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Unfair or Deceptive Acts or Practices - FTC Act

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This document and any attachments are superseded by Comptroller's Handbook – Consumer Compliance - Unfair or Deceptive Acts or Practices and Unfair, Deceptive, or Abusive Acts or Practices

EXAMINATION OBJECTIVES

To assess the quality of the financial institution's compliance risk management systems, internal controls, and policies and procedures for avoiding unfairness and deception.

To identify products, services, or activities that increase the risk of being unfair or deceptive.

To gather facts that help determine whether a financial institution's products, services, programs, or operations are likely to be unfair or deceptive.

To consult with the agency's legal or compliance departments, regional offices, and/or headquarters, as necessary, to determine whether unfair or deceptive acts or practices have occurred.

EXAMINATION PROCEDURES

General Guidance

Examiners should use these procedures consistent with OTS's risk-based compliance supervision approach. Taking into account an institution's product and service mix, customer base, and other factors, examiners should consider including a review for potential unfair or deceptive acts or practices when performing risk assessments as part of examination scoping activities. Also, examiners should be alert to possible unfair or deceptive acts or practices throughout an examination, including when reviewing specific bank products or services, compliance with other consumer compliance regulatory requirements, or consumer complaints.

Unfair or deceptive acts and practices may occur in connection with any financial product or service. In addition, the determination of whether an act or practice violates the FTC Act is fact-specific and determined on a case-by-case basis. Therefore, safety and soundness/credit risk examiners, as well as other compliance examiners, may identify potentially problematic activities in the course of an examination.

Use the following examination procedures, as appropriate, to assist you in recognizing potential unfair or deceptive acts or practices, analyzing potential issues, and determining an appropriate response.

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MANAGEMENT AND POLICY-RELATED EXAMINATION PROCEDURES

1. Review the Matters Requiring Board Attention and Corrective Actions from the three or four previous ROEs to ensure that the board and management have taken appropriate corrective action where necessary and persistent problems have not recurred.

2. Through a review of all relevant written policies and procedures, management's self-assessments, customer complaints received by the agency or the institution, prior examination reports, and any compliance audit material, including work papers, internal and external audit reports, and statistical and other reports, determine whether:
 - The institution has product or service lines that expose the institution to a high risk of unfair or deceptive practices.
 - The institution has significantly higher fee income than similar institutions.
 - The institution has been subject to any enforcement action by a regulatory or law enforcement agency for violations of consumer protection laws or regulations.
 - The scope of the compliance audit addresses all applicable provisions.
 - Management has taken corrective actions to follow-up on significant deficiencies.
 - The institution's compliance testing includes samples covering all relevant product types and decision centers including sales, processing and underwriting, to confirm that policies are being followed.
 - The compliance audit work performed is accurate.
 - Significant deficiencies and their causes are included in reports to management and/or to the Board of Directors.
 - The frequency and depth of review is appropriate.

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3. Through discussions with management and review of available information, determine whether the financial institution's internal controls are adequate to prevent unfair or deceptive acts or practices. Consider the following:
 - The institution's compliance management program for avoiding unfair and deceptive practices
 - Organization charts and process flowcharts
 - Policies and procedures
 - Monitoring and audit procedures
 - The institution's evaluation of advertising and promotional materials
 - Advertisement and marketing documentation
 - Promotional materials and marketing scripts including new products
 - The institution's evaluation of initial and subsequent disclosures
 - The institution's process for receiving and responding to consumer complaints
 - New product development documentation
 - Account documentation
 - Customer agreements
 - Terms and conditions
 - The institution's evaluation of servicing and collections
 - Crediting of customer payments
 - Account statements
 - The institution's monitoring of employee and third-party conduct
 - Third-party agreements and contractual performance
 - Compensation programs
 - Documentation of institution's internal control process
 - Checklists

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- Computer program documentation
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4. Through a review of the financial institution's relevant training materials and programs, determine whether:
- The financial institution provides appropriate training to individuals responsible for preventing (Unfair or Deceptive Acts or Practices (UDAP) and individuals responsible for operational procedures.
 - The training is comprehensive and covers in detail how to determine whether an act or practice is unfair or deceptive with respect to financial institution's products, services and operations.
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5. Complete the questionnaire to determine if particular aspects of the financial institution's performance with respect to UDAP may be a supervisory concern.
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6. If you identify potential unfair or deceptive acts or practices, consult with your regional, or headquarters office, as appropriate. Proposed violations should be supported by a legal analysis.
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TRANSACTION-RELATED EXAMINATION PROCEDURES

If upon conclusion of the management and policy-related examination procedures, procedural weaknesses or other risks requiring further investigation are noted, conduct transaction testing, as necessary, using the following examination procedures. Likewise, if there are indications of unfair or deceptive acts or practices in consumer complaints, conduct transaction testing, as necessary, using the following procedures. Use examiner judgment in deciding whether to sample individual products, services, or marketing programs. Increase the sample to achieve confidence that all aspects of the financial institution's products and services are reviewed sufficiently.

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7. Obtain and review copies of the following to the extent relevant to the investigation:

- Marketing programs and advertisements (all forms of media including print, radio, television and Internet or social media advertising).
- Procedural manuals and written policies.
- List of the institution's products and services.
- Customer disclosures, notices, agreements, and periodic statements for products and services.
- Agreements with third parties.
- Consumer complaint files.
- Training materials.
- Internal control monitoring and auditing materials.
- Compensation arrangements, including incentive programs for employees and third parties.

8. Determine the adequacy of the financial institution's policies, procedures, and practices for ensuring compliance with the FTC Act. In particular, consider:

- The role and approach of the compliance management function within the institution, especially in the areas of product development and marketing.
 - Whether the compliance function has sufficient resources to both detect unfair or deceptive acts or practices and to take appropriate action to correct them.
 - Whether the institution's complaint resolution process not only appropriately resolves individual problems, but also evaluates complaints to discern trends or patterns that could be an indication of potential unfair or deceptive acts or practices, including those that may be systemic in nature.
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9. Determine whether any of the institution's products, services, and operations may be particularly susceptible to violations of the FTC Act and therefore require additional scrutiny. These may include:

- Marketing to the elderly, non-English speakers, financially vulnerable, or unsophisticated consumers.
- Subprime or nontraditional mortgage lending.
- High cost mortgage lending as covered under the Home Ownership and Equity Protection Act.
- Reverse mortgages.
- Subprime credit card lending
- Secured credit card lending.
- Short-term, high cost lending.
- Fee based overdraft protection programs, particularly when automatically applied to accounts.
- Tax refund anticipation lending.
- Motor vehicle title lending.
- Marketing or collection practices that result in the imposition of significant fees.
- Failure to protect consumer's information.
- A high volume of consumer complaints.

10. Determine whether the institution's relevant marketing materials, customer agreements, and other disclosures fairly and accurately describe material terms and limitations before the consumer chooses to obtain the product or service. Consider whether such disclosures:

- Fairly and accurately describe the terms, benefits, and material limitations of the products or services being offered, including any related or optional products

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or services, and that they do not misrepresent such terms either affirmatively or by omission.

- Draw the customer's attention to key terms, including limitations and conditions that are important in enabling the consumer to make an informed decision.
 - Clearly disclose all material limitations or conditions on the terms or availability of products and services, such as limitations that apply to interest rates, expiration dates, material prerequisites for obtaining particular products or services, or conditions for canceling services.
 - Clearly disclose the fees, penalties, and other charges that may be imposed and the reason for the imposition.
 - Clearly inform customers of contract provisions that permit changes in terms and conditions of the product or service.
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11. Evaluate how the institution monitors the activities of third party contractors, vendors, and service providers to ensure they comply with the FTC Act's prohibition on unfair or deceptive acts or practices. Specifically, consider whether the institution:

- Ensures that employees and third parties who market or promote products or services are adequately trained to avoid unfair or deceptive acts or practices.
 - Reviews compensation arrangements for institution employees and third party contractors and service providers to ensure that they do not create unintended incentives to engage in unfair or deceptive acts or practices, particularly with respect to product sales, loan originations, and collections.
 - Implements and maintains effective risk and supervisory controls to select and manage third party contractors and service providers.
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12. Select a sample of product(s) and service(s) to verify that consumers are receiving them consistent with the institution's disclosures and policies. The sample selected should be sufficient in size to reach a supportable conclusion about whether actual practices are inconsistent with institution policy and may be unfair or deceptive. If potential UDAP weaknesses or concerns are found, consult with the district, regional, or headquarters office as appropriate.

For each product being reviewed:

- Select a sample that includes, as appropriate, transactions from different origination and underwriting channels. For example, different geographical areas or from different sectors of the institution's organization structure.
- Sample recently approved/denied accounts to assess adherence to the institution's policies and procedures and accuracy of initial account disclosures provided to consumers.
- Determine that consumers received the specific account or service requested.
- Determine that counteroffers and subsequent disclosures provided consumers were accurate and that the consumer actually received the product or service requested and understood the difference between the original requested product and the one actually obtained.
- Determine whether institution practices followed may be inconsistent with stated policies, procedures, or account disclosures and may create UDAP concerns.

ELEMENTS NECESSARY FOR FINDING UNFAIRNESS OR DECEPTION

To determine that an act or practice is unfair or deceptive, an examiner should note the way in which it meets all the requirements.

For unfairness, three elements are necessary:

- 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; and

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- The injury must not be outweighed by countervailing benefits to consumers or to competition.

For deception, three elements are necessary:

- 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; and
- The representation, omission or practice must be material.

EXAMINER'S SUMMARY, RECOMMENDATIONS, AND COMMENTS

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