



June 27, 2022

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Via Electronic Mail

Re: CFPB Exam Manual Changes

Dear Director Chopra,

On March 16, the Consumer Financial Protection Bureau (CFPB or Bureau) announced changes to its exam manual for evaluating potential unfair, deceptive and abusive acts and practices. Specifically, the Bureau stated that the changes to the manual were intended to guide “examiners in evaluating discriminatory practices as potential unfair practices,” further explaining that, in the Bureau’s view, discrimination may meet each of the three prongs of the statutory test for unfairness: discrimination may cause substantial harm to consumers, that they cannot reasonably avoid, and such harm may not be outweighed by countervailing benefits to consumers or competition. The Bureau also asserted that “a discriminatory act or practice is not shielded from the possibility of being unfair, deceptive or abusive even when fair lending laws do not apply to the conduct. For example, not allowing consumers of a certain religion or race to open deposit accounts, or subjecting consumers of a certain religion or race to different requirements to open deposit accounts, may be an unfair practice even in those instances when [the Equal Credit Opportunity Act] does not apply to this type of transaction.” In addition, the revised manual provides that a discriminatory act or practice that is unfair, deceptive, or abusive may *also* violate other antidiscrimination laws, such as ECOA.

The CFPB announced that it will examine for discrimination in all consumer finance markets, including credit, servicing, collections, consumer reporting, payments, remittances, and deposits. Among other things, CFPB examiners will require supervised companies to show their processes for assessing risks and discriminatory outcomes, including documentation of customer demographics and the impact of products and fees on different demographic groups. The CFPB will look at how companies test and monitor their decision-making processes for unfair discrimination, as well as discrimination under ECOA.

To our knowledge, the Bureau did not engage in any outreach to industry or other stakeholders prior to publishing these changes to the UDAAP examination manual, nor were these changes

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issued for public notice and comment. While we support the Bureau's efforts to combat discrimination, we have significant concerns regarding the promulgation of these changes without stakeholder engagement or the opportunity for comment. Nonetheless, members of the American Financial Services Association (AFSA)¹ and the Bank Policy Institute (BPI)² are reviewing their practices to ensure compliance with the updated manual. However, without the benefit of prior notice or engagement with the CFPB on these changes, financial institutions subject to the Bureau's examination authority have a number of questions regarding the expectations of the Bureau in examining institutions according to the revised exam manual. Answers to these questions will help institutions to understand the Bureau's expectations for financial institutions subject to the Bureau's UDAAP examination authority. Conversely, lack of further guidance and focus regarding the Bureau's examination manual changes, including with respect to the questions listed below, would deprive institutions of fair notice regarding the Bureau's regulatory expectations and impede their ability to develop and implement processes for assessing risks and discriminatory outcomes.

Finally, regular dialogue between industry and the Bureau, including through CFPB-led workshops and listening sessions, is imperative to help provide institutions with further clarity about the Bureau's expectations, which would help to further the CFPB's objective to combat discrimination and benefit consumers and industry.

¹ Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

² BPI is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's small business loans and are an engine for financial innovation and economic growth.

Questions

1. In connection with its March 16 announcement of changes to the UDAAP section of the Bureau's exam manual, the agency used certain terms that were not clearly defined in the context of those changes. Please explain how the Bureau defines the following terms in connection with its recently announced interpretation of the UDAAP provision:
 - a. Discrimination;
 - b. Customer demographics;
 - c. Decision-making processes;
 - d. Emotional impacts; and
 - e. Dignitary harm.
2. When evaluating differences in treatment or outcomes under UDAAP principles, are customer demographics (*e.g.*, race, ethnicity, sex) intended to be the same as the "prohibited bases" addressed by ECOA and Regulation B?
3. Some practices designed to assist certain groups of consumers, such as fraud monitoring for older customers, affirmative advertising, and ADA accommodations, result in customers being treated differently, but to their benefit or in furtherance of compliance with other laws and regulations, such as those requiring the detection and prevention of elder abuse. Please confirm that such practices would not meet the statutory test for "unfairness" under UDAAP.
4. Does the Bureau view a "legitimate business need" under Regulation B as equivalent to the "countervailing benefits" element under UDAAP? If not, please explain how they differ.
5. Given that ECOA prohibits the collection of such information, does the CFPB expect entities to be aware of their customers' demographics, outside of circumstances where entities are required to collect demographic data (*i.e.*, HMDA)? If so, how?
6. To deploy their resources efficiently, both the CFPB and many institutions take a risk-based approach to fair lending, focusing their oversight on those activities which appear to present the highest fair lending risks. Please confirm that when designing a CMS to identify and address discrimination under the UDAAP, a similar risk-prioritized approach is appropriate.
7. Which decision-making processes outside of the credit context will the CFPB prioritize in its review for potential discriminatory outcomes? The Director has given the example of institutions refusing deposit accounts to particular groups of consumers. Please provide other examples of the conduct the Bureau is concerned about.
8. Does the Bureau believe that there are activities in the credit context that could be UDAAP violations that are not also prohibited under ECOA and Regulation B? If so, please describe those activities.

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We appreciate the CFPB's review and response to these questions. We would welcome the opportunity to discuss these questions with you. Please contact Celia Winslow at AFSA by phone, (202) 776-7300 or email (cwinslow@afsamail.org), or Paige Paridon at BPI by phone (703) 887-5229) or email (paige.paridon@bpi.com), with questions or to schedule a meeting.

Sincerely,

AFSA
BPI

cc: Dave Uejio, Associate Director, Division of Supervision, Enforcement & Fair Lending,
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