

UDAAP and Fair Lending: When's the last time you reviewed your Policies?

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As expected, the change in presidential administrations is leading to a change in administrative policies. All consumer financial service providers who are subject to the jurisdiction of the Consumer Financial Protection Bureau (CFPB) should carefully review their compliance management policies and procedures with a particular focus on Unfair, Deceptive, or Abusive Acts or Practices (UDAAP) and Fair Lending.

On March 9, 2021, the CFPB issued an [Interpretive Rule](#) clarifying that the prohibition against sex discrimination in the Equal Credit Opportunity Act, as implemented by Regulation B, includes sexual orientation discrimination and gender identity discrimination, including discrimination based on actual or perceived, “nonconformity with sex-based or gender-based stereotypes and discrimination based on an applicant’s associations.” The interpretive rule follows the United States Supreme Court [decision](#) in *Bostock v. Clayton County, Georgia*, 590 U.S. 140 S.Ct. 1731 (2020), which held that sex discrimination under Title VII of the Civil Rights Act of 1964 included sexual orientation and gender identity discrimination. The CFPB agreed with the Court’s interpretation, “that it is impossible to discriminate against a person for being homosexual or transgender without discriminating against the individual based on sex.” As such, the CFPB found that Regulation B’s prohibition on discrimination on the basis of “sex” fundamentally included discrimination related to a person’s sexual orientation or gender identity. The Interpretative Rule now aligns Regulation B with the state fair lending laws that already had prohibited credit-related discrimination on the basis of sexual orientation or gender identity.

Interestingly, the CFPB declared the Interpretive Rule as “solely” interpretive and therefore not subject to the 30-day delayed effective date for substantive rules under the Administrative Procedure Act (APA). Further, the CFPB indicated the Interpretive Rule does not require approval by the Office of Management and Budget because there are no new recordkeeping, reporting, or disclosure requirements. As such, the Interpretive Rule is effective upon publication in the Federal Register. We anticipate that this approach by the CFPB may result in criticism that the Interpretative Rule is an improper use of agency authority to amend Regulation B beyond the scope of the Equal Credit Opportunity Act.

In addition, on March 11, 2021, the CFPB rescinded its January 24, 2020 [policy statement](#), “Statement of Policy Regarding Prohibition on Abusive Acts or Practices” (the “2020 Policy Statement”). The 2020 Policy Statement was widely seen as offering at least a partial response to the concerns of the consumer financial service industry that the CFPB’s ability to take enforcement action against abusive acts or practices was overly broad. To address those concerns, the 2020 Policy Statement generally indicated that the CFPB would:

- (a) challenge or cite abusive conduct only when harm to consumers outweighs the benefit of the conduct;
- (b) generally avoid citing conduct as both abusive and unfair or deceptive at the same time; and
- (c) seek monetary relief for abusiveness only when there was a lack of good faith effort to comply.

In rescinding the 2020 Policy Statement, the CFPB signaled that it intends to vigorously use its authority to challenge abusive conduct by rolling back the limits announced in the 2020 Policy Statement. In the “Statement of Policy Regarding Prohibition on Abusive Acts or Practices; Rescission,” the CFPB **reiterated** the definition of “abusive” and cited court cases that have held the statutory definition was sufficient notice for due process purposes. The CFPB also made it clear that “abusive” conduct would be taken seriously, explaining that it “intends to consider good faith, company size, and all other factors ... but a policy statement declining to enforce the full scope of Congress’s definition of an abusive practice harms both the consumers who were taken advantage of and the honest companies that have to compete against those that violate the law.” Similar to the Interpretative Rule discussed above, the CFPB asserted its belief that the rescission of the 2020 Policy Statement was not subject to the notice and comment rulemaking requirements of the APA because the rescission constituted only a “general statement of policy.”

All covered persons subject to the CFPB’s jurisdiction should review their compliance management program regularly. An integral aspect of this process is the thorough review of policies and procedures. It is possible that a covered person’s current Fair Lending policies, and/or monitoring, do not fully consider sexual orientation or gender identity discrimination directly. It is equally possible that some covered persons modified their risk assessments addressing UDAAP risk in accordance with the (at least perceived) lower level of risk associated with the abusive standard. As such, we would highly recommend that these policies and practices be reviewed and modified where necessary.

Related people

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