

VII. Unfair, Deceptive, and Abusive Practices - Federal Trade Commission Act/Dodd-Frank Act

Federal Trade Commission Act, Section 5 and Dodd-Frank Wall Street Reform and Consumer Protection Act, Sections 1031 and 1036

Introduction

These examination procedures inform examiners about activities that may constitute unfair, deceptive, or abusive acts or practices and how to evaluate the effectiveness of FDIC-supervised institutions' processes for identifying, measuring, monitoring, and otherwise mitigating the risks associated with them. In this context, unfair, deceptive, or abusive acts or practices are legal standards established pursuant to Section 5 of the Federal Trade Commission Act (FTC Act) and the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act). Throughout these procedures these standards will be referred to, respectively, as "FTC UDAPs" and "Dodd-Frank UDAAPs."

The FDIC utilizes a risk-focused examination approach to promote, assess, and confirm institutions' compliance with FTC UDAPs and/or Dodd-Frank UDAAPs. While FTC UDAPs and/or Dodd-Frank UDAAPs occur infrequently, they may result in significant consumer harm and erode consumer confidence in the financial institution. Heightened risk may be present in situations involving: changes to a bank's products or services; the offering of a complex or atypical product; and marketing and delivery strategies using one or more third-party providers.

A FTC UDAP and/or Dodd-Frank UDAAP finding is dependent on the relevant specific facts and circumstances; each institution is different and presents distinct potential risks. Accordingly, examination staff should apply the instructions in these procedures consistently as part of their assessment of institutions. In addition, the FDIC will conduct appropriate legal analysis based on the FTC UDAP and/or Dodd-Frank UDAAP standards, and consider the particular facts and circumstances at each institution to determine whether a violation has occurred.

Background

In 1938, Congress expanded the FTC Act to not only prohibit unfair methods of competition but to also prohibit "unfair or deceptive acts or practices" in or affecting commerce to allow

the FTC to directly protect consumers. See 15 U.S.C. § 45(a) (Section 5 of the FTC Act). These procedures provide information regarding the applicability of Section 5 of the FTC Act.

In 2010, Congress passed the Dodd-Frank Act. Section 1036 of the Dodd-Frank Act prohibits a "covered person"¹ from engaging in unfair, deceptive, or abusive acts or practices (Dodd-Frank UDAAP). See 12 U.S.C. § 5536. Section 1031 of the Dodd-Frank Act provides authority to the Consumer Financial Protection Bureau (CFPB) to promulgate rules identifying such acts or practices as unfair, deceptive, or abusive in connection with consumer financial products and services generally. See 12 U.S.C. § 5531. These procedures also provide information regarding Sections 1031 and 1036 of the Dodd-Frank Act.²

The legal standards for "unfair" and "deceptive" under Section 5 of the FTC Act and the Dodd-Frank Act are substantially similar. Further, the legal standards for unfair, deceptive, or abusive are independent of each other. Depending on the facts, an act or practice may be unfair or deceptive or abusive or any combination of the three, or not constitute a violation.

Section 5 of the FTC Act

The banking agencies³ have authority to enforce Section 5 of the FTC Act for the institutions they supervise and their institution affiliated parties (IAPs). The FDIC has provided notice to state nonmember institutions of its intent to cite them and their IAPs for violations of Section 5 of the FTC Act, and of its intent to take appropriate action pursuant to its authority under Section 8 of the Federal Deposit Insurance Act (FDI Act) when a FTC UDAP violation is cited. The FTC has authority to take action against nonbanks that engage in a FTC UDAP. If a FTC UDAP involves an entity or entities over which more than one agency has enforcement authority such as, for example, the FDIC and the FTC, the agencies may coordinate their enforcement actions. Unlike many consumer protection laws, Section 5 of the FTC Act also applies to transactions that may impact business customers as well as individual consumers.⁴

On March 11, 2004, the FDIC and the Board of Governors of the Federal Reserve System (FRB) issued additional guidance regarding FTC UDAPs prohibited by Section 5 of the FTC

¹ The term "covered person" means (1) any person who engages in offering or providing a consumer financial product or service, and (2) any affiliate of a person described in (1) if such affiliate acts as a service provider to such person. See 12 U.S.C. § 5481(6).

² Information on Dodd-Frank and its standards of unfair, deceptive and abusive begins on page VII-1.4.

³ Federal Deposit Insurance Corporation, Federal Reserve Board, and Office of the Comptroller of the Currency.

⁴ *FTC v. J.P.C. Credit Corp.*, 543 F. Supp. 2d 825, 843 (2008): "The FTC has construed the term 'consumer' to include businesses as well as individuals. Defiance must be given to the interpretation of the agency charged by Congress with the statute's implementation."

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