

LENDERS UPDATE™

ALT & ASSOCIATES NEWSLETTER

A COMPLIMENTARY SERVICE TO THE MORTGAGE LENDING INDUSTRY

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CFPB AND FAIR LENDING

For those who may not have been paying attention to the concept or have thought that Fair Lending was a distant concern, the Consumer Finance Protection Bureau (CFPB) has today reminded us that it not. With the issuance today of CFPB Bulletin 2012-04 (Fair Lending), Fair Lending has been put on the front burner.

In the blog on the CFPB website announcing the issuance of the Bulletin, Patrice Ficklin, who is the CFPB's Assistant Director for the Office of Fair Lending and Equal Opportunity, after briefly describing the Bulletin's content, states "*We will use every tool at our disposal to protect American consumers.*" Ficklin then states "*Today we are giving fair notice on Fair Lending*" and will combat unlawful and discriminatory practices.

The Dodd/Frank Wall Street Reform and Consumer Protection Act of 2010 gave the CFPB the authority to administer the Equal Credit Opportunity Act (ECOA) and its implementing regulation, Regulation B. As the Bulletin points out, ECOA makes it

illegal for any lender to discriminate against any applicant based on race, color, religion, national origin, sex, marital status, age and several other factors. The CFPB states that it will continue to adhere to the principals outlined in Reg. B but most significantly, reaffirms that the doctrine of disparate impact remains applicable to CFPB's supervision and enforcement.

An Interagency Task Force on Fair Lending issued a policy statement in 1994 recognizing 3 types of lending discrimination under ECOA:

1. Overt evidence of discrimination
2. Evidence of disparate treatment
3. Evidence of disparate impact

The Bulletin affirms that the CFPB concurs with this policy statement. The Bureau feels that the disparate impact doctrine, which is also referred to as the Effects test, is reflected in the legislative history of ECOA.

Having reviewed this issue in some detail, we could argue whether the concept of disparate impact is actually incorporated into ECOA, however, it seems to be generally accepted as fact at this point. To quote, as does the Bulletin, a comment to Reg. B:

“The Act and Regulation may prohibit a creditor from a practice that is discriminatory in effect because it has a disproportionately negative impact on a prohibited basis, even though the creditor has no intent to discriminate and the practice appears neutral on its face, unless the creditor practice meets a legitimate business need that cannot reasonably be achieved as well by means that are less disparate in their impact.”

Multiple actions have been brought on this issue in the past several years. For example, in one case the plaintiff alleged that a lender offering yield spread premiums acted in a discriminatory manner by targeting minorities for higher cost loans by targeting brokers who served minority communities. The court found that this was sufficient to state a disparate impact claim for racial discrimination.

While nothing appears to be new in the CFPB's affirmation of disparate impact, it does indicate an emphasis in its enforcement actions on the concept.

FAIR LENDING SHOULD AND MUST BE AN ACTIVE COMPLIANCE CONCERN ON THE OPERATIONS OF ANY LENDER.

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