

CFPB Uses Springtime To Grow Authority

Article By:

Craig N. Landrum

Since March 16, 2022, the Consumer Financial Protection Board (CFPB) has expanded its authority to act to “better protect families and communities from illegal discrimination, including situations where fair lending laws may not apply.” On March 16, the CFPB announced a policy change through revisions to its examination manual dealing with unfair, deceptive, or abusive acts or practices (UDAAP) that provided details about the types of discrimination it intends to address under the UDAAP standards. The CFPB notes that discrimination may meet the criteria for “unfairness” by causing substantial harm to consumers that they cannot reasonably avoid, thus expanding discrimination through UDAAP to advertising, pricing, and areas of bank operations other than lending. In contrast to the Equal Credit Opportunity Act (ECOA), which until recently applied primarily to applicants for credit, the CFPB’s unfairness authority applies to all consumer financial products or services, such as collections payments, remittances, and deposits. At this point, the federal prudential regulators do not appear to have followed suit. However, the more subjective standard for unfairness certainly implies expanded risk of disparate impact analysis.

On April 25, the CFPB invoked its “dormant authority” to examine non-bank companies posing risks to consumers, ostensibly to level the playing field between banks and non-banks by utilizing that authority to hold non-banks to the same standards to which banks are held. The CFPB, pursuant to its authority under the Dodd-Frank Wall Street Reform and Consumer Protection Act, has regulated non-bank entities in the mortgage, private student loan, and payday loan industries as well as larger participants in other non-bank markets for consumer financial products and services such as consumer reporting, debt collection, student loan servicing, international remittances, and auto loan servicing. The dormant authority is to be applied to a third category of entities whose activities the CFPB has reasonable cause to determine pose risks to consumers, although it is not specific to any particular consumer financial product or service.

This change of rules allows the CFPB to determine by order, after notice to the covered person and reasonable opportunity for such covered person to respond, whether an entity is engaging or has engaged in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services, based on complaints or information collected from other sources.

Finally, on May 9, 2022, the CFPB issued an Advisory Opinion on the coverage of ECOA, stating that the act continues to protect borrowers after they have applied for and received credit and are no longer “applicants.” As noted above, the ECOA has traditionally applied to applicants. The Advisory

Opinion and accompanying analysis 1) clarify that ECOA protects individuals from discrimination in all aspects of a credit arrangement and 2) require lenders to provide adverse action notices to borrowers with existing credit. An example of the former is that ECOA prohibits lenders from lowering the credit limit of certain borrowers' accounts or subjecting certain borrowers to more aggressive collection practices on a prohibited basis, such as race. An example of the latter is that borrowers receive notices when an existing account is terminated or account terms are unfavorably changed, in addition to when credit is denied.

Thus, with these three actions, the CFPB has broadened its reach, all without any formal rulemaking action, other than with respect to allowing comments on the establishment of authority over certain non-bank covered parties based on risk. Although no rulemaking action was involved, regulatory risk to CFPB-regulated institutions was greatly increased through the broader application of the more subjective standards of UDAAP and the extended application of ECOA beyond applicants.

© 2024 Jones Walker LLP

National Law Review, Volumess XII, Number 146

Source URL: <https://www.natlawreview.com/article/cfpb-uses-springtime-to-grow-authority>