

UDAAP: STATE AUTHORITY

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) of 2010 provides state regulators and attorneys general with new authority, broader than that which may be available under state law, to take enforcement actions in the name of protecting consumers against unfair, deceptive and abusive practices (UDAAP).

The financial crisis provided federal lawmakers with an incentive to expand state enforcement powers. Title X—the Consumer Financial Protection Act—of Dodd-Frank not only created the Consumer Financial Protection Bureau (CFPB), but broadened states’ enforcement powers with regards to national banks and federal savings banks.

Prior to Dodd-Frank, federal laws and regulations largely pre-empted state regulators and attorneys general from regulating federally registered national banks—especially if state law was in conflict with federal law. Post-Dodd-Frank, though state laws on rates and licensing still do not apply to national banks, and attorneys general still do not have the authority to enforce Title X against a national bank¹, the law does give state attorneys general new power to enforce CFPB regulation and state regulators the power to enforce for unfair, deceptive and abusive acts or practices.

This means that state attorneys general and state regulators are generally authorized to enforce provisions of Title X and any regulations promulgated by the CFPB under Title X against persons other than national banks and federal thrifts. This includes a prohibition on engaging in unfair, deceptive or abusive acts or practices (UDAAP) in connection with offering a consumer financial product or service. However, the CFPB has yet to publish regulations that outline what constitutes unfair, deceptive or abusive acts or practices, instead choosing to define UDAAP through enforcement actions and informal guidance.

Regarding the “unfair” and “deceptive” portions of UDAAP, the CFPB appears to follow the Federal Trade Commission’s (FTC) definitions for the terms:

- Unfair: The act causes or is likely to cause substantial injury to a consumer that is not reasonably avoidable and the injury is not outweighed by the countervailing benefits to consumers or competition.
- Deceptive: A representation, omission, act or practice that is material and likely to mislead a consumer and the consumer’s interpretation is reasonable.

¹ With the exception that they can sue national banks as a codification of the Supreme Court’s decision in *Cuomo v. Clearing House Association*

The newest UDAAP element introduced by Dodd-Frank is the *abusive* standard. An abusive act or practice is defined by Dodd-Frank as an act or practice that materially interferes with a consumer's ability to understand a term or condition of a consumer financial product or service, or takes unreasonable advantage of any of the following:

- The consumer's lack of understanding of the material risks, costs or conditions of the product or service;
- The consumer's inability to protect her or his interest in selecting or using the product or service;
- The consumer's reasonable reliance on a covered person to act in the consumer's interests.

To date, six states have used the new tools available to them under Title X of Dodd-Frank.

AFSA'S POSITION

The Dodd-Frank Act changed the landscape for preemption as applied to federally chartered banks and savings banks and opened financial service companies to potentially stronger and far-reaching enforcement actions by state attorneys general and regulators. The impact of these actions will depend greatly on how they are determined by the courts in the coming years. AFSA is committed to monitoring state UDAAP enforcement actions, as well as legislative and regulatory proposals concerning UDAAP issues.