

October 25, 2021

# U.S. Department of Justice Announces Initiative to Combat Redlining; DOJ/CFPB/OCC Settle Claims Against a National Bank

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## Attorney General Garland Sets Expectation for Increase in “Redlining” Investigations and Enforcement

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### SUMMARY

On October 22, 2021, the United States Department of Justice (“DOJ”) announced a new initiative to combat “redlining” (the “Initiative”) in partnership with the Consumer Financial Protection Bureau (“CFPB”) and Office of the Comptroller of the Currency (“OCC”). The Initiative will include an increased emphasis on coordination between the DOJ and U.S. Attorneys’ Offices, financial regulators, and State Attorneys General. In remarks accompanying the announcement, Attorney General Merrick Garland stated that the DOJ’s Civil Rights Division has “several open redlining investigations” and that the DOJ “expects to open more in the months ahead.”<sup>1</sup> Additionally, Director of the CFPB Rohit Chopra emphasized the CFPB’s intention to eliminate “algorithmic redlining” involving the use of “discriminatory black box models.”<sup>2</sup>

At the same press conference, Attorney General Garland also announced that the DOJ, U.S. Attorney’s Office for the Western District of Tennessee, CFPB, and OCC reached an agreement to resolve allegations that Trustmark National Bank engaged in lending discrimination by redlining predominantly Black and Hispanic neighborhoods in the Memphis, Tennessee area. Under the proposed consent order to resolve the matter, Trustmark will pay a total civil money penalty of \$5 million to the OCC and CFPB, invest \$3.85 million in a loan subsidy fund to increase credit opportunities for residents of predominantly Black and Hispanic neighborhoods in the Memphis area, and commit to implementing numerous other internal remediation measures.<sup>3</sup>

## BACKGROUND

“Redlining” is one form of discrimination prohibited under federal fair lending laws, including the Federal Housing Act (“FHA”) and Equal Credit Opportunity Act (“ECOA”).<sup>4</sup> It specifically refers to the practice through which lenders avoid providing loans and other credit services in certain neighborhoods because of the race, color, or national origin of the residents of those neighborhoods.<sup>5</sup> Whereas the most archetypical form of redlining involved drawing lines on a map to mark the neighborhoods in which a lender would not invest, more “modern” forms of redlining can involve creating barriers or allocating resources in order to limit the provision of lending services to certain groups or communities.<sup>6</sup> Numerous federal financial regulators—including the Federal Reserve, Federal Deposit Insurance Corporation, CFPB, and OCC—have authority to enforce the prohibition against redlining for those financial institutions within their remit. In recent years, the DOJ has brought several civil enforcement actions against financial institutions to redress alleged redlining.<sup>7</sup>

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## THE REDLINING INITIATIVE

The Initiative will be led by the Housing and Civil Enforcement Section of the Civil Rights Division of the DOJ in partnership with U.S. Attorneys’ Offices, and was described as the “most aggressive and coordinated enforcement effort to address redlining.”<sup>8</sup> In his remarks, Attorney General Garland emphasized the intention to increase enforcement of redlining prohibitions: “Today, we are committing ourselves to addressing modern-day redlining by making far more robust use of our fair lending authorities. . . . we will spare no resource to ensure that federal fair lending laws are vigorously enforced and that financial institutions provide equal opportunity for every American to obtain credit.”<sup>9</sup>

The Initiative includes four enumerated elements:

1. U.S. Attorneys’ Offices will be used as “force multipliers” to ensure local expertise on housing markets informs fair lending enforcement;
2. The DOJ will expand its analyses of potential redlining to both depository *and* non-depository institutions that do not provide typical banking services but engage in mortgage lending;
3. Partnership between the DOJ and financial regulatory agencies will be strengthened to ensure fair lending violations are identified and referred to the DOJ; and
4. There will be increased coordination with State Attorneys General in connection with potential fair lending violations.<sup>10</sup>

As these elements demonstrate, increased coordination among the DOJ, financial regulators, and state authorities is a consistent theme of the Initiative. In the remarks of Acting Comptroller Michael J. Hsu, he

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noted that an “all hands on deck” approach is necessary because “modern redlining, while equally pernicious, is often more subtle, harder to detect, and resource-intensive to find.”<sup>11</sup>

The press conference also included an emphasis on scrutinizing the use of algorithms for credit decisions for potential discrimination. In Director of the CFPB Rohit Chopra’s remarks, he noted that, in addition to the type of conduct underlying the settlement with Trustmark, the CFPB “will also be closely watching for digital redlining, disguised through so-called neutral algorithms, that may reinforce the biases that have long existed.”<sup>12</sup> Director Chopra cited a statistical analysis showing that Black families were significantly more likely to be denied loans by an algorithm compared to White families with similar financial and credit backgrounds, and described algorithms as “black boxes behind brick walls” that are not only failing to create a “more equal paying field,” but also “exacerbat[ing] the biases fed into them.”<sup>13</sup>

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### TRUSTMARK NATIONAL BANK SETTLEMENT

On October 22, 2021, the DOJ, U.S. Attorney’s Office for the Western District of Tennessee, CFPB, and OCC announced an agreement to resolve allegations that Trustmark National Bank engaged in lending discrimination by redlining predominantly Black and Hispanic neighborhoods in the Memphis, Tennessee area from 2014 through 2018.<sup>14</sup> In February 2018, the OCC (as Trustmark’s prudential regulator) initiated a fair lending examination of Trustmark, and, upon completing its investigation, referred the matter to the DOJ and CFPB on April 6, 2020.<sup>15</sup> The Complaint filed by the DOJ and CFPB in the U.S. District Court for the Western District of Tennessee alleged violations of the FHA and its implementing regulations, as well as the ECOA and its implementing regulations.<sup>16</sup>

The Complaint alleged that Trustmark maintained “nearly all” of its branches and mortgage loan officers in majority-white neighborhoods, and thus located its branches and officers so as to “avoid serving the credit needs of those residing in or seeking credit for properties located in majority-Black and Hispanic neighborhoods.”<sup>17</sup> Specifically, Trustmark was alleged to have maintained just four out of its 25 branches in the Memphis area within majority-Black and Hispanic census tracts, and to have failed to assign a single mortgage loan officer to any of its branches located in majority-Black and Hispanic census tracts, notwithstanding the prevalence of such tracts in the Memphis area.<sup>18</sup>

The Complaint also described numerous deficiencies in Trustmark’s fair lending program, including (i) “inadequate” fair lending policies and procedures, (ii) a lack of internal governance and oversight committees to oversee fair lending efforts prior to August 2018, (iii) a focus on commercial advertising and “generic brand messaging” that was “ineffective at generating” applications from majority-Black and Hispanic areas, and (iv) a failure to incorporate fair lending considerations into branching decisions or the development of new loan products and services prior to 2018.<sup>19</sup>

Consistent with other redlining actions, the Complaint compared Trustmark to its peers in the Memphis area in terms of the percentage of home mortgage loan applications received from majority-Black and Hispanic

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census tracts, as well as the percentage of residential mortgage loans made to residents of majority-Black and Hispanic census tracts. These comparisons were used to illustrate a “statistically significant failure” by Trustmark to draw applications from or originate loans in majority-Black and Hispanic areas, such that Trustmark was alleged to have “had no legitimate, non-discriminatory reason to make so few home loans from the area.”<sup>20</sup>

Pursuant to the proposed consent order to resolve the matter, Trustmark must pay a civil money penalty of \$5 million to the CFPB and OCC.<sup>21</sup> Additionally, Trustmark agreed to invest a minimum of \$3.85 million in a loan subsidy fund to increase credit for applicants from majority-Black and Hispanic census tracts in the Memphis area.<sup>22</sup> Trustmark also committed to open one new loan production office in a majority-Black and Hispanic census tract, and assign at least four loan officers or specialists to branches in majority-Black and Hispanic census tracts.<sup>23</sup> Finally, among other things, Trustmark is also obligated to (i) conduct a “detailed assessment” of its fair lending program in the Memphis area and submit a status report related thereto,<sup>24</sup> (ii) provide enhanced training to relevant employees,<sup>25</sup> (iii) submit a “Community Credit Needs Assessment” conducted by an independent consultant and a remedial plan in response thereto,<sup>26</sup> (iv) spend at least \$200,000 per year on advertising, controls, consumer education, and credit counseling in the Memphis area,<sup>27</sup> (v) enhance its advertising to majority-Black and Hispanic census tracts,<sup>28</sup> and (vi) provide four outreach programs per year directed at majority-Black and Hispanic areas relating to its products and services.<sup>29</sup>

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## IMPLICATIONS

The Initiative, accompanying remarks, and the Trustmark agreement all suggest that financial institutions are likely to face an increased risk of redlining investigations and subsequent enforcement actions by the DOJ and financial regulators. Attorney General Garland referenced “several” ongoing redlining investigations by the DOJ,<sup>30</sup> and Assistant Attorney General Kristen Clarke described the Initiative as a “strong message to banks and lenders that we will hold them accountable.”<sup>31</sup> The Trustmark settlement represents the second significant agreement to resolve redlining allegations within the last two months, following the resolution of redlining allegations against Cadence Bank N.A. on August 30, 2021, which was also accompanied by a civil money penalty issued by the OCC.<sup>32</sup>

Several aspects of the Trustmark resolution are consistent with prior redlining actions brought by the DOJ, rather than reflective of a sharp departure from precedent. In particular, the Complaint relies heavily on the location of physical branches and lending offices, suggesting that brick and mortar operations will remain a relevant factor in assessing redlining. The physical location issue appears to arise most frequently where a bank enters a new market (or largely new market) with an acquisition of a bank that has operations predominantly in suburban areas. Additionally, the comparison of Trustmark’s lending performance to a defined set of peers follows the practice of prior enforcement actions. Thus, financial institutions should ensure their fair lending programs continue to assess traditional measures of redlining risk.

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With respect to the potential focus of future enforcement actions, Director Chopra's remarks indicate that the use of algorithms to assess credit risk and make lending decisions will face increased scrutiny from financial regulators. This is consistent with previous concerns raised by Director Chopra regarding the potential discriminatory effects resulting from the use of algorithms in making credit decisions.<sup>33</sup> For example, on October 21, 2021, the CFPB announced a series of orders to collect information on the business practices of large technology companies that operate payment systems in the United States, in order to better understand how firms "use personal payments data and manage data access to users."<sup>34</sup> As a result, financial institutions must also remain vigilant in monitoring how algorithms and other technologies implicate fair lending risk.

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ENDNOTES

- 1 Attorney General Merrick B. Garland, U.S. Dep't of Justice, Remarks Announcing a New Initiative to Combat Redlining (Oct. 22, 2021), available at <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-announcing-new-initiative-combat>.
- 2 Director Rohit Chopra, Consumer Financial Protection Bureau, Remarks at Joint DOJ, CFPB, and OCC Press Conference on the Trustmark National Bank Enforcement Action (Oct. 22, 2021), available at <https://www.consumerfinance.gov/about-us/newsroom/remarks-of-director-rohit-chopra-at-a-joint-doj-cfpb-and-occ-press-conference-on-the-trustmark-national-bank-enforcement-action/>.
- 3 Consent Order, *United States and Consumer Financial Protection Bureau v. Trustmark National Bank*, No. 2:21-cv-02664 (W.D. Ten. Oct. 22, 2021) (Doc. No. 2-1) ("Trustmark Consent Order"), at ¶ 41.
- 4 Complaint, *United States and Consumer Financial Protection Bureau v. Trustmark National Bank*, No. 2:21-cv-02664 (W.D. Tenn. Oct. 22, 2021) ("Trustmark Complaint"), at ¶¶ 2-3.
- 5 *Id.*, at ¶ 3.
- 6 Acting Comptroller Michael J. Hsu, Office of the Comptroller of the Currency, Remarks at the Department of Justice Combatting Redlining Initiative Announcement (Oct. 22, 2021), available at <https://www.occ.treas.gov/news-issuances/speeches/2021/pub-speech-2021-109.pdf>.
- 7 See, e.g., *United States v. Cadence Bank, N.A.*, No. 1:21-mi-9999-UNA (N.D. Ga. Aug. 30, 2021); *United States v. First Merchants Bank*, No. 1:19-cv-02365-JPH-MPB (S.D. Ind. June 13, 2019); *United States v. KleinBank*, No. 17-cv-00136-PAM-FLN (D. Minn. Jan. 13, 2017); *United States v. Union Savings Bank and Guardian Savings Bank FSB*, No. 1:16-cv-01172 (S.D. Oh. Dec. 28, 2016).
- 8 Justice Department Announces New Initiative to Combat Redlining, U.S. Dep't of Justice (Oct. 22, 2021), available at <https://www.justice.gov/opa/pr/justice-department-announces-new-initiative-combat-redlining>.
- 9 Attorney General Merrick B. Garland, U.S. Dep't of Justice, Remarks Announcing a New Initiative to Combat Redlining (Oct. 22, 2021), available at <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-announcing-new-initiative-combat>.
- 10 Justice Department Announces New Initiative to Combat Redlining, U.S. Dep't of Justice (Oct. 22, 2021), available at <https://www.justice.gov/opa/pr/justice-department-announces-new-initiative-combat-redlining>.
- 11 Acting Comptroller Michael J. Hsu, Office of the Comptroller of the Currency, Remarks at the Department of Justice Combatting Redlining Initiative Announcement (Oct. 22, 2021), available at <https://www.occ.treas.gov/news-issuances/speeches/2021/pub-speech-2021-109.pdf>.
- 12 Director Rohit Chopra, Consumer Financial Protection Bureau, Remarks at Joint DOJ, CFPB, and OCC Press Conference on the Trustmark National Bank Enforcement Action (Oct. 22, 2021), available at <https://www.consumerfinance.gov/about-us/newsroom/remarks-of-director-rohit-chopra-at-a-joint-doj-cfpb-and-occ-press-conference-on-the-trustmark-national-bank-enforcement-action/>.
- 13 Director Rohit Chopra, Consumer Financial Protection Bureau, Remarks at Joint DOJ, CFPB, and OCC Press Conference on the Trustmark National Bank Enforcement Action (Oct. 22, 2021), available at <https://www.consumerfinance.gov/about-us/newsroom/remarks-of-director-rohit-chopra-at-a-joint-doj-cfpb-and-occ-press-conference-on-the-trustmark-national-bank-enforcement-action/>.

ENDNOTES (CONTINUED)

- 14 Justice Department Announces New Initiative to Combat Redlining, U.S. Dep't of Justice (Oct. 22, 2021), available at <https://www.justice.gov/opa/pr/justice-department-announces-new-initiative-combat-redlining>.
- 15 Trustmark Complaint, at ¶¶ 55-59.
- 16 *Id.* at ¶¶ 60-74.
- 17 *Id.* at ¶¶ 5, 20-29.
- 18 *Id.* at ¶¶ 22, 29, 31.
- 19 *Id.* at ¶¶ 36-41.
- 20 *Id.* at ¶¶ 42-59.
- 21 Trustmark Consent Order, at ¶ 41.
- 22 *Id.* at ¶ 22.
- 23 *Id.*, at ¶¶ 18-21.
- 24 *Id.* at ¶¶ 5-7.
- 25 *Id.* at ¶¶ 8-12.
- 26 *Id.* at ¶¶ 13-16.
- 27 *Id.* at ¶ 29.
- 28 *Id.* at ¶¶ 30-34.
- 29 *Id.* at ¶¶ 35-36.
- 30 Attorney General Merrick B. Garland, U.S. Dep't of Justice, Remarks Announcing a New Initiative to Combat Redlining (Oct. 22, 2021), available at <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-announcing-new-initiative-combat>.
- 31 Assistant Attorney General Kristen Clarke, U.S. Dep't of Justice, Remarks Announcing a New Initiative to Combat Redlining (Oct. 22, 2021), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-kristen-clarke-delivers-remarks-announcing-new-initiative>.
- 32 Justice Department and Office of the Comptroller of the Currency Announce Actions to Resolve Lending Discrimination Claims Against Cadence Bank, U.S. Dep't of Justice (Aug. 30, 2021), available at <https://www.justice.gov/opa/pr/justice-department-and-office-comptroller-currency-announce-actions-resolve-lending>.
- 33 See, e.g., Comment Letter of FTC Commissioner Rohit Chopra to the Department of Housing Development's Proposed Rule to Amend HUD's Interpretation of the Fair Housing Act's Discriminatory Effects Standard, at 3-4, Oct. 16, 2019, available at [https://www.ftc.gov/system/files/documents/public\\_statements/1549212/chopra\\_-\\_letter\\_to\\_hud\\_on\\_disparate\\_impact\\_proposed\\_rulemaking\\_10-16-2019.pdf](https://www.ftc.gov/system/files/documents/public_statements/1549212/chopra_-_letter_to_hud_on_disparate_impact_proposed_rulemaking_10-16-2019.pdf).
- 34 CFPB Orders Tech Giants to Turn Over Information on their Payment System Plans, Consumer Financial Protection Bureau (Oct. 21, 2021), available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-tech-giants-to-turn-over-information-on-their-payment-system-plans/>.

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