New CFPB Guidance Affirms "Disparate Impact Doctrine"

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The Consumer Financial Protection Bureau (“CFPB”) has issued new fair lending guidance reaffirming the “disparate impact doctrine” under the Equal Credit Opportunity Act (“ECOA”) and Regulation B.

The CFPB bulletin of April 18, 2012 provides that “[c]onsistent with other federal supervisory and law enforcement agencies, the CFPB reaffirms that the legal doctrine of disparate impact remains applicable as the [CFPB] exercises its supervision and enforcement authority to enforce compliance with the ECOA and Regulation B.”

The bulletin matches remarks from CFPB Director Richard Cordray given in his speech to the National Community Reinvestment Coalition, where he stated, “We know that even intentional discrimination can be difficult to identify and that consumers often do not know it is happening. But conduct that may seem benign – what the lawyers call “facially neutral” actions – can create effects that are just as devastating for those marginalized communities.”

The use of the disparate impact test was at issue in the case Magner v. Gallagher, which concerned whether disparate impact claims are cognizable under the Fair Housing Act and, if so, what test should be used to analyze them. Though the Supreme Court granted certiorari and the case was set for decision in 2012, the case was dismissed by agreement of the parties involved shortly before oral arguments were scheduled to begin.

Industry representatives have raised concerns with disparate impact analysis, since it permits recovery without proof of an intent to discriminate. Disparate impact lawsuits can be defended by showing a sufficient justification for a policy or practice resulting in statistical disparity and by showing there are no less discriminatory means available. However, industry representatives have argued that even when such lawsuits can be defended, significant reputational and legal costs are often incurred.

The CFPB, in response to inquiries, concurred with the 1994 policy statement of the Interagency Task Force on Fair Lending, which stated that lending discrimination under the ECOA could be proved by showing evidence of disparate impact. The statement established that: “[p]olicies and practices that are neutral on their face and that are applied equally may still, on a prohibited basis, disproportionately and adversely affect a person's access to credit.” The CFPB also concluded that “The applicability of the disparate impact doctrine, also known as the ‘effects test,’ to credit transactions is reflected in the legislative history of the ECOA.”

The CFPB announced that it would “consider evidence of the disparate impact

doctrine as one method of proving lending discrimination" as they exercised their supervisory and enforcement authority.

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