

# RESCINDED

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Handbook: **Examination**

Subject: **Unfair or Deceptive Acts or Practices – FTC Act**

**Section: 1354**

### Unfair or Deceptive Acts or Practices – FTC Act

**Summary:** This bulletin transmits new Examination Handbook Section 1354, Unfair or Deceptive Acts or Practices – FTC Act. This handbook section provides examination guidance for evaluating whether an institution has engaged in unfair or deceptive acts or practices (UDAPs) in violation of Section 5 of the Federal Trade Commission (FTC) Act. Examination Handbook Section 1355, currently titled Unfair or Deceptive Acts is re-titled, Unfair or Deceptive Acts or Practices - Credit Practices Rule.

**For Further Information Contact:** Your Office of Thrift Supervision (OTS) Regional Office or Suzanne McQueen in the Compliance and Consumer Protection Division of OTS, Washington D.C. at (202) 906-6459. You may access this bulletin and the Examination Handbook at our web site: [www.ots.treas.gov](http://www.ots.treas.gov).

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#### SUMMARY OF CHANGES

The Federal Trade Commission (FTC) Act prohibits unfair or deceptive acts or practices (UDAPs).<sup>1</sup> 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.

<sup>1</sup> FTC Act § 5(a)(1), 15 U.S.C. § 45(a)(1).

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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 when 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.

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 endorsed 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. They might also include offering products such as subprime or nontraditional mortgages, high cost mortgages, reverse mortgages, subprime credit cards, high cost short term-loans, tax refund loans, or pre-authorized 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](mailto:Suzanne.McQueen@ots.treas.gov).



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## 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.<sup>1</sup> 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.

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### L I N K S

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 [Program](#)

 [Questionnaire](#)

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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.

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<sup>1</sup> 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.<sup>2</sup> The harm that consumers experience from these fees is widespread, with 35 percent of active accounts in 2005 assessed at least one late fee.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> The preamble also explained that financially vulnerable or unsophisticated consumers (such as those who are elderly,

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<sup>2</sup> 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.

<sup>3</sup> 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>.

<sup>4</sup> 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.

<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</sup> 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

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<sup>6</sup> UDAP Rule Preamble, 74 Fed. Reg. at 5539-5540.

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

<sup>8</sup> 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.<sup>9</sup> 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

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<sup>9</sup> 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](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 of 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. The 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, the 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

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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 Provident 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.<sup>10</sup> 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.

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<sup>10</sup> 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 Provident 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>.

OCC Advisory Letter 2004-10 (Sept. 10, 2004), available at <http://www.occ.treas.gov/ftp/advisory>.

OCC Advisory Letter 2004-4 (Apr. 28, 2004), available at <http://www.occ.treas.gov/ftp/advisory>.

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

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>.

OCC Advisory Letter 2000-11 (Nov. 27, 2000), available at <http://www.occ.treas.gov/ftp/advisory>.

OCC Advisory Letter 2000-10 (Nov. 27, 2000), available at <http://www.occ.treas.gov/ftp/advisory>.

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>.

Unfair or Deceptive Acts or Practices, Amendment; Final rule, 75 Fed. Reg. 23565 (May 4, 2010), available at <http://edocket.access.gpo.gov> (reaffirming the UDAP standards articulated in the UDAP Rule Preamble).

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>.

# Unfair or Deceptive Acts or Practices - FTC Act Program

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## EXAMINATION OBJECTIVES

To assess the quality of the financial institution's compliance risk management systems, internal controls, and policies and procedures for avoiding unfairness and deception.

To identify products, services, or activities that increase the risk of being unfair or deceptive.

To gather facts that help determine whether a financial institution's products, services, programs, or operations are likely to be unfair or deceptive.

To consult with the agency's legal or compliance departments, regional offices, and/or headquarters, as necessary, to determine whether unfair or deceptive acts or practices have occurred.

## EXAMINATION PROCEDURES

### General Guidance

Examiners should use these procedures consistent with OTS's risk-based compliance supervision approach. Taking into account an institution's product and service mix, customer base, and other factors, examiners should consider including a review for potential unfair or deceptive acts or practices when performing risk assessments as part of examination scoping activities. Also, examiners should be alert to possible unfair or deceptive acts or practices throughout an examination, including when reviewing specific bank products or services, compliance with other consumer compliance regulatory requirements, or consumer complaints.

Unfair or deceptive acts and practices may occur in connection with any financial product or service. In addition, the determination of whether an act or practice violates the FTC Act is fact-specific and determined on a case-by-case basis. Therefore, safety and soundness/credit risk examiners, as well as other compliance examiners, may identify potentially problematic activities in the course of an examination.

Use the following examination procedures, as appropriate, to assist you in recognizing potential unfair or deceptive acts or practices, analyzing potential issues, and determining an appropriate response.

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## MANAGEMENT AND POLICY-RELATED EXAMINATION PROCEDURES

1. Through a review of all relevant written policies and procedures, management's self-assessments, customer complaints received by the agency or the institution, prior examination reports, and any compliance audit material, including work papers, internal and external audit reports, and statistical and other reports, determine whether:
    - The institution has product or service lines that expose the institution to a high risk of unfair or deceptive practices.
    - The institution has significantly higher fee income than similar institutions.
    - The institution has been subject to any enforcement action by a regulatory or law enforcement agency for violations of consumer protection laws or regulations.
    - The scope of the compliance audit addresses all applicable provisions.
    - Management has taken corrective actions to follow-up on significant deficiencies.
    - The institution's compliance testing includes samples covering all relevant product types and decision centers including sales, processing and underwriting, to confirm that policies are being followed.
    - The compliance audit work performed is accurate.
    - Significant deficiencies and their causes are included in reports to management and/or to the Board of Directors.
    - The frequency and depth of review is appropriate.
- 
2. Through discussions with management and review of available information, determine whether the financial institution's internal controls are adequate to prevent unfair or deceptive acts or practices. Consider the following:

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- The institution's compliance management program for avoiding unfair and deceptive practices
    - Organization charts and process flowcharts
    - Policies and procedures
    - Monitoring and audit procedures
  - The institution's evaluation of advertising and promotional materials
    - Advertisement and marketing documentation
    - Promotional materials and marketing scripts including new products
  - The institution's evaluation of initial and subsequent disclosures
  - The institution's process for receiving and responding to consumer complaints
  - New product development documentation
  - Account documentation
    - Customer agreements
    - Terms and conditions
  - The institution's evaluation of servicing and collections
    - Crediting of customer payments
    - Account statements
  - The institution's monitoring of employee and third-party conduct
    - Third-party agreements and contractual performance
    - Compensation programs
  - Documentation of institution's internal control process
    - Checklists
    - Computer program documentation
- 

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3. Through a review of the financial institution's relevant training materials and programs, determine whether:
  - The financial institution provides appropriate training to individuals responsible for preventing (Unfair or Deceptive Acts or Practices (UDAP) and individuals responsible for operational procedures.
  - The training is comprehensive and covers in detail how to determine whether an act or practice is unfair or deceptive with respect to financial institution's products, services and operations.

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4. Complete the questionnaire to determine if particular aspects of the financial institution's performance with respect to UDAP may be a supervisory concern.

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5. If you identify potential unfair or deceptive acts or practices, consult with your regional, or headquarters office, as appropriate. Proposed violations should be supported by a legal analysis.

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## TRANSACTION-RELATED EXAMINATION PROCEDURES

If upon conclusion of the management and policy-related examination procedures, procedural weaknesses or other risks requiring further investigation are noted, conduct transaction testing, as necessary, using the following examination procedures. Likewise, if there are indications of unfair or deceptive acts or practices in consumer complaints, conduct transaction testing, as necessary, using the following procedures. Use examiner judgment in deciding whether to sample individual products, services, or marketing programs. Increase the sample to achieve confidence that all aspects of the financial institution's products and services are reviewed sufficiently.

1. Obtain and review copies of the following to the extent relevant to the investigation:
  - Marketing programs and advertisements (all forms of media including print, radio, television and Internet or social media advertising).

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- Procedural manuals and written policies.
  - List of the institution's products and services.
  - Customer disclosures, notices, agreements, and periodic statements for products and services.
  - Agreements with third parties.
  - Consumer complaint files.
  - Training materials.
  - Internal control monitoring and auditing materials.
  - Compensation arrangements, including incentive programs for employees and third parties.
- 

2. Determine the adequacy of the financial institution's policies, procedures, and practices for ensuring compliance with the FTC Act. In particular, consider:

- The role and approach of the compliance management function within the institution, especially in the areas of product development and marketing.
  - Whether the compliance function has sufficient resources to both detect unfair or deceptive acts or practices and to take appropriate action to correct them.
  - Whether the institution's complaint resolution process not only appropriately resolves individual problems, but also evaluates complaints to discern trends or patterns that could be an indication of potential unfair or deceptive acts or practices, including those that may be systemic in nature.
- 

3. Determine whether any of the institution's products, services, and operations may be particularly susceptible to violations of the FTC Act and therefore require additional scrutiny. These may include:

- Marketing to the elderly, non-English speakers, financially vulnerable, or unsophisticated consumers.
- Subprime or nontraditional mortgage lending.

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- High cost mortgage lending as covered under the Home Ownership and Equity Protection Act.
  - Reverse mortgages.
  - Subprime credit card lending
  - Secured credit card lending.
  - Short-term, high cost lending.
  - Fee based overdraft protection programs, particularly when automatically applied to accounts.
  - Tax refund anticipation lending.
  - Motor vehicle title lending.
  - Marketing or collection practices that result in the imposition of significant fees.
  - Failure to protect consumer's information.
  - A high volume of consumer complaints.
- 

4. Determine whether the institution's relevant marketing materials, customer agreements, and other disclosures fairly and accurately describe material terms and limitations before the consumer chooses to obtain the product or service. Consider whether such disclosures:

- Fairly and accurately describe the terms, benefits, and material limitations of the products or services being offered, including any related or optional products or services, and that they do not misrepresent such terms either affirmatively or by omission.
- Draw the customer's attention to key terms, including limitations and conditions that are important in enabling the consumer to make an informed decision.
- Clearly disclose all material limitations or conditions on the terms or availability of products and services, such as limitations that apply to interest rates, expiration dates, material prerequisites for obtaining particular products or services, or conditions for canceling services.

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- Clearly disclose the fees, penalties, and other charges that may be imposed and the reason for the imposition.
  - Clearly inform customers of contract provisions that permit changes in terms and conditions of the product or service.
- 

5. Evaluate how the institution monitors the activities of third party contractors, vendors, and service providers to ensure they comply with the FTC Act's prohibition on unfair or deceptive acts or practices. Specifically, consider whether the institution:

- Ensures that employees and third parties who market or promote products or services are adequately trained to avoid unfair or deceptive acts or practices.
  - Reviews compensation arrangements for institution employees and third party contractors and service providers to ensure that they do not create unintended incentives to engage in unfair or deceptive acts or practices, particularly with respect to product sales, loan originations, and collections.
  - Implements and maintains effective risk and supervisory controls to select and manage third party contractors and service providers.
- 

6. Select a sample of product(s) and service(s) to verify that consumers are receiving them consistent with the institution's disclosures and policies. The sample selected should be sufficient in size to reach a supportable conclusion about whether actual practices are inconsistent with institution policy and may be unfair or deceptive. If potential UDAP weaknesses or concerns are found, consult with the district, regional, or headquarters office as appropriate.

For each product being reviewed:

- Select a sample that includes, as appropriate, transactions from different origination and underwriting channels. For example, different geographical areas or from different sectors of the institution's organization structure.

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- Sample recently approved/denied accounts to assess adherence to the institution's policies and procedures and accuracy of initial account disclosures provided to consumers.
  - Determine that consumers received the specific account or service requested.
  - Determine that counteroffers and subsequent disclosures provided consumers were accurate and that the consumer actually received the product or service requested and understood the difference between the original requested product and the one actually obtained.
  - Determine whether institution practices followed may be inconsistent with stated policies, procedures, or account disclosures and may create UDAP concerns.
- 

## ELEMENTS NECESSARY FOR FINDING UNFAIRNESS OR DECEPTION

To determine that an act or practice is unfair or deceptive, an examiner should note the way in which it meets all the requirements.

For unfairness, three elements are necessary:

- The act or practice must cause or be likely to cause substantial injury to consumers;
- Consumers must not reasonably be able to avoid the injury; and
- The injury must not be outweighed by countervailing benefits to consumers or to competition.

For deception, three elements are necessary:

- A representation, omission, or practice that misleads or is likely to mislead the consumer;
- The act or practice must be considered from the perspective of the reasonable consumer; and
- The representation, omission or practice must be material.

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EXAMINER'S SUMMARY, RECOMMENDATIONS, AND COMMENTS

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# Unfair or Deceptive Acts or Practices – FTC Act Questionnaire

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Use this questionnaire to review internal controls, audit work papers, evaluate the institution’s policies and procedures, perform transaction testing, and for training purposes as appropriate. Complete only those aspects of the questionnaire that specifically relate to the issue being reviewed, evaluated, or tested; and retain the completed sections in the work papers.

When you review internal controls, audit, evaluate institution policies or procedures, or perform transaction testing, use a “No” answer to indicate a possible exception/deficiency/violation and add an explanation in the comments column. If a line item is not applicable within the area you are reviewing, indicate “NA.”

	Yes	No	Comments
<b>Compliance Function</b>			
1. Does the institution’s compliance function have sufficient resources and authority to detect unfair or deceptive practices and to address them?	<input type="checkbox"/>	<input type="checkbox"/>	
2. Has the institution explicitly or implicitly identified risks for unfair or deceptive acts or practices in its product lines, interactions with customers and potential customers and outsourcing practices?	<input type="checkbox"/>	<input type="checkbox"/>	
3. Is the compliance function effective in identifying and mitigating overall compliance risks?	<input type="checkbox"/>	<input type="checkbox"/>	
4. Does the institution’s complaint resolution process not only resolve complaints but evaluate them to detect potentially unfair or deceptive practices that should be changed to avoid harm?	<input type="checkbox"/>	<input type="checkbox"/>	

**Policies and Procedures to Prevent Unfair or Deceptive Acts or Practices (UDAPs)**

5. Do the institution’s policies and procedures for avoiding unfair or deceptive activities in its operations include:			
• development of product structure and terms?	<input type="checkbox"/>	<input type="checkbox"/>	
• advertising and solicitation?	<input type="checkbox"/>	<input type="checkbox"/>	
• repricing and changes in terms?	<input type="checkbox"/>	<input type="checkbox"/>	
• underwriting and quality control?	<input type="checkbox"/>	<input type="checkbox"/>	
• servicing and collections?	<input type="checkbox"/>	<input type="checkbox"/>	

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# Unfair or Deceptive Acts or Practices – FTC Act

## Questionnaire

	Yes	No	Comments
• protecting consumer information?	<input type="checkbox"/>	<input type="checkbox"/>	
• employee training?	<input type="checkbox"/>	<input type="checkbox"/>	
• managing and monitoring of employees and third parties?	<input type="checkbox"/>	<input type="checkbox"/>	
6. Does the institution periodically test its policies to ensure that they are being followed?			
• Does the institution track and monitor exceptions to policies and procedures? Are high levels of exceptions made?	<input type="checkbox"/>	<input type="checkbox"/>	
• When control systems or operating practices are found deficient, are business-line managers and third-party originators held accountable for correcting deficiencies in a timely manner?	<input type="checkbox"/>	<input type="checkbox"/>	

### Further Evaluation

7. Based on your review of the risks and the compliance function is transaction testing required?	<input type="checkbox"/>	<input type="checkbox"/>	
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### Products and Services Particularly Susceptible to Unfairness and Deception

8. Does the institution avoid products and services that are particularly susceptible to violations of the FTC Act, such as:			
• fee based overdraft protection?	<input type="checkbox"/>	<input type="checkbox"/>	
• subprime credit card lending?	<input type="checkbox"/>	<input type="checkbox"/>	
• secured credit card lending?	<input type="checkbox"/>	<input type="checkbox"/>	
• subprime or nontraditional mortgages?	<input type="checkbox"/>	<input type="checkbox"/>	
• high cost mortgages covered by the Home Ownership and Equity Protection Act?	<input type="checkbox"/>	<input type="checkbox"/>	
• reverse mortgages?	<input type="checkbox"/>	<input type="checkbox"/>	
• “optional” insurance or related products?	<input type="checkbox"/>	<input type="checkbox"/>	

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# Unfair or Deceptive Acts or Practices – FTC Act

## Questionnaire

	Yes	No	Comments
• products structured to trigger multiple charges or fees for late payment or exceeding the credit limit?	<input type="checkbox"/>	<input type="checkbox"/>	
• credit repair?	<input type="checkbox"/>	<input type="checkbox"/>	
• short-term, high cost lending?	<input type="checkbox"/>	<input type="checkbox"/>	
• tax refund anticipation loans?	<input type="checkbox"/>	<input type="checkbox"/>	
• motor vehicle title loans?	<input type="checkbox"/>	<input type="checkbox"/>	
• rewards programs?	<input type="checkbox"/>	<input type="checkbox"/>	
9. Does the institution pay specific attention to bank functions that are particularly susceptible to violations of the FTC Act, such as:			
• marketing especially to the elderly, non-English speaking, financially vulnerable or unsophisticated?	<input type="checkbox"/>	<input type="checkbox"/>	
• marketing and collection where practices may result in increased fees?	<input type="checkbox"/>	<input type="checkbox"/>	
• collection where practices may harass consumers?	<input type="checkbox"/>	<input type="checkbox"/>	
• billing practices where practices may increase fees?	<input type="checkbox"/>	<input type="checkbox"/>	
• handling and protection of consumers' personal information?	<input type="checkbox"/>	<input type="checkbox"/>	

### Marketing and Disclosures

10. Does the institution ensure that:			
• it has a reasonable factual basis for all representations?	<input type="checkbox"/>	<input type="checkbox"/>	
• its materials do not use fine print, separate statements or inconspicuous disclosures to correct potentially misleading headlines?	<input type="checkbox"/>	<input type="checkbox"/>	
• its materials avoid the use of any government or official-looking symbols, references or numbers (e.g. IRS codes)?	<input type="checkbox"/>	<input type="checkbox"/>	

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# Unfair or Deceptive Acts or Practices – FTC Act

## Questionnaire

	Yes	No	Comments
<ul style="list-style-type: none"> <li>• its materials avoid any references to, or the appearance of any affiliations or relationships with, entities that are not accurate?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>	
<ul style="list-style-type: none"> <li>• its materials clearly disclose limitations, conditions or restrictions on the offer when it uses terms such as “preapproved” or “guaranteed”?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>	
<ul style="list-style-type: none"> <li>• its materials take account of the sophistication of the target audience so that its claims about cost, value, availability, savings, benefits or terms are not misleading?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>	
<ul style="list-style-type: none"> <li>• costs and benefits of optional or related products (such as overdraft protection) are not misrepresented or incomplete?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>	
<ul style="list-style-type: none"> <li>• it avoids advertising terms that are unavailable to most customers or using unrepresentative examples?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>	
<ul style="list-style-type: none"> <li>• its materials include contact information for consumer complaints for the institution or its third party service providers?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>	
11. Do the promotional materials and marketing scripts:			
<ul style="list-style-type: none"> <li>• fairly and accurately describe the terms, benefits and material limitations of the products or services being offered?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>	
<ul style="list-style-type: none"> <li>• clearly disclose when apparently optional products and services offered simultaneously with credit – such as insurance, travel services, credit protection, and consumer report update services that are – are optional, rather than required to obtain credit?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>	
<ul style="list-style-type: none"> <li>• not misrepresent the terms either affirmatively or by omission?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>	
<ul style="list-style-type: none"> <li>• draw the consumer’s attention to key terms, including limitations or conditions important to making an informed decision?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>	

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# Unfair or Deceptive Acts or Practices – FTC Act

## Questionnaire

	Yes	No	Comments
<ul style="list-style-type: none"> <li>• clearly disclose material limitations or conditions, such as limits on interest rates, expiration dates, prerequisites and cancellation requirements?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>	
<ul style="list-style-type: none"> <li>• clearly disclose all material limitations or conditions on the terms or availability of products or services, such as               <ul style="list-style-type: none"> <li>— special interest rates only for balance transfers;</li> <li>— the date that introductory terms expire;</li> <li>— prerequisites for particular products, services or benefits (e.g., discounts, refunds or rebates);</li> <li>— conditions for canceling a trial basis service without charge?</li> </ul> </li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>	
<ul style="list-style-type: none"> <li>• alert consumers in a clear and timely manner about penalties and other charges and the reasons for them?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>	
<ul style="list-style-type: none"> <li>• clearly inform consumers if contract provisions permit changes in terms of the agreement?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>	
12. Does the institution refrain from advertising services or benefits that it does not intend or is not able to provide?	<input type="checkbox"/>	<input type="checkbox"/>	
<ul style="list-style-type: none"> <li>• Does the institution avoid promoting products and services, such as teaser rates or “best case” scenarios, that are unlikely to occur?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>	
<ul style="list-style-type: none"> <li>• Are the conditions imposed to receive such services or benefits so burdensome or difficult to meet that the advertised service or benefit is illusory?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>	
13. Are disclosures clear and accurate with respect to:			
<ul style="list-style-type: none"> <li>• points and other charges that will be financed as part of home-secured loans?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>	
<ul style="list-style-type: none"> <li>• terms and conditions related to insurance offered in connection with loans?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>	
<ul style="list-style-type: none"> <li>• prepayment penalties, temporary introductory terms, or terms that are not available as advertised to all consumers?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>	

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# Unfair or Deceptive Acts or Practices – FTC Act

## Questionnaire

	Yes	No	Comments
• loans covered by the Home Ownership and Equity Protection Act?	<input type="checkbox"/>	<input type="checkbox"/>	
• reverse mortgages?	<input type="checkbox"/>	<input type="checkbox"/>	
• credit cards?	<input type="checkbox"/>	<input type="checkbox"/>	
• secured and other credit cards designed to rehabilitate the credit of a borrower?	<input type="checkbox"/>	<input type="checkbox"/>	
• overdraft protection programs?	<input type="checkbox"/>	<input type="checkbox"/>	
• all terms, whether or not they are prepared by the institution or its third party servicer?	<input type="checkbox"/>	<input type="checkbox"/>	

### Availability of Credit

- |     |   |                          |                          |  |
|-----|---|--------------------------|--------------------------|--|
| 14. | Does the institution accurately and completely represent the amount of useable credit that the consumer will receive?                                 | <input type="checkbox"/> | <input type="checkbox"/> |  |
|     | • Is the available credit high enough to prevent a significant reduction or elimination of the consumer's ability to use the product?                 | <input type="checkbox"/> | <input type="checkbox"/> |  |
|     | • Do fees and charges, imposed both initially and throughout the term of the loan, remain low enough so that the utility of the loan is not impaired? | <input type="checkbox"/> | <input type="checkbox"/> |  |
|     | • Does the institution notify the consumer before dishonoring convenience checks?   | <input type="checkbox"/> | <input type="checkbox"/> |  |

### Repricing and Other Changes in Terms

- |     |  |                          |                          |  |
|-----|--|--------------------------|--------------------------|--|
| 15. | Are credit and deposit disclosures of possible changes meaningful and easy to understand?  | <input type="checkbox"/> | <input type="checkbox"/> |  |
|     | • Does the institution have policies and procedures to ensure the reasonable and clear disclosure of post-origination changes?   | <input type="checkbox"/> | <input type="checkbox"/> |  |
|     | • Do agreements clearly disclose how and when the institution unilaterally changes the rate or other terms and conditions and the circumstances when such changes may be made? | <input type="checkbox"/> | <input type="checkbox"/> |  |

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# Unfair or Deceptive Acts or Practices – FTC Act Questionnaire

	Yes	No	Comments
<b>Servicing</b>			
16. Does the institution handle consumer payments in a manner to prevent unfairness and deception as demonstrated by the fact that:			
• the institution mails periodic statements in a manner that is not calculated to increase late payments?	<input type="checkbox"/>	<input type="checkbox"/>	
• the institution does not charge customers for products or services they did not bargain for, such as various credit protection programs or insurance?	<input type="checkbox"/>	<input type="checkbox"/>	
• the amounts due and associated fees or charges on the periodic statements are accurate and clearly disclosed?	<input type="checkbox"/>	<input type="checkbox"/>	
• the “please pay by” date stated on the periodic statement is consistent with the product’s grace period?	<input type="checkbox"/>	<input type="checkbox"/>	
• the institution ensures that it and its third party servicers have and follow procedures to credit consumer payments in a timely manner?	<input type="checkbox"/>	<input type="checkbox"/>	
• the institution promptly posts payments upon receipt?	<input type="checkbox"/>	<input type="checkbox"/>	
• the institution does not employ a payment “lockbox” or other receipt method that does not recognize timely receipt?	<input type="checkbox"/>	<input type="checkbox"/>	
• consumers are clearly told when and if monthly payments are applied to fees, penalties, or other charges before being applied to regular principal and interest?	<input type="checkbox"/>	<input type="checkbox"/>	
• the institution applies payments first to balances with the highest interest rates?	<input type="checkbox"/>	<input type="checkbox"/>	
• the institution does not represent to consumers that they may pay less than the minimum amount due without adequately disclosing the fees for paying the reduced amount?	<input type="checkbox"/>	<input type="checkbox"/>	

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# Unfair or Deceptive Acts or Practices – FTC Act

## Questionnaire

	Yes	No	Comments
<b>Collections</b>			
17. Do the institution's collection practices prevent unfairness and deception?	<input type="checkbox"/>	<input type="checkbox"/>	
• Does the institution's automated call answering service for billing questions, have a mechanism to obtain a human representative for questions that are unanswered or have not been resolved?	<input type="checkbox"/>	<input type="checkbox"/>	
• Does the institution stop contacting consumers at work after being advised not to do so?	<input type="checkbox"/>	<input type="checkbox"/>	
• Does the institution prevent disclosure of consumers' debt to third-parties without the consumer's consent?	<input type="checkbox"/>	<input type="checkbox"/>	
• Does the institution discontinue calls to third-parties once they have notified it that they do not have any location information about the consumer?	<input type="checkbox"/>	<input type="checkbox"/>	
• Does the institution prohibit repeated telephone calls to consumers and/or third parties with the intent to annoy, abuse, or harass any person at the number called?	<input type="checkbox"/>	<input type="checkbox"/>	
<b>Monitoring the Conduct of Employees and Third-Parties</b>			
18. Does the institution ensure that employees and third parties who market or promote its products or service loans, are adequately trained to avoid making statements or taking actions that might be unfair or deceptive?	<input type="checkbox"/>	<input type="checkbox"/>	
19. Does the institution review compensation arrangements for its employees as well as third-party contractors and service providers to ensure that they do not create unintended incentives to engage in unfair or deceptive practices, particularly with respect to loan originations and collections?	<input type="checkbox"/>	<input type="checkbox"/>	
20. Has the institution implemented and maintained effective risk and supervisory controls to select and manage third-party contractors or service providers?	<input type="checkbox"/>	<input type="checkbox"/>	

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# Unfair or Deceptive Acts or Practices – FTC Act Questionnaire

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Yes No Comments

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## COMMENTS

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## Unfair or Deceptive Acts or Practices – Credit Practices Rule

A Credit Practices Rule was adopted by the OTS and the Federal Reserve Board under Section 18(f)(1) of the Federal Trade Commission Act (15 USC 45) in response to a similar rule adopted by the Federal Trade Commission. The Rule is contained in 12 CFR 535 for savings associations, and Subpart B of Regulation AA (12 CFR Part 227) for banks. The Rule became effective on January 1, 1986.

The Rule prohibits financial institutions from using: (1) certain provisions in their consumer credit contracts; (2) a certain late charge accounting practice; and (3) deceptive cosigner practices. The Rule also requires that a disclosure notice be given to a cosigner prior to becoming obligated. Finally, the Rule prohibits financial institutions from enforcing in purchased contracts the same provisions that institutions are prohibited from including in their own consumer credit contracts.

### SCOPE

The Rule applies to the consumer credit contracts of all financial institutions and their subsidiaries other than those contracts that are for the purchase of real estate. Dwellings such as mobile homes and houseboats are not considered real estate if they are considered personal property under state law. A consumer is a natural person who seeks or acquires goods, services, or money for personal, family, or household purposes. There is no monetary limitation on the coverage of the Rule.

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#### L I N K S

 [Program](#)

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### PROHIBITED CONTRACT PROVISIONS

#### Confession of Judgment

A confession of judgment is a provision (which may also be known as a cognovit, or warrant of attorney) in which the borrower waives the right to notice and the opportunity to be heard in the event of a suit to enforce an obligation. [§535.2 (a)(1)]



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Approved – FFIEC

The following are not prohibited.

- confessions executed after default or the filing of a suit on the debt
- powers of attorney contained in a mortgage or deed of trust for foreclosure purposes or given to expedite the repossession or transfer of collateral
- confessions in Louisiana for the purpose of executory process

### Waiver of Exemption

A waiver of exemption is a provision in which the consumer relinquishes the statutory right to protect his or her home (known as the homestead exemption), possessions, or wages from seizure to satisfy a judgment unless the waiver is given with respect to property that will serve as security for an obligation. [§535.2(a)(2)]

Any other types of waivers (for example, waiver of demand, presentment, protest, notice of dishonor, and notice of protest and dishonor) are not prohibited.

### Assignment of Wages

An assignment of wages is a provision which gives the institution the right to receive the consumer's wages or earnings directly from the consumer's employer. [§535.2(a)(3)]

The following are not prohibited:

- an assignment that by its terms is revocable at will by the consumer
- a payroll deduction or preauthorized payment plan (whether or not revocable by the consumer), commencing at consummation of the loan, for the purpose of making each payment
- an assignment of wages that have been earned at the time of the assignment
- garnishment

Earnings are defined as compensation paid or payable for personal services rendered or to be rendered by the consumer, whether denominated as wages, salary, commission, or bonus, including periodic payments pursuant to a pension, retirement, or disability program. [§535.1(f)]

### Household Goods Security Interests

A nonpossessory security interest in household goods is prohibited unless such goods are purchased with credit extended by the financial institution. [§535.2(a)(4)]

The following are not prohibited:

- security interests in household goods not purchased with credit extended by the financial institution if the goods are placed in the financial institution's possession.
- security interests in all other real and personal property of the consumer other than household goods as defined in the rule.

The term "household goods" is defined as meaning only the clothing, furniture, appliances, linens, china, crockery, kitchenware, and personal effects of the consumer and consumer's dependents. [§535.1(g)]

The following are not household goods:

- works of art
- electronic equipment (other than one television and one radio)
- items acquired as antiques (they must be over one-hundred years of age in order to be considered antiques), including such items that have been repaired or renovated without changing their original form or character
- jewelry (other than wedding rings)
- fixtures, automobiles, boats, snowmobiles, cameras and camera equipment (including darkroom), pianos, home workshops, and the like.

## PROHIBITED PRACTICES

### Pyramiding of Late Charges

"Pyramiding" of late charges is a prohibited practice. Pyramiding is an accounting method which results in the assessment of multiple delinquency charges due to a single delinquent payment. For example, when a borrower is late on a payment, the lender applies a late charge to the payment, when it is received, which then results in a short or insufficient payment. A subsequent payment is received on time, but since the previous payment is considered short a late charge is again applied. This is perpetuated until the borrower either pays the late charge separately or until the loan matures. The examiner should not confuse this with a situation in which a payment is missed and never made up, triggering late charges each month until the entire payment is made and the account is brought entirely up to date or paid in full. [§535.4(a)]

## Cosigner Deception

The institution may not misrepresent the nature and extent of a cosigner's liability to any person. [§535.3(a)(1)]

## Cosigner Disclosure (§535.3(b)(1))

The financial institution must provide, either in a separate document or in the credit obligation, a clear and conspicuous notice that is substantially similar to the following statement:

### Notice of Cosignor

*You are being asked to guarantee this debt. Think carefully before you do. If the borrower doesn't pay the debt, you will have to. Be sure you can afford to pay the debt if you have to, and that you want to accept this responsibility.*

*You may have to pay up to the full amount of the debt if the borrower does not pay. You may also have to pay late fees or collection costs, which increase this amount.*

*The bank can collect this debt from you without first trying to collect from the borrower. The bank can use the same collection methods against you that can be used against the borrower, such as suing you, garnishing your wages, etc. If this debt is ever in default, that fact may become a part of your credit record.*

*This notice is not the contract that makes you liable for the debt.*

This notice must be given to the cosigner prior to the time he or she becomes obligated. In the case of open-end credit plans, the notice must be given prior to the time the cosigner becomes obligated for fees or transactions on the account.

A Cosigner is defined as (§535.1(c)):

- Any person who assumes personal liability, in any capacity, for the obligation of another consumer without receiving goods, services, or money in return for the obligation. This includes any person whose signature is requested to allow a consumer to obtain credit or to prevent collection of a consumer's obligation that is in default.
- A person who meets the above definition is a cosigner whether or not designated as such in the contract.
- For open-end credit, a cosigner is a person who signs the debt instrument but does not have the contractual right to obtain credit under the account.

A Cosigner is not:

- A spouse whose signature is required on a credit obligation to perfect a security interest pursuant to state law.
- A person who does not assume personal liability, but who rather only provides collateral for the obligation of another person.
- A person who has the contractual right to obtain credit under an open-end account, whether exercised or not.

### CIVIL LIABILITY

There is no express provision for civil liability either in the Federal Trade Commission Act or Regulation AA, or the OTS Regulations.

### ADMINISTRATIVE ENFORCEMENT

The regulation is to be enforced for banks through Section 8 of the Federal Deposit Insurance Act (12 USC 1818), and for savings associations through Section 5 of the Home Owners' Loan Act (15 USC 1464), Section 407 of the National Housing Act (15 USC 1730), and Section 5 (1) and 17 of the Federal Home Loan Bank Act (15 USC 1457). In addition, a supervisory agency may enforce compliance through any other authority conferred on it by law. [15 USC 57a(f) (4)]

### Examples of Prohibited Contract Provisions

#### *Confession of Judgment*

1. If you fail to carry out the terms of this notice, you appoint \_\_\_\_\_ or \_\_\_\_\_ as your attorney in-fact for the purpose of confessing judgment against you and you authorize either of them to confess judgment against you in favor of us in the Clerk's Office of the City/ County of POWATAN, Virginia or in any other court of proper jurisdiction for the unpaid balance of this Note plus costs, expenses and attorney's fees as provided on the reverse side of this Note.
2. You and any Co-Maker, jointly and severally, authorize the Prothonotary, Clerk or any attorney of any court of record to appear for you and any Co-Maker and confess judgment in our favor or in favor of any other holder of this Note. Judgment of confession may be entered either prior to or after an event of default, as often as necessary, for such sums as are or any become due on this Note, with costs of suit and 20% added as actual and reasonable attorney's fees. You and any Co-Maker agree to waive, to the extent permitted by law, all rights of appeal, appraisal, stay of execution and exemption now or later in force. If a copy of this Note is led in connection with the entry of judgment, it shall not be necessary to le the original Note as a Warrant of Attorney, if the copy is verified by affidavit.

3. You and any Co-Maker, jointly and severally, authorize the Prothonotary, Clerk and any attorney of any court of record to appear for you and any Co-Maker and confess judgment in our favor or in favor of any other holder of this Note. Judgment by confession may be entered either prior to or after an event of default, as often as necessary, for such sums as are or may become due on this Note, with costs of suit and 20% added as actual and reasonable attorney's fees. You and Co-Maker agree to the extent permitted by law, all rights of appeal, appraisement, stay of execution and exemption now or later enforce. If a copy of this Note is filed in connection with the entry of judgment, it shall not be necessary to file the original Note as a Warrant of Attorney, if the copy is verified by affidavit.

## Waiver of Exemption

1. I waive my homestead exemption.
2. In consideration of the credit extended, Mortgagor waives and relinquished, with respect to the Property and all other property now or hereafter owned by Mortgagor, the benefit of any and all stay and extension laws, and further expressly waives notice and delay accorded by Louisiana Code of Civil Procedure Articles 2331, 2639, 2639 and 2722 and La. R. S. 12:4363-4366 including, but not limited to, any and all homestead and other claims to exemption from seizure which under existing or future laws, might be asserted against enforcement of payment of the indebtedness secured hereby, and consents to the immediate seizure, advertisement and sale of said property in the event of institution of executory or other legal proceedings.
3. Debtor hereby acknowledges express intent to hereby waive and abandon all personal property exemptions granted by law upon the goods which are the subject of this Agreement. NOTICE: By signing this Agreement, Debtor waives all rights provided by law to claim such goods exempt from process.
4. I waive (to the extent permitted by law) certain rights I might otherwise have. All exemptions in and to any of the property are hereby waived.

## REFERENCES

### Laws

15 U.S.C. 41      Federal Trade Commission Act  
et seq.

### Regulations

#### *OTS Regulations:*

12 C.F.R.      Prohibited Consumer Credit  
Part 535      Practices

# Unfair or Deceptive Acts or Practices – Credit Practices Rule Program

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## EXAMINATION OBJECTIVES

To determine if the institution has established an effective system to ensure that it:

- does not originate, acquire, or enforce contracts which contain prohibited provisions
- does not “pyramid” late charges
- does not engage in deceptive cosigner practices
- provides the required disclosure to cosigners prior to becoming obligated.

To determine whether the institution’s contracts contain prohibited provisions in their originated or purchased credit contacts.

To determine whether the institution used impermissible late charge accounting practices.

To determine if the institution advised cosigners prior to becoming contractually liable of the nature and extent of their liability.

To determine if the institution provides the required notices to cosigners prior to becoming obligated, or in case of open-end credit plans, prior to the time the cosigner becomes obligated for fees or transactions on the account.

To determine if the institution has attempted to enforce prohibited provisions in contracts it has originated or acquired.

## EXAMINATION PROCEDURES

1. Obtain and review blank notes (contracts) and disclosures (including those furnished to dealers) used by the institution in extending consumer credit for the following prohibited contract provisions:
  - Confessions to Judgment - which is a waiver of the right to notice and the opportunity to be heard in the event of a suit on the obligation. [§535.2(a)(1)]

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# Unfair or Deceptive Acts or Practices – Credit Practices Rule Program

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WKP. REF.

- Waiver of Statutory Property Exemption - which is a provision that waives the consumer's statutory right to protect his or her home (known as the homestead exemption), possessions, or wages unless given solely on property that will serve as security for the obligation. [§535.2(a)(2)]
- Assignment of Wages - which is a provision that gives the institution the right to receive the consumer's wages or earnings directly from the consumer's employer. [§535.2(a)(3)] However, such an assignment is permitted if:
  - It is revocable, at will, by the consumer.
  - It is a payroll deduction plan or preauthorized payment plan (whether or not revocable by the consumer), commencing at consummation, for the purpose of making loan payments.
  - It applies only to wages or earnings already earned at the time of the assignment.
- Blanket Security Interest in Household Goods - which is a provision which allows the institution to hold as collateral the clothing, furniture, appliances, and the personal effects of the consumer's dependents. [§535.2(a)(4)]

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2. Determine through discussions with management and staff if the institution attempts to enforce confessions of judgment, assignments of wages, security interests in household goods, or waivers of exemption in originated or acquired contracts.

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3. Review the institution's collection policies, procedures, and practices to ensure that staff members are not using an assignment of wages except where permissible. [§ 535.2(a) (3)]

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# Unfair or Deceptive Acts or Practices – Credit Practices Rule Program

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4. Judgmentally sample an adequate number of loan files to ensure that prohibited contract provisions are not included in contracts (or related documents) originated, or enforced in contracts acquired, by the institution.

---

5. Judgmentally sample an adequate number of overdue loans to determine if the institution collects or attempts to collect overdue payments through assignments of wages. [§535.2(a)(3)]

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6. Judgmentally sample an adequate number of overdue loans to determine if the institution collects or attempts to collect a late charge on a timely payment because of the consumer's failure to pay a late charge attributable to a prior delinquent payment. [§535.4(a)]

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7. Determine through a review of procedures, policies, and practices whether the institution takes steps to prevent its staff from engaging in prohibited cosigner practices in loans it originated or acquired. [§535.3(a)]

---

8. Determine through discussions with management and staff if there is evidence that the institution engages in prohibited cosigner practices (i.e., misrepresentation of a cosigner's liability and contractually obligating cosigners prior to informing them of their liability).

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9. Determine through discussions with management and staff of the institution, whether the nature and extent of a cosigner's liability is properly represented to cosigners prior to the time signatures are obtained. [§535.3(b)]

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# Unfair or Deceptive Acts or Practices – Credit Practices Rule Program

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WKP. REF.

10. Judgmentally sample the documents evidencing the credit obligation for the required notice to cosigners. [§535.3(b)(1)]
- If the notice to cosigners is contained in the note or disclosure, it must be clear, conspicuous, and substantially similar to that provided in the regulation and must be provided before the cosigner becomes obligated.
  - If the notice to cosigners is contained in a separate document also:
    - Interview applicable employees to determine if they are aware that the notice must be provided prior to the cosigners becoming obligated.
    - Review the institution’s policies, procedures, and practices to ensure that staff members are aware that cosigners must be provided with the notice prior to becoming obligated.
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## EXAMINER’S SUMMARY, RECOMMENDATIONS, AND COMMENTS

<b>Exam Date:</b>	
<b>Prepared By:</b>	
<b>Reviewed By:</b>	
<b>Docket #:</b>	