

## Disparate Impact Questions Could Limit CFPB Enforcement

By Evan Weinberger

Posted July 2, 2018, 6:30 AM

- The CFPB under Mick Mulvaney is limiting the use of disparate impact assessments
- That limitation could make it harder to bring fair lending enforcement actions

The banking industry wants to change the way the Consumer Financial Protection Bureau uses statistical analysis to justify fair lending enforcement actions as part of an effort to rein in such cases.

The CFPB under former Director Richard Cordray made regular use of statistics, using a theory that looks for differences in how lending practices affect various communities, when bringing cases under the Equal Credit Opportunity Act. That statute can be applied to credit products ranging from auto loans to credit cards to mortgages.

The banking industry has long said the CFPB was too aggressive in using “disparate impact” arguments in its ECOA actions, and the bureau’s acting director, Mick Mulvaney, agrees. He has been vocal in stating that the CFPB under Cordray stretched its authority and has directed the bureau to re-examine the use of disparate impact under ECOA in light of a recent Supreme Court decision.

Such a shift could further slow the pace of enforcement actions at the bureau, Kate Elengold, the director of the Consumer Financial Transactions Clinic at the University of North Carolina Law School, told Bloomberg Law.

“Whenever a regulator decides not to use a tool in its tool belt, that is pulling back on enforcement,” Elengold, a former trial attorney in the Justice Department’s Civil Rights Division, said in a June 26 phone interview.

The CFPB has only announced three enforcement actions and dropped several other investigations, since Mulvaney took control of the bureau in late November.

### **Disputed Tool**

Disparate impact has long been one of the most contentious concepts in civil rights law.

The disparate impact theory states that lending practices can be discriminatory if they are found to have a disparate impact on communities of color or other minorities, regardless of whether the lender intended to engage in racial discrimination.

Regulators, prosecutors, and private plaintiffs’ attorneys have relied for years on those statistics to build cases against lenders. Lenders, on the other hand, said those statistics don’t tell the full story.

The financial services industry hoped to get the use of disparate impact eliminated by the courts in 2015.

But a June 2015 U.S. Supreme Court decision, written by retiring Justice Anthony Kennedy, in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project Inc.*, allowed the use of disparate impact in Fair Housing Act-based cases.

However, the decision put some restrictions on the way the legal argument can be used. Plaintiffs and regulators, for instance, have to prove some causality between a lending practice and its effect on minority communities. But overall, the decision preserved the use of the tool.

Left unresolved is whether Inclusive Communities applies to ECOA, which is a much broader statute than the FHA.

Cordray's CFPB regularly deployed disparate impact theory in ECOA cases. The industry and Mulvaney said the CFPB did so without applying the causality that Inclusive Communities mandated.

"Given a recent [U.S.] Supreme Court decision distinguishing between antidiscrimination statutes that refer to the consequences of actions and those that refer only to the intent of the actor, and in light of the fact that the bureau is required by statute to enforce federal consumer financial laws consistently, the bureau will be reexamining the requirements of the ECOA," the CFPB said in a May 21 statement.

The American Bankers Association said in a June 22 letter to the CFPB that it viewed the Cordray-era bureau's use of disparate impact statistics as a clear violation of Inclusive Communities.

"The Supreme Court is clear that the standards articulated in its decision are critical to preventing abusive claims of discrimination," said the ABA letter to the CFPB.

### **Proper Use?**

The Inclusive Communities decision didn't answer whether the disparate impact argument is available for ECOA cases, leaving open the question of whether it is even appropriate for the CFPB to use that tool in enforcing the 1974 fair lending law, the ABA added in the letter.

Elengold and other law professors disagree with that assessment, saying disparate impact can be used in ECOA cases.

"That was true before Inclusive Communities, and I think it is true today," Elengold said.

Ultimately, that debate should not matter given Mulvaney's position on fair lending enforcement, Andrea Mitchell, a Buckley Sandler LLP partner, told Bloomberg Law.

"He was very clear that he does not intend for the bureau to pursue disparate impact claims on his watch," Mitchell, a former Federal Reserve attorney who focused on consumer protection issues, said in a June 26 phone interview. "Absent formal guidance to that effect, Mulvaney's remarks are the best indicator we have about fair lending enforcement at the bureau."

With Kathy Kraninger, Mulvaney's hand-picked successor, expected to secure confirmation as the CFPB's next director in the coming months, that nagging legal question may not be fully answered for some time.

### **No Smoking Gun**

Eliminating or limiting the use of disparate impact theory in ECOA cases will make it harder for CFPB attorneys to spot discriminatory lending practices and root them out, Mehrsa Baradaran, a University of Georgia Law School professor and author of several books focusing on racial discrimination in financial services, told Bloomberg Law.

Most companies don't intend to engage in discrimination in their lending, but entrenched systems that people don't notice can frequently yield discriminatory results, she said in a June 25 phone interview.

"You can't prove racial discrimination without disparate impact," she said. "So much of the processes that the banks used to determine credit are either mechanized or not public, so it's impossible to follow the smoking gun. And often there isn't a smoking gun."

To contact the reporter on this story: Evan Weinberger in New York at [eweinberger@bloomberglaw.com](mailto:eweinberger@bloomberglaw.com)

To contact the editor responsible for this story: Michael Ferullo at [mferullo@bloomberglaw.com](mailto:mferullo@bloomberglaw.com)

© 2018 The Bureau of National Affairs, Inc.  
All Rights Reserved