

CFPB Massively Expands Enforcement of Anti-Discrimination Through UDAAP

WRITTEN BY

David N. Anthony | Mark J. Furletti | Michael E. Lacy | Chris Willis | Alan D. Wingfield | Christopher J. Capurso

On March 16, the Consumer Financial Protection Bureau (CFPB or Bureau) unveiled an enormous change to its fair lending philosophy that will have major ramifications for financial services providers of all types. In a [press release](#), the CFPB announced that it will begin targeting discrimination as an unfair practice under its unfair, deceptive, and abusive acts or practices (UDAAP) authority, vastly expanding the reach of its anti-discrimination enforcement beyond the limits of the Equal Credit Opportunity Act (ECOA). The CFPB also updated its [UDAAP Exam Manual](#) to reflect this expansion, providing details about the types of discrimination it intends to address under this new standard.

Background

While this announcement will likely surprise the financial services industry, the idea that discrimination could be enforced under UDAAP authority has been simmering for a couple of years now. In May 2020, the Federal Trade Commission (FTC) settled with a motor vehicle dealer regarding discriminatory practices in its sale and financing of motor vehicles. In a [concurring statement](#), then-FTC Commissioner and current CFPB Director Rohit Chopra noted that practices could be both discriminatory (under specific laws like ECOA and the Fair Housing Act (FHA)) and unfair under the FTC Act. Chopra specifically noted that the FTC could “use its unfairness authority to attack harmful discrimination in other sectors of the economy.”

Then, in spring 2021, the Student Borrower Protection Center published an article by Relman Colfax attorneys Stephen Hayes and Kali Schellenberg, titled “[Discrimination is “Unfair”: Interpreting UDA\(A\)P to Prohibit Discrimination.](#)” The article noted that the existing legal framework for discrimination (including ECOA and FHA) is a “patchwork” of laws and that discrimination is “not expressly prohibited or regulated in large swaths of our nation’s economy.” To remedy these gaps, the article argued that discrimination fits squarely within the definition of “unfairness” used by regulators in that discrimination is (1) likely to cause substantial injury to consumers; (2) which is not reasonably avoidable; and (3) that is not outweighed by countervailing benefits to consumers or competition. Notably, the article argued that *both disparate treatment and disparate impact* should be actionable under a UDAP/UDAAP statute.

Practical Impacts

The CFPB, through its announcement and exam manual updates, adopted the position that discrimination meets

the definition of “unfairness.” We are skeptical that federal courts would endorse this position in contested litigation because it seems to ignore the legislative choice made by Congress to explicitly limit the reach of anti-discrimination concepts to specific areas when it passed legislation like ECOA, the Fair Housing Act, Title VII, the Americans with Disabilities Act, and the like. We suspect a court would be suspicious of the CFPB taking this policy judgment into its own hands.

Moreover, if discrimination is “unfair” under the Dodd-Frank Act, then it also must be “unfair” under the FTC Act and other state UDAAP laws. But those laws reach every aspect of the economy. The logical conclusion of the CFPB’s position is that disparate impact applies to everything in society. Every industry in the economy, from grocery stores to equipment manufacturers to nail salons, would be under a commandment to ensure that all their operations — including marketing and advertising — are free from disparate impact. This is an impossible and unnecessary restriction to impose, but it is what the CFPB’s position would require because it has always aligned the definition of “unfair” under Dodd-Frank with the same term used in the FTC Act.

But our doubts about its legal merits aside, the Bureau signaled that it intends to apply this position in supervision and enforcement matters, and the implications of this position for the financial services industry cannot be overstated.

First, though not explicitly mentioned by the CFPB, the updated UDAAP Exam Manual very strongly indicates that the CFPB plans to use both disparate treatment and disparate impact analyses as a way of establishing “unfair” discrimination. For example, the manual urges its examiners to consider whether a supervised entity has “a process to take prompt corrective action if the decision-making processes it uses produce deficiencies or *discriminatory results*.” (emphasis added). Further, examiners must consider whether a supervised entity ensures that employees and third-party service providers “refrain from engaging in servicing or collection practices that lead to differential treatment or *disproportionately adverse impacts* on a discriminatory basis.” (emphasis added). According to the CFPB, this means the disparate impact doctrine now applies to every aspect of every financial services provider over which the Bureau has jurisdiction.

Second, by expanding the reach of its unfair practices authority to include discrimination, the CFPB now has the power to examine potentially discriminatory practices in both new markets and involving activities outside of its authority under ECOA. Under ECOA, discrimination is prohibited only against “applicants” for credit. In its press release, the CFPB specifically noted that it would examine for discrimination in “all consumer finance market,” including noncredit products like payments, remittances, and deposit accounts.

In addition, the CFPB specifically highlighted targeted marketing, which we consider to be outside of the scope of ECOA because viewers of advertisements are not “applicants.” The updated UDAAP Exam Manual states that transaction testing should determine whether a supervised entity “engages in targeted advertising or marketing in a discriminatory way.” The manual also notes that a supervised entity’s policies, procedures, and practices should “not target or exclude consumers from products and services, or offer different terms and conditions, in a discriminatory manner.” Now, for the first time, the CFPB explicitly asserted that targeted marketing is discriminatory or actionable, although how the Bureau intends to assess targeted advertising remains unclear. Nevertheless, the Bureau’s new exam manual clearly signaled that the Bureau will examine targeted advertising.

Conclusion

The CFPB's announcement is a sea change in how financial institutions need to think about fair lending and fair treatment. By expanding both the product and activity reach of anti-discrimination enforcement, the CFPB will force financial institutions — including those with operations wholly outside the scope of ECOA — to perform comprehensive compliance assessments and establish fair lending concepts like policies, procedures, training, testing, monitoring, and even statistical analyses of their operations.

On March 23, please join us for a webinar where we will examine this announcement, its enormous practical impacts, and what the Bureau's new position means for the financial services industry. [Click here to register.](#)

RELATED INDUSTRIES + PRACTICES

- [Consumer Financial Protection Bureau \(CFPB\)](#)
- [Consumer Financial Services](#)
- [Fair Lending](#)