



## ***Financial Services Management***

---

### **Anti-Discrimination Requirements, Enforcement**

#### **Cite**

S. 4801, H. R. 8667: Fair Access to Financial Services Act of 2020

#### **Recommended Distribution:**

Retail Finance, Social Policy, Fair Lending, Diversity, Policy, Compliance, Risk Management, Legal, Government Relations

#### **Websites:**

<https://www.congress.gov/bill/116th-congress/senate-bill/4801>

<https://www.congress.gov/bill/116th-congress/house-bill/8667>

### **Impact Assessment**

---

- This measure is largely a statement of intent rather than a considered statutory revision, leaving many key implementation questions unanswered.
- Financial inclusion could increase.
- A private right of action increases litigation risk across much of consumer finance.
- Risk-based pricing, service-delivery geography, customer-treatment disputes, and other retail-finance matters could be subject to high-profile challenge and costly legal disputes.
- State- and unregulated financial companies could face additional challenges in the absence of prior anti-discrimination efforts and established compliance cultures.
- The measure adds no express regulatory requirements, leaving the banking agencies to use existing authority to clarify what the measure's broad mandate means in practice or, should this authority not suffice, to create considerable legal uncertainty.
- The measure does not make clear if the CFPB would share regulatory and enforcement duties against discrimination, an issue not clearly encompassed in consumer protection.
- Credit reporting agencies and P&C insurance companies could also face near-term legal and reputational risk.
- Broker-dealers and capital-market activities deemed adverse to racial equity could also be subject to regulatory sanction or challenge in the courts given the general focus of their federal regulators on investor protection, not anti-discrimination.

---

## Overview

---

Congressional Democrats have introduced legislation that formally expands civil-rights obligations to financial institutions. Although framed in introductory statements as a measure aimed at banks, the bill in fact reaches across virtually all consumer-finance companies and many others regardless of charter and standing under state versus federal law. Although much remains unclear in this short bill about how its financial-inclusion and racial-justice objectives would be achieved in practice, the measure's private right of action against perceived violations would create significant legal and reputational risk across the sector and, for business lines under public scrutiny, still more damage that could lead to franchise-value cost.

---

## Impact

---

Democrats clearly intend for this bill to be an opening salvo ahead of an election that could give them considerably more power to enforce an array of racial-equity objectives. These include a racial-equity mandate for the Federal Reserve that goes well beyond monetary policy,<sup>1</sup> expansion of the Community Reinvestment Act to make it more stringent for banks and applicable to other financial companies,<sup>2</sup> new "Fed accounts" to bypass banks,<sup>3</sup> and many proposals to expand community development financial institutions, minority depository institutions, and other financial-inclusion entities. However, in the wake of numerous assertions about "banking-while-Black" barriers, new statutory requirements ensuring fair access will likely number among these high-profile regulatory and statutory initiatives in 2021 if Democrats gain power after the election.

Even in the absence of express coverage of financial-services delivery under the Civil Rights Act, many financial institutions have worked hard to end discrimination. However, focus has often been on specific issues such as employment or lending, not on the very wide range of activities and offerings expressly covered in this measure. Many new issues – e.g., risk-based pricing that may appear to correlate with protected groups, the types of products on offer (e.g., wealth management) that appear to exclude minorities, and facility location – may come under new scrutiny and even attack. Enforcement may or may not come via federal agencies for companies subject to them, but they and all other financial institutions – even those viewing themselves as far distant from traditional retail consumers – would face significantly more legal and reputational risk due to the measure's private right of action. This gives individuals and lawyers representing groups the power to sue individually or via costly class-action cases for any company deemed to have violated the bill's revised provisions in the Civil Rights Act. Such litigation has significant costs, but may pose risks up to and including some to franchise value if allegations arouse strong public sentiment.

---

<sup>1</sup> See **FEDERALRESERVE58**, *Financial Services Management*, August 6, 2020.

<sup>2</sup> See **CRA29**, *Financial Services Management*, September 21, 2020.

<sup>3</sup> See **CBDC**, *Financial Services Management*, April 16, 2020.

---

As noted, this legislation does not apply only to banks. It tracks a broader definition of “financial institution” that includes not only many banking organizations, but also broker-dealers, insurance companies, investment funds, foreign-bank branches and agencies, and the full swath of financial entities subsumed within the Federal Reserve’s definition of providing “finance” or products and services incidental to finance. A 2013 Federal Reserve rule defines these terms broadly,<sup>4</sup> going well beyond the activities expressly permissible for bank holding companies to capture much, if not all, of what is conventionally thought of as financial services and many entities outside the reach of specific law – e.g., the Equal Credit Opportunity Act (ECOA) – generally thought to encompass the anti-discrimination duties of retail financial companies.

Reflecting ongoing rethinking about these issues, the CFPB has sought comment on new ways to interpret and even enforce ECOA.<sup>5</sup> Action on legislation of this sort would dramatically change how the Bureau would go about doing so, expanding the scope of its review and, under a Democratic head, targeting it far more forcefully across all large retail-finance firms.

Insurance companies are generally outside the scope of both the banking agencies and the CFPB. Thus, there has been little opportunity for federal remedy when House Democrats questioned the sector on matters such as the extent to which auto-insurance pricing is equitable. Private mortgage-insurance companies could also come under criticism related to risk-based pricing, which a recent study suggests in part imposes a “black tax” on homeownership.<sup>6</sup> This legislation does not give either the banking agencies or CFPB greater tools to discipline insurance companies, but the private right of action it endorses would create at least as much legal and reputational risk.

Credit reporting companies are within the CFPB’s ambit, but the Bureau has so far taken no direct action to address allegations that credit-scoring methodologies discriminate against Blacks and other minority groups. If enacted, this legislation would not only give the Bureau more authority to do so, but again also create additional litigation and franchise-value risk.

## What’s Next

---

**S.** 4801 was introduced on October 21 by Senate Banking Committee Ranking Member Brown (D-OH) and cosponsored by five of his Democratic colleagues. H.R. 8667 was introduced on October 23 by Reps. Johnson (D-GA), and Beatty (D-OH).

## Analysis

---

**T**his analysis addresses aspects of the final rule with strategic and policy impact. Clients are referred to the final rule for compliance and technical matters.

---

<sup>4</sup> See **SYSTEMIC65**, *Financial Services Management*, April 10, 2013.

<sup>5</sup> See **FAIRLEND7**, *Financial Services Management*, July 31, 2020.

<sup>6</sup> See **GSE-102120**, *GSE Activity Report*, October 21, 2020.

## **A. Definitions**

“Financial institutions” covered by this bill are defined to include:

- depository institutions;
- foreign bank branches and agencies and certain U.S. international banking entities;
- credit unions;
- broker-dealers;
- investment companies;
- insurance companies;
- investment advisers;
- futures commission merchants; and
- any company engaged in financial activities that are financial in nature or incidental to financial activity as defined in the Bank Holding Company Act.

A limited exclusion applies to:

- designated contract markets, registered futures associations, and several other capital-markets entities; and
- various national securities exchanges

## **B. Standards**

The “goods, services, facilities, privileges, and accommodation” of any financial institution would need to ensure “fair and equal access.” This would need to be done without discrimination due to race, color, religion, national origin, and sex (including sexual orientation and gender identity). Disability as a grounds for protection along with receipt of public benefits are excluded even though they are ordinarily encompassed in the anti-discrimination framework.

## **C. Private Right of Action**

Any person who believes there has been a violation could sue for preventive relief without the need to demonstrate that all avenues for administrative relief have been exhausted. Prevailing parties could also recoup court costs. This private right of action is to be the law’s primary enforcement tool, but nothing in the bill precludes state or federal regulators from exercising existing enforcement authority not inconsistent with the measure.