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## **Advertising and Marketing Law Fundamentals for Consumer Financial Products and Services**

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# Today's Webinar

- The similarities and differences between the CFPB UDAAP (Consumer Financial Protection Act), FTC UDAP (FTC Act), and the federal banking agencies UDAP legal authorities (FTC Act and Regulation AA).
- Advertising and marketing law basics, including general rules for print, TV, radio, online, email, telemarketing, and social media
- Case studies from notable CFPB enforcement actions and announcements
- Compliance tips, including use of third-party service providers
- Exam preparation and ways to navigate a CFPB investigation into advertising and marketing practices



# The CFPB and Advertising and Marketing

- **Enforcement**
- **Supervision**
  - Banks (\$10 billion in total assets or greater)
  - Nonbanks
    - Mortgage, Private Student Loans, Small Dollar Lenders
    - Larger Participants (Credit Bureaus, and Debt Collectors, more to follow)
  - Service providers
- **Financial Education, Reports, etc.**
- **Regulatory**



# Overview of CFPB's Unfair, Deceptive, Abusive Acts or Practices (UDAAP) Authority

- The Consumer Financial Protection Act prohibits unfair, deceptive, or abusive acts and practices in connection with consumer financial products and services, and the “enumerated consumer laws” and the implementing regulations.
- Enumerated Consumer Laws include:
  - Electronic Fund Transfer Act (15 U.S.C. 1693 et seq.), except with respect to Section 920 of that Act;
  - Equal Credit Opportunity Act (15 U.S.C. 1691et seq.);
  - Fair Credit Billing Act (15 U.S.C. 1666 et seq.);
  - Fair Credit Reporting Act (15 U.S.C. 1681et seq.), except with respect to Sections 615(e) and 628 of that Act (15 U.S.C. 1681m(e), 1681w);
  - Home Owners Protection Act of 1998 (12 U.S.C. 4901 et seq.);
  - Fair Debt Collection Practices Act (15 U.S.C. 1692 et seq.);
  - Subsections (b) through (f) of Section 43 of the Federal Deposit Insurance Act (12 U.S.C. 1831t(b)–(f));
  - Sections 502 through 509 of the Gramm-Leach-Bliley Act of 2009 [Privacy of Consumer
  - Financial Information](15 U.S.C. 6802–6809) except for Section 505 as it applies to Section 501(b);
  - Truth in Lending Act (15 U.S.C. 1601 et seq.);
  - Truth in Savings Act (12 U.S.C. 4301 et seq.);
  - Section 626 of the Omnibus Appropriations Act of 2009, Public Law 111–8



# Overview of CFPB's Unfair, Deceptive, Abusive Acts or Practices (UDAAP) Authority

- Unfair Acts and Practices: Defined in the CFPA
- Deceptive Acts and Practices: Not defined in the CFPA; CFPB has looked to the Federal Trade Commission Act
- Abusive Acts and Practices: Defined in the CFPA; new standard



# CFPB's Authority vs. Authority of the FTC and Banking agencies

- Section 5 of the **Federal Trade Commission Act** (FTCA) is the basis for the unfairness and deception standards used by the FTC and banking agencies
- CFPB looks to the Dodd-Frank Act (Title X, **Consumer Financial Protection Act**)
  - CFPB **deception** and **unfairness** standards are similar to FTC Act standards
- Only CFPB has the **abusive** standard in its core statute
  - “Abusive” standard appears in Telemarketing Sales Rule



# What Types of Practices Are Abusive?

**Abusive** means 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/ service; OR
  - the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product/service; OR
  - the reasonable reliance by the consumer on a covered person (bank or nonbank within the CFPB's jurisdiction) to act in the interests of the consumer

Recently settled case: *Consumer Financial Protection Bureau v. American Debt Settlement Solutions, Inc. et al.*



## CFPB may enforce several rules issued by the Federal Trade Commission

- Telemarketing Sales Rule (16 CFR Part 310);
- Use of Prenotification Negative Option Plans (16 CFR Part 425);
- Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations (16 CFR Part 429);
- Preservation of Consumers' Claims and Defenses (16 CFR Part 433);
- Credit Practices (16 CFR Part 444);
- Mail or Telephone Order Merchandise (16 CFR Part 435);
- Disclosure Requirements and Prohibitions Concerning Franchising (16 CFR Part 436);
- Disclosure Requirements and Prohibitions Concerning Business Opportunities (16 CFR Part 437).



# Application of UDAAP Authority in Recent CFPB Actions

- Types of **UDAAP** issues flagged by the CFPB to-date
  - **Deciphering Claims**
    - Distressed consumers
  - **Telemarketing/Backroom issues**
  - **Traditional advertising/marketing**
- Remedies
  - Scope of redress



# Compliance Process

- Implications of CFPB settlement potentially far greater than FTC
- Far-reaching compliance provisions
- Regular periodic reports
- Third party consultant
- Oversight and responsibility of Board
- Order scope potentially very broad (all advertising and marketing)
- In one case, ceasing activity until approved plan



## Preventative Steps

- Periodic training
- Audit customer interactions
- Remedy problems when discovered
- Backstop oral representations with written follow-up
- Prepare for supervision/upgrade compliance



# Third Party Service Providers

- What a service provider is under the CFPA
- CFPB's stated-expectations: April 2012 Bulletin
- Managing service providers: UDAAP context



CFPB Bulletin 2012-03  
Date: April 13, 2012  
Subject: Service Providers

The Consumer Financial Protection Bureau ("CFPB") expects supervised banks and nonbanks to oversee their business relationships with service providers in a manner that ensures compliance with Federal consumer financial law, which is designed to protect the interests of consumers and avoid consumer harm. The CFPB's exercise of its supervisory and enforcement authority will closely reflect this orientation and emphasis.

This Bulletin uses the following terms:

*Supervised banks and nonbanks* refers to the following entities supervised by the CFPB:

- Large insured depository institutions, large insured credit unions, and their affiliates (12 U.S.C. § 5515); and
- Certain non-depository consumer financial services companies (12 U.S.C. § 5514).

*Supervised service providers* refers to the following entities supervised by the CFPB:

- Service providers to supervised banks and nonbanks (12 U.S.C. §§ 5515, 5514); and
- Service providers to a substantial number of small insured depository institutions or small insured credit unions (12 U.S.C. § 5516).

*Service provider* is generally defined in section 1002(26) of the Dodd-Frank Act as "any person that provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service." (12 U.S.C. § 5481(26)). A service provider may or may not be affiliated with the person to which it provides services.

*Federal consumer financial law* is defined in section 1002(14) of the Dodd-Frank Act (12 U.S.C. § 5481(14)).

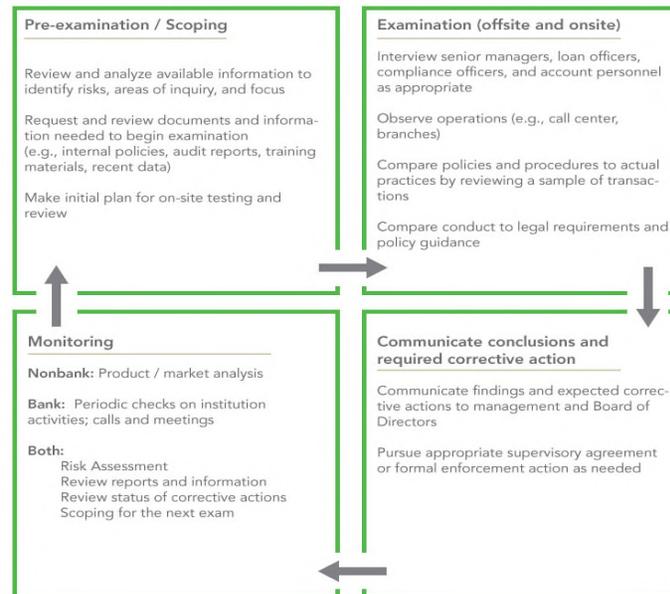
**A. Service Provider Relationships**

The CFPB recognizes that the use of service providers is often an appropriate business decision for supervised banks and nonbanks. Supervised banks and nonbanks may outsource certain functions to service providers due to resource constraints, use service providers to develop and market additional products or services, or rely on expertise from service providers that would not otherwise be available without significant investment.



# How The Bureau Can Apply Its UDAAP Authority

- Understanding the CFPB's Enforcement Process
- Understanding the CFPB's Supervision Process



## CFPB Enforcement Authority

- CFPB is authorized to conduct investigations to determine whether any person is, or has, engaged in conduct that violates Federal consumer financial law.
- Investigations may be conducted jointly with other regulators, and may include:
  - subpoenas or civil investigative demands for testimony,
  - responses to written questions,
  - documents, or
  - other materials



# CFPB Enforcement Power

- CFPB may investigate, issue subpoenas and civil investigative demands, and compel testimony
- CFPB may conduct hearings and adjudications to enforce compliance, including issuing cease-and-desist orders
- CFPB may initiate actions for civil penalties or an injunction
- Penalties up to \$1M per day for knowing violations
- No exemplary or punitive damages
- Criminal referrals to DOJ
- Whistleblower protection
- State attorneys general may also enforce the CFPA with notice to the CFPB
- May enforce rules issued by the FTC to the extent such rules apply to a covered a person or service provider
- No express private right of action under the CFPA



# Questions to Consider When Reviewing Advertising

- Do they contain any material misrepresentations, expressly or by implication, including the following:
  - The existence, nature, or amount of fees or other costs,
  - The nature and benefits of the product or service advertised,
  - The means by which to close or cancel an product or service, or
  - Terms and Conditions.
- How do the representations compare to actual practices?
- Do advertisements and promotional materials directed to consumers clearly disclose all material limitations or conditions on the terms or availability of products or services marketed to consumers, such as:
  - expiration date
  - material prerequisites for obtaining particular products, services, or benefits (e.g., discounts, refunds, or rebates).
- Is there fine print or other disclosures?
- Are there required disclosures required by applicable law or regulation?
- If additional products or services are sold or offered in connection with products or services sold to consumers, determine :
  - Do marketing materials reflect the actual terms and conditions of the product and are not deceptive or misleading to consumers?
  - Have you reviewed scripts and manuals used by the entity's telemarketing and customer service centers?
  - What is the cancelation/return policy?
  - Are there any guarantees?
  - Are testimonials or endorsements used?
  - Is the advertisement comprehensible by the target audience?



## Questions and Answers

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