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MEMORANDUM FOR: CHIEF EXECUTIVE OFFICERS
Montrice G. Yakimov
FROM: Montrice G. Yakimov, Managing Director
Compliance and Consumer Protection
SUBJECT: Unfair or Deceptive Acts or Practices: Examination Procedures

The Federal Trade Commission (FTC) Act prohibits unfair or deceptive acts or practices (UDAPs).¹ To help examiners and institutions identify UDAPs, OTS has developed new Examination Handbook Section 1354, Unfair or Deceptive Acts or Practices – FTC Act. This new handbook section is consistent with guidance issued by several other federal financial regulatory agencies. It explains:

- The standards that the OTS and other federal regulatory agencies use to assess whether an act or practice is unfair or deceptive;
- The process for determining whether an institution is engaging in UDAPs; and
- Examples of enforcement actions taken under the FTC Act.

The guidance set forth in this handbook section also clarifies that acts or practices that violate the FTC Act may also violate other statutes, such as the Truth in Lending Act, the Truth in Savings Act, the Equal Credit Opportunity Act, the Fair Housing Act, and the Fair Debt Collection Practices Act.

Unfairness

Under standards endorsed by all of the federal financial institution regulatory agencies and the FTC, an act or practice is unfair where it:

- Causes or is likely to cause substantial injury (usually monetary) to consumers;
- Cannot be reasonably avoided by consumers; and
- Is not outweighed by countervailing benefits to consumers or to competition.

¹ FTC Act § 5(a)(1), 15 U.S.C. § 45(a)(1).

Public policy may also be considered in the analysis of whether a particular act or practice is unfair. This handbook section discusses each element of these standards with supporting examples. In addition, it cites several enforcement actions taken because an institution's actions violated the unfairness standards noted above.

Deception

Under standards addressed by all of the federal financial institution regulatory agencies and the FTC, a representation, omission, or practice is deceptive when:

- It misleads or is likely to mislead a consumer;
- The consumer's interpretation of the representation, omission, or practice is reasonable under the circumstances; and
- The misleading representation, omission, or practice is material.

Notably, the standards for establishing deception do not require that injury be reasonably avoidable or that the injury be weighed against benefits to consumers or to competition. This handbook section discusses each element of the deception standards with supporting examples. In addition, it cites several enforcement actions taken because an institution's actions were found deceptive.

Scoping and Consultation

As the examination procedures take a risk-based approach, examiners are directed to consider circumstances that expose institutions to a higher risk of unfair or deceptive practices. These include situations in which an institution has weak internal controls or has been subject to enforcement action for the violation of other consumer protection laws. In addition, the examination procedures alert examiners to pay close attention to consumer complaints. A pattern of complaints or a single complaint expressing concerns about unfairness or deception may warrant thorough review.

The procedures also encourage examiners to consider whether an institution offers products and services that may be particularly susceptible to violations of the FTC Act. Such activities might include marketing to the elderly, non-English speakers, or to financially vulnerable or unsophisticated consumers. It might also include offering products such as subprime or nontraditional mortgages, high cost mortgages, reverse mortgages, subprime credit cards, high cost short term lending, tax refund loans, or fee-based overdraft protection programs. Because violations of the FTC Act are fact-specific and determined on a case-by-case basis, the procedures direct examiners who find potentially problematic activities to consult with their regional office or OTS headquarters.

For more information, please contact Suzanne McQueen, Consumer Regulations Analyst, at (202) 906-6459 or Suzanne.McQueen@ots.treas.gov.

Link: [Examination Handbook Section 1354](#)