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UDAAP ROUND UP

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UDAAP Round Up: 2014 Year in Review

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Consumer financial services companies have long been heavily regulated by a veritable alphabet soup of federal laws, including ECOA, EFTA, FCRA, FDCPA, RESPA, SCRA, and TILA. In the last few years, the industry has also increasingly faced the new darling tool of government enforcers -- the prohibition of unfair or deceptive acts or practices ("UDAP") found in Section 5 of the FTC Act[1] and the prohibition of unfair, deceptive, or abusive acts or practices ("UDAAP") found in Section 1031 of the Dodd-Frank Act.[2] Section 5 of the FTC Act is enforceable by the FTC and federal prudential regulators, while Section 1031 of Dodd-Frank is enforceable by the CFPB, federal prudential regulators, state attorneys general, and certain state regulators. In 2014 alone, federal regulators resolved approximately 50 UDAP/UDAAP cases involving various forms of consumer financial services. These settlements resulted in over $2.5 billion in civil money penalties and consumer redress.[3]

The challenge of UDAP/UDAAP compliance is that their standards are intentionally broad and inherently flexible. UDAP/UDAAP claims are also often brought in conjunction with claims under other consumer financial services laws, but are construed to be broader. Also, as demonstrated below, federal agencies have raised UDAP/UDAAP claims that mirror consumer financial services laws where the consumer financial services laws did not directly apply, thus effectively expanding the reach of those laws. Regulators have also expressly stated that compliance with a consumer financial services law is no defense to a UDAP/UDAAP claim.[4] Regulators have resisted issuing a comprehensive set of regulations that define prohibited UDAP/UDAAP activity upon which companies can rely. Rather, firms must look to enforcement actions and agency guidance to evaluate the contours of UDAP/UDAAP.

[1] 15 U.S.C. § 45.
[2] 12 U.S.C. § 5531.
[3] Our analysis generally excludes actions involving loan-modification and debt-relief services.
[4] *See*, *e.g.*, Consumer Fin. Prot. Bureau, Supervision and Examination Manual, UDAAP-10 (Oct. 2012), ***available at*** http://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf ("…a transaction that is in technical compliance with other federal or state laws may nevertheless violate the prohibition against UDAAPs"); Fed. Deposit Ins. Corp., Compliance Manual. VII-1.4 (June 2014), ***available at*** https://www.fdic.gov/regulations/compliance/manual/pdf/VII-1.1.pdf ("...certain practices may violate the FTC Act while complying with the technical requirements of other consumer protection laws").

A. 2014 UDAP/UDAAP Actions

In this report, we provide a detailed view of the specific acts and practices that were challenged as unfair, deceptive, or abusive in 2014. We also include a summary of formal and informal UDAP/UDAAP guidance issued in the past year. Taken together, this compendium is a useful introduction for consumer financial services companies interested in evaluating and mitigating their UDAP/UDAAP risk.

1. Auto Lending

The CFPB and FTC both took an active role in bringing UDAAP claims against those in the automobile finance industry in 2014.

In May, the FTC alleged that a corporation that purchases and services subprime automobile finance contracts engaged in unfair and deceptive acts and practices related to its collection and servicing activities. The FTC alleged that the company misrepresented the fees and amounts owed under the loans, unfairly assessed and collected fees and other amounts not allowed under the retail installment sales contracts, unfairly modified the contracts, and failed to disclose the effects of an extension of the loan terms. The FTC also alleged violations of the Fair Debt Collection Practices Act ("FDCPA"),[5] the Fair Credit Reporting Act ("FCRA"),[6] and the Furnisher Rule.[7] The action resulted in the assessment of approximately $3.5 million in consumer redress and a $2 million civil money penalty ("CMP") ($1 million for FDCPA violations and $1 million for violations of the Furnisher Rule).

In January, the FTC also performed a nationwide "sweep" of auto dealers that used allegedly deceptive print, web, and video advertisements, including advertisements about vehicle pricing and financing options. The FTC alleged that the dealers' advertisements misrepresented purchase prices, monthly payment amounts, amount due at lease inception, and upfront fees in violation of the FTC Act, the Truth in Lending Act ("TILA"),[8] and Regulation Z.[9] These FTC actions resulted in injunctions against 10 dealers.

In August, the CFPB brought a deception claim against an auto finance company due to its representations regarding the accuracy of the information it furnishes to credit reporting agencies. In addition to alleged violations of FCRA, the CFPB alleged that the defendant misled borrowers by posting "frequently asked questions" on the company's website indicating that the company furnishes accurate information to consumer reporting agencies, and that this representation was material to the company's customers. The company was ordered to pay a $2.75 million CMP.

In November, the CFPB also brought an enforcement action against a "buy-here-pay-here" used auto dealer. While most activities by auto dealers are specifically excluded from the CFPB's jurisdiction by the Dodd-Frank Act, the CFPB may have jurisdiction if an auto dealer retains loans on its books and does not routinely assign the loans to an unaffiliated third party.[10] The CFPB alleged that the company engaged in unfair practices, including the failure to prevent account servicing and collection calls to consumers' workplaces after consumers asked the company to stop such calls; prevent calls to consumers' third party references after the references or consumers asked the company to stop calling them; and prevent calls to people at wrong numbers after they have asked the company to stop calling. The CFPB also alleged that the company engaged in violations of FCRA. The company was ordered to pay an $8 million CMP.

In addition to the enforcement actions it brought in 2014, the CFPB proposed a new rule in September that would enable the agency to supervise nonbank larger participants of the auto financing market. If adopted, the rule will be the first time that nonbank auto finance companies will be federally supervised, which means that they will be subject to CFPB examination, including UDAAP compliance, and will be expected to establish and implement compliance

[5] 15 U.S.C. §§ 1692-1692p.
[6] 15 U.S.C. § 1681s(a).
[7] 16 C.F.R. pt. 660.
[8] 15 U.S.C. § 1601 *et seq*.
[9] 12 C.F.R. pt. 226 (Federal Reserve Board's Regulation Z, applicable to certain auto dealers exempt from CFPB's Regulation Z).
[10] *See* 15 U.S.C. § 5519.

management systems that are appropriate for their size and complexity.[11]

2. Banking Products

The CFPB and banking regulators brought enforcement actions against banks for allegedly unfair and deceptive practices regarding certain banking activities.

In one action settled in October, the CFPB alleged that a bank's marketing of free checking accounts via TV, print, and radio were misleading because the marketing did not properly disclose the minimum account activity required to keep the account free or that the bank would automatically convert the free account to an account with a monthly fee after 90 days of inactivity. The Bureau identified certain phrases such as "free yourself from monthly service fees" and "untangle yourself from monthly service fees" as deceptive because consumers unknowingly incurred monthly service charges for the accounts. The settlement resulted in $2.9 million in consumer refunds and a $200,000 CMP.

The FDIC brought a series of smaller enforcement actions against its supervised institutions for a variety of banking practices:

- In February, the FDIC alleged that a bank engaged in unfair practices by imposing "burdensome requirements" on consumers in connection with its electronic funds transfer error resolution process and by failing to provide consumers protection against liability for unauthorized charges. The Bank was ordered to pay a $35,000 CMP.

- In June, the FDIC alleged that a bank committed deceptive and unfair acts and practices by understating available interest rates on deposit-secured loans on its website and in advertising brochures available at branch locations. The action resulted in a $70,000 CMP.

- In July, the FDIC alleged that a bank engaged in deceptive acts or practices associated with the cash advance features of the bank's credit card program. The FDIC alleged that the bank failed to disclose certain fees and grace periods associated with the cash advances, and that all customers were entitled to free identity theft benefits. In addition, the bank allegedly misrepresented how the identity theft insurance product would be provided. The bank was ordered to pay a $20,000 CMP.

- In August, the FDIC alleged that a bank committed unfair and deceptive acts and practices "in connection with the publication and utilization of certain advertising and marketing materials that were prepared by an independent third-party contractor under the direction and supervision of the Bank." The action resulted in a $10,000 CMP.

3. Credit Card Add-On Products

To date, the CFPB alone has recovered over $579 million in restitution and civil money penalties for allegedly deceptive marketing and sales of credit card add-on products. In 2014, the CFPB and banking regulators continued aggressive enforcement against banks for add-on products such as identity protection products, payment protection products, and credit monitoring services.

In one action in April, the CFPB and OCC issued a coordinated enforcement action against two banks for alleged UDAAP in connection with certain credit card payment protection products. The agencies alleged that the banks engaged in deceptive acts and practices, including misrepresentations regarding the cost of the first 30 days of coverage, the enrollment process, and benefits of the products. The agencies also alleged unfair billing practices, including billing consumers for services they did not receive, charging consumers unfair interest and fees, illegally charging consumer accounts, and failing to provide product

[11] *See* Melanie Brody, Anjali Garg, and Christa Bieker, K&L Gates LLP, Start Your Compliance Engines: CFPB Proposes Rule to Supervise Larger Nonbank Auto Finance Companies (Oct. 8, 2014), *available at* http://www.klgates.com/start-your-compliance-engines-cfpb-proposes-rule-to-supervise-larger-nonbank-auto-finance-companies-10-08-2014/; Laurence Platt, K&L Gates LLP, Non-Direct Auto Lending: Is the CFPB Asserting Jurisdiction over the Capital Markets? (Nov. 18, 2014), *available at* http://www.consumerfinancialserviceswatch.com/2014/11/18/non-direct-auto-lending-is-the-cfpb-asserting-jurisdiction-over-the-capital-markets.

benefits. The OCC imposed a $25 million CMP for the allegedly unfair billing practices, and the CFPB issued a $20 million penalty. The consent orders require the banks to pay approximately $727 million in consumer redress: $268 million for those affected by deceptive marketing practices and $459 million for those who were enrolled in the products and did not receive all of the promised services.

The OCC and CFPB also coordinated efforts in September against a bank that marketed an identity protection product to customers on behalf of a third party. The product included credit monitoring and credit report retrieval services. The agencies alleged unfair billing practices, including billing consumers for services they did not receive; unfairly imposing charges for interest and fees; and failing to provide product benefits. The consent orders require the bank to issue refunds for the full amount paid for the product and associated over-limit fees and finance charges totaling approximately $48 million. The bank was also ordered to pay a $4 million CMP to the OCC and a $5 million CMP to the CFPB.

In another case in June, the CFPB challenged a bank's sale and marketing of five different credit card add-on products that provided payment and/or balance cancellation options. The CFPB alleged that the bank's practices were deceptive, including misrepresenting the products as free of charge; failing to disclose a consumer's ineligibility for the products; failing to disclose that consumers were purchasing the products; and misrepresenting that the products were limited-time offers. The settlement resulted in $225 million in restitution and a $3.5 million CMP. The bank was also ordered to pay $169 million in consumer redress for alleged fair lending violations.

The FDIC was also active in the add-on product space in 2014. In March, the FDIC issued an enforcement action against a bank in connection with an identity protection add-on product for store credit cards. The bank was ordered to pay a $1 million CMP and restitution to consumers for alleged UDAP in connection with the marketing, promotion, and administration of its credit card and add-on products. The bank was also ordered to refund interest and premiums paid by consumers.

In another case in September, the FDIC settled an action relating to a bank's payment protection add-on product. The FDIC alleged that the bank misrepresented the product's benefits and how payments would be made, and failed to adequately disclose material conditions and restrictions associated with the product and benefits. In addition, the FDIC alleged that the bank's requirement that disabled consumers recertify their disabled status each month was a UDAP. The bank was ordered to pay a $1.1 million CMP and approximately $15 million in restitution.

The FDIC also brought two smaller actions in 2014. In one case brought in June, the FDIC alleged that a bank engaged in UDAP regarding its identity theft protection products by mischaracterizing the benefits as automatic, when in fact the consumer was required to register for the product, and by failing to disclose that new and existing deposit account customers would receive the benefits for free, even if they opted out of purchasing the product for $1.95 per month. The bank was ordered to pay a $40,000 CMP. In another case in July, the FDIC alleged that a bank's failure to disclose that existing consumers could opt-out of an identity theft insurance product was an unfair or deceptive act or practice. The bank was assessed a $10,000 CMP.

Finally, in October, the OCC alleged that a bank's billing practices for an identity protection add-on product were unfair. The bank and its vendors offered identity protection products that included credit-monitoring services, but consumers had to provide authorization before the bank could access credit reports. The OCC alleged that for approximately 9 years, the bank and its predecessor billed customers for the full fee of the product, but not all customers received all of the benefits of the product. The bank was ordered to pay a $2 million CMP and provide full reimbursement to eligible consumers.

4. Credit Card Advertising

In December 2014, the CFPB filed a complaint against a corporation that advertised an allegedly sham general-use credit card via direct mail and web. The defendant allegedly targeted blue-collar workers in marketing a general-use platinum credit card that consumers could obtain if they paid a membership fee of between $37 and $95. In fact, according to the CFPB, consumers who paid the membership fee did not receive a general-use credit card, but rather, a paper "membership" card that could only be used to purchase products offered by the defendant. The CFPB also alleged that the defendant misrepresented that it was affiliated or associated with labor unions. The complaint also alleged FCRA violations for failing to obtain consumers' consent to use consumer reports.

By way of guidance, in September of 2014, the CFPB issued a bulletin titled "Marketing of Credit Card Promotional APR Offers."[12] The Bureau issued the bulletin "to inform credit card issuers of the risk of engaging in deceptive and/or abusive acts and practices in connection with solicitations that offer a promotional annual percentage rate (APR) on a particular transaction over a defined period of time." The CFPB cautioned that these solicitations could be deceptive "if the marketing materials do not clearly and prominently convey that a consumer who accepts such an offer and continues to use the credit card to make purchases will lose the grace period on the new purchases if the consumer does not pay the entire statement balance, including the amount subject to the promotional APR, by the payment due date." Moreover, the Bureau indicated that it might constitute abusive conduct for a credit card issuer to "fail to provide adequate information alerting consumers that they will be unable to maintain a grace period on new purchases if they do not repay their entire balance, including any promotional balance and any new purchase balance, by the statement due date." The CFPB noted that a UDAAP violation might exist even if the credit card issuer did not violate Regulation Z.[13] The Bureau closed by noting that credit card issuers' compliance management systems should include measures to prevent UDAAP violations of this nature.

5. Credit Reporting and Monitoring

In March, the FTC obtained relief against a data broker that the FTC alleged operated as a consumer reporting agency for allegedly selling inaccurate consumer reports to employers and landlords. The FTC alleged that the company's FCRA violations, including failure to provide a user notice and failing to ensure the accuracy of the reports, also constituted UDAP in violation of Section 5 of the FTC Act. The company was ordered to pay a $1 million CMP.

In April, the FTC obtained relief against another data broker that the FTC alleged operated as a consumer reporting agency for allegedly selling inaccurate information about prospective and current employees to employers, including public record information. The FTC alleged that the company's violations of FCRA also constituted violations of the FTC Act. The company was assessed a $525,000 CMP.

In November, the FTC, the State of Ohio, and the State of Illinois obtained relief against a company that advertised a credit-monitoring program with a negative billing option. The FTC alleged that "many consumers' overall net impression of the Defendants' websites is that Defendants offer consumers 'free' credit scores with no further payment obligation." The UDAP allegations included failure to adequately disclose offer terms, failure to disclose all material terms of the transaction before obtaining the consumers' billing information, failure to obtain consumers' express informed consent, and failure to provide a simple cancellation method. The FTC also alleged that violations of the Restore Online Shoppers' Confidence Act[14] also constituted a UDAP. The company was ordered to pay equitable relief in the amount of $22 million.

6. Debt Collection

In 2014, the FTC obtained a number of settlements against debt-collection operations for UDAP violations as well as violations of the FDCPA. Many of these settlements involved individual defendants as well as corporate defendants. In addition, the CFPB and state attorneys general successfully brought an enforcement action against a debt collector for UDAAP violations that illuminates how the CFPB may bring claims of "abusive" practices in the future.

In April 2014, the FTC closed down a debt-collection business that focused on Spanish-speaking consumers and used allegedly deceptive and misleading

[12] Consumer Fin. Prot. Bureau, Marketing of Credit Card Promotional APR Offers (Sept. 3, 2014), *available at* http://files.consumerfinance.gov/f/201409_cfpb_bulletin_marketing-credit-card-promotional-apr-offers.pdf.
[13] 12 C.F.R. pt. 1026.

[14] 15 U.S.C. § 8401 *et seq*.

representations to collect debts. The FTC alleged that the defendants falsely claimed that a lawsuit had been or would be filed against the consumer and that the consumer owed attorney fees and/or court costs for the legal action, represented that the defendant is a process servicer, and threatened consumers with legal action or arrest, or seizure, garnishment, or attachment of the consumer's property or wages. The FTC also alleged violations of the FDCPA. The order imposed equitable relief in the amount of approximately $23 million.

In May, the FTC also brought an action against a group of debt collectors and individual defendants that resulted in monetary judgments and banned the defendants from collecting debts. The complaint alleged that the defendants engaged in deceptive acts or practices, including misrepresenting that defendant was a process server and worked with or was employed by a lawyer; misrepresenting that nonpayment of the debt would result in arrest; and misrepresenting that defendant had filed or would file a lawsuit against the consumer. The FTC also alleged violations of the FDCPA. The action resulted in a monetary judgment totaling over $90 million.

In June 2014, the FTC and New York Attorney General obtained a temporary restraining order against a debt-collection operation and individual defendants. The complaint alleged that the defendants used abusive and deceptive tactics to collect debts on loans that consumers had challenged. The complaint further alleged that defendants used false threats regarding the consequences of not making payments and made false or unsubstantiated representations that consumers owed the debts. The FTC also alleged violations of the FDCPA.

Also in June, the FTC obtained a permanent injunction and monetary judgment against a debt collector and its sole shareholder and president for third-party debt-collection activities. The FTC alleged that the defendants made false claims that collection calls were made on behalf of an attorney, made false litigation threats against consumers, used deceptive schemes to collect debts and obtain consumer information through a "Hard-Ship Program," and charged transaction and convenience fees for payments authorized by telephone. The FTC also alleged violations of the FDCPA. The FTC obtained equitable relief in the amount of $4 million.

In August, the FTC brought an action against a Tennessee debt collector for allegedly using false or deceptive means to collect or attempt to collect debts. The FTC alleged that making unsubstantiated representations about debts owed constituted a deceptive act or practice. In addition, the FTC alleged that the defendant's practice of withdrawing funds from consumers' bank accounts without obtaining consumers' express informed consent constituted an unfair act or practice. The FTC also alleged violations of the FDCPA. The defendant was assessed a $1.5 million CMP.

In August 2014, the FTC obtained a settlement with debt collectors and associated individual defendants for allegedly abusive and deceptive collection tactics. Defendants collected debts of overdraft fees or other fees and charges from consumers' former bank accounts, including debts that were 10 years old or older. The FTC alleged that the defendants misrepresented the consequences of nonpayment of the debts, misrepresented that the purpose of the defendants' phone calls was to offer financial relief or assistance, and made unsubstantiated representations about debts and interest that defendants claimed consumers owed. The FTC also alleged violations of the FDCPA. The defendant was assessed a $1.2 million CMP.

In September 2014, the FTC brought an action against debt collectors and individual defendants for allegedly collecting and processing payments for debts that consumers did not owe or that the defendants did not have authority to collect. The FTC alleged that defendants made false or misleading statements about the consumers' debts and consequences of non-payment. The FTC also alleged violations of the FDCPA. The corporate and most individual defendants were held jointly and severally liable for approximately $9 million. A separate individual defendant settled for approximately $1.5 million.

In December 2014, the CFPB, along with the attorneys general of Virginia and North Carolina, brought an enforcement action against group of companies in connection with the sale and financing of consumer goods and electronics. Defendants included the company that sold and offered financing for the goods; the company that acquired, purchased, or serviced the extensions of credit; and the company that collected the debts owed under credit contracts. The credit contracts contained a non-negotiable venue selection clause enabling the defendants to file debt-collection lawsuits in Norfolk, Virginia. The CFPB and attorneys general alleged that filing debt-collection lawsuits in a distant forum constituted unfair and abusive practices. This is one of a handful of CFPB cases where the CFPB has raised an abusiveness claim. The complaint also alleged that the following practices were unfair: contacting third parties, including military chain-of-command, to discuss debts owed by consumers; withdrawing payments from a related payor without authorization; and electronically withdrawing more than the payment owed in a single billing cycle without notice. The complaint also alleges violations of the Electronic Fund Transfer Act ("EFTA"),[15] TILA, and various state laws. The companies were ordered to pay a CMP of $100,000 and over $2.5 million in consumer redress.

7. General Consumer Credit

In a July 2014 case, the CFPB asserted two unfairness theories against a company that bought financing agreements from merchants who sold goods to military servicemembers on credit. Under the first unfairness theory, described in the complaint as "Unfairly Facilitating Deception," the CFPB alleged that merchants deceived the servicemembers about the terms of credit. According to the CFPB, because the respondents "fully understood" the merchants' deceptive practices when the respondents took assignments, consumer injury was a "predictable consequence" of taking the assignments, and, thus, the respondents allegedly "helped cause" the injury and were liable. Under the CFPB's second unfairness theory, because the merchants allegedly did not hold appropriate consumer lending licenses and/or charged rates above state usury limits, the financing agreements were void under state law. Accordingly, it was allegedly unfair for the respondents to collect payments that the borrowers did not legally owe. The CFPB, along with 13 state attorneys general who filed separate suits, settled with the respondents for approximately $92 million in consumer relief and a $1 CMP.

In August 2014, the CFPB brought unfairness and deception claims against a retailer for allegedly charging a $5 fee to military servicemembers to whom it extended credit, ostensibly for an independent "SCRA Specialist" who would represent the servicemember in dealings with the retailer related to the Servicemembers Civil Relief Act ("SCRA").[16] In fact, the CFPB alleged, no specialists provided services of any value. The CFPB obtained restitution of $350,000 and a CMP of $50,000. Notably, the CFPB lacks authority to directly enforce SCRA.[17]

8. Mortgage Advertising

Both the FTC and the CFPB pursued cases related to online advertising of mortgages over the course of 2014.

The FTC brought three such cases: two cases against mortgage lead generators and one case against a builder and marketer of new homes. In these cases, the FTC made a number of deception claims. Specifically, the FTC alleged that that one or more of the defendants: (1) advertised mortgage rates that were not, in fact, available; (2) falsely claimed that a loan was available with no money down and no closing costs; (3) misrepresented the size of monthly payments; (4) failed to disclose material terms and conditions of the loans advertised; and/or (5) made unsubstantiated claims that consumers could reduce their mortgage payments through the defendants. In addition, the FTC made various claims under TILA and Regulation N (the Mortgage Acts and Practices-Advertising Rule).[18] The three cases settled for CMPs of $225,000, $650,000, and $500,000 respectively.

In August 2014, the CFPB reached a settlement of $6 million in CMPs and $14.8 million in consumer relief with an online mortgage lender. The lender allegedly

[15] 15 U.S.C. § 1693 *et seq*.

[16] 50 U.S.C. App. § 501 *et seq*.

[17] *See*, *e.g.*, Memorandum of Understanding on Supervisory Coordination between the Consumer Financial Protection Bureau and Prudential Regulators at 4 (May 16, 2012) (noting that SCRA is not a "Federal consumer financial law"), *available at* http://files.consumerfinance.gov/f/201206_CFPB_MOU_Supervisory_Coordination.pdf.

[18] 12 C.F.R. pt. 1014.

engaged in deceptive practices by: (1) advertising certain mortgage terms on third-party websites that, in fact, were not available to any consumer; (2) failing to disclose that its advertised rates on third-party websites assumed discount points; (3) advertising certain mortgage terms on third-party websites that were only available to consumers with a FICO of 800 or higher, and not to the majority of its customers; and (4) providing personalized mortgage rate quotes on its website that assumed a FICO score of 800, without adequately disclosing this assumption. The CFPB also asserted that the lender unfairly charged consumers an appraisal-related fee, without disclosing its affiliation with the appraisal management company until it was practically too late for the consumer to back out of the transaction. Finally, the CFPB alleged various claims under TILA, Regulation N, and the Real Estate Settlement Procedures Act ("RESPA").[19]

9. Mortgage Servicing

In June 2014, the DOJ, HUD, CFPB, and 49 states reached a settlement with a mortgage originator and servicer for $540 million in consumer relief and a $418 million DOJ penalty. In addition to claims under the False Claims Act,[20] the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"),[21] and bankruptcy law, the defendant allegedly committed a litany of federal and state UDAAP violations. The alleged UDAAP violations included the failure to timely and accurately apply payments; failure to maintain accurate account statements; charging unauthorized fees for default-related services; wrongly force placing insurance; and providing false and misleading information in response to borrower complaints. Additionally, the defendant allegedly mishandled the loss-mitigation process in a number of respects, such as by wrongfully denying loss-mitigation applications; failing to provide accurate information to borrowers; and failing to assign and train adequate staff for loss-mitigation activities. Moreover, the defendant allegedly committed various UDAAPs connected to foreclosure, including charging unauthorized fees, robo-signing, and dual-tracking. The state plaintiffs, but not the CFPB, also asserted that the defendant committed UDAPs in its origination practices, but these claims were not clearly articulated.

In September 2014, the CFPB entered into a consent order with a mortgage servicer to resolve unfairness and deception claims, as well as separate violations of the CFPB's Mortgage Servicing Rules.[22] The CFPB alleged that the servicer unfairly "impeded borrowers' access to loss mitigation" by: (1) taking an unreasonable amount of time to review loss-mitigation applications (routinely more than 90 days); (2) failing to inform borrowers about documents missing from their applications in a timely manner; (3) improperly denying applications due to the servicer's miscalculation of borrower income; and (4) prolonging trial periods for loan modifications due to the servicer's delays in executing permanent modifications. Additionally, the servicer allegedly engaged in deceptive practices by sending notices to borrowers indicating that the borrowers had the right to appeal denials of loss-mitigation applications only if they resided in certain states during a five-month period after the Mortgage Servicing Rules extended the right to appeal to all states. Finally, the CFPB alleged several violations directly under the Mortgage Servicing Rules. The servicer agreed to pay $27.5 million in consumer redress and a CMP of $10 million.

Also in September 2014, the FDIC assessed a CMP of $15,000 against a small bank for engaging in unspecified UDAAPs "in connection with its disclosures and practices related to the assessment of prepayment penalties on residential mortgage loans."

In the Fall 2014 edition of the CFPB's *Supervisory Highlights*,[23] the CFPB expressly stated that conduct may constitute a UDAAP violation even if the conduct does not violate a specific provision of the CFPB's new Mortgage Servicing Rules. As one example, the CFPB indicated that substantial delays in converting trial loan modifications to permanent modifications after the borrower successfully completed the trial period constituted an unfair practice. The CFPB noted that borrowers were harmed by such delays, because (1)

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[19] 12 U.S.C. § 2601 *et seq*.
[20] 31 U.S.C. § 3729 *et seq*.
[21] Pub. L. No. 101-73, 103 Stat. 183.
[22] *See generally* 12 C.F.R. pts. 1024 and 1026.
[23] Consumer Fin. Prot. Bureau, Supervisory Highlights (Fall 2014), *available at* http://www.consumerfinance.gov/f/201410_cfpb_supervisory-highlights_fall-2014.pdf.

they owed higher amounts of accrued interest than they would have if the permanent modification had been completed promptly and (2) if the borrower was delinquent at the start of the trial modification, servicers continued to report the borrower as delinquent to consumer reporting agencies during the period of delay. The CFPB also noted two practices that it considered deceptive in connection with loan modifications: (1) sending permanent modification agreements to borrowers with one set of terms and then, after "substantial delays," sending new modification agreements with materially different terms; and (2) playing up the benefits of a proprietary loan-modification option and downplaying its disadvantages relative to the Home Affordable Modification Program ("HAMP") modification option, as well as misrepresenting aspects of the HAMP option. With regard to short sales, the CFPB indicated that it had cited servicers for deceptive practices where servicers told consumers that no deficiency judgment would be sought in connection with a short sale, but the short-sale agreement did not expressly waive the loan owner's right to pursue a deficiency judgment.

10. Payday Loans

The FTC and CFPB pursued several cases related to payday lending. Some of these cases involved unlawful debt collection practices, while others were alleged to be consumer scams.

In April 2014, the FTC settled UDAP claims with a payday lender for approximately $400,000 in disgorgement and also obtained a $550,000 CMP for certain violations of the FTC's Credit Practices Rule.[24] The FTC alleged that the payday lender engaged in deception by, among other things, misrepresenting to borrowers' employers that it was entitled to garnish the borrowers' wages. The FTC also alleged that the payday lender unfairly disclosed the existence and amount of debts to the borrowers' employers and co-workers without the borrowers' knowledge or consent. This unfairness claim parallels similar restrictions on communicating with third parties found in the FDCPA. The FDCPA did not apply to the payday lender, because it collected debts on its own behalf and in its own name.

[24] 16 C.F.R. pt. 444.

In May 2014, the FTC settled with a third-party collector of payday loans and other consumer debts on a deception claim, as well as various claims under the FDCPA. The FTC alleged that the collector engaged in deceptive practices by making numerous false statements, including false claims that the defendants were attorneys; that the defendants were associated with law enforcement; and that the borrowers could be arrested, lose their drivers' licenses, or lose custody of their minor children if they failed to pay their debts. The FTC obtained a judgment of approximately $1.4 million in consumer relief on its deception and FDCPA claims, in addition to a total ban on any debt collection activities by the defendants in future.

The FTC is engaged in an ongoing enforcement matter against a firm that allegedly cold-called consumers who it suspected had taken out payday loans. According to the FTC's complaint, the firm allegedly made false statements and wild threats in order to extract payments from the consumers, even though the defendants had no actual authority from the lenders to collect the debts. The FTC sought and obtained a preliminary injunction with a freeze on the defendants' assets and the appointment of a receiver.

In July 2014, the CFPB brought unfairness, deception, and abusiveness claims against a payday lender for its collection activities. The CFPB alleged that the payday lender unfairly made an excessive number of phone calls to borrowers; disclosed the existence of debts to non-liable third parties; continued to call borrowers at work after being told that such calls were prohibited; continued to call borrowers directly after being told that they were represented by counsel; and continued to call consumers with no relation to the debt after being told that the payday lender had the wrong person. The CFPB also alleged that the payday lender misrepresented what would happen if the payday lender had to refer the debt to a third-party collection agency and made various false threats regarding litigation, criminal prosecution, credit reporting, and collection fees. The CFPB did not raise FDCPA claims, likely because the FDCPA did not apply to the payday lender, which was collecting on its own debts. The CFPB also alleged that the payday lender committed an abusive practice by taking "unreasonable advantage of … the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service." The payday lender allegedly trained its staff to generate what the company called a “sense of urgency,” in order to pressure borrowers who could not afford to repay their existing loans to take out a new payday loan. The company agreed to pay consumer restitution of $5 million and a CMP of $5 million.

In September 2014, the CFPB filed a complaint against an online payday lender that allegedly engaged in a “cash-grab scam.” Allegedly, the defendants bought information from online lead generators in order to access consumer’s checking accounts, deposit payday loans, and withdraw fees without the consumers’ consent. The defendants allegedly falsified loan documents to claim that the consumers had agreed to the unauthorized payday loans. The CFPB asserted that these actions were both unfair and deceptive, and also violated TILA and EFTA.

On the issue of payday lending, the CFPB announced in the Spring 2014 edition of *Supervisory Highlights*[25] that it had cited multiple payday lenders for UDAAP violations, or risks of UDAAP violations, for conduct including the following: (1) making repeated, unnecessary calls to third parties, such as individuals listed by the borrower as character or credit references; (2) improperly disclosing personal debt information to third parties or failing to have procedures in place to verify that the collections caller confirmed that he or she was speaking with the borrower before sharing personal debt information; (3) making collections calls to borrowers after the borrowers had filed do-not-call requests; and (4) making deceptive claims during collections calls, such as falsely threatening to impose additional fees or falsely threatening to refer the loan to a non-existent in-house “legal department.” The CFPB also indicated that it had cited lenders for unfair practices where an employee of a payday lender visited the borrower’s workplace to attempt to collect the debt. Finally, the CFPB raised concerns about deceptive ACH practices by payday lenders. For example, the CFPB indicated that some payday lenders threatened to make ACH debits from the borrower’s checking account that were contrary to the terms of the loan agreement and that the lender did not actually intend to make.

11. Student Loans

Over the course of 2014, the CFPB brought UDAAP enforcement actions against for-profit schools and companies offering student debt-relief services, while the FDIC brought an action against a student lender and the Federal Reserve Board brought an action relating to student financial aid refund disbursement.

The CFPB filed suits against two for-profit schools that offered loans to students for tuition. In one case, the CFPB alleged that the school unfairly “subjected students to undue influence or coerced them into taking out” loans, including by barring them from class, emailing and calling them at home, and threatening to expel them. An element of the alleged unfairness was granting students temporary loans for tuition that they could not afford and then pressuring them into taking out longer-term loans. The CFPB also alleged that the school engaged in an abusive practice by, among other things, taking unreasonable advantage of students’ inability to protect their interests, since students faced expulsion unless they took out a longer-term loan to repay their temporary loans. In the other case, the school allegedly engaged in an unfair practice by, among other things, pulling students from classes and denying them use of computers as a tactic to collect past-due loan payments. The CFPB also alleged violations of the FDCPA in this case.

In December 2014, the CFPB announced two enforcement actions against companies that offered student debt relief services. In one case, which settled for $25,000 in CMPs plus $25,000 in damages to Florida regulators, the defendants allegedly (1) engaged in a deceptive practice by misleading students about the results that it achieved and (2) engaged in an abusive practice by, among other things, taking unreasonable advantage of students’ reasonable reliance by taking fees from them when, in fact, their debts did not qualify for the debt consolidation or other debt relief promised. In the other case, which is still ongoing, the CFPB alleged that the defendants engaged in deceptive practices by: (1) creating the “net impression” that they were affiliated with the U.S. Department of Education, including with misleading statements, Internet URLs,

[25] Consumer Fin. Prot. Bureau, Supervisory Highlights (Spring 2014), *available at* http://www.consumerfinance.gov/f/201405_cfpb_supervisory-highlights-spring-2014.pdf.

and logos; and (2) misrepresented the total cost of their services. In both cases, the CFPB also alleged various violations of the FTC's Telemarketing Sales Rule ("TSR").[26]

In May 2014, the FDIC issued an order against a student lender for $6.6 million in CMPs and $90 million in consumer restitution and remediation to resolve UDAP and SCRA claims. The FDIC determined that the student lender committed UDAPs by: (1) inadequately disclosing its payment allocation methodologies to borrowers while allocating borrowers' payments across multiple loans in a manner that maximized late fees; (2) misrepresenting and inadequately disclosing in its billing statements how borrowers could avoid late fees; and (3) committing certain violations of SCRA that also amounted to UDAPs.

In June 2014, the Federal Reserve Board and Illinois state regulators jointly issued an order for approximately $4.1 million in total CMPs and $30 million in consumer restitution against a bank. This was due to the actions of the bank's agent, which was hired by institutions of higher education to disburse financial aid refunds to their students, and which marketed a deposit account and debit card that students could use to receive and spend these refunds. The regulators determined that the bank's agent engaged in deceptive practices when communicating with students by: (1) omitting material information about how students could get their financial aid refunds without having to obtain a deposit account and debit card from the respondent; (2) omitting material information about the fees, features, and limitations of the deposit account and debit card, which may have made it more difficult for students to make fully informed decisions prior to selecting the method for financial aid refund disbursement; (3) omitting material information about the locations, hours, and availability of free ATMs; and (4) prominently displaying school logos, which may have erroneously implied that the school endorsed the deposit account and debit card. The U.S. Department of Education has been conducting a negotiated rulemaking proceeding that addresses restrictions on such products when it comes to disbursement of federal financial aid refunds.[27]

In its Fall 2014 edition of *Supervisory Highlights*,[28] the CFPB addressed UDAAP issues related to student loan servicing. The CFPB identified the following violations: (1) allocating partial payments pro rata across a single borrower's multiple student loans such that each loan became delinquent and was charged a separate late fee; (2) representing in periodic statements and online account statements that the minimum payment due included accrued interest on loans that were still in deferment; (3) charging late fees when payments were received after the due date but during the contractual grace period; (4) failing to provide a 1098-E tax form and misrepresenting in online account statements that the borrower had not paid any deductible student loan interest unless the borrower provided a superfluous certification that the student loan was used for qualified higher education expenses,; (5) making statements to borrowers asserting or implying that student loans are never dischargeable in bankruptcy; and (6) regularly making telephone calls to delinquent borrowers early in the morning or late at night, which occurred because the automated dialer did not take the borrower's location into account.

B. Other UDAAP Developments

1. State Consumer Financial Services UDAAP Enforcement

In 2014, the consumer finance industry also saw continued UDAAP enforcement at the state level, including state attorneys general and regulators using their authority to enforce the Consumer Financial Protection Act pursuant to Section 1042 of Dodd-Frank.[29] The New York Department of Financial Services settled the first Section 1042 case in December 2014 against an indirect auto lender. This

[26] 16 C.F.R. pt. 310.

[27] U.S. Dep't of Educ., Negotiated Rulemaking for Higher Education 2012 - 2014, *available at* http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/index.html.

[28] Consumer Fin. Prot. Bureau, Supervisory Highlights (Fall 2014), *available at* http://www.consumerfinance.gov/f/201410_cfpb_supervisory-highlights_fall-2014.pdf.

[29] 12 U.S.C. § 5552.

action resulted in a $3 million civil money penalty and over $8 million in restitution.[30]

2. Data and Cyber Security

Another UDAAP risk facing consumer financial services firms is in connection with their data and cyber security practices. As reported in another client alert,[31] the FTC has emerged as the leading cybersecurity enforcer. The FTC has brought numerous data security cases against firms involved in consumer finance, including three actions in 2014.

In August, the FTC successfully obtained an injunction against a company whose website allowed consumers to monitor and evaluate their credit and financial status. The FTC alleged that the company's mobile application and website did not adequately protect consumers' personal information. The complaint alleged that the company engaged in deceptive representations regarding its commitment to protecting users' identity, data, and privacy and misrepresented that it transmits consumer data over secure connections. The final order prevents the company from continuing to make misrepresentations regarding its data security practices and requires the company to implement a comprehensive security program to address security risks to consumers.

In November, the FTC announced two suits filed against debt sellers who allegedly posted hundreds of thousands of consumers' sensitive personal information on the Internet. The information allegedly included consumers' bank account and credit card numbers, dates of birth, contact information, employers, and other information. The information was allegedly posted without redaction or any encryption, thus allowing any visitor to the websites to access the information.

3. Cramming

In 2014, the FTC was increasingly active in pursuing "cramming" cases as UDAP violations, and the CFPB entered the field by filing its first cramming case. Cramming is the practice of placing charges from third parties on consumers' phone bills that were never authorized by the consumer. As alleged by the FTC and CFPB, consumers may be victimized because they do not notice the illegitimate charges on their bills or do not realize that the charges are illegitimate. Because cramming implicates third-party billing practices, the CFPB appears to take the position that it is a consumer financial product or service subject to CFPB jurisdiction, at least in some situations.

The FTC has recognized that landline phone cramming has been a problem for over a decade, and it has brought more than 30 landline cramming cases.

The FTC has recently shifted much of its focus to mobile phone cramming cases. These cases are typically directed at alleged scam operations that obtain consumers' information, often through fraudulent online ads or mobile apps, and then use that information to insert unauthorized charges on the consumers' phone bills. For example, in June 2014, the FTC obtained a settlement of $150 million (partially suspended) from defendants who allegedly obtained consumers' phone numbers by using online ads that falsely promised consumers a chance to win free Justin Bieber tickets and other prizes. The defendants allegedly used the phone numbers to sign a large number of consumers up to a subscription service without their consent. In 2014, the FTC also filed cramming cases against two telecommunications companies, in cooperation with the Federal Communications Commission and state regulators. The two cases settled for approximately $90 million and $105 million.

The CFPB filed a UDAAP suit against a third telecommunications company in December 2014. The suit alleges that the defendant engaged in an unfair practice by automatically enrolling customers in third-party billing without their consent, failing to implement compliance controls or address customer complaints, and ignoring "red flags" of abuse.

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[30] *See* Melanie Brody and Anjali Garg, K&L Gates LLP, State Enforcement of the Consumer Financial Protection Act: State Lawsuits Offer a Sign of What's to Come (Jan. 20, 2015), *available at* http://www.klgates.com/state-enforcement-of-the-consumer-financial-protection-act-state-lawsuits-offer-a-sign-of-whats-to-come-01-20-2015/.

[31] *See* Soyong Cho and Andrew Caplan, K&L Gates LLP, Cybersecurity Lessons Learned From the FTC's Enforcement History (Dec. 2014), *available at* http://www.klgates.com/cybersecurity-lessons-learned-from-the-ftcs-enforcement-history-12-22-2014/.

C. Conclusion

As amply demonstrated by the cases detailed above, 2014 proved to be an active year for UDAP/UDAAP claims. The reported enforcement actions spanned a wide array of consumer financial products and services and captured a broad swath of acts and practices alleged to be unlawful. We expect state and federal agencies to continue to be active in UDAP/UDAAP investigations and actions, particularly given the tremendous flexibility and reach of UDAP/UDAAP laws and the ability to obtain large monetary penalties and consumer relief.