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FOCUSING ON SIGNIFICANT CASELAW AND EMERGING TRENDS

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REGULATORY TRENDS

STATES DIVERGE FROM FEDERAL REGULATORS ON DISPARATE IMPACT

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Federal and state fair lending regulators are charting different courses for the future of "disparate impact" liability under the Equal Credit Opportunity Act and analogous state law. For its part, the federal policymaking apparatus is working to limit or eliminate disparate impact liability under ECOA, basing the change on the Supreme Court's 2015 *Inclusive Communities* decision. (*Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507 (2015).)

Some state regulators — who share ECOA enforcement authority with their federal counterparts and can also bring actions to enforce state fair lending law — have raised public objection and acted to replace rescinded federal disparate impact guidance.

The first notable development in this area came in May 2018, when Congress approved a joint resolution expressing disapproval[1] of CFPB Bulletin 2013-02[2], titled "Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act" (Bulletin) — long a target of Congressional Republicans. The bureau's bulletin was viewed by many as an end-run around an express exclusion of auto dealers from bureau jurisdiction and some argued the Bureau's disparate impact program was based on flawed statistical methods.

The bulletin had warned indirect auto lenders that they may be liable under ECOA if dealer markup and compensation practices result in disparities on a prohibited basis, and the Bureau brought several enforcement actions predicated on the legal theory announced in the Bulletin.

In response to the joint resolution disapproving of the bulletin, acting bureau director Mick Mulvaney

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issued a statement[3] "thank[ing] the President and the Congress for reaffirming that the bureau lacks the power to act outside or federal statutes" and announcing that the bureau would be "reexamining the requirements of the ECOA." The statement referred to the Supreme Court's *Inclusive Communities* decision as "distinguishing between antidiscrimination statutes that refer to the consequences of actions [a reference to the Fair Housing Act] and those that refer only to the intent of the actor [a reference to ECOA]."

Mulvaney's statement confirmed that the new bureau leadership credits industry's view that ECOA only applies to intentional, or "disparate treatment," discrimination. Most recently, the Bureau included a potential ECOA rulemaking in the "Future Planning" section of its October 2018 Rulemaking Agenda[4], stating:

> The bureau announced in May 2018 that it is reexamining the requirements of the ECOA concerning the disparate impact doctrine in light of recent Supreme Court case law and the congressional disapproval of a prior bureau bulletin concerning indirect auto lender compliance with ECOA and its implementing regulations.

Meanwhile, industry trade associations and others have already begun to advocate before the bureau that ECOA "does not provide for disparate impact claims," as one comment letter put it.

At the same time, in direct response to the *Inclusive Communities* decision, the U.S. Department of Housing and Urban Development is reconsidering[5] its implementation of disparate impact under the Fair Housing Act, drawing over 500 public comments on a range of issues including HUD's longstanding burden-shifting framework, the relevant decisions, the causation standard, and whether any other changes to HUD's rules would be appropriate.

States respond

These developments drew a quick rebuke from state authorities that remain committed to monitoring for disparate impact in auto lending and beyond.

On August 23, 2018, the New York Department of Financial Services released updated guidance[6] on fair lending compliance for indirect auto lending. The NYDFS guidance, in effect, re-imposes the requirements of the bureau's earlier (now voided) bulletin, at least within the scope of the NYDFS' authority.

And on September 5, 2018, nineteen state Attorneys General wrote[7] to Acting Director Mulvaney warning that "any action to reinterpret ECOA not to provide for disparate impact liability could be set aside by a court as arbitrary, capricious, and otherwise not in accordance with law."

With four new Democratic Attorneys General installed following the November 2018 elections (in Colorado, Michigan, Nevada, and Wisconsin); a new, purpose-built consumer financial protection body within the Attorney General's office in Pennsylvania; and the legislatively created Maryland Financial Consumer Protection Commission, these state-level trends are sure to continue.

Fair-lending tension builds

These fair lending developments illustrate two cross-cutting initiatives currently at work in the area of financial regulation.

First is the federal regulators' deregulatory push, exhibited recently by the federal banking agencies denunciation of informal agency guidance as a tool of regulation. Institutions have been constrained by, but also benefited from, informal issuances such as the bureau's indirect auto bulletin. Industry has sometimes resisted so-called "guidance" that agencies issue without notice and comment process or the other trappings of rulemaking.

Evidently responding to these criticisms, the federal banking agencies recently announced[8] (through guidance, no less) a new set of principles for the use of supervisory guidance for regulated institutions. The interagency announcement:

- "Confirms" that supervisory guidance does not have the force and effect of law.
- States that the agencies will not take enforcement actions based on supervisory guidance, but rather, any such action will be predicated on a law or rule.
- Explains that supervisory guidance can outline supervisory expectations or priorities and articulate general views regarding appropriate practices in a given area.

By not altogether dismissing the relevance of supervisory guidance, the agencies' announcement implicitly recognizes the fundamental tension in this area — that guidance often benefits regulated institutions by providing certainty, even if some guidance is not well-considered.

Second, as the bureau and other regulators retrench and adopt a deregulatory posture, state authorities (particularly of the opposing party) are stepping into the breach.

State authorities have their own laws to enforce fair lending, in addition to the ability to advance disparate impact cases under the federal ECOA. The states' authority is not constrained by acting director Mulvaney's disapproval of the disparate impact theory of liability. State authority to enforce federal would be significantly limited, however, if the bureau were to effectuate its "reexamination" with a rulemaking.

In the meantime, the bureau's official interpretation[9] of ECOA continues to provide for liability through disparate impact, and at least some states have signaled their faith in this approach.

Notes

[1] *Joint Resolution*, S.J. Res. 57: Congressional Record, Vol. 164 (2018), 132 Stat. 1290, Public Law 115-72 — May 21, 2018, 115th Congress, 1 page, https://www.congress.gov/115/plaws/publ172/PLAW-115publ172.pdf.

[2] *Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act*, Consumer Financial Protection Bureau Bulletin 2013-02, 6 pages, dated March 21, 2013, found at https://www.dwt.com/files/Uploads/Documents/Publications/Auto%20Finance%20Bulletin.pdf.

[3] *Statement of the Bureau of Consumer Financial Protection on enactment of S.J. Res. 57*, Consumer Financial Protection Bureau – Newsroom, dated May 21, 2018, found at https://www.consumerfinance.gov/about-us/newsroom/statement-bureau-consumer-financial-protection-enactment-sj-res-57/.

[4] Cochran, Kelly, *Fall 2018 rulemaking agenda*, Consumer Financial Protection Bureau – Blog, dated October 17, 2018, found at https://www.consumerfinance.gov/about-us/blog/fall-2018-rulemaking-agenda/.

[5] *Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard – A Proposed Rule by the Housing and Urban Development Department on 06/20/2018*, 83 FR 28560-28562, found at https://www.federalregister.gov/documents/2018/06/20/2018-13340/reconsideration-of-huds-implementation-of-the-fair-housing-acts-disparate-impact-standard.

[6] *Indirect Automobile Lending and Compliance with New York's Fair Lending Statute*, Memo from Maria T. Vullo, Superintendent of Financial Services, New York State Department of Financial Services, 4 pages, dated August 23, 2018, found at https://www.dfs.ny.gov/legal/industry/il180823.pdf.

[7] Letter to Mick Mulvaney, Acting Director of the Consumer Financial Protection Bureau, from Josh Stein, Attorney General, North Carolina Department of Justice, 5 pages, dated September 5, 2018, found at https://ncdoj.gov/getattachment/36142f21-0b34-4955-8f8a-c5d92051662b/ECOA-disparate-impact-letter-to-CFPB-final.pdf.aspx.

[8] *Agencies issue statement reaffirming the role of supervisory guidance*, Board of Governors of the Federal Reserve System – Press Release, dated September 11, 2018, found at https://www.federalreserve.gov/newsevents/press?releases/bcreg20180911a.htm.

[9] Bureau of Consumer Financial Protection, Pt. 1002, Supp. I, pages 91-107, found at https://www.gpo.gov/fdsys/pkg/CFR-2014-title12-vol8/pdf/CFR-2014-title12-vol8-part1002-appI.pdf.