

## The CFPB’s Inaction on Artificial Intelligence

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### Introduction

The Biden Administration released an executive order in the fall of 2023 addressing the development and use of artificial intelligence.<sup>1</sup> This order encouraged independent regulatory agencies to consider their rulemaking authority and power to provide additional guidance to ensure artificial intelligence adoption in their fields is aligned with the “[A]dministration’s dedication to advancing equity and civil rights.”<sup>2</sup> Among these agencies is the Consumer Financial Protection Bureau, which indicated it took action under the EO, but failed to issue sufficient guidance.<sup>3</sup> Because AI is likely to replicate existing patterns of discrimination of traditional lending, the unguided adoption of AI systems may pave the way to further institutional inequity in the consumer financial market.<sup>4</sup> This inaction is contributing to a disruption in the consumer financial sector where larger firms and disruptors are able to take AI-related risks, while smaller firms and institutions who cannot afford these risks are stagnating due to a lack of guidance.<sup>5</sup>

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<sup>1</sup> Exec. Order No. 14,110, 88 Fed. Reg. 75191 (Nov. 1, 2023).

<sup>2</sup> *Id.* at §2(d).

<sup>3</sup> Fact Sheet: Biden-Harris Administration Announces Key AI Actions Following President Biden’s Landmark Executive Order, THE WHITE HOUSE, (Jan. 29, 2024) <https://www.whitehouse.gov/briefing-room/statements-releases/2024/01/29/fact-sheet-biden-harris-administration-announces-key-ai-actions-following-president-bidens-landmark-executive-order/> [hereinafter *Fact Sheet*].

<sup>4</sup> Explainability & Fairness in Machine Learning For Credit Underwriting, FINREGLAB (December 7, 2023) <https://finreglab.org/ai-machine-learning/explainability-and-fairness-of-machine-learning-in-credit-underwriting/>.

<sup>5</sup> Adam Rust & Brad Blower, The CFPB Has An Opportunity to Greatly Advance the Ethical and Non-Discriminatory Use of AI in Financial Services and Should Take It, CONSUMER FED’N OF AM. (Jan. 3, 2023), <https://consumerfed.org/the-cfpb-has-an-opportunity-to-greatly-advance-the-ethical-and-non-discriminatory-use-of-ai-in-financial-services-and-should-take-it/>.

## I. The Executive Order Encouraged AI-Specific Guidance

The Biden Administration (Administration) released the *Executive Order 14110: Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence* (EO) on October 30, 2023.<sup>6</sup> The EO has the force of law and encourages over 50 federal entities to engage in a range of specific actions to implement guidance on artificial intelligence (AI).<sup>7</sup> This guidance includes eight overarching policy areas and has been positioned as a sweeping call for the executive branch and federal agencies to integrate effective, and ethical, uses of AI.<sup>8</sup>

In Section 8, the EO calls upon independent regulatory agencies to consider using their “full range of authorities to protect American consumers from fraud, discrimination, and threats to privacy and to address other risks that may arise from the use of AI.”<sup>9</sup> This includes “risks to financial stability, and to consider rulemaking, as well as emphasizing or clarifying the responsibility of regulated entities” in their conduct related to AI services.<sup>10</sup> Section 8 encourages the use of independent federal agencies’ rulemaking power and authority to issue guidance to enact appropriate measures in light of the directives to each entity in the EO.<sup>11</sup> This EO language provides the leeway and authority for agencies to act expeditiously to enact protections and guidance for American consumers.<sup>12</sup>

One of the main goals of the EO is to ensure its adoption is aligned with the “[A]dministration’s dedication to advancing equity and civil rights.”<sup>13</sup> The order states that the

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<sup>6</sup> Exec. Order, *supra* note 1.

<sup>7</sup> Exec. Order, *supra* note 1.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at §8.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at §2(d).

“[Biden] Administration cannot – and will not – tolerate the use of AI to disadvantage those who are already too often denied equal opportunity and justice.”<sup>14</sup> The order specifically cites issues of discrimination in housing and directs a range of entities to deliver specific guidance to work toward these goals.<sup>15</sup> One such entity is the Consumer Financial Protection Bureau (CFPB).<sup>16</sup>

## II. The CFPB Was Encouraged to Provide Broad AI-Specific Guidance

The CFPB is an independent bureau within the Federal Reserve System created under the Dodd-Frank Wall Street Reform and Consumer Protection Act.<sup>17</sup> The bureau’s purpose is to “promote fairness and transparency for mortgages, credit cards, and other consumer financial products and services.”<sup>18</sup> Arising out of the 2008 financial crisis, the CFPB is the primary entity with oversight authority to “make sure consumer markets work for all of us.”<sup>19</sup> The CFPB has supervisory authority over a range of consumer financial services, including banks, thrifts and large credit unions, payday lenders, certain mortgage originators and servicers, and private student loan lenders.<sup>20</sup> Additionally, this bureau has the authority to supervise larger participants of other consumer financial markets, including consumer reporting, debt collection, loan serving,

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at §7.3(b).

<sup>17</sup> Nat’l Archives, *Consumer Financial Protection Bureau*, FED. REG., <https://www.federalregister.gov/agencies/consumer-financial-protection-bureau> (last visited March 30, 2024).

<sup>18</sup> *Id.*

<sup>19</sup> *Building the CFPB*, CONSUMER FIN. PROT. BUREAU, [https://www.consumerfinance.gov/data-research/research-reports/building-the-cfpb/#:~:text=In%20July%202010%2C%20Congress%20passed,Protection%20Bureau%20\(the%20CFPB\)](https://www.consumerfinance.gov/data-research/research-reports/building-the-cfpb/#:~:text=In%20July%202010%2C%20Congress%20passed,Protection%20Bureau%20(the%20CFPB)) (last visited March 30, 2024).

<sup>20</sup> *Institutions subject to CFPB supervisory authority*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/compliance/supervision-examinations/institutions/#:~:text=The%20CFPB%20supervises%20a%20range,as%20well%20as%20their%20affiliates> (last visited March 30, 2024).

international money transfers, and auto financing.<sup>21</sup> With this authority, the CFPB is positioned to implement and enforce federal consumer financial law.<sup>22</sup>

In line with the CFPB's power to enforce consumer financial protections, the Administration encouraged the CFPB to issue additional guidance addressing the use of tenant screening systems in ways that violate the Fair Housing Act and the Fair Credit Reporting Act or other Federal Laws.<sup>23</sup> This EO directive concerns the potential of AI to perpetuate biases and potentially result in civil rights violations.<sup>24</sup> According to the EO, this guidance should include how the use of data can lead to discriminatory outcomes in violation of federal law.<sup>25</sup>

On January 21, 2024, The White House released an EO "Fact Sheet" that shifted the previous directive to: "[issue] an advisory opinion to highlight that false, incomplete, and old information must not appear in the background check reports, including for tenant screening."<sup>26</sup> This directive previously encouraged the CFPB to evaluate rulemaking in light of AI. However, this Fact Sheet marked this task complete by confirming the CFPB issued rules relating to removing redundant or extraneous information from background checks. Not only is this an extremely narrow reading of the EO directive, but it is also an ineffective solution to the Administration's instruction based on their "dedication to advancing equity and civil rights."<sup>27</sup>

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<sup>21</sup> *Id.*

<sup>22</sup> *About us*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/about-us/#:~:text=The%20Consumer%20Financial%20Protection%20Bureau,fair%2C%20transparent%2C%20and%20competitive> (last visited March 30, 2024).

<sup>23</sup> Exec. Order, *supra* note 1 at §7.3(b).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Fact Sheet, *supra* note 3.

<sup>27</sup> Exec. Order, *supra* note 1, at §8.

### III. The CFPB's Guidance Was Insufficient to Answer Pertinent Questions in the Adoption of AI

According to the EO Fact Sheet, the CFPB completed their assigned deliverable pertaining to background check reports.<sup>28</sup> This deliverable likely refers to two advisory opinions published on January 11, 2024, "Fair Credit Reporting: Background Screening" (Background Screening) and "Fair Credit Reporting: File Disclosure" (File Disclosure).<sup>29</sup> While the Administration marked the CFPB's deliverable as complete, the CFPB issued opinions do little to inform how the bureau will "combat unlawful discrimination," focus more on an effort to clean up "sloppy" credit reporting practices, and ensure credit report accuracy and transparency in a traditional lending format.<sup>30</sup>

The opinion on Background Screening highlights that credit reporting agencies (CRAs) must: 1) prevent the reporting of information that has been expunged, sealed, or otherwise legally restricted from public access, 2) ensure disposition information is reported for any arrests, criminal charges or eviction proceedings or other court filings included in background reports; and 3) prevent the reporting of duplicative information.<sup>31</sup>

On the other hand, the opinion on File Disclosure 1) lowers the bar for consumers to secure their credit files, 2) states that consumers must be provided their files in a way that can be understood by the average person in a format that will help them identify inaccuracies, and 3)

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<sup>28</sup> Fact Sheet, *supra* note 3. The deliverable is listed as "issuing an advisory opinion to highlight that false, incomplete, and old information must not appear in background check reports, including for tenant screening."

<sup>29</sup> Fact Sheet, *supra* note 3.

<sup>30</sup> Kristen E. Larson & John L. Culhane, Jr., *CFPB issues two new FCRA advisory opinions on background screening reports and disclosure of credit files to consumers*, BALLARD SPAHR LLP (Jan. 11, 2024), <https://www.consumerfinancemonitor.com/2024/01/16/cfpb-issues-two-new-fcra-advisory-opinions-on-background-screening-reports-and-disclosure-of-credit-files-to-consumers/>.

<sup>31</sup> Consumer Fin. Prot. Bureau, *Advisory Opinion on Fair Credit Reporting; Background Screening* (Jan. 2024), [https://files.consumerfinance.gov/f/documents/cfpb\\_fair-credi-reporting-background-screening\\_2024-01.pdf](https://files.consumerfinance.gov/f/documents/cfpb_fair-credi-reporting-background-screening_2024-01.pdf).

mandates that consumers must be provided with the sources of the information on their file, including both the original and intermediary vendor source or sources.<sup>32</sup>

In each of these opinions, there is direction for the CRA and for the individual, placing the onus of eliminating discriminatory reporting on the consumer. However, neither of these advisory opinions address how these admittedly “sloppy” practices will play out in a more automated space. This guidance provides no insight on limiting discriminatory practices in adopting AI systems, leaving questions on the methods and techniques that could be used for creating compliant models,<sup>33</sup> when lenders should consider less discriminatory alternatives,<sup>34</sup> or what thresholds would constitute a disparate impact.<sup>35</sup> Instead, this guidance is applicable generally to the requirements of Regulation B with no additional guardrails in the application of AI.<sup>36</sup>

The CFPB also released a report on tenant background checks in 2022, which may also be applicable in evaluating whether the CFPB sufficiently provided guidance encouraged by the EO.<sup>37</sup> This report highlighted issues of misleading or inaccurate information, errors in criminal records, and concluded by stating, “[t]he experiences documented in this report illustrate that

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<sup>32</sup> *CFPB Addresses Inaccurate Background Check Reports and Sloppy Credit File Sharing Practices*, CONSUMER FIN. PROT. BUREAU (Jan. 11, 2024), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-addresses-inaccurate-background-check-reports-and-sloppy-credit-file-sharing-practices/#:~:text=The%20CFPB%20issued%20today's%20advisory,with%20false%20or%20misleading%20information.>

<sup>33</sup> *NCRC Comment On The CFPBs RFI On The Equal Credit Opportunity Act*, NAT'L CMTY. REINVESTMENT COAL. (Dec. 1, 2020), <https://ncrc.org/ncrc-comment-on-the-cfpbs-rfi-on-the-equal-credit-opportunity-act/>.

<sup>34</sup> *CFPB Should Encourage Lenders To Look For Less Discriminatory Models*, NAT'L CMTY. REINVESTMENT COAL. (April 15, 2022), <https://ncrc.org/cfpb-should-encourage-lenders-to-look-for-less-discriminatory-models/>.

<sup>35</sup> Adam Rust, *Innovation Council Call For CFPB To Clarify Lender Demographic Data Guidance*, NAT'L CMTY. REINVESTMENT COAL. (June 27, 2022), <https://ncrc.org/ncrc-innovation-council-call-for-cfpb-to-clarify-lender-demographic-data-guidance/>.

<sup>36</sup> 12 CFR §1002.9.

<sup>37</sup> *Consumer Snapshot: Tenant background checks*, CONSUMER FIN. PROT. BUREAU (Nov. 2022) [https://files.consumerfinance.gov/f/documents/cfpb\\_consumer-snapshot-tenant-background-check\\_2022-11.pdf](https://files.consumerfinance.gov/f/documents/cfpb_consumer-snapshot-tenant-background-check_2022-11.pdf).

tenant screening reports are an increasing area of concern for many across the country.”<sup>38</sup> In defining its future actions, the CFPB reported it planned to “[i]dentify guidance or rules that the CFPB can issue to ensure that the background screening industry adheres to the law.”<sup>39</sup> The report does not identify future guidance.

In both the 2024 advisory opinions and 2022 report, the CFPB stated its clear attempt to “address inaccurate background check reports, as well as sloppy credit file sharing practices,” however, neither of these reports speak to the exacerbation of these issues as applied to AI or algorithmic processes in determining eligibility based on these reports.<sup>40</sup> This lack of guidance geared toward “combatting unlawful discrimination” does little to get ahead of the issue, instead allowing the financial industry to develop potentially unlawful, anticompetitive, and discriminatory systems in the absence of clearer guidance.<sup>41</sup>

### **Conclusion**

The CFPB’s inaction to provide guidance on acceptable uses of AI in the consumer financial sector is already causing harm.<sup>42</sup> According to the Consumer Federation of America, small and mid-sized financial institutions are waiting to invest their resources, while larger firms are less hesitant to move forward with AI adoption.<sup>43</sup> This is a result of a market where small institutions may be waiting for clear guidance before acting.<sup>44</sup> The CFPB is contributing to a sector “market dominated by large banks and disruptors,” as they are the institutions that can

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Reich, *supra* note 16, at 6.

<sup>41</sup> Adam Rust & Brad Blower, *The CFPB Has An Opportunity to Greatly Advance the Ethical and Non-Discriminatory Use of AI in Financial Services and Should Take It*, CONSUMER FED’N OF AM. (Jan. 3, 2023), <https://consumerfed.org/the-cfpb-has-an-opportunity-to-greatly-advance-the-ethical-and-non-discriminatory-use-of-ai-in-financial-services-and-should-take-it/>.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

afford to take risks in AI-adoption, while smaller firms and institutions lag behind.<sup>45</sup> In such a case, the CFPB will have difficulty assessing if and how these lenders are fostering accuracy, financial inclusion, and equity in the financial market without examples of compliant fair-lending methodologies and AI oversight.<sup>46</sup>

According to the National Fair Housing Alliance under the U.S. Senate Committee on Banking, Housing, and Urban Affairs, “[b]uilding public trust in AI systems, particularly in sensitive areas likely financial advice and housing, is crucial for widespread adoption.”<sup>47</sup> A system of clear guidance that protects American consumers from unfair and inequitable application of AI in financial institutions is foundational to building public trust. This requires federal entities, like the CFPB, to engage in understanding and mitigating the effects of discrimination—both in traditional lending formats and those impacted by the adoption of AI. By relying on past reports and opinions that are not targeted toward issues that can be created and exacerbated by automated decision making, the CFPB has failed to provide sufficient guidance under its assigned deliverable in the EO, and improperly indicated this task was complete.<sup>48</sup>

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Lisa Rice, Artificial Intelligence and Housing: Exploring Promise and Peril, Nat'l Fair Hous. All. (Jan. 31, 2024) [https://www.banking.senate.gov/imo/media/doc/rice\\_testimony\\_1-31-24.pdf](https://www.banking.senate.gov/imo/media/doc/rice_testimony_1-31-24.pdf).

<sup>48</sup> Fact Sheet, *supra* note 3.