

are targeted to a specific audience, such as the elderly or the financially unsophisticated, the standard is based upon the effects of the act or practice on a reasonable member of that group.

If a representation conveys two or more meanings to reasonable consumers and one meaning is misleading, the representation may be deceptive. Moreover, a consumer's interpretation or reaction may indicate that an act or practice is deceptive under the circumstances, even if the consumer's interpretation is not shared by a majority of the consumers in the relevant class, so long as a significant minority of such consumers is misled.

In evaluating whether a representation, omission or practice is deceptive, the FDIC will look at the entire advertisement, transaction, or course of dealing to determine how a reasonable consumer would respond. Written disclosures may be insufficient to correct a misleading statement or representation, particularly where the consumer is directed away from qualifying limitations in the text or is counseled that reading the disclosures is unnecessary. Likewise, oral disclosures or fine print may be insufficient to cure a misleading headline or prominent written representation.

- ***The representation, omission, or practice must be material.***

A representation, omission, or practice is material if it is likely to affect a consumer's decision regarding a product or service. In general, information about costs, benefits, or restrictions on the use or availability of a product or service is material. When express claims are made with respect to a financial product or service, the claims will be presumed to be material. Similarly, the materiality of an implied claim will be presumed when it is demonstrated that the institution intended that the consumer draw certain conclusions based upon the claim.

Claims made with the knowledge that they are false will also be presumed to be material. Omissions will be presumed to be material when the financial institution knew or should have known that the consumer needed the omitted information to evaluate the product or service.

### **Relationship to Other Laws**

Acts or practices that are unfair or deceptive within the meaning of section 5 of the FTC Act may also violate other federal or state statutes. On the other hand, there may be circumstances in which an act or practice violates section 5 of the FTC Act even though the institution is in technical compliance with other applicable laws, such as consumer protection and fair lending laws. Banks should be mindful of both possibilities. The following laws warrant particular attention in this regard:

### ***Truth in Lending and Truth in Savings Acts***

Pursuant to the Truth in Lending Act (TILA), creditors must "clearly and conspicuously" disclose the costs and terms of credit. The Truth in Savings Act (TISA) requires depository institutions to provide interest and fee disclosures for deposit accounts so that consumers may compare deposit products. TISA also provides that advertisements shall not be misleading or inaccurate, and cannot misrepresent an institution's deposit contract. An act or practice that does not comply with these provisions of TILA or TISA may also violate the FTC Act. On the other hand, a transaction that is in technical compliance with TILA or TISA may nevertheless violate the FTC Act. For example, consumers could be misled by advertisements of "guaranteed" or "lifetime" interest rates when the creditor or depository institution intends to change the rates, whether or not the disclosures satisfy the technical requirements of TILA or TISA.

### ***Equal Credit Opportunity and Fair Housing Acts***

The Equal Credit Opportunity Act (ECOA) prohibits discrimination in any aspect of a credit transaction against persons on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to contract), the fact that an applicant's income derives from any public assistance program, and the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act. Similarly, the Fair Housing Act (FHA) prohibits creditors involved in residential real estate transactions from discriminating against any person on the basis of race, color, religion, sex, handicap, familial status, or national origin. Unfair or deceptive practices that target or have a disparate impact on consumers who are members of these protected classes may violate the ECOA or the FHA, as well as the FTC Act.

### ***Fair Debt Collection Practices Act***

The Fair Debt Collection Practices Act prohibits unfair, deceptive, and abusive practices related to the collection of consumer debts. Although this statute does not by its terms apply to banks that collect their own debts, failure to adhere to the standards set by this Act may support a claim of unfair or deceptive practices in violation of the FTC Act. Moreover, banks that either affirmatively or through lack of oversight, permit a third-party debt collector acting on their behalf to engage in deception, harassment, or threats in the collection of monies due may be exposed to liability for approving or assisting in an unfair or deceptive act or practice.

### **Examination Procedures**

#### **Required Consultations with FDIC Regional and Washington Offices**

Because Congress drafted the FTC Act prohibition against unfair and deceptive practices broadly, it is flexible enough to

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address change in market conduct as it emerges. To determine whether an act or practice is unfair or deceptive, examiners must carefully evaluate the facts in consultation with policy and legal staff from the FDIC Regional and Washington Offices.

FDIC examiners must consult with Field and Regional Office staff when they identify an act or practice that appears to be unfair or deceptive. This requirement applies when potential unfair or deceptive acts or practices are identified during an examination, through a consumer complaint, or from another source. Further formal consultation with the FDIC Washington Office is required once the preliminary facts have been established and the Region believes a violation should be cited. Formal FDIC Washington Office consultation memoranda should be addressed to the Associate Director. They should include a description of the act or practice that explains why it meets the standards for unfairness or deception described above.

### Scoping

The scope of an examination to determine whether an institution is engaging in unfair or deceptive practices encompasses the institution's product(s), service(s), target market(s), operations, and compliance management systems and programs. Consistent with the FDIC's risk-focused examination approach, examiners should develop a compliance risk profile for the institution using information about the institution's business lines, organizational structure, operations, past supervisory performance and identified high risk areas, such as subprime lending, servicing and collections by third-parties, and situations in which allegations of misleading advertising have been made.

Consumer complaints received by the FDIC or the bank are also an important source of information in identifying possible areas of concern, even if previously resolved. Although a consumer complaint may not evidence an unfair or deceptive practice when considered in isolation, additional information or a pattern of complaints may reveal such practices.

### Evaluating Compliance Management Systems and Programs

*When reviewing a bank's compliance management system (CMS), examiners should consider whether it ensures that the institution avoids unfair or deceptive acts or practices, and promptly remedies any such practices that may nevertheless arise.*

The degree of specificity with which a CMS can be expected to address this area will vary depending on the bank's size, complexity and product offerings. A small institution that offers a limited number of products through a few branches,

with marketing restricted to local newspaper and radio outlets, will not need the kind of specific, documented compliance program that should be in place at an institution engaged in nationwide mortgage or credit card lending. On the other hand, where an institution offers products or uses business strategies that have repeatedly raised concern about consumer treatment, a compliance program should be in place that specifically addresses steps taken to ensure that unfair or deceptive conduct does not occur.

*Consider these general questions when conducting the examination:*

- What is the role and approach of the compliance function in the bank? Does it go beyond merely checking whether the letter of the law is followed, to considering the larger question of whether interactions with customers are clear and fair?
- Does the compliance function have sufficient resources and authority to be in a position to both detect potentially unfair or deceptive acts or practices, and take action to address them?
- Does the bank have a complaint resolution process that will not only appropriately resolve individual problems, but also evaluate complaints to detect potentially unfair or deceptive practices that should be changed to avoid customer harm?

*Identify the risks for unfair or deceptive acts or practices in the bank's product lines, interactions with customers and potential customers, and outsourcing practices. Then consider:*

- Has the bank identified these risks, either explicitly or implicitly? Are there risks that are not identified?
- Does the bank's CMS address the identified risks? Is the attention given commensurate with the degree of risk?
- How effective is the CMS in practice?

Based upon your review of the risks and the bank's CMS, determine whether additional, more specific evaluation is required.

### Evaluating Products, Operations and Communications

The prohibitions against unfair or deceptive acts or practices apply to all bank products and services. However, there are some activities that have been particularly susceptible to violations of the FTC Act and warrant additional scrutiny. These include:

- marketing to the elderly or financially vulnerable or unsophisticated,
- subprime mortgage and credit card lending,
- payday lending,
- overdraft or "bounce" protection, and

- marketing and collection practices that result in increased fees.

Some operational areas also have a heightened risk of producing unfair or deceptive practices. These include:

- development of product structure and terms,
- advertising and solicitation,
- repricing and change of terms,
- servicing and collections, and
- the management and monitoring of employees and third-parties.

Section 5 of the FTC Act does not impose specific requirements on banks. Policies and procedures necessary to avoid engaging in unfair or deceptive activities will largely be based upon the bank's products and services, marketing and advertising, and its outsourcing agreements with third parties.

*Examiners should use the questions below as applicable. If it appears that unfairness or deception may be occurring, examiners should analyze the situation by applying the standards above and the UDAP Guidance. As they develop this analysis, FDIC examiners should consult with Regional and Washington Office policy staff as well as the Legal Division.*

### Product Structure and Terms

The structure and pricing of consumer products, particularly mortgages and credit cards, has become increasingly complex and diverse. Consequently, it has become increasingly important that communications with consumers are meaningful and easily understood.

*Examiners should use copies of disclosures, notices, agreements, and promotional materials for the products and services<sup>4</sup> at risk for unfair or deceptive practices, as well as discussions with appropriate bank personnel, to respond to the following questions, as applicable:*

1. Does the bank review all promotional materials, marketing scripts, and customer agreements and disclosures to ensure that they fairly and adequately describe the terms, benefits, and material limitations of the product or service being offered, including any related or optional products or services, and that they do not misrepresent such terms either affirmatively or by omission?
2. Do the promotional materials and/or customer agreements and disclosures draw the attention of customers to key terms, including limitations and conditions that are important in enabling the customer to make an informed decision regarding whether the product or service meets the customer's needs?
3. Do the promotional materials and/or customer agreements and disclosures used clearly disclose all material limitations or conditions on the terms or availability of products or services, such as a limitation that applies a special interest rate only to balance transfers; the expiration date for terms that apply only during an introductory period; material prerequisites for obtaining particular products, services or benefit (e.g., discounts, refunds or rebates); or conditions for canceling a service without charge when the service is offered on a trial basis?
4. Do the promotional materials and/or customer agreements and disclosures inform consumers in a clear and timely manner about any fees, penalties, or other charges (including charges for any force-placed products) that have been imposed, and the reasons for their imposition?
5. Do the promotional materials and/or customer agreements and disclosures clearly inform customers of contract provisions that permit a change in the terms and conditions of an agreement?
6. Does the bank advertise services or benefits provided in connection with an account that it does not intend or is not able to provide? Are the conditions imposed to receive such services or benefits so burdensome or difficult to meet that the advertised service or benefit is illusory?
7. Does the bank clearly disclose when apparently optional products and services — such as insurance, travel services, credit protection, and consumer report update services that are offered simultaneously with credit — are required to obtain credit or considered in decisions to grant credit?
8. When making claims about amounts of credit available to consumers, does the bank accurately and completely represent the amount of potential, approved, or useable credit that the consumer will receive? Is the product structured so that the amount of available credit is so low as to significantly reduce or eliminate the consumer's ability to use the product? Do fees and charges, imposed both initially and throughout the term of the loan, similarly impair the utility of the loan?
9. Does the bank avoid making representations to consumers that they may pay less than the minimum amount due required by the account terms without adequately disclosing any late fees, over-the-limit fees, or other account fees that will result from the consumer paying such reduced amount? Does the bank waive the consumer's credit limit for the purpose of obtaining additional over-the-limit fees?
10. Does the bank, if offering a variety of interest rates on different types of balances, clearly advise consumers how their payments will be applied?
11. Is the "please pay by" date stated on the periodic statement consistent with the product's grace period?

<sup>4</sup> Examiners should review sample periodic statements if they are used to convey offers, particularly offers that relate to fees or collection practices.

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### Advertising and Solicitation

The need for clear and accurate marketing and disclosures that are sensitive to the sophistication of the target audience is heightened for products and services that have been associated with deceptive practices. Accordingly, banks should take particular care in marketing credit and other products and services to the elderly, the financially vulnerable, and customers who are not financially sophisticated. In addition, creditors should pay particular attention to ensure that disclosures are clear and accurate with respect to:

- the points and other charges that will be financed as part of home-secured loans;
- the terms and conditions related to insurance offered in connection with loans;
- loans covered by the Home Ownership and Equity Protection Act;
- reverse mortgages;
- secured and other credit cards designed to rehabilitate the credit position of the cardholder;
- overdraft or “bounce” protection; and
- loans with pre-payment penalties, temporary introductory terms, or terms that are not available as advertised to all consumers.

*Examiners should use representative samples of all marketing and advertising materials, including print, electronic and other media, such as the Internet, e-mail and text messages, telephone solicitation scripts, agreements and disclosures for the product(s) and service(s) under analysis, together with any marketing and solicitation policies or instructions, as well as discussions with appropriate bank personnel, to respond to the following questions:*

1. Does the bank ensure that there is a reasonable factual basis for all representations made?
2. Does the bank ensure that these promotional materials do not use fine print, separate statements or inconspicuous disclosures to correct potentially misleading headlines?
3. When using terms such as “pre-approved” or “guaranteed,” do the promotional materials and/or customer agreements and disclosures used by the bank clearly disclose any limitations, conditions, or restrictions on the offer?
4. Does the bank tailor advertisements, promotional materials, disclosures and scripts to take account of the sophistication and experience of the target audience? Do the promotional materials or customer agreements/disclosures used by the bank make claims, representations or statements that may mislead members of the target audience about the cost, value, availability, cost savings, benefits, or terms of the product or service?

5. Does the bank ensure that costs and benefits of optional or related products and services, such as overdraft protection, are not misrepresented or presented in an incomplete manner?
6. Does the bank avoid advertising terms that are not available to most customers and using unrepresentative examples in advertising, marketing, and promotional materials?
7. Do the promotional materials or customer agreements/disclosures used by the bank clearly disclose a telephone number or mailing address (and, as an addition, an email or website address if available) that consumers may use to contact the bank or its third-party servicers regarding any complaints they may have, and maintain appropriate procedures for resolving complaints?

### Repricing and Other Changes in Terms

The terms and conditions governing many credit and deposit products provide for periodic adjustments tied to an external variable such as changes in a defined prime rate or the London Inter Bank Offering Rate (LIBOR). Many of the terms governing credit cards may be changed automatically following the occurrence of a specified event. Such events may include an increase in the interest rate upon the consumer’s delinquency with either the credit card issuer or other creditor, or upon fifteen-day written notice to the consumer. The terms and notices given to consumers should be meaningful and easy to understand.

*Examiners should use representative samples of customer notification forms, periodic statements, telephone scripts, and any related print or electronic materials, together with repricing and other change-in-terms policies or procedures and associated employee instructions and policy manuals, as well as discussions with appropriate bank personnel, to obtain responses to the following questions:*

1. Do credit agreements clearly disclose that the bank or subsidiary may unilaterally make future changes to the rate or other terms and conditions? Do those disclosures clearly explain the circumstances under which such changes may be made, such as a delinquency with the creditor or with any other creditor, on the credit line or with any other credit and the nature and potential range of such changes?
2. Does the bank or subsidiary have policies and procedures to ensure the reasonable and clear disclosure of post-origination changes?

### Servicing and Collections

Servicing practices have a noteworthy capacity to be unfair, as do a number of collection practices. These activities are often conducted by bank subsidiaries and third-party contractors, in which case examiners should review these activities both in light of the questions below as well as those found under “Monitoring the Conduct of Employees and Third Parties.”

*Examiners should use servicing and collection policies, telephone scripts, training and compliance manuals, as well as periodic statements and payment histories, in addition to discussions with appropriate bank personnel, to determine:*

1. Does the bank charge customers for products or services they did not bargain for, like various credit protection programs or insurance?
2. Are the amounts due stated and any associated fees or charges on the periodic billing statements accurately and clearly disclosed?
3. Does the bank ensure that the institution and its third party servicers have and follow procedures to credit consumer payments in a timely manner? Consumers should be clearly told when and if monthly payments are applied to fees, penalties, or other charges before being applied to regular principal and interest.
4. Does the bank promptly post payments upon receipt?
5. Does the bank mail periodic statements in a manner calculated to increase late payments?
6. Does the bank structure the product to trigger multiple charges or fees for late payment or exceeding the credit limit?
7. If the bank uses an automated call answering service for billing questions, is there a mechanism to obtain a human representative for questions that are unanswered or have not been resolved?
8. Does the bank continue to contact consumers at work after being advised not to do so?
9. Does the bank disclose the consumers' debt to third-parties without the consumer's consent? Does the bank discontinue calls to third-parties once they have notified the institution that they do not have any location information about the consumer?
10. Does the bank make repeated telephone calls to consumers and/or third parties with the intent to annoy, abuse, or harass any person at the number called?

### **Monitoring the Conduct of Employees and Third-Parties**

Banks should have procedures in place to assure that their employees and third-party contractors, as well as other individuals and entities with whom they do business, avoid engaging in unfair or deceptive acts or practices. Examiners should evaluate how the bank monitors the activities of third-party contractors, vendors and service providers to ensure that they comply with the FTC's prohibition on unfair or deceptive acts.

*Examiners should use training and policy manuals, scripts, oversight and compliance policies, and discussions with appropriate bank personnel, to respond to the following questions:*

1. Does the bank ensure that employees and third parties who market or promote bank products, or service loans, are adequately trained to avoid making statements or taking actions that might be unfair or deceptive?
2. Does the bank review compensation arrangements for bank employees as well as third-party contractors and service providers to ensure that they do not create unintended incentives to engage in unfair or deceptive practices, particularly with respect to loan originations and collections?
3. Has the bank implemented and maintained effective risk and supervisory controls to select and manage third-party contractors or service providers?

### **References**

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*DSC Memorandum 6428, Procedures for Determining Compliance with the Prohibition on Unfair or Deceptive Acts or Practices found in Section 5 of the Federal Trade Commission Act, June 17, 2005*

### **FDIC Consultation Policy**

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*DSC RD Memo 04-17: Consultation Policy and Procedures for Compliance Examination and Community Reinvestment Act Issues*

<http://fdic01/division/dsc/memos/memos/direct/04-017.pdf>

### **Policy Statements and Enforcement Actions Involving Unfair or Deceptive Acts or Practices**

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*FTC Policy Statement on Unfairness,*  
<http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>

*FTC Policy Statement on Deception,*  
<http://www.ftc.gov/bcp/policystmt/ad-decept.htm>

*FIL 57-2002: Guidance on Unfair or Deceptive Acts or Practices*  
<http://www.fdic.gov/news/news/financial/2002/fil0257.html>

*FIL 26-2004: Unfair or Deceptive Acts or Practices by State-Chartered Banks*  
<http://www.fdic.gov/news/news/financial/2004/fil2604.html>

*OCC Advisory Letter 2002-3: Guidance on Unfair or Deceptive Acts or Practices,*  
<http://www.occ.treas.gov/ftp/advisory/2002-3.txt>

*OCC Unfair and Deceptive Enforcement Actions*  
<http://www.occ.treas.gov/Consumer/Unfair.htm>

*FTC's Subprime Lending Cases*  
<http://www.ftc.gov/opa/2002/07/subprimelendingcases.htm>