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CFPB ISSUES FAIR LENDING BULLETIN REAFFIRMING DOCTRINE OF DISPARATE IMPACT

The Dodd-Frank Act gave authority to the Consumer Financial Protection Bureau (CFPB) to supervise and enforce compliance with the Equal Credit Opportunity Act (ECOA) and its implementing regulation, Regulation B, for entities subject to CFPB supervisory authority. The CFPB issued a bulletin on lending discrimination in which the CFPB states that it will consider evidence of disparate impact as one method of proving lending discrimination under ECOA and Regulation B. CFPB Bulletin 2012-104 (Fair Lending).

The CFPB states that it concurs with the Policy Statement on Discrimination in Lending previously issued by the federal banking agencies and the Department of Justice. As the CFPB exercises its authority to enforce compliance with the ECOA and Regulation B, the CFPB will rely on the methods of proving lending discrimination listed in the Policy statement, and recognized by the courts, including:

- Overt evidence of discrimination;
- Evidence of disparate treatment; and
- Evidence of disparate impact.

The CFPB bulletin underscores the importance of considering fair lending compliance and the potential unintended consequences of lending policies prior to a visit by the CFPB. □

✧ *Elizabeth Anstaett and Michael Tomkies*

CFPB ISSUES BULLETIN ON SERVICE PROVIDER OVERSIGHT

The CFPB has issued a bulletin asserting that under the Dodd-Frank Act, the CFPB is authorized to exercise its enforcement authority against supervised service providers as appropriate. The CFPB reminds supervised banks and nonbanks to exercise appropriate oversight over service providers as such financial institutions can be held responsible for the actions of their service providers.

The bulletin applies to supervised banks and nonbanks, including large depository institutions, large insured credit unions and their affiliates, certain non-depository consumer financial services

companies, and supervised service providers, including service providers to supervised banks and nonbanks and service providers to a substantial number of small insured depository institutions or small insured credit unions. Under the Dodd-Frank Act, "service provider" includes any person that provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service.

The CFPB's bulletin makes it clear that entering into a business relationship with a service provider will not absolve a supervised bank or nonbank of responsibility for complying with Federal consumer financial laws and avoiding consumer harm – legal responsibility for a service provider's actions might fall with the supervised bank or nonbank as well as the service provider.

The CFPB recommends that supervised banks and nonbanks take the following steps in regard to their relationship with service providers:

- Conducting thorough due diligence to verify that the service provider understands and is capable of complying with Federal consumer financial law;
- Requesting and reviewing the service providers' policies, procedures, internal controls, and training materials to ensure that the service provider conducts appropriate training and oversight of employees or agents that have consumer contact or compliance responsibilities;
- Including in the contract with the service provider clear expectations about compliance, as well as appropriate and enforceable consequences for violating any compliance-related responsibilities, including engaging in unfair, deceptive, or abusive acts or practices;
- Establishing internal controls and on-going monitoring to determine whether the service provider is complying with Federal consumer financial law; and
- Taking prompt action to address fully any problems identified through the monitoring process, including terminating the relationship where appropriate.

Federal banking agencies have exercised similar authority over service providers to banks in the past. However, such supervision

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and liability may be a novel concept to some nonbank creditors and service providers. Based on agency principles, companies using service providers to provide services on behalf of the company, such as providing customer service, delivering legally required disclosures and pursuing collections, should ensure that such service providers are operating in compliance with the law. □

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