

# UDAAP: Why is it Like Pornography?

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# UDAAP – What is different/new? “Abusive”

- Dodd–Frank created new federal prohibition
  - Why adopted?
- The CFPB may take enforcement action to prevent
  - a covered person or service provider
  - from committing or engaging in an unfair, deceptive, or abusive act or practice
  - in connection with any transaction with a consumer for a consumer financial product or service
  - or the offering of a consumer financial product or service

# UDAAP – What is different/new? “Abusive”

(cont’d)

- “Abusive” added to traditional definition under FTC Act and state law -- unfair, deceptive acts & practices
- Actual injury not required; significant risk of harm is sufficient
- An act or practice that causes a small amount of harm to a large number of people may be deemed to cause substantial injury

# What is “Unfair”?

- Causes, or likely to cause, substantial injury to consumers;
- The injury is not reasonably avoidable by consumers; and
- The injury is not outweighed by countervailing benefits to consumers or to competition

# What is “Deceptive”?

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

# How do you recognize an “Abusive” Practice?

- A lender can violate the new “abusive” standard if a lender unreasonably takes advantage of
  - Borrower’s lack of appreciation of risks, e.g., costs, terms of product, full extent of liability
  - Borrower’s inability to protect its own interests
  - Borrower’s unreasonable reliance on lender serving consumer’s best interest
  - Materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service
  - “I’ll know it when I see it.” CFPB Director Cordray statement to U.S. Senate, 2012

# How do you recognize an “Abusive” Practice? (cont’d)

- “The possibilities here for injuring consumers are almost limitless. Maybe a customer service representative provided misleading information. Maybe consumers were told only about the benefits of a product and not about any of the limitations or risky features. Maybe important information about rates or fees was hidden or obscured. Or maybe consumers were told that they would have the chance to consider the matter further, and later found they were already signed up and charged for a service without ever giving their actual consent.”  
CFPB Director Richard Cordray, Feb. 21, 2013

# How do you recognize an “Abusive” Practice? (cont’d)

- Query disclosures no longer sufficient?
- “Now, as to ‘abusive’ . . . the fact that a consumer couldn’t understand it is not in itself a reason to be declared ‘abusive.’ . . . There are things that could be neither unfair nor deceptive that could be abusive, and it is not that the consumer didn’t understand it . . . First of all, that if not quite deceptive but framed in a way that made it very hard for the consumer to understand and it wasn’t the consumer’s fault. That is why it says . . . materially interferes with the ability of the consumer to understand the term. Secondly, it says that you should not take unreasonable advantage of lack of understanding.”  
Representative Barney Frank, Nov. 2, 2011



# Using UDAAP in Fair Lending and other Compliance Enforcement Efforts and Litigation

- Exceptionally broad definition thus broad potential application
- UDAAP could be used if unable to prove a specific, technical violation of another statute or regulation
- Query: Can compliance with a regulation or use of a model form still be a UDAPP violation?
  - Yes according to at least some government officials!
- If unable to prevail in ECOA/FHA “disparate impact” cases, may try to use UDAAP to attack practices that have a disparate impact on protected (or even unprotected) classes of consumer

# Using UDAAP in Fair Lending and other Compliance Enforcement Efforts and Litigation

- Mortgage servicing rules also contain UDAAP component
- Complaints as basis for investigation, enforcement
- State AG's also have enforcement authority

# Preventing UDAAP Claims

- Establish clear consumer complaint and inquiry procedures
- Staff training; customize for all levels
- Integrate with other regulatory compliance mechanisms
- Like Regulations B and Z, UDAAP can be invoked at all stages of a transaction, e.g., advertising, application, processing, underwriting, approval/declination, closing
- Ask yourself, would I be ok with my spouse, child, parent entering into this transaction?

# Preventing UDAAP Claims

- Don't forget state UDAP claims
  - Different scope in different states
  - Different precedents/case law
- Don't forget Reg. AA/Credit Practices Rule
- FDCPA
- FCRA

**Thank you**