



CONSUMER FINANCIAL SERVICES COMMITTEE NEWSLETTER

March 2018

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Important Dates

[Business Law Section Spring Meeting](#)

April 12-14, 2018
Orlando, FL

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Membership Minute

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Leadership Message



Andrew Smith, Chair
Consumer Financial Services Committee

This Chairman's Message provides details of our upcoming Spring Meeting in Orlando - including a financial literacy initiative sponsored by our Pro Bono Subcommittee - and recap our recent success at the Winter Meeting in Park City, Utah.

Business Law Section Spring Meeting

Our Committee is convening again April 11-14 at the [ABA Business Law Section Spring Meeting](#) in Orlando. All of our events are at the Rosen Shingle Creek Resort - make your reservations ASAP. As you make your travel arrangements, please plan to arrive on Wednesday and depart on Saturday (or Sunday for those of you who are staying for the Annual ACCFSL Dinner).

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Legal Feature

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In short, the Prepaid Rule imposes a number of significant compliance burdens on prepaid accounts covered by the rule, such as the requirement to ensure that both the long-form and short-form disclosure requirements are satisfied. Nonetheless, the Bureau did address some industry concerns in the 2018 Amendments. Perhaps the most important change in the 2018 Amendments, the Bureau further extended the effective date of the Prepaid Rule to April 1, 2019. Moreover, to assist with the compliance burdens, the Bureau previously published model forms, disclosure guides, a coverage chart, and a Small Entity Compliance Guide, which are located on the [Bureau's site](#).

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Legal Feature

Housing Finance Subcommittee's Panel on the New Federal Trade Secrets Act and Mortgage Loan Originator Recruiting

By Peter Cockrell

At this year's ABA Consumer Financial Services Committee Winter Meeting in Park City, UT, the Housing Finance Subcommittee presented a panel addressing the impact of the federal Defend Trade Secrets Act of 2016 ("DTSA") on mortgage loan originator ("LO") recruitment. The panel was moderated by Jason McElroy, subcommittee member and partner at Weiner Brodsky Kider PC, and featured Carnesha Craft, assistant corporate counsel at HomeServices Lending, LLC, and Ernest Wagner, partner at Maurice Wutscher LLP. The panel discussed the DTSA, which created a federal cause of action for trade secrets misappropriation. The DTSA raises a host of issues for competition in the mortgage industry by creating new risks and potential liabilities relating to the manner in which mortgage companies recruit LOs. After describing the basics of trade secrets misappropriation, the panel addressed the effect the new law is having, and could have, on the recruiting practices of mortgage companies. Finally, the panel discussed best practices for companies to minimize risk.

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Legal Feature

2017 Survey of Activities Identified as Unfair, Deceptive, or Abusive Under the Dodd-Frank Act, Part Two

By Adam D. Maarec and Christopher R. Rahl

This is our latest article in a series that surveys activities identified as unfair, deceptive or abusive acts or practices ("UDAAPs") by the Consumer Financial Protection Bureau ("CFPB"), and state attorneys general and consumer financial services regulators, using federal UDAAP powers created by the Dodd-Frank Act. This article covers relevant UDAAP activity that occurred between July 1, 2017 and December 31, 2017, and surveys enforcement actions and other statements by the CFPB in reports, rulemakings, and bulletins that discuss UDAAP violations. These activities provide insight into the specific types of practices that could be considered UDAAP violations in the future.

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Chairman's Message

This Chairman's Message provides details of our upcoming Spring Meeting in Orlando – including a financial literacy initiative sponsored by our Pro Bono Subcommittee – and recap our recent success at the Winter Meeting in Park City, Utah.

Business Law Section Spring Meeting

Our Committee is convening again April 11-14 at the [ABA Business Law Section Spring Meeting](#) in Orlando. All of our events are at the Rosen Shingle Creek Resort – make your reservations ASAP. As you make your travel arrangements, please plan to arrive on Wednesday and depart on Saturday (or Sunday for those of you who are staying for the Annual ACCFSL Dinner).

Our Pro Bono Subcommittee is planning a Public Service Project for the morning of Friday, April 13, offering financial literacy training for students at a local school in Orlando, in conjunction with Junior Achievement. Please sign up by emailing our Pro Bono Subcommittee Vice-Chair, Jennifer Newton (jnewton@kaufmanrossin.com).

We also have a full schedule of meetings planned:

- Our formal programming begins at 4:00 PM on Wednesday, April 11 with **Beer & Basics**, followed by a **Welcome Reception** with the Banking Law Committee.
- On Thursday, April 12, we have a full day of CLE programming. Thursday's CLE programs include presentations on:
 - ability to pay and doctrines of suitability;
 - debt collection enforcement;
 - state licensing and examination;
 - community engagement by financial services companies;
 - state enforcement in housing finance;
 - fair lending in the new Administration;
 - a retrospective on TILA on the occasion of its 50th anniversary; and
 - a timely selection of Roundtable presentations, as well as the In-House Counsel Roundtable.
- **Our Committee Dinner** will be held on Thursday evening at [Itta Bena](#), and is generously sponsored by Burr & Forman and Morrison & Foerster. Tickets are **\$125**.
 - Register for the dinner at <https://shop.americanbar.org/ebus/ABAEventsCalendar/EventDetails.aspx?productId=278734183>.

- To add a dinner ticket to your existing meeting registration, click on “Register Now,” which will prompt you to log-in with your ABA credentials. After logging in, click on “View Registration.” Find the “Select Events” header and click on “Edit” – this will take you to the list of ticketed events to select.
- On Friday, April 13, we have another full day of CLE programming which we are holding jointly with the Banking Law Committee, including the venerable Fisher Memorial Program. Friday’s CLE programs include presentations on:
 - UDAP and UDAAP;
 - regulatory sand boxes and state regulation of fintech;
 - the future of financial regulation in the new Administration;
 - BSA/AML; and
 - data security breaches and their effect on cyber security.
- On Saturday, April 14, our programming ends at 12:00 PM, and includes CLE presentations on
 - personal property finance;
 - the state of play with *Madden v. Midland*;
 - the Uniform Regulation of Virtual Currency Businesses Act; and
 - the anatomy of a digital payment transactions.
- On Saturday evening, the American College of Consumer Financial Services Lawyers will host its annual dinner for the Fellows of the College. Details to follow directly from the ACCFSL.

Winter Meeting Recap

We had another successful stand-alone CFSC meeting on January 6-9, 2017, at the Canyons Resort in Park City, Utah. We had representation from the CFPB, FTC, banking agencies, state regulators, and the consumer advocate community, as speakers and in the audience.

Program materials, including audio recordings of CLE presentations, are located [here](#).

Attendance was very good – although not at the level of the last ski meeting in Park City (or the 2015 meeting in New Orleans, which remains the high-water mark). As you will see, below, our meeting attendance has held up nicely, even during the down years of the financial crisis:

YEAR	LOCATION	TOTAL
2018	Park City, UT	217
2017	Carlsbad, CA	263
2016	Park City, UT	277
2015	New Orleans, LA	290
2014	Park City, UT	245
2013	Naples, FL	217
2012	Park City, UT	172

YEAR	LOCATION	TOTAL
2011	Naples, FL	160
2010	Park City, UT	150
2009	Scottsdale, AZ	168
2008	Park City, UT	166
2007	Dana Point, CA	221
2006	Park City, UT	153
2005	Key Biscayne, FL	108
2004	Park City, UT	127

Although we are not the largest Committee in the ABA Business Law Section – that distinction belongs to the Mergers & Acquisitions Committee – we are among the most enthusiastic, with attendance at our stand-alone meetings and at our CLE programs at the Business Law Section Spring and Annual Meetings, frequently setting new records.

The Consumer Financial Protection Bureau Amends Final Prepaid Account Rule and Further Extends Its Effective Date

By Gabriel Crowson*

I. Introduction and Overview

Following a four-year rulemaking process, in October 2016, the Consumer Financial Protection Bureau (the “Bureau”) issued a final rule that created comprehensive consumer protection requirements under Regulations E and Z for prepaid accounts (the “2016 Prepaid Rule”). Most of the provisions of the 2016 Prepaid Rule were initially set to take effect on October 1, 2017; however, the Bureau extended that effective date to April 1, 2018 as an accommodation to industry. Most recently under the Bureau’s new Acting Director, on January 25, 2018, the Bureau issued a final rule that amended the 2016 Prepaid Rule (the “2018 Amendments”). The 2016 Prepaid Rule, as amended by the 2018 Amendments, is referenced as the “Prepaid Rule.”

In short, the Prepaid Rule imposes a number of significant compliance burdens on prepaid accounts covered by the rule, such as the requirement to ensure that both the long-form and short-form disclosure requirements are satisfied. Nonetheless, the Bureau did address some industry concerns in the 2018 Amendments. Perhaps the most important change in the 2018 Amendments, the Bureau further extended the effective date of the Prepaid Rule to April 1, 2019. Moreover, to assist with the compliance burdens, the Bureau previously published model forms, disclosure guides, a coverage chart, and a Small Entity Compliance Guide, which are located on the Bureau’s site at <https://www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/prepaid-rule/>.¹

II. The Prepaid Rule’s Requirements

A. Coverage of Rule.

* Gabe Crowson is a member in the New Orleans office of McGlinchey Stafford. Gabe represents banks, lenders, mortgage servicers, and consumer finance companies in connection with investigations by federal and state regulatory authorities and class action suits, regarding a variety of consumer financial services compliance and regulatory issues.

¹ As of the deadline for submission of this article, the Bureau had not yet updated the Small Entity Compliance Guide or the Preparing the Short Form Disclosure Guide to account for the 2018 Amendments.

As a general matter, the Prepaid Rule extends Regulation E's error resolution procedures and liability limitations to prepaid accounts. In that regard, the Prepaid Rule defines prepaid accounts to include payroll card accounts, government benefit accounts, and two other types of accounts:

- (1) An account marketed or labeled as prepaid and redeemable at multiple, unaffiliated merchants for goods and services, or designed for use at ATMs; or
- (2) An account issued on a prepaid basis in a specified amount or capable of being loaded with funds after issuance whose primary function is to conduct transactions with multiple, unaffiliated merchants for goods or services, or at ATMs, or to conduct person-to-person transfers.²

A prepaid account includes a physical card or device, as well as an account that may only be accessed electronically or online through a mobile device/smartphone. Certain prepaid products are excluded from the definition, including gift certificates, gift cards, and accounts loaded with funds from a health savings account or flexible spending arrangement.

B. Pre-Acquisition Disclosure Requirements and Submission of Agreements.

For prepaid accounts that are covered by the Prepaid Rule, there are certain pre-acquisition disclosure requirements, both short-form disclosures and long-form disclosures. The Prepaid Rule also adds new requirements for prepaid accounts, including the requirements for an issuer to post its prepaid account agreements online and submit them to the Bureau.

With respect to the short-form disclosure, the Prepaid Rule states that certain information (*e.g.*, information about periodic fees, per purchase fees, ATM withdrawal fees, cash reload fees, ATM balance inquiry fees, customer service fees, and inactivity fees) must be disclosed in a specified format. The short-form disclosure must also reflect the number of additional fee types that the consumer could be charged in connection with his account; the two additional fee types that generated the highest revenue for the prepaid account program during the previous 24 months; statements regarding linked overdraft credit features, registration, and FDIC/NCUA insurance; and information on where the consumer can find the long-form disclosure.

The long-form disclosures must include additional information, such as the prepaid account program's name, information about all fees that may be imposed in connection with the prepaid account, a statement regarding registration and FDIC/NCUA insurance, a statement regarding linked overdraft credit features, the financial institution's contact information, and a statement directing the consumer to the Bureau's website for general information about prepaid accounts in the complaint section of its website.

C. Hybrid Prepaid-Credit Cards.

In addition to the pre-acquisition disclosure requirements, the Prepaid Rule also imposes requirements on prepaid accounts that are equipped with an overdraft credit feature, a new

² See 83 Fed. Reg. 6364, 6368-69 (Feb. 13, 2018); 12 C.F.R. § 1005.2(b)(3).

concept termed “hybrid prepaid-credit cards” (“Hybrid Cards”). The term Hybrid Cards covers a transaction that exceeds the prepaid funds that are available in a consumer’s prepaid accounts. Subject to certain exceptions, Hybrid Cards are considered credit card accounts and are subject to Regulation Z’s Subpart B, governing open-end accounts, and Subpart G, governing credit card accounts.

A prepaid account is a Hybrid Card if it can be used to access credit either: (1) by linking the prepaid account to a credit account or separate credit feature offered by the prepaid account issuer, its affiliate, or its business partner, and allowing credit to be accessed in the course of a transaction conducted with a prepaid card, to obtain cash, or to conduct P2P transfers; or (2) by allowing the prepaid account to acquire a negative balance.

The Prepaid Rule requires companies to structure an overdraft credit feature accessible by a Hybrid Card as a separate credit feature, not as a negative balance to a prepaid account. The Prepaid Rule provides one exception to address force pay transactions and other situations where incidental credit is extended as a negative balance. To take advantage of this limited exception, the prepaid account issuer must have a policy and practice of declining to authorize transactions when the consumer lacks sufficient funds to cover the transaction and does not impose certain credit-related fees on the asset account. In this circumstance, the credit extended is only incidental and will not be considered a line of credit subject to Regulation Z.

The Prepaid Rule requires prepaid account issuers to wait at least 30 days after the prepaid account is registered before offering to the consumer overdraft credit features that may be accessed on the newly registered prepaid account. Before linking an overdraft credit feature or increasing a credit line related to a prepaid account, the issuer must ensure that the consumer has the ability to repay any overdraft and must comply with special rules regarding credit extensions to individuals under the age of 21. The ability-to-repay assessment is similar to the underwriting standard for credit card issuers.

Moreover, the Prepaid Rule generally requires a Hybrid Card’s credit features to be distinct from the consumer’s asset account. Furthermore, when a consumer reloads funds into a prepaid account after utilizing the overdraft credit feature, the issuer must obtain the consumer’s signed written authorization before applying the reloaded funds to repay the credit extension. Once authorized by the consumer, the Hybrid Card issuer may only automatically deduct prepaid funds once per month to cover the overdraft balance.

Hybrid Cards will be treated for Regulation Z purposes as open-end credit, subject to various credit card rules, including the limitation on fees and interest charges and the requirement to send monthly credit billing statements. Additionally, because the Prepaid Rule now brings prepaid accounts under Regulation E coverage, issuers must comply with Regulation E’s compulsory use provision. Accordingly, issuers are prohibited from requiring consumers to set up preauthorized electronic fund transfers to repay credit extended through overdraft credit features. However, these credit features are not considered overdraft services under Regulation E. Accordingly, opt-in notices are not required to be sent to consumers for these overdraft credit features (although consumer consent is still required, as discussed above).

III. Changes Made By the 2018 Amendments

As noted above, one of the most significant changes made by the 2018 Amendments was the extension of the effective date to April 1, 2019. This will give industry participants an additional year to structure their prepaid card programs to comply with the Prepaid Rule.

In addition, the 2018 Amendments slightly modified the exclusion from the definition of prepaid account for loyalty, award, or promotional gift cards. As amended, the Prepaid Rule also exempts loyalty, award, or promotional gift cards that are (1) redeemable upon presentation at one or more merchants for goods or services, or usable ATMs, and (2) that are not marketed to the general public. These cards are not required to satisfy the existing disclosure requirements under Regulation E for loyalty, award, or promotional gift cards in order to be excluded from the definition of prepaid account.

While the 2018 Amendments did not significantly change the short-form disclosure requirements, they did provide an alternative to the part of the disclosure that requires issuers to disclose the two additional fee types that generated the highest revenue. Under the 2018 Amendments, issuers have the option to consolidate the fee variations into two categories and disclose those two categories and the fee amounts.

Per the 2018 Amendments, there is now some flexibility in providing the long-form disclosure. Issuers can provide the long-form disclosure electronically without regard to the E-Sign Act's consumer notice and consent requirements and provide the disclosure after acquisition if (1) the financial institution does not provide the long-form disclosure inside the prepaid packaging materials, and (2) the financial institution is not otherwise mailing or delivering to the consumer written account-related communications within 30 days of obtaining the consumer's contact information.

As an accommodation to industry, the 2018 Amendments provide an exception for the error resolution and limited liability requirements for unverified prepaid accounts. This exception applies to prepaid accounts that have not concluded the consumer identification and verification process, as long as the financial institution has disclosed the risks of not registering and verifying the account using a form substantially similar to the model notice forms. The exception also applies when the consumer identification and verification process has concluded but the consumer's identity has not been verified and the financial institution has disclosed the risks of not registering and verifying the account using a form substantially similar to the model notice forms. In addition, the exception also covers prepaid accounts that are in programs for which there is no consumer identification and verification process, provided that the financial institution has made the required alternative disclosure for programs with no verification process.

The Consumer Financial Protection Bureau Regulates Pay-by-Phone “Convenience” Fees

By Scott J. Hyman* and Erik Kemp**

The Consumer Financial Protection Bureau (the “CFPB”) issued a compliance bulletin warning that companies should not trick consumers into paying expensive pay-by-phone or “convenience” fees (the “Bulletin”). The Bulletin does not “mandate any particular way to inform consumers about pay-by-phone options and fees,” nor does it prohibit charging such fees.¹ Rather, the CFPB’s UDAAP authority merely empowers it to regulate such tricks designed to “substantially harm consumers, who are pushed into materially higher-cost options.”² Thus, since the CFPB advised that the propriety of charging convenience fees depends on federal law, state law and the instruments creating the financial obligation, the CFPB’s guidance and enforcement positions should be well-heeded, lest compliance counsel commit “compliance malpractice.”³

I. The Backdrop

Consumers often are provided various payment options by their lenders, including pay-by-phone options that may be available through a live-person or through automated means. Other options include phone payments by means of credit card, debit card, electronic check, or

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** Erik Kemp is a member of Severson & Werson’s San Francisco office, specializing in financial services litigation. His practice emphasizes class action defense and the appellate courts. Mr. Kemp has also defended a number of class actions challenging late fee assessment, loan origination disclosures, and lender-placed insurance. Mr. Kemp earned his J.D. from the University of California, Hastings College of the Law, graduating magna cum laude and Order of the Coif. Mr. Kemp earned his B.A. in political science from the University of California, Berkeley, graduating with high distinction in general scholarship and Phi Beta Kappa honors.

¹ *Phone Pay Fees*, CFPB Compliance Bulletin 2017-01, at pp. 7 (July 27, 2017).

² Bulletin, at pp. 3.

³ E.g., Kate Berry, *Cordray: CFPB Is Right to Use Enforcement Actions to Craft Policy*, <http://www.americanbanker.com/news/law-regulation/cordray-cfpb-is-right-to-use-enforcement-actions-to-craft-policy-1079823-1.html> (Mar. 9, 2016) (“Financial industry executives would be engaging in ‘compliance malpractice’ if they did not glean information from consent orders and respond by cleaning up their own practices, says CFPB Director Richard Cordray”).

other options to have the payment expedited. Some entities use third-party vendors to handle and process payments.

A “debt collector” cannot charge fees, including phone pay fees, “*unless such amount is expressly authorized by the agreement creating the debt or permitted by law.*”⁴ Accordingly, the propriety of charging convenience fees turns not only on the language of the instrument creating the obligation itself but also a hodgepodge of 50 states’ laws and state regulators’ opinions.

In pursuing its enforcement authority, the CFPB has applied this legal background to factually developed evidence that lenders, servicers, and debt collectors: 1) failed to disclose all available phone pay fees when different phone pay options carried materially different fees, 2) misrepresented the available payment options or that a fee is required to pay by phone, 3 failed to disclose that a fee would be added to the consumer’s payment, and 4) failed to oversee employees or vendors.

II. Analysis

A. Regulatory and Litigation History

The CFPB’s Bulletin followed earlier enforcement actions asserting unlawful convenience fees under both its UDAAP authority⁵ and the FDCPA⁶. The CFPB relied on judicially developed rules under section 1692f(1):

If state law expressly permits service charges, a service charge may be imposed even if the contract is silent on the matter;

If state law expressly prohibits service charges, a service charge cannot be imposed even if the contract allows it;

If state law neither affirmatively permits nor expressly prohibits service charges, a service charge can be imposed only if the customer expressly agrees to it in the contract.⁷

Thus, early case law concluded that convenience fees for optional payment methods can be prohibited by § 1692f(1)—and a debt collector that charges those fees also violates 1692e(2)

⁴ 15 U.S.C. § 1692f(1) (emphasis added); Cal. Civ. Code § 1788.17.

⁵ *In re Citibank, N.A.*, No. 2015-CFPB-0015 (July 21, 2015); *FTC and CFPB v Green Tree Servicing, LLC*, No. 15-cv-02064 (April 23, 2015).

⁶ Bulletin, at pp. 7, fn. 12 (citing *Supervisory Highlights*, Fall 2015 edition at pp. 20-21.).

⁷ *Tuttle v. Equifax Check*, 190 F.3d 9, 13 (2d Cir. 1999); *see also* Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed.Reg. 50,097, 50,108 (FTC 1988) (“A debt collector may attempt to collect a fee or charge in addition to the debt if either (a) the charge is expressly provided for in the contract creating the debt and the charge is not prohibited by state law, or (B) the contract is silent but the charge is otherwise expressly permitted by state law. Conversely, a debt collector may not collect an additional amount if either (A) state law expressly prohibits collection of the amount or (B) the contract does not provide for collection of the amount and state law is silent”).

which prohibits false representations regarding the amount of a debt.⁸ It was no defense that convenience fees were for the debtor's alleged convenience.⁹

B. Going Forward

Earlier cases have held that a convenience fee does not violate the FDCPA if the fee is optional, disclosed as optional,¹⁰ and paid solely to a third-party service provider without markup.¹¹ The FTC (which shares FDCPA enforcement responsibilities with the CFPB) has also given at least some indication in prior enforcement actions that it believes that fully disclosed fees for optional payment methods may not violate § 1692f(1).¹²

Recent cases, however, have held that convenience fees violate the FDCPA unless expressly authorized by contract or state law and are mere pass-through charges. The CFPB's Bulletin appears to adopt the reasoning of these cases, noting that its supervisory activity has revealed that "one or more mortgage servicers that met the definition of debt collector under the FDCPA violated the Act ..." by charging fees for telephonic payments that were not expressly permitted by contract or state law.¹³ Not only has the charging of convenience fees been widely criticized in the media in recent years,¹⁴ but one survey noted that 79% of debt collection agencies responding to a survey did not charge convenience fees because of "confusing state laws" or because "their company just didn't have the appetite for that kind of compliance risk."¹⁵

Specifically, the CFPB's Bulletin warns that entities should:

⁸ *Johnson-Morris v. Santander Consumer USA, Inc.*, 194 F.Supp.3d 757, 765 (N.D.Ill., 2016) ("Nor is Santander's position strengthened by its repeated insistence that such fees are not 'involuntary' and were instead 'elected,' because the payment methods that generate such fees are not 'the only payment means available'"); *see also Lindblom v. Santander Consumer USA, Inc.*, 1:15-cv-990-LJO-BAM, 2016 WL 2841495, at *6-7 (E.D. Cal. May 9, 2016); *Campbell v. MBI Associates, Inc.*, 98 F. Supp. 3d 568, 579-80 (E.D.N.Y. 2015); *Acosta v. Credit Bureau of Napa Cty.*, No. 14 C 8198, 2015 WL 1943244, at *2-4 (N.D. Ill. Apr. 29, 2015); *Shami v. Nat'l Enter. Sys.*, No. 09-CV-722 RRM VVP, 2010 WL 3824151, at *3-4 (E.D.N.Y. Sept. 23, 2010).

⁹ *Quinteros v. MBI Assocs., Inc.*, 999 F. Supp. 2d 434, 438-39 (E.D. N.Y. 2014) (debt collector violated the FDCPA by charging a \$5 processing fee for all credit-card and check-over-the-phone payments because § 1692f(1) prohibits "any" amount incidental to the principal obligation unless authorized by the agreement creating the debt or applicable state law).

¹⁰ *Mann v. Nat'l Ass'n Mgmt. Enters., Inc.*, No. 04-1304, 2005 U.S. Dist. LEXIS 49552, (C.D.Ill. Feb. 23, 2005).

¹¹ *Lewis v. ACB Bus. Servs., Inc.*, 911 F. Supp. 290 (S.D. Ohio 1996); *Lee v. Main Accounts, Inc.*, 125 F.3d 855 (6th Cir. 1997) (unpublished).

¹² In its Feb. 21, 2014 letter to the CFPB reporting on its FDCPA enforcement activities for the previous fiscal year, the FTC reported that its complaint in *FTC v. Security Credit Servs., LLC*, N.D. Ga. No. 1:13-cv-799 alleged only misleading and deceptive convenience fees. Accordingly, the resulting stipulated judgment did not prohibit charging any convenience fee but, did prohibit material misrepresentations or a failure to disclose the fee. *Id.*, Dkt. #6, p. 5.

¹³ Bulletin at p. 6 (citing CFPB Supervisory Highlights, Fall 2015 edition at pp. 20-21).

¹⁴ *See* Jeremy R. McClane, *Class Action in the Age of Twitter: A Dispute Systems Approach*, 19 Harv. Negot. L. Rev. 213, 248 (2014) (discussing widespread criticism of Verizon Wireless's December 2011 announcement that it would begin charging its customers an additional \$2 convenience fee for one-time bill payments made by phone and online.)

¹⁵ Tim Bauer, *CFPB Issues Compliance Bulletin on Pay-by-Phone Fees*, Inside ARM, (Aug. 1, 2017), <https://www.insidearm.com/news/00043157-cfpb-issues-compliance-bulletin-pay-phone/> ("For the 79 percent who did not, the main apprehension was around confusing state laws, with most also saying their company just didn't have the appetite for that kind of compliance risk").

- Review applicable State and Federal laws regarding the propriety of charging convenience fees.
- Review underlying debt agreements to determine the propriety of such fees.
- Review internal and service providers' policies and procedures and scripts to address any improprieties.
- Review whether information on convenience fees is shared in loan servicing documents.
- Incorporate pay-by-phone issues in regular monitoring or audits of calls.
- Review consumer complaints regarding fees.
- Perform regular reviews of service providers.
- Correct inadequate programs and reimburse consumers when appropriate.
- Review employee and service provider incentive programs to prevent steering consumers to certain payment types or to avoid disclosures.

Ultimately, the CFPB's guidance and enforcement positions should be well-heeded, lest compliance counsel commit "compliance malpractice." As the CFPB revises its enforcement priorities and methodologies with a change in leadership, watch this space for any changes to the CFPB's approach.

Dude, Where's My Bank?!

Banking State Legal Marijuana

By Aaron Kouhopt*

To bank or not to bank, that is the question posed to financial institutions located in the 38 states where the sale of marijuana has been legalized either recreationally or for medical use. Management and boards are faced with this difficult decision every day as flourishing cash-rich marijuana businesses look to financial institutions for banking services. In 2016 marijuana sales in Colorado reached \$1.3 billion dollars.¹ However, the drug remains illegal under Federal law creating a conflict that is at the center of the dilemma faced by financial institutions.

Unfortunately, looking to Federal guidance brings little sense of certainty in answering this fundamental question. The Department of Justice issued guidance in October 2009, June 2011, and August 2013 (collectively, the “Cole Memos”) regarding the enforcement of marijuana under the Controlled Substances Act (“CSA”). These memos urged prosecutorial discretion when enforcing marijuana laws with a focus on higher risk activities, such as distribution to minors, violence related to cultivation and distribution, and use of public lands.

In response, the United States Department of Treasury, Financial Crimes Enforcement Network (“FinCen”) issued “BSA Expectations Regarding Marijuana Related Businesses” in February 2014. This memo was based on the Cole Memos' guidance and was intended to clarify how financial institutions can provide services to marijuana-related businesses. FinCen concluded that financial institutions could provide services and should perform a risk analysis looking at a variety of due diligence factors including a review of state licensing, a business's policies to ensure activity does not violate a Cole Memo priority, ongoing monitoring of account activity, and an understanding of normal business activities. FinCen further clarified that financial institutions should file Suspicious Activity Reports when banking a marijuana-related business, depending on the specific nature of the activity.

So far so good, right? While the FinCen guidance made it clear that a financial institution could bank the marijuana industry subject to certain strict requirements, it left unclear how the institution could properly follow the Cole Memos' guidelines. For example, how would the institution clearly show that the business it was banking was keeping the product away from minors? A review of policies and procedures established by the business along with on-site visits and continued monitoring of news articles may give the institution some comfort, but was

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¹ <https://www.colorado.gov/pacific/revenue/colorado-marijuana-sales-reports>.

it enough? Further, the Cole Memos did not make marijuana legal on the federal level, nor did it prohibit the prosecution under the CSA. Rather, the Cole Memos urged federal prosecutors to use discretion in enforcement as it related to marijuana in states where it was legalized.

Therefore, it was plausible that a financial institution could be in violation of the CSA if federal prosecutors, in their sole discretion, determined that the banking activities exceeded “permissible” activities. When making a loan that is secured by a property associated with marijuana related activities, the institution would need to consider the possibility of federal seizure of that property. When establishing a deposit account, the institution would need to consider the legal and regulatory implications, and, at a minimum, allocate significant resources to conduct initial and ongoing due diligence on the business.

Making matters even more complicated, Attorney General Jeff Sessions in January 2018 issued a Marijuana Enforcement memo stating that “previous nationwide guidance specific to marijuana enforcement is unnecessary and is rescinded, effective immediately.” Attorney General Sessions reiterated that federal prosecutors should follow “well established principles” in deciding which marijuana activities to prosecute. Therefore, the Cole Memos are no longer valid. Further, since the 2014 FinCen guidance was in response to the Cole Memos, does the FinCen guidance still carry any weight or authority? Treasury Secretary Mnuchin has indicated the guidance should not be withdrawn without a replacement in place; however, that is of little comfort to financial institutions being asked by their marijuana business customers to bank their activities.

So, what do boards and management of financial institutions do to answer the question of whether to bank marijuana related businesses? Although the FinCen guidance was issued in response to the Cole Memos, it was not reliant on them. The FinCen guidance is still in effect as of the publication date of this article. The subject of banking marijuana was raised at a House Financial Services Committee hearing on February 6, 2018. Mnuchin said that the Treasury was reviewing the existing guidance but that it would not be rescinded without an alternative in place. On the surface this should allow financial institutions to bank marijuana-related activity with strict policies and procedures in place to ensure proper due diligence and compliance with FinCen’s parameters. However, this approach should include a comprehensive analysis and review by the board of directors of the financial institution, including consultation with legal counsel as to the potential risk of the financial institution being found in violation of the CSA.

Regardless of one’s opinion as to whether marijuana should be legal or illegal, or whether it is a federal or states’ rights issue, it would be in everyone’s interest to resolve the conflict between federal and state law. A group of 19 State Attorney Generals has signed onto a letter submitted to Congressional leaders urging review of banking regulations as it pertains to the marijuana industry. Maine Attorney General Janet Mills summarized that “[t]he federal government needs to bring its practices in line with the states that have seen fit to legalize marijuana, encouraging those businesses to use established banking institutions and to *protect those financial institutions from federal sanction*” (emphasis added). In the meantime, marijuana related businesses are likely to keep asking, “Dude, where’s my bank?”

Housing Finance Subcommittee's Panel on the New Federal Trade Secrets Act and Mortgage Loan Originator Recruiting

By [Peter Cockrell*](#)

At this year's ABA Consumer Financial Services Committee Winter Meeting in Park City, UT, the Housing Finance Subcommittee presented a panel addressing the impact of the federal Defend Trade Secrets Act of 2016 ("DTSA")¹ on mortgage loan originator ("LO") recruitment. The panel was moderated by Jason McElroy, subcommittee member and partner at Weiner Brodsky Kider PC, and featured Carnesha Craft, assistant corporate counsel at HomeServices Lending, LLC, and Ernest Wagner, partner at Maurice Wutscher LLP. The panel discussed the DTSA, which created a federal cause of action for trade secrets misappropriation. The DTSA raises a host of issues for competition in the mortgage industry by creating new risks and potential liabilities relating to the manner in which mortgage companies recruit LOs. After describing the basics of trade secrets misappropriation, the panel addressed the effect the new law is having, and could have, on the recruiting practices of mortgage companies. Finally, the panel discussed best practices for companies to minimize risk.

Before the enactment of the DTSA, trade secret misappropriation was largely a state law issue. Although a misappropriation claim derives from common law, almost all U.S. jurisdictions have now enacted some version of the Uniform Trade Secrets Act ("UTSA"), which was originally adopted in 1979. "Trade secret" is broadly defined to include information that (i) derives independent economic value from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. "Misappropriation" means either (i) the acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means, or (ii) disclosure or use of a trade secret of another without express or implied consent by a person who used improper means to acquire the trade secret.

In the mortgage context, the misappropriation of trade secrets generally involves allegations that an LO leaving one mortgage company brings customer lists, active loan applications or other similar information to a new mortgage company. In 2016, such a case in

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¹ Pub. L. 114–153, 130 Stat. 376 (May 11, 2016); 18 U.S.C. § 1836.

California state court made headlines with a \$25 million jury verdict, including \$13 million in punitive damages. State versions of the UTSA typically allow recovery of multiple damages, disgorgement and unjust enrichment, and attorneys' fees.

The DTSA, which became effective May 11, 2016, creates a similar federal claim for trade secret misappropriation, including federally-related mortgage loans as defined under Real Estate Settlement Procedures Act, but it does not preempt state trade secrets laws. The DTSA's definitions are similar to the UTSA's, and although DTSA case law is still emerging, at least one federal court has already ruled that customer information combined with "buying patterns and marketing and pricing strategies" was sufficient to meet the definition of "trade secret" under the DTSA.² The DTSA provides compensatory damages for actual losses, "reasonable royalties" or unjust enrichment in lieu of traditional compensatory damage measures, and two times damages for willful misappropriation.

After discussing this background, the panel turned to a discussion of how lenders can protect themselves from trade secret misappropriation claims. The panel agreed that mortgage companies must be cognizant of where a new LO's business originates. Companies should take adequate measures to ensure new LOs are not improperly bringing over business that could give rise to misappropriation claims.

Ms. Craft said that it is "paramount" to have a confidentiality agreement with each LO, and to ensure that the LO actually understands the terms of the agreement. Companies should make clear to their LOs that they have a duty to keep information confidential. Ms. Craft suggested including the LO's duty of loyalty to the company as a term of the agreement to clearly establish this duty. Ms. Craft also encouraged mortgage companies to establish an appropriate culture in recruiting and to clearly set out expectations for LOs at hiring. Often LOs do not understand that borrower lists developed while employed by a company do not belong to them alone, but rather are considered a trade secret belonging to the company. To this end, Ms. Craft said that mortgage companies must tell their new LOs that they should not bring information from prior employers. Considering the economics of mortgage origination, incentives are a good way to accomplish this. Ms. Craft suggested including a provision in LO employment agreements to continue to pay for loans already in process to departing LOs.

Mr. Wagner agreed with Ms. Craft's recommendations and also recommended that companies explicitly state in their policies and procedures that customer lists are company property. This statement should also be included in employment agreements and LOs should be trained on it as well. Mr. Wagner suggested that companies make clear to new LOs that the company does not want their existing customer lists, but also explain to LO's what behavior is appropriate, such as taking calls from customers. Mr. Wagner also emphasized taking action now to address these risks because the issue is not yet a focus of the plaintiffs' bar.

Finally, the panel warned of the DTSA's Racketeer Influenced and Corrupt Organizations Act ("RICO") provisions. The DTSA makes the theft of trade secrets a "predicate act" under

² See *Henry Schein, Inc. v. Cook*, No. 16-cv-03166-JST, 2016 U.S. Dist. LEXIS 81369 (N.D. Cal. June 22, 2016).

RICO.³ The panel expressed concern that RICO claims, which allow for treble damages and attorneys' fees, can create reputational risks for mortgage companies.

³ Pub. L. 114-153, § 3(b).



2017 Survey of Activities Identified as Unfair, Deceptive, or Abusive Under the Dodd-Frank Act, Part Two

By Adam D. Maarec and Christopher R. Rahl

I. Introduction

This is our latest article in a series that surveys activities identified as unfair, deceptive or abusive acts or practices (“UDAAPs”) by the Consumer Financial Protection Bureau (“CFPB”), and state attorneys general and consumer financial services regulators, using federal UDAAP powers created by the Dodd-Frank Act.¹ This article covers relevant UDAAP activity that occurred between July 1, 2017 and December 31, 2017, and surveys enforcement actions and other statements by the CFPB in reports, rulemakings, and bulletins that discuss UDAAP violations.² These activities provide insight into the specific types of practices that could be considered UDAAP violations in the future.³

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5301 *et seq.* (the “Dodd-Frank Act”); *see, e.g.*, 12 U.S.C. § 5552 (2017).

² We have attempted to make this survey as comprehensive as possible; however, it is not exhaustive and there may be other relevant actions that are not discussed in this paper. Also, it must be noted that this area of law is rapidly evolving and new actions arise regularly.

³ The term “unfair” is defined in the Dodd-Frank Act as an act or practice that “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers [and the] injury is not outweighed by countervailing benefits to consumers or to competition.” 12 USC § 5531(c)(1). The term “deceptive” is not statutorily defined, but it is defined in the CFPB’s examination manual as “a material representation, omission, act or practice that misleads or is likely to mislead a consumer, provided the consumer’s interpretation is reasonable under the circumstances.” CFPB Examination Manual V.2, UDAAP 5 (October 2012), available at http://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf. The Dodd-Frank Act introduced the term “abusive” and defined it as an act or practice that either:

[1] materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or

[2] takes unreasonable advantage of [either]:

(A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;

(B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or

(C) the reasonable reliance by the consumer on a covered person [such as a bank or other financial institution] to act in the interests of the consumer. 12 USC § 5531(d).

We intend to publish periodic updates to this article cataloging new UDAAP activity based upon the federal UDAAP powers contained in the Dodd-Frank Act.

II. Overview: Identification of Unfair, Deceptive, or Abusive Acts or Practices

Between July 1, 2017 and December 31, 2017, the CFPB engaged in 10 public enforcement actions involving alleged UDAAP violations. Past UDAAP actions can provide a road map for industry participants to identify and better understand acts or practices that are considered problematic by law enforcement authorities. UDAAP enforcement actions during the period of this summary involved marketing, servicing, debt relief services, and debt collection. The CFPB highlighted other UDAAP issues involving automobile loan servicing, credit card servicing, deposit accounts, mortgages, and short-term, small-dollar lending products in its Supervisory Highlights report. During this period there were no joint enforcement actions between the CFPB and state attorneys general and two enforcement actions filed independently by state attorneys general alleging violations of the federal UDAAP prohibition. We provide an update on two litigated cases that were described in previous surveys. Finally, we describe the CFPB's final rule governing payday, vehicle title, and certain high-cost installment loans, which identifies certain practices as unfair and abusive.

Summaries of the UDAAP actions below appear in chronological order and are intended to provide a straightforward identification of the specific acts or practices that were alleged to be unfair, deceptive, or abusive under the Dodd-Frank Act.

III. CFPB Enforcement Actions

- a. *Aequitas Capital Management, Inc. – August 2017 (Student Loan Financing)*⁴

The CFPB filed a complaint in federal court against Aequitas Capital Management Inc., Aequitas Management LLC, Aequitas Holdings LLC, Aequitas Commercial Finance LLC, Campus Student Funding LLC, CSF Leverage I LLC, Aequitas Income Opportunity Fund, and Aequitas Income Protection Fund (collectively the “company”), in connection with student lending activities. The complaint stems from an arrangement established by Corinthian Colleges, Inc. (the “college”), a large for-profit post-secondary educational company.

The college allegedly enlisted the company's help to enable the college to continue receiving certain educational funding under Title IV of the Higher Education Act of 1965 (“Title IV”). Title IV required the college to obtain 10% of its revenue from sources other than Title IV education funding. To meet this requirement, the college allegedly artificially inflated its tuition in an effort to cause its students to need to obtain loans to finance the increased tuition. The college then established an arrangement with the company to enable the company to purchase student loans or directly fund student loans for the college's tuition. The arrangement apparently included a repurchase feature that shifted student loan default risk back to the college. The CFPB alleged that the company knew that the loans it was purchasing and/or making did not

⁴ *Consumer Financial Protection Bureau v. Aequitas Capital Management Inc., et al.*, Case No. 3:17-cv-01278-MO (D. Or. Aug. 17, 2017).

provide any economic benefit to the college and that the sole purpose of the arrangement was to enable the college's continued receipt of federal funds under Title IV.

The CFPB alleged that the company's conduct in assisting the college in the purported "sham" was abusive because students were not able to protect their interests and the company took unreasonable advantage of students' inability to protect their interests in selecting student loan financing.

b. The National Collegiate Master Student Loan Trusts – September 2017 (Debt Collection)⁵

The CFPB filed a complaint and stipulated judgment against The National Collegiate Master Student Loan Trust and 14 related Delaware statutory trusts (collectively, the "company"), in connection with certain student loan debt collection activities. The CFPB alleged that the company filed or caused to be filed collection actions against student loan borrowers without required documentation needed to show the company's ownership of the loans and prove the right to collect amounts due. The CFPB's complaint alleged that, when collecting defaulted student loans, the company filed or caused to be filed affidavits that falsely claimed personal knowledge of the loan account records.

The CFPB alleged that the following conduct constituted deceptive acts and practices:

- Falsely representing to consumers in collection-related affidavits that:
 - The company's representatives had personal knowledge of the loan records evidencing the debt;
 - The company's representatives had personal knowledge of the record management practices and procedures of the company;
 - The company's representatives had personal knowledge of the chain of title and ownership of student loans by the company; and
 - Such affidavits were properly sworn and executed before a notary;
- Filing collection lawsuits without the intent or ability to prove the underlying claims if contested; and
- Falsely representing to consumers that the company had the legal right to obtain judgment through collection lawsuits in connection with loans for which the applicable statutes of limitation had expired.

The CFPB also alleged that the following conduct was unfair:

- Filing collection lawsuits without the intent or ability to prove the underlying claims if contested; and

⁵ *Consumer Financial Protection Bureau v. The National Collegiate Master Student Loan Trust, et al.*, Case No. 1:17-cv-01323 (D. Del. Sept. 18, 2017).

- Collecting payments made by consumer borrowers in connection with such collection lawsuits.
- The CFPB filed a proposed final judgment and consent order simultaneously with the complaint that requires the company to pay at least \$3.5 million in restitution to harmed borrowers, \$7.8 million in disgorgement, and a \$7.8 million civil money penalty.

The proposed final order is awaiting court approval as of the date of publication.

c. Transworld Systems, Inc. – September 2017 (Debt Collection)⁶

Transworld Systems, Inc. (the “collection agency”) entered into a consent order with the CFPB on the same date as the CFPB’s complaint against The National Collegiate Master Student Loan Trust and 14 related Delaware statutory trusts (collectively the “company”) (see above item). The collection agency collected defaulted student loans on behalf of the company. The CFPB alleged that the following acts and practices by the collection agency were deceptive:

- Filing false and misleading collection affidavits; and
- Filing lawsuits against consumers without the intent or ability to prove the claims if contested.

Under the consent order, the collection agency agreed to pay a \$2.5 million civil money penalty and change its collection practices.

d. Zero Parallel, LLC – September 2017 (Marketing)⁷

Zero Parallel, LLC is a company that receives consumer information (leads) from both its own lead generation websites and third party lead generation websites, and sells them to third party small-dollar and installment lenders and remarketing companies. A consent order with the company alleges that consumers entering information on the lead generation websites were immediately redirected to a lender’s webpage, without disclosure that their information had been passed through to others or sold by the company. The consent order also alleges that, because the lenders purchasing leads for consumers in certain states were not properly licensed and/or provided loans in excess of state usury caps, the loans issued as a result of the company’s actions were void in whole or in part.

The CFPB alleged that the company engaged in an abusive practice when it sold leads that resulted in or were likely to result in the issuance of loans that were void under applicable state law because such a practice takes unreasonable advantage of consumers’ lack of understanding of the loan’s material risks, costs, and conditions.

Pursuant to the consent order, the company agreed to pay a \$100,000 civil money penalty.

⁶ *In the Matter of: Transworld Systems, Inc.*, File No. 2017-CFPB-0018, Consent Order (September 18, 2017).

⁷ *In the Matter of: Zero Parallel, LLC*, File No. 2017-CFPB-0017, Consent Order (September 6, 2017).

e. Top Notch Funding II, LLC et al – September 2017 (Marketing)⁸

Top Notch Funding II, LLC offers loans to consumers who are entitled to receive compensation from a settlement fund or statutory-compensation fund, which is typically paid to a consumer in connection with the wrongful onset of a serious illness or disease. To settle allegedly deceptive marketing claims, the CFPB filed a complaint and stipulated judgment against the company, its owner and CEO in his individual capacity, and a person providing marketing and loan brokering services in his individual capacity (collectively “the company”).

The CFPB alleged that the company engaged in the following deceptive practices:

- Representing that the company was a direct lender when it did not provide loans but merely brokered loans to other creditors;
- Falsely representing that:
 - The loans carried interest rates as low as 1-2% when rates were actually much higher;
 - That it had offices in all 50 states with accounting, financial, and legal professionals when it did not have any offices or professional staff; and
 - That consumers could receive loan proceeds in as little as an hour when that was not reasonably possible.

Pursuant to the stipulated judgment, the company agreed to pay a \$70,000 civil money penalty.

f. Federal Debt Assistance Association, LLC – October 2017 (Debt Relief)⁹

The CFPB filed a complaint against Federal Debt Assistance Association, LLC; Financial Document Assistance Administration, Inc.; Clear Solutions, Inc.; and related principals (collectively the “company”) in connection with the company’s debt relief and debt validation services. The company marketed itself as a nationwide provider of debt management services and credit repair services.

The CFPB alleged that the following conduct constituted deceptive acts and practices:

- Representing that the company’s programs would eliminate consumers’ unsecured debt balances by at least 60% when such programs did not provide the promised results;
- Representing that the company’s programs would leave creditors without recourse concerning consumers’ unsecured debts when such programs did not result in “invalid” debts;
- Representing that the company’s programs would increase consumers’ credit scores when the company never provided any credit restoration services; and

⁸ *Consumer Financial Protection Bureau v. Top Notch Funding II, LLC, Rory Donadio, and John “Gene” Cavalli*, 1:17-cv-07114 (S.D. N.Y. Sept. 19, 2017).

⁹ *Consumer Financial Protection Bureau v. Federal Debt Assistance Association, LLC, et al.*, Case No. 1:17-cv-02997-GLR (D. Md. Oct. 12, 2017).

- Using marketing materials that falsely indicated that the company was affiliated with, endorsed by, or sponsored by the federal government (specifically the CFPB and the Federal Trade Commission).

The CFPB also alleged violations of the Telemarketing and Consumer Fraud and Abuse Prevention Act (TCPA) and the Telemarketing Sales Rule (TSR). This case was not resolved at the time of publication.

g. Freedom Debt Relief, LLC – November 2017 (Debt Relief)¹⁰

The CFPB filed a complaint against Freedom Debt Relief and its principal (collectively the “company”) in connection with the company’s debt settlement services. The company is a nationwide provider of debt relief services, primarily offering to reduce consumer unsecured debt balances through debt settlement negotiation.

The CFPB alleged that the following conduct constituted deceptive acts and practices:

- Representing to consumers that the company would negotiate directly with creditors when the company had knowledge that several large creditors would not deal directly with the company; and
- Representing to consumers that the company would not take any fees for services except when debt settlements were reached, when the company actually took fees in situations where creditors merely stopped collection action.

The CFPB alleged that the following conduct was abusive:

- Representing to consumers that the company would negotiate directly with creditors, then subsequently instructing consumers to negotiate directly with certain creditors while concealing the company’s involvement with the consumer.

The CFPB also alleged violations of the TCPA and TSR. This case was not resolved at the time of publication.

h. Think Finance, LLC – November 2017 (Marketing/Servicing)¹¹

Think Finance, LLC provides a back-end loan origination and servicing platform for a series of tribal lenders, which offer high-cost small dollar credit and claim to be subject to tribal laws rather than federal laws. The CFPB filed a complaint against the company alleging that because the company was involved in managing all aspects of the lending business, it effectively controlled and ran the lending business. The critical functions performed for the tribal lenders

¹⁰ *Consumer Financial Protection Bureau v. Freedom Debt Relief, LLC, et al.*, Case No. 3:17-cv-6484 (N.D. Cal. Nov. 8, 2017).

¹¹ *Consumer Financial Protection Bureau v. Think Finance, LLC*, 4:17-cv-00127-BMM (Dist. MT November 15, 2017).

included marketing and advertising, maintaining websites, training customer service representatives, monitoring tribal lender employees, providing a loan origination and servicing platform, making underwriting decisions, and handling delinquent accounts. The company was also an investor in an investment vehicle that provided funds to the tribal lenders, resulting in the company's retention of most of the financial risk and economic profits from the tribal lending business. The loan documents stated that the loans were subject to tribal law and enforceable.

While the company's loan documents stated that tribal law applies, the CFPB alleged that the company knew that loans issued in certain states were actually subject to state law, in violation of state usury caps and, as a result, were void in whole or in part.

The CFPB alleged that the company engaged in deceptive practices by misrepresenting that consumers had an obligation to repay loans that were actually void in whole or in part as a result of state usury laws, by sending demand letters, contacting consumers by phone to collect payments, and originating ACH debits to collect payments – all without disclosing that the company had no legal right to collect the loans under applicable state law.

The CFPB alleged that the company engaged in both unfair and abusive practices by collecting payments on loans that were rendered void in whole or in part by state law.

Finally, the CFPB alleged that the tribal lenders committed unfair, deceptive, and abusive acts or practices by demanding and collecting payments on debts that were void under state law, but that the company was responsible for these actions because it provided substantial assistance to the tribal lenders as they committed these violations of law.

This case was not resolved at the time of publication.

i. Conduent Business Services, LLC – November 2017 (Servicing)¹²

Conduent Business Services, LLC operates and maintains automobile loan servicing software. The CFPB alleged in a consent order that the company's software contained defects that caused lenders to furnish inaccurate information about more than one million consumers to credit bureaus.

The CFPB alleged that the company engaged in unfair practices by using coding that was incapable of producing accurate data in the Metro 2 format (a standard for the uniform furnishing of consumer report data) failing to timely correct the problem when it was identified by lenders, and failing to notify other lenders of the problem.

Pursuant to the consent order, the company agreed to pay a \$1.1 million civil money penalty.

¹² *In the Matter of: Conduent Business Services, LLC*, File No. 2017-CFPB-0020, Consent Order (November 20, 2017).

j. Citibank, N.A. – November 2017 (Servicing)

Citibank, N.A. is a national bank engaged in student loan servicing activities, among other things. In a consent order the CFPB alleged the company engaged in unfair and deceptive practices while servicing student loans.

The CFPB alleged that the company engaged in the following deceptive practices:

- Misrepresenting that consumers had not paid qualified interest on student loans eligible for a tax deduction (by inaccurately identifying the amount of interest paid on a student loan or failing to send a notice of how much interest had been paid in a particular year) unless a consumer submitted a particular form; and
- Overstating the minimum amount due by including interest on loans that were in deferment.

The CFPB alleged that the company engaged in the following unfair practices:

- Failing to fully correct the consequences of erroneous in-school deferment de-enrollments by refunding late fees but not reversing the effects of premature student loan interest capitalizations;

The CFPB alleged that the company engaged in the following practices that were both unfair and deceptive:

- Failing to adequately disclose eligibility information for student loan interest tax benefits in light of the misrepresentations regarding the amount of qualified interest paid.

Pursuant to the consent order, the company agreed to pay \$3.75 million in consumer redress and a \$2.75 million civil money penalty to resolve these allegations, along with alleged violations of the Fair Credit Reporting Act.

II. State Actions

a. Pennsylvania Higher Education Assistance Agency – August 2017 (Servicing)¹³

The Massachusetts Attorney General (the “AG”) filed a complaint against Pennsylvania Higher Education Assistance Agency, d/b/a FedLoan Servicing (the “company”), in connection with the company’s student loan servicing practices. The AG alleged violations of Massachusetts consumer protection law as well as violations of the Consumer Financial Protection Act of 2010.

The AG alleged that the company engaged in the following unfair practices:

¹³ *Commonwealth of Massachusetts v. Pennsylvania Higher Education Assistance Agency*, 1784CV02682 (Mass. Sup. Court August 23, 2017).

- Denying student loan borrowers the opportunity to make qualifying payments for certain federally-backed student loan programs when it failed to timely and properly process applications for income driven repayment plans;
- Failing to properly count student loan borrowers' qualifying payments for certain federally-backed student loan programs; and
- Collecting amounts not legitimately due and owing and failing to refund such amounts.

This case was not resolved at the time of publication.

b. Navient Corporation and Navient Solutions, LLC – October 2017 (Servicing)¹⁴

Navient Corporation and Navient Solutions, LLC (formerly Sallie Mae, Inc.) (collectively the “company”) are the largest student loan servicer in the U.S. The Attorney General of Pennsylvania (“AG”) filed a complaint against the company alleging that the servicer engaged in unfair, deceptive, or abusive practices under federal law in connection with its servicing of student loans.

The AG alleged that the company engaged in the following abusive practices:

- Taking unreasonable advantage of borrowers' reliance on the servicer to act in their interests by encouraging borrowers to rely on the servicer to provide advice but steering borrowers experiencing long-term hardships into forbearance programs for temporary hardships and misrepresenting the suitability of certain federal loan programs that would have been more financially beneficial to the borrower.

The AG alleged that the company engaged in the following unfair practices:

- Steering borrowers into forbearance plans without providing adequate information regarding other repayment plans; and
- Misallocating and misapplying payments in a manner that caused or was likely to cause injury through late fees, interest accrual, and negative credit reporting.

The AG alleged that the company engaged in the following deceptive practices:

- Representing that a co-signer release would be available if a certain number of “consecutive, on-time principal and interest payments” were made without disclosing that, to be eligible, payments had to be made even in billing periods where no payment was due as a result of the loan being paid ahead;

¹⁴ *Commonwealth of Pennsylvania, By Attorney General Josh Shapiro v. Navient Corporation and Navient Solutions, LLC*, 3:17-cv-00101-RDM (Dist. PA January 18, 2017). Note that the CFPB previously filed a complaint against the company in January 2017, along with a debt collector, alleging similar loan servicing failures. See *Consumer Financial Protection Bureau v. Navient Corporation; Navient Solutions, Inc.; and Pioneer Credit Recovery, Inc.*, 3:17-cv-00101-RDM (Dist. PA January 18, 2017). That case was not resolved at the time of publication.

The AG alleged that the following practices were both unfair and deceptive practices:

- Causing certain borrowers to miss the deadline to file recertification forms for continued enrollment in income-driven repayment plans by:
 - Not disclosing a date certain for the form to be returned;
 - Implying that recertification forms submitted late would only result in a delay in processing when it actually caused monthly payments to increase, interest to capitalize, the loss of a subsidy, and delayed progress towards loan forgiveness; and
 - For borrowers who provided consent to receive electronic disclosures, inadequately providing notice that a recertification notice was available (via an email notice that that did not include information about the purpose or contents of the renewal notice in the subject line or body).

This case was not resolved at the time of publication.

Note that the CFPB previously filed a complaint against the company in January 2017, along with a debt collector, alleging similar loan servicing failures.¹⁵ That case was not resolved at the time of publication.

III. CFPB Guidance

a. Phone Pay Fees¹⁶

The CFPB published a compliance bulletin to address payments made by phone, particularly with respect to fees charged for payments made by phone. The bulletin identifies a series of practices that may constitute UDAAPs, including:

- Not disclosing the fees of all materially different phone payment options;
- Misrepresenting the nature of phone payment options and the existence of fees;
- Adding phone payment fees to a consumer's payment in a manner that disguises the fee; and
- Inadequate employee monitoring and service provider oversight to prevent the problems identified above.

¹⁵ *Consumer Financial Protection Bureau v. Navient Corporation; Navient Solutions, Inc.; and Pioneer Credit Recovery, Inc.*, 3:17-cv-00101-RDM (Dist. PA January 18, 2017).

¹⁶ CFPB Compliance Bulletin 2017-01, *Phone Pay Fees* (July 31, 2017), available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201707_cfpb_compliance-bulletin-phone-pay-fee.pdf.

IV. CFPB Supervisory Highlights

The CFPB periodically issues Supervisory Highlights reports that summarize its supervisory activity over a period of time and identify, among other things, allegedly unfair, deceptive or abusive conduct that may not have otherwise been publicly disclosed in enforcement actions.

a. Summer 2017 Supervisory Highlights (September 2017)¹⁷

The CFPB's Spring 2017 Supervisory Highlights report identified confidentially resolved UDAAPs in connection with automobile loan servicing, credit card servicing, deposit accounts, mortgages, and short-term, small-dollar lending products.

With respect to automobile loan servicing, certain servicers engaged in unfair acts or practices by repossessing vehicles after the repossession had been cancelled, with sufficient time to stop the repossession, based on a borrower's payment or an agreed-upon arrangement.

With respect to credit card servicing, certain credit card issuers engaged in deceptive acts or practices by:

- Misrepresenting the cost and availability of pay-by-phone options. For example, telephone customer service agents only informed customers of a free payment option after customers authorized expedited payments that carried a cost; and
- Misrepresenting the costs and benefits of add-on products, namely debt cancellation.

With respect to deposit accounts, certain banks engaged in deceptive practices related to their overdraft products by:

- Misrepresenting the scope of the service, namely that the service applied to payments made by check, automated clearing house (ACH), and a recurring bill payment service, when the service did not apply to these payments;
- Claiming that consumers could withdraw more than the daily ATM cash withdrawal limit and incur only a single overdraft fee when such withdrawals were not permitted; and
- Claiming that the service would be available on the day of enrollment when it was actually available the next day.

With respect to mortgages:

- Certain originators engaged in unfair practices by collecting service deposits but not reimbursing unused portions of the deposit when an application was withdrawn;

¹⁷ CFPB, *Supervisory Highlights*, Issue 16 (September 2017), available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201709_cfpb_Supervisory-Highlights_Issue-16.pdf.

- Certain servicers engaged in unfair practices by including broad waiver of rights clauses in forbearance, loan modification, and other loss mitigation agreements;
- Certain servicers engaged in unfair and deceptive acts and practices by including blanket waivers in boilerplate “cash-for-keys” agreements that could have been construed as applying in connection with the original credit transaction, not only the cash-for-keys agreement; and
- Certain template mortgage loan documents containing arbitration provisions were considered deceptive because federal law prohibits consumer mortgages from requiring arbitration.

With respect to short-term, small-dollar lending products:

- Certain lenders engaged in unfair practices by:
 - Placing collection calls to consumers at work after being asked to stop making such calls and being told such calls were prohibited by the consumer’s employer;
 - Placing collection calls to third parties and disclosing the existence of a consumer’s default;
 - Making unauthorized debits of consumers’ bank accounts, namely when accounts had already been paid; and
 - Failing to employ adequate processes to identify unauthorized debits and issue timely refunds.
- Certain lenders engaged in deceptive practices by:
 - Claiming in debt collection phone calls that they must contact the lender to avoid being visited at home or work when the lender did not conduct such visits;
 - Claiming that consumers could receive loans without a credit check when special credit reports were accessed to underwrite loans and used as the basis for denials;
 - Advertising products that the company no longer offered;
 - Advertising that products had lower fees than competitors without adequate substantiation;
 - Claiming on websites that consumers could apply online for a loan when consumers had to visit a physical storefront to obtain a loan; and
 - Collecting names of references on loan applications to verify consumers’ information and subsequently contacting those loan references when a consumer’s loan became delinquent and to market products and services.

V. Updates on Past Cases

a. Prime Marketing Holdings, LLC – August 2017 (Marketing)¹⁸

We previously reported that the CFPB filed a complaint against Prime Marketing Holdings, LLC, a credit repair company that operated under various names (including Park View Credit,

¹⁸ *Consumer Financial Protection Bureau v. Prime Marketing Holdings, LLC (d/b/a Park View Credit, National Credit Advisors, and Credit Experts)*, Case No. 16-cv-7111 (C.D. Cal. Sept. 22, 2016).

National Credit Advisors, and Credit Experts) (collectively the “company”). The CFPB’s complaint alleged that the company violated the TSR and engaged in a number of deceptive acts and practices related to the company’s nationwide marketing of its services. In August 2017, the CFPB filed and the court approved a stipulated final judgment and order to resolve the complaint. The final order provides for the company to pay a \$150,000 civil money penalty and permanently refrain from offering, providing, assisting in the sale of, and/or receiving any fees or other consideration for credit repair services.

b. One Individual Owner of D and D Marketing – September 2017 (Marketing)¹⁹

We previously reported that D and D Marketing, Inc., doing business as T3Leads, was subject to a December 2015 CFPB complaint that the company and two of its then-current individual owners/operators engaged in unfair and abusive acts or practices when it failed to perform due diligence on companies it paid to generate leads (lead generators) and on the payday and installment lenders to whom it sold leads (purchasers).²⁰ Each of the individuals was later sued by the CFPB in April 2016 for knowingly and recklessly providing substantial assistance to the company’s allegedly unfair and abusive acts or practices.²¹

In September 2017, the CFPB and one of the individual owners of the company entered a joint stipulated final judgment and order to resolve these allegations, in which the individual owner agreed to pay a civil money penalty of \$250,000. The CFPB’s cases against D and D Marketing, Inc., and the other individual owner, were not resolved at the time of publication.

VI. CFPB Rulemakings

a. Payday, Vehicle Title, and Certain High-Cost Installment Loans – October 2017²²

In October 2017 the CFPB issued a final rule governing payday, vehicle title, and certain high-cost installment loans. The rule identifies unfair and abusive practices related to short-term “payday” loans and certain longer-term vehicle title and high-cost consumer installment loans and open-end credit plans. The rule provides that it is an unfair and abusive practice to:

- Make certain “covered” short-term or longer-term balloon payment loans (including payday loans and vehicle title loans) without reasonably determining that a consumer has the ability to repay the loan; and

¹⁹ *Consumer Financial Protection Bureau v. Davit Gasparyan, a/k/a David Gasparyan*, Case No. 2:16cv02725 (C.D. Ca.) (Sept. 6, 2017).

²⁰ *Consumer Financial Protection Bureau v. D and D Marketing, Inc. et al.*, Case No. 2:15-cn-9692 (C.D. Cal.) (Dec. 17, 2015). For a summary of the alleged UDAAP violations in the December 2015 T3Leads case, see page 17 of our January 2016 survey.

²¹ *Consumer Financial Protection Bureau v. Davit Gasparyan, a/k/a David Gasparyan*, Case No. 2:16cv02725 (C.D. Ca. April 21, 2016).

²² 82 Fed. Reg. 54472 (November 17, 2017).

- Attempting to withdraw a payment for certain “covered loans” from a consumer deposit account after two consecutive attempts have failed without obtaining a new authorization from the consumer.

The rule applies to “covered loans”²³, which are either closed-end or open-end extensions of credit to consumers for personal, family, or household purposes that:

- Must be substantially repaid within 45 days of consummation/advance;
- Must be substantially repaid more than 45 days after consummation/advance through at least one payment that is more than twice as large as any other payments; or
- Has an Annual Percentage Rate greater than 36% and the lender obtains a “leveraged payment mechanism.”²⁴

The rule imposes requirements on lenders to determine a borrower’s ability to repay certain covered loans to verify that the borrower will be able to meet the loan terms and still meet basic living expenses (both during the term of the covered loan and for 30 days after the highest payment on the covered loan). Lenders must verify the income and major financial obligations of a borrower and estimate basic living expenses. The rule also caps the number of shorter-term covered loans that can be made in rapid succession at three. In addition, the rule requires lenders to submit specified periodic reporting to the CFPB, provide certain notices before debiting payments from a consumer’s deposit account, and requires lenders to obtain new debit authorizations after two failed debit attempts or if any payment amount or timing changes. The rule becomes effective on January 16, 2018, though compliance with certain key provisions is not required until August 19, 2019.

²³ Carve-outs from the “covered loan” definition include: 1) purchase money loans to finance motor vehicles/goods; 2) home mortgage loans; 3) credit cards; 4) student loans; 5) non-recourse pawn loans (where the consumer has no possession of the pawned goods); 6) overdraft lines of credit; 7) wage advance loans (only for accrued wages); 8) no-cost advances; payday alternatives (following specified parameters); 9) accommodation loans; and 10) business-to-business loans.

²⁴ The rule defines “leveraged payment mechanism” to include: 1) a loan agreement that provides that a borrower (at some point in the future) must authorize the lender or a service provider to debit the borrower’s deposit account on a recurring basis; 2) a loan agreement that provides that in the event of default a borrower must authorize the lender or a service provider to debit the borrower’s deposit account on a one-time or a recurring basis; and 3) any authorization where the lender obtains the ability to initiate a transfer from a borrower’s deposit account (either on a one-time or recurring basis). Examples include: checks or other instruments written by the borrower, auto-debit authorizations, remotely created checks/payment orders, and transfers initiated by a lender that is also the depository holding the borrower’s deposit account. There are carve-outs from the “leveraged payment mechanism” definition for “single immediate payment transfers” that are initiated at a borrower’s request.

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