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***The Consumer Finance Podcast* — Regulatory Rollback: Impact on Industry of CFPB's Withdrawal of Fair Lending and UDAAP Informal Guidance**

**Host: Chris Willis**

**Guest: Lori Sommerfield**

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**Chris Willis:**

Welcome to *The Consumer Finance Podcast*. I'm Chris Willis, the co-leader of Troutman Pepper Locke's Consumer Financial Services Regulatory Practice, and today, we're going to be doing a special deep dive on some of the withdrawals of informal guidance by the CFPB in May 2025, focusing on those documents that were withdrawn that relate to fair lending and UDAAP issues.

But before we jump into that topic, let me remind you to subscribe to our blogs, [TroutmanFinancialServices.com](https://www.troutmanpepperlocke.com/Consumer-Financial-Services) and [ConsumerFinancialServicesLawMonitor.com](https://www.consumerfinancialserviceslawmonitor.com), and don't forget about all of our other podcasts, the [FCRA Focus](#), [The Crypto Exchange](#), [Unauthorized Access](#), which is our privacy and data security podcast, [Payments Pros](#), and of course, [Moving the Metal](#).

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Now, as I said, today, we're going to be taking a closer look at some of the withdrawals of guidance that is sort of more informal guidance by the CFPB on May the 9<sup>th</sup>, with a particular focus on those items that affect fair lending and UDAAP issues, and joining me to have that discussion is my partner, Lori Sommerfield, who, she and I, worked together on all kinds of UDAAP and fair lending matters together, and she is a very experienced lawyer in both of those areas in her own right. So, Lori, thanks for being on the podcast again today.

**Lori Sommerfield:**

Hi Chris, great to be with you again.

**Chris Willis:**

So, the audience is, I'm sure, familiar with the fact that on May the 9<sup>th</sup>, the CFPB withdrew over 60 pieces of informal guidance, sometimes going back all the way to 2012 on a wide variety of topics, and today, we're just going to be talking about the ones that deal with fair lending, and you and I thought were especially important. So, do you want to kick things off by starting with the list of things that you thought were significant in the withdrawn guidance related to fair lending?

**Lori Sommerfield:**

Sure, happy to do so, Chris. First of all, let's tackle the fair lending guidance, and by my count, there seven sets of fair lending guidance that the bureau withdrew. So, I'm just going to quickly describe each one of them, and then we can go back and talk about which ones were significant or not so significant, if that's okay.

The first fair lending guidance that the bureau withdrew was its bulletin on lending discrimination that it issued in 2012, and that was one of the first policies that came out of the bureau, and it established the CFPB's framework for how it was going to go about enforcing ECOA and Reg B.

The next item was an interpretive rule on ECOA and Reg B in discrimination on the basis of sexual orientation and gender identity. And this was basically the CFPB means of implementing the US Supreme Court's decision in *Bostock v. Clayton County*, a decision that was rendered in 2020, and that held Title VII of the Civil Rights Act of 1964 prohibited discrimination on the basis of sexual orientation or gender identity. So, the bureau's guidance basically extended that prohibition on discriminating against individuals on the basis of gender to include both sexual orientation and gender identity.

**Chris Willis:**

Which, I have to say, Lori, given the fact that it was based on a Supreme Court decision interpreting either identical or similar language in another Federal Civil Rights Statute, like what difference does it make?

**Lori Sommerfield:**

I guess that's a fair point, Chris, but the Supreme Court decision still stands. So, it's still out there.

**Chris Willis:**

That's what I'm saying, whether the CFPB had this guidance or doesn't have it, or issued it or withdrew it, the Supreme Court's decision in *Bostock* is still there.

**Lori Sommerfield:**

That's exactly right.

**Chris Willis:**

Okay.

**Lori Sommerfield:**

So, you could say, in a way, that this guidance is not so meaningful, at the end of the day.

**Chris Willis:**

Let's keep it going, maybe we'll find something more meaningful.

**Lori Sommerfield:**

The next item was the policy statement on enforcement and supervisory practices relating to the small business data collection rule, and that policy statement basically focused on ensuring that lenders don't discourage loan applicants for providing requested data, and it would have allowed the CFPB to closely examine lenders' response rates, and consider how they compare to similar institutions.

So, that policy statement came out in 2023, but now, the CFPB has said that they are going to be completely rewriting it. So, this policy statement now seems rather moot in the light of that development.

**Chris Willis:**

Yeah, I mean, that makes sense if they're going to redo the 1071 rule, they should withdraw the guidance related to it, until they finalize a new rule. I'm eagerly anticipating seeing that notice of proposed rulemaking when it comes out, though.

**Lori Sommerfield:**

I agree. I feel the same way. Another item withdrawn was an advisory opinion on ECOA and Reg B concerning revocations or unfavorable changes to the terms of existing credit arrangements, and that to me again was a piece of guidance that really was not all that pivotal at the end of the day.

**Chris Willis:**

Well, it's interesting because that was a subject, as I recall, that the CFPB wrote some amicus briefs in, and some private litigation where the theory of the litigation was the plaintiffs brought adverse action notice-related claims following line management decisions by credit card issuers. Like, your line was reduced or your account was terminated, or whatever, and the issuers in those litigation matters were defending on the basis that once you have an account opened, you are no longer an applicant, under the language of ECOA and Reg B.

And the CFPB wrote amicus briefs in those two cases, as I recall, saying, "Oh, it applies, you're always an applicant, even after your account is already opened." And my recollection is this advisory opinion was meant to sort of further support the position they were taking in those amicus briefs.

**Lori Sommerfield:**

So, this is actually about change in the CFPB's position, then?

**Chris Willis:**

Maybe, I don't know. They've withdrawn it, they haven't said what they think the real answer is, so I don't know.

**Lori Sommerfield:**

So, the jury is still out on that question, right, Chris?

**Chris Willis:**

Yeah, and the thing is, because it's a statute with the private right of action, whether the CFPB says one thing or the other, you still have to potentially deal with the private litigation of the nature that gave rise to those amicus briefs.

**Lori Sommerfield:**

That's true. So, stay tuned for more on this topic.

**Chris Willis:**

Yeah, for sure. It is an interesting topic on the subject of, like, who is an applicant under Reg B?

**Lori Sommerfield:**

True, and that's been a thorny question, including under the Townstone redlining litigation.

**Chris Willis:**

Correct, but that one was ultimately decided on the basis that the statute permitted claims of non-applicants or prospective applicants, and so it doesn't really bear on the issue of who is an applicant and who is not.

**Lori Sommerfield:**

That's true.

**Chris Willis:**

So, what else? There were a couple of circulars that got withdrawn.

**Lori Sommerfield:**

That's right.

**Chris Willis:**

These, I think, are pretty significant, I have to say.

**Lori Sommerfield:**

Right. So, there were two circulars, one issued in 2022 and one in 2023, that basically related to adverse action notice requirements and how to properly use them. It also was a commentary on the CFPB sample forms that are contained in the appendix to Reg B, as well as commentary about the use of adverse action reasons when you have credit decisions that are based on complex algorithms.

So, both sets of guidance seem to be part of a big push by the CFPB to make sure that lenders were using more specific and more accurate adverse action reasons.

**Chris Willis:**

Yeah, and my interpretation of them when they came out, was the first one was sort of a shot across the bow on machine learning models, essentially saying like, "Well, you can't use a machine learning model if you can't produce accurate adverse action reasons that interpret whatever the reason for the models decision was." And so, it marked a very significant reversal in what seemed to be more friendly communications from the CFPB about AI and machine learning during the previous administration.

And then, the latter one, the 2023 one, although it was dressed up as, "Here's something we're saying about the use of adverse action notices in AI models," was really, to me, more about expressing hostility about alternative data. Things like shopping behavior and stuff like that, and the CFPB in that circular, took the position that you had to have these hyper-specific adverse action reasons.

Like, it wouldn't be enough to say, "We're declining you because of your shopping behavior," which would be very similar to the reasons and the model form in Reg B. The CFPB even said in that circular, "You would have to list the exact transaction with the exact merchant, and even give the date of it, in order to use that as an adverse action reason." Which to me was so contrary to the nature of the adverse action reasons in the model forms in Reg B, but of course, they didn't even mention that disparity.

**Lori Sommerfield:**

Yes, these were both very consequential circulars, I believe. So, the fact that the bureau has now withdrawn them, I think, is actually probably giving the industry a sense of relief.

**Chris Willis:**

I think so, too, particularly because with regard to that second one, I didn't see a lot of movement in the industry to adopt these mega-specific adverse action reasons. People were

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still using things that were, very much after using it as a precedent, the reasons on the model forms in Reg B, which were much more general.

**Lori Sommerfield:**

Nor did I, and the adverse action reasons that are noted in the appendix to Reg B have been in existence for decades.

**Chris Willis:**

Correct, that's right, and industries relied on them, and there was no notice and comment rulemaking to change that. There was just this circular that seemed to be totally contradictory to them.

**Lori Sommerfield:**

That's exactly right.

**Chris Willis:**

It didn't have that much credibility to me, and the CFPB certainly didn't get around to taking action against anybody for failing to do these mega-specific reasons of the nature in the circular.

**Lori Sommerfield:**

Very true. So, perhaps, goodbye and good riddance to this guidance?

**Chris Willis:**

I think so, because I thought it was not very well-reasoned and not very persuasive to the industry, because I don't think the industry really followed it.

**Lori Sommerfield:**

Agreed.

**Chris Willis:**

But there was one more of these greatest hits that I can't wait to hear you talk about. There is one more bulletin that got withdrawn. So, tell us about that one.

**Lori Sommerfield:**

Yes, there is. The CFPB withdrew its infamous, indirect auto lending in ECOA bulletin that it issued in 2013. Now, interestingly, the guidance was already repealed by Congress under the Congressional Review Act and then signed by President Trump in 2018. So, I guess they're just rescinding this as a housekeeping matter at this point.

**Chris Willis:**

Yeah, just for good measure. Just to make sure that horse is completely dead.

**Lori Sommerfield:**

Like, let's just shoot that horse multiple times, but yes, this infamous bulletin is finally rescinded, it's finally gone.

**Chris Willis:**

Yeah, but that was the one that sort of stated the legal theory underlying the CFPB's dealer finance charge markup cases that it pursued between 2013 and 2016, and there were four or five of them that the CFPB entered into consent orders with industry participants jointly with DOJ, as I recall, and then there hasn't been one since. And as you noted, Congress disapproved this as a "Rule" in 2018, and so, we didn't see the CFPB touch it after that. But like you said, just for good measure.

**Lori Sommerfield:**

Indeed. Well, should we move on to UDAAP?

**Chris Willis:**

Yeah, there were also a number of UDAAP-related policy statements and advisory opinions, and all kinds of things. Some of which, again, I think are pretty consequential. So, Lori, why don't you lead us through a discussion of that?

**Lori Sommerfield:**

Sure, Chris. I just want to start the discussion by saying that much of the CFPB's guidance did have some sort of UDAAP component to it, depending on what the topical matter was. So, I thought I would just focus on three of the key sets of UDAAP guidance that are more purely focused on that topic.

**Chris Willis:**

Yeah, and then I've got one to add when you're finished. So, go ahead.

**Lori Sommerfield:**

Okay, sounds good. First of all, the CFPB withdrew its 2023 policy statement on prohibiting abusive acts or practices, and that was a policy statement that outlined the prohibition on abusive acts or practices under the Consumer Financial Protection Act, and it aimed to provide an analytical framework for identifying practices, drawing on examples from past enforcement actions.

But I think this is the third iteration of that policy since the CFPB's inception, and each administration has seemed to want to put their stamp on it. So, this is Trump 2.0's administration effort to withdraw that policy statement.

**Chris Willis:**

Right, but of course, like the Biden administration, CFPB had withdrawn an interpretation of "abusive" that Kathy Kraninger had published while she was the director of the CFPB during Trump's last term, and the two were very different from one another. The Kathy Kraninger version really sought to put some real guidelines and limits around what's abusive and what's not.

And if I recall correctly, said, like, "We're going to try not to muddy up the waters by simultaneously alleging that something is both unfair and deceptive and abusive at the same time, so we can give abusive some independent meaning." The Chopra policy statement, the one that's now been withdrawn, was quite different in that regard, as I recall.

**Lori Sommerfield:**

Exactly, it took a much more expansive approach to defining abusive practices and how that authority would be used in supervision and enforcement matters.

**Chris Willis:**

Yeah, and notably, my recollection of the now-withdrawn 2023 policy statement is that it imposed really no limitations at all on what could be abusive. There didn't have to be any specific amount of consumer impact, there didn't have to be any quantum of consumer complaints that were related to it. I mean, the bureau basically said, "Anything can be abusive." And I recall, too, there being a statement in that 2023 statement that you know, having things in in form contracts that were, "Take it or leave it," you know, could be an indication of abusiveness. And I was sitting there thinking, "Well, like, the whole industry works on formed contracts." You don't individually negotiate credit card agreements or mortgage security agreements. So, like I guess everything is abusive now, is what it seemed like to me.

**Lori Sommerfield:**

Agreed.

**Chris Willis:**

So, that one, I think, was subject to some rightful criticism, and I'm quite glad that it's been withdrawn. It will be interesting to see if the new Trump 2.0 CFPB will try to resurrect the Kathy Kraninger abusive interpretation, or come out with yet another one, or just say nothing, I don't know.



**Lori Sommerfield:**

Exactly, hard to predict at this point.

**Chris Willis:**

Yeah, there are some others, though, that are coming out here too that have been withdrawn. I'd like to hear about those as well.

**Lori Sommerfield:**

Yes, so the next one under the UDAAP category is a circular that was issued in 2024 on unlawful and unenforceable contract terms and conditions, and that circular warned covered persons that including unlawful or unenforceable terms and conditions in consumer contracts could violate the prohibition on deceptive acts or practices.

So, for example, if you had a contract provision stating that a consumer agreed not to exercise a legal right that was deemed likely to affect the consumer's willingness to attempt to exercise that right in the event of a dispute, that could be deemed an unlawful or an unenforceable term.

**Chris Willis:**

Yeah, and this one really actually did send quite a few market participants into a frenzy of trying to review all of their agreements, and try to figure out, you know, is there anything in this agreement that would be unenforceable under any state's law, because that was basically what the circular was around because the CFPB crucially in the circular said it's not enough to say, "You know, you hereby agree to this, except to the extent inconsistent with state law" because the Bureau's position was, well, consumers don't know what state law says, and so you know, it really did mandate a state-by-state approach to literally almost every term in a consumer financial services agreement.

**Lori Sommerfield:**

That's right, Chris. That's right.

**Chris Willis:**

Yeah, this wasn't a very popular one. So, I am sure the industry's breathing a sigh of relief that it has been withdrawn because it really did create a very difficult situation for industry participants.

**Lori Sommerfield:**

Indeed.

**Chris Willis:**

But the CFPB didn't just withdraw things from the last administration. There is an older UDAAP one that they withdrew as well. Can you tell us about that one?

**Lori Sommerfield:**

Sure. So, the CFPB also withdrew a bulletin that they issued in 2013, which would prohibit unfair, deceptive, or abusive practices in the collection of consumer debts, and Chris, since you're a debt collection expert, you probably actually had experience dealing with that bulletin back in the day.

**Chris Willis:**

Well, I think this is the one that basically said to creditors who are not subject to the Fair Debt Collection Practices Act that a number of the prohibited practices in the FDCPA would be applied by the CFPB to creditors collecting their own debts under the rubric of Dodd-Frank UDAAP. So, it is essentially saying, "Hey, you have to abide by a number of the provisions in the FDCPA even though you are not covered by it because you are not a debt collector." That's my recollection of this one.

**Lori Sommerfield:**

That's my understanding, too, Chris, and I believe it really rocked creditors when they received that guidance. So, this again is another piece of regulatory guidance that is going to be a relief, especially to creditors who would have been subject to it now that it's been rescinded.

**Chris Willis:**

But I think the relief is really limited because the thing is, every state has a UDAAP law.

**Lori Sommerfield:**

That's right.

**Chris Willis:**

The Federal Trade Commission has a UDAP law, and several states have debt collection laws that explicitly apply to creditors collecting their own debts, and so it's not like the withdrawal of this bulletin really makes that big of a practical difference for creditors collecting their own debts because they still have all those state laws to deal with.

**Lori Sommerfield:**

That's a fair point, Chris.

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**Chris Willis:**

So, I think this is not likely to bring about much in the way of operational change for our creditor clients in connection with their own internal debt collection efforts, but can I add one because I had my own least favorite UDAAP circular that came out during the last administration that I was very loud about criticizing when it came out, and that has now also been withdrawn. And so I am thanking the new leadership of the CFPB for that, and that's Circular 2024-01.

It came out in the spring of 2024, and it had to do with Internet comparison shopping sites, which are very popular in the consumer financial services industry for consumers to shop for loan or deposit products, and the FTC had done some enforcement around some of those sites under its sort of existing framework that if the site was receiving compensation from the providers of the products.

And ranking them or presenting them or giving them more prominence because they were paying the site for that, that that's something that would need to be disclosed to consumers, and the operators of these sites sort of uniformly said, "Okay, we'll do that," and they adopted the FTC's guidance and put very prominent disclosures. It says the appearance of products on this site and the rankings in our charts are influenced by money that we get from the providers of the product. So, you should know that.

The CFPB then came along and basically disagreed with the Federal Trade Commission, and they took the position in this circular, 2024-01, that anytime money is paid by the product provider to the operator of the site, it is a UDAAP violation. And what was amazing about the circular is, it didn't address the disclosures at all. So, the disclosures were like the central theme of the FTC's efforts in this area.

And then, the CFPB said it's a violation of law and didn't say anything about disclosure, which was sort of, I think, meant to imply that the sites are illegal regardless of disclosure if they take any compensation for the product provider. Now, that, of course, was the whole foundation of the business model of these sites, which are very important gateways for consumers to learn about and apply for consumer financial products and services.

And so, I was critical of this circular for omitting any discussion about the disclosures, which I thought was a really important part of the legal analysis, as apparently did the FTC as well because that's what its enforcement actions were based on, but I also thought that this circular really didn't have much credibility and was not likely to lead to that whole segment of the industry just shutting its doors because the CFPB had released a circular.

And, in fact, that did not happen, and the CFPB didn't do anything from an enforcement standpoint or even a supervisory standpoint, to follow the reasoning of this circular, and now, of course, it's been withdrawn. I thought it was very poorly reasoned and really should have been withdrawn, so I'm glad that happened.

**Lori Sommerfield:**

Another one that happily bites the dust. Glad to see it.

**Chris Willis:**

Yeah, because this one was a real stretch, I thought, and really was very disconnected from the reality of how that market worked, and I didn't really understand the reasoning of it or even why the CFPB released it because then they didn't really follow up on it in supervision or in enforcement. So, you know, I thought it was just a headline at the time, and as it turns out, it was just a headline, and now it's gone, at least for the time being.

So, like these are a bunch of things that have been withdrawn by the CFPB, but let's close this episode, Lori, with a quick discussion about what do we think the practical impact of some of this is? Because the CFPB issued this on an informal basis during the last administration. Now, the new administration's withdrawn them. What do we as industry actors do about all that? What practical impact does it have for us?

**Lori Sommerfield:**

Well, I think it's important to note, first of all, that the two laws we're talking about, the Equal Credit Opportunity and UDAAP, are still on the books, regardless of whether this regulatory guidance exists or was withdrawn. So, the CFPB still has the statutory duty to enforce those two laws under the Dodd-Frank Act. We haven't seen any indications that Congress intends to amend either of those statutes, nor has the CFPB indicated that it plans to amend Regulation B, that implements ECOA.

So, for now, I think it doesn't make a big difference. I think the gamechanger here is really the CFPB's 2025 supervision and enforcement priorities, which noted that the bureau only plans to enforce fair lending laws to the extent of actual consumer harm, and only where there is actually intentional discrimination. So, that to me is more telling than the withdrawal of any of this guidance.

Another thing that I think is also very fascinating is Presidential Executive Order 14281, which was issued in an attempt to dismantle the disparate impact theory of fair lending liability because that also supports the bureau's less aggressive enforcement of the federal fair lending laws that it outlined in that 2025 supervision and enforcement priorities document. So, that's my take on it.

With regard to UDAAP, I think that the CFPB's withdrawal of the UDAAP policy statement is an indication that the bureau's going to pare back on use of UDAAP in examinations, supervision, investigations, and enforcement. So, you know, I think that is sort of an early indicator that UDAAP is not going to be such a core part of the activity and the laws that the CFPB will seek to enforce going forward under the Trump administration.

**Chris Willis:**

Yeah, and I agree with all that, and it's all abundantly clear that that's what the bureau's intentions are, but I think the thing that we should remind the audience of is a presidential administration only lasts four years, and the next president, whoever that person may be, will have the right to appoint a new CFPB director, just as, you know, the previous two have done, and anything that can be rapidly and easily withdrawn can also be rapidly and easily reinstated. And so, that's one good reason to take with a grain of salt, the withdrawal of all of this guidance and not have it be too influential in our compliance efforts, and of course, the overlay of states. You know, states have discrimination laws, and they also have UDAP laws, some general, some specific to things like collections, and so I think the industry is really constrained both by what may happen in the future at the federal level, and by what can happen today at the state level from making massive changes to their operations or their compliance posture because of the withdrawal of this guidance.

**Lori Sommerfield:**

Agreed, and further to my point that these laws still remain on the books, ECOA has a five-year statute of limitations, so there's still the ability for the next administration to look back five years, and that would cover the entire time of the Trump 2.0 administration.

**Chris Willis:**

That's right. So, although I am definitely celebrating the withdrawal of some of these pieces of guidance because I really didn't agree with them at the time.

**Lori Sommerfield:**

Me, too.

**Chris Willis:**

It's not like we can say, "Oh, we're now going to have a permanent party on this," because you know, political administrations can be fleeting in the grand scheme of the lifetime of one of our clients' business operations.

**Lori Sommerfield:**

That's correct, and I agree with you about that, Chris.

**Chris Willis:**

All right. Well, Lori, thanks for joining me to talk about this important topic today, and of course, thanks to our audience for tuning in as well. Don't forget to visit and subscribe to our blogs, [TroutmanFinancialServices.com](http://TroutmanFinancialServices.com) and [ConsumerFinancialServicesLawMonitor.com](http://ConsumerFinancialServicesLawMonitor.com), and while you're at it, why not visit us on the web at [troutman.com](http://troutman.com) and add yourself to our Consumer Financial Services email list. That way, we can send you copies of the alerts and advisories that

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