U.S. Chamber of Commerce
Litigation Center

June 28, 2022

The Honorable Rohit Chopra
Director, Consumer Financial Protection Bureau
1700 G Street NW
Washington, D.C. 20552

Dear Director Chopra:

I write to express the views of the U.S. Chamber of Commerce concerning the Bureau's March 16, 2022 amendment of its Supervision and Examination Manual. While the business community supports the fair enforcement of existing nondiscrimination laws, the amendment will harm businesses, and consumers, through its adoption of the novel position that the Bureau can examine financial institutions for alleged discriminatory conduct under its "unfair, deceptive, and abusive acts or practices" (UDAAP) authority.[1] The business community strongly supports effective anti-discrimination policies and adherence to the laws prescribed by Congress, and the Chamber is encouraging Congress to craft bipartisan legislation to further deal with the scourge of discrimination . The Bureau's action, however, taken without legislative authority, opens the door to uncertain and excessive regulation in the financial marketplace. It is unlawful.

The Bureau has exceeded its authority by extending fair-lending laws beyond the bounds carefully set by Congress. Specifically, the Bureau's mistaken notion that "[d]iscrimination … can trigger liability under [the] ban on unfair acts or practices"[2] ignores the text, structure, and history of the Dodd-Frank Act, as well as similar legislation addressing agency authority to regulate unfairness. What's more, the Bureau's contemplation of disparate-impact liability—a specific form of liability that not even most antidiscrimination laws create—flouts congressional intent and Supreme Court precedent.[3] The Bureau's action constitutes a final agency action ripe for judicial

1 CFPB Unfair, Deceptive, or Abusive Acts or Practices Examination Manual at 11, 13, 14, 17 (revised Mar. 16, 2022), https://files.consumerfinance.gov/f/documents/cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures.pdf [hereinafter Manual].

2 CFPB Targets Unfair Discrimination in Consumer Finance, CFPB (Mar. 16, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-targets-unfair-discrimination-in-consumer-finance/ [hereinafter Press Release].

3 The Bureau confirmed its position in a blog post by its chiefs of Supervisory Policy and Enforcement that discriminatory conduct is "unfair" under Title X of the Dodd-Frank Act (also called

review under the Administrative Procedure Act. The Bureau should rescind its misguided action to respect the limits Congress placed on its authority.

The Dodd-Frank Act created the Bureau and gave it authority nearly identical to the Federal Trade Commission's authority to prohibit "unfair" acts or practices by covered entities. Congress separately authorized the Bureau to implement two specific antidiscrimination laws, the Equal Credit Opportunity Act and the Home Mortgage Disclosure Act. Congress has always recognized that "unfairness" and "discrimination" are distinct concepts, each with specific meanings and limited scope. The concepts have never been interchangeable. Accordingly, an agency cannot regulate what Congress defines as discriminatory conduct under its unfairness authority, or vice versa.

The Equal Credit Opportunity Act is a specific antidiscrimination statute that prohibits discrimination based on particular characteristics of a credit applicant, and the Home Mortgage Disclosure Act similarly requires specific disclosures of data to help agencies identify discriminatory activity. Each reflects a careful balance that Congress struck to root out discrimination in the provision of credit without encouraging unsound lending practices or the allocation of credit, practices that could themselves harm underserved communities. Those choices are specified for industry, and they are the subject of even more specific regulations to which the industry is now accustomed. The UDAAP authority does not include any such specifics about discrimination; indeed, it does not speak of discrimination at all. Applying the UDAAP to discriminatory conduct would thus provoke confusion—for both consumers about their rights and regulated entities about their responsibilities. Such confusion would inject uncertainty into the financial services industry and make it nearly impossible for them to be confident that the products and services they offer to consumers adhere to the CFPB's arbitrary and malleable definition of "unfair."

Nevertheless, on March 16, the Bureau improperly conflated the concepts by announcing that it will now regulate alleged discriminatory conduct, and even alleged disparate impacts, through the exercise of its unfairness authority. The amended manual provides new instructions for examiners evaluating potential UDAAP violations, and it repeatedly describes such concerns or violations as "including discrimination." Manual at 11, 13, 14, 17. For example, the amended manual instructs examiners to now consider "[f]oregone [*sic*] monetary benefits or denial of access to products or services, like that which may result from discriminatory behavior." *Id.* at 2. When considering the

---

the "Consumer Financial Protection Act"). Eric Halperin and Lorelei Salas, Cracking Down on Discrimination in the Financial Sector, CFPB (Mar. 16, 2022), https://www.consumerfinance.gov/about-us/blog/cracking-down-on-discrimination-in-the-financial-sector/ [hereinafter CFPB Blog]. The blog went on to proclaim that actions producing "disparate treatment or a discriminatory outcome … fall squarely within our mandate to address and eliminate unfair practices." Id.

relationship of UDAAP issues to other laws, the amended manual also instructs examiners to conclude that "a discriminatory act or practice is not shielded from the possibility of being unfair, deceptive or abusive even when fair lending laws do not apply to the conduct." *Id.* at 10. In other words, examiners will now look for potentially discriminatory conduct in contexts beyond the scope of conduct covered by fair lending laws.

The Bureau did not hide its decision to overstep its unfairness authority. Rather, the Bureau proclaimed in its press release that "[d]iscrimination or improper exclusion can trigger liability under [the] ban on unfair acts or practices." Press Release. "In the course of examining banks' and other companies' compliance with consumer protection rules," it claimed, the agency "will scrutinize discriminatory conduct that violates the federal prohibition against unfair practices." *Id.* The agency further boasted, "We will be *expanding* our anti-discrimination efforts to combat discriminatory practices *across the board* in consumer finance." *Id.* (emphases added). The Bureau "will examine for discrimination in all consumer finance markets, including credit, servicing, collections, consumer reporting, payments, remittances, and deposits." *Id.* Bureau 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." *Id.* (emphasis added). Finally, the Bureau "will look at how companies test and monitor their decision-making processes for unfair discrimination, *as well as discrimination* under [the Equal Credit Opportunity Act]." *Id.* (emphasis added). This raw exercise of regulatory authority is untethered to the statutes outlining the Bureau's authority.

"[T]he best evidence of Congress's intent is the statutory text." *NFIB v. Sebelius*, 567 U.S. 519, 544 (2012). Dodd-Frank discusses "unfairness" and "discrimination" as two distinct concepts, and it defines "unfairness" without making any reference to "discrimination." Specifically, section 1021(b) sets forth Congress's objectives for the Bureau and makes clear that Congress "authorized [the Bureau] to exercise its authorities under Federal consumer financial law for the purposes of ensuring that, with respect to consumer financial products and services … consumers are protected from unfair, deceptive or abusive acts and practices *and* from discrimination." 12 U.S.C. §5511(b) (emphasis added). Congress's word choice is significant. Congress did not authorize the Bureau to protect consumers from unfair acts or practices "including" or "such as" discrimination, as it would if Congress had meant for discrimination to be viewed as a type of unfairness. *See id.* Instead, Congress chose to authorize the Bureau to protect consumers from unfair acts or practices "and" from discrimination, separately. Nor did Congress include discrimination in the same list as the unfair, deceptive, or abusive acts and practices that fall under the Bureau's UDAAP authority. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013) ("Given this clear language, it would be improper to conclude that what Congress omitted from the statute is nevertheless within its scope."). In short, Congress used different words to mean

different things. *See Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 62-63 (2006) ("We normally presume that, where words differ as they differ here, Congress acts intentionally and purposely in the disparate inclusion or exclusion."). Ignoring the distinction that Congress drew between unfairness and discrimination would fail to "give effect ... to every clause and word of [the] statute." *United States v. Menasche*, 348 U.S. 528, 538-39 (1955).

Other examples of Congress's design are easy to find. In Section 1002(13) of Dodd-Frank, Congress again distinguished between "unfairness" and "discrimination" when it defined "fair lending" as "fair, equitable, and nondiscriminatory access to credit for consumers." 12 U.S.C. §5481(13). This definition shows that when Congress wants the concept of fairness to include nondiscrimination in a specific context, it plainly does so. Of course, if "fair" naturally included "nondiscriminatory," Congress would not have had to include nondiscriminatory in its definition of fair lending. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995) ("[T]he Court will avoid a reading which renders some words altogether redundant."). This distinction is again apparent in Dodd-Frank's creation of the Bureau's Office of Fair Lending and Equal Opportunity. 12 U.S.C. §5493. There, Congress authorized the Office to oversee and enforce federal laws designed to ensure the "fair, equitable, and nondiscriminatory access to credit" (*i.e.*, federal "fair lending" laws), of which the Equal Credit Opportunity Act and Home Mortgage Disclosure Act—but not the Bureau's unfairness authority—are listed as examples. 12 U.S.C. §5493(c)(2)(A). Again, if "fair" naturally meant "nondiscriminatory," the additional language here would be "altogether redundant." *Gustafson*, 513 U.S. at 574.

Likewise, the Bureau's novel position is unsupported by the structure of Dodd-Frank. "Just as Congress' choice of words is presumed to be deliberate, so too are its structural choices." *Nassar*, 570 U.S. at 353. For example, the section that defines "unfairness" does not mention discrimination. 12 U.S.C. §5531(c). The section that defines prohibited acts under the Consumer Financial Protection Act clearly distinguishes between actions out of conformity with "Federal consumer financial law"—a defined term meaning one of eighteen enumerated consumer laws, including the Equal Credit Opportunity Act and the Home Mortgage Disclosure Act—and engaging in an unfair act or practice. 12 U.S.C. §5536(a)(1).

The Bureau's expansive approach to its unfairness authority is also unsupported by the legislative history. Indeed, nothing in the history of the passage of Dodd-Frank indicates that Congress intended for the Bureau to use its unfairness authority to address discrimination. Rather, the legislative history supports the contrary conclusion: that the Bureau's authority to address discrimination flows only from existing antidiscrimination laws. The only mention of how the Bureau should address discrimination in Dodd-

Frank's conference report focuses on existing antidiscrimination laws.[4] Though the conference report twice mentions the Bureau's UDAAP authority, it does so in separate paragraphs without any mention of discrimination. *See* Dodd-Frank Conference Report at 874-75.

Next, the Bureau's expansive view of "unfairness" contradicts the historical use and understanding of the term in the context of the Federal Trade Commission's unfairness authority. In 1938, Congress authorized the FTC to protect consumers from "unfair or deceptive acts or practices in or affecting commerce." Wheeler-Lea Amendment, Pub. L. No. 75-447, 52 Stat. 111 (1938) (codified as amended at 15 U.S.C. §45(a)(1)). After initially leaving the term "unfair" undefined, Congress later curtailed the Commission's use of its unfairness authority. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980) (codified as amended in scattered sections of 15 U.S.C.). It codified a constrained definition of unfairness—that does not include discrimination—to limit the Commission's ability to use unfairness to pursue other public-policy goals. 15 U.S.C. §45(n). These efforts confirm that the "unfairness" authority conferred by Congress did not extend to discrimination. This context is important because Congress borrowed the unfairness definition that governs the Board from the Federal Trade Commission Act.[5] As you conceded in recent testimony, "'[U]nfairness' … derive[s] from the FTC Act. It is identical language."[6] Where Congress borrows terms of art from other acts, it presumably conveys the same meaning. *Morissette v. United States*, 342 U.S. 246, 263 (1952).

The Bureau's intention to go even further and use its unfairness authority to address disparate impacts also contradicts Supreme Court precedent. In its press release, the Bureau stated that "[c]onsumers can be harmed by discrimination regardless of whether it is intentional," so examiners will consider "discriminatory outcomes." Press Release. The Bureau doubled down in its blog post by stating that actions producing

---

4 Dodd-Frank Wall Street Reform and Consumer Protection Act Conference Report, H.R. Rep. No. 111-517, at 875 (June 29, 2010) ("Title X establishes the Office of Fair Lending and Equal Opportunity within the Bureau. This Office will oversee the enforcement of federal laws intended to ensure fair, equitable and nondiscriminatory access to credit for individuals and communities, including the Equal Credit Opportunity Act (ECOA) and Home Mortgage Disclosure Act (HMDA).") [hereinafter Dodd-Frank Conference Report].

5 The Bureau's Manual states: "The standard for unfairness in the Dodd-Frank Act has the same three-part test as the FTC Act" and that "[t]he principles of 'unfair' and 'deceptive' practices in the Act are similar to those under Sec. 5 of the Federal Trade Commission Act (FTC Act)." Manual, supra note 1, at 1 n.2, 2 n.4.

6 The Consumer Financial Protection Bureau's Semi-Annual Report to Congress, Hearing before the Senate Comm. on Banking, Hous., and Urb. Affairs, 117th Cong. (2022) (statement of Rohit Chopra, Director of the CFPB).

"disparate treatment or a discriminatory outcome … fall squarely within our mandate to address and eliminate unfair practices." CFPB Blog. This position is particularly striking because the Supreme Court has read antidiscrimination laws to prohibit disparate impact only in narrow circumstances. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Proj., Inc.*, 576 U.S. 519, 534 (2015). The Supreme Court has required two conditions to imply disparate impact liability: (1) the statute must be an antidiscrimination law, and (2) the statute must contain results-oriented language demonstrating that it is designed to impose liability for disparate-impact claims. *Id.*

Dodd-Frank satisfies neither condition. For starters, it is not an antidiscrimination statute. Therefore, the Bureau's quest to address disparate-impact liability under its UDAAP authority fails at step one. What's more, neither Dodd-Frank nor any of the other relevant statutes include language showing that Congress intended for the Bureau to address disparate-impact claims.[7] The Dodd-Frank sections that define unfairness or prohibit unfair acts do not include any results-oriented language. *See* 12 U.S.C. §5531(c); §5536(a)(1)(B). Accordingly, Dodd-Frank provides no textual support for the notion that Congress authorized disparate-impact claims.

The Supreme Court has further warned that disparate-impact liability, even where permissibly implied in a statute, must be subject to adequate safeguards. These include, for example, "[a] robust causality requirement" tying a challenged policy to a statistical disparity. *Inclusive Communities Proj.*, 576 U.S. at 542. Absent such safeguards, the specter of disparate-impact liability could "inject racial considerations into every [business] decision," creating "a danger that potential defendants may adopt racial quotas" and "displace valid governmental and private priorities." *Id.* at 543. The Bureau's recent action fails to even consider adequate safeguards, and it unlawfully replaces the robust causality standard for discrimination findings with an unrestrained standard that looks merely at statistical outcomes and disparities.

Finally, the Bureau's action is ripe for judicial review. The Bureau's amendments to its Manual are plainly an agency action that can be challenged under the APA. The accompanying press release announces its finality by confirming that discrimination can presently "trigger liability" for regulated entities. Press Release. By imposing new substantive obligations on regulated entities through its interpretation of Dodd-Frank's UDAAP protections, the Bureau's action further constitutes a legislative rule. Yet, the

7 Indeed, the Supreme Court has not considered whether disparate impact is even cognizable under the Equal Credit Opportunity Act. That antidiscrimination act does not include the results-oriented language that Congress has identified in other statutes as implying disparate impact liability. *See Marietta Mem'l Hosp. Emp. Health Benefit Plan v. Davita, Inc.*, No. 20-1641, slip. op. at 5 (U.S. June 21, 2022).

Bureau did not comply with the APA's procedures for notice-and-comment rulemaking. As explained, the amendments exceed the Bureau's statutory authority.

The Bureau's self-expansion of its authority will impose significant burdens on banks, financial markets, and the consumers they serve. Yet, this is not the first time that an agency helmed by you has engaged in troubling procedural irregularities.[8] It is unclear why you or the Bureau would want to imperil your credibility in this way. Instead of perpetuating an improper exercise of authority, the Bureau should respect the limits of its authority and rescind these troubling amendments. We encourage you to follow this course. The Chamber will not hesitate to take legal action to defend businesses (and the economy that they serve) against the Bureau's unlawful actions.

Sincerely,

Daryl Joseffer
Executive Vice President and Chief Counsel
U.S. Chamber Litigation Center
U.S. Chamber of Commerce
1615 H Street, NW
Washington, D.C. 20062
202-463-5368 (phone)
202-463-5346 (fax)
DJoseffer@USChamber.com

8 See U.S. Chamber, Letter to FTC on Practice of Counting "Zombie Votes", U.S. Chamber (Nov. 19, 2021).