

# SPOTLIGHT ON CFPB ENFORCEMENT

UNCOVERING RECENT TRENDS, TRARGETS, AND  
PRIORITIES SURROUNDING PREPAID



NBPCA Power of Prepaid  
Washington, DC  
Thursday, April 28, 2016

Adam D. Maarec  
Davis Wright Tremaine

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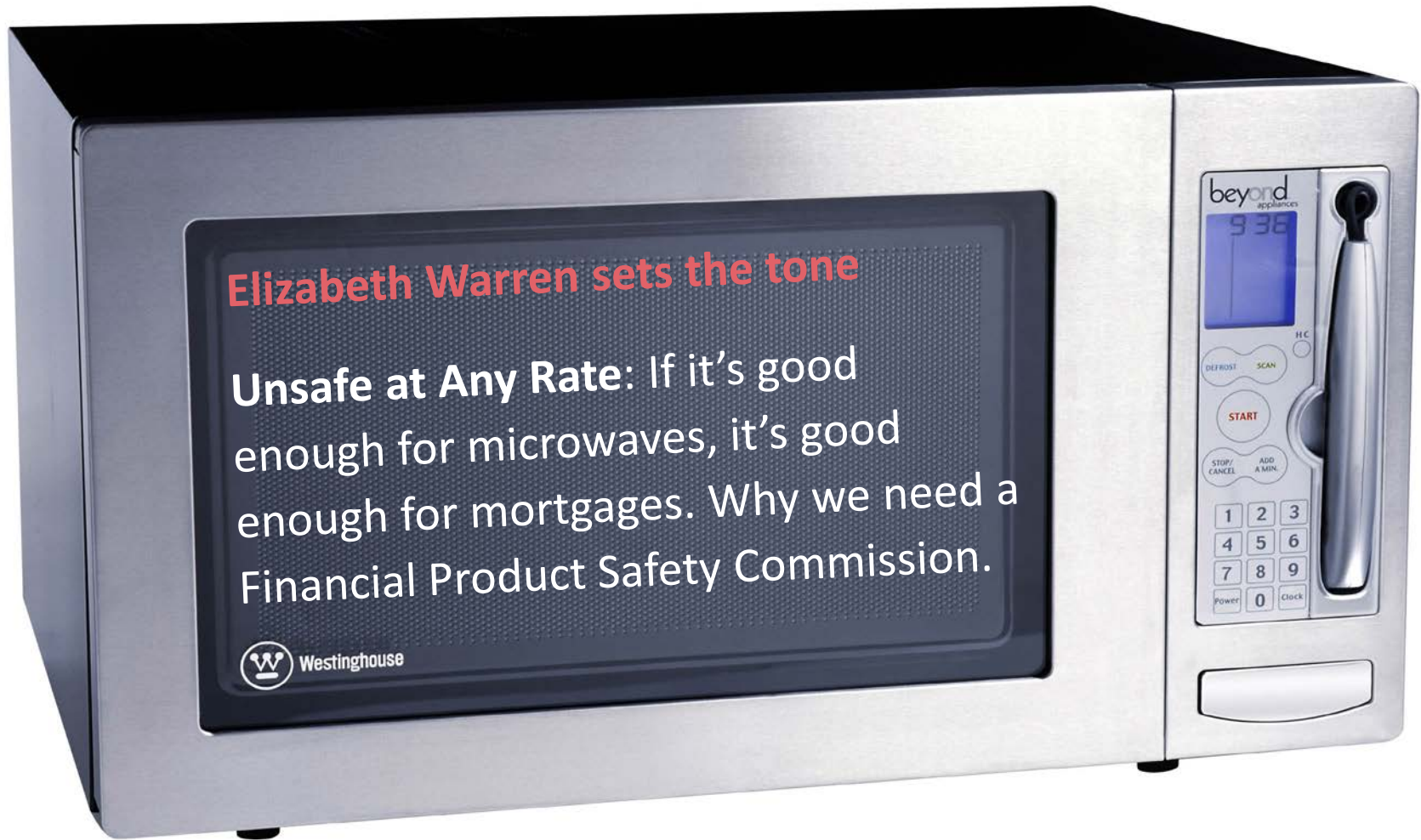




- Background – UDAAP as a CFPB enforcement priority
- Spotting unfairness, deception, and abusiveness
- Enforcement trends

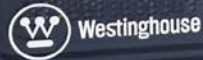


- Section 5 of the FTC Act prohibits UDAP
  - Wheeler-Lea Act of 1938 expanded FTC powers from preventing unfair competition to UDAP
    - FTC has enforcement authority over many non-banks
    - Banking regulators have enforcement authority over banks
- State authorities enforce state UDAP statutes
- But Dodd-Frank changes the regulatory focus



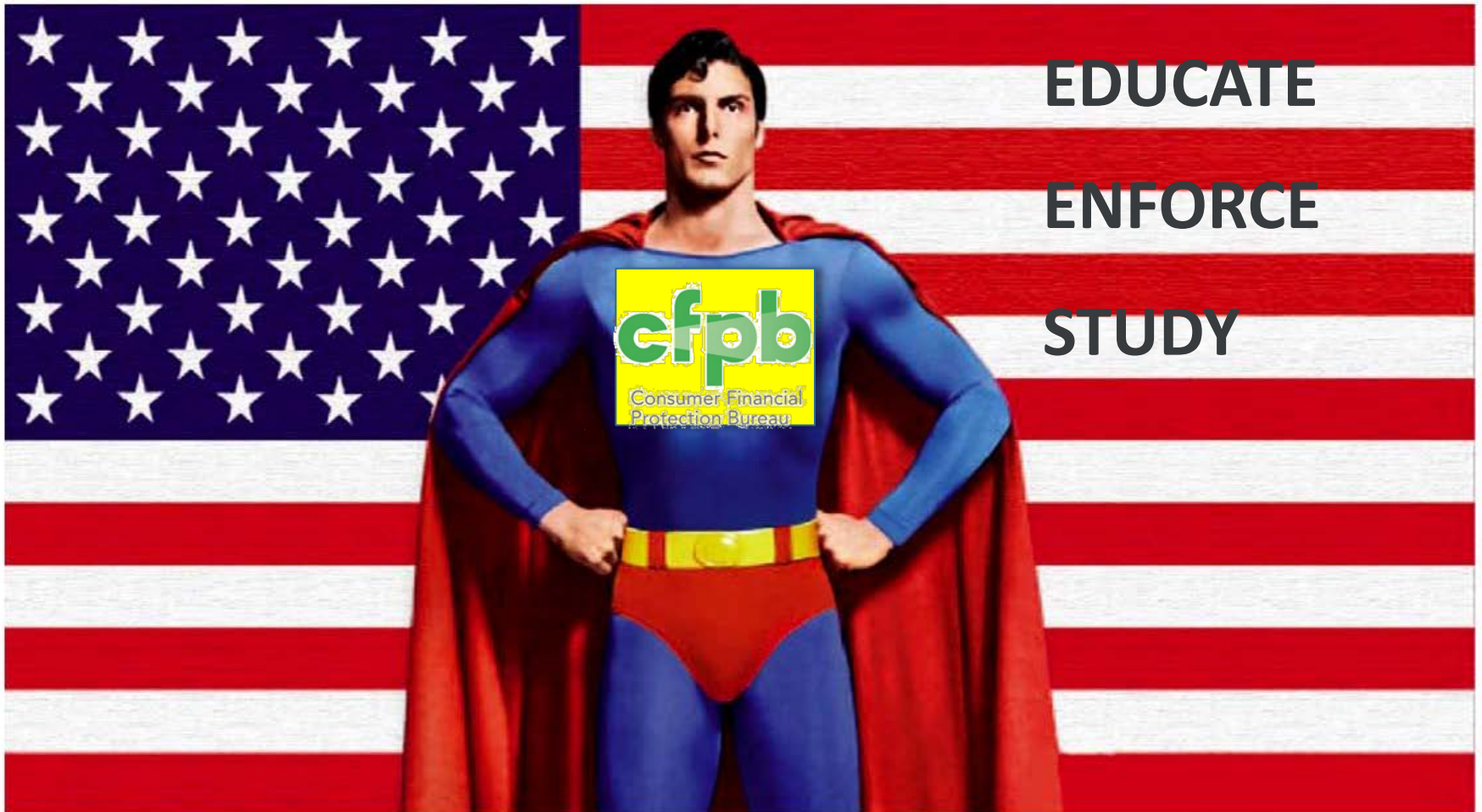
**Elizabeth Warren sets the tone**

**Unsafe at Any Rate:** If it's good enough for microwaves, it's good enough for mortgages. Why we need a Financial Product Safety Commission.



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# CFPB's Bold Mission to Protect Americans



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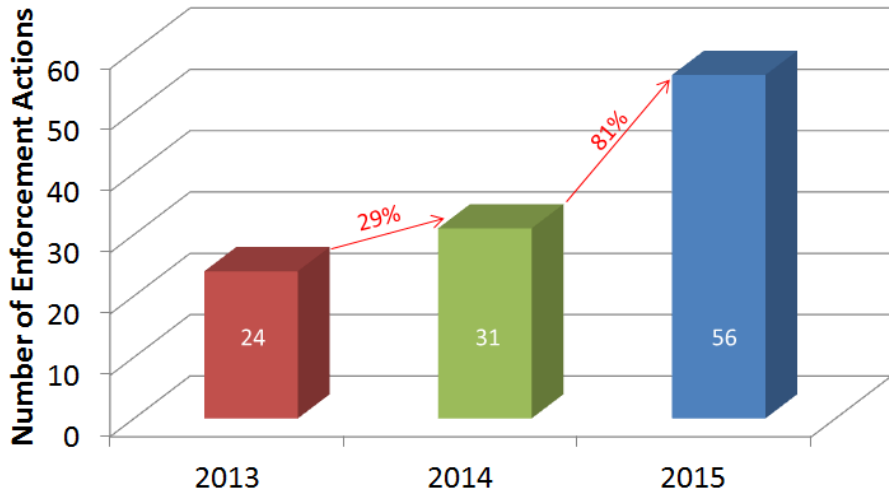
**ENFORCE**

**STUDY**

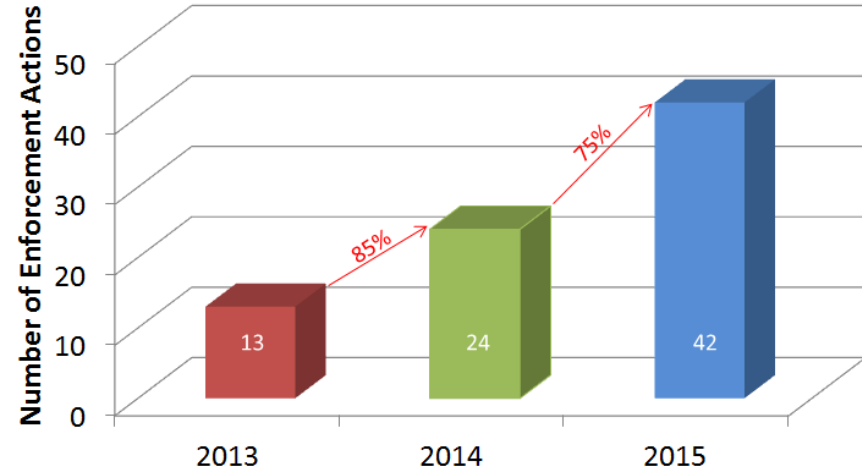
# Past UDAAP Actions & Trends



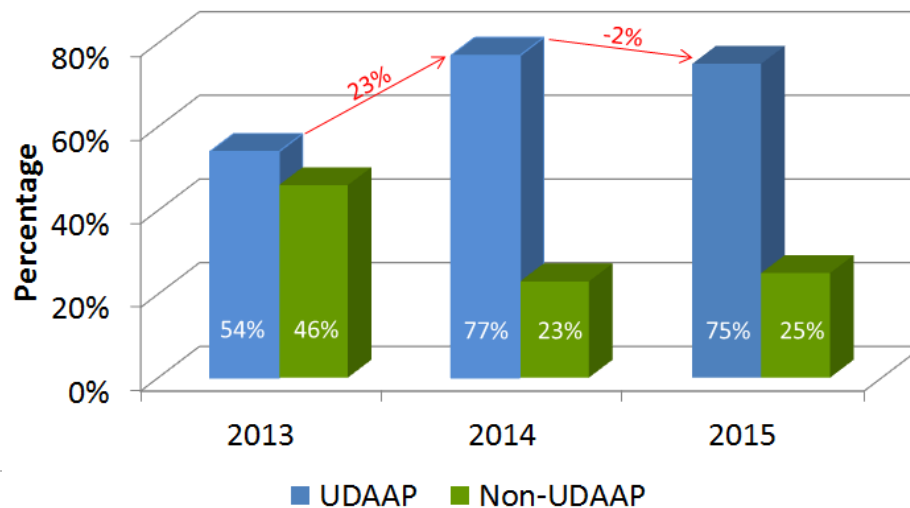
### Volume of CFPB Enforcement Actions



### Volume of CFPB UDAAP Enforcement Actions



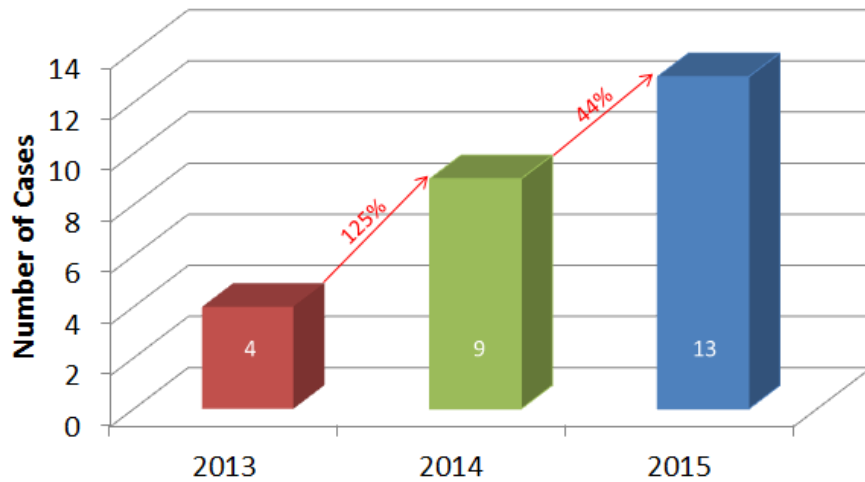
### UDAAP vs. Non-UDAAP



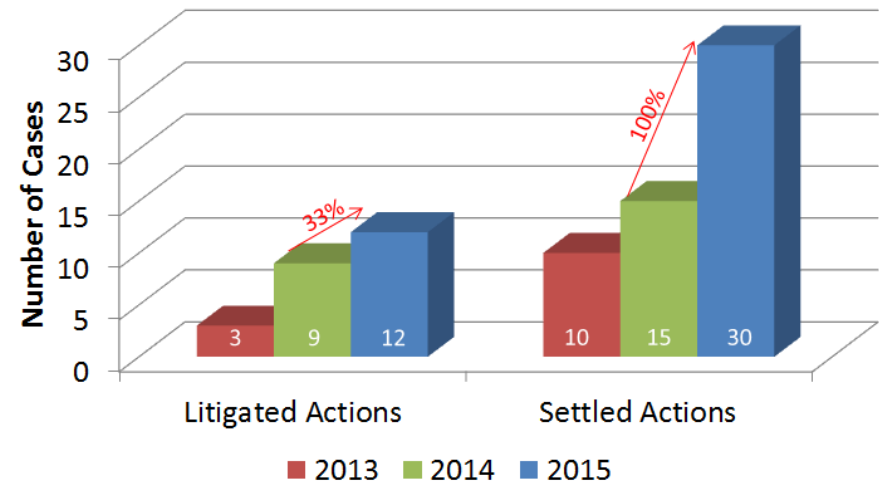
# Past UDAAP Actions & Trends



### CFPB Litigated Enforcement Actions



### UDAAP: Litigated Actions vs. Settled Actions



# Achieving Compliance & Avoiding Enforcement Actions



First ensure technical compliance with applicable law



- UDAAP risks tend to be assessed *after* negotiating technical compliance must-haves
- “Show me the law that says we can’t do this”
  - Marching through unfairness, deception, and abusive elements
    - FDIC Guidance – FIL 26-2004
    - CFPB Exam Manual
    - Past UDAAP actions
      - Enforcement actions, bulletins, reports
      - Distinction between UDAAPs and remedial programs
    - UDAAP trends – applying analyses from one product line to another





- **Assessing whether an act or practice is unfair**
  - Cause or likely to cause substantial injury to consumers.
  - Consumers must not reasonably be able to avoid the injury.
    - For example:
      - Withholding material price information until after the consumer has committed to purchase the product or service; or
      - Subjecting consumers to undue influence or coercing them to purchase unwanted products or services.
  - The injury must not be outweighed by countervailing benefits to consumers or to competition.
  - Public policy may be considered.



## ■ **Assessing whether an act or practice is deceptive**

- A representation, omission, or practice that misleads or is likely to mislead a reasonable consumer.
- Acts or practices that have the potential to be deceptive include:
  - Misleading cost or price claims;
  - Bait-and-switch techniques;
  - Offering to provide a product or service that is not in fact available;
  - Omitting material limitations or conditions from an offer;
  - Selling a product unfit for the purposes for which it is sold; and
  - Failing to provide promised services.

# Examples from CFPB Enforcement Actions



## Unfairness

- Credit monitoring – promising 3 bureau monitoring but only monitoring 1 or 2 bureaus

## Deception

- Misrepresentations of debt protection product features
  - Death benefit value: \$25,000 vs. up to \$25,000 of outstanding debt
  - Duration of benefits: 12 or 24 months of benefits vs. 3 months
- Misleading representations of data security policies

# Standards for Determining What is Abusive



- An act or practice is abusive if it:
  - **Materially interferes** with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
  - Takes **unreasonable advantage** of [either]:
    - A **lack of understanding** on the part of the consumer of the material risks, costs, or conditions of the product or service;
    - The **inability of the consumer to protect the interests of the consumer** in selecting or using a consumer financial product or service; or
    - 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.

# Examples from CFPB Enforcement Actions



## Abusiveness

- Tribal lender's collection of online payday loan debts rendered void by state usury laws
  - Lender stated that tribal law applied, not state or federal law
  - CFPB alleged:
    - Interference with consumers' ability to understand that the debt was void under state law; and
    - Collecting on the void debt took unreasonable advantage of consumers' lack of understanding.
- Pension advance product failed to disclose interest rates and fees, and provided misleading information regarding the nature of the product as a loan and whether the product was comparatively better than a home equity loan for a particular consumer

# A Few Enforcement Trends



- Identify a problem and pursue it
  - Marketing – representations regarding costs and benefits
  - Debt collection tactics
  - Online payday loans – allegedly exceeding state usury caps
  - Mortgage servicing (and other loan servicing)
  - Discrimination – auto and mortgage lending
- Targeting service providers
- Targeting individuals – not “covered persons” but those who knowingly or recklessly provide substantial assistance to a UDAAP violation
- Investigation sources vary – e.g. complaints, supervision, enforcement investigations, Bureau priorities, etc.

# UDAAP Flags – Complaints



- Complaints – CFPB began accepting prepaid complaints in July 2014
- Press release sought complaints about:
  - Problems managing, opening, or closing their account
  - Overdraft issues and incorrect or unexpected fees
  - Frauds, scams, or unauthorized transactions
  - Advertising, disclosures, and marketing practices
  - Adding money and savings or rewards features

# UDAAP Flags – Complaints



- CFPB highlights prepaid complaints in monthly complaint report – March 2016

**TABLE 1: CHANGE IN COMPLAINT VOLUME**

	% change	3 month average: Nov 2014 - Jan 2015	3 month average: Nov 2015 - Jan 2016
Other financial services	77%	100	178
Prepaid	62%	147	238
Money transfer	42%	142	202
Bank account or services	37%	1,491	2,046
Credit card	33%	1,445	1,922
Consumer loan	15%	964	1,105
Mortgage	13%	3,536	4,006
Debt collection	4%	6,251	6,497
Credit reporting	-7%	3,807	3,536
Student loans	-10%	556	501
Payday loan	-12%	467	409
<b>Total</b>	<b>10%</b>	<b>19,074</b>	<b>20,887</b>

**FIGURE 2: TYPES OF PREPAID COMPLAINTS REPORTED BY CONSUMERS<sup>9</sup>**







# Past UDAAP Actions – Lessons & Trends



- Precedent set in enforcement actions; UDAAPs identified in bulletins, reports, etc.
- Distinction between UDAAPs and remedial programs



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DEFINING SUCCESS TOGETHER

## A Survey of Activities Identified as Unfair, Deceptive, or Abusive Under the Dodd-Frank Act

by  
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American Bar Association Consumer Financial Services Committee  
Compliance Management and Federal and State Trade Practices Subcommittees

January 15, 2016

### 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.<sup>1</sup> This article covers relevant UDAAP activity that occurred between July 1, 2015 and December 31, 2015. This survey includes enforcement actions and other statements by the CFPB in reports and bulletins that discuss UDAAP violations.<sup>2</sup> These activities provide insight into the specific types of practices that could be considered UDAAP violations in the future.

We intend to publish periodic updates to this article cataloging new UDAAP activity and related state enforcement actions using federal UDAAP powers.


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

Between July 1, 2015 and December 31, 2015, the CFPB engaged in 25 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, debt collection/settlement, credit reporting, product servicing, and information brokering. The CFPB highlighted other UDAAP issues involving student loan servicing and in-person debt collection efforts in reports and guidance. During this period there were no enforcement actions filed independently by state regulators or attorneys general alleging violations of the federal UDAAP prohibition. Finally, a series of private lawsuits alleging violations of the federal UDAAP prohibition were adjudicated, all of which failed because the statute does not provide a private right of action, are discussed.

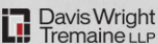
<sup>1</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5301 *et seq.* (the “Dodd-Frank Act”); *see, e.g.*, 12 U.S.C. § 5552 (2016).

<sup>2</sup> 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 are arising monthly.

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## UDAAP Enforcement Action Database

PLA presents below a database of enforcement actions that include allegations of unfair, deceptive, or abusive acts or practices (UDAAP) in connection with consumer financial products. The database focuses on enforcement actions by the Consumer Financial Protection Bureau, the Office of the Comptroller of the Currency, and the Federal Trade Commission. PLA intends the database to facilitate analysis of the themes and patterns in these agencies’ UDAAP enforcement actions.

We’ve sorted the actions by agency in the sequence indicated above. (Some actions involved multiple federal and/or state regulators, but for simplicity they’re grouped under the CFPB, FDIC, OCC or FTC.) The comments column offers data about selected issues such as whether the action involves claims of abusive practices.

A couple of disclaimers: first, although we’ll be supplementing the database from time to time, it’s not currently comprehensive. Second, while the PLA site has a search function, there’s no search function specifically for the database. If you’re on this page and need to search it, we’d recommend you use your browser’s “find” function.





We hope the database is useful and would welcome your feedback. Please [contact us here](#) with your suggestions.

The following resources, linked elsewhere on our site as well, may also be useful in this context:

- [CFPB Supervision and Examination Manual: UDAAP Section](#) (as of October 2012)
- [Federal Trade Commission Act Section 5: Unfair or Deceptive Acts or Practices](#)
- [Dodd-Frank Wall Street Reform and Consumer Protection Act Section 1031](#): Prohibiting unfair, deceptive, or abusive acts or practices
- [Dodd-Frank Wall Street Reform and Consumer Protection Act Section 1036](#): Prohibited acts

Agency	Date of Action	Party	Documents	Activity	Product/Service	Comments
CFPB	10/29/15	Student Financial Resource Center and College Financial Advisory	<a href="#">Complaint-Press Release</a>	Deceptive marketing	Student financial aid counseling	
CFPB	10/01/15	Westlake Services, LLC & Wilshire	<a href="#">Consent Order-Press Release</a>	Debt collection	Auto Loans	

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# Thank You!



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