WHY TODAY'S COMPLIANCE OFFICER NEEDS A GOOD NOSE

UDAAP has been around longer than most think, and so has the "smell test"

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Managing compliance can be compared to many things, from obsession with putting regulatory requirements into chart form or herding cats.

We've all been there--all of the places. And there are days when a compliance manager feels like one of those modern paintings that looks like paint splattered on the canvas--complete with fur from the herded cats.

What holds it together?

Neither herding cats nor splatter management is a particularly satisfying activity. So days with a little Truth in Lending here, a fair-lending question there, an OFAC crisis (he's still in the lobby!!) there can seem confused and theme-less.

A little bit of everything, but a lot of nothing.

And the compliance program--to say nothing of the compliance manager--seems like a work in progress never to be completed.

Just like the painter, one more splat of a different color just might do it.

Or not.

Introducing a unifying theme, from an unexpected palette

There are days when we feel like something is needed to pull it all together--a theme of some sort.

Well, compliance does have a theme. Underlying everything is UDAAP--even when the regulation is named something else--like Truth in Savings.

Specific compliance laws, such as the Truth in Savings Act or the Fair Credit Reporting Act, address specific practices that are undesirable in some way. The regulated practices, when not regulated, can involve unfair techniques to market and deliver products, deception about terms and conditions, or downright abuse of consumers.

In short, something like Truth in Lending is a very specific UDAAP law, when viewed through a modern lens.

Then there is the general law prohibiting unfair, deceptive, or abusive acts or practices that resides in the Federal Trade Commission Act. This one is the elephant in the room because it can address everything that isn't already addressed by a more specific law. UDAAP was addressed in almost every session at ABA's 2012 Regulatory Compliance Conference and clearly emerged as a theme for compliance.

UDAAP was discussed in all of the conference's general sessions--especially the general session on UDAAP.

But it didn't stop there. UDAAP popped up in almost every conference session. It became the ultimate question. Something might be technically compliant but could it pass the UDAAP test?

So, what does it mean?

So then the question becomes what, exactly, is an unfair, deceptive, or abusive practice?

There are well-established definitions for unfair and deceptive, and a long list of enforcement actions. But the term "abusive" is new. It could mean almost anything from a clearly-defined practice to something that passes the unfairness and deception tests but still doesn't smell right.

Seeking clarification on how CFPB will approach the abusive test is something bankers have been focusing on. During the regulatory session on the conference's closing day, ABA's Rich Riese, head of the association's Center for Regulatory Compliance, put the question to Steve Antonakes, then CFPB's Assistant Director for Large Bank supervision (and since promoted).

The response was not helpful.

Antonakes simply stated that the term is defined in the statute, as though that answer should be enough. He gave no clue beyond that.

Challenge becomes regulatory DIY

Obviously, banks are on their own to figure this one out. So how can we figure out what constitutes abusive treatment?

1. One tool is consumer complaints.

Paying close attention to what customers like and don't like can provide a solid guide. And since we know that CFPB is tracking consumer complaints, it is simply prudent to pay attention to the complaints as they come in to the bank.

Consumers are quick to say what they don't like. They may write letters to complain. But they are most likely to let their objections be known when in the lobby or talking on the phone. If you want a really good system for capturing and responding to customer concerns, the lobby and customer service staff need to be involved. This is the real front line for customer concerns. And that makes it the front line for a UDAAP prevention program. (Read the ABA BJ June cover story, "Science of the Complaint," from our Digital Magazine.)

2. Cross-examine your new ideas.

Another essential element of a UDAAP prevention program is to ask, with each new idea for a product or service, who will reap the most benefit. This question was presented in a surprising number of sessions at the conference.

It is important because UDAAP is all about striking a fair balance between bank and customer.

And the correct answer to the question is that both bank and customer should benefit. If the bank benefits but the customer does not, there is likely to be a UDAAP problem.

Turning UDAAP into a test

When the balance favors the bank but provides little to the customer, it is the product idea that should be challenged and re-thought. Too often, the "solution" to this problem is addressed by a marketing campaign--one that involves stressing some features and minimizing or even hiding others. (Enter deception, stage right.)

And then there is abusive--whenever unfair or deceptive don't do the trick. It may be defined in the Dodd-Frank Act, but it can mean almost anything. Here the test is also based on customer benefit.

Something that benefits only the bank is not going to pass the UDAAP test, whichever test is used. A practice or product that actually takes advantage of the customer is likely to be considered abusive. This could be the case even if the product or service also provides a customer benefit.

The bottom line is that everything the bank does should be measured against the UDAAP test today.

This means both the established measurements set out by the Federal Trade Commission for unfair and deceptive as well as the growing smell test for what abusive might mean.

This is going to call for creative thinking--and strong noses.

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About Lucy Griffin

"Lucy and Nancy's Common Sense Compliance" is blogged by both Lucy Griffin and Nancy Derr-Castiglione, both longtime ABA Banking Journal contributing editors on compliance.

- Lucy, a Certified Regulatory Compliance Manager, has over 30 years experience in compliance. She began as a regulator, including stints with the Federal Reserve Board, the Federal Trade Commission, and the Federal Home Loan Bank Board. For many years she managed the ABA Compliance Division. Since 1993 she has served as a compliance consultant as president of Compliance Resources, Inc., Reston, Va. She is also editor of Compliance Action newsletter and senior advisor with Paragon Compliance Group, a compliance training firm.

In addition to serving as a Contributing Editor of ABA Banking Journal, Lucy serves on the faculty of ABA's National Compliance Schools board. For more than a decade she developed and administered the case study at ABA's National Graduate School of Compliance Management. She can be reached at lucygriffin@earthlink.net

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