Unfair or Deceptive Acts or Practices, Federal Trade Commission Act, Section 5

Unfair or deceptive acts or practices are illegal pursuant to Section 5 of the Federal Trade Commission Act.[1] The federal banking agencies have authority to enforce Section 5 of the Federal Trade Commission Act (FTC Act) for the institutions they supervise. If unfair or deceptive acts or practices involve an entity or entities over which more than one enforcement agency (including, for example, the Federal Trade Commission (FTC)) has enforcement authority, the agencies may coordinate their enforcement actions. The guidance in this handbook section is intended to assist examiners and institutions in addressing acts or practices that may be unfair or deceptive.

LINKS
Program
Questionnaire

The legal standards for unfairness and deception are independent of each other. Depending on the facts, a practice may be unfair, deceptive, or both.

This handbook section includes:

- Analysis of standards used to assess whether an act or practice is unfair or deceptive;
- Examples of enforcement actions taken under the FTC Act;
- Discussion of the interplay between the FTC Act and other consumer protection statutes; and
- Examination procedures for determining compliance with the FTC Act standards.

Unfair Acts or Practices

The federal banking agencies apply the same standards as the FTC in determining whether a practice is unfair. These standards were first announced in the FTC Policy Statement on Unfairness (included in the List of References at the end of this Background section). Under the FTC Policy Statement on Unfairness, an act or practice is unfair where it (1) causes or is likely to cause substantial injury (usually monetary) to consumers, (2) cannot be reasonably avoided by consumers, 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. All three of the elements necessary to establish unfairness are discussed further below, with examples to help illustrate them.

[1] FTC Act section 5(a), 15 USC § 45(a).

- ***The act or practice must cause or be likely to cause substantial injury to consumers.***

  Substantial injury usually involves monetary harm. An act or practice that causes a small amount of harm to a large number of people may be deemed to cause substantial injury. For example, in considering whether it is unfair to treat a payment as late when consumers have not been provided with a reasonable time to pay, the OTS and other agencies have focused on the harm that consumers experience from the fees imposed when a payment is received after the due date.[2] The harm that consumers experience from these fees is widespread, with 35 percent of active accounts in 2005 assessed at least one late fee.[3] Thus, the agencies found that failure to provide a reasonable amount of time to make payment caused or was likely to cause substantial monetary injury to a significant number of consumers.

- ***Consumers must not be reasonably able to avoid the injury.***

  An act or practice is not considered unfair if consumers may reasonably avoid injury. Consumers cannot reasonably avoid injury from an act or practice if it interferes with their ability to effectively make decisions. This may occur if material information about a product, such as pricing, is withheld until after the consumer has committed to purchasing the product, so that the consumer cannot reasonably avoid the injury. It also may occur where testing reveals that disclosures do not effectively explain an act or practice to consumers.[4]

  Because consumers should be able to survey the available alternatives, choose those that are most desirable, and avoid those that are inadequate or unsatisfactory, the question is whether an act or practice unreasonably impairs the consumer's ability to make an informed decision, not whether the consumer could have made a wiser decision. Such an impairment can be created by a lack of alternatives in the market – *i.e.*, where most market participants engage in a practice, consumers may have no meaningful way to avoid it. For example, the preamble to the interagency UDAP Rule noted that because high fee subprime credit cards were marketed to consumers who generally could not obtain products with less onerous terms, consumers could not reasonably avoid the injuries such as high upfront fees and low credit availability caused by these cards.[5] The preamble also explained that financially vulnerable or unsophisticated consumers (such as those who are elderly,

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[2] See Preamble to Interagency Rule on Unfair or Deceptive Acts or Practices (UDAP Rule Preamble) 74 Fed. Reg. 5498, 5509 (Jan. 29, 2009), available at http://edocket.access.gpo.gov/2009/pdf/E8-31186.pdf. The references to the UDAP Rule Preamble in these procedures are intended to provide examiners with insight into how the elements of unfairness and deception have been analyzed. However, an examination or enforcement determination that a specific practice is unfair or deceptive must be based on the particular facts and circumstances that surround the relevant conduct.

[3] Government Accountability Office Report "Credit Cards, Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers," Sept. 2006 at pp. 32-33, available at http://www.gao.gov/new.items/d06929.pdf.

[4] UDAP Rule Preamble, 74 Fed. Reg. at 5514. The FRB's testing of certain disclosures concluded that consumers cannot reasonably avoid certain payment allocation and billing practices because disclosures fail to adequately explain these practices.

[5] UDAP Rule Preamble, 74 Fed. Reg. at 5539.

living on fixed incomes and/or having serious health problems) to whom these cards were marketed had particularly limited ability to avoid harm.[6]

Actions that prevent a consumer from avoiding injury and making reasonable market decisions include withholding material price information until after the consumer has committed to purchase the product or service, or withholding or failing to generate critical price or performance data, leaving consumers with insufficient information for informed comparisons. A practice may also be unfair where consumers are subject to undue influence or are coerced into purchasing unwanted products or services. See the FTC Policy Statement on Unfairness in the List of References for more details on this part of the test.

The actions that a consumer is expected to take to avoid injury must be reasonable. While a consumer may avoid harm by hiring independent experts to test products in advance or bring legal claims for damages, these actions generally would be too expensive to be practical for individual consumers.

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

  To be unfair, the act or practice must be injurious in its net effects – that is, the injury must not be outweighed by any offsetting consumer or competitive benefits that are also produced by the act or practice.[7] Offsetting consumer or competitive benefits may include lower prices or a wider availability of products and services. Nonetheless, both consumers and competition benefit from preventing unfair acts or practices because prices are likely to better reflect actual transaction costs and merchants who do not rely on unfair acts or practices are no longer required to compete with those who do.[8] Unfair acts or practices injure both consumers and competitors because consumers who would otherwise have selected a competitor's product are wrongly diverted by the unfair act or practice.

- ***Public policy may be considered.***

  Public policy, as established by statute, regulation, judicial decision, or agency determination may be considered with all other evidence in determining whether an act or practice is unfair. Public policy considerations by themselves, however, will not serve as the primary basis for determining that an act or practice is unfair. For example, the fact that a particular lending practice violates a banking regulation may be considered as evidence in determining whether the act or practice is unfair. Conversely, the fact that a particular practice is permitted by statute or regulation may be considered as evidence that the practice is not unfair. However, the fact that a statute or regulation

[6] UDAP Rule Preamble, 74 Fed. Reg. at 5539-5540.

[7] See FTC Public Comment on OTS–2007–0015, at 6 (Dec. 12, 2007) available at http://www.ots.treas.gov/docs/9/963034.pdf.

[8] See FTC Public Comment on OTS–2007–0015, at 8 (citing Preservation of Consumers' Claims and Defenses, Statement of Basis and Purpose, 40 Fed. Reg. 53506, 53523 (Nov. 18, 1975) (codified at 16 CFR part 433)). See also FTC Policy Statement on Deceptive Acts and Practices, available at http://www.ftc.gov/bcp/policystmt/ad-decept.htm.

recognizes the existence of a practice does not establish its fairness.[9] The requirements of the Truth in Lending Act (TILA), the Truth in Savings Act (TISA), the Fair Credit Reporting Act (FCRA), or the Fair Debt Collection Practices Act (FDCPA) are examples of public policy considerations.

EXAMPLES OF ENFORCEMENT ACTIONS TAKEN TO ADDRESS UNFAIR ACTS OR PRACTICES

The actions described below provide additional insight into practices that have been found to be unfair. However, the particular facts are crucial to a determination of unfairness, and a change in facts could have changed the outcome of an agency decision. At the same time, this list is not exhaustive, and examiners should consider situations other than those covered here.

Failure to reasonably limit aggregate overdraft fees. A savings association failed to impose a reasonable limit on aggregate overdraft fees assessed under an automatic-enrollment overdraft program, resulting in consumers paying more in overdraft fees in a given month than the overdraft limit on their accounts or their average daily account balance. Savings association also failed to provide consumers overdrawn on their accounts with a reasonable opportunity to cease the imposition of additional daily fees for remaining overdrawn. Part of the reason consumers could not avoid the harm caused by the overdraft program was deceptive marketing of the accounts, which omitted information concerning the costs of the overdraft program. For those consumers who frequently overdrew their accounts, the harm from the overdraft program outweighed the benefits. OTS found the savings association's actions to be unfair in violation of Section 5 of the FTC Act. The institution was ordered to impose limits on aggregate overdraft fees acceptable to OTS, to pay more than $12 million in restitution to consumers, and to pay a $400,000 civil money penalty. *In the Matter of Woodforest Bank* (Order to Cease and Desist and Stipulation and Consent to Issuance of Order to Cease and Desist, Order WN-10-16, and Order of Assessment of a Civil Money Penalty and Stipulation and Consent to the Issuance of an Order of Assessment of a Civil Money Penalty, WN-10-17, April 23, 2010), OTS Docket No. 18047, available at http://www.ots.treas.gov/?p=Enforcement; and http://www.ots.treas.gov/?p=Enforcement; press release available at http://www.ots.treas.gov/index.cfm?p=PressReleases.

Dishonoring convenience checks without notice. Affiliated institutions sent convenience checks to customers for use on credit card accounts and then, when the checks were presented for payment, performed credit checks, reduced the customers' lines of credit prior to notifying the customers, and dishonored the checks. Customers were then subject to returned check fees for those checks and any additional checks the customers may have presented before receiving notice that the line of credit had been reduced. The institutions caused consumers harm by failing to provide adequate or timely notice of credit line reductions before consumers used the convenience checks that they were sent. The institution's practice caused insufficient fund fees to be assessed and may have caused other damage to

[9] UDAP Rule Preamble, 74 Fed. Reg. at 5516, 5528, and 5536 (public policy analysis supporting conclusion that practices concerning time for payment, payment allocation, repricing, and two-cycle billing are unfair). See also 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_acts.html.

consumer credit records that could not be reasonably avoided and was not outweighed by countervailing benefits to consumers or to competition. The institutions' actions were found by the OTS and the FDIC to be unfair in violation of Section 5 of the FTC Act. *In re American Express Bank, FSB* (Cease and Desist Order WN-09-016, and Order of Assessment of a Civil Money Penalty for $250,000, WN-09-017, June 29, 2009) OTS Docket No. 15648, available at http://www.ots.treas.gov/ files/enforcement; and http://www.ots.treas.gov/ files/enforcement; press release available at http://www.ots.treas.gov/index.cfm?p=PressReleases; *In re American Express Centurion Bank*, (Cease and Desist Order, June 30, 2009) Docket FDIC-09-251b, available at http://www.fdic.gov/news.

Increasing the annual percentage rate (APR) without giving notice or reason. A credit card issuer increased the APR on the accounts of small business owners and professionals who had neither exceeded their credit limits nor were delinquent on payments. The institution failed to adequately notify accountholders that their APR would increase, or to adequately notify them of the amount of the increase, the reason for the increase, the procedures to opt-out, and the consequences of an opt-out. Withholding and/or providing inadequate information prevented customers from reasonably avoiding the injury, and provided no benefit to the customer or competition. *In re Advanta Bank Corp*., (Cease and Desist Order, June 24, 2009), Docket FDIC-08-259b and 08-403k, available at http://www.fdic.gov/news.

Failure to protect consumers' personal information. A data collection company settled claims by the FTC that it: allowed unqualified users to obtain personal information, leading to identity theft. The company failed to make a minimal effort to verify information on user applications and failed to question suspicious representations in many cases. The FTC charged that failure to implement adequate background checks on third party companies caused or was likely to cause substantial injury to consumers, resulting in unqualified users being able to obtain personal data, that consumers could not avoid the harm, and there was no benefit to consumers or to competition from this failure. *United States v. ChoicePoint*, (ND GA, CA No. 1:06-cv-00198-GET, settled Feb 10, 2006), available at http://www.ftc.gov.

Failure to protect customers from financial abuse. The OCC brought an enforcement action based on its findings that: a bank maintained deposit account relations with telemarketers and payment processors for telemarketers that regularly deposited large numbers of remotely created checks that were either not authorized by consumers or for which consumers received little or nothing in return; and the bank failed to appropriately respond to allegations of fraud from other institutions and customers. *In re Wachovia Bank, National Association,* available at http://www.occ.treas.gov/ea2008-027.pdf and http://www.occ.treas.gov/ea2008-028.pdf

Deceptive Acts or Practices

A three-part test is used to determine whether a representation, omission, or practice is deceptive. First, the representation, omission, or practice must mislead or be likely to mislead the consumer. Second, the consumer's interpretation of the representation, omission, or practice must be reasonable under the circumstances. Third, the misleading representation, omission, or practice must be material. See the

FTC Act Policy Statement on Deception in the List of References for more details. As a general matter, the standards for establishing deception are less burdensome than the standards for establishing unfairness because, under deception, there is no requirement that the injury not be reasonably avoidable or that the injury be weighed against benefits to consumers or to competition. All three of the elements necessary to establish deception are discussed below, followed by examples of deceptive acts or practices.

- ***There must be a representation, omission, or practice that misleads or is likely to mislead the consumer.***

  A representation, omission, or practice that actually misleads a consumer may be deceptive, but deception is not limited to situations in which a consumer has already been misled. Instead, an act or practice may be deceptive if it is likely to mislead consumers. A representation may be an express or implied claim or promise and may be written or oral. It may be deceptive to omit information if the omitted information is necessary to prevent a consumer from being misled.

  An individual statement, representation, or omission is not evaluated in isolation to determine if it is misleading, but rather in the context of the entire advertisement, transaction, or course of dealing. Examples of deceptive acts or practices include: making misleading cost or price claims; using bait-and-switch techniques; offering to provide a product or service that is not available; omitting material limitations or conditions from an offer; selling a product unfit for the purposes for which it is sold; and failing to provide promised services.

  Written disclosures may be insufficient to correct a misleading statement or representation, particularly where the consumer is directed away from qualifying limitations in the text or is counseled that reading the disclosures is unnecessary. Likewise, oral disclosures or fine print are generally insufficient to cure a misleading headline or prominent written representation. Finally, a deceptive act or practice cannot be cured by subsequent truthful disclosures.

- ***The act or practice must be considered from the perspective of the reasonable consumer.***

  In determining whether an act or practice is misleading, the consumer's interpretation of or reaction to the representation, omission, or practice must be reasonable under the circumstances. In other words, whether an act or practice is deceptive depends on how a reasonable member of the target audience would interpret the marketing material. When representations or marketing practices are targeted to a specific audience, such as the elderly or the financially unsophisticated, the communication is reviewed from the point of view of a reasonable member of that group.

  If a representation conveys two or more meanings to reasonable consumers and one meaning is misleading, the representation may be deceptive. Moreover, a consumer's interpretation or reaction may indicate that an act or practice is deceptive under the circumstances, even if the consumer's interpretation is not shared by a majority of the consumers in the relevant class, so long as a significant minority of such consumers is misled.

- ***The representation, omission, or practice must be material.***

  A representation, omission, or practice is material if it is likely to affect a consumer's decision to purchase or use a product or service. In general, information about costs, benefits, or restrictions on the use or availability of a product or service is material. When express claims are made with respect to a financial product or service, the claims will be presumed to be material. While intent to deceive is not a required element of proving that an act or practice is deceptive, the materiality of an implied claim will be presumed if it can be shown that the institution intended that the consumer draw certain conclusions based upon the claim.

  Claims made with knowledge that they are false will also be presumed to be material. Omissions will be presumed to be material when the financial institution knew or should have known that the consumer needed the omitted information to make an informed choice about the product or service.

Examples of Enforcement Actions Taken to Address Deceptive Acts or Practices

The actions described below provide additional insight into practices that have been found to be deceptive. However, the particular facts are crucial to a determination deception, and a change in facts could have changed the outcome of an agency decision. At the same time, this list is not exhaustive, and examiners should consider situations other than those covered here.

Deceptive advertising of accounts with overdraft protection. A savings association used marketing and promotional materials with misleading representations that certain deposit account products were suitable for consumers who mishandled their credit or bank account in the past while omitting information about such accounts such as overdraft fees that made them unsuitable for such consumers. Savings association also promoted or marketed deposit account products as being free or having low cost features while omitting information concerning costs including costs of overdraft programs. Further, savings association provided information that contained unclear or misleading disclosures about ineligibility, suspension, or reinstatement of deposit accounts from the overdraft program. OTS found the savings association's actions to be deceptive in violation of Section 5 of the FTC Act. The institution was ordered to cease its deceptive advertising, to pay more than $12 million in restitution to consumers, and to pay a $400,000 civil money penalty. *In the Matter of Woodforest Bank* (Order to Cease and Desist and Stipulation and Consent to Issuance of Order to Cease and Desist, Order WN-10-16, and Order of Assessment of a Civil Money Penalty and Stipulation and Consent to the Issuance of an Order of Assessment of a Civil Money Penalty, WN-10-17, April 23, 2010), OTS Docket No. 18047, available at http://www.ots.treas.gov/?p=Enforcement; and http://www.ots.treas.gov/?p=Enforcement; press release available at http://www.ots.treas.gov/index.cfm?p=PressReleases.

Deceptive overdraft disclosures. A savings association provided account disclosures stating a daily limit on overdrafts and overdraft transaction fees but did not adhere to those limits. Savings association entered into a Supervisory Agreement that included reimbursing overdraft fees to consumers. *Bank of Greene County Supervisory Agreement,* July 22, 2009, available at http://www.ots.treas.gov/?=Enforcement.

Advertised percentage in a cash-back rewards program not available for all purchases. A bank's cash back rewards program advertised a percentage of cash back on certain purchases by business credit card accountholders; however, the FDIC determined that it was effectively impossible for accountholders to get the stated percentage of cash back reward payments. The agency determined that the representations in the advertisements were material since the consumers likely applied for the credit based on the cash rewards program. Since such representations would be likely to mislead a reasonable person, it was determined that the bank had engaged in a pattern of deceptive acts or practices. *In re Advanta Bank Corp.*, (Cease and Desist Order, June 24, 2009), Docket FDIC-08-259b and 08-403k, available at http://www.fdic.gov/news.

Inadequate credit card fee disclosures and misrepresentation of available credit. The FDIC brought enforcement actions against several banks and a third party vendor for marketing credit cards through solicitations that had misrepresentations about credit limits or available credit and inadequately disclosing fees and restrictions on initial available credit. In some situations the solicitations appeared to offer credit cards with a $300 credit limit; however, consumers were immediately charged up to $185 in inadequately disclosed fees, leaving them with as little as $115 in available credit. Another card solicitation failed to disclose that only half of the credit limit would be available for the first 90 days. *In re Columbus Bank and Trust Company, First Bank of Delaware, First Bank and Trust (Brookings, South Dakota), and CompuCredit Corporation,* available at http://www.fdic.gov; *In re First National Bank in Brookings,* available at http://www.occ.treas.gov.

Misrepresentation of available credit. The OCC brought an action against a credit card issuer for advertising that its secured credit card product did not require submission of funds for a savings deposit in order to receive a card with a usable amount of available credit. However, the issuer failed to disclose that the deposit requirement and various fees would be charged to the card, so that the vast majority of applicants received little or no available credit. *In re First National Bank of Marin,* Fact Sheet, available at http://www.occ.treas.gov.

Misrepresentation of available credit. A subprime credit card issuer advertised unsecured credit cards with substantial maximum credit limits. However, the agency found that virtually all consumers were only approved for the minimum credit limit of one-tenth the advertised maximum, and many consumers were only approved for secured cards. In addition, the issuer did not adequately disclose that required fees would be charged to the card, reducing the initial available credit even further. *In re First National Bank Fort Pierre,* available at http://www.occ.treas.gov.

Misrepresentation of available credit. An issuer of secured credit cards encouraged customers to charge the initial security deposit to the credit card. However, the OCC found that the issuer failed to disclose that the consumer's available credit would be reduced by doing so. Customers who received the bank's minimum credit line of $260 had only $2.50 in credit available for their use after the security deposit and various fees were charged to the account. In addition, charging the security deposit to the card inflated the balance that the issuer used to calculate the interest paid by the consumer. *OCC Issues Order Against First National Bank of Marin,* Release 2004-37, available at http://www.occ.treas.gov/toolkit, and Consent order, available at http://www.occ.treas.gov/FTP.

Failure to disclose fees. A card issuer marketed bank-issued prepaid debit cards under a variety of names through the Internet and e-mail that directed consumers to sites for individual VISA and MasterCard debit cards. The advertisements said "No Annual Fees" or "No Security Deposit." The advertisements did not identify the other costs applicable to these cards. The FTC found that a reasonable consumer would believe that the advertisements represented that a card can be obtained "free," without obligation, or at a reduced cost. *FTC v. EdebitPay, LLC, et al.* (CDC CA), Civ. Action No.: CV-07-4880 ODW (AJWx); FTC File No.: 062-3125, available at http://www.ftc.gov/os, FTC Release, Jan. 24, 2008, available at http://www.ftc.gov/opa.

Failure to disclose fees and down-selling of credit products. A bank agreed to a consent order after the OCC charged it with failing to disclose application or processing fees as finance charges, and engaging in down-selling, a practice where the creditor offers one product, but provides another with one or more terms less favorable than the most favorable term(s) disclosed in its advertising. *In re Direct Merchants Credit Card Bank N.A.,* OCC Fact Sheet, available at http://www.occ.treas.gov, consent order, available at: http://www.occ.treas.gov.

Failure to disclose fees and limitations of credit and other products. A bank agreed to a consent order to settle OCC charges that it failed to disclose all fees, charges and product limitations fully and accurately. Specifically, the OCC claimed there was inaccurate advertising and disclosure of credit insurance, other fee-based products, and annual fees for some credit cards. *In re Providian National Bank,* OCC Release 2000-49, available at http://www.occ.treas.gov, Fact Sheet, available at http://www.occ.treas.gov, consent order available at http://www.occ.treas.gov.

Failure to comply with disclosed privacy policy. A mortgage lender's privacy policy claimed: "We take our responsibility to protect the privacy and confidentiality of customer information very seriously. We maintain physical, electronic, and procedural safeguards that comply with federal standards to store and secure information about you from unauthorized access, alteration and destruction. Our control policies, for example, authorize access to customer information only by individuals who need access to do their work." However, the FTC complaint alleged that the lender failed to provide reasonable security to protect sensitive customer data, making it vulnerable by allowing a third-party home seller to access the data without taking reasonable steps to protect it. A hacker compromised the data by breaking into the home seller's computer, obtaining the lender's credentials, and using them to access hundreds of consumer reports. *In the Matter of Premier Capital Lending, Inc., a corporation, and Debra Stiles, individually and as an officer of the corporation,* Docket No. C-4241, FTC File No. 0723004, available at http://www.ftc.gov.

Failure to disclose fees for credit repair. AmeriDebt, Inc., agreed to shut down its debt management operation as part of a settlement of FTC charges that it deceived consumers into paying at least $170 million in hidden fees. The FTC charged that the company misrepresented that it was a non-profit credit counseling organization that could teach consumers how to manage their finances for no up-front fee. According to the FTC, AmeriDebt deceived new clients into making a "voluntary contribution" to enroll in the program. The FTC alleged that AmeriDebt kept these initial "contributions" as fees without consumers' knowledge, rather than disbursing the money to consumers' creditors as promised. This fact would be material to consumers. The organization's failure to disclose this fact, in light of the representations made, was a deceptive practice. *FTC v. AmeriDebt, Inc., et al*, (D. MD) Settlement March 21, 2005, available at http://www.ftc.gov.

Bait and switch advertising. The FTC claimed that a mortgage broker advertised refinanced mortgage loans at "3.5% fixed payment 30 year loan" or "3.5% Fixed Payment for 30 Years," but never actually offered them. Instead, the FTC claimed, the broker offered adjustable rate mortgages (ARMs) with an option to pay various amounts, including a minimum monthly payment that represented only a portion of the required interest, resulting in negative amortization as unpaid interest was added to the principal of the loan. The advertisements promised annual cash savings. The FTC claimed that the advertisements were misleading because they compared payments on a mortgage that fully amortizes to payments on a non-amortizing loan with increases after the first year. In addition, the FTC claimed that after application, the broker provided TILA disclosures that omitted information that the loan was a variable rate loan and misstated the APR. The representations were material because consumers relied on them, and refinanced their fully amortizing 30 year fixed loans into ARMs that could have negative amortization. The mortgage broker entered into a stipulated injunction to cease these activities *FTC v. Chase Financial Funding, Inc.* No. SACV04-549 (C.D.CA 2004), Stipulated Preliminary Injunction, available at http://www.ftc.gov.

THE ROLE OF CONSUMER COMPLAINTS IN IDENTIFYING UNFAIR OR DECEPTIVE ACTS OR PRACTICES

Consumer complaints play a key role in the detection of unfair or deceptive acts or practices. While the absence of complaints does not ensure that unfair or deceptive acts or practices are not occurring, the presence of complaints may be red flags indicating that a more detailed review is warranted. This is especially the case when similar complaints are received from several consumers regarding the same product or service. One of the three tests in determining a deceptive practice is: "The act or practice must be considered from the perspective of the reasonable consumer." Consumer complaints can provide a window into the perspective of the reasonable consumer.

Examiners should conduct transaction testing when a pattern of similar complaints are noted. Transaction testing will also help to identify deficiencies in disclosures. While disclosures provide important information to consumers, and can help avoid consumer confusion, disclosures should include all material information with sufficient prominence to ensure that consumers fully understand the product or service.

When reviewing complaints, examiners should look for trends. While a large volume of complaints may indicate an area of concern, the number of complaints alone is not a determinative of whether a potential unfair or deceptive practice exists. Conversely, a small number of complaints does not undermine the seriousness of the allegations that are raised. If even a single complaint raises valid concerns relative to unfair or deceptive acts or practices, a more thorough review may be warranted. It is important to focus on the issues raised in the complaints and the institution's responses, not just the number of complaints.

RELATIONSHIP TO OTHER LAWS

Unfair or deceptive acts or practices that violate the FTC Act may also violate other federal or State laws. These include the TILA, TISA, the Equal Credit Opportunity Act (ECOA), the Fair Housing Act (FH Act), and the FDCPA. On the other hand, certain practices may violate the FTC Act while complying with the technical requirements of other consumer protection laws. Examiners should consider both possibilities. The following laws warrant particular attention in this regard:

Truth in Lending and Truth in Savings Acts

Pursuant to TILA, creditors must "clearly and conspicuously" disclose the costs and terms of credit. TISA requires depository institutions to provide interest and fee disclosures for deposit accounts so that consumers may compare deposit products. TISA also provides that advertisements shall not be misleading or inaccurate, and cannot misrepresent an institution's deposit contract. An act or practice that does not comply with these provisions of TILA or TISA may also violate the FTC Act. On the other hand, a transaction that is in technical compliance with TILA or TISA may nevertheless violate the FTC Act.[10] For example, consumers could be misled by advertisements of "guaranteed" or "lifetime" interest rates when the creditor or depository institution intends to change the rates, whether or not the disclosures satisfy the technical requirements of TILA or TISA.

Equal Credit Opportunity and Fair Housing Acts

ECOA prohibits discrimination in any aspect of a credit transaction against persons on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to contract), the fact that an applicant's income derives from any public assistance program, and the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The FH Act prohibits creditors involved in residential real estate transactions from discriminating against any person on the basis of race, color, religion, sex, handicap, familial status, or national origin. Unfair or deceptive practices that target or have a disparate impact on consumers in one of these protected classes may violate the ECOA or the FH Act, as well as the FTC Act. Moreover, some State and local laws address discrimination against additional protected classes, e.g., handicap in non-housing transactions, or sexual orientation. Such conduct may also violate the FTC Act.

[10] See *In the Matter of CompuCredit Corporation,* Docket No. FDIC-08-139b & FDIC-08-140k, Memorandum Opinion and Order dated September 22, 2008 (compliance with TILA is not a defense to an alleged violation of the FTC Act's prohibition against unfair or deceptive practices).

Fair Debt Collection Practices Act

The FDCPA prohibits unfair, deceptive, and abusive practices related to the collection of consumer debts. Although this statute does not apply to institutions that collect their own debts in their own name, failure to adhere to the standards set by this Act may support a claim of unfair or deceptive acts or practices in violation of the FTC Act. Moreover, institutions that either affirmatively or through lack of oversight permit a third-party debt collector acting on their behalf to engage in deception, harassment, or threats in the collection of monies due may be exposed to liability for approving or assisting in an unfair or deceptive act or practice.

Privacy Requirements

Privacy requirements prohibit the disclosure to a nonaffiliated third party, other than to a consumer reporting agency, of an account number or similar access code for a credit card, deposit, or transaction account of a consumer for use in marketing. Depending upon the totality of the circumstances, an institution that does not comply with these requirements may be also engaging in unfair or deceptive acts or practices – for example, the unlawful disclosure of account numbers in connection with marketing of a third party's products or services may be an unfair or deceptive act or practice.

Community Reinvestment Act (CRA)

Unfair or deceptive acts or practices may adversely affect CRA ratings. In determining the overall CRA rating for an institution, examiners consider evidence of discrimination or other illegal acts, including violations of Section 5 of the FTC Act.

List of Resources

This list includes references that are cited in the text, as well as additional resources that may be useful to examiners.

Enforcement Actions

In re Advanta Bank Corp., (Cease and Desist Order, June 24, 2009), Docket FDIC-08-259b and 08-403k, available at http://www.fdic.gov/news.

American Express Centurion Bank, (Cease and Desist Order, June 30, 2009), Docket FDIC-09-251b, available at http://www.fdic.gov/news.

In re American Express Bank, FSB (Cease and Desist Order WN-09-016, June 29, 2009) OTS Docket No. 15648, available at http://files.ots.treas.gov/enforcement.

Bank of Greene County Supervisory Agreement, July 22, 2009, available at http://www.ots.treas.gov/files/enforcement.

In the Matter of CVS CAREMARK Corporation, Docket No. Ca 072-3119, Feb. 18, 2009, available at http://www.ftc.gov.

In re Clear Lake National Bank, San Antonio, Texas (consent order – November 7, 2003), available at: http://www.occ.treas.gov/FTP, Release 2003-88, available at http://www.occ.treas.gov/toolkit. The bank charged duplicative fees and fees for services not performed, failed to make adequate disclosures on tax lien loans.

In re Columbus Bank and Trust Company, First Bank of Delaware, First Bank and Trust (Brookings, South Dakota), and CompuCredit Corporation, available at http://www.fdic.gov.

In re Direct Merchants Credit Card Bank N.A, Fact Sheet, available at: http://www.occ.treas.gov/ftp, consent order, available at http://www.occ.treas.gov/FTP.

In re First Consumers National Bank, Beaverton, Oregon, formal agreement – July 31, 2003, available at http://www.occ.treas.gov/FTP, Release 2003-59, available at http://www.occ.treas.gov/toolkit. The bank charged annual fees on credit cards shortly before it ceased accepting new charges on credit cards. The bank also charged overlimit fees where those annual fees caused the account to exceed the credit limit.

In re First National Bank in Brookings, available at http://www.occ.treas.gov/FTP, Release 2003-03, available at http://www.occ.treas.gov/toolkit.

In re First National Bank of Marin, Release 2004-37, available at http://www.occ.treas.gov/toolkit, Fact Sheet, available at http://www.occ.treas.gov/foia, Consent order, available at http://www.occ.treas.gov/FTP.

In re First National Bank Fort Pierre, available at http://www.occ.treas.gov/FTP.

FTC v. AmeriDebt, Inc., et al, (D. MD) Complaint filed Nov. 19, 2003, available at http://www.ftc.gov.

FTC v. Chase Financial Funding, Inc. No. SACV04-549 (C.D.CA 2004), Complaint, available at http://www.ftc.gov.

FTC v. EdebitPay, LLC, et al. (CDC CA), Civ. Action No.: CV-07-4880 ODW (AJWx); FTC File No.: 062-3125, available at http://www.ftc.gov/os, FTC Release, Jan. 24, 2008, available at http://www.ftc.gov/opa.

In re Household Bank (SB), National Association, (formal agreement – March 25, 2003), available at http://www.occ.treas.gov/FTP. A bank issuing a private credit card agreed to make restitution to customers of a third party providing faulty or incomplete work.

Internet Marketers of Credit Repair Program to Pay $17,500 in Redress Under Settlement with FTC, FTC Release, Mar. 20, 1996, available at http://www.ftc.gov/opa. A law firm agreed to pay redress for a deceptive advertisement for credit repair services that omitted the fact that customers have no legal right to remove accurate information.

In re The Laredo National Bank, , and its subsidiary, Homeowners Loan Corporation, Release 2005-110, available at http://www.occ.treas.gov/toolkit, formal agreement – November 1, 2005, available at http://www.occ.treas.gov/FTP. A bank reimbursed borrowers who applied for a loan in response to a "pre-approved" direct mail solicitation, paid appraisal fees out-of-pocket, but then had their loan application denied.

In the Matter of Premier Capital Lending, Inc., a corporation, and Debra Stiles, individually and as an officer of the corporation, Docket No. C-4241, FTC File No. 0723004, available at http://www.ftc.gov/os.

In re Providian National Bank, Release 2000-49, available at http://www.occ.treas.gov, Fact Sheet, available at http://www.occ.treas.gov/ftp, consent order available at http://www.occ.treas.gov/FTP.

United States v. ChoicePoint, (ND GA, CA No. 1:06-cv-00198-GET, Complaint, filed Jan. 30, 2006, available at http://www.ftc.gov/os (settled Feb 10, 2006).

In re Wachovia Bank, N.A., Release NR 2008-143, available at http://www.occ.treas.gov/ftp/release/2008-143.htm, Release NR 2008-48, available at http://www.occ.treas.gov/ftp/release/2008-48.htm, consent order and formal agreement, available at http://www.occ.treas.gov/FTP/EAs/ea2008-027.pdf, and http://www.occ.treas.gov/FTP/EAs/ea2008-028.pdf.

In the Matter of Woodforest Bank (Order to Cease and Desist and Stipulation and Consent to Issuance of Order to Cease and Desist, Order WN-10-16, and Order of Assessment of a Civil Money Penalty and Stipulation and Consent to the Issuance of an Order of Assessment of a Civil Money Penalty, WN-10-17, April 23, 2010), OTS Docket No. 18047, available at http://www.ots.treas.gov/?p=Enforcement; and http://www.ots.treas.gov/?p=Enforcement; press release available at http://www.ots.treas.gov/index.cfm?p=PressReleases.

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.

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.

FDIC and Federal Reserve Board, *Unfair or Deceptive Acts or Practices by State-Chartered Banks*, Financial Institution Letter 26-2004, March 11, 2004, available at http://www.fdic.gov/news.

FDIC, *Guidance On Unfair Or Deceptive Acts Or Practices*, Financial Institution Letter 57-2002, May 30, 2002, available at http://www.fdic.gov/news.

FTC Policy Statement on Deceptive Acts and Practices, available at http://www.ftc.gov/bcp.

FTC Policy Statement on Unfairness, available at http://www.ftc.gov/bcp.

FTC Public Comment on OTS–2007–0015, (Dec. 12, 2007), available at http://www.ots.treas.gov.

OCC Bulletin 2006-34 (Aug. 14, 2006), available at http://www.occ.treas.gov/ftp/bulletin.

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OCC Advisory Letter 2003-3 (Feb. 21, 2003), available at http://www.occ.treas.gov/ftp/advisory.

OCC Advisory Letter 2002-3 (Mar. 22, 2002), available at http://www.occ.treas.gov/ftp/advisory.

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OCC Advisory Letter 2000-7 (July 25, 2000), available at http://www.occ.treas.gov/ftp/advisory.

Regulations

Unfair or Deceptive Acts or Practices; Final rule (UDAP Rule), 74 Fed. Reg. 5498 (Jan. 29, 2009), available at http://edocket.access.gpo.gov.

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OCC Guidelines Establishing Standards for Residential Mortgage Lending Practices, 70 Fed. Reg. 6329 (Feb. 7, 2005), available at http://www.occ.treas.gov/fr.

Legislation

Credit CARD Act of 2009 (Public Law No: 111-24), signed May 22, 2009, amending TILA at §§1632, 1637, 1661, 1666, 1681 and 1693, available at http://frwebgate.access.gpo.gov.