

# Finance Cos. Should Brace For Wider CFPB Anti-Bias Reach

By Jonice Gray Tucker, Kari Hall and Caroline Stapleton (April 5, 2022)

The Consumer Financial Protection Bureau recently raised eyebrows when it broadly expanded the legal theories under which it will seek to challenge illegal discrimination in the financial services industry.

The CFPB announced[1] on March 16 that it revised its examination manual[2] to identify discrimination as a potential unfair, deceptive or abusive act or practice, or UDAAP, in addition to a violation of laws focused specifically on anti-discrimination.

Previously, the Equal Credit Opportunity Act[3] had served as the primary tool in the CFPB's arsenal for combating discrimination against protected classes in financial services. The CFPB has affirmed[4] it will continue to actively enforce the ECOA, but in releasing its updated exam manual the agency has staked out its intention to guide "examiners in looking beyond discrimination directly connected to fair lending laws," particularly where complex or novel technologies or data sources are involved.

In the wake of this announcement, financial institutions can expect the CFPB will review non-credit products, as well as operational functions arguably beyond the ECOA's reach — such as marketing, customer service and certain loan servicing activities — for potential discrimination.

The CFPB's expanding definition of UDAAP also reaches innovative activities in financial services, including algorithmic decision-making and the use of alternative data. The bureau's broad interpretation of what constitutes an unfair practice may be only the beginning of a broader trend.

Specifically, the Federal Trade Commission, prudential banking regulators and state attorneys general could follow the CFPB's lead by leveraging their own respective consumer protection statutes to UDAAP-ify anti-discrimination principles beyond traditional fair lending requirements.

### The CFPB's Heightened Focus on Eliminating Bias

CFPB Director Rohit Chopra has made it clear that rooting out discrimination in financial services is at the top of the agency's agenda — a focus he has prioritized[5] throughout his career, including in his previous post as an FTC commissioner.

During his tenure, the CFPB has issued a number of blog posts highlighting the potential for discrimination in the use of technology — including geolocation[6] — third-party data and home appraisals.[7]

The agency has also partnered with other federal regulators to encourage lenders[8] to utilize special-purpose credit programs authorized under the ECOA "to better serve historically disadvantaged individuals and communities," and has urged tech workers at financial services providers to come forward as whistleblowers[9] to report potential discrimination in their employers' use of algorithms and technologies.



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The CFPB's assistant director for supervision policy, Lorelei Salas, and assistant director for the office of enforcement, Eric Halperin, said in a blog post<sup>[10]</sup> accompanying the revised manual that discriminatory practices "fall squarely within our mandate to address and eliminate unfair practices."

They cited machine learning, automated decision making and data harvesting as examples of technology-based practices and tools that may cause hidden discriminatory UDAAPs. They also pointed out that the revised manual instructs examiners to review noncredit products — such as deposit products — for potential discrimination that may constitute a UDAAP.

### **Affect on Nonlending, Marketing, Fintech and More**

The CFPB's expanded interpretation of UDAAP has broad implications for entities offering consumer financial products or services, including banks, nonbank lenders and service providers.

Industry participants can expect the CFPB to assert that alleged discriminatory conduct is now a UDAAP in supervision, and the same should be anticipated in enforcement. Likely targets may include products and services that are arguably beyond the scope of an ECOA claim, or as to which ECOA applicability has been hotly debated.

### ***Marketing and Advertising***

The Chopra CFPB has highlighted the need to prevent digital redlining — i.e., bias resulting from the use of alternative data, algorithms and other technology in consumer finance decisions — in advertising.<sup>[11]</sup>

However, the question of whether the ECOA can be interpreted to prohibit discrimination in pre-application activities, including marketing strategy development, has been hotly debated due to limitations in the statutory and regulatory text.<sup>[12]</sup>

The CFPB's definition of UDAAP to expressly include discrimination as an unfair practice may allow the agency to solve for any potential gap between (1) its goal to prevent redlining in pre-application marketing and (2) the potential jurisdictional limitations of the ECOA.<sup>[13]</sup>

To this end, the revised manual indicates examiners should seek and scrutinize demographic research and analysis by covered persons related to the advertising of their consumer financial products or services as part of a UDAAP review.<sup>[14]</sup>

### ***Noncredit Products and Services***

The updated exam manual makes clear that discriminatory UDAAPs can occur in any consumer financial product or service.<sup>[15]</sup>

The revisions provide an example of a discriminatory UDAAP that could occur in the context of deposit accounts,<sup>[16]</sup> but the same concept could equally apply to other products or services offered to consumers that do not involve any extension of credit.

### ***Technology-Enabled Models and Processes***

The language added to the revised exam manual reflects the CFPB's increasing skepticism of

algorithms, automated decision making and other technology-enabled processes used by consumer financial services providers to make decisions about their products and services.

For example, examiners are instructed to collect documentation regarding "use of models, algorithms, and decision-making processes,"[17] and are asked to evaluate the inputs into decision-making processes for UDAAP risk. Entities exploring financial technology solutions should take heed of the increasing UDAAP risk in implementing untested tools that may result in discriminatory outcomes.

### ***Customer Service***

The exam manual update reveals CFPB examiners may cite a UDAAP in cases where "customer service representatives improperly treat customers of certain demographics worse or provide extra assistance or exceptions to customers of certain demographics." [18] With respect to servicing call centers, this includes an obligation to effectively respond to calls from consumers with limited English proficiency.[19]

This clearly signals that issues related to fairness in servicing activity may return as a focal point for the CFPB — a trend line that is not surprising in view of the federal focus across agencies on racial justice and the outsize impact of the pandemic on certain protected classes, including ethnic minorities.

By UDAAP-ifying anti-discrimination concepts, the CFPB effectively communicates that it will no longer be sufficient for institutions to maintain fair lending programs. Instead, broader anti-discrimination efforts will be necessary to prevent UDAAPs in noncredit products and business activities arguably outside the scope of the ECOA.

### **Preparing for UDAP-ification Beyond the CFPB**

State and federal regulators that have typically pursued claims of unlawful discrimination under more specific anti-discrimination statutes may now increasingly seek to match the CFPB's more expansive view of unfair practices by framing discrimination as an unfair or deceptive act or practice, or UDAP, and in doing so, avail themselves of an additional statutory hook for citing regulatory violations and initiating enforcement actions.

The UDAP-ification of anti-discrimination principles is an approach being pushed by consumer advocates,[20] and is already used by plaintiffs in lawsuits against financial service providers.[21]

What can institutions expect from other regulators in the near term? The FTC has previously touted its ability to tackle discrimination under its UDAP authority and prudential regulators, which also enforce the FTC's UDAP prohibition, are likewise geared up to fight discrimination in financial services.[22]

At the state level, some statutes already link discriminatory and unfair practices,[23] setting the stage for combined-theory UDAP and anti-discrimination enforcement actions by state attorneys general.[24]

In preparation for expanded UDAP examination and enforcement, legal and compliance leaders should review anti-discrimination compliance management functions, with an eye toward the broader ambit in coverage of activities, products and services that the CFPB's policy shift indicates.

Institutions should revisit anti-discrimination policies and procedures, reevaluate financial anti-discrimination training requirements — including for nonlending staff — and monitor for discriminatory effects of all products and services.

The CFPB has taken a bold and expansive step, and the best way for institutions to address what may come involves the individualized assessment of gaps along with proactive steps to close those that are identified.

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[1] Press Release, CFPB Targets Unfair Discrimination in Consumer Finance (Mar. 16, 2022).

[2] CFPB Supervision and Examination Manual, UDAAP (Mar. 2022).

[3] 15 U.S.C. § 1691 et seq.

[4] Eric Halperin and Lorelai Salas, CFPB Blog Post, Cracking down on discrimination in the financial sector (Mar. 16, 2022).

[5] See e.g. Introductory Remarks of Commissioner Rohit Chopra, National Fair Housing Alliance 2020 National Conference (Oct. 6, 2020) (stating UDAP provision of the FTC Act "can serve as an important gap-filler to combat discrimination across the economy, particularly as machine learning and artificial intelligence make more and more decisions about our lives").

[6] CFPB Blog Post, It's illegal to penalize borrowers for being religious (Jan. 14, 2022).

[7] CFPB Blog Post, Consumer Financial Protection Bureau Outlines Options To Prevent Algorithmic Bias In Home Valuations (Feb. 23, 2022).

[8] CFPB Blog Post, Using special purpose credit programs to serve unmet credit needs (Feb. 22, 2022).

[9] CFPB Blog Post, CFPB calls tech workers to action (Dec. 15, 2021).

[10] *Supra* n.4.

[11] Chopra Remarks, *supra* n.5.

[12] See 12 C.F.R. 1002.4(a)-(b) (prohibiting discrimination against "applicants" and oral or written discouragement of "prospective applicants," but not addressing advertising or marketing that simply is not made available to "prospective applicants" based on their protected class status).

[13] CFPB Exam Manual, *supra* n.2, at \*UDAAP 17–18.

[14] Id. at \*UDAAP 14.

[15] Id. at \*UDAAP 15.

[16] Id. at \*UDAAP 11.

[17] Id. at \*UDAAP 12.

[18] Id. at \*UDAAP 15.

[19] Id. at \*UDAAP 20.

[20] See e.g. Student Borrower Protection Center, *Discrimination Is "Unfair": Interpreting UDA(A)P to Prohibit Discrimination* (Apr. 2021) ("By taking seriously the plain language of UDA(A)P law, federal entities like the CFPB and FTC, state attorneys general and agencies, and in some cases private individuals, could make great strides towards ensuring that entire markets and industries are not free to discriminate.") [https://protectborrowers.org/wp-content/uploads/2021/04/Discrimination\\_is\\_Unfair.pdf](https://protectborrowers.org/wp-content/uploads/2021/04/Discrimination_is_Unfair.pdf).

[21] See e.g. Complaint, *Braxton v. Wells Fargo Bank, N.A., et al.*, Case No. 4:22-cv-01748-KAW (N.D. Cal. Mar. 18, 2022) (alleging Wells Fargo's refinancing practices, including its algorithms and machine learning in underwriting, resulted in discrimination that violated ECOA, other federal and state anti-discrimination laws, and the state's prohibition on "unfair" conduct).

[22] See e.g. Remarks by Acting Comptroller Michael J. Hsu (Oct. 22, 2021) (collective efforts with DOJ and CFPB against redlining "are critical to addressing the discriminatory lending practices that create and reinforce racial inequity in the financial system.") <https://www.occ.gov/news-issuances/speeches/2021/pub-speech-2021-109.pdf>.

[23] See e.g. Iowa Code Ann. § 216.7, 216.10 (prohibiting "unfair and discriminatory" practices in accommodations, services, and credit transactions); Wash. Rev. Code. 49.60.030(3) (violations of state anti-discrimination statute are also UDAPs under the state's Consumer Protection Act).

[24] E.g. Complaint, *State v. Arlene's Flowers, Inc., et al.*, Case No. 132008715 (Wash. Sup. Ct. Apr. 9, 2013) (Washington attorney general claiming UDAP based on sexual orientation discrimination by a flower shop).