

CFPB Adds “Discrimination” to its “Unfair, Deceptive, or Abusive Acts and Practices” (UDAAP) Examination Guidance

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On March 16, 2022, the Consumer Financial Protection Bureau (CFPB) announced its intent to address discrimination as an “unfair practice” under the Consumer Financial Protection Act (commonly known as Dodd-Frank). Specifically, by indicating that discrimination falls within “unfair practices” in its Exam Manual, the CFPB has authorized its examiners to look “beyond discrimination directly connected to fair lending laws” and ask companies to “review any policies or practices that exclude individuals from products and services, or offer products or services with different terms, in an unfairly discriminatory manner.”^[1]

Utilizing the Bureau’s manual, CFPB Examiners play a critical role in evaluating companies’ compliance with Dodd-Frank and other federal consumer protection laws in addition to aiding in the determination of whether “supervisory or enforcement actions are appropriate.”^[2]

In its efforts to combat discrimination, the CFPB is particularly concerned with the growing use of artificial intelligence and machine learning, and how consumers from protected classes may be uniquely harmed by biased algorithms. For example, “data harvesting and consumer surveillance fuel complex algorithms that can target highly specific demographics of consumers to exploit perceived vulnerabilities and strengthen structural inequities.”^[3]

Dodd-Frank prohibits “any provider of consumer financial products or services” from engaging in unfair, deceptive and abusive acts and practices (UDAAP).^[4] It further provides the CFPB with “enforcement authority to prevent unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.”^[5] In addition, Dodd-Frank provides the CFPB with “supervisory authority for detecting and assessing risks to consumers and to markets for consumer financial products and services.”^[6] In this capacity, the CFPB maintains “supervisory authority over banks, thrifts, and credit unions with assets over \$10 billion, as well as their affiliates [and] . . .

nonbank mortgage originators and servicers, payday lenders, and private student lenders of all sizes.”^[7]

Under Dodd-Frank, “an act or practice is unfair when:

- It causes or is likely to cause substantial injury to consumers;
- The injury is not reasonably avoidable by consumers; and
- The injury is not outweighed by countervailing benefits to consumers or to competition.”^[8]

The CFPB, in its updated manual, details how it contends discrimination satisfies this definition. First, regarding the likelihood of “substantial injury,” the manual points to “[f]oregone monetary benefits or denial of access to products or services” that can result from discrimination.^[9] Critically, the CFPB notes that “[c]onsumers can be harmed by discrimination regardless of whether it is intentional.”^[10] Next, concerning reasonable avoidability, the CFPB states that the question is not “whether a consumer could have made a better choice[,]” but rather “whether an act or practice hinders a consumer’s decision-making.”^[11] To that end, the CFPB contends that “[c]onsumers cannot reasonably avoid discrimination.”^[12] Finally, the CFPB’s press release notes that “discrimination may meet the criteria for ‘unfairness’ . . . where that harm is not outweighed by countervailing benefits to consumers or competition.”^[13]

While the manual’s updated language does not create legal duties, such as those imposed by fair lending laws, it establishes the CFPB’s expectations for covered entities. For this reason, these changes to the manual will likely have a substantial real-world impact on companies that engage in consumer-related financial transactions.

Footnotes

[1] Eric Halperin & Lorelei Salas, *Cracking Down on Discrimination in the Financial Sector*, Consumer Fin. Prot. Bureau (Mar. 16, 2022), <https://www.consumerfinance.gov/about-us/blog/cracking-down-on-discrimination-in-the-financial-sector/>.

[2] Consumer Fin. Prot. Bureau, CFPB Supervision and Examination Manual, 11 (March 2022) <https://www.cfpaguide.com/portalresource/Exam%20Manual%20v%202%20-%20UDAAP.pdf> (Examination Manual).

[3] Halperin & Salas, *supra* note 1.

[4] Press Release, Consumer Fin. Prot. Bureau, CFPB Targets Unfair Discrimination in Consumer Finance (Mar. 16, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-targets->

unfair-discrimination-in-consumer-finance/.

[5] Examination Manual, *supra* note 2, at 1.

[6] *Id.* at 1.

[7] Consumer Fin. Prot. Bureau, *Institutions Subject to CFPB Supervisory Authority*, <https://www.consumerfinance.gov/compliance/supervision-examinations/institutions/> (last visited Mar. 28, 2022).

[8] Examination Manual, *supra* note 2, at 1–2. This is the same test applied by the FTC under the FTC Act.

[9] Examination Manual, *supra* note 2, at 2.

[10] Press Release, Consumer Fin. Prot. Bureau, *supra* note 4.

[11] Examination Manual, *supra* note 2, at 2.

[12] *Id.* at 2.

[13] Press Release, Consumer Fin. Prot. Bureau, *supra* note 4.

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