Cooley

CFPB Shores Up Legal Basis for Monitoring Loan Servicing Discrimination

May 11, 2022

On May 9, 2022, the Consumer Financial Protection Bureau issued an advisory opinion declaring that the Equal Credit Opportunity Act's prohibitions against discrimination protect borrowers in all aspects of a credit transaction, including in connection with account servicing.

Echoing positions taken in previous amicus briefs, the CFPB's opinion highlights that the ECOA defines an "applicant" to mean "any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit" (15 US Code 1691a(b)). As defined by Regulation B, an "applicant" includes "any person who requests or who has received an extension of credit from a creditor." According to the CFPB, the "best interpretation" is therefore that an "applicant" subject to the protections in the ECOA and Regulation B includes an existing borrower.

By clarifying the scope of the ECOA and Regulation B, the CFPB is enhancing its legal basis for applying the ECOA's anti-discrimination provisions to post-origination interactions with borrowers. In a key footnote, the CFPB states that it "interprets aspects of the credit transactions enumerated in Regulation B as including and encompassing the servicing of that credit, debt collection, loss mitigation, payment plans, settlements, co-signer release, and certain other services provided to existing accountholders." The opinion also highlights prior CFPB enforcement actions, such as its action against a large bank that allegedly discriminated against certain borrowers by engaging in aggressive collections practices.

The announcement is part of a broader CFPB initiative to expand the boundaries of anti-discrimination protections, such as in its March 16 announcement that it would leverage its unfair, deceptive, and abusive acts or practices (UDAAP) authority to prohibit discrimination in noncredit financial products and services.

What does this mean for you?

In light of the CFPB's announcement, financial services providers may want to consider taking action to enhance their fair servicing practices, including by:

- Expanding fair lending training to employees engaged in account servicing, debt collection and loss mitigation.
- Expanding fair lending policies to clearly incorporate fair servicing principles in all aspects of account servicing.
- Revisiting servicing practices to assess whether borrowers with existing credit are receiving adverse action notices, as appropriate.
- Adopting a testing program to assess whether servicing practices risk noncompliance with the ECOA's anti-discrimination protections.

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as "Cooley"). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction, and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. When advising companies, our attorney-client relationship is with the company, not with any individual. This content may have been generated with the assistance of artificial intelligence (AI) in accordance with our AI Principles, may be considered Attorney Advertising and is subject to our legal notices.

Key Contacts

Michelle L. Rogers Washington, DC	mrogers@cooley.com +1 202 776 2227

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.