

# Client Alert.

July 15, 2014

## The CFPB's Most Recent Consent Order: Defining "Abusive" Acts and Practices Through Enforcement

By Nancy Thomas, David Fioccola and Jessica Kaufman

Last week, the CFPB announced a settlement with payday lender ACE Cash Express of an enforcement action for alleged unfair, deceptive, and abusive practices (UDAAP). The Consent Order reflects the CFPB's continued focus on debt collection practices and payday lenders. The Consent Order also provides another data point on how the CFPB will exercise its authority to prohibit "abusive practices," which the CFPB has declined to define in notice-and-comment rulemaking.

In the Consent Order, the CFPB alleged that ACE collectors and third-party debt collectors acting on ACE's behalf engaged in unfair practices, including making an excessive number of calls, disclosing the existence of consumers' debt to third parties, such as the consumer's employer or relatives, calling consumers after being told they were represented by counsel, and calling consumers' workplaces after being told to stop. The CFPB also alleged deceptive acts and practices, including falsely threatening to litigate or criminally prosecute, to report the debt to credit reporting agencies, or to add fees.

The CFPB based its "abusive" allegations on ACE's use of these tactics to create a "false sense of urgency," pressuring delinquent borrowers who could not pay off their loans to take out new loans to cover the amount owed, and generating new fees with each renewal.<sup>1</sup> The CFPB alleged borrowers "frequently roll over, renew, refinance or otherwise extend their loans,"<sup>2</sup> characterizing this activity as a "payday cycle of debt." The CFPB relied in part on a diagram from an ACE training manual referring to the customer lacking the ability to repay the loan, followed by ACE offering the option to refinance or extend the loan, followed by customer inability to make a payment, and then the customer's application for another loan.<sup>3</sup>

ACE entered into the Consent Order without admitting or denying any of the allegations. ACE agreed to pay \$5 million in restitution and a \$5 million civil monetary penalty, to implement injunctive relief, and to implement an extensive compliance plan. Restitution will be paid to consumers who were subject to collection efforts by ACE or third-party debt collectors from March 7, 2011 to September 12, 2012.

ACE issued a press release addressing many of the CFPB's allegations. ACE states in the release that the Consent Order concerns practices ended prior to 2012. It also refers to conclusions by an outside consultant that are inconsistent with the CFPB's assertions of improper debt collection tactics and the inability of ACE borrowers to pay off their loans when due. ACE reports that it retained an outside consultant to review a random sample of call recordings from the relevant time period and concluded that 96% of the recordings "met relevant collections standards."<sup>4</sup> The consultant also found that 99.5% of customers with a loan in collections for more than 90 days did not take out a new loan with ACE within two days of paying off their existing loan, and 99.1% of customers did not take out a new loan within 14 days of paying off their existing loan.<sup>5</sup>

<sup>1</sup> CFPB Press Release: [CFPB Takes Action Against ACE Cash Express for Pushing Payday Borrowers Into Cycle of Debt](#).

<sup>2</sup> [Consent Order](#) ¶ 6, ACE Cash Express, Inc., File No. 2014-CFPB-0008 (July 10, 2014).

<sup>3</sup> [Consent Order](#) ¶¶ 15-16.

<sup>4</sup> Press Release: [ACE Cash Express Issues Statement on CFPB Settlement](#).

<sup>5</sup> *Id.*

# Client Alert.

## Key Takeaways

- **The abusive standard continues to develop.** The distinction between “deceptive” and “abusive” practices is not always clear. Director Cordray has recognized that “abusive” practices often will be “deceptive” practices as well. The ACE Consent Order may provide some insight, as it characterizes the alleged debt collection practices as “deceptive” and cites the alleged product model’s encouragement of loan renewals as “abusive.” The CFPB similarly focused on the product structure in a prior Stipulated Judgment alleging an abusive practice. In the Complaint filed with that Stipulated Judgment, the CFPB alleged the defendants enrolled customers in a debt relief program and accepted fees despite their knowledge that certain customers’ financial situations made it unlikely these customers could obtain any benefits from the program.<sup>6</sup>

Both of these Consent Orders also seem to indicate that the CFPB views delinquent borrowers as a vulnerable group that may reasonably believe that lenders or other consumer financial product providers are acting in their interests.

- **Accountability for conduct of third-party vendors.** The ACE Consent Order follows several other consent orders holding the settling party accountable for the conduct of third-party vendors acting on its behalf. Several of the allegations in the ACE Consent Order indicate third-party debt collectors were not following ACE’s policies. For example, the Consent Order alleges that one of ACE’s third-party debt collectors falsely threatened litigation when ACE does not sue consumers or allow its third-party debt collectors to do so.<sup>7</sup> ACE, though, was held responsible for these alleged acts as if its own employees had taken these actions.
- **Continued focus on hot button issues.** The CFPB has made no secret of its enforcement focus on debt collection and payday lending, two issues that intersect in the allegations underlying the ACE Consent Order. The alleged improper debt collection practices alleged as to ACE echo certain of the allegations in the CFPB’s complaint against CashCall, a servicer of online loans, filed earlier this year. And the CFPB cited many of the debt collection practices alleged in the ACE Consent Order in its 2013 Bulletin on prohibition of UDAAP in debt collection (the Debt Collection Bulletin).<sup>8</sup>

The CFPB issued a report on payday lending in March 2014. The Report focused on storefront lenders, finding “the majority of payday loans are made to borrowers who renew their loans so many times that they end up paying more in fees than the amount of money they originally borrowed.”<sup>9</sup> The “abusive” allegations in the Consent Order mirror the concerns expressed in the Report as well as in Director Cordray’s public statements.<sup>10</sup>

- **Using UDAAP to fill in the blanks.** The ACE settlement provides yet another example of how the CFPB will use its UDAAP enforcement authority to fill in what it views as gaps in applicable substantive law. Many of the alleged practices in the Consent Order are examples of UDAAP identified in the CFPB’s Debt Collection Bulletin. Many of these practices also are prohibited by the Fair Debt Collection Practices Act (the FDCPA).<sup>11</sup> Although the FDCPA applies only to third-party debt collectors, the CFPB indicated in the Debt Collection Bulletin that it would rely on its UDAAP authority to effectively apply the FDCPA prohibitions to entities collecting their own debts. The CFPB did just that in the ACE Consent Order.

<sup>6</sup> See Complaint, Consumer Fin. Prot. Bureau v. Am. Debt Settlement Solutions, Inc., No. 9:13-cv-80548 (S.D. Fl. May 30, 2013)

<sup>7</sup> Consent Order ¶ 14.

<sup>8</sup> See CFPB Bulletin 2013-07, Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts.

<sup>9</sup> Press Release: CFPB Finds Four Out Of Five Payday Loans Are Rolled Over Or Renewed.

<sup>10</sup> See, e.g., Prepared Remarks, by Richard Cordray at Consumer Advisory Board Meeting.

<sup>11</sup> See, e.g., 15 U.S.C. § 1692e(5) (prohibiting “the threat to take any action that cannot legally be taken or that is not intended to be taken”).

## Client Alert.

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- **Examinations as an enforcement tool.** The ACE enforcement proceeding followed an examination conducted in conjunction with the Texas Office of Consumer Credit Commissioner. The ACE Consent Order, then, is the latest example of the connection between exams and enforcement activity.

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