UDAAP: THE ALL TOO SUBJECTIVE REGULATION

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What you will learn

- What is UDAAP
- Identifying UDAAP issues
- Spotting UDAAP

Information provided in this presentation is a brief overview and should not be considered legal advice or exhaustive coverage of the topic.
UDAAP HISTORY

- UDAP
  - FTC Act (1933)
    - Original consumer protection law
    - Counter to “caveat emptor”
    - Section 5 prohibits
      - “unfair or deceptive acts and practices in or affecting commerce”
      - Consumer and commercial customers
  - Dodd-Frank Act Section 1031 and 1036
    - Added the “A” abusive standard
    - Consumer only
    - “consumer financial product or service”

Regulator interest not slowing

CONSIDER THIS

- Although stated in reference to RESPA Section 8, Cordray’s remarks are broad enough that one must consider in reference to UDAAP

- Cordray’s remarks at the Consumer Bankers Association May 2016
  “Likewise, our public enforcement actions have been marked by orders, whether entered by our agency or by a court, which specify the facts and the resulting legal conclusions. These orders provide detailed guidance for compliance officers across the marketplace about how they should regard similar practices at their own institutions. If the same problems exist in their day-to-day operations, they should look closely at their processes and clean up whatever is not being handled appropriately. Indeed, it would be “compliance malpractice” for executives not to take careful bearings from the contents of these orders about how to comply with the law and treat consumers fairly.”
WHAT IS UDAAP

**Unfair**
- Causes or is likely to cause substantial injury to consumers
- The injury is not reasonably avoidable by consumers
- The injury is not outweighed by countervailing benefit to consumers or to competition

**Deceptive**
- The representation, omission, or practice misleads or is likely to mislead the consumer
- Consumer’s interpretation is reasonable under the circumstances
- Misleading representation, omission, act or practice is material

**Abusive**
- Materially interferes with consumer’s ability to understand a term or condition of a consumer financial product or service; or
- Takes unreasonable advantage of a consumer’s
  - lack of understanding of the material risks, costs, or conditions of the product or service; or
  - inability to protect his or her own interests in selecting or using a consumer financial product or service; or
  - reasonable reliance on a covered person to act in the consumer’s interests

UNFAIRNESS EXAMPLES

- **Unfair billing practices**
  - Identity theft programs / credit monitoring
    - $3 million
    - $35 million
    - $35 million
    - $6 million
    - $2 million
    - $25 million CMP
  - $495.5 million Restitution

- **Deposit processing**
  - Bank credited deposit as written by customer even when system reported transaction out of balance
    - $7.5 million CMP
    - $11 million Restitution
DECEPTION EXAMPLES

- Mortgage add-on products
- Debt collection
- Credit score marketing
  - $3 million
- Overdraft services
  - “mandatory opt in”
  - Hidden fees
- Deceptive marketing

Deception can be anywhere

- 2009, FTC action against CVS Caremark
  - UDAP not on product or service but on privacy policy
  - Policy promised to safeguard sensitive consumer information
  - Act of disposing of unneeded consumer files and information in an unsecured manner by dumping files into dumpsters in back of numerous CVS stores made statements in policy false and misleading
  - FTC required 20 years of independent auditing and reporting to FTC

SPAGHETTI ON THE WALL
ABUSIVE EXAMPLES

- Overdraft services
  - Hidden fees
  - "mandatory opt in"
- Bi-monthly mortgage payments
- Student loan servicing
  - Took unreasonable advantage
- Payday loans

ISSUES IN ABUSIVE

- Consumer’s lack of understanding
  - Products with multiple features or terms that change
  - Language used in customer agreements
    - “plain” enough to be understood
- Inability to protect self
  - Consumer’s lack of financial sophistication or knowledge of financial concepts
    - vulnerability
  - Consumer’s reasonable reliance on Financial Institution
    - Obligation to “steer” customer into the product or service that is the “best” for consumer
    - Obligation to guide or advise customer when they make a “bad” choice
- Reverse Mortgages
  - Area of greater regulatory concern and action
  - RMs target population over 62, a protected class
  - General UDAAP now but predict new reverse mortgage rules
    - Predict new regulations for disclosures and advertising
    - FRB proposed changes in August 2009
    - HUD Mortgagee Letters
  - CFPB Reports to Congress
  - CFPB Consumer Advisory Notice
    - June 4, 2015
IDENTIFYING UDAAP issues

Unfairness Key
Does the behavior hinder the consumer’s ability to make an informed decision?

Deception Key
Look at the entire advertisement, transaction or course of dealing to determine:
- how a reasonable consumer would respond
- how important is the information

Abusive Key
- Are conditions or terms of the product or service simple or complex? What acts or omissions might cause “interference” with understanding? How is the consumer’s ability to understand or lack of understanding to be measured?
- Consider the consumer’s lack of financial sophistication or knowledge of financial concepts and their vulnerability to financial abuse and the consumer’s overuse of a fee-based service. Does it come from their inability to understand the financial impact or is it a knowing acceptance of risk?
- Consider the consumer’s reasonable reliance on the financial institution and your obligation to “steer” a customer into the product or service that is the “best” for consumer. Is it best for the consumer or is it the best that you offer or is it the best profit for your institution?

SHOULD HAVE BEEN EASY ...
- Unfair
- Deceptive
- Abusive

Press Release

Consumer Financial Protection Bureau Fines Wells Fargo $100 Million for Widespread Illegal Practice of Secretly Opening Unauthorized Accounts

Bank Incentives to Boost Sales Figures Spurred Employees to Secretly Open Deposit and Credit Card Accounts

SEP 08, 2016
HITTING ALL THE TICKS

**Unfair acts or practices**

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

**Deceptive acts or practices**

- There must be a representation, omission, or practice that misleads or is likely to mislead the consumer
- The act or practice must be considered from the perspective of the reasonable consumer
- The representation, omission, or practice must be material

**Abusive acts or practices**

- Materially interferes with the consumer's ability to understand a term or condition of a consumer financial product or service; or
- Takes unreasonable advantage of a consumer's lack of understanding of the material risks, costs, or conditions of the product or service; or
- Takes unreasonable advantage of a consumer's inability to protect his or her own interests in selecting or using a consumer financial product or service; or
- Takes unreasonable advantage of the consumer when the consumer reasonably relies on a covered person to act in the consumer's interests

SPOTTING UDAAP ISSUES

- Lettered Regulations
  - Technical
  - Have I included everything?
- If it violates these, it is could also be a UDAAP:
  - Truth in Lending Act
  - Truth in Savings Act
  - Equal Credit Opportunity Act
  - Fair Housing Act
  - Fair Debt Collection Practices Act
- May comply with other laws and still violate UDAAP
  - “As long as the disclosure is somewhere on the ad we are okay” mentality
- UDAAP
  - Principles
    - Consumer oriented
  - Is it unfair or deceptive or abusive?
  - Should I add more? Clarify?
  - Any hooks/qualifications to obtain?
- No easy checklists
  - Always fact specific and subjective
SPOTTING UDAAP ISSUES

- **The basics: The 4 P’s**
  - Prominence
    - Do not bury disclosures in a tiny footnote
  - Placement
    - Provide disclosures in a place where consumer is expected to look and at volume speed that can be heard (audio)
  - Presentation
    - Place disclosures in easy to understand language, given when consumer’s attention is not otherwise distracted
    - Look at the format, look at the wording and overall appearance
  - Proximity
    - Disclosure should be close to the terms or triggers it qualifies to be considered effectively given

UDAAPs can occur in all products and services at every stage

- Product development and rollout
  - Failure to consider consumer
- Advertisements and direct marketing
  - Most often involve deception, misleading statements, omissions
  - Also conflicts and/or inconsistencies between advertisement and account disclosure
- Disclosures
  - Discrepancies
  - Nomenclature consistency
- Policies, procedures and practices
  - Failure to follow
SPOTTING UDAAP ISSUES

- Contracts
  - Inconsistencies with advertisements
  - Misleading
  - Omissions
- Account statements
  - Inconsistencies with advertisements
  - Misleading
  - Omissions
- Billing
  - Inconsistencies between advertisements and disclosures
  - First year, 12 months, 12 billing cycles
- Loan servicing, loss mitigation, collections
  - Failure to act
  - Inconsistencies between advertisements and disclosures
  - Fair Debt Collection Practices Act (FDCPA) violations
- Third-party service providers
  - Privacy Act violations
  - Inconsistencies between advertisements and disclosures
  - Incentive problems

ADDITIONAL RISK AREAS

- Fee refunds/waivers
  - Deposits
  - Lending
- Overdraft processing
  - Available balance vs. ledger balance
- Interest calculations
- Regulation CC Holds
  - Freezing accounts
- People
  - Training
    - Understand products and services
- Scripts
  - VRS
  - Live person
- Systems
  - Conversions
  - Updates
  - Parameter settings
    - Over-write
    - Over-rides
THE LATEST COMPLIANCE ISSUE TO MONITOR

- Sales culture compliance
  - Sales practice review
    - Compensation analysis
  - Thank you letters
    - Responses
    - Complaints
  - Deceptive sales practices
    - Misrepresenting benefits
    - Steering
    - Disclosures
    - Marketing
    - Scripts
    - Training
    - Third party oversight

SPOTTING UDAAP ISSUES

- Key factors to look for:
  - Information is complete and understandable
  - Clear on timing of any costs, fees and penalties
  - Clear on any benefits/risks to consumer
  - Effect on consumer
    - Consider the effect on consumer at all points in the product life cycle
      - Complex products carry an increased UDAAP risk
    - Give the consumer the necessary information for them to make an informed decision about the product or service
      - Advantageous
      - Disadvantageous
      - Poses UDAAP risk
**ACTION PLANNING**

- Risk assess
  - Overall, LOB, product, service, people
- Develop, train and implement document standards, policies, procedures (regardless if required to do so)
  - Scripts
- Monitor, transaction testing and quality control
  - Transaction test phone calls
- Internal and external audits and reviews
- Training
- Third party oversight
  - Complaints
  - Training
  - Metrics
- Mystery shoppers

**RESOURCES**

- Section 5 FTC Act
  - Each state has its own FTC Act
- Sections 1031 and 1036 Dodd-Frank
- Exam Manuals
- FTC 2013 dot com disclosures
  - [http://www.ftc.gov/os/2013/03/130312dotcomdisclosures.pdf](http://www.ftc.gov/os/2013/03/130312dotcomdisclosures.pdf)

- UDAAP Consent Orders
Questions?
Thank you!