2019 Banking Law Committee Meeting
Washington, D.C.

Trends in Regulatory Enforcement
January 11, 2019

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Interagency Statement Clarifying the Role of Supervisory Guidance

The Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, National Credit Union Administration, and Office of the Comptroller of the Currency (together, the “prudential agencies”) are responsible for promoting safety and soundness and effective consumer compliance at supervised institutions. The Bureau of Consumer Financial Protection (“Bureau,” and, with the prudential agencies, the “agencies”) is generally responsible for regulating the offering and provision of consumer financial products or services under the federal consumer financial laws. The agencies are issuing this statement to explain the role of supervisory guidance and to describe the agencies’ approach to supervisory guidance.

Difference between supervisory guidance and laws or regulations

The agencies issue various types of supervisory guidance, including interagency statements, advisories, bulletins, policy statements, questions and answers, and frequently asked questions, to their respective supervised institutions. A law or regulation has the force and effect of law. Unlike a law or regulation, supervisory guidance does not have the force and effect of law, and the agencies do not take enforcement actions based on supervisory guidance. Rather, supervisory guidance outlines the agencies’ supervisory expectations or priorities and articulates the agencies’ general views regarding appropriate practices for a given subject area. Supervisory guidance often provides examples of practices that the agencies generally consider consistent with safety-and-soundness standards or other applicable laws and regulations, including those designed to protect consumers. Supervised institutions at times request supervisory guidance, and such guidance is important to provide insight to industry, as well as supervisory staff, in a transparent way that helps to ensure consistency in the supervisory approach.

Ongoing agency efforts to clarify the role of supervisory guidance

The agencies are clarifying the following policies and practices related to supervisory guidance:

- The agencies intend to limit the use of numerical thresholds or other “bright-lines” in describing expectations in supervisory guidance. Where numerical thresholds are used, the agencies intend to clarify that the thresholds are exemplary only and not suggestive of requirements. The agencies will continue to use numerical thresholds to tailor, and otherwise make clear, the applicability of supervisory guidance or programs to supervised institutions, and as required by statute.

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1 Government agencies issue regulations that generally have the force and effect of law. Such regulations generally take effect only after the agency proposes the regulation to the public and responds to comments on the proposal in a final rulemaking document.
Examiners will not criticize a supervised financial institution for a "violation" of supervisory guidance. Rather, any citations will be for violations of law, regulation, or non-compliance with enforcement orders or other enforceable conditions. During examinations and other supervisory activities, examiners may identify unsafe or unsound practices or other deficiencies in risk management, including compliance risk management, or other areas that do not constitute violations of law or regulation. In some situations, examiners may reference (including in writing) supervisory guidance to provide examples of safe and sound conduct, appropriate consumer protection and risk management practices, and other actions for addressing compliance with laws or regulations.

The agencies also have at times sought, and may continue to seek, public comment on supervisory guidance. Seeking public comment on supervisory guidance does not mean that the guidance is intended to be a regulation or have the force and effect of law. The comment process helps the agencies to improve their understanding of an issue, to gather information on institutions’ risk management practices, or to seek ways to achieve a supervisory objective most effectively and with the least burden on institutions.

The agencies will aim to reduce the issuance of multiple supervisory guidance documents on the same topic and will generally limit such multiple issuances going forward.

The agencies will continue efforts to make the role of supervisory guidance clear in their communications to examiners and to supervised financial institutions, and encourage supervised institutions with questions about this statement or any applicable supervisory guidance to discuss the questions with their appropriate agency contact.
HIGHLIGHTS FROM Q2 2018

Actions by Regulators

- Actions by all regulators continue to fall, with only 39 actions this period. This is the first quarter since Navigant Consulting, Inc. began publishing the tracker where the number of actions fell below 40. The current quarter is a 15% decrease from Q2 2017, and a 19% decrease since last quarter. Recall that in Q1 2017 (which saw the transition from the Obama administration to the Trump administration), there were 65 total actions, so this quarter’s activity reflects a 40% reduction from that experienced during the final partial Obama quarter.

- Unlike Q1 2018, the Consumer Financial Protection Bureau (CFPB) was active again in Q2 2018, with three actions and a total of $1.34 billion in fines enforced. One of these items was a highly publicized Unfair, Deceptive, or Abusive Acts or Practices (UDAAP) action against a top-three bank, which resulted in a $1 billion civil money penalty.

- The decrease in number of total actions was primarily caused by a lower number of Federal Deposit Insurance Corporation (FDIC) and Federal Reserve Bank (Fed) enforcement actions, both of which had their least active enforcement periods in the past five quarters. In Q2 2018, there were 22 actions levied by the five main federal regulators (CFPB, Office of the Comptroller of the Currency, FDIC, Fed, and Department of Justice), which is a 27% decrease compared to Q2 2017, and a 31% decrease since last quarter.

- The Office of the Comptroller of Currency (OCC) had six actions in the quarter. This is the most actions from the OCC in a single period observed over the past five quarters and up 50% from the previous quarter. Two of its Q2 actions were involved with the UDAAP violations, and a total amount of $515 million civil monetary penalty was enforced in these two actions.

- The main driver of actions was again state and local regulators, which were involved with 11 actions, or 28% of all actions.

Actions by Action Types

- Regulators most frequently used Civil Money Penalty to enforce regulatory requirements, with a total of 16 actions composing 41% of the 39 total Q2 2018 actions. The next most frequently used method of enforcement was Settlement, with 11 instances accounting for 28% of the quarter’s 39 actions.

Actions by Cited Regulations

- UDAAP-related violations were the area of law that was cited the most during the quarter, with a total of 10 actions, or 26% of total Q2 actions. It is also the law that was cited the most during the past five quarters, with a total of 51 actions accounting for 22% of the total 232 observed actions.

- Also noteworthy is that State Foreclosure Law was cited in two actions during Q2 2018. This is the first time this area of law was cited over the past five observed quarters.
Actions by Business Area
• Seven actions in the quarter were related to servicing or origination of closed-end mortgage loans, six actions were related to unsecured lending, and four actions were related to auto loans.

Monetary Penalty by Violation Types
• In the past five consecutive quarters, improper mortgage loan practice has been the source of the highest amount of associated monetary penalty, with over $11.1 billion in fines or penalties. The second-most frequent source was unfair or deceptive acts or practices, with over $2.7 billion in fines or penalties in the past five quarters.
• Unfair or deceptive acts or practices accounted for 11 actions this quarter and had the highest fines in Q2 2018, with $1.93 billion, or 58% of the $3.34 billion total fines. Even with the one $1 billion fine removed, this is a marked increase in penalties. Other violations that stand out this quarter include improper mortgage loan practices, improper auto lending practices, and improper foreign transactions.
• Another area to generate increased focus was governance deficiencies, involved with 12 actions and a total of $500 million civil money penalty in Q2 2018.

Q2 2018 SUMMARY
A total of 39 actions were levied in Q2 2018. The number of regulatory enforcement actions decreased 19% from Q1 2018 and was driven primarily by a decrease in activity from the FDIC and Fed, as seen in Table 1.

<table>
<thead>
<tr>
<th>Number of Actions by Regulators (Table 1)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
</tr>
<tr>
<td>CFPB</td>
</tr>
<tr>
<td>OCC</td>
</tr>
<tr>
<td>FDIC</td>
</tr>
<tr>
<td>FED</td>
</tr>
<tr>
<td>DOJ</td>
</tr>
<tr>
<td>Total Actions by Five Major Regulators</td>
</tr>
<tr>
<td>State / Local</td>
</tr>
<tr>
<td>Other</td>
</tr>
<tr>
<td>Total Actions</td>
</tr>
</tbody>
</table>

The five major federal regulators issued 56% of total enforcement actions this quarter, with six from the OCC, five from the DOJ, five from the FDIC, three from the CFPB, and three from the Fed. CFPB was active again after zero actions had been enforced in last quarter, and FDIC and Fed both had a big drop in number of actions in Q2 2018. State and local regulators were involved in a total of 11 actions and maintained the top spot for the fifth straight quarter.

REGULATORY ACTIONS HIGHLIGHTS

Noteworthy Actions from the Quarter are Detailed Below:

Unfair, Deceptive, or Abusive Acts or Practices
Wells Fargo Bank was disciplined by the OCC in April 2018 after deficiencies in the bank’s enterprise-wide compliance risk management program were identified. The deficiencies constituted “reckless, unsafe, or unsound practices” and resulted in violations of the unfair acts or practices provision of the Federal Trade Commission Act. An order for a civil money penalty of $500 million was issued and required to be paid upon the execution of the consent order.

Wells Fargo was further disciplined by the CFPB in the same month after pleading guilty to the following violations of Mortgage-Interest-Rate-Lock Policies and Practices and Force-Placed Automobile Insurance Practices: (1) failure to follow the mortgage-interest-rate-lock process; it explained to some prospective borrowers; and (2) unfair operation of its Force-Placed Insurance program. The consent order issued by CFPB ordered Wells Fargo to pay a civil money penalty of $1 billion to the bureau within 10 days of the effective date, and the amount can be credited by the $500 million penalty paid to the OCC upon the bank’s satisfaction of its fine.

1. Federal Other consists of certain relevant enforcement actions by Commodity Futures Trading Commission, DOJ, Federal Housing Finance Agency, FinCEN, FHFA, Federal Trade Commission, Housing and Urban Development, SEC, National Credit Union Administration, and OFAC at banks and subsidiaries of bank holding companies.
In May 2018, PNC Bank was disciplined by the OCC after deficiencies in the bank’s practices that resulted in violation of UDAAP were identified. The bank was found to have failed to (1) waive certain fees as represented in disclosures; and (2) provide overdraft protection transfers from a linked account within the time period represented in online disclosures. The bank is ordered to pay a civil money penalty of $15 million upon execution of the consent order.

In June 2018, Security Group, Inc. was disciplined by the CFPB after its unfair practices in debt collecting processes were identified. From 2011 to 2016, Security Group conducted in-person collection visits to consumers’ homes and places of employment to collect debts and made collection calls to consumers’ work places and third parties on shared phone lines, which risked disclosing the existence of consumer’s delinquent debts. It was also found that Security Group has failed to update and correct inaccurate credit reporting and furnish the date of first delinquency. The consent order issued by CFPB ordered Security Group to pay a civil money penalty of $5 million to the bureau.

Additional commentary on Q2 2018 financial enforcement actions, and related charts and graphs, can be found below:

**Actions by Regulators (Figure 1-2)**

<table>
<thead>
<tr>
<th>Unique Regulatory Action Quarterly Counts (Figure 1)</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Regulatory Actions Taken by Top 5 Federal Regulators and State/Local Regulators (Figure 2)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Q2 2017</td>
</tr>
<tr>
<td>CFPB</td>
</tr>
<tr>
<td>11</td>
</tr>
<tr>
<td>3</td>
</tr>
<tr>
<td>10</td>
</tr>
<tr>
<td>11</td>
</tr>
</tbody>
</table>

**Highlights:**

- A total of 39 actions were levied in Q2 2018, which is a 15% decrease compared to Q2 2017, and a 19% decrease compared to Q1 2018.
- Enforcement actions by major actors decreased in Q2 2018. The FDIC and the Fed had their fewest number of actions in the past five quarters.
- Eleven enforcement actions were levied by state and local regulators, making state regulators the most active in the quarter for the fifth consecutive quarter.

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Regulatory Trends by Action/Violation and Enforcement Occurrences (Figure 3-5)

### Trends of Major Regulatory Actions (Figure 3)

<table>
<thead>
<tr>
<th></th>
<th>Q2 2017</th>
<th>Q3 2017</th>
<th>Q4 2017</th>
<th>Q1 2018</th>
<th>Q2 2018</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lawsuit</td>
<td>4</td>
<td>6</td>
<td>4</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>Cease and Desist Order</td>
<td>6</td>
<td>4</td>
<td>5</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Civil Money Penalty</td>
<td>9</td>
<td>16</td>
<td>16</td>
<td>16</td>
<td>16</td>
</tr>
<tr>
<td>Settlement</td>
<td>18</td>
<td>11</td>
<td>11</td>
<td>11</td>
<td>11</td>
</tr>
<tr>
<td>Formal Agreement / Consent Order</td>
<td>12</td>
<td>10</td>
<td>0</td>
<td>11</td>
<td>11</td>
</tr>
<tr>
<td>Prompt Corrective Action</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Other Fines</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Note:** One regulatory action may be categorized as multiple action types. Actions from previous quarters issued after the previous publication's cutoff date may be included in the above figures.

**Highlights:**

- While the distribution of regulatory actions varies across each quarter, civil money penalty accounted for the greatest number of actions in Q2 2018, with 16 total actions.
- Formal agreements/consent orders continued to decline in frequency and reached their lowest total count in Q2 2018.
Q2 2017 to Q2 2018 Regulation/Regulation
Agency Types of Violations (Figure 4)

<table>
<thead>
<tr>
<th>REGULATORY VIOLATION TYPE</th>
<th>Q2 2017</th>
<th>Q3 2017</th>
<th>Q4 2017</th>
<th>Q1 2018</th>
<th>Q2 2018</th>
<th>GRAND TOTAL</th>
<th>% OF TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Allowance for Loan and Lease Losses</td>
<td>1</td>
<td>5</td>
<td>4</td>
<td>0</td>
<td>0</td>
<td>10</td>
<td>3.6%</td>
</tr>
<tr>
<td>Bank Secrecy Act/Anti-Money Laundering Act</td>
<td>4</td>
<td>8</td>
<td>6</td>
<td>13</td>
<td>5</td>
<td>36</td>
<td>13.1%</td>
</tr>
<tr>
<td>Basel -- Capital Requirements</td>
<td>1</td>
<td>6</td>
<td>2</td>
<td>1</td>
<td>0</td>
<td>10</td>
<td>3.6%</td>
</tr>
<tr>
<td>Commodities or Securities Exchange Act</td>
<td>0</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>6</td>
<td>12</td>
<td>4.4%</td>
</tr>
<tr>
<td>Fair Housing Act</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>4</td>
<td>1.5%</td>
</tr>
<tr>
<td>Financial Industry Regulatory Authority</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>3</td>
<td>1.1%</td>
</tr>
<tr>
<td>National Flood Insurance Program</td>
<td>6</td>
<td>4</td>
<td>9</td>
<td>6</td>
<td>4</td>
<td>29</td>
<td>10.5%</td>
</tr>
<tr>
<td>Office of Foreign Assets Control</td>
<td>2</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>6</td>
<td>2.2%</td>
</tr>
<tr>
<td>Regulation AE: Asset-backed Securities &amp; RMBS Violations</td>
<td>2</td>
<td>2</td>
<td>2</td>
<td>2</td>
<td>1</td>
<td>9</td>
<td>3.3%</td>
</tr>
<tr>
<td>Regulation B: Equal Credit Opportunity Act</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>2</td>
<td>0.7%</td>
</tr>
<tr>
<td>Regulation C: Home Mortgage Disclosure Act</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0.0%</td>
</tr>
<tr>
<td>Regulation E: Electronic Fund Transfer Act</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>3</td>
<td>0</td>
<td>3</td>
<td>1.1%</td>
</tr>
<tr>
<td>Regulation H: Membership of State Banking Institutions in The Federal Reserve System</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>2</td>
<td>0.7%</td>
</tr>
<tr>
<td>Regulation V: Fair Credit Reporting Act</td>
<td>0</td>
<td>1</td>
<td>2</td>
<td>0</td>
<td>1</td>
<td>4</td>
<td>1.5%</td>
</tr>
<tr>
<td>Regulation X: Real Estate Settlement Procedures Act</td>
<td>5</td>
<td>4</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>11</td>
<td>4.0%</td>
</tr>
<tr>
<td>Regulation Y: Bank Holding Companies and Change in Bank Control</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0.4%</td>
</tr>
<tr>
<td>Regulation Z: Truth in Lending Act.</td>
<td>2</td>
<td>0</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>6</td>
<td>2.2%</td>
</tr>
<tr>
<td>Servicemember Civil Relief Act</td>
<td>0</td>
<td>3</td>
<td>2</td>
<td>2</td>
<td>0</td>
<td>7</td>
<td>2.5%</td>
</tr>
<tr>
<td>State Foreclosure Laws</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>2</td>
<td>0.7%</td>
</tr>
<tr>
<td>State Payday Lending Statutes</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0.4%</td>
</tr>
<tr>
<td>Unfair, Deceptive, or Abusive Acts or Practices</td>
<td>12</td>
<td>12</td>
<td>12</td>
<td>5</td>
<td>10</td>
<td>51</td>
<td>18.5%</td>
</tr>
<tr>
<td>Other</td>
<td>14</td>
<td>16</td>
<td>8</td>
<td>13</td>
<td>15</td>
<td>66</td>
<td>24.0%</td>
</tr>
<tr>
<td>Total</td>
<td>52</td>
<td>66</td>
<td>52</td>
<td>55</td>
<td>50</td>
<td>275</td>
<td>100%</td>
</tr>
</tbody>
</table>

Note: Multiple violation types may be counted as part of one consent order or action taken by federal and state regulators. Actions from previous quarters issued after the previous publication’s cutoff date may be included in the above figures.

Highlights:

- Frequency of violations related to UDAAP increased from five actions in Q1 2018 to 10 actions in Q2 2018, making it the most frequent regulatory violation type of the quarter.
- The top areas of violations over the past five quarters were issues around UDAAP (19%); Bank Secrecy Act/Anti-Money Laundering (BSA/AML) (13%); National Flood Insurance Program (11%); Commodities or Securities Exchange Act (4%); and Regulation X: Real Estate Settlement and Procedures Act (4%).
Q2 2017 — Q2 2018 Number of Enforcement Occurrences and Total Amount in Fines and Penalties (Figure 5)

Note: Multiple violation types may be counted as part of one consent order or action taken by federal and state regulators. Actions from previous quarters issued after the previous publication’s cutoff date may be included in the above figures.

Highlights:

- Improper mortgage loan practices accounted for the highest total related fines over the past five quarters; UDAAP accounted for the second-highest total dollars in fines and penalties.
- UDAAP violations (25%), improper mortgage loan practices (19%), governance deficiencies (17%), BSA/AML violations (15%), national flood insurance program violations (13%), and Securities, Commodities, or FX Violation (9%) were the most frequent enforcement occurrences over the past five quarters.

METHODOLOGY

Navigant Consulting Inc.'s dedicated internal research team leverages regulatory agency publications, Factiva, SNL Financial, and LSM to monitor regulatory action in the financial services space by key federal, state, and local regulators.

Our internal research team collected information about actions taken over the past five quarters by the following U.S. regulators:

- Office of the Comptroller of the Currency (OCC)
- Federal Deposit Insurance Corporation (FDIC)
- Federal Reserve (Fed)
- Consumer Financial Protection Bureau (CFPB)
- Department of Justice (DOJ)
- State and local regulators, and others

The team focused on regulatory issues related to violations of:

- Unfair, Deceptive, or Abusive Acts or Practices (UDAAP)
- Real Estate Settlement Procedures Act (RESPA)
- Bank Secrecy Act/Anti-Money Laundering laws (BSA/AML)
- Servicemembers Civil Relief Act (SCRA)
- Equal Credit Opportunity Act (ECOA)
- Truth in Lending Act (TILA)
- Fair Credit Reporting Act (FCRA)
- Various state laws, and others

Actions against individuals, removal or prohibition orders, termination of insurance, Section 19 letters, 1829 letters, and securities enforcement actions are not captured in this tracker. Actions published after July 30, 2018, are not included in this report.
Enforcement Tracker Violation Type Definitions

Bank Secrecy Act violation: Failure of the financial institution to meet internal controls and monitoring requirements set forth by the Bank Secrecy Act or anti-money laundering regulations.

Fraudulent lending to insiders: Extension of credit to an insider, as defined by Regulation O and Regulation W, that exceeds limits set by Regulation O or Regulation W or provides the insider with any preferential treatment.

Governance deficiencies: Failure of a financial institution and/or its board to fulfill its fiduciary responsibilities in various areas of bank management, such as compliance risk management, operational efficiency, or interest rate risk management. (This category includes directors and officers actions; compliance risk management; management replacement and operations; credit risk and interest risk management).

Improper accounting practices: Failure to follow generally accepted accounting principles through means such as fraudulent reporting, omission of assets or liabilities, etc.

Improper auto lending practices: Violation of laws or regulations in the origination or servicing of an auto loan.

Improper foreign transactions: Violation of any law or regulation governing interactions with foreign entities; commonly an OFAC violation.

Improper mortgage loan practices: Violation of a law or regulation in the origination or servicing of a mortgage loan or mortgage-backed securities.

Improper student lending practices: Violation of law or regulation in the origination or servicing of an education loan.

Improper consumer lending practices: Violation of law or regulation in the origination or servicing of a consumer loan, other than mortgage, auto, or student loans.

Insufficient capital: Failure of a financial institution to meet minimum capital requirements set forth by Basel.

National Flood Insurance Program violation: Violation of the National Flood Insurance Program requirements or related acts and regulations, such as the National Flood Insurance Act or Flood Disaster Protection Act.

Payday loans violation: Violation of any law or regulations in the issuance or servicing of payday loans.

Securities, commodities or forex violation: Violation of any law or regulation in the distribution, monitoring, or trading of securities, commodities, or forex.

Servicemembers Civil Relief Act violation: Violation of any law or regulation in the origination of servicing of a line of credit to an active-duty member of the U.S. armed forces.

Third-party vendor management: Failure by an institution to ensure that third-party vendors are operating in compliance with pertinent laws and regulations.

Unfair, Deceptive, or Abusive Acts or Practices: Any unfair or deceptive statement, disclosure, or action that causes material harm to the consumer.
ORDER OF PROHIBITION FROM FURTHER PARTICIPATION

FDIC-18-0059e

GREGORY ST. ANGELO (Respondent) HAS BEEN ADVISED OF THE RIGHT TO RECEIVE a NOTICE OF INTENTION TO PROHIBIT FROM FURTHER PARTICIPATION (NOTICE) issued by the Federal Deposit Insurance Corporation (FDIC) detailing the UNSAFE OR UNSOUND BANKING PRACTICE, AND/OR BREACH OF FIDUCIARY DUTY, for which an ORDER OF PROHIBITION FROM FURTHER PARTICIPATION (ORDER) may issue and has been further advised of the right to a hearing on the allegations under 12 U.S.C. § 1818(e) and the FDIC’s Rules of Practice and Procedure, 12 C.F.R. Part 308. Having waived those rights, Respondent entered into a STIPULATION AND CONSENT TO THE ISSUANCE OF AN ORDER OF PROHIBITION FROM FURTHER PARTICIPATION (CONSENT AGREEMENT) with a representative of the Legal Division of the FDIC, dated April 18, 2018, whereby solely for the purpose of this proceeding and without admitting or denying any VIOLATIONS, UNSAFE OR UNSOUND BANKING PRACTICES, AND/OR ANY
Banking Regulators Issue Joint Policy Statement Downplaying the Role of Supervisory Guidance in Enforcement

September 12, 2018
Financial Services

On September 11, 2018, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Bureau of Consumer Financial Protection (the “Bureau”, and, collectively, the “Agencies”) issued a statement “clarifying the role of supervisory guidance.” The release affirms that the Agencies “do not take enforcement actions based on supervisory guidance” and that such guidance “does not have the force and effect of law.” This statement continues a recent pattern in regulatory policy of downplaying the force of guidance documents, at least as they relate to enforcement actions.

The statement explains that, rather than create binding rules with the force and effect of law, guidance “outlines supervisory expectations or priorities” and/or provides examples of practices the Agencies consider acceptable under applicable legal standards, such as safety and soundness standards. Further, the Agencies state that guidance is often issued in part as a response to requests from supervised institutions to “provide insight to industry” and help “ensure consistency in the supervisory approach.”

The Agencies’ statement further clarifies a number of going-forward policies and practices related to supervisory guidance:

- The Agencies intend to limit the use of numerical thresholds and bright-line tests in guidance (although numerical thresholds, such as an institution’s asset size, will continue to be used to tailor the applicability of guidance).
- Examiners will not criticize institutions for a “violation” of guidance, although they may identify unsafe or unsound banking practices or risk management or other deficiencies and reference supervisory guidance to provide examples of safe and sound practices, appropriate risk management, and other actions designed to comply with laws and regulations.
- Although the Agencies may continue to seek public comment on some guidance documents, seeking comment does not transform guidance into a rule.
- The Agencies will limit the issuance of multiple guidance documents on the same topic.
- The Agencies will make further efforts to clarify the role of supervisory guidance when communicating both with examiners and supervised institutions, and also encourage supervised institutions to contact the appropriate Agency if they have questions about guidance.
The statement appears to address concerns raised by Congressman Blaine Luetkemeyer, a senior member of the House Financial Services Committee, in a June 2018 letter to the Agencies and the Securities and Exchange Commission. This letter noted that members of industry believed guidance had been treated by the Agencies "as though it was a rule" and that the Agencies engaged in "regulation by enforcement."

This Agencies' statement is also consistent with a recent U.S. government theme of reducing the perceived role of guidance documents in regulatory oversight and enforcement. For example, Attorney General Jeff Sessions issued a memorandum in November 2017 that stated that the Department of Justice ("DOJ") had "in the past published guidance documents . . . that effectively bind private parties without undergoing the rulemaking process" and directed the DOJ to revise its policy to "avoid circumventing the rulemaking process." In January 2018, then-Associate Attorney General Rachel Brand issued such a revised policy "limiting use of agency guidance documents in affirmative civil enforcement cases."

In a similar vein, the Government Accountability Office ("GAO") has determined that multiple regulatory guidance documents are, in reality, "rules" for purposes of the Congressional Review Act ("CRA"). The CRA provides Congress with the opportunity to disapprove any rule before it takes effect.

Most notably, the GAO determined that Bureau guidance on indirect auto lending under the Equal Credit Opportunity Act and interagency guidance on leveraged lending both constituted "rules" under the CRA because the statements were "designed to implement, interpret or prescribe law or policy." Congress later invalidated the Bureau auto lending guidance under the CRA, and testimony and other comments from banking agency leaders have called into question the practical import of the leveraged lending guidance going forward. For example, Comptroller of the Currency Joseph Otting stated at a conference in February that national banks "have the right to do what [they] want" with respect to leveraged lending "as long as it does not impair safety and soundness."

It is unclear whether the Agencies' statement disclaiming the binding effect of guidance will affect future GAO reviews of guidance documents under the CRA. It also remains to be seen how the Agencies' statement will be implemented in practice as their supervisory teams conduct future examinations.

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How FTC Is Stepping Up Its Consumer Protection Efforts

By Jonice Gray Tucker, Amanda Lawrence and Christopher Robins

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Recent changes in agendas and leadership at the federal level are prompting companies offering financial products and services to question what consumer protection enforcement will look like on the road ahead. There has been significant discussion about the increasing role of state regulators, including state attorneys general, and what they may do to fill the perceived void that may be left by agencies like the Consumer Financial Protection Bureau. Many state regulators have indicated that they are ready to step up enforcement, and a number already are doing so. This does not mean, however, that the industry should shift its focus exclusively to the states.

The Federal Trade Commission, which once dominated the playing field on many consumer protection issues, should be carefully watched. Prior to the bureau’s inception, the FTC took a series of enforcement actions that significantly reshaped mortgage servicing,[1] well before the CFPB codified its rules.[2] However, passage of the Dodd-Frank Act[3] and creation of the CFPB made the FTC’s role in the federal consumer protection landscape seem uncertain at times for companies offering financial products and services. Under Dodd-Frank, the FTC retained its authority to enforce numerous consumer protection laws, and to enforce CFPB rules applicable to entities within the FTC’s jurisdiction[4] — including most providers of financial services that are not banks, thrifts or federal credit unions. Yet, on certain issues, the FTC seemed to cede enforcement authority to the CFPB, which also acquired many of the commission’s most seasoned consumer protection lawyers.

The FTC appears poised to reclaim a more active role in consumer enforcement in connection with financial products and services. The bipartisan commission is now at full strength with five members, and includes Rohit Chopra, who previously was student loan ombudsman at the CFPB. Financial services companies subject to FTC jurisdiction and their service providers should be aware of potential consumer protection enforcement priorities for 2018 and beyond.

Consumer Protection Agenda Under Chairman Joseph Simons
The FTC has escalated enforcement over the past year in a number of areas that are relevant to financial services companies and their service providers. While continuing to bring enforcement actions under its general unfair or deceptive acts or practices, or UDAP, authority, the FTC appears to have focused its consumer protection agenda on: (1) privacy and data security; (2) debt collection; (3) fintech companies, especially those focusing on lending and payment-related issues; and (4) the treatment of military personnel and families. It has also brought cases utilizing a third-party liability theory, demonstrating that it is willing to hold companies liable for the actions of its service providers.

Privacy and Data Security

FTC Chairman Joseph Simons told Congress in July that “privacy and data security top the list of [its] consumer protection priorities.”[5] The FTC has brought more than 500 such cases, and over the course of the past year has taken actions related to data breaches, privacy violations under the Gramm-Leach-Bliley Act, and international privacy frameworks.

The FTC has brought privacy and data security cases against or is currently investigating a number of companies for:

- Allegedly failing to reasonably secure sensitive consumer data stored in the cloud.[6]
- Allegedly misleading consumers into completing loan applications and selling those applications, which included consumers’ personal data, to unscrupulous third parties.[7]
- Data breaches.[8]

The FTC also has brought several recent enforcement actions related to the GLBA’s privacy provisions, which it had regularly enforced prior to the creation of the bureau. A recent case against TaxSlayer (November 2017) and a matter involving Venmo (May 2018) may signal a recommitment to challenging such conduct.

The FTC also has been actively enforcing the EU-U.S. Privacy Shield Framework, which was designed to facilitate trans-Atlantic transfers of personal data. While the Privacy Shield Framework is a voluntary mechanism, the FTC is responsible for enforcing its provisions for any organizations that commit to complying with it. The FTC has brought over 45 cases enforcing the Privacy Shield, the predecessor Safe Harbor framework, and the Asia Pacific Economic Cooperation Cross Border Privacy Rules framework.[9]

The FTC last year established a privacy and data security task force to “better understand the markets for consumer information, incentives for the various parties in that marketplace, and how to quantify costs and benefits of different actions the FTC or others could take.”[10] The commission said it wanted to “deepen its understanding of the economics of privacy,” which includes “studying consumer preferences and the relationship between access to consumer information and innovation.”[11] It also held an informational injury workshop in December 2017 in which it developed a taxonomy for information injury: loss of opportunity, economic loss, social detriment, and loss of liberty.[12] While the FTC has yet to provide further guidance regarding the types of injury, its mere acknowledgment that injury goes beyond economic loss suggests that it could broaden its assessment of injury.

Debt Collection

Debt collection accounted for 22.7 percent of the 2.7 million complaints the FTC received in 2017 through its consumer complaint portal.[13] That was the top complaint, and matters related to debt collection not
surprisingly are a priority for the FTC. For example, on Sept. 7, it settled with the operators of a company that allegedly used false claims and threats to get consumers to pay debts, including debts that the company did not have authority to collect or that the people did not owe.[14]

While the conduct in question in this case appears extreme, the FTC could expand its enforcement efforts to include under its jurisdiction entities that employ service providers engaging in illegal conduct. That could entail reviewing vendor management policies, procedures and practices related to debt collection, and pursuing enforcement actions based on a company’s failure to monitor a vendor.

In March, the FTC and CFPB announced joint efforts to police debt collectors and issued an annual report to Congress on their collective actions to combat illegal debt collection practices under their shared responsibilities under the Fair Debt Collection Practices Act.[15] The two agencies are likely to pursue greater collaboration on debt collection going forward.

**Fintech Companies**

The FTC remains focused on protecting consumers who use various forms of financial technology and ensuring that “market participants offering these exciting new products keep in mind important consumer protection principles as they continue to innovate for consumers’ benefit.”[16] Of interest to the FTC are mobile payments, with a focus on the Electronic Funds Transfer Act, marketplace lending, cryptocurrencies and money transmitters.[17]

The FTC’s recent enforcement action related to Venmo, a payment and social networking application and website that had been acquired just before the action, indicates that fintech companies, especially those in the payments and lending space, may be in the crosshairs of the FTC’s broader agenda. The commission alleged that Venmo failed to disclose to users of its peer-to-peer payment service that transfers of funds to external bank accounts were subject to review and could be frozen or removed, and that it misrepresented the extent to which accounts were protected by “bank-grade security systems.”[18] The FTC’s emphasis in this case is consistent with its more general focus on data privacy and security and sends a strong signal that it is willing to rely on its UDAP authority to protect fintech customers.

The commission has also stated that money transmitters have a responsibility to implement controls and procedures to ensure that criminals are not using their services to defraud consumers. In one example, the FTC alleged that a money transmitter was aware that its system was being used for fraud-induced money transfers, but failed to take measures to detect and prevent such transfers, such as terminating agents and locations involved in high levels of fraudulent transactions or imposing more robust ID requirements to receive transfers.[19] Here again, the FTC is looking to third-party vendor management issues as an avenue to pursue enforcement actions.

The proliferation of cryptocurrency has pushed the FTC to take actions to protect consumers from schemes related to this relatively new medium of exchange. While its efforts to date have focused primarily on consumer education, a recent UDAP enforcement action against a cryptocurrency promoter may be a sign of what is to come. The case involved four individuals that allegedly promoted deceptive moneymaking schemes involving cryptocurrencies through websites, YouTube videos, social media and conference calls.[20] Exchanges, brokers, wallet providers and other participants in cryptocurrency markets should be aware that the FTC is watching carefully.

**Military and Veterans**
The FTC also has identified fraud targeting military personnel as a priority.[21] Although the FTC does not have enforcement authority under the Servicemembers Civil Relief Act, it can bring actions under its general UDAP authority, as well as under the authority granted in other statutes — including the Truth in Lending Act, the Electronic Fund Transfer Act, the Fair Credit Reporting Act and the FDCPA. In 2017 alone, the FTC received more than 114,000 consumer complaints from service members, their dependents, military retirees and veterans, with the top complaints related to imposter scams, identity theft and debt collection.[22]

The FTC last year established a military task force and has already brought a number of cases related to debt collection and mortgage debt relief targeting service members and veterans.[23] It also has brought cases alleging deceptive practices in the sale of automobile add-on products.

**UDAP**

UDAP has been a centerpiece of the FTC’s enforcement agenda for years. The FTC has stepped up its UDAP enforcement generally, including actions brought by the FTC in the last year that involve cryptocurrencies and data breaches discussed above.

The FTC has emphasized that ensuring that advertising is truthful and not misleading is one of its core missions. The FTC filed a UDAP-related complaint in April alleging that an online lender’s claim that its loans had “no hidden fees” was deceptive because consumers were charged origination fees.[24] This lawsuit may be a precursor to other similar actions that the FTC may take in reviewing advertising and marketing materials.

The FTC also recently has taken UDAP actions in connection with credit cards and student loans. Last December, it filed a complaint alleging that the defendants violated the FTC Act and the Telemarketing Sales Rule by misrepresenting that they could reduce credit card interest rates and save consumers money, and failed to disclose that consumers could pay a range of additional bank fees totaling 1 to 3 percent of their credit card debt.[25] Last October, it announced “Operation Game of Loans,” the first coordinated federal-state law enforcement initiative targeting deceptive student loan debt-relief scams.[26]

**Conclusion**

While consumer protection priorities under the Trump administration are different from those under the Obama administration, this does not mean that all federal enforcement agencies are standing down on these issues.

- The FTC has reiterated its commitment to taking enforcement action in the privacy and data security space, and has brought a number of actions that allege UDAP violations and violations of specific privacy statutes. Companies would be well-served to review their policies, procedures and practices related to data breaches as well as general compliance with privacy laws to ensure that there are no gaps.

- The FTC and the CFPB have identified debt collection as a top enforcement priority. Debt collectors and those who hire third parties to collect debt on their behalf should examine their practices and ask themselves whether they have adequate policies, procedures and practices in place to monitor and rapidly correct infractions, even those by their third-party collectors.

- The FTC appears focused on legal issues related to mobile payments, marketplace lending, cryptocurrencies and money transmitters, and will scrutinize fintech companies if compliance with the spirit and letter of consumer protection is called into question.
• Issues facing service members are a priority for the FTC. Companies serving military consumers should assess their compliance with a host of laws, including SCRA, TILA, EFTA, FDCPA and FCRA — along with a general UDAP review.

• The FTC will continue to utilize its UDAP authority to bring actions. Matters of interest to the FTC include alleged misrepresentations or deception in advertising, as well as fraud. Companies should review their advertising and other consumer-facing materials, as well as origination and servicing practices, for UDAP risk.

In the last year, the FTC brought or settled 109 consumer protection matters and distributed over $269 million in redress to over 3 million consumers.[27] Financial services companies and their service providers should keep a watchful eye on FTC’s enforcement agenda.

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[7] Id.


[17] Id.


[19] Id.


[22] Id.


[25] Id.
