

The Consumer Finance Podcast — UDAAP and Fair Lending Developments: 2024 Year-in-Review and 2025 Predictions

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Chris Willis:

Welcome to *The Consumer Finance Podcast*. I'm Chris Willis, co-leader of Troutman Pepper Locke's Consumer Financial Services Regulatory Practice. Today's episode is another in our Year in Review and Look Ahead series, in which we're going to be talking about Fair Lending and UDAAP developments in 2024, and what we expect in 2025.

But before we jump into that topic, let me remind you to visit and subscribe to our blogs, [TroutmanFinancialServices.com](https://www.troutmanfinancialservices.com), and [ConsumerFinancialServicesLawMonitor.com](https://www.consumerfinancialserviceslawmonitor.com). 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](#), which is all about the payments industry, and our auto-finance podcast called [Moving the Metal](#). All of those are available on all popular podcast platforms.

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Now, as I said, this is part of our Year in Review and Look Ahead series. And in today's episode, we're going to be talking about UDAAP and fair lending, two of the things that create most risk, I think, for the financial services industry. Joining me to talk about those two pivotal areas of law is my partner, Lori Sommerfield, who does a lot of work in both UDAAP and fair lending. So, Lori, welcome to the podcast. Thanks for being here with me today.

Lori Sommerfield:

Thanks, Chris. Great to be with you again.

Chris Willis:

I feel like I'm at significant risk of understatement by saying that 2024 was an extremely active year for the federal regulators in terms of aggressive enforcement of the federal fair lending laws and UDAAP too, under the Biden administration. Do you mind just starting off by sharing with the audience some of the highlights from last year in the area of fair lending with respect to federal and state agencies?

Lori Sommerfield:

Sure, Chris. That is definitely not an understatement. The federal agencies were very active in aggressively enforcing the fair lending laws. I'd like to start our discussion by talking about the

Combating Redlining Initiative, because that's and a signature issue under the Biden administration in terms of aggressive enforcement of the federal fair lending laws.

So, in 2024, we saw this government-wide crackdown on redlining practices continue unabated. And there were five additional redlining settlements that were announced last year. At this point, the DOJ and the other federal regulators have now entered into 15 consent orders with financial institutions about resolving redlining matters. We've heard publicly from the DOJ that there are still dozens of referrals in the pipeline. Were it not for a change in administration that's coming up very soon, that would be a major source of concern, I think, for the financial services industry. But it's probably likely that this Combating Redlining Initiative is going to be deprioritized by the new attorney general when he or she takes office.

That's hopeful news for the industry because we feel that a lot of financial institutions that were not bad actors have been caught up in this drag net. Certainly, those institutions that are bad actors should be the subject of enforcement actions if they were actually engaged in redlining activities, but that hasn't been the case with a lot of the consent orders that we've seen.

Here's an interesting fact, Chris, that I learned from a former DOJ official recently. The DOJ began bringing redlining enforcement actions in the early 1990s. From that point in time until 2021, when the Combating Redlining Initiative was announced, the DOJ entered into 14 redlining settlements. However, since the Combating Redlining Initiative was announced in October of 2021, as I mentioned, they've now entered into 15 consent orders. The number of redlining settlements within the past three years alone, in comparison to the prior 30 years, is really quite staggering.

Chris Willis:

It really is. They've been amazingly active. Of course, it wasn't just like the public cases that were going on, as you noted. There were tons of redlining action going on in supervision with the various federal banking regulators like the OCC and the FDIC and the FED, and even the CFPB. So, for each case that sort of made its way into public, there was a lot of supervisory activity around things like increasing monitoring, or making more loans in certain majority-minority census tracts that was pushed in supervision that never made its way into public, because it was part of a confidential supervisory process.

Lori Sommerfield:

That's exactly right. It's probably also worth noting, Chris, that there was one state redlining action. Traditionally, state attorneys general and state agencies haven't been that active in redlining enforcement compared to federal agencies. But in 2024, the New Jersey attorney general released a report in October alleging redlining practices by Republic First Bank after they conducted a multi-year investigation. Interestingly, the bank closed in early 2024, but the state of New Jersey took the unusual approach of filing a report, outlining its findings, and then filing a claim with the FDIC instead of bringing litigation against the bank.

So, I think this case demonstrates the risk of redlining cases that exist with state regulators and state AGs, and I expect that that risk is going to continue to increase as federal agencies shift their fair lending priorities under the new administration.

Chris Willis:

That's right. The thing is, I think we'd be remiss if we didn't make the point that redlining in the future may include the traditional residential mortgage kind of cases that we've been seeing for decades and that you and I have just been talking about, but also small business redlining cases because the 1071 rule is going to require collection of data starting this year for the largest small business lenders in July. Then the reporting of that data starting in 2026, that data will presumably become public sometime in the latter part of 2026. The same kinds of analyses that regulators and consumer advocates do on HMDA data can be just as easily applied to that 1071 data once it becomes available at the end of 2026. So, I think we should look for those small business redlining cases to occur as well.

Lori Sommerfield:

I absolutely agree with you, Chris. Redlining in a small business lending context is decidedly the new frontier.

Chris Willis:

So, redlining wasn't the only area where we saw action on fair lending last year and where we expect to see it continue. There's also the whole issue about artificial intelligence and underwriting and other types of models. Would you tell the audience about that?

Lori Sommerfield:

Sure, Chris. You and I are very engaged in a lot of these AI initiatives by our clients, so, we're very familiar with this concept, but federal and state regulators are increasingly focusing on the use of artificial intelligence in consumer financial services markets and especially potential discrimination in the use of AI in consumer lending. So, at the federal level, we've seen activity and scrutiny about the use of AI by the CFPB, HUD, and the FTC.

Specifically, in August, the CFPB issued a comment emphasizing that all technologies, including AI, have to comply with federal consumer financial protection laws. The Bureau noted that it's actively monitoring the use of advanced technologies, such as automated customer service and fraud screening to ensure that they comply with federal law. The Bureau highlighted the need for fair lending practices and regular testing for discrimination in AI technologies that are used in lending and underwriting decisioning in particular.

Importantly, the Bureau also warned creditors that they should be engaging in fair lending testing of their credit models, including assessments of whether a less discriminatory alternative version of the models could be implemented and noted that the CFPB would be performing its own analyses of creditors models. Also, in May, HUD release guidance recommending monitoring AI in tenant screening to prevent discriminatory outcomes and there's been a lot of activity as you know, around the use of tenant screening and how there could be potential discrimination there particularly when AI is used.

Then finally, in September, the FTC launched something called Operation AI Comply to ensure that AI use complies with consumer protection laws. They announced five actions against companies for deceptive or unfair AI practices in that regard.

Chris Willis:

I guess the natural question that our listeners I think will have and that I have too is, to what extent will this focus on fair lending compliance in particular with machine learning or AI models continue past the administration change on January 20th, and my own view is that it will continue. I think there's, first of all, a significant sort of public and political groundswell of suspicion of, at least, and most hostility towards AI. I think it's likely that you're going

to see just a 180-degree reversal on that and the administration's approach to it given that, I think, likely broadly held public view through media and politicians and regulators.

But the other thing I'd point out is the incoming Trump administration has people associated with it who have been advocates for significant regulation of AI. With that as part of the mix also, it also makes me think it's unlikely that this pressure for greater sort of model testing, less discriminatory alternative testing, all the things that we saw happening in 2024, that those are just going to disappear like a magic wand to happen to them. Rather, my belief is that they will continue.

Lori Sommerfield:

I agree with you, Chris. I think that as the use of AI and various areas of consumer financial services continues to grow, we're going to see efforts at both the federal and the state level to promulgate laws, regulations, and regulatory guidance attempting to control its usage. For the very reason that you just mentioned, there's this public suspicion about the use of AI and what really happens in these black boxes. So, I think we've really only seen the tip of the spear so far and there's much more to come. In that regard, I also wanted to mention some of the activity we're seeing at the state level.

I know you're familiar with the Colorado AI Act that was enacted last May, which becomes effective in February of 2026. And that's designed to protect consumers from discrimination in AI-based systems. That law will also require an annual impact assessment about the model that's used and its impact on consumers. We've also seen attempts at similar legislation by states like California. So again, I think we're going to see this growth of legislation at the state level as well attempting to regulate the use of AI.

Chris Willis:

Okay. And then the last development, which I sort of alluded to a minute ago, is the 1071 rule coming online. So, I think, I sort of previewed a little bit, but I think the audience would appreciate a more fulsome description of where are we with 1071 and what's likely to happen next. Do you mind just covering that?

Lori Sommerfield:

Sure, Chris. There have been a lot of developments related to the Section 1071 final rule over the last couple of years, and it is definitely worth summarizing them. Just to refresh everyone's memory, in March of 2023, the CFPB issued the final rule implementing section 1071 of the Dodd-Frank Act, and that concerned basically small business, loan data collection, and reporting requirements. But implementation of that final rule has been delayed due to ongoing litigation.

Currently, there's been an Administrative Procedure Act challenge that was filed by several banking trade groups, and that remains pending in the Fifth Circuit. Oral argument is scheduled for February 3rd of this year, and a decision is expected sometime in the spring. Nonetheless, the CFPB is proceeding as though the final rule is going to be implemented.

So, let me give our audience a couple of examples of that evidence. First of all, in June, the CFPB issued an interim final rule extending the compliance dates by 290 days in order to compensate for the period that the rule with state and litigation by providing new compliance dates for lenders based on their volume. As you mentioned earlier, Chris, the highest volume lenders are going to be required to begin reporting their data as of July 18, 2025, and then those dates run out until like 2026 based on moderate volume lenders and small volume lenders.

Then in August, the CFPB unveiled its beta platform for filing small business lending data for testing purposes. So, it's clear that the CFPB is basically moving full speed ahead toward implementation of the final rule. We think it's unlikely that that rule is going to be tabled during the Trump administration because it's simply too far down the path.

Chris Willis:

Well, not only that, but the rule is required by statute and required by a stipulated consent judgment that the CFPB entered into in a case bought by the California Community Reinvestment Coalition during the last Trump administration. During the last Trump administration, the CFPB agreed to that judgment saying, "We will do this rule and we will do it on a specific time schedule." I don't see how the agency could certainly undo that without being in contempt of that court order, which surely it will not do. I think you're right. My belief is that the rule is just going to go into effect as is without significant change.

Honestly, there's no time to change much of anything before July anyway, given that it would require a full APA notice and comment process because this is a final rule.

Lori Sommerfield:

Exactly.

Chris Willis:

So, let's sort of shift gears and talk about UDAAP. I mean, the thing about UDAAP is it is so all-encompassing and the Biden CFPB used UDAAP for so many things. So, in this podcast, we're

not going to be able to try to survey all of that because it would take us a really long time. But are there a couple of regulatory priorities that you think are most notable for the audience that we should talk about as a way of reviewing last year and looking ahead?

Lori Sommerfield:

Yes. I would suggest that we focus first on the CFPB's war on "junk fees". That was a huge issue, again, in 2024. Then secondly, talk about the CFPB's revised UDAAP manual, which caused quite a stir when it was issued in March of 2022 and some developments there.

First of all, with regard to junk fees, the CFPB continued its all-out war on these so-called junk fees by alleging UDAAP violations, issuing regulatory guidance, and pursuing enforcement actions. By the way, for audience insight, "junk fees" is director Rohit Chopra's term for basically any type of fee charged by a financial institution to its customers. It's been a key issue during his tenure.

There've been multiple junk fee initiatives by the CFPB during 2024, so I'll just hit on a few highlights. First, in January 2024, the Bureau issued two proposed rules, one to prevent financial institutions from charging NSF fees on transactions that are declined in real time. And those are things like debit card purchases and ATM withdrawals. Another proposal was to close an alleged loophole exempting large financial institutions overdraft lending practices from the Truth in Lending Act. So, the CFPB finalized the large institutions overdraft rule in December and gave large financial institutions only three options when they're charging overdrafts now. They can cap the fee at \$5, cap the fee at an amount that covers costs and losses, or disclose the terms of the overdraft loan just like any other loan.

However, the Bureau just withdrew the NSF proposed rule on January 13th of 2025. In my view, that rule seemed pretty ill-conceived because the Bureau acknowledged that NSF fees are rarely even charged on instantaneous transactions. The rule was intended to prevent the practice from becoming more common if other institutions were going to begin charging it. In the notice withdrawing the rule, the CFPB stated that it's going to instead consider a more comprehensive approach that could involve restricting other NSF fees.

In March, the CFPB issued a credit card late fee final rule that dramatically restricted the amount of late fees by capping them at only \$8. Previously, the prior average was \$32. This final rule was very controversial, as you can imagine, in the industry, and the rule has been the subject of litigation. It's been stayed through a preliminary injunction for now, and it remains to be seen what's going to happen with that final rule as well.

Finally, I'll just mention that in April, the Bureau started addressing mortgage servicer fees that it deemed unlawful in its supervisory highlight's publication. It seems as though the Bureau is basically leaving no stone unturned in terms of examining all types of fees that financial institutions can charge to consumers, often legitimately. So, we expect that that initiative will be tabled in the new Trump administration and certainly there will be a new director of the Bureau that will take place shortly after January 20th.

It's also important to understand, though, that the CFPB isn't alone in attacking fees that are charged by financial institutions. For example, at the state level, we've seen that California

implemented a new law in July requiring that all mandatory fees be included in advertising prices, excluding anything that's like a government-imposed tax or fee. The FTC also finalized a junk rule in December, but it's limited to live event tickets and short-term accommodations, so that rule won't impact the financial services industry.

In terms of a second UDAAP initiative, as I mentioned, it's worth noting the status of the CFPB's revised UDAAP exam manual. So, as I mentioned, in March of 2022, the CFPB issued a press release and a revised UDAAP exam manual, in which the Bureau announced that it would begin targeting discrimination as an unfair practice under its UDAAP authority. But that vastly expanded the reach of its anti-discrimination enforcement authority beyond the limits of ECOA, and it was highly controversial.

In September of 2022, the U.S. Chamber of Commerce and several trade associations banded together to sue the CFPB, claiming that the revised UDAAP exam manual exceeded the Bureau's statutory authority and lacked proper public notice and comment under the Administrative Procedure Act. Then in September of 2023, a Texas federal district court vacated the CFPB's changes to its manual, and the Bureau was forced to remove those manual changes regarding discriminatory conduct as unfair practice.

At this point, the CFPB has appealed that ruling to the Fifth Circuit, and oral arguments are tentatively set for February of 2025, so we expect a final decision this spring.

Chris Willis:

Okay, thanks very much for that recap. Let's close out the podcast by letting me ask you, what should financial institutions and financial services companies expect concerning enforcement of the federal fair lending laws and UDAAP when the new administration is sort of in office and in control of the various administrative agencies? What do you think?

Lori Sommerfield:

Well, I think we would probably certainly agree, Chris, that the federal banking agencies, the CFPB and the DOJ are not going to be able to as aggressively enforce the federal fair lending laws as they have during the Biden administration, so we're not going to see a lot of activity in terms of new fair lending in UDAAP investigations or public enforcement actions. But we certainly expect that those laws are going to continue to be actively enforced through the examination and supervision process, because that is exactly what we saw during the prior Trump administration.

I think we'd also expect that the CFPB is going to be less assertive in its rulemaking efforts that could implicate fair lending and UDAAP concerns. There's probably going to be fewer, newer rules, and we may see some of the rules that are on the books rolled back, particularly those that were promulgated by the CFPB. Again, potentially through the use of the Congressional Review Act, as I mentioned. But as we also noted in this podcast, we do expect that the Section 1071 final rule will likely proceed.

I think we'll also probably expect less aggressive interpretations of UDAAP by the CFPB under the new administration with a focus on more sort of mainstream applications of the concept. For example, we might see the Bureau issue a third iteration of its policy statement explaining what constitutes abusive practices and we'll likely see the CFPB if they choose to do so and issue a new policy statement tone that down. That's what we saw happen during the Trump administration the last time around.

Chris Willis:

Absolutely. But the point that you made is correct, which is if we look back at the years of the previous Trump administration and the behavior of the CFPB and the other federal agencies, we didn't see silence. We didn't see inaction. We saw plenty of action, actually. Even in the areas of fair lending in UDAAP, there were fair lending enforcement cases brought, there were plenty of UDAAP cases brought. They didn't tend to be as inventive in terms of targeting novel conduct or novel interpretations of those concepts, but there was plenty for the agencies to do and they busied themselves doing it during the last Trump administration.

So, it's not like a situation where we're going to have a four-year vacation from regulatory oversight. It's just the oversight will be more centered in mainstream rather than as adventurous as I think what we saw during this most recent administration.

Lori Sommerfield:

I agree, Chris. So, I think advice to financial institutions and financial services companies is that you need to continue to attend to fair lending and UDAAP risk management because you're going to see activity in examinations and supervision. It's important to keep your foot on the pedal.

Chris Willis:

Yeah, absolutely. Well, Lori, thank you for being on the podcast today and for sharing your insight and guidance on this issue. Of course, thanks to our audience for listening to today as well.

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