



# UDAAP 101: What's the Latest?

Scott M. Pearson  
Manatt, Phelps & Phillips, LLP  
(310) 312-4283  
[spearson@manatt.com](mailto:spearson@manatt.com)

Mike G. Silver  
Husch Blackwell LLP  
(202) 378-5854  
[mike.g.silver@huschblackwell.com](mailto:mike.g.silver@huschblackwell.com)

**COMPLIANCE UNIVERSITY**

## CFPB UDAAP Developments – Enforcement

Recent Enforcement against Fintech Companies:

- *Solo Funds* (May 2024) – Complaint against peer-to-peer lender alleging various UDAAPs, including by marketing itself as 0% APR alternative to high-cost small-dollar loans but using dark patterns and other misleading tactics to ensure almost every borrower pay fees via “tips” or “donations.”
- *Chime* (May 2024) – Consent order with neobank/fintech company that did not timely refund consumers’ balances following account closures, which the CFPB alleged was an unfair practice.

## CFPB UDAAP Developments – Enforcement

### NSF Fees:

- *Bank of America* (July 2023) – Joint CFPB/OCC consent order alleging that BOA engaged in unfair practices by charging multiple NSF fees for the same failed transaction.

### Dark Patterns:

- *Active Network, LLC* (October 2022) – Complaint alleging company providing enrollment and payment processing services to organizers of charity races, youth camps, and other events engaged in deceptive and abusive practices by using dark patterns and other tactics to enroll consumers in and charge them for discount club memberships without their knowledge, consent, or a full understanding of the material terms.

## CFPB UDAAP Developments – Rulemaking

### NSF Fees

- *Non-Sufficient Funds (NSF) Fees Proposal* (January 2024) – Proposed rule would determine that charging NSF fees on instantaneous declines of debit card, ATM, and certain peer-to-peer transactions is an abusive practice, under the lack-of-understanding prong.

### Mortgage Closing Cost “Junk Fees”

- *Request for Information (RFI)* (May 2024) – RFI as prelude to potential rulemaking or guidance that would address consumer choice and affordability of title insurance, credit report fees, and other mortgage closing costs, potentially under a UDAAP theory.

## CFPB UDAAP Developments – Guidance

### Unenforceable Contract Terms

- *Circular on Contract Terms and Conditions and Deception* (June 2024) – Inclusion of certain terms in contracts for consumer financial products or services may be deceptive when applicable federal or state law renders such contractual terms, including those that purport to waive consumer rights, unlawful or unenforceable.

### Digital Comparison-Shopping Tools

- *Circular on Digital Comparison-Shopping Tools and Abusiveness* (February 2024) – Applies “reasonable reliance” prong of abusiveness to digital comparison-shopping platform operators and lead generators that preference certain products based on financial considerations.

## CFPB UDAAP Developments – Guidance

### Negative Option Marketing

- *Circular on Negative Option Marketing* (January 2023) – Negative option marketing practices may violate the prohibitions on unfair, deceptive, or abusive practices when a seller:
  - Misrepresents or fails to clearly and conspicuously disclose the material terms of a negative option program;
  - Fails to obtain consumers’ informed consent; or
  - Misleads consumers who want to cancel, erects unreasonable barriers to cancellation, or fails to honor cancellation requests that comply with promised cancellation procedures.

### Abusiveness Generally

- *Policy Statement on Abusive Acts or Practices* (April 2023) – Summarized CFPB and other agencies’ abusiveness enforcement and supervisory actions and purported to provide analytical framework to government enforcers and market for identifying abusive practices.
  - Very different approach than 2020 CFPB policy statement (later rescinded)

## CFPB UDAAP Developments – Guidance

### Discrimination-is-Unfair Theory

- *UDAAP Exam Manual Revisions* (March 2022)
  - Exam manual changes would declare discrimination as an unfair practice when federal fair lending laws (such as ECOA) did not apply.
  - Trade groups challenged revisions, and Texas federal district court found that CFPB exceeded its statutory authority.
  - Litigation was stayed in the Fifth Circuit pending the Supreme Court decision in *CFSA vs. CFPB*, which is now resolved.

## FTC: “Junk” Fees

- *Adobe* (June 2024): DOJ sued Adobe and two executives alleging concealment of cancellation fees for subscription plans (FTC referral)
- *Doxo* (April 2024): FTC sued bill payment company and two executives, alleging deception in advertising bill payment service and concealment of fees for the service
- Proposed Rule on “Unfair or Deceptive Fees” (Nov. 2023): Would require “total price” to be clearly and conspicuously disclosed in advertising (including most fees and costs of mandatory ancillary products), and prohibit misleading fees (i.e., nature of fee and its refundability)



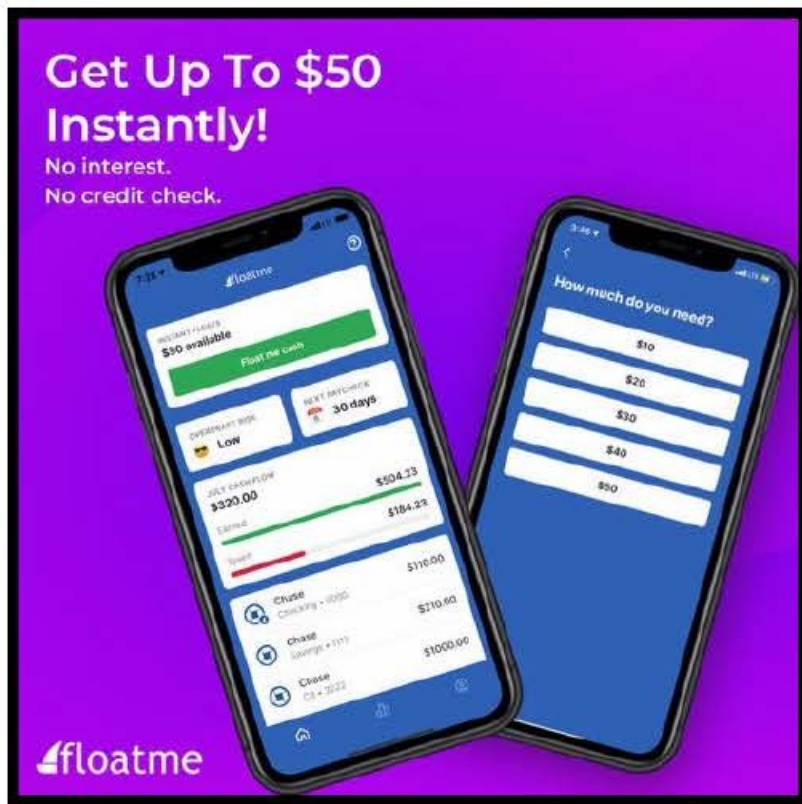
## Advance Fees/TSR

- *Express Enrollment/Intercontinental Solutions* (Feb. 2024):
  - FTC sued two debt relief firms and several of their executives for violations of the Telemarketing Sales Rule and the Gramm-Leach-Bliley Act
  - Firms misrepresented their student debt relief services and took illegal advance payments
    - Referred to the advance fees as “junk fees” in their press releases
  - Firms used false statements to obtain private customer information
  - Stipulated judgment banned the companies and their executives from the industry and imposed a \$7.4M monetary judgment

## FTC: Misleading Advertising

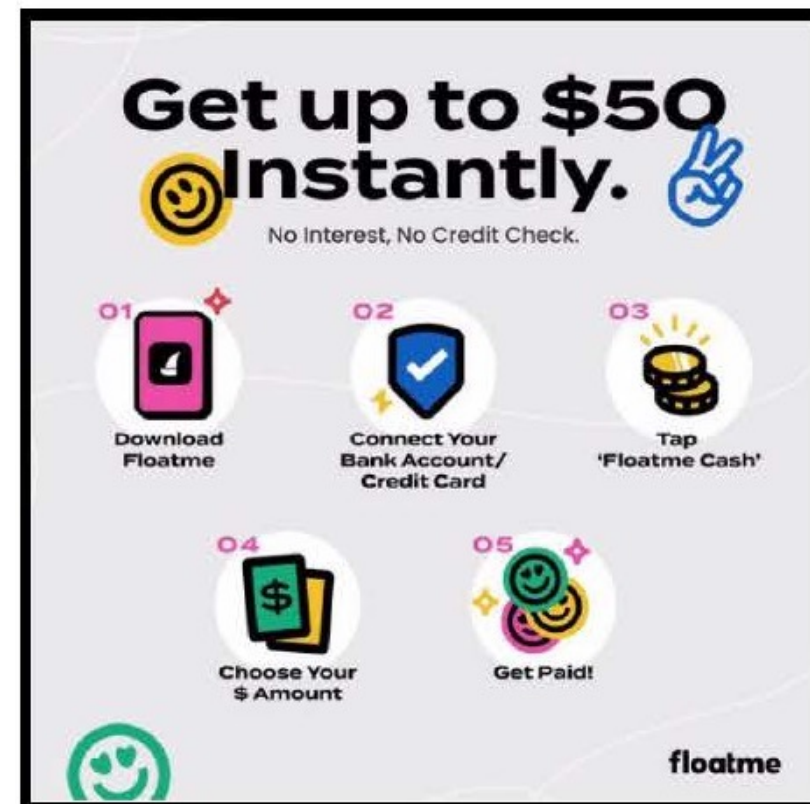
- *FloatMe* (Jan. 2024):
  - FTC sued cash advance company and two executives, alleging false advertising and violations of various statutes
  - Company allegedly charged recurring, negative-option subscription fee to receive “up to \$50” advances “instantly” with “no hidden fees”
  - Advance amounts were actually \$20 and could not be increased easily
  - Fees charged for “instant” delivery of funds
  - Cancellation very difficult, company often continued to charge after cancellation was requested
  - Discrimination based on refusal to consider public assistance benefits in underwriting

## FloatMe Ads



**Get Up To \$50 Instantly!**  
No interest.  
No credit check.

floatme



**Get up to \$50 Instantly.**  
No Interest, No Credit Check.

- 01 Download Floatme
- 02 Connect Your Bank Account/  
Credit Card
- 03 Tap 'Floatme Cash'
- 04 Choose Your \$ Amount
- 05 Get Paid!

floatme

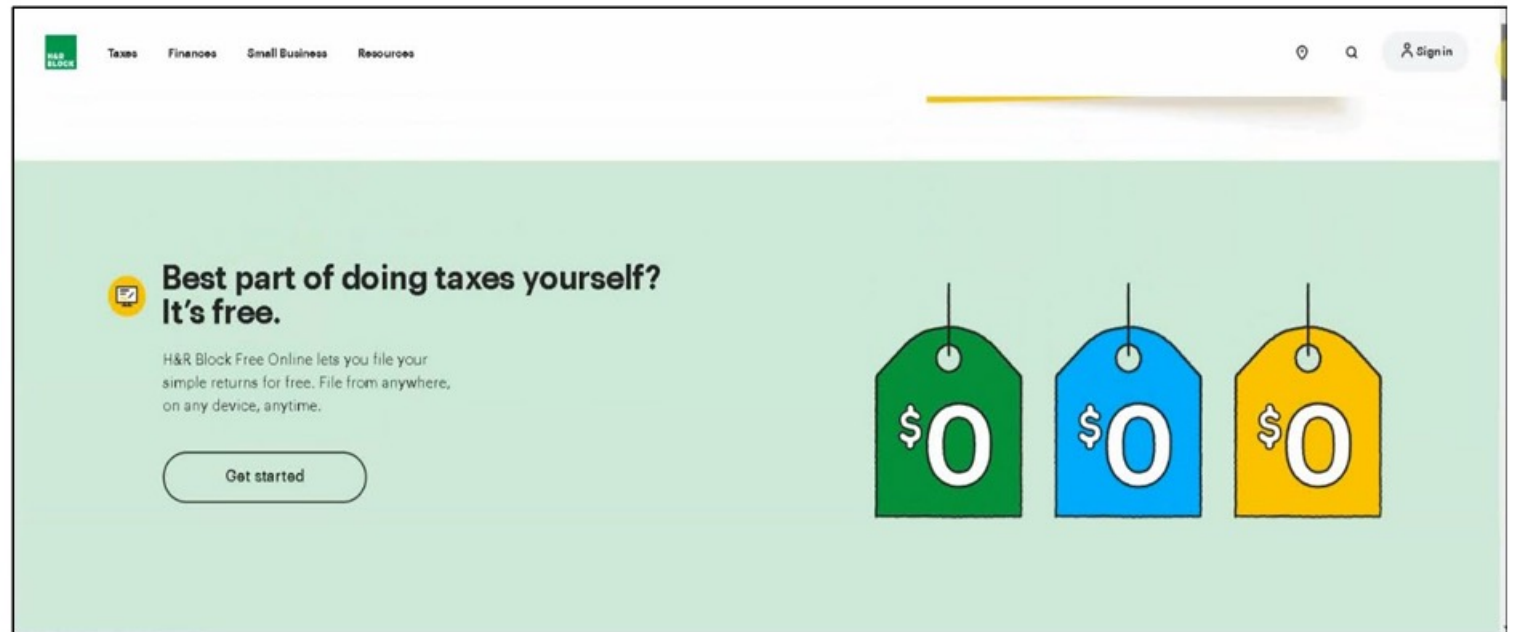
## FTC: Misleading Advertising

- *H&R Block* (Feb. 2024):
  - FTC brought administrative action against tax preparation company, alleging false advertising and unfair practices
  - Company advertised service as “free” without disclosing limitations of free product, which was one of several options offered
  - Company allegedly erected structural barriers to downgrading version in use, including by deleting all data that had been entered in a more expensive version of the service; in practice, it was allegedly very difficult to contact customer service and obtain a downgrade

## H&R Block Ads

**File for free.**

Simple returns only when filing with H&R Block Free Online.



The screenshot shows the H&R Block website interface. At the top, there is a navigation bar with the H&R Block logo and links for Taxes, Finances, Small Business, and Resources. A search icon and a 'Sign in' button are also visible. The main content area features a green background with the following text and graphics:

- Best part of doing taxes yourself? It's free.**
- A sub-headline: "H&R Block Free Online lets you file your simple returns for free. File from anywhere, on any device, anytime."
- A "Get started" button.
- Three price tags (green, blue, and yellow) each displaying "\$0".

## FTC “Click to Cancel” Rulemaking

- FTC proposed amendments to its negative option rule in March 2023
  - Prohibits misrepresentations
  - Requires “unambiguously affirmative consent” to a negative option
  - Must allow cancellation through same mechanism as signing up
  - Cancellation must be “simple” and “at least as easy to use as the method the consumer used to initiate the negative option feature”
  - Requires prompt answering of customer service calls
  - Restrictions on “save”

## State Enforcement

- *Mariner Finance* (Apr. 2024): Ongoing multistate AG action challenging add-on product practices
- *Marriott* (Feb. 2024): Colorado AG settled with hotel chain over price display (total price) practices
  - Numerous class actions in SDNY concerning similar issues in ticketing (2024)
- *Credova Financial* (Jan. 2024): California DFPI settlement concerning “pay to pay” fees

## State Legislation/Regulation

- Massachusetts AG issued an advisory notice in April 2024 stating that discrimination by companies using AI may give rise to UDAP liability
- California regulations adopted in October 2023 extend UDAAP authority to commercial finance
- NY considering legislation to prohibit “unfair” and “abusive” practices
- Numerous state laws are targeting “junk fees” by requiring “total price” disclosures (CA, NY, TN)



## Questions?



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spears@manatt.com



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