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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. 1691 et seq.);
  - Fair Credit Reporting Act (15 U.S.C. 1681 et seq.), except with respect to Sections 615(e) and 628 of that Act (15 U.S.C. 1681m(e), 1681w);
  - 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–
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

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);
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
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 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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