

Marketing in the Land of “No”

Compliance Trends and Best Practices
for Bank Marketers

May 9, 2013

Today's Moderator



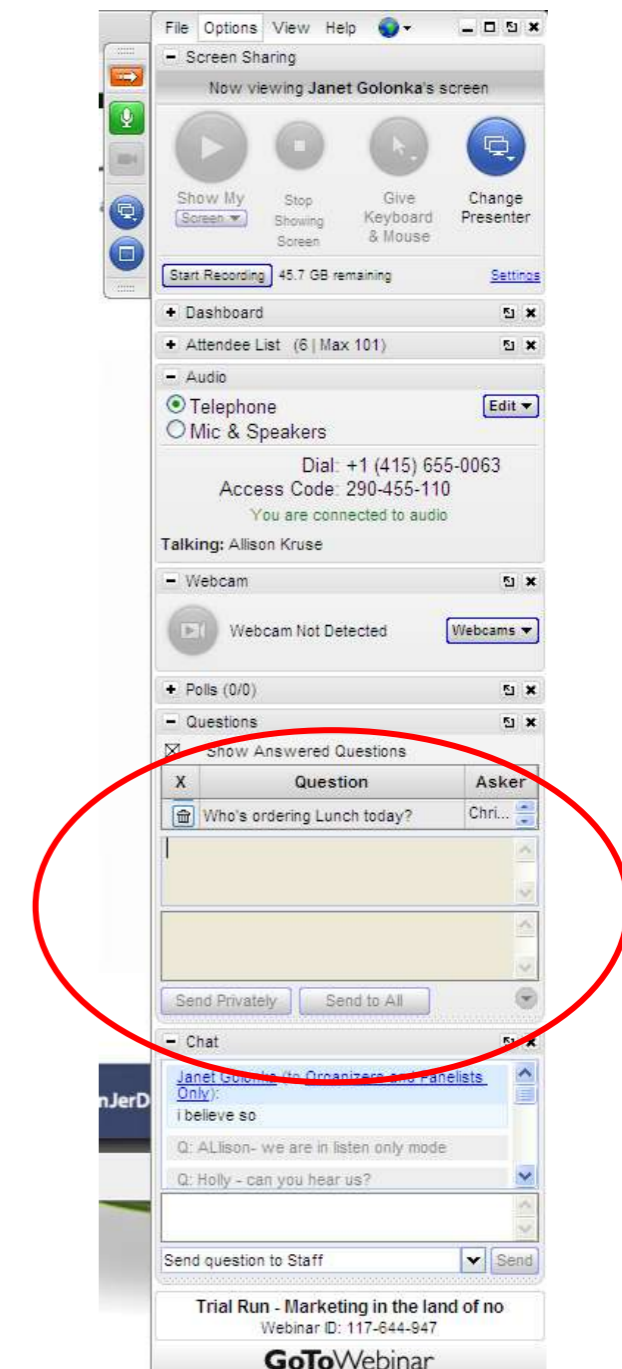
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How to Interact Today

Our speakers will respond to your questions at the end of today's presentation.

Please submit questions via the Questions section at the bottom of the Control Panel.



Speakers



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UDAAP

Unfair, Deceptive or Abusive Acts or Practices

UDAAP Background

- Regulation AA prohibits a number of consumer credit practices defined as unfair and deceptive.
- Section 5 of the Federal Trade Commission (FTC) Act prohibits “unfair or deceptive trade practices in or affecting commerce.”
- “Unfair,” “Deceptive” and “Abusive” are difficult concepts even when carefully defined.

An act or practice does not have to violate any other law in order to be considered unfair or deceptive.

UDAAP – What has changed?

- Originally Unfair or Deceptive Acts or Practices
 - **Unfair** is defined in the Dodd-Frank Act similarly to the FTC Act.
 - **Deceptive** is not defined in the Dodd-Frank Act, and the definition remains the FTC’s definition until the CFPB makes a rule.
- Abusive was added by Dodd-Frank – Unfair, Deceptive or Abusive Acts or Practices
 - New standard of “abusive acts or practices” will be defined by CFPB.
- Dodd-Frank provisions that require or relate to a bank’s duty to customers
 - Duty to act in the best interest of customers
 - Products must be understandable and not unfair, deceptive or abusive
 - May not steer customers to loans they cannot repay, have predatory characteristics or involve abusive practices
 - May not require mandatory arbitration

UDAAP Fun Facts

- UDAAP affects banks of all sizes, including small community banks.
- Since 2008, 43% of UDAAP violations cited by the FDIC impacted banks with assets of \$250 million or less.
- UDAAP applies to both consumer and business-purpose products and services.
- UDAAP violations have resulted in unsatisfactory CRA ratings, downgrades in consumer compliance ratings, restitution orders and civil money penalties.

UDAAP Today

- Established Unfairness Test
 - Cause substantial harm to consumer
 - Not reasonably avoidable by consumer
 - Practice not outweighed by benefits to consumers or to competition
- Established Deception Test
 - Representation, omission, act or practice that is likely to mislead
 - Act or practice would be deceptive from the perspective of a reasonable consumer
 - Representation, omission, act or practice is material
- Abusive Test – Title X of the Dodd-Frank Act
 - Materially interferes with ability of consumer to understand a term/condition **OR**
 - Takes unreasonable advantage of consumer's :
 - Lack of understanding of material risks/costs/conditions of product/service
 - Inability to protect his or her interests in selecting product/service
 - The reasonable reliance on a covered person to act in their interest

Clear and Conspicuous Standard

The four Ps of deception

- **PROMINENCE:** Is it big enough for consumers to notice and read?
- **PRESENTATION:** Are wording and format easy for consumers to understand?
- **PLACEMENT:** Is it where consumers will look?
- **PROXIMITY:** Is it near the claim that it qualifies?

UDAAP Advertising Considerations

- Is the ad understandable by its target audience?
- Do the people the ad is targeted to have a reasonable chance of qualifying/obtaining the products/service as advertised?
- Is fine print used to correct other information in the ad?
- Is there anything about the ad that indicates there is a “bait and switch” going on?
- Does the ad suggest any features or benefits that might not really be available?

FTC Recommendations for Advertising

DO

- Format ads to direct attention to key information
- Present information clearly and conspicuously
- Disclose all decision-impacting information near most highly promoted features and place any qualifiers near claim it is qualifying

DO NOT

- Use small font to hide costs, critical terms or conditions
- Use pop-up windows or hyperlinks to display key information
- Bury information at the end of a long Web page
- Use a fast-moving “scroll” on Web sites

UDAAP Vendor Management Considerations

- If you are using a third party to assist with marketing or advertising:
 - Review actual vendor and third-party contracts to determine whether the bank is protected at all from the risk of the vendor engaging in unfair, deceptive or abusive practices.
 - To consumers, it doesn't matter if your vendor messed up . . . they will perceive that it was your bank that acted unfairly, deceptively or abusively.
 - Reputational risk cannot be contracted away or insured against.

Recent Regulator Focus

- Rewards checking
- Overdraft programs and services
- Credit card practices
- Third-party or affinity relationships (i.e., Rent-a-BIN)
- Insurance-related practices
- Negative amortization ARM loans
- ARM loan pricing
- Error resolution process

Recent Examination Findings Regarding UDAAP

- No policies/procedures evidencing proactive efforts to comply with UDAAP
No UDAAP training has occurred or is presently scheduled
- Key officers and staff have no awareness of UDAAP issues/risks and applicability to departmental operations – including designees responsible for reviewing marketing materials
- Indications of marketing practices that could be interpreted as not being consistent with UDAAP guidelines and/or best practices.
- New product/service review/approval process is devoid of UDAAP issues
- Vendor management program doesn't consider UDAAP issues
- Compliance-related reviews of marketing materials do not include UDAAP
- Consumer complaint policy/procedures don't effectively capture and elevate indications that there could be UDAAP issues

UDAAP – Best Practices

- Risk assessment
- Training
- Ad review process
- Customer agreements
- Customer complaint administration
- New products and services
- Vendor management
- Error resolution process
- Monitoring

Complaint Management – UDAAP Triggers

- Missing disclosures or information
- Undue or excessive fees
- Inability to reach customer service (or a live person)
- Undisclosed or unauthorized charges
- Products geared toward the “vulnerable” – students, elders, service members, those in financial distress, those with limited English skills or education, etc.
- A statement to the effect of “I didn’t understand”

Advertising and Marketing – UDAAP Triggers

- Advertising ODP on “free” deposit accounts
- Rewards Program: Stating customers must “make” transactions within certain time frame when what bank really means is that transactions must “post” within a certain time frame
- Rewards Program: Stating “month” if bank really means “qualification cycle”
- Rewards Program: Stating customer must “receive” electronic statements if bank really means “view” electronic statements
- Rewards Program: Stating “ATM transactions” if bank really means “debit card purchases”

Best Practices for Advertising

- Review ALL forms of advertising including that from 3rd parties.
- Consider target audience Material should be complete, accurate and help the consumer make an informed decision.
- Monitor compliance with applicable laws and regulations.
- Compare disclosures to actual practices and marketing materials.
- Consider additional levels of review for accuracy/readability.
- Be alert to consumer complaints about products or ads.
- Training

DO NOT:

- Use small font to hide costs, critical terms or conditions
- Use pop-up windows or hyperlinks to display key information
- Bury information at the end of a long Web page
- Use a fast-moving “scroll” on Web sites

Other Important Consumer Protection Laws

- Section 5 of the FTC Act
 - Prohibits “unfair or deceptive trade practices in or affecting commerce”
- The Dodd-Frank Act
 - **Unfair** is defined similarly to the FTC Act.
 - **Deceptive** is defined by the CFPB similar to FTC Act.
 - **Abusive** is defined as material interference with the consumer’s ability to understand . . . or takes unreasonable advantage.
- Regulation AA
 - Prohibits unfair credit contract provisions, unfair or deceptive cosigner practices, and unfair late charges, among other things
- State laws as applicable
 - PA Unfair Trade Practices and Consumer Protection Act 73 P.S. § § 201-1 –201-9.2
 - NJ Consumer Fraud Act
 - Delaware Title 29 Chapter 25 Subchapter II Consumer Protection

Social Media

Resent focus and guidance

New Guidance

- FFIEC issued “Social Media: Consumer Compliance Risk Management Guidance” on January 22, 2013. Comment period closed March 22, 2013.
- Upon completion of the guidance, “. . . institutions will be expected to use the guidance in their efforts to ensure that their policies and procedures provide insight and controls commensurate with the risks posed by their social media activities.”

Why Do We Care?

- Fraudsters and hackers are always one step ahead of security gurus and educated users.
- Any form of electronic message can be redistributed in an uncontrolled manner with relative ease.
- Open and flexible two-way communication occurs between the institution and customers – and between customers – and this communication takes place without full knowledge about regulatory compliance issues.
- The casual and informal nature of many social media communications could cause the poster to forget that a business correspondence is taking place and regulations might apply to the “posting.”

Compliance vs. Marketing

Dear Compliance Folks:

- The marketing department doesn't want to hear, "The regulations prevent us from doing that." They want to hear, "We can do this, as long as we do it this way."
- Advise marketing department regarding the development of policies and procedures that incorporate compliance guidelines.
- Provide training to marketing department and bank employees who could be using social media.

Dear Marketing Folks:

- Don't be surprised if the first thing you hear from Compliance is, "We can't possibly do social media. The risks are way too high and I can't approve it."
- There are some serious compliance risks, but they can be overcome. Management should be prepared to present to the board how the risks can be addressed.
- If you are the marketing, business development or advertising director, this is a great time to brush up on all of the same compliance issues you deal with for print, radio and Web site marketing/advertising.
- Come to the table ready, willing and able to partner with the compliance officer.

All Eyes Are on You

- This can be tricky with an endeavor that is not just new to the institution, but fairly new to the industry as a whole.
- Social media outlets include Facebook, Twitter, LinkedIn, YouTube, blogs, Google+, instant messaging and Pinterest.
- FFIEC guidance states that “A financial institution that has chosen not to use social media should still be prepared to address the potential for negative comments or complaints that may arise within the many social media platforms . . . and provide guidance for employee use of social media.”

Components of a Risk Management Program

- Governance structure
 - Strategic goals for use of social media
 - Clearly defined roles and responsibilities
 - Establishment of controls and ongoing assessment of risk
- Policies and procedures
- Due diligence process for managing third-party service providers
- Employee training
- Monitoring of information posted to proprietary sites
- Audit and compliance reviews
- Management reporting

Compliance and Legal Risk

- Truth in Savings Act/Regulation DD
- Fair lending laws (ECOA/Regulation B and Fair Housing Act)
- Truth in Lending
- Real Estate Settlement Procedures Act
- FCRA
- Fair Debt Collections Practices Act
- Unfair, Deceptive or Abusive Acts or Practices
- Deposit insurance
- BSA/AML
- CRA
- Privacy and data security
- CAN-SPAM and Telephone Consumer Protection Act
- COPPA
- If social media is used to facilitate use of payment systems, include:
 - Electronic Funds Transfer Act/Regulation E
 - Rules applicable to check transactions such as industry rules, UCC and Regulation CC

Reputation Risk

- Negative public opinion
- Customer dissatisfaction
- Privacy
- Fraud and brand identity
- Third-party relationships
- Consumer complaints and inquiries
- Employee use of social media sites through personal accounts
- Employee use of social media sites through employer accounts

Operational Risk

- Adopt a response protocol
- Arise from failed processes, people or systems
- Arise from both internal and external events
 - Account takeover
 - Malware
- Requires management of IT risks
 - FFIEC Information Technology Examination Handbook
 - Outsourcing Technology Services booklet
 - Information Security booklet

What and How to Monitor

- Continuous monitoring of bank's social media site for visitor/employee postings. Watch for "complaints," "advertising" or sharing of "customer information." (Designate role/write into job description. Can use services such as Google Alerts or third party)
- Periodic monitoring of bank's social media site for advertising compliance, fair lending compliance, consumer complaint compliance and customer information sharing (can be outsourced, formal report expected for vendor)
- IT security monitoring
- Periodic monitoring of your employees' own use of social media for all of the potential compliance risks
- Specify which employees use social media.
- Monitoring results should be escalated to the compliance officer and included in reports the Compliance and/or Risk Management Committee.

Policy and Procedure Considerations

- Social media policy should address:
 - Who can post?
 - What can be posted?
 - What training is required and how is it evidenced?
 - What approval process will there be and how will that be documented?
 - Marketing approval
 - Compliance approval
 - IT approval
 - What happens when a compliance “violation” occurs?
 - What happens when a consumer complaint comes in?
 - How will postings/pages be documented and retained?
 - What happens when information security is compromised?
 - How will any third parties be monitored?
 - How will social media use be audited and by whom?

Policy and Procedure Considerations

- Social media policy (cont.)
 - How often will the Risk Assessment be updated and by whom?
 - How will the social media use be monitored and by whom?
 - How will proper electronic communications insurance be maintained?
 - How often will senior management and/or the board be provided with a social media update?

Policy and Procedure Considerations

- Employee policies
 - Employee use of their own social media during work hours using bank IT resources (no different than any other acceptable use of time and IT resources)
 - Employee use of their own social media sites during non-work hours using non-bank IT resources
 - Consult your legal counsel or HR attorney.

Social Media Best Practices

- Allow certain employees to post to Facebook and/or “tweet.”
- Make sure that all other employees understand who has restricted access.
- Postings on bank social media sites should be properly written and authorized by appropriate bank management, including Compliance.
- Limit advertising or become experts quickly in advertising disclosure requirements. Having a Facebook page is considered “advertising.”)
- Instruct employees that there can be no disclosure of customer and/or bank confidential and/or proprietary information.
- Ensure designated employees have been trained in advertising regulations regarding and are aware of issues with reputation risk.
 - No employee statements about products/services, rates or terms, or any indication of who should be interested in the products/services or who would qualify
 - Train employees on advertising compliance Include real examples.

Social Media Best Practices

- Require bank employees who "like" the bank Facebook page to have their own Facebook pages set to be as private as possible, to limit the risk that bank Facebook page visitors will click through to something that would embarrass the bank.
- Instruct employees not to post anything that could be construed as an advertisement on their own sites.
- Continuously monitor, monitor, monitor:
 - The bank's social media sites
 - Bank employee social media sites
 - Google Alerts
- Have a clear process in place for responding to compliance events/incidents.
- Have a disciplinary process in place for employees who stray from policy.
- Perform and update the social media Risk Assessment.
- Have policies/procedures for all of the above.

Dangers of Employee Posting on Own Web Site

- Many employees are very excited about the bank they work at. Some employees are compensated, even if indirectly, on sales generation.
- There is risk that employees could start discussing (i.e., advertising) bank products/services on their own sites or on sites that aren't bank-sponsored.
- In addition to the advertising compliance regulations, employees cannot make unsubstantiated claims about bank products/services, regardless of how excited they are about that extremely low home equity line of credit rate.

As Seen on Facebook

- Our marketing department has proposed a contest to drive our customers to "like" us on Facebook. The prize is a \$1,000 gift card. The contest will require the entrant to indicate that they "like" us on our Facebook page. Once the entrant does this, they will automatically register for the contest. What do we need to be concerned about?
 - Your Facebook page is definitely considered "advertising." Be careful with proper FDIC and/or Equal Housing Lender logos.
 - Do you inform visitors to your Facebook page how they can enter the game without "liking" you?

As Seen on LinkedIn

ABSOLUTELY LOWEST MORTGAGE RATES AND FEES
IN TOWN at XYZ Bank!!!

What's required of this, and what's missing?

Summary

Via XYZ Bank, I offer all types of residential real estate loans to customers in [town]. Our 30-year fixed has just dropped to 4.xx%

What's required of this, and what's missing?

ABC Mortgage Solutions, LLC.

Summary

Mortgage guru!

Avoid expensive bank programs. I can offer mortgage rates as low as 4.75% fixed for a 30-year mortgage.

What's required of this, and what's missing?

As Seen on Facebook Wall

XYZBank CHECK OUT THESE LIMITED TIME CD
SPECIALS!!!

2.10%*APY - Two Year CD

1.25%**APY - Five Month CD

—See More—

When one clicked on “—See More—” one could see all the disclosures, plus there was yet another link that took the visitor to the bank’s Web site.

“Member FDIC” did not appear on any of the pages.

This bank had an entire “Products” tab on Facebook.

COPPA

Children's Online Privacy Protection Act

Children's Online Privacy Protection Act (COPPA)

- Amendments go into effect July 1, 2013.
- COPPA was originally enacted in 1998.
 - Requires operators of Web sites or online services that are directed to children under 13 or have actual knowledge that they are collecting personal information from children under 13 to give notice to parents and get their verifiable consent prior to collecting, using or disclosing the personal information
 - Requires collectors of information to maintain this info securely
 - Prohibits conditioning a child's participation in activities on the collection of more information than is reasonably necessary to participate

COPPA Changes – “Operator” Definitions

- Operator
 - Clarifies that the rule covers child-directed site or service that integrates outside services such as plug-ins and advertising networks that collect personal information (PI) from visitors
 - Does not extend to Google Play or the App Store
- Web site or online service directed to children
 - Expanded to include plug-ins or ad networks that have actual knowledge that they are collecting PI through a child-directed Web site or online service
 - Sites that target children only as a secondary audience will be required to provide notice and obtain parental consent only for those users who identify themselves as being younger than 13.
- Personal Information
 - Now includes geo-location information as well as photos, videos and audio files that contain a child’s image or voice
- Personal information requiring parental consent
 - Now includes “persistent identifiers” that are used to recognize users over time and across different Web sites or online services

COPPA Changes – Parental Notice and Consent

- Privacy policies and direct notices must be concise and timely.
- Added several new methods for verifiable consent:
 - Electronic scans of signed parental consent forms
 - Video conferencing
 - Government-issued ID
 - Alternative payment systems such as debit cards and electronic payment systems that meet certain criteria

COPPA Changes – Confidentiality and Security

- Requires reasonable measures to ensure that children’s PI is released only to service providers and third parties that are capable of maintaining confidentiality and security
- Third party must offer assurance.
- Operators can only maintain children’s PI as long as reasonably necessary.
- Must protect confidentiality during disposal and destruction
- Safe Harbor Provision
 - FTC requires audit of self-regulatory “safe harbor programs” and annual reporting to the commission.

Help, I need somebody!

Make sure your creative team knows the rules of the game....or at least a few rules.

- Incorporate general compliance rules in your style guide for your writers and designers.
- Give them the checklists—so they know what the review process looks like.
- “We don’t have to do that for our other bank client....”

Ask Early and Often

It's not a final exam.

- Before you develop your campaign or product, put your thoughts down on paper and share it with compliance.
- Provide a product grid that answers the basic questions about the product so that compliance can understand what you are offering.
- Know the issues before you start.

But you said...

If your creative has major redirect or changed its focus.....

- Start fresh with compliance and avoid confusion.
- Your compliance team gets paid the same whether they review your materials once or six times. Get your money's worth.

Can we talk?

It's a conversation.

- Ask open-ended questions and ask them in different ways.
 - What issues should we consider if we offer a loan product that starts at a certain interest rate and declines over time, based on the consumer's timely payments?
 - Our product will give the customer a .25% reduction in rate for each year as long as the customer pays on time. What are your concerns?

Compliance folks have opinions, too....but

- Don't confuse opinions for regs. Color, word choices, shapes, photos, and design are not regulations (but we do appreciate you picking up typos).
- Best practices may be overkill.
- Show me the reg.
- What will the customer think and say...too much small print, too confusing. Maybe it's time to rethink the promotion.

R-e-s-p-e-c-t

- We're both trying to do our best.
- We both want a clean audit.
- We both want a successful campaign.
- We both want to keep our jobs.
- We can agree to disagree, and I will be willing to take responsibility for my decision.

And if you're lucky, you will enjoy working with your compliance person. 😊

Resources

Marketing Resources

<http://www.consumerfinance.gov/> sign up for regulatory alerts; focused on the consumer and consumer complaints regarding financial institutions.

<http://www.ffiec.gov/> Interagency guidance, including proposed guidance on social media advertising available

<http://ftc.gov/> recent guidance on social media advertising and the changes with COPPA.

Regulator Websites

<http://fdic.gov> FDIC website

(<http://www.fdic.gov/regulations/laws/rules/2000-5200.html> - advertisement of membership)

<http://www.occ.treas.gov/> Office of the Comptroller of the Currency

<http://www.federalreserve.gov/> Federal Reserve

<http://www.ncua.gov/Pages/default.aspx> Credit Unions only!

<http://magazines.aba.com/bcmag/20101112?pg=6#pg6> links to UDAAP article by ABA

<http://www.fisregulatoryservices.com/index.asp> FIS Regulatory Advisory Services

<http://bankersonline.com/> Bankersonline.com

Also look at your specific state websites!

Questions?

Please submit questions via the Questions section at the bottom of the Control Panel.

Thank you for attending!

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