

Racial Equity and Fair Lending at the Forefront of Consumer Financial Services Enforcement

Skadden

04 / 30 / 21

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Joe Barloon

Partner / Washington, D.C.
202.371.7322
joseph.barloon@skadden.com

Anand S. Raman

Partner / Washington, D.C.
202.371.7019
anand.raman@skadden.com

Darren M. Welch

Counsel / Washington, D.C.
202.371.7804
darren.welch@skadden.com

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

One Manhattan West
New York, NY 10001
212.735.3000

The Biden administration has moved quickly on its promise to take a more aggressive approach to pursuing actions against consumer financial services companies. Though the administration has implemented some concrete policy changes in that direction, the most consequential action to date has been its announcement of nominees supporting an aggressive enforcement agenda.

President Biden's ability to alter the enforcement landscape was accelerated by a landmark U.S. Supreme Court ruling last year, that the Dodd-Frank Act provision insulating the director of the Consumer Financial Protection Bureau (CFPB) from political control did not comport with the separation-of-powers principles embedded in the Constitution. The ruling meant the president could remove the director for any reason, not just for cause, and President Biden did just that within hours of taking office. He then nominated Rohit Chopra, currently a commissioner at the Federal Trade Commission, to replace Kathy Kraninger. In the interim, CFPB Acting Director Dave Uejio rescinded Kraninger-era guidance that he viewed as "conveying a relaxed approach to enforcement of the laws in our care" and announced his priorities would be two-fold: promoting racial equity and fair lending, and providing "relief for consumers facing hardships due to COVID-19 and the related economic crisis." We expect these will remain once Mr. Chopra is confirmed.

The Department of Housing and Urban Development (HUD) has undergone a significant transformation as well. Less than a week after taking office, President Biden directed HUD to review the effects of a rule promulgated last year on disparate impact liability, which consumer advocates had criticized as making it too difficult to prove disparate impact discrimination. Thereafter, HUD dismissed its appeal of a district court order that had enjoined the rule from going into effect — thus effectively rescinding it. Whether HUD will engage in further rulemaking is unclear. However, President Biden's new HUD secretary, former Ohio Congresswoman Marcia Fudge, has stated that she intends to increase enforcement of the Fair Housing Act, so further rulemaking remains a possibility.

At the Department of Justice (DOJ), Attorney General Merrick Garland has stated that addressing discrimination in housing and other areas will be a key goal for the DOJ in the coming years. President Biden's pick to head the DOJ Civil Rights Division, Kristen Clarke, is an experienced civil rights litigator who is expected to initiate numerous investigations of potential discrimination in housing and other areas.

Finally, pressure on the Biden administration to take a hard line against financial services companies led the administration to back away from its expected nomination of Michael Barr as comptroller of the currency. His name was withdrawn from consideration after consumer groups criticized Mr. Barr, one of the architects of the Dodd-Frank Act, for his ties to fintech companies. Although the administration has not yet announced its pick, the next head of the Office of the Comptroller of the Currency will likely seek a more active role in consumer finance enforcement.

While much remains unknown about the specific consumer financial services priorities of the administration, it is clear that racial equity and fair lending will be a significant focus. In addition, a renewed emphasis on enforcement of other consumer protection laws, including the prohibitions against unfair, deceptive and abusive acts and practices, appears likely.