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2017 Survey of Activities Identified as Unfair, Deceptive, or Abusive Under the Dodd-Frank Act, Part Two

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I. Introduction

This is our latest article in a series that surveys activities identified as unfair, deceptive or abusive acts or practices ("UDAAPs") by the Consumer Financial Protection Bureau ("CFPB"), and state attorneys general and consumer financial services regulators, using federal UDAAP powers created by the Dodd-Frank Act.[1] This article covers relevant UDAAP activity that occurred between July 1, 2017 and December 31, 2017, and surveys enforcement actions and other statements by the CFPB in reports, rulemakings, and bulletins that discuss UDAAP violations.[2] These activities provide insight into the specific types of practices that could be considered UDAAP violations in the future.[3]

[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5301 *et seq.* (the "Dodd-Frank Act"); *see, e.g.*, 12 U.S.C. § 5552 (2017).

[2] We have attempted to make this survey as comprehensive as possible; however, it is not exhaustive and there may be other relevant actions that are not discussed in this paper. Also, it must be noted that this area of law is rapidly evolving and new actions arise regularly.

[3] The term "unfair" is defined in the Dodd-Frank Act as an act or practice that "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers [and the] injury is not outweighed by countervailing benefits to consumers or to competition." 12 USC § 5531(c)(1). The term "deceptive" is not statutorily defined, but it is defined in the CFPB's examination manual as "a material representation, omission, act or practice that misleads or is likely to mislead a consumer, provided the consumer's interpretation is reasonable under the circumstances." CFPB Examination Manual V.2, UDAAP 5 (October 2012), available at http://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf. The Dodd-Frank Act introduced the term "abusive" and defined it as an act or practice that either:

> [1] materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
>
> [2] takes unreasonable advantage of [either]:
>
> > (A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
> >
> > (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or
> >
> > (C) the reasonable reliance by the consumer on a covered person [such as a bank or other financial institution] to act in the interests of the consumer. 12 USC § 5531(d).

We intend to publish periodic updates to this article cataloging new UDAAP activity based upon the federal UDAAP powers contained in the Dodd-Frank Act.

II. Overview: Identification of Unfair, Deceptive, or Abusive Acts or Practices

Between July 1, 2017 and December 31, 2017, the CFPB engaged in 10 public enforcement actions involving alleged UDAAP violations. Past UDAAP actions can provide a road map for industry participants to identify and better understand acts or practices that are considered problematic by law enforcement authorities. UDAAP enforcement actions during the period of this summary involved marketing, servicing, debt relief services, and debt collection. The CFPB highlighted other UDAAP issues involving automobile loan servicing, credit card servicing, deposit accounts, mortgages, and short-term, small-dollar lending products in its Supervisory Highlights report. During this period there were no joint enforcement actions between the CFPB and state attorneys general and two enforcement actions filed independently by state attorneys general alleging violations of the federal UDAAP prohibition. We provide an update on two litigated cases that were described in previous surveys. Finally, we describe the CFPB's final rule governing payday, vehicle title, and certain high-cost installment loans, which identifies certain practices as unfair and abusive.

Summaries of the UDAAP actions below appear in chronological order and are intended to provide a straightforward identification of the specific acts or practices that were alleged to be unfair, deceptive, or abusive under the Dodd-Frank Act.

III. CFPB Enforcement Actions

a. Aequitas Capital Management, Inc. – August 2017 (Student Loan Financing)[4]

The CFPB filed a complaint in federal court against Aequitas Capital Management Inc., Aequitas Management LLC, Aequitas Holdings LLC, Aequitas Commercial Finance LLC, Campus Student Funding LLC, CSF Leverage I LLC, Aequitas Income Opportunity Fund, and Aequitas Income Protection Fund (collectively the "company"), in connection with student lending activities. The complaint stems from an arrangement established by Corinthian Colleges, Inc. (the "college"), a large for-profit post-secondary educational company.

The college allegedly enlisted the company's help to enable the college to continue receiving certain educational funding under Title IV of the Higher Education Act of 1965 ("Title IV"). Title IV required the college to obtain 10% of its revenue from sources other than Title IV education funding. To meet this requirement, the college allegedly artificially inflated its tuition in an effort to cause its students to need to obtain loans to finance the increased tuition. The college then established an arrangement with the company to enable the company to purchase student loans or directly fund student loans for the college's tuition. The arrangement apparently included a repurchase feature that shifted student loan default risk back to the college. The CFPB alleged that the company knew that the loans it was purchasing and/or making did not

[4] *Consumer Financial Protection Bureau v. Aequitas Capital Management Inc., et al.*, Case No. 3:17-cv-01278-MO (D. Or. Aug. 17, 2017).

provide any economic benefit to the college and that the sole purpose of the arrangement was to enable the college's continued receipt of federal funds under Title IV.

The CFPB alleged that the company's conduct in assisting the college in the purported "sham" was abusive because students were not able to protect their interests and the company took unreasonable advantage of students' inability to protect their interests in selecting student loan financing.

b. The National Collegiate Master Student Loan Trusts – September 2017 (Debt Collection)[5]

The CFPB filed a complaint and stipulated judgment against The National Collegiate Master Student Loan Trust and 14 related Delaware statutory trusts (collectively, the "company"), in connection with certain student loan debt collection activities. The CFPB alleged that the company filed or caused to be filed collection actions against student loan borrowers without required documentation needed to show the company's ownership of the loans and prove the right to collect amounts due. The CFPB's complaint alleged that, when collecting defaulted student loans, the company filed or caused to be filed affidavits that falsely claimed personal knowledge of the loan account records.

The CFPB alleged that the following conduct constituted deceptive acts and practices:

- Falsely representing to consumers in collection-related affidavits that:
  - The company's representatives had personal knowledge of the loan records evidencing the debt;
  - The company's representatives had personal knowledge of the record management practices and procedures of the company;
  - The company's representatives had personal knowledge of the chain of title and ownership of student loans by the company; and
  - Such affidavits were properly sworn and executed before a notary;

- Filing collection lawsuits without the intent or ability to prove the underlying claims if contested; and

- Falsely representing to consumers that the company had the legal right to obtain judgment through collection lawsuits in connection with loans for which the applicable statutes of limitation had expired.

The CFPB also alleged that the following conduct was unfair:

- Filing collection lawsuits without the intent or ability to prove the underlying claims if contested; and

[5] *Consumer Financial Protection Bureau v. The National Collegiate Master Student Loan Trust, et al.*, Case No. 1:17-cv-01323 (D. Del. Sept. 18, 2017).

- Collecting payments made by consumer borrowers in connection with such collection lawsuits.

- The CFPB filed a proposed final judgment and consent order simultaneously with the complaint that requires the company to pay at least $3.5 million in restitution to harmed borrowers, $7.8 million in disgorgement, and a $7.8 million civil money penalty.

The proposed final order is awaiting court approval as of the date of publication.

c. Transworld Systems, Inc. – September 2017 (Debt Collection)[6]

Transworld Systems, Inc. (the "collection agency") entered into a consent order with the CFPB on the same date as the CFPB's complaint against The National Collegiate Master Student Loan Trust and 14 related Delaware statutory trusts (collectively the "company") (see above item). The collection agency collected defaulted student loans on behalf of the company. The CFPB alleged that the following acts and practices by the collection agency were deceptive:

- Filing false and misleading collection affidavits; and

- Filing lawsuits against consumers without the intent or ability to prove the claims if contested.

Under the consent order, the collection agency agreed to pay a $2.5 million civil money penalty and change its collection practices.

d. Zero Parallel, LLC – September 2017 (Marketing)[7]

Zero Parallel, LLC is a company that receives consumer information (leads) from both its own lead generation websites and third party lead generation websites, and sells them to third party small-dollar and installment lenders and remarketing companies. A consent order with the company alleges that consumers entering information on the lead generation websites were immediately redirected to a lender's webpage, without disclosure that their information had been passed through to others or sold by the company. The consent order also alleges that, because the lenders purchasing leads for consumers in certain states were not properly licensed and/or provided loans in excess of state usury caps, the loans issued as a result of the company's actions were void in whole or in part.

The CFPB alleged that the company engaged in an abusive practice when it sold leads that resulted in or were likely to result in the issuance of loans that were void under applicable state law because such a practice takes unreasonable advantage of consumers' lack of understanding of the loan's material risks, costs, and conditions.

Pursuant to the consent order, the company agreed to pay a $100,000 civil money penalty.

[6] *In the Matter of: Transworld Systems, Inc.*, File No. 2017-CFPB-0018, Consent Order (September 18, 2017).
[7] *In the Matter of: Zero Parallel, LLC,* File No. 2017-CFPB-0017, Consent Order (September 6, 2017).

e. Top Notch Funding II, LLC et al – September 2017 (Marketing)[8]

Top Notch Funding II, LLC offers loans to consumers who are entitled to receive compensation from a settlement fund or statutory-compensation fund, which is typically paid to a consumer in connection with the wrongful onset of a serious illness or disease. To settle allegedly deceptive marketing claims, the CFPB filed a complaint and stipulated judgment against the company, its owner and CEO in his individual capacity, and a person providing marketing and loan brokering services in his individual capacity (collectively "the company").

The CFPB alleged that the company engaged in the following deceptive practices:

- Representing that the company was a direct lender when it did not provide loans but merely brokered loans to other creditors;

- Falsely representing that:
  - The loans carried interest rates as low as 1-2% when rates were actually much higher;
  - That it had offices in all 50 states with accounting, financial, and legal professionals when it did not have any offices or professional staff; and
  - That consumers could receive loan proceeds in as little as an hour when that was not reasonably possible.

Pursuant to the stipulated judgment, the company agreed to pay a $70,000 civil money penalty.

f. Federal Debt assistance Association, LLC – October 2017 (Debt Relief)[9]

The CFPB filed a complaint against Federal Debt Assistance Association, LLC; Financial Document Assistance Administration, Inc.; Clear Solutions, Inc.; and related principals (collectively the "company") in connection with the company's debt relief and debt validation services. The company marketed itself as a nationwide provider of debt management services and credit repair services.

The CFPB alleged that the following conduct constituted deceptive acts and practices:

- Representing that the company's programs would eliminate consumers' unsecured debt balances by at least 60% when such programs did not provide the promised results;

- Representing that the company's programs would leave creditors without recourse concerning consumers' unsecured debts when such programs did not result in "invalid" debts;

- Representing that the company's programs would increase consumers' credit scores when the company never provided any credit restoration services; and

[8] *Consumer Financial Protection Bureau v. Top Notch Funding II, LLC, Rory Donadio, and John "Gene" Cavalli*, 1:17-cv-07114 (S.D. N.Y. Sept. 19, 2017).

[9] *Consumer Financial Protection Bureau v. Federal Debt Assistance Association, LLC, et al.*, Case No. 1:17-cv-02997-GLR (D. Md. Oct. 12, 2017).

- Using marketing materials that falsely indicated that the company was affiliated with, endorsed by, or sponsored by the federal government (specifically the CFPB and the Federal Trade Commission).

The CFPB also alleged violations of the Telemarketing and Consumer Fraud and Abuse Prevention Act (TCPA) and the Telemarketing Sales Rule (TSR). This case was not resolved at the time of publication.

g. Freedom Debt Relief, LLC – November 2017 (Debt Relief)[10]

The CFPB filed a complaint against Freedom Debt Relief and its principal (collectively the "company") in connection with the company's debt settlement services. The company is a nationwide provider of debt relief services, primarily offering to reduce consumer unsecured debt balances through debt settlement negotiation.

The CFPB alleged that the following conduct constituted deceptive acts and practices:

- Representing to consumers that the company would negotiate directly with creditors when the company had knowledge that several large creditors would not deal directly with the company; and

- Representing to consumers that the company would not take any fees for services except when debt settlements were reached, when the company actually took fees in situations where creditors merely stopped collection action.

The CFPB alleged that the following conduct was abusive:

- Representing to consumers that the company would negotiate directly with creditors, then subsequently instructing consumers to negotiate directly with certain creditors while concealing the company's involvement with the consumer.

The CFPB also alleged violations of the TCPA and TSR. This case was not resolved at the time of publication.

h. Think Finance, LLC – November 2017 (Marketing/Servicing)[11]

Think Finance, LLC provides a back-end loan origination and servicing platform for a series of tribal lenders, which offer high-cost small dollar credit and claim to be subject to tribal laws rather than federal laws. The CFPB filed a complaint against the company alleging that because the company was involved in managing all aspects of the lending business, it effectively controlled and ran the lending business. The critical functions performed for the tribal lenders

[10] *Consumer Financial Protection Bureau v. Freedom Debt Relief, LLC, et al.*, Case No. 3:17-cv-6484 (N.D. Cal. Nov. 8, 2017).

[11] *Consumer Financial Protection Bureau v. Think Finance, LLC*, 4:17-cv-00127-BMM (Dist. MT November 15, 2017).

included marketing and advertising, maintaining websites, training customer service representatives, monitoring tribal lender employees, providing a loan origination and servicing platform, making underwriting decisions, and handling delinquent accounts. The company was also an investor in an investment vehicle that provided funds to the tribal lenders, resulting in the company's retention of most of the financial risk and economic profits from the tribal lending business. The loan documents stated that the loans were subject to tribal law and enforceable.

While the company's loan documents stated that tribal law applies, the CFPB alleged that the company knew that loans issued in certain states were actually subject to state law, in violation of state usury caps and, as a result, were void in whole or in part.

The CFPB alleged that the company engaged in deceptive practices by misrepresenting that consumers had an obligation to repay loans that were actually void in whole or in part as a result of state usury laws, by sending demand letters, contacting consumers by phone to collect payments, and originating ACH debits to collect payments – all without disclosing that the company had no legal right to collect the loans under applicable state law.

The CFPB alleged that the company engaged in both unfair and abusive practices by collecting payments on loans that were rendered void in whole or in part by state law.

Finally, the CFPB alleged that the tribal lenders committed unfair, deceptive, and abusive acts or practices by demanding and collecting payments on debts that were void under state law, but that the company was responsible for these actions because it provided substantial assistance to the tribal lenders as they committed these violations of law.

This case was not resolved at the time of publication.

i. Conduent Business Services, LLC – November 2017 (Servicing)[12]

Conduent Business Services, LLC operates and maintains automobile loan servicing software. The CFPB alleged in a consent order that the company's software contained defects that caused lenders to furnish inaccurate information about more than one million consumers to credit bureaus.

The CFPB alleged that the CFPB engaged in unfair practices by using coding that was incapable of producing accurate data in the Metro 2 format for furnishing to credit bureaus, failing to timely correct the problem when it was identified by lenders, and failing to notify other lenders of the problem.

Pursuant to the consent order, the company agreed to pay a $1.1 million civil money penalty.

[12] *In the Matter of: Conduent Business Services, LLC*, File No. 2017-CFPB-0020, Consent Order (November 20, 2017).

j. Citibank, N.A. – November 2017 (Servicing)

Citibank, N.A. is a national bank engaged in student loan servicing activities, among other things. In a consent order the CFPB alleged the company engaged in unfair and deceptive practices while servicing student loans.

The CFPB alleged that the company engaged in the following deceptive practices:

- Misrepresenting that consumers had not paid qualified interest on student loans eligible for a tax deduction (by inaccurately identifying the amount of interest paid on a student loan or failing to send a notice of how much interest had been paid in a particular year) unless a consumer submitted a particular form; and

- Overstating the minimum amount due by including interest on loans that were in deferment.

The CFPB alleged that the company engaged in the following unfair practices:

- Failing to fully correct the consequences of erroneous in-school deferment de-enrollments by refunding late fees but not reversing the effects of premature student loan interest capitalizations;

The CFPB alleged that the company engaged in the following practices that were both unfair and deceptive:

- Failing to adequately disclose eligibility information for student loan interest tax benefits in light of the misrepresentations regarding the amount of qualified interest paid.

Pursuant to the consent order, the company agreed to pay $3.75 million in consumer redress and a $2.75 million civil money penalty to resolve these allegations, along with alleged violations of the Fair Credit Reporting Act.

II. State Actions

a. Pennsylvania Higher Education Assistance Agency – August 2017 (Servicing)[13]

The Massachusetts Attorney General (the "AG") filed a complaint against Pennsylvania Higher Education Assistance Agency, d/b/a FedLoan Servicing (the "company"), in connection with the company's student loan servicing practices. The AG alleged violations of Massachusetts consumer protection law as well as violations of the Consumer Financial Protection Act of 2010.

The AG alleged that the company engaged in the following unfair practices:

[13] *Commonwealth of Massachusetts v. Pennsylvania Higher Education Assistance Agency*, 1784CV02682 (Mass. Sup. Court August 23, 2017).

- Denying student loan borrowers the opportunity to make qualifying payments for certain federally-backed student loan programs when it failed to timely and properly process applications for income driven repayment plans;

- Failing to properly count student loan borrowers' qualifying payments for certain federally-backed student loan programs; and

- Collecting amounts not legitimately due and owing and failing to refund such amounts.

This case was not resolved at the time of publication.

b. Navient Corporation and Navient Solutions, LLC – October 2017 (Servicing)[14]

Navient Corporation and Navient Solutions, LLC (formerly Sallie Mae, Inc.) (collectively the "company") is the largest student loan servicer in the U.S. The Attorney General of Pennsylvania ("AG") filed a complaint against the company alleging that the servicer engaged in unfair, deceptive, or abusive practices under federal law in connection with its servicing of student loans.

The AG alleged that the company engaged in the following abusive practices:

- Taking unreasonable advantage of borrowers' reliance on the servicer to act in their interests by encouraging borrowers to rely on the servicer to provide advice but steering borrowers experiencing long-term hardships into forbearance programs for temporary hardships and misrepresenting the suitability of certain federal loan programs that would have been more financially beneficial to the borrower.

The AG alleged that the company engaged in the following unfair practices:

- Steering borrowers into forbearance plans without providing adequate information regarding other repayment plans; and

- Misallocating and misapplying payments in a manner that caused or was likely to cause injury through late fees, interest accrual, and negative credit reporting.

The AG alleged that the company engaged in the following deceptive practices:

- Representing that a co-signer release would be available if a certain number of "consecutive, on-time principal and interest payments" were made without disclosing that, to be eligible, payments had to be made even in billing periods where no payment was due as a result of the loan being paid ahead;

[14] *Commonwealth of Pennsylvania, By Attorney General Josh Shapiro v. Navient Corporation and Navient Solutions, LLC*, 3:17-cv-00101-RDM (Dist. PA January 18, 2017). Note that the CFPB previously filed a complaint against the company in January 2017, along with a debt collector, alleging similar loan servicing failures. *See Consumer Financial Protection Bureau v. Navient Corporation; Navient Solutions, Inc.; and Pioneer Credit Recovery, Inc.*, 3:17-cv-00101-RDM (Dist. PA January 18, 2017). That case was not resolved at the time of publication.

The AG alleged that the following practices were both unfair and deceptive practices:

- Causing certain borrowers to miss the deadline to file recertification forms for continued enrollment in income-driven repayment plans by:
    - Not disclosing a date certain for the form to be returned;
    - Implying that recertifications submitted late would only result in a delay in processing when it actually caused monthly payments to increase, interest to capitalize, the loss of a subsidy, and delayed progress towards loan forgiveness; and
    - For borrowers who provided consent to receive electronic disclosures, inadequately providing notice that a recertification notice was available (via an email notice that that did not include information about the purpose or contents of the renewal notice in the subject line or body).

This case was not resolved at the time of publication.

Note that the CFPB previously filed a complaint against the company in January 2017, along with a debt collector, alleging similar loan servicing failures. [15] That case was not resolved at the time of publication.

III. CFPB Guidance

a. Phone Pay Fees[16]

The CFPB published a compliance bulletin to address payments made by phone, particularly with respect to fees charged for payments made by phone. The bulletin identifies a series of practices that may constitute UDAAPs, including:

- Not disclosing the fees of all materially different phone payment options;
- Misrepresenting the nature of phone payment options and the existence of fees;
- Adding phone payment fees to a consumer's payment in a manner that disguises the fee; and
- Inadequate employee monitoring and service provider oversight to prevent the problems identified above.

[15] *Consumer Financial Protection Bureau v. Navient Corporation; Navient Solutions, Inc.; and Pioneer Credit Recovery, Inc.*, 3:17-cv-00101-RDM (Dist. PA January 18, 2017).

[16] CFPB Compliance Bulletin 2017-01, *Phone Pay Fees* (July 31, 2017), available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201707_cfpb_compliance-bulletin-phone-pay-fee.pdf.

IV. CFPB Supervisory Highlights

The CFPB periodically issues Supervisory Highlights reports that summarize its supervisory activity over a period of time and identify, among other things, allegedly unfair, deceptive or abusive conduct that may not have otherwise been publicly disclosed in enforcement actions.

a. Summer 2017 Supervisory Highlights (September 2017)[17]

The CFPB's Spring 2017 Supervisory Highlights report identified confidentially resolved UDAAPs in connection with automobile loan servicing, credit card servicing, deposit accounts, mortgages, and short-term, small-dollar lending products.

With respect to automobile loan servicing, certain servicers engaged in unfair acts or practices by repossessing vehicles after the repossession had been cancelled, with sufficient time to stop the repossession, based on a borrower's payment or an agreed-upon arrangement.

With respect to credit card servicing, certain credit card issuers engaged in deceptive acts or practices by:

- Misrepresenting the cost and availability of pay-by-phone options. For example, telephone customer service agents only informed customers of a free payment option after customers authorized expedited payments that carried a cost; and

- Misrepresenting the costs and benefits of add-on products, namely debt cancellation.

With respect to deposit accounts, certain banks engaged in deceptive practices related to their overdraft products by:

- Misrepresenting the scope of the service, namely that the service applied to payments made by check, automated clearing house (ACH), and a recurring bill payment service, when the service did not apply to these payments;

- Claiming that consumers could withdraw more than the daily ATM cash withdrawal limit and incur only a single overdraft fee when such withdrawals were not permitted; and

- Claiming that the service would be available on the day of enrollment when it was actually available the next day.

With respect to mortgages:

- Certain originators engaged in unfair practices by collecting service deposits but not reimbursing unused portions of the deposit when an application was withdrawn;

[17] CFPB, *Supervisory Highlights*, Issue 16 (September 2017), available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201709_cfpb_Supervisory-Highlights_Issue-16.pdf.

- Certain servicers engaged in unfair practices by including broad waiver of rights clauses in forbearance, loan modification, and other loss mitigation agreements;

- Certain servicers engaged in unfair and deceptive acts and practices by including blanket waivers in boilerplate "cash-for-keys" agreements that could have been construed as applying in connection with the original credit transaction, not only the cash-for-keys agreement; and

- Certain template mortgage loan documents containing arbitration provisions were considered deceptive because federal law prohibits consumer mortgages from requiring arbitration.

With respect to short-term, small-dollar lending products:

- Certain lenders engaged in unfair practices by:
    - Placing collection calls to consumers at work after being asked to stop making such calls and being told such calls were prohibited by the consumer's employer;
    - Placing collection calls to third parties and disclosing the existence of a consumer's default;
    - Making unauthorized debits of consumers' bank accounts, namely when accounts had already been paid; and
    - Failing to employ adequate processes to identify unauthorized debits and issue timely refunds.

- Certain lenders engaged in deceptive practices by:
    - Claiming in debt collection phone calls that they must contact the lender to avoid being visited at home or work when the lender did not conduct such visits;
    - Claiming that consumers could receive loans without a credit check when special credit reports were accessed to underwrite loans and used as the basis for denials;
    - Advertising products that the company no longer offered;
    - Advertising that products had lower fees than competitors without adequate substantiation;
    - Claiming on websites that consumers could apply online for a loan when consumers had to visit a physical storefront to obtain a loan; and
    - Collecting names of references on loan applications to verify consumers' information and subsequently contacting those loan references when a consumer's loan became delinquent and to market products and services.

V. ***Updates on Past Cases***

a. Prime Marketing Holdings, LLC – August 2017 (Marketing)[18]

We previously reported that the CFPB filed a complaint against Prime Marketing Holdings, LLC, a credit repair company that operated under various names (including Park View Credit,

[18] *Consumer Financial Protection Bureau v. Prime Marketing Holdings, LLC (d/b/a Park View Credit, National Credit Advisors, and Credit Experts)*, Case No. 16-cv-7111 (C.D. Cal. Sept. 22, 2016).

National Credit Advisors, and Credit Experts) (collectively the "company"). The CFPB's complaint alleged that the company violated the TSR and engaged in a number of deceptive acts and practices related to the company's nationwide marketing of its services. In August 2017, the CFPB filed and the court approved a stipulated final judgment and order to resolve the complaint. The final order provides for the company to pay a $150,000 civil money penalty and permanently refrain from offering, providing, assisting in the sale of, and/or receiving any fees or other consideration for credit repair services.

b. One Individual Owner of D and D Marketing – September 2017 (Marketing)[19]

We previously reported that D and D Marketing, Inc., doing business as T3Leads, was subject to a December 2015 CFPB complaint that the company and two of its then-current individual owners/operators engaged in unfair and abusive acts or practices when it failed to perform due diligence on companies it paid to generate leads (lead generators) and on the payday and installment lenders to whom it sold leads (purchasers).[20] Each of the individuals was later sued by the CFPB in April 2016 for knowingly and recklessly providing substantial assistance to the company's allegedly unfair and abusive acts or practices.[21]

In September 2017, the CFPB and one of the individual owners of the company entered a joint stipulated final judgment and order to resolve these allegations, in which the individual owner agreed to pay a civil money penalty of $250,000. The CFPB's cases against D and D Marketing, Inc., and the other individual owner, were not resolved at the time of publication.

VI. CFPB Rulemakings

a. Payday, Vehicle Title, and Certain High-Cost Installment Loans – October 2017[22]

In October 2017 the CFPB issued a final rule governing payday, vehicle title, and certain high-cost installment loans. The rule identifies unfair and abusive practices related to short-term "payday" loans and certain longer-term vehicle title and high-cost consumer installment loans and open-end credit plans. The rule provides that it is an unfair and abusive practice to:

- Make certain "covered" short-term or longer-term balloon payment loans (including payday loans and vehicle title loans) without reasonably determining that a consumer has the ability to repay the loan; and

[19] *Consumer Financial Protection Bureau v. Davit Gasparyan, a/k/a David Gasparyan*, Case No. 2:16cv02725 (C.D. Ca.) (Sept. 6, 2017).
[20] *Consumer Financial Protection Bureau v. D and D Marketing, Inc. et al.*, Case No. 2:15-cn-9692 (C.D. Cal.) (Dec. 17, 2015). For a summary of the alleged UDAAP violations in the December 2015 T3Leads case, see page 17 of our January 2016 survey.
[21] *Consumer Financial Protection Bureau v. Davit Gasparyan, a/k/a David Gasparyan*, Case No. 2:16cv02725 (C.D. Ca. April 21, 2016).
[22] 82 Fed. Reg. 54472 (November 17, 2017).

- Attempting to withdraw a payment for certain "covered loans" from a consumer deposit account after two consecutive attempts have failed without obtaining a new authorization from the consumer.

The rule applies to "covered loans"[23], which are either closed-end or open-end extensions of credit to consumers for personal, family, or household purposes that:

- Must be substantially repaid within 45 days of consummation/advance;

- Must be substantially repaid more than 45 days after consummation/advance through at least one payment that is more than twice as large as any other payments; or

- Has an Annual Percentage Rate greater than 36% and the lender obtains a "leveraged payment mechanism."[24]

The rule imposes requirements on lenders to determine a borrower's ability to repay certain covered loans to verify that the borrower will be able to meet the loan terms and still meet basic living expenses (both during the term of the covered loan and for 30 days after the highest payment on the covered loan). Lenders must verify the income and major financial obligations of a borrower and estimate basic living expenses. The rule also caps the number of shorter-term covered loans that can be made in rapid succession at three. In addition, the rule requires lenders to submit specified periodic reporting to the CFPB, provide certain notices before debiting payments from a consumer's deposit account, and requires lenders to obtain new debit authorizations after two failed debit attempts or if any payment amount or timing changes. The rule becomes effective on January 16, 2018, though compliance with certain key provisions is not required until August 19, 2019.

[23] Carve-outs from the "covered loan" definition include: 1) purchase money loans to finance motor vehicles/goods; 2) home mortgage loans; 3) credit cards; 4) student loans; 5) non-recourse pawn loans (where the consumer has no possession of the pawned goods); 6) overdraft lines of credit; 7) wage advance loans (only for accrued wages); 8) no-cost advances; payday alternatives (following specified parameters); 9) accommodation loans; and 10) business-to-business loans.

[24] The rule defines "leveraged payment mechanism" to include: 1) a loan agreement that provides that a borrower (at some point in the future) must authorize the lender or a service provider to debit the borrower's deposit account on a recurring basis; 2) a loan agreement that provides that in the event of default a borrower must authorize the lender or a service provider to debit the borrower's deposit account on a one-time or a recurring basis; and 3) any authorization where the lender obtains the ability to initiate a transfer from a borrower's deposit account (either on a one-time or recurring basis). Examples include: checks or other instruments written by the borrower, auto-debit authorizations, remotely created checks/payment orders, and transfers initiated by a lender that is also the depository holding the borrower's deposit account. There are carve-outs from the "leveraged payment mechanism" definition for "single immediate payment transfers" that are initiated at a borrower's request.

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