

# CFPB Revises UDAAP Manual to Include Discriminatory Practices

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*The authors discuss the revisions to the Unfair, Deceptive, or Abusive Acts or Practices exam manual announced by the Consumer Financial Protection Bureau, which highlight the Bureau's view that its broad authority allows it to address discriminatory conduct in the offering of any financial product or service.*

The Consumer Financial Protection Bureau (“CFPB”) has announced<sup>1</sup> significant revisions to its Unfair, Deceptive, or Abusive Acts or Practices (“UDAAP”) exam manual,<sup>2</sup> in particular highlighting the CFPB’s view that its broad authority under UDAAP allows it to address discriminatory conduct in the offering of any financial product or service.

Congress has enacted several statutes that outlaw discrimination on specified prohibited bases, including the Equal Credit Opportunity Act (“ECOA”), which generally makes it unlawful to discriminate on a prohibited basis when extending credit and which the CFPB is authorized to enforce.

With this announcement, the CFPB made clear its view that any type of discrimination in connection with a consumer financial product or service could be an “unfair” practice—and, therefore, the CFPB can bring discrimination claims related to non-credit financial products (and other agencies that have UDAP authority may follow in the CFPB’s lead).

## THE REVISIONS

Although the revisions to the examination manual are not explicit on this point, the expectation is that the CFPB’s references to “discrimination” largely refer to discrimination on the basis of a prohibited “demographic” factor, such

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<sup>1</sup> <https://www.consumerfinance.gov/about-us/newsroom/cfpb-targets-unfair-discrimination-in-consumer-finance/>.

<sup>2</sup> [https://files.consumerfinance.gov/f/documents/cfpb\\_unfair-deceptive-abusive-acts-practices-udaaps\\_procedures.pdf](https://files.consumerfinance.gov/f/documents/cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures.pdf).

as those prohibited bases identified by the ECOA. The CFPB's revised exam manual states that such discrimination may be unfair because:

- It could cause substantial injury by limiting consumers' monetary benefits and preventing them from accessing certain products;
- Consumers cannot reasonably avoid improper discrimination in the marketplace; and
- There are no offsetting benefits arising from discrimination on a prohibited basis.

The CFPB emphasized that a discriminatory practice can be unfair even when there is no extension of credit and "fair lending laws do not apply," and used the example of a financial institution that prohibits African-Americans from opening a deposit account or subjects them to different requirements as unfair practices.

The CFPB also made changes to its UDAAP examination procedures in line with its focus on preventing discriminatory conduct. As part of future UDAAP exams, CFPB examiners will now review models, algorithms, and decision-making processes for potentially "unfair" discrimination; monitor employees and third parties for discriminatory conduct; and take corrective action upon discovering potential discrimination in relation to any consumer financial product or service.

The CFPB also signaled that UDAAP examiners may employ "disparate impact" (or other preexisting theories of discrimination under ECOA) to identify "unfair" discriminatory practices. As a result, these changes to the CFPB's examination procedures may be intended to cause a supervised institution to apply traditional fair lending analyses to all of the institution's consumer-facing products and services, including deposits and payments. Accordingly, all institutions subject to the CFPB's authority should take this into account across all consumer products—credit, depository, or otherwise.

At the same time, CFPB Assistant Director for the Office of Enforcement Eric Halperin and Assistant Director for Supervision Policy Lorelai Salas published a blog post<sup>3</sup> discussing these changes. They emphasized that the updated UDAAP manual "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 and services, or offer products or services with different terms, in an unfairly discriminatory manner." And in

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<sup>3</sup> <https://www.consumerfinance.gov/about-us/newsroom/cfpb-names-new-chiefs-for-supervision-and-enforcement-positions/>.

recognition of the CFPB's existing authority to enforce fair lending laws, Halperin and Salas reaffirmed that ECOA remains an "essential" priority for the CFPB.

## OBSERVATIONS

The prior version of the CFPB's UDAAP manual was, generally speaking, a more mainstream restatement of existing precedent interpreting the unfairness prohibition. The revisions do not cite to new precedent, nor has the CFPB stated that it intends to promulgate a rule identifying the specific contours of "unfair" discrimination. As a result, the CFPB's announcement raises many questions for participants in the consumer financial services market regarding the contours and basis for the CFPB's newly announced theory of unfairness.<sup>4</sup>

It is also unclear what impact this announcement will have on the actions of other federal agencies. For example, the federal banking agencies and the Federal Trade Commission also enforce federal prohibitions on unfair acts and practices, but did not join in the announcement.

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<sup>4</sup> The CFPB's revisions to its UDAAP manual have not been without criticism, as a coalition of industry trade groups have prepared a white paper arguing that the CFPB's position conflates the statutory language, ignores the longstanding view of "unfairness" under the Federal Trade Commission Act, and conflicts with the Supreme Court's focus on "results-oriented" language to invoke disparate impact theories of discrimination in *Texas Dep't of Housing and Cmty. Aff. v. Inclusive Cmty. Project, Inc.* See <https://www.aba.com/advocacy/policy-analysis/unfairness-and-discrimination>.