Compliance Risks and Requirements: Are You Ready?

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No Legal Advice, Opinions, or Services Provided
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Amy Avitable is a nationally known compliance expert through both her frequent speaking engagements for state bankers associations, state mortgage associations, the American Bankers Association, and the Mortgage Bankers Association, as well as articles in banking and compliance publications.

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She was previously the National Director of Compliance Services at Sheshunoff Consulting + Solutions, where she managed a team of compliance professionals who performed compliance audits and consulting for financial institutions of all sizes. Before joining Sheshunoff, she was the Director of FIS Regulatory Advisory Services (formerly Kirchman/Metavante Regulatory Service), where she was the Editor-In-Chief for the renowned “Big Orange Book” compliance manual and served hundreds of financial institutions throughout the country as well as the FDIC, Federal Reserve and OCC.
Agenda

- Recent Regulatory Changes
- Increasing Compliance Risks
  - UDAP/UDAAP
  - Fair Lending
TILA/RESPA Integrated Disclosures ("TRID")

- Combines Regulation Z and RESPA disclosures for home loans
- Affects:
  - Home purchase loans
  - Refinancings
  - Closed end home equity loans
  - Reverse mortgages
- Does not affect:
  - Home equity lines of credit
  - Commercial loans
  - Non-home secured (car loans, etc.)

Effective August 1st
Don’t Underestimate the Impact on Your Bank!

- **Practical Issues**
  - Affects more aspects of mortgage lending than you think
    - Loans to irrevocable trusts that are effectively “consumer purpose” are now subject to consumer protection rules
    - Loans secured by a home on 25 or more acres of land are now subject to mortgage rules
    - New definition of “application” means that disclosures are triggered when 6 key pieces of information are obtained, regardless if an application form has been completed or any other information has been obtained

- **Financial Implications**
  - More fees subject to zero tolerance so you will be absorbing or refunding more where fees increase by closing
  - Cannot adopt early in order to practice
Will Your Vendor Be Ready?
Increasing Compliance Risks
Unfair, Deceptive or Abusive Acts or Practices

- **Unfairness**
  - It causes or is 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

- **Deception**
  - 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

_The “Unfair” and “Deceptive” standards apply to all banks!_
Key Definitions

- **Abusive**
  - Interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service
  - Takes unreasonable advantage of:
    - A lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
    - The inability of the consumer to protect its interests in selecting or using a consumer financial product or service; or
    - The reasonable reliance by the consumer on a covered person to act in the interests of the consumer

*The “Abusive” standard applies to CFPB-regulated banks and where CFPB issues a regulation on “abusive” acts or practices*
Do You Have a UDAP/UDAAP Program?

- Risk Assessment
- Policy
- Procedures
  1. Advertising and solicitations
     - Social media risk management
  2. Account and loan disclosures
  3. Servicing and collections
  4. Managing and monitoring of third-party service providers
  5. Consumer complaints
- Processes for Reviewing New Products
- Training

FDIC’s Top Five Areas of Greatest UDAP Risk
UDAP and UDAAP Always Apply

- Product Design
- Marketing
- Account Opening / Origination
- Servicing
- Collections
Common UDAP/UDAAP Risks

High Risk Customers
- Seniors
- Students
- Members of the military

High Risk Products
- Overdraft protection
- Reward accounts
- “Free” products
- Prepaid cards
- Add-on products
- Third party products
High Risk Customers: Seniors

- Products designed for seniors
  - Senior deposit accounts
    - Must have same overdraft fee and policies for these accounts as for other, non-senior accounts
    - Other non-lending preferential benefits may be offered
  - Reverse mortgages
    - Customer understanding is critical!
    - Carefully review all marketing, disclosures and communications
    - Consider education options
High Risk Customers: Students

- Even if you partner with someone else, you are still responsible!

- **Cole Taylor Bank Enforcement Action**
  - Higher One offered student loan disbursement services for schools
  - Higher One partnered with Cole Taylor Bank to allow students to open internet accounts under Higher One’s disbursement program
  - **Higher One’s website**
    - Omitted info about fees, features, limitations and online nature of the account
    - Omitted cheaper alternatives
    - Omitted information about ATM locations and hours
    - Registration process disclosed fees, terms and conditions after customer entered personal info
    - Featured school logo more prominently than Higher One or Cole Taylor, which “may have erroneously implied” endorsement by the school
High Risk Customers: Students

- **Cole Taylor Bank Enforcement Action**
  - **Benefits for Higher One**
    - Various account fees
    - Interchange fees
  - **Benefits for Cole Taylor**
    - “Although Cole Taylor did not receive any OneAccount fees paid by students, Cole Taylor did receive benefits from holding and deploying the funds held in non-interest bearing accounts.”
  - **Consequences for Cole Taylor**
    - $4.11 million civil money penalties
    - Responsibility for paying restitution not paid by Higher One, up to $30 million
    - Relationship with Cole Taylor lasted less than 18 months
High Risk Customers: Members of the Military

- **Veterans’ Benefits Act of 2010**
  - Provides private cause of action for servicemembers to enforce their rights
  - Expands civil penalties to cover all provisions of SCRA
    - Consequential and punitive damages
    - Civil penalties of $55,000 for the first violation and $110,000 for subsequent violations
  - March 2015 – Santander paid $9 million for SCRA violations

- **Foreclosure Protections**
  - Honoring America’s Veterans and Caring for Camp Lejuene Families Act of 2012 extends period of relief from foreclosure, sale or seizure of property on loans secured by real or personal property owned by the servicemember
    - Extended for one year after period of military service
    - Relief was scheduled to expire on December 31, 2014 but extended to December 31, 2015
High Risk Customers: Members of the Military

- **FDIC UDAP Restitution Order for Sallie Mae Bank**

- **Acceptable Documentation Practices**
  - Accepting military orders or request for a military deferment or forbearance as written notice of eligibility
  - In lieu of written orders, accepting a letter on official letterhead from a borrower’s commanding officer that includes contact information for confirmation, borrower’s identifying information, and information about period of military service

- **Prohibited Documentation Practices**
  - Conditioning the granting of benefits on the use of a specific form or requiring that a written notice explicitly request benefits
  - Engaging in communications that, expressly or by implication, condition receipt of SCRA benefits on an agreement that the borrower will recertify his/her active-duty status periodically
High Risk Customers: Members of the Military

- May not:
  - Require that any military orders submitted have a specific end date for the period of military service
  - Remove protections unless an end date is indicated or found on Department of Defense Manpower Data Center
  - Require that any military orders submitted specify the date upon which the borrower first entered active duty for this period of service
Other CFPB Recommendations

- **CFPB Complaint Report**
  - Get updated military address before changing account terms
  - Provide clear instructions on how to access accounts
  - Notify military customers of Power of Attorney policies and required format
Current Department of Defense regulations under Military Lending Act affect:

- **Payday loans**
  - Closed-end credit with term of 91 days or less and amount financed of $2,000 or less where borrower:
    - Provides a check or other payment instrument to creditor who agrees not to deposit it for more than one day; or
    - Authorizes creditor to initiate one or more debits from borrower's deposit account (by electronic fund transfer or remotely created check) after one or more days

- **Vehicle title loans**
  - Closed-end credit with term of 181 days or less secured by title to a motor vehicle (other than purchase money transaction)

- **Tax refund anticipation**
  - Closed-end credit that will expressly be repaid in whole or part by borrower’s income tax refund
High Risk Customers: Members of the Military

- **DOD Proposed Rule**
  - Current requirements include origination disclosures and limit on “Military APR” (MAPR) > 36%
  - Proposal to extend coverage to other consumer loans
    - Not applicable to consumer real estate loans

- **CFPB Announcement**
  - Extend coverage to consumer loans with:
    - Term of 45 days or less or
    - Any term if “all-in” APR > 36% and is vehicle title loan or will be repaid through access to deposit account
  - Possible proposed rules include:
    - “Debt trap prevention” requirements such as underwriting / ability to repay rules
    - “Debt trap protection” requirements such as limits on rollovers within set timeframes, cooling off periods between loans
High Risk Products: Overdraft Protection

- **Common Expectations**
  - Limits on fees
  - Discouraging use or abuse of overdraft protection
  - If you pay, consider:
    - Customer education
    - Customer notifications (texts, online banking) where account is or will become overdrawn
    - Notice where overdraft transactions occur and fees are charged
    - Requiring opt ins for all transactions
    - Alternatively, opt outs for all transactions
  - Neutral payment order

Renewed CFPB Focus
“...[I]nstitutions with a **policy and practice of not paying ATM or one-time debit card transactions into overdraft**, which the FDIC describes as “no-pay” banks. There are, however, **instances in which a point of sale transaction may be paid into overdraft even by a no-pay bank.** These “force pay” situations can arise if a network: (1) is offline and uses a stand in balance; (2) does not operate in real-time and works from the prior days balance; or (3) the merchant does not seek authorization for the full amount of a transaction – i.e., the case in which a merchant seeks only a $1.00 preauthorization to ensure that a card is active and valid, but under network rules, the bank that authorizes the transaction is required to pay the full amount when presented for settlement.

Overdraft Opt Ins

- Regions Bank Enforcement Action – April 28, 2015
  - First enforcement action on application of opt in rules
- Two products
  - Linked deposit accounts
    - Did not provide opt in notice
    - Charged overdraft fee when both accounts were exhausted
    - Did not correct for 10 months
  - Deposit advance product
    - Determined that overdraft and NSF fees should not be charged by flawed system programming only suppressed NSF fees
  - Disclosures were deceptive because indicated that fee would not charged without an opt in but fees were charged on linked accounts without opt in
- Voluntarily refunded $49 million and fined $7.5 million
  - Would have been higher if bank had not self-reported
Account Balances for Overdraft Fees

- **CFPB Supervisory Highlights – Winter 2015**
  - **Transaction Processing**
    - Banks changed from ledger balance to available balance
    - Available balance includes authorized, unsettled transactions so balance was lower and more transactions were overdrafts
    - Overdraft fee also charged when authorized transaction was later settled in overdrawn account
  - **Disclosures**
    - Create misimpression that institution would not charge overdraft fee if transaction authorization did not cause account to become overdrawn
FDIC Supervisory Highlights, Winter 2012 – Concerns about ads, websites and disclosures that:

- Highlight highest APY but omit fall-back APY
- Omit qualifiers or provide some but not all of the qualifiers
- Fail to explain how to enroll in online banking or omit the requirement to log in and view periodic statements
- Omit requirement that transactions be PIN or signature-based, or that they post and settle during the statement or qualification cycle
- Fail to state that ATM transactions do not qualify as debit card transactions
- Fail to explain the period in which qualifiers must be met
- Represent unlimited, free, nationwide ATM access but actually require qualification to receive them and impose limits on refunds per statement or qualifier cycle
High Risk Products: High Yield Checking Accounts

- **FDIC Best Practices**
  - Involve compliance in all aspects of product
  - Ensure materials contain clear and conspicuous terminology, including qualifiers and limitations
  - Monitor consumer inquiries and complaints for signs that consumers may not understand the product
  - Review training materials and scripts used in promoting the product
  - Ensure staff are properly trained on the product and can communicate it clearly with customers
  - If you will prohibit abuse of the system, clearly state the purpose of the account and examples of inappropriate behavior or account misuse
  - Clearly and conspicuously explain consequences of not qualifying
High Risk Products: “Free” Products

**Free Account**
- FDIC’s official position is that it will follow Regulation DD
  - Free if there is no maintenance or activity fee on the account
  - An overdraft fee will not prevent an account from being called free

**Free Services**
- An account can be free even if services are not free if services are not required on the account
- Where different components of a service are free and others are not, ensure that ads and disclosures are extremely clear
  - Free online banking but use of online billpay is not free
- If a fee is likely to arise, the service is not free
  - Non-usage fee for online billpay or only free if used for 6 transactions per month
  - A service can have a fee on an unusual or special service without causing the service to no longer be “free”
High Risk Products: “Free” Products

- **Bank Enforcement Action**
  - $2.9 million in penalties and restitution - October 2014
- **Bank offered “free” account but:**
  - Had to maintain minimum activity to hold free account
  - Failure to meet minimum activity level caused account to be converted to checking account with minimum balance fee
- **CFPB’s criticism**
  - Advertised as “free” and “no strings attached” without disclosing condition in ads
    - Condition and terms for both accounts disclosed at account opening
  - Automatically converted accounts into product with fees
  - Did not notify customers of the account conversion
High Risk Products: Prepaid Cards

- **2014 Proposed Rule**
  - Prepaid protections
    - Periodic statements or online information for easy access
    - Error resolution
    - Limited consumer liability for loss or theft
  - Know Before You Owe disclosures
    - Short and long form disclosures
      - Both would be available before card provided
    - Publicly available card agreements
      - Posted on websites
      - Submitted to CFPB for posting on CFPB website
  - If related credit product provided, additional requirements apply
High Risk Products: Prepaid Cards

- Concern that consumers do not understand the fees associated with prepaid cards
- FDIC’s Recommended Procedure:
  1. Customer requests a prepaid card

  **DO NOT TAKE THE CUSTOMER’S MONEY YET!**

  2. Provide customer with the disclosures that go along with the card **AND** highlight the typical card fees
     - Preferably, provide a separate document that shows and explains common fees for the card
     - No need to highlight unusual fees that are unlikely to arise
     - Train staff to explain the fees to the customer to ensure that customers understand them

  3. **ONLY THEN** can you take the customer’s payment for the card
High Risk Products: Add-On Products

- **First United Security Bank Enforcement Action**
  - $500 million assets
  - 19 branches all in the same state
- $40,000 civil money penalty for UDAP violation
- Bank offered identity theft insurance add-on product
  - Disclosed to existing customers who purchased the add-on product that benefits were “automatically” provided when registration was required to receive all of the benefits
  - Failed to adequately disclose to new and existing customers that they would receive the identity theft insurance benefit for free even if they opted-out of purchasing the product for $1.95 per month
Does Your Bank Monitor the Complaint File?

- **Trends in complaints**
  - Numerous complaints relative to the size of the customer base or similar institutions offering similar products
  - Multiple complaints about the same product, employee, branch or third party

- **Complaints about high risk concerns**
  - Misleading or false statements, or lack of disclosure
  - Unauthorized fees, fees for services not provided, or duplicative fees
  - Previously undisclosed charges
  - Loan servicing and collections
  - Compliance violations
  - Discrimination

- **Timeliness of corrective action**
Fair Lending

- Lender Compensation
- Pricing Discretion
- Exceptions and Inconsistent Application of Policies

Fair Lending Analysis
Fair Lending Risk: Mortgage Lending

- Continue to test HMDA LAR
- But don’t forget about underwriting standards and QM policies!
  - [Interagency Statement on Fair Lending Compliance and the Ability-to-Repay and Qualified Mortgage Standards Rule](#)
    - Decision to make all or mostly QMs will not, absent other factors, elevate fair lending risk
  - **But** risks continue to exist:
    - Applying Ability to Repay standards for products designed for private banking or high income customers while applying QM standards to other products
    - Applying QM vs. ATR standards inconsistently or allowing exceptions
Sexual Orientation and Gender Identity

- **HUD Final Rule on Equal Access to Housing in HUD Programs—Regardless of Sexual Orientation or Gender Identity**
  - Effective March 5, 2012

- **Bank of America Settlement**
  - Borrower and partner’s mother applied for a loan
  - BOA denied the loan, stating that co-applicants were not directly related because borrower and partner were not married
  - In January 2013, HUD and BOA entered into settlement under which BOA will pay HUD $7,500 and revise its fair lending program

“Members of the housing industry should take note of this settlement agreement. HUD will enforce its regulations to make sure its programs are truly open to all qualified families.”
Sexual Orientation and Gender Identity

- **New HUD Guidance:**
  - **Notice H 2015-01**, Notice of Program Eligibility for HUD Assisted and Insured Housing Programs for All People Regardless of Sexual Orientation, Gender Identity or Marital Status as Required by HUD’s Equal Access Rule

- **Reiterate that:**
  - Housing financed or insured by HUD must be made available without regard to actual or perceived sexual orientation, gender identity, or marital status
  - Owners and operators of HUD-funded housing, or housing whose financing was insured by HUD, cannot inquire about an applicant’s sexual orientation or gender identity or denying housing on that basis
  - Sexual orientation and gender identity cannot be part of any lending decision for an FHA-insured mortgage
Sexual Orientation and Gender Identity

- **Allowed:**
  - Voluntary self-identification by the applicant
  - Lawful inquiries of gender where housing is temporary, emergency shelter involving sharing of sleeping areas or bathrooms
  - Lawful inquiries for purpose of determining number of bedrooms to which household may be entitled
  - Gathering gender information as required under HMDA and Reg. B
Same-Sex Marriage

- **CFPB Staff Memo - June 2014**
- Sets forth the agency’s policy to regard a person who is married under the laws of any jurisdiction as married nationwide, regardless of residency
  - Not applicable to domestic partnerships, civil unions or other relationships not denominated as “marriage” by law
- Applicable to all laws, regulations and policies administered by CFPB, including:
  - Regulation B
  - Fair Debt Collection Practices Act
  - Regulation Z
  - RESPA
Claims generally deal with pregnant women or women on maternity leave, though men are also protected.

**Suntrust Settlement** - May 8, 2013
- Prior to closing, bank tries to verify income with employer and learns that applicant is on unpaid maternity leave.
- Employer refused to verify continued employment or return date.
- Due to inability to verify info and in accordance with investor guidelines, bank did not fund the loan.
- Bank ordered to pay $18,000 and adopt Parental Leave policy.
- “A woman’s maternity status should not determine whether she receives a mortgage loan.”

**Wells Fargo** settled claims for $5 million on October 9, 2014.
Parental Leave Policy

- **Cannot:**
  - Inquire about future maternity leave plans
  - Require the applicant to return to work in order to approve or close the loan

- If applicant is on maternity leave at closing, document:
  - Borrower’s intent to return to work
  - That borrower has right to return to work
Pregnancy and Parental Leave Discrimination

- **Sample Parental Leave Policy**
  - Exhibit A or FirstBank Mortgage Partners Conciliation Agreement

- **Temporary Leave Underwriting Guidelines**
  - Must consider reduced income in underwriting
  - **Customer’s Return to Work Date Before First Mortgage Payment**
    - Use pre-leave income if post-leave income will not be less
  - **Customer’s Return to Work Date NOT Before First Mortgage Payment**
    - May use any income received during leave to meet underwriting standard
    - If insufficient, customer may use verified liquid assets not required to close the loan to bridge any period of reduced income
Fair Lending Risk: Auto Lending

- **CFPB Bulletin 2013-02 on Indirect Auto Lending**
  - Any creditor or assignee who participated in the decision making to extend the loan is subject to Regulation B
  - Risk mitigation options
    - Imposing controls on dealer markup and compensation policies and monitoring and addressing the effects of such policies
    - Eliminating dealer discretion to mark up buy rates and fairly compensating dealers using another mechanism, such as a flat fee per transaction, that does not result in discrimination

- CFPB and Federal Reserve banks expected to:
  - Code loan files for Race, Ethnicity and Sex
  - Perform statistical analysis of loans on a rolling basis
    - With markups, without them, with negative markups
    - Within and across dealers
Fair Lending Risk: Auto Lending

- Concerns not limited to Indirect Auto Lending!
- ECOA Baseline Examination Guidelines include Direct Auto Lending
  - Circumstances in which loan officers are permitted to deviate from the par rate
  - Impact of pricing deviation on loan officer compensation
  - Caps or limits on loan originator pricing discretion
  - Frequency and reasons for underwriting or pricing exceptions
  - Compensation for employees involved with direct auto lending based on product type, price (including both interest rates and fees) or loan volume
What Can You Do?

- **Adopt a UDAP/UDAAP Program**
  - Update procedures for military customers
  - Review product lines for high risk products

- **Update Your Fair Lending Program**
  - Annual HMDA LAR review
  - Expand program to include new and evolving areas of fair lending risk

- **Prepare for TRID**
  - Ensure implementing staff understand broader implications than just disclosures
  - Understand your vendor’s timelines

- **Keep Your Board Educated and Informed as Risks Change**
Questions?

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No Legal Advice, Opinions, or Services Provided
This presentation does not constitute legal advice