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Navigating Fair Lending and Redlining Considerations Under the Biden Administration

By Abigail M. Lyle and Nicole Skolnekovich*

The authors of this article discuss recent fair lending actions the Biden administration has undertaken in a stated effort to promote equity and equality in banking and focus on combatting redlining.

2021 was a busy year for fair lending. Immediately upon taking office, the Biden administration and Chopra-led Consumer Financial Protection Bureau ("CFPB") took the lead in emphasizing regulation and enforcement of equity issues and anti-discrimination laws, such as the Equal Credit Opportunity Act ("ECOA") and the Fair Housing Act ("FHA"). These concerted efforts include several new fair lending policy initiatives and rule changes to promote equity and equality in banking and a renewed focus on combatting redlining. It is critical that institutions act proactively to prepare for the renewed focus on fair lending and redlining.

RECENT POLICY INITIATIVES

First, Commissioner Chopra quickly advocated for a return to the disparate impact analysis to detect and eliminate discriminatory lending practices—an approach that had been largely abandoned under the Trump administration.[1] After challenges to the 2013 Housing and Urban Development ("HUD")—disparate impact rules and decreased enforcement in recent years, the controversial disparate impact theory is now remerging under the Biden administration.

- *Takeaway*: We expect to see an uptick in enforcement actions under this revived disparate impact theory in 2022, and institutions should be prepared for their lending practices to be assessed under this approach.

Second, in January 2021, the CFPB issued guidance encouraging financial institutions to better promote access and accommodations for customers with

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[1] *See, e.g., Introductory Remarks of Commissioner Rohit Chopra,* NATIONAL FAIR HOUSING ALLIANCE 2020 NATIONAL CONFERENCE (Oct. 6, 2020).

limited English proficiency ("LEP").[2] In response to the "compliance risks and uncertainty that many financial institutions raise as challenges to better serving LEP consumers in non-English languages," the CFPB issued guidance outlining "compliance principles and guidelines that encourage financial institutions to expand access to products and services for LEP consumers."[3] While the CFPB recognized that there is not a one-size-fits-all approach, the CFPB encouraged institutions to assess the needs of the communities they serve and consider implementing formal LEP policies and procedures. It should also be noted that the failure to provide any LEP services, such as non-English marketing and language services, can also raise redlining concerns. As discussed below, the Department of Justice ("DOJ") and Office of the Comptroller of the Currency ("OCC") noted redlining concerns where an institution "did not advertise at all in Spanish" and did not employ or hire loan officers with the "requisite Spanish language skills necessary to provide credit services" notwithstanding the high Hispanic populations in the communities that the institution served.[4]

- *Takeaway*: Institutions should proactively assess the communities they serve and consider adopting formal LEP policies and procedures to provide that they are meeting the needs of those communities.

Third, in March 2021, the CFPB clarified that the prohibition against sex discrimination in ECOA and Regulation B encompasses sexual orientation discrimination and gender identity discrimination. This includes discrimination based on actual or perceived nonconformity with sex-based and gender-based stereotypes and discrimination. The CFPB is expected to continue developing rules under the ECOA to ensure nondiscriminatory access to credit.

- *Takeaway*: Financial institutions must review and revise their policies and procedures to incorporate the expanded definition of sex under ECOA and Regulation B and continue to monitor interpretations and rules to keep their policies up to date.

Fourth, in September 2021, the CFPB proposed new data collection and reporting requirements to implement Section 1071 of the ECOA. The requirements would broadly apply to any application for credit to a "covered financial institution"[5] for a "small business."[6] The "proposed rule would create

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[2] *Statement Regarding the Provision of Financial Products and Services to Consumers with Limited English Proficiency*, 86 Fed. Reg. 6306 (Jan. 21, 2021).

[3] *Id.* at p. 2.

[4] *See infra*, n. 9 and 12.

[5] A "covered financial institution" is a "financial institution that originated at least 25 covered

the first comprehensive database of small business credit applications in the United States" and an entirely new data collection and reporting requirement.[7]

Covered financial institutions would be required to collect and report mandatory data points, including minority-owned business status, women-owned business status, and ethnicity, race, or sex of principal owners. From this new data, regulators will have a readily available source to assess institutions for potential fair lending and compliance risks in small business lending. The period to submit comments on the proposed rule ended January 6, 2022.

- *Takeaway*: The proposed rule will cover a broad spectrum of lenders that will be subject to the new data collection and reporting requirements. Institutions should monitor these developments, be prepared to adopt policies and procedures to meet the data reporting metrics, and be prepared to proactively monitor this new dataset for potential fair lending risk areas.[8]

COMBATTING REDLINING

In addition to new policy initiatives and rule changes, there was an increasing focus on redlining issues in 2021 by a variety of banking regulators. On August 31, 2021, the OCC and DOJ announced the largest fair lending enforcement action in several years based on alleged "redlining" violations under the FHA and ECOA, resulting in a $3 million penalty and $5.5 million to be spent on fair lending initiatives. The OCC and DOJ alleged that the lender significantly underperformed in generating home mortgage applications from majority-Black and Hispanic neighborhoods compared to "peer lenders."[9]

The OCC and DOJ also took issue with the fact that the lender-maintained branches and loan officers concentrated in majority-white neighborhoods without similar outreach or services provided in majority-Black and Hispanic neighborhoods. Specifically, the OCC and DOJ alleged that the lender only

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credit transactions for small businesses in each of the two preceding calendar years." *Small Business Lending Data Collection under the Equal Credit Opportunity Act*, Docket No. CFPB-2021-0015, CONSUMER FINANCIAL PROTECTION BUREAU (Sept. 1, 2021), available at https://files.consumerfinance.gov/f/documents/cfpb_section-1071_nprm_2021-09.pdf.

[6] "Small business" will be defined by reference to the SBA definition found in 15 U.S.C. 632(a), with an additional limitation to businesses with gross annual revenues of $5 million or less in the preceding fiscal year. *Id.* at p. 789.

[7] *Id.*

[8] *Id.*

[9] Complaint, *United States of America v. Cadence Bank, N.A.*, No. 21-mi-99999-UNA (N.D. GA Aug. 30, 2021).

maintained one branch location in a majority-Black and Hispanic neighborhood and did not assign this branch a dedicated loan officer. Further, unlike borrowers at other branches located in majority-white areas, the OCC and DOJ alleged that borrowers at the single branch located in a majority-Black and Hispanic neighborhood faced an additional hurdle of being required to make an appointment in advance to meet with a loan officer.

The OCC and DOJ also noted that the lender engaged in very limited advertising and outreach through avenues serving majority-Black and Hispanic communities. Finally, the OCC and DOJ emphasized that the lender had no loan officers with Spanish language skills and that there was no advertising in Spanish. The DOJ and OCC alleged that these issues led to the lender's operations being structured to "avoid providing access" in violation of ECOA and the FHA.

Thereafter, on October 22, 2021, the DOJ formally launched its Combatting Redlining Initiative which seeks to make mortgage credit and homeownership accessible to all Americans on the same terms, regardless of race or national origin and regardless of the neighborhood where they live.[10] The initiative is a cross-government effort, including the OCC, local U.S. attorneys' offices, and state attorneys general, to bring greater collaboration regarding redlining referrals and examinations. Of note, the DOJ also indicated that the initiative would expand the DOJ's analyses of potential redlining to both depository and non-depository institutions.

On that same day, the OCC and DOJ announced a second major redlining consent order resulting in a $5 million penalty and approximately $4.5 million in fair lending initiatives.[11] Again, the OCC and DOJ alleged that the lender's Home Mortgage Disclosure Act ("HMDA") data showed that it underperformed compared to peer lenders in generating home mortgage loan applications from majority-Black and Hispanic areas.[12] Beyond the HMDA data, the OCC and DOJ noted that the majority of the lender's full service branches were located in majority-white neighborhoods and the lender did not assign mortgage loan officers to any of the branches located in majority-Black and Hispanic areas.

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[10] *Justice Department Announces New Initiative to Combat Redlining*, United States Department of Justice (Oct. 22, 2021), available at https://www.justice.gov/opa/pr/justice-department-announces-new-initiative-combat-redlining.

[11] Consent Order, *United States of America v. Trustmark National Bank*, No. 2:21-cv-2664 (W.D. TN Oct. 22, 2021).

[12] Complaint, *United States of America v. Trustmark Nat'l Bank*, No. 2:21-cv-2664 (W.D. TN Oct. 22, 2021).

The DOJ and CFPB also alleged that the lender's marketing strategy focused on developing commercial business and that the generic "brand" messaging was insufficient because it was "ineffective at generating mortgage loan applications from majority-Black and Hispanic areas."[13] In 2022, we expect to see continued investigations and formal enforcement actions under the Combatting Redlining Initiative.

State legislatures and regulators have also refocused on redlining and fair lending. Earlier in 2021, Illinois passed legislation to expand state community reinvestment act mandates to non-bank lenders.[14] New York recently enacted an expansion of its existing community reinvestment act mandate to non-bank lenders.[15] As such, we also expect to see an uptick in fair lending activity at the state-level.

Finally, in August 2021, HUD and the Federal Housing Finance Agency signed a memorandum of understanding to enhance enforcement of the FHA and fair lending oversight of Fannie Mae and Freddie Mac. Accordingly, these recent enactments demonstrate the heightened focus on redlining and fair lending at various levels of government and across various institution-types.

- *Takeaway*: While redlining is not a new concept, there is heightened regulatory focus on redlining issues across a variety of federal and state regulators. It is essential that institutions proactively evaluate their lending practices, including an assessment of their performance against peers, as that is what the regulators are actively doing based upon their publicly available HMDA data. As the consent orders make clear, generic marketing and boilerplate fair lending policies and procedures are not enough. The regulatory expectation is policies and procedures specifically designed to address redlining risk and proactive development of outreach and marketing programs targeted to reach low-to-moderate and majority-minority census tracts.

CONCLUSION

In this heightened regulatory environment, it is essential that institutions closely-monitor the regulatory developments and proactively enhance their fair lending and redlining policies and procedures.

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[13] *Id.* at 8–9.

[14] *See* 205 Ill. Comp. Stat. Ann. 735/35-1 (the "Illinois Community Reinvestment Act").

[15] N.Y. Legis. Assemb., S5246A. Reg. Sess. 2021–2022 (2021) (enacted on Nov. 1, 2021 creating new N.Y. Banking Law § 28-bb).