Federal Trade Commission Act, Section 5 Unfair or Deceptive Acts or Practices

Introduction

Advances in banking technology and changes in lending organization structure since Gramm-Leach-Bliley have permitted institutions to engage in non-banking activities and given banking organizations the ability to structure financial products in increasingly complex ways and to market such products with increasingly sophisticated methods. While most banking organizations do not engage in unfair or deceptive acts or practices (UDAPs), the pace and complexity of these advances heighten the potential risk for consumer harm. This potential risk, coupled with identified abusive practices, warrants increased scrutiny by the FDIC and state and federal enforcement agencies. UDAPs are illegal; can cause significant financial injury to consumers; erode consumer confidence; and present significant credit and asset quality risks, undermining the financial soundness of banking organizations.

Section 5 of the Federal Trade Commission Act (FTC Act) declares that UDAPs affecting commerce are illegal. *See* 15 USC § 45(a) (Section 5 FTC Act). The banking agencies[1] have authority to enforce Section 5 of the FTC Act for the institutions they supervise. The FDIC has provided notice to state nonmember institutions of its intent to cite them and their institution affiliated parties for violations of Section 5 FTC Act and of its intent to take appropriate action pursuant to its authority under Section 8 of the Federal Deposit Insurance Act (FDI Act) when a UDAP is discovered.[2] The FTC has authority to take action against nonbanks that engage in a UDAP. If a UDAP involves an entity or entities over which more than one agency has enforcement authority such as, for example, the FDIC and the FTC, the agencies may coordinate their enforcement actions. Unlike many consumer protection laws, Section 5 of the FTC Act also applies to transactions with non-consumers and businesses.[3]

On March 11, 2004, the FDIC and the Board of Governors of the Federal Reserve System (FRB) issued additional guidance regarding UDAPs prohibited by Section 5 of the FTC Act.[4] Following the release of the guidance, the FDIC issued a revised consultation policy which requires examiners to consult with the Regional and Washington Offices whenever they consider a situation that may be a UDAP violation.

These examination procedures include:

- Standards used to assess whether an act or practice is unfair or deceptive
- Interplay between the FTC Act and other consumer protection statutes
- Examination procedures for determining compliance with the FTC Act standards, including risk assessment procedures that should be followed to determine if transaction testing is warranted
- Consultation procedures
- Best practices for documenting a case
- Corrective actions that should be considered for violations of Section 5
- List of resources

NOTE: In August 2014, the FDIC, FRB, CFPB, the National Credit Union Administration (NCUA), and the Office of the Comptroller of the Currency (OCC) (collectively, the Agencies) issued guidance regarding certain consumer credit practices as they relate to Section 5 of the FTC Act. The authority to issue credit practices rules under Section 5 of the FTC Act (e.g., Regulation AA, Credit Practices Rule) for banks, savings associations, and federal credit unions was repealed as a consequence of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).

Notwithstanding the repeal of such authority, the guidance indicated that the Agencies continue to have supervisory and enforcement authority regarding unfair or deceptive acts or practices, which could include those practices previously addressed in the former credit practices rules. Such practices included: (1) the use of certain provisions in consumer credit contracts, (2) the misrepresentation of the nature or extent of cosigner liability, and (3) the pyramiding of late fees.

The guidance clarifies that institutions should not construe the repeal of these rules to indicate that the unfair or deceptive practices described in these former regulations are permissible. The guidance makes clear that these practices remain subject to Section 5 of the Federal Trade Commission (FTC) Act and Sections 1031 and 1036 of the Dodd-Frank Act.

Standards for Determining What is Unfair or Deceptive

The legal standard for unfairness is independent of the legal standard for deception. Depending on the facts, an act or practice may be unfair, deceptive, both, or neither.

In order to determine whether an act or practice is "unfair," the FDIC will consider whether the practice "causes or is likely to

1 Federal Deposit Insurance Corporation, Federal Reserve Board, Office of the Comptroller of the Currency and Office of Thrift Supervision.

2 See FIL-57-2002, Unfair or Deceptive Acts or Practices: Applicability of the Federal Trade Commission Act (May 30, 2002).

3 *FTC v. IFC Credit Corp.*, 543 F. Supp. 2d 925, 943 (2008): "The FTC has construed the term 'consumer' to include businesses as well as individuals. Deference must be given to the interpretation of the agency charged by Congress with the statute's implementation."

4 See FIL-26-2004, Unfair or Deceptive Acts or Practices Under Section 5 of the Federal Trade Commission Act (March 11, 2004).

cause substantial injury to consumers which cannot be reasonably avoided by consumers themselves and are not outweighed by countervailing benefits to consumers or to competition."[5] Section 5 of the FTC Act also applies to commercial transactions and businesses. In applying these statutory factors, the FDIC will identify and take action whenever it finds conduct that is unfair, as such conduct that falls well below the high standards of business practice expected of banks and the parties affiliated with them.

To correct deceptive trade practices, the FDIC will take action against representations, omissions, or practices that are likely to mislead consumers acting reasonably under the circumstances, and are likely to cause such consumers harm. The FDIC will focus on material misrepresentations or omissions, that is, those that affect choices made by consumers because such misrepresentations are most likely to cause consumers financial harm.[6]

UDAPs that violate the FTC Act may also violate other federal or state laws. However, practices that fully comply with consumer protection or other laws may still violate the FTC Act. For additional information, please refer to the "Relationship to Other Laws" section further in this document.

Unfair Acts or Practices

The FDIC applies the same standards as the FTC in determining whether an act or practice is unfair. These standards were first stated in the FTC Policy Statement on Unfairness. Under the FTC Policy Statement on Unfairness, an act or practice is unfair when it (1) causes or is likely to cause substantial injury (usually monetary) to consumers, (2) cannot be reasonably avoided by consumers, and (3) is not outweighed by countervailing benefits to consumers or to competition. Public policy may also be considered in the analysis of whether a particular act or practice is unfair. All three of the elements necessary to establish unfairness are discussed further below.

- ***The act or practice must cause or be likely to cause substantial injury to consumers.***
  Substantial injury usually involves monetary harm, but can also include reputational harm. An act or practice that causes a small amount of harm to a large number of people may be deemed to cause substantial injury.

  An injury may be substantial if it raises significant risk of concrete harm. Trivial or merely speculative harms are typically insufficient for a finding of substantial injury. Emotional impact and other more subjective types of harm will not ordinarily make a practice unfair.

- ***Consumers must not be reasonably able to avoid the injury.***
  An act or practice is not considered unfair if consumers may reasonably avoid injury. Consumers cannot reasonably avoid injury from an act or practice if it interferes with their ability to effectively make decisions or to take action to avoid injury. This may occur if material information about a product, such as pricing, is modified or withheld until after the consumer has committed to purchasing the product, so that the consumer cannot reasonably avoid the injury. It also may occur where testing reveals that disclosures do not effectively explain an act or practice to consumers.[7] A practice may also be unfair where consumers are subject to undue influence or are coerced into purchasing unwanted products or services.

  Because consumers should be able to survey the available alternatives, choose those that are most desirable, and avoid those that are inadequate or unsatisfactory, the question is whether an act or practice unreasonably impairs the consumer's ability to make an informed decision, not whether the consumer could have made a wiser decision. The FDIC will not second-guess the wisdom of particular consumer decisions. Instead, the FDIC will consider whether an institution's behavior unreasonably creates an obstacle that impairs the free exercise of consumer decision-making.

  The actions that a consumer is expected to take to avoid injury must be reasonable. While a consumer may avoid harm by hiring independent experts to test products in advance or bring legal claims for damages, these actions generally would be too expensive to be practical for individual consumers and, therefore, are not reasonable.

- ***The injury must not be outweighed by countervailing benefits to consumers or to competition.***
  To be unfair, the act or practice must be injurious in its net effects — that is, the injury must not be outweighed by any offsetting consumer or competitive benefits that are also produced by the act or practice. Offsetting consumer or competitive benefits may include lower prices or a wider availability of products and services. Nonetheless, both consumers and competition benefit from preventing unfair acts or practices because prices are likely to better reflect actual transaction costs, and merchants who do not rely on unfair acts or practices are no longer required to

5 See FTC Policy Statement on Unfairness (December 19, 1980).

6 See FTC Policy Statement on Deceptive Acts and Practices (October 14, 1983).

7 The FRB's testing of certain disclosures concluded that consumers cannot reasonably avoid certain payment allocation and billing practices because disclosures fail to adequately explain these practices. The FTC discusses potential ways to make electronic disclosures clear and understandable in its "Dot Com Disclosures: How to Make Effective Disclosures in Digital Advertising" (March 2013), available at https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf.

compete with those who do. Unfair acts or practices injure both consumers and competitors because consumers who would otherwise have selected a competitor's product are wrongly diverted by the unfair act or practice.

Costs that would be incurred for remedies or measures to prevent the injury are also taken into account in determining whether an act or practice is unfair. These costs may include the costs to the institution in taking preventive measures and the costs to society as a whole of any increased burden and similar matters.

Public Policy May be Considered

Public policy, as established by statute, regulation, judicial decision, or agency determination may be considered with all other evidence in determining whether an act or practice is unfair. Public policy considerations by themselves, however, will not serve as the primary basis for determining that an act or practice is unfair. For example, the fact that a particular lending practice violates a state law or a banking regulation may be considered as evidence in determining whether the act or practice is unfair. Conversely, the fact that a particular practice is permitted by statute or regulation may be considered as evidence that the practice is not unfair. However, the fact that a statute or regulation recognizes the existence of a practice does not establish its fairness. The requirements of the Truth in Lending Act (TILA), the Truth in Savings Act (TISA), the Fair Credit Reporting Act (FCRA), or the Fair Debt Collection Practices Act (FDCPA) are examples of public policy considerations. Fiduciary responsibilities under state law may clarify public policy for actions, especially those involving trusts, guardianships, unsophisticated consumers, the elderly, or minors. State statutes and regulations that prohibit UDAPs are often aimed at making sure that lenders do not exploit the lack of access to mainstream banking institutions by low-income individuals, the elderly, and minorities.

Deceptive Acts or Practices

A three-part test is used to determine whether a representation, omission, or practice is deceptive. First, the representation, omission, or practice must mislead or be likely to mislead the consumer. Second, the consumer's interpretation of the representation, omission, or practice must be reasonable under the circumstances. Third, the misleading representation, omission, or practice must be material.[8] As a general matter, the standards for establishing deception are less burdensome than the standards for establishing unfairness because, under deception, there is no requirement that the injury could not be reasonably avoidable or that the injury be weighed against benefits to consumers or to competition. All three of the elements necessary to establish deception are discussed below.

- ***There must be a representation, omission, or practice that misleads or is likely to mislead the consumer.***
  An act or practice may be found to be deceptive if there is a representation, omission, or practice that misleads or is likely to mislead a consumer. Deception is not limited to situations in which a consumer has already been misled. Instead, an act or practice may be found to be deceptive if it is *likely to mislead* consumers. A representation may be in the form of express or implied claims or promises and may be written or oral. Omission of information may be deceptive if disclosure of the omitted information is necessary to prevent a consumer from being misled. An individual statement, representation, or omission is not evaluated in isolation to determine if it is misleading, but rather in the context of the entire advertisement, transaction, or course of dealing. Acts or practices that have the potential to be deceptive include: making misleading cost or price claims; using bait-and-switch techniques; offering to provide a product or service that is not in fact available; omitting material limitations or conditions from an offer; selling a product unfit for the purposes for which it is sold; and failing to provide promised services.
- ***The act or practice must be considered from the perspective of the reasonable consumer.***
  In determining whether an act or practice is misleading, the consumer's interpretation of or reaction to the representation, omission, or practice must be reasonable under the circumstances. In other words, whether an act or practice is deceptive depends on how a reasonable member of the target audience would interpret the marketing material. When representations or marketing practices are targeted to a specific audience, such as the elderly or the financially unsophisticated, the communication is reviewed from the point of view of 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.

  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 are generally insufficient to cure a misleading headline or prominent written representation. Finally, a deceptive act

8 See FTC Act Policy Statement on Deceptive Acts and Practices.

or practice cannot be cured by subsequent truthful disclosures.[9]

- ***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 to purchase or use 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. While intent to deceive is not a required element of proving that an act or practice is deceptive, the materiality of an implied claim will be presumed if it can be shown that the institution intended that the consumer draw certain conclusions based upon the claim.

  Claims made with 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 make an informed choice about the product or service.

The Role of Consumer Complaints in Identifying Unfair or Deceptive Acts or Practices

Consumer complaints play a key role in the detection of a UDAP. Consumer complaints have often been an essential source of information for possible UDAPs and can also be an indicator of weaknesses in elements of the institution's compliance management system, such as training, internal controls, or monitoring.

While the absence of complaints does not ensure that UDAPs are not occurring, the presence of complaints may be a red flag indicating that a more detailed review is warranted. This is especially the case when similar complaints are received from several consumers regarding the same product or service. One of the three tests in evaluating an apparent deceptive practice is: "The act or practice must be considered from the perspective of the reasonable consumer." Consumer complaints provide a window into the perspective of the reasonable consumer.

Complaint Resolution Procedures

Examiners should interview institution staff about consumer complaints and the institution's procedures for resolving and monitoring consumer complaints. Examiners should determine whether management has responded promptly and appropriately to consumer complaints. The FDIC expects institutions to be proactive in resolving consumer complaints, as well as monitoring complaints for trends that indicate potential UDAP concerns. Institutions should centralize consumer complaint handling and ensure that all complaints are captured, whether they are made via telephone, mail, email, the institution's regulator, or other methods. In addition to resolving individual complaints, an institution should take action to improve its business practices and compliance management system, when appropriate. The institution's audit function should also include a review of consumer complaints.

Sources for Identifying Complaints

Consumer complaints can originate from many different sources. The primary sources for complaints are those received directly by the institution and those received by the FDIC Consumer Response Center. Secondary sources for complaints would include State Attorneys General, the Better Business Bureau, the FTC's Consumer Sentinel database, consumer complaint boards, and web blogs. In many cases, complaints have been identified through simple Internet searches with the institution's name or particular product or service that it offers. At times, former employees may post complaints. These can be an important information source. For institutions that have significant third-party relationships, complaints may have been directed to the third-party, rather than to the institution. Examiners should determine if the institution is provided with copies of complaints received by third-parties. If they are not, this would be a red flag and should be examined further.

Analyzing Complaints

Examiners should consider conducting transaction testing when consumers repeatedly complain about an institution's product or service. However, even a single complaint may raise valid concerns that would warrant transaction testing. Complaints that allege misleading or false statements, missing disclosure information, excessive fees, inability to reach customer service, or previously undisclosed charges may indicate a possible UDAP.[10]

If a large volume of complaints exists, examiners should create a spreadsheet that details the complainant, date, source (i.e., institution, website, etc.), product or service involved, summary of the issue, and action taken by the institution. The spreadsheets can then be used to identify trends by type of

9 Clear and Conspicuous Disclosures
When evaluating the three-part test for deception, the four "Ps" should be considered: prominence, presentation, placement, and proximity. First, is the statement prominent enough for the consumer to notice? Second, is the information presented in an easy to understand format that does not contradict other information in the package and at a time when the consumer's attention is not distracted elsewhere? Third, is the placement of the information in a location where consumers can be expected to look or hear? Finally, is the information in close proximity to the claim it qualifies?

10 ***See*** Supervisory Insights FDIC, Supervisory Insights, Winter 2006, Vol. 3, Issue 2, Chasing the Asterisk: A Field Guide to Caveats, Exceptions, Material Misrepresentations, and Other Unfair or Deceptive Acts or Practices.

product or issue. The Consumer Response Center can be of assistance during this process by creating spreadsheets for complaints that were received by the FDIC.

When reviewing complaints, examiners should look for trends. While a large volume of complaints may indicate an area of concern, the number of complaints alone is not dispositive of whether a potential UDAP exists. Conversely, a small number of complaints does not undermine the seriousness of the allegations that are raised. If even a single complaint raises valid concerns relative to a UDAP, a more thorough review may be warranted. It is important to focus on the issues raised in the complaints and the institution's responses, and not just on the number of complaints.

Note also that high rates of chargebacks or refunds regarding a product or service can be indicative of potential UDAP violations. This information may not appear in the consumer complaint process.

When reviewing complaints, also look for any complaints lodged against subsidiaries, affiliates, third-parties, and affinity groups regarding activities that involve the institution, a product offered through the institution, or a product offered using the institution's name. While the institution may not be actively involved in the activity, if it is a branded product or third-party relationship product, the institution can be held responsible and face the same risks as if the activity was housed within the institution. *In re Columbus Bank and Trust Company, First Bank of Delaware, First Bank and Trust (Brookings, South Dakota), and CompuCredit Corporation*[11] is a prime example of where complaints against a third-party directly related to the institutions and the institutions were held accountable for the activities of the third-party.

Relationship to Other Laws

A UDAP that violates the FTC Act may also violate other federal or state laws. These include TILA, TISA, the Equal Credit Opportunity Act (ECOA), the Fair Housing Act (FHA), the FDCPA, the FCRA, and laws related to the privacy of consumer financial information. On the other hand, certain practices may violate the FTC Act while complying with the technical requirements of other consumer protection laws. Examiners should consider both possibilities. The following laws warrant particular attention in this regard:

Truth in Lending Act (TILA)

Pursuant to TILA, creditors must "clearly and conspicuously" disclose the costs and terms of credit. An act or practice that does not comply with these provisions of TILA may also violate the FTC Act. Conversely, a transaction that is in technical compliance with TILA may nevertheless violate the FTC Act. For example, an institution's credit card advertisement may contain all the required TILA disclosures, but limitations or restrictions that are obscured or inadequately disclosed may be considered a UDAP.

Truth in Savings Act (TISA)

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 cannot be misleading or inaccurate or misrepresent an institution's deposit contract. As with TILA, an act or practice that does not comply with these provisions may also violate the FTC Act, but transactions that are in technical compliance with TISA may still be considered as unfair or deceptive. 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, even if the disclosures satisfy the technical requirements of TISA.

Equal Credit Opportunity (ECOA) and Fair Housing (FHA) Acts

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. The 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. UDAPs that target or have a disparate impact on consumers in one of these prohibited basis groups may violate the ECOA or the FHA, as well as the FTC Act. Moreover, some state and local laws address discrimination against additional protected classes, e.g., handicap in non-housing transactions, or sexual orientation. Such conduct may also violate the FTC Act.

Fair Debt Collection Practices Act (FDCPA)

The FDCPA prohibits unfair, deceptive, and abusive practices related to the collection of consumer debts. Although this statute does not apply to institutions that collect their own debts in their own name, failure to adhere to the standards set by this Act may support a claim of a UDAP in violation of the FTC Act. Moreover, institutions 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 participating in or permitting a UDAP.

Fair Credit Reporting Act (FCRA)

The FCRA contains significant responsibilities for institutions that obtain and use information about consumers to determine the consumer's eligibility for products, services, or

11 Available at http://www.fdic.gov.

employment; share such information among affiliates; and furnish information to consumer reporting agencies. The FCRA was substantially amended with the passage of the Fair and Accurate Credit Transactions Act (FACT Act) in 2003, which contained many new consumer disclosure requirements as well as provisions to address identity theft. Violations of the FCRA may also be considered as a UDAP. For example, obtaining and using unsolicited medical information (outside of the exceptions provided by the rule) to make credit decisions may also be considered as unfair.

Privacy of Consumer Financial Information

Section 332.12 prohibits an institution or its affiliates from disclosing a customer's account number or similar access code for a credit card, deposit, or transaction account to a nonaffiliated third party for use in telemarketing, direct mail marketing, or other marketing through electronic mail. There are only three exceptions to this prohibition. A financial institution may disclose its customers' account numbers to: (1) a consumer reporting agency; (2) its agent to market the institution's own products or services, provided that the agent is not authorized to directly initiate charges to the account; or (3) another participant in a private label credit card or an affinity or similar program involving the institution. Depending upon the totality of the circumstances, an institution that does not comply with these requirements may be also engaging in UDAPs.

Examination Procedures

Examination Objectives

1. To assess the quality of the financial institution's compliance risk management systems, internal controls, and policies and procedures for avoiding unfairness and deception.
2. To identify products, services, or activities that materially increase the risk of being unfair or deceptive.
3. To gather facts that help determine whether a financial institution's products, services, programs, or operations are likely to be unfair or deceptive.
4. To consult with the Regional and Washington Offices, as necessary, to determine whether a UDAP has occurred.

General Guidance

During pre-examination planning, examiners should determine if transaction-related testing is warranted for one or more of the institution's products or services. Also, examiners should be alert to possible UDAPs throughout an examination, including when reviewing specific institution products or services for compliance with other consumer compliance regulatory requirements.

The following risk assessment and transaction-related examination procedures should be used, as appropriate, to assist examiners in recognizing potential UDAPs, analyzing potential issues, and determining an appropriate response.

Risk Assessment Procedures

The risk assessment process should begin during the pre-examination planning stage, when the institution is first contacted to discuss the Compliance and Information Document Request (CIDR). The CIDR can then be customized to request information that is needed to determine the institution's risk profile for potential UDAPs.

Institutions warranting transaction testing: Transaction testing is not automatically required when a risk factor is identified because all factors need to be taken into consideration. For example, transaction testing may not be warranted for an institution that offers a rewards checking account program, if the following conditions are present: the product was reviewed at the previous examination, with no deficiencies noted; marketing or terms remain unchanged; complaints do not indicate a UDAP concern; and the institution has strong internal controls, monitoring, and audit functions.

Institutions with limited risk: Many institutions have low risk profiles for potential Section 5 FTC Act violations and would not generally require transaction testing. These include institutions that do not offer products associated with increased incidence of complaints, violations, chargebacks, or risk of consumer harm, have not introduced any new products, and have no consumer complaints (or a limited number that are unrelated to UDAP). However, examiners should be alert to possible UDAPs throughout an examination, including when reviewing specific institution products or services for compliance with other consumer compliance regulatory requirements.

Transaction-Related Examination Procedures

If upon conclusion of the risk assessment procedures, risks requiring further investigation are noted, conduct transaction testing, as necessary. Use examiner judgment in deciding whether to sample individual products, services, or marketing programs. Increase the sample to achieve confidence that all aspects of the financial institution's products and services are reviewed sufficiently.

A Section 5 FTC Act analysis is fact-specific and cannot be based on a particular checklist; however, transaction-related examination procedures fall into the following general categories: marketing and disclosures, availability of credit, availability of advertised terms, repricing and other changes, servicing, and collections.

The following are examples of items that should be reviewed, as applicable:

- Advertisement and marketing documentations

- New product development documentation
- Documentation of software testing
- Procedural manuals, including those for servicing and collections
- Customer disclosures, notices, agreements, and periodic statements for each product and service reviewed
- Account statements
- Agreements with third-parties
- Compensation programs
- Promotional materials
- Telemarketing scripts
- Recorded calls for telemarketing or collections
- Organization charts and process workflows
- Software parameters
- Relevant marketing and advertising materials, including website pages
- Relevant disclosures and customer contracts

Consultations

UDAPs may occur in connection with any financial product, service or activity. In addition, the determination of whether an act or practice violates the FTC Act is fact-specific and determined on a case-by-case basis. Therefore, examiners should follow the outstanding consultation policy which requires Regional and Washington Office consultations except in the case of routine violations that the Washington Office has previously considered and for which clear standards exist. Consultation should be initiated as soon as an examiner finds a situation that may involve a UDAP.

Legal Division (Legal)

Examiners are encouraged to consult with Regional Office Legal as early as possible when potential violations of Section 5 FTC Act are identified. Examiners should follow regional protocol for initiating an informal consultation with their Legal division. Legal can provide valuable assistance to examiners during the onsite examination, including advising examiners on the types of documentation that should be obtained and developing interview questions.

Division of Insurance and Research (DIR)

DIR can provide assistance in conducting an analysis of large amounts of customer data. Examiners should consult with the Regional Office when a determination of whether an act or practice violates the FTC Act involves a review of large amounts of data. The Regional Office will contact the Washington Office to obtain DIR assistance.

Fair Lending Examination Specialist (FLEX)

When potential UDAPs appear to target or have a disparate impact on consumers on a prohibited basis under ECOA or FHA, the examiner should follow regional protocol to request additional guidance from their FLEX. A separate consultation may be warranted for potential discriminatory violations.

Consultation Memorandum

When a consultation is required, the examiner shall prepare a memorandum which summarizes the examination findings. The memorandum should include a summary of how the act or practice meets the tests for unfairness or deception.

For unfairness, the standards require that:

1. The act or practice cause or be likely to cause substantial injury to consumers;
2. Consumers must not reasonably be able to avoid the injury; and
3. The injury must not be outweighed by countervailing benefits to consumers or to competition. Public policy may be considered in making this determination.

For deception, three elements are necessary:

1. A representation, omission, or practice that misleads or is likely to mislead the consumer;
2. The act or practice must be considered from the perspective of the reasonable consumer; and
3. The representation, omission, or practice must be material.

The examiner shall initiate a consultation through SOURCE. The consultation memorandum and supporting documentation shall be attached in SOURCE. The supporting documentation to consultations is typically voluminous. Therefore, the examiner should follow regional guidance as to whether these documents should be attached to the SOURCE-generated email or whether the email should instead include a listing of the applicable items attached in SOURCE. The following guidance should be followed when documenting a case and determining the types of supporting documentation to attach in SOURCE.

Documentation

Documentation of potential UDAP cases is extremely important. The following guidance should be used to facilitate Legal’s review of the case:

1. Create an inventory of documentary evidence gathered and interviews conducted.
2. Create chronologies or charts to explain complex fact patterns.
3. For printed materials (marketing, solicitations, disclosures), an original, unmarked copy should be maintained.
4. For websites, print copies or save the webpages electronically as soon as possible. Websites are easily

altered, so versions of the website that support the case must be preserved by the examiner. When possible, print in color. If they cannot be printed in color, notate the colors used on the website. The printed copy should be formatted such that the following information is included: window title, URL, date, time, page number, total number of pages.
In cases where the website includes links for additional information, notate the page succession. In addition to printing the website, the examiner should attempt to save the webpages electronically. The electronic and print versions can be used in combination to replicate the live website as closely as possible.

5. If consumer complaints are voluminous, create spreadsheets or summaries. Refer to the Analyzing Complaints section for additional guidance.
6. Indicate the type of institution reports that are available. For those documents received, notate why it was obtained, how it was received, when, and from whom.
7. Maintain a final, typed version of the interview notes. All examiners that participated in the interview should review the notes and attest to their accuracy.
8. During the onsite review, the examiner should consider the types of corrective actions that may be pursued. For cases where restitution to consumers may be necessary, the examiner should obtain information needed to identify and estimate restitution.
9. If the potential violation involves an affiliate or third party, obtain the information and documentation needed to determine whether an affiliate is an institution affiliated party (IAP). Refer to the IAP examination procedures for further information and guidance.
10. The following includes a list of other documents that are generally needed:
    - Income reports
    - Third-party contracts
    - Relevant board minutes
    - Relevant audit reports
    - Due diligence records
    - Training materials
    - Telemarketing scripts

Corrective Actions to be Considered for Section 5 FTC Act Violations

As with any violation of law or regulation, the response to a violation of Section 5 FTC Act will depend on a number of factors, including:

- The nature of the violation;
- Whether it is a repeat violation or a variation of a previously cited violation;
- The harm, or potential harm, suffered by consumers;
- The number of parties affected; and
- The institution's overall compliance posture and history, both in general and with respect to UDAP.

Level 3 or Level 2 violations may result in a downgrade of the institution's compliance and CRA ratings and potentially, the institution's risk management rating. In determining the overall CRA rating for an institution, examiners consider evidence of discrimination or other illegal acts, including violations of Section 5 of the FTC Act.

In addition to determining a violation's impact on the institution's compliance and CRA ratings, examiners must consider corrective actions that should be taken. These may include requiring the discontinuance of the act or practice, restitution to consumers, informal or formal enforcement actions, and assessment of a civil money penalty. Examiners should refer to the Formal and Informal Actions Procedures Manual for additional guidance.

Risk Management Considerations

In cases where formal enforcement actions are being considered, the compliance examiner will notify the appropriate Regional Office official. The Regional Office will determine whether Risk Management should also examine the conduct at issue and whether Compliance participation will be necessary in such an examination. The Regional Office will also determine whether a joint enforcement action is appropriate.

List of Resources

This list includes references that are cited in the text, as well as additional resources that may be useful to examiners.

SOURCE

Select individuals within each region have the ability to generate reports of Section 5 FTC Act consultations that have been initiated. Examiners can access consultation documents to learn of additional UDAP examples.

Agency Issuances

- Interagency Guidance Regarding Unfair or Deceptive Credit Practices (FIL 44-2014).
- CFPB: Marketing of Credit Card Add-on Products 2012-06.
- FDIC, *Supervisory Insights, Winter 2008, Vol. 5, Issue 2*, *From the Examiner's Desk: Unfair and Deceptive Acts and Practices: Recent FDIC Experience*
- FDIC, *Supervisory Insights, Winter 2006, Vol. 3, Issue 2*, *Chasing the Asterisk: A Field Guide to Caveats,*

Exceptions, Material Misrepresentations, and Other Unfair or Deceptive Acts or Practices.

- FIL 26-2004: *Unfair or Deceptive Acts or Practices by State-Chartered Banks.*
- FIL 57-2002: *Guidance On Unfair Or Deceptive Acts Or Practices.*
- FTC Policy Statement on Deceptive Acts and Practices.
- FTC Policy Statement on Unfairness.
- FTC's *Dot Com Disclosures: Information about Online Advertising*.
- FTC Public Comment on OTS–2007–0015.
- Joint Guidance on Overdraft Protection Programs, 70 Fed. Reg. 9127 (Feb. 24, 2005).
- OCC Bulletin 2006-34, Gift Card Disclosures (Aug. 14, 2006).
- OCC Advisory Letter 2004-10, Credit Card Practices (Sept. 10, 2004).
- OCC Advisory Letter 2004-4, Secured Credit Cards (Apr. 28, 2004).
- OCC Advisory Letter 2003-3, Avoiding Predatory and Abusive Lending Practices in Brokered and Purchased Loans (Feb. 21, 2003).
- OCC Advisory Letter 2002-3, Guidance on Unfair or Deceptive Acts or Practices (Mar. 22, 2002).
- OCC Advisory Letter 2000-11, Title Loan Programs (Nov. 27, 2000).
- OCC Advisory Letter 2000-10, Payday Lending (Nov. 27, 2000).
- OCC Advisory Letter 2000-7, Abusive Lending Practices (July 25, 2000)

References

FIL-32-2009 Third-Party Referrals Promising Above-Market Rates on Certificates of Deposit

FIL-44-2008 Third-Party Risk: Guidance for Managing Third-Party Risk

FTC Predatory Lending Practices in the Subprime Industry
Policy Statements and Enforcement Actions Involving Unfair or Deceptive Acts or Practices

FIL 57-2002: Guidance on Unfair or Deceptive Acts or Practices

FIL 26-2004: Unfair or Deceptive Acts or Practices by State-Chartered Banks

OCC Advisory Letter 2002-3: Guidance on Unfair or Deceptive Acts or Practices

OCC Unfair and Deceptive Enforcement Actions

FTC's Subprime Lending Cases

FTC Unfair or Deceptive Acts or Practices Enforcement Actions: Mortgage Servicing

FTC Unfair or Deceptive Acts or Practices Enforcement Actions: Collection Practices

OCC Policy Statements and Enforcement Actions Relating to Credit Cards

Other Regulations with Provisions that Relate to Accurate Advertising

12 CFR Part 1026: Regulation Z Truth in Lending

12 CFR Section 1026.16: Open-end advertising

12 CFR Section 1026.24: Closed-end advertising

12 CFR Part 1030: Regulation DD, Truth in Savings Advertising: 12 CFR Section 1030.8

12 CFR Section 1030.11: Additional disclosure requirements for institutions advertising the payment of overdrafts

12 CFR Part 343: Consumer Protection in Sales of Insurance

12 CFR Section 343.40(d): Advertising