Adjusting Your Operations and Compliance for UDAAP Risks

Panelists: **Jonathan Pompan**, Venable LLP

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This information is not intended to be legal advice and may not be used as legal advice. Legal advice must be tailored to the specific circumstances of each case.

Every effort has been made to ensure this information is up-to-date. It is not intended to be a full and exhaustive explanation of the law in any area, nor should it be used to replace the advice of your own legal counsel.

Any opinions expressed are the opinions of the speaker and not their organization, or the Receivables Management Association International.

Today's Session

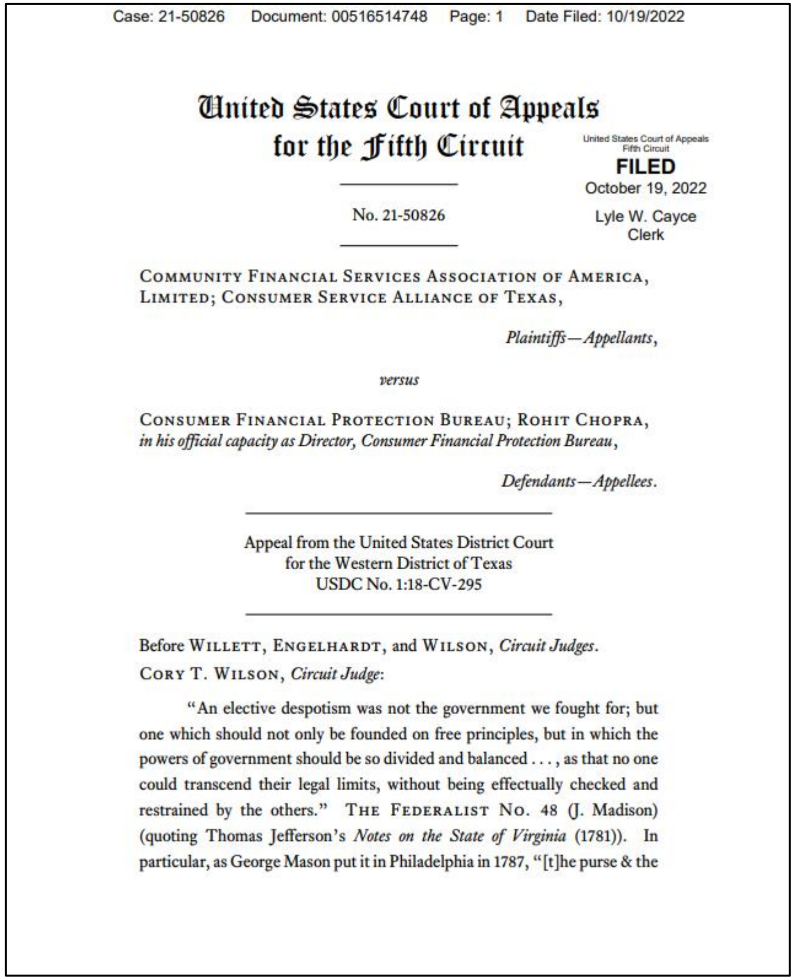
1. Sources of UDAAP Risk
2. The Evolving Application of UDAAP
3. Challenges: Asset Classes and Practices
4. Tools and Policymaking
5. Adjusting Risk Tolerances, and Minimizing Legal and Regulatory Risk
    a) RMAi Certification Standards – Steps you can take today!
    b) What's on the horizon?
6. Wrap Up

Backdrop: CFPB and Divided Congress

The 118th Congress and the Biden Administration

- Return of divided government and continued narrow majorities in both chambers
  - House – Republicans flip majority (mirror image of 117th Congress)
  - Senate – Democrats retain control and gain a seat for outright majority
  - Overall, this was the best midterm performance by President's party since 2002
- What does this mean?
  - House – a slim majority is still a majority
    - Aggressive oversight
    - RIP Biden legislative agenda
  - Senate – no more veto power for any one senator
    - Biden maintains control over judicial nominations and personnel – agency leaders are able to implement
    - Counterbalance to House Republican oversight
  - Biden administration – no course correction (including banking agencies)
  - CFPB Remains in the driver's seat, but with backseat drivers!

CFSA v. CFPB: 5th Circuit and What's Next?


Case: 21-50826 Document: 00516514748 Page: 1 Date Filed: 10/19/2022

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
October 19, 2022
Lyle W. Cayce
Clerk

No. 21-50826

Community Financial Services Association of America, Limited; Consumer Service Alliance of Texas,

Plaintiffs—Appellants,

versus

Consumer Financial Protection Bureau; Rohit Chopra, *in his official capacity as Director, Consumer Financial Protection Bureau,*

Defendants—Appellees.

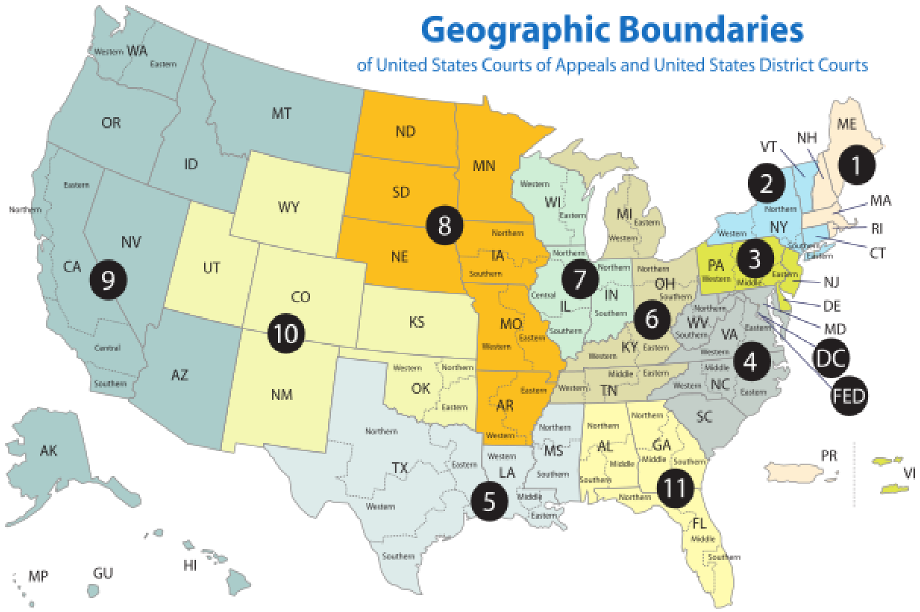
Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:18-CV-295

Before Willett, Engelhardt, and Wilson, *Circuit Judges.*
Cory T. Wilson, *Circuit Judge*:

"An elective despotism was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced . . . , as that no one could transcend their legal limits, without being effectually checked and restrained by the others." The Federalist No. 48 (J. Madison) (quoting Thomas Jefferson's *Notes on the State of Virginia* (1781)). In particular, as George Mason put it in Philadelphia in 1787, "[t]he purse & the

- 5th Circuit held that the CFPB is funded in an unconstitutional manner.
- The court reasoned that the Constitution's framers sought to create separation of powers by placing the power of the purse *exclusively* in Congress's purview, articulated through the Appropriations Clause in the Constitution.
- When Congress combined authority (rulemaking, supervision, enforcement) over consumer financial services with the ability to self-fund into one agency, Congress violated the principle of separation of powers and the Appropriations Clause.

Impact of Fifth Circuit Decision and What's Next



No.

In the Supreme Court of the United States

CONSUMER FINANCIAL PROTECTION BUREAU, ET AL., PETITIONERS

v.

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LIMITED, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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S.Ct. Conference on February 17, 2023

Sources of UDAAP Risk

What is UDAAP Risk?

- **Unfair, Deceptive, or Abusive Acts or Practices (UDAAPs)** – can cause significance financial injury to consumers, erode consumer confidence, and undermine the financial marketplace.
  - Consumer Financial Protection Act (UDAAP)
  - Section 5 of the Federal Trade Commission Act (UDAP)
  - Mini-State FTC Acts
  - Additional federal and state laws include UDAAPs / UDAPs

CFPB Consumer Laws and Regulations **UDAAP**

Unfair, Deceptive, or Abusive Acts or Practices

Unfair, deceptive, or abusive acts and practices (UDAAPs) can cause significant financial injury to consumers, erode consumer confidence, and undermine the financial marketplace. Under the Dodd-Frank Act, it is unlawful for any provider of consumer financial products or services or a service provider to engage in any unfair, deceptive or abusive act or practice.[1] The Act also provides CFPB with rule-making authority and, with respect to entities within its jurisdiction, enforcement authority to prevent unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.[2] In addition, CFPB has supervisory authority for detecting and assessing risks to consumers and to markets for consumer financial products and services.[3]

As examiners review products or services, such as deposit products or lending activities, they generally should identify the risks of harm to consumers that are particular to those activities. Examiners also should review products that combine features and terms in a manner that can increase the difficulty of consumer understanding of the overall costs or risks of the product and the potential harm to the consumer associated with the product.

These examination procedures provide general guidance on:

- The principles of unfairness, deception, and abuse in the context of offering and providing consumer financial products and services;
- Assessing the risk that an institution's practices may be unfair, deceptive, or abusive;
- Identifying unfair, deceptive or abusive acts or practices (including by providing examples of potentially unfair or deceptive acts and practices); and
- Understanding the interplay between unfair, deceptive, or abusive acts or practices and other consumer protection and antidiscrimination statutes.

Unfair Acts or Practices

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

(1) It causes or is likely to cause substantial injury to consumers;

(2) The injury is not reasonably avoidable by consumers; and

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[1] Dodd-Frank Act, Title X, Subtitle C, Sec. 1036; PL 111-203 (July 21, 2010).

[2] Sec. 1031 of the Dodd-Frank Act. The principles of "unfair" and "deceptive" practices in the Act are similar to those under Sec. 5 of the Federal Trade Commission Act (FTC Act). The Federal Trade Commission (FTC) and federal banking regulators have applied these standards through case law, official policy statements, guidance, examination procedures, and enforcement actions that may inform CFPB.

[3] Dodd-Frank Act, Secs. 1024; 1025(b)(1); 1026(b) of the Act.

CFPA: UDAAP Deeper Dive

- The Dodd-Frank Act renders it unlawful for a “covered person” or a “service provider” to engage in any unfair, deceptive, or abusive act or practice. That is, the Act’s UDAAP prohibitions only apply to individuals and entities that are “covered persons” or “service providers.”
- The Dodd-Frank Act defines “service provider” as:
  - any person that provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service, including a person that-- * * *
  - (ii) processes transactions relating to the consumer financial product or service (other than knowingly or incidentally transmitting or processing financial data in a manner that such data is undifferentiated from other types of data of the same form as the person transmits or processes)

Relationship to Other Laws

- A UDAAP may also violate federal or state laws
  - Truth in Lending Act
  - Equal Credit Opportunity Act

- A transaction, practice, or product may be in technical compliance with other federal or state laws, but may violate the prohibition on UDAAPs.

- A violation of a consumer financial law may be a UDAAP
  - FDCPA

Substantial Assistance Risk

- Section 1036 of the Dodd-Frank Act renders it unlawful for any person to "knowingly or recklessly provide substantial assistance" to a covered person or service provider committing a UDAAP.

- On January 10, 2022, the Consumer Financial Protection Bureau (CFPB) filed a complaint in federal district court against three affiliated debt-buying businesses and the individuals who founded and operated them for "knowingly and recklessly [placing debts with and selling them to] debt collection agencies that used threats and misrepresentations to coerce payments from consumers."

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Consumer Financial Protection Bureau, Plaintiff, v. Craig Manseth, Jacob Adamo, Darren Turco, United Debt Holding LLC, JTM Capital Management, LLC, and United Holding Group, LLC also known as United Holdings Group, LLC, UHG, LLC, UHG I LLC, and UHG II LLC, Defendants.	Case No. 1:22-cv-29 **COMPLAINT**

The Consumer Financial Protection Bureau (Bureau) brings this action against Defendants Craig Manseth, Jacob Adamo, Darren Turco, United Debt Holding LLC (UDH), JTM Capital Management, LLC (JTM), and United Holding Group, LLC (also known as United Holdings Group, LLC, UHG, LLC, UHG I LLC, and UHG II LLC) (UHG) and alleges as follows:

INTRODUCTION

1. UDH, JTM, and UHG are debt collectors that have purchased defaulted consumer debt worth tens of millions of dollars. They place the debt portfolios they purchase with, or sell them to, other debt collection companies.

The Evolving Application of UDAAP

Bulletin 2013-07: Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts

- Collecting or assessing a debt and/or any additional amounts in connection with a debt (including interest, fees, and charges) not expressly authorized by the agreement creating the debt or permitted by law.
- Failing to post payments timely or properly or to credit a consumer's account with payments that the consumer submitted on time and then charging late fees to that consumer.
- Taking possession of property without the legal right to do so.
- Revealing the consumer's debt, without the consumer's consent, to the consumer's employer and/or co-workers.
- Falsely representing the character, amount, or legal status of the debt.
- Misrepresenting that a debt collection communication is from an attorney.
- Misrepresenting that a communication is from a government source or that the source of the communication is affiliated with the government. Misrepresenting whether information about a payment or nonpayment would be furnished to a credit reporting agency.
- Misrepresenting to consumers that their debts would be waived or forgiven if they accepted a settlement offer, when the company does not, in fact, forgive or waive the debt.30 Threatening any action that is not intended or the covered person or service provider does not have the authorization to pursue, including false threats of lawsuits, arrest, prosecution, or imprisonment for non-payment of a debt.

Consumer Financial Protection Bureau

1700 G Street, N.W., Washington, DC 20552

CFPB Bulletin 2013-07

Date: July 10, 2013
Subject: Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts

Under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), all covered persons or service providers are legally required to refrain from committing unfair, deceptive, or abusive acts or practices (collectively, UDAAPs) in violation of the Act. The Consumer Financial Protection Bureau (CFPB or Bureau) is issuing this bulletin to clarify the contours of that obligation in the context of collecting consumer debts.

This bulletin describes certain acts or practices related to the collection of consumer debt that could, depending on the facts and circumstances, constitute UDAAPs prohibited by the Dodd-Frank Act. Whether conduct like that described in this bulletin constitutes a UDAAP may depend on additional facts and analysis. The examples described in this bulletin are not exhaustive of all potential UDAAPs. The Bureau may closely review any covered person or service provider's consumer debt collection efforts for potential violations of Federal consumer financial laws.

A. Background

UDAAPs can cause significant financial injury to consumers, erode consumer confidence, and undermine fair competition in the financial marketplace. Original creditors and other covered persons and service providers under the Dodd-Frank Act involved in collecting debt related to any consumer financial product or service are subject to the prohibition against UDAAPs in the Dodd-Frank Act.[1]

In addition to the prohibition of UDAAPs under the Dodd-Frank Act, the Fair Debt Collection Practices Act (FDCPA) also makes it illegal for a person defined as a "debt collector" from engaging in conduct "the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt,"[2] to "use

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[1] *See* Dodd-Frank Act, §§ 1002, 1031 & 1036(a), codified at 12 U.S.C. §§ 5481, 5531 & 5536(a). It is also prohibited for any person, even if not a covered person or service provider, to knowingly or recklessly provide substantial assistance to a covered person or service provider in violating section 1031 of the Dodd-Frank Act. *See* Dodd-Frank Act, § 1036(a)(3), 12 U.S.C. § 5536(a)(3). The principles of "unfair" and "deceptive" practices in the Act are informed by the standards for the same terms under Section 5 of the Federal Trade Commission Act (FTC Act). *See* CFPB Examination Manual v.2 (Oct. 2012) at UDAAP 1 (CFPB Exam Manual). To the extent that this Bulletin cites FTC guidance or authority, such references reflect the views of the FTC, and are not binding upon the Bureau in interpreting the Dodd-Frank Act's prohibition on UDAAPs.

[2] FDCPA § 806, 15 U.S.C. § 1692d.

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UDAAP and Targeting Discrimination

"The CFPB will **examine for discrimination in all consumer finance markets, including credit, servicing, collections, consumer reporting, payments, remittances, and deposits.** CFPB examiners will require supervised companies to **show their processes for assessing risks and discriminatory outcomes, including documentation of customer demographics and the impact of products and fees on different demographic groups.** The CFPB will look at **how companies test and monitor their decision-making processes for unfair discrimination, as well as discrimination under ECOA.**"

Source: CFPB Press Release (Mar. 16, 2022)

- Controversy, litigation, and examination observations

cfpb Consumer Financial Protection Bureau (cfpb.gov/)

CFPB Targets Unfair Discrimination in Consumer Finance

Discrimination or improper exclusion can trigger liability under ban on unfair acts and practices

MAR 16, 2022

WASHINGTON, D.C. – Today the Consumer Financial Protection Bureau (CFPB) announced changes to its supervisory operations to better protect families and communities from illegal discrimination, including in situations where fair lending laws may not apply. In the course of examining banks' and other companies' compliance with consumer protection rules, the CFPB will scrutinize discriminatory conduct that violates the federal prohibition against unfair practices. The CFPB will closely examine financial institutions' decision-making in advertising, pricing, and other areas to ensure that companies are appropriately testing for and eliminating illegal discrimination.

"When a person is denied access to a bank account because of their religion or race, this is unambiguously unfair," said CFPB Director Rohit Chopra. "We will be expanding our anti-discrimination efforts to combat discriminatory practices across the board in consumer finance."

The CFPB enforces several laws that can target discriminatory practices. Government regulators and private plaintiffs have commonly relied on the Equal Credit Opportunity Act (ECOA), a fair lending law which covers extensions of credit. However, certain discriminatory practices may also trigger liability under the Consumer Financial Protection Act (CFPA), which prohibits unfair, deceptive and abusive acts and practices (UDAAPs).

The CFPB published an updated exam manual today for evaluating UDAAPs, which notes that discrimination may meet the criteria for "unfairness" by causing substantial harm to consumers that they cannot reasonably avoid, where that harm is not outweighed by countervailing benefits to consumers or competition. Consumers can be harmed by discrimination regardless of whether it is intentional. Discrimination can be unfair in cases where the conduct may also be covered by ECOA, as well as in instances where ECOA does not apply. For example, denying access to a checking account because the individual is of a particular race could be an unfair practice even in those instances where ECOA may not apply.

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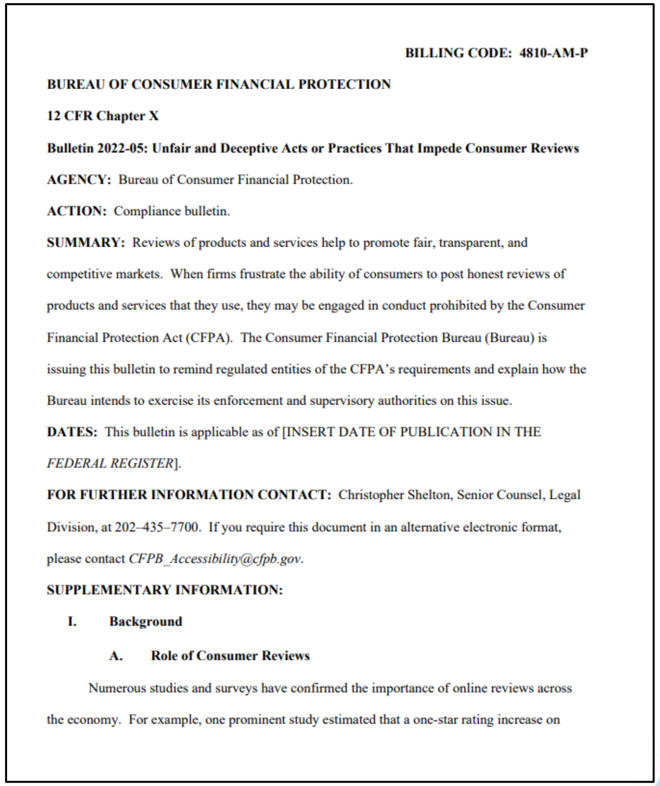
Bulletin 2022-05: Unfair and Deceptive Acts or Practices That Impede Consumer Reviews

- According to the CFPB reviews of products and services help to promote fair, transparent, and competitive markets.
- When firms frustrate the ability of consumers to post honest reviews of products and services that they use, they may be engaged in conduct prohibited by the CFPA.



BILLING CODE: 4810-AM-P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Chapter X

Bulletin 2022-05: Unfair and Deceptive Acts or Practices That Impede Consumer Reviews

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Compliance bulletin.

SUMMARY: Reviews of products and services help to promote fair, transparent, and competitive markets. When firms frustrate the ability of consumers to post honest reviews of products and services that they use, they may be engaged in conduct prohibited by the Consumer Financial Protection Act (CFPA). The Consumer Financial Protection Bureau (Bureau) is issuing this bulletin to remind regulated entities of the CFPA's requirements and explain how the Bureau intends to exercise its enforcement and supervisory authorities on this issue.

DATES: This bulletin is applicable as of [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Christopher Shelton, Senior Counsel, Legal Division, at 202–435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

A. Role of Consumer Reviews

Numerous studies and surveys have confirmed the importance of online reviews across the economy. For example, one prominent study estimated that a one-star rating increase on

First Party Creditors: FDCPA and UDAAP

- Creditors that collect third-party debt using an assumed name are covered.
- Banks that use third-party collectors have vendor management responsibilities
- Banks can engage in violations of Section 5 of the FTC Act / CFPA
- Vendors face substantial assistance risk

Home // News // Press Releases

Press Release

FDIC Announces Settlement with Umpqua Bank, Roseburg, Oregon for Unfair and Deceptive Practices in Violation of Section 5 of the Federal Trade Commission Act

Monday, May 10, 2021

For Release

WASHINGTON – The Federal Deposit Insurance Corporation (FDIC) today announced a settlement with Umpqua Bank, Roseburg, Oregon, for engaging in unfair and deceptive practices, in violation of Section 5 of the Federal Trade Commission Act (Section 5). Umpqua Bank stipulated to the issuance of an Order to Pay Civil Money Penalty (CMP) in the amount of $1.8 million.

The FDIC determined that Umpqua Bank engaged in Section 5 violations related to collection practices involving commercial equipment financing through its wholly owned subsidiary, Financial Pacific Leasing, Inc. (FinPac). The FDIC determined that FinPac's collection fee practices were unfair and deceptive. Specifically, FinPac charged various undisclosed collection fees to borrowers whose accounts were past due, such as collection call and letter fees and third-party collection fees.

The FDIC also determined that certain collection practices at FinPac were unfair and deceptive. FinPac engaged in excessive and sequential collection calls to customers, even when customers requested that FinPac stop these calls. FinPac also disclosed information about the customers' debts to third parties. Lastly, FinPac advised borrowers FinPac would report delinquencies on commercial debt to the consumer reporting agencies, when its policy and practice was not to report such delinquencies to the consumer reporting agencies.

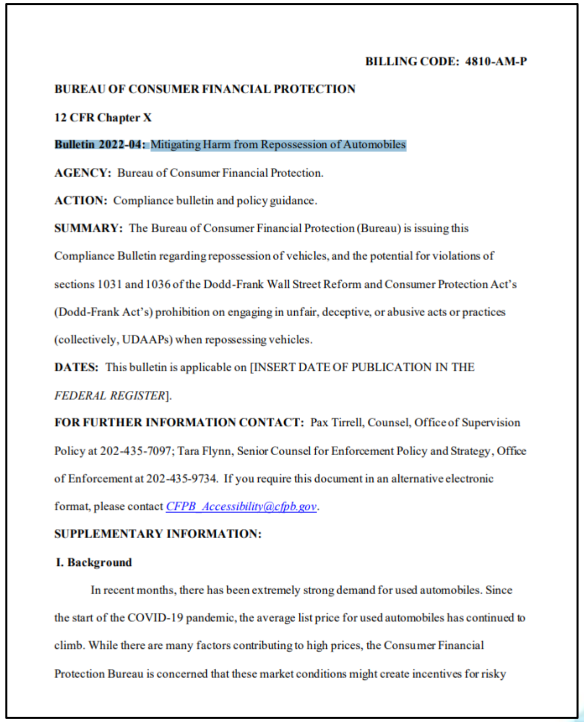
Umpqua Bank agreed to the issuance of the Order without admitting or denying these violations. In addition, the Bank voluntarily paid restitution totaling approximately $1,628,000 to the 16,902 customers who were charged the undisclosed collection fees.

FDIC: PR-42-2021

Asset Classes and Practices

Bulletin 2022-04: Mitigating Harm from Repossession of Automobiles

- The Bureau intends to hold loan holders and servicers accountable for UDAAPs related to the repossession of consumers' vehicles.
- Wrongful repossession of consumers' vehicles
  - Misrepresentations
  - Servicers incorrectly coded consumers as delinquent
  - Servicer representatives failed to cancel repossession orders that had previously been communicated to repossession agents
  - Repossession agents failed to confirm that the repossession order was still active prior to repossessing a vehicle.
- Other practices causing wrongful repossession (e.g., bankruptcy automatic stay)



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BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Chapter X

Bulletin 2022-04: Mitigating Harm from Repossession of Automobiles

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Compliance bulletin and policy guidance.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is issuing this Compliance Bulletin regarding repossession of vehicles, and the potential for violations of sections 1031 and 1036 of the Dodd-Frank Wall Street Reform and Consumer Protection Act's (Dodd-Frank Act's) prohibition on engaging in unfair, deceptive, or abusive acts or practices (collectively, UDAAPs) when repossessing vehicles.

DATES: This bulletin is applicable on [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Pax Tirrell, Counsel, Office of Supervision Policy at 202-435-7097; Tara Flynn, Senior Counsel for Enforcement Policy and Strategy, Office of Enforcement at 202-435-9734. If you require this document in an alternative electronic format, please contact CFPB_Accessibility@cfpb.gov.

SUPPLEMENTARY INFORMATION:

I. Background

In recent months, there has been extremely strong demand for used automobiles. Since the start of the COVID-19 pandemic, the average list price for used automobiles has continued to climb. While there are many factors contributing to high prices, the Consumer Financial Protection Bureau is concerned that these market conditions might create incentives for risky

True Lender, Competition, Scale and Technology Under the Microscope

- **“True Lender”** – CA DFPI v. OppFi (and OppFi v. CA DFPI), putting the “predominate economic interest test” to the test.
- **CFPB scrutiny of competition, scale, and technology in the consumer finance infrastructure, and its connection to relationship banking**
    - “Local financial institutions depend on core services providers being agile, responsive, and cost-effective in order to compete and serve their clients and customers in their communities.” – CFPB Director Rohit Chopra, Opening Remarks to the Community Bank and Credit Union Advisory Councils (April 7, 2022)
- **Bank Partnerships Getting a Closer Look** – “Some lenders employing rent-a-bank schemes have unusually high default rates, which raise questions about whether their products set borrowers up for failure. And our complaints database reveals a range of other significant consumer protection concerns with certain loans associated with bank partnerships.” – CFPB Deputy Director Zixta Martinez’s Keynote Address at the Consumer Federation of America’s 2022 Consumer Assembly (June 15, 2022)

CFPB Report, *The Convergence of Payments and Commerce: Implications for Consumers* (Aug. 2022)

Integrated "super apps"

Provide users with a wide array of financial, payments, and commerce functions within a single app; nearly every capability needed to conduct their online life

May be convenient, but may limit consumer product and service choice

Embedded commerce

Purchase options ranging from QR code payments on a restaurant check or screen to contactless transactions at the points of sale and payments fully embedded in a social media feed

Transaction is enabled with very little activity from the consumer, increasing the risk of an unwanted purchase

Buy Now, Pay Later (BNPL)

Four-payment, no interest loans; now have their own apps with rewards and social media platforms

Hidden charges (late fees), potential overextension of credit, concern over data use highlight the discussion

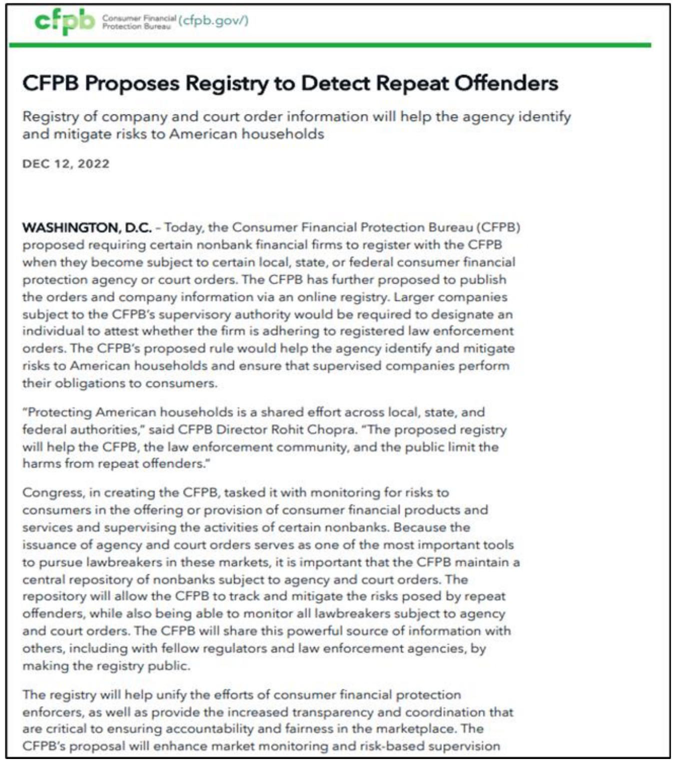
Other Areas of Scrutiny in 2023?

- Focus on Junk Fees
- AI and Machine Learning
- Credit reporting – furnishing and reporting
- “Banking as a service” and “payments as a service” will continue to grow, which will allow additional fintechs and services providers to offer bundled services to customers.
- Continued expansion of buy now, pay later, along with heightened regulatory scrutiny
- Continued enforcement against companies that engage in UDAAP affecting consumers and small businesses
- Focus on “dark patterns,” user interfaces and subscription / continuity services
- Protecting financially distressed consumers
- Privacy and data security practices

Tools and Policymaking Developments

Nonbank Registration for “Repeat Offenders”

- The CFPB is developing a rule under its authorities at 12 U.S.C. 5512(b) and (c) and 5514(b) that would require nonbanks that are under certain final enforcement orders
  - to register with the CFPB via a public registry that the CFPB would create for such purposes;
  - to submit copies of public orders to the same; and, where such persons are supervised by the CFPB,
  - to prepare and submit annual reports and other statements regarding such orders for use in connection with the CFPB’s supervisory functions.
- The public registry created by the CFPB would identify institutions subject to registration and include public enforcement orders and information regarding those orders.
- Status: NPRM



cfpb Consumer Financial Protection Bureau (cfpb.gov/)

CFPB Proposes Registry to Detect Repeat Offenders

Registry of company and court order information will help the agency identify and mitigate risks to American households

DEC 12, 2022

WASHINGTON, D.C. – Today, the Consumer Financial Protection Bureau (CFPB) proposed requiring certain nonbank financial firms to register with the CFPB when they become subject to certain local, state, or federal consumer financial protection agency or court orders. The CFPB has further proposed to publish the orders and company information via an online registry. Larger companies subject to the CFPB’s supervisory authority would be required to designate an individual to attest whether the firm is adhering to registered law enforcement orders. The CFPB’s proposed rule would help the agency identify and mitigate risks to American households and ensure that supervised companies perform their obligations to consumers.

“Protecting American households is a shared effort across local, state, and federal authorities,” said CFPB Director Rohit Chopra. “The proposed registry will help the CFPB, the law enforcement community, and the public limit the harms from repeat offenders.”

Congress, in creating the CFPB, tasked it with monitoring for risks to consumers in the offering or provision of consumer financial products and services and supervising the activities of certain nonbanks. Because the issuance of agency and court orders serves as one of the most important tools to pursue lawbreakers in these markets, it is important that the CFPB maintain a central repository of nonbanks subject to agency and court orders. The repository will allow the CFPB to track and mitigate the risks posed by repeat offenders, while also being able to monitor all lawbreakers subject to agency and court orders. The CFPB will share this powerful source of information with others, including with fellow regulators and law enforcement agencies, by making the registry public.

The registry will help unify the efforts of consumer financial protection enforcers, as well as provide the increased transparency and coordination that are critical to ensuring accountability and fairness in the marketplace. The CFPB’s proposal will enhance market monitoring and risk-based supervision

Nonbank Registration of Consumer Terms and Conditions

- January 11, 2023 - CFPB published a proposed rule that would **require supervised nonbank entities to register and provide information about their use of certain terms and conditions in standard-form contracts**.
- In particular, the CFPB is targeting the following types of terms:
  - waivers of claims a consumer can bring in a legal action;
  - limits on the company's liability to a consumer;
  - limits on the consumer's ability to bring a legal action by dictating the time frame, forum, or venue for a consumer to bring a legal action;
  - limits on the ability of a consumer to bring or participate in collective legal actions such as class actions;
  - limits on the ability of the consumer to complain or post reviews; certain other waivers of consumer rights or other legal protections; and arbitration agreements
- Status: NPRM

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1092

[Docket No. CFPB-2023-0002]

RIN 3170-AB14

Registry of Supervised Nonbanks that Use Form Contracts to Impose Terms and Conditions that Seek to Waive or Limit Consumer Legal Protections

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Proposed rule with request for public comment.

SUMMARY: The Consumer Financial Protection Act of 2010 (CFPA) requires the Consumer Financial Protection Bureau (Bureau or CFPB) to monitor markets for consumer financial products and services for risks to consumers in order to support the various statutory functions of the CFPB, and to conduct a risk-based nonbank supervision program for the purpose of assessing compliance with Federal consumer financial law (among other purposes).[1] Pursuant to these authorities, the CFPB is proposing a rule to require that nonbanks subject to its supervisory authority, with limited exceptions, register each year in a nonbank registration system established by the CFPB information about their use of certain terms and conditions in form contracts for consumer financial products and services that pose risks to consumers. In particular, these

Privacy and Data Security

- **CFPB Announcements:** Recent rulemakings by the CFPB demonstrate an increased focus on digital marketing and consumer data rights—topics of key interest to privacy advocates.
- **New State Privacy Laws:** UDAAP continues to be a significant tool used by states, but comprehensive state privacy laws in California, Virginia, Colorado, Connecticut, and Utah have already gone, or will go, into effect in 2023. All five laws have exemptions relevant to financial institutions.
    - Financial institutions should continue to comply with state privacy laws for any consumer data that is not exempted.
    - Additionally, financial institutions should be prepared to comply with obligations under the California Privacy Rights Act related to personnel and business contacts.
- **Federal Privacy Activity:** Both Congress and the FTC actively took steps to develop new privacy frameworks in 2022, and it is likely such efforts will continue this year.
- **Upgraded Safeguards Rule** for non-bank financial institutions (some exceptions for entities with info for less than 5k customers) effective June 9, 2023.

State Developments: UDAAP

- State AGs to remain active on consumer protection matters related to economic distress and vulnerable consumers.
- CFPB partnering and reminder to states to utilize Consumer Financial Protection Act / UDAAP.
- Alleged violations of law and regulations involving advertisements, websites, and social media sites utilized by mortgage companies, and lenders.
- NMLS Modernization in process
  - single source of standardized data that all regulators require; supports interdependent reviews by state agencies based on uniform standards that allow agencies to rely on one another's work, eliminating redundancies.
  - Piloted with MSB licenses.
  - Growing number of debt collection licenses
  - How will this fit with CFPB enforcement order database?

Adjusting Risk Tolerances, and Minimizing Legal and Regulatory Risk

Certification and building on your CMS….steps you can take today….

Standard A1 – Laws & Regulations

Laws & Regulations. A Certified Company shall comply with all local, state, and federal laws and regulations concerning:

(a) collection activity on consumer accounts,
(b) the rights of consumers,
(c) debt buying, and
(d) financial services as they may apply to debt collection companies. In the United States, these laws shall include, but not be limited to, the Fair Debt Collection Practices Act, the Telephone Consumer Protection Act, the Fair Credit Reporting Act, the Servicemembers Civil Relief Act, the Electronic Fund Transfer Act, the United States Bankruptcy Code, section 5 of the Federal Trade Commission Act, and sections 1031 and 1036 of the Dodd-Frank Act.

Standard A5 – Consumer Complaint and Dispute Resolution

Consumer Complaint and Dispute Resolution. A Certified Company shall establish and maintain written Consumer Complaint and Dispute resolution policies and procedures that instruct employees how to handle, document, process, and attempt to resolve Consumer Complaints and Disputes in compliance with the Certification Program and applicable laws and regulations, including but not limited to the Fair Debt Collection Practices Act and the Fair Credit Reporting Act. It is within a company's discretion as to whether the policy will apply to accounts that are in active litigation. A reasonable policy shall include, but not be limited to, measures taken to ensure:

(a) When a Consumer Complaint or Dispute is received, active collection activity shall be paused until

- (i) the complaint or dispute is investigated and a response has been transmitted to the consumer following the investigation;
- (ii) it has been determined the complaint or dispute is a duplicate where the consumer has already received a response; or
- (iii) it has been determined that the consumer appeared in court and admitted to the debt. On accounts purchased on or after January 1, 2017, when a consumer questions the accuracy or validity of a debt, the company should confirm such accuracy and/or validity through the use of Original Account Level Documentation or a copy of a valid judgment;

Standard A5 – Consumer Complaint and Dispute Resolution Continued

(b) When a consumer provides an FTC identity theft report6 , the company shall immediately cease all collections on applicable accounts and refer the affidavit to compliance or legal for review prior to resuming collections;

(c) A consumer-friendly approach to communications is emphasized with employees.

Standard A13 – Chief Compliance Officer

Chief Compliance Officer. A Certified Company shall create and maintain the position of "Chief Compliance Officer" with a direct or indirect reporting line to the president, CEO, board of directors, managing partner, or general counsel (unless the Chief Compliance Officer is the president, CEO, managing partner, or general counsel). The Chief Compliance Officer's documented job description shall include, at a minimum, the following responsibilities:

(a) Maintaining an electronic or physical copy of the Certified Company's most recent application for the Certification Program;

(b) Maintaining the Certified Company's official copy of the Certification Standards Manual;

(c) Identifying policies, procedures, or activities of the Certified Company that are out of conformity with the Certification Standards;

(d) Either directly or indirectly:
- (i) receiving Consumer Complaints,
- (ii) investigating the legitimacy of Consumer Complaints, and/or
- (iii) overseeing the complaint process, including complaint activity, root cause analysis, and timely response;

Standard A13 – Chief Compliance Officer Continued

(e) Developing recommendations for corrective actions when the Certified Company is not conforming with the Certification Standards and providing them to his or her direct and indirect report(s);

(f) Interacting as the point of contact, unless designated otherwise by the company, for the CFPB, FTC, state and local consumer regulatory agencies, and state and federal attorneys general regarding the oversight and accountability of the Certified Company's Consumer Complaint and Dispute Resolution Policy and the CFPB's Consumer Complaint System; and

(g) Maintain his or her status as a Certified Individual pursuant to section 5.5(A) of the Governance Document

Standard A15 – Vendor Management

Vendor Management. In order to identify and retain qualified third-party vendors and to assure appropriate oversight of such vendors, a Certified Company shall:

(a) Establish and maintain vendor management policies and procedures with defined due diligence and/or audit controls. The Chief Compliance Officer or a designee shall perform an annual assessment of these policies and procedures and provide any recommendations for improvements to his or her direct and indirect report(s);

(b) Perform an annual assessment of the company's third-party vendors to determine whether they continue to meet or exceed the requirements and expectations of the company. As part of the annual assessment, the Certified Company may need to perform additional due diligence, including by way of example rather than limitation, confirmation of certification status, vendor audits, review of policies and procedures maintained by vendors, and review of consumer complaints related to the vendor (including the data publicly available on the CFPB's consumer complaint system); and

(c) Obtain the certification number when contracting with a vendor claiming to be an RMAI Certified Company or RMAI Certified Vendor and confirm the vendor's certification status on RMAI's website.

Standard B3 – Due Diligence

Due Diligence. A Certified Company shall conduct reasonable due diligence on entities the company seeks to contract with for the purchase or sale of receivables prior to the transmission or receipt of any account level data.

Reasonable due diligence shall include, but not be limited to, reviewing:

(i) publicly available financial statements associated with United States Securities and Exchange Commission filings, if applicable,

(ii) the entity's reputation and experience,

(iii) adverse litigation and/or consent orders against the entity in the prior two years; and

(iv) the volume and nature of consumer complaints filed with the CFPB's consumer complaint system and the Better Business Bureau against the entity in the prior two years.

In addition, when the originating creditor is not a party to the contract for the purchase or sale of receivables, reasonable due diligence shall also include reviewing:

(i) the entity's financial strength,

(ii) the data security measures the entity has adopted to preserve the integrity and privacy of Consumer Data, and

(iii) adverse information concerning the entity and the entity's principals.

Expanded Supervision / Focus on Repeat Offenders

- Nonbanks whose activities the CFPB has reasonable cause to determine pose risks to consumers. Expands nonbank exams beyond
  - mortgage, private student loan, and payday loan industries, regardless of size
  - "larger participants" in other nonbank markets for consumer financial products and services (i.e., consumer reporting, debt collection, student loan servicing, international remittances, and auto loan servicing)
- Continued Release of Consumer Financial Protection Circulars and advisory opinions:
  - make our positions on statutory authorities clear to covered entities, the public, and other consumer protection enforcers
  - transparency by launching a new way for the public to petition for rulemakings
- Emerging Trends from the Trenches: Perpetual exams for certain nonbanks vs. cadence of risk-based exams, payment processing fees, scrutiny of AI, concerns with failure to consider all available options (dark patterns), debt collection / loss mitigation, credit reporting, privacy, and more

"Supervision is **increasing its focus on repeat offenders**, particularly those who violate agency or court orders.

As part of that focus, Supervision has created a **Repeat Offender Unit**.

- reviewing and monitoring the activities of repeat offenders;
- identifying the root cause of recurring violations;
- pursuing and recommending solutions and remedies that hold entities accountable for
- failing to consistently comply with Federal consumer financial law; and
- designing a model for order review and monitoring that reduces the occurrences of repeat offenders."

Source: CFPB Supervisory Highlights Fall 2022

Wrap-Up

Access This Presentation

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