

# Identifying and Mitigating UDAP Risk

Chicago Region Regulatory  
Compliance Call

December 17, 2014

# Introduction

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- Presenters:
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# Agenda

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- UDAP Overview
- CMS Best Practices
- Recent Cases
- Correcting Identified Issues

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# UDAP Overview

# UDAP Background

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- Section 5 of the FTC Act prohibits “unfair or deceptive trade practices in or affecting commerce.”
- Section 8 of the FDI Act grants authority to the FDIC to enforce Section 5 with respect to state non-member banks.
- An act or practice may be unfair, deceptive or both.

# Unfair Standards

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

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- 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
  - It must be material

# Consideration of Other Laws

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- An act or practice DOES NOT have to violate any other law to be considered unfair or deceptive.
- An act or practice can be considered a violation of Section 5 even if it also violates another law or regulation.

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# CMS Best Practices

# Compliance Management System

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- Board and Management Oversight
- Compliance Program
  - Policies and Procedures
  - Training
  - Monitoring
  - Consumer Complaint Response
- Audit

# Board and Management Oversight

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- Responsibilities include:
  - Understanding the risks which exist
  - Developing a strong CMS to mitigate those risks
- Assessment of risk
  - Can be accomplished through a formal or informal risk assessment
  - Should include compliance staff and management

# Oversight (cont.)

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- Compliance staff should be knowledgeable of the bank's operations that directly affect consumers:
  - New product development
  - New third-party relationships
  - When changes are made to existing products, software or platforms, fee structures, etc.

# Compliance Program

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- Policies and Procedures
  - Ensure bank has comprehensive policies and procedures for high-risk areas
- Training
  - Provide training to Board members, staff tasked with conducting transactions for consumers, as well as all compliance personnel

# Compliance Program (cont.)

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- Monitoring Best Practices:
  - Monitor and review high-risk areas
  - Monitor changes that occur through system conversions or updates
  - Perform periodic reviews of disclosures and operating systems to ensure consistency
  - Monitor fee structure changes

# Compliance Program (cont.)

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- Consumer Complaint Response Procedures should consider:
  - Formal complaints received through FDIC, other agencies or directly by the bank
  - Informal complaints received in person, via phone or through email
  - Complaints received via third parties
  - Complaints via social media or other electronic means
  - Customer feedback (written or verbal) on new products, services, processes, or fees

# Audit Function

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- Used to supplement monitoring
- Scope and frequency of audits should be based on the bank's assessment of risk
- The audit function should change when the bank's risk changes

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# Recent UDAP Cases

# Overdraft Programs

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- Disclosing Fees
- Continuous Overdraft Fees
- Calendar versus Business days
- Ad Hoc and Automated Overdraft Programs
- Refer to FIL-81-2010 when considering changes to your Overdraft Program

# Fees

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- Fee amounts and descriptions must be uniform across various disclosures.
- Customers should be provided with enough information to make informed decisions.
- Requirements apply to both loan and deposit products.

# Contracts

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- Bank management should
  - Understand limitations and allowances of all account agreements
  - Monitor these agreements to ensure they do not contradict disclosures;
  - Monitor software “updates” that may affect the contract language

# Third-Party Relationships

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- Do not rely on “compliance guarantees”
- Fully understand products or services offered by third parties
- Monitor penetration rates
- Review comments received about products and services, especially at launch

# Consumers Rights

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- Policies, procedures and training should:
  - Reflect accurate and complete information
  - Explain what to do when consumers assert their rights under various laws
  - Ensure that bank staff do not place more burdens on consumers than allowed by law

# Advertisements

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- Advertisements and scripts should be reviewed prior to use
- Utilize the FTC's four Ps:
  - Prominence
  - Presentation
  - Placement
  - Proximity

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# Correcting Identified Issues: Now What?

# Remediation

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- Corrective action is very fact specific
- Identify and correct the root cause of the issue by asking, “How do we prevent this issue from continuing?”
- Follow up testing should occur to ensure remediation was effective
- Contact your local FDIC examiner or UDAP Specialist for guidance

# Restitution

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- Ask yourself, “How do we make consumers whole and address the harm consumers have already encountered?”
- We highly encourage banks to consult with legal counsel and the FDIC
- Identify victims and the extent to which they were harmed

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# QUESTIONS?

Can also submit via email:  
[chiconferencecall@fdic.gov](mailto:chiconferencecall@fdic.gov)

# FDIC Resources

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- **FIL 26-2004: Unfair or Deceptive Acts or Practices by State-Chartered Banks**
- **FIL 44-2008: Guidance for Managing Third Party Risk**
- **FIL 81-2010: Overdraft Payment Programs and Consumer Protection- Final OD Payment Supervisory Guidance**
- **FIL 11-2005: Interagency Guidance on Overdraft Protection**

# FDIC Resources

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- **Chicago Region's Quarterly DCP Newsletter:**
  - (1<sup>st</sup> Quarter 2014, 4<sup>th</sup> Quarter 2013, and 3<sup>rd</sup> Quarter 2013)
- **FDIC Supervisory Insights Journal:**
  - **From the Examiner's Desk: Unfair and Deceptive Acts and Practices: Recent FDIC Experience-** Winter 2008, Vol. 5, Issue 2
  - **Chasing the Asterisk: A field Guide to Caveats, Exceptions, Material Misrepresentations, and Other Unfair or Deceptive Acts or Practices-** Winter 2006, Vol. 3, Issue 2

# FTC Resources

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- **FTC's Dot Com Disclosures: Information About Online Advertising:**  
<http://business.ftc.gov/sites/default/files/pdf/bus41-dot-com-disclosures-information-about-online-advertising.pdf>
- **FTC's Big Print. Little Print. What's the Deal:**  
<http://business.ftc.gov/sites/default/files/pdf/bus44-big-print-little-print-whats-deal.pdf>

# FTC Resources

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- **FTC's Screening Advertisements: A Guide for the Media:**  
<http://business.ftc.gov/sites/default/files/pdf/bus36-screening-advertisements-guide-media.pdf>
- **FTC Blog Post on Full Disclosure (with discussion on 4Ps):**  
<http://www.business.ftc.gov/blog/2014/09/full-disclosure>