

Regulatory: A peek into what a Cordray-led bureau might look like *Tea leaves reveal that UDAAP is a clear and present danger.*

August 19, 2011

By [Martin Bishop](#)

This column is part of a series of articles on the new Consumer Financial Protection Bureau and the upcoming wave of regulations affecting the consumer financial industry

Over the past two segments, we have taken a closer look at the provisions of Title X of the Dodd-Frank Act that give the new Consumer Financial Protection Bureau (CFPB) the power to prevent unfair, deceptive, or abusive acts or practices (UDAAP) in the consumer financial services industry. Along the way, we have learned a few important things:

- Title X's UDAAP provisions are amorphous, with key terms vaguely defined (i.e., unfair, abusive) or undefined altogether (i.e., deceptive)
- UDAAP has a dedicated regulator in the CFPB, which has significant enforcement powers to implement UDAAP
- The CFPB has the power, but not the obligation, to issue rules in furtherance of its UDAAP powers
- UDAAP is a high-priority agenda item for the CFPB
- The future of UDAAP is likely to be influenced by the historical development of the law under UDAP and the Little FTC Acts
- In this area, there is a symbiotic relationship between federal regulators, state regulators, and the plaintiffs' bar

How can this knowledge be used to mitigate risk? In the next and final installment on UDAAP, I will provide you with some concrete and practical approaches to limiting your exposure to the hazards of UDAAP. For now, though, let us look at a real-life example of why UDAAP could be dangerous.

In 2009, Richard Cordray, then-Ohio Attorney General and current nominee to be the bureau's first director, filed a series of lawsuits against mortgage servicers asserting numerous claims, not the least of which were violations of Ohio's unfair or deceptive acts or practices laws. Mr. Cordray, on behalf of the people of Ohio, was unhappy with things like the servicers alleged inability to "communicate meaningfully with consumers," the provision of "inadequate and inefficient customer service," and the failure "to respond, or timely respond, to borrowers requests for assistance."

Importantly, at the time these complaints were filed, there was nothing in any applicable state or federal banking or lending statute or regulation that addressed these issues in the mortgage servicing context. Nonetheless, Cordray said in a press release issued when the complaints were filed that, "[u]nfortunately, many servicers have ... repeatedly chosen to aggravate the [foreclosure] crisis through noncompliance and excuses. ... In Ohio, we have zero tolerance for any more excuses."

"Noncompliance with what?," you may be asking yourself. The answer is largely circular: noncompliance with UDAP. Later, as the cases progressed and some passed the motion to dismiss hurdle, Mr. Cordray said in a statement that "[f]or too long, servicers have stood idly by, talking the talk but failing to provide any solutions to the foreclosure crisis."

This series of Ohio cases—some of which are still winding themselves through the court system—are UDAAP tea leaves. Do not fool yourself into believing that it is just coincidence that the President is

advancing as his nominee for the first director of the bureau a man who is a former chief enforcement official with UDAP experience. The bureau will be enforcing UDAAP, we just do not know exactly how, yet. But that is coming.

Perhaps the most disconcerting thing about these Ohio cases is the apparent use of UDAP to meet policy goals. As his comments demonstrate, Cordray clearly wanted to reduce foreclosures in Ohio—a noble goal in the abstract. There were no statutes or regulations that Cordray could point to in his efforts to change and punish the alleged conduct of the servicers, however, so he resorted to UDAP. If Cordray's prior behavior is a predictor of the future performance of the bureau, UDAAP compliance could be very difficult. How, after all, can anyone accurately predict today what the policy goals of elected and appointed governmental officials will be tomorrow or, worse, years from now?

There is no simple answer. Instead, under Dodd-Frank's UDAAP provisions, the consumer financial services industry will need to regularly review its products and services for compliance. Next time, we will talk about how to do that in this environment.

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