

4 Tips For Avoiding The Eye Of The CFPB

By **Allison Grande**

Law360, New York (February 13, 2012, 3:15 PM ET) -- The Consumer Financial Protection Bureau's reluctance to clearly define the acts and practices it considers deceptive or abusive has put companies on edge, but there are some steps they can take to lower the risk of coming under scrutiny, attorneys say.

"The bureau has said that it wants to level the playing field between financial institutions and consumers as well as banks and nonbanks, and UDAAP is a very powerful tool for them to do that," Foley & Lardner LLP partner Martin Bishop told Law360, referring to unfair, deceptive and abusive acts. "These terms could be broad enough for the agency to make an argument that any mainstream product violates one of these three standards."

CFPB Director Richard Cordray said during a recent U.S. House of Representatives hearing that only "outrageous" practices would violate the abusive standard. But the agency has declined to issue solid definitions for these terms, leaving only the unclear and vague standards articulated in Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

"Commentators have compared these standards to the pornography 'know it when you see it' standard," Paul Hastings LLP partner Kevin Petrasic said. "While they are certainly hard standards to define, it's unclear if they're going to be standards that the agency will be able to know when it sees, since not even the director of the CFPB seems to be entirely clear about how the agency will use these standards."

Here are four steps companies can take to protect themselves amid this uncertainty:

Craft Clear Disclosures

During its short lifetime, the CFPB has indicated that companies' disclosures to consumers — or lack thereof — will be a major focal point for the agency.

“Disclosure is a key component in a consumer compliance program,” Skadden Arps Slate Meagher & Flom LLP counsel Darren Welch said. “The CFPB has spoken repeatedly about the importance of clear disclosure in their examination guidance and with respect to their efforts to simplify mortgage disclosures.”

In order to be an effective disclosure, product terms and risks need to be prominent enough for consumers to notice, presented in a way that is easy for consumers to understand, and not inconsistent with other claims, according to Welch.

While the specific unfair, deceptive and abusive acts that will raise the agency’s ire remain unknown, companies can rely on the language of the Dodd-Frank Act and the agency’s examination manual — which offered basic definitions of these terms — to craft the best possible disclosures.

“The concepts embedded in Dodd-Frank are the best guide that companies have for these practices,” Bishop said. “Some financial institutions are already posting their policies against engaging in these practices on their websites and taking steps to internally test them and live up to their pledge as best as they can.”

By not affirmatively narrowing these definitions, the CFPB has created an environment where it is up to the financial services provider to act in good faith when marketing products to make sure that they do not obscure consumers’ understanding, Petrasic noted.

“My answer two years from now, [when there might be more guidance,] might be different, but for now and in the immediate future, there is so much covered by UDAAP rules, so companies need to make sure that their disclosures and marketing programs are not doing anything to affirmatively mislead customers,” he said.

Having disclosures analyzed by internal and external consultants and agencies can also help protect companies from future scrutiny, DLA Piper financial services regulatory practice chair Jeffrey Hare said.

“While it won’t keep the CFPB from going after you, explaining what you’re disclosing to regulators or other consultants will make you a little more secure about your disclosures,” Hare said.

Put Safeguards in Place Early

While clear disclosures are a good start, merely being transparent may not allow companies to easily escape scrutiny under the new regime.

“With the CFPB, we may be seeing a bit of a paradigm shift from a disclosure-based regime to a rules-based regime,” Welch said. “It’s certainly possible that we’ll see rule-making that will ban certain products, terms or features if the bureau decides that no amount of disclosure would be appropriate to protect consumers under the circumstances.”

Ensuring that companies operate their businesses with an eye towards litigation could help them mitigate damages, Loeb & Loeb LLP consumer protection defense and unfair competition practice chair Michael Mallow said.

“What companies need to understand is that there are now two major regulatory agencies looking into consumer protection issues, especially in the financial practices area,” Mallow said. “The [Federal Trade Commission] is looking at nonbanking issues such as debt settlement and credit repair, and the CFPB will be sucking in banking-related products like credit cards and mortgage services.”

Companies will be well-served to carefully monitor and analyze consumer complaints that they or the CFPB receive and to adjust their practices accordingly because these will drive enforcement actions, Mallow added.

“Consumer protection litigation is a very hot issue right now, so companies need to prepare for litigation by having operational procedures in place that allow them to understand the claims that are being made and to keep documents that prove that they are substantiating their claims,” he said.

Taking these steps to develop a solid compliance program in the present will help companies better identify which issues might trigger a problem in the future, Welch added.

“Companies would be well-advised to review their UDAP compliance procedures and to analyze consumer complaints to determine what types of products and features are raising concerns,” he said.

Be Mindful of Past FTC Actions

Through guidelines and enforcement actions brought under Section 5 of the FTC Act during the past two decades, the FTC has laid out loose parameters of what actions constitute unfair and deceptive practices.

“Everything that the FTC does in the consumer space revolves around the concept of unfair and deceptive,” Mallow said.

The agency has also touched on the idea of “abusive” in its telemarketing sales rule, which it uses to police unfair fee structures implemented by credit repair companies, debt relief companies and others, Mallow added.

In deciding how it will enforce these standards, the CFPB is likely to follow the example set by the FTC, according to attorneys.

“They’re going to rely on the FTC guidance to date to provide some stability to the consumer financial marketplace,” Bishop said. “But they’re also going to build on that over the long term by providing more guidance that potentially broadens the scope of the way that UDAAP is applied to the FTC.”

The major migration of FTC personnel to the new bureau — including former associate director of the FTC’s division of financial practices and current CFPB nonbank supervision leader Peggy Twohig — combined with a recent cooperation agreement under which the agencies agreed to work together in bringing enforcement actions and investigations, further supports the theory that their definitions of these terms will be similar, Loeb & Lobeb partner Michael Thurman said.

Learn from the First CFPB Action

In the same way that consent orders under Section 5 under the FTC have built up what acts are and are not permissible under the unfair and abusive standards, future enforcement actions and orders from the CFPB will provide a guide to companies of what marketing strategies and practices will fall under the new agency's authorities, Hare said.

Communications from and about the CFPB, including its Nov. 30 report on its credit card consumer complaints and the White House's Dec. 1 report on the importance of a CFPB director, provided important information about the path that the agency will likely take, Mallow and Thurman said.

These reports focused on the agency's receipt of complaints focusing on fraudulent credit card charges and disclosures and the importance of the agency's authority to regulate nonbank financial companies, leading to the conclusion that the credit card industry may be the agency's first target.

"Overdraft fees, ATM fees and other similar practices may be fertile grounds for them to come out and use their powers," Bishop said. "The bureau has some pretty strong enforcement powers, and the bureau is expected to make an example out of a company if it uncovers a particularly egregious instance."

While it is possible that companies may still be speculating about what this standard means in a few years, attorneys predict that the standards will develop more solid footing as case history in this area is established.

But companies who fail to take steps before these actions develop may find themselves in an undesirable position, attorneys caution.

"Once the bureau comes out and swings its UDAAP sword once or twice, financial institutions across the board will pay more attention," Bishop said. "But it will do companies a bigger service to pay attention to UDAAP and get ahead of these issues now."

--Editing by Elizabeth Bowen.