

Unfair, Deceptive, or Abusive Acts or Practices (UDAAP) Webinar 2012

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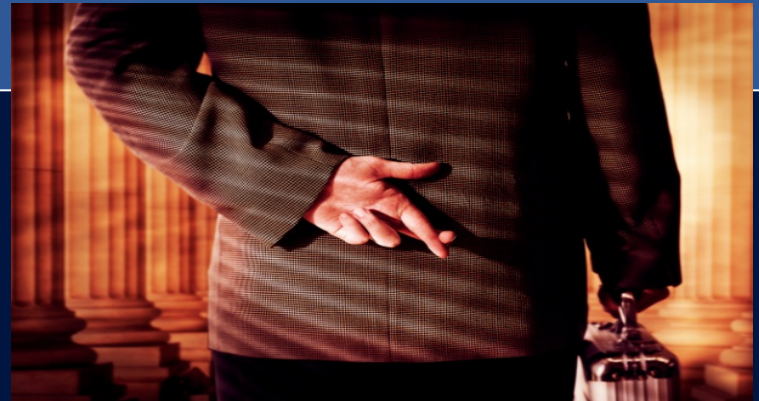
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UDAAP

- Under the Dodd-Frank Act §1026 it is unlawful for any provider of consumer financial products or services or a service provider to engage in any unfair, deceptive, abusive act or practice.
- The Consumer Financial Protection Bureau (CFPB) gained control of the UDAAP in July, 2011.



Legal Framework

The Act also provides CFPB with rule-making authority, and with respect to entities within its jurisdiction, enforcement authority to prevent unfair, deceptive, abusive acts or practices in connection with any transaction with a consumer for any consumer financial product or service. There are also FTC Amendments and Regulation AA including Cosigner Notices; Contractual Provisions and Pyramiding Late Fees.



Making the Rounds

- What is UDAAP?
- Why it's high risk.
- What can you do about it?



The Golden Rule

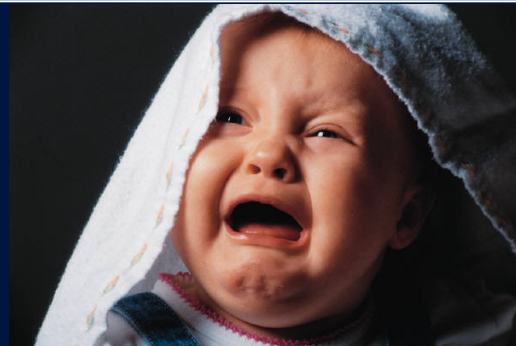
- UDAAP supplements other regulations.
- Is a general catch-all.
- Is the golden rule for all that is good and fair!



What do you mean, Unfair?

The standard for unfairness in the Dodd-Frank Act is that an act or practice is unfair when:

- ✓ It causes or is likely to cause substantial injury to consumers;
- ✓ The injury is not reasonably avoidable by consumers; and
- ✓ The injury is not outweighed by countervailing benefits to consumers or to the competition.



Unfair Defined:

Causes or is likely to cause substantial consumer injury:

- Injury must be substantial and unavoidable;
- Loss of free exercise of decision-making;
- Undue influence.

For example...In certain circumstances, such as unreasonable debt collection harassment, emotional impacts may amount to or contribute to substantial injury.

Unfair Defined:

Injury cannot be reasonably avoided:

- Material information withheld so their choice is not informed;
- Must be coercive or exert undue influence that will unreasonably impair consumer's ability to make an informed decision; Lack of market alternatives and more than the consumer not picking the best product.

The key question is not whether a consumer could have made a better choice but rather an act or practice hinders a consumer's decision making.

For example:

- ❖ Offering a "Rewards Account" when it is not clear how to earn the Reward or although a reward is offered, no one seems to meet the criteria for obtaining the reward.
- ❖ Are your practices for processing holds on demand accounts vs. savings accounts fair?

Unfair Defined:

Is not outweighed by countervailing benefits to consumers or competition:

➤ Look to net benefits, weighing:

- Consumer costs and Regulatory burden.

➤ Public policy as established by statute, regulation, judicial decision or agency determination may be considered with all other evidence to determine whether an act or practice is unfair. However, public policy considerations by themselves may not serve as the primary basis for determining unfair.

What do you mean, Deceptive?



A representation, omission or practice that is likely to mislead consumers:

- False Statement/Misleading Claims:
 - Bait and switch or Omitting material information;
- Legal Standard is likelihood wherein intent is irrelevant;
- Analysis considers ad as a whole.

Deceptive Defined:

Who are acting reasonably in the circumstances presented:

- Consider intended audience;
- Look at the net impression and the totality of the circumstances;
- Fine print cannot correct conspicuous statement.

Deceptive Defined:

Representation, omission, or practice is material:

- Likely to affect a consumer's choice or conduct:
 - Express or Implied claims;
 - Omitting material information.
- Statements related to:
 - Purpose
 - Cost
 - Performance or quality
 - Benefits
 - Limitations

The “Four P’s” Test

The FTC’s “four P’s” test can assist in the evaluation of whether a representation, omission, act, or practice is likely to mislead.

- Is the statement **prominent** enough for the consumer to notice?
- If 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?
- 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?

Deceptive? For Example:

- ❖ Disclosing fees for check items, rather than per item fee or per debit fee.
- ❖ Travel Cards (TravelEx) – all the fees associated with the purchase of the card (bank fees) are not disclosed.
- ❖ Providing the Opt-In disclosure when the Bank does not offer the “courtesy or privilege” overdraft product.
- ❖ Providing incomplete itemizations of amount financed, i.e. Settlement Statements vs. Truth-in-Lending disclosures.
- ❖ Providing a GFE when the loan is not subject to RESPA (are you bound by the figures you provided although the loan is not subject to RESPA?).

Unfair vs. Deceptive

Comparison Chart

Unfair	Deceptive
Likely to cause substantial injury	Likely to mislead consumers (Materially Presumed)
Injury cannot be reasonably avoided	Acting Reasonably
Net Benefits	

Note: Distinction is mostly academic!

What do you mean, Abusive?

Materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service:

- Takes unreasonable advantage of a consumer's:
 - Lack of understanding of the material risks, costs or conditions of the product or service;
 - Inability to protect his/her interests in selecting or using the financial product or service; or
 - The reasonable reliance that the Bank is acting in their best interests.



The Role of Consumer Complaints

Consumer complaints play a key role in the detection of unfair, deceptive, or abusive practices. Consumer complaints have been an essential source of information for examinations, enforcement and rule-making for regulators. Consumer complaints can indicate weaknesses in elements of the institution's compliance management system such as training, internal controls, or monitoring.

How does your institution handle a complaint?

While the absence of complaints does not ensure that unfair, deceptive, or abusive practices are not occurring, complaints may be one indication of UDAAPs. For example, the presence of complaints alleging that consumers did not understand the terms of a product or service may be a red flag indicating that the institution should take immediate action to resolve the basis of the complaint(s). Analysis of consumer complaints may assist the institution in the identification of potential unfair, deceptive, or abusive acts or practices.



Summarizing UDAAP

Missing/Inadequate/Confusing (not required)
Marketing and Disclosures:

- ✓ Fees
- ✓ Prerequisites
- ✓ Limitations

Ask the question:

➤ IS IT HARMFUL TO THE CONSUMER?

High Risks

- Enforcement Actions
- Monetary Penalties/Judgments
- Litigation
- New Roommates



High Risk, Such As

Harm to Reputation

“When a bank engages in unfair and deceptive marketing practices, it damages its most precious asset – the trust and confidence of its customers.”

John D. Hawke, Jr.
Comptroller of the Currency
June 2000



There is an **ALTERNATIVE?**

Review Marketing Materials:

- ✓ Is the message complete and accurate?
- ✓ Could it mislead the average customer?
- ✓ Is there an explanation missing, given how you operate?

BE PROACTIVE!

Watch Out!

Watch out for Limited Time Promotions:

- Duration must be clear;
- Validate changes that increase costs or reduce value;
- Send clear and timely notices of fees and other changes.

Choose Your Words Wisely:

- Limited Time; Pre-approved; Guaranteed; Lifetime Rate; Free Anything; and Up to or as Low as.

More Considerations

- Base analysis on your intended market;
- Promote consumer understanding.

Products:

- Carefully select Third-Party Products
 - Is the vendor legitimate?
 - Is the product useful and of value?
 - Would you want your mother to buy it?
- ❖ Avoid sales incentives that could lead to abusive practices.



Action Plan

Focus on the Overall Impression:

➤ Prominent:

- The statement should be big enough to attract attention.

➤ Presentation:

- Wording or format must be understandable.

➤ Placement:

- Is the information in a location where consumers can be expected to look?



Go Formal!

Develop a formal UDAAP Program:

- Disclosures
- Marketing
- New Products
- Vendors
- Complaints



Questions?

Thank You!

Additional Questions? Please contact us:

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