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CFPB Leverages UDAAP Authority to Prohibit Discrimination in Noncredit Financial Products and Services

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On March 16, 2022, the Consumer Financial Protection Bureau (CFPB) announced that it will consider whether institutions are engaging in the "unfair" practice of discriminating, expanding its anti-discrimination efforts to cover a wide range of noncredit consumer products. Acknowledging that fair lending laws such as the Equal Credit Opportunity Act (ECOA) may not apply to those products, the CFPB made clear that it intends to rely on the Consumer Financial Protection Act (CFPA) prohibition on unfair, deceptive, and abusive acts or practices, or UDAAPs, to reach "all consumer finance markets," including collections, servicing, consumer reporting, payments, remittances and deposits.

This does not mean that the CFPB is singularly focused on noncredit products, however. By referencing "credit" in the list, the announcement also suggests that the CFPB will apply this theory where fair lending laws do still apply, thus expanding risk for lenders. With the announcement, the CFPB also updated its UDAAP exam manual, which adds detail on the CFPB's approach, including expectations for compliance management tied to this theory.

The ECOA, over which the CFPB has authority, prohibits discrimination on the basis of, among other things, race and ethnicity. With this week's announcement, the CFPB suggests that discrimination can be "unfair," and a violation of the CFPA, because consumers are unable to avoid injury due to discriminatory practices – and may suffer substantial injury in the form of foregone monetary benefits or denial of products or services. The CFPB also has added "dignitary harm" to the list of potential harms that do not result in actual injury but may, at least in the bureau's view, amount or contribute to a showing of substantial injury sufficient to support a legal claim of "unfairness."

The CFPB offered examples of practices that may be "unfair" because they are discriminatory, including in connection with the offering of noncredit products and services, such as:

- Giving inferior terms to one customer demographic as compared to another demographic.
- Offering or providing more products or services to one customer demographic as compared to other customer demographics.
- Treating customers of certain demographics in a less favorable way, or providing extra assistance or exceptions to customers of a certain demographic in customer service interactions.
- Engaging in targeted advertising or marketing in a discriminatory way.

The CFPB also indicates in the updated manual that examiners will be looking to regulated entities for:

- Documentation regarding the use of models, algorithms, and decision-making processes used in connection with offering consumer financial products and services.
- Information an institution collects, retains or uses regarding customer demographics, including a breakdown of demographic usage of products, fees associated with those products, and revenue sources and costs associated with them.
- Demographic research and analysis relating to marketing or advertising of consumer financial products or services.
- Evidence of processes implemented to prevent discrimination throughout the product development and implementation life cycle, and periodic monitoring of decision-making processes for potential discrimination.

The CFPB does not tackle the question of how institutions are to assess this information where they do not collect demographic or other information concerning a consumer's protected class status. In many cases, this will require institutions to resort to testing proxies that, in recent years, have been increasingly questioned on their reliability, including Bayesian Improved Surname Geocoding (BISG) analysis.

What does this mean for you?

The CFPB's announcement is not a binding interpretation of the "unfairness" standard under the CFPA, but it certainly signals a significant shift in how the bureau intends to scrutinize financial products and services that are not subject to the ECOA. To that end, financial services providers may want to consider:

- Reviewing noncredit offerings, such as deposit and payment products, and assessing whether there is a risk of discrimination in the way the products are offered or administered.
- Creating a nondiscrimination policy and implementing procedures for noncredit products, or expanding existing fair lending policies to cover noncredit products.
- Working with marketing partners to assess whether marketing strategies and practices exclude certain groups of consumers from product offerings.
- Providing fair and responsible banking training to employees who offer noncredit products.
- Piloting a testing program aimed at assessing risk of discrimination in offering or administering noncredit products.
- Closely monitoring complaints for signs of potential unfair treatment or discrimination.

As the CFPB is not the only entity with authority to prohibit unfair practices – the Federal Trade Commission and state attorneys general also have their own such authority, and many states provide private rights of action to consumers for such practices – institutions should also be mindful of the increased litigation and enforcement risks created by the announcement.

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