CAN'T GO BACK TO YESTERDAY: HOW THE DODD-FRANK ACT HAS CHANGED FINANCIAL SERVICES REGULATION AND LITIGATION

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FROM UDAP TO UDAAP

UDAP- Federal Prohibition Under Section 5 of the Federal Trade Commission Act

- Unfair or Deceptive Acts or Practices ("UDAP")
  - Prohibits ''unfair or deceptive acts or practices in or affecting commerce"
  - Prudential regulators retain the ability to take action against supervised institutions under Section 5
  - No private right of action under Section 5

UDAP – State-Level Consumer Protection Laws

- All 50 states and the District of Columbia have UDAP laws
- State Attorneys General typically given enforcement authority
- Many states also permit private suits
- Remedies differ under state law, but may include injunctive relief, restitution and/or civil penalties

UDAAP – Dodd-Frank's Expansion (12 U.S.C.A. §§ 5531 and 5536)

- Prohibits Unfair, Deceptive, or Abusive Acts or Practices ("UDAAP")
- Adopts historical "unfair" and "deceptive" standards, while adding an "abusive" standard:
  - UDAAP standards provide great deal of subjectivity and leave terms such as "abusive" not fully defined. (E.g., What is /are "substantial injury," "not reasonably avoidable", "unreasonable advantage," "not outweighed by countervailing benefits," "material interference," "lack of understanding," "material risks, costs, or conditions," "inability of the consumer to protect the interests of the consumer," and "reasonable reliance"?)
  - Even actions technically are permissible under other laws may constitute a UDAAP violation—means stricter standards and potential for increased enforcement activity
- Consumer Financial Protection Bureau ("CFPB") new enforcer and rulemaker for UDAAP

RECENT ENFORCEMENT ACTIONS

- To date, the CFPB has negotiated resolutions in eight matters

- Three Consent Orders involving credit card issuers:
  - Were joint investigations conducted with prudential regulators
  - Relied heavily on UDAAP and UDAP theories of liability
  - Alleged lack of oversight of vendors
  - Resulted in civil penalties and significant borrower restitution
  - Required changes to compliance management systems
- An action was filed in federal district court against a debt-relief services company for charging advance fees
- Four Consent Orders involving national mortgage insurers
  - Initiated by the HUD-OIG, and in July 2011, HUD's authority over the investigation transferred to the CFPB
  - Alleged improper kickbacks paid by mortgage insurers to mortgage lenders in exchange for business
  - Resulted in civil penalties and termination from business practices
  - Required changes to compliance management systems

July Consent Order

- CFPB issued its first Consent Order on July 18, 2012, in tandem with Bulletin 2012-06 on the marketing of credit card add-on products
  - Joint CFPB-OCC action
- The Consent Order between the CFPB and the credit card issuer alleged that the issuer's marketing practices for its add-on products violated UDAAP
- The CFPB Consent Order called for $140 million in remediation and imposed an additional $25 million in civil penalties
  - OCC issued a separate Consent Order requiring an additional $10 million in remediation and imposing $35 million in civil penalties
- See: http://files.consumerfinance.gov/f/201209_cfpb_0001_001_Consent_Order_and_Stipulation.pdf
- See: http://files.consumerfinance.gov/f/201207_cfpb_bulletin_marketing_of_credit_card_addon_products.pdf

September Consent Order

- On September 24, 2012, CFPB and FDIC entered into a joint Consent Order with a credit card issuer alleging that the issuer's marketing and sales practices for add-on products violated UDAAP and UDAP
  - See: http://www.consumerfinance.gov/pressreleases/discover-consent-order/
- The joint order required $200 million in restitution and imposed $14 million in civil penalties

July and September Consent Order Themes

- The first two Consent Orders allege unfair and deceptive practices in connection with the credit card issuer's marketing, enrollment, and billing practices
- Nature of alleged concerns vary for each Consent Order, but between the two include focus on:

- Marketing selection process
- Clarity regarding purpose of call
- Use of terminology alleged to make it unclear that the consumer was purchasing a product (e.g., “enroll” or “become a member”)
- Delivery and disclosure of material terms and conditions
- Use of rebuttals during initial enrollment or attempted cancellation

- Significant focus on telesales of products (third-party and in-house)
  - Alleged lack of oversight of vendors with specific focus on monitoring of third-party telesales agents
- In addition to restitution and penalties, banks were required to undertake actions to improve compliance programs

October Consent Orders

- Enforcement action stemmed from examinations of a major credit card issuer and its three subsidiaries by the FDIC and the Utah Department of Financial Institutions
  - CFPB, Federal Reserve Board (“FRB”), and the Office of the Comptroller of the Currency (“OCC”) later joined the examination
  - Agencies alleged violations of Federal consumer financial laws as well as compliance management deficiencies occurring from 2003 to 2012
  - On October 1, 2012, the CFPB entered into three Consent Orders with the card issuer’s subsidiaries
    - The FDIC was a party to one of the orders
  - The orders included allegations that the issuer:
    - Employed deceptive marketing and debt collection practices in violation of UDAAP and UDAP laws
    - Committed age discrimination in violation of ECOA and Regulation B
    - Carried out unlawful fee collection in violation of TILA and Regulation Z
    - Failed to report consumer disputes in violation of FCRA
- The orders called for $85 million in restitution to 250,000 consumers, imposed $27.5 million in civil penalties, and required implementation of compliance risk management and vendor oversight programs
- See: http://files.consumerfinance.gov/f/2012-CFPB-0002-American-Express-Centurion-Consent-Order.pdf
- See: http://files.consumerfinance.gov/f/2012-CFPB-0003-American-Express-Bank-FSB-Consent-Order.pdf
- See: http://files.consumerfinance.gov/f/2012-CFPB-0004-American-Express-Travel-Related-Services-Company-Inc.-Consent-Order.pdf
- On October 1, 2012, the OCC entered into a similar Consent Order with the card issuer’s subsidiary

- The regulator asserted that the card issuer failed to properly manage vendors who engaged in deceptive debt collection practices in violation of section 5 of the FTC Act
- The OCC ordered a $500,000 civil money penalty against the card issuer and ordered the bank to provide approximately $6 million in restitution to an estimated 17,000 affected customers
- See: http://www.occ.gov/news-issuances/news-releases/2012/nr-occ-2012-137a.pdf
- See: http://www.occ.gov/news-issuances/news-releases/2012/nr-occ-2012-137.html
- Also on October 1, 2012, the FRB entered into a Consent Order with two of the card issuer's subsidiaries to address alleged deceptive marketing and debt collection practices and associated deficiencies in compliance risk management and internal audit
- The FRB ordered a $9 million civil money penalty against the card issuer's subsidiaries and required the card issuer to improve consumer compliance oversight and compliance risk-management and internal audit programs
- See: http://www.federalreserve.gov/newsevents/press/enforcement/enf20121001a1.pdf
- See: http://www.federalreserve.gov/newsevents/press/enforcement/20121001a.htm

December Consent Order

- On December 21, 2012 CFPB entered into a Stipulated Order with a nationwide payday debt relief services company to refund up to $100,000 to consumers who were charged advance fees for services
- CFPB was joined by Attorneys General of New Mexico, North Carolina, North Dakota, and Wisconsin, as well as Hawaii Office of Consumer Protection
- Alleged violations of FTC's Telemarketing Sales Rule, Dodd-Frank, and various state laws
- Company also agreed to a $5,000 in civil penalties payable to CFPB, as well as compliance monitoring and reporting

April Consent Orders

- On April 4, the CFPB announced that it filed complaints and proposed Consent Orders with the United States District Court for the Southern District of Florida against four national mortgage insurance companies relating to improper kickbacks paid by mortgage insurers to mortgage lenders
- Proposed Consent Orders require the four mortgage insurance companies to change their practices and pay penalties to the CFPB totaling more than $15 million
- Insurers agreed not to enter into captive mortgage reinsurance arrangements with affiliates of mortgage lenders and not to obtain captive reinsurance on new mortgages for a period of ten years
- Insurers also agreed to compliance monitoring and reporting to ensure compliance with the orders
- See: http://files.consumerfinance.gov/f/201304_cfpb_Doc5_Genworth-Final-Order.pdf
- See: http://files.consumerfinance.gov/f/201304_cfpb_Doc5_MGIC-Final-Order.pdf
- See: http://files.consumerfinance.gov/f/201304_cfpb_Doc5_Radian-Final-Order.pdf

- See: http://files.consumerfinance.gov/f/201304_cfpb_Doc5_UGI-Final-Order.pdf

May Consent Order/Complaints

- On May 17, the CFPB issued an order against a Texas homebuilder, Paul Taylor, which alleged use of sham mortgage companies to funnel kickbacks for referring mortgage origination business
- Consent Order called for $118,194 in disgorgement of profits, and prevents the homebuilder from engaging in real estate settlement services for five years
- On May 7 and May 30, the CFPB filed two complaints in federal district courts against debt-relief service providers, each of which allege that the providers charged illegal up-front fees and misled consumers in violation of UDAAP and the FTC's Telemarketing Sales Rule
  - The CFPB stated in a press release that the complaints are part of a "comprehensive effort to prevent consumer harm in the debt relief industry"

OTHER CFPB INITIATIVES

Overdraft study

- On June 11, the CFPB released a white paper with initial findings from its study of bank and credit union overdraft practices
- The paper reports that
  - Customers who opt-in to overdraft programs pay higher fees and are more likely to have their accounts involuntarily closed,
  - Overdraft practices and costs / closures related to overdraft programs vary widely by institution, and
  - Some policies and practices are not disclosed or are disclosed in a technical manner
- The report is based on a review of institution-level data, and the CFPB plans to review account-level data in order to better understand how differences in bank practices affect customers

Expanded Complaint Database

- CFPB expanded its public Consumer Complaint Database to include complaints about credit reporting and money transfers
- CFPB uses complaints its receives to prioritize and prepare for investigations and examinations
  - The public database contains over 117,000 complaints
- The public database now contains complaints about credit cards, mortgages, student loans, bank accounts and services, other consumer loans, credit reporting, and money transfers
- The CFPB does not verify the facts alleged in a complaint before making it public

Payday Lending

- On April 29, the CFPB published a white paper on payday loan and deposit advance products that claims to show those products lead to a "cycle of high-cost borrowing"
- CFPB concludes that such products are only appropriate in limited circumstances and faults lenders for not determining whether the products are suitable for each customer

- The CFPB white paper reflects the results of what the CFPB characterizes as a year-long, in-depth review of short-term, small-dollar loans, which began with a January 2012 field hearing
- The white paper notes that a related CFPB study of online payday loans is ongoing

Amicus Program

- CFPB is actively filing amicus briefs in the Supreme Court and the Federal Courts of Appeal
  - Briefs to date have discussed TILA, FDCPA, and RESPA
  - All have supported the consumer position
- CFPB soliciting suggestions for briefs in cases that have "one or more important legal questions about the interpretation or application of a federal consumer financial protection statute or regulation that we interpret and enforce"
- Open issues:
  - What degree of deference will the courts give CFPB's briefs?
  - How transparent will CFPB be in its amicus efforts?

Information Sharing

- Coordinated examination and enforcement activity with prudential regulators
- CFPB Information-Sharing Agreement with City of Chicago
  - Enhanced reporting of locally gathered data to CFPB, which will inform CFPB initiatives on a larger scale
- CFPB MOU with DOJ
  - Concentration on fair lending enforcement, with goal of streamlining enforcement efforts
- CFPB-State AG Cooperation
  - Joint Statement of Principles signed with NAAG addressing coordination of investigations, enforcement actions and information sharing
  - Proposed MOU establishing framework for information sharing

CFPB RULEMAKING: FINAL RULES ISSUED BY THE CFPB

See http://www.consumerfinance.gov/regulations/

2013

May 29

- Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z)
- Loan Originator Compensation Requirements under the Truth In Lending Act (Regulation Z); Prohibition on Financing Credit Insurance Premiums; Delay of Effective Date

May 16

- Amendments to the 2013 Escrows Final Rule under the Truth in Lending Act (Regulation Z)

April 30

- ☐ Electronic Fund Transfers (Regulation E)

April 29

- ☐ Truth in Lending (Regulation Z)

April 26

- ☐ Consumer Financial Civil Penalty Fund Rule

March 22

- ☐ Truth in Lending (Regulation Z)

March 21

- ☐ Amendments to Disclosures at Automated Teller Machines (Regulation E)

February 15

- ☐ Disclosure of Records and Information

January 20

- ☐ Loan Originator Compensation Requirements under the Truth in Lending Act (Regulation Z)

January 18

- ☐ Appraisals for Higher-Priced Mortgage Loans (issued jointly with other agencies)
- ☐ Disclosure and Delivery Requirements for Copies of Appraisals and Other Written Valuations Under the Equal Credit Opportunity Act (Regulation B)

January 17

- ☐ Real Estate Settlement Procedures Act (Regulation X) and Truth in Lending Act (Regulation Z) Mortgage Servicing Final Rules

January 10

- ☐ Ability to Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z)
- ☐ Escrow Requirements under the Truth in Lending Act (Regulation Z)
- ☐ High-Cost Mortgage and Homeownership Counseling Amendments to the Truth in Lending Act (Regulation Z) and Homeownership Counseling Amendments to the Real Estate Settlement Procedures Act (Regulation X)

2012

- ☐ Procedure Relating to Rulemaking
- ☐ Home Mortgage Disclosure (Regulation C) Adjustment to Asset-Size Exemption Threshold
- ☐ Regulation M Exemption Threshold Adjustment
- ☐ Regulation Z Exemption Threshold Adjustment

- Regulation Z HOEPA Threshold Adjustment
- Defining Larger Participants of the Consumer Reporting Market
- Defining Larger Participants of the Consumer Debt Collection Market
- Defining Larger Participants of the Consumer Debt Collection Market; Correction
- Confidential Treatment of Privileged Information
- Rules Relating to Investigations
- Rules of Practice for Adjudication Proceedings
- State Official Notification Rule
- Equal Access to Justice Act Implementation Rule
- Disclosure of Records and Information
- Final Remittance Rule (Amendment to Regulation E)
- Home Mortgage Disclosure (Regulation C) asset threshold for 2012
- Fair Credit Reporting Act Disclosures ceiling for allowable charges
- Correcting amendments to Regulation V (fair credit reporting)
- Delayed Implementation of Certain New Mortgage Disclosures required under Title XIV of the Dodd-Frank Act
- Supplemental Standards of Ethical Conduct for Employees of the Bureau of Consumer Financial Protection
- Enforcement of Nondiscrimination on the Basis of Disability in Programs and Activities Conducted by the Bureau of Consumer Financial Protection

CFPB RULEMAKING PRIORITIES

Fall 2012 Statement of Regulatory Priorities and Semiannual Regulatory Agenda

- Mortgage rules:
  - Ability to repay and QM (issued January 10, 2013)
  - Amendments to TILA requiring escrow account for high-priced mortgage loans and disclosures regarding escrow accounts (issued May 16, 2013)
  - Finalize amendments to Regulation Z and Regulation X relating to initial rate adjustment notices for ARMs, periodic statements, and prompt crediting of payments and response to requests for payoff amounts (issued January 17, 2013)
  - Finalize interagency proposal on appraisal requirements for higher-risk mortgages
  - Finalize amendment to ECOA relating to provision of free copies of appraisals
  - Implement TILA amendments to expand scope of mortgage loans subject to HOEPA, triggers for HOEPA coverage, and HOEPA restrictions
  - Loan originator compensation (Regulation Z)
- Other pending rulemakings:
  - Finalize rules and forms combining disclosures under TILA and RESPA

- Amend Reg Z to address concerns that rule limits ability of spouses and partners not working outside the home to obtain credit cards based on spousal/partner income
- EFTA regulations concerning disclosures, error resolution procedures, and other topics
- EFA (Regulation CC) amendments relating to funds availability and model form disclosures

- Further rulemaking:
  - Third rule to come in 2013 relating to nonbank supervision and “larger participants”
    - Consumer reporting and consumer debt collection in 2012
  - Streamline inherited regulations
  - Address markets for consumer financial products and services including:
    - Products offered to servicemembers or seniors
    - Private student loans
    - Overdraft
    - Payday lending
    - Pre-dispute arbitration agreements
    - General purpose reloadable prepaid cards
    - Reverse mortgages
    - Differences between consumer- and creditor-purchased credit scores