

San Francisco Region Bankers' Forum: Consumer Protection Hot Topics

The Development and Launch of A New
Banking Product: *A UDAP Primer*

May 29, 2014



Agenda

- Opening Comments
- UDAP: The Basics
- The Development Phase
- Ad Substantiation
- Managing and Monitoring Third Parties
- UDAP and Adequacy of Disclosures
- Best Practices (and Reminders)
- Questions and Answers

What is UDAP?

- Section 5 of the Federal Trade Commission Act
- Unfair OR Deceptive Acts or Practices are illegal

Unfairness

Three requirements must be met:

- The act or practice must cause, or is likely to cause, substantial injury to consumers
- The injury is not reasonably avoidable by the consumer
- The act or practice is not outweighed by countervailing benefits to consumers or to competition

Helpful Acronym

Unfairness: I – N – N

- **I** Injury
- **N** NOT reasonably avoidable
- **N** NOT outweighed by countervailing benefits

Deception

Three requirements must be met:

- A representation, omission or practice that misleads, *or is likely to mislead*, the consumer
- The act or practice must be considered from the perspective of the reasonable consumer
- The representation, omission or practice must be **MATERIAL**

Helpful Acronym

Deception: **M – R – M**

- **M** Misleading
- **R** Reasonable Consumer
- **M** Materiality

A Few Additional Points on the Basics

- A finding of intent is not necessary
- The “net impression” is critical
- For deception, a showing of actual injury is not required

The Development Phase

The important point to remember:

*Section 5 applies to the entire lifecycle
of a product or service*

The Development Phase (cont.)

UDAP applies to all:

- Banking Products and Services
- Media
- Methods of Marketing

The Development Phase (cont.)

- Focus Groups
- Copy Tests
- Pilot Studies
- Test Marketing

The Development Phase (cont.)

Determine What Claims Are Being Made:

- Express Claims
- Implied Claims

Puffery

- What it is?
- Can it result in a UDAP violation?

Ambiguous Claims

- What are ambiguous claims?
- How does UDAP apply to ambiguous claims?

Ad Substantiation

- Required for all claims and representations
- The bank must have substantiation *before* the claim or representation is first made
- A Section 5 violation occurs if the substantiation is insufficient or inadequate
- A Section 5 violation occurs if the bank failed to have substantiation *prior to the time* it disseminates the claim or representation

Ad Substantiation: How Much Does The Bank Need?

Factors to consider in determining what a “reasonable basis” is:

- Type of claim
- Benefit if the claim is true
- Consequences if the claim is false
- Ease and cost of developing substantiation for the claim
- Type of product
- Level of substantiation experts in the field would agree is appropriate

Ad Substantiation: Some Additional Rules

- Ambiguous Claims
- Establishment Claims

Managing and Monitoring Third Parties

- Purchasing a new product from a third-party vendor
- Using a third party to administer or service a new product
- Using other third parties to develop a new product

Third-Party Management Program

- Risk Assessment
- Due Diligence
- Contract Structuring and Review
- Oversight

UDAP and Adequacy of Disclosures

Introduction to our discussion
on disclosures

The Four “P”s

- Prominence
- Presentation
- Placement
- Proximity

“.com Disclosures”

- Do NOT use small font to hide costs, critical terms or conditions
- Do NOT use hyperlinks or pop-up windows to display key information
- Do NOT bury information at the end of a long webpage
- Do NOT use a fast moving “scroll” on websites

Best Practices (and Reminders)

Internal Review and Oversight

Best Practices (and Reminders)

Compensation Concerns

Best Practices (and Reminders)

- Monitor consumer “reactions” to the new product or service
- Analyze, react and respond to consumer complaints

Questions and Answers

Press *1

or email

SFConsumerProtection@fdic.gov



Resources

FDIC's UDAP Examination Procedures

<https://www.fdic.gov/regulations/compliance/manual/pdf/VII-1.1.pdf>

FTC Policy Statements on Basic UDAP Principles

- <http://www.ftc.gov/ftc-policy-statement-on-unfairness> (unfairness)
- <http://www.ftc.gov/ftc-policy-statement-on-deception> (deception)
- <http://www.ftc.gov/ftc-policy-statement-regarding-advertising-substantiation>
(ad substantiation)

Resources (cont.)

Third-Party Oversight

- Financial Institution Letter-44-2008: Guidance for Managing Third-Party Risk
<http://www.fdic.gov/news/news/financial/2008/fil08044.html>

Disclosures for Digital Advertising

- .com Disclosures: How to Make Effective Disclosures in Digital Advertising
<http://www.ftc.gov/os/2013/03/130312dotcomdisclosures.pdf>

Social Media

- FFIEC -- Social Media: Consumer Compliance Risk Management Guidance
<https://www.ffiec.gov/press/pr121113.htm>



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