

Unfairness *and* Discrimination

Examining the CFPB's Conflation
of Distinct Statutory Concepts

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Introduction

The American Bankers Association,¹ the Consumer Bankers Association,² the Independent Community Bankers Association,³ the U.S. Chamber of Commerce⁴ (the Associations) and our members oppose discrimination in any form and seek to treat all customers fairly. Banks are committed to serving the families and businesses in their communities and proudly supply the financial products and services that provide important economic opportunities for individuals, families, and small business owners. It follows that banks support fair, objective, and transparent enforcement of civil rights and fair lending laws. However, we cannot support the CFPB's recent actions, taken without legislative authority, to extend fair lending laws beyond the bounds carefully set by Congress.

For the better part of a century, Congress has taken affirmative steps to protect American consumers by preserving their ability to choose the products and services that best fit their individual needs. In 1938, for example, Congress gave the Federal Trade Commission (FTC) the ability to prohibit “unfair” acts or practices in or affecting commerce, a term that Congress would later give a precise statutory definition. And for more than 50 years, Congress enacted a series of civil rights laws to protect consumers from invidious discrimination on the basis of specific characteristics and in specific contexts, including Title VII of the Civil Rights Act of 1964 (employment), the Fair Housing Act of 1968 (housing), the Equal Credit Opportunity Act of 1974 (credit), and the Americans with Disabilities Act of 1990 (disability). Most recently, in 2010, Congress enacted the Dodd-Frank Act, which created the Consumer Financial Protection Bureau (CFPB) and gave it authority nearly identical to that of the FTC to prohibit “unfair” acts or practices by covered persons or service providers offering or providing consumer financial products and services. Congress separately authorized the CFPB to implement two specific antidiscrimination laws, the Equal Credit Opportunity Act (ECOA) and the Home Mortgage Disclosure Act (HMDA).

¹ The American Bankers Association is the voice of the nation’s \$24.0 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard \$19.9 trillion in deposits and extend \$11.4 trillion in loans.

² The Consumer Bankers Association is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation’s largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

³ The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. With nearly 50,000 locations nationwide, community banks constitute roughly 99 percent of all banks, employ nearly 700,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding nearly \$5.9 trillion in assets, over \$4.9 trillion in deposits, and more than \$3.5 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers’ dreams in communities throughout America. For more information, visit ICBA’s website at www.icba.org

⁴ The U.S. Chamber of Commerce Center for Capital Markets Competitiveness’s (CCMC) mission is to advance America’s global leadership in capital formation by supporting diverse capital markets that are the most fair, transparent, efficient, and innovative in the world. CCMC advocates on behalf of American businesses to ensure that legislation and regulation strengthen our capital markets allowing businesses—from the local flower shop to a multinational manufacturer—to mitigate risks, manage liquidity, access credit, and raise capital.

Throughout these many decades, Congress never used these two statutory concepts, “unfairness” on the one hand, and “discrimination” on the other, interchangeably. Rather, they are distinct, and each has a well-established meaning and scope of application. However, on March 16, 2022, the CFPB conflated the concepts by announcing that it would begin examining financial institutions for alleged discriminatory conduct that it deemed to be “unfair” under its “unfair, deceptive, and abusive acts or practices” (UDAAP) authority. The CFPB also revised its examination manual to reflect its new view that “unfairness” can be applied to allegedly discriminatory practices.

The Associations call on the CFPB to rescind the revised examination manual. Congress did not authorize or intend for the CFPB to “fill gaps” between the clearly articulated boundaries of antidiscrimination statutes with its UDAAP authority. However, if the CFPB believes additional authority is necessary to address alleged discriminatory conduct, we stand ready to work with Congress and the CFPB to explore that possibility and to ensure the just administration of the law.

The CFPB’s action has created significant uncertainty in the financial marketplace to the detriment of consumers and banks alike, and it raises profound substantive and procedural legal concerns. This paper examines the CFPB’s action and concludes that is contrary to law and is subject to legal challenge. We summarize immediately below the primary legal flaws in the CFPB’s action.

- **The CFPB’s conflation of unfairness and discrimination ignores the text, structure, and legislative history of the Dodd-Frank Act.** For example, the Dodd-Frank Act discusses “unfairness” and “discrimination” as two separate concepts, and defines “unfairness” without mentioning discrimination. The Act’s legislative history refers to the Bureau’s antidiscrimination authority in the context of ECOA and HMDA, while referring to the Bureau’s UDAAP authority separately.
- **The CFPB’s view of “unfairness” is inconsistent with decades of understanding and usage of that term in the Federal Trade Commission Act and with the enactment of ECOA.** Congress gave the CFPB the same “unfairness” authority that it gave to the Federal Trade Commission in 1938, which has never included discrimination. It makes no sense that Congress would have enacted ECOA in 1974 to address discrimination in credit transactions, if it had already prohibited discrimination through the FTC’s unfairness authority. For the same reason, Congress could not have intended in 1938 for unfairness to “fill gaps” in civil rights laws that did not exist.
- **The CFPB’s view is contrary to Supreme Court precedent regarding disparate impact liability.** The CFPB’s actions and statements indicate it conflates unfairness with disparate impact, or unintentional discrimination. The Supreme Court has recognized disparate impact as a theory of liability only when Congress uses certain “results-oriented” language in antidiscrimination laws, e.g., the Fair Housing Act. The Dodd Frank Act neither contains the requisite language, nor is it an antidiscrimination law.
- **The CFPB’s action is subject to review by courts because it constitutes final agency action – a legislative rule – that is invalid, both substantively and procedurally.** The CFPB’s action carries the force and effect of law and imposes new substantive duties on

supervised institutions. However, the Bureau did not follow Administrative Procedure Act requirements for notice-and-comment rulemaking. Additionally, the CFPB's interpretation is not in accordance with law and exceeds the CFPB's statutory authority. The CFPB's action should be held unlawful and set aside.

- **The CFPB's action is subject to Congressional disapproval under the Congressional Review Act.** A Member of Congress can request a GAO opinion on whether the CFPB's actions are a rule, which can ultimately trigger Congressional review using the procedures established in the Congressional Review Act.

Background

On March 16, 2022, the CFPB announced it would begin using its authority to prohibit “unfair” acts or practices to address alleged discriminatory conduct. In the Dodd-Frank Act, Congress defined an act or practice as “unfair” when: (1) it causes or is likely to cause substantial injury to consumers; (2) the injury is not reasonably avoidable by consumers; and (3) the injury is not outweighed by countervailing benefits to consumers or to competition. The form of the CFPB’s announcement (the CFPB’s action) was tripartite: it issued a press release,⁵ published a blog post,⁶ and revised the UDAAP section of its Supervision and Examination manual.⁷

a. The Press Release

The CFPB’s press release announced, “changes to its supervisory operations to better protect families and communities from illegal discrimination, including in situations where fair lending laws may not apply.”⁸ According to the CFPB, “[d]iscrimination or improper exclusion can trigger liability under [the] ban on unfair acts or practices.”⁹ Accordingly, the CFPB stated that “[i]n the course of examining banks’ and other companies’ compliance with consumer protection rules, [it] will scrutinize discriminatory conduct that violates the federal prohibition against unfair practices.”¹⁰ Director Chopra further stated, “We will be *expanding* our anti-discrimination efforts to combat discriminatory practices *across the board* in consumer finance.”¹¹ Thus, the CFPB “will examine for discrimination in *all* consumer finance markets, including credit, servicing, collections, consumer reporting, payments, remittances, and deposits.”¹² And, CFPB examiners “will *require* supervised companies to show their processes for assessing risks and discriminatory outcomes, including documentation of customer demographics and the impact of products and fees on different demographic groups.”¹³ Finally, the CFPB “will look at how companies test and

⁵ Press Release, CFPB Targets Unfair Discrimination in Consumer Finance (Mar. 16, 2022), *available at* <https://www.consumerfinance.gov/about-us/newsroom/cfbp-targets-unfair-discrimination-in-consumer-finance/>.

⁶ Blog Post, Eric Halperin and Lorelei Salas, Cracking down on discrimination in the financial sector (Mar. 16, 2022), *available at* <https://www.consumerfinance.gov/about-us/blog/cracking-down-on-discrimination-in-the-financial-sector/>.

⁷ CFPB Unfair, Deceptive, or Abusive Acts or Practices Examination Manual (revised Mar. 16, 2022), *available at* https://files.consumerfinance.gov/f/documents/cfbp_unfair-deceptive-abusive-acts-practices-udaaps_procedures.pdf.

⁸ Press Release, CFPB Targets Unfair Discrimination in Consumer Finance (Mar. 16, 2022), *available at* <https://www.consumerfinance.gov/about-us/newsroom/cfbp-targets-unfair-discrimination-in-consumer-finance/>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* (emphasis added).

¹² *Id.* (emphasis added).

¹³ *Id.* (emphasis added).

monitor their decision-making processes for unfair discrimination, *as well as* discrimination under ECOA.”¹⁴

b. The Blog Post

That same day, the CFPB published a blog post by the CFPB’s chiefs of Supervisory Policy and of Enforcement titled “Cracking down on discrimination in the financial sector.”¹⁵ This blog post confirms the CFPB’s view that it can apply its unfairness authority to alleged discriminatory conduct, and that it can hold institutions liable for both disparate treatment and disparate impact.

According to the blog post, discriminatory conduct is “unfair” under Title X of the Dodd-Frank Act (also called the “Consumer Financial Protection Act” or “CFPA”) because “racist conduct in the financial marketplace [] can cause substantial monetary and non-monetary harms,” and “[d]epending on how the [discriminatory] conduct occurs (face-to-face, digital, systematic, etc.), many individuals may be unaware they received disparate treatment or a discriminatory outcome.”¹⁶ Given this, the CFPB views any form of discriminatory conduct as “fall[ing] squarely within [the CFPB’s] mandate to address and eliminate unfair practices.”¹⁷

Accordingly, the blog post indicates that “[t]he updated manual guides examiners in looking *beyond discrimination directly connected to fair lending laws*, asking them to review any policies or practices that exclude individuals from products and services, or offer products or services with different terms.”¹⁸ The blog post specified further that CFPB examiners “will be closely examining companies’ reliance on automated decision-making models and any potential discriminatory outcomes.”¹⁹

c. The UDAAP Exam Manual Revisions

In conjunction with its press release and blog post, the CFPB also revised the UDAAP section of its Supervision and Examination Manual (Exam Manual).²⁰ According to the CFPB, the Exam Manual “is our guide for examiners to use in overseeing companies that provide consumer financial products or services. The manual describes how we supervise and examine these companies and gives our examiners direction on how to assess compliance with federal consumer financial laws.”²¹ In recent hearing testimony following the announcement of the CFPB’s action, Director Chopra further explained: “The Compliance Manual is a transparency tool essentially giving the financial institution what the test is. We give them exactly what we would be looking

¹⁴ *Id.* (emphasis added).

¹⁵ Blog Post, Eric Halperin and Lorelei Salas, Cracking down on discrimination in the financial sector (Mar. 16, 2022), *available at* <https://www.consumerfinance.gov/about-us/blog/cracking-down-on-discrimination-in-the-financial-sector/>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* (emphasis added).

¹⁹ *Id.*

²⁰ CFPB Unfair, Deceptive, or Abusive Acts or Practices Examination Manual (revised Mar. 16, 2022), *available at* https://files.consumerfinance.gov/f/documents/cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures.pdf.

²¹ See Supervision & Examinations | Consumer Financial Protection Bureau (last visited May 18, 2022), <https://www.consumerfinance.gov/compliance/supervision-examinations/#:~:text=The%20Supervision%20and%20Examination%20Manual,with%20federal%20consumer%20financial%20laws>.

for in order to ascertain their compliance management system and their adherence to existing law.”²²

The revised Exam Manual provides new instructions for examiners when evaluating potential UDAAP violations, and repeatedly describes such concerns or violations as “including discrimination.”²³ With respect to the first prong of the statutory definition of an unfair act or practice, the revised Exam Manual instructs examiners for the first time to consider that “[f]oregone monetary benefits or denial of access to products or services, like that which may result from discriminatory behavior, may also cause substantial injury.”²⁴ And with respect to the second prong of the definition, the revised Exam Manual instructs examiners to conclude that “Consumers cannot reasonably avoid discrimination.”²⁵ When considering the relationship of UDAAP to other laws, the revised Exam Manual also instructs examiners to conclude that “a discriminatory act or practice is not shielded from the possibility of being unfair, deceptive or abusive even when fair lending laws do not apply to the conduct.”²⁶ This means examiners will now be looking for potentially discriminatory conduct in contexts beyond the scope of the bank’s credit offerings, even though such conduct is not covered by fair lending laws.

The revised Exam Manual also provides new procedures governing an examiner’s conduct of supervisory examinations. For instance, examiners must now obtain and review copies of new documents, including: (1) documents regarding the use of models, algorithms, and decision-making processes used in connection with consumer financial products and services; (2) information collected, retained, or used regarding customer demographics²⁷; and (3) any demographic research or analysis relating to marketing or advertising of consumer financial products or services.²⁸

Examiners also must make new determinations regarding compliance programs and processes, including whether: (1) the entity has a process to prevent discrimination in relation to all aspects of consumer financial products or services the entity offers or provides, which includes the evaluation of all policies, procedures and processes for discrimination prior to implementation or making changes, and continued monitoring for discrimination after implementation; and (2) the entity’s compliance program includes an established process for periodic analysis and monitoring of all decision-making processes used in connection with consumer financial products or services, and a process to take corrective action to address any potential UDAAP concerns related to their use, including discrimination.²⁹

Additionally, examiners must undertake new considerations when evaluating internal controls.³⁰ Specifically, they must now consider whether: (1) the entity has established policies and

²² *The Consumer Financial Protection Bureau’s Semi-Annual Report to Congress, Hearing before the Senate Committee on Banking, Housing, and Urban Affairs*, 117th Cong. (2022) (statement of Rohit Chopra, Director of the CFPB).

²³ CFPB Unfair, Deceptive, or Abusive Acts or Practices Examination Manual at 11, 13, 14, 17 (revised Mar. 16, 2022), available at https://files.consumerfinance.gov/f/documents/cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures.pdf.

²⁴ *Id.* at 2.

²⁵ *Id.*

²⁶ *Id.* at 10.

²⁷ The CFPB does not define this term “demographics” and provides no guidance on the type of demographic information that must now be collected by supervised institutions and produced to the CFPB. This is one of many areas where the CFPB’s lack of precision has generated significant unanswered compliance questions.

²⁸ *Id.* at 11-12.

²⁹ *Id.* at 12-13.

³⁰ *Id.* at 13-14.

procedures to review, test, and monitor any decision-making processes it uses for potential UDAAP concerns, including discrimination; (2) the entity has established policies and procedures to mitigate potential UDAAP concerns arising from the use of its decision-making processes, including discrimination; (3) the entity's policies, procedures, and practices do not target or exclude customers from products and services, or offer different terms and conditions, in a discriminatory manner; and (4) the entity has appropriate training for customer service personnel to prevent discrimination.³¹

Examiners are also instructed to make new determinations when identifying areas of potential transaction testing, including whether: (1) the entity improperly gives inferior terms to one customer demographic as compared to other customer demographics; (2) the entity improperly offers or provides more products or services to one customer demographic as compared to other customer demographics; (3) customer service representatives improperly treat customers of certain demographics worse or provide extra assistance or exceptions to customers of certain demographics; (4) the entity engages in targeted advertising or marketing in a discriminatory way; (5) the entity uses decision-making processes in its eligibility determinations, underwriting, pricing, servicing, or collections that result in discrimination; and (6) the entity fails to evaluate and make necessary adjustments and corrections to prevent discrimination.³²

Finally, examiners must undertake new determinations, evaluations, and considerations when conducting transaction testing.³³ Specifically, they must: (1) determine whether marketing or advertising improperly target or exclude customers on a discriminatory basis, including through digital advertising; (2) select samples that identify the decision-making processes used to determine approval or denial for a product and the terms of the offer, as well as the corresponding inputs used in the decision-making processes for each account in the sample; (3) determine whether the entity offers products and services in a manner that prevents discrimination; and (4) consider whether an entity ensures that employees and third party contractors refrain from engaging in servicing or collection practices that lead to differential treatment or disproportionately adverse impacts on a discriminatory basis.³⁴

d. Other Prior Statements

Prior statements made by Director Chopra and by an advocacy organization founded by the CFPB's current General Counsel may provide additional context regarding the CFPB's action. In particular, they suggest an intent to tactically mischaracterize the CFPB's "unfairness" authority as a "gap-filler" to address conduct not proscribed by the civil rights laws enacted by Congress.

For example, in connection with a May 2020 FTC enforcement action, then-FTC Commissioner Chopra issued a concurring statement in which he argued that: "many practices are not only discriminatory, but are also unfair. Here, for example, the alleged conduct is illegal under the Equal Credit Opportunity Act, but it also violates the [Federal Trade Commission Act's, or FTC Act's]

³¹ *Id.* at 14.

³² *Id.* at 14-15.

³³ *Id.* at 15-19.

³⁴ *Id.* at 16-18.

prohibition on unfair practices. Using disparate impact analysis and other tools, the Commission can use its unfairness authority to attack harmful discrimination in other sectors of the economy.”³⁵

Additionally, in an October 2020 speech to the National Fair Housing Alliance, then-Commissioner Chopra stated:

As we all know, it is rare to uncover direct evidence of racist intent, which is why disparate impact analysis is a critical tool to uncover hidden forms of discrimination under sector-specific laws like the Fair Housing Act and the Equal Credit Opportunity Act. But many areas of the economy are not covered by these laws. In a recent auto lending discrimination case brought by the FTC, I argued that many discriminatory practices are also unfair under the FTC Act, which covers almost the entire economy. . . . This means that the FTC Act can serve as an important *gap-filler* to combat discrimination across the economy.³⁶

Then-Commissioner Chopra’s argument was also echoed and broadened to encompass the CFPB’s unfairness authority in an April 2021 report prepared by an outside law firm and issued by the Student Borrower Protection Center, which argued:

Discrimination fits neatly within this statutory language, and its incorporation as an unfair practice is consistent with the purposes and traditional guardrails around application of UDA(A)P law, as well as general principles in civil rights jurisprudence. Applying the “unfairness-discrimination” theory would *fill important gaps* in the existing patchwork of antidiscrimination laws, which currently leave large swaths of the economy unregulated and unprotected from a variety of discriminatory practices, including those with a disparate impact. By taking seriously the plain language of UDA(A)P law, federal entities like the CFPB and FTC, state attorneys general and agencies, and in some cases private individuals, could make great strides towards ensuring that entire markets and industries are not free to discriminate.³⁷

Legal Analysis

a. The CFPB’s View of Unfairness is Contrary to Law

The CFPB’s newly expressed view that “[d]iscrimination . . . can trigger liability under [the] ban on unfair acts or practices” is contrary to law.

³⁵ Statement of Commissioner Rohit Chopra, *In the Matter of Liberty Chevrolet, Inc. d/b/a Bronx Honda*, Commission File No. 1623238 (May 27, 2020), available at https://www.ftc.gov/system/files/documents/public_statements/1576002/bronx_honda_final_rchopra_bronx_honda_statement.pdf.

³⁶ Introductory Remarks of Commissioner Rohit Chopra, National Fair Housing Alliance, 2020 National Conference (Oct. 6, 2020), available at https://www.ftc.gov/system/files/documents/public_statements/1581594/final_remarks_of_rchopra_to_nfha_v3.pdf (emphasis added).

³⁷ See Student Borrower Protection Center, *Discrimination is “Unfair”: Interpreting UDA(A)P to Prohibit Discrimination at 4* (Apr. 2021), available at https://protectborrowers.org/wp-content/uploads/2021/04/Discrimination_is_Unfair.pdf (emphasis added).

i. The CFPB's View is Contrary to the Text and Structure of the Dodd-Frank Act

“[T]he best evidence of Congress’s intent is the statutory text.”³⁸ The CFPB’s view is not supported by the plain text of the Dodd-Frank Act, which distinguishes between the terms unfairness and discrimination. Specifically, in Section 1021(b) of the Dodd-Frank Act (12 U.S.C. § 5511(b)), which sets forth Congress’s objectives for the CFPB, Congress “authorized [the CFPB] to exercise its authorities under Federal consumer financial law for the purposes of ensuring that, with respect to consumer financial products and services . . . consumers are protected from unfair, deceptive or abusive acts and practices **and** from discrimination.”³⁹ Congress’s word choice here is key. Congress did not authorize the CFPB to protect consumers from unfair acts or practices “including” or “such as” discrimination, which could have indicated Congress’s intent that discrimination be viewed as a type of unfairness. Instead, Congress chose to authorize the CFPB to protect consumers from unfair acts or practices “and” from discrimination, separately. Nor did Congress include discrimination in the same list as unfair, deceptive or abusive acts and practices that fall under the CFPB’s UDAAP authority. This is evident from Congress’s decision to use “from” twice, once before “unfair” and then again before “discrimination.” Only one “from” would have been necessary if there was only one, inclusive list.⁴⁰ In short, Congress used different words to mean different things.⁴¹ And ignoring the distinction Congress drew between unfairness and discrimination would fail to “give effect [] to every clause and word of [the] statute.”⁴²

Another example of the distinction Congress drew in the Dodd-Frank Act between “unfairness” and “discrimination” is in the definition of “fair lending,” which is defined in Section 1002(13) as “fair, equitable, and nondiscriminatory access to credit for consumers.”⁴³ This definition shows that when Congress wants the concept of fairness to include nondiscrimination, it says so explicitly, and within a specific context, in this case the offering or provision of credit. But if “fair” naturally meant or included “nondiscriminatory” (or the inverse, “unfair,” naturally meant or included “discriminatory”), Congress would not have needed to spell this out. Rather, the inclusion of “nondiscriminatory” in this definition would have been “altogether redundant.”⁴⁴

The distinction is also apparent in the section creating the CFPB’s Office of Fair Lending and Equal Opportunity (12 U.S.C. § 5493). There, Congress authorized the Director to delegate authority to the office to oversee and enforce federal laws intended to ensure the “fair, equitable, and nondiscriminatory access to credit” (i.e., federal “fair lending” laws), of which ECOA and HMDA are listed as two examples. “Unfairness” authority, to the contrary, is not listed as such an example. Again, if “fair” naturally meant “nondiscriminatory,” the extra language in this delegation of authority would be “altogether redundant.” And if Congress had intended the CFPB to use its “unfairness” authority to ensure fair and nondiscriminatory conduct, it would have said

³⁸ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012).

³⁹ CFPB, 12 U.S.C. § 5511(b) (emphasis added).

⁴⁰ “When there is a straightforward, parallel construction that involves all nouns or verbs in a series” a modifier at the beginning of the list “normally applies to the entire series.” A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (2012).

⁴¹ *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 62-63 (2006) (“We normally presume that, where words differ as they differ here, Congress acts intentionally and purposely in the disparate inclusion or exclusion.” (cleaned up)); see also Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in *Benchmarks* 224 (1967) (“[W]hen Congress employs the same word, it normally means the same thing, when it employs different words, it usually means different things.”).

⁴² See *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (holding that courts have a duty “to give effect, if possible, to every clause and word of a statute.”).

⁴³ CFPB, 12 U.S.C. § 5481(13).

⁴⁴ *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995) (“[T]he Court will avoid a reading which renders some words altogether redundant.”); see also *Dunn v. Cfte*, 519 U.S. 465, 472 (1997) (“[L]egislative enactments should not be construed to render their provisions mere surplusage.”).

so. But Congress did not. Instead, where Congress tasked the CFPB with combatting discriminatory conduct, it directed the CFPB to use existing antidiscrimination laws and regulations within its assigned jurisdiction.

Similarly, the CFPB's view is not supported by the structure of the Dodd-Frank Act. "Just as Congress's choice of words is presumed to be deliberate, so too are its structural choices."⁴⁵ For example, the section that defines "unfairness" (12 U.S.C. § 5531) does not mention discrimination. And the section that defines prohibited acts under the CFPB (12 U.S.C. § 5536) clearly distinguishes between offering a product or service not in conformity with "Federal consumer financial law" (a defined term meaning one of eighteen enumerated consumer laws, including the ECOA and HMDA, but excluding the FTC Act) and engaging in an unfair act or practice.

Additionally, Congress specifically amended both ECOA and HMDA in several respects in the Dodd-Frank Act.⁴⁶ As one example, in Section 1071 Congress amended ECOA to extend the law in a new way, namely by authorizing the CFPB to write rules requiring the collection and reporting of data regarding applications for commercial credit by women-owned, minority-owned, and small businesses. However, none of these amendments prohibits additional acts or practices not involving the offering or extension of credit. Congress could have done so but did not.

Further, when Congress writes antidiscrimination laws, it typically does so with particularity and precision. Congress proscribes only certain types of conduct (e.g., discrimination in employment or the provision of credit, etc.), prohibits discrimination only on specific bases (e.g., race, ethnicity, age, sex, etc.), and often provides for enforcement by both administrative enforcement and private right of action. Congress demonstrated its capacity to follow this practice in the Dodd-Frank Act itself. For instance, in granting the Federal Deposit Insurance Corporation (FDIC) its Title II orderly liquidation authority, Congress specified that in exercising any rights as receiver of a covered financial company the FDIC must conduct its operations in a manner that "prohibits discrimination on the basis of race, sex, or ethnic group in the solicitation and consideration of offers."⁴⁷ By comparison, the CFPB's statutory authority to prohibit unfair acts and practices lacks the textual hallmarks of an antidiscrimination statute. For instance, it provides no list of prohibited bases and provides no private right of action. This further suggests that Congress did not intend for unfairness to be applied to discriminatory practices.

ii. The CFPB's View is Contrary to the Legislative History of the Dodd-Frank Act

The CFPB's view also is not supported by the legislative history of the Dodd-Frank Act. Indeed, nothing in the history of the passage of the Act indicates that Congress intended for the CFPB to use its unfairness authority to address discrimination. Rather, the legislative history supports the contrary conclusion that the CFPB's authority to address discrimination flows only from existing antidiscrimination laws. For example, the only mention of how the CFPB should address discrimination in the Dodd-Frank Act's conference report focuses on existing antidiscrimination laws: "Title X establishes the Office of Fair Lending and Equal Opportunity within the Bureau. This Office will oversee the enforcement of federal laws intended to ensure fair, equitable and nondiscriminatory access to credit for individuals and communities, including the Equal Credit

⁴⁵ *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013) (cleaned up).

⁴⁶ See, e.g., Sections 1071, 1085, 1094, and 1474.

⁴⁷ 12 U.S.C. § 5390(a)(9)(E)(v).

Opportunity Act (EOCA) and Home Mortgage Disclosure Act (HMDA).”⁴⁸ And though the conference report twice mentions the CFPB’s UDAAP authority, it does so in separate paragraphs without any mention of discrimination.⁴⁹ This separate placement supports an inference that Congress viewed unfairness and discrimination as distinct concepts.

iii. The CFPB’s View is Contrary to the Historical Use and Understanding of Agency Unfairness Authority

The CFPB’s view is also inconsistent with the historical use and understanding of unfairness authority. “Unfair acts or practices” is a term of art that Congress has used for over eighty years. “It is a cardinal rule of statutory construction that, when Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken.”⁵⁰ Thus, understanding how the term of art came to be and has developed over time can help inform an understanding of Congress’s intent for its use in the Dodd-Frank Act.

1. The FTC’s Unfairness Authority

In 1938, Congress authorized the FTC to protect consumers from “unfair or deceptive acts or practices in or affecting commerce” under Section 5 of the FTC Act.⁵¹ However, Congress initially chose not to define the word “unfair” in the statute, and for nearly four decades, its definition was imprecise. Then in 1975, Congress provided the FTC with rulemaking authority to identify and prohibit specific acts or practices as “unfair.”⁵² Beginning that year, the FTC commenced what has been described as a “decade of ‘over-exuberance’ during which ‘the agency tested the outer limits of its [unfairness] powers.’”⁵³ Armed with its new rulemaking authority, the FTC promulgated a series of regulations advancing expansive theories of the scope of its unfairness authority. So great was the outcry over the FTC’s misuse of its unfairness authority that the press dubbed it the “National Nanny.”⁵⁴ “The result was a series of rulemakings relying upon broad, newly found theories of unfairness that often had no empirical basis, could be based entirely upon the individual Commissioner’s personal values, and did not have to consider the ultimate costs to consumers of foregoing their ability to choose freely in the marketplace.”⁵⁵ The most problematic proposals relied heavily on public policy. For example, the FTC tried to use its unfairness authority to ban all advertising directed to children based on generalized public policies to protect children.⁵⁶

In 1980, Congress decided to put a stop to the FTC’s overreach and enacted the Federal Trade Commission Improvement Act,⁵⁷ which “prohibited application of the unfairness doctrine in

⁴⁸ Dodd-Frank Conference Report, No. 111-517 at 875 (June 29, 2010).

⁴⁹ See *id.* at 874-75.

⁵⁰ *FAA v. Cooper*, 566 U.S. 284, 292 (2012) (cleaned up); *McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991) (“In the absence of contrary indication, we assume that when a statute uses such a term [of art], Congress intended it to have its established meaning.”).

⁵¹ Wheeler-Lea Amendment, Pub. L. No. 75-447, 52 Stat. 111 (1938) (codified as amended at 15 U.S.C. § 45(a)(1)).

⁵² Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1974) (codified as amended at 15 U.S.C. §§ 2301-2312).

⁵³ Robert A. Skitol, *How BC and BCP Can Strengthen Their Respective Policy Missions Through New Uses of Each Other’s Authority*, 72 ANTITRUST L.J. 1167, 1168 (2005).

⁵⁴ See J. Howard Beales, *The FTC’s Use of Unfairness Authority: Its Rise, Fall, and Resurrection* (2003), available at https://www.ftc.gov/news-events/news/speeches/ftcs-use-unfairness-authority-its-rise-fall-resurrection#N_14_.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980) (codified as amended in scattered sections of 15 U.S.C.).

several specified proceedings and curtailed its use in rulemaking for at least three years while Congress engaged in oversight hearings.”⁵⁸ Extraordinarily, Congress also refused to reauthorize the FTC itself for a period of fourteen years.⁵⁹ During this time, a chastened FTC had no resort but to issue a Policy Statement on Unfairness that significantly constrained the agency’s formerly expansive use of its unfairness authority.⁶⁰ And in 1994, when Congress eventually reauthorized the FTC, it took pains to codify the constrained definition of unfairness in statute in order to prevent a future policy reversal by the FTC and to limit the FTC’s further use of unfairness to pursue public policy goals.⁶¹

Given this history of Congress’s efforts to rein in the FTC’s abuse of its unfairness authority, it is apparent that Congress intended to constrain the concept of unfairness and did not intend for it to function as an expansive policy tool for creative or innovative regulation. Congress certainly did not envision that “unfairness” meant or included “discrimination.” Indeed, if Congress had intended for its grant of unfairness authority to the FTC in 1938 to address discriminatory conduct, it would have been unnecessary for Congress to later enact more specific antidiscrimination laws such as the ECOA, as the FTC could have simply prohibited credit discrimination through its preexisting unfairness authority. Similarly, Congress could not have intended the FTC’s unfairness authority to be used as a “gap-filler” to address conduct not proscribed by civil rights laws, which would not be enacted until 30-40 years later; it simply makes no sense that Congress intended for an authority to be used to fill statutory gaps before they even existed.

The understanding that the FTC’s unfairness authority does not apply to discriminatory conduct is also informed by the FTC’s historical practice. Significantly, even at the height of the FTC’s push to expand its unfairness powers, it never engaged in a rulemaking premised on the view that unfairness included discrimination. Also, the Associations are unaware of any FTC enforcement action in which the FTC brought a stand-alone claim alleging that alleged discriminatory conduct constitutes an “unfair act or practice” in violation of Section 5(a) of the FTC Act or of any enforcement action in which it sought to impose liability on the basis of disparate impact.⁶² To be sure, there have been cases where the FTC has alleged in its complaint that certain conduct violated both the ECOA and the FTC Act, but this is because under Section 704(c) of ECOA (15 U.S.C. § 1691c(c)), violations of ECOA are deemed to also be violations of the FTC Act for purposes of pursuing enforcement remedies.⁶³

⁵⁸ Ernest Gellhorn, *Trading Stamps, S & H, and the FTC’s Unfairness Doctrine*, 1983 Duke L.J. 903, 942 (1983).

⁵⁹ See J. Howard Beales, *The FTC’s Use of Unfairness Authority: Its Rise, Fall, and Resurrection* (2003), available at https://www.ftc.gov/news-events/news/speeches/ftcs-use-unfairness-authority-its-rise-fall-resurrection#N_14.

⁶⁰ FTC Policy Statement on Unfairness (1980), available at <https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness>.

⁶¹ See 15 U.S.C. § 45(n).

⁶² The FTC also made no such claim in its recent *Napleton Automotive* case, which was announced on March 31, 2022, after the CFPB’s March 16, 2022, announcement. However, a concurring statement by Chair Khan and Commissioner Slaughter strongly suggests that the FTC may adopt the CFPB’s view and attempt to apply unfairness to discriminatory practices in or affecting commerce in the future. See Joint Statement of Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter at 3-4, *In the Matter of Napleton Automotive Group*, Commission File No. 2023195 (Mar. 31, 2022), available at https://www.ftc.gov/system/files/ftc_gov/pdf/Statement%20of%20Chair%20Lina%20M.%20Khan%20Joined%20by%20RKS%20in%20re%20Napleton_Finalized.pdf.

⁶³ See, e.g., *FTC v. Gateway Funding Diversified Mortgage Services, L.P.*, No. 2:08-cv-05805, Compl. for P. Inj. & Other Eq. Relief, Dkt. No. 1, at p.6 (E.D. PA, Dec. 15, 2008); *FTC v. Golden Empire Mortgage, Inc.*, No. CV09-03227, Complaint for P. Inj. & Other Eq. Relief, Dkt. No. 1, at p.7 (C.D. CA, May 7, 2009). Additionally, under section 8 of the Federal Deposit Insurance Act (12 USC § 1818), an “appropriate Federal banking agency” may take appropriate enforcement actions against institutions under their jurisdiction for violations of any law or regulation, which includes section 5 of the FTC Act and the ECOA and FHA. On this basis, some of the prudential banking agencies have at times asserted in guidance that unfair or deceptive practices that target or have a disparate impact on consumers in one or more protected classes may violate the ECOA or the FHA, as well as the FTC Act. However, Congress chose not to include the CFPB as an “appropriate Federal banking agency” as that term is defined in 12 U.S.C. § 1813(q), and Congress did not otherwise extend similar authority to it in the Dodd-Frank Act. Accordingly, they do not support the CFPB’s view, and in any event cannot be read to mean that “unfairness” can be used to target “discrimination” outside the boundaries of ECOA and FHA.

2. The CFPB's Unfairness Authority

It is against this backdrop that Congress enacted the Dodd-Frank Act, as “Congress is presumed to enact legislation with knowledge of the current statutory scheme and its application.”⁶⁴ In defining the CFPB’s unfairness authority, Congress borrowed the unfairness definition from section 5 of the FTC Act.⁶⁵ As Director Chopra conceded in recent testimony, “‘unfairness’ as you say does derive from the FTC Act. It is identical language.”⁶⁶ “And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of [decades] of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.”⁶⁷ Or said another way, “if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings its soil with it.”⁶⁸ Accordingly, Congress’s efforts to constrain the FTC’s historical abuses of unfairness, and its codification of a limiting definition of unfairness into the FTC Act, should inform the understanding of Congress’s use of substantively identical language in the CFPA.

The CFPB first opened its doors on July 21, 2011. In the decade since, the Associations are aware of no guidance or rulemaking issued by the CFPB indicating its intention to break from FTC precedent with respect to the application of unfairness authority to alleged discriminatory practices.⁶⁹ Indeed, prior to the announcement of its recent action, the CFPB had generally agreed to align its efforts to regulate unfair acts and practices with the efforts of the FTC.⁷⁰ Nor are the Associations aware of any enforcement action brought by the CFPB in which the agency used its unfairness authority to address alleged discrimination. Instead, the CFPB has consistently relied upon existing antidiscrimination laws such as ECOA to address alleged discriminatory conduct. This subsequent history suggests that the CFPB’s newly announced view of unfairness is at odds with its own settled practice and prior understanding of the meaning and limits of its statutory authority.

⁶⁴ *Bo v. Wilkie*, 31 Vet. App. 321, 352 (2019); see also *Commissioner v. Keystone Consol. Industries, Inc.*, 508 U.S. 152, 159 (1993) (noting presumption that Congress is aware of “settled judicial and administrative interpretation[s]” of terms when it enacts a statute).

⁶⁵ The CFPB’s Exam Manual states: “The standard for unfairness in the Dodd-Frank Act has the same three-part test as the FTC Act” and that “[t]he principles of ‘unfair’ and ‘deceptive’ practices in the Act are similar to those under Sec. 5 of the Federal Trade Commission Act (FTC Act). The Federal Trade Commission (FTC) and federal banking regulators have applied these standards through case law, official policy statements, guidance, examination procedures, and enforcement actions that may inform CFPB.” CFPB Unfair, Deceptive, or Abusive Acts or Practices Examination Manual at 1 n.2, 2 n.4 (revised Mar. 16, 2022), available at https://files.consumerfinance.gov/f/documents/cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures.pdf.

⁶⁶ See supra fn. 19.

⁶⁷ *Morissette v. United States*, 342 U.S. 246, 263 (1952). In recent hearing testimony, Director Chopra acknowledged that “[t]here are decades of precedent about the application of unfairness which dates back to the 1930’s.” See supra fn. 19.

⁶⁸ Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947).

⁶⁹ However, since announcing its action, the CFPB has sought to retroactively characterize prior UDAAP enforcement actions that involved no allegations of discriminatory conduct by the CFPB – including one action announced during Director Chopra’s tenure and about which he issued a public statement – as “discrimination that manifests as unfair, deceptive, or abusive acts and practices.” See Fair Lending Report of the Consumer Financial Protection Bureau 4 (May 2022) (Message from the Fair Lending Director), available at https://files.consumerfinance.gov/f/documents/cfpb_2021-fair-lending_report_2022-05.pdf.

⁷⁰ See Memorandum of Understanding Between the Consumer Financial Protection Bureau and the Federal Trade Commission (Feb. 25, 2019), available at https://files.consumerfinance.gov/f/documents/cfpb_ftc_memo-of-understanding_2019-02.pdf.

iv. The CFPB's View is Contrary to Supreme Court Precedent Regarding Disparate Impact Liability

The CFPB's action makes plain that the CFPB will use its unfairness authority to address unintentional conduct it alleges to be discriminatory via the controversial theory of disparate impact. This is apparent in the Press Release, where the CFPB explains that “[c]onsumers can be harmed by discrimination regardless of whether it is intentional,” so “CFPB examiners [will be examining] supervised companies . . . [concerning] discriminatory outcomes, including . . . the impact of products and fees on different demographic groups.”⁷¹ It is also apparent in the Blog Post, where the CFPB further stated that “digital [and] systematic” discriminatory conduct that causes a consumer to experience a “discriminatory outcome . . . fall[s] squarely within [the CFPB’s] mandate to address and eliminate unfair practices.”⁷² And it is also apparent in the revised Exam Manual, where the CFPB instructs its examiners to look for “[i]nformation . . . regarding customer demographics, including . . . the impacts of various products and services on specific demographics,” as well as whether the examined entity “ensures that employees and third party contractors refrain from engaging in servicing or collection practices that lead to . . . disproportionately adverse impacts on a discriminatory basis.”⁷³

The CFPB's intent to use its unfairness authority in this manner is striking because it remains an open question whether disparate impact is a cognizable theory of liability under the ECOA.⁷⁴ In 2015, the Supreme Court in *Texas Dep't of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015), addressed when a statute can support a disparate impact claim. But there, the Supreme Court concluded that “antidiscrimination laws” may be construed to encompass disparate-impact claims, but only when certain other conditions were met.⁷⁵ Thus, the first prerequisite to imposing disparate impact liability is that the statute be an antidiscrimination law, which the CFPB is not.

The Supreme Court also noted the importance of the presence of “results-oriented” (also called “effects-based”) language in a statute to support a conclusion that Congress intended for a statute to impose disparate impact liability.⁷⁶ This is because liability for disparate impact is the exception, not the rule. This language is generally “[l]ocated at the end of lengthy sentences that begin with prohibitions on disparate treatment, [and] serve as catchall phrases.”⁷⁷ And in every example given in *Inclusive Communities*, the word “otherwise” was used at the beginning of that catchall phrase.⁷⁸

⁷¹ Press Release, CFPB Targets Unfair Discrimination in Consumer Finance (Mar. 16, 2022), available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-targets-unfair-discrimination-in-consumer-finance/>.

⁷² Blog Post, Eric Halperin and Lorelei Salas, Cracking down on discrimination in the financial sector (Mar. 16, 2022), available at <https://www.consumerfinance.gov/about-us/blog/cracking-down-on-discrimination-in-the-financial-sector/>.

⁷³ CFPB Unfair, Deceptive, or Abusive Acts or Practices Examination Manual at 12, 18 (revised Mar. 16, 2022), available at https://files.consumerfinance.gov/f/documents/cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures.pdf. It should be noted that the Ranking Member of the Senate Committee on Banking, Housing, and Urban Affairs asked Director Chopra the following question in a recent hearing following the announcement of the CFPB's action: “At what occasion in the one hundred and some odd years at the FTC was UDAP ever used as a justification for using disparate impact?” In response, Director Chopra stated: “That’s not what is in the manual, respectfully. That is not what is in the manual.” See supra fn. 19. To the extent that the Director’s personal views contradict the clear language adopted by the CFPB in the revised exam manual, clarification of the agency’s official position is necessary.

⁷⁴ Indeed, the Supreme Court has not considered whether disparate impact is cognizable under ECOA.

The only two references to disparate impact in Regulation B, which implements ECOA, and its official commentary merely summarize legislative history and judicial doctrine, which are likely not an actual exercise of agency rulemaking authority.

⁷⁵ *Inclusive Communities Project, Inc.*, 576 U.S. at 533 (emphasis added).

⁷⁶ *Id.* at 534.

⁷⁷ *Id.* at 534-35.

⁷⁸ *Id.* at 535.

Setting aside that the Dodd-Frank Act is not an antidiscrimination statute, it also does not contain any of the above-described results-oriented language. To begin, neither Section 5531(c), which defines unfairness, nor Section 5536(a)(1)(B), which prohibits unfair acts or practices, includes a list of prohibited conduct followed by a catchall phrase. And neither contains the word “otherwise” (or anything similar) to signal that results-oriented language is being used. Further, where the Dodd-Frank Act mentions “discrimination,” it also does so generally, without use of this results-oriented language. Consequently, there is no textual support for the conclusion that Congress authorized disparate-impact claims under the Dodd-Frank Act; to the contrary, the absence of results-oriented language, if not wholly dispositive, strongly suggests that Congress did not authorize such claims.

Additionally, the way the CFPB appears to be framing disparate impact liability ignores a number of safeguards the Supreme Court has said must be observed in order to sustain a disparate impact claim. Without adequate safeguards, the Court warned that disparate impact liability could be interpreted so expansively “as to inject racial considerations into every [business] decision”⁷⁹ and it “might cause race to be used and considered in a pervasive way,” which creates “a danger that potential defendants may adopt racial quotas,” and could “displace valid governmental and private priorities.”⁸⁰ *Inclusive Communities* identified three key safeguards to prevent such outcomes. First, disparate-impact liability may not attach if the policy or practice at issue “is necessary to achieve a valid interest,” which in the private sector would include valid business interests.⁸¹ Second, practices or policies “are not contrary to the disparate-impact requirement unless they are ‘artificial, arbitrary, and unnecessary barriers.’”⁸² Third, liability for disparate impact requires “robust causality.”⁸³ Mere statistical disparity is not enough. And an institution should not be held responsible for disparities that are not caused by the institution’s valid business policies and practices but rather a reflection of disparities that exist outside of the institution. Otherwise, disparate impact would improperly hold defendants “liable for [] disparities they did not create.”⁸⁴

The CFPB’s recent announcement does not take any of these safeguards into account. The public must therefore conclude that the CFPB assumes that evidence of disparate impact on some identified basis is evidence of illegal unfairness. But this ignores that a practice or policy resulting in a disparate impact may achieve a valid interest. And perhaps most shocking is that it completely ignores the need for “robust causality,” which requires a “direct relation between the injury asserted and the injurious conduct alleged.”⁸⁵ The CFPA’s definition of unfairness requires a minimal causal relation between the act or practice and consumer harm. In fact, causation is not even required if the CFPB has a “reasonable basis to conclude” an act or practice is “likely to cause” consumer harm. Thus, the CFPB’s view of “unfairness” inappropriately *replaces* the robust causality standard mandated by the Supreme Court in *Inclusive Communities* with an almost strict liability standard that looks merely at statistical outcomes and disparities.

Finally, using disparate impact to establish liability raises significant policy issues. Without wading into this ongoing debate here, it is enough to recognize that a “core administrative-law

⁷⁹ *Id.* at 543.

⁸⁰ *Id.* at 544.

⁸¹ *Id.* at 541.

⁸² *Id.* at 543.

⁸³ *Id.* at 542.

⁸⁴ *Id.*

⁸⁵ See *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1305-06 (2017).

principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate,”⁸⁶ so the CFPB cannot impose its policy preferences regarding disparate impact liability when Congress has obviously not contemplated it under the Dodd-Frank Act. Nor is it sufficient for the CFPB to say that Congress generally authorized it to protect consumers from discrimination, so it may impose liability for disparate impact to further that objective. “[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute’s [] objective must be the law.”⁸⁷

b. The CFPB’s Action is Subject to Judicial Review under the APA

i. The CFPB’s Action Constitutes a “Final Agency Action”

In general, federal courts have subject matter jurisdiction to hear challenges to agency actions arising under the Administrative Procedures Act (APA).⁸⁸ The APA permits judicial review of “final agency action for which there is no other adequate remedy in court.”⁸⁹ “[A]gency action’ includes the whole or a part of an agency rule, order, license, sanction, relief or the equivalent or denial thereof, or failure to act[.]”⁹⁰ Under the Supreme Court’s *Bennet* precedent, an agency’s action is final “if two independent conditions are met: (1) the action ‘mark[s] the consummation of the agency’s decisionmaking process’ and is not ‘of a merely tentative or interlocutory nature;’ and (2) it is an action ‘by which rights or obligations have been determined, or from which legal consequences will flow.’”⁹¹

The consummation prong of the finality inquiry requires a determination of “whether an action is properly attributable to the agency itself and represents the culmination of that agency’s consideration of an issue,” or is, instead, “only the ruling of a subordinate official, or tentative.”⁹² Here, there can be no doubt that the CFPB’s action was the consummation of its decision-making process on the legal question of whether unfairness can be applied to alleged discriminatory conduct. The press release and revisions made to the exam manual are attributable to the agency itself. Moreover, the press release contains a definitive statement by the Director himself. The blog post, while authored by subordinates, describes the Director’s priorities and the CFPB’s plans.

Additionally, the CFPB’s action is not tentative or interlocutory, but is rather the culmination of its consideration. The press release definitively announces the CFPB’s mistaken view that “[d]iscrimination . . . can trigger liability under [the] ban on unfair acts or practices.”⁹³ The press release also definitively announces actions the CFPB will take, namely that as a consequence of adopting its mistaken view, the CFPB will expand the scope of its efforts to “examine for

⁸⁶ *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 328 (2014).

⁸⁷ *Rodriguez v. United States*, 480 U.S. 522, 526 (1987).

⁸⁸ 28 U.S.C. § 1331 (granting federal district courts “original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States”).

⁸⁹ 5 U.S.C. § 704.

⁹⁰ 5 U.S.C. § 551(13).

⁹¹ *Soundboard Ass’n v. FTC*, 888 F.3d 1261, 1267 (D.C. Cir. 2018) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (alteration in *Soundboard Ass’n*)). In measuring finality, the “agency’s characterization of its action as being provisional or advisory is not necessarily dispositive”; instead, “courts consider whether the practical effects of an agency’s decision make it a final agency action, regardless of how it is labeled.” See *Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084, 1094-95 (9th Cir. 2014).

⁹² *NRDC v. Wheeler*, 955 F.3d 68, 78 (D.C. Cir. 2020) (quoting *Soundboard Ass’n*, 888 F.3d at 1267).

⁹³ CFPB Targets Unfair Discrimination in Consumer Finance (Mar. 16, 2022), available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-targets-unfair-discrimination-in-consumer-finance/>.

discrimination in *all* consumer finance markets” and “will *require* supervised companies to show their processes for assessing risks and discriminatory outcomes.”⁹⁴

Similarly, the revisions to the exam manual were made effective immediately and announce definitive rather than tentative changes to the manner in which CFPB examiners must evaluate the statutory definition of unfairness and conduct examinations. And as Director Chopra recently testified, the CFPB views its exam manual as setting forth the “test” for ascertaining “adherence to existing law.”⁹⁵ All of this underscores the finality of the CFPB’s action,⁹⁶ and supports the conclusion that the CFPB’s action was the consummation of its decision-making process—the first *Bennett* “final agency action” prong.

The definitive nature of the CFPB’s action also creates new obligations for both the CFPB and for supervised financial institutions and gives rise to direct and appreciable legal consequences, thereby satisfying the second *Bennett* prong.⁹⁷ With respect to obligations imposed on the CFPB, the revisions to the exam manual require examiners to undertake a host of new determinations, evaluations, and considerations in the conduct of a UDAAP examination. Additionally, when evaluating whether an act or practice is unfair, the revised exam manual requires examiners to conclude as a matter of law that “[c]onsumers cannot reasonably avoid discrimination.”⁹⁸ Prior to this revision to the exam manual, CFPB examiners were expected to evaluate on a case-by-case basis the facts and circumstances of a particular act or practice and then determine whether a consumer is able to reasonably avoid potential injury. With this revision, however, the CFPB has categorically eliminated an examiner’s discretion to evaluate this prong of the unfairness definition in cases where an act or practice is potentially discriminatory.⁹⁹

The CFPB’s action also imposes new obligations on supervised financial institutions. For instance, as previously described, financial institutions must now produce new documentation, information, and analysis not previously required to be produced to the CFPB in UDAAP examinations. And, as a direct consequence of the CFPB’s action, financial institutions must also, among other things, establish a new “process to prevent discrimination in relation to all aspects of consumer financial products or services the entity offers or provides” and establish within their compliance programs a new “process for periodic analysis and monitoring of all decision-making processes used in connection with consumer financial products or services, and a process to take corrective action to address any potential UDAAP concerns related to their use, including discrimination.”¹⁰⁰ An institution’s provision of this new material, or for that matter its refusal or failure to undertake

⁹⁴ *Id.* (emphasis added).

⁹⁵ See *supra* fn. 19.

⁹⁶ Perhaps it can be said that the CFPB’s action is a patchwork of both policy and rule. For instance, the APA defines a “rule” as “the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.” 5 U.S.C. §551(4). “But the placement of a rule in tandem with a policy, or a policy in tandem with a rule, does not hide the rule or insulate the rule from judicial review.” See *Western Watersheds Project v. Zinke*, 441 F. Supp.3d 1042, 1062 (D. Id. 2020).

⁹⁷ See *Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 216 (D.C. Cir. 2007) (finding that agency actions that “bind[] private parties or the agency itself with the ‘force of law’” are final) (quoting *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002)); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (finding EPA “guidance” to be final because it was binding and unequivocal, reasoning: “[T]he entire Guidance, from beginning to end . . . reads like a ukase. It commands, it requires, it orders, it dictates”).

⁹⁸ CFPB Unfair, Deceptive, or Abusive Acts or Practices Examination Manual at 2 (revised Mar. 16, 2022),

available at https://files.consumerfinance.gov/f/documents/cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures.pdf.

⁹⁹ See *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988) (“If a statement denies the decisionmaker discretion in the area of its coverage, so that he, she, or they will automatically decline to entertain challenges to the statement’s position, then the statement is binding, and creates rights or obligations . . .”); *Nat. Res. Def. Council v. EPA*, 643 F.3d 311, 319-20 (9th Cir. 2011) (“[T]he Guidance binds EPA regional directors and thus qualifies as final agency action.”).

¹⁰⁰ CFPB Unfair, Deceptive, or Abusive Acts or Practices Examination Manual at 13 (revised Mar. 16, 2022),

available at https://files.consumerfinance.gov/f/documents/cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures.pdf.

these new obligations, carries with it concrete legal consequences.¹⁰¹ For instance, it may result in a supervisory finding that the entity has violated a Federal consumer financial law, which the CFPB will consider when assessing the institution’s consumer compliance rating or otherwise evaluating the risks that its activities pose to consumers and to markets, and the CFPB may use these risk considerations for purposes of prioritizing future supervisory work and assessing the need for enforcement action.

These directives make clear that the CFPB’s action definitively changes the scope and application of its unfairness authority and how it will conduct UDAAP examinations.¹⁰² The CFPB’s action prescribes and requires an unmistakably different regulatory and supervisory framework for the CFPB’s review of potential UDAAPs.¹⁰³ As such, the CFPB’s action contains significant substantive and procedural changes in CFPB decision-making practices and upon the rights and abilities of supervised institutions.¹⁰⁴ Therefore, *Bennett’s* second final agency action prong is also met. Set against this backdrop, the CFPB’s action is a final agency action.

ii. The CFPB’s Action Constitutes a Legislative Rule

Having confirmed that a reviewing court has jurisdiction over a challenge to the CFPB’s action, the next relevant consideration is the form of the CFPB’s action. As a general matter, an agency action can take several forms, including “rules.” The APA defines a “rule” as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.”¹⁰⁵ Among the various types of rules recognized by the APA are substantive rules (also called “legislative rules” or “regulations”), general statements of policy, interpretive rules, and procedural rules. The APA requires federal agencies to publish “[g]eneral notice of proposed rulemaking” in the Federal Register,¹⁰⁶ and “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.”¹⁰⁷ However, the APA exempts interpretative rules and general statements of policy from notice and comment procedures.¹⁰⁸

In distinguishing between a substantive rule and other types of rules, reviewing courts look to “whether the agency ‘intended’ ” for its action “to speak with the force of law.”¹⁰⁹ Agency action that creates new rights or imposes new obligations on regulated parties or narrowly limits administrative discretion constitutes a legislative rule.¹¹⁰ However, agency intent alone is not decisive.¹¹¹ “Were it otherwise, an agency could simply label—and intend—a regulatory overhaul that changes the permissible conduct of regulated parties as interpretive and avoid notice and

¹⁰¹ *Ciba-Geigy Corp. v. United States EPA*, 801 F.2d 430, 434 (D.C. 1986) (finding party “confronted with the dilemma of choosing between disadvantageous compliance or risking imposition of serious penalties” faced a final agency action because “once the agency publicly articulates an unequivocal position . . . and expects regulated entities to alter their primary conduct to conform to that position, the agency has voluntarily relinquished the benefit of postponed judicial review”).

¹⁰² See *Western Watersheds Project*, 441 F. Supp.3d at 1064.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ APA, 5 U.S.C. § 551(4).

¹⁰⁶ APA, 5 U.S.C. § 553(b).

¹⁰⁷ APA, 5 U.S.C. § 553(c).

¹⁰⁸ APA, 5 U.S.C. § 553(b)(3)(A).

¹⁰⁹ *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 18 (D.C. Cir. 2019) (per curiam) (citation omitted).

¹¹⁰ See *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 948 (D.C. Cir. 1987) (per curiam). Accord

Center for Auto Safety v. National Highway Traffic Safety Admin., 452 F.3d 798, 806 (D.C. Cir. 2006).

¹¹¹ *POET Biorefining LLC v. EPA*, 970 F.3d 392, 415 (D.C. Cir. 2020) (J., Henderson, concurring in part and dissenting in part).

comment requirements.”¹¹² Thus, reviewing courts must consider the substantive effect of the rule in question.¹¹³

Here, there can be no doubt that the CFPB’s action is a substantive rule. It goes well beyond a general statement of policy as it establishes a “binding norm.”¹¹⁴ And it is not an interpretive rule because such rules “do not have the force and effect of law.”¹¹⁵ As previously explained, the CFPB’s action carries the force and effect of law and imposes new substantive duties on supervised institutions and the CFPB itself, including by eliminating the discretion of CFPB examiners. It does not announce what the CFPB seeks to establish as policy or clarify how an ambiguous statute should be interpreted as much as it creates entirely new law. Indeed, the Director himself described the action as “expanding” efforts “across the board in consumer finance.” And industry legal observers have described the CFPB’s action as “breaking new ground”¹¹⁶ and “vastly expanding the reach of its anti-discrimination enforcement beyond the limits of the [ECOFA],” which “will have major ramifications for financial services providers of all types.”¹¹⁷

iii. The CFPB’s Action is Procedurally and Substantively Invalid

Because the CFPB’s action constitutes the issuance of a substantive rule without following the required notice-and-comment process, it is procedurally invalid under the APA and must be set aside as unlawful. Additionally, regardless of whether the CFPB’s action is determined to be a substantive rule, it is also subject to challenge on substantive grounds as “not in accordance with law” and “in excess of statutory jurisdiction, authority, or limitations.”¹¹⁸ For example, the Supreme Court has held that an agency exceeds its statutory authority by interpreting a statutory term beyond the meaning Congress intended.¹¹⁹ Here, the CFPB’s action in announcing its new view of unfairness and announcing new supervisory actions and procedures has no support in the text or structure or legislative history of the Dodd-Frank Act, nor is there historical support in the long-settled meaning of unfairness. Accordingly, the CFPB’s view of unfairness is contrary to law and exceeds the plain meaning and limits of the Dodd-Frank Act. As a result, the CFPB’s action should also be set aside as unlawful on substantive grounds.

Further, the CFPB’s action, to the extent that it mistakenly construes unfairness to apply to discriminatory conduct, should not be entitled deference by reviewing courts under the *Chevron Doctrine*. An agency interpretation is entitled to *Chevron* deference only when the interpreted

¹¹² *Id.*; see also *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000) (“It is well-established that an agency may not escape the notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation.”).

¹¹³ See *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014) (“The court’s inquiry in distinguishing legislative rules from interpretive rules ‘is whether the new rule effects a substantive regulatory change to the statutory or regulatory regime.’” (quoting *Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 653 F.3d 1, 6-7 (D.C. Cir. 2011))); *Office of Comm’n of United Church of Christ v. FCC*, 826 F.2d 101, 105 (D.C. Cir. 1987) (“Since the court reviews not the label but the agency pronouncement that underlies the label, it is that pronouncement itself that governs the determination of its status.”); cf. *Strange ex rel. Strange v. Islamic Republic of Iran*, 964 F.3d 1190, 1201 (D.C. Cir. 2020) (“Substance, not name or label, is what matters here.”).

¹¹⁴ *Pac. Gas & Elec. Co. v. Fed. Power Com.*, 506 F.2d 33, 38 (D.C. 1974) (“A general statement of policy, on the other hand, does not establish a ‘binding norm.’”).

¹¹⁵ *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 97 (2015).

¹¹⁶ See *Breaking New Ground, CFPB Will Pursue Discrimination as an “Unfair” Practice Across the Range of Consumer Financial Services*, available at <https://www.paulweiss.com/practices/litigation/white-collar-regulatory-defense/publications/breaking-new-ground-cfpb-will-pursue-discrimination-as-an-unfair-practice-across-the-range-of-consumer-financial-services?id=42867>.

¹¹⁷ See *CFPB Massively Expands Enforcement of Anti-Discrimination Through UDAAP*, available at <https://www.troutman.com/insights/cfpb-massively-expands-enforcement-of-anti-discrimination-through-udaap.html>.

¹¹⁸ See 5 U.S.C. § 706.

¹¹⁹ *Lubrizol Corp. v. Evtl. Prot. Agency*, 562 F.2d 807, 815 (D.C. Cir. 1977) (holding that EPA’s interpretation of the term “fuel” went beyond what Congress meant by the term, which exceeded the EPA’s statutory authority and rendered the EPA’s interpretation invalid).

language is ambiguous. But the Dodd-Frank Act is not ambiguous on the meaning of unfairness or the fact that unfairness is different from, and not inclusive of, discrimination. The CFPB is not exercising “gap-filling” authority, it is tactically mischaracterizing its unfairness authority to usurp Congress’s legislative prerogative. And even to the extent the Dodd-Frank Act could be considered ambiguous in this regard, not all linguistic ambiguity in a statute means that Congress delegated interstitial gap-filling authority to the agency.¹²⁰ Reading the CFPB’s unfairness authority as providing gap-filling authority to regulate discrimination assumes that Congress delegated the tremendous task of filling the gaps in existing antidiscrimination laws without ever using the word “discrimination” in the delegation of authority. That would be absurd and would conflict with the major questions doctrine:

“Sometimes, Congress passes broadly worded statutes seeking to resolve important policy questions in a field while leaving an agency to work out the details of implementation. Later, the agency may seek to exploit some gap, ambiguity, or doubtful expression in Congress’s statutes to assume responsibilities far beyond its initial assignment. The major questions doctrine guards against this possibility by recognizing that Congress does not usually hide elephants in mouseholes. In this way, the doctrine is a vital check on expansive and aggressive assertions of executive authority.”¹²¹

Indeed, “[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, [courts] typically greet its announcement with a measure of skepticism.”¹²² Thus, the CFPB’s action should not be entitled to *Chevron* deference but should instead be held unlawful and set aside.

c. The CFPB’s Action is Subject to Congressional Challenge under the CRA

Under the Congressional Review Act (CRA),¹²³ rules issued by federal agencies are subject to review and possible disapproval.¹²⁴ Agency actions subject to CRA review are all actions defined as “rules” under the APA, with the exception of rules of particular applicability, rules relating to agency management or personnel, or rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties.¹²⁵ Before any rule may take effect, an agency must submit the rule to Congress and the Government Accountability Office (GAO).¹²⁶ Upon receipt of the rule, Congress then has a specified period of time to take action on a joint resolution of disapproval overturning the rule.

Because the CFPB’s action constitutes a rule not subject to any of the exceptions in the CRA, it must be submitted to Congress and the GAO. Importantly, because the CFPB has not formally submitted its rule to Congress for review, the rule cannot take effect. Further, the CFPB’s refusal to submit its rule to Congress in accordance with the CRA does not mean that the rule escapes

¹²⁰ *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1844 (2012) (concluding despite “linguistic ambiguity” that Congress had not “delegated gap-filling power to the agency”).

¹²¹ *Nat’l Fed’n of Indep. Bus. v. DOL, OSHA*, 142 S. Ct. 661, 669 (2022).

¹²² *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) (cleaned up).

¹²³ Title II, Subtitle E, P.L. 104-121, 5 U.S.C. §§801 et seq.

¹²⁴ 5 U.S.C. § 801 et seq.

¹²⁵ 5 U.S.C. § 804(3).

¹²⁶ 5 U.S.C. § 801(a).

Congressional review. Congress and the GAO have developed a process by which Members of Congress can request that GAO provide a formal legal opinion on whether a particular agency action qualifies as a rule under the CRA, and if so, the publication of the GAO's opinion in the Congressional Record is treated as constructive submission of the rule to Congress. Accordingly, either the CFPB's submission of its rule to Congress or a Member's request for a GAO opinion on the rule can trigger potential Congressional review of the rule using the procedures established in the CRA.

Conclusion

The CFPB's action has tremendous implications for consumers, for banks, and for financial markets at large. It represents an enormous self-expansion of the CFPB's authority that stands contrary to law and the intent of Congress. Such sweeping changes that alter the legal duties of so many are the proper province of Congress, not of independent regulatory agencies, and the CFPB cannot ignore the requirements of the APA and CRA. The CFPB may well wish to "fill gaps" it perceives in federal antidiscrimination law. But Congress has simply not authorized the CFPB to fill those gaps. If the CFPB believes it requires additional authority to address alleged discriminatory conduct, it must obtain that authority from Congress, not take the law into its own hands. The Associations and our members stand ready to work with Congress and the CFPB to ensure the just administration of the law.