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CHAIRWOMAN

United States House of Representatives
Committee on Financial Services
Washington, DC 20515

PATRICK McHENRY, NC
RANKING MEMBER

May 19, 2022

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

Dear Director Chopra:

We are writing to express our concern with respect to two recent actions taken by the Consumer Financial Protection Bureau (CFPB). In particular, the CFPB's new unfair, deceptive, or abusive acts and practices (UDAAPs) supervisory policy and the recent changes to CFPB administrative adjudication procedures deviate significantly from past practices. Moreover, notwithstanding the fact these actions were taken outside of the typical notice and comment process, they suggest the CFPB intends to pursue a regulatory and enforcement agenda well beyond its statutory authority. We call on you rescind these measures immediately and adhere to the appropriate notice and comment paradigm.

On March 16, 2022, CFPB amended its UDAAP supervision exam manual.[1] At the same time, the CFPB announced plans to target discrimination as an "unfair" practice under the Consumer Financial Protection Act's prohibition against UDAAPs.[2] Under the new policy, Bureau examiners will look for discriminatory conduct, whether intentional or unintentional, in all consumer financial products and services, "including in situations where fair lending laws may not apply."[3] These updates to the CFPB exam manual strongly suggest that the new UDAAP policy is intended to cover both intentional and unintentional or disparate impact discrimination.[4]

Let us be clear, there is no place for discrimination in financial services. If illegal discriminatory practices are identified, they should be addressed through the enforcement of existing laws, such as the Equal Credit Opportunity Act (ECOA) and the Fair Housing Act – known together as the fair lending laws. Congress enacted the fair lending laws and delegated their enforcement to the CFPB, clearly defining the limits of CFPB's jurisdiction.

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[1] Consumer Financial Protection Bureau (CFPB), "CFPB Targets Unfair Discrimination in Consumer Finance," Mar. 16, 2022, https://www.consumerfinance.gov/about-us/newsroom/cfpb-targets-unfair-discrimination-in-consumer-finance/.
[2] *Id*.
[3] *Id*.
[4] For example, examiners are instructed to consider whether an "entity has a process to take prompt corrective action if the decision-making processes it uses produce deficiencies or discriminatory results." *See* CFPB UDAAP Exam Manual V.3 (March 2022) pg. 18.

Extending ECOA's disparate treatment and disparate impact analysis to non-credit financial products and services ignores these clear limits. Moreover, the CFPB's recent decision to fundamentally alter long-standing fair lending policy was made outside of the rulemaking process. The CFPB did not solicit public input or provide any prior notice to those who must comply with a new "theory" of liability. Instead, the changes were communicated through press release, blog post, and exam manual update. These channels do not satisfy the requirements of the Administrative Procedure Act (APA) and circumvent judicial review.

In addition to radically reinterpreting UDAAP, changes to the way the CFPB will supervise for UDAAP will impose significant new responsibilities on supervised entities. For example, the CFPB announced that "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," and examiners "will look at how companies test and monitor their decision-making processes for unfair discrimination, as well as discrimination under ECOA." We would remind the CFPB that under its own Role of Supervisory Guidance rule, "unlike a law or regulation, supervisory guidance does not have the force and effect of law, and the Bureau does not take enforcement actions based on supervisory guidance."[5]

Our concerns with the new UDAAP policy are heightened even more by the changes recently made to the rules governing CFPB administrative adjudications. On February 22, 2022, the CFPB quietly issued a procedural rule to update its Rules of Practice for Adjudication Proceedings (Rules of Practice).[6] The Rules of Practice were effective immediately and provide significant new powers to the CFPB Director, limit due process rights, and will contribute to the formation of partisan, and not durable, jurisprudence.[7]

This action is disturbing. Not only is it contrary to your comments about intending to establish durable jurisprudence made during testimony before the House Financial Services Committee in October 2021, but it does not abide by typical notice and comment procedures. It is worth noting that on March 22, 2022, other prudential regulators issued an interagency proposal for comment as they seek to update certain parts of their policies and procedures governing administrative proceedings.[8]

Moreover, the CFPB did not issue a press release or public statement when publishing the revised Rules of Practice. In fact, it was only noted at the end of the announcement in the federal register that it "welcomes comments on this rule, and the Bureau may make further amendments if it receives comments warranting changes."[9] Equally disturbing, the comment period closed

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[5] Appendix A to 12 CFR § 1074, Statement Clarifying the Role of Supervisory Guidance.
[6] CFPB, "Interim Final Rule: Rules of Practice for Adjudication Proceedings" Feb. 22, 2022, https://www.consumerfinance.gov/rules-policy/final-rules/rules-of-practice-for-adjudication-proceedings/.
[7] See U.S. Chamber of Commerce, et. al., comment letter, https://www.regulations.gov/comment/CFPB-2022-0009-0006.
[8] Office of the Comptroller of the Currency, Treasury; Board of Governors of the Federal Reserve System; Federal Deposit Insurance Corporation; National Credit Union Administration, "Rules of Practice and Procedure," Mar. 22, 2022, https://www.federalregister.gov/documents/2022/04/13/2022-04454/rules-of-practice-and-procedure.
[9] CFPB, "Rules of Practice for Adjudication Proceedings," Feb. 22, 2022, https://www.federalregister.gov/documents/2022/02/22/2022-02863/rules-of-practice-for-adjudication-proceedings.

April 8, 2022. In light of comments since received by the CFPB, we believe it is appropriate for the CFPB to immediately revert back to the previous Rules of Practice and conduct notice and comment rulemaking before the any new procedures become effective.[10] This is critical. In the past, Article III courts have found the CFPB's administrative adjudication process to have been abused. Specifically, the CFPB used its in-house adjudication process to apply new regulatory interpretations to conduct that occurred before the new interpretation was issued and before any entity could reasonably have had fair notice.[11]

Considering the significance of the changes adopted under the new UDAAP policy, we believe it would be inappropriate for the CFPB to pursue actions under the policy through the administrative adjudication process. The new interpretation within the policy should be considered by a non-partisan, independent judge. We believe this should be the practice for all cases but particularly when the CFPB circumvents the rulemaking process. The CFPB must not pursue actions under these theories and then be allowed to judge the legality of its own actions and processes and impose significant penalties. Given the CFPB's unprecedented and expansive new self-appointed authorities we request answers to the following questions:

1. Does the CFPB believe that entities regulated by the CFPB should change their practices or take additional steps—for example by seeking demographic information or language preference information on customers where not already required to do so by law—in response to these changes to the examination manual?
    a. If yes, does the CFPB believe its official statements on supervisory guidance not creating new obligations nor providing a basis for CFPB enforcement to no longer be accurate?
    b. If yes, why did the CFPB choose to circumvent the Administrative Procedure Act (APA) which is generally required for announcing significant and binding new regulatory requirements?

2. Is the CFPB pursuing any enforcement matters under this theory of unfairness? Does the CFPB expect covered entities to retroactively comply with the new supervisory guidance?

3. On what date did the CFPB begin pursuing the inclusion of "discriminatory" conduct under UDAAP in relation to supervisory responsibilities?

4. What correspondence, including written (email, text, other documentation), verbal, or in person and what internal or external staff were involved in making the determination that the discriminatory conduct would fall under UDAAP in a supervisory matter?

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[10] See U.S. Chamber of Commerce, et. al., "Comment from U.S. Chamber of Commerce," Apr. 8, 2022, https://www.regulations.gov/comment/CFPB-2022-0009-0006.

[11] *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc) [Reinstating portions of the earlier panel's decision in *PHH Corp. v. CFPB*, 839 F.3d 1, 39-44 (D.C. Cir. 2016), vacated upon grant of reh'g en banc (Feb. 16, 2017), specifically the panel's rejection of the CFPB Director's interpretation of the anti-kickback provision of the Real Estate Settlement Procedures Act (RESPA), his attempt to apply that interpretation retroactively, his construction of RESPA's limitations provision, and his theory that the CFPB is bound by no limitations period in any administrative enforcement action under any of the laws the agency administers.].

5. Has the CFPB conducted any type of cost-benefit or regulatory impact analysis on how these new powers and procedures will affect consumers and consumer choice in financial services?

Additionally, we request that any documentation referenced in the questions included in this letter be submitted with your responses in an unredacted form.

Sincerely,

Patrick McHenry
Ranking Member

Blaine Luetkemeyer
Ranking Member on the Subcommittee on Consumer Protection and Financial Institutions

Ann Wagner
Vice Ranking Member

Pete Sessions
Committee on Financial Services

Bill Posey
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Bill Huizenga
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