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CFPB's Annual Fair Lending Report Highlights Robust Oversight of Traditional and Innovative Lending Practices

July 12, 2023

On June 29, 2023, the Consumer Financial Protection Bureau issued its annual fair lending report to Congress, confirming that although there was relatively little public fair lending enforcement in 2022, the CFPB and other financial regulatory agencies are engaged in significant nonpublic oversight, examination, and enforcement activities, in addition to ongoing rulemaking initiatives. These oversight activities extend to virtually all consumer lending products, as well as small business loans. And, while the CFPB is focused on bias with respect to advanced and emerging technologies, such as artificial intelligence and automated valuation models, the report details a host of regulatory activities around technical noncompliance with protections beyond customer race and ethnicity, with a particular focus on age discrimination and public assistance discrimination.

CFPB's fair lending supervision and enforcement spans wide set of credit markets, with focus on traditional and new technologies

The CFPB brought only one fair lending enforcement action in 2022 – a joint settlement with the Department of Justice (DOJ) and attorneys general over claims of redlining in the Philadelphia region. However, the report also reflects that the CFPB devoted significant resources to fair lending oversight in the past year, and it is engaging in substantial nonpublic examinations and investigations of lending activity across a wide range of products. Specifically, the CFPB indicates it is conducting active fair lending investigations in product markets including student lending, payday lending, credit cards and mortgage lending for evidence of unfair, deceptive, or abusive acts and practices (UDAAP) and/or Equal Credit Opportunity Act (ECOA) violations. In the mortgage space, the CFPB notes it is looking at redlining, reverse redlining, and pricing exception and home valuation practices. Finally, the CFPB says it is using its ECOA and UDAAP authority to look at bias in automated systems and models, including the targeting of vulnerable populations.

Multiple financial services regulatory agencies focusing on fair lending practices

The annual fair lending report states that the bureau, the Federal Deposit Insurance Corporation (FDIC), the Federal Reserve Board (FRB) and the National Credit Union Administration (NCUA) collectively referred 23 potential fair lending violations to the DOJ in 2022, with the FDIC accounting for 12, the CFPB and the NCUA accounting for five each, and the FRB accounting for one. Those referrals covered mortgage lending, consumer lending, auto pricing and credit cards.

The referral activity also shows that, while agencies have concerns about historic areas of focus – redlining and discrimination on the basis of race and ethnicity in underwriting and pricing practices – there is also a significant focus on compliance with other ECOA protections. In particular, the agencies are looking at improper consideration of consumer marital status, age, public assistance income, familial status and a consumer's exercise of rights under the Consumer Credit Protection Act.

What to expect

The report makes clear that the CFPB and other agencies are focused on risks of discrimination associated with

new or advanced technologies. In its statement about the "future of fair lending," the CFPB flags discrimination risks associated with sophisticated digital marketing, fraud screens and underwriting models reliant on artificial intelligence and machine learning, and chatbots and behavioral analytics that impact post-origination consumer interactions. To that end, the bureau notes it is increasing its expertise in data science and analytics to ensure it is able to hold creditors and service providers accountable for complying with fair lending laws. The CFPB also calls out "big tech platforms," which collect data that "are now fueling highly complex, black box algorithms."

Yet the examination and investigation statistics contained in the report also make clear that agencies continue their focus on traditional fair lending risks, or fair lending risks associated with traditional credit offerings. Thus, while institutions should consider stretching their fair lending programs to reflect advanced technologies, they still should be mindful of ECOA's protections and procedural requirements.

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