

Alert | Financial Regulatory & Compliance



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CFPB Expands Anti-Discrimination by Applying UDAAP to Credit and Non-credit Products

This GT Alert covers the following:

- CFPB expands its anti-discrimination oversight and enforcement of covered persons to all consumer finance products and services, regardless of whether they involve an extension of credit.
- Examples of discriminatory conduct CFBP deems “unfair” in its updated UDAAP exam manual.
- Information required of providers of consumer financial products and services.
- Proactive measures providers of consumer financial products and services may wish to consider.

On March 16, 2022, the Consumer Financial Protection Bureau (CFPB, or Bureau) **announced** a significant expansion to its anti-discrimination oversight and enforcement of covered persons, stating expressly that it will now apply such scrutiny to all consumer finance products and services, regardless of whether they involve an extension of credit. The non-credit products and services the Bureau identified as ones it will prioritize during examinations and for enforcement include collections, servicing, consumer reporting, payments, remittances, and deposits.

Although the CFPB made clear that its anti-discrimination supervisory and enforcement efforts will continue to rely on the Equal Credit Opportunity Act (ECOA), which ensures fair lending in credit extensions, it expressed that “certain discriminatory practices” may trigger liability under the Consumer Financial Protection Act (CFPA), which prohibits unfair, deceptive, and abusive acts and practices

(UDAAPs). The Bureau explained that it will leverage the CFPB not only in cases in which the ECOA does not apply, but also in cases in which it does.

Concurrent with its announcement, the CFPB published an updated UDAAP exam manual. In the updated exam manual, the CFPB states that discrimination may be “unfair” and a violation of the CFPB if it causes substantial harm to consumers that they cannot reasonably avoid, where the harm is not outweighed by countervailing benefits to consumers or competition. The CFPB further indicates that consumers “typically” cannot reasonably avoid discriminatory practices that can cause them substantial harm by virtue of foregone monetary benefits and/or the denial of products or services. The Bureau also states that “emotional impacts” or “dignitary harm” may amount to or contribute to substantial injury, although it “will not ordinarily” be the case that such factors will be sufficient to establish substantial injury on their own.

In the exam manual, the CFPB cites several examples of discriminatory conduct it deems “unfair” including:

- Providing inferior terms improperly to one customer demographic and not another;
- Offering or providing more products or services improperly to one customer demographic as compared to others;
- Treating customers of certain demographics in a less favorable way, or providing extra assistance or exceptions to customers of a certain demographic in customer service interactions; and
- Engaging in targeted advertising or marketing in a discriminatory way.

In recent years, consumer advocacy groups and progressive regulators have urged the expansion of federal regulatory enforcement of discriminatory practices by leveraging UDAAP. For example, in May 2020, current CFPB Director Rohit Chopra, then a commissioner of the Federal Trade Commission (FTC), [stated](#) in a case involving a disparate impact claim against an auto dealer that certain practices could be found to be both discriminatory under ECOA and other laws like the Fair Housing Act (FHA), and additionally found to be “unfair” under Section 5 of the FTC Act. Indeed, it bears repeating that the FTC has overlapping enforcement jurisdiction with the CFPB, and providers of consumer finance products and services may expect that the FTC will also police “unfair” discrimination going forward. Following Chopra’s 2020 statements, in 2021, the Student Borrower Protection Center published an article titled [“Discrimination is ‘Unfair’: Interpreting UDA\(A\)P to Prohibit Discrimination,”](#) prepared by civil rights lawyers (one former CFPB) at Relman Colfax PLLC, the former law firm of current CFPB Fair Lending Director Patrice Ficklin.

Per the updated exam manual, providers of consumer financial products and services must show:

- Documentation regarding the use of models, algorithms, and decision-making processes used in connection with offering consumer financial products and services;
- Information an institution collects, retains, or uses regarding customer demographics, including a breakdown of demographic usage of products, fees associated with those products, and revenue sources and costs associated with them;
- Demographic research and analysis relating to marketing or advertising of consumer financial products or services; and

- Evidence of processes implemented to prevent discrimination throughout the product development and implementation life cycle, and periodic monitoring of decision-making processes for potential discrimination.

The Bureau's announcement and exam manual updates spotlight how the CFPB plans to utilize the CFPA in supervision and enforcement to police discrimination throughout the consumer finance marketplace, a top priority of the Biden administration from day one. Providers of consumer financial products and services may wish to consider the following proactive measures:

- Employ a risk-based approach to compliance that analyzes the risk of discrimination in how they offer non-credit products, particularly those identified by the Bureau and noted above. As in traditional fair lending programs, focus on aspects of the product life-cycle in which discretion can be exercised and where facially neutral policies and procedures present a risk of disparate impacts on protected groups.
- Update compliance management systems by developing antidiscrimination policies and procedures that apply to non-credit products, and provide training to applicable employees on the same.
- Monitor complaints for trends that may suggest discrimination in the provision of a consumer financial product or service.
- Conduct enhanced diligence on third-party partners who offer marketing, lead generation, or other essential services to ensure their compliance with anti-discrimination laws (now including UDAAP), and likewise enhance, as appropriate, representations and warranties in contracts with the same.
- Develop qualitative reviews of marketing, fraud and other models used for non-credit products to reduce disparate impact risks, and consider development of periodic statistical testing programs to monitor for potential discriminatory outcomes in connection with non-credit products.

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