

San Francisco Region Bankers' Forum: Consumer Protection Hot Topics

June 25, 2012

Agenda

- Opening Comments
 - Regional Director Stan Ivie
- Fair Lending
 - Fair Lending Examination Specialist Lorrie Wang
- Unfair or Deceptive Acts or Practices (UDAP)
 - UDAP Examination Specialist Heather Smedra
- Overdraft Payment Programs
 - Compliance Examiner Karen Kopczak
- Question and Answers

Fair Lending

Lorrie Wang

Fair Lending Exam Specialist

What is fair lending?

Equal Credit Opportunity Act (Regulation B): Prohibits discrimination in any aspect of a credit transaction.	Fair Housing Act (HUD's 24 CFR Part 100): Prohibits discrimination in all aspects of "residential real- estate related transactions."	Law
<ul style="list-style-type: none">• Race• Color• National origin• Religion• Sex• Marital status• Age (provided the applicant has the capacity to contract)• The applicant's receipt of income derived from any public assistance program• The applicant's exercise, in good faith, of any right under the Consumer Credit Protection Act	<ul style="list-style-type: none">• Race• Color• National origin• Religion• Sex• Familial status (defined as children under the age of 18 living with a parent or legal custodian, pregnant women, and people securing custody of children under 18)• Handicap	Prohibited Bases

Trends in Examination Findings

- Disparate impact in pricing :
 - Mortgage (national origin, race)
 - Unsecured consumer lending (national origin)
- To limit pricing risk:
 - Establish clear pricing guidance
 - Rate sheets, exception policy, etc.
 - Monitor for exceptions and areas with discretion
 - Consider testing transactions to detect any differences in treatment

Trends in Examination Findings

- Disparate treatment in underwriting
 - Credit scoring models (age, gender)
 - Credit card lending (age)
 - Spousal signatures (marital status)
- To limit disparate treatment risk:
 - Consider fair lending risk during product development and when changing procedures
 - Establish underwriting guidelines
 - Provide training on guidelines
 - Monitor for adherence and areas with discretion

Trends in Examination Findings

- Discouragement in marketing
 - Credit card lending (age)
 - Advertising practices that target specific segments of the community (race, gender)
- To limit marketing risk:
 - Review marketing/advertising campaigns for compliance with applicable consumer protection laws and regulations
 - Consider the fair lending implications of the bank's marketing program

What's Next

- Underwriting
- Loss mitigation
- Redlining
- Steering

Redlining

- Unequal access to credit or unequal terms of credit based on prohibited basis characteristic(s) of the residents of the area in which:
 - the credit seeker resides, or
 - the residential property to be mortgaged is located
- To limit redlining risk:
 - Ensure marketing, branching, and lending activities support equal access to credit
 - Consider “gaps” that may result from branching, merger, and/or acquisition activity
 - Analyze areas with no lending activity to identify any prohibited basis characteristic(s) and potential lending opportunities

Steering

- Lending channel and product placement based on:
 - Prohibited basis (national origin, race, religion, gender, etc.)
→ steering
 - Placement based on applicant's needs or other legitimate factors → okay
- Not necessary to demonstrate financial harm
- To limit steering risk:
 - Ensure all options are communicated to eligible applicants
 - Adopt guidelines for product placement based on legitimate credit factors
 - Document referral decisions
 - Ensure loan officer compensation is not tied to lending channel or product placement

What can you do?

- Understand your credit operations
 - Relationships with third parties
 - Brokers
 - Dealers
 - Servicers
 - Collectors
 - Others
 - Perform periodic risk assessments
 - Proactively identify and mitigate fair lending risk
 - Frequency should be based on institution needs

What can you do?

- FFIEC Fair Lending Examination Procedures
 - List of discrimination risk indicators
 - Types of analyses that may be performed
 - Compliance Management Checklist

What can you do?

Incorporate fair lending into your compliance management system

- Program
 - Formalize policies, procedures, and written guidelines where possible
 - Fully investigate consumer complaints alleging discrimination
- Audit
 - Consider whether your institution would benefit from a fair lending review
- Oversight

Unfair or Deceptive Acts or Practices

Heather Smedra
UDAP Exam Specialist

What is UDAP?

- Unfair or Deceptive Acts or Practices (Section 5 of the FTC Act)
- Two separate tests:
 1. Unfair
 2. Deceptive

Unfair Acts or Practices

- The act or practice must cause or be likely to cause substantial injury to consumers.
- Consumers must not be reasonably able to avoid the injury.
- The injury must not be outweighed by countervailing benefits to consumers or to the competition.

*Note: Public policy may also be considered under the unfairness test.

Deceptive Acts or Practices

- There must be 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.

The New Abusive Standard

Under the Dodd-Frank Act, the CFPB has the power to declare an act or practice abusive if it:

- (1) materially interferes with the ability of the consumer to understand a term or condition of a consumer financial product or service, or
- (2) takes unreasonable advantage on the part of the consumer of the material risks, costs, or conditions of the product or service; the inability of the consumer to protect his or her interests in selecting or using the financial product or service; or the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.

UDAP Risks with Prepaid Cards

- Three areas to pay close attention to:
 1. Fees
 2. Features
 3. Marketing

Regulation E UDAP Risks

- Overdraft Payment Practices
 - Aggressive Marketing Campaigns
 - Steering
- Error Resolution Procedures
 - Requiring consumers to complete additional steps before investigating errors

Advertising UDAP Risks

- Misleading/Inaccurate Statements
- Incomplete or Omitted Information
- Consider the 4 P's
 - Prominence
 - Presentation
 - Placement
 - Proximity

Third Party Oversight and UDAP

- A bank's responsibility for third-party activity is the SAME as an activity handled directly by the bank.
- Effective third-party management programs incorporate:
 1. Risk Assessment
 2. Due Diligence
 3. Contract Structuring and Review
 4. Oversight

What Can You Do?

- Oversee the products and services offered by the institution
- Provide training to applicable personnel
- Conduct periodic monitoring
- Include higher risk products in scope of internal or external audits
- Review consumer complaints and questions

Overdraft Payment Programs

Karen Kopczak
Compliance Examiner

What is an Overdraft?

- Customer initiates withdrawal activity that is not covered by their available funds on deposits in that account
 - Check or other negotiable instrument
 - ACH – recurring or one-time
 - ATM
 - Debit card – recurring or one-time POS transaction

What is an Overdraft Program?

- Types of programs:
 - Automatic transfer of customer funds from another deposit account
 - Automatic transfer from a customer line of credit
 - Bank covers overdraft from the bank's own funds.
 - Ad hoc manual decisions made by bank staff, or
 - Automated credit decision systems (often provided by a third-party vendor)

Coverage of Rules and Guidance

- Distinction between program types is critical
- Guidance & Rules that apply to all three scenarios:
 - 2005 Joint Guidance (FIL-11-2005)
 - Regulation DD requirements (Section 230.11(c))
- Rules that apply only to ad hoc and automated programs:
 - Regulation E overdraft requirements
 - Only for ATM or one-time POS transactions
 - Regulation DD requirements (Section 230.11(a))
- Guidance focused on automated programs:
 - FDIC's Overdraft Payment Program Guidance (FIL-81-2010)

Joint Agency Guidance Overdraft Protection Programs

- FIL-11-2005, dated 2/18/2005
- Coverage – **all** overdraft programs
- Discusses:
 - Potential concerns of regulatory agencies
 - Risk management considerations
 - Compliance with all federal and state laws
 - Best practices

Final FDIC Overdraft Supervisory Guidance

- FIL-81-2010, dated 11/24/2010
- Reaffirms existing guidance
- Focuses on risks posed by *automated* overdraft payment and excessive use

Highlights of Supervisory Guidance

- Monitor Accounts
- Meaningful and Effective Follow-Up
- Fee Limits
- Neutral Transaction Processing Order
- Opt-In Requirement
 - Opt-out recommended for transactions not covered by Regulation E

Applicable Laws and Regulations

- Truth in Savings & Regulation DD
- Truth in Lending & Regulation Z
- Electronic Fund Transfer Act & Regulation E
- Section 5 of the FTC Act (UDAP) & Regulation AA
- Equal Credit Opportunity Act & Regulation B
- Community Reinvestment Act
- Privacy

Question and Answers

Press *1

or email

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Fair Lending References

- Fair Lending Examination Procedures
<http://www.ffiec.gov/PDF/fairlend.pdf>
<http://www.ffiec.gov/PDF/fairappx.pdf>
- Policy Statement on Discrimination in Lending
<http://www.fdic.gov/regulations/laws/rules/5000-3860.html>
- DOJ Fair Lending Cases
<http://www.justice.gov/crt/about/hce/caselist.php#lending>
- FDIC Teleconference on Conducting a Fair Lending Risk Assessment
<http://www.fdic.gov/news/news/financial/2008/fil08148a.pdf>

UDAP References

- UDAP Financial Institution Letters

<http://www.fdic.gov/news/news/financial/2002/fil0257.html>

<http://www.fdic.gov/news/news/financial/2004/fil2604.html>

- FDIC's UDAP Examination Procedures

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

- FTC Websites

<http://www.ftc.gov/>

<http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>

<http://www.ftc.gov/bcp/policystmt/ad-decept.htm>

UDAP References (cont.)

- FTC's Dot Com Disclosures: Information About Online Advertising

<http://business.ftc.gov/sites/default/files/pdf/bus41-dot-com-disclosures-information-about-online-advertising.pdf>

- FDIC Supervisory Insight Articles

From the Examiner's Desk: Unfair and Deceptive Acts and Practices: Recent FDIC Experience (Winter 2008)

http://www.fdic.gov/regulations/examinations/supervisory/insights/siwin08/unfair_acts.html

Chasing the Asterisk: A Field Guide to Caveats, Exceptions, Material Misrepresentations, and Other Unfair or Deceptive Acts or Practices (Winter 2006)

http://www.fdic.gov/regulations/examinations/supervisory/insights/siwin06/article02_chasing.html

Overdraft Program References

- Financial Institution Letters
 - *Overdraft Protection Programs Joint Agency Guidance (FIL-11-2005)*
<http://www.fdic.gov/news/news/financial/2005/fil105.html>
 - *Overdraft Payment Programs and Consumer Protection: Final Overdraft Payment Supervisory Guidance (FIL-81-2010)*
<http://www.fdic.gov/news/news/financial/2010/fil10081.html>
- FDIC Overdraft Payment Program Supervisory Guidance FAQs
<http://www.fdic.gov/news/conference/overdraft/FAQ.html>
- FDIC's Overdraft Payment Programs Exam Procedures
<http://www.fdic.gov/regulations/compliance/manual/pdf/V-13.1.pdf>

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