# Chasing the Asterisk: A Field Guide to Caveats, Exceptions, Material Misrepresentations, and Other Unfair or Deceptive Acts or Practices

Section 5 of the Federal Trade Commission (FTC) Act prohibits "unfair or deceptive practices in or affecting commerce."[1] Although enforced generally by the FTC against nonbank entities, the authority for enforcing Section 5 as it relates to FDIC-supervised institutions rests with the FDIC, pursuant to Section 8 of the Federal Deposit Insurance Act,[2] which permits the FDIC and the other Federal banking agencies to enforce "any law."

The prohibition against unfair and deceptive acts or practices (UDAPs) applies to all products and services offered by a financial institution, directly or indirectly. The prohibition applies to every stage and activity: from product development to the creation and rollout of the marketing campaign; from servicing and collections all the way through to the termination of the customer relationship.

Although the vast majority of FDIC-supervised institutions adhere to a high level of professional conduct, the FDIC has seen an increase in violations of Section 5 of the FTC Act. This may be the result of increased competition among financial institutions, along with a growing dependence on fee income and increased reliance on third parties. Expansion into the subprime market may be another factor, as well as the proliferation of products with complex structures and pricing. Examiners have identified various acts and practices that violate Section 5, including deceptive marketing and solicitations, misleading billing statements, and failure to adequately disclose material terms and conditions for both credit and deposit products.

Depending on the severity of their nature and scope, violations of the FTC Act may adversely affect an institution's compliance rating, as well as result in an enforcement action and restitution. Evidence of such violations may also cause a downgrade of an institution's Community Reinvestment Act (CRA) rating. Public knowledge that a financial institution engaged in unfair or deceptive acts or practices—from publication of a cease and desist order, a statement in the institution's public CRA Performance Evaluation, or reports in the media—may result in reputational harm to the institution, lawsuits, and financial damages. In light of these risks, failure to prevent or address potential UDAPs may, in turn, expose the institution to questions regarding the adequacy of its management and the safety and soundness of its operations.

This article provides insights into how examiners identify and address acts or practices that may violate the prohibition against UDAPs found in Section 5 of the FTC Act. Financial institutions can use this information to conduct assessments of their products and services and to develop a blueprint for avoiding Section 5 violations.

## FDIC Enforcement of Section 5 of the FTC Act

A number of agencies have authority to combat UDAPs. While the FTC has broad authority to enforce the requirements of Section 5 of the FTC Act, banks and certain other businesses are exempted from the FTC's authority.[3] In a Financial Institution Letter (FIL) dated May 30, 2002,[4]

[1] 15 U.S.C. § 45(a).

[2] 12 U.S.C. § 1818(b).

[3] 15 U.S.C. § 45.

[4] FIL-57-2002, Guidance on Unfair or Deceptive Acts or Practices, May 30, 2002, www.fdic.gov/news/news/financial/2002/fil0257.html.

the FDIC confirmed the applicability of Section 5 of the FTC Act to state nonmember banks and their institution-affiliated parties, as well as the FDIC's intention to cite violations of this law and take appropriate action under Section 8 of the Federal Deposit Insurance Act[5] (FDI Act) when it discovers unfair or deceptive acts or practices.

On March 11, 2004, the FDIC with the Board of Governors of the Federal Reserve System (FRB) jointly issued guidance on UDAP (Joint Guidance) to state-chartered banks outlining the standards the FDIC and the FRB will consider when applying the prohibitions against UDAPs found in the FTC Act and providing advice on managing risks relating to UDAPs.[6]

In determining the appropriate response to a Section 5 violation, the FDIC consults with other state and federal agencies depending on the issue and their jurisdiction over the parties involved. Where necessary to address the UDAP and provide an appropriate remedy for consumers, the FDIC will also pursue a joint action with other government entities.[7]

## Standards for Determining What Is Unfair or Deceptive

As stated in the Joint Guidance,[8] the standards for unfairness and deception are independent of each other. While a specific act or practice may be both unfair and deceptive, an act or practice is prohibited by the FTC Act if it is *either* unfair *or* deceptive.

To assist in determining whether a particular act or practice is unfair or deceptive, the FTC has issued policy statements on both unfairness and deception.[9] In most cases, Section 5 violations involve deception, although there have been a few instances where a particular act or practice, or the sum of a variety of acts and practices, have been found to be unfair.

### Unfairness

An act or practice may be found to be unfair where it

(1) Causes or is likely to cause substantial injury to consumers, which

(2) Is not reasonably avoidable by consumers themselves, and

(3) Is not outweighed by countervailing benefits to consumers or to competition.

Public policy may also be considered in the analysis of whether a particular act or practice is unfair.

### Deception

A three-part test is used to assess whether a representation, omission, or practice is deceptive:

(1) The representation, omission, or practice must mislead or be likely to mislead the consumer;

(2) The consumer's interpretation of the representation, omission, or practice must be reasonable under the circumstances. If a representation or practice is targeted to a particular group—for example, the elderly

[5] 12 U.S.C. § 1818(a).

[6] FIL-26-2004, Unfair or Deceptive Acts or Practices by State-Chartered Banks, March 11, 2004 (Joint Guidance), www.fdic.gov/news/news/financial/2004/fil2604.html.

[7] Ibid., footnote 6, page 1.

[8] Ibid., footnote 6, page 2.

[9] See FTC Policy Statement on Unfairness (December 17, 1980), www.ftc.gov/bcp/policystmt/ad-unfair.htm, and FTC Policy Statement on Deception (October 14, 1983), www.ftc.gov/bcp/policystmt/ad-decept.htm.

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### Unfairness Based upon Lack of Utility

A bank advertised a credit card with no application or annual fees. However, consumers were charged a "refundable acceptance fee," which completely exhausted the available credit line. According to the terms of the card, this acceptance fee would be "refunded" in increments of $50 every three months, assuming the consumer paid the minimum amount due on a timely basis, making available an equal amount of credit. As opposed to an annual fee, a monthly maintenance charge of $10 was charged against the account, along with an interest rate of almost 20 percent against the outstanding balance.

The FDIC found that the "refundable acceptance fee" was nothing more than a bookkeeping entry used by the bank to create a balance upon which it could assess interest and other charges. At a minimum, consumers were paying $120 a year plus interest in exchange for the use of a credit line made available to them in $50 increments. Account activity reports showed little or no purchases or charges, only the assessment of monthly fees, interest, and other charges.

The card program was determined to be "unfair." The fees associated with the program made any benefit negligible, and the program was structured so that only a very small percentage of account holders would receive any initial or subsequent credit. Moreover, with no out-of-pocket money at risk and the limited utility of the card, a high delinquency rate was foreseeable. Within six months from the initial offering of the product, nearly 50 percent of all accounts opened were delinquent.

or troubled borrowers—its reasonableness must be evaluated from the vantage point of that group; *and*,

(3) The misleading representation, omission, or practice must be material.

A deceptive representation can be expressed, implied, or involve a material omission. The overall impression is key—written disclosures in the text or fine print in a footnote may be insufficient to correct a misleading headline.[10]

As can be seen from the examples in the text box above and on the facing page, and as stated in the Joint Guidance, whether an act or practice is unfair or deceptive depends upon a careful analysis of the facts and circumstances. In analyzing a particular act or practice, the FDIC is guided by the body of law and official interpretations for defining UDAPs developed by the courts and the FTC, as well as factually similar cases brought by other enforcement and regulatory agencies, including other federal bank regulatory agencies.[11]

## Identifying UDAP Issues

UDAPs are not always apparent or easily discovered. In most instances, examiners may be unaware of any potential unfair or deceptive concerns prior to their examination of a bank. FDIC examiners may identify potential UDAPs during the course of an examination, through a consumer complaint, or through referrals from state or local agencies or consumer protection organizations. Reports of unfair or deceptive acts or practices in the media—print, TV, and the Internet—may trigger investigations.

The scope of an examination or investigation to determine whether an institution is engaging in UDAPs involves a review of the institution's products, services, target markets, operations, and compliance management systems and programs. Examiners first develop a risk profile for the institution using information about the institution's business lines, organizational structure, operations, and past supervisory performance. Then they investigate any identified high-risk areas, such as subprime lending and third-party relationships.

Identifying red flags and high-risk areas, and investigating them, is a key part of any UDAP review or investigation.

[10] FTC Policy Statement on Deception, p. 5, October 14, 1983, www.ftc.gov/bcp/policystmt/ad-decept.htm.

[11] Joint Guidance at page 2; FIL-57-2002, Guidance on Unfair or Deceptive Acts or Practices, May 30, 2002, www.fdic.gov/news/news/financial/2002/fil0257.html.

### Deceptive Advertising and Billing

On one bank's home page was a large multicolored advertisement that prominently displayed a series of credit cards and a large blue ball. Alternately flashing across the ball, in bold white letters outlined in red, were the statements "NO COLLECTION CALLS*!" and "NO LATE FEES*!" Although each statement contained an asterisk, there were no explanatory notes on this page.

A consumer who clicked on the blue ball or one of the credit cards would be linked to an application page containing the online application form. At the top of this page, the statements "NO collection calls*" and "NO late fees*" again appeared as static text, along with the statement, "NO Nonsense." The phrases "NO COLLECTION CALLS*," "NO LATE FEES*," and "APPLY NOW!" appeared a second time on this page as flashing text in a red banner. The following text appeared in small print in the middle of the page, largely obscured by other promotional information:

> Late fees may apply and you may receive collection calls if payments are past due on your credit account and charges or fees incurred cause your credit account balance to exceed its credit line (over limit) or any portion of your credit line becomes unsecured . . .

If the consumer clicked the site on or near "APPLY NOW!" the online application moved from the middle to the top of the screen, covering over this qualification. If, instead of clicking "APPLY NOW!" the consumer clicked the "Important Terms and Conditions" link appearing at the top of the application page, they would be taken to another web page containing the general terms and conditions, again with the flashing statements "NO COLLECTION CALLS*," "NO LATE FEES*," and "APPLY NOW" appearing at the top of the page. In this instance, as with the original statements on the bank's home page, there were no qualifying disclosures.

The FDIC found the statements to be deceptive. The qualifications, printed in small text and largely obscured, contradicted the prominently advertised terms. Additionally, while the banner headlines appeared multiple times on each of the three pages, the qualifying language appeared only once, could easily be skipped, and was completely covered if the consumer clicked the link for the online application.

In a similar case, the bank sent out billing statements to its delinquent credit card account holders featuring a prominently placed message, located in a box in the center of the statement, advising the consumer that if they paid a specific sum, they could avoid additional fees and further collection efforts. Upon investigation, the examiners determined that the amount stated in the message box was the amount past due, not the larger minimum payment amount, and that payment of this amount would result in additional charges as well as continuation of the consumer's delinquent status.

Although the minimum amount due was stated elsewhere on the billing statement, the bank's practice was deceptive because it used an alternative amount in the message box to direct the consumer's attention away from the correct minimum payment amount necessary to restore their account to a current status. Moreover, despite the bank's explicit claims to the contrary, payment of the amount the bank specified in the message box would subject the consumer to what they were told they would avoid: additional fees and collection efforts.

The bank was directed to immediately terminate this practice and reimburse those consumers who incurred late charges and other fees as a result of this practice.

## Red Flags That Could Warrant a UDAP Review

### Consumer Complaints

Consumer complaints are often a key source of information on possible UDAPs.[12]

As part of the pre-examination process,[13] examiners are required to review consumer complaints. At the FDIC, complaints received regarding state nonmember banks are maintained in an automated database and are available directly to examiners. In addition to reviewing complaints received by the FDIC, on-site examinations always include a review of the complaints received by the institution and its procedures for addressing them.[14]

[12] For agencies that do not have authority to perform on-site examinations, such as the FTC or a state attorney general, consumer complaints often serve as the primary basis for their investigations.

[13] FDIC *Compliance Examination Handbook,* "Compliance Examinations—Pre-examination Planning," page II-3.1.

[14] Ibid., "Compliance Examinations—Analysis," page II-4.1.

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When reviewing complaints, examiners also look for trends: for example, how many of the same or similar type of complaints did the bank receive? While a large volume of complaints will frequently indicate an area of concern, the number of complaints received is not a determining factor in and of itself of whether there is a potential unfair or deceptive issue. A small number of complaints do not undermine the validity of the complaints or the seriousness of the allegations raised. If even a single complaint raises apparent valid concerns relative to a potential UDAP, the examiner may determine that a Section 5 review is warranted. Consequently, examiners focus on the issues raised in complaints, not just the number of complaints.

Because many consumers may not be aware that the FDIC and the other bank regulatory agencies have consumer protection offices responsible for investigating consumer complaints,[15] examiners may contact other entities more generally known to consumers as places to file a complaint. These include the Better Business Bureau, the FTC, and state agencies, such as a state banking department or an attorney general's office.

When reviewing complaints, examiners pay particular attention not only to the immediate concerns of the consumer, but the broader implications. 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, or
- Previously undisclosed charges.

## Investigations by Other Federal or State Agencies

The FDIC gives serious attention to investigations initiated by other government agencies such as state banking departments or attorneys general offices. The regional offices are often notified directly by the investigating agency, although notice may first come from the target bank once it has learned it is under investigation.[16]

Where a state or other agency asserts that an FDIC-insured institution has violated state consumer protection law, the FDIC office in the Region, in consultation with the Washington office, reviews the allegations to determine if they involve potential UDAPs. Although such assertions may be based on state law, they nonetheless may also involve potential violations of Section 5 of the FTC Act.

## Criticism of Institution, Product, or Service in the Media

Newspaper articles, radio programs, and television consumer reports can provide information on potential UDAP issues. For example, during the course of one bank examination, a local news station did a special report on a consumer's complaint of deceptive practices at the bank's mortgage subsidiary. This information further corroborated issues examiners noted in consumer complaints.

Internet searches for information on an institution or a particular product or service it offers (such as a credit card or other loan product) can be another source of information on possible UDAPs. There are many websites and blogs where consumers write about the problems they have

[15] Congress amended the FTC Act in 1975 to require that each of the bank regulatory agencies establish a division of consumer affairs to address complaints. See 15 U.S.C. § 57a.

[16] As part of the Compliance Information and Document Request (CIDR) sent to institutions prior to a compliance examination, financial institutions are asked whether they are subject to any investigation by a state or government entity or other legal action.

had with particular entities or products. These websites may be used by examiners to supplement information in the complaints received by the FDIC and state authorities.

## *High-Risk Areas Requiring Scrutiny for UDAPs*

### Subprime Products

Subprime lending, by its nature, involves the extension of credit to borrowers who may be among the more economically vulnerable or less financially sophisticated. While the presence of subprime products does not automatically equate to unfairness or deception, the complexity of many of these products and their pricing structure may raise Section 5 concerns.

Subprime products are sometimes specifically marketed to consumers with lower levels of financial sophistication, creating greater risk for Section 5 problems. *Products targeted to the elderly, recent immigrants, or a specific ethnic or racial group are also subject to scrutiny for Section 5 violations, as well as for violations of the Equal Credit Opportunity and Fair Housing Acts.*

### Third-Party Relationships

The prohibitions against UDAPs found in the FTC Act apply to state-chartered banks, their subsidiaries and institution-affiliated parties, *and* third-party contractors.[17] Third-party relationships, both affiliated and unaffiliated, are one of the most common features in the Section 5 violations found by FDIC examiners.

### Unaffiliated Third Parties

An unaffiliated third-party relationship could include a company that provides advertising services, issues credit cards through the bank, sells insurance, brokers loans, or purchases loans or receivables from the bank. Collection activity is another activity frequently conducted by unaffiliated third parties.

Examiners analyze all third-party relationships, affinity agreements, contracts, or partnerships in which the bank is involved or anticipates involvement. In particular, examiners focus on what functions the third party performs for the bank and the bank's oversight and monitoring of the relationship.

If the bank is involved with a third party that offers products or services that raise concerns about UDAP, such as subprime loans, examiners closely review the agreement between the bank

**Analyzing Third-Party Relationships**

In reviewing third-party arrangements, examiners consider

- The types of services or products provided by the third party and their potential for possible UDAP concerns;
- The due diligence conducted by the bank prior to entering into an agreement with the third party;
- The extent of the bank's oversight and monitoring of the third party; particularly whether the bank's oversight goes beyond "rubber-stamping" disclosures or solicitations produced by the third party; and
- Whether the bank reviews customer service and collection activity for compliance with Section 5.

Financial institutions also can consider these issues when assessing a potential or ongoing relationship with a third party.

[17] FIL-57-2002, Guidance on Unfair or Deceptive Acts or Practices, May 30, 2002, www.fdic.gov/news/news/financial/2002/fil0257.html

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and the third party to fully understand its scope and to identify important terms and conditions, such as indemnification clauses and limitations on liability, that may have an impact on the redress for consumers. Moreover, if the agreement provides for the performance of significant activities by the third party—such as marketing, loan processing, or collections—examiners may need to conduct an on-site visitation of the third party.

### Affiliated Third Parties

Examiners will want to be apprised of all subsidiaries and affiliates and the types of products and services each offers. Other important factors in the examiner's analysis include

- Level of control and oversight the banks exert over the subsidiary;
- Types of reporting mechanisms in place;
- Origin of the relationship between the bank and the affiliated third party (i.e., was the subsidiary or affiliate "homegrown" or was it an independent entity purchased by the bank?).

Regarding the relationship between the bank and the affiliated third party, it can sometimes take a long time to implement bank policies and procedures and integrate a purchased subsidiary into the bank's organizational culture. Previously independent entities and independent vendors frequently have difficulty assimilating and conforming to the supervisory compliance structure of regulated institutions.

If weaknesses are seen in the oversight and controls of a bank subsidiary or affiliate, and the types of products or services the subsidiary or affiliate offers have the potential for possible unfair or deceptive practices, examiners may review related files, documents, disclosures, or information on-site at the offices of the subsidiary or affiliate instead of at the bank. As with any examination, examiners on-site observe how the subsidiary or affiliate operates, the business culture, and how well-versed employees dealing directly with consumers are with applicable laws and regulations.

## *Analyzing an Unfair or Deceptive Case*

Section 5 of the FTC Act does not impose any specific requirements on banks.[18] The policies and procedures necessary to avoid engaging in unfair or deceptive activities will largely depend on an institution's business strategy, its target markets, its products and services, and its relationships with third parties.

The UDAP examination procedures cover various topics to assist examiners

### Importance of Strong Oversight and Control

In some cases involving UDAP issues, the banks involved had affinity agreements with unaffiliated third-party providers to issue credit cards via a rent-a-BIN arrangement. In this type of arrangement, the financial institution permits a third party to use its Bank Identification Number (which is required to issue credit cards) to issue credit cards on its behalf. Generally, in rent-a-BIN relationships, the institution sells its credit card receivables to the third party, although the bank remains the issuer. In both small and large institutions involved in these arrangements, examiners have at times found a lack of oversight and control, resulting in unchecked UDAPs in connection with the subprime credit card product issued under the bank's name.

[18] FDIC *Compliance Examination Handbook,* "Abusive Practices—Federal Trade Commission Act," page VII-1.5.

in their review: product structure and terms, advertising and solicitation, repricing and change of terms, servicing and collections, and monitoring the conduct of third parties. A Section 5 analysis is not based upon a particular checklist, but is fact specific. The examination procedures provide, as guidelines, questions for examiners to consider when evaluating a particular act or practice, developed largely based upon past Section 5 violations. Whenever an examiner determines a product or practice is potentially unfair or deceptive, he or she will analyze it using the standards for unfairness and deception summarized in the examination procedures and discussed more fully in the Joint Guidance.

In addition to setting forth the standards for evaluating a potential Section 5 situation, the Joint Guidance addresses a number of other topics examiners consider when evaluating a product or practice. The Joint Guidance further discusses the interplay between the FTC Act and other laws, and cautions that even though a bank may be in technical compliance with other laws, such as the Truth in Lending or Truth in Savings Acts, a product or practice may still violate Section 5. For example, a bank's credit card advertisement may contain all the required Truth in Lending Act disclosures, but obscured or inadequately disclosed material limitations and restrictions could lead to a Section 5 violation.

In analyzing a product or service that raises unfairness or deception concerns, examiners will often look beyond the compliance aspects and evaluate the product or practice from a safety and soundness perspective. For example, high default and delinquency rates identified through profitability reports, aging and delinquency reports, or re-aging and negative amortization practices may raise questions about whether a product fulfills its various marketing promises—claims often based upon building or improving a borrower's credit. Account activity reports, with fees and interest broken out, may also raise questions. In several credit card products reviewed by FDIC examiners, the limited credit lines were largely exhausted by various account opening fees and other fees. As a result, there was no purchase or other normal credit activity because there was little or no available credit. Activity reports for deposit products, such as stored-value cards, are also often reviewed to assess consumer usage, access to account information, and the assessment of fees and other charges and their impact on the deposited balance.

Enforcement actions brought by the FDIC, other banking agencies, and the FTC on similar issues, and guidance issued by the FDIC and these agencies provide an important framework for analyzing potential Section 5 violations. State investigations and actions may also be useful in evaluating an unfairness or deception claim. The FDIC's examination procedures provide a reference section on cases and guidance on unfairness or deception issues relating to specific areas, such as mortgage and credit card lending, and servicing and collections.[19]

Given the dynamic nature of the market and the constant emergence of new products and practices that may raise unfairness or deception issues, it is important to remain alert to any new case law or guidance on a given topic.

## Corrective Action

As with any violation of law or regulation, the response to a violation of the FTC Act will depend on a number of factors, including

- The nature of the violation;

[19] Ibid., page VII-1.7.

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- Whether it is a repeat violation or a variation of a previously cited violation;
- The harm, or potential harm, suffered by consumers;
- The number of parties affected; and
- The institution's overall compliance posture and history, both in general and with respect to UDAPs.

Significant violations not only may require discontinuance of the practice and reimbursement of consumers, but may also result in a downgrade of the bank's compliance (and possibly CRA[20]) rating as well as an enforcement action.

## *UDAP—a Priority at the FDIC*

Unlike most consumer compliance laws and regulations, which tend to be prescriptive, Section 5 of the FTC Act is a broadly written law subject to interpretation. While Section 5 is specific in the criteria that must be met for an act or practice to be considered unfair or deceptive, determining whether any particular act or practice is unfair or deceptive requires a review of applicable law and judgment. In a dynamic market with constant new products and services emerging, it is critical that UDAP situations be evaluated with a national perspective. The FDIC recognizes the seriousness of violations involving UDAPs and the potential impact of such violations on consumers, the institution, and the community at large. Therefore, examiners are required to consult with both the regional and headquarters offices when they first identify a product or service that raises deception or unfairness concerns. Headquarters concurrence, which may include consultation with the FDIC's Legal Division and the FTC, must be obtained before a violation of the FTC Act may be cited in an examination report.

The FDIC has made identification of products and services with UDAP implications a key priority in its efforts to combat predatory lending practices. The significance and seriousness of these violations should not be underestimated: they are raised to the highest levels of the FDIC, and can adversely affect the institution's overall compliance, CRA, and safety and soundness ratings. Depending on their severity, violations may result in a costly formal enforcement action and restitution for

### Corrective Action in the Case of Overdraft Protection and Erroneous ATM Disclosures

In several cases involving overdraft protection, examiners found that the bank provided only a single account balance at its ATMs reflecting the consumer's actual balance plus the amount of overdraft protection. If consumers did not have adequate information at the time of their ATM transaction to determine the amount of funds they had available, they could inadvertently overdraw their accounts and incur overdraft protection fees as well as other charges.

In some instances, the FDIC determined that this practice was deceptive based upon an omission of material information necessary for the consumer to consider in making an informed decision. The affected banks corrected the problem in different ways: some posted signs at ATMs that alerted customers that withdrawals might overdraw accounts and trigger fees; others took steps to ensure that ATMs showed actual account balances. The FDIC required banks to identify and reimburse all consumers who were charged overdraft protection and other fees as a result of the initial practice.

[20] 12 C.F.R. § 345.28(2).

consumers. These actions, in turn, may damage the institution's reputation, expose it to litigation risk, and result in substantial financial loss. Financial institutions should use this information and prior guidance on unfairness and deception issued by the FDIC and other agencies to educate their staffs on how to avoid UDAPs and to strengthen their compliance management system overall.

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