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**The Brave New World of
Consumer Compliance**

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THE BRAVE NEW WORLD OF CONSUMER COMPLIANCE



BY ANDY SANDLER

Coping with Expanding and Evolving UDAAP Standards



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Compliance has changed from a checklist-based, technical science to a principles-based, qualitative art. Gone are the days when an institution that is compliant with all substantive consumer protection laws can breathe easy; practices and products long viewed as acceptable now are susceptible to claims that they constitute Unfair, Deceptive, or Abusive Acts or Practices (UDAAP). Unlike other consumer protection laws, a UDAAP violation hinges on the specific facts and circumstances surrounding each act or practice rather than well-defined legal standards and regulations setting forth clear lines between lawful and unlawful conduct. UDAAP standards are so vague

and regulators – particularly the CFPB – are so aggressive in interpreting those standards, that it is virtually impossible to predict with any level of certainty the practices and products that may be subject to challenge. UDAAP is also unique in the sense that its provisions touch nearly every part of a consumer financial institution's policies and practices, including product development, disclosures, sales, advertising, account servicing, and collections. An additional challenge presented by UDAAP is that regulators now take the view that financial services companies are responsible for the conduct of the third party service providers they partner with in offering products and services to their customers. ▶

So, how can the challenges of this new UDAAP-centric consumer compliance environment be addressed? First, it is important to understand the regulatory enforcement standard. It is best described as akin to the pornography standard set forth by United States Supreme Court Justice Potter Stewart who famously wrote: "I know it when I see it." Legal and compliance professionals must accept that, when it comes to UDAAP, there are no objective legal standards or regulatory guidance from which to advise the business. They must communicate to their business colleagues that it is no longer possible to tell them what the rules are so they can design, sell, service, and collect on products without risk simply by adhering to those rules. Instead, businesses need their products and services to be consumer friendly and consumer focused. Will the consumer understand? Is the product or service one that has demonstrable benefit to the consumer? Are practices and approaches fair in context of the greater power and sophistication of the provider? Building a compliance culture that is consumer-centric is far from easy. It is particularly difficult because regulators increasingly approach these questions in an enormously paternalistic manner. The seemingly strong defense to challenge – demonstrable evidence that customers like and want the product on the terms it has been offered – often is rejected by regulators where they, as a consumer, would not reach that same conclusion. Regulators often take the view that if they would not want this product a consumer who does must, by definition, have been deceived into thinking a "bad" product is "good."


How best then to build effective and defensible compliance programs in the current regulatory environment? Institutions can mitigate their UDAAP risk by developing UDAAP compliance programs that are designed to ensure their policies and practices adhere to the statutory definitions of unfairness, deceptiveness and abusiveness and are structured from an enforcement defense perspective. This includes:

- Establishing a compliance-oriented culture and governance structure;
- Appointing a fair and responsible lending officer and consumer ombudsman;

- Implementing strong policies and procedures that apply to every stage of the consumer product life cycle;
- Providing comprehensive training at every level of the company (including the Board of Directors);
- Engaging in monitoring and testing;
- Conducting periodic risk assessments and audits;
- Maintaining a robust complaint management program that is designed to detect, monitor and resolve UDAAP issues, involves root cause analyses, and escalates issues that present significant or systemic UDAAP risk; and
- Ensuring performance of adequate due diligence and monitoring of consumer-facing third party service providers.

Because UDAAP standards are primarily communicated to the industry by way of examination findings and enforcement actions, it is imperative to closely monitor public settlements, CFPB guidance and white papers as well as the company's own examination reports to identify and stay ahead of enforcement trends and hot topics. It is imperative that UDAAP compliance programs consistently be reevaluated and augmented to address emerging areas of regulatory interest.

While there is no magic bullet to protect a company from UDAAP challenges, it is the case that entities with sound compliance programs, self-assessment and remediation mechanisms, and other proactive systems meant to deter and detect weaknesses and violations are much better positioned when regulatory scrutiny comes.

Welcome to the brave new consumer compliance world. Embrace the challenge. 

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