Regulatory: Collaborating to solve the vexing UDAAP dilemma

The industry must work together to develop UDAAP rules, standards and best practices

Inside Counsel
May 1, 2013

By Martin Bishop

The Consumer Financial Protection Bureau's (CFPB) authority to prevent unfair, deceptive or abusive acts or practice (UDAAP) under the Dodd-Frank Wall Street Reform and Consumer Protection Act is, as it turns out, a very powerful weapon. UDAAP, particularly with the addition of the new abusive standard, is a highly utilitarian policy tool in the hands of our neophyte regulator.

What do I mean by that? What I mean is that the CFPB, if it chooses, can use the broad and vaguely worded UDAAP standards to address a policy agenda—even one that is unpublished, unwritten or unstated, as opposed to regulating unfairness, deception and abuse by guidance through public rulemaking or some other less opaque means. In other words, UDAAP gives the CFPB the power to look at the acts and practices of anyone subject to its jurisdiction and declare those acts or practices—without notice—to be unfair, deceptive or abusive. The CFPB can use its own subjective nose and declare something foul.

A prime example is the CFPB's sole attempt thus far at enforcing UDAAP. Last summer, the CFPB settled three investigations into the sales and marketing of credit card "add-on" products by third-party vendors of three major credit card companies. Although it may be obvious to you, it is worth pointing out that, other than labeling certain conduct as deceptive, the CFPB did not cite to any particular statutory or regulatory authority prohibiting the allegedly deceptive conduct at issue. Instead, regulators likely made an observation on their own or received complaints from third parties, conducted an investigation, and when other, more clearly defined statutes apparently had no application to the facts at hand (say, for example, the Truth in Lending Act, the Fair Credit Reporting Act or the Credit CARD Act), regulators defaulted to UDAAP. At the end of the day, the CFPB trotted out to the courtyard of public opinion and placed the heads of each of the credit card companies on a stake for all to see (figuratively, of course). Penalties and restitution totaling in excess of $525 million were levied by the CFPB and other regulators, and the message was clear: Violate UDAAP at your peril!

Is there something we can do to band together as an industry to collaborate on reasonable solutions to the vexing challenges that UDAAP presents?

Yes.

Under Dodd-Frank, the bureau's rulemaking abilities are broad, allowing the agency to "prescribe rules and issue orders and guidance, as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof." Indeed, Congress got downright suggestive that the bureau should at least consider UDAAP rulemaking, specifically providing that:

The Bureau may prescribe rules applicable to a covered person or service provider identifying as unlawful 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. Rules under this section may include requirements for the purpose of preventing such acts or practices.

There are some very compelling reasons for the CFPB to engage in UDAAP rulemaking. First, it will ultimately conserve the CFPB's precious resources as well as those of the regulated. Clear rules will narrow the CFPB's focus and give financial institutions—many of which are being crushed under the weight of Dodd-Frank absorption—a meaningful resource to guide their behavior.

Second, comprehensive and comprehensible rules will provide clarity and uniformity in the application of UDAAP. The CFPB's use of supervision, enforcement and adjudication are backward-looking and antithetical to notions of fairness and forward-looking clarity.

Third, public, inclusive rulemaking will allow the CFPB to articulate its policy about the UDAAP standards without regard to a particular set of facts. In other words, the bureau can articulate its understanding of unfairness, deception and abuse, and the industry can then rely on that understanding to govern its consumer-facing acts and practices, and risk management and compliance functions.

Finally, rulemaking is transparent and open—virtues the CFPB is enamored with when it comes to consumers. Transparency should not be a one-way street. Rather, the industry should enjoy the same benefit when it comes to UDAAP. The CFPB should let us "know before we loan," just as it demands that consumers get to "know before they owe."

How do we get there?

When it comes to UDAAP, the issues have no boundaries. It does not matter if you are a bank, thrift or credit union (large or small), a mortgage servicer, a prepaid credit card, a real estate settlement service, a debt collector, a credit reporting service or a check cashier. If you are within the CFPB's jurisdiction in any way, you are subject to UDAAP. Herein lies our power.

With numbers, there is power. And our numbers are great. There are, quite literally, countless companies that engage in the consumer financial services industry. We must get together and collaborate. We need to talk about what those rules would look like. We need to talk about standards and best practices. We need to set an agenda. In the meantime, we need to open the door and collaborate with the CFPB and other consumer advocates to understand and, where possible, address their reasonable concerns. It is time; this is your call to arms. Email me or go to www.udaap.com to find out more about what the rapidly growing UDAAP movement is up to and how you can help.

Martin J. Bishop is a partner, litigation department vice chairman and co-chair of the consumer financial services litigation practice at Foley & Lardner LLP. He can be reached at mbishop@foley.com.

Reprinted with permission from *InsideCounsel*.