

CFPB Claims that Discrimination Is a UDAAP

April 12, 2022 | [Eric L. Johnson](#)

The Consumer Financial Protection Bureau recently announced that discrimination—whether intentional or unintentional but produces a discriminatory outcome—is an unfair, deceptive, or abusive act or practice ("UDAAP") under the Consumer Financial Protection Act. The CFPB will now target discrimination as an unfair practice in connection with *all* financial products and services and not just credit products. This change in philosophy represents a major shift in the CFPB's stance on UDAAPs and discrimination that could significantly affect an auto finance company's business and operations. As we've seen, when auto finance companies are impacted, so too are dealers.

In conjunction with this declaration, the CFPB also announced changes to its supervision and examination manual for evaluating UDAAPs. The updated examination manual notes that discrimination may meet the criteria for "unfairness" by causing substantial harm to consumers that they cannot reasonably avoid, where that harm is not outweighed by countervailing benefits to consumers or competition. Under this new examination criteria, consumers can be harmed by discrimination regardless of whether it is intentional. Under the new theory, discrimination can now be unfair in cases where the conduct may also be covered by the Equal Credit Opportunity Act, as well as in instances where fair lending laws like the ECOA do not apply. One of the given examples of an unfair practice where ECOA may not apply is denying access to a checking account because the individual is of a particular race.

The CFPB stated that it will examine for discrimination in all consumer finance markets, including credit, servicing, collections, consumer reporting, payments, remittances, and deposits. 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 also look at how companies test and monitor their decision-making processes for unfair discrimination, as well as discrimination under the ECOA.

In the course of examining banks' and non-banks' compliance with consumer protection laws, the CFPB will scrutinize discriminatory conduct that violates the federal prohibition against UDAAPs. The CFPB will also closely examine financial institutions' decision-making in advertising, pricing, and other areas to ensure that companies are appropriately testing for and eliminating illegal discrimination.

Eric Halperin, the CFPB's Assistant Director for Enforcement, and Lorelei Salas, the CFPB's Assistant Director for Supervision Policy and Supervision Examination, wrote in a blog post titled "Cracking down on discrimination in the financial sector" that the COVID-19 pandemic brought into sharper focus the inequities that continue to plague the country and that the CFPB will fight to end discrimination in the

financial sector. They explained that the CFPB will be closely examining companies' reliance on automated decision-making models and any potential discriminatory outcomes.

They also discussed the updated examination manual and how it guides examiners in "looking beyond" discrimination directly connected to fair lending laws, asking them to review any policies or practices that exclude individuals from products or services, or offer products or services with different terms, in an unfairly discriminatory manner.

Finally, they noted how vigorous enforcement of the ECOA continues to be essential for the CFPB to achieve "broader equity and opportunity." The CFPB will prioritize enforcement of the ECOA to ensure that no one suffers discrimination with respect to any aspect of a credit transaction.

This new way of "looking beyond" discrimination that's directly connected to fair lending laws like the ECOA and treating discrimination as a UDAAP represents a seismic shift in the CFPB's fair lending and UDAAP philosophy. Jean Noonan, my awesome partner and fellow Oklahoman, has a must-read [article](#) on what the CFPB's statement might mean for auto finance. Run, don't walk, with these articles in hand, to speak with knowledgeable counsel to determine how the CFPB's new stance will affect your business and operations.

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