

# Unfair or Deceptive Acts or Practices Get Attention

Recently, more attention has been focused on unfair or deceptive acts or practices by financial institutions toward consumers. The **Federal Trade Commission** (FTC) which is charged with the responsibility for implementing laws to prevent such practices has basically advised the other regulatory agencies that if they do not accept their responsibility under the *FTC Act*, it will take all the responsibility upon itself. In other words, the agencies were advised they should use that rulemaking authority or lose it.

What are unfair or deceptive acts or practices? The FTC defines an *unfair practice* as an act or practice that is unfair where it:

- Causes or is likely to cause substantial injury to consumers;
- Cannot be reasonably avoided by consumers; and
- Is not outweighed by countervailing benefits to consumers or to competition

It defines a *deceptive practice* as an act or practice where:

- A representation, omission, or practice misleads or is likely to misled the consumer;
- A consumer's interpretation of the representation, omission, or practice is considered reasonable under the circumstance; and
- The misleading representation, omission, or practice is material.

## ANPR

The **Office of Thrift Supervision** (OTS) recently issued an Advance Notice of Proposed Rulemaking (ANPR) requesting public comment on approaches the OTS can take in expanding its regulatory authority to address unfair or deceptive acts or practices (UDAP) in the OTS-regulated thrift industry. The OTS' mission is to "supervise savings associations and their holding companies in order to maintain their safety and soundness and compliance with consumer protection laws, and to encourage a competitive industry that meets America's financial services needs." To more completely fulfill that mission, the OTS wants to determine whether it should expand its current prohibitions against unfair or deceptive acts or practices.

While the OTS is responsible for supervising the thrift industry, it recognizes the importance of joint efforts of all financial regulatory agencies in providing consistency for consumers. The Agency has worked with the other regulators on multiple occasions and will continue to do so. The results of this ANPR will help the OTS fulfill its rulemaking authority and responsibility assigned by the *Federal Trade Commission Act*. That same authority is given to the other regulatory agencies.

The ANPR points out that the OTS has fulfilled its rule making authority for more than 20 years. The FTC's rule took effect on March 1, 1985. Shortly after that effective date, the **Federal Home Loan Bank Board** (FHLLB), the OTS' predecessor agency, issued a substantially similar rule.

In the ANPR the OTS points out several methods it could use in expanding its UDAP program. Those include adopting the FTC model, adopting the other regulatory agency models, converting guidance to rules, following the lead of state UDAP statutes, and/or targeting specific practices (e.g., credit card lending, residential mortgage lending, and gift cards).

Another consideration in the ANPR is whether to expand the OTS advertising rules by providing more comprehensive guidance.

Comments were due in November and a final rule is expected early in 2008.

## **UDAP Exam Guidelines**

The **Federal Reserve Board** (FRB) and **Federal Deposit Insurance Corporation** (FDIC) issued a joint statement outlining the standards to be used in determining whether specific acts or practices by state-chartered banks are unfair or deceptive. The Joint Statement also includes general guidance on measures that state banks can take to avoid engaging in such acts or practices.

The agencies attached examination procedures incorporating the guidance provided in the Joint Statement as well as further assistance to examiners in analyzing potential UDAP issues during a consumer compliance examination or a compliance investigation.

The Joint Statement and exam procedures can be viewed at <http://www.federalreserve.gov/boarddocs/caletters/2007/0708/caltr0708.htm>.