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Breaking New Ground, CFPB Will Pursue Discrimination as an “Unfair” Practice Across the Range of Consumer Financial Services

On March 16, 2022, the Consumer Financial Protection Bureau (CFPB) signaled a broad expansion of its supervisory and enforcement authority when it announced its intent to target discriminatory conduct as an “unfair” practice under its authority to pursue violations of unfair, deceptive, or abusive acts or practices (UDAAPs).¹ The key takeaways are as follows:

- **CFPB will pursue discrimination across the range of consumer financial services, not just lending.** Although credit-related products have long been subject to the Equal Credit Opportunity Act’s (ECOA) anti-discrimination requirements, the CFPB now plans to “combat discriminatory practices across the board in consumer finance,” even where fair lending laws may not apply.² Such an expansion opens the door to anti-discrimination oversight and enforcement for many activities not previously subject to the CFPB’s anti-discrimination requirements. For example, while excluding a person from a checking account based on race or religion may not violate ECOA, the CFPB has stated that this would be an illegal UDAAP. The CFPB has stated that it will scrutinize potential discrimination as “unfair” across “all consumer finance markets, including credit, servicing, collections, consumer reporting, payments, remittances, and deposits.”³
- **CFPB will pursue discrimination in the form of “unfairness” claims even absent discriminatory intent.** This announcement tracks the approach taken by Director Rohit Chopra while he was at the Federal Trade Commission (FTC). While at the FTC, then-Commissioner Chopra took the position that discriminatory practices, including practices that have a disparate impact, may also meet the FTC Act’s standard for unfairness—a standard that has the same elements as unfairness under the UDAAP prohibition that the CFPB enforces.⁴ The Bureau’s recent announcement indicates that it, too, will employ a “disparate impact” theory of liability to identify “unfair” discriminatory practices. This means that discriminatory intent may not be required to find a UDAAP violation, because, as Director Chopra stated, “[c]onsumers can be harmed by

¹ Press Release, CFPB, *CFPB Targets Unfair Discrimination in Consumer Finance* (Mar. 16, 2022) (“Press Release”), available [here](#).

² *Id.*

³ *Id.*

⁴ Statement of Commissioner Rohit Chopra, FTC, *In the Matter of Liberty Chevrolet, Inc. d/b/a Bronx Honda Commission*, File No. 1623238 (May 27, 2020), available [here](#).

discrimination regardless of whether it is intentional.”⁵ CFPB emphasized the need to assess “discriminatory outcomes,” including “the impact of products and fees on different demographic groups.”⁶

- **CFPB did not delineate protected categories.** Employing a disparate impact theory of liability is in line with the ECOA and other federal anti-discrimination statutes and regulations, which generally impose liability under both disparate treatment and disparate impact theories. But in contrast to these laws, which explicitly prohibit discrimination on the basis of, among others, race, color, national origin, religion, sex,⁷ or familial status, the CFPB’s announcement is silent with respect to protected classes, leaving the scope of the prohibition uncertain.
- **CFPB will scrutinize algorithmic decision-making for discrimination.** The CFPB noted in an accompanying blog post that it “will be closely examining companies’ reliance on automated decision-making models and any potential discriminatory outcomes,” including “certain targeted advertising and marketing, based on machine learning models.”⁸ This tracks the Bureau’s recent emphasis on countering redlining pricing and algorithmic bias. For example, while announcing the Trustmark National Bank settlement, Director Chopra stated, “[w]e will be closely watching for digital redlining, disguised through so-called neutral algorithms, that may reinforce the biases that have long existed. . . . we must not allow robo-discrimination to proliferate in a new crisis.”⁹ Likewise, during its recent announcement about the issuance of the SBREFA Outline in preparation for rulemaking on the use of automated valuation models, Director Chopra stated, “[i]t is tempting to think that machines crunching numbers can take bias out of the equation, but they can’t.”¹⁰
- **CFPB will continue to exercise its existing ECOA authority.** The CFPB blog post made clear that it will continue to “prioritize enforcement of the ECOA,” because “vigorous enforcement of the ECOA continues to be essential for us to achieve broader equity and opportunity.”¹¹ According to press reports, the CFPB recently issued questionnaires to banks on their lending practices, with the questions covering types of discrimination that have not traditionally been the focus of ECOA enforcement.¹² The questions asked about how loans are written to women on maternity leave, the treatment of consumers with limited English proficiency, the way that public assistance is counted in loan origination and servicing, the securitization of loans by property on tribal lands, and discrepancies in treatment of same-sex and opposite-sex couples. If the CFPB detects violations, it is possible that the agency will pursue these as both ECOA and “unfair” violations.
- **CFPB’s updates to its UDAAP Examination Manual provide further insights.** The Bureau revised its UDAAP examination manual¹³ to reflect that discrimination may meet the elements for unfairness, which are as follows: the act or practice (1) causes or is likely to cause substantial injury to consumers; (2) is not reasonably avoidable by consumers; and (3) is not outweighed by countervailing benefits to consumers or to competition.¹⁴ While the CFPB can bring enforcement actions

⁵ Press Release.

⁶ *Id.*

⁷ In March 2021, the CFPB issued an interpretive rule stating that the ECOA’s prohibition against sex discrimination encompasses sexual orientation discrimination and gender identity discrimination. See 85 FR 14363, Doc. No. 2021-05233, available [here](#).

⁸ Blog, CFPB, *Cracking Down on Discrimination in the Financial Sector* (Mar. 16, 2022) (“Blog Post”), available [here](#).

⁹ Remarks of Director Rohit Chopra at a Joint DOJ, CFPB, and OCC Press Conference on the Trustmark National Bank Enforcement Action (Oct. 22, 2021), available [here](#).

¹⁰ Press Release, CFPB, Consumer Financial Protection Bureau Outlines Options to Prevent Algorithmic Bias in Home Valuations (Feb. 23, 2022), available [here](#).

¹¹ Blog Post.

¹² See American Banker, *CFPB’s Questions to Banks Suggest New Frontiers in Fair-Lending Scrutiny* (Mar. 31, 2022), available [here](#).

¹³ CFPB, *UDAAP Examination Manual* (3d ed. March 2022), available [here](#).

¹⁴ Dodd-Frank Act, Title X, Subtitle C, Sec. 1031(c).

against a much broader swath of companies compared to those as to which it can exercise examination authority, the CFPB’s exam manual updates provide insights into how the CFPB will approach these discrimination claims more generally. These updates are summarized below.

- **Review of Documents.** CFPB examiners’ review of documents is now expanded to include a review of:
 - Documentation regarding the use of models, algorithms, and decision-making processes (including machine learning and AI) used in connection with consumer financial products and services;
 - Information collected, retained, or used, regarding customer demographics; and
 - Any demographic research or analysis relating to marketing or advertising of consumer financial products or services.
- **Review of Internal Policies and Procedures and Internal Controls.** CFPB examiners will also now determine whether:
 - The entity has a process to prevent discrimination in relation to all consumer financial products and services it offers, including evaluating policies, procedures, and processes for discrimination prior to implementation and continued monitoring afterwards;
 - The entity’s compliance program includes an established process for periodic analysis and monitoring of decision-making, as well as a process to take corrective action upon discovering potential discrimination;
 - The entity’s policies, procedures, and practices do not target or exclude consumers from products or services, or offer different terms and conditions, in a discriminatory manner; and
 - The entity has established policies and procedures to monitor for and mitigate potential UDAAP concerns, and appropriate training to prevent discrimination.
- **Areas for Transaction Testing.** The potential areas for transaction testing were also expanded to direct CFPB examiners to determine, through a high-level assessment of products, services, and customer base, whether an entity is:
 - Engaging in targeted advertising or marketing in a discriminatory way;
 - Improperly treating one customer demographic differently than other customer demographics (for example, by providing inferior terms, by offering fewer products or services, or by providing exceptions for certain demographics);
 - Using decision-making processes in eligibility determinations, underwriting, pricing, servicing, or collections that result in discrimination; or
 - Failing to evaluate and make necessary adjustments and corrections to prevent discrimination.
- **Transaction-Related Examination Procedures.** Where transaction-related testing is found to be necessary, the transaction-related procedures in each of the below categories were expanded to evaluate:
 - **Marketing and Disclosures:** Whether marketing or advertising improperly targets or excludes consumers on a discriminatory basis, including through digital advertising;

- **Availability of Terms or Services as Advertised:** The decision-making processes that are used to determine approval or denial for a product and the terms of the offer, as well as the corresponding inputs used in the decision-making process for each account in the sample; and whether the entity offers products and services to consumers in a manner that prevents discrimination.
 - **Employees and Third Parties Interacting with Consumers:** Whether the entity has a process to take corrective action if the decision-making processes it uses produce deficiencies or discriminatory results.
 - **Servicing and Collections:** Whether call centers, including those operated by third parties, can effectively respond to consumers’ calls, including calls from consumers with limited English proficiency; and whether the entity ensures that employees and third party contractors refrain from servicing or collection practices that lead to differential treatment or disproportionately adverse impacts on a discriminatory basis.
- **Relationship to Other Laws.** The manual was also updated to clarify that “a discriminatory act or practice that is unfair, deceptive, or abusive, may also violate other antidiscrimination laws, such as ECOA,” indicating that, where other statutes apply to the discriminatory conduct, the CFPB may seek relief for each violation.

Considerations for Mitigating Enforcement Risk

Companies that provide consumer financial products or services should review the CFPB’s new guidance carefully. Among other things, companies should consider:

- If appropriate, updating policies and procedures designed to mitigate the occurrence of UDAAP and ECOA violations;
- Training relevant employees, including product engineers and marketing and sales personnel, on the CFPB’s announcement that discrimination can constitute an “unfair” practice;
- Tracking and responding to consumer complaints regarding discriminatory treatment or impact and escalating trend data for appropriate action;
- On a risk basis, subjecting certain products or services to an anti-discrimination analysis akin to a fair lending analysis;
- Periodically reviewing decision-making models and algorithms that determine when consumers are offered or provided consumer financial services for discriminatory impact across a range of categories;
- Monitoring whether vendors or other third parties that advertise or deliver the company’s services are reviewing these matters and have adequate anti-discrimination procedures in place; and
- When appropriate, conducting enhanced diligence on third-party partners to assess their compliance with anti-discrimination laws.

We will continue to monitor developments in this space.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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