



Federal Housing Finance Agency

ADVISORY BULLETIN

AB 2024 – 06: Regulated Entity Unfair or Deceptive Acts or Practices Compliance

Purpose

The Federal Housing Finance Agency (FHFA) is the primary regulator for Fannie Mae and Freddie Mac (the Enterprises) and the Federal Home Loan Banks (FHLBanks) (collectively, the regulated entities). The purpose of this Advisory Bulletin is to articulate FHFA’s expectations and guidance to the regulated entities on compliance with the prohibition against unfair or deceptive acts or practices (UDAPs) under Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 (the FTC Act).¹ This Advisory Bulletin is intended to be consistent with the FTC Act and to provide guidance to the regulated entities seeking to comply. Ensuring the regulated entities’ compliance with the FTC Act is part of FHFA’s responsibility to ensure the regulated entities’ activities and operations comply with applicable laws and are consistent with serving the public interest.²

Background

This Advisory Bulletin focuses on the application of Section 5 of the FTC Act to the regulated entities’ activities. FHFA codified its authority to ensure Section 5 compliance in its Final Rule on Fair Lending, Fair Housing, and Equitable Housing Finance Plans.³ This Advisory Bulletin provides background information about the applicable law and articulates considerations relevant to FHFA’s exercise of its authorities.

The regulated entities are subject to the prohibition in the FTC Act against “unfair or deceptive acts or practices in or affecting commerce.”⁴ Under the Federal Housing Enterprises Financial

¹ This document provides guidance and articulates FHFA’s expectations, including supervisory expectations. This document does not create or confer any substantive or procedural rights enforceable at law or in any administrative or civil proceeding. 12 CFR 1293.1(c).

² 12 U.S.C. 4511(b)(2), 4513(a)(1)(B)(v).

³ 89 FR 42768 (May 16, 2024); 12 C.F.R. 1293.11(b).

⁴ 15 U.S.C. 45(a)(1).

Safety and Soundness Act of 1992 (Safety and Soundness Act), as amended, FHFA is responsible for oversight of the regulated entities' compliance with the purposes of the “[Safety and Soundness] Act, the authorizing statutes, and any other applicable law,”⁵ and enforcement for noncompliance with law.⁶ FHFA is also responsible for ensuring that the regulated entities operate “consistent with the public interest.”⁷ Accordingly, FHFA has comprehensive oversight of the regulated entities' Section 5 compliance, including authority to monitor their activities, gather information, conduct supervisory examinations, and enforce compliance with law where appropriate.⁸

FHFA is committed to ensuring that the regulated entities foster a “liquid, efficient, competitive, and resilient” housing finance market.⁹ The regulated entities play a unique and important role in the housing finance markets, and their operations and policies can promote legal compliance and further the public interest. FHFA considers ensuring that the regulated entities do not commit UDAP violations adverse to lenders, servicers, borrowers, renters, and other housing market participants to be part of FHFA's responsibility to ensure the regulated entities comply with all applicable laws.¹⁰ This Advisory Bulletin outlines applicable legal principles and articulate how the regulated entities can identify, assess, avoid, and mitigate UDAP risk.

Guidance

The regulated entities must comply with the FTC Act's prohibition against “unfair or deceptive acts or practices in or affecting commerce.”¹¹ Effective UDAP risk management by the regulated entities includes identifying, assessing, monitoring, and mitigating UDAP risk and preventing the occurrence of UDAP violations in their operations. These expectations complement FHFA's expectations regarding compliance with applicable fair lending laws.¹²

⁵ 12 U.S.C. 4511(b)(2).

⁶ See 12 U.S.C. 4511(b), 4526(a), and 4631.

⁷ 12 U.S.C. 4513(a)(1)(B)(v).

⁸ See 12 U.S.C. 4511(b), 4514(a), 4517(b), 4517(e), and 4631.

⁹ 12 U.S.C. 4513(a)(1)(B)(ii).

¹⁰ See 12 U.S.C. 4513(a), 4526(a).

¹¹ 15 U.S.C. 45.

¹² See, e.g., FHFA Advisory Bulletin 2021-04: Enterprise Fair Lending and Fair Housing Compliance (Dec. 20, 2021).

I. Compliance with Section 5 of the FTC Act (15 U.S.C. 45)

The following section provides general guidance with respect to the regulated entities' compliance with UDAP prohibitions. It is intended to articulate general legal principles and give practical guidance for Section 5 compliance with respect to regulated entities' operations and is not intended to provide authoritative or definitive statements of UDAP law or provide an exhaustive list of activities that might constitute a UDAP. The examples provided are general in nature. When determining whether a UDAP has occurred, detailed examination of the facts and law are warranted in all cases. However, even situations where conduct is close to the line of illegality may raise questions about the effectiveness of a regulated entity's management of UDAP risk. The fact that an aspect of UDAP law is not covered explicitly in this Advisory Bulletin should not be construed to mean that FHFA will not enforce that aspect as part of its UDAP supervision. In its exercise of its authorities, FHFA is committed to coordinating with other agencies as appropriate.

A. Covered Regulated Entity Activities

Section 5 of the FTC Act prohibits “unfair or deceptive acts or practices in or affecting commerce,” which can encompass a broad range of activities of FHFA’s regulated entities.¹³ Activities¹⁴ covered by Section 5 of the FTC Act include, but are not limited to:

- Purchasing loans (including setting terms and conditions for purchase);
- Providing loans or financial assistance (such as preferential guarantee fee pricing, advances, grants, free or discounted services in connection with a loan or tenancy);
- Participating in credit decisions;
- Selling dwellings (such as through the disposition of Real Estate Owned (REO) properties);
- Advertising, communications, and statements;
- Setting standards for appraisals and relying on appraisals in purchasing loans;
- Making decisions related to loss mitigation in the servicing of loans (including establishing standards for such decisions);

¹³ 15 U.S.C. 45(a)(1).

¹⁴ The term “loans” as used in the non-exhaustive list of covered activities refers to loans for both single family and multifamily properties.

- Pooling, packaging, and securitizing loans, as well as marketing and selling such securities;
- Establishing policies and procedures for grants and advances, including those made under housing and community investment programs such as the FHLBanks' Affordable Housing Programs, Community Investment Programs, Community Investment Cash Advance Programs, and voluntary programs; and
- Using algorithms and models, including Artificial Intelligence/Machine Learning (AI/ML) models, and other automated systems related to these activities.¹⁵

Activities of the regulated entities have significant impacts on consumers. For example, the Enterprises maintain underwriting models and other automated systems as well as selling and servicing standards that have substantial potential to affect consumers and the housing finance market.¹⁶ There are certain circumstances involving mortgage servicing and disposition of REO properties where the regulated entities or their agents interact with consumers. Enterprise policies, standards, and actions related to multifamily lending can impact the tenants living in multifamily properties.¹⁷ The regulated entities also provide consumer education and outreach services to borrowers and applicants. UDAP protections, moreover, apply to both natural person consumers and non-natural persons such as business entities.¹⁸ The regulated entities have a duty to ensure that their dealings with parties protected by UDAP standards are compliant and that their dealings that affect primary market lenders and servicers are consistent with Section 5.¹⁹

B. Direct and Vicarious Liability and Third-Party Relationships

In general, liability for UDAP violations may be either direct or vicarious, and may include violations that arise from the conduct of employees, agents, and third parties in certain

¹⁵ For purposes of this Advisory Bulletin, artificial intelligence broadly refers to the development and application of computational tools and computer systems able to perform tasks normally requiring human intelligence, and machine learning is a sub-category of AI described as algorithms that optimize automatically through experience and with limited or no human intervention. See FHFA Advisory Bulletin 2022-02: Artificial Intelligence/Machine Learning Risk Management (Feb. 10, 2022).

¹⁶ See 89 FR at 42776.

¹⁷ See FHFA Request for Input, Tenant Protections for Enterprise-Backed Multifamily Properties at 2 (May 2023), <https://www.fhfa.gov/sites/default/files/2024-01/Multifamily-Tenant-Protections-RFI.pdf>.

¹⁸ See 89 FR at 42776 (citing *Fed. Trade Comm'n v. IFC Credit Corp.*, 543 F. Supp. 2d 925, 941 (N.D. Ill. 2008)); *Fed. Trade Comm'n v. Am. Future Sys., Inc.*, Civ. Action No. 20-2266, 2021 WL 1721589, at *15 (E.D. Pa. Apr. 30, 2021) (holding that “the businesses to which [defendants] direct their alleged deceptive collection activities are ‘consumers’ entitled to protection under the FTCA”).

¹⁹ See 89 FR at 42776.

circumstances.²⁰ Above all else, a regulated entity is directly responsible for UDAP violations resulting from its own conduct. However, regulated entities may also be vicariously responsible for UDAPs that result from the conduct of its employees and agents, regardless of whether the regulated entity knew or should have known of the conduct of its agents and employees, consistent with agency law.

A regulated entity may also be liable for failing to take prompt action to correct and end UDAP violations in certain circumstances, including:

- A UDAP violation by the regulated entity's employee or agent where the regulated entity knew or should have known of the violative conduct; and
- A UDAP violation by a third party, where the regulated entity knew or should have known of the violative conduct and had the power to correct it, depending on the extent of the regulated entity's control or other legal responsibility a regulated entity may have with respect to the third party's conduct.

Facts and circumstances that may be relevant in assessing whether a regulated entity knew or should have known of the conduct include, but are not limited to:

- Instructions or guidance from the regulated entity itself;
- The nature of the relationship between the regulated entity and the third party;
- Evidence reflected in the regulated entity's collection, monitoring, or assessment of data, third party provider activities, or legal compliance;
- Credible complaints or publications;
- Risks or violations reported proactively by third party providers; and
- Judicial or regulatory enforcement or supervisory actions.

²⁰ See e.g., *Fed. Trade Comm'n v. Stefanchik*, 559 F.3d 924, 930 (9th Cir. 2009) (holding seller liable as a principal for the acts of its agent, a telemarketer, that made false and deceptive claims); *Southwest Sunsites, Inc.*, 105 F.T.C. 79 (1985), *aff'd*, 785 F.2d 1431, 1438 (9th Cir. 1986) (affirming FTC finding that land sales companies were liable for the acts of sales agent that made deceptive representations and failed to disclose material information in advertisements); *United States v. Johnson*, 541 F.2d 710, 711 (8th Cir. 1976) (holding that FTC cease and desist order for violations of Section 5 of the FTC Act applied to principal in capacity as individual and corporate officer); *Fed. Trade Comm'n v. Credit Bureau Ctr., LLC*, 235 F. Supp. 3d 1054, 1061 (N.D. Ill. 2017) (holding that seller of credit monitoring service likely had agency relationship with affiliates); *Am. Family Publishers*, 58 FR 8762, F.T.C. Dkt. 9240 (Feb. 17, 1993) (consent order) (creditor's failure to oversee activities of debt collection agencies violated Section 5 of the FTC Act).

FHFA has provided relevant guidance on assessing and managing risks related to third-party provider relationships, including oversight of single-family and multifamily seller/servicer relationships.²¹ In doing so, FHFA has emphasized the importance of assessing, monitoring, and taking corrective action related to legal, compliance, and reputation risks associated with potential sellers and servicers, including risks associated with compliance programs, records of compliance, and other relevant information related to compliance with all applicable laws and regulations, including consumer protection laws.²² The FTC as well as federal prudential regulators that oversee UDAP compliance for federally regulated financial institutions have also identified that third-party relationships can expose regulated entities to UDAP liability, and have emphasized the importance of managing risks associated with third-party relationships.²³

C. Unfair Acts or Practices

An act or practice is unfair when:

- (1) It causes or is likely to cause substantial injury to consumers;
- (2) The injury cannot be reasonably avoided by consumers; and
- (3) The injury is not outweighed by countervailing benefits to consumers or to competition.²⁴

An act or practice that causes substantial injury often involves monetary harm, such as costs or other fees as a result of the unfair practice. It can also involve the lost ability to obtain a product or service. Even a small amount of harm may be deemed to cause substantial injury if it affects a large number of people. It is not necessary to show actual injury—showing that an act or practice

²¹ See, e.g., FHFA Advisory Bulletin 2018-08: Oversight of Third-Party Provider Relationships (Sept. 28, 2018); FHFA Advisory Bulletin 2018-05: Oversight of Multifamily Seller-Servicer Relationships (Aug. 14, 2018); FHFA Advisory Bulletin 2014-07: Oversight of Single-Family Seller/Servicer Relationships (Dec. 1, 2014).

²² FHFA Advisory Bulletin 2018-05 at 4-6; FHFA Advisory Bulletin 2014-07 at 4.

²³ See, e.g., *In re Columbus Bank and Trust Company, First Bank of Delaware, First Bank and Trust (Brookings, South Dakota), and CompuCredit Corporation* (June 10, 2008); FDIC Consumer Compliance Exam Manual Section VII (June 2022); OCC Comptroller's Handbook, Unfair or Deceptive Acts or Practices and Unfair, Deceptive, or Abusive Acts or Practices (June 2020); Federal Reserve Board Supervisory Manual, Consumer Compliance Handbook, Federal Trade Commission Act Section 5: Unfair or Deceptive Acts or Practices (Dec. 2016); NCUA Federal Consumer Protection Guide, Unfair, Deceptive, or Abusive Acts or Practices (UDAAP) (Oct. 30, 2019); FTC Business Blog, Multi-party liability (Jan. 29, 2021).

²⁴ 15 U.S.C. 45(n); see also, e.g., FTC Policy Statement on Unfairness (Dec. 17, 1980); CFPB Unfair, Deceptive, or Abusive Acts or Practices Examination Procedures at 1-2 (Oct. 2012); Federal Reserve, Consumer Compliance Handbook on Federal Trade Commission Act Section 5: Unfair or Deceptive Acts or Practices at 1 (Dec. 2016); and OCC Examination Procedures on Unfair, Deceptive or Abusive Acts or Practices at 43 (June 2020).

presents a risk of concrete harm is enough. A practice that causes trivial or speculative harm would typically not be considered the cause of a substantial injury. Emotional injuries are generally not considered substantial. In rare circumstances, however, emotional injuries such as ones caused by unreasonable debt collection measures may amount to or contribute to substantial injury where such injury can be clearly demonstrated.

Consumers cannot reasonably avoid the injury if the act or practice interferes with their ability to effectively make decisions or take action to avoid the injury. If material information about a product or service is modified after, or withheld until after, the consumer has committed to obtaining the product or service, the consumer cannot reasonably avoid the injury. In addition, an injury is not reasonably avoidable if consumers are subject to undue influence or coerced into making decisions, or if a transaction occurs without their knowledge or consent. The onus is on the regulated entities to show that their behavior does not hinder consumer decision-making. Practices that widely influence the housing finance market in a way that prevent consumers from identifying alternative products or terms may cause injuries that are not reasonably avoidable.

Finally, to be unfair, the act or practice must be injurious in its net effects—that is, the injury must not be outweighed by any countervailing consumer or competitive benefits that also are produced by the act or practice. For example, acts or practices that engender competition that results in lower prices to the consumer or greater availability of products and services may offset consumer injury. An analysis of the net effects includes not only the costs and harm to the consumer but also costs that would be incurred for measures to prevent the injury. They may also include the costs to society as a whole of any increased burden. The obligations in the regulated entities' charters are also relevant considerations when analyzing net effects. For example, an analysis may account for significant obstacles to a regulated entity's ability to conduct business in a safe and sound manner, or to provide liquidity and stability to the housing market.

Public policy, as established by statute, regulation, judicial decision, or agency determination, may be considered with all other evidence to determine whether an act or practice is unfair. Specific sources of public policy may include, but are not limited to, FHFA's duty to affirmatively further fair housing; statutes enforced by FHFA in addition to Section 5 of the FTC

Act; and the purposes delineated in the regulated entities' authorizing statutes.²⁵ However, public policy considerations by themselves may not serve as the primary basis for determining that an act or practice is unfair.²⁶ The following examples provide a non-exhaustive list of acts and practices that could be considered unfair.

Example: Suppose that a servicer acting at the direction of an Enterprise fails to properly credit payments and therefore improperly assesses the borrower late fees despite having received payments on time and a letter from the borrower informing them that the payment date recorded was incorrect.²⁷ Such conduct could constitute an unfair act or practice because it causes substantial injury by requiring the borrower to pay inapplicable late fees, is not reasonably avoidable because the borrower does not control the payment date recorded by the servicer, and is not outweighed by relevant countervailing benefits.

Example: Suppose an Enterprise knows or should have known that fees and charges were being assessed to tenants for services that were never being performed by a borrower and/or property manager of an underlying multifamily property, the issue was brought to the Enterprise's attention by its servicer, and the Enterprise does not promptly respond with actions within its control. Such conduct could constitute an unfair act or practice because it causes substantial injury in the form of the underlying harms, is not reasonably avoidable by those injured, and is not outweighed by relevant countervailing benefits. The UDAP analysis is also informed by the Enterprise's deficient third-party oversight.

Example: Suppose an Enterprise, through its automated underwriting system, disfavors low-income applicants for a refinance loan compared to applicants with higher income but equivalent debt-to-income and other qualifying characteristics. Such conduct could constitute an unfair practice because it causes substantial injury in the form of the denial of credit opportunities, is not reasonably avoidable by the consumer, and is not outweighed by relevant countervailing benefits. The UDAP analysis is informed by the

²⁵ Purposes delineated in the regulated entities' authorizing statutes include but are not limited to the principles of safety and soundness, the duty to provide liquidity and stability to the U.S. housing market, and the duty to promote access to affordable mortgage credit and quality housing.

²⁶ 15 U.S.C. 45(n).

²⁷ Facts and circumstances that may be relevant in assessing whether a third party is acting at the direction of a regulated entity include, but are not limited to, requirements or instructions in selling and servicing guides, contractual relationships, the existence of an agency relationship, or other communications with or to third-party providers.

public policy purpose of serving low-income borrowers, as demonstrated by the fact that the Enterprise is required by its charter and other statutes enforced by FHFA to serve low-income borrowers.²⁸

Example: Suppose an applicant for FHLBank membership has or may have engaged in predatory lending practices constituting a UDAP involving mortgage loans and is subject to a public regulatory enforcement action for its conduct at the time of application. The FHLBank fails to take appropriate action under the character of management requirement of the Federal Home Loan Bank Act and FHFA regulations.²⁹ The FHLBank's actions generally acquiesce to the conduct and further continuance of the predatory conduct. Such conduct could constitute an unfair practice because the underlying conduct causes substantial injury which is not reasonably avoidable and is not outweighed by relevant countervailing benefits. The UDAP analysis is informed by the public policy purpose of ensuring an FHLBank member's character of its management and its home financing policy are consistent with sound and economical home financing.³⁰ The UDAP analysis is also informed by the FHLBank's deficient third-party oversight.

The following example provides an example of appropriate compliance with UDAP standards to avoid committing an unfair act or practice.

Example: Suppose a member institution of an FHLBank has or may have engaged in predatory lending practices involving mortgage loans that are pledged as collateral to the FHLBank or otherwise supported by FHLBank programs. To ensure compliance with UDAP requirements, the FHLBank takes appropriate, timely action under its anti-predatory lending policy and removes said loans, notifying the member that they are no longer considered to be pledged collateral.³¹ The FHLBank's actions would represent a prompt response with actions within its control. Such conduct could be considered compliant with UDAP standards described in this advisory bulletin.

²⁸ 12 U.S.C. 1716(3), 12 U.S.C. 1451 note (b)(3), 12 U.S.C. 4501(7), 12 U.S.C. 4562, 12 U.S.C. 4565.

²⁹ 12 U.S.C. 1424(a)(2)(c); 12 C.F.R. 1263.12 (character of management bank membership requirement); 12 C.F.R. 1263.17 (rebuttable presumptions related to bank membership requirements).

³⁰ 12 U.S.C. 1424(a)(2)(c).

³¹ *See, e.g.*, FHFA Advisory Bulletin 2005-08: Guidance on Federal Home Loan Bank Anti-Predatory Lending Policies at 2 (Aug. 25, 2005) ("Each FHLBank must have in place comprehensive anti-predatory lending policies to govern the FHLBank's purchasing of mortgages and calculating the level of advances that can be made to its members.")

D. Deceptive Acts or Practices

A representation, omission, or practice is deceptive when:

- (1) The representation, omission, or practice misleads or is likely to mislead the consumer;
- (2) The consumer's interpretation of the representation, omission, or practice is reasonable under the circumstances; and
- (3) The misleading representation, omission, or practice is material.³²

Deception is not limited to situations in which a person has already been misled. An act or practice may also be deceptive if it is *likely to mislead*. Whether a representation, omission, or practice misleads or is likely to mislead is considered within the context of the entire communication, transaction or dealing. Practices that can be misleading include false oral and written misrepresentations, bait-and-switch techniques, the omission of material terms and conditions, and failure to provide promised terms and conditions.

Written disclosures may be insufficient to correct a misleading statement or representation, particularly where the consumer is directed away from qualifying limitations in the text or is counseled that reading the disclosures is unnecessary.³³ Likewise, oral or fine print disclosures or contract disclosures may be insufficient to cure a misleading headline or a prominent written representation. Depending on the circumstances, subsequent written disclosures containing accurate information about terms, conditions, requirements, benefits or material limitations of a product or service may be insufficient to correct a misleading representation.

Determining whether an act or practice is deceptive requires considering whether the consumer's interpretation of the representation, omission, or practice is reasonable under the circumstances.³⁴ This inquiry is evaluated from the perspective of any specific audience to which

³² See FTC Policy Statement on Deception (Oct. 14, 1983); see also CFPB Unfair, Deceptive, or Abusive Acts or Practices Examination Procedures at 5 (Oct. 2012); Federal Reserve, Consumer Compliance Handbook on Federal Trade Commission Act Section 5: Unfair or Deceptive Acts or Practices at 1 (Dec. 2016); and OCC Examination Procedures on Unfair, Deceptive or Abusive Acts or Practices at 44 (June 2020).

³³ The FTC has articulated a "4Ps" test to help determine whether a disclosure is clear and conspicuous or likely to mislead. That test considers prominence, presentation, placement, and proximity. See FTC, *Full Disclosure* (September 23, 2014), <https://www.ftc.gov/business-guidance/blog/2014/09/full-disclosure>; See also CFPB Unfair, Deceptive, or Abusive Acts or Practices Examination Procedures at 5-6 (Oct. 2012).

³⁴ See FTC Policy Statement on Deception at 2-5; Federal Reserve, Consumer Compliance Handbook on Federal Trade Commission Act Section 5: Unfair or Deceptive Acts or Practices at 9 (Dec. 2016).

the representation, omission, or practice was targeted, or which was reasonably foreseeable. The key is how a reasonable member of the target audience would interpret the representation, omission, or practice. For example, when representations target a specific audience, such as older, young, vulnerable, underserved or financially distressed consumers, the communication must be reviewed from the point of view of a reasonable member of that group. In some cases, a consumer may be misled even though most consumers in the target group would not be. A significant minority of consumers being misled would be an indication that the consumer's reaction or interpretation is reasonable. If a representation conveys two or more meanings to reasonable consumers and one meaning is misleading, the representation may be deceptive. Finally, deception requires that a representation, omission, or practice materially affects or is likely to materially affect a consumer's choice of or conduct regarding a product or service. Information that is important to consumers is material. This includes but is not limited to information about costs, benefits, or significant limitations or requirements related to a product or service..

A representation may be an express or implied claim or promise, and it may be written or oral. An express claim about a product or service is presumed to be material. An implied claim is presumed to be material when evidence shows that it was implied intentionally. A claim made with knowledge that it is false is presumed to be material. An omission is presumed material when it is made by someone who knows or should know that the consumer needs the omitted information to evaluate the product or service. If material information is necessary to prevent a consumer from being misled, it may be deceptive to omit that information. The following examples provide a non-exhaustive list of acts and practices that could be considered deceptive.

Example: Suppose that an FHLBank member acting at the direction of its FHLBank makes a statement misrepresenting eligibility criteria for the FHLBank's downpayment assistance program that discourages borrowers from applying for assistance. These actions could constitute deceptive acts or practices because they would likely materially mislead a reasonable consumer.

Example: Suppose that the owner of a multifamily housing property with an Enterprise-acquired loan advertises units as "move-in ready," claims the units have passed a quality assurance inspection, and lists apartment features. However, the units require immediate

repairs, violate local health and safety codes, and do not include the advertised features. The Enterprise's servicer has failed to appropriately identify or correct these issues, including noncompliance with Enterprise requirements, and the Enterprise knows or should have known of the servicer's deficiencies but fails to promptly respond with actions within its control. Such conduct could constitute deceptive acts or practices because they would likely materially mislead a reasonable consumer. The UDAP analysis is also informed by the Enterprise's deficient third-party oversight.

Example: Suppose that a servicer becomes aware through a lease agreement review, and additional credible consumer complaints and information, that a borrower and/or property manager of an underlying multifamily property advertised a monthly leasing price that does not include mandatory monthly fees that tenants must pay. The servicer makes an Enterprise aware of this information, and the Enterprise does not follow up on that information in a servicer review and fails to promptly respond with actions within the Enterprise's control. Such conduct could constitute deceptive acts or practices because they would likely materially mislead a reasonable consumer. The UDAP analysis is also informed by the Enterprise's deficient third-party oversight.

Example: Suppose that an Enterprise amends its Seller Guide to require or encourage seller notifications to borrowers that would conflict with notifications that are otherwise required by law or would misrepresent consumers' legal rights or protections. Such conduct could constitute deceptive acts or practices because they would likely materially mislead a reasonable consumer.

Example: Suppose an Enterprise advertisement for an REO property on the Enterprise's website states that the property features a new roof installed within the last year and a clear pest report and does not mention risk of floods or flood history. However, the most recent roof installation was over five years ago, no pest report was commissioned, and the property flooded several times in recent years. Those statements on the website could constitute deceptive acts or practices because they would likely materially mislead a reasonable consumer.

II. Effective Regulated Entity UDAP Risk Management

The following section provides general guidance on FHFA's expectations for effective UDAP risk management. This Advisory Bulletin does not affect or supersede other FHFA supervisory guidance on risk management, including guidance on regulated entities' oversight of third-party provider relationships, compliance risk management, and model risk management.

The regulated entities are required to regularly certify compliance with Section 5 of the FTC Act.³⁵ FHFA expects the regulated entities to effectively identify, assess, monitor, and mitigate UDAP risk and prevent the occurrence of UDAP violations in their operations. UDAP risk includes violations of Section 5 of the FTC Act or conditions that permit the occurrence of UDAP violations. In this way, UDAP risk poses both management and operational risks. The consequences of violating UDAP prohibitions can include litigation, enforcement actions (including civil money penalties), and monetary restitution.

Effectively monitoring for UDAP risk requires appropriate board of directors and management oversight and support, and the cooperation from business and operational areas.³⁶ Clear expectations that operational areas must take steps necessary to implement controls to mitigate UDAP risk and prevent the occurrence of UDAP violations should be underscored by board and management support. The board should oversee and management should implement effective processes to manage UDAP risk. To assist the board in oversight of UDAP risk, management should provide the board with regular reports on the regulated entity's management of UDAP risks, including risks associated with third parties. Regulated entity personnel responsible for UDAP risk management should have management support, with board oversight, in conducting their work free from interference or retaliation. Cooperation with FHFA in its oversight of the regulated entity is also an important element of managing UDAP risk and an expectation of FHFA.

The following section provides general guidelines that illustrate the types of actions that could be taken by the regulated entities to manage UDAP risks.

³⁵ 89 FR at 42777; 12 C.F.R. 1293.11(b).

³⁶ While the board of directors may delegate the execution of operations to management and other staff at the regulated entity, the board is ultimately responsible for having adequate policies in place to oversee compliance. 12 C.F.R. 1293.11(c); 12 C.F.R. 1293.4(b)(4)

A. Risk Management

The regulated entities should identify, assess, monitor, and mitigate UDAP risk. UDAP risk arising from the regulated entities' own conduct should be the first and foremost concern with respect to risk management, but third party UDAP risks should also be addressed. The regulated entities should implement effective policies and procedures that provide guidelines and standards for managing UDAP risk in the regulated entities' activities. Regulated entities should identify, assess, monitor, and mitigate UDAP risk, including risks arising from third-party relationships, commensurate with the level of risk presented in the activity, the nature of the activity, the scale and size of the product or service, and the inherent risk presented in the activity.³⁷

B. Identifying UDAP Risk

The risks associated with UDAP include legal, compliance, credit, operational, strategic, and reputational risks. Identifying UDAP risk necessitates assigning this task to personnel knowledgeable in UDAP law and guidance as well as regulated entity activities and business operations. The regulated entities should perform recurring risk assessments to identify operational areas where UDAP risk may be present.

C. Assessing UDAP Risk

Assessing UDAP risk involves the assessment of operational areas using both qualitative and quantitative methods to accurately assess the amount and nature of the UDAP risk present in an operational area. When assessing UDAP risk, the regulated entities should consider the level of risk associated with a particular operational area, including the volume of products or services offered, the potential for consumer or other party harm, the complexity, and the risk profile.

D. Monitoring UDAP Risk

Monitoring UDAP risk involves having processes in place to monitor the identification and assessment of UDAP risk in an operational area to ensure that identification and assessment remain up to date and accurate. Operational areas include but are not limited to:

- Policies and procedures;
- Seller/servicer guides;

³⁷ See FHFA, AB 2018-08: Oversight of Third-Party Provider Relationships.

- Board of directors and management oversight;
- Internal controls, such as audit and monitoring processes;
- Third-party relationships, including contractual arrangements related to loan servicing and collection activities conducted by third parties on behalf of the regulated entities;
- Disclosures and statements provided to lenders, servicers, borrowers, and tenants by, on behalf of, or associated with services or conditions related to the regulated entities;
- Advertising, promotional, and marketing materials;
- Complaints, including resolution processes; and
- Algorithms and models, including AI/ML models and other automated systems, related to regulated entity activities.³⁸

Monitoring for UDAP risks may be incorporated in existing compliance risk assessments or other operational risk assessments, including routine monitoring and assessments of sellers, servicers, and other third parties.

E. Mitigating UDAP Risk

Mitigating UDAP risk involves creating and supporting a control environment around operational areas where UDAP risk is identified and assessed to effectively mitigate the risk. Appropriate training both at a general level and a level specific to an operational area's particular UDAP risks is an important component of mitigating UDAP risk.

Because the regulated entities' responsibilities for compliance with UDAP requirements extend to agents and, in some cases, other third parties, third-party risk management is an important component of mitigating UDAP risk. Regulated entities should collect data and information sufficient to enable an assessment of UDAP risks, including demonstration of third-party compliance. Assessment of UDAP risks can also be built into existing third-party reviews and quality control processes. Regulated entities are ultimately responsible for managing activities conducted through third-party relationships and identifying and controlling the risks arising from such relationships. Both the board and management are responsible for identifying and controlling the risks related to third-party provider relationships through oversight and risk management implementation, respectively. The more significant the third-party program, the

³⁸ See FHFA Advisory Bulletin 2022-02: Artificial Intelligence/Machine Learning Risk Management (Feb. 10, 2022).

more important it is that the regulated entity conduct regular periodic reviews of the adequacy of its oversight and controls over third-party relationships. While a regulated entity may seek to mitigate its economic risks from third-party relationships through the use of indemnity agreements with third parties, such agreements do not insulate the regulated entity from its full responsibility to conduct its activities in a safe and sound manner and in compliance with applicable laws and regulations, including UDAP prohibitions. Among other risk mitigation tools, regulated entities should assess the appropriateness of invoking contractual remedies, such as loan repurchases, with third parties that either pose serious risks of UDAP violations or breach their representations and warranties that they comply with applicable law and regulations.

F. Preventing the Occurrence of UDAP Violations

Preventing UDAP violations is a core component of effectively mitigating risk, and failure to prevent UDAP violations is an indication that UDAP risk has not been appropriately identified, assessed, monitored, and mitigated. Such failure can also indicate that a regulated entity has not adequately implemented controls in an operational area or taken the steps necessary to mitigate UDAP risk in that area—a broader compliance issue for that operational area and an issue implicating board and management oversight of the operations of the regulated entity and their support for preventing UDAP violations.

G. Cooperation

Cooperation is an important element of preventing UDAP violations and an expectation that FHFA has for all operational areas of the regulated entities. Cooperation is expected of both business and operational areas with respect to the regulated entities' internal UDAP management and oversight, as well as with FHFA in conducting UDAP supervision. Cooperation includes the sharing of complete information requested by FHFA during supervision. As is true with fair lending compliance, FHFA encourages self-reporting by the regulated entities of potential UDAP violations, which FHFA views favorably in exercising its supervisory and enforcement discretion.³⁹

³⁹ FHFA Advisory Bulletin 2021-04: Enterprise Fair Lending and Fair Housing Compliance at 11 (Dec. 20, 2021).

III. Common UDAP Risk Factors

Certain risk factors are commonly associated with higher UDAP risk and the existence of conditions under which UDAP violations may occur. FHFA's expectation is that the regulated entities will take account of these risks and establish appropriate compliance controls when they are present. Failure to appropriately mitigate UDAP risk that occurs because of UDAP risk factors can result in supervisory findings by FHFA depending on the facts and circumstances.

Risk factors commonly associated with higher UDAP risk that could lead to substantial injury, inability of consumers to reasonably avoid injury, misleading statements, or other similar circumstances include:

- Lack of board and management oversight of compliance;
- Substantial discretion, either within or delegated by a regulated entity, to make decisions related to transactions or underlying properties;
- Lack of clear policies, procedures, business rules, or decision criteria;
- Use of factors in decision-making that are subjective rather than objective;
- Policies impacting outcomes that have not undergone review for effectiveness or appropriateness for a significant period of time;
- Compensation criteria or other incentives that could lead to unfair or deceptive outcomes;
- Reliance on third parties without appropriate oversight;
- Unreliable or incomplete data;
- Consumer complaints, including improper handling and monitoring of consumer complaints;
- Employee statements indicating awareness of substantial injury, inability of consumers to reasonably avoid injury, misleading statements, or other similar circumstances;
- New products and services, particularly those targeted to those with limited experience with financial services and those vulnerable to financial abuse, such as the elderly, young people, limited English proficiency (LEP) individuals, or financially distressed individuals;
- Lack of internal controls over products and services, including the use of disclosures and other materials to ensure understanding by consumers;

- Lack of internal controls over highly automated systems or environments that support regulated entity activities; and
- Lack of proper training for employees and third parties.

IV. Promoting Compliance

The regulated entities play a unique and important role in the housing finance market, and their operations and policies can promote compliance with Section 5 and further the purposes of UDAP principles and the public interest. FHFA encourages each regulated entity to promote compliance by its third parties with Section 5 of the FTC Act and the purposes of UDAP principles while furthering their public purposes in the housing finance markets. While such actions are not a substitute for ensuring compliance with Section 5 in a regulated entity's own operations or compliance with associated requirements, they demonstrate a commitment to promoting consumer protection that FHFA encourages and recognizes. A regulated entity that takes such actions to promote consumer protection is encouraged to document them and to provide them to FHFA, even when not required to by other FHFA requirements.

V. Relationship to Other Laws

A violation of Section 5 of the FTC Act may also be a violation of other federal or state laws, including fair housing, fair lending, and other consumer protection laws. Conversely, a transaction that is in technical compliance with other federal or state laws may nevertheless violate Section 5 of the FTC Act.

VI. FHFA Conservatorship Requirements

While the Enterprises are in conservatorship, FHFA's conservatorship function for each Enterprise also includes UDAP oversight. FHFA conservatorship directives may include requirements associated with Section 5 compliance or intended to further UDAP principles. FHFA expects each Enterprise to comply with these requirements and have available information demonstrating compliance for supervisory review.

Related Guidance and Regulations

I. Federal UDAP Laws and Regulations

- Section 5 of the Federal Trade Commission Act — 15 U.S.C. 45

- Consumer Financial Protection Act of 2010 (CFPA) – 12 U.S.C. 5536(a)(1)(B), 5531(c)(1)
- Fair Housing, Fair Lending, and Unfair or Deceptive Acts or Practices Compliance – 12 CFR part 1293

II. Federal UDAP Guidance

The following resources are issued by federal agencies related to UDAP matters within their respective jurisdictions. They may provide helpful guidance on the application of Section 5 of the FTC Act or examination and investigation procedures and methods in a variety of contexts. While FHFA considers the resources relevant and helpful guidance, the list of resources is not intended to be comprehensive, nor are these resources binding on FHFA or the regulated entities. FHFA carefully considers the full context of the facts and law in any particular matter involving the regulated entities' compliance with Section 5.

- FTC Policy Statement on Unfairness, available at <https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness>
- FTC Policy Statement on Deception, available at <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>
- OCC Guidance on Unfair or Deceptive Acts or Practices AL 2002-3, available at <https://www.occ.treas.gov/news-issuances/advisory-letters/2002/advisory-letter-2002-3.pdf>
- Interagency Guidance Regarding Unfair or Deceptive Credit Practices, available at <https://www.fdic.gov/news/financial-institution-letters/2014/fil14044.html>
- Federal Reserve & FDIC, Unfair or Deceptive Acts or Practices by State-Chartered Banks, available at <https://www.federalreserve.gov/boarddocs/press/bcreg/2004/20040311/attachment.pdf>
- CFPB Examination Procedures on Unfair, Deceptive, or Abusive Acts or Practices, available at <https://www.consumerfinance.gov/compliance/supervision-examinations/unfair-deceptive-or-abusive-acts-or-practices-udaaps-examination-procedures/>

- OCC Examination Procedures on Unfair, Deceptive or Abusive Acts or Practices, available at <https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-handbook/files/unfair-deceptive-act/index-udaap.html>
- Federal Reserve, Consumer Compliance Handbook on Federal Trade Commission Act Section 5: Unfair or Deceptive Acts or Practices, available at <https://www.federalreserve.gov/boarddocs/supmanual/cch/cch.pdf>
- FDIC Consumer Compliance Examination Manual (June 2022) available at <https://www.fdic.gov/resources/supervision-and-examinations/consumer-compliance-examination-manual/documents/7/vii-1-1.pdf>

III. Other Relevant FHFA Guidance

- Appendix to Part 1236, Prudential Management Operating Standards
- AB 2022-02 Artificial Intelligence/Machine Learning Risk Management
- AB 2021-04 Enterprise Fair Lending and Fair Housing Compliance
- AB 2020-06 Enterprise Risk Management Program
- AB 2019-05 Compliance Risk Management
- AB 2018-08 Oversight of Third-Party Provider Relationships
- AB 2018-05 Oversight of Multifamily Seller/Service Relationships
- AB 2017-01 Classification of Adverse Examination Findings
- AB 2014-07 Oversight of Single-Family Seller/Service Relationships
- AB 2013-07 Model Risk Management Guidance
- AB 2013-03 FHFA Enforcement Policy
- AB 2005-08 Guidance on Federal Home Loan Bank Anti-Predatory Lending Policies

FHFA has statutory responsibility to ensure that the regulated entities carry out their missions consistently with the provisions and purposes of FHFA's statute and the regulated entities' authorizing statutes and applicable law. Advisory Bulletins describe supervisory expectations in particular areas and are used in FHFA examinations of the regulated entities. For comments or questions pertaining to this Advisory Bulletin, contact PublicInterest@fhfa.gov.