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Fair Lending Enforcement Poised To Increase Under Biden Administration

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Administrative enforcement and litigation directed toward the consumer financial services industry is expected to increase under the Biden administration, which will likely replace the leadership and senior officials within key agencies, including at the Department of Housing and Urban Development (HUD), the Consumer Financial Protection Bureau (CFPB) and the Department of Justice (DOJ). While this increased enforcement is likely to apply across the board — including with respect to the laws relating to unfair, deceptive, and abusive acts or practices — we expect the most significant increase to be in the area of fair lending enforcement, which was relatively subdued under the Trump administration.

Within the federal system, fair lending enforcement is allocated among numerous agencies. Depending on the entity and the laws involved — such as the Equal Credit Opportunity Act (ECOA) or Fair Housing Act (FHA) — the relevant agencies may include the DOJ, HUD, CFPB or bank regulatory agencies such as the Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation (FDIC) and Federal Reserve Board.

Enforcement by Agency

CFPB. The president intends to nominate Rohit Chopra, a former CFPB assistant director and a current commissioner of the Federal Trade Commission, to be the new CFPB director. Under Mr. Chopra, the bureau will likely expand enforcement activity, particularly in the area of fair lending. Enforcement activity had been narrowed somewhat under Director Kathy Kraninger, who resigned on Inauguration Day, and before her, Interim Director Mick Mulvaney. Prior to their tenures, the bureau's first director, Richard Cordray, had implemented an aggressive enforcement posture, including under the fair lending laws, with a particular focus on auto lending, mortgage lending and credit cards. Under Mr. Mulvaney's and Ms. Kraninger's leadership, however, only one enforcement action focused on fair lending (involving allegations of redlining).

DOJ. Like the CFPB, the DOJ had a marked decrease in fair lending enforcement under the ECOA and FHA during the Trump administration. President Biden has nominated Kristen Clarke, who for several years served as the head of the Civil Rights Bureau in the New York Attorney General's Office, to be the assistant attorney general for the Civil Rights Division. Under Ms. Clarke's leadership, we expect to see a return to the levels of activity under the Obama administration, when the DOJ was particularly active not only in pursuing redlining matters but also fair lending cases involving auto, mortgage and unsecured consumer lending.

HUD. HUD enforces the FHA, and like other agencies, was relatively quiet during the Trump administration. One area of focus that we expect to continue, however, is the emphasis on allegedly discriminatory marketing practices. Under Secretary Ben Carson's leadership, for example, HUD brought an action against Facebook alleging that its marketing platform allowed for discrimination in mortgage and housing advertisements on the basis of race, sex and other prohibited factors. We also expect a return to the much higher levels of FHA mortgage lending enforcement activity under the Obama administration.

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Other Agencies. The bank regulatory agencies tend to be more consistent from administration to administration than cabinet departments. Nonetheless, as turnover occurs at the top of each agency, it is likely that their enforcement postures will shift toward more intense enforcement of the fair lending laws, in both examinations and formal enforcement proceedings. A summary of the status of each agency is as follows:

- **Office of the Comptroller of the Currency (OCC).** The OCC is responsible for regulating national banks and federal savings associations (thrifts). The president will nominate a replacement for Acting Comptroller Blake Paulson, who is expected to serve in that position on a temporary basis.
- **FDIC.** The FDIC supervises and enforces the law against state-chartered banks that are not members of the Federal Reserve system. Up to four of the five FDIC board members are likely to be replaced by the president.
- The current commissioners of the **Federal Trade Commission** and the governors of the **Federal Reserve Board** have terms extending to 2025 or beyond, making major leadership changes less likely at those agencies in the near term.

Areas of Focus

Across these agencies, we expect to see the following areas of fair lending focus:

- **Loan Servicing and Debt Collection.** Increased defaults attributable to economic strain from COVID-19 have placed servicing practices under the spotlight and could lead to more enforcement and further rulemaking in this area. The CFPB also could revive a rulemaking initiative started under Director Cordray and impose restrictions on the collections practices by first-party creditors that are similar to those in effect for third-party debt collectors.
- **Machine Learning/Artificial Intelligence (AI).** Over the past several years, many creditors have rolled out machine learning and AI techniques for statistical modeling. The fair lending guidance in this area, however, has not kept up. We expect both increased "regulation by enforcement" as well as the potential for additional rulemaking or informal guidance as to best practices in this area, particularly with respect to how to assess and test such models for bias.
- **Limited English Proficiency (LEP).** Industry practices vary widely as to whether marketing, loan documents and phone services are provided in English only or also in Spanish and other languages. Regulators have issued some enforcement actions alleging LEP fair lending violations and unfair, deceptive, and abusive acts and practices, but limited regulatory guidance exists. We expect enhanced regulatory scrutiny and investigations of LEP practices under the new administration as well as further guidance.
- **Auto Finance.** This area had been very active under the Obama administration, particularly with respect to allegations of discriminatory dealer pricing. Congress nullified the CFPB's written guidance with respect to discretionary dealer pricing under the Congressional Review Act in 2018, and federal regulators stopped bringing enforcement actions in this area. The new administration's regulatory agencies may shift their auto finance fair lending focus to other issues such as underwriting, which — along with pricing — had been scrutinized under the Obama administration.

Given the likelihood of increased fair lending enforcement in the Biden administration, financial services institutions should review their fair lending policies and procedures to ensure compliance with applicable laws and regulations, and carefully monitor areas of focus by regulators and enforcement agencies.