Monitoring for Unfair, Deceptive, or Abusive Acts or Practices (UDAAP)

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By Jeffrey Torp

This is the last in a series of three articles regarding unfair, deceptive, or abusive acts or practices (UDAAP) by financial institutions. The first article provided an overview of what are considered to be unfair, deceptive, or abusive acts or practices under the law. The second article discussed conducting a UDAAP risk assessment, and this last article covers implementing and monitoring for UDAAP compliance.

Once you are familiar with the requirements of UDAAP and have conducted your risk assessment, you may find you need to make changes to existing products and/or marketing efforts in order to address areas of high risk. The next step is to train personnel to make them aware of UDAAP as well and then monitor for compliance.

Most personnel will need to have some familiarity with UDAAP. Some personnel, particularly management and those involved in product development and marketing, will need more detailed knowledge since they are typically the ones involved in the creation and marketing of products, which is where most of the UDAAP issues are born. In addition, other decision-making personnel involved in areas that have been identified as having a moderate to high UDAAP risk will also need more detailed knowledge.

In some cases, you may find it necessary to adopt specific internal controls, policies, and/or procedures to help avoid UDAAP problems in high-risk areas or to prevent areas of lower UDAAP risk from becoming high-risk. In particular, take a look at the items listed below in the section titled “Review Procedures.” This section includes things that are contained in the CFPB’s examination manual that examiners look for during examinations for UDAAP compliance and, therefore, should be considered for adoption as controls, policies, and/or procedures.

All such internal controls, policies, and/or procedures need to be included in your training for appropriate personnel.

Finally, once you have adopted necessary internal controls and policies/procedures and conducted your training, you need to monitor for compliance with UDAAP to make sure your policies, procedures, and training are being followed.

Based on the results of the risk assessment of the institution, examiners should review for potential unfair, deceptive, or abusive acts or practices, taking into account an institution’s marketing
programs, product and service mix, customer base, and other factors, as appropriate. Even if the risk assessment has not identified potential unfair, deceptive, or abusive acts or practices, examiners should be alert throughout an examination for situations that warrant review.

**DOCUMENTS TO REVIEW**

To help spot potential areas of UDAAP concern, obtain and review records from relevant institution activities, including the following:

- Lists of products and services, including descriptions, fee structure, disclosures, notices, agreements, and periodic and account statements.
- Procedure manuals and written policies, including those for servicing and collections.
- Compensation arrangements, including incentive programs for employees and third parties.
- Documentation related to new product development, including relevant meeting minutes of Board of Directors, and of compliance and new product committees.
- Marketing programs, advertisements, and other promotional material in all forms of media (including print, radio, television, telephone, Internet, or social media advertising).
- Scripts and recorded calls for telemarketing and collections.
- Agreements with affiliates and third parties that interact with consumers on behalf of the institution.
- Consumer complaint files.

Note any items in this information that raise UDAAP concerns.

**REVIEW PROCEDURES**

In reviewing your institution’s procedures, consider the following items:

- Through its sampling of relevant product types and decision centers, including sales, processing, and underwriting, are UDAAP policies and procedures being followed?
- Does the institution have a process to respond to consumer complaints in a timely manner and determine whether consumer complaints raise potential UDAAP concerns?
- Are the institution’s internal controls are adequate to prevent unfair, deceptive, or abusive acts or practices? In making this determination, include consideration of whether:
  - The compliance management program includes adequate measures aimed at avoiding unfair, deceptive, or abusive practices.
— The institution conducts prior UDAAP reviews of advertising and promotional materials, including promotional materials and marketing scripts for new products.

— The institution evaluates initial and subsequent disclosures, including customer agreements and changes in terms, for potential UDAAP concerns.

— The institution reviews new products and changes in the terms and conditions of existing products for potential UDAAP concerns.

— The institution has a thorough process for receiving and responding to consumer complaints and has a process to receive complaints made to third parties, such as the Better Business Bureau or the CFPB.

— The institution evaluates servicing and collections for UDAAP concerns.

— The institution has established policies and controls relating to employee and third-party conduct and compensation.

**Potential Areas for Transaction Testing**

Identify areas for potential transaction testing. This process should determine whether:

- The institution does not underwrite a given credit product on the basis of ability to repay.

- A product’s profitability depends significantly on penalty fees or “back-end,” rather than upfront, fees.

- A product has high rates of repricing or other changes in terms.

- A product combines features and terms in a manner that can increase the difficulty of consumer understanding of the overall costs or risks of the product and the potential harm.

- Penalties are imposed on a customer when he terminates his relationship with the institution.

- Fees or other costs are imposed on a consumer to obtain information about his account.

- A product is targeted to particular populations, without appropriate tailoring of marketing, disclosures, and other materials designed to ensure understanding by the consumers.

**Transaction-Related Examination Procedures**

If upon conclusion of the management and policy-related examination procedures, procedural weaknesses or other UDAAP risks require further investigation, conduct transaction testing, as necessary, using the following examination procedures. Use judgment in deciding to what extent to sample individual products, services, or marketing programs. Increase the sample size to achieve confidence that all aspects of the institution’s products and services are reviewed sufficiently.
**Marketing and Disclosures**

Through a review of marketing materials, customer agreements, and other disclosures, determine whether, before the consumer chooses to obtain the product or service:

- All representations are factually based.

- All materials describe clearly, prominently, and accurately:
  - Costs, benefits, and other material terms of the products or services being offered
  - Related products or services being offered either as an option or required to obtained certain terms
  - Material limitations or conditions on the terms or availability of products and services, such as time limitations for favorable rates, promotional features, expiration dates, prerequisites for obtaining particular products or services, or conditions for canceling services

- The customer’s attention is drawn to key terms, including limitations and conditions, that are important to enable the consumer to make an informed decision.

- All materials clearly and prominently disclose the fees, penalties, and other charges that may be imposed and the reason for the imposition.

- Contracts clearly inform customers of contract provisions that permit changes in terms and conditions of the product or service.

- All materials clearly communicate the costs, benefits, availability, and other terms in language that can be understood when products are targeted to particular populations, such as reverse mortgage loans for the elderly.

- Materials do not misrepresent costs, conditions, limitations, or other terms either affirmatively or by omission.

- The institution avoids advertising terms that are generally not available to the typical targeted consumer.

**Availability of Terms or Services as Advertised**

Evaluate whether product(s) and service(s) that consumers are receiving are consistent with the disclosures and policies. For each product and service being reviewed, select a sample that:

- Is sufficient in size to reach a supportable conclusion about such consistency

- Includes, as appropriate, transactions from different origination and underwriting channels — for example, different geographical areas or different sectors of the institution’s organization structure

- Includes approved and/or denied accounts
Based on a review of the samples selected, determine whether:

- Consumers are reasonably able to obtain the products and services, including interest rates or rewards, as represented by the institution.
- Consumers receive the specific product or service that they request.
- Counter-offers clearly, prominently, and accurately explain the difference between the original product or services requested and the one being offered.
- Actual practices are consistent with stated policies, procedures, or account disclosures.

**Availability of Actual Credit to the Consumer**

Evaluate whether the institution represents the amount of useable credit that the consumer will receive in a truthful way. Consider whether:

- The available credit is sufficient to allow the consumer to use the product as advertised and disclosed to the consumer.
- The fees and charges typically imposed on the average targeted customer, both initially and throughout the term of the loan, remain in a range that does not prevent the availability of credit.
- The institution honors convenience checks when used by the customer in a manner consistent with introductory or promotional materials and disclosures.

**Employees and Third Parties Interacting with Consumers**

Evaluate how the institution monitors the activities of employees and third-party contractors, marketing sales personnel, vendors, and service providers to ensure they do not engage in unfair, deceptive, or abusive acts or practices with respect to consumer interactions. Interview employees and third parties, as appropriate. Specifically, consider whether:

- The institution ensures that employees and third parties who market or promote products or services are adequately trained so that they do not engage in unfair, deceptive, or abusive acts or practices.
- The institution conducts periodic evaluations or audits to check whether employees or third parties follow the institution’s training and procedures and has a disciplinary policy in place to deal with any deficiencies.
- The institution reviews compensation arrangements for employees, third-party contractors, and service providers to ensure that they do not create unintended incentives to engage in unfair, deceptive, or abusive acts or practices, particularly with respect to product sales, loan originations, and collections.
• Performance evaluation criteria do not create unintended incentives to engage in unfair, deceptive, or abusive acts or practices, including criteria for sales personnel based on sales volume, size, terms of sale, or account performance.

• The institution implements and maintains effective risk and supervisory controls to select and manage third-party contractors and service providers.

**Servicing and Collections**

Evaluate whether any of the institution’s servicing and collections practices raise potential UDAAP concerns, by considering whether:

• The institution has policies detailing servicing and collections practices and has monitoring systems to prevent unfair, deceptive, or abusive acts or practices.

• Call centers, either operated by the institution itself or by third parties, effectively respond to consumers’ calls.

• The institution ensures that employees and third-party contractors:
  — Represent fees or charges on periodic statements in a manner that is not misleading.
  — Post and credit consumer payments in a timely manner.
  — Apply payments in a manner that does not unnecessarily increase customer payments, without clear justification.
  — Only charge customers for products and services, such as insurance or credit protection programs, that are specifically agreed to.
  — Mail periodic statements in time to provide the consumer ample opportunity to avoid late payments.
  — Do not represent to consumers that they may pay less than the minimum amount without clearly and prominently disclosing any fees for paying the reduced amount.

• The institution has policies to ensure compliance with the standards under the Fair Debt Collections Practices Act to prevent abusive, deceptive, or unfair debt collection practices. (Note: The FDCPA applies to any third party hired by the institution to collect a debt owed to the institution. While the FDCPA does not apply to an institution collecting a debt owed to itself, many institutions follow the standards of the FDCPA as a best practice.)

• Employees and third-party contractors clearly indicate to consumers that they are calling about the collection of a debt.

• Employees and third-party contractors do not disclose the existence of a consumer’s debt to the public without the consent of the consumer, except as permitted by law.

• The institution avoids repeated telephone calls to consumers that annoy, abuse, or harass any person at the number called.
ABOUT THE AUTHOR

Jeffrey Torp is a consultant in the area of regulatory risk for financial institutions. He specializes in the financial institution industry and has more than 35 years of experience serving financial institution clients in matters relating to bank regulation. Mr. Torp is an attorney and has previously served as a consultant with KPMG and with McGladrey & Pullen, LLP, and as legal counsel to the Independent Bankers of Minnesota. He received his law degree from William Mitchell College of Law in St. Paul, Minnesota and his Bachelor of Arts Degree from Augsburg College in Minneapolis, Minnesota. He has worked with financial institutions throughout the country on regulatory issues, and given numerous presentations on regulatory topics to groups of bankers, bank examiners, trade associations, and attorneys. He has also served as an instructor for the Independent Bankers Association of America’s compliance school and certification program and authored several publications.
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