

CFPB Actions and Announcements Reflect Looming Changes in Financial Services Regulatory Landscape

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Several recent actions and announcements by the Consumer Financial Protection Bureau (CFPB) signal important changes underway in the regulatory landscape for credit unions. These issues are not necessarily new, but the CFPB has shown clearly that it intends to step up actions in these areas. This affects all credit unions, not just those directly examined by the CFPB, because: a) the CFPB has the power to investigate based on consumer complaints; b) other agencies such as the NCUA and state regulators view the CFPB's position on these issues as authoritative - these agencies tend to "keep up" with the CFPB in protecting consumers; and c) plaintiff attorneys may also latch onto such announcements to support claims under similar state unlawful and deceptive practices. Finally, these announcements evidence the CFPB's apparent return to an approach of "regulation by enforcement," in which new interpretations or applications of existing regulations are not done through the rulemaking process (in which proposed regulations and official interpretations are published in the federal register and subject to public review and comment before becoming effective). Instead, financial service providers must glean the nuances of the regulatory landscape from CFPB enforcement actions, speeches and news releases, FAQ, and other informal CFPB activity.

Fair Everything Through UDAAP

Last month, the CFPB announced an update to its examination manual for Unlawful and Deceptive or Abusive Acts and Practices (UDAAP). The updated manual indicates that discrimination on a prohibited basis in the provision of all financial services (not just loans) meets the CFPB's regulatory criteria for unfair practices. These criteria are: (i) the practice causes substantial harm to consumers; (ii) the consumers cannot reasonably avoid that harm; and (iii) the harm is not outweighed by countervailing benefits to consumers or competition. The CFPB noted that it would pursue discriminatory conduct in all financial services, but offered credit servicing, collections, consumer reporting, payments, remittances, and deposits as specific examples. This is not necessarily a new legal concept; many states have public accommodation laws against discrimination that are broad enough to encompass any type of financial services. But the CFPB's announcement draws new attention to the issues.

Moreover, the agency's announcement also set forth its expectations for steps that regulated entities should be taking to guard against discrimination, including: formal processes for assessing risks and discriminatory outcomes, documentation of customer demographics, and the impact of products and fees on different demographic groups. The examination manual changes indicate that the CFPB will assess a supervised entity's targeted advertising and marketing, its processes for decision-making in origination, pricing, servicing, or collections for signs of discrimination.

Appraisal Bias Initiatives

Last fall, the Biden administration established a task force to create an action plan to advance property appraisal and valuation equity ("PAVE" Task Force). The PAVE Task Force, consisting of the federal financial regulatory agencies, along with the CFPB, HUD, the U.S. Department of Justice and various other agencies, released its report to President Biden last month. The task force report, which can be accessed at [PAVE Action Plan](#), includes a plethora of regulatory commitments and proposals aimed at decreasing discrimination in the appraisal process. Significantly, financial regulators including the NCUA have committed to include examination procedures to ensure that credit unions consider appraisal bias as a risk, to evaluate appraisal irregularities that appear during examinations, and to improve data collection needed to identify appraisal bias.

In February, the CFPB released an outline of proposals and alternatives under consideration by the CFPB, the financial regulators, and the Federal Housing Finance Agency in accordance with the Dodd Frank Act's requirement for the agencies to jointly develop quality control standards for automated valuation models (AVMs) used by regulated lenders. By law, the CFPB must convene a small business review panel to consider the potential economic impact on small businesses before issuing a rule. The CFPB released its outline as a part of this review process.

The CFPB outline described two alternative approaches to regulatory quality control standards. Either approach would require quality control standards designed to address five factors:

- Confidence in the value estimate
- Protection against manipulation of data
- Avoidance of conflicts of interest
- Random testing and reviews
- Other factors the agencies deem appropriate

One alternative would require institutions to adopt and maintain policies, practices, and control systems to address these five factors. Under the second alternative, the CFPB would prescribe specific requirements related to the first four factors, as well as a bias factor.

The five factors listed above were a part of FIRREA's property valuation requirements for regulated financial institutions, and thus are already addressed in agency rules and guidance (including the NCUA's appraisal rule and interagency guidance regarding valuations and appraisals). The CFPB also proposes to add a nondiscrimination quality control factor. The outline includes considerable discussion of the potential for algorithmic bias in AVMs, as well as bias arising from flawed data input and from other sources. It also expresses a clear expectation that regulated institutions will include vigilance against AVM bias as part of their compliance programs. The proposals that the CFPB announced in this outline would eventually become part of new valuation guidance or regulations issued by the agencies including the NCUA. If adopted, they would require credit unions to modify policies and procedures related to use of AVMs to address potential bias in those AVMs.

Use of Artificial Intelligence and Machine Learning

In an October press conference on an enforcement action against Trustmark National Bank for alleged redlining, CFPB director Rohit Chopra made a special effort to show his (and presumably the CFPB's) distrust for some kinds of automated loan decisioning processes. Although there were no allegations against Trustmark regarding the use of algorithms or automated systems, Chopra stated that the CFPB 'will also be closely watching for digital redlining, disguised through so-called neutral algorithms, that may reinforce the biases that have long existed. He further noted that in response to criticisms of the use of such programs:

“the response of [lenders] has been that researchers do not have all the data that feeds into their algorithms or full knowledge of the algorithms. But their defense illuminates the problem: the algorithms are black boxes behind brick walls. When consumers and regulators do not know how decisions are made by algorithms, consumers are unable to participate in a fair and competitive market free from bias. . . . Given what we have seen in other contexts, the speed with which banks and lenders are turning lending and advertising decisions over to algorithms is concerning. Too many families were victimized by the robo-signing scandals from the last

crisis, and we must not allow robo-discrimination to proliferate in a new crisis.” (Emphasis added.) Full speech can be found on the CFPB’s website here: [Chopra Trustmark Speech](#)

This is one example of several occasions on which the CFPB director Chopra or other CFPB representatives have expressed concern over automated decisioning processes. This is a clear signal that credit unions should exercise caution when using any process that includes algorithms, artificial intelligence, or machine learning. Vendors should be able not only to represent, but to demonstrate, that their products and processes do not result in unintentional bias or discrimination and should test those products and processes on an ongoing basis. Credit unions should do the same for any internal processes.

What the Future Holds

These announcements and actions point to increasing public and regulatory scrutiny of potential bias in the marketing and provision of financial services. Last year’s change in administration and the turnover of the CFPB director position have certainly added fuel to the CFPB’s interest and ability to pursue its agenda on these issues. Director Chopra’s recent press releases on “repeat offenders” and comments about seeking to work with regulators to revoke deposit insurance or charters of egregious violators show just how strongly he feels about these issues and how much power he believes the agency has to address them. Credit unions over \$10 billion in assets will of course have an “up close and personal” view of CFPB initiatives in these areas. But all credit unions will sooner or later be confronted with the changing landscape. As is so often the case in regulatory matters, an ounce of prevention is worth a pound of cure.

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