

Everything a Marketer Needs to Know About the CFPB – But May Not Know to Ask

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Overview

What is the CFPB?

Why Does the CFPB Matter to Me?

What Are the CFPB's "Hot Issues?"

What Are the CFPB's "Rules of the Road?"

What Penalties Are Available to the CFPB?

How Can I Stay Out of Trouble?



No Ostrich Zone



What is the CFPB?

- **“Consumer Financial Protection Bureau”**
- New federal agency
- Created by the Dodd-Frank Act of 2010
- Separately-funded directly by the Federal Reserve
 - Annual budget up of \$448 million in 2013
 - Independent of the Congressional appropriation process
 - Retains all civil penalties exacted in enforcement actions
- Headed by a single Director appointed by the President
- More than 1,100 employees hired to date
 - CFPB’s plan: 1,350 employees by 2013 year end
 - **Nearly half assigned to supervision/enforcement**



What Does the CFPB Do?

- Primary rulemaking, supervisory and enforcement authority over entities that offer consumer financial products and services
- Includes banks and “covered” non-banks
 - And their “**service providers**”
- Responsible for ensuring that markets for consumer financial products and services are fair, transparent and competitive



What Is the CFPB's Mission?

Mission:

- Prevent unfair, deceptive or abusive acts and practices
- Investigate and respond to consumer complaints
- Require “covered persons” to respond to such investigations
- Initiate civil and administrative enforcement actions against violators



Who Does the CFPB Oversee?

- Examines, supervises and enforces federal consumer financial laws applicable to “covered persons,” including:
 - Banks, thrifts and credit unions with assets over \$10 billion, their affiliates and certain service providers
 - Nonbanks in the residential mortgage, private education lending and payday lending markets
 - Nonbanks that are determined to be “larger participants” in other markets that pose risks to consumers with regard to consumer financial products or services:
 - Debt Collection companies with \$10 million plus in annual receipts
 - Consumer reporting companies with \$7 million plus in annual receipts



Key Definitions

“Covered persons”

- Entities that provide “consumer financial products or services” **as well as their service providers**

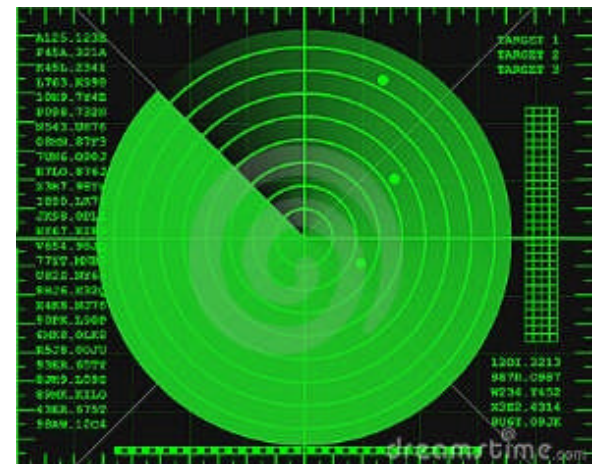
“Consumer financial product or service”

- Includes extending credit, servicing or brokering loans, real estate services, deposits, stored value, check cashing, payment processing, credit report and debt collection



Why Does The CFPB Matter to Me?

Do you know if you're on the CFPB's radar?



A “Service Provider” is:

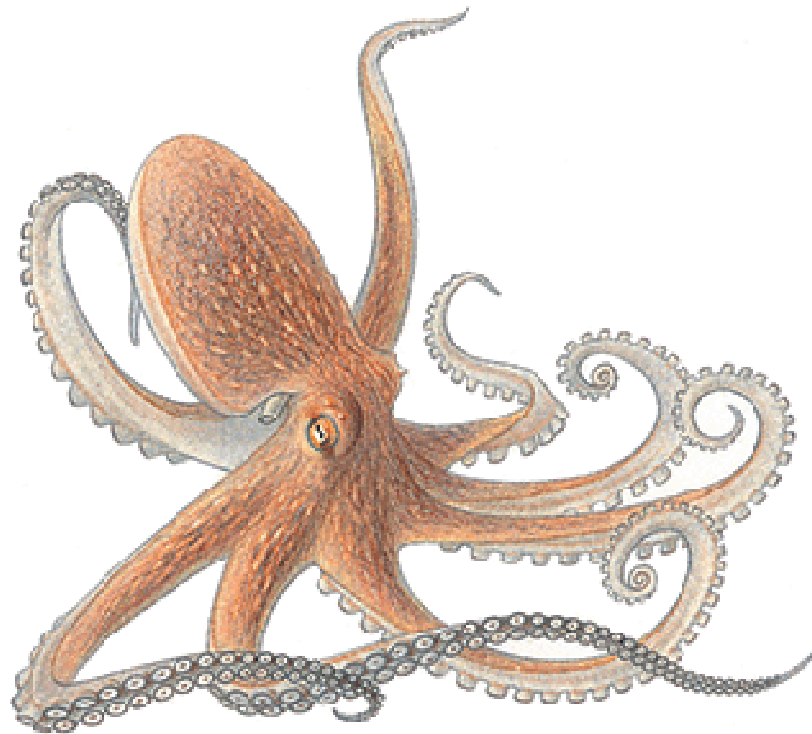
“Any person that **provides a material service to a covered person** in connection with the offering or provision by such covered person of a consumer financial product or service.”

(12 U.S.C. § 5481(26)).



Why Does the CFPB Matter to Me?

How far does the CFPB's jurisdiction reach?



“Covered Persons”

Any person that engages in offering or providing a “consumer financial practice or service”:

- Banks, thrifts, and credit unions with assets over \$10 billion
- Consumer finance lenders
- Mortgage loan originators
- Loan servicers and brokers
- Currency exchanges
- Real estate settlement companies
- Appraisers, appraisal companies and appraisal mgmt. cos.
- Consumer credit reporting agencies
- Debt collectors
- Debt settlement and debt management services
- Check cashing, collection and guaranty services
- Lenders and brokers in certain lease-to-own arrangements



“Covered Persons”

- Financial and investment advisors that are not registered with the SEC
- Payday lenders
- Credit counselors
- Broker-dealers, non-depository trust companies and deposit intermediation services
- Money services businesses, wire and money transmitters
- Stored value cards and instruments sellers and issuers
- Financial data processors, including data storage providers, transmission services, and software and hardware providers.
- Tax preparers, accountants, merchants or retailers and attorneys
- **Service providers and related persons of “covered persons”**



CFPB Expectations of Service Provider Relationships

Supervised banks and nonbanks must manage the risks of service provider relationships, including:

- Verification that the service provider understands and is **capable of complying** with Federal consumer financial laws
- Request and **review of service provider's policies, procedures, internal controls, and training materials**
- Steps to ensure service provider conducts **appropriate training** and **oversight** of its employees or agents

Source: CFPB Bulletin 2012-03 (April 12, 2012)



CFPB Expectations of Service Provider Relationships

- Service provider contracts should include:
 - Clear expectations about the service provider's compliance requirements
 - Appropriate and enforceable consequences for violation of compliance-related responsibilities
 - Must establish internal controls and ongoing monitoring to determine whether the service provider is complying with Federal consumer financial law.
 - Must take prompt action to respond to any problems identified through the monitoring process.

Source: CFPB Bulletin 2012-03 (April 12, 2012)



“Enumerated Consumer Laws”

Include:

- Consumer Financial Practices Act (CFPA)
 - Unfair Deceptive and Abusive Practices
- Federal Trade Commission Act (joint with FTC)
- Truth in Lending Act (TILA)
- Real Estate Settlement Practices Act (RESPA)
- Mortgage Lending Acts
- Equal Credit Opportunity Act (ECOA)
- Fair Credit Reporting Act sections
- SAFE Act
- Fair Debt Collection Practices Act
- Gramm-Leach Bliley Act sections



“Enumerated Consumer Laws”

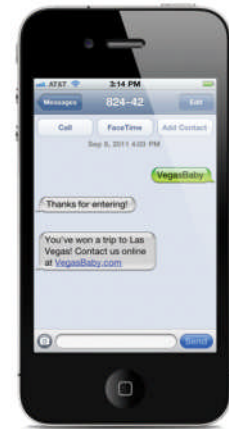
Unfair, Deceptive and Abusive Acts and Practices

- **“Unfair”**
 - Likely to cause substantial injury to consumers
 - Not reasonably avoidable by consumers
 - Not outweighed by benefits to consumers or competition
- **“Deceptive”**
 - False or misleading
 - Unsubstantiated
- **“Abusive” – NEW!**
 - Interferes with consumer’s ability to understand a term or condition, or
 - Takes unreasonable advantage of:
 - Consumer’s lack of understanding of risks, costs or conditions
 - Inability of consumers to protect their own interests, or
 - Reasonable reliance of consumers on the seller to act in their interest.



“Hot Issues” That Will Draw CFPB Scrutiny

1. Advertising for financial service companies
2. Internet lead generation
3. Telephone/text message solicitation
4. Social media – recent FFIEC guidance



CFPB Supervision Manual – “The Rules of the Road”

- Available on the CFPB’s website: consumerfinance.gov
- 924 pages covering all areas of CFPB jurisdiction
- Key marketing compliance sections:
 - Compliance Management Systems
 - UDAAP – Unfair, Deceptive or Abusive Practices
- Numerous other provisions apply to marketing mortgages and other consumer loans



CFPB's "Rules of the Road"

CFPB Supervision and Examination Manual

Part I – Supervision and Examination Process

Part II – Examination Procedures:

- **Unfair, Deceptive or Abusive Acts or Practices**
- Equal Credit Opportunity Act
- Home Mortgage Disclosure Act
- Truth in Lending Act
- Real Estate Settlement Procedures Act
- Homeowners Protection Act
- Consumer Leasing Act
- Fair Credit Reporting Act
- Fair Debt Collection Practices Act
- Electronic Fund Transfer Act
- Truth in Savings Act
- Privacy of Consumer Financial Information

Part III – Examination Process Templates



Investigations

- Investigations are usually **non-public**
- Conducted jointly with other state and federal regulators
- Can issue Civil Investigative Demands (“CIDs”) for:
 - Oral testimony
 - Document productions
 - Written responses to questions
 - Written reports



Civil Investigative Demands (“CIDs”)

- CID must specify:
 - The nature of the conduct constituting the alleged violation that is under investigation
 - The applicable laws relating to the alleged violation
 - Name(s) of the enforcement staff involved in investigation
 - Any instructions regarding the production of ESI (Electronically Stored Information)
 - The deadline for the response or date of oral testimony



CFPB Enforcement Actions

Enforcement Authority:

The CFPB is the primary authority for enforcing federal consumer financial laws.

- Enforcement Powers:
 - Issue subpoenas, CIDs, notices of charges
 - Commence civil or administrative enforcement actions
 - Actions can be brought in administrative proceedings or state or federal court.
 - Recover civil money penalties (but not exemplary or punitive damages).
 - Refer investigations to appropriate federal, state or foreign government agencies.



Enforcement Actions

CFPB v. Chance E. Gordon, et. al.

- First civil enforcement action filed in California federal court
- Followed the “FTC playbook”:
 - Facially egregious small loan modification operation
 - Imposed an ex parte asset freeze and a court-appointed Receiver
- Interesting issue:
 - Defendants have challenged CFPB’s authority based on the agency’s structure and the Director’s recess appointment



Enforcement Actions

- **Credit card marketing settlements**

- **Capital One Bank – July 2012**

- Agreed to pay \$210 million in fines and restitution in July 2012
- Alleged deceptive telemarketing **performed by third parties** of add-on products

- **Discover Bank – September 2012**

- Agreed to pay \$214 million in fines and restitution
- Alleged deceptive telemarketing **performed by third parties** of add-on products

- **American Express – October 2012**

- Agreed to pay \$112.5 million in fines and restitution
- Numerous compliance violations **by third party affiliates** uncovered in CFPB's February 2012 examination



Enforcement Actions

Credit card company settlement terms:

- Stop marketing add-on products
- Pay full restitution to consumers
- Additional fines and penalties
- Implement additional compliance procedures, including for **supervising third party providers**
- Submit to ongoing reviews by independent auditors
- **Banks were prohibited from enforcing indemnification agreements against their service providers!**
- **No indication CFPB has taken action against the service providers!**



Enforcement Penalties

Statutory Penalties:

- First Tier – violation of a law, rule, final order or CFPB-imposed condition
 - Up to \$5,000 for each day violation continues
- Second Tier – **reckless** violation of a Federal consumer financial law
 - Up to \$25,000 for each day violation continues
- Third Tier – **knowing or intentional** violation of a Federal consumer financial law
 - Up to \$1,000,000 for each day violation continues
- CFPB required to notify the U.S. Attorney General for possible criminal proceedings if there is evidence of violation of federal **criminal** laws.



Enforcement Penalties

Equitable and Injunctive Remedies:

- Rescission or reformation of contracts
- Restitution - refund of monies or return of real property
- Disgorgement - compensation for “unjust enrichment”
- Public notification regarding the violation, including all costs of notification
- Limitations on the activities or functions of the person
- Other monetary relief
- Recovery of government's attorney's fees and costs



Enforcement Actions

Potentially Liable Parties:

- Include those who provide "substantial assistance" to a covered person in engaging in an "unfair, deceptive or abusive act."
 - Directors, officers or employees charged with managerial responsibility
 - Controlling shareholders
 - Agents
 - Affiliates/other related entities
 - **Service providers**



Does any of this still matter?

Noel Canning v. National Labor Relations Board

- Court of Appeals for the District of Columbia (Feb. 2013)
- Held President Obama’s “recess appointments” of three NLRB board members on January 4, 2012 were “constitutionally invalid”
 - Found that the U.S. Senate was in session on that day
- CFPB Director Cordray was also appointed on the same day

- If the Court’s holding is upheld and applied to the CFPB:
 - Bureau’s powers could be substantially curtailed
 - Many of its 2012 actions, including some of its new rules and enforcement actions, could be overturned.
- Appeals are expected up to the U.S. Supreme Court



Does any of this still matter?

State Natl. Bank of Big Spring v. Timothy Geithner

- Filed in District of Columbia federal court (July 2012)
- Challenges:
 1. Constitutionality of the CFPB Structure
 - Lack of accountability to Congress and the President
 - Unsupervised appropriations process
 - Single director vs. Commission structure
 2. “Recess Appointment” of CFPB’s Director
 - Significant, since many of CFPB’s powers were designed to commence upon the Director’s appointment
 - Claimed “end run” around Congressional approval (“checks and balances”)



Does any of this still matter?

- If the CFPB Director's appointment is upheld as unconstitutional, the Bureau's powers will be limited until a Director can be properly appointed as follows:
 - Can make rules under pre-existing laws that were transferred to the CFPB's authority
 - Can supervise banks over \$10B in assets
- Until a Director is appointed, the CFPB cannot:
 - Make new rules or bring enforcement actions based on its UDAAP authority
 - Supervise non-bank entities (**or their service providers**)



What Does That Mean for Marketers?

- If the Director's appointment is overturned, "covered" businesses have **more time to prepare**.
- If the Director's appointment is upheld, the Bureau will likely increase its activity, including bringing **many more enforcement actions** against businesses and their service providers.
- Either way, the CFPB is not going away and providers of consumer financial products and services (**and their service providers**) will have to comply with the Bureau's rules.



Preparing for CFPB Scrutiny

1. Know your client!
 - Are they (**and you**) subject to CFPB jurisdiction?
2. Familiarize yourself with the CFPB's rules and examination manuals (especially UDAAP).
3. Be diligent and aware that you can be contacted directly by the CFPB.
4. Develop policies and procedures for:
 - Responding to a CFPB examination, CID and/or investigation
 - Collecting and organizing documents
 - Responding to UDAAP manual recommendations



Preparing for CFPB Scrutiny

5. Know the CFPB's "hot" issues

- Monitor their website and blog
- Follow their new rules, complaint database and enforcement actions
- Monitor any complaints relating to your ads
- Monitor other regulators (such as the FTC's annual Sentinel report)

6. Know the target ad audience

- Older, financially-compromised consumers present higher risks



Preparing for CFPB Scrutiny

7. Do what you always do!
 - Substantiate your claims!
 - Respect consumer privacy!
 - Review client claims for at least facial accuracy!
8. Vet your advertisements.
 - Will consumers understand the messages you send?
 - Are any disclaimers or explanations needed?



Preparing for CFPB Scrutiny

9. Add terms to your client agreements requiring that you be informed of:
 - Any consumer complaints arising from your ads.
 - Any regulatory inquiries or investigations relating to your ads.



Questions?



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