protiviti®
Face the Future with Confidence

Compliance Insights

Your monthly compliance news roundup

Nov - Dec
2018

UDAAP: Further Clarification Forthcoming on "Abusive" Acts and Practices

Since the passage of the Dodd-Frank Act (DFA), the financial services industry has raised concerns related to the Bureau of Consumer Financial Protection's (BCFP, or Bureau) authority to take action against financial institutions engaging in unfair, deceptive or abusive acts or practices (UDAAP), in particular related to acts or practices deemed "abusive." The DFA added "abusive acts" to the long-standing concept of unfair or deceptive acts or practices (UDAP) as defined by the Federal Trade Commission Act and subsequent rulings, and provided the BCFP with the authority to engage in rulemaking and to take enforcement actions to prohibit UDAAP related to consumer financial products and services.

Per the DFA, an abusive act or practice is one that:

- Materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
- 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 the interests of the consumer 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 DFA did not, however, provide more specific details regarding what acts or practices are "abusive" under the statute. Unlike the terms "unfair" or "deceptive," for which statutes, policy statements, case law, and regulatory requirements have been in place for many years, the term "abusive" was first introduced by and defined only in the DFA. As a result, the industry has looked to regulatory enforcement actions, which provide limited guidance to industry participants on the types of acts or practices that are distinctively abusive, and any other guidance available from the Bureau on the topic.

The Bureau has previously indicated that it would consider rulemaking related to the definition of abusive but not until some time had passed to gain perspective on the application of the statutory language. Recently, in the preamble to its Fall 2018 semi-annual regulatory agenda, the Bureau indicated that it will consider whether rulemaking or other activities may be helpful to further clarify the meaning of this term.

The possibility of a forthcoming rulemaking addressing the abusive standard should be monitored closely by the financial services industry. In the meanwhile, financial institutions should continue to monitor regulatory guidance and enforcement activities for any indication of acts or practices that could be considered abusive and ensure that their responsible and fair banking programs continue to assess products, services, processes and practices for potential UDAAP, and initiate appropriate risk mitigation.

Federal Banking Agencies Issue Frequently Asked Questions on the Appraisal Regulations

In October 2018, The Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (Board), and the Federal Deposit Insurance Corporation (FDIC) collectively issued Frequently Asked Questions on the Appraisal Regulations and the Interagency Appraisal and Evaluation Guidelines (FAQs). These FAQs supersede the Frequently Asked Questions on the Appraisal Regulations and the Interagency Statement on Independent Appraisal and Evaluation Functions issued on March 22, 2005. The FAQs communicate policy and interpretations surrounding the Agencies' appraisal regulations, real estate lending standards, the Interagency Appraisal and Evaluation Guidelines, and the Interagency Advisory on the Use of Evaluations in Real Estate-Related Financial Transactions.

While the FAQs do not implement new policy or guidelines, financial institutions should be aware of the areas covered by the FAQs, which include:

- Appraisal and Evaluation Programs – addressing the importance of establishing the market value for properties securing loans, identifying transactions that require appraisals, and the information that should be contained in evaluations;
- Appraisal Exemptions – clarifying circumstances where an appraisal may not be required and circumstances where an appraisal may be advisable on a renewal; and

- Appraisal Independence – reiterating the requirements of appraisal independence with respect to the various parties involved in a transaction.

Additionally, the FAQs provide several examples/scenarios that institutions may find helpful in determining whether an appraisal is required on a transaction. Institutions should note that the FAQs do not address the rules regarding appraisals for higher-priced mortgage loans.

Considering these updated FAQs, institutions should review policies and procedures for appraisal evaluations to verify consistency with the regulations and the FAQs. They should also assess policies regarding the selection of an appraiser or persons who perform evaluations, and perform a review of a sample of appraisals to determine whether the institution's minimum appraisal standards, appraisal policies and procedures, and independence requirements were followed.

The Benefit of Sharing BSA/AML Resources

In October 2018, the Board of Governors of the Federal Reserve Banking System (FRB), the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Administration (NCUA), the Office of the Comptroller of the Currency (OCC), and the U.S. Department of Treasury's Financial Crimes Enforcement Network (FinCEN) (collectively, the Agencies), released an Interagency Statement (the Interagency Statement) on sharing resources in an effort to help financial institutions manage Bank Secrecy Act and anti-money laundering (BSA/AML) compliance obligations more effectively. The Interagency Statement highlights the benefits and risks of collaboration by detailing specific examples in which entering into a collaborative agreement may benefit financial institutions, especially smaller ones with similar risk profiles, and provides several examples along with risk mitigation considerations.

The idea of pooling resources is not new, and many of the views in this Interagency Statement echo those in a statement issued by the OCC in January 2015: An Opportunity for Community Banks: Working Together Collaboratively. The Interagency Statement defines collaborative agreements as those involving two or more banks with the common objective of sharing related resources, including both staff and technology, to, among other things, improve efficiency, strengthen internal controls and reduce costs. Included in the statement are several examples where collaborative agreements may be worthwhile, such as drafting and reviewing policies and procedures, performing independent testing and/or quality assurance on another institution's BSA/AML compliance program, and sharing training costs.

In addition to including the benefits of collaborating on BSA/AML-related resources, the Interagency Statement cautioned that clear delineation of roles and responsibilities, proper documentation of the collaboration agreement and adequate governance and oversight controls be in place to help ensure applicable legal and regulatory compliance is met by all involved parties. When contemplating establishing a collaborative resource agreement, financial institutions should approach it with proper due diligence and a sound understanding of its potential benefits and risks relevant to its risk appetite and profile.

About Protiviti

Protiviti is a global consulting firm that delivers deep expertise, objective insights, a tailored approach and unparalleled collaboration to help leaders confidently face the future. Protiviti and our independently owned Member Firms provide consulting solutions in finance, technology, operations, data, analytics, governance, risk and internal audit to our clients through our network of more than 70 offices in over 20 countries.

We have served more than 60 percent of *Fortune* 1000® and 35 percent of *Fortune* Global 500® companies. We also work with smaller, growing companies, including those looking to go public, as well as with government agencies. Protiviti is a wholly owned subsidiary of Robert Half (NYSE: RHI). Founded in 1948, Robert Half is a member of the S&P 500 index.

protiviti®