Section 15: Unfair, Deceptive or Abusive Acts and Practices (UDAAP) Policy

Summary
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. The Act provides the CFPB with rule-making and 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.

SecurityNational Mortgage Company (SNMC) reviews its products, services, advertising and marketing materials, and consumer complaints to assess risk to consumers and assure compliance with established standards as outlined in the following sections.

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
3) The injury is not outweighed by countervailing benefits to consumers or to competition.

The act or practice must cause or be likely to cause substantial injury to consumers. Substantial injury usually involves monetary harm. Monetary harm includes, for example, costs or fees paid by consumers as a result of an unfair practice. An act or practice that causes a small amount of harm to a large number of people may be deemed to cause substantial injury. Actual injury is not required in every case. A significant risk of concrete harm is also sufficient. However, trivial or merely speculative harms are typically insufficient for a finding of substantial injury. Emotional impact and other more subjective types of harm also will not ordinarily amount to substantial injury. Nevertheless, in certain circumstances, such as unreasonable debt collection harassment, emotional impacts may amount to or contribute to substantial injury.

Consumers must not be reasonably able to avoid the injury. An act or practice is not considered unfair if consumers may reasonably avoid injury. Consumers cannot reasonably avoid injury if the act or practice interferes with their ability to effectively make decisions or to take action to avoid injury. Normally the marketplace is self-correcting; it is governed by consumer choice and the ability of individual consumers to make their own private decisions without regulatory intervention. If material information about a product, such as pricing, is modified after, or withheld until after, the consumer has committed to purchasing the product, however, the consumer cannot reasonably avoid the injury. Moreover, consumers cannot avoid injury if they are coerced into accepting unwanted or less favorable products or services or if a transaction occurs without their knowledge or consent. A key question is not whether a consumer could have made a better choice. Rather, the question is whether an act or practice hinders a consumer’s decision-making. For example, not having access to important information could prevent consumers from comparing available alternatives, choosing those that are most desirable to them, and avoiding those that are inadequate or unsatisfactory. In addition, if almost all market participants engage in a practice, a consumer’s incentive to search elsewhere for better terms is reduced, and the practice may not be reasonably avoidable. The actions that a consumer is expected to take to avoid injury must be reasonable. While a consumer might avoid harm by hiring independent experts to evaluate products in advance or by bringing legal claims for damages in every case of harm, these actions generally would be too expensive to be practical for individual consumers and, therefore, are not reasonable.
The injury must not be outweighed by countervailing benefits to consumers or competition.

To be unfair, the act or practice must be injurious in its net effects — that is, the injury must not be outweighed by any offsetting consumer or competitive benefits that also are produced by the act or practice. Offset ting consumer or competitive benefits of an act or practice may include lower prices to the consumer or a wider availability of products and services resulting from competition. Costs that would be incurred for measures to prevent the injury also are taken into account in determining whether an act or practice is unfair. These costs may include the costs to the institution in taking preventive measures and the costs to society as a whole of any increased burden and similar matters. 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. However, public policy considerations by themselves may not serve as the primary basis for determining that an act or practice is unfair.

Deceptive Acts or Practices

A representation, omission, act or practice is deceptive when

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

There must be a representation, omission, act, or practice that misleads or is likely to mislead the consumer.

Deception is not limited to situations in which a consumer has already been misled. Instead, an act or practice may be deceptive if it is likely to mislead consumers. It is necessary to evaluate an individual statement, representation, or omission not in isolation, but rather in the context of the entire advertisement, transaction, or course of dealing, to determine whether the overall net impression is misleading or deceptive. A representation may be an express or implied claim or promise, and it may be written or oral. If material information is necessary to prevent a consumer from being misled, it may be deceptive to omit that information. 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 or fine print disclosures or contract disclosures may be insufficient to cure a misleading headline or a prominent written representation. Similarly, a deceptive act or practice may not be cured by subsequent truthful disclosures. Acts or practices that may be deceptive include: making misleading cost or price claims; offering to provide a product or service that is not in fact available; using bait-and-switch techniques; omitting material limitations or conditions from an offer; or failing to provide the promised services.

The FTC’s “four Ps” test can assist in the evaluation of whether a representation, omission, act, or practice is likely to mislead:

- Is the statement prominent enough for the consumer to notice?
- Is the information presented in an easy-to-understand format that does not contradict other information in the package and at a time when the consumer’s attention is not distracted elsewhere?
- Is the placement of the information in a location where consumers can be expected to look or hear?
- Finally, is the information in close proximity to the claim it qualifies?

The representation, omission, act, or practice must be considered from the perspective of the reasonable consumer.

In determining whether an act or practice is misleading, one also must consider whether the consumer’s interpretation of or reaction to the representation, omission, act, or practice is reasonable under the circumstances. In other words, whether an act or practice is deceptive depends on how a reasonable member of the target audience would interpret the representation. When representations or marketing practices target a
specific audience, such as older Americans, young people, or financially distressed consumers, the communication must be reviewed from the point of view of a reasonable member of that group. Moreover, a representation may be deceptive if the majority of consumers in the target class do not share the consumer’s interpretation, so long as a significant minority of such consumers is misled. When a lender’s representation conveys more than one meaning to reasonable consumers, one of which is false, the lender is liable for the misleading interpretation. Exaggerated claims or “puffery,” however, are not deceptive if the claims would not be taken seriously by a reasonable consumer.

The representation, omission, or practice must be material.
A representation, omission, act, or practice is material if it is likely to affect a consumer’s choice of, or conduct regarding, the product or service. Information that is important to consumers is material. Certain categories of information are presumed to be material. In general, information about the central characteristics of a product or service – such as costs, benefits, or restrictions on the use or availability – is presumed to be material. Express claims made with respect to a financial product or service are presumed material. Implied claims are presumed to be material when evidence shows that the institution intended to make the claim (even though intent to deceive is not necessary for deception to exist). Claims made with knowledge that they are false are 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. If a representation or claim is not presumed to be material, it still would be considered material if there is evidence that it is likely to be considered important by consumers.

Abusive Acts or Practices
The Dodd-Frank Act makes it unlawful for any covered person or service provider to engage in an “abusive act or practice.” An abusive act or practice:

- 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 its interests 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.

Although abusive acts also may be unfair or deceptive, examiners should be aware that the legal standards for abusive, unfair, and deceptive each are separate.