



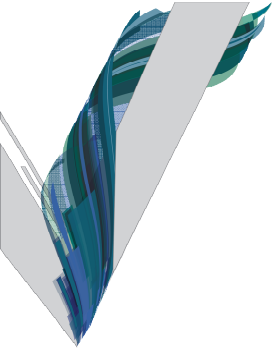
# **UDAAP & UBIT: Legal Issues Affecting the Student Loan Industry**

**2015 Education Finance Council Mid-Year Membership Meeting**

**July 10, 2015**

**Jonathan L. Pompan**  
Partner and Co-Chair CFPB Task Force  
Venable LLP  
JLPompan@Venable.com  
202.344.4383

**Carrie Garber Siegrist**  
Associate, Venable LLP  
CGSiegrist@Venable.com  
202.344.4249



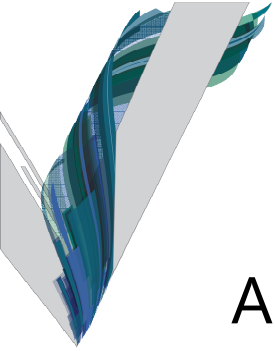
# **Avoiding Unfair, Deceptive, or Abusive Acts or Practices**

**Jonathan L. Pompan**



## What is UDDAP?

- Under the **Dodd-Frank Wall Street Reform and Consumer Protection Act** (Dodd-Frank Act), all covered persons or service providers are legally required to refrain from committing **unfair, deceptive, or abusive acts or practices** (collectively, UDAAPs) in violation of the Act. (See Dodd-Frank Act, §§ 1002, 1031 & 1036(a), codified at 12 U.S.C. §§ 5481, 5531 & 5536(a))
- It is also prohibited for any person, even if not a covered person or service provider, to knowingly or recklessly provide substantial assistance to a covered person or service provider in violating section 1031 of the Dodd-Frank Act. (See Dodd-Frank Act, § 1036(a)(3), 12 U.S.C. § 5536(a)(3))



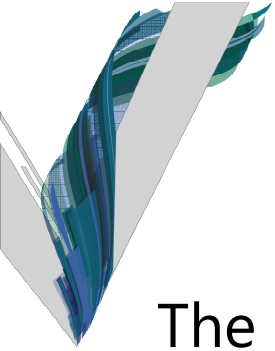
## Deceptive Acts or Practices

A representation, omission, act or practice is **deceptive** when:

1. The representation, omission, act, or practice misleads or is likely to mislead the consumer;
2. The consumer's interpretation of the representation, omission, act, or practice is reasonable under the circumstances; and
3. The misleading representation, omission, act, or practice is material.

Consider: 4 Ps: prominent, presented, placement, proximity.





## Unfair Acts or Practices

The standard for unfairness in the Dodd-Frank Act is that an act or practice is **unfair** when:

- (1) It causes or is likely to cause substantial injury to consumers;
- (2) The injury is not reasonably avoidable by consumers; and .
- (3) The injury is not outweighed by countervailing benefits to consumers or to competition.



# Abusive Acts or Practices

The Dodd-Frank Act 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.

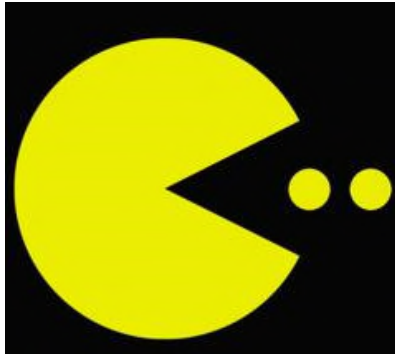
# CFPB and Sources of Expectations

The collage features several key CFPB resources:

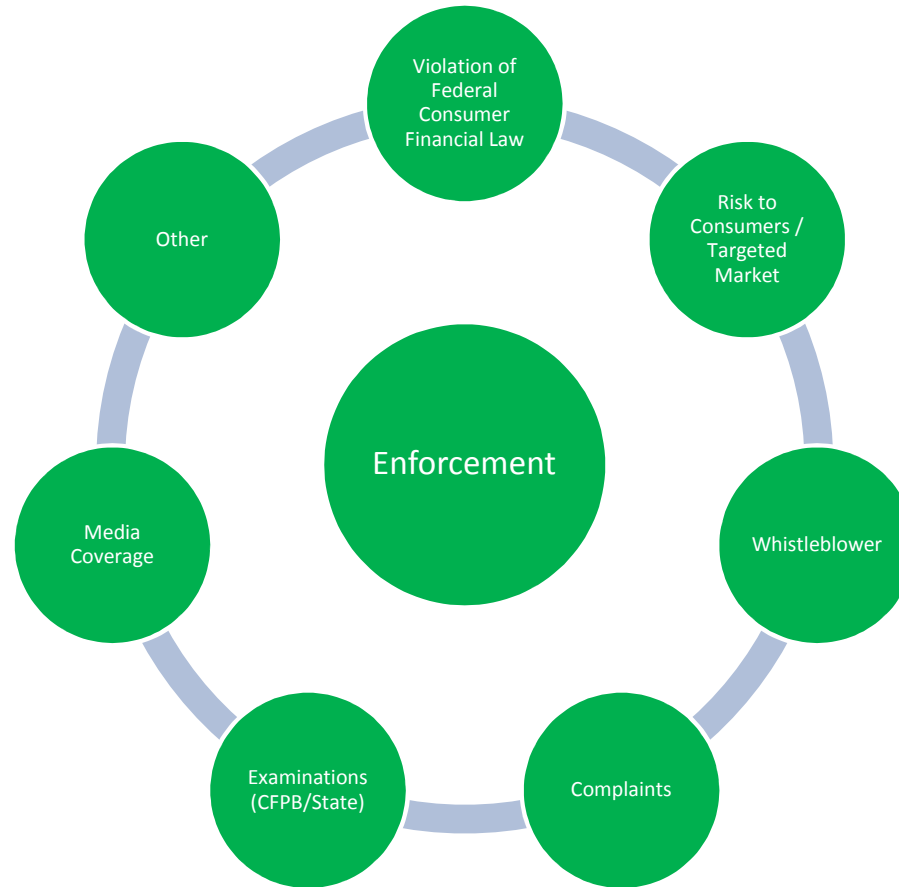
- Submit a complaint:** A blue header with instructions on how to file a complaint and a 'Check status' button.
- FINAL RULES ISSUED BY THE CFPB:** A white box listing rules from 2015, including 'Defining Larger Participants of the Automobile Financing Market and Defining Certain Automobile Lending Activity as a Financial Product or Service' (June 9) and '2015 Rural or underserved counties list' (June 10).
- Supervisory Highlights:** A green cover for a report from October 2013, dated Fall 2014.
- CFPB Supervision and Examination Manual:** A green cover for a manual from October 2013, dated Fall 2014.
- 2015 Decision List:** A list of administrative proceedings with links to consent orders and stipulations, including cases like 'Guarantee Mortgage Corporation' and 'International Land Consultants, Inc., et al.'



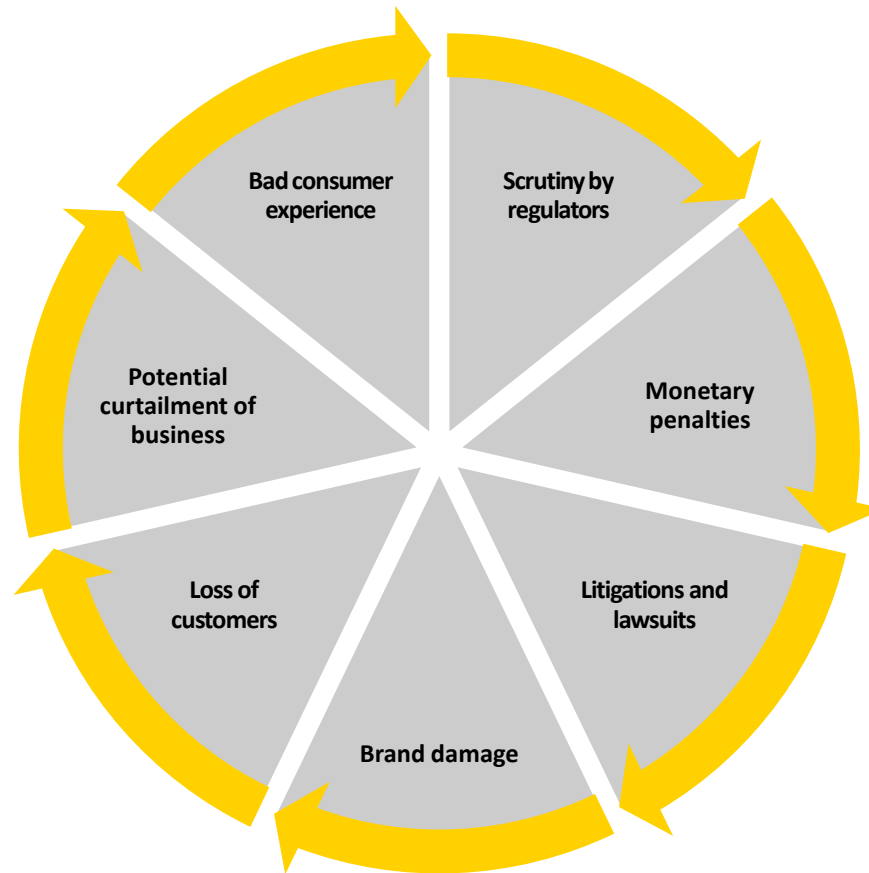
# CFPB and other Sources of Regulation

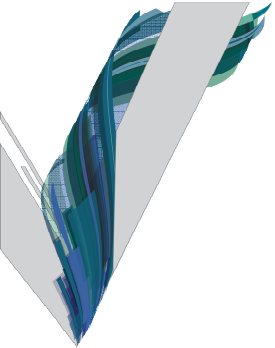


# Common Triggers of Enforcement



# What's the impact of an investigation and enforcement action?

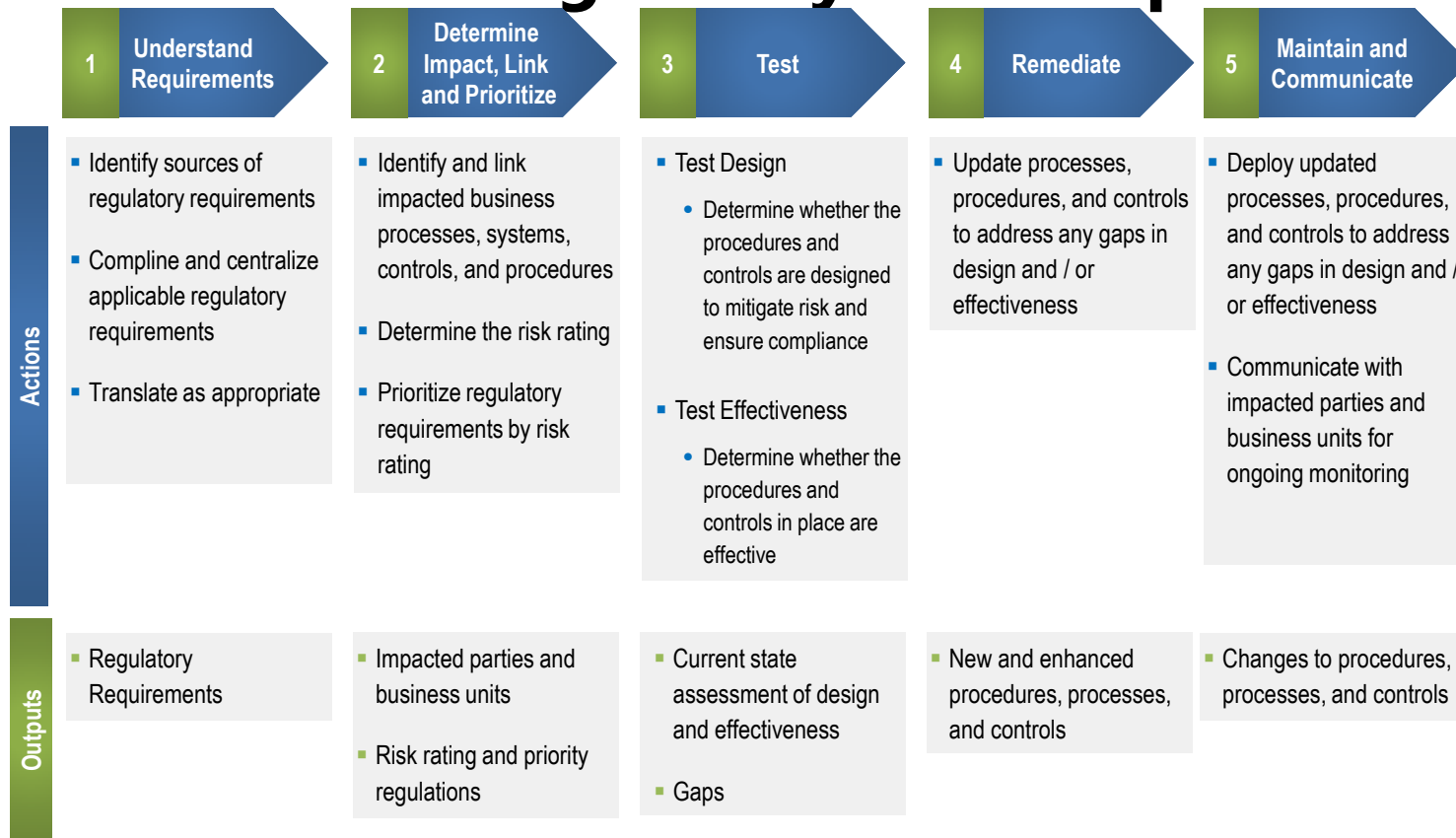




# CFPB Enforcement Authority

- 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

# Avoiding UDAAP in an Evolving Regulatory Landscape







# CFPB Coordination with Other Federal and State Enforcement Agencies

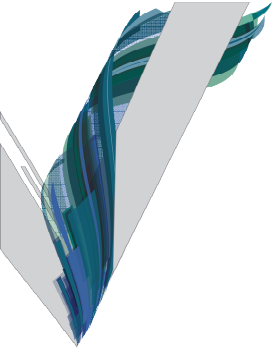
- Announced in January 2012 (after State of the Union Address)
- Unit within the Financial Fraud Enforcement Task Force that was created in late 2009, and is led by the DOJ
- CFPB, FTC, DOJ, DoE Inspector General, state AGs, and more are participating



# CFPB Threats and Opportunities

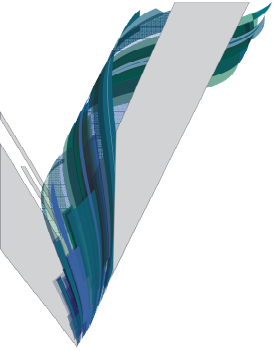
- Student Related Initiatives
- Civil Money Penalty Fund
- Consumer Financial and Literacy Initiatives
- Initiatives Related to Other Lending and Debt Collection
- Other



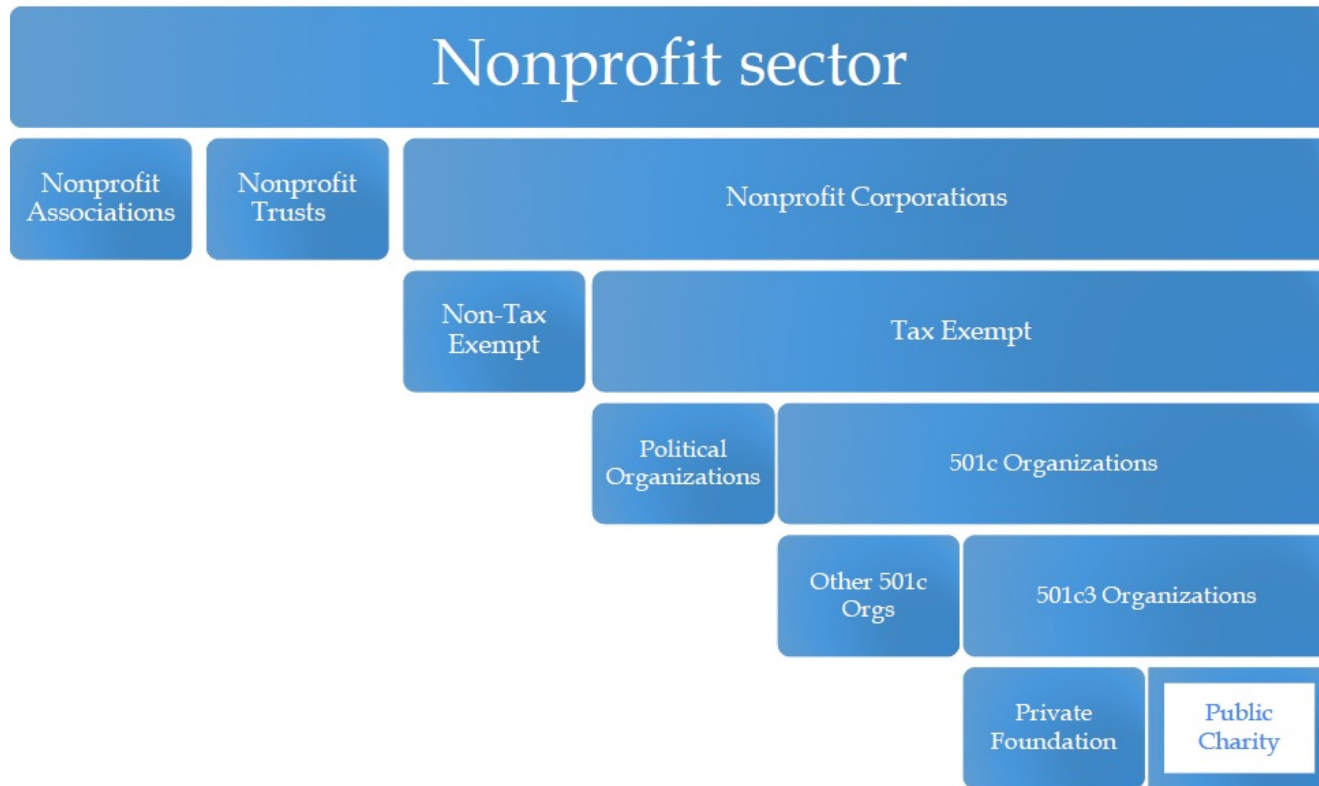


# **UBIT: Unrelated Business Income Tax**

**Carrie Garber Siegrist**



# Scope of Presentation





## Exempt Organization Purposes

- IRC Section 501(c)(3) tax-exempt organizations must be organized and operated exclusively for the exempt purposes described in the Code.
- IRC §501(c)(3)
  - “...religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals...”



## Private Inurement / Private Benefit

- Earnings of an exempt organization may not inure to any private shareholder or individual
  - Any person having a personal or private interest in the activities of the organization
- Examples
  - Goods and services to members or other insiders
  - Paying personal expenses
  - Rent-free housing
  - Interest-free or no-obligation-to-repay loans



## Commerciality – Not More than an Insubstantial Amount

- Proper for an exempt organization to conduct a commercial trade or business if it is in furtherance of its exempt purposes and the primary purpose is not to engage in an unrelated trade or business
- Generally, the IRS will revoke or deny exempt status to otherwise qualifying organizations where their operation of a commercial trade or business is unrelated to the organization's purposes and it will require substantial attention from the organization



## Unrelated Business Income Tax

- Unrelated business taxable income tax is the gross income derived by any organization from any unrelated trade or business regularly carried on by it, less the deductions allowed which are directly connected with the carrying on of such trade or business.
  - Trade or business
  - Not substantially related
  - Regularly carried on





## Income Excluded from UBTI

- Income that is specifically excluded from UBIT
  - Interest income
  - Royalty income
  - Certain research income
  - Conference and trade show revenue
  - Qualified sponsorship income
  - Certain bingo games
  - Debt management plan services
  - Renting mailing list to another charitable organization



## Trade or Business

- Not an unrelated trade or business if:
  - Volunteer labor
  - Convenience of members, students, patients, officers, or employees
  - Donated merchandise
  - Low-cost articles



## Substantially Related

- Relevant factor here: Is the trade or business related to your exempt organization's purposes?
  - Need to generate revenue is not enough
- Focus: unfair competitive advantage to exempt organization?



## Exception: IRC Section 115

- Section 115 excludes from gross income “income derived from any public utility or the exercise of any essential government function and accruing to a State or any political subdivision thereof, or the District of Columbia.”
- Implications
  - IRS Form 990
  - Corporate Status
  - Change in Programs



**Jonathan L. Pompan**  
**Partner and Co-Chair CFPB Task Force**  
**Venable LLP**  
**JLPompan@Venable.com**  
**202.344.4383**

**Carrie Garber Siegrist**  
**Associate, Venable LLP**  
**CGSiegrist@Venable.com**  
**202.344.4249**

## Thank you.

To view an index of Venable's articles and presentations or upcoming seminars on consumer financial protection legal topics, see [www.Venable.com/cfpb/publications](http://www.Venable.com/cfpb/publications) or <http://www.venable.com/cfpb/events>.

To view an index of Venable's articles and presentations or upcoming seminars on nonprofit legal topics, see [www.Venable.com/nonprofits/publications](http://www.Venable.com/nonprofits/publications) or [www.Venable.com/nonprofits/events](http://www.Venable.com/nonprofits/events).

To view recordings of Venable's nonprofit programs on our YouTube channel, see [www.youtube.com/user/VenableNonprofits](http://www.youtube.com/user/VenableNonprofits).