

Consumer Financial Protection Bureau (CFPB) broadens Unfair, Deceptive, or Abusive Acts or Practices (UDAAP) focus to include anti-discrimination

On March 16, 2022, the CFPB announced enhancements to its supervisory approach to expand discrimination prevention measures by using the unfairness standard under the UDAAP statute.¹ Now, during its examination of banks and non-banks, inclusive of service providers and fintech companies (collectively financial institutions), the CFPB will place closer scrutiny on discriminatory conduct and practices to include situations where fair lending laws may not technically apply.

This change reflects a significant expansion from a historical reliance on the existing credit-focused and arguably siloed regulatory requirements and related risks, including the Equal Credit Opportunity Act (ECOA) and the Fair Housing Act, to a more holistic view on fair lending and anti-discrimination across financial operations including with respect to non-lending products and services. For financial institutions not already viewing risk through the combined lens of fair lending and responsible banking, this announcement will likely require a shift in internal processes, practices, and controls to better mind the gap between fair lending and UDAAP.

Summary of key changes

As part of this expansion of supervisory operations, the CFPB's new examination manual includes changes to its explanation of the standard for unfair acts or practices. The standard for unfairness in the [Dodd-Frank Wall Street Reform and Consumer Protection Act](#) is that an act or practice is unfair when: (1) it causes or is likely to cause substantial injury to consumers; (2) the injury is not reasonably avoidable by consumers; and (3) the injury is not outweighed by countervailing benefits to consumers or to competition.²

The updated CFPB examination manual details that discrimination, regardless of intent, may meet the criteria for “unfairness” if it causes substantial harm to consumers in scenarios where consumers cannot reasonably avoid the discrimination.³

In a March 16, 2022, press release, CFPB Director Rohit Chopra communicated the agency's intent to expand “anti-discrimination efforts to combat discriminatory practices across the board in consumer finance.”⁴ The Director also confirmed that “when a person is denied access to a bank account because of their religion or race, this is unambiguously unfair.”⁵ Discriminatory conduct, not previously covered by the fair lending laws, is now also triggering liability under the Consumer Financial Protection Act and now will be in scope as a result of the CFPB's interpretation of unfairness.

These changes demonstrate the agency's continued efforts to strengthen the enforcement of fair and responsible banking issues, better protect families and communities from discrimination, and enhance financial inclusion practices. Fair and responsible banking programs will likely need to account for changes in the agency's supervisory approach and definition of unfairness. Accounting for these changes going forward would include considering how to address the expanded examination scope to products beyond core lending and assessing both discriminatory practices and a currently undefined expectation for unfairness in the fair lending space.

How can financial institutions prepare for what's next?

While there is still uncertainty on what the supervision, and possible enforcement, of these changes may look like, the CFPB provided initial guidance on the scope of future examinations as it relates to the enhanced criteria for unfairness. Specifically, the CFPB outlines its plans to examine for discrimination in “all consumer finance markets, including credit, servicing, collections, consumer reporting, payments, remittances, and deposits.”⁶ At a minimum, the agency says, financial institutions should be prepared to provide documentation related to their processes for assessing risks as well as discriminatory outcomes, including details of not only customer demographics but also the impact of products and fees on different demographic groups.⁷ Additionally, as part of examinations and

internal audits, financial institutions would need to evidence the results of testing and monitoring related to their decision-making processes for unfair discrimination, as well as discrimination under ECOA.⁸ To prepare for the impact of these future examinations, there are a few key focus areas financial institutions can begin to evaluate as it relates to their fair and responsible banking program.

Key areas of focus for financial institutions

- **Policy, procedure, and processes** – Evaluate and enhance existing policy and procedural documentation to confirm processes are clearly established to prevent discrimination in relation to applicable products or services. In some cases, financial institutions may need to develop and formalize new processes related to products (e.g., deposits) that may not be currently monitored from an anti-discrimination perspective:
 - Financial institutions should prepare for examiners to review procedure manuals and written policies, including those for servicing and collections as well as documentation related to new product development and the use of models (e.g., automated valuation models utilized for appraisals), algorithms, and decision-making processes.⁹
- **Control environment** – Enhance and implement applicable controls related to customer eligibility and notification requirements and aligning fair lending and UDAAP compliance program elements and controls:
 - Financial institutions should prepare for examiners to review internal control documentation and related control monitoring and auditing materials.¹⁰
- **Marketing and advertising** – Assess and enhance processes related to reviewing advertising and promotional materials, including testing of any products targeted to a particular population. Specifically, financial institutions may also want to evaluate their technology-driven marketing programs, including algorithms driving what financial products are offered, to determine if there are any unintended consequences or disparate treatment:
 - Financial institutions should prepare for examiners to review marketing programs, advertisements, and other promotional materials in all forms of media (including social media), scripts, and recorded calls for telemarketing and collections as well as any demographic research or analysis related to marketing or advertising of consumer financial products or services. Additionally, examiners may also conduct transaction testing, as necessary, on marketing and disclosure materials to determine if materials describe clearly, prominently, and accurately the costs,

benefits, and other terms of products and services, key terms that are important to enable the consumer to make an informed decision, etc.¹¹

- **Special purpose programs** – In applying these newly defined parameters, financial institutions should evaluate not only their applicable products and services but also any special purpose programs for potential instances of discriminatory acts or unfair practices. For example, if a financial institution is offering a rewards credit card targeted to a specific population, it will be critical to evaluate if the promotion gives inferior terms to one consumer demographic over another or if the decision-making process related to card eligibility may result in discrimination:
 - Financial institutions should prepare for these products to be in scope for any upcoming examinations and consider how they have implemented the adoption of a consistent standard of protected classes across all financial products, in alignment with the CFPB’s evolving definition under ECOA.

As a next step, financial institutions should look internally within their fair and responsible banking program to assess how to integrate this enhanced definition of unfairness alongside disparate treatment. Most fair and responsible banking programs already assess risk across an organization utilizing monitoring and testing processes, issues, controls, complaints, etc. to identify potential areas for enhancement.

Now, financial institutions must expand these practices to establish use cases related to the CFPB’s revised approach and definition of unfairness. If not already doing so, the three lines within a financial institution should strongly consider viewing fair lending and UDAAP beyond the silos and taking a more holistic view of fair lending and responsible banking. It will be essential for the first-, second-, and third-lines’ stakeholders to consider and address the impacts of this intersection of unfairness and disparate treatment across their fair and responsible banking programs.

Conclusion

While the industry waits to see how the CFPB will apply the revised examination procedures, including any resulting enforcement activity or additional supervisory guidance, financial institutions should consider preparing for upcoming examinations and the likely impact of the expanded unfairness scope on their fair and responsible banking activities.

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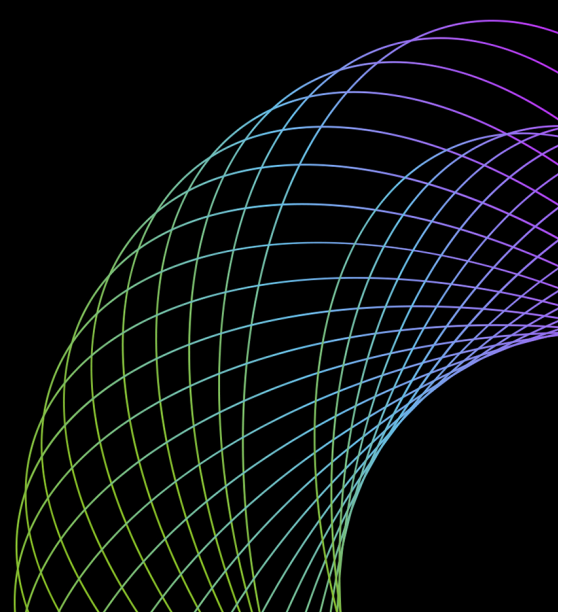
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Endnotes

¹ Consumer Financial Protection Bureau (CFPB), "[CFPB Targets Unfair Discrimination in Consumer Finance](#)," press release, March 16, 2022.

² Dodd-Frank Act, Title X, Subtitle C, Sec. 1036; PL 111-203, July 21, 2010.

³ CFPB, "[Unfair, Deceptive, or Abusive Acts or Practices \(UDAAPs\) examination procedures](#)," press release, March 16, 2022.

⁴ CFPB, "[CFPB Targets Unfair Discrimination in Consumer Finance](#)," press release, March 16, 2022.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ CFPB, "[Unfair, Deceptive, or Abusive Acts or Practices \(UDAAPs\) examination procedures](#)," press release, March 16, 2022.

¹⁰ Ibid.

¹¹ Ibid.



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