CFPB Defines 'Unfair,' 'Deceptive' and 'Abusive' Practices Through Enforcement Activity

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Since the Consumer Financial Protection Bureau (CFPB) opened its doors in July 2011, it has aggressively pursued enforcement actions against a wide range of consumer financial services providers. Although the Dodd-Frank Act gives the bureau the authority to enforce numerous financial services statutes, the CFPB has relied upon its authority to prosecute Unfair, Deceptive, or Abusive Acts and Practices (UDAAP) more than any other authority. Of the more than 40 enforcement matters that the CFPB has made public to date, half have alleged violations of the UDAAP provision of the Dodd-Frank Act. These actions have resulted in restitution to consumers totaling more than $1.7 billion, as well as civil money penalties totaling more than $142 million.

The bureau has relied upon UDAAP as its primary enforcement tool for a number of reasons. First, penalties for violating the UDAAP provision can be drastic — up to $1 million per day for a knowing violation of the law. In 2014, six of the bureau's 14 UDAAP enforcement actions resulted in penalties greater than $5 million, including two actions with penalties greater than $10 million.

Perhaps more importantly, the language of the UDAAP provision is broad and vague, allowing the CFPB to rely on its UDAAP authority to challenge conduct it finds troubling, even if not in violation of any express legal requirement. Although some precedent exists regarding the interpretation of "unfair" or "deceptive," those terms remain elastic; as to "abusive," there is no prior precedent, and the statute provides little guidance as to what constitutes an abusive act or practice. While both Congress and industry groups have called upon the bureau to clarify the scope and meaning of UDAAP through its rulemaking authority, the CFPB has declined to do so, choosing instead to rely upon its enforcement authority and develop its UDAAP doctrine on a case-by-case basis.

Recent enforcement cases illustrate the CFPB's broad application of its UDAAP authority. The bureau alleged that:

- mortgage loan servicers engaged in unfair and deceptive practices by impeding borrowers' access to loss mitigation options and misrepresenting the right to appeal loan modification denials.
- a number of financial institutions engaged in unfair and deceptive practices by failing to disclose all relevant terms of identity fraud protection and credit monitoring memberships or by billing the full price of the memberships regardless of whether the member was utilizing all of the membership benefits.
- an online loan servicer engaged in unfair, deceptive and abusive practices by collecting on debts that were allegedly void under state law without informing the consumers that the debts might be void.
- a payday lender engaged in unfair and deceptive practices by "robo-signing" inaccurate affidavits and pleadings in debt collection lawsuits.

Institutions also can infer the bureau's views on what constitutes evidence of a potential UDAAP violation from various informal CFPB guidance documents addressing issues such as debt collection practices, credit card marketing and student lending. Taken together, the CFPB's enforcement actions and guidance documents highlight the types of practices that are likely to be subject to scrutiny, as well as steps that institutions can take to identify and mitigate UDAAP risks.

The CFPB likely will continue to rely upon its UDAAP authority as its primary enforcement tool in 2015. In particular, the CFPB may pursue a number of cases alleging abusive acts or practices, and these actions could clarify two elements of the abusive standard: (1) whether a practice "materially interferes" with a consumer's ability to understand a product or service, and (2) whether the practice takes "unreasonable advantage" of consumers. In addition, the CFPB is expected to promulgate rules in 2015 addressing a number of products, such as bank account overdraft coverage and prepaid cards. Practitioners will look to these rules not only to understand the bureau's approach for specific products, but also to draw broader conclusions about how the bureau is likely to utilize UDAAP as it continues to enforce the nation's consumer financial services laws.