

## Viewpoint

*In Viewpoints, prepaid and emerging payment professionals share their perspectives on the industry. Paybefore endeavors to present many points of view to offer readers new insights and information. The opinions expressed in Viewpoints are not necessarily those of Paybefore.*

# UDAAP: Shouldn't the CFPB Give Us More Information?

A Viewpoint by Martin J. Bishop and Rebecca Hanson, Foley & Lardner LLP



**D**emand for prepaid cards continues to grow. According to the Consumer Financial Protection Bureau (CFPB), consumers loaded approximately \$57 billion onto prepaid cards in 2011. CFPB Director Richard Cordray has noted that these cards are popular among the “most vulnerable among us” and that they can be “pretty terrible and definitely exploitative” of those individuals. It’s these types of statements that suggest prepaid cards may be prime targets for enforcement by the CFPB under the Dodd-Frank Act’s nebulous prohibition of “unfair, deceptive, or abusive acts or practices” (UDAAP).

Notwithstanding the call from the consumer finance industry at large for more clarity about Dodd-Frank’s

prohibition against UDAAP and the CFPB’s own promises to provide consumer protections regarding prepaid cards, the bureau has yet to provide the prepaid card industry with any specific or even meaningful regulatory direction on UDAAP. Given the CFPB’s significant enforcement powers to prevent UDAAP in connection with any transaction or offering of a consumer financial product or service—powers that include the ability to investigate, conduct hearings and adjudications; and litigate and seek civil penalties of up to \$1 million per day for knowing violations of any consumer laws, including UDAAP—it is imperative that the CFPB become transparent about what it believes constitutes UDAAP.

Although the Dodd-Frank Act sets forth some UDAAP standards, it provides little, if any, guidance on those standards. Compounding the

problem, the CFPB has yet to provide any meaningful guidance on how it views UDAAP. To make matters worse, the CFPB seems content to adopt the “I know it when I see it” approach that Supreme Court Justice Potter Stewart famously took regarding pornography. When the House Financial Services Committee recently pressed Director Cordray on a definition of “abusive” financial practices, he stated that “most good businesses know an abusive practice when they see it.”

The CFPB’s recent settlement with **Capital One** of its first UDAAP enforcement action is a very real reminder of the extreme power the CFPB has when it comes to UDAAP. The CFPB claimed Capital One misled consumers about the benefits of certain credit card add-on products. Consumers were deceived, the CFPB said, about the nature of the add-on products in cases where Capital One did not tell



*Rebecca Hanson is an associate with Foley & Lardner LLP and a member of the firm’s Business Litigation & Dispute Resolution and Labor & Employment Practices groups. Martin J. Bishop is a partner at Foley & Lardner LLP, vice chair of the firm’s litigation department and co-chair of its Consumer Financial Services Practice. He invites those interested in collaborating on solutions suggested in this article to contact him at 312.832.5154 or [mbishop@foley.com](mailto:mbishop@foley.com).*



consumers that the products were optional. According to the CFPB, some consumers were led to believe that they were signing up for a free product, rather than making a purchase.

Relying for the first time on its UDAAP enforcement powers, the CFPB concluded that “Capital One’s call center vendors engaged in deceptive tactics to sell the company’s credit card add-on products.” These allegations led to a settlement of an estimated \$140 million in refunds to an estimated 2 million Capital One consumers and a \$25 million penalty fee that Capital One has to pay to the Civil Penalty Fund. Importantly, the CFPB went out of its way to put other institutions on notice that it “will not tolerate deceptive marketing practices.”

So what exactly is deception? The prepaid card industry shouldn’t have to guess at what constitutes deception or, for that matter, abuse or unfairness under UDAAP. The CFPB is authorized by the Dodd-Frank Act to write rules pertaining to the regulation of the prepaid card market and to give real shape to UDAAP, which would better provide the prepaid card industry direction about what practices and services will not pass muster under the Dodd-Frank Act’s UDAAP prohibitions.

While to us, it is readily apparent that the CFPB should utilize its rule-making powers in this area, it is likewise apparent that the CFPB has no plans to do so. While the CFPB has repeatedly stated that one of its overarching goals is to ensure that consistent minimum standards apply across financial products and specifically indicated its intention to extend federal consumer protections to prepaid cards, the CFPB has voiced no plans to address UDAAP

in any forthcoming rule concerning prepaid cards or otherwise. The CFPB has aggressively advanced its various “Know Before You Owe” programs to consumers. But the CFPB is not providing or even offering to provide industry with the transparency on UDAAP that even comes close to what it has demanded for consumers. Don’t we have the right to know more about UDAAP before we issue our cards and put ourselves at risk?

The result of all this is that what might constitute a UDAAP violation in the prepaid card industry—like all other products in the consumer finance

*“Don’t we have the right to know more about UDAAP before we issue our cards and put ourselves at risk?”*

space—remains somewhat of a mystery. Abusive, for instance, is a relatively new concept in the financial services industry with no generally accepted common understanding of what falls within the standard. And while “unfair” and “deceptive” have been defined in other statutes, most significantly in Section 5 of the Federal Trade Commission Act (FTC Act), one could argue that the CFPB has no obligation to adopt the FTC’s pronouncements on or the case law interpreting those terms under the FTC Act. Without any guiding rules to play by, UDAAP is in the eye of the beholder (i.e., the CFPB). This amorphous and uncertain environment leaves the prepaid card industry with little to go by but its training and intuition. This untenable situation can and should change—and in short order.

## What We Know about the UDAAP Standards

As noted above, the Dodd-Frank Act prohibits any provider of consumer financial products or services or a service provider to engage in any “unfair,” “deceptive” or “abusive” act or practice. An “unfair” practice under UDAAP is one that: (1) causes or is likely to cause substantial injury, (2) cannot be reasonably avoided and (3) the injury is not outweighed by any benefits.

Curiously, Congress did not define “deceptive” in the Dodd-Frank Act. While the “unfair” and “deceptive” standards have been given concrete meaning in other consumer protection acts, such as the FTC Act and the so-called “mini” FTC Acts passed by many states, the CFPB has made no explicit expression that it is going to follow the precedent that is out there on these standards. There are some clues that it will do so, however, at least to some degree. In fact, the CFPB has included the FTC Act definitions in its Examination Handbook—a helpful step in the right direction. But these definitions fall far short of a complete or near-complete illumination of UDAAP’s terms.

The new “abusive” standard is perhaps the most tricky of the three UDAAP standards. The Dodd-Frank Act defines an “abusive” act or practice as one that: (1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service or (2) takes unreasonable advantage of (a) a lack of understanding on the part of the consumer of the material risks, costs or conditions of the product or service; (b) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service or (c) the reasonable reliance by the



consumer on a covered person to act in the interests of the consumer.

The CFPB has been clear that “abusive” is a separate standard from the more familiar “unfair” and “deceptive” standards. But this is so obvious that it really adds nothing to the understanding of UDAAP. Director Cordray, for example, has stated—and the CFPB’s Examination Manual reflects—that “there is a distinction among each of [the UDAAP] categories” and “that isn’t to say there can’t be some overlap.” He noted “there could be a practice that would not be unfair but that would be abusive.” Merely stating that there are differences between the three UDAAP standards is all but meaningless.

### The CFPB Should Develop a UDAAP Rule

What could the CFPB consider in making a policy statement or rule regarding prepaid cards and UDAAP? It’s no secret that the CFPB and consumer advocates have raised certain concerns about prepaid cards, including fee and terms disclosures; consumer access to account information; consumer access to customer service; and protections, such as FDIC insurance and protections against unauthorized use. The CFPB could respond to these areas of concern by providing, for example, guidance about how the CFPB thinks the prepaid card industry could ensure that consumers understand the risks and costs of the

cards, and whether a prepaid card meets the consumer’s needs. Guidance of this sort would provide the roadmap the prepaid card industry needs to proceed without fear of action against them by the CFPB.

The CFPB appears intent on utilizing its enforcement powers to define the UDAAP standards rather than engaging in rulemaking or other efforts that would set forth, in advance, what the purveyors of consumer

*“It is imperative that the CFPB become transparent about what it believes constitutes UDAAP.”*

financial products and services need to do to avoid running afoul of this aspect of the Dodd-Frank Act. Director Cordray has pointedly indicated that he does not “anticipate [the CFPB] writing a rule around UDAAP,” stating that “I think a lot of the law is really clear in that area, and what is maybe not clear to people because they haven’t had experience with it has been specifically defined by Congress, so that is what it is. We’ll continue to develop as we go.”

By relying solely on the enforcement of individual cases—as the CFPB did in the case of the Capital One settlement—is the CFPB considering the

likelihood of harm to the industry and consumers for its failure to provide some clarity here? Prepaid cards serve a very real and valid purpose, and the market for these products is clouded by the lack of clarity on UDAAP. Prepaid cards give consumers with little or no access to credit or traditional financial services the ability to budget, spend and save like a mainstream consumer. The CFPB should do its part to keep the industry focused on innovation and bringing new and better products so that these consumers can have the products they demand.

In the absence of clear rules on what are “unfair,” “deceptive” or “abusive” acts or practices, the prepaid card industry may be forced to shy away from introducing new products without some upfront assurance that they are not running afoul of the CFPB, thereby narrowing the range of consumer choice. The CFPB possesses the power to avoid this uncertainty and allow the financial sector to innovate and provide new products with the knowledge necessary to meet Dodd-Frank’s goals and its UDAAP standards. 

**Viewpoint** Paybefore works with professionals throughout the prepaid and emerging payments industry as well as service providers to the sector to create insightful opinions on topics of interest. If you’re interested in working with us on a Viewpoint, please contact [Marilyn Bochicchio](#).