



UDAP-Yes, It Applies to Your Bank

FDIC Chicago Region Regulatory
Conference Call
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Introduction

- Introduction
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Agenda

- Background of UDAP & Recent Industry Trends
- Unfair and Deceptive Concepts and Standards
- Managing Risks to Avoid UDAP violations
- Best Practices
- Recent UDAP Cases
- Dodd-Frank Act UDAP Implications
- Resources
- Q & As

Background

- FTC Act prohibits “unfair or deceptive trade practices in or affecting commerce”
- “Unfair” and “deceptive” are difficult concepts
- FDIC has regulatory enforcement with respect to state non-member banks under the authority of Section 8 of the FDI Act

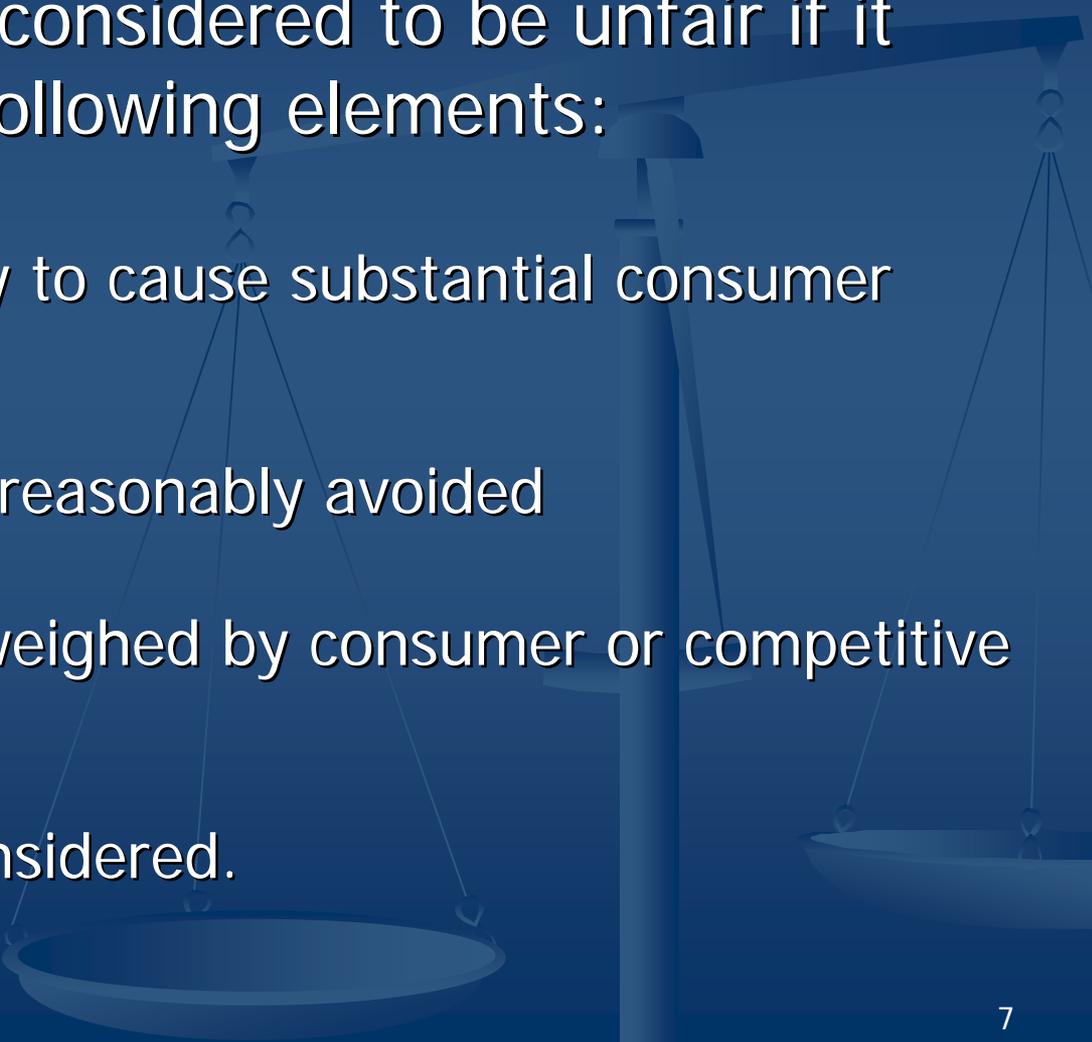
UDAP Trends

- UDAP affects banks of all sizes, including small community banks. It's a common misconception that UDAP applies only to large credit card banks or automated overdraft programs.
- Since 2008, 43 percent of UDAP violations cited by the FDIC were for banks with total assets of \$250 million or less.
- UDAP violations have resulted in unsatisfactory CRA ratings, downgraded consumer compliance ratings, restitution to customers, and the pursuit of civil money penalties. The penalty and restitution amounts can be significant.

Basic UDAP Concepts

- Act or practice may be:
 - unfair
 - deceptive
 - or both
- An act or practice DOES NOT have to violate any other law in order to be considered unfair or deceptive

Unfair Standards



An act or practice is considered to be unfair if it has all three of the following elements:

- Must cause or is likely to cause substantial consumer injury
- The injury cannot be reasonably avoided
- The injury is not outweighed by consumer or competitive benefits

Public policy may be considered.

Deceptive Standards

An act or practice is considered to be deceptive if it meets the following three-part test:

- The representation, omission or practice misleads or is likely to mislead the consumer
- Must be considered from the perspective of the reasonable consumer, and
- It must be material.

Clear and Conspicuous Disclosures

The Four Ps of Deception

- PROMINENCE: Is it big enough for consumers to notice and read?
- PRESENTATION: Is wording and format easy for consumers to understand?
- PLACEMENT: Is it where consumers will look?
- PROXIMITY: Is it near the claim that it qualifies?

Managing Risks to Avoid UDAP

The areas with the greatest potential for unfair or deceptive acts or practices include:

1. Advertising and solicitations
2. Account and loan disclosures
3. Servicing and collections
4. Managing and monitoring of third-party service providers
5. Consumer Complaints

Advertising and Solicitations

- ALL forms of advertising should be reviewed including materials from third parties
- Target audience should be considered
- Material should be complete, accurate, and help the consumer make an informed decision

FTC Recommendations for Advertising

DO

- Format ads to direct attention to key information
- Present information clearly and conspicuously
- Disclose all decision impacting information near most highly promoted features and place any qualifiers near claim it is qualifying

DO NOT

- Use small font to hide costs, critical terms or conditions
- Use pop-up windows or hyperlinks to display key information
- Bury information at the end of a long webpage
- Use a fast moving "scroll" on websites

Account and Loan Disclosures

- Banks should:
 - Monitor compliance with applicable laws and regulations
 - Compare disclosures to actual practices and marketing materials
 - Consider additional levels of review for accuracy and readability

Servicing and Collections

- Monitor scripts for compliance with applicable laws and regulations and to ensure product or service is accurately described
- Provide frequent compliance and product/service training
- Monitor correspondence and listening to customer calls
- Evaluate debt collection practices
- Review payment processing practices
- Review fee practices

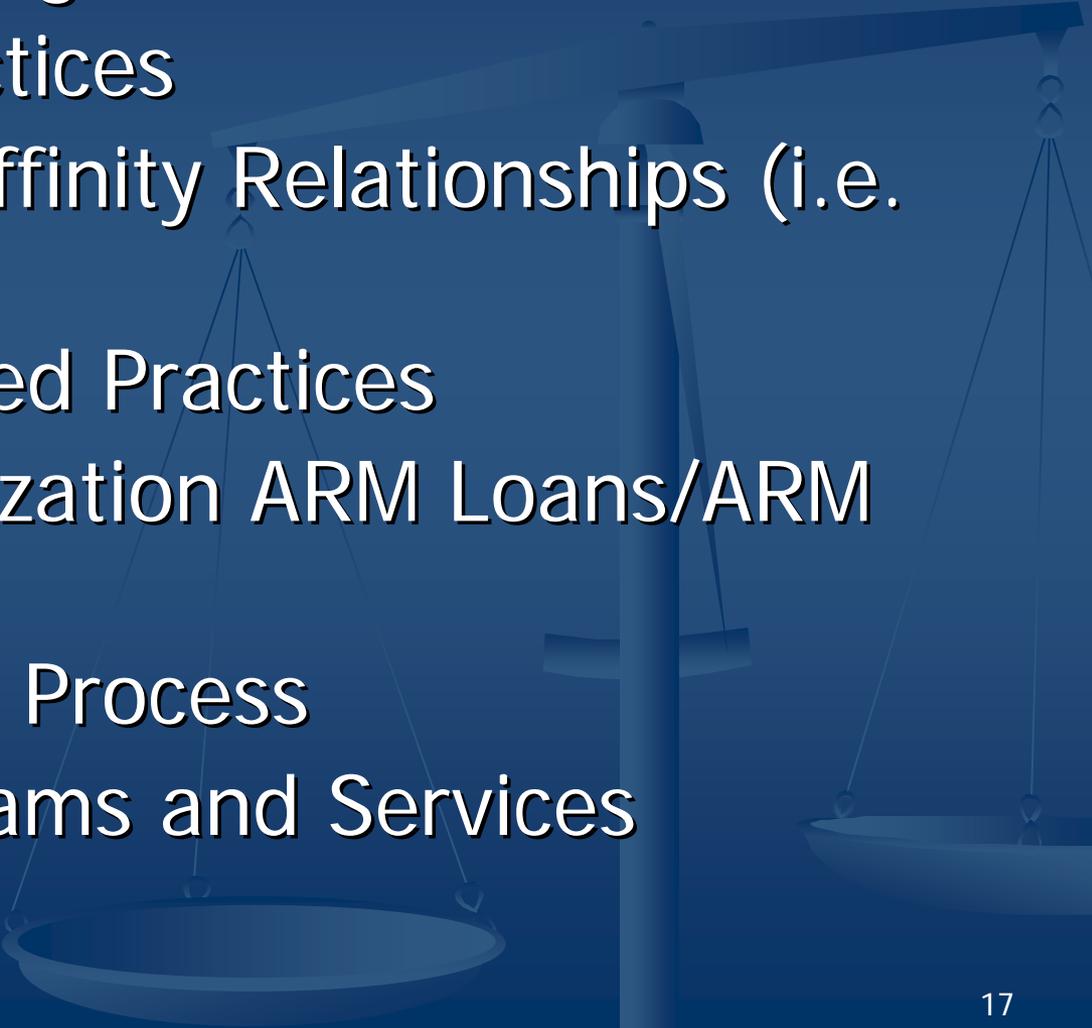
Managing and Monitoring Third-Party Service Providers

- A bank's responsibility for third-party activity IS THE SAME as an activity handled directly by the bank
- Third-party activities should be integrated into the bank's Compliance Management System
- Effective third-party management program incorporates:
 - Risk Assessment
 - Due Diligence
 - Contract Structuring and Review
 - Oversight
- Do not rely solely on claims made by third-party vendors

Consumer Complaints

- Maintain procedures for consumer complaints
- Complaints can be received from other sources such as the Better Business Bureau, website blogs or social networking sites
- Allegations or claims that may indicate possible UDAPs include:
 - Misleading or false statements
 - Missing disclosures or information
 - Undue or excessive fees
 - Inability to reach customer service
 - Previously undisclosed or unauthorized charges

Recent UDAP Cases



- Rewards Checking
- Credit Card Practices
- Third Party or Affinity Relationships (i.e. Rent-a-BIN)
- Insurance Related Practices
- Negative Amortization ARM Loans/ARM Loan Pricing
- Error Resolution Process
- Overdraft Programs and Services

The Dodd Frank Act

Impact on UDAP

- The newly created CFPB is assigned rule making authority for unfair, deceptive, or abusive acts or practices.
- The rules may include requirements for the purpose of PREVENTING unfair, deceptive, or abusive acts or practices.
- Unfair is defined in the Dodd-Frank Act similarly to the FTC Act.
- Deceptive is not defined in the Dodd-Frank Act and the definition remains the FTC's definition until the CFPB makes a Rule.
- New standard of "abusive acts or practices" that will be defined by CFPB.

Resources

- **Agency Issuances**
- FDIC, Supervisory Insights, Winter 2008, Vol. 5, Issue 2, *From the Examiner's Desk: Unfair and Deceptive Acts and Practices: Recent FDIC Experience* (available at: http://www.fdic.gov/regulations/examinations/supervisory/insights/siwin08/unfair_act_s.html).
- FDIC, Supervisory Insights, Winter 2006, Vol. 3, Issue 2, *Chasing the Asterisk: A Field Guide to Caveats, Exceptions, Material Misrepresentations, and Other Unfair or Deceptive Acts or Practices* (available at: http://www.fdic.gov/regulations/examinations/supervisory/insights/siwin06/article02_chasing.html).
- FDIC and Federal Reserve Board, *Unfair or Deceptive Acts or Practices by State-Chartered Banks*, FIL 26-2004, March 11, 2004 (available at: <http://www.fdic.gov/news/news/financial/2004/fil2604a.html>).
- FDIC, *Guidance On Unfair Or Deceptive Acts Or Practices*, FIL 57-2002, May 30, 2002 (available at: <http://www.fdic.gov/news/news/financial/2002/FIL0257.html>).
- FDIC Overdraft Payment Program Supervisory Guidance Frequently Asked Questions (available at: <http://www.fdic.gov/news/conferences/overdraft/FAQ.html>).

Resources, continued...

- FTC Policy Statement on Deceptive Acts and Practices (available at: <http://www.ftc.gov/bcp/policystmt/ad-decept.html>).
- FTC Policy Statement on Unfairness (available at: <http://www.ftc.gov/bcp/policystmt/ad-unfair.html>).
- FTC's *Dot Com Disclosures: Information about Online Advertising* (available at: <http://www.ftc.gov/bcp/edu/pubs/business/ecommerce/bus41.pdf>).
- FTC Public Comment on OTS-2007-0015, (Dec. 12, 2007) (available at <http://www.ots.treas.gov/docs/9/963034.pdf>).
- FDIC, *Joint Guidance on Overdraft Protection Programs*, FIL 11-2005, February 24, 2005) (available at <http://www.federalreserve.gov/boarddocs/press/bcreg/2005/20050218/attachment.pdf>).
- FDIC, *Third Party Risk: Guidance for Managing Third Party Risk*, FIL 44-2008, June 6, 2008 (available at: <http://www.fdic.gov/news/news/financial/2008/fil08044.html>).
- FDIC, *Overdraft Payment Programs and Consumer Protection Final Overdraft Payment Supervisory Guidance*, FIL 81-2010, November 24, 2010 (available at: <http://www.fdic.gov/news/news/financial/2010/fil10081.html>).

Questions

