



Unfair or Deceptive Acts or Practices

A Refresher for Dodd-Frank Compliance

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You Will Learn



- What types of acts or practices are covered under the pre-Dodd-Frank rules and guidance
- What the Dodd-Frank Act requires
- What the powers of the Consumer Financial Protection Bureau are to enforce the rules
- What the penalties are for non-compliance
- What institutions can do to address compliance goals



UDAP-The Rules



- **Federal Trade Commission Act (the “FTC”)**
 - The primary statutory authority on “Unfair or Deceptive Acts or Practices” (“UDAP”) before Dodd-Frank
 - Prohibits financial institutions and other persons from engaging in acts that are considered “unfair or deceptive”
 - Regulation DD advertising rules
 - Regulation Z advertising rules
 - A general underlying theme among Federal regulations
- **Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”)**
 - Introduced “UDAAP”-”Unfair, Deceptive or Abusive Acts or Practices”



UDAP/UDAAP-More Rules



- “Little FTC Acts” under State law
- When creating your UDAAP policy, focus on
 - Existing agency pronouncements
 - Pronouncements by the Bureau
 - State laws and regulations
 - Consult legal counsel on state law



UDAP-Definitions



- Section 5(a) of the FTC Act
 - Unfair
 - Causes, or is likely to cause, substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition
 - Deceptive
 - Likely to mislead a consumer acting reasonably under the circumstances and is likely to affect a consumer's actions or decision regarding a product or service
- Dodd-Frank Bureau will enforce under UDAAP rules



UDAAP-Definitions



- Unfair, Deceptive or Abusive Acts or Practices (U-D-A-A-P; the extra “A” is for “abusive”)
- Dodd-Frank does not replace existing UDAP under FTC Act
 - Bureau has authority to enforce provisions of FTC Act
- Covered person
 - Any person (and any affiliate of that person if the affiliate acts as a service provider to that person) that engages in offering or providing
 - A financial product or service to consumers
 - Primarily for personal, family, or household purposes
 - Example: Financial institutions that offer or provide consumer loans and deposits, and stored value cards



“Unfair” in UDAAP is same as UDAP



- The act or practice causes or is likely to cause substantial injury to consumers
 - There must be a substantial injury
- The injury must be real
 - Not emotional
 - Not speculative
- Act or practice not considered unfair if consumer can avoid being injured
 - Example: Providing proper disclosures in an advertisement that inform consumers fairly
- Unfair if consumer cannot avoid injury
 - Examples: disclosures withheld material price information until after a consumer agreed to purchase a product or service or disclosures confusing or not clearly legible



“Deceptive” in UDAAP is same as UDAP



- A representation omission or practice is deceptive when:
 - The representation, omission, or practice misleads or will likely mislead the consumer;
 - Example: Institution makes certain claims that are misleading or does not mention some of the negatives associated with a product or service
 - The consumer’s interpretation of the representation, omission, or practice is reasonable under the circumstances;
 - Different groups can have differing definitions of what is reasonable
 - The misleading representation, omission, or practice must be material
 - “Material” if it is likely to affect a consumer’s decision regarding a product or service, such as information about costs, benefits, or restrictions on the use or availability of a product or service



Abusive Standard is New



- Not taking “unreasonable advantage” of the consumer’s understanding (or lack thereof)
 - Institutions put in position of determining how much a consumer understands
 - Legal counsel might address through having consumer sign acknowledgement
 - Puts responsibility back on the consumer to read and understand before signing
- Ensuring the consumer understands the risks, costs or conditions of the product or service
 - Institutions put in the position of determining product “suitability” for each consumer
 - Higher costs of training and compliance; or
 - Just offer generic “plain Jane” products or services
- Not taking “unreasonable advantage” of the “reasonable reliance” by the consumer on the institution, to act in the consumer’s best interests
 - A relationship of trust between the institution and the consumer?
 - Regulation Z prohibits using the term “counselor” in an advertisement
 - Legal counsel might draft consumer acknowledgements and disclaimers



CFPB UDAAP Enforcement Powers



- Joint Investigations with HUD, the U.S. Attorney General, or both
- Issue a Civil Investigative Demand
 - Before any proceedings against an institution
 - Testimony and/or documents
 - Petition the U.S. District Court to enforce Demand, if institution not comply
- Issue subpoenas for documents or testimony for hearing
- Conduct hearings, Cease-and-Desist and adjudication proceedings to penalize and enforce compliance
- Issue Cease-and-Desist orders, and petition the U.S. District Court to enforce
- File civil action against institution within a 3-year period of discovering violation



UDAAP-Penalties



- If Bureau finds UDAAP violation at hearing, it may order
 - Rescission of a contract
 - Monetary refunds or return of real property
 - Restitution
 - Payment of damages
 - Payment of civil money penalties
 - Payment of attorney's fees and costs
 - Public notification regarding the violation (this may affect reputation)
 - Limits on future institutional activities or functions



UDAAP-Regulatory Penalties



- For any violation of a law, rule, or final order or condition imposed in writing by the Bureau, a civil penalty of:
 - Up to \$5,000 for each day during which the violation or failure to pay continues
- For any institution that recklessly engages in a violation of a Federal consumer financial law, a civil penalty of:
 - Up to \$25,000 for each day during which the violation continues.
- For knowingly violating a Federal consumer financial law, a civil penalty of:
 - Up to \$1,000,000 for each day during which the violation continues



UDAAP-Lessening the Penalties



- The Bureau can consider “mitigating factors in determining the amount of any penalty assessed”:
 - The size of financial resources and good faith of the person charged
 - The gravity of the violation or failure to pay
 - The severity of the risks to or losses of the consumer
 - May take into account the number of products or services sold or provided
 - The history of previous violations; and
 - Anything else “as justice may require”
- The Bureau may negotiate and settle with an institution issues of
 - Whether to assess penalties
 - What penalties to assess
 - The dollar amount or extent of any penalties assessed



What To Do, How To Do and How Much?



- Areas of concern:
 - Advertising and solicitation
 - Management and monitoring of employees
 - Management and monitoring of third-party service providers
 - Their acts and practices affect your consumers—if they aren't compliant, neither are you!
 - Their actions may bind you legally and affect your reputation
- No “one size fits all” solution
 - Depends on institution's size, complexity, market composition, and product offerings
- Monitor compliance with your policies and procedures
- Monitor your third party vendors



Advertising and Solicitation Best Practices



- Review all promotional material and disclosures
- Website
- Key terms
- Material limitations or conditions
- Fees, penalties, or other charges
- Changes to agreements
- “Pre-approved,” “guaranteed” or “fixed rates”
- Less favorable terms
- Tailor advertisements to target audience
- Services not intended to be provided
- Optional products
- Amount of credit available
- Unavailable terms
- Paying less than minimum amount due
- Clear and accurate disclosures



UDAAP Violations



- **Credit Cards**

- Cash back rewards program advertises a percentage of cash back on certain purchases; however it is effectively impossible for accountholders to get the stated percentage of cash back reward payments
- Solicitations offer credit cards with a \$300 credit limit; however, consumers are immediately charged up to \$185 in fees, leaving them with as little as \$115 in available credit
- Solicitation fails to disclose that only half of the credit limit would be available for the first 90 days



UDAAP Violations



• Internet Advertising

- Flashing across the screen -"NO COLLECTION CALLS*!" and "NO LATE FEES*!" Although each statement contained an asterisk, there were no explanatory notes on this page.
- Linked to an online application form. At the top of the page -"NO collection calls*" and "NO late fees*" and "NO Nonsense."
- Disclosure hidden by promotional material . "Late fees may apply and you may receive collection calls if payments are past due on your credit account and charges or fees incurred cause your credit account balance to exceed its credit line"



UDAAP Violations



• Deceptive Billing

- Billing statements sent to delinquent credit card holders with prominent message advising that if the consumer paid a specific sum, they could avoid additional fees and further collection efforts.
- Examiners found that the amount stated was the amount past due, not the larger minimum payment amount, and that payment of this amount would result in additional charges as well as continuation of the consumer's delinquent status.
- Directed to immediately terminate this practice and reimburse those consumers who incurred late charges and other fees as a result of this practice.



UDAAP Violations



- Third Party Relationships:

- Bank uses ABC Telemarketing to promote CD Product aimed at seniors
- To increase response, Telemarketers deleted scripted disclosure about balance transfer fee charged
- In addition, they cross-marketed a \$25 membership to a travel club that promises the best rates on airfare



Complaint Red Flags



- Misleading or false statements
- Missing disclosures or information
- Undue or excessive fees
- Inability to reach customer service
- Previously undisclosed charges

UDAAP Considerations



- Consider various stages for review:
 - Product design and development process
 - Preparation of consumer disclosures and documentation
 - Pricing Decisions
 - Marketing and Advertising Review
 - Change in Terms
- Understand Target Market and Reasonable Person
- Watch Competition and Complaints
- **DON'T FORGET ABOUT SOCIAL MEDIA**

UDAAP Best Practices



- Periodically test UDAAP policies to ensure that they are being followed
- Track and monitor exceptions to policies and procedures and do something if high levels of exceptions made
- Follow up to ensure that recommended corrective actions are implemented in every instance
- Ensure marketing & advertising:
 - Has a reasonable factual basis for all representations
 - Considers fair lending & UDAAP implications
 - Reviewed by compliance



Summary and Closing Thoughts



- So now you understand:
 - What types of acts and practices are addressed under the pre-Dodd-Frank rules and guidance
 - What the Dodd-Frank Act requires
 - How the Consumer Financial Protection Bureau can enforce the rules
 - What the penalties are for non-compliance
 - What to do towards meeting compliance objectives

Thank you!