
Frank byplay from top federal officials at ABA Regulatory Compliance Conference

Discussions on UDAP, CRA, RESPA, overdraft, and more underscore bank challenges

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Most compliance conferences

tend to dwell on the "how" of lending, when credit comes up, not the "how much." But when the subject of the evolving Community Reinvestment Act and its implementing rules and commentaries arose during a keynote session at ABA's recent Regulatory Compliance Conference, how and how much intersected.

Ann Jaedicke, Deputy

Comptroller for Compliance Policy at the Office of the Comptroller of the Currency, had been asked about banker expectations for change in CRA. She took the opportunity to link CRA to the broader issue that has dogged banks and savings institutions throughout the financial crisis—balancing new lending for economic recovery with retrenchment or maintenance to help the institutions themselves to regroup, heal, or simply get by.

Politicians from the Oval

Office down have been battering banks to lend more before, during, and since steps such as the TARP program were taken, at the same time that some experts indicated that a de-leveraging was just what the doctor ordered for a credit-bloated economy.

Community bankers have

often cited a flagging appetite for credit, with some borrowers preferring to avoid or pay down debt when they can. Others have actually been ordered to shrink their banks' portfolios, and some, in the wake of writeoffs, have had to do so on their own judgment in order to maintain capital levels.

Jaedicke clearly favored

lending, whenever possible.

CRA compliance focus, she said, "is a place where we as regulators may be able to assess whether a bank isn't lending as a result of lack of demand in the community or as a result of a bank not being willing to take on risk and make a long-term commitment."

Continuing her point, Jaedicke, involved in OCC exams and regulation for more than three decades, reflected on the role of compliance examiners and examiners in general.

"I don't think there is anybody better situated than we are to make these kinds of determinations," she said, noting that "every situation is different."

On a related point, Luke Brown, associate director of compliance policy at FDIC, noted his agency's advocacy for bringing the unbanked and underbanked into the banking industry's mainstream. This attitude has grown significantly in the administration of current FDIC Chairman Sheila Bair. Under Bair's leadership FDIC has pushed programs, pilots, and protocols dealing with overdraft checking, small-balance lending, consumer product templating, and more.

This facet of a wide-ranging discussion demonstrated that while plans for a "Consumer Financial Protection Bureau," under the pending financial reform legislation, would likely accelerate institutionalized consumerism at the federal level, it has not been dormant under the current regulatory structure. Yet while the four speakers—one from each banking and savings institutions regulatory agency—frequently spoke in harmony, they demonstrated that even on the regulators' side of the debate there are differing viewpoints.

Growing importance of UDAP

The senior regulatory panel, a fixture for years at the longstanding ABA conference, held more than one significance.

In a sense, there was an unspoken "last hurrah" about the gathering, at least in the sense of a last look at a setup banks and savings institutions have grown used to.

For one thing, one agency represented on the panel, the Office of Thrift Supervision, will be absorbed into the Office of the Comptroller of the Currency under pending financial reform legislation.

For another, consumer compliance and other regulatory compliance issues have long been shared among the federal banking and savings institutions regulators, as well as other agencies, such as the Federal Trade Commission and the Department of Housing and Urban Development. With the all-but-assured creation of the Consumer Financial Protection Bureau, much of the policymaking in certain of these areas will move to the new organization. For most banks, most primary enforcement will remain with the primary federal regulator, with, at least in theory, enhanced state-level participation as well in financial consumer protection enforcement.

Just who will be up on the stage next year-and how groups like ABA will work with them-is an open question. The rumor mill has been churning already concerning who will head the new agency and how its staff will be populated.

However, the agencies represented have wrought most of what banking institutions must cope with in the compliance context, either directly or through implementation of congressional decisions. There has been evolution in both spheres.

A strong example that the panelists devoted a large portion of their conference discussion to is UDAP-Unfair and Deceptive Acts and Practices law and regulation. UDAP was actually promulgated, originally, in the Federal Trade Commission Act. However, the banking regulatory agencies have been issuing supervisory guidance on UDAP and bringing enforcement cases, and the Federal Reserve, which hung back somewhat among the regulators on UDAP for a time, has recently times been citing UDAP as authority for new regulatory initiatives. UDAP came up in numerous contexts throughout the entire conference.

The rise in UDAP marks a shift in federal financial regulation, noted panelist Timothy Burniston, senior associate director in the Division of Consumer and Community Affairs at the Federal Reserve Board. "It reflects the fundamental shifting between what has been called 'consumer compliance'," he said, "and what is now called 'consumer protection'." Burniston said regulators have moved beyond "check boxes and correct disclosures" to the bottom line, whether processes and products result in fair treatment of customers.

"Federal consumer protection laws are very robust," said April Breslaw, director, consumer regulation, at the Office of Thrift Supervision, "but they don't cover everything. That's when UDAP analysis can begin."

OCC's Ann Jaedicke had a divergent viewpoint.

"It's not a shift in focus, but our examiners are much more sensitized," Jaedicke explained. OCC has been a leader among the banking agencies in using UDAP as the basis of enforcement actions. Over ten years, the national bank regulator has made a string of high-profile cases on UDAP grounds. Panelists noted that UDAP enforcement is driven very much by the facts in individual cases, versus traditional compliance and enforcement that relies more heavily on finding outliers to established, regulated norms and requirements. OCC began with credit card cases and moved into mortgages and other banking areas from there. OTS's recent enforcement action taken against Woodforest Bank, a Texas savings institution, concerning overdraft protection program practices, hinged on UDAP.

"This isn't a welcome comment to this audience," said Jaedicke, "but I think we are getting better at it. We have ten years of experience at it now and that is what it takes."

Nonetheless, Jaedicke said UDAP isn't an easy mandate for examiners, because of the fact-specific nature of the cases. In recognition of this, they are limited or backstopped, depending on the viewpoint. "Our examiners can't take enforcement action on their own, without going through Washington, on UDAP issues," said Jaedicke. "They don't have that authority."

Tim Burniston of the Fed reacted to a tone running through some fellow panelists' comments that postured UDAP as a means of tackling issues that make regulators feel uncomfortable but which don't clearly violate any rule or statute. He said there was a sense that the FTC Act's UDAP provisions were a "catchall for all things we don't like."

"There's a lot of fearmongering that we will turn what we don't like into UDAP violations," said Burniston. "I don't think that is the case at all." Burniston said UDAP often comes up indirectly, when a regulator is looking at an issue on some other grounds-possibly even something as far removed as fraud concerns-and UDAP issues then surface.

"We really do have a lot of other things to do," said Burniston.

However, April Breslaw of OTS clearly felt that such issues were a priority. "There is an element of using Section 5 (of the FTC Act, containing UDAP) as a tool," she said. She

said when examiners see fees that are "way out of bounds, way out of whack," they can see that UDAP can be applied.

"The value of Section 5 is that it is broad," Breslaw continued, "and can be applied to new situations that we haven't seen before."

[The June 2010 ABA Banking Journal featured a special cover story concerning UDAP, by expert Jo Ann Barefoot. Read the digital edition now]

More overdraft protection compliance coming?

The OTS enforcement action against Woodforest and the related proposed supplemental guidance released simultaneously with the regulatory enforcement order in April have already been broached among all the agencies as a rallying point for further united action on overdraft issues in a UDAP context. This comes even as institutions push to comply with new Fed rules. The panel discussed this concept and its possibilities, although one regulatory analyst painted the OTS order as highly unfair, and the proposed supplemental guidance as a "last gasp" effort by a condemned agency to justify its existence. (For more about overdraft issues from the conference, see our companion article.)

Interagency adoption of something like the OTS proposal "is not something that is going to happen quickly," admitted Breslaw. But, in an apparent nod to the pending Consumer Financial Protection Bureau, she noted that agencies, while not always having policymaking authority, will continue to have enforcement authority.

"It is in our best interests to come up with a single policy," acknowledged Burniston.

A curious point made by Jaedicke was that the 2005 interagency guidance that OTS would supplement with its proposed document fell out of touch with reality.

"The world changed on us," said Jaedicke, who said she'd spent more time on overdraft issues in the last six months that she'd dreamt was possible.

Elaborating, the regulator said that the 2005 document, which included many best practices, as opposed to being wholly made up of rules, fell behind the times.

"One thing we didn't anticipate was the increased use of debit cards and some of the IT issues and payment processing issues, as well as young people's use of debit cards for small-dollar purchases," said Jaedicke. She added that many consumers have difficulty understanding the timing of how items clear through their transaction accounts and "keeping those accounts in balance."

"Some banks are making that work to their advantage," said Jaedicke, aiming for a wry tone, perhaps. "I could describe it more harshly than that, but that's how I'll choose to describe it."

However, Jaedicke stressed the regulators' insistence that banks monitor overdrafts in order to filter overuse. They are expected to counsel customers who use overdraft protection too much.

"It appears that in some cases that hasn't happened," Jaedicke said. She then threw down a warning as banks race to comply with the Fed's new overdraft debit-card rules.

"Don't be frightening people into opting in," said Jaedicke. "If you do, I'm going to call you. I don't have time to write you a nice letter, so I'm going to call you. Or I'll call your CEO."

The Fed's Burniston allowed that his agency hadn't seen too many strange efforts going on in the opt-in campaigns underway, "but sometimes people bring us strange flyers." Some he characterized as "frightening," and examples of the risks run when Marketing gets too far ahead of Compliance.

FDIC's Luke Brown confirmed that proposed product templates that his agency had put out for comment earlier this year include the potential for not permitting overdraft services to be attached to those transaction accounts. The templates could be used as a basis for low-cost transactional and basic savings accounts.

"It's on the table," said Brown.

Read companion article on overdraft issues from the ABA Regulatory Compliance Conference

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