Disparate Impact (Still) a Fair Lending Risk

April 08, 2019

Since the Consumer Financial Protection Bureau's 2013 indirect automobile guidance was repealed last year, there have been no new public indirect automobile fair lending cases alleging disparate impact. However, fair lending risk still exists. The Equal Credit Opportunity Act and Regulation B remain. So, too, does the CFPB's 2012 fair lending guidance endorsing disparate impact.

Additionally, the Dodd-Frank Act permits state attorneys general to enforce CFPB-authored regulations like Reg B. In a 2018 letter to the CFPB's Acting Director Mick Mulvaney, a group of AGs wrote that they share Reg B enforcement authority with the CFPB, many states have laws modeled on ECOA, and the AGs "will not hesitate to uphold the law." None has yet used its Dodd-Frank Act authority to allege disparate impact. However, at some point, one probably will. Then another (and another) might.

The Federal Trade Commission enforces ECOA except concerning banks. Because its most recent disparate impact case was settled in 2010, the FTC's interest in fair lending enforcement appears to be low. That said, the FTC is out there, and it has the authority.

The prudential banking regulators (Federal Deposit Insurance Corp., Federal Reserve Board, National Credit Union Administration, and Office of the Comptroller of the Currency) continue to employ economists (i.e., statistics experts), and they continue to conduct fair lending examinations. Potential patterns or practices of discrimination are referred to the Department of Justice. If the DOJ declines the case, the regulator may continue the enforcement process.

The DOJ enforces ECOA through referrals, discussed above, or by investigating its own cases. In 2019, the DOJ appears as likely as the CFPB to bring a disparate impact case against an indirect auto lender. This is not a promise, however.

ECOA authorizes consumers to initiate class-action lawsuits, and consumers have done so. Additionally, consumers have brought suits under state fair lending laws, and state authorities have, as well (largely in the mortgage market). New York recently issued guidance to automobile lenders reprising the CFPB's guidance: "The lender should monitor… for compliance. [T]his may require conducting regular statistical and regression analyses of loan data. …The lender should take prompt corrective action if it finds any differences in interest rates that are unexplained." States are the laboratories of democracy. States are also a source of fair lending risk.

If the CFPB ultimately revises Reg B (which it may be contemplating), more aggressive state-level enforcement may result. It is hard, however, to bring a disparate impact suit without data, and it is hard to find it. Connecticut amended state law to generate data but suspended enforcement to resolve potential conflicts with ECOA requirements prohibiting automobile lenders from collecting demographic information.

Unless the Supreme Court holds that ECOA does not support disparate impact or the CFPB revises Reg B (and wins the inevitable lawsuits), managing disparate impact risk remains important. Even then, the states may continue to play a role. So, as always, build and maintain effective compliance management programs.

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