Federal Financial Analytics, Inc.

The CFPB to Banks: Don't Even Think About it

Several recent CFPB actions are likely to not only create the dread of bad practice the Bureau intends but may also quash an array of innovations within the regulated sector that, if properly structured, would have otherwise advanced inclusion, equity, and equality.

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An array of recent in-depth FedFin reports, taken altogether, have demonstrated a new landscape of heightened legal and reputational risk well before the Bureau does anything official about two other high-impact proposals that would also expressly sanction "junk" fees and circumscribe bigtech. Although the Bureau has had the power to punish unfair, deceptive, or abusive acts or practices (UDAAP) since its inception, the agency now plans to swing this heavy hammer with what it will call just determination, while critics will castigate it as impunity.

The agency reasserted its UDAAP authority in a rewrite of its 2012 examination manual that ostensibly focused on bolstering anti-discrimination efforts, but in practice told examiners to look out for anything that may disadvantage consumers in ways the supervisory staff or headquarters may think improper.

Indeed, the Bureau plans to sanction not just companies that cross the UDAAP line, but also others that in its view facilitated the transgression. The agency may read its UDAAP authority here broadly enough to govern not just the firms over which it has explicit sway, but also third parties such as insurers or brokers otherwise seemingly outside its ambit.

Is this an idle threat? Clearly not.

The agency promptly wielded UDAAP to threaten any company found to interfere with consumer reviews related to financial services, a longstanding FTC complaint. Thus, even though the Bureau has yet to say what it plans to do to bigtech, it will do what it wants, when it wants, on a case-by-case basis when something or someone strikes it as amiss.

Although these UDAAP actions ramps up a lot of legal and reputational risk, they aren't the only ones the Bureau is advancing under its activist director, Rohit Chopra. Adding still more firepower to its actions against the raft of activities that trouble the CFPB, Mr. Chopra believes that "repeat offenders" should be punished with more than the enforcement actions that the Bureau and bank regulators have prided themselves on in recent years. Naming a few big banks as his targets, along with Facebook, Mr. Chopra wants banks stripped of their ability to offer deposit insurance or even to stay in business if they violate a consumer-protection standard one time too many. What would then be done with the institution he doesn't say, although putting a giant big bank into the equivalent of receivership is not an action one would think any bank regulator would be willing to take idly.

However, the Bureau may not need to go this far to get at least some of its way. Few financial-services companies are likely to take any innovative action that is other than purely philanthropic in this environment without clearing it through every level of the Bureau that might come to take exception to it. This will make it still easier to protect consumers, but still harder to offer innovative products such as short-term small-dollar loans, new equitable-finance mortgages, and many digital payment offerings that could enhance consumer access, even in the absence of overdue payment-system reform.

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