INTEGRATING UDAAP CONSIDERATIONS INTO COMPLIANCE MANAGEMENT SYSTEMS

Compliance Management Subcommittee

ABA Consumer Financial Services Committee
Winter Meeting - Park City, Utah
Monday, January 11, 2016

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Overview

- The role of outside counsel in preventing UDAAPs
- Elements of unfairness, deception, and abusiveness
- Two unique scenarios
- Handoff to compliance

Outside Counsel's Perspective

Approaching UDAAP as Outside Counsel

- Often approached to assess a change to a specific act or practice, e.g. change or implement new marketing materials, website features, or servicing communications or practices

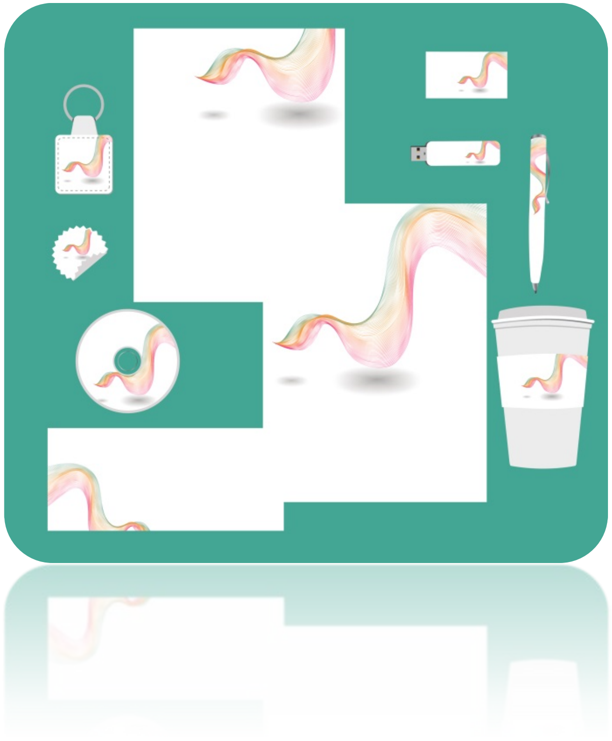
Level Set

Gather all the information you (and a regulator) may need to assess the question

- How will the customer be / how has the customer been affected by this particular action
  - Challenge to get a complete picture of what is happening

Level Set (continued)

- If changing a practice or disclosure for a product – what else has been said to the customer about that same issue?
  - Marketing materials, welcome kits, product guides, product agreements, a multitude of servicing communications (statements, letters and notices via mail and email, texts, websites, mobile apps), etc.
  - Aligning messaging and disclosures across *documents and channels* will limit UDAAP risk



Achieving Compliance

First ensure technical compliance with applicable law, e.g. Reg E or Z

- UDAAP risks tend to be assessed *after* negotiating technical compliance must-haves
- "Show me the law that says we can't do this"
  - Marching through unfairness, deception, and abusive elements
    - FDIC Guidance – FIL 26-2004
    - CFPB Exam Manual
    - Past UDAAP actions
      - Enforcement actions, bulletins, reports
      - Distinction between UDAAPs and remedial programs
    - UDAAP trends – applying analyses from one product line to another

Board / FDIC Guidance on UDAAP – FIL 26-2004

Standards for Determining What is Unfair or Deceptive

- **Assessing whether an act or practice is unfair**
  - Cause or be likely to cause substantial injury to consumers.
    - Substantial injury usually involves monetary harm. Small amount of harm to a large number of people may be deemed to cause substantial injury. Trivial or speculative harms are typically insufficient.
    - Emotional impact and other more subjective types of harm will not ordinarily make a practice unfair.
  - Consumers must not reasonably be able to avoid the injury.
    - Injury can’t be avoided if an act or practice interferes with consumer’s ability to effectively make decisions.
    - For example:
      - Withholding material price information until after the consumer has committed to purchase the product or service; or
      - Subjecting consumers to undue influence or coercing them to purchase unwanted products or services.
    - The Agencies will not second-guess the wisdom of particular consumer decisions. Instead, the Agencies will consider whether a bank's behavior unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decision-making.

Board / FDIC Guidance on UDAAP – FIL 26-2004

- **Assessing whether an act or practice is unfair cont…**
  - The injury must not be outweighed by countervailing benefits to consumers or to competition.
    - Injurious in its net effects — not outweighed by any offsetting consumer or competitive benefits, e.g. lower prices or wider availability of products and services.
    - Costs for remedies or to prevent the injury are also considered, e.g. costs to the bank in taking preventive measures and the costs to society as a whole of any increased burden and similar matters.
  - Public policy may be considered.
    - Public policy, as established by statute, regulation, or judicial decisions may be considered, e.g. violation of a state law or a banking regulation may be considered. Conversely, the fact that a particular practice is affirmatively allowed by statute may be considered as evidence that the practice is not unfair.
    - Public policy considerations by themselves, however, will not serve as the primary basis for determining that an act or practice is unfair.

Board / FDIC Guidance on UDAAP – FIL 26-2004

- **Assessing whether an act or practice is deceptive**
  - There must be a representation, omission, or practice that misleads or is likely to mislead the consumer.
    - Express or implied claims or promises may be written or oral.
    - Omissions may be deceptive if disclosure of the omitted information is necessary to prevent a consumer from being misled.
    - Not evaluated in isolation.
      - Representations evaluated in the context of the entire advertisement, transaction, or course of dealing to determine whether it constitutes deception.
    - Acts or practices that have the potential to be deceptive include:
      - Misleading cost or price claims;
      - Bait-and-switch techniques;
      - Offering to provide a product or service that is not in fact available;
      - Omitting material limitations or conditions from an offer;
      - Selling a product unfit for the purposes for which it is sold; and
      - Failing to provide promised services.

Board / FDIC Guidance on UDAAP – FIL 26-2004

- **Assessing whether an act or practice is deceptive cont…**
  - Considered from the perspective of a reasonable consumer.
    - Consumer's interpretation or reaction must be reasonable under the circumstances (in light of the claims made).
      - When targeted to a specific audience, such as the elderly or the financially unsophisticated, standard is based upon the effects of the act or practice on a reasonable member of that group.
    - If a representation conveys *two or more meanings* to reasonable consumers *and one meaning is misleading*, the representation may be deceptive.
      - Only requires a *a significant minority* of such consumers to be misled (not a majority).
    - Not evaluated in isolation. Look at the entire advertisement, transaction, or course of dealing to determine how a reasonable consumer would respond.
    - 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. Likewise, oral disclosures or fine print may be insufficient to cure a misleading headline or prominent written representation.

Board / FDIC Guidance on UDAAP – FIL 26-2004

- **Assessing whether an act or practice is deceptive cont…**
  - The representation, omission, or practice must be material.
    - Material if likely to affect a consumer's decision-making.
      - Information about costs, benefits, or restrictions on the use or availability of a product or service is material.
      - Express claims will be presumed to be material.
      - Materiality of an implied claim will be presumed when the institution intended that the consumer draw certain conclusions based upon the claim.
    - Claims made with the knowledge that they are false will also be presumed to be material.
      - Omissions will be presumed to be material when the financial institution knew or should have known that the consumer needed the omitted information to evaluate the product or service.

CFPB Exam Manual

Unfair, Deceptive, or Abusive Acts or Practices

Unfair, deceptive, or abusive acts and practices (UDAAPs) can cause significant financial injury to consumers, erode consumer confidence, and undermine the financial marketplace. Under the Dodd-Frank Act, it is unlawful for any provider of consumer financial products or services or a service provider to engage in any unfair, deceptive or abusive act or practice.[1] The Act also provides CFPB with rule-making authority and, with respect to entities within its jurisdiction, enforcement authority to prevent unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.[2] In addition, CFPB has supervisory authority for detecting and assessing risks to consumers and to markets for consumer financial products and services.[3]

As examiners review products or services, such as deposit products or lending activities, they generally should identify the risks of harm to consumers that are particular to those activities. Examiners also should review products that combine features and terms in a manner that can increase the difficulty of consumer understanding of the overall costs or risks of the product and the potential harm to the consumer associated with the product.

These examination procedures provide general guidance on:

- The principles of unfairness, deception, and abuse in the context of offering and providing consumer financial products and services;
- Assessing the risk that an institution's practices may be unfair, deceptive, or abusive;
- Identifying unfair, deceptive or abusive acts or practices (including by providing examples of potentially unfair or deceptive acts and practices); and
- Understanding the interplay between unfair, deceptive, or abusive acts or practices and other consumer protection statutes.

Unfair Acts or Practices

The standard for unfairness in the Dodd-Frank Act is that an act or practice is unfair when:

(1) It causes or is likely to cause substantial injury to consumers;

(2) The injury is not reasonably avoidable by consumers; and

[1] Dodd-Frank Act, Title X, Subtitle C, Sec. 1036; PL 111-203 (July 21, 2010).

[2] Sec. 1031 of the Dodd-Frank Act. The principles of "unfair" and "deceptive" practices in the Act are similar to those under Sec. 5 of the Federal Trade Commission Act (FTC Act). The Federal Trade Commission (FTC) and federal banking regulators have applied these standards through case law, official policy statements, guidance, examination procedures, and enforcement actions that may inform CFPB.

[3] Dodd-Frank Act, Secs. 1024; 1025(b)(1); 1026(b) of the Act.

CFPB Exam Manual

CFPB **Risk Assessment**

Entity Name:
Docket Number:

Prepared by:
Date:

The sections below include (1) factors that specifically increase the risk that unfair, deceptive, abusive acts or practices, discrimination, or other violations of Federal consumer financial law will occur and (2) factors that generally increase the difficulty of managing compliance in an organization.

Inherent Risk

Comments in each section should identify any specific factors present in the line of business or entity being assessed, note the potential UDAAP, discrimination, or other regulatory issues to review during an examination, and comment briefly on the basis for the rating assigned to that factor. The rating should reflect the degree of risk.

Nature and Structure of Products	Comments
The profitability of a product is dependent upon penalty fees (e.g., fees for a late payment, for exceeding a credit limit, or for overdrawing deposited funds).	[Click&type]
The terms of the product are subject to change at the discretion of the entity, and the entity has frequently made changes in the terms.	
The entity reverses fees at a significantly higher rate than other entities of similar size offering similar products.	
Pricing structure (interest rate, points, fees) and other features and terms are combined in a manner that is likely to make the total costs of the product difficult for consumers to understand.	
Products are bundled in a way that may obscure relative costs.	
Consumers pay penalties to terminate a relationship, including forgoing money or benefits they would otherwise earn.	

CFPB Exam Manual

CFPB **Risk Assessment**

Entity Name:
Docket Number:

Prepared by:
Date:

The considerations below bear on both the general quality of an entity's consumer compliance risk management and specifically on controlling the risks of unfair, deceptive or abusive acts or practices, discrimination, or other violations of Federal consumer financial law. The specific factors indicate strong compliance management.

QUALITY OF CONSUMER COMPLIANCE RISK CONTROLS AND MITIGATION

Comments in each section should identify any factors of concern in the line of business or entity being assessed, note particular compliance management issues to review during an examination, and comment briefly on the basis for the rating assigned to that factor. The rating should reflect the strength of compliance management.

Board of Directors and Management	Comments
The board of directors has adopted comprehensive policies that establish clear standards for compliance with applicable laws, including laws prohibiting unfair, deceptive or abusive acts or practices, and discrimination: • Policies and procedures are comprehensive and thorough. • Policies are current and consistent with consumer business activities, and reflect current laws and regulations. • A clear process exists for aligning compliance policies with changing business activities.	[Click&type]
Management's commitment to consumer compliance has been communicated throughout the regulated entity.	
The board and management receive regular and meaningful reporting with respect to consumer protection issues, consumer compliance, or complaints.	

CFPB Exam Manual

Overall Risk to Consumers				
		Quality of Risk Controls		
		Strong	Adequate	Weak
Inherent Risk	High	Moderate	High	High
	Moderate	Low	Moderate	High
	Low	Low	Low	Moderate

Past UDAAP Actions & Trends

- Precendent set in enforcement actions; UDAAPs identified in bulletins, reports, etc.
- Distinction between UDAAPs and remedial programs

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DEFINING SUCCESS TOGETHER

A Survey of Activities Identified as Unfair, Deceptive, or Abusive Under the Dodd-Frank Act

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American Bar Association Consumer Financial Services Committee
Compliance Management and Federal and State Trade Practices Subcommittees

September 17, 2015

I. Introduction

This is our latest article in a series that surveys activities identified as unfair, deceptive or abusive (UDAAP) by the CFPB, and state attorneys general and consumer financial services regulators, using federal UDAAP powers created by the Dodd-Frank Act.[1] This article covers relevant UDAAP activity that occurred between January 1, 2015 and June 30, 2015, including enforcement actions and other statements by the CFPB in reports that discuss UDAAP violations.[2] These activities provide insight into the specific types of practices that could be considered UDAAP violations in the future.

We intend to publish periodic updates to this article cataloging new CFPB UDAAP activity and related state enforcement actions using federal UDAAP powers.

II. Overview: Identification of Unfair, Deceptive, and Abusive Practices by the CFPB and by the States

Between January 1, 2015 and June 30, 2015, the CFPB engaged in 16 new public enforcement actions based on alleged UDAAP violations. These UDAAP actions can provide a road map for industry participants to identify and better understand acts and practices that are considered problematic by law enforcement authorities. UDAAP enforcement actions during the period of this summary involved marketing, debt collection, debt settlement, and the servicing of mortgages, other loans, deposit accounts, and payment accounts. The CFPB highlighted other UDAAP issues in its Supervisory Highlights reports involving ACH payment cancellation terms, deposit account servicing, overdrafts, student loan servicing, "general waiver provisions" in home equity loan agreements, and mortgage servicing loss mitigation practices.

[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5301 *et seq.* (the "Dodd-Frank Act"); *see, e.g.*, 12 U.S.C. § 5552 (2014).
[2] We have attempted to make this survey as comprehensive as possible, however, it is not exhaustive and there may be other relevant actions that are not discussed in this paper. Also, it must be noted that this area of law is rapidly evolving and new actions arise frequently.

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UDAAP Enforcement Action Database

PLA presents below a database of enforcement actions that include allegations of unfair, deceptive, or abusive acts or practices (UDAAP) in connection with consumer financial products. The database focuses on enforcement actions by the Consumer Financial Protection Bureau, the Office of the Comptroller of the Currency, and the Federal Trade Commission. PLA intends the database to facilitate analysis of the themes and patterns in these agencies' UDAAP enforcement actions.

We've sorted the actions by agency in the sequence indicated above. (Some actions involved multiple federal and/or state regulators, but for simplicity they're grouped under the CFPB, FDIC, OCC or FTC.) The comments column offers data about selected issues such as whether the action involves claims of abusive practices.

A couple of disclaimers: first, although we'll be supplementing the database from time to time, it's not currently comprehensive. Second, while the PLA site has a search function, there's no search function specifically for the database. If you're on this page and need to search it, we'd recommend you use your browser's "find" function.

We hope the database is useful and would welcome your feedback. Please contact us here with your suggestions.

The following resources, linked elsewhere on our site as well, may also be useful in this context:

CFPB Supervision and Examination Manual: UDAAP Section (as of October 2012)

Federal Trade Commission Act Section 5: Unfair or Deceptive Acts or Practices

Dodd-Frank Wall Street Reform and Consumer Protection Act Section 1031: Prohibiting unfair, deceptive, or abusive acts or practices

Dodd-Frank Wall Street Reform and Consumer Protection Act Section 1036: Prohibited acts

Agency	Date of Action	Party	Documents	Activity	Product/ Service	Comments
CFPB	10/29/15	Student Financial Resource Center and College Financial Advisory	Complaint; Press Release	Deceptive marketing	Student financial aid counseling	
CFPB	10/01/15	Westlake Services, LLC & Wilshire	Consent Order; Press Release	Debt collection	Auto Loans	

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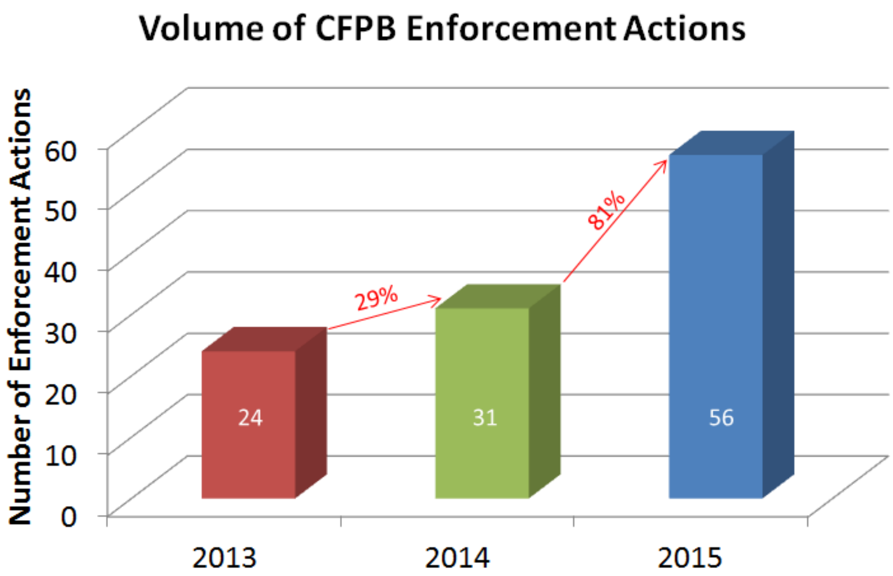
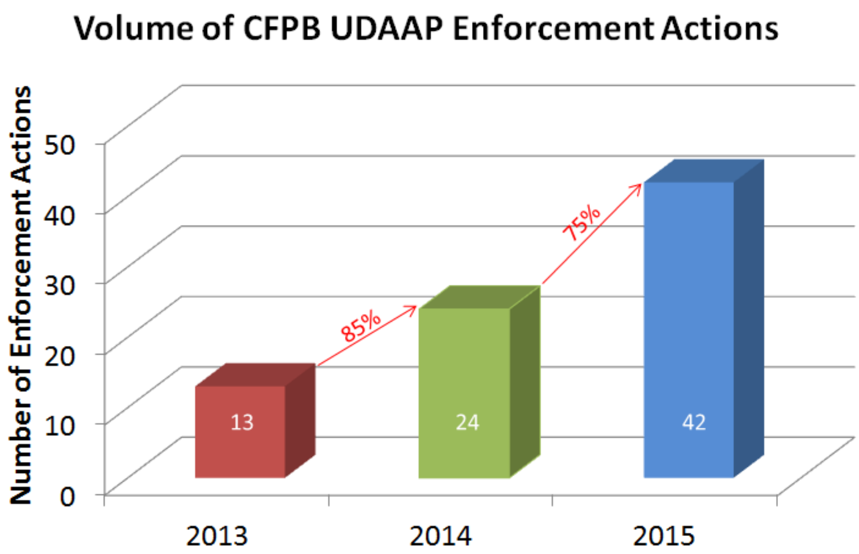
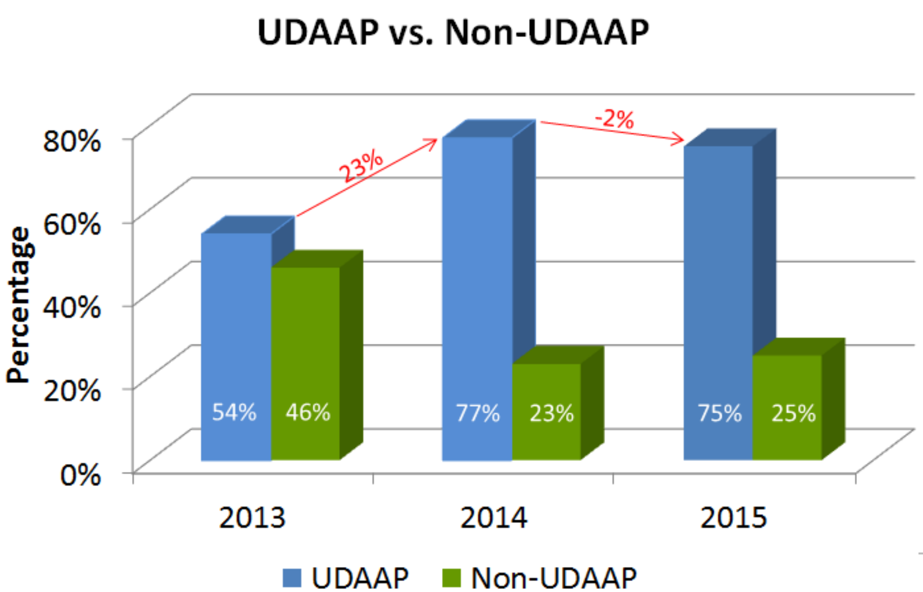
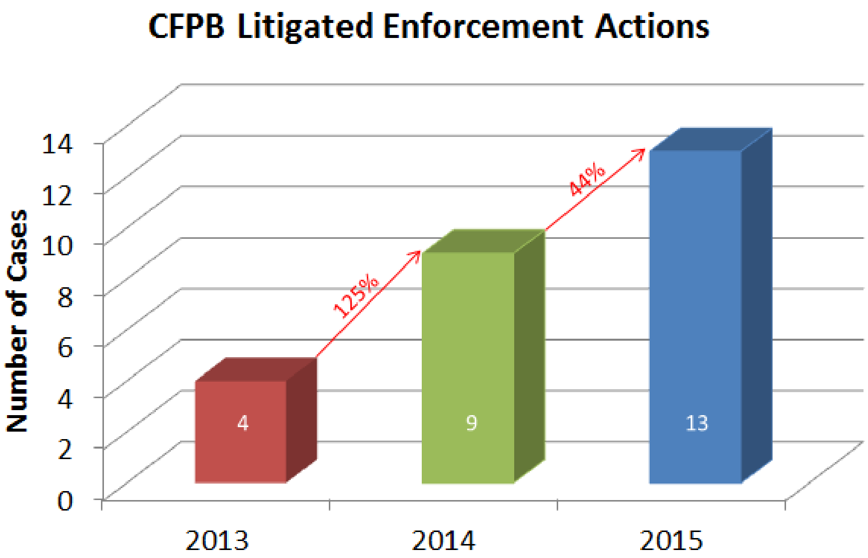
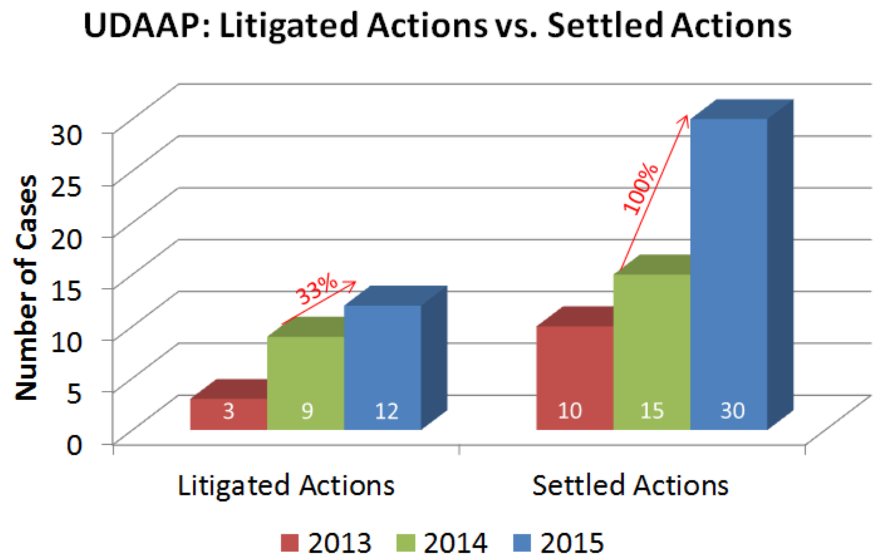






Past UDAAP Actions & Trends





Two Unique Scenarios

Building a product from scratch

- Opportunity to embed UDAAP avoidance themes throughout the product life-cycle
- Approach product development and servicing with recent UDAAP precedent in mind

Agile development teams

- All stakeholders – business, tech, operations, legal, compliance, risk, and others – in the room all the time
- Opportunity for legal to be very effective:
  - To better understand and influence business objectives based on legal obligations
  - Set a culture of compliance and inform non-lawyers of UDAAP rationales
  - Address UDAAP risks early

Trusting Compliance

- Tendency to advise on legal determinations and leave implementation and ongoing monitoring to compliance
- Build assurances that CMS that will prevent, monitor, detect, and resolve UDAAPs
  - Policies and procedures
  - Set benchmarks for reporting
  - Complaint escalation guidelines

Thank You!

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