buyers need to review advertising and marketing for compliance with applicable laws and regulations, and bedrock advertising requirements.

A copy of the FTC’s press release, complaint, and settlement with the lead generator, Intermundo Media, LLC d/b/a Delta Prime Refinance, Delta Prime Mortgage, and American Dream Quotes, is available [here](#).

We recently discussed heightened government scrutiny of online lead generation advertising in greater detail during our panel session, [Staying Current with Consumer Protection: Practical Lessons from Recent Enforcement Actions](#) (presentation slides available), at LeadsCon NY 2014. The [panel included commentary](#) from Roberto Anguizola, Assistant Director of the FTC Division of Marketing Practices; Natalie Williams, Assistant Litigation Deputy of the CFPB Office of Enforcement; and David

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## RELATED PRACTICES

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Morgan of PerformLine. For a write-up on the session, see [What lead gen firms need to know about consumer protection laws](#) (third party link).

Since November 2012, the CFPB and FTC have jointly been investigating mortgage advertising, including lead generators, and since then have brought several public enforcement actions. At the time the CFPB said, “the actions stem from a joint ‘sweep’ – a review conducted by the CFPB and the FTC of about 800 randomly selected mortgage-related ads across the country – including ads for mortgage loans, refinancing, and reverse mortgages.”

\* \* \* \* \*

Below is a list of several relevant articles and presentations from our attorneys, which may be of assistance to your organization in this environment of enhanced scrutiny.

*To view any of these articles, alerts, or presentations, please click on the title.*

[Navigating CFPB, FTC, and State Attorneys General Consumer Protection Investigations](#)  
(Presentation)

[Mortgage Lending: Important Lessons about Advertising, Affiliates, and Authorizations](#) (Article)

[Advertising and Marketing Law Fundamentals for Consumer Financial Products and Services](#)  
(Presentation)

[The FTC's Revised .com Disclosures Guide: What Third Party Advertisers and Lead Generators Need to Know](#) (Presentation)

[CFPB and FTC Target Mortgage Advertising](#) (Article)

[New FTC Mortgage Assistance Rule Targets Lead Generators and Affiliate Marketers](#) (Article)

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For more information, please contact Jonathan L. Pompan at 202.344.4383 or [jpompan@Venable.com](mailto:jpompan@Venable.com); or Alexandra Megaris at 212.370.6210 or [amegaris@Venable.com](mailto:amegaris@Venable.com).

***Jonathan L. Pompan**, a partner in the Washington, DC office of Venable LLP, co-chairs the firm's **Consumer Financial Protection Bureau Task Force**. His practice focuses on providing comprehensive legal advice and regulatory advocacy to a broad spectrum of clients, such as nonbank financial products and services providers, advertisers and marketers, and trade and professional associations, before the CFPB, the Federal Trade Commission, state Attorneys General, and regulatory agencies.*

***Alexandra Megaris** is an associate in Venable's regulatory practice group, where she advises clients on advertising and marketing and general business matters, including compliance with the Consumer Financial Protection Act and the Federal Trade Commission Act. She also assists clients with civil investigations before the CFBP, FTC, U.S. Congress, and various other federal and state enforcement agencies.*

## ARTICLES

August 12, 2014

### CFPB TARGETS MORTGAGE ONLINE ADVERTISING: LEAD GENERATION LESSONS

#### AUTHORS

Jonathan L. Pompan

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The Consumer Financial Protection Bureau (“CFPB”) has entered into a consent order under which, Amerisave Mortgage Corporation, an affiliate, and the owner of both companies, agreed to pay a total of \$20.8 million to settle allegations of deceptive advertising and illegal lending practices. The Consent Order reflects the CFPB’s continued focus on mortgage lending and online advertising practices. The order also provides a window into potential pitfalls to avoid when advertising mortgages online.

#### CFPB’s Investigation

The CFPB investigation of Amerisave covered activities from 2010-2014. Amerisave advertised its interest rates and terms using online banner ads and searchable rate tables on third-party websites. The CFPB alleged that the lender posted inaccurate rates on these banner ads and rate tables, inducing consumers to pursue a mortgage with Amerisave. Moreover, the CFPB alleged that when consumers were directed to the lender’s own website, the lender gave consumers quotes based on an 800 FICO score, even where consumers provided lower self-reported scores on the third-party website that led them to the lender. According to the CFPB this resulted in Amerisave offering many consumers misleadingly low quotes. In addition, the CFPB alleged that the lender required payment authorization before receiving a Good Faith Estimate and referred appraisal orders to an affiliated company without disclosure.

The CFPB found:

- Deceptively advertised low interest rates that were not available. In its Consent Order, the CFPB found that this practice was deceptive under the Consumer Financial Protection Act (“CFPA”) and the Mortgage Acts and Practices (“MAP”) Rule.
- Locked consumers in with costly up-front fees in violation of the Truth in Lending Act (“TILA”) and the Real Estate Settlement Procedures Act (“RESPA”).
- Failed to properly disclose its affiliate relationship in violation of RESPA.
- Charged unfairly inflated prices for services through its affiliate in violation of the CFPB.

#### Enforcement Action

The CFPB’s Consent Order requires Amerisave, its affiliate, and its principal to take the following actions:

- Pay \$14.8 million in consumer refunds.
- Stop advertising unavailable mortgage rates. The order requires that the lender:
  - Ensure that it will not engage in deceptive mortgage advertising practices. Those practices include, but are not limited to, advertising unavailable rates on third-party searchable rate tables, advertising deceptive rates in its banner ads, and giving consumers mortgage quotes based on an undisclosed 800 credit score.
  - If the majority of consumers who applied for loans with the lender during the previous calendar quarter would not qualify for the rate and discount point combination advertised in display and banner ads, then it is required to make specific disclosures of parameters related the advertised rates.
  - Implement a quality control program and retain an independent consultant to review its advertising practices
- No longer charge illegal fees.
- Pay \$6 million in fines to the CFPB’s Civil Penalty Fund.

Third-party marketers, including online lead generators, and mortgage lenders and brokers need to be prepared to respond to increased scrutiny.

A copy of the CFPB’s Consent Order is available [here](#).

\* \* \* \* \*

Below is a list of several relevant articles and presentations from our attorneys, which may be of assistance to your company in this environment of enhanced scrutiny.

*To view any of these articles, alerts, or presentations, please click on the title.*

[Preparing for a CFPB Examination or Investigation](#) (Article)

[CFPB Compliance Myths That Deserve Debunking](#) (Article)

[Lessons from the FTC's Latest Lead Generation Enforcement Action](#) (Article)

[Are You Ready for the New Mortgage Landscape?](#) (Article)

[Advertising and Marketing Law Fundamentals for Consumer Financial Products and Services](#) (Presentation)

[The FTC's Revised .com Disclosures Guide: What Third Party Advertisers and Lead Generators Need to Know](#) (Presentation)

[What to Look for in 2014 – CFPB Regulatory Outlook](#) (Recording and Presentation)

[Consumer Financial Protection Bureau Investigations and FTC Coordination Tips and Techniques](#) (Presentation)

[Telemarketing, E-mail, and Text Message Marketing: Tips to Avoid Lawsuits](#) (Presentation)

[Understanding New Restrictions on Advertising GI Bill Benefits](#) (Article)

[CFPB and FTC Target Mortgage Advertising](#) (Article)

[New FTC Mortgage Assistance Rule Targets Lead Generators and Affiliate Marketers](#) (Article)

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For more information, please contact **Jonathan L. Pompan** at 202.344.4383 or [jlpompan@Venable.com](mailto:jlpompan@Venable.com).

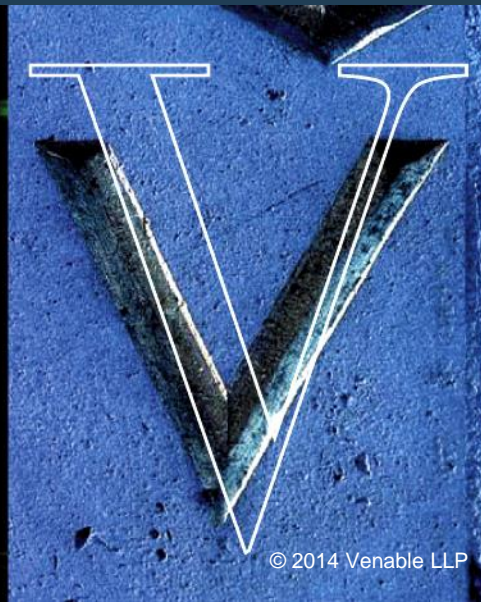
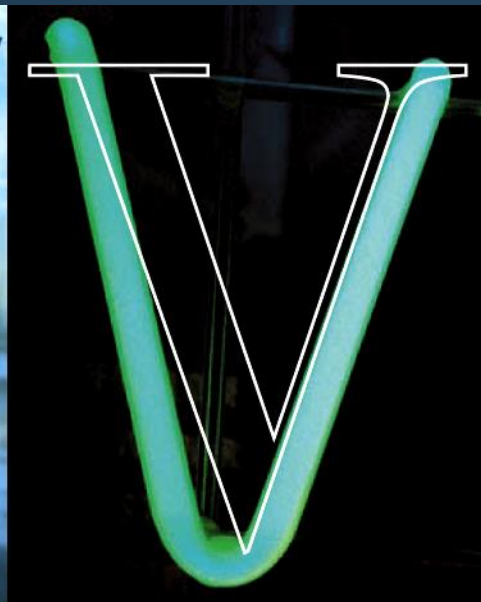
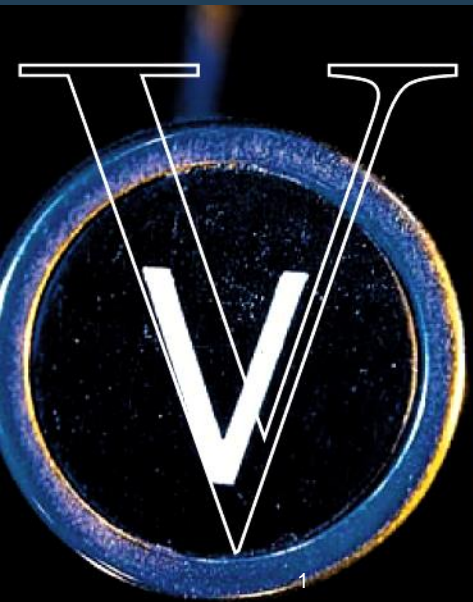
*Jonathan L. Pompan, a partner in the Washington, DC office of Venable LLP, co-chairs the firm's **Consumer Financial Protection Bureau Task Force**. His practice focuses on providing comprehensive legal advice and regulatory advocacy to a broad spectrum of clients, such as nonbank financial products and services providers, advertisers and marketers, and trade and professional associations, before the CFPB, the Federal Trade Commission, state Attorneys General, and regulatory agencies.*



## Navigating CFPB, FTC, and State Attorneys General Consumer Protection Investigations

LeadsCouncil  
April 24, 2014  
2 pm – 3 pm ET  
Webinar

*Jonathan L. Pompan, Esq.*  
*Leonard L. Gordon, Esq.*  
*Alexandra Megaris, Esq.*  
Venable LLP





# Agenda

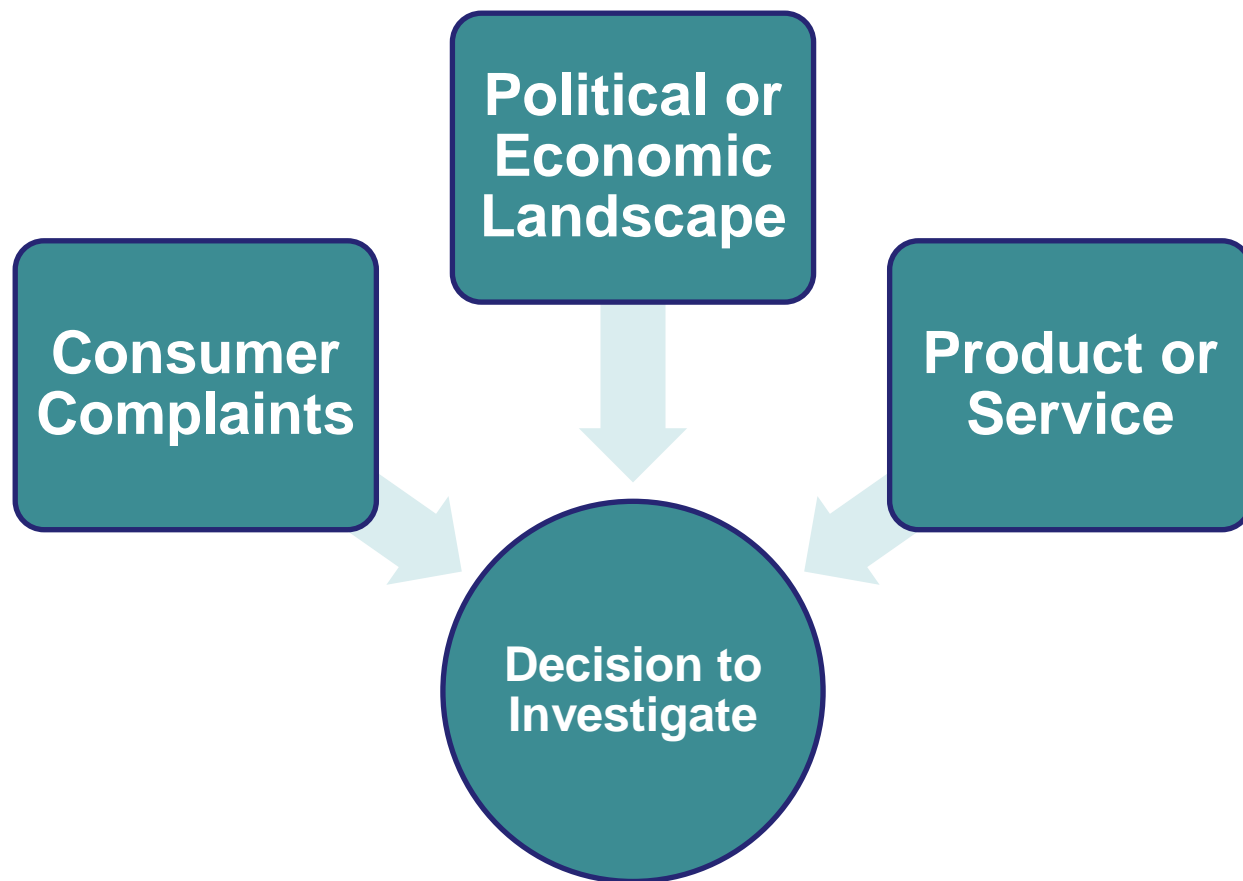
- FTC, CFPB, and State Attorneys General Enforcement Jurisdiction
- Unpacking the Enforcement Process
- Investing in Compliance to Prevent Scrutiny by Regulators and Enforcement Authorities
- Recent Trends and Developments in Consumer Protection Enforcement



# Who Enforces Advertising & Marketing Laws?



# Launch of an Investigation\*



\* Supervisory exams can often result in referrals to enforcement.



# Two Possible Paths: Notice or “No Notice”

United States of America  
Federal Trade Commission  
**CIVIL INVESTIGATIVE DEMAND**

TO: **F**

This demand is issued pursuant to Section 20 of the Federal Trade Commission Act, 15 U.S.C. § 57c-1, in the course of an investigation to determine whether there is, has been, or may be a violation of any laws administered by the Federal Trade Commission by conduct, activities or proposed action as described in item 3.

**2. ACTION REQUIRED**  
 You are required to appear and testify.  
 LOCATION OF HEARING: \_\_\_\_\_ YOUR APPEARANCE WILL BE BEFORE: \_\_\_\_\_  
 DATE AND TIME OF HEARING OR DEPOSITION: \_\_\_\_\_

You are required to process all documents described in the attached schedule that are in your possession, custody, or control, and to make them available at your address indicated above for inspection and copying or reproduction at the date and time specified below.  
 You are required to answer the interrogatories or provide the written report described on the attached schedule. Answer each interrogatory or report separately and fully in writing. Submit your answers or report to the Records Custodian named in item 4 on or before the date specified below.

DATE AND TIME THE DOCUMENTS MUST BE AVAILABLE: \_\_\_\_\_  
 (See 16 CFR 2.103)

**3. SUBJECT OF INVESTIGATION**  
 See attached notification

**4. RECORDS CUSTODIAN/DEPOSITORY RECORDS CUSTODIAN**  
 Patricia Tavares-Coyne  
 200 Pennsylvania Ave., N.W., Room NJ-2272  
 Washington, DC 20580

**5. COMMISSION COUNSEL**  
 Richard M. Gorman  
 400 Pennsylvania Ave., N.W., Room NJ-2272  
 Washington, DC 20580

DATE ISSUED: 7/29/11 COMMISSIONER'S SIGNATURE: [Signature]

**INSTRUCTIONS AND NOTICES**  
 The delivery of this demand to you, or any method prescribed by the Commission's Rules of Practice, is not notice and does not constitute an order to produce documents or information. It is your obligation to respond to this demand by the date specified. If you are unable to comply with the demand, you should advise the Commission in writing as soon as possible. If you are a natural person, you are advised of your rights to a hearing and to a trial by jury. If you are a corporation, partnership, or other entity, you are advised of your right to a hearing and to a trial by jury. If you are a partnership, you are advised of your right to a hearing and to a trial by jury. If you are a partnership, you are advised of your right to a hearing and to a trial by jury. If you are a partnership, you are advised of your right to a hearing and to a trial by jury.

**PETITION TO LIMIT OR QUASH**  
 The Commission's Rules of Practice provide that any petition to limit or quash this demand must be filed with the Commission within 30 days of the date this demand is served on you. The initial and final copies of this petition must be filed with the Secretary of the Federal Trade Commission, and one copy with the Records Custodian designated in item 4.


**YOUR RIGHTS TO REGULATORY ENFORCEMENT FAIRNESS**  
 The FTC has a longstanding commitment to fair regulatory enforcement procedures. If you are a small business, you have the right to request a hearing and to a trial by jury. You should understand, however, that the National Consumer Council charges fees for filing a petition to request a hearing and to a trial by jury.

**FEES AND EXPENSES**  
 Use the enclosed request, which accompanies this demand, to file a petition to request a hearing and to a trial by jury. The initial and final copies of this petition must be filed with the Secretary of the Federal Trade Commission, and one copy with the Records Custodian designated in item 4.

FTC Form 144 (rev. 2/95)



# What to Expect When You are Under Investigation

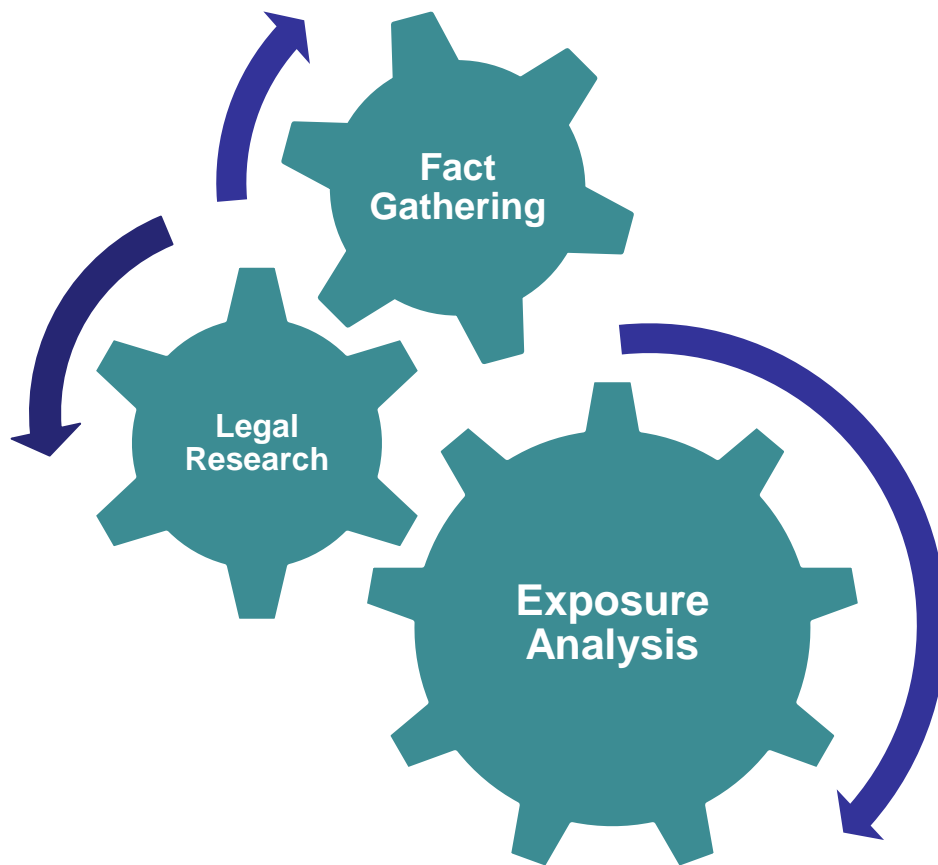
- 
- Receipt of CID or civil subpoena
  - Assessing its scope
  - Weigh options

- 
- Engaging with enforcement staff to limit burden and understand basis for investigation

- 
- Record hold
  - ESI considerations
  - Collection, review, and production of documents

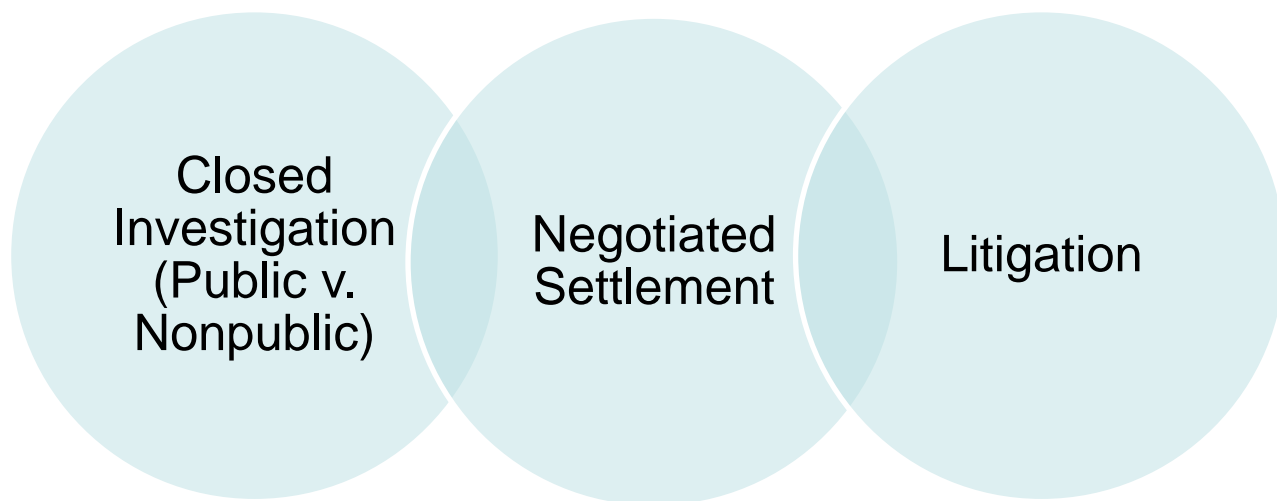


# Preparing the Defense





# How Does a Government Investigation Typically Play Out?



# Cost of Noncompliance



# Investing in Compliance



# Hot Topics in Consumer Protection Enforcement

Consumer financial  
products and services.

Commercial robocalling  
and Do Not Call rules.

Liability for violations of  
your business partners.



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For an index of articles and presentations on lead generation other advertising related legal topics, see [www.venable.com/leads/publications](http://www.venable.com/leads/publications).

[www.Venable.com](http://www.Venable.com)



## Articles

September 27, 2012

### What to Expect When You're Under a CFPB Investigation – Negotiating the Scope of the CID

#### AUTHORS

Jonathan L. Pompan  
Alexandra Megaris

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The Consumer Financial Protection Bureau (“CFPB”) has investigations underway that span the full breadth of the Bureau’s enforcement authority over providers of financial products and services and their vendors. If your company is the recipient of a civil investigative demand (“CID”) from the CFPB the process is not an easy one. You have to issue a record retention notice, negotiate the scope of the CID, collect responsive information and materials, respond to the CID, and then wait for the CFPB to make decision on whether it will bring an enforcement action or close the investigation.

All of this can be challenging, especially since the CFPB is still in the process of rolling out regulatory reforms and articulating its positions. On top of this, for many nonbanks, the CFPB has or will be able to exercise supervision authority and launch examinations of business practices. (For depository institutions with assets over \$10 billion the CFPB already has supervision authority). As a result, there is likely no escaping additional CFPB scrutiny in the future—even after the investigation is concluded.

When the CFPB launches an investigation, it operates under its procedures for investigating whether persons have engaged in conduct that violates federal consumer financial law. The CFPB’s investigation rules are somewhat similar to those used by other regulators, such as the Federal Trade Commission, and they establish the procedures the CFPB follows when conducting investigations. CFPB investigations generally will not be made public by the Bureau until a public enforcement action is filed or consent order is issued.

While the CFPB has the power to compel information in an investigation, the CFPB’s investigatory process is not self-executing. Accordingly, when a CID is received, the recipient first must decide whether to (1) petition the CFPB for an order modifying or setting aside the CID, or (2) negotiate the scope of the CID. These decisions must be made quickly. The CFPB’s rules require the CID recipient and the CFPB to meet and confer within 10 days on the terms of compliance with the CID, including appropriate limitations on the scope of the request, issues related to electronically stored information (“ESI”), issues related to privilege and confidential information, and a reasonable time for compliance. Moreover, the CFPB rules allow only for a short window—20 days—to petition the CFPB for an order to modify or set aside the CID.

Accordingly, a CID recipient must decide quickly on an approach and overall strategy to navigate the investigation and identify long- and short-term goals.

#### Petition to Modify or Set Aside the CID

The Consumer Financial Protection Act (“CFPA”) provides a mechanism whereby the recipient of a CID may challenge a CID by filing a petition with the CFPB Director seeking a petition to modify or set aside the CID altogether. When deciding whether or not to file a petition, the recipient of a CID must balance many factors. For instance, while the investigation itself is nonpublic, a petition to modify or set aside the CID is made public by the CFPB. On the other hand, under FTC precedent, the failure to file a petition could result in the waiver of any objections to the CID.

The CFPB’s regulations relating to petitions to modify or set aside a CID impose the following requirements:

- **Timing.** A petition must be filed within 20 days after service of the CID. However, if the return date on the CID is less than 20 days after service, the petition must be filed prior to the return date.
- **Requests for Extension of Time.** The Assistant Director of the Division of Enforcement may grant a request for an extension of time to file a petition (although such requests are disfavored).
- **Substance.** The petition must set forth all assertions of privilege or other factual and legal objection



to the CID, including all appropriate arguments, affidavits, and other supporting documentation. To date, the CFPB has issued only one decision in response to a petition to modify or set aside a CID. In this order, the CFPB Director denied the request and ordered the recipient to comply with the CID. The Director cited the CFPB and the broad latitude in the use of investigative subpoenas afforded to administrative agencies in order to advance the government's duty to enforce the law. As a result, the decision process on whether to petition the CFPB or negotiate can feel like a catch-22 situation that is setup to result in cooperation.

### Negotiating the Scope of CID Request

The key to successfully negotiating a CID is preparation and working quickly. The CFPB typically will not grant a modification to a CID request unless the justification for the modification is both legitimate and specific. The more details you provide the CFPB to support your rationale for seeking the modification and substantiate claims of burden—especially with respect to any technical burden imposed on the company—the greater likelihood you will succeed. It also is advisable to offer specific alternatives and suggestions for responding to the requests instead of simply asserting that the requests are too broad.

The first opportunity you likely will have to discuss the scope of the CID with the CFPB and negotiate the terms of compliance is during the mandatory meet and confer with the CFPB attorneys, which is supposed to take place within 10 calendar days after receipt of the CID. In order to be prepared for the meet and confer, you must quickly assemble a legal team, assess the scope of the CID, consult with the relevant IT and business personnel, and outline, request-by-request, a proposal for modifying the CID.

There are many ways to push back on the scope of a CID, and all options should be put on the table in order to reach maximum results. While each CID is different and highly dependent on the underlying legal issues and facts, there are several areas common to all CIDs that greatly affect the burden and cost of complying with a CID. Below we provide an overview of these areas and some suggestions.

- . **Applicable Time Period.** Each CID includes a defined time period covered by the CID. Typically the CFPB will seek information and materials going back several years, until “the date of full compliance with this CID.” Although the CFPB may not agree to a blanket modification to the applicable time period, it may consider limiting the time period for select requests.
- . **Definitions.** It is easy to overlook the Definitions section of the CID and go straight to the CID requests, but it is important to review the definitions carefully because they greatly affect the scope and burden of the CID. For instance, the CFPB typically defines the term “company” broadly to include the CID recipient plus all entities affiliated with the recipient—even if those affiliates are in different lines of business than the recipient. Depending on the company, this could significantly expand the scale of the document/data collection and review. This is particularly true for larger entities with complicated corporate structures.
- . **Redundant or Superfluous Documents.** Like other government investigators, the CFPB typically will phrase its requests as broadly as possible to capture all documents and information (using phrases such as “all documents relating to”). Often times such requests require the production of numerous copies of materials that are, in all material respects, identical. For instance, a request for all consumer contracts could potentially require the production of millions of contracts, all of which are identical except for the name and signature of the consumer. Consider offering the CFPB models, templates, or samples of documents in lieu of a full production to reduce the overall burden and cost of the document production. Further, companies that are publicly traded will have disclosed through filings with the Securities and Exchange Commission information that may duplicate information responsive to the CID.
- . **ESI Considerations.** The search, collection, and production of ESI are particularly daunting when dealing with a CID. You should treat the issue of ESI here the same as you would in civil litigation. At a minimum, you will need to (1) issue a records retention notice to ensure all potentially responsive ESI is preserved, (2) confer with your IT staff to identify potential sources, locations, and storage and retrieval mechanisms of ESI, and (3) work with the IT and business departments to determine the nature and volume of potentially responsive ESI. Depending on the volume of potentially responsive ESI and the degree of difficulty of retrieving it, you may need to narrow the amount of ESI collected. To do so, you will need to present to the CFPB information about the unavailability, inaccessibility, or excessive volumes of ESI. In any event, the first step will be to

understand where and what ESI is held by the company and how that fits with the requests of the CID.

- **Privileged and Confidential Information.** The CID likely will require you to identify all materials withheld or redacted on the grounds of privilege. The process of identifying privileged documentation and creating a privilege log may, depending on the nature of your business, be extremely time consuming and costly. Consider ways to modify the scope of the CID to minimize this burden (for example, excluding the company's lawyers from any custodian lists). At the same time, it may be useful to consider whether privileged material would be useful to disclose and whether it can still be protected with causing waiver issues.
- **Time for Compliance.** Regardless of what you ultimately negotiate with respect to the terms of compliance with the CID, you should consider requesting a rolling production of information and documents, in order to help manage the time and resources needed to respond to the requests. Whether the CFPB will grant the request will depend upon the circumstances and if it's a "win-win" for both parties. Obviously, an extension and rolling production can allow the CFPB to receive some materials sooner, but also it can give recipients of a CID valuable time to collect and process other information that is potentially responsive to the request.

Responding to a CFPB investigation can be a difficult process. A company that is the recipient of a CID will be better able to be successful if it understands and minimizes its risks and at the same time maximizes its opportunity for a successful long-term relationship as a regulated entity. The decision to challenge a CID or to negotiate the terms of the CID, and that negotiation, is just the first step on this long road.

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This article is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to a specific fact situation.

## ARTICLES

December 19, 2013

### CFPB ENFORCEMENT USES UDAAP TO PUT FOCUS ON STATE LAW COMPLIANCE

*This article was also published in the January 2014 edition of The Independent Counselor, the quarterly newsletter of the Association of Independent Consumer Credit Counseling Agencies.*

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The Consumer Financial Protection Bureau (“CFPB” or the “Bureau”) has put state law compliance front and center in a case filed in federal court against an online payday lender, related companies, and their principal for allegedly collecting on money they did not owe. According to the CFPB, the companies funded, purchased, serviced and collected online payday loans made by a tribally-affiliated lender (not sued by the CFPB). The defendants were charged with engaging in unfair, deceptive and abusive acts and practices (“UDAAP”) in seeking to collect loans that were purportedly void in whole or in part under state law. The CFPB does not have authority to enforce state usury rates or establish its own standard, so this approach has become one of the few ways that the CFPB can go after online small-dollar or payday lenders.

The CFPB seeks:

- Monetary relief, damages, and civil penalties: The CFPB wants the lender to refund consumers the money that they took from them where the loans were void or the consumer’s obligation was otherwise nullified. The Bureau’s complaint also seeks additional damages and civil penalties.
- No further violations of federal consumer laws: The Bureau wants the defendants to adhere to all federal consumer financial protection laws, including prohibitions on UDAAPs.

This is the CFPB’s first lawsuit against companies involved in online payday lending, and it advances an aggressive legal theory by asserting UDAAP violations as a result of alleged violations of state law. In addition, the Bureau is working closely with state Attorneys General and banking regulators. According to the press release announcing the lawsuit, many of these state officials are also filing their own lawsuits and announcing formal investigations; others are already in litigation. This type of allegation by a federal enforcer is rare, but not entirely novel. In our experience, we have seen enforcement staff at the Federal Trade Commission base allegations of deceptive conduct on alleged violations of state law compliance in some debt relief and loan modification cases. Notably, unlike the CFPB’s complaint against the payday lender, in the FTC examples that we are familiar with the alleged state law compliance violations were not the primary allegation that led to the enforcement action. Rather, the main issues were telemarketing (e.g., robocalling) or a perceived lack of claim substantiation for advertising and marketing.

Bottom line, the CFPB scrutinizes state law compliance, and may consider non-compliance as the basis for a deceptive activity, even in the absence of other perceived violations of federal consumer protection law. Accordingly, state law compliance cannot be ignored by nonbanks that fall under the scope of the CFPB. This includes requirements under such statutes as state money services business acts, debt adjusting laws, credit services organization acts, state usury and payday loan statutes and other laws that would often result in a void or voidable consumer agreement if there is non-compliance with the state law.

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## ARTICLES

July 21, 2014

### CFPB TO SCRUTINIZE NONBANK PRODUCTS: PREPAID CARDS, DEBT SETTLEMENT, CREDIT REPAIR, AND PAWN AND TITLE LOANS

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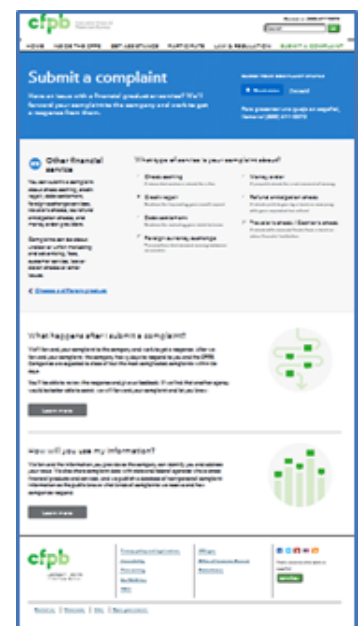
Three years after it opened for business, on July 21, 2014, the Consumer Financial Protection Bureau (CFPB) announced it was accepting complaints from consumers with problems with (1) prepaid cards; (2) debt settlement services; (3) credit repair services; and (4) pawn and title loans. This signals that the CFPB will now be subjecting companies in these markets to heightened scrutiny.

#### Background

The CFPB started taking complaints about credit cards when it opened its doors in July 2011. It also solicits complaints about mortgages, bank accounts and services, private student loans, auto and other consumer loans, credit reporting, debt collection, payday loans, and money transfers. To date, the CFPB has received 400,000 complaints from consumers.

#### Complaint Process

The CFPB expects companies to respond to complaints within 15 days and describe the steps they have taken or plan to take. The CFPB expects companies to close all but the most complicated complaints within 60 days. Consumers are given a tracking number after submitting a complaint and can check the status of their complaint by logging on to the CFPB website.



#### Prepaid Cards

Prepaid cards, which include gift cards, benefit cards, and general purpose reloadable cards (GPRCs), generally allow a consumer to access money that has been paid and loaded onto the card upfront. The CFPB and consumer groups believe that some prepaid cards have fewer consumer protections than debit or credit cards. As a result, the CFPB indicates it will issue a proposed rule aimed at increasing federal consumer protections for general purpose reloadable prepaid cards.

Complaint categories include:

- Problems managing, opening, or closing an account
- Overdraft issues and incorrect or unexpected fees
- Frauds, scams, or unauthorized transactions
- Advertising, disclosures, and marketing practices
- Adding money and savings or rewards features

#### Debt Settlement and Credit Repair Services

While debt settlement services fall under the jurisdiction of the CFPB, credit repair services don't clearly do so. Nonetheless, they are now included in the portal.

Complaint categories include:

- Excessive or unexpected fees
- Advertising, disclosures, and marketing practices

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- Customer service issues
- Frauds or scams

### **Pawn and Title Loans**

According to the CFPB, pawn stores and title loan companies often provide small loans to consumers using personal property or a vehicle title as collateral that are frequently short-term and may have high interest rates.

Complaint categories include:

- Unexpected charges or interest fees
- Loan application issues
- Problems with the lender correctly charging and crediting payments
- Issues with the lender repossessing, selling, or damaging the consumer's property or vehicle
- Unable to contact lender

\* \* \* \* \*

The consumer complaint portal is an integral part of the CFPB's data gathering process and used to inform decisions about regulatory, supervision and examination, and enforcement priorities.

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## ARTICLES

July 2014

### CFPB DEBT COLLECTION (REGULATION F) RULEMAKING FAQs

On November 12, 2013, the Consumer Financial Protection Bureau (“CFPB” or the “Bureau”) issued an [Advance Notice of Proposed Rulemaking](#) (“ANPR”) seeking comment, data, and information from the public about debt collection practices, and in January 2014, the CFPB extended the comment period to February 28, 2014. The CFPB has indicated that it will move to the next stage in rulemaking in December 2014. While the ANPR is far from a final rule, the ANPR included a number of policy statements and questions that provide insight into the direction the CFPB may be headed when it releases a proposed rule.

#### Why is the CFPB engaged in a rulemaking?

For the last several years, the Federal Trade Commission (“FTC”) and now the CFPB have reportedly received more consumer complaints about debt collectors than about any other single industry.

#### What Federal rules presently apply to debt collection?

The Fair Debt Collection Practices Act (“FDCPA”) prohibits debt collectors from engaging in unfair, deceptive, abusive, and other unlawful collection practices, but no federal agency was vested with authority to issue general implementing regulations prior to the creation of the CFPB. In addition, generally consumer financial services providers are subject to restrictions on unfair, deceptive, or abusive acts and practices (“UDAAPs”) under the Consumer Financial Protection Act (“CFPA”), and, for the most part, restrictions on unfair and deceptive trade practices under the Federal Trade Commission Act.

From 1977 to 2010, the primary enforcement authority on the federal level for the FDCPA was the FTC. Under the Dodd-Frank Act, the CFPB has primary government responsibility for administering the FDCPA. The Bureau has the authority to prescribe rules with respect to debt collection; issue guidance concerning compliance with the law; collect complaint data; educate consumers and collectors; and undertake research and policy initiatives related to consumer debt collection. The Bureau now shares federal enforcement responsibility for the FDCPA with the FTC and other federal agencies. In January 2012, the CFPB and the FTC entered into a [Memorandum of Understanding](#) (“MOU”) to coordinate efforts to protect consumers and avoid duplication of federal law enforcement and regulatory efforts. The MOU allows the FTC and CFPB to share enforcement information and coordinate activities.

#### What are the highlights of the rulemaking?

The CFPB is considering whether rules governing the collection of debts are warranted under the FDCPA or other CFPB authorities, including the CFPA, and, if so, what types of rules would be appropriate. Among the highlights:

- **Scope of Rulemaking** - Significantly, the CFPB indicated that future rules could encompass parties that collect their own debts—entities that are, under most circumstances, not subject to the FDCPA. The FDCPA generally applies to third-party debt collectors, such as collection agencies, debt purchasers, and attorneys who are regularly engaged in debt collection.

In addition, in [Bulletin 2013-07 \(July 10, 2013\)](#) the CFPB stated that by its authority under Dodd-Frank, all “covered persons,” including originating creditors, must refrain from committing UDAAPs when engaging in debt collection. The Bulletin offered examples of conduct that could constitute UDAAPs, including various acts or practices specifically identified in the FDCPA as prohibited, as well as various acts or practices that would likely be covered by the general FDCPA prohibitions on harassment or abuse, false or misleading representations, and unfair practices.

Also, the CFPB notes in the ANPR that some debt collection that is subject to the FDCPA may not be subject to the CFPA’s restriction on UDAAPs, and hence, it sought information about different types of debts in collection to help it determine which debts involve a consumer financial product or service.

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- **Disclosures** - The CFPB indicated that the rulemaking might include disclosures or address acts or practices in connection with debt collection activities. Of note, the CFPB expressed concerns about time-barred debt and the risk it poses to consumers who may not understand their legal rights and obligations. However, at the time of the ANPR there was a circuit split on whether settlement letters in which debt collectors made no affirmative disclosure about the time-barred nature of the debt violated the FDCPA.
- **Litigation Practices** - The CFPB indicated that there is a state role in debt collection litigation. However, based on the questions asked it appears that the CFPB may seek to influence state court procedures through imposing requirements on collectors by creating higher burdens of substantiation using UDAAP concepts.

#### **What areas of the collections process is the CFPB considering for a rule?**

The ANPR requested responses to 450 questions and sub questions. Among the topics the ANPR addressed were: Scope; Information Accuracy; Validation Notices, Disputes, and Verifications; Debt Collection Communications; Unfair, Deceptive, and Abusive Acts and Practices; Collection of Timed-Barred Debts; Debt Collection Litigation Practices; State and Local Debt Collection Systems; Recordkeeping Monitoring; and Compliance Requirements.

#### **What questions did the CFPB ask about information accuracy?**

The CFPB has stated several times that it is concerned about the transfer of information from an original creditor to third-party debt collection firms and debt buyers, and from those parties to other debt collectors and credit bureaus. The CFPB asked how documents and records are currently transferred and how to improve the accuracy of that information. The Bureau asked questions about how to ensure that debt collectors identify the correct person, claim the correct amount, and have adequate paperwork or data to support their claims about the amount owed.

#### **What questions did the CFPB ask about information provided to the consumer?**

Among the questions the ANPR raised is whether federal rules can better ensure that consumers receive clear information about debts and adequate information about legal rights. The CFPB is presently testing disclosures for debt collection.

#### **What questions did the CFPB ask about communication tactics used by collectors?**

Among the questions the ANPR raised is how federal rules can regulate contact frequency, contact methods, and contact claims.

#### **Have the FTC and the CFPB previously taken steps to study the debt collection market?**

The FTC and CFPB have undertaken several studies of the debt collection industry.

- **Collecting Consumer Debts: The Challenges of Change** (2009) – This FTC report recognized that the modernization of the FDCPA was needed in order to address new technologies, and noted inconsistencies in the implementation and interpretation of the law.
- **Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration** (2010) – This FTC report made recommendations for enhanced state court and arbitration rules.
- **The Structure and Practices of the Debt Buying Industry**(2013) – This FTC report took an extensive look at the debt buying industry, focusing primarily on the manner and flow of information from creditors and other owners of debts to debt buyers. Of note, the FTC acknowledged in the report that its study did not permit any conclusions as to the prevalence of errors or inaccuracies in the information about the debts transferred.
- **Life of A Debt: Date Integrity in Debt Collection**(2013) – The FTC and CFPB held a joint roundtable that focused on four key areas: (1) information available to debt collectors at the time of assignment or sale, (2) verifying disputed debts both from the perspective of the FDCPA and FCRA, (3) debt collection litigation, and (4) time-barred debt.

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For more information about this and related industry topics, see [www.venable.com/cfpb/publications](http://www.venable.com/cfpb/publications).

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## ARTICLES

August 4, 2014

### NEW OCC GUIDANCE ON DEBT SALES

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On August 4, 2014, the Office of the Comptroller of the Currency (“OCC”) released new guidance to (Bulletin 2014-37) regulated entities on the application of consumer protection requirements and safe and sound banking practices to consumer debt-sale arrangements with third parties (e.g., debt buyers) that intend to pursue collection of the underlying obligations. This new guidance takes the place of a best practices document provided in July 2013 to the Senate Subcommittee on Financial Institutions and Consumer Protection. It emphasizes that banks must be cognizant of the significant risks associated with debt-sale arrangements, including operational, compliance, reputation, and strategic risks. The OCC’s view is that banks that engage in debt sales should do so in a safe and sound manner and in compliance with applicable laws—including consumer protection laws.

The guidance describes the OCC’s expectations for banks that engage in debt-sale arrangements, including

- ensuring that appropriate internal policies and procedures have been developed and implemented to govern debt-sale arrangements consistently across the bank.
- performing appropriate due diligence when selecting debt buyers.
- ensuring that debt-sale arrangements with debt buyers cover all important considerations.
- providing accurate and comprehensive information regarding each debt sold, at the time of sale.
- ensuring compliance by the bank with applicable consumer protection laws and regulations.
- implementing appropriate oversight of debt-sale arrangements.

The guidance makes clear that if OCC examiners find unsafe or unsound practices or practices that fail to comply with applicable laws or regulations, the OCC may bring enforcement actions. For example, the OCC announced a large enforcement action with a **major bank** regarding its collection activities in September 2013. The guidance also states that when the OCC becomes aware of concerns with nonbank debt buyers, the agency refers those issues to the CFPB, which has jurisdiction over these entities.

As OCC Bulletin 2014-37 is effective immediately, banks should consider and enhance their debt sales programs to achieve full compliance with the new guidance. At the same time, would-be debt buyers should consider and enhance their compliance management systems and compliance programs in order to meet the expectations of banks and their supervisory examiners.

A copy of the Bulletin can be found [here](#).

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