

The Latest UDAAP Battleground: Mortgage Advertising

Law360, New York (December 04, 2012, 11:15 AM ET) -- The Consumer Financial Protection Bureau may be gearing up for a second round of major enforcement activities targeted at enforcing the Dodd-Frank Wall Street Reform and Consumer Protection Act's prohibition against unfair, deceptive, or abusive acts or practices (UDAAP) in connection with consumer financial products and services.

Fresh on the heels of settling its first round of UDAAP enforcement activities against several major credit card companies over alleged deceptive and illegal practices involving add-on products for credit cards, the bureau has now set its sights on mortgage lenders and brokers who are allegedly violating UDAAP and the Mortgage Acts and Practices Advertising Rule (MAP Rule).

In this new effort, the bureau has indicated that marketing materials are squarely in its line of fire in its quest to protect consumers. But what in your marketing materials might constitute an unfair, deceptive or abusive act or practice? The bureau has yet to provide any comprehensive guidance on UDAAP and we will likely continue to have to glean such information piecemeal from the outcomes of enforcement actions.

Along with the Federal Trade Commission, the bureau conducted a "sweep" of over 800 "randomly selected mortgage-related ads across the country, including ads for mortgage loans, refinancing and reverse mortgages," according to the

bureau's website. Based on the "sweep," the bureau has launched formal investigations of six companies who it believes have violated the MAP Rule, a rule that addresses claims and statements in mortgage advertising that may be misleading to consumers.

The bureau is particularly concerned with advertisements and claims aimed at the elderly and veterans. The bureau has also issued warning letters to other mortgage lenders and brokers urging them to undertake a review of their marketing materials to ensure they comply with the MAP Rule and that they are not committing UDAAP violations.

In its investigations, the bureau is focusing on marketing materials — as it did in actions against the credit card companies — in alleging that mortgage lenders and brokers are misleading consumers. The bureau has specifically alleged that mortgage advertisements improperly contain:

- Official-looking seals or logos that consumers could misinterpret as government endorsements;
- Promises of low rates that may have mislead consumers about the actual terms of the products at issue;
- Claims that consumers would have no payments in connection with reverse mortgages even though they are commonly required to continue to make monthly or other periodic tax or insurance payments, the failure of which to pay could lead to default; and
- Mock checks or suggestions that a consumer was pre-approved to receive a certain amount of money in connection with refinancing their mortgage or taking out a reverse mortgage, when there is typically a number of other required steps before a consumer is approved.

Given this latest round of activity targeting marketing materials, it is clear that the bureau will continue to rely on enforcement actions, rather than advance rulemaking, to give financial institutions guidance on what constitutes UDAAP. This approach makes it difficult for consumer financial institutions to know how to avoid UDAAP pitfalls.

The bureau continues to drop hints about what constitutes UDAAP, however. For instance, in the wake of the credit card enforcement action settlements, the bureau did set forth some limited expectations about how to avoid deceptive practices, stating that it expects that financial institutions will ensure that marketing materials "reflect the actual terms and conditions of the product and are not deceptive or

misleading to consumers.” The bureau also cautioned consumer financial institutions to ensure that their marketing materials help educate consumers about the real benefits and costs of a product.

This is only a peek behind the curtain, however, and the consumer financial services industry as a whole is still left wondering what acts and practices the bureau considers unfair, deceptive or abusive. While the terms “deceptive” and “unfair” have some history in other legislation, “abusive” is a new concept in the financial services industry, and the bureau has done nothing to add shape and context to the standard.

It is certainly possible — perhaps even probable — that the bureau will address the meaning of “abusive” if it proceeds with enforcement actions against mortgage lenders and brokers, however. Just days before announcing the investigations of the mortgage lenders and brokers, Assistant Director for the Bureau’s Office of Older Americans, Hubert H. “Skip” Humphrey, spoke to the Senate Special Committee on Aging telling the committee that the bureau was committed to combating elder financial abuse, especially with respect to reverse mortgages, which the bureau says are difficult for consumers to understand.

The bureau then identified reverse mortgage advertising to the elderly as a problem area in announcing the investigations of the mortgage lenders and brokers. Do the bureau’s concerns about reverse mortgages fall within the definition of “abusive” contained in the Dodd-Frank Act or the Bureau’s enforcement manual? “Abusive” is defined as, among other things, an act or practice that takes “unreasonable advantage” of a “lack of understanding on the part of the consumer of the material risks, costs or conditions of the product or service.” A very broad standard like this provides the bureau with ample room to bring enforcement actions in this and a myriad of other contexts.

While the industry waits for more guidance from the bureau about what constitutes UDAAP violations to trickle in, it is clear that the bureau is focused on the propriety of marketing materials. What can your institution do to protect itself against the bureau’s sweeping reach? Consumer financial services institutions should consider these proactive steps:

- Conduct in-depth reviews of all marketing materials to ensure that what you tell consumers reflects the terms of the products being offered;
- Conduct quality assurance reviews of advertising campaigns and sales pitches;
- Provide training on UDAAP avoidance to sales and advertising personnel, including third-party vendors;
- Provide written policies governing the content of marketing materials;
- Review customer complaints — they could reveal potential UDAAP violations; and
- Review products aimed at particular groups of people — such as older Americans — and ensure that terms and conditions are appropriate and clear.

The bureau is clearly seeking out UDAAP violations and has so far shown no reservations in bringing enforcement actions, notwithstanding near-uniform agreement in the industry that the boundaries of UDAAP remain elusive. As a result — and until the bureau provides more guidance — banks and other consumer financial services companies will be largely on their own in mitigating UDAAP risks.

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