

CFPB Expands UDAAP Examinations to Target Unfair Discrimination

Supervision manual updates apply ECOA-like antidiscrimination reviews to all consumer financial products and services

Ori Lev

Partner

+1 (202) 263-3270

OLev@mayerbrown.com

Stephanie Robinson

Partner

+1 (202) 263-3353

SRobinson@mayerbrown.com

Tori Shinohara

Partner

+1 (202) 263-3318

TShinohara@mayerbrown.com

March 2022

Changes to Exam Manual for Evaluating UDAAPs

- CFPB press release states that discrimination may be “unfair” under UDAAP legal standard
- Dodd-Frank Act prohibits unfair, deceptive and abusive acts and practices (UDAAPs)
- Legal standard for unfairness = an act or practice that
 - (1) causes or is likely to cause substantial injury to consumers,
 - (2) the injury is not reasonably avoidable by consumers, and
 - (3) the injury is not outweighed by countervailing benefits to consumers or to competition

Consumer Finance Markets CFPB Will Examine for Discrimination

- Credit
- Servicing
- Collections
- Consumer reporting
- Payments
- Remittances
- Deposits

Examples of Unfair Practices

- The revised manual offers only a couple of examples of discriminatory conduct that may constitute unfair practices:
 - Not allowing African-American consumers to open deposit accounts
 - Subjecting African-American consumers to different requirements to open deposit accounts
- The revised manual appears to cover both disparate treatment and disparate impact.

Review Elements

- Documentation
 - Use of models, algorithms and decision-making processes
 - Information collected, retained or used regarding customer demographics –
 - breakdowns for product uses, fees, revenue sources and costs
 - impacts of products and services on specific demographics
 - Demographic research or analysis used for marketing

Review Elements

- Policies
 - Antidiscrimination controls and monitoring
 - Established process for periodic analysis and monitoring of all decision-making processes, including a corrective action process
 - P&P to review, test and monitor for potential UDAAP concerns, including discrimination
 - P&P to mitigate potential UDAAP concerns, including discrimination
 - P&P themselves do not target, exclude or offer different terms or conditions in a discriminatory manner
 - Antidiscrimination training for customer service personnel

Transaction Testing

- Areas for transaction testing – comparing one customer demographic to other customer demographics for:
 - Inferior terms
 - Offering or providing more products or services
 - Customer service quality/exceptions provided
 - Targeted advertising or marketing
 - Decision-making processes in eligibility determinations, underwriting, pricing, servicing or collections that result in discrimination
 - Failure to evaluate and make necessary adjustments and corrections to prevent discrimination

Transaction Testing

- Transaction testing may include:
 - Marketing – institution should not improperly target or exclude consumers on a discriminatory basis
 - Terms consistent with disclosures and policies – examiners may review the institution’s decision-making processes and inputs used
 - Third-party oversight – entity should ensure employees and third parties who promote products or services are adequately trained in antidiscrimination, and should have a corrective action process
 - Servicing and collections –
 - Call centers should effectively respond to calls from consumers with limited English proficiency
 - Should ensure employees and third party contractors refrain from practices that lead to **differential treatment** or **disproportionately adverse impacts** on a discriminatory basis

Compliance Challenges

- Breadth of changes
 - Appears to cover all aspects of all consumer financial products and services
- Testing
 - What to test and how to test
 - What is the appropriate testing framework and methodology for non-credit?
 - What is a legally sufficient business justification in the non-credit context?
- Financial and other costs (e.g., internal resources)

Legal Questions

- Dodd-Frank Act expressly authorizes CFPB to “prescribe rules ... identifying as unlawful unfair, deceptive, or abusive acts or practices”
 - Notice-and-comment rulemaking
 - Is exam manual “final agency action” under APA
- Congress has chosen to outlaw discrimination in certain contexts (e.g., ECOA, FHA)
- Scope of “prohibition”
 - Prohibited bases vs. “customer demographics”

Disclaimer

- These materials are provided by Mayer Brown and reflect information as of the date of presentation.
- The contents are intended to provide a general guide to the subject matter only and should not be treated as a substitute for specific advice concerning individual situations.
- You may not copy or modify the materials or use them for any purpose without our express prior written permission.

[Americas](#) | [Asia](#) | [Europe](#) | [Middle East](#)

mayerbrown.com

Mayer Brown is a global services provider comprising associated legal practices that are separate entities, including Mayer Brown LLP (Illinois, USA), Mayer Brown International LLP (England), Mayer Brown (a Hong Kong partnership) and Taull & Chequer Advogados (a Brazilian law partnership) (collectively the "Mayer Brown Practices") and non-legal service providers, which provide consultancy services (the "Mayer Brown Consultancies"). The Mayer Brown Practices and Mayer Brown Consultancies are established in various jurisdictions and may be a legal person or a partnership. Details of the individual Mayer Brown Practices and Mayer Brown Consultancies can be found in the Legal Notices section of our website. "Mayer Brown" and the Mayer Brown logo are the trademarks of Mayer Brown. © Mayer Brown. All rights reserved.