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Will CFPB Abandon or Limit the Use of Disparate Impact?

The CFPB in the Trump era is likely to abandon or limit the use of the disparate-impact theory in enforcing fair lending laws, said attorneys.

“Given the lack of ‘effects’ language in [the Equal Credit Opportunity Act] and the [CFPB’s] stated focus on enforcing statutes as they are written, we expect that they will determine that ECOA does not support a disparate-impact theory,” said Jeffrey Naimon, a partner at Buckley Sandler.

Under the disparate-impact theory, lending practices can be deemed discriminatory if they have a disproportionately negative effect on minorities and other protected classes, even if there was no intent by the lender to discriminate. The CFPB has used the disparate-impact theory in a number of fair lending claims and issued an indirect auto lending guidance based on this theory.

Many industry groups said it is problematic to use statistics to determine possible illegal discrimination, particularly when there was no intent to engage in illegal discrimination. Trade groups asked the CFPB to clarify its standards under ECOA in letters responding to the bureau’s request for information earlier.

The American Bankers Association said the CFPB should focus on “addressing genuine illegal activity, identified by intent to violate fair lending standards,” in a letter to the bureau.

To that end, the trade group urged the bureau to be guided by the framework set by the U.S. Supreme Court in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*

In that ruling, the court upheld the viability of disparate impact in Fair Housing Act cases while setting forth a three-stage process for analyzing such charges. A plaintiff can bring a claim but first must demonstrate a causal connection between the challenged practice and the statistical disparity. The defendant can then show a business rationale for the challenged practice to rebut the claim. Finally, the burden shifts back to the plaintiff to show that an available alternative exists that has less disparate impact while also addressing business needs.

“The Supreme Court is clear that the standards articulated in its decision are critical to preventing abusive claims of discrimination,” said the ABA, urging the bureau to apply the burden-shifting framework of the Supreme Court ruling.

The Mortgage Bankers Association, similarly, said the CFPB should reexamine the scope of ECOA’s anti-discrimination protections in light of U.S. Supreme Court precedent.

The bureau should “faithfully implement the Supreme Court’s mandate that disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system,” the MBA said.

If the bureau decides not to clarify the applicability of disparate impact under ECOA, the MBA said, it should ensure its ECOA interpretations reflect the disparate-impact standard set by the Supreme Court in the Fair Housing Act case.

Acting CFPB Director Mick Mulvaney in May announced plans to revisit ECOA requirements given the Supreme Court decision.

Naimon said if the bureau abandons disparate impact for ECOA or limits its use by adopting the standards set forth in *Inclusive Communities*, it would be good for the lending industry as it removes a great deal of uncertainty.

“Restricting disparate impact will reduce the burden on lenders to be constantly assessing every business practice to see if it might have a disparate impact on some group of consumers,” said Naimon.

“Lenders always want clarity on what they can and cannot do, both so they can act to prevent liability, and so they are not competitively disadvantaged compared to other lenders on the basis of willingness to take more regulatory risk,” he added.