Marketing Compliance and Enforcement Actions Quarterly Review

Special Edition: 2H 2023

PerformLine's Marketing Compliance and Enforcement Actions Quarterly Review offers a focused look at the latest enforcement and compliance trends that impacted consumer finance companies in the second half of 2023. Powered by our in-depth compliance monitoring and industry analysis, this review provides essential insights to help businesses effectively navigate the evolving regulatory landscape.

Enforcement Actions at a Glance

22
Enforcements Actions*

$237B+
In Monetary Fines

$90M
Highest Single Enforcement Action Fine

67%
Taken by State Regulators

*Note: These numbers only include enforcement actions that have been finalized. There are still several complaints, consent orders, and other actions that are pending.

In the second half of 2023, federal and state regulators took 22 enforcement actions against consumer finance companies, totaling over $237B in monetary fines.

The highest monetary fine from a single enforcement action is $90 million, which was taken against a bank by the Consumer Financial Protection Bureau (CFPB). However, a related enforcement action was taken against the same bank by the Office of the Comptroller of Currency (OCC). Between the CFPB and the OCC, this bank was ordered to pay a combined total of $150 million in monetary fines for UDAAP violations.

Notably, 67% of these finalized enforcement actions came from state regulatory agencies, specifically New Jersey, Texas, Oregon, and Washington.

Notable Enforcement Actions, Consent and Settlement Orders, and Complaints

Note: These notable actions include some that are still awaiting final orders.

Key Themes

UDAAP and dark patterns

Continued scrutiny on UDAAP and dark patterns, including misleading advertising and complex cancellation processes.

Monetary and structural penalties

Significant monetary and structural penalties, such as refunds to consumers, mandatory policy revisions, and even shutdowns.

Transparency and ethical practices

Emphasis on transparency and ethical practices, demanding honesty in advertising and fair consumer treatment.

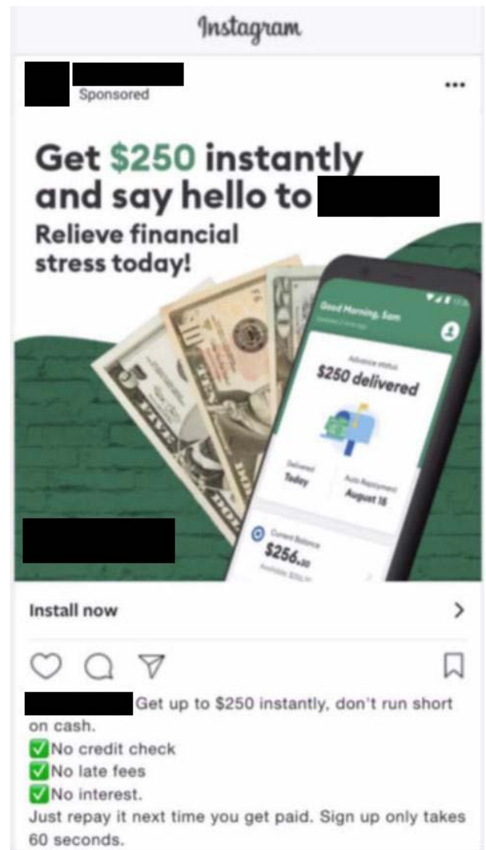
Third party partnerships

Focus on risk management for third party partnerships, specifically for bank-fintech and BaaS partnerships.

Fintech engaged in deceptive advertising and dark patterns

Regulatory Agency:	Federal Trade Commission (FTC)
Total Penalty Amount:	$18M
Regulatory Issue(s):	UDAAP, Dark Patterns

Summary: The FTC took action against a fintech company for engaging in deceptive advertising and using "dark patterns" to create a confusing and misleading cancellation process that prevented consumers from canceling their subscriptions.



The fintech advertised its cash advance service online, through social media, and through broadcast ads with claims that customers who subscribed to the company's service would have access to "instant" cash advances of up to $250 "whenever you need it," and could cancel anytime.

Despite these promises, the company began charging consumers a 99-cent fee for an instant transfer, and consumers who did not pay the fee had to wait up to three business days for their advances.

The fintech prevented consumers with an open advance from canceling their subscriptions and continued to withdraw a $9.99 monthly fee from their bank accounts until the advance was paid off. Even for consumers without an open cash advance, the company used dark patterns to create a confusing and misleading cancellation process.

Enforcement Action

The proposed settlement order would:

- Require the fintech to pay $18 million to the FTC to be used to provide refunds to consumers.
- Prohibits the company from misleading consumers about how much money is available through their advances, how fast the money would be available, any fees associated with delivery, and consumers' ability to cancel their service.
- Require the company to make clear disclosures about its subscription products and provide a simple mechanism for consumers to cancel.

Company tricked consumers into income share loans and used abusive debt collection practices

Regulatory Agency:	Consumer Financial Protection Bureau (CFPB) and 11 State Attorneys General
Total Penalty Amount:	$30M
Regulatory Issue(s):	UDAAP, TILA, Reg Z

Summary: The CFPB and 11 States took action against a company for making false promises of job placement, trapping students with "income share" loans, and resorting to abusive debt collection practices when borrowers could not pay.

This company operated a 12-week online training program promising to prepare students for entry-level positions as software sales development representatives with assured "six-figure salaries" and a "job guarantee."

The company's marketing falsely claimed that loans didn't create debt, deceptively buried and hid important loan terms, tricked consumers into converting their income share loan into a revised "settlement agreement" that required them to make payments even if they had not found a job, and filed debt collection lawsuits to consumers in a distant jurisdictions where they couldn't be physically present during the financing contract execution.

Enforcement Action

This company was ordered to:

- Refund $4.2 million to student borrowers.
- Cancel all outstanding income share loans.
- Shut down permanently.
- Pay a civil money penalty.

Fintech deceived consumers about the cost and speed of money transfers and failed to investigate consumer disputes

Regulatory Agency:	Consumer Financial Protection Bureau (CFPB)
Total Penalty Amount:	$3M
Regulatory Issue(s):	UDAAP, EFTA, Reg E

Summary: The CFPB took action against a fintech for deceptive advertising, failing to provide required disclosures and receipts, and requiring customers to waive their rights.

The company made false promises in marketing materials on social media, saying that transfers would be delivered “instantly” or ”within seconds,” when in most cases, transfers took much longer than just seconds. They also claimed that transfers would incur “no fees,” but customers were charged fees for their transfers.

The fintech failed to make required disclosures about the date on which funds would be available and failed to accurately represent exchange rates to consumers. They also failed to provide receipts of transfers within one business day as required by Regulation E under the Electronic Fund Transfer Act (EFTA).

Proper policies and procedures weren’t in place to identify and track transfer errors, and the company did not conduct proper investigations upon notification of errors.

Lastly, the company required customers to sign an agreement that protected the company from being responsible for losses the consumer incurred through the use of the app and limited its liability for damages—both of which are restricted under the EFTA.

Enforcement Action

The CFPB required the fintech to:

- Refund charges to customers who sent transfers during the time the company was deceptively marketing its transfers as “fee-free.”
- Refund any fees consumers paid when funds failed to be delivered by the designated recipient date. All of these total around $1.5 million.
- Pay a $1.5 million dollar penalty, totaling $3M in total penalties and fees.

PERFORMLINE PERSPECTIVE

Phrases like:

“instant,” “within seconds,” “guarantee,” and ***“no fees”***

are among the top terms most commonly flagged and remediated within the PerformLine platform.

As demonstrated by the above enforcement actions, these terms—especially when used in marketing materials across social media, the web, or other collateral—signal a potential UDAAP compliance issue because they often lead to false expectations for the consumer.

Using PerformLine’s omni-channel compliance monitoring technology, companies can proactively monitor for these terms (and more) to proactively identify and remediate any potential compliance issues before they turn into investigations and enforcement actions by the regulators.

Servicer harassed consumers by phone, engaged in bait-and-switch tactics, and failed to respond to complaints with accurate information

Regulatory Agency:	New Jersey State Attorney and Division of Consumer Affairs
Total Penalty Amount:	$502k
Regulatory Issue(s):	UDAAP, CFA, Advertising Regulations, TCPA

Summary: Sparked by over 1,400 complaints, the NJ State Attorney and Divison of Consumer Affairs took action against a mortgage servicer for bombarding consumers with harassing sales calls about loan refinancing, engaged in bait-and-switch sales tactics to induce them to refinance their loans, and caused them financial harm by repeatedly failing to meet its responsibilities as a loan servicer.

The mortgage company violated the New Jersey Consumer Fraud Act (NJ's version of UDAAP) and the Telemarketing Do Not Call Law by, among other things:

- Engaging in abusive and deceptive telemarketing practices, primarily involving multiple refinancing solicitations
- Engaging in "bait-and-switch" sales tactics, such as inducing consumers to refinance their loans at lower rates only to raise the rates after consumers sign the refinancing documents
- Failing to respond to consumer inquiries with accurate information

Enforcement Action

The settlement orders the company to:

- Pay $365,200 in civil penalties and $136,800 in reimbursement for the Division's attorneys' fees and investigative costs. An additional $50,000 in civil penalties is suspended but will become immediately payable if the company fails to comply with the settlement terms within the next year.
- Designate an employee to serve as the company's Complaint Coordinator for a period of 18 months, who will be responsible for ensuring the company complies with the terms of the consent order and all other consumer protection laws and regulations.

PERFORMLINE PERSPECTIVE

PerformLine's Call Monitoring solution can help monitor calls to identify and flag complaints or negative reviews by consumers, aggressive or high-pressure solicitations by reps, and consumers expressly stating that they did not give permission to be called.

Bank engaged in unsound practices due to fintech relationship

Regulatory Agency:	Federal Deposit Insurance Corporation (FDIC)
Total Penalty Amount:	$TBD
Regulatory Issue(s):	Third party risk management, UDAAP

Summary: The FDIC took action against a bank for unsafe and unsound banking practices, specifically regarding a fintech relationship.

The FDIC said the bank engaged in deceptive and unfair acts and practices by implying that certain credit products with non-optional debt cancellation features were unemployment insurance, and approving consumers who did not qualify for the debt cancellation feature while misrepresenting the fees for those products.

Enforcement Action

As part of the consent order, the bank is ordered to:

- Obtain written non-objection from the FDIC before onboarding new fintech partners.
- Review, revise, develop and/or implement policies, procedures, and training to enhance compliance with consumer protection laws.
- Complete regular internal reviews and independent audits.

PERFORMLINE PERSPECTIVE

As regulatory scrutiny of third party relationships continues to increase, having the technology in place to scale the compliance monitoring of partners is critical.

The use of automated marketing compliance technology—like PerformLine—can help banks identify compliance issues across partners at scale and significantly increase overall efficiency.

Expert Insights

Notable quotes and takeaways from seasoned industry professionals.

Compliance technology is critical to operating at scale and growing a large customer base

“Leveraging technology to ingest rules that trigger an alert, being able to triage them on a risk-adjusted basis, and then filter them into workflows is the only way we can [ensure compliance] at scale. It’s not something that we can handle in spreadsheets on a manual basis. It has to be something that’s built into our platform and systems that we’re able to do with the right number of full-time employees and not an army of compliance people like traditional financial institutions sometimes do."

– Harsha Raghunath, Stripe

An administration change likely won’t affect enforcement action numbers at the CFPB significantly

“What’s interesting is that I think every Director at the Bureau–regardless of what side of the aisle they come from–has recognized the value in the measurability of enforcement actions… We can count off the billions of dollars that have been returned to consumers, and I think many directors have made sure that shows up at the bottom of every press release and everything they put out."

– Gary Stein, 99FinTech

Planning ahead helps you prepare for changes in the regulatory environment

"It’s better to plan ahead, so take the opportunity… Make a list of all the different things coming down the pipe. There are so many resources–there are law firms, there’s technology, there are consultants. Figure out what are the things that might impact your business and use a waterfall risk-based approach to how you need to tackle these challenges and what resources you need."

– Melissa Baal Guidorizzi, Orrick

Do more with less using compliance technology

"This [automated] approach not only allows us to gain more insights into themes and trends but also enables our team to allocate their time to more value-added activities. Our focus should extend beyond handling individual exceptions for specific customers. We need to discern what the overarching themes and trends reveal about what’s on the horizon and potential systemic issues we must address."

– Babette Reynolds, Truist

Most Common Compliance Issues

How are these compliance issues identified?

PerformLine monitors hundreds of thousands of marketing assets daily for compliance using proprietary technology and expert rulebooks to search for potential violations.

PerformLine's rulebooks are carefully curated to cover specific compliance categories, regulations, laws, and guidelines that organizations use to monitor marketing content against to identify potential compliance violations at scale. These rulebooks cover everything from broad compliance concerns (like UDAAP) to industry or product-specific requirements.

These compliance issues were the most commonly flagged and remediated within the PerformLine platform over the last 6 months.

1. Offer Inflation

Offer inflation–also referred to as exaggerated claims–refers to statements that are not entirely truthful or accurate and are designed to make the product or service appear more attractive or valuable than it actually is.

Common terms include:
Free, the best, discount, no fees

2. Brand Misrepresentation

Brand misrepresentation involves using deceptive or false language and terminology that misrepresents a brand's attributes or product qualities. This is most commonly identified in the insurance industry but is applicable to other industries as well.

Common terms include:
Safe, secure

3. Misleading Language

Misleading language refers to terms or phrases within proximity to a company name that would mislead consumers about the nature of the company's products or services. This compliance issue is most prominent for organizations that work with third parties, such as partner banks and fintechs.

Common terms include:
Bank, partner, unique, improve

4. Credit Deception

Credit deception means using language that would lead consumers to believe that a certain product or service would help, repair, or build credit. While it may be true for some products or consumers, it isn't always true.

Common terms include:
Help, bad, build

5. Disclosures

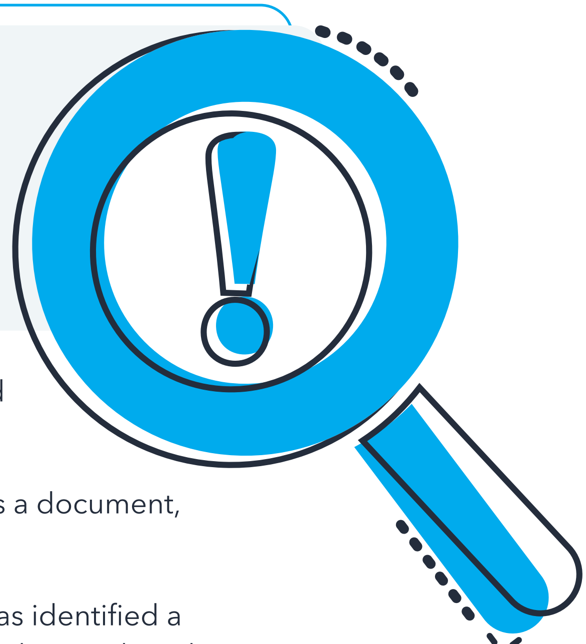
Disclosures include any information that lenders are required to include on their websites, social media profiles and posts, or other marketing materials regarding their products. Assets are flagged if any of the required disclosures are missing. This is most commonly identified in the mortgage industry but is applicable to other industries as well.

Common terms include:
Corporate ID, NMLS #s, Company URL

Compliance Benchmark Stats

1 in 4

assets monitored were flagged for potential compliance issues



In the second half of 2023, PerformLine monitored 9.8M assets and flagged 2.2M of those for a potential compliance issue.

Assets refer to a specific marketing item or communication, such as a document, web page, social media post, email, call, or message.

When an asset is flagged, it means that the PerformLine platform has identified a potential compliance issue that needs to be reviewed and, if needed, remediated.

Some notable marketing channel-specific stats...

DOCUMENTS

97%

of documents reviewed by PerformLine were approved in less than 24 hours

Learn more about Document Review

ACROSS THE WEB

68%

of web pages monitored were previously unknown and discovered with PerformLine's Kraken Crawler

Learn more about Web Monitoring

SOCIAL MEDIA

80%

of social media posts flagged for compliance issues were on Facebook or Instagram

Learn more about Social Media Monitoring

EMAILS

31%

of emails sent were flagged for a potential compliance issue

Learn more about Email Monitoring

CALLS

25%

calls monitored were flagged for a potential compliance or performance issue

Learn more about Call Monitoring

MESSAGES

33%

of messages, on average, were flagged for a compliance or performance observation

Learn more about Message Monitoring

Navigating Compliance Challenges with PerformLine

At PerformLine, our mission is to empower marketing and compliance leaders with the technology and knowledge to ensure that their organization and partners provide accurate and compliant information to consumers across any channel.

Here's how we're helping leading organizations mitigate marketing compliance risk while increasing efficiency:

TIME SAVINGS

on hours spent manually searching and reviewing marketing materials for compliance.

COST SAVINGS

by identifying compliance issues and allowing for quick remediation before they turn into investigations enforcement actions

AUTOMATED DISCOVERY

of unknown brand mentions, product promotions, across marketing channels to find potential compliance issues

COMPREHENSIVE COVERAGE

and oversight across marketing channels, products, and partners at scale through automated technology

Get ahead of emerging compliance risks and challenges with PerformLine.

Get a Personalized Demo