

# Don't Sell Yourself Short!

## Protecting Your Bank from Unfair and Deceptive Practices Liability

by Alan B. Horn and Gilbert L. Rudolph

*Certain sales and marketing techniques may be considered unfair and deceptive acts or practices (UDAP) and can subject soliciting banks to fines and penalties under federal or state laws.<sup>1</sup> Under certain circumstances, banks may be liable for such sales and marketing techniques even though those techniques are used solely by other entities with which the bank has a third-party relationship. This article briefly examines how UDAP laws affect banks. It further examines compliance issues relating to the use of third-party service providers and the purchase of consumer obligations from others.*

On a daily basis, most consumers receive mail solicitations and telephone calls promoting financial products and services, such as credit cards or mortgages. In these solicitations, consumers are advised that they are “preapproved” for a stated credit limit or “guaranteed” a particular interest rate. These products and services are touted to the consumer as offering great savings or improving individual credit. In some cases, the details of these offers are set forth in fine print, on separate documents, or not defined at all until after enrollment or upon receipt of the marketed product. These types of sales and marketing strategies could be considered unfair and deceptive.

For example, a credit card advertisement promises “guaranteed approval” for a “Presidential Credit Card” with no annual or processing fees. In a separate insert in fine print, the credit card issuer discloses that the Presidential Card is guaranteed only to consumers who qualify, and, depending on the individual’s qualifications, the consumer might instead be “upgraded” to a “Royal Card.” However, the consumer is not advised that the periodic rates for the Royal Card are significantly higher or that its subscribers are charged annual and processing fees. These terms are disclosed in a separate insert, usually delivered with the subscriber’s credit card.

### How the FTC Act Applies to Banking Institutions

Section 5 of the Federal Trade Commission Act (FTC Act)<sup>2</sup> is the primary source of federal law regulating UDAP. Section 5 prohibits “unfair or deceptive acts or practices in or affecting commerce.”<sup>3</sup> ➤

Rob Colvin/Images.com

The OCC and the FDIC have asserted authority under the Federal Deposit Insurance Act to enforce any law or regulation, including the FTC Act, against national banks and their operating subsidiaries.<sup>6</sup>

The Federal Trade Commission is the regulatory agency empowered by the FTC Act to enforce its prohibitions.<sup>4</sup> However, the FTC's authority is limited and does not extend to banks or savings and loan institutions.<sup>5</sup>

Although the FTC has limited enforcement authority with regard to banks, other agencies may enforce the FTC Act with respect to the entities they directly regulate. The Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation are two such agencies. Although this authority has been challenged by some, the OCC and the FDIC have asserted authority under the Federal Deposit Insurance Act to enforce any law or regulation, including the FTC Act, against national banks and their operating subsidiaries.<sup>6</sup> The OCC issued an advisory letter (AL 2002-3) warning national banks and their operating subsidiaries about the risks of engaging in UDAP and providing guidelines for avoiding those risks.<sup>7</sup> The OCC specifically pointed to the FTC Act and case law interpretations of it as the primary sources of law to be used for identifying prohibited conduct. The FDIC then issued its own guidance, making it clear to state nonmember banks and their affiliates that it intends to exercise its enforcement authority to similarly protect against UDAP conduct falling within the scope of the FTC Act.<sup>8</sup> The OCC and FDIC policy statements send a clear message that banking institution practices will be scrutinized to prohibit UDAP and resulting injury to consumers. Accordingly, it is important to develop an

understanding of UDAP laws and the kinds of conduct that those laws prohibit.

Unfair and Deceptive Practices

UDAP provisions are found in the FTC Act and also in state laws, which may apply to banks directly or indirectly through subordinates and third parties.

**The FTC definition.** The FTC Act prohibits "unfair" and "deceptive" acts and practices. Congress deliberately crafted the definitions in general terms to ensure sufficient flexibility to address new misleading practices as they evolve.<sup>9</sup> A narrow definition would have been easy to avoid or could have become outdated.<sup>10</sup> In a letter following AL 2002-3 and FDIC guidance, the Federal Reserve Board acknowledged the flexibility of the FTC Act but declined to exercise its rulemaking authority to more precisely define prohibited practices.<sup>11</sup> As a result, the OCC and the FDIC have great power and discretion in identifying and targeting UDAP violations. Despite this flexibility, judicial application of the FTC Act provides examples of violations and establishes criteria that the FTC has formally summarized into useful policy guides.<sup>12</sup>

**Deception.** Deceptive conduct is described as "a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."<sup>13</sup> This standard combines several key elements. First, there must be a representation, omission, or practice that is likely to mislead. The entire transac-

tion and course of dealing must be considered in making this determination. If deception or confusion is likely, the practice is suspect even if consumers are not actually deceived or confused.

Second, the practice must be misleading from the perspective of a reasonable consumer. If the practice is directed to a particular group, the inquiry then will be based on what is reasonable for a member of that group. For example, products marketed to terminally ill patients would be examined from the perspective of such individuals who may be particularly susceptible to exploitation.<sup>14</sup> If the seller's message is subject to different reasonable interpretations, it will be deemed misleading if one such interpretation is false. The message may also be deemed misleading even if only a minority of those interpreting it are confused or deceived by it, as long as that reaction is reasonable under the circumstances. As in the example about the Presidential card, subsequent disclosures or fine print may not be sufficient to correct misleading statements if consumers are not likely to read the entire document or if their attention is directed away from such disclosures or fine print.

Finally, for any transaction to be rendered deceptive as a whole, the misleading representation, omission, or practice must be material. It is material if it is likely to affect a consumer's decision. Certain types of information are presumed material. For example, costs and fees or conditions and limitations are likely to affect a consumer's decision to purchase. In a recent enforcement action, the OCC alleged that a national bank engaged in unfair or deceptive practices because it "did not adequately disclose" a credit protection fee required of subscribers for its "no annual fee"

Sample UDAP Prevention Checklist

by Michael D. Maher

About This Checklist

This checklist is intended to provide sample questions you may want to consider when reviewing campaigns and their accompanying materials and programs for risk related to unfair or deceptive acts or practices (UDAP). This checklist was written using regulatory advisories from the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation, as well as communications related to recent enforcement agreements into which the OCC has entered with financial organizations. Information was also collected from state attorneys general and other resources related to UDAP.

- Key terms used in the checklist are defined below:
  - The terms "campaign" and "product" are used here for shorthand purposes — these terms are not used as such in the above-referenced resources.
  - The terms "material" and "unfair" are derived from the above-referenced resources.
- The checklist is intended to be fairly comprehensive. But it might not contemplate all relevant questions or considerations for a given organization or campaign. Blank space is provided throughout the checklist for additional entries.
- "Yes" and "No" responses in a shaded box may be indicators that there is greater risk of an unfair or deceptive act or practice being associated with the campaign.
- The checklist is intended to guide analysis; professional judgment is still essential.

Glossary of Checklist Terms

"Campaign" means all of the circumstances surrounding a particular promotional or product process. It includes all advertising and oral and written consumer (i.e., a prospect or a customer) communications, including those made as part of a promotional effort, sales process, fulfillment process, or the transaction itself, or at any other time in the course of dealing. Course of dealing can include providing services of any kind as well as collection efforts. Per federal regulators, focus should be on the "totality of the circumstances" and the net impression made upon a customer or prospect.

"Product," for purposes of this checklist, includes a product or service or a feature of a product or service.

"Material," in the context of acts or practices, means that the act or practice is likely to affect a consumer's choice or conduct concerning a product or service. Generally, any information regarding costs, benefits, or significant limitations should be viewed as material.

"Unfair," in the context of acts or practices, means that the act or practice causes injury (e.g., monetary harm), that is not outweighed by benefits provided to the consumer, and that the consumer could not reasonably have avoided the injury.

About the Author

This checklist was developed by **Michael D. Maher**, CRCM, director – Compliance Services, Bankers Systems, Inc. Maher has spent his entire career in the compliance profession, working first as an examiner for the Federal Reserve System and then leading the bank compliance function for US Bank. He joined Bankers Systems in early 2002. Maher has taught at the ABA Compliance School since 1990, and he regularly contributes to *ABA Bank Compliance* and serves on its editorial board.

Potential Items to Consider/Questions to Ask <small>(Answers in shaded boxes might indicate a greater potential risk of UDAP.)</small>	YES	NO
<b>Baseline Consideration</b>		
<i>Legal/regulatory review.</i> Has a comprehensive review been conducted for compliance with all applicable laws and regulations?		
<b>Disclosures</b>		
<i>General.</i> Is information in the campaign complete and accurate?		
<i>Omissions.</i> Is any material information omitted from the campaign?		
<i>Contradictory information.</i> Does any information in the campaign contradict other information, such as disclosures required by laws or regulations?		
<i>Fees.</i> Are all fees that are likely to be charged disclosed?		
<i>Fees.</i> Are fees disclosed prior to the time they will be charged?		

Potential Items to Consider/Questions to Ask (Answers in shaded boxes might indicate a greater potential risk of UDAP.)	YES	NO
<i>Free trial.</i> If a “free trial period” is referenced, does the campaign clearly describe any steps a consumer must take to cancel service prior to incurring any fee?		
<i>Prerequisites.</i> Are any prerequisites to qualify for the product adequately and clearly disclosed?		
<i>Limitations.</i> Are any material limitations affecting the product adequately and clearly disclosed?		
<i>Changes in terms.</i> If a change in terms of the product is a possibility, is that fact clearly disclosed up front? (This applies especially to terms that may make the campaign offer attractive.)		
<i>Fine print.</i> Is material information stated only in fine print/“mousetype”?		
<i>Fine print.</i> Does the campaign rely on fine print or information buried deep in the campaign to clarify a more prominently disclosed point of the campaign that may be misleading?		
<i>Opportunity to perceive/comprehend.</i> Are required disclosures in television and radio media displayed long enough or read slowly and clearly enough that a consumer has reasonable opportunity to perceive them?		
<i>Opportunity to perceive/comprehend.</i> Are required disclosures in visual media displayed in such a manner that they can be easily discerned and do not fade into the background?		
<b>Consumer Understanding</b>		
<i>Potential to mislead.</i> Is any information in the campaign likely to mislead a reasonable customer?		
<i>Potential to mislead.</i> Could anything in the campaign mislead even a significant minority of consumers?		
<i>Potential to mislead.</i> Could any specific audience or market segment to which the campaign is targeted be misled?		
If yes, is there potential for correlation between the audience being misled and a prohibited basis for discrimination?		
<i>Potential to mislead.</i> Does the campaign draw the consumer’s attention away from information that is important to his or her ability to fully understand the campaign? (The key here is that the consumer’s attention not be specifically drawn away from material and accurate information.)		
<i>Potential to mislead.</i> If information might be misleading, can a consumer easily clarify that information with other information that is presented concurrently and in comparable type size and format? (For example, language buried deep in the content of the campaign will not necessarily correct the misleading information.)		
<i>Potential to mislead.</i> Does the campaign include superlative expressions? Watch for expressions like “the greatest rate in town,” “rates will never be lower,” “the best bank in the West,” “no one can match us.”		
<i>Fake images.</i> Will any fake pictures or images be used in the campaign that could create a false impression materially influencing a consumer’s choice?		
<i>Fake testimonials/endorsements.</i> Are any fake testimonials or endorsements used in the campaign?		
<i>Comprehension.</i> Does the campaign provide sufficient information to allow consumers to reasonably understand the terms of the campaign?		
<i>Comprehension.</i> Does the campaign provide sufficient information to allow consumers to reasonably understand the terms of the product or service offered?		
<i>Comprehension.</i> Does the campaign provide sufficient information for the consumer to make an informed choice?		
<i>Comprehension.</i> Can the campaign content be interpreted in more than one way and is one way a false interpretation of the campaign?		
<i>Clear and affirmative consent.</i> Do campaign procedures require that a clear and affirmative consent from the consumer is required to complete the sale? (This is especially important if telemarketing is involved.)		
<b>“Puffery” Considerations</b>		
<i>Over-promise.</i> Does the campaign promise more than the organization can deliver?		
<i>Guarantees.</i> Are all promises in the campaign unequivocally true? (Watch for promises like “lifetime guarantee,” “guaranteed rate,” “unconditionally guaranteed,” or “you cannot be turned down.”)		
<i>Refunds.</i> If the campaign uses expressions like “unconditionally guaranteed” or “satisfaction or your money back,” is the consumer truly able to obtain a refund of all amounts the consumer has paid with respect to the product?		

Potential Items to Consider/Questions to Ask (Answers in shaded boxes might indicate a greater potential risk of UDAP.)	YES	NO
<b>“Bait and Switch” Considerations</b>		
<i>Getting what’s offered.</i> Will a preponderance of campaign prospects likely qualify for the offer, product(s), feature(s), etc., as described in the campaign?		
<i>Getting what’s offered.</i> Will consumers who do not qualify for the offering of the campaign be downsold or upsold to a less attractive product?		
<i>Getting what’s offered.</i> Does the campaign suggest any product features or benefits that are not, in fact, available?		
<i>Getting what’s offered.</i> Does the campaign suggest any product features or benefits that some number of recipients will not likely receive?		
<i>Preapproved offers.</i> If the campaign uses the word “preapproved,” is there a possibility that a number of consumers will not receive terms as attractive as those stated in the campaign?		
<i>Negated benefits.</i> Does the campaign highlight a particular benefit that is likely to be negated by another aspect of the product? (For example, promoting “no annual fee” when required insurance will cost as much as or more than a typical annual fee could negate the benefit.)		
<i>Campaign terms inconsistent with product contract.</i> Does the campaign highlight terms that are inconsistent with the product agreement or other contract the consumer signs to take advantage of the offer? (For example, the campaign might reference “no annual fee” or similar language when the product agreement used to fulfill the campaign provides that an annual fee may be assessed.)		
<i>Conditional approvals.</i> If any kind of conditional approval could apply, is the consumer protected from loss during the conditional approval period? (As an illustration, some car dealers have been accused of an unfair practice involving conditional approval. The consumer receives a “conditional approval” on his or her credit and a corresponding annual percentage rate for the credit. The consumer completes the deal and trades in his or her vehicle. Several days later, the consumer is told that he or she does not qualify for the rate initially offered as part of the “conditional approval.” The trade-in car has been “sold.” As such, the consumer’s options are compromised, and he or she may feel compelled to accept the higher APR.)		
<b>Miscellaneous Considerations</b>		
<i>Privacy/disclosure of information.</i> Could any aspect of the campaign lead to disclosure of consumer or customer information in a manner that might violate privacy laws, contracts with or promises to a customer, or other customer privacy expectations?		
<i>Coercion.</i> Does the campaign coerce any consumers to buy?		
<i>Incentive compensation.</i> Are financial incentives for employees or third parties structured in such a manner that employees might be encouraged to mislead consumers? (For example, incentives tied to the initial sale of a product with no consequence if a consumer subsequently cancels the product might promote behaviors to mislead consumers.)		
<i>Harassment.</i> Could any aspect of the campaign be considered harassment (especially marketing or collection efforts)?		
<i>Threats.</i> Could any aspect of the campaign be considered to be a threat (especially marketing or collection efforts)?		
<i>Morality/ethics.</i> Does any aspect of the campaign seem immoral or unethical?		
<i>Empathy check.</i> Knowing all that you know about the campaign, would you personally react favorably to its clarity and fairness if you were to experience it as a consumer?		
<i>Complaint monitoring.</i> Are processes set up such that any complaints related to the campaign can be monitored and any complaints or trends related to potential unfair or deceptive acts or practices quickly identified?		
<i>Prompt posting of payments.</i> If payments are part of the product offered, will the payments be promptly posted?		
<b>Third-Party Considerations (if a third party is involved)</b>		
<i>Due diligence.</i> Has appropriate due diligence been conducted on the competence, policies, practices, and financial capacity of the third party (e.g., a telemarketer)?		
<i>Contracts.</i> Do contractual arrangements with third parties hold them accountable for fair and ethical practices and generally protect the financial institution against risk related to unfair or deceptive acts or practices of the third party?		

credit card.<sup>15</sup> In addition to fee and cost information, information relating to product quality or warranties is material. All of these terms should be disclosed in advertising up front and in a clear and conspicuous manner.

**Unfairness.** Specific primary factors have been identified for determining whether acts or omissions result in “unfairness” to consumers.<sup>16</sup> These factors were adopted by the OCC in AL 2002-3. First, the practice must result in substantial injury to consumers. Whether particular conduct results in substantial injury depends on the entire circumstances. In most cases, any monetary harm will establish substantial injury. Additionally, a seemingly minor injury might become substantial if it affects numerous consumers. On the other hand, the FTC has indicated that tastes or beliefs should not necessarily be protected, and therefore alleged emotional impact will not likely establish unfairness.<sup>17</sup>

In addition to being substantial, the injury must not be outweighed by the benefits to consumers or to competition. Conduct is prohibited only if it is “injurious in its net effects.”<sup>18</sup> This means the associated costs of complete disclosure must be weighed against the benefits to consumers.

Finally, to be unfair, the injury must be one that consumers could not reasonably avoid. Generally, the market is considered self-correcting. Consumers are expected to compare products and choose those best suited to their needs. This means sales and marketing practices that interfere with consumer comparison or informed decision making may be characterized as unfair. For example, the omission of price or performance information might prevent a consumer from making an informed choice.

*All 50 states have enacted some form of legislation prohibiting conduct considered unfair or misleading. These laws generally empower state attorneys general or other state regulators to enforce them. In addition, the OCC and the FDIC have asserted authority to enforce state UDAP laws...*

In determining whether particular conduct is unfair, regulatory agencies will look at public policy and generally established standards of business and ethics. Statutes and regulations, common law, or industry practice may establish such evidence. Accordingly, it is important to stay abreast of changes in the law and also changes in industry standards and norms.

**Banking laws.** Banking institutions are regulated by various other laws and regulations, many of which relate to what might be considered unfair or deceptive practices. For example, the Truth in Lending Act,<sup>19</sup> the Equal Credit Opportunity Act,<sup>20</sup> and the Fair Debt Collection Practices Act<sup>21</sup> identify and prohibit specific problematic practices or mandate specific disclosures. In addition, the Federal Reserve Board’s Credit Practices Rule<sup>22</sup> and the new OCC rule on debt cancellation contracts require certain disclosures and proscribe behavior that could be categorized as UDAP.<sup>23</sup> Banking institutions should be aware that violations of these laws might also constitute direct violations of the FTC Act if committed by third parties.

### State UDAP Laws

Although the OCC and the FDIC rely on the FTC Act as their primary source of authority to identify deceptive practices, state laws also identify and prohibit such conduct. All 50 states have enacted some form of legislation pro-

hibiting conduct considered unfair or misleading. The state UDAP laws generally empower state attorneys general or other state regulators to enforce them. In addition, the OCC and the FDIC have asserted authority to enforce state UDAP laws against insured depository institutions and bank operating subsidiaries.<sup>24</sup>

State laws might not seem to apply to banking institutions. For example, in some states, the UDAP laws expressly exclude banks or other financial institutions.<sup>25</sup> This type of exclusion may make state law enforcement authorities unable to enforce state laws against relevant banking institutions. However, the state law does not affect the authority of the OCC and the FDIC, which may assert authority to enforce the state law under their empowering statute, the Federal Deposit Insurance Act. Further, this banking institution exclusion is not uniform in all states.

Other state statutes contain a more generic form of exemption for entities comprehensively regulated by other laws or agencies.<sup>26</sup> The recent OCC and FDIC policy statements arguably support the position that the banking institutions regulated by the OCC and the FDIC fall within this exemption. At least one state court has accepted this argument, finding that its state UDAP law does not apply to OCC-regulated entities.<sup>27</sup> However, the ruling from that case has not been uniformly adopted.

Finally, even if exempt from direct liability under state UDAP statutes, banks and other financial institutions are not necessarily exempt from indirect liability for state law violations under the FTC Holder in Due Course Rule (Holder Rule) discussed below.<sup>28</sup> Consequently, state laws must also be considered.

Banking institutions should also be aware that consumers may assert private causes of action under many state UDAP statutes.<sup>29</sup> This means that banking institutions and their affiliates can be susceptible to claims brought by individuals in state courts, including state law class actions. Although this article does not examine all state UDAP laws, banks should be aware that state laws might apply.

### Liability for Acts of Third Parties

**Service providers.** Banking organizations are responsible for ensuring that their employees do not engage in unfair and deceptive sales and marketing practices. They are equally responsible for ensuring that third parties with whom they contract or to whom they outsource functions do not engage in such practices. The OCC discussed in AL 2002-3 the increased reliance by banks on independent vendors and service providers. According to the OCC, this increased reliance on third parties creates an increased risk of unfair and deceptive practices, customer dissatisfaction, and harm. In their policy statements, both the OCC and the FDIC stated that they intend to hold banks responsible for UDAP violations of third-party service providers. Accordingly, banks must thoroughly examine and monitor the performance and conduct of their third-party service providers.

Other recent OCC advisory letters illustrate the risks associated with use of third-party services and recommend practices to help reduce those risks.<sup>30</sup> To minimize the risk of UDAP violations, third-party service providers should be carefully selected after thorough screening. At a minimum, such investigation should include an examination of the provider’s reputation, financial condition, and internal procedures. After selection, service providers should be regularly and frequently monitored to ensure that their practices are in conformity with expectations. Third-party services should be regularly audited, including legal or compliance reviews of all scripts and other marketing materials used to promote bank products and services.

Contracts with third parties should clearly document expected sales techniques and results. The compensation structure under such contracts should be examined to ensure that there are no incentives to deceive. For example, compensating sales staff for enrollment without regard to retention of customers may encourage the use of questionable sales practices. Additionally, contracts with third parties should clearly allocate the costs of examination by bank regulators, authorize audits, and provide for indemnification for negligent and unlawful acts. Banks should also be permitted to review, if not directly respond to, customer complaints.

**FTC Holder Rule.** Banking institutions can be responsible for FTC Act violations of others in another way. Under the FTC Holder Rule,<sup>31</sup> they may be responsible for the violations of independent parties from whom they purchase consumer credit contracts, such as retail installment contracts on automobiles and other consumer goods.

The FTC Holder Rule essentially requires that sellers of consumer credit contracts provide in those contracts that subsequent holders will be subject to the claims and defenses of the consumer against the seller. As a result, consumers may assert any claims regarding the contract directly against banks that acquire the sellers’ contracts. Those consumer claims may be based on deceptive acts and practices of the seller. For example, if a bank routinely purchases retail installment contracts from a car dealer who falsely advertises rates, the bank can be liable to the consumer for the car dealer’s misrepresentations. Therefore, sellers should be investigated and monitored in the same way as other third-party service providers.

### Minimizing Your Risk

Your risk of UDAP violations can be minimized by developing and implementing policies and procedures that educate your employees and by monitoring their sales and marketing practices. Such policies and procedures should also apply to third-party service providers. Generally, your policies should achieve the following:

- **Communicate clearly.** Disclose all relevant fees, costs, limitations, and exceptions up front and in a manner that your customers can understand.
- **Educate and train your employees.** Thoroughly advise your employees about the risks associated with questionable sales practices. Employees should be trained to respond to inquiries and should be aware of your policies against questionable sales tactics. ➤

- **Know your service providers.** You are responsible for ensuring that others selling your products and services treat customers honestly and fairly. This applies equally to sellers from whom you purchase consumer credit contracts.
- **Review employee and third-party compensation.** You should prohibit sales and marketing practices that might confuse or mislead your customers. Employees and third parties should be compensated in a manner that reinforces this prohibition.
- **Respond to customer complaints.** Customers may be the best source of feedback regarding sales practices, especially those of third-party vendors. If a particular product, service, or sales technique results in com-

plaints, take those complaints seriously, promptly investigate, and eradicate any questionable practices.

- **Initiate legal and compliance reviews.** Make it your practice to have legal and compliance advisors review all new sales and marketing programs or processes and periodically review old ones. Legal counsel and compliance officers can objectively review your programs and processes and establish working guidelines for sales and marketing personnel.

Through awareness and due diligence, UDAP violations can be avoided. Fair practices not only reduce risks but, more important, also protect your reputation and produce customers who are more satisfied. ❖

## about the authors

**Alan Horn** is a shareholder in the New York Financial Institutions practice at Greenberg Traurig, LLP. He focuses his practice on financial institution regulatory matters, commercial lending, and consumer products and transactions. He can be reached at [horna@gtflaw.com](mailto:horna@gtflaw.com).

**Gilbert Rudolph** is a shareholder in Greenberg Traurig's National Financial Institutions Group based in its Phoenix office. He represents banks, finance companies, and mortgage lenders relating to consumer credit regulatory and compliance issues under federal and state law. He is a fellow of the American College of Consumer Financial Services Lawyers, a member of the Governing Committee of the Conference on Consumer Finance Law, and listed in *The Best Lawyers in America*. He can be reached at [rudolphg@gtflaw.com](mailto:rudolphg@gtflaw.com).

The authors acknowledge the invaluable assistance of **Julie Rystad Bestor**, an associate in the Phoenix office of Greenberg Traurig, in the preparation of this article.

The views expressed in this article are solely those of the authors and should not be attributed to the authors' firm or its clients.

## Have a question or comment?

Use the postage-paid reply card provided in this issue or leave a message at (202) 663-5075.

1. Similar sales techniques were the subject of a recent enforcement action by the Office of the Comptroller of Currency, which alleged violations of the FTC Act and other laws. OCC 2001-24, May 3, 2001.

2. 15 U.S.C. §45.

3. 15 U.S.C. §45(a)(1).

4. 15 U.S.C. §45(a)(2).

5. *Ibid.*

6. OCC Advisory Letter 2002-3, March 22, 2002; Federal Deposit Insurance Corporation, "Guidance on Unfair or Deceptive Acts or Practices," FIL-57-2002, May 30, 2002.

7. OCC Advisory Letter 2002-3, March 22, 2002.

8. Federal Deposit Insurance Corporation, "Guidance on Unfair or Deceptive Acts or Practices," FIL-57-2002, May 30, 2002.

9. FTC Policy Statement on Unfairness, December 17, 1980.

10. *Ibid.*

11. Letter from Chairman Alan Greenspan to the Hon. John J. LaFalce, ranking member Committee on Financial Services, May 30, 2002.

12. FTC Policy Statement on Unfairness, December 17, 1980; FTC Policy Statement on Deception, October 14, 1983.

13. FTC Policy Statement on Deception, October 14, 1983.

14. *Ibid.*

15. OCC 2000-53, June 28, 2000.

16. FTC Policy Statement on Unfairness, December 17, 1980.

17. *Ibid.*

18. *Ibid.*

19. 15 U.S.C. §1601 *et seq.*

20. 15 U.S.C. §1691 *et seq.*

21. 15 U.S.C. §1692 *et seq.*

22. 12 C.F.R. Part 227.

23. 67 *Federal Register* 58,962 (Sept. 19, 2002) (to be codified at 12 C.F.R. Parts 7 and 37).

24. OCC Advisory Letter AL 2002-3, March 22, 2002, page 3, n.2. For example, the OCC enforced California unfair competition and false advertising code sections in OCC 2000-53, June 28, 2000.

25. See, e.g., Ala. Code, §8-19-7(3); Fla. Stat. Ann. §501.212(4); La. Rev. Stat. Ann. §51:1406(1).

26. See, e.g., R.I. Gen. Laws §6-13.1-4.

27. See *Chavers v. Fleet Bank (RI)*, N.A., 2002 WL 481797 (R.I. Super. 2002) (unpublished opinion).

28. 16 C.F.R. §433.

29. See, e.g., Ark. Code Ann. §4-88-113(f); *Sellinger v. Freeway Mobile Home Sales, Inc.*, 521 P.2d 1119, 110 Ariz. 573 (1974)(en banc); Ca. Civ. Code §1780; Fla. Stat. Ann. §501.211; 815 Ill. Comp. Stat. Ann. §505/10a; Ind. Code Ann. §24-5-0.5-4.

30. OCC Advisory Letter 2000-9, August 29, 2000; OCC Advisory Letter 2001-47, November 1, 2001.

31. 16 C.F.R. §433.