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

Community Bankers for Compliance

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Section 1: Introduction

A Brief History of UDAAP

The Unfair or Deceptive Acts or Practices (UDAAP) rule has been around for many years and is a rule that is not specific to the financial industry as it deals with consumer protection on a broad level. Dating back to the FTC Act in 1914, which created the Federal Trade Commission, the early version of the rule, was designed to protect consumers against the effects of monopolies. In 1938, the rule was amended by the Wheeler-Lea amendments, which changed the focus of the rule to protecting consumers against false advertising and other types of consumer fraud.

Over time, the rule evolved to the point where there were very well defined tests to determine both unfair and deceptive acts and practices. Most recently, the Dodd-Frank Act added a second "A" into the mix, which stands for abusive. Therefore, the rule as we know it today prohibits Unfair, Deceptive or Abusive Acts or Practices (UDAAP).

We are presenting this subject due to the prevalent use of these rules in lieu of actually changing regulations. Regulators are using UDAAP as a way of enforcing compliance on certain issues. Often the regulation lags behind the actual world in which we all live, and to compensate for that, regulators are forced to use UDAAP as a way of stopping certain activities. While UDAAP is very broad, and perhaps is used too much, mostly due to the regulation's lack of clarity, it is the world we live in, and we need to properly prepare.

The Importance of UDAAP

UDAAP is an extremely important consumer protection law that reaches well beyond the financial industry. In prior years, UDAP enforcement was implemented through the Federal Reserve has now rescinded Regulation AA that focused primarily on consumer complaints and certain credit practices such as unfair credit contract provisions, unfair late charges, and practices involving cosigners. With the inception of the Dodd-Frank Act, UDAAP now carries a much greater weight in the financial industry.

UDAAP can cause significant financial injury to consumers, erode consumer confidence, and undermine the financial marketplace. Under the Dodd-Frank Act, it is unlawful for any provider of consumer financial products or services or a service provider to engage in any unfair, deceptive or abusive act or practice. The Act provides the Consumer Financial Protection Bureau (CFPB) with rule-making authority to prevent unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.

UDAAP Enforcement

To ensure that financial institutions comply with UDAAP rules, each federal functional regulator reviews UDAAP as part of their oversight function of each financial institution. Examiners review products or services, such as deposit products or lending activities, and identifying the risks of harm to consumers that are particular to those activities. They also review products that combine features and terms in a manner that can increase the difficulty of consumer understanding of the overall costs or risks of the product and the potential harm to the consumer associated with the product. Financial institution marketing and advertising efforts are also often examined for UDAAP violations.

Managing UDAAP Risk

Unfair, Deceptive, or Abusive Acts or Practices (UDAAP) can be one of the most challenging areas to manage in a financial institution. The challenge is twofold. First, practices that were once considered acceptable are now being cited as significant violations and are often accompanied with large, public fines. In addition, UDAAP often appears to be a moving target as patterns in newly discovered violations are sometimes inconsistent. The result of this is that many financial institutions have an "elephant in the closet" and do not even realize it. Because of these challenges, UDAAP continues to be one of the hottest issues in regulatory compliance. Therefore, it is imperative that every financial institution appropriately manage the risk of potential UDAAP violations.

There are several steps a financial institution can take in order to limit UDAAP risk. First, a financial institution should work to fully understand what a UDAAP violation is and what the regulatory expectations for UDAAP are. This can be accomplished by reviewing the established exam procedures used by the regulators during a compliance exam. Secondly, an organization must understand how to uncover potential UDAAP violations within its established processes and procedures. This can be accomplished in a number of ways. First, a financial institution could conduct a self-review of UDAAP to pro-actively identify UDAAP risk. Secondly, organizations can compare their own practices with known UDAAP violations. Finally, a financial institution can ensure that it has an effective system in place to monitor complaints and review any associated practices for UDAAP risk.

Manual Structure

This manual is designed to assist financial institutions in uncovering and mitigating UDAAP risk within the organization. The first few sections begin with an overview of UDAAP and discuss the differences between Unfair, Deceptive, and Abusive acts and practices. The manual then provides an overview of examiner expectations by reviewing the current UDAAP exam procedures and other relevant guidance. The next few sections of the manual provide an overview of complaint management and the conclusion of the manual provides guidance on conducting an internal UDAAP review.

The goal of this seminar is to help financial institutions understand and mitigate UDAAP risk in their organizations.

UDAAP Highlights from the CFPB:

- Deceptive NSF or similar fees
- Deceptive misrepresentations to consumers regarding costs and availability of pay-by-phone options
- Deceptive misrepresentations to consumers concerning benefits and terms of credit card add-on products
- Deceptively implying that authorized users are responsible for a debt
- False representations regarding the effect on a consumer's credit report of paying a debt in full rather than settling the debt in full
- Freezing of deposit accounts
- Misrepresentations about monthly service fees
- Deceptive statements about overdraft protection products
- Failure to reimburse unused portions of a required service deposit where certain disclosure language was used constituted an unfair practice
- Deceptive practice involving an arbitration notice on certain residential mortgage loan documents
- Broad waivers in short sale and cash-for-keys agreements
- Workplace collection calls
- Repeated collection calls to third parties
- Misrepresentations in collections
- Marketing misrepresentations about small dollar loan products
- Misrepresentations regarding use of references provided by borrowers in small dollar loan applications
- Small dollar lending unauthorized debits and overpayments

Section 2: Unfair Acts or Practices

Assessing Whether an Act or Practice is Unfair

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

1. It causes or is likely to cause substantial injury to consumers,
2. The injury is not reasonably avoidable by consumers, and
3. The injury is not outweighed by countervailing benefits to consumers or to competition.

Criteria 1: The act or practice must cause or be likely to cause substantial injury to consumers.

- To be unfair, an act or practice must cause or be likely to cause substantial injury to consumers. Substantial injury usually involves monetary harm. Monetary harm includes, for example, costs or fees paid by consumers as a result of an unfair practice.
- An act or practice that causes a small amount of harm to a large number of people may be deemed to cause substantial injury.
- Actual injury is not required in every case. An injury may be substantial if it raises a significant risk of concrete harm. Trivial or speculative harms are typically insufficient for a finding of substantial injury. Emotional impact and other more subjective types of harm are generally not considered when determining that a practice is unfair. In certain circumstances, such as unreasonable debt collection harassment, emotional impacts may amount to or contribute to substantial injury.

Criteria 2: 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 take action to avoid injury. Withholding material price information until after the consumer has committed to purchase the product or service would be an example of preventing a consumer from making an informed decision. A practice may also be unfair where consumers are subject to undue influence or are coerced into purchasing unwanted products or services or if a transaction occurs without their knowledge or consent

- The CFPB guidance states that they will not second guess the wisdom of particular consumer decisions. Instead, the Agencies will consider whether a bank's behavior unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decision-making.
- The consumer's actions to avoid injury must be reasonable.

Criteria 3: The injury must not be outweighed by countervailing benefits to consumers or 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 benefits may include lower prices or a wider availability of products and services resulting from competition.
- Costs that would be incurred for 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 bank 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. 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 affirmatively allowed by statute may be considered as evidence that the practice is not unfair. Public policy considerations by themselves will not serve as the primary basis for determining whether an act or practice is unfair.

Regulators are using this standard often for issues that impact banks.

Examples

The examples described below stem from federal enforcement actions. They provide insight into practices that have been alleged to be unfair by other regulators and may inform CFPB's determinations. However, the particular facts in a case are crucial to a determination of unfairness. It is important to bear in mind that a change in facts could change the appropriate determination. Moreover, the brief summaries below do not present all of the material facts relevant to the determinations in each case. The examples show how the unfairness standard may be applied.

It should be noted that these examples are older – but no less relevant today.

Refusing to release lien after consumer makes final payment on a mortgage.

The FTC brought an enforcement action against a mortgage company based on allegations, described below, that repeatedly failed to release liens after consumers fully paid the amount due on their mortgages.

- ***Substantial injury***. Consumer's sustained economic injury when the mortgage servicer did not release the liens on their properties after the consumers had repaid the total amount due on the mortgages.
- ***Not outweighed by benefits***. Countervailing benefits to competition or consumers did not result from the servicer's alleged failure to appropriately service the mortgage loan and release the lien promptly.
- ***Not reasonably avoidable***. Consumers had no way to know in advance of obtaining the loan that the mortgage servicer would not release the lien after full payment. Moreover, consumers generally cannot avoid the harm caused by an improper practice of a mortgage servicer because the servicer is chosen by the owner of the loan, not the borrower. Thus, consumers cannot choose their loan servicer and cannot change loan servicers when they are dissatisfied with the quality of the loan servicing.

Dishonoring credit card convenience checks without notice.

[Editor's Note: Young & Associates had a hotline question in 2023 on this exact situation. So apparently, it still happens.]

The FDIC brought enforcement actions against a credit card issuer that sent convenience checks with stated credit limits and expiration dates to customers. For a significant percentage of consumers, the issuer reduced credit lines after the checks were presented, and then the issuer dishonored the consumers' checks.

- ***Substantial injury.*** Customers paid returned-check fees and may have experienced a negative impact on credit history.
- ***Not outweighed by benefits.*** The card issuer later reduced credit limits based on credit reviews. Based on the particular facts involved in the case, the harm to consumers from the dishonored convenience checks outweighed any benefit of using new credit reviews.
- ***Not reasonably avoidable.*** Consumers reasonably relied on their existing credit limits and expiration dates on the checks when deciding to use them for a payment. Consumers had received no notice that the checks they used were being dishonored until they learned from the payees. Thus, consumers could not reasonably have avoided the injury.

Processing payments for companies engaged in fraudulent activities.

The OCC brought an enforcement action in a case involving a bank that maintained deposit account relations with telemarketers and payment processors, based on the following allegations. The telemarketers regularly deposited large numbers of remotely created checks drawn against consumers' accounts. A large percentage of the checks were not authorized by consumers. The bank failed to establish appropriate policies and procedures to prevent, detect, or remedy such activities.

- ***Substantial injury.*** Consumers lost money from fraudulent checks created remotely and drawn against their accounts.
- ***Not outweighed by benefits.*** The cost to the bank of establishing a minimum level of due diligence, monitoring, and response procedures sufficient to remedy the problem would have been far less than the amount of injury to consumers that resulted from the bank's avoiding those costs.
- ***Not reasonably avoidable.*** Consumers could not avoid the harm because the harm resulted principally from transactions to which the consumers had not consented.

Section 3:
Deceptive Acts or Practices

Assessing Whether an Act or Practice is Deceptive

A three-part test is used to determine whether a representation, omission, or practice is "deceptive."

1. First, the representation, omission, act, or practice must mislead or be likely to mislead the consumer,
2. Second, the consumer's interpretation of the representation, omission, act, or practice must be reasonable under the circumstances, and
3. Lastly, the misleading representation, omission, act, or practice must be material.

Criteria 1: There must be a representation, omission, act, 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, act, or practice that misleads or is likely to mislead the 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.
- In determining whether an individual statement, representation, or omission is misleading, the statement, representation, or omission must not be evaluated in isolation. The context of the entire advertisement, transaction, or course of dealing will be evaluated to determine whether it constitutes deception.
- 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; and
  - failing to provide promised services.
- 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.

Similarly, oral or fine print disclosures or contracts may be insufficient to cure a misleading headline or a prominent written representation. Additionally, a deceptive act or practice may not be cured by giving subsequent accurate disclosures.

The FTC's "Four Ps"

The FTC's "four Ps" 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?
- 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?
- 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?

Criteria 2: The representation, omission, 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, act, or practice must be reasonable under the circumstances. The test is whether an act or practice is deceptive depends on how a reasonable member of the target audience would interpret the representation.
- When representations or marketing practices are targeted to a specific audience, such as the elderly or the financially unsophisticated, the standard is based upon the effects of the act or practice on 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.

Criteria 3: The representation, omission, or practice must be material.

- A representation, omission, act or practice is material if it is likely to affect a consumer's decision regarding a product or service.
- Information that is important to consumers is material.

- 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.
- Similarly, the materiality of an implied claim will be presumed when it is demonstrated that the institution intended to make the claim (even though intent to deceive is not necessary for deception to exist).
- Claims made with the 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 evaluate the product or service.
- If a representation or claim is not presumed to be material, it still would be considered material if it is likely to be considered important by consumers.

Examples

The examples described below stem from federal enforcement actions. They provide insight into practices that have been alleged to be deceptive by other regulators and may inform CFPB's determinations. However, as with unfairness, the particular facts in a case are crucial to a determination of deception. It is important to bear in mind that a change in facts could change the appropriate determination. Moreover, the brief summaries below do not present all of the material facts relevant to the determinations in each case. The examples show how the deception standard may be applied.

Inadequate disclosure of material lease terms in television advertising.

The FTC brought actions against vehicle leasing companies alleging that their television advertisements represented that consumers could lease vehicles for "$0 down" when advertising a monthly lease payment. However, the FTC alleged that the "blur" of "unreadable fine print" that flashed on the screen at the end of the advertisement disclosed costs of at least $1,000. The settlements prohibited the vehicle leasing companies from misrepresenting the amount consumers must pay when signing the lease.

In addition, the FTC required that if the companies make any representation about the amounts due at lease signing, or that there is "no down payment," the companies must make an equally prominent (readable and audible) disclosure of the total amount of all fees due when consumers sign the lease.

- ***Representation or omission likely to mislead:*** The television advertisements featured prominent statements of "no money down" or "$0 down" at lease signing. The advertisement also contained, at the bottom of the screen, a "blur" of small print in which disclosures of various costs required by Regulation M (the Consumer Leasing Act) were made. The FTC alleged that the disclosures were inadequate because they were not clear, prominent, or audible to consumers.

- ***Reasonable consumer perspective***. A reasonable consumer would believe that he did not have to put any money down and that all he owed was the regular monthly payment.
- ***Material representation***. The stated "no money down" or "$0 down" plus the low monthly lease payment were material representations to consumers. The fact that the additional material costs were disclosed at signing of the lease did not cure the deceptive failure to disclose in the television advertising, the FTC claimed.

Misrepresentation about loan terms.

The FTC sued a mortgage broker advertising mortgage refinance loans at "3.5% fixed payment 30-year loan" or "3.5% fixed payment for 30 years," implying that the offer was for a 30-year loan with a 3.5% fixed interest rate. Instead, the FTC claimed that the broker offered adjustable rate mortgages (ARMs) with an option to pay various amounts, including a minimum monthly payment that represented only a portion of the required interest. As a result, unpaid interest was added to the principal of the loan, resulting in negative amortization.

- ***Practice likely to mislead.*** The FTC claimed that the advertisements were misleading because they compared payments on a mortgage that fully amortized to payments on a non-amortizing loan with payments that increased after the first year. In addition, the FTC claimed that after application, the broker provided Truth in Lending Act (TILA) disclosures that misstated the annual percentage rate (APR) and that failed to state that the loan was a variable rate loan.
- ***Reasonable consumer perspective.*** It was reasonable for consumers to believe that they would obtain fixed-rate mortgages, based on the representations.
- ***Material representation.*** The representations were material because consumers relied on them when making the decision to refinance their fully amortizing 30-year fixed loans. As a result, the consumers ended up with adjustable rate mortgages that would negatively amortize if they made payments at the stated 3.5% payment rate.

Section 4:
Abusive Acts or Practices

Abusive Acts or Practices

The Dodd-Frank Act makes it unlawful for a bank to engage in an "abusive act or practice."

Assessing Whether an Act or Practice is Abusive

An abusive act or practice:

- Materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service or
- Takes unreasonable advantage of:
  - A lack of understanding 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 its interests in selecting or using a consumer financial product or service; or
  - The reasonable reliance by the consumer on a covered person to act in the interests of the consumer.

Although abusive acts may also be unfair or deceptive, keep in mind that the legal standards for abusive, unfair, and deceptive are separate.

There was additional information regarding "abusive" under the regulation, but that language has been removed, and we have not included it in this manual.

Examples

The word "abusive" in UD**A**AP was added courtesy of the Dodd-Frank Act. Therefore, there are currently no real cases to cite as examples. However, you can be assured that one or more will probably occur in the near future.

Section 5: Relationship to Other Laws

Relationship to Other Laws

An unfair, deceptive, or abusive act or practice may also violate other federal or state laws. For example, pursuant to the 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 be unfair, deceptive, or abusive.

Conversely, a transaction that is in technical compliance with other federal or state laws may nevertheless violate the FTC Act. For example, an advertisement may comply with TILA's requirements, but contain additional statements that are untrue or misleading, and compliance with TILA's disclosure requirements does not insulate the rest of the advertisement from the possibility of being deceptive.

The following laws warrant particular attention in this regard:

Truth in Lending and Truth in Savings Acts

Under the Truth in Lending Act (TILA), creditors must "clearly and conspicuously" disclose the costs and terms of credit. The Truth in Savings Act (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 shall not be misleading or inaccurate, and cannot misrepresent an institution's deposit contract. An act or practice that does not comply with these provisions of TILA or TISA may also violate the FTC Act and/or UDAAP. A transaction that is in technical compliance with TILA or TISA may still violate the FTC Act and/or UDAAP. 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, whether or not the disclosures satisfy the technical requirements of TILA or TISA.

Equal Credit Opportunity and Fair Housing Acts

The Equal Credit Opportunity Act (ECOA) prohibits discrimination in any aspect of a credit transaction against persons on the basis of race, color, religion, national origin, sex (including sexual orientation), 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.

Similarly, the Fair Housing Act (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. Unfair, deceptive, or abusive practices that target or have a disparate impact on consumers who are members of these protected classes may violate the ECOA or the FHA, as well as the FTC Act or UDAAP..

Fair Debt Collection Practices Act

The Fair Debt Collection Practices Act prohibits unfair, deceptive, and abusive practices related to the collection of consumer debts. Although this statute does not by its terms apply to banks that collect their own debts, failure to adhere to the standards set by this Act may support a claim of unfair, deceptive, or abusive practices in violation of the FTC Act. Moreover, banks 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 approving or assisting in an unfair, deceptive, or abusive act or practice.

Section 6:
CFPB Exam Procedures

Introduction

The Consumer Financial Protection Bureau (CFPB) issued UDAAP exam procedures in October of 2011 and have provided one revision to these procedures. The current (2012) version of these procedures have been formatted for inclusion in this manual.

This document has been modified to focus on those areas of most applicable to you.

Examination Objectives

- To assess the quality of the regulated entity's compliance risk management systems, including internal controls and policies and procedures, for avoiding unfair, deceptive, or abusive acts or practices (UDAAP).
- To identify acts or practices that materially increase the risk of consumers being treated in an unfair, deceptive, or abusive manner.
- To gather facts that help determine whether a regulated entity engages in acts or practices when offering or providing consumer financial products or services that are likely to be unfair, deceptive, or abusive.
- To determine, in consultation with Headquarters, whether an unfair, deceptive or abusive act or practice has occurred and whether further supervisory or enforcement actions are appropriate.

General Guidance

Based on the results of the risk assessment of the entity, examiners should review for potential unfair, deceptive, or abusive acts or practices, taking into account an entity's marketing programs, product and service mix, customer base, and other factors, as appropriate. Even if the risk assessment has not identified potential unfair, deceptive, or abusive acts or practices, examiners should be alert throughout an examination for situations that warrant review.

Document Review

To initially identify potential areas of UDAAP concerns, obtain and review copies of the following to the extent relevant to the examination:

- Training materials.

- Lists of products and services, including descriptions, fee structure, disclosures, notices, agreements, and periodic and account statements.
- Procedure manuals and written policies, including those for servicing and collections.
- Minutes of the meetings of the Board of Directors and of management committees, including those related to compliance.
- Internal control monitoring and auditing materials.
- Compensation arrangements, including incentive programs for employees and third parties.
- Documentation related to new product development, including relevant meeting minutes of Board of Directors, and of compliance and new product committees.
- Marketing programs, advertisements, and other promotional material in all forms of media (including print, radio, television, telephone, Internet, or social media advertising).
- Scripts and recorded calls for telemarketing and collections.
- Organizational charts, including those related to affiliate relationships and work processes.
- Agreements with affiliates and third parties that interact with consumers on behalf of the entity.
- Consumer complaint files.
- Documentation related to software development and testing, as applicable.

Management and Policy-Related Examination Procedures

1. Identify potential UDAAP concerns by reviewing all relevant written policies and procedures, customer complaints received by the entity or by the CFPB, internal and external audit reports, statistical and management reports, and examination reports. Determine whether:

    a. The scope of the entity's compliance audit includes a review of potential unfair, deceptive, or abusive acts or practices.

    b. The compliance audit work is performed consistent with the audit plan and scope.

    c. The frequency and depth of audit review is appropriate to the nature of the activities and size of the entity.

    d. Management and the Board of Directors are made aware of and review significant deficiencies and their causes.

    e. Management has taken corrective actions to followup on any identified deficiencies.

f. The entity's compliance programs ensure that policies are being followed through its sampling of relevant product types and decision centers, including sales, processing, and underwriting.

g. The entity has a process to respond to consumer complaints in a timely manner and determine whether consumer complaints raise potential UDAAP concerns.

h. The entity has been subject to any enforcement actions or has been investigated by a regulatory or law enforcement agency for violations of consumer protection laws or regulations that may indicate potential UDAAP concerns.

2. Through discussions with management and a review of available information, determine whether the entity's internal controls are adequate to prevent unfair, deceptive or abusive acts or practices. Consider whether:

   a. The compliance management program includes measures aimed at avoiding unfair, deceptive, or abusive practices, including:

      i. Organization charts and process flowcharts;

      ii. Policies and procedures; and

      iii. Monitoring and audit procedures.

   b. The entity conducts prior UDAAP reviews of advertising and promotional materials, including promotional materials and marketing scripts for new products.

   c. The entity evaluates initial and subsequent disclosures, including customer agreements and changes in terms, for potential UDAAP concerns.

   d. The entity reviews new products and changes in the terms and conditions of existing products for potential UDAAP concerns.

   e. The entity has a thorough process for receiving and responding to consumer complaints and has a process to receive complaints made to third parties, such as the Better Business Bureau or the CFPB.

   f. The entity evaluates servicing and collections for UDAAP concerns.

   g. The entity has established policies and controls relating to employee and third-party conduct, including:

      i. Initial and ongoing training;

      ii. Performance reviews or audits;

      iii. Discipline policies and records of disciplinary actions;

      iv. Third-party agreements and contractual performance standards;

      v. Compensation programs; and

      vi. Monitoring.

   h. The entity's internal control processes are documented.

i. Computer programs are tested and documented to ensure accurate and timely disclosures to consumers.

3. Potential Areas for Transaction Testing**:**

   Through a high-level assessment of the entity's products, services, and customer base, identify areas for potential transaction testing. This process should determine whether:

   a. The entity does not underwrite a given credit product on the basis of ability to repay.

   b. A product's profitability depends significantly on penalty fees or "back-end" rather than upfront fees.

   c. A product has high rates of repricing or other changes in terms.

   d. A product combines features and terms in a manner that can increase the difficulty of consumer understanding of the overall costs or risks of the product and the potential harm.

   e. Penalties are imposed on a customer when he terminates his relationship with the entity.

   f. Fees or other costs are imposed on a consumer to obtain information about his account.

   g. A product is targeted to particular populations, without appropriate tailoring of marketing disclosures, and other materials designed to ensure understanding by the consumer.

Transaction-Related Examination Procedures

If upon conclusion of the management and policy-related examination procedures, procedural weaknesses, or other UDAAP risks require further investigation, conduct transaction testing, as necessary, using the following examination procedures. Use judgment in deciding to what extent to sample individual products, services, or marketing programs. Increase the sample size to achieve confidence that all aspects of the entity's products and services are reviewed sufficiently. Consult with Headquarters to obtain assistance with the sampling process.

1. **Marketing and Disclosures**

   Through a review of marketing materials, customer agreements, and other disclosures, determine whether, before the consumer chooses to obtain the product or service:

   a. All representations are factually based.

   b. All materials describe clearly, prominently, and accurately:

      i. costs, benefits, and other material terms of the products or services being offered;

      ii. related products or services being offered either as an option or required to obtained certain terms; and

      iii. material limitations or conditions on the terms or availability of products and services, such as time limitations for favorable rates, promotional features, expiration dates, prerequisites for obtaining particular products or services, or conditions for canceling services.

c. The customer's attention is drawn to key terms, including limitations and conditions, that are important to enable the consumer to make an informed decision.

d. All materials clearly and prominently disclose the fees, penalties, and other charges that may be imposed and the reason for the imposition.

e. Contracts clearly inform customers of contract provisions that permit changes in terms and conditions of the product or service.

f. All materials clearly communicate the costs, benefits, availability, and other terms in language that can be understood when products are targeted to particular populations, such as reverse mortgage loans for the elderly.

g. Materials do not misrepresent costs, conditions, limitations, or other terms either affirmatively or by omission.

h. The entity avoids advertising terms that are generally not available to the typical targeted consumer.

2. **Availability of Terms or Services as advertised**

Evaluate whether product(s) and service(s) that consumers are receiving are consistent with the disclosures and policies. For each product and service being reviewed, select a sample that:

a. Is sufficient in size to reach a supportable conclusion about such consistency;

b. Includes, as appropriate, transactions from different origination and underwriting channels. For example, different geographical areas or different sectors of the entity's organization structure; and

c. Includes approved and/or denied accounts.

Determine whether:

d. Consumers are reasonably able to obtain the products and services, including interest rates or rewards, as represented by the entity.

e. Consumers receive the specific product or service that they request.

f. Counter-offers clearly, prominently, and accurately explain the difference between the original product or services requested and the one being offered.

g. Actual practices are consistent with stated policies, procedures, or account disclosures.

3. **Availability of Actual Credit to the Consumer**

Evaluate whether the entity represents the amount of useable credit that the consumer will receive in a truthful way. Consider whether:

a. The available credit is sufficient to allow the consumer to use the product as advertised and disclosed to the consumer.

b. The fees and charges, typically imposed on the average targeted customer, both initially and throughout the term of the loan, remain in a range that does not prevent the availability of credit.

c. The entity honors convenience checks when used by the customer in a manner consistent with introductory or promotional materials and disclosures.

4. **Employees and Third Parties Interacting with Consumers**

Evaluate how the entity monitors the activities of employees and third-party contractors, marketing sales personnel, vendors, and service providers to ensure they do not engage in unfair, deceptive, or abusive acts or practices with respect to consumer interactions. Interview employees and third parties, as appropriate. Specifically, consider whether:

a. The entity ensures that employees and third parties who market or promote products or services are adequately trained so that they do not engage in unfair, deceptive, or abusive acts or practices.

b. The entity conducts periodic evaluations or audits to check whether employees or third parties follow the entity's training and procedures and has a disciplinary policy in place to deal withany deficiencies.

c. The entity reviews compensation arrangements for employees, third-party contractors, and service providers to ensure that they do not create unintended incentives to engage in unfair, deceptive, or abusive acts or practices, particularly with respect to product sales, loan originations, and collections.

d. Performance evaluation criteria do not create unintended incentives to engage in unfair, deceptive, or abusive acts or practices, including criteria for sales personnel based on sales volume, size, terms of sale, or account performance.

e. The entity implements and maintains effective risk and supervisory controls to select and manage third-party contractors and service providers.

5. **Servicing and Collections**

Evaluate whether servicing and collections practices raise potential UDAAP concerns, by considering whether**:**

a. The entity has policies detailing servicing and collections practices and has monitoring systems to prevent unfair, deceptive or abusive acts or practices.

b. Call centers, either operated by the entity itself or by third parties, effectively respond to consumers' calls.

c. The entity ensures that employees and third party contractors:

   i. represent fees or charges on periodic statements in a manner that is not misleading;

   ii. post and credit consumer payments in a timely manner;

   iii. apply payments in a manner that does not unnecessarily increase customer payments, without clear justification;

   iv. only charge customers for products and services, such as insurance or credit protection programs, that are specifically agreed to;

   v. mail periodic statements in time to provide the consumer ample opportunity to avoid late payments; and

   vi. do not represent to consumers that they may pay less than the minimum amount without clearly and prominently disclosing any fees for paying the reduced amount.

d. The entity has policies to ensure compliance with the standards under the Fair Debt Collections Practices Act to prevent abusive, deceptive, or unfair debt collection practices.

e. Employees and third party contractors clearly indicate to consumers that they are calling about the collection of a debt.

f. Employees and third party contractors do not disclose the existence of a consumer's debt to the public without the consent of the consumer, except as permitted by law.

g. The entity avoids repeated telephone calls to consumers that annoy, abuse, or harass any person at the number called.

6. **Interviews with Consumers.** If potential UDAAP issues are identified that would necessitate interviews with consumers, consult with regional management who will confer with Headquarters.

Section 7: Consumer Complaints

Introduction to Complaint Management

An institution must have a method to review complaints from a consumer protection perspective and be prepared to handle consumer complaints promptly. Procedures should be established for addressing complaints, and individuals or departments responsible for handling them should be designated and known to all institution personnel to expedite responses.

Complaints may be indicative of a weakness in a particular function or department – especially from a UDAAP perspective. Therefore, a compliance officer should be aware of the complaints received and act to ensure a timely resolution. A compliance officer should determine the cause of the complaint and take action to improve the institution's business practices, as appropriate.

Developing a Complaint Management System

Each financial institution must develop a formal complaint management system for written complaints. This system should do a number of things.

- **Complaint Repository**: First, the complaint management system should provide for a centralized repository of all written complaints. Each written complaint that is received by the financial institution should be sent to a central point of contact, such as the compliance officer.
- **Complaint Review**: Secondly, a complaint management system should provide for a review of all complaints. This review should be looking at complaints from a consumer protection perspective. While public relations and customer service is important, the goal in developing a complaint management system is to be able to identify institutional deficiencies.
- **Complaint Response:** The third step in a complaint management system should be to respond to any identified consumer protection concerns, and respond to the consumer in a timely manner..
- **Process Correction:** Once a deficiency is identified through a consumer complaint, the financial institution must work to resolve the underlying issue. This includes working with the applicable department and management team to ensure that the issue is resolved. If the identified issue carries elevated risk, the issue may need to be reported to the Audit Committee or Board of Directors.
- **Ongoing Monitoring:** The final step in a complaint management system is to follow-up on the identified issue and ensure that the deficiency has been fully corrected. This could include monitoring of both the identified area of the financial institution as well as monitoring future complaints for the same issue.

Types of Complaints

The following types of complaints should be considered in accordance with the size, complexity, and overall risk posture of the financial institution:

- **Verbal Complaints**: While a formal method for tracking verbal complaints may not be appropriate for all financial institutions, it is important to ensure that the institution has an ability to understand potential issues customers may be identifying as they are frustrated with the financial institution. Monitoring verbal complaints could come from a number of ways such as (1) having employees complete a form for each verbal complaint; (2) asking employees to contact their manager for each verbal complaint and for the manager to determine if a referral to the compliance officer is warranted; or (3) to conduct regular staff surveys of complaints either by e-mail or in a compliance council meeting.

- **Written Complaints**: Written complaints are included in a complaint management system. Written complaints could be directly sent to the financial institution, or could come directly from the financial institution's primary Federal regulator.

- **Third Party Complaints:** An institution should also monitor complaints to and/or about third parties that are providing services on behalf of the institution. Specifically, each financial institution should be concerned with third parties that have direct interactions with consumers, either through providing disclosure or through providing services to customers of the financial institution.

A complaint management system will vary from one financial institution to another, and no program will be exactly the same. Each program, however, should be designed based on the size, complexity, and overall risk profile of the organization.

Examiner Expectations for Consumer Complaints in Identifying Unfair, Deceptive, or Abusive Acts or Practices

The following are the CFPB's expectations for handling consumer complaints and how they can be used in identifying unfair, deceptive, or abusive acts or practices.

Introduction

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. As a general matter, consumer complaints can indicate 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 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 financial institution should conduct a detailed review of the relevant practice. This is especially true when numerous consumers make similar complaints about the same product or service. Because the perspective of a reasonable consumer is one of the tests for evaluating whether a representation, omission, act, or practice is potentially deceptive, consumer complaints alleging misrepresentations or misunderstanding may provide a window into the perspective of the reasonable consumer.

When reviewing complaints against the financial institution, one should consider complaints lodged against subsidiaries, affiliates, and third parties regarding the products and services offered through the financial institution or using the financial institution's name. In particular, the financial institution should determine whether it receives, monitors, and responds to complaints filed against its subsidiaries, affiliates, and third parties. Consumers can file complaints at a number of entities: the financial institution itself, the Better Business Bureau, State Attorneys General, the FTC's Consumer Sentinel, the CFPB Consumer Response Center, other Federal and State agencies, or on-line consumer complaint boards such as www.ripoffreport.com or www.complaints.com.

Analyzing Complaints

Analyzing consumer complaints may assist in the identification of potential unfair, deceptive, or abusive practices. The financial institution should consider the context and reliability of complaints; every complaint does not indicate violation of law. When consumers repeatedly complain about a financial institution's product or service, however, the financial institution should flag the issue for possible further review. Moreover, even a single substantive complaint may raise serious concerns that would warrant further review. Complaints that allege, for example, misleading or false statements, or missing disclosure information, may indicate possible unfair, deceptive, or abusive acts or practices needing review.

Another area that could indicate potential unfair, deceptive, or abusive acts or practices is a high volume of charge-backs or refunds for a product or service. While this information is relevant to the consumer complaint analysis, it may not appear in the financial institution's complaint records.

Section 8:
Conducting Internal UDAAP Reviews

Introduction

There are several steps a financial institution can take in order to limit UDAAP risk. First, a financial institution should work to fully understand what a UDAAP violation is and what the regulatory expectations for UDAAP are. This can be accomplished by reviewing the established exam procedures used by the regulators during a compliance exam.

Secondly, an organization must understand how to uncover potential UDAAP violations within its established processes and procedures. This can be accomplished in a number of ways. First, a financial institution could conduct a self-review of UDAAP to pro-actively identify UDAAP risk. Secondly, organizations can compare their own practices with known UDAAP violations. Finally, a financial institution can ensure that it has an effective system in place to monitor complaints and review any associated practices for UDAAP risk.

Steps for Conducting a UDAAP Review

To conduct an internal UDAAP review, a financial institution should take a number of steps to ensure their acts and practices are appropriate and do not violate UDAAP or other consumer rules and regulations. While many of these steps have been previously explained in this manual, this section of the manual is designed to provide a step-by-step action plan to conduct an internal UDAAP review. In doing this, the following steps can be utilized:

1. Set the scope for the review
2. Evaluate applicable products, marketing material, disclosures, and other pertanent data for UDAAP risk.
3. Compare known violations against the financial institution's practices
4. Evaluate suspected acts or practices against the established three-prong tests
5. Summarize results
6. Correcting Deficiencies

Step 1: Scoping the Review

The first step for conducting a UDAAP review is to establish a scope regarding what is going to be reviewed. The intent of this review is to analyze the program objectively. The goal is to determine what has been done to ensure compliance and how successful these efforts have been. For example, the review may focus on all the actions taken by the financial institution during the past year.

There is no right or wrong way to identify your scope. The regulatory agencies do not generally prescribe a minimum number of files to be audited, though auditor associations and internal regulatory guidance may do so. With that said, the goal of your review should be to identify any deficiencies. Therefore, a risk-based approach of focusing on the higher-risk areas may be warranted. For example, areas with known violations should be a key focus of a review. In addition, new products, disclosures, or marketing material will most likely present higher risk than established ones that have been reviewed previously.

In establishing a scope, a financial institution will want to determine which areas to focus their efforts in. To do this, they can utilize the categories discussed in the CFPB exam procedures in Section 6 of this manual:

- Management and policy review
- Marketing disclosures
- Availability of terms or services actually advertised
- Availability of credit to consumers
- Employees and third parties interacting with consumers
- Servicing and collection
- Interviews with consumers

Each financial institution is unique, and each review is unique. You will have to base your scope on the amount of time and resources available.

Step 2: Evaluate Applicable Documents

Many of the cited UDAAP violations are a result of documentation not aligning with actual practices or procedures. Whether the document is an advertising piece, regulatory disclosure, or just a customer communication, written information that does not align with actual practices can easily result in UDAAP violations. Therefore, it is imperative that a UDAAP assessment include a review of applicable documents.

When evaluating documents, the goal should not necessarily to identify actual UDAAP violations (as that will come later in step 4.) The goal in evaluating documents should be to "flush out" all potential risk so that it can be appropriately evaluated for UDAAP deficiencies.

The following types of documents might be reviewed for unfair, deceptive or abusive acts and practices, including:

- documents outlining requirements for new products or services
- advertisements and solicitations;
- deposit account and loan disclosures;
- servicing and collection communications;
- disclosures and marketing material provided third-party service providers; and

- consumer complaints.

Steps to Evaluate Documents

To avoid engaging in unfair, deceptive, or abusive activity, the CFPB and the Agencies encourage use of the following practices:

- Review all promotional materials and marketing scripts to ensure that they fairly and adequately describe the terms, benefits, and material limitations of the product or service being offered, including any related or optional products or services, and that they do not misrepresent such terms either affirmatively or by omission.
- Ensure that these materials do not
  - use fine print,
  - separate statements or
  - inconspicuous disclosures to correct potentially misleading headlines
- Ensure that there is a reasonable factual basis for all representations made.
- Ensure that these materials clearly disclose all material limitations or conditions on the terms or availability of products or services, such as:
  - a limitation that applies a special interest rate only to balance transfers;
  - the expiration date for terms that apply only during an introductory period;
  - material prerequisites for obtaining particular products, services or terms (e.g., minimum transaction amounts, introductory or other fees, or other qualifications); or
  - conditions for canceling a service without charge when the service is offered on a free trial basis.
- When using terms such as “pre-approved” or “guaranteed,” clearly disclose any limitations, conditions, or restrictions on the offer.
- Tailor advertisements, promotional materials, disclosures and scripts to take account of the sophistication and experience of the target audience.
- Do not make claims, representations or statements that mislead members of the target audience about the cost, value, availability, cost savings, benefits, or terms of the product or service.
- Avoid advertising that a particular service will be provided in connection with an account if the financial institution does not intend or is not able to provide the service to accountholders.
- Avoid advertising terms that are not available to most customers and using unrepresentative examples in advertising, marketing, and promotional materials.
- Ensure that employees and third parties who market or promote financial institution products, or service loans, are adequately trained to avoid making statements or taking actions that might be unfair, deceptive, or abusive.

Financial institutions should also take particular care in marketing credit and other products and services to service members, the elderly, the financially vulnerable, and customers who are not financially sophisticated.

Step 3: Compare Known Violations

The next step in the UDAAP review process continues to identify any potential areas of UDAAP risk: to compare known UDAAP violations with the practices of the financial institution. To do this, the financial institution must compile a list of known UDAAP violations – violations cited by regulatory agencies against other financial institutions. Once this list is compiled, the financial institution can compare this list of know violations against its own practices.

Step 4: Evaluate Suspected Acts or Practices

Once an act or practice has been identified as having risk of being a UDAAP concern, a financial institution must determine the level of risk the act or practice presents to the organization. To accomplish this, the financial institution should utilize the three-prong tests identified earlier in this manual. The Unfair test can be found in Section 2 while the tests for deceptive and abusive can be found in Sections 3 and 4, respectively.

Step 5: Summarizing Results

The next step in conducting an internal UDAAP review is to summarize your results. This summary may vary depending on the function your review is serving. For example, if this review is serving as an independent audit, the results should be summarized in a formal report and reported to the Board. If your review is just for management's peace of mind, however, the summary may not be as formal.

Regardless of the function, we recommend providing a written report of findings as UDAAP is a higher-risk area in your organization. In writing your UDAAP report, the report could include the following items:

- Scope of the audit (including documents, policies, and product types reviewed)
- Deficiencies or modifications identified
- Number of transactions sampled by category of product type
- Descriptions of, or suggestions for, corrective actions and time frames for correction

Board and/or senior management response to the report should be prompt. The compliance officer should receive a copy of the UDAAP report and assist to address noted deficiencies and required changes to ensure full compliance in regard to UDAAP.

Step 6: Correcting Deficiencies

While conducting a review to identify any UDAAP deficiencies, ensuring that any identified deficiencies are appropriately resolved is even more important.

Reviewing Results

Management responsible for reviewing the review results need to evaluate a number of factors during each review. Most importantly, the following elements should be considered:

- Source(s) of the issue
- Consequences of noncompliance
- Possible solution(s) to rectify the issue

The UDAAP results should be reviewed in a timely manner, ideally soon after the results are received. Timely reviews will demonstrate the financial institution's commitment to an effective compliance program and allow for an immediate response to any discovered issues. The review should also prompt management to determine any impact to the financial institution's compliance risk profile. Finally, similar to the results from an exam or audit, these results should be tracked to assess their direction in the future.

Tracking Results

While management generally recognizes the need to correct deficiencies, often times the implementation of an action plan is not finalized. Creating a document to track UDAAP review results can assist in this process. This can be accomplished a number of ways and can be as complex as customer software or a database, or can be as simple as utilizing a Word or Excel document.

Impact to Risk Profile

Results of a UDAAP review should be considered as the financial institution's risk profile is adjusted. Determining whether the results will impact the overall risk profile can be subjective. As a general rule, the UDAAP results will often only be considered during an annual risk profile review. However, should UDAAP review results reveal a significant deficiency that warrants immediate attention and that possess the potential for future occurrences, the risk profile should be adjusted immediately.

Section 9:
UDAAP Advertising Case Study #1:

Objective

Anytown Bank is in the process of introducing a new second mortgage loan product. The underwriting standards and bullet points for the promotional advertisement are included below. Review and determine if there are any potential UDAAP concerns.

Underwriting Standards

- Collateral must be an owner occupied dwelling.
- Minimum credit score of 675.
- Fixed rate loan term of either 3 years or 5 years. Rate is 4.25% for 3 years fixed and 4.75% for 5 year fixed.
- A loan fee of $250 per loan request will be charged.
- The bank will pay for the flood and credit bureau report fees.
- An appraisal is required for Combined Loan to Values (CLTV) exceeding 75%. The applicant is responsible for the cost of the appraisal, if required.

Advertisement

- Looking for that new kitchen? Anytown Bank has the right loan for you.
- All credit scores accepted.
- Get a loan for $250.
- Take as long as 5 years to pay the loan back.
- Stop by one of our convenient locations and ask to speak with a mortgage loan specialist.

Section 10:
UDAAP Advertising Case Study #2:

Objective

Anytown Bank would like to advertise a "special" certificate of deposit in anticipation of the opening of a new branch location. The marketing department has provided you with the following terms and conditions and advertisement. Review and determine if there are any potential UDAAP concerns.

Terms and Conditions

- Minimum deposit of $10,000.
- APY of 1.24% is effective for the first six months, then the APY goes to .25%.
- No business customers.
- Term is 18 months.
- Interest compounds monthly and must be deposited into a depository account at Anytown Bank.
- CD does not automatically renew.

Advertisement

- Bring your deposits to Anytown Bank
- With a minimum deposit of $10,000 you can earn an APY of 1.24% - That's the highest APY in town, so no business customers, please.
- Term of the CD is 18 months.
- Penalties apply for early withdrawal.
- Stop by one of our convenient locations and ask to speak with the Branch Manager.

Section 11:
UDAAP Advertising Case Study #3:

Objective

Anytown Bank has provided you with the following underwriting standards and promotional advertisement for a new HELOC product. Review and determine if there are any potential UDAAP concerns.

Underwriting Standards

- The collateral for the loan must be an owner occupied dwelling.
- Minimum credit score of 650.
- Rate structure:
  - WSJP + 1.0% for LTV's between 85.01% and 90%
  - WSJP + .75% for LTV's between 75.01% and 85%
  - WSJP + 0% for LTV's 75% and lower
- We will offer a fixed rate product for applicants who have been a customer of Anytown Bank for a minimum of 5 years.
- Five (5) year draw with a ten (10) year payback.
- Annual fee of $75 charged during the first month a draw is made on the line.

Advertisement

- Need a Line of Credit for those unexpected expenses? Anytown Bank has the right loan for you.
- Low annual fee.
- Fixed and Adjustable rate products available.
- A minimum draw of $5,000 must be made at loan closing.
- Stop by one of our convenient locations and ask to speak with one of our experienced lenders.

Section 12:
UDAAP Advertising Case Study #4:

Objective

Anytown Bank has provided you with the following underwriting standards and promotional advertisement for a new automobile loan product. Review and determine if there are any potential UDAAP concerns.

Underwriting Standards

- Year of the vehicle must be a 2010 or newer.
- Minimum credit score of 620.
- Rate structure:
  - 5.00% for credit score of 700 and above.
  - 5.25% for credit score between 650 and 699
  - 5.50% for credit score below 650
- Above rates will be a .25% higher if the monthly payment is not auto debited from an Anytown Bank depository account.
- Loan Fee: $200

Advertisement

- Need a new car? Let Anytown Bank do the financing.
- The year of the vehicle must be a 2010 or newer.
- With a credit score of 725, you can get a 5.00% interest rate.
- A small loan fee will be charged.
- Stop by one of our convenient locations and ask to speak with one of our experienced lenders.

Section 13:
Other Non-Advertising Case Studies

Introduction

Only a judge can answer a UDAAP question with certainty. The Unfair Deceptive or Abusive Acts or Practices ("UDAAP") laws are based on principles, not technical rules. So, it is impossible for anyone to know for sure that a particular practice violates the law, short of a court ruling. However, unless an organization wants to fight a regulatory order in court, it's best to use some common sense principles as a lens through which practices can be evaluated for their UDAAP risk.

UDAAP is different from technical regulations because it requires a view of all the circumstances based on a reasonable consumer's perspective. Can a reasonable consumer understand? The following UDAAP case studies are focused on that question.

Case Study #1

The bank places holds on funds spent through debit card transactions to make sure the money is there when the transaction arrives. The bank is, of course, obligated to pay the transactions once they are approved. The hold appears on the customer’s mobile devices and on their internet banking pages.

The hold is placed for one day only, even if the transaction has not yet cleared. Sometimes, funds are used for other purposes prior to the time the debit transaction is presented for payment. If this happens, if the consumer has opted into debit card overdraft protection, an overdraft fee will be charged.

Is this a UDAAP issue?

Case Study #2

The bank is including each customer's credit score monthly on their checking account statements if they have opted into overdraft protection. The score is a generic and proprietary score, and the bank purchases it from a credit reporting agency. It is not a score that is used by lenders like FICO. The statement has a disclaimer that the score is for the consumer's educational purpose only. The disclaimer says: "This creditor score may help you determine your own credit worthiness. It is not used by lenders and is only for your own educational purposes." The bank uses the fact that customers will get this credit score each month in its advertising for overdraft protection. The ad also has the same disclaimer in small print at the bottom of the page.

Is this a UDAAP issue?

Case Study #3

The bank has experienced an increase in fraudulent debit card transactions conducted by family members of the cardholder. It would like to implement a policy to tighten up the practice of investigating unauthorized debit card transactions. Currently the bank has the cardholder sign a simple statement that affirms that he/she has not authorized the transactions in question. The bank would like to add to its statement the following two provisions:

- At the bank's request, the cardholder would be required to file a police report affirming that he has been defrauded; and
- Require the cardholder to agree to assist the bank in prosecuting any fraudster found to have used the card.

Case Study #4

A local newspaper publishes mortgage rates of local banks and financial companies as a service to its readers. The newspaper obtains the rates by calling the institutions. The rates published this week have a typo that shows ABC Bank's rate as 1% lower than it actually is. The Bank had nothing to do with the error, but is now facing several angry applicants who came to the bank to get a mortgage at the published rate.

Case Study #5

A bank has a large servicing portfolio containing all types of consumer loans. The bank frequently receives payments from consumers that are more than the amount owed. Sometimes in these cases the consumer provides instructions for the overpayment. They may want the extra funds applied to a different loan or they may want the funds applied as a “principal reduction.” In cases where the borrower sends no instructions, the Bank's policy is to hold the funds in a suspense account and apply them to the next payment at the time the next payment is due.

Case Study #6

We are revising our deposit accounts, and one account will be titled Free Checking. This product will have e-statements as the default at no charge. Since e-statements are the default, we will charge $3.95 for a paper statement. Is this a concern relative to Unfair, Deceptive, or Abusive Acts or Practices?

Case Study #7

Senior management is considering a non-advertised product. We all know those “good” customers (aka high dollar depositors), that will ask for a better interest rate because they’ve been shopping and XYZ bank down the street can give them a higher rate. Senior management would like to have a "premier" account where those with $250,000 or more could be offered a higher rate, and those with $500,000 or more would be offered an even better rate, to keep them. They also wondered if there would be Regulation O issues if a board member or officer qualified and asked to take advantage of it.

Only officers would be allowed to approve opening the account and frontline staff wouldn't be trained on offering it or opening it. The compliance officer wants to avoid UDAAP and Regulation O issues, but also wants to do it right if they go forward with this. '

Questions:

Is it a UDAAP issue?

You are the compliance officer. What is your advice to management?

Section 14:
Other Non-Advertising Case Studies - Discussion

Case Study #1 Discussion

Look at this practice from the consumer's standpoint. The consumer has made a purchase that was approved by the bank through the debit card system. At that time, a hold was placed on the funds. At the time of the hold the consumer had an expectation that those funds will be there when the debit transaction arrives at the bank for settlement. But, if the bank releases the funds too early, they could be used up by paying checks, ACH transactions, cash withdrawals or anything else. Then when the approved debit transaction comes in it could result in an overdraft fee for which the consumer was not prepared.

Most of the banking agencies consider this to be a UDAAP problem based on the fact that it is deceptive not to hold funds until the payment when the consumer would reasonably expect it based on the initial hold. This is a predictability problem. The service is not behaving in a way the consumer expects. Most of these problems can be prevented by holding the debit card transaction funds for 2 or 3 days instead of just one day.

Case Study #2 Discussion

What is the value the consumer expects to receive? Again, consider the consumer's perspective. The score being provided may have some value, but clearly it is not as valuable as a score actually used by lenders. Since there are disclaimers in the ad and on the statement, the bank is trying to make that fact clear, so there will not be a misunderstanding. The question is this - is the disclaimer prominent enough so that it will be seen by anyone who is thinking about the benefit of the credit score while they are considering signing up for the overdraft protection service. One mitigating factor here is that if the consumer decides they do not like the credit score, they can opt out of overdraft protection at any time. The main factor in deciding whether or not this is a UDAAP problem is how prominent the disclaimers are in the advertising and on the statement itself.

Case Study #3 Discussion

This is a basic fairness issue that is related to predictability. The consumer cardholders have rights under the Electronic Fund Transfer Act to be reimbursed for unauthorized charges on their debit cards with only a few restrictions. Generally, consumers are aware of these rights and the EFTA disclosure, given to them at the time they open accounts generally reinforces their expectations. The bank in this case is placing more requirements on the consumer than the law does. In fact, the requirement to file a police report and assist the bank in prosecution are fairly onerous. Regulatory agencies have considered requirements like these that limit debit card reimbursements to be unfair and burdensome and therefore a UDAAP issue.

Case Study #4 Discussion

This is probably not a UDAAP issue for the bank as long as it quickly corrects the impression given to applicants. It should make sure that they are aware of the correct rate before they begin the application process. The bank should notify the newspaper and ask them to immediately post a prominent correction notice to avoid as much confusion as possible.

Case Study #5 Discussion

This is a potential UDAAP issue for the bank. Holding the payments without giving the borrower credit for the overpayment is potentially an unfair practice. Again, this problem is one of predictability. The consumer has reasonable expectations for how the funds would be treated and presumably those expectations include the funds being credited in a way that is advantageous to him or her. The consumer sent extra funds to the bank with some intent. That intent is unknown because they did not send instructions with the payment. However, the bank should either get into contact with each borrower when the funds are received to determine their wishes, or the bank should formulate a policy that provides that the funds will be applied in a manner that is the most advantageous to the borrower, such as crediting them to the principal balance. Once a policy is formulated, borrowers should be notified so they will know what to expect when overpayments arc made with no specific instructions.

Case Study #6 Discussion

From an Unfair, Deceptive, or Abusive Acts or Practices perspective, the account should not be titled "free" checking. In order to do this, any advertising or promotion must make it clear that electronic statements are required.

Case Study #7 Discussion

This question is a discussion topic. There are many ramifications within this case study.

Section 15:
Other Real World Situations

"Interest Free" Marketing

The Bank was found to promote a deferred-interest offer as "Interest Free" in multiple advertisements. The advertisement indicates the loan has "Up to 12 months Interest Free…" The Consumer Finance Protection Bureau recently raised concerns around the marketing of deferred-interest offers.

Recommendation

We believe, based on the warning from the CFPB, that management should not promote the product as "Interest Free." Management should review all marketing material for the deferred-interest loan to ensure that costs, conditions, and limitations associated with the promotional offer are clearly communicated. Specifically, that interest accrues from the date of the consumer's purchase and is charged if the balance not paid in full before the promotional period ends.

Marketing - Bank's Website

Through a review of the Bank's website, it was determined that several representations increase the risk of potential unfair, deceptive, or abusive acts or practices. The following statements do not appear to be factually based and/or accurate.

When discussing a consolidation loan the disclosure states:

- Make Yourself "Debt FREE" and Save On Interest

When discussing auto loans the disclosures states:

- With a Bank Auto Loan, dealers will view you as a cash customer and you'll be in a much better bargaining position. You'll have the ability to negotiate a better vehicle price and, in most cases, drive away the same day.

When discussing certificates of deposit the disclosure states:

- Our Certificates of Deposits offer guaranteed yields, flexibility, and the safety of FDIC insurance. You will lock in a high yield that's guaranteed from the day you open the account until the day it matures. You know exactly what return you'll get and when you'll get it.

Recommendation

Management should review the information provided to consumers to ensure that the materials do not misrepresent costs, conditions, limitations, or other terms either affirmatively or by omission.

Collection of Consumer Debt

Depending on the facts and circumstances, certain acts or practices related to the collection of consumer debt could constitute unfair, deceptive, or abusive acts or practices (UDAAPs). A number of letters potentially use false, deceptive, or misleading representations or use potentially unfair or unconscionable means to collect or attempt to collect debt. Also, a number of letters threaten specific action that could be UDAAPs if not intended.

To determine whether an act or practice has actually misled or is likely to mislead a consumer, the totality of the circumstances is considered. Deceptive acts or practices can take the form of a representation or omission. The Bureau also looks at implied representations, including any implications that statements about the consumer's debt can be supported. Ensuring that claims are supported before they are made will minimize the risk of omitting material information and/or making false statements that could mislead consumers.

Recommendation

Management should review the facts and circumstances for each sample collection letter to determine if the letters contain false, misleading and/or threatening statements.

Continuous or Extended Overdraft or Negative Balance Fees

The Bank's overdraft privilege service disclosure provides that continuous overdraft fees may be charged after accounts are overdrawn **more** than ten business days. The overdraft notice provided to the customer indicates an additional $30 is charged "**each** ten business days overdrawn".

The Bank should consider that the difference in the language provided could cause confusion for the customer. In the statement sample provided, the continuous overdraft fee was assessed on the tenth business day, not after the account was overdrawn more than ten business days, which would be the eleventh business day. This practice could be considered as unfair in violation of Section 5.

Recommendation

Management should review the information provided to consumers concerning overdraft services, particularly any extended overdraft and negative balance fees and ensure that language is consistent on the disclosure and overdraft notice to reflect the Bank's actual practice.

Overdraft Protection Program

Issue

Overdraft protection programs have recently been subject to examiner scrutiny with focus on UDAAP. Clear disclosures and explanations to consumers of the operation, costs, and limitations of an overdraft protection program and appropriate management oversight of the program are fundamental to enabling responsible use of overdraft protection. Such disclosures and oversight can also minimize potential consumer confusion and complaints, foster good customer relations, and reduce credit, legal and other potential risks to the institution.

Management is not currently monitoring excessive consumer usage.

Recommendation

Management should monitor the program for excessive or chronic customer use. Excessive usage may indicate a need for alternative credit arrangements or other services. Consumers found to have excessive usage should be contacted to discuss less costly alternatives to the automated overdraft payment program such as a linked savings account or a more reasonably priced line of credit consistent with safe and sound banking practices. Customers should be given a reasonable opportunity to decide whether to continue fee-based overdraft coverage or choose another available alternative.

Issue: Explain impact of transaction clearing policies

The Bank's payment order was not found in communications about the Bank's overdraft protection program.

Recommendation

In communications about the Bank's overdraft protection program, the Bank should clearly disclose to consumers the payment order, that transactions may not be processed in the order in which they occurred, and that the order in which transactions are received by the institution and processed can affect the total amount of overdraft fees incurred by the consumer.

Section 16:
CFPB Takes Action Against Bank of America for Illegally Charging Junk Fees, Withholding Credit Card Rewards, and Opening Fake Accounts

July 11, 2023

Editor's Note: Manual contains minor edits, mostly for formatting

Text

WASHINGTON, D.C. – Today, the Consumer Financial Protection Bureau (CFPB) ordered Bank of America to pay more than $100 million to customers for systematically double-dipping on fees imposed on customers with insufficient funds in their account, withholding reward bonuses explicitly promised to credit card customers, and misappropriating sensitive personal information to open accounts without customer knowledge or authorization. The Office of the Comptroller of the Currency (OCC) also found that the bank's double-dipping on fees was illegal. Bank of America will pay a total of $90 million in penalties to the CFPB and $60 million in penalties to the OCC.

"Bank of America wrongfully withheld credit card rewards, double-dipped on fees, and opened accounts without consent," said CFPB Director Rohit Chopra. "These practices are illegal and undermine customer trust. The CFPB will be putting an end to these practices across the banking system."

Bank of America (NYSE:BAC) is a global, systemically important bank serving 68 million people and small business clients, and has one of the largest coverages in consumer financial services in the country. As of March 31, 2023, the bank had $2.4 trillion in consolidated assets and $1.9 trillion in domestic deposits, which makes it the second- largest bank in the United States.

Bank of America harmed hundreds of thousands of consumers over a period of several years and across multiple product lines and services. Specifically, Bank of America:

- **Deployed a double-dipping scheme to harvest junk fees:** Bank of America had a policy of charging customers $35 after the bank declined a transaction because the customer did not have enough funds in their account. The CFPB's investigation found that Bank of America double-dipped by allowing fees to be repeatedly charged for the same transaction. Over a period of multiple years, Bank of America generated substantial additional revenue by illegally charging multiple $35 fees.
- **Withheld cash and points rewards on credit cards:** To compete with other credit card companies, Bank of America targeted individuals with special offers of cash and points when signing up for a credit card. Bank of America illegally withheld promised credit card

account bonuses, such as cash rewards or bonus points, to tens of thousands of consumers. The bank failed to honor rewards promises for consumers who submitted in-person or over-the-phone applications. The bank also denied sign-up bonuses to consumers due to the failure of Bank of America's business processes and systems.

- **Misused Sensitive Customer Information to Open Unauthorized Accounts**: From at least 2012, in order to reach now disbanded sales-based incentive goals and evaluation criteria, Bank of America employees illegally applied for and enrolled consumers in credit card accounts without consumers' knowledge or authorization. In those cases, Bank of America illegally used or obtained consumers' credit reports, without their permission, to complete applications. Because of Bank of America's actions, consumers were charged unjustified fees, suffered negative effects to their credit profiles, and had to spend time correcting errors.

This is not the first enforcement action Bank of America has faced for illegal activity in its consumer business. In 2014, the CFPB ordered Bank of America to pay $727 million in redress to its victims for illegal credit card practices. In May 2022, the CFPB ordered Bank of America to pay a $10 million civil penalty over unlawful garnishments and, later in 2022, the CFPB and OCC fined Bank of America $225 million and required it to pay hundreds of millions of dollars in redress to consumers for botched disbursement of state unemployment benefits at the height of the COVID-19 pandemic.

Enforcement Action

Under the Consumer Financial Protection Act, the CFPB has the authority to take action against institutions violating consumer financial protection laws. Bank of America's practices violated the Act's prohibition on unfair and deceptive acts or practices. Bank of America also violated the Fair Credit Reporting Act by using or obtaining consumer reports without a permissible purpose in connection with unauthorized credit cards, as well as the Truth in Lending Act and its implementing Regulation Z, by issuing credit cards to consumers without their knowledge or consent.

The CFPB's orders require Bank of America to:

- **Stop its repeat offenses**: Under the terms of today's orders, Bank of America must stop opening unauthorized accounts, and the bank must disclose material limitations on any rewards cards bonuses and provide bonuses as advertised. Additionally, while Bank of America has generally reduced its reliance on junk fees, the bank is also strictly prohibited from charging repeat non-sufficient funds fees in the future.
- **Pay redress to harmed consumers:** The orders require Bank of America to compensate consumers charged unlawful non-sufficient funds fees and who have not already been made whole by the bank, totaling approximately $80.4 million in consumer redress. The bank must also compensate consumers who incurred costs stemming from the unauthorized opening of new credit card accounts, and any customers improperly denied bonuses whom the bank has not already made whole. The bank previously paid around $23 million to consumers who were denied rewards bonuses.
- **Pay $90 million in penalties to the CFPB:** Bank of America will pay a $60 million penalty to the CFPB for charging repeat non-sufficient funds fees, and a $30 million

penalty to the CFPB for its credit card rewards practices and for opening unauthorized accounts. The penalties will be deposited into the CFPB's victims relief fund. Separately, Bank of America will also pay a $60 million penalty to the OCC for its double-dipping fee practices.

Section 17: CFPB Orders Installment Lender OneMain to Pay $20 Million for Deceptive Sales Practices

May 31, 2023

Editor's Note: Manual contains minor edits, mostly for formatting

Text

WASHINGTON, D.C. – The Consumer Financial Protection Bureau (CFPB) has ordered installment lender OneMain Financial to pay $20 million in redress and penalties for failing to refund interest charged to 25,000 customers who cancelled purchases within a purported "full refund period," and for deceiving borrowers about needing to purchase add-on products to receive a loan. OneMain will pay $10 million in refunds to consumers it harmed, and an additional $10 million penalty to the CFPB's victims relief fund.

"OneMain pressured its employees to load up its loans with extra charges through false promises of easy cancellation with full refunds," said CFPB Director Rohit Chopra. "We are ordering OneMain to refund borrowers it cheated and to clean up its business practices."

OneMain is a nonbank personal loan installment lender headquartered in Evansville, Indiana and is a subsidiary of OneMain Holdings, Inc. (NYSE:OMF). OneMain is one of the largest non-depository personal installment lenders in the United States. It has a nationwide network with more than 1,400 branches across 44 states. The company offers loans and makes extra profits by upselling borrowers with products such as roadside assistance, unemployment coverage, and identity theft coverage.

OneMain expected its employees to upsell borrowers on every loan. Employees were incentivized to push more products, and company training materials directed them to upsell them even when consumers had already declined the products on previous loans. Salespeople were evaluated on the basis of their sales rate and could even be fired if they did not upsell enough.

The CFPB found that OneMain:

- **Tricked borrowers into signing up for optional products:** OneMain customers were led to believe that they could not receive a loan without signing up for an add-on product. Some employees added the products to paperwork without verbally informing the consumer that the products were included or optional, a practice referred to internally as "pre-packing." If the consumer identified the products and asked for their removal, employees were expected to make it seem difficult to remove the products. In other cases, employees obscured written disclosures from consumers' view, or verbally contradicted them.

- **Kept $10 million in interest charges despite its "full-refund" policy:** OneMain told borrowers they would receive a "full refund" on add-on purchases if they cancelled within a certain period (generally 30 days). However, OneMain unfairly failed to refund interest charges for about 25,000 borrowers who signed up for add-ons such as roadside assistance benefits, identity theft protection, or entertainment discounts. Because of how OneMain precomputed interest on some loans, customers had already been charged significant amounts of interest that the company did not refund. Over the past four years, OneMain kept approximately $10 million in interest charges attributable to add-ons cancelled within its purported "full refund period."

Enforcement Action

Under the Consumer Financial Protection Act (CFPA), the CFPB has the authority to take enforcement action against institutions violating consumer financial laws. The CFPB found that OneMain's practices violated the CFPA's prohibition on unfair practices by charging and then failing to refund the full premium or fee and interest that accrued on add-on products consumers did not agree to purchase. OneMain also charged and failed to refund interest that accrued on add-on product fees during an advertised full refund period. Finally, the CFPB found OneMain was illegally interfering with consumers' ability to understand that certain products were optional, and that OneMain charged non-refundable interest during the purported full-refund period.

The order requires OneMain to:

- **Adjust cancellation policies**: The order requires OneMain to stop its unlawful activities, adjust its policies to make cancellation of add-on products easier, double the period in which a consumer can cancel an unused add-on product without cost from 30 to 60 days, and include interest in refunds after add-on product cancellations at any time.
- **Provide redress to consumers:** The order requires OneMain to pay $10 million in refunds to consumers for improper charges.
- **Pay $10 million in penalties:** OneMain is required to pay a $10 million penalty to the CFPB, which will be deposited into the CFPB's victims relief fund.

Section 18:
CFPB Exams Return $140 Million to Consumers Hit by Illegal Junk Fees in Banking, Auto Loans, and Remittances

October 11, 2023

Editor's Note: Manual contains minor edits, mostly for formatting. All items in this section were dated October 11, 2023.

Text

WASHINGTON, D.C. – Today, the Consumer Financial Protection Bureau (CFPB) released a special edition of its Supervisory Highlights focused on the agency's efforts to protect consumers from illegal junk fees. The junk fees discussed in the report – including fees for fake paper statements and worthless add-on products for auto loans – can strain the financial stability of even the most financially savvy families. As a result of the CFPB's supervisory work, the companies in today's report are refunding $140 million to consumers, $120 million of which is for surprise overdraft fees and double-dipping on non-sufficient funds fees. A separate report today finds that most financial institutions have eliminated non-sufficient funds fees, saving consumers an estimated $2 billion every year.

"The CFPB continues to uncover junk fee scams that violate the law and undermine consumer trust," said CFPB Director Rohit Chopra. "We will continue to combat the illegal fees cropping up in consumer finance markets."

This Supervisory Highlights special edition covers junk fees in the areas of bank account deposits, auto loan servicing, and remittances found during examinations between February and August 2023. CFPB oversight has identified instances of companies charging a variety of junk fees, including for:

- **Fake paper statements:** Some institutions charge customers monthly fees for sending paper bank statements. CFPB examiners found instances where banks charged fees for statements they never actually printed or mailed.
- **Worthless add-on products for paid-off auto loans:** When people purchase cars, they sometimes have purchase loan add-on products, like guaranteed asset protection (GAP) insurance. In situations when borrowers paid off their loan early or had their vehicle repossessed, CFPB examiners found that loan servicers continued to charge fees for the add-on products, which no longer offered any value.
- **Sloppy international money transfers:** CFPB examiners found remittance providers charged hidden fees by taking money out of the funds consumers sent without properly

disclosing them. In other instances, CFPB examiners found remittance providers failed to refund fees when the money consumers sent failed to arrive on time.

Additionally, CFPB examiners found how service providers contribute to many banks' illegal fee practices. These companies provide critical deposit, payment, and data processing services to many banks' operation systems. Those operation systems have contributed to banks' double-dipping on non-sufficient funds fees on a single transaction. The CFPB directed these service providers to stop supporting banks' ability violate the law.

When CFPB examiners uncover problems, they share their findings with companies to help them remediate violations. Typically, as with many of the instances identified within today's report, companies take actions to fix the identified problems. For more serious violations or when companies fail to take corrective actions, the CFPB opens investigations for potential enforcement actions.

Non-sufficient funds fees report

The CFPB has enhanced its supervision and enforcement scrutiny of banks that are heavily dependent on fees. Over the past several years, more financial institutions have voluntarily moved away from charging non-sufficient funds fees. In a data spotlight published today, the CFPB found that the vast majority of reported NSF fee revenue has been eliminated. The policy changes among financial institutions that led to this change are expected to save consumers $2 billion annually.

Vast Majority of NSF Fees Have Been Eliminated, Saving Consumers Nearly $2 billion annually

Some financial institutions are behind the trend, continuing to charge these fees.

CFPB recently analyzed the non-sufficient fund (NSF) fee practices of a number of banks and credit unions. NSF fees are charges that some financial institutions impose when they decline to make a payment from a consumer's account, like a check or electronic authorization, after determining the account lacks sufficient funds. NSF fees are distinct from overdraft fees, which financial institutions charge when they pay, rather than decline, a payment when the account lacks sufficient funds. CFPB's analysis found that

- Nearly two-thirds of banks with over $10 billion in assets have eliminated NSF fees.
- Nearly three-fourths of the banks that earned the most in overdraft/NSF fee revenue in 2021, including 27 of the top 30 earners, have eliminated NSF fees.
- Among credit unions with over $10 billion in assets, 16 of 20 continue to charge NSF fees, including four of the five largest.

CFPB used this analysis to estimate the resulting reduction in NSF fee revenue over the past several years. In their call reports, banks over $1 billion in assets are required to report their combined overdraft/NSF fee revenue separately from other deposit account service charges. Based on CFPB's prior work, CFPB estimates that NSF fee revenue alone has typically comprised approximately 19% of combined overdraft/NSF fee revenue. Based on CFPB's analysis and applying this assumption, CFPB estimates

- Among banks with over $10 billion in assets, 97% of NSF fee revenue has been eliminated.
- Among the 75 banks earning the most overdraft/NSF fee revenue in 2021, 95% of NSF fee revenue has been eliminated.
- CFPB estimates that, as a result of the elimination of NSF fees at these banks, consumers are saving almost $2 billion annually on a going forward basis.

Generally, larger banks have been more likely to eliminate NSF fees. All banks with over $75 billion in assets and all but seven of the 63 banks with over $25 billion in assets have eliminated NSF fees.

CFPB Issues Guidance to Halt Large Banks from Charging Illegal Junk Fees for Basic Customer Service

Advisory opinion provides guidance on 2010 legal provision regarding customer service by large financial firms.

Today, the Consumer Financial Protection Bureau (CFPB) issued an advisory opinion regarding a provision enacted by Congress which generally prohibits large banks and credit unions from imposing unreasonable obstacles on customers, such as charging excessive fees, for basic information about their own accounts. Under a 2010 federal law, large banks and credit unions must provide complete and accurate account information when requested by accountholders. As many large banks shift away from a relationship banking model that prioritizes high levels of customer service, today's advisory opinion clarifies that people are entitled to get the basic information they need without having to pay junk fees.

"While small relationship banks pride themselves on customer service, many large banks erect obstacle courses and impose junk fees to answer basic questions," said CFPB Director Rohit Chopra. "While the biggest banks have abandoned the relationship banking model, federal law still requires them to answer certain customer inquiries completely, accurately, and in a timely manner."

In the run up to the 2008 financial crisis, large banks, along with other financial institutions, failed to ensure consumers had access to full details about their accounts. As millions of homeowners struggled to pay their mortgages, many were unable to even determine which companies held their loans. When Congress instituted financial reforms in the Consumer Financial Protection Act, it included a provision in Section 1034(c) requiring large banks and credit unions – those with more than $10 billion in assets – to provide account information that is in their control or possession, when it is requested by customers.

When large financial institutions charge fees to respond to those requests, they impede customers from obtaining the essential information they are entitled to under federal law. From its market monitoring and the public's comments about large banks' customer service, the CFPB is aware that some large banks charge customers for basic information that is critical to fix problems with their bank account or to manage their finances.

Banks give many different names to these fees. Today's guidance explains how the CFPB will administer the legal requirement for large banks when it comes to customer service, including how the CFPB will evaluate fees imposed on customers for making reasonable requests, such as seeking original account agreements or information about recurring withdrawals from an account.

Prepared Remarks of CFPB Director Rohit Chopra on a Press Call on Junk Fees

Across the country, Americans are working hard to create and provide products sold here at home and around the world.

That's what makes American businesses grow and succeed, and it's what helps our entire economy.

Americans are willing to pay a competitive price for great products, because that's how a fair economy works. And when companies focus on competing, rather than cheating, everyone wins.

But, unfortunately, some companies don't want to compete. Instead of investing to develop new and innovative products and services, they're devoting their energy to come up with new ways to trick us – or even force us – to pay billions of dollars each year in junk fees.

Junk fees are unavoidable, surprise, excessive, or unnecessary charges imposed for fake or even worthless services. Even when a service is legitimate, junk fees often far exceed the actual cost, because the company figures out how to sidestep meaningful competition.

For years, junk fees have been creeping across the economy, and Americans are tired and fed up.

The Consumer Financial Protection Bureau, which polices the financial industry for abuses against families and honest businesses, has been focused on creating more competition, which is helping to eliminate junk fees and stop financial firms from cooking up new junk fees.

Our investigations have uncovered major misconduct at the nation's largest banks. We caught Wells Fargo and Regions Bank in a multi-year surprise overdraft fee scam. By manipulating how payments were processed, the banks even charged people multiple overdraft fees in a single day, rather than just one. At Bank of America, we found a nationwide double-dipping scheme, where the bank charged multiple fees for the same transaction. Our junk fee enforcement actions have led to hundreds of millions of dollars in refunds for people across the country.

And this work is having an impact beyond just those specific law enforcement actions. For example, a report we issued today shows that financial firms have nearly eliminated transaction denial fees or NSF fees entirely. Since 2021, that fee revenue shrank by 86%, saving consumers almost $2 billion every year.

Today, the CFPB is announcing additional actions that will put money back in Americans' pockets and stop new junk fees from emerging in the financial industry.

First, we're issuing a new policy to ensure that the largest banks in the country play it straight with customers when it comes to their accounts, rather than imposing excessive junk fees when people need basic answers to their questions.

Local banks tend to put a heavy emphasis on customer service, because they make their money through their customer relationships. That's why they'll take the time to help you with any problems that arise. But big banks in our country have mostly abandoned relationship banking and have shifted toward algorithmic or assembly-line banking. Many of them now use chatbots and artificial intelligence to discourage or prevent you from talking to a human.

To address the customer service problems at big banks, Congress passed a law in 2010 requiring heightened customer service standards. However, to date, this law has not been enforced. We are changing that.

Today's guidance outlines a pretty basic concept: when people request basic information about their accounts, big banks cannot charge them junk fees or trap them in endless customer service loops. When people are just trying to get simple information to fix problems with their bank account or manage their finances, they shouldn't be hit with one fee after another. Banks must answer questions completely, accurately, and in a timely manner.

Charging a competitive price for a legitimate service make sense. But charging junk fees for basic customer responsiveness doesn't.

In addition, we are issuing the results of our recent oversight inspections of major financial institutions. Based on our work, these companies will be refunding $140 million in junk fees they shouldn't have charged in the first place, covering multiple lines of business.

We uncovered a number of egregious, illegal junk fee practices, including one company that charged a monthly paper statement fee without even printing or mailing the statement, leading to millions in fake revenue.

There is more to come. Later this month, the CFPB will propose new rules to create more competition in banking to make it easier to switch your account, find more attractive rates, and avoid junk fees.

Our work is paying off, and we're already seeing billions of dollars in savings for Americans. We are pleased to be part of this all-of-government effort to promote competition for the benefit of both families and honest businesses.

Section 19: CFPB Orders Atlantic Union Bank to Pay $6.2 Million for Illegal Overdraft Fee Harvesting

December 07, 2023

Editor's Note: Manual contains minor edits, mostly for formatting

Text

WASHINGTON, D.C. – The Consumer Financial Protection Bureau (CFPB) today took action against Atlantic Union Bank for illegally enrolling thousands of customers in checking account overdraft programs. The CFPB found that Atlantic Union misled consumers who enrolled in this overdraft service by phone and failed to provide proper disclosures. The CFPB is ordering Atlantic Union to refund at least $5 million in illegal overdraft fees and pay a $1.2 million penalty to the CFPB's victims relief fund.

"Atlantic Union Bank harvested millions of dollars in overdraft fees through a host of illegal practices," said CFPB Director Rohit Chopra. "Americans are fed up with junk fee scams and the CFPB will continue its work to ensure families are treated fairly."

Atlantic Union Bank (NYSE: AUB) is a subsidiary of Atlantic Union Bankshares Corporation, a bank holding company headquartered in Richmond, Virginia. As of March 31, 2023, Atlantic Union had over $20 billion in total assets.

The Electronic Fund Transfer Act and its implementing regulation require banks to describe their overdraft service in writing before getting a consumer to opt-in to overdraft coverage for ATM withdrawals and one-time debit card transactions.

The CFPB's order describes the bank's illegal conduct and how it improperly communicated with and enrolled consumers in its overdraft program. Specifically, the bank violated federal law by:

- **Charging fees without proper consent**: At Atlantic Union Bank branches, employees gave oral descriptions of the bank's overdraft coverage to new customers who opened checking accounts. Employees sought oral confirmation from customers to enroll in overdraft coverage before providing them with the required written disclosures describing the terms of service.
- **Misleading customers about the terms and costs of overdraft coverage**: For customers who enrolled in overdraft coverage by phone, Atlantic Union Bank employees did not clearly explain which transactions were covered by the service, and made other misleading statements about the terms and conditions of the service. In some calls, bank

employees also omitted key information about the cost of the service and the fact that consumers could incur a hefty overdraft fee for each transaction covered by the service.

Enforcement Action

Under the Consumer Financial Protection Act (CFPA), the CFPB has the authority to take action against institutions violating consumer financial laws, including engaging in unfair, deceptive, or abusive acts or practices. The CFPB found Atlantic Union Bank violated the Electronic Fund Transfer Act's opt-in requirements for overdraft services, and it found the bank engaged in deceptive acts or practices in violation of the CFPA.

The order requires Atlantic Union to end its unlawful practices and:

- **Refund $5 million to thousands of consumers:** The bank must pay at least $5 million in redress to thousands of affected consumers illegally charged overdraft fees.
- **Pay a $1.2 million fine**: Atlantic Union will pay a $1.2 million penalty to the CFPB's victims relief fund.

Section 20: CFPB Proposes Rule to Close Bank Overdraft Loophole that Costs Americans Billions Each Year in Junk Fees

January 17, 2024

Text

WASHINGTON, D.C. – The Consumer Financial Protection Bureau (CFPB) today proposed a rule to rein in excessive overdraft fees charged by the nation's biggest financial institutions. The proposal would close an outdated loophole that exempts overdraft lending services from longstanding provisions of the Truth in Lending Act and other consumer financial protection laws. For decades, very large financial institutions have been able to issue highly profitable overdraft loans, which have garnered them billions of dollars in revenue annually. Under the proposal, large banks would be free to extend overdraft loans if they complied with longstanding lending laws, including disclosing any applicable interest rate. Alternatively, banks could charge a fee to recoup their costs at an established benchmark – as low as $3, or at a cost they calculate, if they show their cost data.

"Decades ago, overdraft loans got special treatment to make it easier for banks to cover paper checks that were often sent through the mail," said CFPB Director Rohit Chopra. "Today, we are proposing rules to close a longstanding loophole that allowed many large banks to transform overdraft into a massive junk fee harvesting machine."

The proposed rule would apply to insured financial institutions with more than $10 billion in assets, which covers approximately the 175 largest depository institutions in the country. These institutions typically charge $35 for an overdraft loan, even though the majority of consumers' debit card overdrafts are for less than $26, and are repaid within three days.

Approximately 23 million households pay overdraft fees in any given year. The CFPB estimates that this rule may save consumers $3.5 billion or more in fees per year. The potential savings would translate to $150 for households that pay overdraft fees.

The Truth in Lending Loophole

In 1968, Congress enacted the Truth in Lending Act. In 1969, the Federal Reserve Board wrote rules to implement the new law, which generally required lenders to clearly disclose the cost of credit to a borrower. At the time, many families received and sent checks through the mail, and had little certainty about when their deposits and withdrawals would clear. When a bank clears a check and the consumer doesn't have funds in the account, the bank is issuing a loan to cover the difference. The Federal Reserve Board created an exemption to Truth in Lending protections if the bank was honoring a check when their depositor "inadvertently" overdrew their account. At the time, this was used infrequently and there was a modest cost. It was not a major profit driver.

However, in the 1990s and early 2000s, with the rise of debit cards, institutions began raising fees and using the exemption to churn high volumes of overdraft loans on debit card transactions. Annual overdraft fee revenue in 2019 was an estimated $12.6 billion. And, in 2022, Wells Fargo and JPMorgan Chase led the way – accounting for one-third of overdraft revenue reported by banks over $1 billion.

Recent policy changes at some banks have lowered overdraft fee revenue to about $9 billion per year. The policy changes followed enforcement and supervisory efforts by the CFPB to root out illegal overdraft practices, such as charging fees to consumers who had enough money in their account to cover the transaction at the time the bank authorized it.

Proposed Rule

The proposed rule would require very large financial institutions to treat overdraft loans like credit cards and other loans as well as to provide clear disclosures and other protections. Many banks and credit unions already provide lines of credit tied to a checking account or debit card when the consumer overdraws. The proposal provides clear rules of the road to ensure consistency and clarity.

The CFPB also is proposing to limit the longstanding exemption to overdraft practices that are offered as a convenience, rather than as a profit driver. The proposed rule would allow financial institutions to charge a fee in line with their costs or in accordance with an established benchmark. The CFPB has proposed benchmarks of $3, $6, $7, or $14 and is seeking comment on the appropriate amount.

CFPB's Junk Fee Efforts

The proposed overdraft rule is part of a continued effort by the CFPB to rein in junk fees and spur competition in the consumer financial product marketplace. In early 2022, the CFPB launched an initiative to save Americans billions in junk fees, which generated more than 80,000 responses from the public. The overwhelming majority of the responses were complaints about overdraft fees.

The CFPB has taken multiple actions to curb out-of-control overdraft fees and other junk fees prevalent in consumer financial products. The CFPB issued guidance to rein in surprise overdraft fees in October 2022. It also took enforcement actions against Wells Fargo, Regions Bank, and Atlantic Union to return to consumers $205 million, $141 million, and $5 million in unlawful fees, respectively, in addition to significant civil money penalties paid to the CFPB's victims relief fund.

Additionally, the CFPB's recent supervisory efforts resulted in financial institutions returning $120 million in junk overdraft and non-sufficient funds fees to consumers. And in a separate enforcement action, the CFPB ordered Bank of America to pay $90 million for, among other things, double-dipping on non-sufficient funds fees.

After the CFPB began its work to tackle junk fees, many banks began reforming their overdraft and non-sufficient funds fees policies. Those reforms have resulted in $3.5 billion in annual savings on overdraft fees and an additional $2 billion in savings on non-sufficient funds fees.

The CFPB has also taken actions on credit card late fees and customer service fees. In February 2023, the CFPB proposed a rule to rein in excessive credit card late fees. In October 2023, the CFPB issued an advisory opinion to halt large banks from charging illegal junk fees for basic customer service.

The CFPB is one of many independent regulatory agencies and cabinet departments that are members of the White House Competition Council , established by the Executive Order on Promoting Competition in the American Economy

Consumer Financial Protection Bureau

Policy Statement on Abusive Acts or Practices April 3, 2023

Background

In 2010, Congress passed the Consumer Financial Protection Act of 2010 (CFPA) and banned abusive conduct. The CFPA's prohibition on abusive conduct was the most recent instance of congressional tailoring of the Federal prohibitions intended to ensure fair dealing and protect consumers and market participants in the United States.

Since the beginning of the 20th century, Congress has amended these prohibitions in response to evolving norms, economic events, and judicial interpretations, guiding those tasked with enforcing the law. Beginning with the creation of the Federal Trade Commission, and the development of the "unfair methods of competition" and "unfair or deceptive acts or practices" prohibitions, Congress has passed laws to regulate fair dealing, and the agencies tasked with administering those laws have issued policy statements to offer guidance on the agencies' approach to enforcing those prohibitions.

For centuries, lenders and investors generally had an incentive to ensure that a borrower had the ability to repay a debt. But innovations in capital markets and fixed income instruments altered this alignment of incentives. The advent of complex securitization led to lenders no longer bearing risk when a borrower defaulted because they had sold the underlying asset, and passed on the exposure to investors. Fair dealing laws in the U.S. have long sought to address the risks and harms from market failures.

The 2007-2008 financial crisis tested U.S. consumer protection laws, government watchdogs, and the ability of the existing authorities to address the predatory lending that was a root cause of the collapse. The financial crisis was set in motion by a set of avoidable interlocking forces but at its core were mortgage lenders profiting (by immediately selling on the secondary market) on loans that set people up to fail because they could not repay. Millions of Americans saw their home values drop and their jobs eliminated as a result of forces largely out of their control.

In response, Congress concluded that the manner in which agencies had enforced the prohibitions on unfair and deceptive acts or practices was too limited to be effective at preventing the financial crisis, and once again amended existing law to better meet new challenges. In the CFPA, Congress granted authority over unfair or deceptive acts or practices to the States, the Federal banking agencies, and the newly created Consumer Financial Protection Bureau (CFPB). Congress also added a prohibition on abusive acts or practices.

Since the enactment of the CFPA, government enforcers and supervisory agencies have taken dozens of actions to condemn prohibited abusive conduct. The CFPB is issuing this Policy Statement to summarize those actions and explain how the CFPB analyzes the elements of abusiveness through relevant examples, with the goal of providing an analytical framework to fellow government enforcers and to the market for how to identify violative acts or practices.

Analysis

Under the CFPA, there are two abusiveness prohibitions. An abusive act or practice: (1) Materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or (2) Takes unreasonable advantage of:

- A lack of understanding 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 the interests of the consumer in selecting or using a consumer financial product or service; or
- The reasonable reliance by the consumer on a covered person to act in the interests of the consumer.

The statutory text of these two prohibitions can be summarized at a high level as: (1) obscuring important features of a product or service, or (2) leveraging certain circumstances to take an unreasonable advantage. The circumstances that Congress set forth, stated generally, concern *gaps in understanding, unequal bargaining power, and consumer reliance.*

Unlike with unfairness but similar to deception, abusiveness requires no showing of substantial injury to establish liability, but is rather focused on conduct that Congress presumed to be harmful or distortionary to the proper functioning of the market. An act or practice need fall into only one of the categories above in order to be abusive, but an act or practice could fall into more than one category.

Materially Interfering with Consumers' Understanding of Terms and Conditions

The first abusiveness prohibition concerns situations where an entity "materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service." Material interference can be shown when an act or omission is intended to impede consumers' ability to understand terms or conditions, has the natural consequence of impeding consumers' ability to understand, or actually impedes understanding.

Acts or Omissions

Material interference may include actions or omissions that obscure, withhold, de-emphasize, render confusing, or hide information relevant to the ability of a consumer to understand terms and conditions. Interference can take numerous forms, such as buried disclosures, physical or digital interference, overshadowing, and various other means of manipulating consumers' understanding.

Buried disclosures include disclosures that limit people's comprehension of a term or condition, including but not limited to, through the use of fine print, complex language, jargon, or the timing of the disclosure. Entities can also interfere with understanding by omitting material terms or conditions.

Physical interference can include any physical conduct that impedes a person's ability to see, hear, or understand the terms and conditions, including but not limited to physically hiding or withholding notices.

Digital interference can include impediments to a person's ability to see, hear, or understand the terms and conditions when they are presented to someone in electronic or virtual format. This form of interference includes but is not limited to user interface and user experience manipulations such as the use of pop-up or drop-down boxes, multiple click-throughs, or other actions or "dark patterns" that have the effect of making the terms and conditions materially less accessible or salient.

Overshadowing includes the prominent placement of certain content that interferes with the comprehension of other content, including terms and conditions.

Material Interference

There are a number of methods to prove material interference with a consumers' ability to understand terms or conditions, including but not limited to those described below. First, while intent is not a required element to show material interference, it is reasonable to infer that an act or omission materially interferes with consumers' ability to understand a term or condition when the entity intends it to interfere. Second, material interference can be established with evidence that the natural consequence of the act or omission would be to impede consumers' ability to understand. And third, material interference can also be shown with evidence that the act or omission did in fact impede consumers' actual understanding. While evidence of intent would provide a basis for inferring material interference under the first method, it is not a required element to show material interference.

Certain terms of a transaction are so consequential that when they are not conveyed to people prominently or clearly, it may be reasonable to presume that the entity engaged in acts or omissions that materially interfere with consumers' ability to understand. That information includes, but is not limited to, pricing or costs, limitations on the person's ability to use or benefit from the product or service, and contractually specified consequences of default.

Additionally, an entity's provision of a product or service may interfere with consumers' ability to understand if the product or service is so complicated that material information about it cannot be sufficiently explained or if the entity's business model functions in a manner that is inconsistent with its product's or service's apparent terms.

Taking Unreasonable Advantage

The second form of "abusiveness" under the CFPA prohibits entities from taking unreasonable advantage of certain circumstances. Congress determined that it is an abusive act or practice when an entity takes unreasonable advantage of three particular circumstances. The circumstances are:

1. A "lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service." This circumstance concerns gaps in understanding affecting consumer decision-making.
2. The "inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service." This circumstance concerns unequal bargaining power where, for example, consumers lack the practical ability to switch providers, seek more favorable terms, or make other decisions to protect their interests.
3. The "reasonable reliance by the consumer on a covered person to act in the interests of the consumer." This circumstance concerns consumer reliance on an entity, including when consumers reasonably rely on an entity to make a decision for them or advise them on how to make a decision.

Under the CFPA, it is illegal for an entity to take unreasonable advantage of one of these three circumstances, even if the condition was not created by the entity.

The ordinary meaning of the phrase "take advantage of" is generally "to make use of for one's own benefit." An advantage can include a variety of monetary and non-monetary benefits to the entity or its affiliates or partners, including but not limited to increased market share, revenue, cost savings, profits, reputational benefits, and other operational benefits to the entity.

The CFPA prohibits taking "unreasonable" advantage of the specified statutory circumstances. The term "reasonable" means "fair, proper, or moderate under the circumstances," and conversely, "unreasonable" means "exceeding the bounds of reason or moderation."

In crafting the abusiveness prohibition, Congress identified categories of practices that distort the market and ultimately harm consumers. Therefore, unlike unfairness, government enforcers do not need to independently prove that an act or practice caused substantial injury in order to establish liability under the abusiveness prohibition.

Evaluating unreasonable advantage involves an evaluation of the facts and circumstances that may affect the nature of the advantage and the question of whether the advantage-taking was unreasonable under the circumstances. Such an evaluation does not require an inquiry into whether advantage-taking is typical or not. And even a relatively small advantage may be abusive if it is unreasonable. There are also a number of analytical methods, including but not limited to those described below, that can be used to evaluate unreasonable advantage- taking.

First, when Congress formulated the CFPA, one of its main concerns was financial products and services that may be "set up to fail." Before the 2007-2008 financial crisis, mortgage lenders were willing to make loans on terms that people could not afford in part due to the ability to off-load default risk into the secondary market. This led to significant harm to the household sector, which was ultimately transmitted to the broader financial system.

The CFPA's legislative history explains that, had the CFPB existed, "the CFPB would have been able to see and take action against the proliferation of poorly underwritten mortgages with abusive terms." Partly in response to the financial crisis, Congress prohibited certain abusive business models and other acts or practices that—contrary to many consumer finance relationships where the company benefits from consumer success—misalign incentives and generate benefit for a company when people are harmed. In many circumstances, it is unreasonable for an entity to benefit from, or be indifferent to, negative consumer outcomes resulting from one of the circumstances identified by Congress.

Second, the CFPA's legislative history emphasized that, as a result of CFPB oversight, "a consumer can shop and compare products based on quality, price, and convenience without having to worry about getting trapped by fine print into an abusive deal." Unreasonable advantage-taking includes using the statutory circumstances to acquire particular leverage over people or deprive consumers of legal rights. Relatedly, advantage-taking may be unreasonable when an entity caused one of the circumstances described in CFPA section 1031(d)(2).

One may also assess whether entities are obtaining an unreasonable advantage by considering whether they are reaping more benefits as a consequence of the statutorily identified circumstances, or whether the benefit to the entity would have existed if the circumstance did not exist. In other words, entities should not get a windfall due to a gap in understanding, unequal bargaining power, or consumer reliance. Having said that, section 1031(d)(2) does not require an investigative accounting of costs and benefits or other form of quantification to make a finding. Instead, one may rely on qualitative assessment to determine whether an entity takes an unreasonable advantage.

Lack of Understanding

The first circumstance, of which entities cannot take "unreasonable advantage," as defined in the CFPA, concerns "a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service." When there are *gaps in understanding* regarding the material risks, costs, or conditions of the entity's product or service, entities may not take unreasonable advantage of that gap. Such gaps could include those between an entity and a consumer. Certain types of gaps in understanding can create circumstances where transactions are exploitative.

Gaps in understanding as to "risks" encompass a wide range of potential consumer harms. "Risks" include but are not limited to the consequences or likelihood of default and the loss of future benefits. Gaps in understanding related to "costs" include any monetary charge to a person as well as non-monetary costs such as lost time, loss of use, or reputational harm. And gaps in understanding with respect to "conditions" include any circumstance, context, or attribute of a product or service, whether express or implicit. For example, "conditions" could include the length of time it would take a person to realize the benefits of a financial product or service, the relationship between the entity and the consumer's creditors, the fact a debt is not legally enforceable, or the processes that determine when fees will be assessed.

While acts or omissions by an entity can be relevant in determining whether people lack understanding, the prohibition in section 1031(d)(2)(A) does not require that the entity caused the person's lack of understanding through untruthful statements or other actions or omissions. Under the text of section 1031(d)(2)(A), the consumer's lack of understanding, regardless of how it arose, is sufficient. If people lack understanding, entities may not take unreasonable advantage of that lack of understanding. The lack of understanding can be caused by third parties and can exist even when there is no contractual relationship between the person and the entity that takes unreasonable advantage of the person's lack of understanding.

The statutory text of the prohibition does not require that the consumer's lack of understanding was reasonable to demonstrate abusive conduct. Similarly, the prohibition does not require proof that some threshold number of people lacked understanding to establish that an act or practice was abusive.

A person may lack understanding of risks, costs, or conditions, even if they have an awareness that it is in the realm of possibility that a particular negative consequence may follow, or a particular cost may be incurred as a result of using the product or service. But consumers generally do not expect companies to benefit from or be indifferent to certain negative consequences, including but not limited to default. Moreover, consumers may not understand that a risk is very likely to happen or that—though relatively rare—the impact of a particular risk would be severe. The inquiry under section 1031(d)(2)(A) is whether some consumers in question have a lack of understanding, not all consumers or even most consumers. Since there can be differences among consumers in the risks, costs, and conditions they face and in their understanding of them, there may be a violation with respect to some consumers even if other consumers do not lack understanding.

Lastly, one can demonstrate a person's lack of understanding in a number of ways. For example, direct evidence of lack of understanding, including but not limited to complaints and consumer testimony, can suffice. Evidence or analysis showing that reasonable consumers were not likely to understand can likewise be used to establish lack of understanding. One can also demonstrate lack of understanding by considering course of conduct and likely consequences. For example, if a transaction would entail material risks or costs and people would likely derive minimal or no benefit from the transaction, it is generally reasonable to infer that people who nonetheless went ahead with the transaction did not understand those material risks or costs.

Inability of Consumers to Protect their Interests

The second circumstance, of which entities cannot take "unreasonable advantage," as defined in the CFPA, concerns "the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service." When people are unable to protect their interests in selecting or using a consumer financial product or service, they can lack autonomy. In these situations, there is a risk that entities will take unreasonable advantage of the *unequal bargaining power*. Thus, Congress has outlawed taking unreasonable advantage of circumstances where people lack sufficient bargaining power to protect their interests. Such circumstances may occur at the time of, or prior to, the person selecting the product or service, during their use of the product or service, or both.

The consumer "interests" contemplated in section 1031(d)(2)(B) include monetary and non-monetary interests, including but not limited to property, privacy, or reputational interests. People also have interests in limiting the amount of time or effort necessary to obtain consumer financial products or services or remedy problems related to those products or services. This includes, but is not limited to, the time spent trying to obtain customer support assistance.

A consumer's "inability" to protect their interests includes situations when it is impractical for them to protect their interests in selecting or using a consumer financial product or service. For example, when the steps a person would need to take to protect their interests are unknown to the person or are especially onerous, they are likely unable to protect their interest. Furthermore, people who do not have monetary means may be unable to protect their interests if the only practical method for doing so requires payment of money. Of course, merely serving people without monetary means is not abusive. However, it may be abusive to take unreasonable advantage of a person's lack of monetary means to protect their interests.

The nature of the customer relationship may also render consumers unable to protect their interests in selecting or using a consumer financial product or service. People are often unable to protect their interests when they do not elect to enter into a relationship with an entity and cannot elect to instead enter into a relationship with a competitor. These consumer relationships, including but not limited to those with credit reporting companies, debt collectors, and third-party loan servicers, are generally structured such that people cannot exercise meaningful choice in the selection or use of any particular entity as a provider. In these circumstances, people cannot protect their interests by choosing an alternative provider either upfront (i.e., they have no ability to select the provider to begin with) or during the course of the customer relationship (i.e., they have no competitive recourse if they encounter difficulty with the entity while using the product or service). Obviously, such relationships are not *per se* abusive; however, entities may not take unreasonable advantage of the absence of choice in these types of relationships. In addition, entities may not take unreasonable advantage of the fact that they are the only source for important information or services.

Consumers may also lack power to protect their interests in selecting or using a consumer financial product or service when entities use form contracts, where contractual provisions are not subject to a consumer choice. Similarly, where the person is unable to bargain over a clause because it is non-negotiable, they may be deprived of the ability to protect their interests.

Consumers are often unable to protect their interests in selecting or using a consumer financial product or service where companies have outsized market power. When an entity's market share, the concentration in a market more broadly, or the market structure prevents people from protecting their interests by choosing an entity that offers competitive pricing, entities may not use their market power to their "unreasonable advantage."

In addition, people are often unable to protect their interests in using a product or service if they face high transaction costs to exit the relationship. For example, the time, effort, cost, or risks associated with extricating oneself from a relationship with entities may effectively lock people into the relationship.

Reasonable Reliance

The third circumstance, of which entities cannot take "unreasonable advantage," as defined in the CFPA, concerns "the reasonable reliance by the consumer on a covered person to act in the interests of the consumer." This basis for finding abusiveness recognizes that sometimes people are in a position in which they have a reasonable expectation that an entity will act in their interest to make decisions for them, or to advise them on how to make a decision. Where people reasonably expect that a covered entity will make decisions or provide advice in the person's interest, there is potential for betrayal or exploitation of the person's trust. Therefore, Congress prohibited taking unreasonable advantage of reasonable *consumer reliance*. There are a number of ways to establish reasonable reliance, including but not limited to the two described below.

First, reasonable reliance may exist where an entity communicates to a person or the public that it will act in its customers' best interest, or otherwise holds itself out as acting in the person's best interest. Where an entity communicates to people that it will act in their best interest, or otherwise holds itself out as doing so, including through statements, advertising, or any other means, it is generally reasonable for people to rely on the entity's explicit or implicit representations to that effect. People reasonably assume entities are telling the truth. The entity in these situations creates an expectation of trust and the conditions for people to rely on the entity to act in their best interest.

Second, reasonable reliance may also exist where an entity assumes the role of acting on behalf of consumers or helping them to select providers in the market. In certain circumstances entities assume the role of acting on behalf of people as their agents or representatives, and people should be able to rely on those entities to act on their behalf. In other circumstances entities often act as intermediaries to help people navigate marketplaces for consumer financial products or services. In these situations, the entity, acting as an intermediary, can function as a broker or other trusted source that the person uses in selecting, negotiating for, or otherwise facilitating the procurement of consumer financial products or services provided by third parties. Where the entity's role in the marketplace is to perform these kinds of intermediary functions, people should be able to rely on the entity to do so in a manner that is free of manipulation. In both circumstances, entities that engage in certain forms of steering or self-dealing may be taking unreasonable advantage of the consumers' reasonable reliance.